2d Civil No. B079817

IN THE COURT OF APPEAL

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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' REPLY BRIEF

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Honorable Madeleine Flier, Judge

APPELLANTS' REPLY BRIEF

INTRODUCTION

Perhaps the most striking feature of the Respondent's Brief is its herculean determination to distract attention from the real, substantive issues at the heart of this case. Those issues are whether the Bank's purchase of the lease in 1981--four years after Congress made it legal once more to contract in terms tied to the price of gold--

constituted a novation and, if so, whether that novation created (i.e., "issued") a new obligation containing a legally enforceable gold clause. The opening brief presented a detailed exposition of the reasons why it does. The Respondent's Brief, by contrast, emphasizes everything else under the sun. For example, it:

--Not only spends eight full pages discussing the standard of review, but disingenuously attempts to persuade the Court, contrary to fact, that this appeal is principally a substantial evidence challenge.

--Insists that the opening brief slanted its presentation of the evidence, but remains decidedly vague about the particulars, no doubt because the salient facts underlying the appeal really are, as the opening brief portrayed them, essentially undisputed, with the real controversy focusing not on what the facts are, but rather what legal conclusions can be drawn from them.

--Lavishes attention on the issues of estoppel and laches, and in particular on the amounts it paid to purchase the lease and maintain the property as somehow constituting "detrimental reliance," yet manages somehow to avoid the fact that the critical event was the purchase of the lease which thereby obligated it to pay those sums, an event which everyone agrees plaintiffs knew nothing about until well after it was accomplished.

Moreover, to the extent the Bank does get around to discussing the controlling legal issues, it is equally obfuscatory. For example, it:

--Persistently mischaracterizes plaintiffs' claim as seeking "revival" of a gold clause, when the real issue is whether the Bank's purchase of the lease worked a novation which under controlling law is not a "revival", but rather is equivalent to the creation of a *new* contract containing a gold clause.

--Overlooking the fact that the very concept of novation not only anticipates but requires a meeting of all interested contracting minds, implausibly insists that plaintiffs' analysis, if adopted, would make it possible for any creditor to engineer the "revival" of a pre-1981 gold clause simply by singlehandedly effecting a novation.

--Portrays the persuasive *Fay* case (which found an enforceable gold clause under closely analogous facts) as an aberration by setting up false comparisons between it and various other cases from around the country, all of which involve gold clauses in one context or another, but none of which involves the novation issue which forms the crux of the gold clause validity question both in this case and in *Fay*.

Moreover, the Bank's brief is as revealing for what it does <u>not</u> say as for what it does. Specifically, the Bank does not contest that what occurred here was, indeed, a novation. This concession is crucial. The bottom line is that the Bank could have simply renegotiated its sublease with Triangle, in which event there would have been no issue about enforceability of the gold clause. Instead, the Bank -- with full knowledge that it was entering into a new contract which contained an unambiguous gold clause -- chose to take advantage of the lease provision which permitted a complete substitution of lessees, thereby obtaining full control of all rights under the lease, including the possibility (however unwarranted) it might continue to use the premises at a sharply reduced rental rate or to sublease to whomever it chose at market rates. Moreover, whatever consideration was paid by the Bank necessarily reflected the fact that the lessors might enforce the gold clause. Without saying it in so many words, the Bank has tacitly admitted that its purchase of the lease was a novation, and that the entire transaction was a calculated gamble.

The weakness of the Bank's position is evident in its chosen briefing strategy of misdirection from, and distortion and avoidance of, the real issues. The objectives of this reply, therefore, will be to refocus the appeal on the controlling substantive legal question of whether the Bank's lease contains an enforceable gold clause, and to explode some of the more pernicious myths expounded in the Respondent's Brief.

I.

THE BANK'S 1981 PURCHASE OF THE LEASE WAS A NOVATION OF THE LEASE CONTRACT; THAT MAKES IT A NEW OBLIGATION ISSUING AFTER OCTOBER 27, 1977. THEREFORE, UNDER THE TERMS OF 31 U.S.C. § 5118(d)(2), ITS GOLD CLAUSE IS VIABLE AND PLAINTIFFS ARE ENTITLED TO BE PAID RENT AT THE GOLD CLAUSE RATE.

The opening brief detailed the reasons why the Bank's 1981 purchase of the lease from Triangle (the previous lessee) constituted a novation of the lease contract, and why the gold clause contained in the *new* contract thereby created must be viewed as valid and enforceable. (See AOB 16-33.)[1/] In its Respondent's Brief, the Bank challenges this

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1/ Notwithstanding its lengthy pitch that this should be treated as a substantial evidence appeal (e.g., RB 9-16), the Bank quietly concedes that the issues of novation and statutory interpretation present legal questions requiring this Court's *de novo* review. (See RB 4.)

The balance of the Bank's argument about the standard of review is addressed in Section II, *infra*. As we discuss there, despite the Bank's insistence that plaintiffs' estoppel and laches arguments are merely evidentiary disputes, the true crux of plaintiffs' arguments concerns what legal conclusions properly can be drawn from facts which are in reality undisputed.

analysis in four principal ways, none of them persuasive. The Bank argues: (a) that the 1977 enactment making gold clauses legal once more (now 31 U.S.C. § 5118(d)(2)) did not "revive" old gold clauses (RB 30-40); (b) that if novation were treated as "reviving" a pre-1977 gold clause, any creditor could work such a "revival" simply by singlehandedly working a novation (RB 33-35, 40-42); (c) that California law governing the interpretation of contracts cannot be employed to interpret the federal statute making enforceable only those gold clauses contained in obligations which are "issued" after the statutory date (RB 42-44); and (d) that *Fay* (*Fay Corp. v. BAT Holdings I, Inc.* (W.D. Wash. 1987) 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 federal case which enforced a gold clause under closely analogous facts, is an aberration (RB 44-48). All of these arguments are profoundly flawed; upon examination, none remotely undermines the soundness of plaintiffs' position. We address each one in turn.

