2d Civil No. B079817

IN THE COURT OF APPEAL

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

WELLS FARGO BANK, N.A., as Trustee of the
WILLIAM & MARY WOODS TRUST, etc., et al.,

Plaintiffs and Appellants,

vs.

PACIFIC SOUTHWEST REALTY CORP., a Delaware
corporation; SECURITY PACIFIC NATIONAL BANK,
etc., et al.,

Defendants and Respondents.

Appeal From A Judgment Of The Los Angeles Superior Court,
Los Angeles Superior Court Case Number BC041198,
Honorable Madeleine Flier, Judge

APPELLANTS' OPENING BRIEF

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APPELLANTS' OPENING BRIEF

INTRODUCTION

The factual backdrop of this eccentric case spans the economic history of the United States from before the Great Depression to the present day. In fact, plaintiffs in this case--a small group of family trusts and individuals whose predecessors sought economic security for their heirs and successors by entering into a long-term lease of the real property they owned--may be among the last victims of Depression-era legislation: For the last 13 years, a superseded 1933 federal statute has been relied upon to justify

rental payments to plaintiffs at a rate shockingly below the market rate and the rate expressly set forth in the lease. By contrast, the defendants in this case--principally a bank which purchased the lease obligations in 1981--may be among the last entities continuing to successfully exploit Depression-era legislation: For despite Congress' explicit determination that the crisis animating its earlier statute is over, the bank continues to reap an enormous economic windfall at plaintiffs' expense. Moreover, this inequity continues despite the fact that the law plainly supports the plaintiffs' position that the bank's free lunch is over.

Plaintiffs are the owners/lessors and defendants the current tenants/lessees of the real property located at the southwest corner of Beverly Drive and Little Santa Monica Boulevard in Beverly Hills. Back in 1929, the owners' predecessors (chiefly their parents and grandparents) leased the property for a term of 95 years (through February 2024) to the original lessee, the First National Bank of Beverly Hills. The lease included a "gold clause," a then-common method of adjusting price by indexing the amount due on an obligation according to the prevailing price of gold. Thus, while the lease calls for a monthly rent of $2000, it also provides that the rent "shall be paid in gold coin of the United States of America . . . ," and that "by the word 'dollar' wherever used in this lease is meant a United States of America gold coin composed of 25.8 grains of gold .900 fine, which is present standard of weight and fitness of said United States of America gold coin." The aim of the gold clause provisions was to conform the amount of rent actually due under the lease to prevailing economic conditions, and the expectation was that the gold clause would cause the rent to increase gradually over the lease's 95-year term.

Unfortunately for the lessors, history intervened to thwart the parties' intent. In 1933, during the Great Depression, Congress enacted a joint resolution invalidating all

gold clauses and providing that any obligation to make payment in the form of gold could be discharged "dollar for dollar." (48 Stat. 112, 113 (1933) [formerly codified at 31 U.S.C. § 463].) In other words, the rent was frozen indefinitely at $2,000 per month and from 1933 to this day that is all plaintiffs and their predecessor lessors have been paid.

However, the joint resolution, like many of the emergency economic measures of the Depression, is no longer the law. On October 28, 1977, Congress enacted new legislation providing that the 1933 joint resolution "shall not apply to obligations issued on or after the date of the enactment of this section." (P.L. 95-147 § 4(c), 91 Stat. 1229, former 31 U.S.C. § 463 note.) This legislation was recodified in 1982, when Congress adopted 31 U.S.C. § 5118(d)(2), which provides that gold clauses are enforceable in obligations entered into after October 27, 1977.

Four years later, in October 1981, Bank of America NT & SA ("the Bank"),[1/] which was operating a branch on the leasehold premises as a subtenant, determined that it might be able to save itself a great deal of money on rent. The Bank figured that if it could assume the current lessee's rights under the lease, and if it could claim that the 1933 legislation was still effective to invalidate the gold clause, it could obtain the premises for only $2,000 a month rather than the prevailing market rates it was paying. The Bank therefore acquired all of the interest in the lease of then-lessee Triangle Co. and concurrently assumed all obligations under the lease. Since the lease gave the lessee the right to assign the lease without the lessors' prior approval, no one consulted

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1/ As the result of a merger after this action was filed, Bank of America NT & SA has become the successor in interest in this litigation to original defendants Pacific Southwest Realty and Security Pacific National Bank, and by stipulation has been substituted in their place as the named defendant in this action. (See Clerk's Transcript [CT] 1692.) Accordingly, all references to defendant in this brief will be to Bank of America NT & SA.

plaintiffs about the transfer and, indeed, no one even informed them about it until it was already a done deal.

The Bank, however, purchased the transfer with its eyes wide open. Before becoming bound under the lease, the bank obtained a legal opinion as to whether the gold clause would be enforceable against it once it became obligated on the lease. The Bank's counsel advised that this was a real risk in light of the 1977 legislation, so the Bank tried to get Triangle to indemnify it should the gold clause be enforced. However, when Triangle refused, the Bank decided to take the risk and purchased the lease obligation anyway. Once bound on the lease, the Bank commenced paying plaintiffs the same $2,000 per month that Triangle had been paying since before Congress changed the law.

Plaintiffs' first inkling that they might be entitled to the benefit of their bargain--i.e., that the purchase transfer of the lease by the Bank might have constituted a new obligation making the gold clause enforceable--came in November 1986. That was when one of the plaintiffs, George Linthicum, read a newspaper article about a ruling in a case pending in federal court in Washington state, *Fay Corp. v. BAT Holdings I, Inc.* (W.D. Wash.) 646 F.Supp. 946, *recon. denied* (W.D. Wash. 1987) 651 F.Supp. 307, *aff'd sub nom. Fay Corp. v. Frederick & Nelson Seattle, Inc.* (9th Cir. 1990) 896 F.2d 1227, endorsing the view that the post-October 27, 1977, transfer of a long-term lease containing a gold clause could constitute a novation of the original contract, i.e., a new obligation "issued" or "entered into" after the statutory date within the meaning of 31 U.S.C. § 5118(d)(2). Once *Fay* reached its final affirmance on appeal early in 1990, plaintiffs began coordinating efforts to enforce the gold clause, culminating in their filing of this action.

The lawsuit, which was tried to the bench under stipulated facts, states claims for breach of contract and declaratory relief. The thrust of both causes of action is straightforward: The Bank's 1981 purchase of the lease effected a novation of the lease contract--a new obligation, entered into well after October 27, 1977, as to which the lease's gold provisions are fully enforceable. The Bank, of course, adamantly insists otherwise, and succeeded in persuading the trial court to its view that the depression-era gold clause prohibition limits the Bank's monthly rent to $2,000 even though the joint resolution became a dead letter a good four years before the Bank's obligations under the lease came into being.

Now this court must review *de novo* the purely legal issues presented by this lawsuit. Plaintiffs urge that the required fresh look can only yield the conclusion that the trial court badly erred. The Bank, knowing full well what it was doing, entered into a completely new, previously nonexistent obligation to plaintiffs under the lease some four years after Congress changed the pertinent law. Thus, the Bank's obligation to plaintiffs "issued" in the new era, when gold clauses are enforceable once more.

Moreover, and further contrary to the trial court's misguided conclusions, the Bank cannot legitimately avail itself of the defenses of estoppel or laches. Even if, contrary to reality, there were some ground to complain that plaintiffs should have initiated their action against the Bank sooner than they did, these defenses are, by turns, unproved and unavailable. Estoppel, for example, is available *only* to a party who can prove *each* of four stringent elements--knowledge of the facts by the party to be estopped, an intention by that party that his conduct be relied upon, ignorance of the true facts by the other party, and reliance and resulting injury to that party. Yet the Bank proved none, and a couple of them were particularly elusive. For example, the

Bank could not hope to clear the hurdle of establishing its own ignorance in the matter, when the stipulated facts plainly show that it had full knowledge, at all times, of all relevant facts and law. Nor could the Bank approach anything resembling the required proof of its detrimental reliance on plaintiffs' supposedly unreasonable delay in bringing this action. Once again, stipulated facts demonstrate that the more time that passed before this action was filed, the longer the Bank paid the Depression-era rent of $2,000 per month and the larger the windfall it reaped. In sum, it was not remotely possible for the Bank to prove estoppel under the stipulated facts. As for laches, it is an equitable defense. It thus has absolutely no application to plaintiff's breach of contract claim, and is equally inapposite to the declaratory relief claim, which is also built solidly on a breach-of-contract foundation.

The Bank has been reaping a remarkable bounty. Since entering into the lease in 1981, the Bank has held a piece of prime Beverly Hills commercial property for less than the typical monthly rental on a suburban bungalow. It is past time to call a halt to this inequity. Plaintiffs are entitled to have the Bank honor its obligations under the lease, including the gold clause. Plaintiffs therefore respectfully urge this court to reverse the judgment of the superior court with directions to enter a new and different judgment in plaintiffs' favor.