A. <u>This Case Is About Novation, Not Revival.</u>

The Bank's principal tack is to harp on Congress' intent not to "revive" old gold clauses contained in obligations issued before October 27, 1977, and to portray this lawsuit as a campaign to "revive" the gold clause contained in the original 1929 lease. A victory for plaintiffs, so the argument goes, would thwart Congressional intent. (See generally RB 28-40.)

But this isn't so. Plaintiffs agree that Congress was clear in its intention not to "revive" gold clauses contained in obligations issued before October 27, 1977. Thus, the

Bank's protracted discourse on this point is a *non sequitur*; this lawsuit simply is not about revival.

What this lawsuit does concern is novation. As the opening brief makes clear, plaintiffs' real contention is *not* that the original 1929 gold clause should be "revived," but rather that the Bank's 1981 purchase of the lease worked a novation. (See, e.g., 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 906, p. 811 ["Novation is the *substitution* by agreement of a new obligation for an existing one, with intent to *extinguish the latter*" (emphases in original)]; Civ. Code, § 1530 [novation defined]; *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].) And, since a novation constitutes the creation of a new contract (e.g., 1 Witkin, Summary of Cal. Law, *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)" (emphasis in original)]; id. at § 907, p. 812 [expressly terming novation a "new contract"]), plaintiffs therefore argue that the gold clause contained among the provisions of the parties' 1981 contract is enforceable under 31 U.S.C. § 3118(d)(2).

The Bank's relentless characterization of this lawsuit as an effort to "revive" a pre-October 27, 1977, gold clause is calculated to distract the Court from the legal issues at hand. Plaintiffs respectfully urge the Court not to fall for this word play, but rather to zero in on the central legal questions in the case: Did the 1981 transaction by which the Bank purchased the lease constitute a novation; and, if so, since a novation entails the creation of a new contract, doesn't that mean that this particular novation created (i.e., "issued") a new obligation in 1981, the gold clause contained in which is enforceable under federal law? For the reasons detailed in the opening brief and further elaborated in this reply, plaintiffs urge that these questions must be answered affirmatively.

B. <u>Adoption Of Plaintiffs' Novation Argument Would Not Open The Door For Creditors To Forcibly Resurrect Every Gold Clause Predating Congress' 1977 Enactment.</u>

When the Bank focuses more directly on the issues at hand, one of its favorite arguments is that the novation theory "proves too much." (See RB 29.) According to the Bank,

> "If this theory were applied to all gold clauses existing at the time of the 1977 Amendment, it would revive *every single one*. Bondholders only would need to sell their bonds to revive the gold clauses for the buyer, and landlords need only sell their land to revive their gold clauses for the buyer. No debtor would be able to resist revival by creditor substitution. Such a revival would be in direct contravention of Congress' expressed intent." (*Ibid.*, emphasis in original; see also RB 40-42.)

This emotional rhetoric is disconnected from legal reality. The fact is, novation cannot be created singlehandedly. One party to a contract cannot force novation on another. (E.g., *California C.P. Growers v. Downey* (1925) 76 Cal.App. 1, 18 [novation cannot be accomplished by the act of one party alone].) Indeed, the very reason that a novation creates a new contract is that the doctrine contemplates a new meeting of the minds among all the contracting parties.

Countless decisions confirm this rule. "'Novation is predicated on consent.'" (*Baer v. Associated Life Ins. Co.* (1988) 202 Cal.App.3d 117, 124.) It requires the intent of all parties to extinguish the prior obligation. (*Malmstrom v. Kaiser Aluminum & Chemical Corp.* (1986) 187 Cal.App.3d 299, 317-318.) "In order to effect a novation involving the introduction of a new party there must be a mutual agreement among the parties to the old contract and the parties to the new one whereby the new obligation is substituted for the old one." (*DeNure Corp. v. Security First Nat. Bk.* (1933) 132 Cal.App. 256, 232; see, e.g., *Garthofner v. Edmonds* (1946) 74 Cal.App.2d 15, 20 ["'It is a well-settled principle that an essential element of every novation is a new contract to which all the parties concerned must agree, and in the absence of such agreement or consent a novation cannot be effected'"]; *Young v. Benton* (1913) 21 Cal.App. 382, 384 ["Novation, strictly speaking, implies four essential requisites: 1. A previous valid obligation; 2. The agreement of all the parties to the new contract; 3. The extinguishment of the old contract; and 4. The validity of the new one"].)[2/]

In light of these authorities, the Bank's specter of creditors rushing willy-nilly to forcibly impose gold clauses on hapless debtors is completely fallacious. Since "[n]ovation is made by contract, and is subject to all the rules concerning contracts in general" (Civ. Code, § 1532), it occurs only where all parties choose to bring it about. In

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2/ In other words, not every transfer of interest in a contract is a novation; that happens only when the parties have the requisite intent to supplant an existing agreement with a new one. This helps explain why, contrary to the Bank's superficial analysis (RB 41), it does not impair the free alienability of property to say that a landlord's transfer of interest in property works a novation only where all parties, including the tenant, agree. The landlord can transfer its interest freely, but the new owner cannot impose new terms on a sitting tenant absent a novation of the lease agreement. (See, e.g., *People ex rel. Dept. of P.W. v. Auman* (1950) 100 Cal.App.2d 262, 263 [State took land by eminent domain, then had to obtain existing tenants' agreement to a novation of their lease in order to shorten duration of their tenancy].)