STATEMENT OF THE CASE

A. Summary Of Material Facts.

1. The 1929 Lease Of The Subject Property.

In March 1929, members of the Woods, Kelso and Beekman families, owners of the commercial real property located in Beverly Hills at the southwest corner of Beverly Drive and Little Santa Monica Boulevard and predecessors of the plaintiffs in this action, leased the property for a term of 95 years to the First National Bank of Beverly Hills. (CT 2, 11-50, 219-260, 1686-1687.) The stated monthly rent under the lease was $2,000; however, the lease also contained the following highly significant provision:

> "SECTION 3. *Said net rental . . . shall be paid in gold coin of the United States of America of the present standard of weight and fineness*; and it is expressly understood and agreed that no acceptance by the lessor of any currency, legal tender, checks, money or coin whatsoever, or any representation of value other than gold coin of the United States of America of the present standard of weight and fineness, as herein described, in payment of any instalment or installments of rent . . . shall be construed to be a waiver on the part of the lessors of the right to demand the payment of any of said sums in said gold coin of the United States of America. . . . *It is expressly understood and agreed that by the word 'dollar' wherever used in this lease is meant a United States of America gold coin composed of 25.8 grains of gold .900 fine, which is the present standard of*

weight and fineness of said United States of America gold coin." (CT 12-13 [emphasis added].)

2. The Gold Clause Legislation.[2/]

Prior to the Great Depression, gold clauses were a popular method of adjusting for inflation. (See, e.g., *Fay Corp. v. BAT Holdings I, Inc.*, *supra*, 646 F.Supp. 946, 948 [reproduced at CT 188]; see generally Dam, *From the Gold Clause Cases to the Gold Commission: A Half Century of American Monetary Law* (1983) 50 Chicago L.Rev. 504 [hereafter, "*Gold Clause* article"].) The lease in the present case exemplifies how this device was used. In effect, the gold clause provides that the real monthly rent due at any point under the lease is the current value of the requisite amount of gold. Thus, by linking the rent actually due under the lease to the prevailing price of gold, the gold clause functions as a crude price-indexing mechanism. (See, e.g., CT 210 [remarks of Sen. J. Helms].) When a gold clause governs the rent due under a lease, as the price of gold fluctuates, so does the rent.

In 1933, however, at the depth of the Great Depression, a joint resolution of Congress invalidated all gold clauses and provided that 'dollar for dollar' payments in United States currency would discharge any obligation that had required payment in gold. (48 Stat. 112, 113 (1933) [formerly codified at 31 U.S.C. § 463].) The joint resolution effectively froze the rent on the Beverly Hills property at $2,000 per month.

2/ The historical backdrop of the case is discussed in greater detail later in this brief. (See Section IA, *infra*.)

By the 1970s, the need for various economic measures adopted in response to the Depression, including the joint resolution, had evaporated. Accordingly, on October 28, 1977, Congress changed the law to provide that the 1933 joint resolution "shall not apply to obligations issued on or after the date of the enactment of this section." (P.L. 95-147 § 4(c), 91 Stat. 1229, former 31 U.S.C. § 463 note.) The current version of this enactment states:

> "An obligation issued containing a gold clause or governed by a gold clause is discharged on payment (dollar-for-dollar) in United States coin or currency that is legal tender at the time of payment. *This paragraph does not apply to an obligation issued after October 27, 1977.*" (31 U.S.C. § 5118(d)(2) [emphasis added].)

3. <u>Bank Of America Assumes The Obligations Of The Lease.</u>

By 1977, the First National Bank of Beverly Hills was out of the picture through mesne transfers and Triangle Company was the lessee under the lease, paying plaintiffs $2,000 per month in rent. (CT 1687.) Simultaneously, from October 1977 to October 1981, defendant Bank of America NT & SA[3/] was Triangle's subtenant under a 35-year sublease and was paying Triangle $325,000 in rent per year (i.e., $27,083 per month).

In September 1981, Triangle and the Bank entered into a complex transaction by which the sublease agreement between them was terminated and the Bank became the new lessee under the 1929 lease, assuming all obligations owed under it. (CT 51-55,

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3/ See note 1, *supra*.

115-153, 1688.) Both Triangle and the Bank were fully aware before they entered into this transaction that the lease contained a gold clause. (CT 1688.) They knew, too, that Congress had enacted legislation making gold clauses enforceable in obligations "issued," i.e., entered into, after October 27, 1977. (CT 1688.)

In fact, before entering into the transaction, the Bank sought and obtained legal advice concerning whether the gold clause could be enforceable against the Bank. (CT 1688.) The Bank's counsel issued a legal opinion that it was possible that the gold clause would be enforceable, although he believed that the risk of such an interpretation of the law was less than 50 percent. (CT 1694.) In light of the risk, the Bank asked Triangle for a provision that would indemnify the Bank if the gold clause were later found to be enforceable; however, when Triangle refused, the Bank elected to go forward with the deal anyway. (CT 1694-1695; see also CT 1698-1699.)

Meanwhile, no one informed plaintiffs that the Bank was acquiring the lease until October 1981, after the transfer was completed. (CT 154-163, 1689.) That same month, the Bank began paying plaintiffs $2,000 per month in rent; it has continued to pay that amount to this day. (CT 1689.)[4/]

4/ At the gold clause rate, the monthly rent due under the lease from November 1987 (four years before this action was filed) through July 1993 ranged between a low of $31,772.70 (based on the March 1, 1993, price of gold), and a high of $47,107.58 (based on December 1, 1987, price). (CT 1702-1704.)

4. Plaintiffs Learn That The Gold Clause May Be Enforceable And Begin Efforts To Enforce It.

Plaintiffs' first inkling that it might be possible to require the Bank to honor the gold clause came in November 1986, when one of the plaintiffs, George Linthicum, read a newspaper article about a ruling in a case then pending in federal district court in Washington state, *Fay Corp. v. BAT Holdings I, Inc.*, *supra*, 646 F.Supp. 946, *recon. denied* (W.D. Wash. 1987) 651 F.Supp. 307, *aff'd sub nom. Fay Corp. v. Frederick & Nelson Seattle, Inc.* (9th Cir. 1990) 896 F.2d 1227. The *Fay* ruling endorsed the view that the post-October 27, 1977, transfer of a long-term lease containing a gold clause could constitute a novation of the lease contract, and therefore amount to a new obligation "issued" or "entered into" after that date within the meaning of 31 U.S.C. § 5118(d)(2). (CT 1048-1049, 1695, 1699.) In late March 1988, Linthicum learned that the trial in the *Fay* case had been completed and that the lessor had in fact been awarded rent at the gold clause rate. (CT 1690.)

That same month, plaintiff Donal Botkin sent the Bank the first in a series of letters demanding that the Bank pay rent at the gold clause rate. (CT 167-176, 1690.) Several of these letters received no response (CT 1690-1691); however, on May 11, 1988, Botkin received a telephone call from a Bank official acknowledging his correspondence and informing him that it had been forwarded to the Bank's legal department for evaluation. (CT 368, 1691, 1695.) Subsequently, on May 23 and June 9, 1988, Botkin had telephone conversations with an attorney in the Bank's legal department concerning his demand letters; on both occasions, Botkin agreed to delay initiating legal proceedings

to enforce the gold clause in order to give the Bank time it claimed to need to research the matter. (CT 369-370, 1691, 1696.)

On June 20, 1988, Botkin sent the Bank one more letter demanding payment of rent at the gold clause rate commencing with the January 1988 rent payment. (CT 371-372, 1692.) This one drew a response from the Bank's privately-retained counsel, concluding with a stern accusation that plaintiffs' demand was frivolous and in bad faith, and an admonition that the Bank would seek sanctions should plaintiffs pursue the matter any further. (CT 373-374, 1692.) Botkin rejoined with a letter to the Bank's house counsel reiterating and explaining the basis for the plaintiffs' position. (CT 375-377, 1692.) Botkin received no further response, and the parties exchanged no more letters before this action was filed. (CT 1692.)

Botkin has, however, written on every rent check he has received since January 1988 that such checks were being received under protest as partial payment only. (CT 1693.) In addition, since May 1988, plaintiff Wells Fargo Bank, trustee of the William and Mary Woods Trust, has stamped the following endorsement on all rent checks received from the Bank: "PARTIAL PAYMENT--ACCEPTANCE DOES NOT CONSTITUTE A WAIVER OF RIGHTS UNDER LEASE FOR FULL PAYMENT." Further, George Linthicum's mother, Josephine Stinson, who before her death was an owner of the property, did not cash any rent checks from May 1990 through the time of her death in May 1993. (CT 354, 1373, 1693.)[5/]

5/ All plaintiffs have cashed all rent checks issued since October 1991. (CT 1693.)

5. Plaintiffs Coordinate Their Efforts And File This Lawsuit.

Because of the Bank's privately-retained counsel's accusation that plaintiffs' demand was frivolous and his admonition that the Bank would seek sanctions should plaintiffs pursue the matter (CT 373-374, 1692), plaintiffs believed it prudent to await the final outcome of an appeal in the *Fay* litigation before deciding whether to commence a lawsuit to enforce the gold clause. (CT 1696.) Once the Ninth Circuit affirmed the decision for the lessors in *Fay* on February 28, 1990, plaintiffs began searching out counsel to represent them in such litigation. (CT 1696.) This process proved arduous, not only because the various plaintiffs are scattered around the country, but most significantly because it was necessary to interview several law firms before appropriate counsel could be engaged. (See CT 1697-1698.) Ultimately, plaintiffs made the decision in September or October 1991 to retain the law firm of Tilles, Webb, Kulla & Grant as their trial counsel. The Tilles firm then filed the complaint in this action on October 31, 1991. (CT 1, 1698.)[6]

B. Procedural History of the Lawsuit.

The complaint sets forth causes of action for breach of contract and declaratory relief. (CT 1-10.) Both are founded upon allegations that the Bank's purchase of the lease in 1981, with its concomitant assumption of all responsibilities imposed by its terms, constitutes an obligation "issued after October 27, 1977," within the meaning of 31

6/ Additional facts will be discussed as they relate to particular issues.

U.S.C. § 5118(d)(2), and that the bank is therefore responsible for payment of rent pursuant to the gold clause. The breach of contract cause of action seeks money damages "[f]or unpaid rent in an amount to be proved at trial, together with interest thereon"; the remaining claim seeks a declaration that the gold clause "shall be deemed valid and enforceable against Defendants and their successors and assigns effective as of October 1, 1981, through and including the last day of February 2024." (CT 10.)

Summary judgment motions on both sides were unsuccessful.[7/] However, plaintiffs' motion for summary adjudication was granted as respects the Bank's affirmative defenses of failure to state a cause of action and statute of limitations. (CT 1376, 1754-1755.)

On July 19, 1993, the case proceeded to a bench trial before Judge Madeleine Flier. (Reporter's Transcript [RT] 1-55; see CT 1593 [plaintiffs' trial brief], 1407 [Bank's trial brief].) No one testified at trial; rather, the matter was heard and decided on the basis of stipulated facts and documentary evidence. (See CT 1685-1705.) Finding that the assignment of the lease from Triangle to the Bank "did not revive the [gold] clause," the court granted judgment for the Bank and against the plaintiffs. (CT 1722, 1749; RT 53-55.)

7/ The parties' summary judgment motions are reprinted in the Clerk's Transcript. The supporting documentation includes most of the important non-California authorities. (See CT 93 [beginning page of Bank's motion], 279 [plaintiffs' opposition], 485 [Bank's reply], 510 [order denying Bank's motion], 515 [Bank's motion for reconsideration], 524 [plaintiffs' opposition], 550 [Bank's reply], 570 [order denying reconsideration], 574 [plaintiffs' summary judgment motion], 1134 [Bank's opposition], 1310 [plaintiffs' reply], 1376 [order denying summary judgment; granting summary adjudication in part].)

Judgment was entered on August 31, 1993. (CT 1748-1753.)[8] This appeal from the judgment timely followed on October 29, 1993. (CT 1965-1966.) The judgment, which disposes of all issues between the parties, is appealable under Code of Civil Procedure section 904.1, subdivision (a).

8/ In postjudgment proceedings, the Bank was awarded costs in the amount of $159,415.60. (See CT 1751.) This included $155,715 in attorneys' fees, awarded "under the lease and Civil Code section 1717." (CT 1964.)

LEGAL DISCUSSION

I.

THE BANK'S 1981 PURCHASE OF THE LEASE WAS A NOVATION OF THE LEASE CONTRACT, AND THUS CONSTITUTED A NEW OBLIGATION ISSUING AFTER OCTOBER 27, 1977; THE GOLD CLAUSE THEREFORE IS ENFORCEABLE AGAINST THE BANK, AND PLAINTIFFS ARE ENTITLED TO BE PAID RENT AT THE GOLD CLAUSE RATE.

The depression-era invalidation of gold clauses "does not apply to an obligation issued after October 27, 1977." (31 U.S.C. § 5118(d)(2).) The key inquiry in this case, therefore, is whether the Bank's purchase of the lease from Triangle in 1981 constituted the issuance of a new obligation at that time. Plaintiffs urge that it most certainly did: That transaction constituted a novation, a new agreement between plaintiffs and the Bank, which came into existence in 1981. To demonstrate why this must be so, we first trace the history of gold clause legislation and then examine the law governing the determination of when an obligation "issues" for purposes of resolving the issues at hand and why the Bank's purchase of the lease constituted a novation under California law.[9/]

9/ The governing standard of review calls on this court to independently review the questions of law presented by this appeal, including those regarding construction of the pertinent contractual agreements. (E.g., *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865 [where evidence is not in conflict, construction of an agreement is a question of law for the appellate court's independent review]; *Mole-Richardson Co. v. Franchise Tax Bd.* (1990) 220 Cal.App.3d 889, 894 [where there is no conflict in the evidence and the decisive facts are undisputed, the appellate court is confronted with

(continued...)

A. Background: The Rise And Fall And Resurgence Of Gold Clauses.

"Although the history of gold clauses . . . does not directly affect [the] resolution of this case, it is helpful to see the whole historical terrain before we descend into our particular mineshaft." (*Rudolph v. Steinhardt* (11th Cir. 1983) 721 F.2d 1324, 1325.) Before the economic depression of the 1930s, "gold clauses" were used in contracts as a popular, if crude, method of adjusting for inflation. (See *Fay v. BAT Holdings I, Inc.* (W.D. Wash 1986) 646 F.Supp. 946, 948 [historical discussion]; *Gold Clause* article at p. 523 ["the inclusion of a gold clause may be expected, on general principles, to have resulted in a lower interest rate since it protected the creditor, albeit quite imperfectly, against inflation"].) "The gold clause was, in short, a primitive form of indexation." (*Gold Clause* article at p. 523.)

Gold clauses worked by tying the dollar amount due under an obligation to the prevailing price of gold. (*Fay v. BAT Holdings I, Inc.*, *supra*, 646 F.Supp. at p. 948 [gold clauses "mandated payment in gold coin, its equivalent, or, with some other wording, tied the dollar amount demanded with the price of gold"]; see, e.g., *Rudolph v. Steinhardt*, *supra*, 721 F.2d at p. 1326 ["a gold clause is a provision requiring 'payment in gold or a particular kind of currency, or in an amount of money measured thereby'" [quoting 31 U.S.C.§ 463]; 31 U.S.C. § 5118.) Essentially, under a gold clause, the amount really due at any given point was not the dollar amount stated in the debt instrument, but rather the current value of the quantity of gold which was equivalent to that dollar amount

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9/(...continued)
questions of law and is not bound by the trial court's conclusions]; *Equitable Life Assurance Society v. Berry* (1989) 212 Cal.App.3d 832, 840 [questions of law are subject to independent review on appeal].)

when the obligation was created. (See, e.g., *Rudolph v. Steinhardt*, *supra*, 721 F.2d at p. 1329.)

During the period of their popularity, about 55 percent of long-term obligations were subject to gold clauses. (*Gold Clause* article at p. 523.) As of 1933, it was estimated that more than $100 billion in debt obligations were outstanding which contained clauses requiring payment in gold coin or its equivalent. (77 Cong.Rec. 4531, 4536; *Gold Bondholders Protective Council v. Atchison, Topeka & Santa Fe Railway Co.* (Alaska, 1982) 649 P.2d 947, 949 [historical discussion].)

But 1933 was the year when the gold clause landscape changed drastically. By then the United States was in the depths of calamitous depression, and the federal government responded by promulgating a variety of measures intended to spur economic recovery. (See, e.g., *Gold Clause* article at pp. 509-514; *Gold Bondholders Protective Council v. Atchison, Topeka & Santa Fe Railway Co.*, *supra*, 649 P.2d at p. 949 [federal measures were undertaken "during the Great Depression to reform the monetary and banking systems of the United States, in the hope that the economic recovery of the nation would be facilitated"]; *Fay Corp. v. BAT Holdings I, Inc.*, *supra*, 646 F.Supp. at p. 948.) Several of these measures sharply circumscribed Americans' ability to legally own and contract in terms of gold. (*Ibid.*) For example, the Gold Reserve Act banned private ownership of gold. (Repealed, formerly codified in part at 31 U.S.C. §§ 442, 443; see *Fay Corp v. BAT Holdings, Inc.*, *supra*, 646 F.Supp. at p. 948.) Another measure--the

one directly relevant to this case--outlawed gold clauses, even those which had previously formed the basis of contractual agreements.[10]

The relevant measure took the form of a joint resolution of Congress. (48 Stat. 112, 113 (1933) [formerly codified at 31 U.S.C. § 463].) The joint resolution "invalidated all gold clauses and provided that 'dollar for dollar' payments in United States currency would discharge the obligation." (*Fay v. BAT Holdings, Inc.*, *supra*, 646 F.Supp. at p. 948.) The measure provided as follows:

> "Every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold . . . is declared to be against public policy. . . . Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar-for-dollar, in any coin or currency which at the time of payment is legal tender for public and private debts." (48 Stat. 112, 113.)

By promulgating this measure, "Congress . . . in effect created a windfall for tenants/lessees with long-term leases," since their obligation in one stroke became limited to the dollar amount stated in the instrument. (See *Fay Corp v. BAT Holdings I, Inc.* (W.D. Wash) 682 F.Supp. 1116, 1118.) Nonetheless, courts upheld the measure in a series of decisions as a rational and legitimate exercise of Congress's monetary power.

10/ Various rationales were offered for the gold clause ban. Principally, the ban was intended to prevent creditors from enforcing gold clauses after the 1934 devaluation of the dollar. (See *Gold Clause* article at p. 512.) A second purpose was to ensure that future debt payments not fluctuate relative to the value of paper money. (See *Holyoke Water Power Co. v. American Writing Paper Co.* (1937) 300 U.S. 324, 333, 57 S.Ct. 485, 486, 81 L.Ed. 678.)