legal effect, the parties to a novation simply agree to create a new contract. If they do so after October 27, 1977, and the terms of their new agreement contain a gold clause, it certainly does not thwart Congress' intent to enforce it. On the contrary, *not* to do so would violate both the letter and spirit of 31 U.S.C. § 5118(d)(2).[3/]

Further, as the opening brief explained (see AOB 25-26), and as the Bank apparently does not dispute (see, e.g., RB 40) the parties here unmistakably created a novation: 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. (See, e.g., CT 1688 [parties stipulate that the Bank "became the lessee under the Lease"].) As for plaintiffs' requisite intent to extinguish the prior obligation of Triangle, it is established by the lease itself, which expressly provides that the lessee

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3/ Lurking between the lines of the Respondent's Brief is the suggestion that a distinction may be drawn between parties who enter into a "new" contract containing a gold clause and the novation which occurred here based upon the subjective intent of the parties. (See, e.g., RB 40 ["If A and B *wish* to make a new contract in 1994 that contains a gold clause, 31 U.S.C. § 5118(d)(2) allows them to enforce it" (emphasis added).]) There is certainly no doubt that, after the Bank failed to get the former lessee, Triangle, to indemnify it against enforcement of the gold clause (CT 1694-1695; see also CT 1698-1699), the Bank subjectively hoped plaintiffs would not attempt to enforce the gold clause, or that if they did the Bank could convince California courts to hold it was not bound by the clause. But the Bank's subjective intent is entirely beside the point. As Witkin explains, "[O]rdinarily (in the absence of fraud, mistake, etc.), the outward *manifestation* or *expression* of assent is controlling. Mutual assent is gathered from the reasonable meaning of the words and acts of the parties, and not from their unexpressed intentions or understanding. 'By the modern law of contract, the mere state of mind of the parties--with reference to the "meeting of the minds"--is not the essential object of inquiry, the terms of the promise-act being determinable by an *external* and not by an internal standard . . . or by what distinguished writers have termed the *objective* rather than the *subjective test.*' (*Zurich General Acc. & Liability Assur. Co. v. Industrial Acc. Com.* (1933) 132 Cal.App. 101, 104, 22 P.2d 572.)" (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 119, p. 144.) In other words, a party which enters into a novation of an "old" contract hoping the unambiguous gold clause will *not* be enforceable is no less bound by it than a party which enters into a "new" contract hoping the gold clause *will* be enforceable.

"shall be relieved of all liability accruing under this lease from and after the date of any assignment. . . ." (CT 44 [Lease, Art. XIII, § 2]; see *Chiarello v. Axelson* (1938) 25 Cal.App.2d 157, 158-159 [creditor's requisite consent to novation may be accomplished by preexisting agreement]; see also *Fay Corp. v. BAT Holdings I, Inc., supra*, 646 F.Supp. at p. 952 [confirming that creditor can give advance assent to novation].)

As a result of this novation, the old Triangle lease became a nullity. *People ex rel. Dept. of P.W. v. Auman, supra*, 100 Cal.App.2d at pp. 262-263, a case involving a comparable novation of a lease, confirms this. In *Auman*, tenants originally occupied the subject premises under a lease expiring in March 1949. Before the lease expired, however, the state acquired title by eminent domain and in August 1948 entered into a new rental agreement with the tenants, lasting only through October 1948 and expressly canceling the prior lease. In this condemnation action, the court concluded that the tenants had no right to compensation for truncation of the original lease term, because the August 1948 agreement changing the end of the term from March 1949 to October 1948 "constitutes a novation, and the rights of the parties were covered solely by the new agreement, the original lease being void and of no effect." (*People ex rel. Dept. of P.W. v. Auman, supra*, 100 Cal.App.2d at p. 263 ["Hence defendants did not have any property taken in the condemnation proceeding since at the time of trial they had no interest in the property"]; see also *Eckart v. Brown* (1939) 34 Cal.App.2d 182, 187 ["The effect of a novation is to make the original agreement a nullity (that is, void and of no effect), and the rights of the new parties are governed solely by the new agreement"].)

As these authorities demonstrate, it is legally immaterial that there was a gold clause in the original 1929 lease on the Beverly Hills property at issue in this case. That lease (and any mesne novation predating the one at issue here) is a nullity because the parties' 1981 novation created a new lease containing a new and enforceable gold clause. Contrary to the Bank's rhetoric, that it did so portends no broad implications for the continued repose of the gold clauses which were invalidated by the 1933 enactment made in response to the Depression. It is simply an enforceable term of an enforceable contract created by these parties.

C. The Bank's "Transplanted Category" Argument Is A Red Herring; The Validity Of A Gold Clause In A California Contract Is Determined By Reference To California Law.