(E.g., *Holyoke Water Power Co. v. American Writing Paper Co.*, *supra*, 300 U.S. 324, 57 S.Ct. 485, 81 L.Ed. 678; *Norman v. Baltimore & Ohio R. Co.* (1935) 294 U.S. 240, 55 S.Ct. 407, 79 L.Ed. 885; *Guaranty Trust Co. of New York v. Henwood* (8th Cir. 1938) 98 F.2d 160, aff'd (1939) 307 U.S. 247, 59 S.Ct. 847, 83 L.Ed. 1266; see generally *Gold Clause* article.)

The complete ban on gold clauses remained in effect until 1977. The vastly improved economic conditions of the 1970s led Congress to evaluate whether there remained any purpose in retaining some of the economic measures, including limitations on gold ownership and trading, that were adopted in response to the depression. Several such measures were repealed; for example, in 1973 it became permissible once again for Americans to buy and own gold. (87 Stat. 352 (1973), as amended by 88 Stat. 445 (1974); see, e.g., *Fay Corp. v. BAT Holdings I, Inc.*, *supra*, 646 F.Supp. at p. 948.)

Another such measure addressed the legality of gold clauses. In 1977, Senator Jesse Helms introduced a bill to repeal the 1933 ban. (See 123 Cong.Rec. 633-635 [appearing at CT 209-212].) His remarks before the Senate attacked the prohibition as "anachronistic," pointing out that "[r]ight now, contracts can be made specifying payment in any commodity--except gold." (*Id.* at p. 633; see p. 634 ["Anyone can enter into agreements which state that a sum of dollars will be paid on a certain date measured in the value of porkbellies or any other commodities. But, because of this archaic provision on the books, we could not use gold as a measure of payment"].) Nonetheless, the measure was not couched as a wholesale reversal of the ban. Rather, because the senator was aware of "at least one case pending in the courts which would require gold clause bonds issued before the 1933 resolution, be paid in gold," and because he expressly did not "want any legislation to prejudice the case one way or another," his

measure was limited in design to making "enforceable, gold clause contracts entered into after the enactment of the bill." (*Id.* at p. 635.) His remarks make quite clear an intent that individual cases regarding enforceability of gold clauses be left to determination by the courts. As the Senator put it in his remarks, "It [the gold clause bill] is intended to stand neutral with regard to the enforceability of gold clause obligations issued in the past." (*Ibid.*)

Senator Helms's bill was approved. In October 1977, Congress passed new legislation providing that the 1933 joint resolution that had rendered gold clauses unenforceable "shall not apply to obligations issued after the date of enactment of this section." (P.L. 95-147 § 4(c), 91 Stat. 1229, former 31 U.S.C. § 463 note.) This legislation was recodified in 1982 when Congress adopted 31 U.S.C. § 5118(d)(2), which provides that gold clauses are enforceable in obligations issued "after October 27, 1977."[11/]

B. The Bank's 1981 Purchase Of The Lease Was A Novation Under California Law, And Thus Constituted A New Obligation Issued After The Statutory Date.

The law is clear that gold clauses included in obligations issued post-October 27, 1977, are enforceable. The determinative inquiry in this case, therefore, is whether the

11/ The precise language of the statute reads: "An obligation issued containing a gold clause or governed by a gold clause is discharged on payment (dollar for dollar) in United States coin or currency that is legal tender at the time of payment. This paragraph does not apply to an obligation issued after October 27, 1977." (31 U.S.C. § 5118(d)(2).)

Bank's purchase of the lease in 1981 constituted the creation of a new obligation containing a gold clause. As we now demonstrate, it plainly did, because (1) the law is unequivocal that the word "issued" as used in 31 U.S.C. § 5118(d)(2) means "entered into"; and (2) under California law, the transaction was a novation of the agreement that existed between the plaintiffs and the previous lessee, and thus constituted a new contract whose obligations--including those imposed by the gold clause--were entered into well after October 27, 1977.

1. An Obligation Is "Issued" Within The Meaning Of 31 U.S.C. § 5118(d)(2) When The Responsible Party "Enters Into" It.

The phrase "obligation issued after October 27, 1977" (31 U.S.C. § 5118(d)(2)) "is intended to mean an obligation (including contractual obligations) 'entered into' after that date." (*Fay Corp v. BAT Holdings I, Inc.*, *supra*, 646 F.Supp. 946, 949.) That this was Congress' intent is clear from Senator Helms's remarks:

> "My bill, if approved, will make enforceable, gold clause contracts *entered into* after the enactment of the bill." (123 Cong.Rec. 635 [emphasis added].)

This meaning is confirmed not just in *Fay*, but also in *Rudolph v. Steinhardt*, *supra*, 721 F.2d 1324, a case relied on heavily (but misguidedly; see Section I(C), *infra*) by both the Bank and the trial court. (See, e.g., CT 1407-1441 [Bank's trial brief]; RT 52.) *Rudolph*, in the course of rejecting an argument that each payment due under a lease is a separate obligation which "is issued" when it becomes due, traced the legislative intent

behind the Helms measure and found no room to doubt that the phrase "an obligation issued" means "an obligation entered into." (*Rudolph v. Steinhardt*, *supra*, 721 F.2d at p. 1330.) As the court noted, only Senator Helms explained the bill's meaning and this was the construction he used; further, a supporting letter he submitted from a deputy Treasury counsel, announcing the Treasury's consent to the amendment, stated that the bill "'would repeal the Joint Resolution with respect to *obligations entered into* after the date of enactment. . . .'" (*Ibid.*, quoting letter from Henry Stockwell.)

While acknowledging a general reluctance "to rely on the position of one Congressman to demonstrate Congressional intent" (*ibid.*), the court concluded that "in this case, the evidence is particularly strong, for the speaker was the author of the bill, there were no other interpretations of the statutory language, and the bill was passed summarily based on Sen. Helms' explanation." (*Ibid.*) "Moreover," the court continued, "his construction of the word 'issued' corresponds with its normal meaning in law; debts are normally issued when they are first entered into and made available to the creditor, not when they ultimately come due." (*Id.* at pp. 1330-1331.)

In sum, the reference in 31 U.S.C. § 5118(d)(2) to "an obligation *issued* after October 27, 1977" means that gold clauses are enforceable with respect to obligations *entered into* after that date. As we now explain, that precisely describes the circumstances of the Bank's assumption of obligations to plaintiffs under the lease.

2. The Transaction By Which The Bank Became Plaintiffs' Lessee Was A Novation, And Thus Constituted A New Lease Contract Whose Obligations The Bank "Entered Into" In 1981, Well After The Repeal Of The Gold Clause Ban.

a. *Novation Defined*. "Novation is the *substitution* by agreement of a new obligation for an existing one, with intent to *extinguish the latter*." (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 906, p. 811 [emphases in original]; Civ. Code, § 1530 [novation defined].) Among the three modes of novation defined in the Civil Code is "the substitution of a new debtor in place of the old one; with intent to release the latter[.]" (Civ. Code, § 1531; see, e.g., *Alexander v. Angel* (1951) 37 Cal.2d 856, 860 [where new debtor is substituted for prior one, who is released from contractual obligations by the creditor, there is a novation]; *Young v. Benton* (1913) 21 Cal.App. 382, 384 [same] *Garthofner v. Edmonds* (1946) 74 Cal.App.2d 15, *disapproved on other grounds*, *Alexander v. Angel*, *supra*, 37 Cal.2d 856 [same]; *Chiarello v. Axelson* (1938) 25 Cal.App.2d 157, 159 [same]; *Toogood v. Mack* (1928) 90 Cal.App. 673 [same].)

A novation is a new contract. Indeed, the hallmark of a novation is that it completely supplants the agreement it succeeds. (E.g., Civ. Code, § 1532 ["Novation is made by contract, and is subject to all the rules concerning contracts in general"]; 1 Witkin, *supra*, Contracts, § 906, pp. 811-812 ["A novation completely *extinguishes* the original obligation, and a failure to perform the new one does not revive the old. (Citations)"]; *id.* at § 907, p. 812 [expressly terming novation a "new contract"].)

The requisites of novation are flexible; "[n]o particular form is required; it may be written, oral, or implied from conduct where the intent appears sufficiently clear. This is

so even where the original contract is in writing." (1 Witkin, *supra*, Contracts, § 907, p. 812.) What is essential "is that it 'clearly appear' that the parties intended to extinguish rather than merely modify the original agreement." (*Howard v. County of Amador* (1990) 220 Cal.App.3d 962, 977; *Alexander v. Angel*, *supra*, 37 Cal.2d at p. 860 [novation may be established expressly or "'by unequivocal implication'"].) Consideration is required, but where novation takes the form of a substitution of a new debtor for an old one, the release of the old debtor is sufficient consideration for the new debtor's promise. (*Manfre v. Sharp* (1930) 210 Cal. 479, 481; 1 Witkin, *supra*, Contracts, § 907, p. 812.)

b. *Transfer of the lease to the Bank was a novation.* The record makes quite clear that the Bank's purchase of the lease from Triangle completely extinguished Triangle's obligations to plaintiffs, leaving them to look *only* to the Bank for performance of the lease. For example, Triangle expressly conveyed to the Bank all of its "right, title and interest in the Ground Lease." (CT 146; see CT 51 [Triangle "grants, assigns, transfers, conveys and sets over unto (the Bank) . . . all right, title and interest of (the Bank) in, to and under that certain Indenture of Lease made the 1st day of March, 1929, . . . "].) The Bank "accept[ed], assume[d] and agree[d] to be bound by and perform each and all of the agreements, covenants and obligations upon the part of the lessee" under the lease. (CT 52 [assignment of ground lease]; see also CT 48-49 [lease itself provides that all successor lessees is bound by "all of the covenants, agreements, obligations, conditions and provisions of this lease"].) Once the conveyance was completed, the Bank sent letters to the various lessors informing them that "the leasehold estate of the lessee was sold and assigned to (the Bank)." (CT 154-163.) Indeed, as the parties succinctly stipulated, the Bank "became the lessee under the Lease." (CT 1688.)

Plaintiffs' requisite intent to extinguish the prior obligation of Triangle is established by the lease itself. The lease expressly provides that the lessee "shall be relieved of all liability accruing under this lease from and after the date of any assignment. . . ." (CT 44 [Lease, Art. XIII, § 2].)[12/] That the creditor's consent requisite to novation may be accomplished by preexisting agreement is clear from *Chiarello v. Axelson*, *supra*, 25 Cal.App.2d 157. There, Chiarello entered into a written contract with an individual, Axelson, which provided that "either party . . . may assign this agreement to a corporation to be formed by him, and . . . the party so assigning shall be relieved and discharged of any further liability under this agreement." (*Id.* at p. 158.) Chiarello later filed an action to enforce the agreement against Axelson, who in the meantime had formed a corporation and assigned the contract to it. The appellate court held that the assignment by Axelson to the corporation was a novation, because Chiarello had previously agreed in the contract to release the defendant when he assigned away his interest. (*Id.* at p. 159; see also *Fay v. BAT Holdings I, Inc.*, *supra*, 646 F.Supp. at p. 952 [confirming that creditor can give advance assent to novation].)[13/]

12/ This provision was originally conditioned upon the lessee's construction on the property of improvements worth at least $300,000. (CT 44 [Lease, Art. XIII, § 2.) This condition was satisfied prior to March 1931. (See CT 1687.)

13/ The Bank has suggested that "[i]f a novation revives an existing gold clause, then a landlord could revive a dead gold clause simply by assigning the right to collect rent to an entity the landlord controls." (CT 1423.) According to the Bank, "This substitution of creditors is a novation, just as the substitution of debtors is a novation." The Bank's analysis is far too facile. As discussed above, novation requires the assent of all interested parties to extinguish the prior obligation and substitute the new one. This remains true whether the substituted party is debtor or creditor. (See, e.g., 1 Witkin, *supra*, Contracts, §§ 906, 907.) There is nothing in the lease--nor is there any other evidence--indicating that Triangle, the Bank or any actual or potential tenant agreed the plaintiffs could completely extinguish their obligations under the lease by substituting a new entity as landlord. In short, plaintiffs could not unilaterally work a novation.

In sum, when the transaction transferring the lease to the Bank was completed in 1981, a new contract (in legal effect, a new lease) was created reflecting an utterly new obligation--one between the plaintiffs as lessors and the Bank as lessee. The agreement previously existing between plaintiffs and Triangle was extinguished. Under California law, this was a novation.

3. Since The Novation Created Brand-New Contractual Obligations In 1981, The Gold Clause Set Forth In That Post-October 27, 1977, Lease Contract Is Enforceable.

The novation gave birth to the Bank's obligations to plaintiffs under the lease. Legally, the novation amounted to a new contract, entered into by the parties in 1981. Therefore, contrary to the Bank's mischaracterization (e.g., CT 1407-1440 [Bank's trial brief]), the assignment did not "revive" a gold clause that Congress invalidated in 1933; rather, it created a new gold clause in a new contract. *In 1981*, the Bank expressly agreed to "be bound by and perform each and all" of the new contract's "agreements, covenants and obligations." (CT 51-52.) Thus, the Bank's lease obligation to plaintiffs "issued after October 27, 1977," within the meaning of 31 U.S.C. § 5118(d)(2). Accordingly, its gold clause is enforceable.

A federal court reached an identical result under substantively identical facts and law in *Fay Corp v. BAT Holdings I, Inc.*, *supra*, 646 F.Supp. 946, *recon. denied* (W.D. Wash 1987) 651 F.Supp. 307; *affirmed sub nom Fay Corp v. Frederick & Nelson Seattle, Inc.* (9th Cir. 1990) 896 F.2d 1227. *Fay* involved a 99-year, 1929 lease containing a gold clause. (646 F.Supp. at p. 948.) The lease was assigned to BAT in 1982 by prior lessee

Marshall Field, which (like Triangle here) was released from its obligations upon the assignment by operation of the lease terms. (*Id.* at pp. 947-949.) The court found that several factors combined to make the assignment a novation: The previous lessee's rights and duties under the lease were extinguished; the new lessee became directly and exclusively responsible to the lessor; and the lessor had assented to this change of affairs. (*Id.* at pp. 949-952.) In light of these factors, the court concluded:

> "[T]he 1982 transfer by Marshall Fields (*sic*) to BAT was a valid novation, creating a new contractual obligation as of August 28, 1982. Gold clauses are enforceable after October 27, 1977, pursuant to [31 U.S.C.] section 5118; moreover, enforcement of the gold clause will not do violence to the purpose of section 5118, because it is not a 'past obligation' that the amendment is affecting but a new one entered into after the amendment was in force. Therefore, the gold clause contained in the August 28, 1982 contract is enforceable." (646 F.Supp. at pp. 952-953.)

This case is substantively indistinguishable from *Fay* in every important respect. Accordingly, plaintiffs respectfully urge this court to follow *Fay* and reach a like result. The 1981 assignment of the lease to the Bank plainly was a novation--and therefore a new contract--under California law. Fully apprised as to all relevant facts and law, the Bank chose in 1981 to obligate itself to plaintiffs under all the terms of the lease. The lease obligation between plaintiffs and the Bank "issued after October 27, 1977." (31 U.S.C. § 5118(d)(2).) One of its terms is a gold clause. This court should reverse the trial court and compel the Bank to honor it.

C. <u>The Trial Court's Ruling That The Gold Clause Is Unenforceable Misplaces Its Reliance On Cases Cited By The Bank, And Embraces The Legally Insupportable Fiction That The Gold Clause Was Not Just Invalidated, But Somehow Physically Disappeared From The Lease When Congress Passed The Joint Resolution In 1933.</u>

Despite clear-cut California law favoring plaintiffs' position, the trial court ruled the gold clause unenforceable. (See RT 52-54 [oral ruling]; CT 1748-1751 [judgment].) The court was persuaded both by arguments made by the Bank concerning appellate decisions other than *Fay*, and by its independent reckoning that because the gold clause did not "survive" the joint resolution, it could not have been included as a term of Triangle's assignment to the Bank even if that transaction constituted a novation. Neither aspect of the court's reasoning withstands scrutiny.

1. <u>The Decisions Cited By The Bank And Relied On By The Court Are Dissimilar To This Case And Do Not Support The Court's Ruling.</u>

In light of the undeniable symmetry between this case and *Fay*, the Bank's strategy in this matter has been to pick *Fay* apart and to urge that this case should be decided by reference to other gold clause cases more to the Bank's liking. (See, e.g., CT 1413-1430 [Bank's trial brief].) The trial court expressly relied on two of those cases, *Schickler v. Santa Fe Southern Pacific Corp.* (1992) 229 Ill.App.3d 291, 593 N.E.2d 961 and *Rudolph v. Steinhardt*, *supra*, 721 F.2d 1325. (See RT 52.) On close examination,

however, neither these nor any other decisions promoted by the Bank properly guides the resolution of this case.

Significantly, neither *Rudolph* nor *Schickler* involved an obligation created after October 27, 1977, as was the Bank's obligation here. In *Rudolph*, a lessor asserted under 31 U.S.C. § 5118(d)(2) that a gold clause in a *1970* lease was enforceable with regard to rent coming due after October 27, 1977, because each payment due under the lease was a separate obligation "which is 'issued' when the payment is due." (*Rudolph v. Steinhardt*, *supra*, 721 F.2d at p. 1330.) The Eleventh Circuit rejected this argument, holding instead that the phrase "obligation issued on or after" in the statute refers to the point when the lease obligation is "entered into" and not to each payment as it comes due.[14/] As a result, the *Fay* court had no trouble distinguishing *Rudolph*:

> "There was no transfer at issue in *Rudolph* when the Court determined that lessees or assigns became obligated at that date to pay rent as it became due, and the 1977 statute did not affect a 1970 lease." (646 F.Supp. at p. 949, fn. 6.)

As for *Schickler*, it didn't involve a lease at all. Rather, *Schickler* involved an attempt to enforce a gold clause in bonds issued in 1895. Modern-day holders of the bonds demanded that interest owing on them be paid in gold coin or its equivalent, as contrasted with United States currency. (229 Ill.App.3d at p. 293, 593 N.E.2d at p. 963.) Their argument (one never advanced in this lawsuit) was that changes in federal law

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14/ In fact, *Fay* cited *Rudolph* for the proposition that "issued" means "entered into" for purposes of the statute. (*Fay Corp. v. BAT Holdings I, Inc.*, *supra*, 646 F.Supp. at p. 949.)

concerning such matters as gold ownership and the minting of gold coins impliedly repealed the 1933 gold clause ban in its entirety. The Illinois appellate court (not surprisingly) rejected the bond holders' argument, citing Congress' enactment which expressly limits the repeal to obligations issued after October 27, 1977. (229 Ill.App.3d at p. 300, 593 N.E.2d at p. 967; see 31 U.S.C. § 5118(d)(2).)