The Bank is also fond of making an argument fashioned from a Canadian bar journal article entitled "Fallacy of the Transplanted Category." (See RB 42-44; Hancock, *Fallacy of the Transplanted Category* (1959) 37 Canadian Bar Rev. 535 [reproduced at CT 1544-1564]; see also Note, *Consent, Liability and Guilt: A Study in Judicial Method* (1955) 7 Stan.L.Rev. 507 [reproduced at CT 1565-1586].) Basically, the idea is that it is impermissible to assume that a term of art taken from one area of law is given the same meaning when used in another specialized legal area.[4/] The Bank contends that

4/ The concept is not as subtle as the title of the bar journal article might suggest. For example, take the term *remittitur.* In the context of a new trial motion, it refers to a reduction in the amount of damages awarded. (E.g., Code Civ. Proc., § 662.5 [grant of new trial for excessive damages, subject to denial on consent to *remittitur*].) By contrast, in the context of appellate procedure, the *remittitur* is a document which issues to signal the end of this Court's jurisdiction. (See Cal. Rules of Court, rule 25.) Thus, if an ignorant attorney were to announce to his client, based upon receipt of this Court's Rule 25 remittitur, that a damage award had been reduced, he would be succumbing to the so-called fallacy of the transplanted category.

plaintiffs subscribe to this fallacy in employing California law to interpret the validity of a gold clause under 31 U.S.C. § 5118(d)(2). This contention is itself fallacious.

For one thing, the predicate for applying the Bank's transplanted category theory is missing: This isn't an instance in which the meaning given a term in one specialized legal area is being engrafted onto use of the term in another specialized legal area. The language in question (namely, the sentence in 31 U.S.C. § 5118(d)(2) reading, "This paragraph does not apply to an obligation issued after October 27, 1977") embodies only general terms, calling for construction by reference to general rules of legal interpretation, and the Bank points to no authority suggesting otherwise.

The single federal case the Bank does cite to support its transplanted category theory does not advance its cause. (See RB 43.) *Wells Fargo Bank v. United States* (9th Cir. 1993) 1 F.3d 830 involved an attempt by the IRS to transplant the meaning of the term *republication* as used in highly specialized and completely statutory California probate law, into an equally arcane federal tax statute. Since each use of the term was entirely context-specific, the meaning employed in one context provided no guidance as to the meaning properly employed in the other. No such terminology is at issue here.

Rather, what this case involves is a broad, general statute enacted by Congress to undo its own earlier enactment placing strictures on the ability of the citizens of each state to enter into certain kinds of contracts. (See generally AOB 8-9, 17-21.) Questions concerning the application of 31 U.S.C. § 5118(d)(2) necessarily will arise in the context of interpreting contracts containing gold clauses. By tradition and by law, such questions are determined by reference to state (here, California) law. (See, e.g., *In re Aslan* (9th Cir. 1990) 909 F.2d 367, 369 ["State law controls both the construction of a contract and the question of breach"]; *In re James E. O'Connell Co., Inc.* (9th Cir. 1986) 799 F.2d 1258, 1260 [same].)

There is a simple reason why this is so: There is no federal law of contracts. (E.g., *Vernon v. Resolution Trust Corp.* (11th Cir. 1990) 907 F.2d 1101, 1109 ["As there exists no federal law of construction of contract, our interpretation of the language of the Agreement is therefore controlled by Florida law"]; *New England Machinery v. Conagra Pet Products* (M.D. Fla. 1993) 827 F.Supp. 732, 735 ["Matters concerning the execution, interpretation and the validity of a contract are determined by the place where the contract was made, while those matters concerning performance are regulated by the law of the place of performance"]; *Giannetti Bros. Const. Corp. v. Lee County, Fla.* (M.D. Fla. 1984) 585 F.Supp. 1214, 1218 [contract obligations are creatures of state law]; cf., *United States v. Kimbell Foods, Inc.* (1979) 440 U.S. 715, 728-729, 99 S.Ct. 1448, 1458-1458 59 L.Ed.2d 711 [when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision; further, federal choice-of-law inquiry must consider extent to which application of a federal rule would disrupt commercial relationships predicated on state law].)

Thus, it is entirely appropriate for plaintiffs to look to California law to resolve the question of whether the Bank's purchase of the lease created (i.e., *issued*) an obligation containing a gold clause which is enforceable under 31 U.S.C. § 5118(d)(2). They could hardly do otherwise.

Further, to the extent there are federal cases aiding the construction of when an *obligation issues* within the meaning of this statute, they uniformly support plaintiffs' position that the *obligation* here in question *issued* when the Bank purchased the lease in 1981. Plaintiffs discussed this in some detail in the opening brief. (See AOB 22-23.) To recap briefly, all available authorities confirm that 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] [reproduced at CT 1539]; see also *Rudolph v. Steinhardt* (11th Cir. 1983) 721 F.2d 1324, 1330 [confirming that the phrase *an obligation issued* means *an obligation entered into*].)

In sum, the fallacy of the transplanted category is not at work here. The argument is simply a ploy by the Bank to apply a patina of erudition to its arguments and thus to divert attention from plaintiffs' novation argument. California law properly guides the interpretation of the lease, including the question of whether it contains an enforceable gold clause. And, as detailed here and in the opening brief, California law points unerringly to the conclusion that the gold clause is enforceable.

D. Contrary To The Bank's Portrayal, *Fay* Is Factually Indistinguishable From This Case, And Is The Only Extant Gold Clause Decision Involving A Novation, And In Particular, The Question Whether A Novation Occurring After October 27, 1977, Creates An Enforceable Gold Clause.

The Bank's final tactic in addressing the merits is to depict *Fay v. BAT Holdings I, Inc.*, *supra*, 646 F.Supp. 946, as both an aberration in the law and factually distinguishable from this case. (See RB 44-48.) According to the Bank, apart from *Fay*, "every court in the United States that has faced this issue has refused to enforce or revive pre-1977 gold clauses." (RB 45, citing *Gold Bondholders Protective Council v. Atchison, Topeka & Santa Fe Ry. Co.* (Alaska 1982) 649 P.2d 947; *Rudolph v. Steinhardt*, *supra*, 721 F.2d 1324; *REC Centers, Inc. v. Shaughnessy* (Fla. Ct. App. 1981) 407 So.2d 971; *Henderson v. Mann Theatres Corp.* (1976) 65 Cal.App.3d 397; and generally cases cited at 31 U.S.C. § 5118 (Supp. 1993)].) Like all of the Bank's arguments, this one founders on various fronts.