Other cases cited by the Bank but not expressly embraced by the trial court are equally inapposite. For example, *Gold Bondholders Protective Council v. Atchison, Topeka & Santa Fe Railway Co.*, *supra*, 649 P.2d 947, like *Schickler*, involved bonds issued in the 19th century. Latter-day purchasers of the bonds demanded payment of interest owing in gold coin; the Alaska Supreme Court rejected their claim, holding that although the bonds were delivered in 1980, no new contractual obligation was issued (i.e., entered into) at that time. (*Id.* at p. 950.) *REC Centers, Inc. v. Shaughnessy* (Fla. Ct. App. 1981) 407 So.2d 971 is equally far afield, the issue presented being whether or not particular language constituted a gold clause, and the court noting without discussion that the "obligation here was created prior to October 28, 1977." (*Id.* at p. 972, fn. 1.)

In sum, the cases cited by the Bank and relied on by the trial court are utterly dissimilar to this case. They do not support the trial court's ruling.

2. Neither Law Nor Logic Supports The Trial Court's Conclusion That The Gold Clause Was Not Present In The Lease Purchased By The Bank.

In addition to relying on cases cited by the Bank, the trial court reasoned that "the Assignment of the Lease to defendant transferred only those terms of the Lease which had survived the 1933 Act. [¶] Although the Lease contained a 'gold clause', the Assignment did not revive that clause, which had been declared invalid by Act of Congress in 1933. The same result follows whether the transfer was an assignment or a novation." (CT 1749; see RT 53.) The court elaborated its thinking at trial:

> "The gold clause in question here was issued, entered into in 1929. In 1929 the lessee or his assignees became liable for the rent as adjusted by the gold clause under the lease. The gold clause was invalidated by the 1933 act. Although defendant subsequently assumed the lease in 1981, it assumed the valid obligation of the original lease and not the void and invalidated gold clause. The assignment did not operate to revive the gold clause." (RT 53.)

The court's analysis misses the mark in various respects. Most strikingly, in stating that the assignment bound the Bank only to the "valid" obligations stated in the lease, the court's analysis begs the very question posed by the lawsuit: *Is* the gold clause valid? The court having failed to come to grips with that question, its ruling lacks any real foundation.

Further, the court's conceptualization of the gold clause as "void" is curiously metaphysical. The court seems to view the clause, once invalidated, as having disappeared from the lease. But this defies reality. The gold clause never disappeared from the lease. To the contrary, the Bank knew all along not only that it was there, but that it might be enforceable.

The trial court's indulgence of the fiction that the 1933 law erased the gold clause from the lease may account for its failure to appreciate the critical importance of the novation issue. Even the trial court probably would not dispute that if hypothetical parties entering into a new contract after October 27, 1977, chose to type up their agreement using the precise language of the gold clause in the 1929 lease, they would thereby create an enforceable gold clause. If the parties here have effected a novation (as plaintiffs urge they have), then the gold clause in the lease is entirely as valid as the one typed up in the hypothetical case, because a novation is a new contract.

To sum up, the Bank became bound to plaintiffs under the lease obligation in 1981. The law is quite clear that this was accomplished by novation, which amounted to the creation of a new contract at that time. That 1981 contract contains a gold clause, which, having been "issued"--i.e., "entered into"--after October 27, 1977, is valid and enforceable. Accordingly, for all the reasons stated, plaintiffs urge this court to reverse the judgment with directions to enter a new and different one in plaintiffs' favor.

II.

THE TRIAL COURT ERRED IN RULING THAT PLAINTIFFS' CLAIMS ARE BARRED BY ESTOPPEL, BECAUSE DEFENDANTS FAILED TO PROVE THE FOUR REQUIRED ELEMENTS OF THAT DEFENSE.

In addition to rejecting plaintiffs' claims on the merits, the trial court ruled that "[p]laintiffs' claims are also barred by laches and estoppel" (CT 1750.) This ruling is wrong on both counts and must be reversed.[15]

The evidence is utterly deficient to establish an estoppel. This defense, which is generally disfavored, requires proof of each of four distinct elements:

(1) The party to be estopped must know the facts;

(2) He must intend that his conduct be acted upon or must so act that the party asserting estoppel had a right to believe he so intended;

(3) The party asserting estoppel must be ignorant of the true state of facts; and

(4) That party must rely upon the other's conduct to his injury.

(*Hair v. State* (1991) 2 Cal.App.4th 321, 328 [stating elements and noting that where any one element is absent, there can be no estoppel]; *Insurance Co. of the West v. Haralambos Beverage Co.* (1987) 195 Cal.App.3d 1308, 1321; *International Ass'n of Fire Fighters v. City of San Leandro* (1986) 181 Cal.App.3d 179, 182 ["Generally, the doctrine of estoppel is disfavored"]; *Weadon v. Shahen* (1942) 50 Cal.App.2d 254, 263.)

The Bank failed to prove any of these elements at trial.

15/ Laches is discussed in Section III, *infra*.

1. *Knowledge element not proved.* The first element requires proof that the party to be estopped--i.e., plaintiffs--knew the facts. "Knowledge is an essential element of . . . estoppel and, without knowledge, there can be no . . . estoppel." (*Weadon v. Shahen*, *supra*, 50 Cal.App.2d at p. 263.) No such proof was introduced here.

Rather, the limited evidence is precisely to the contrary. Certainly, everyone agrees that plaintiffs knew nothing before the Bank had already bound itself under the lease. The Stipulation Re: Facts and Documents at Trial (CT 1685-1705) establishes that, at all times, the Bank knew precisely what was happening, while plaintiffs remained ignorant. Indeed, throughout the progression of its dealings with Triangle to buy the lease, it appears the Bank deliberately kept plaintiffs in the dark: "Plaintiffs were not informed by [the Bank] of the assignment of the Lease from Triangle to [the Bank] until after the assignment was made. Plaintiffs were not informed by anyone, including Defendants, about the terms or conditions of the assignment. In October 1981, after the assignment, Plaintiffs were notified by certified mail from Triangle of the assignment." (CT 1689 [Stipulated Fact No. 8].)

For several years after the assignment as well, plaintiffs remained ignorant. The Bank has never countermanded plaintiffs' evidence that before November 1986, at the earliest, plaintiffs had no clue it might be possible to sue the Bank to enforce the gold clause. (See CT 1695-1697.) According to the evidence, their first inkling came only when one of them, George Linthicum, read a newspaper article about a partial summary judgment ruling in the *Fay* case, which had not yet been tried. (CT 1695.) It was only then that plaintiffs commenced educating themselves by tracking the progress of the *Fay* case, communicating with the Bank, and ultimately retaining counsel to file this lawsuit.

(See CT 1695-1699.) In sum, plaintiffs did not have the facts. The evidence fails to prove the first element of estoppel.

2. *Intent element not proved.* The next element requires proof that plaintiffs intended the Bank to act upon their conduct, or acted in a manner leading the Bank to believe its reliance was intended. Defendants failed to prove this element at trial.

First, there is no dispute that for a lengthy period, plaintiffs were completely ignorant concerning the assignment or any aspect of the negotiations between Triangle and the Bank. During this period, certainly, plaintiffs could not possibly have engaged in any conduct, nor harbored any intent, that would estop them from seeking to enforce the gold clause.

Further, the stipulated evidence shows that once the facts finally began to reveal themselves, plaintiffs responded by making repeated demands for payment of rent at the gold clause rate (CT 1690-1692, 1695-1696); pointedly endorsing rent checks as acknowledging receipt of "partial payment only" (CT 1693-1695); shopping for counsel (CT 1696-1698); and filing this lawsuit (CT 1). This evidence does not support the trial court's necessarily implied finding that plaintiffs either intended the Bank to rely to its detriment or lulled the Bank into concluding its reliance was intended.

The Bank urged at trial that once plaintiffs were clued in, they should have acted faster. In fact, the charge of delay is the alpha and omega of the Bank's estoppel claim; there is no other evidence of intent to induce reliance. (E.g., CT 1434 ["If Plaintiffs had raised their gold clause claim promptly after the assignment, Defendants could have re-negotiated the assignment or rescinded it on the grounds of mutual mistake of law, . . . and would have done so"]; CT 1436-1437 ["Plaintiffs acquiesced in Defendants' payment of $2,000 per month after the assignment. Defendants also relied to their detriment on

Plaintiffs' inaction"].) Delay alone, however, cannot be the basis for a finding of estoppel. (See, e.g., *Donovan v. City of Santa Monica* (1948) 88 Cal.App.2d 386, 396 [City's mere delay in enforcing its zoning ordinances did not by itself create a valid defense of estoppel]; *City and County of San Francisco v. Pacello* (1978) 85 Cal.App.3d 637, 645 [delay alone cannot support finding of laches, and estoppel, although related to laches, "is a separate doctrine, with significantly more rigorous requirements"].)