For openers, an elementary fallacy undermines both the Bank's cursory dismissal of *Fay* and its reliance on the other cases cited; specifically, no case but *Fay* has involved the construction of a gold clause *in the context of a novation*. Therefore, neither the analyses nor the results in the other cases has any bearing upon either *Fay's* soundness or its application to the present case.

Further, the cases on which the Bank relies, which were discussed in the opening brief (see AOB 29-31), merely concern whether the 1977 legislation operated to *revive* an already-existing gold clause.[5/] As discussed earlier in this brief, this case is not about revival. Rather, it concerns novation--whether the Bank's 1981 purchase of the lease created a novation and, if so, whether that gave rise to a new and therefore enforceable gold clause. Revival and novation are two quite different issues; thus, the cases on which the Bank relies are entirely inapposite here.

As for the Bank's argument that *Fay* is factually distinguishable from this case, it is based on an incorrect reading of *Fay*. According to the Bank, "the defendants in *Fay* erroneously stipulated that the lease agreement fit the federal statute's definition of an obligation issued after the effective date of the statute." (RB 47.) By so doing, the Bank argues, they "gave away their case" and "virtually pushed the *Fay* court into the erroneous conclusion that, for the purposes of 31 U.S.C. § 5118(d)(2), a novation is a new obligation issued after the 1977 Amendment." (RB 47.)[6/] There is a great deal wrong with this analysis.

For example, the defendants in *Fay* did *not* stipulate that the lease agreement in question constituted a novation which fit within the terms of 31 U.S.C. § 5118(d)(2). Nothing remotely so broad occurred. Rather, the *Fay* parties stipulated only that the phrase "obligations issued after October 27, 1977" in the statute was "intended to mean an obligation (including contractual obligations) 'entered into' after that date." (*Fay*

5/ Actually, the Bank does cite one decision, *Henderson v. Mann Theatres Corp.*, *supra*, 65 Cal.App.3d 397, not discussed in the opening brief. Like the rest, however, *Henderson* involved no issue of novation. Rather, it concerned whether the gold clause ban survived certain 1973 federal legislation making it permissible for individuals to deal in gold as a commodity.

6/ The Bank also seeks to distinguish *Fay* on the ground that it presented no issues of estoppel or laches. (RB 47-48.) The inapplicability of these defenses is discussed later in this brief.

Corp. v. BAT Holdings I, Inc., *supra*, 646 F.Supp. at p. 949.) As already discussed, however, the statute's legislative history leaves little (if any) room to doubt the soundness of this interpretation. Thus, not only didn't the parties' stipulation "give away" the case, it served only to establish an uncontroversial foundational point.

Further, the stipulation left open the determinative questions of whether a novation occurred and, if it did, whether that meant a new gold clause had been created after October 27, 1977. Contrary to the Bank's depiction, those issues received the federal court's full and thoughtful review. (See *Fay*, *supra*, 646 F.Supp. at pp. 949-953.)

Moreover, the federal court's reasoned analysis on these points was based on facts and law closely analogous to the facts at issue and law applicable here. Indeed, this case is indistinguishable from *Fay* in every important respect. That is what leads plaintiffs to urge this Court to follow its lead, and confirm that novation can be created where (as here) one contracting party's consent to creation of a new agreement is supplied by the terms of the existing agreement, and that because a novation is legally equivalent to a new contract under California law, the Bank's 1981 purchase of the lease constituted the creation of a new contract containing an enforceable gold clause.

This case isn't about revival, or transplanted categories, or creditors forcibly subjecting debtors to unwanted novation. Rather, this is about a party which entered into a contract in 1981 *knowing* it contained a gold clause and *knowing* such clauses were enforceable under 1977 federal legislation, but hoping against hope that it could convince California courts not to enforce it so it could made a killing in the real estate market.

In sum, nothing in the Respondent's Brief undermines the soundness of plaintiffs' position. Under the governing law and the facts presented, the Bank entered into a new lease in 1981. It contains a gold clause which, having been "issued" (i.e., "entered into") after October 27, 1977, is enforceable. Accordingly, for all the reasons stated in this brief and in the opening brief, plaintiffs urge this Court to reverse the judgment with directions to enter a new judgment in plaintiffs' favor.

II.

PLAINTIFFS' CLAIMS ARE NOT BARRED BY ESTOPPEL.

This Court will recall that the trial court went beyond rejecting plaintiffs' claims on the merits, ruling also that "[p]laintiffs' claims are also barred by laches and estoppel." (CT 1750.) The opening brief demonstrated that this ruling is wrong on both counts and must be reversed. (See AOB 34-41 [estoppel], 42-48 [laches].)[7]

The Bank's response to plaintiffs' estoppel discussion is strikingly unconvincing. (See RB 23-28.) In the main, the Bank relies on vague assertions of implied findings it imagines the trial court must have made to support its ruling, based on evidence the Bank contends (notwithstanding the parties' election to try the case on stipulated facts) was conflicting. Not surprisingly, the Bank glosses over the nonexistence of substantial evidence to support the trial court's supposed findings. Likewise, for all its insistence that plaintiffs have slanted the evidence (see generally RB 9-16), the Bank never really manages to identify the supposed conflicts, no doubt because for all practical purposes none exist.