In addition, the uncontradicted (indeed, stipulated) fact that the Bank kept plaintiffs in the dark all the while it explored, negotiated and consummated the assignment deal makes the Bank's delay claim decidedly disingenuous. The Bank, which knew all along about the gold clause, the change in the law, and the potential enforcement claim (see CT 1688 [Stipulated Fact No. 7]), always had the wherewithal to find out whether plaintiffs might seek to enforce the gold clause. All it had to do was approach them directly, before entering into the assignment, and ask. The Bank itself made the choice to conduct its business a different way. When it failed to induce Triangle to indemnify it should the gold clause turn out to be enforceable, it took the risk and consummated the deal, knowing full well that the issue remained lurking. (See CT 1694-1695.) Under the circumstances, the Bank can hardly be heard to complain that its choices in this matter were made in reliance upon plaintiffs' conduct. In sum, the Bank failed to prove the second element of its estoppel defense. (See *In re Lisa R.* (1975) 13 Cal.3d 636, 645 ["The essence of an estoppel . . . is that the party to be estopped has by false language or conduct led another to do that which he would not otherwise have done and as a result thereof that he has suffered injury"].)

3. *Ignorance element not proved.* Proof of this element in particular lies well beyond the Bank's grasp. Far from supporting the required finding that the Bank was

ignorant of the true state of facts, the evidence shows that the Bank's knowledge far outstripped plaintiffs' at all times. For example, the Bank[16/] knew "that the Lease contained a gold clause before [it] entered into the assignment transaction." (CT 1688 [Stipulated Fact No. 7].) The Bank knew also "at the time [it] entered into the assignment transaction of the 1977 congressional legislation that made gold clauses enforceable in obligations entered into after October 28 (*sic*), 1977 (P.L. 95-147 § 4(c), 91 Stat. 1229, former 31 U.S.C. § 463)." (CT 1688 [Stipulated Fact No. 7].) Further, before the assignment ever took place, the Bank obtained legal advice concerning possible enforcement of the gold clause. (CT 1688 [Stipulated Fact No. 7 ("Before the assignment, they obtained and relied on a legal opinion from their counsel"); CT 1694 [Stipulated Fact No. 32 (counsel told the Bank "there was a possibility that the Gold Clause would be enforceable after the assignment, but that this risk was less than fifty percent")].) The Bank even tried, unsuccessfully, to persuade Triangle to indemnify it against this possibility. (CT 1694 [Stipulated Fact No. 33].)

The stipulated evidence shows further that Bank had to know from March 1988 forward that plaintiffs had become aware of the gold clause issue and were exploring their remedies. Plaintiff Donal Botkin's correspondence made this quite clear. (CT 1690-1692, 1695-1696.) So did plaintiffs' endorsements on rent checks to the effect that such checks were accepted as partial payment only. (CT 1693.) Plaintiffs' conduct could not have diminished the Bank's awareness of a risk it had known about, and which had

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16/ Although the Bank is the defendant in this matter now, due to a merger after this action was filed (CT 1692; see note 1, *supra*), the point should not be lost that the original defendants in this matter included Pacific Southwest Realty Corp., a professional real estate firm.

figured in its conduct, all along. The third element of estoppel, like the two already discussed, was not proved.

4. *Detrimental reliance element not proved.* Turning to the fourth required element of an estoppel claim, the Bank failed to prove detrimental reliance based on plaintiffs' supposed delay in initiating these proceedings. If anything, the stipulated facts show that the Bank did what it could to perpetuate the delay, first by negotiating and completing the deal with Triangle without plaintiffs' knowledge and later by meeting plaintiff Botkin's inquiries with stalling tactics and accusations of bad faith. (CT 1690-1692, 1695-1696.) Indeed, the facts show that the Bank, far from relying on plaintiffs conduct, consciously and conspicuously chose to proceed in the face of a known risk.

Further, the lease provisions themselves defeat the Bank's reliance claim. The lease expressly provides that "[n]o delay of the lessors in enforcing [its] right[s] . . . shall affect, diminish, suspend or exhaus[]t any of such rights" (CT 48 [Lease, Art. XVI, § 6]) and that "[n]o waiver of any breach . . . shall be construed to be a waiver of any succeeding breach" (*id.*, § 7.). These provisions, by which the Bank agreed to be bound (see CT 52 [assignment of ground lease]), are "tantamount to a relinquishment of the right of the lessees and their assignees, to assert a waiver or estoppel, unless there has been an express waiver . . . [by] the lessor . . . or . . . conduct [by the lessor], other than the acceptance of rent." (*Karbelnig v. Brothwell* (1966) 244 Cal.App.2d 333, 342-343.)

As for the Bank's argument that plaintiffs' delay precluded it from rescinding the deal with Triangle based on mistake of law (e.g., CT 1436-1437 [Bank's trial brief], that claim is a red herring. First, there was no mistake: The Bank very well knew the state of the law before it ever entered into the deal. (CT 1688 [Stipulated Fact No. 7 (Bank knew all along about the gold clause, the change in the law, and the potential

enforcement claim)]; see *Guthrie v. Times-Mirror Co.* (1975) 51 Cal.App.3d 879, 885 [the risk of a doubtful matter of which contracting parties are aware is an element of the bargain, and not the basis for rescission based on mistake of law].) Next, even if there were some foundation for a mistake of law claim, the Bank has never tried to rescind its contract with Triangle, although the law requires a party to give notice of rescission "promptly upon discovering the facts which entitle him to rescind . . . " (Civ. Code, § 1691.) If the Bank's rationale for forbearing from doing so is that its mistake of law will not be determined until this lawsuit is concluded, then, by that analysis, the Bank's statutory duty to give notice has not yet arisen. On the other hand, to the extent the Bank contends that the sheer passage of time precludes it from pursuing a rescission claim, it must be noted that for the first several years after the deal was consummated, the Bank knew the gold clause might be enforceable while plaintiffs did not. (CT 1688-1689, 1695-1697.) Responsibility for the Bank's failure to take steps to rescind the deal during the lengthy interval of plaintiffs' ignorance simply cannot by laid at plaintiffs' doorstep.

Finally, not only was there no reliance, there was no detriment. The Bank actually benefitted to the tune of millions of dollars from the fact that this action was filed in 1991 rather than earlier. The Bank itself concedes it realized an annual rent reduction in the neighborhood of $300,000 by purchasing the lease and paying rent at the steeply reduced rate. (See CT 1687 [Stipulated Fact No. 4, detailing the Bank's rent expenses when it was Triangle's subtenant].) The later this action was filed, the longer the Bank has paid $2,000 per month rent, rather than the gold clause rate specified in the lease, on a plum Beverly Hills site. Indeed, as a result of the four-year statute of limitations on breach of contract actions (Code Civ. Proc., § 337), the Bank has been

relieved of all liability to pay rent at the gold clause rate from October 1981, when the lease was transferred, to October 1987, four years before this action was filed. (Cf. *McCullough v. Jones* (1970) 11 Cal.App.3d 270, 276 [laches defense rejected because "[t]he statute of limitations relieved appellants of liability from 1960 to January 1963. To that extent they have benefitted. Appellants failed to carry their burden of proving that they were prejudiced by the delay in instituting this action"]; see also *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 460 ["defendant . . . actually gained to the extent that any past due payments have become barred . . . by the . . . statute of limitations"].) In short, the Bank suffered no injury from plaintiffs' conduct.

"It is the burden of the party asserting estoppel to prove all of its requisite elements, and the doctrine is strictly applied and must be substantiated in every particular." (*El Camino Comm. College Dist. v. Superior Court* (1985) 173 Cal.App.3d 606, 614.) In this case, the evidence at trial was insufficient with regard to each and every one of the four requisite elements of an estoppel defense. Failure to prove even one element would defeat estoppel. In sum, the Bank failed to prove its estoppel defense. The trial court erred in finding an estoppel. Its ruling must be reversed.

III.

THE TRIAL COURT ABUSED ITS DISCRETION IN RULING THAT PLAINTIFFS' CLAIMS ARE BARRED BY LACHES, BOTH BECAUSE THAT EQUITABLE DEFENSE HAS NO APPLICATION TO THIS ESSENTIALLY LEGAL ACTION, AND BECAUSE THE BANK FAILED TO INTRODUCE EVIDENCE SUFFICIENT TO ESTABLISH LACHES.

Laches is an unreasonable delay in asserting a right, which causes such prejudice to an adverse party as renders the granting of relief inequitable. (E.g., *Conti v. Board of Civil Service Comm'rs* (1969) 1 Cal.3d 351, 359; *Marriage v. Keener* (1994) 26 Cal.App.4th 186, 190; *Butler v. Holman* (1956) 146 Cal.App.2d 22, 28; *Field v. Bank of America* (1950) 100 Cal.App.2d 311, 313-314.) The trial court ruled that plaintiffs' claims are barred by laches. (CT 1750.) This ruling was an abuse of discretion for two distinct reasons: (1) Laches has no application to an action at law for damages; and (2) in any event, the Bank failed to introduce evidence at trial sufficient to support a finding of laches. For both these reasons, the trial court's ruling must be reversed.

A. The Defense Of Laches Is Unavailable In An Action For Damages.

The defense of laches can be asserted *only* in an action in equity. An action at law simply is not subject to the defense, and this remains true even if equitable claims are joined in the suit. (11 Witkin, *supra*, Equity, § 14, p. 692; *Abbott v. City of Los Angeles*, *supra*, 50 Cal.2d 438, 462 [laches defense not available to action for damages,

even where "combined with the . . . remedy of declaratory relief"]; *Mandracio v. Bartenders Union, Local 41* (1953) 41 Cal.2d 81, 85 ["The defense of laches is not available in action at law for damages"]; *Brownrigg v. DeFrees* (1925) 196 Cal. 534, 539 ["'Though a good defense in equity, laches is no defense at law'"].)[17]

Because laches cannot be raised in an action at law for damages, it is unavailable in this lawsuit. Plaintiffs' complaint stated two causes of action: breach of contract and declaratory relief. (CT 1-10.) The very essence of the entire lawsuit is a claim for money damages, namely, the contention that rather than paying $2,000 per month rent, the Bank should be paying plaintiffs at the much higher gold clause rate.

Certainly, the breach of contract claim is the paradigm action at law for damages. Laches is never a defense to such a claim, even where it is joined in a suit in equity. (E.g., *Abbott v. City of Los Angeles*, *supra*, 50 Cal.2d at p. 462 [reversing finding of laches, because that doctrine is unavailable "as a defense to the causes of action (at law) seeking money judgments" even where joined with claims in equity]; *Adler v. Los Angeles Unified School Dist.* (1979) 98 Cal.App.3d 280, 289-290 [laches unavailable to action for money damages]; *Weber v. Marine Cooks etc.* (1954) 123 Cal.App.2d 328, 332 [same].) Thus, the

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17/ The reason why is evident: "The equitable doctrine of laches has a legal equivalent in the statutes of limitations. To allow a laches defense in a legal action would be to override a time limit mandated by the Legislature." (*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 619; see *Bagdasarian v. Gragnon* (1948) 31 Cal.2d 744, 752 [laches unavailable in legal action because statute of limitations governs whether action is timely]; *Pratali v. Gates* (1992) 4 Cal.App.4th 632, 645.) Thus, in this case, the statute of limitations establishes the temporal parameters of plaintiffs' damage claims. Relief accordingly is unavailable for damages incurred more than four years before the action was filed, and a new breach occurs each month the Bank persists in its refusal to pay rent at the gold clause rate. (E.g., *Abbott v. City of Los Angeles*, *supra*, 50 Cal.2d at p. 460; *McCullough v. Jones*, *supra*, 11 Cal.App.3d at p. 276.)

trial court palpably abused its discretion in finding plaintiffs' damage claims to be barred by laches.

Further, the laches defense is also inapplicable to plaintiffs' declaratory relief claim. True, declaratory relief is an equitable proceeding. (*Hamud v. Hawthorne* (1959) 52 Cal.2d 78, 85; *Adams v. Cook* (1940) 15 Cal.2d 352, 362.) However, whether laches is available in a declaratory relief proceeding turns on the nature of the underlying claims. Thus, for example, in *Mandracio v. Bartenders Union, Local 41*, *supra*, 41 Cal.2d 81, 85, the supreme court reversed a finding of laches in an action which was formulated as a declaratory relief claim, but which was really an action for damages.

That is precisely the situation here. The declaration plaintiffs sought in their complaint was "a judicial determination as to their rights to collect rent increases based on the 'Gold Clause' provisions of the 1929 Lease and a declaration that all of the terms and conditions of Article II, Section 3 of the 1929 Lease, and in particular, the 'Gold Clause' provisions are valid and enforceable against these Defendants and their successors and assigns through the expiration of the term of the 1929 Lease." (CT 9.) This is essentially a money claim; in fact, it is substantially identical to the breach of contract claim. Accordingly, the laches defense is unavailable to this aspect of the action as well as the breach of contract claim.

B. Even If Laches Were Available, The Trial Court's Ruling Was Still An Abuse Of Discretion Because The Bank Proved Neither Unreasonable Delay Nor Resulting Prejudice.

Even if laches were theoretically available as a defense to any part of this lawsuit, the trial court still erred in its ruling because the Bank failed to prove either aspect of the defense. It showed neither *unreasonable* delay by plaintiffs, nor *resulting prejudice*. For this additional reason, the trial court's ruling cannot stand.

1. Plaintiffs' Delay In Bringing This Lawsuit Was Reasonable.

Laches requires a showing of *unreasonable* delay. (E.g., *Hill v. Hattrem* (1981) 117 Cal.App.3d 569, 573; *Scott v. Scott* (1959) 172 Cal.App.2d 588, 592; *Butler v. Holman*, *supra*, 146 Cal.App.2d at p. 28.) Here, the Bank failed to establish that plaintiffs' delay in initiating this action was unreasonable.

In fact, plaintiffs' conduct was reasonable at every juncture. For the first several years, plaintiffs' inaction was directly attributable to the Bank, which (despite the breadth of its own knowledge) had kept plaintiffs completely in the dark concerning the assignment. (CT 1689; see *Smetherham v. Laundry Workers' Union* (1941) 44 Cal.App.2d 131, 139 ["delay is excusable where it [is] . . . contributed to by the conduct of the party who claims laches"]; *Austin v. Hallmark Oil Co.* (1943) 21 Cal.2d 718, 735 ["A defendant may be estopped from urging the defense of laches where his conduct contributed to the delay"].)

Then came the period when plaintiffs, while having decided to wait to see how the *Fay* case came out at trial before taking legal action (see *Hill v. Hattrem*, *supra*, 117 Cal.App.3d at p. 573 [reasonable to delay while awaiting determination of a legal issue in another pending case]), nonetheless began making clear to the Bank their intention to enforce the lease and collect rent at the gold clause rate. (CT 326, 1690-1693, 1695-1697.) Particularly in view of the Bank's statements that any lawsuit brought by plaintiffs would be frivolous and its threat to seek monetary sanctions, it was altogether reasonable for plaintiffs to await the outcome of a parallel lawsuit which presented the precise legal issue in question.

Finally, once the Ninth Circuit affirmed *Fay* in 1990, plaintiffs diligently sought out counsel to file this action. (CT 1697-1698.) Although this proved to be a difficult, time-consuming endeavor (see CT 1696-1698), the evidence is uncontradicted that plaintiffs acted expeditiously and diligently, and that once plaintiffs finally found appropriate counsel who were available to represent them, the lawsuit was on file within two months. (CT 1, 1698.)

In sum, plaintiffs' delay in bringing this action was reasonable. Since only an *un*reasonable delay can support a finding of laches, the trial court's ruling lacks foundation and must be reversed.

2. <u>The Bank Sustained No Prejudice Resulting From Plaintiffs' Delay.</u>

Mere delay is insufficient to support a finding of laches. There must also be prejudice, and the prejudice must have resulted from the delay. (E.g., *Frabotta v. Alencastre* (1960) 182 Cal.App.2d 679, 685 [mere delay not enough]; *Weitz v. Yankosky* (1966) 63 Cal.2d 849, 857 [laches requires finding of prejudice cause by the delay]; *Butler v. Holman*, supra, 146 Cal.App.2d at p. 29 ["Unless the party asserting the defense of laches has been injured by the delay complained of no prejudice has occurred"]; *Chang v. City of Palos Verdes Estates* (1979) 98 Cal.App.3d 557, 562-563 [no prejudice, no laches]; *Field v. Bank of America*, supra, 100 Cal.App.2d at pp. 313-314 [same].) The Bank failed to prove the prejudice element of the laches defense.

As explored in the estoppel discussion (Section II, *supra*), the Bank suffered no prejudice resulting from plaintiffs' conduct, nor, in fact, was the Bank prejudiced at all. At the outset, the Bank has no basis for even asserting a defense based on plaintiffs' delay, since the lease itself provides that "[n]o delay of the lessors in enforcing any right . . . shall affect, diminish, suspend or exhaus[]t any of such rights." (CT 48 [Lease, Art., XVI, § 6].) And, in fact, the evidence shows that the Bank did *not* make its business decisions in this matter based on plaintiffs' action or inaction, but rather made and consummated this business deal fully aware of the risk of gold clause enforcement.

Moreover, again as detailed in the estoppel discussion, the Bank actually benefitted financially from the fact that this lawsuit was filed in 1991, rather than earlier. (See, e.g., *Field v. Bank of America*, *supra*, 100 Cal.App.2d at pp. 313-314 [reversing laches finding, court notes that respondent "instead of being prejudiced by appellant's

inactivity, has benefitted thereby. For many years, trustee's fees have accrued to it by reason of Maria's delay in pressing her claim"]; *Abbott v. City of Los Angeles, supra*, 50 Cal.2d at p. 460 [no laches where "defendant . . . actually gained to the extent that any past due payments have become barred . . . by the . . . statute of limitations"].) Since plaintiffs' delay, even if unreasonable, caused no prejudice, the Bank was not entitled to a finding of laches.

In sum, the trial court abused its discretion in ruling that plaintiffs' claims are barred by laches. That equitable defense is unavailable because this is both literally and essentially an action for damages. Even if the defense were available, the Bank failed to prove its elements. Accordingly, the trial court's finding of laches must be reversed.

CONCLUSION

When Congress invalidated gold clauses in 1933, it created an incredible windfall for tenants with long-term leases. For decades, plaintiffs and their predecessors had no choice but to accept $2,000 per month rent on their prime Beverly Hills real estate. They swallowed that bitter pill for as long as the law required. But now the law makes gold clauses enforceable in obligations entered into after October 27, 1977. The 1981 novation by which the Bank became bound under the lease *is* such an obligation, and plaintiffs are therefore entitled to enforce its gold clause. The Bank is legally obliged to pay them the real rent contemplated under the lease.

For all the reasons stated, plaintiffs respectfully urge this court to reverse the judgment of the superior court with directions to enter a new and different judgment in plaintiffs' favor.

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Respectfully submitted,

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