The Bank also ignores the requirement that estoppel, a disfavored defense (*International Ass'n of Fire Fighters v. City of San Leandro* (1986) 181 Cal.App.3d 179,

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7/ As in the opening brief, laches is discussed in Section III.

182), can be found only where each and every one of its elements is proved with particularity. (*El Camino Community College Dist. v. Superior Court* (1985) 173 Cal.App.3d 606, 614.) In sum, the Bank's defense of the trial court's estoppel ruling is a failure.[8/]

A. Contrary To The Bank's Contention, This Case Was Tried On Unconflicting, Stipulated Facts, And This Appeal Does Not Raise Factual Issues, But Rather The Legal Question Of Whether The Elements Of Estoppel Were Established Under The Undisputed Facts.

The Bank spends many pages arguing that with regard to the issues of estoppel and laches, this is a substantial evidence appeal, merely raising questions of whether the trial court acted within its discretion in finding these defenses established under

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8/ Before addressing the elements of estoppel, the Bank makes a one-paragraph argument that a landlord who accepts rent payments from a tenant after a breach of the lease is estopped from claiming the past breach. (RB 23.) Even if this proposition correctly reflected the law, since the lease at issue here runs into the year 2024, there is far more at stake than past rent. In any event, although the Bank claims California law is "well settled" on this point, neither of the two unlawful detainer cases it cites for the proposition supports it. One of the two cases, *Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526, 533-535 isn't about rent payments at all; rather, it concerns whether a landlord waived enforcement of a lease provision concerning beach camping. The other case, *Bettelheim v. Hagstrom Food Stores* (1952) 113 Cal.App.2d 873, 878, concerns waiver, not estoppel. Moreover, *Bettelheim* merely held that the landlord had waived its right to back rent *under the particular facts presented*, facts strikingly distinguishable from those presented here: The *Bettelheim* lessor, knowing beyond question that it was entitled to more, accepted reduced rent without even the meekest protest; here, by contrast, plaintiffs began voicing their protests to the Bank as soon as they realized that changed law and circumstances might entitle them to be paid at the gold clause rate. Thus, unlike the *Bettelheim* lessor, plaintiffs did not *knowingly* relinquish their rights as is required to support a finding of waiver.

conflicting evidence. (See generally RB 9-16.) According to the Bank, the opening brief thinly disguised this fact by citing only evidence favorable to plaintiffs and overlooking evidence supporting the trial court's rulings. (See RB 15-16.) As we now demonstrate, however, the record does not support the Bank's views.

1. *The facts are stipulated and unconflicting.* The Bank states repeatedly that plaintiffs present "only such evidence as helps their cause." (RB 15; see RB 2-3.) However, when it comes to identifying the particulars of the supposed omissions, the Bank lapses into vagueness. The reason why is obvious: plaintiffs have neither omitted or slanted the facts, which were stipulated and without conflict in any event. (See CT 1685-1701.) Indeed, the opening brief's fact statement was far more inclusive than the Bank's. Plaintiffs spent some *seven* pages detailing the facts (AOB 7-13); the Bank spent only *one* (see RB 6-7). Moreover, as we shall discuss shortly (see § II(b), *infra*), the single additional fact supplied by the Bank's fact statement--concerning expenditures the Bank made to Triangle pursuant to its purchase of the lease and in maintaining the property as required by the lease--lends no support to the trial court's ruling.

2. *What the Bank cites as factual issues are really conflicts over what legal inferences properly may be drawn from undisputed facts.* Although the Bank insists that this appeal is built on factual issues, that really isn't so. In making this argument, what the Bank has done is to blur the distinction between the evidence itself and the legal conclusions that can be drawn from it.

For example, the Bank argues that the factual nature of plaintiffs' appeal is apparent in the opening brief. To support this contention, the Bank points to plaintiffs' assertions that "'[t]he evidence is utterly *deficient* to establish an estoppel' (Opening Br.,

p. 34, emphasis added); "'the evidence at trial was *insufficient* with regard to . . . estoppel,' (*id.*, p. 41, emphasis added); and Respondents 'failed to introduce evidence at trial *sufficient* to support a finding of laches (*id.*, p. 42, emphasis added).'" (RB 11.) However, the choice of these excerpts only shows how badly the Bank misses the point. The issue isn't whether the trial court believed the Bank's evidence rather than plaintiffs'; that would be a factual issue. Rather, the issue is whether the trial court's estoppel ruling finds adequate support in the undisputed evidence; this issue is unmistakably legal.[9/]

Pressed to provide an example of an actual conflict in the stipulated facts, the Bank points only to a supposed dispute over whether plaintiffs learned of the gold clause legislation in 1981 or 1986. (RB 12-13.) Even a cursory examination, however, shows the conflict to be nonexistent. The Bank juxtaposes plaintiffs' testimony that they learned of the gold clause legislation in 1986 at the earliest, with evidence that "'one of the lessees, Mrs. Josephine Stinson, . . . indicated that she was aware of pending federal legislation, introduced by Senator Helms, that might assist the lessor in enforcing the Lease's gold clause.'" (RB 12.) But the Bank gives no clue as to when Mrs. Stinson evinced this awareness. Nor does it provide any basis for a conclusion that the Helms bill she heard about was the one that became law, as opposed to the earlier, unsuccessful one. (See RB 39.) And moreover, Mrs. Stinson was never a plaintiff in this lawsuit, so even taking the Bank's evidence at face value, her knowledge is not only irrelevant to the

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9/ Other issues cited by the Bank in characterizing this as a substantial evidence appeal are also legal, including, e.g., whether plaintiffs' delay until 1991 to file their complaint was reasonable; whether the Bank took any action in reliance on the delay; whether the delay operated to the Bank's detriment. (See, e.g., RB 3, 5-6, 14-15.)

Bank's estoppel defense, it creates no genuine conflict with the evidence that *plaintiffs* learned of the gold clause legislation in 1986.

The parties' evidentiary stipulation (see CT 1685-1705) presents a cohesive and unconflicting narrative of the facts leading to this lawsuit. (See CT 1685-1705.) The disputes identified by the Bank concern whether agreed facts support the legal conclusions reached by the trial court concerning the issues of estoppel and laches. These are legal issues, not trial court findings reached on conflicting evidence.

B. The Bank Failed To Prove Even One Element Of Its Estoppel Defense Under The Stipulated Facts.

To demonstrate that the Bank failed to prove the elements of its estoppel defense under the undisputed facts, we begin with a brief recap of the law. The defense of estoppel 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 of California* (1991) 2 Cal.App.4th 321, 328.) Where even one element is absent, there can be no estoppel. (*Ibid.*)

As the opening brief demonstrated, the Bank failed to prove any of these elements at trial. (AOB 34-41.) The Bank's Respondent's Brief only confirms this.

1. *Knowledge element not proved.* As plaintiffs have pointed out, uncontradicted evidence establishes that the Bank's purchase of the lease was presented to them as a *fait accompli.* (AOB 35-36.) The Bank cannot and does not contend otherwise. The Bank notes that plaintiffs knew the lease contained a gold clause (RB 25), but such knowledge in a vacuum amounts to nothing; it falls far short of informing plaintiffs of any chance they might be able to enforce it, especially since the clause had been *un*enforceable against the prior lessee for many years.

The Bank goes on to assert that "[a]t least one" of the plaintiffs "'was aware of pending federal legislation . . . that might assist the lessor in enforcing the Lease's gold clause[.]'" (RB 25.) This misstates the evidence. First, as mentioned earlier, the person referred to in the quotation (for which the Bank overlooked to include a record citation) is the late Mrs. Josephine Stinson. (See CT 1698 [Stipulation re: Facts, ¶ 41.) Mrs. Stinson was the mother of plaintiff George Linthicum. However, she herself was not a plaintiff in this action. Further, even if a non-party's knowledge conceivably could aid the Bank in establishing an estoppel defense, the Bank points to no evidence that the pending federal bill Mrs. Stinson heard about was the same one that eventually became law. As the Bank itself notes later in its brief (see RB 39), Senator Helms' first effort to repeal the gold clause prohibition failed; that bill easily may have been the one Mrs. Stinson heard about. Thus, the Bank really points to no evidence that any plaintiff, or anyone connected with any plaintiff, had early knowledge of the 1977 gold clause legislation.

As a fallback, the Bank charges plaintiffs with constructive knowledge of the 1977 gold clause legislation at the time it was enacted. (RB 25.) The Bank cites no authority for the proposition that constructive knowledge will satisfy the knowledge element of estoppel. This is not surprising, as the proposition is completely inconsistent with the theory of estoppel and the body of law defining it. As already noted, estoppel is a disfavored defense, every element of which must be proved with particularity. (E.g., (*El Camino Community College Dist. v. Superior Court, supra*, 173 Cal.App.3d 606, 614; *Weadon v. Shahen* (1942) 50 Cal.App.2d 254, 263 ["Knowledge is an essential element of . . . estoppel and without knowledge there can be no . . . estoppel"].) Further, since "[a]n estoppel can arise, if at all, only if there is 'some element of fault or blame on the part of the party against whom the estoppel is asserted[,]'" it would be both illogical and anathema to the spirit of the doctrine to impose an estoppel in the absence of actual knowledge. (*Getty v. Getty* (1986) 187 Cal.App.3d 1159, 1171, quoting *Gamboa v. Atchison, Topeka & Santa Fe Ry. Co.* (1971) 20 Cal.App.3d 61, 65; see *Strong v. County of Santa Cruz* (1975) 15 Cal.3d 720, 725 [essence of estoppel is "that a person may not deny the existence of a state of facts if he intentionally led another to believe a particular circumstance to be true and to rely upon such belief to his detriment"]; *California Sch. Employees Assn v. Jefferson Elementary Sch. Dist.* (1975) 45 Cal.App.3d 683, 692 ["It is elementary that equitable estoppel lies only where someone by his words or conduct *wilfully* causes another to believe the existence of a certain state of things and *induces* him to act on that belief so as to alter his own previous position (citation)" (original emphasis)].) In sum, even if plaintiffs could be assigned constructive knowledge of the 1977 change in the gold clause law, that would not satisfy the knowledge element of the Bank's estoppel defense.

2. *Intent element not proved.* Plaintiffs demonstrated the absence of evidence supporting any finding that plaintiffs either intended the Bank to act upon their conduct, or acted in a manner leading the Bank to believe such reliance was intended. (AOB 36-

37.) The Bank offers little in response, asserting mainly that plaintiffs' several years of silence led it to rely. (RB 25.) This is just another way of saying that plaintiffs delayed in initiating their gold clause claim. As noted in the opening brief, however, delay alone cannot be the basis for a finding of estoppel. (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"].)

While acknowledging that some of the plaintiffs endorsed rent checks with the language "partial payment only," the Bank rejoins that such endorsements were legally ineffectual and did not preserve plaintiffs' rights to assert breaches after accepting rent payments. (RB 26.) This position founders on at least two fronts. First, even if the Bank were correct about the legal effect of plaintiffs' actions, so what? Plaintiffs' conduct still gave the Bank reason to know it could not rely on plaintiffs' silence. Secondly, the Bank is wrong. Plaintiffs did *not* forfeit their right to seek the balance due by accepting the Bank's tender of partial rent; such mitigation of damages in no way impairs their right to seek damages to be made whole. (E.g., *Walt v. Superior Court* (1992) 8 Cal.App.4th 1667, 1671, 1678; 4 Witkin, Summary of Cal. Law, *supra*, Real Property §§ 672-684, pp. 855-872; see Civ. Code, § 1951.2.)[10/]

10/ The Bank is not supported by the only authority it cites for its contrary view. Commercial Code section 3410, subdivision (c), deals exclusively with the effect of accepting payment of less than the face value for a negotiable draft (e.g., a check). (Comm. Code, § 3410, subd. (c) ["If the holder assents to an acceptance varying the terms of a draft, the obligation of each drawer and endorser that does not expressly
(continued...)

3. *Ignorance element not proved.* The opening brief explored why proof of this element lies well beyond the Bank's grasp. (See AOB 37-39.) The Bank's knowledge outstripped plaintiffs' at all times and in every particular. The Respondent's Brief virtually concedes this, as it asserts only ignorance that plaintiffs would file this lawsuit. (RB 26-27.) This is yet another way of saying that plaintiffs delayed; once again, however, delay alone does not support estoppel. Moreover, ignorance that plaintiffs would file a lawsuit is not the same as the ignorance of the facts required to support an estoppel. As the opening brief discussed, the Bank knew all the facts creating a palpable risk that the gold clause might be enforced. The Bank's failure to argue otherwise only confirms this.

4. *Detrimental reliance element not proved.* The opening brief addressed both the Bank's failure to produce evidence establishing detrimental reliance and the existence of lease provisions which soundly defeat the Bank's reliance claim. (AOB 39-41.) Tellingly, the Bank says nothing whatsoever about the lease provisions. It merely responds that it paid $4,225,000 to Triangle in 1986 pursuant to the assignment agreement, has paid property taxes of over $840,000, and has repaired and maintained the building. (RB 27.) Although the Bank asserts it did these things in reliance on plaintiffs' silence, neither the facts nor the law bear this out.

First, the 1986 payment to Triangle was made pursuant to an assignment agreement which was entered into and became binding in 1981, before plaintiffs even knew Triangle was selling the lease. (See CT 1688-1689 [Stipulation re: Facts, ¶¶ 6-9].)

10/(...continued)
assent to the acceptance is discharged"].) The statute has no application outside that limited context, and certainly does not stand for the broad proposition for which the Bank cites it.

Thus, this payment was made pursuant to a preexisting legal obligation, not in reliance on anything plaintiffs did or did not do. Further, since the Bank obtained the lease on the property and other benefits, the payment to Triangle did not redound to the Bank's detriment.

As for the payment of property taxes and maintenance, these were undertaken pursuant to the lease and not in reliance on plaintiffs' delay in initiating suit. Moreover, in return for these payments the Bank received the use and enjoyment of the property, where it long maintained a branch of Security Pacific Bank, the Rangoon Racquet Club restaurant, and a public parking garage. (See CT 1693-1694 [Stipulation re: Facts, ¶¶ 30-31.) In sum, once again, these payments demonstrate neither reliance nor detriment.

Further, as pointed out in the opening brief (AOB 40-41), the expenditures cited by the Bank are offset, and probably more than offset, by the rent reduction the Bank realized by purchasing the lease and paying rent at the steeply reduced rate of $2,000 per month rather than the market rate it previously was paying Triangle, combined with such other factors as profits on the parking garage concession and the market rate rent the Bank received from its restaurant subtenant.[11/] Once the Bank passes the break-even point (as it already has or shortly will if this court does not set things right), the 40 years remaining on the lease term will yield it an incredible windfall at plaintiffs' expense.

11/ The Bank itself concedes that its purchase of the lease garnered it an annual rent reduction in the neighborhood of $300,000. (See CT 1687.) Using the Bank's reckoning that plaintiffs could have filed this lawsuit 10 years earlier, this factor alone offsets about $3,000,000 of the Bank's claimed expenses. Further, as plaintiffs pointed out in their trial brief (see CT 1611-1612), the restaurant lease had yielded the Bank some $600,000 in rent by the time of trial, and the parking concession was similarly lucrative: Before 1981, the Bank was paying $73,000 per year for parking, an expense eliminated by its purchase of the lease; moreover, the parking concession produced over $50,000 in income for the Bank between January 1990 and August 1992 alone.

Finally, implied in the Bank's position that it was injured by having to make the various payments it identifies is the assertion that had plaintiffs acted earlier, the Bank would have done something differently. But what? As noted, the payment to Triangle was required under the assignment; the property taxes and maintenance were required under the lease. The Bank assumed its obligations under both the assignment and the lease before plaintiffs even knew there would be a change in lessee. Thus, the argument cannot be that the Bank assumed these obligations in reliance on plaintiffs' conduct. The Bank, however, offers no other explanation.[12/] In short, the Bank has failed to identify any evidence supporting the conclusion that it detrimentally relied on 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 Community College Dist. v. Superior Court*, *supra*, 173 Cal.App.3d 606, 614.) Here, the evidence is insufficient with regard to each and every element of the defense. Failure to prove even one element defeats estoppel. In sum, the trial court erred in finding an estoppel. Accordingly, its ruling must be reversed.

12/ Apart from a bare assertion in its laches argument that plaintiffs' delay caused it to forgo the opportunity to rescind (see RB 20), the Bank offers no explanation of how the supposed detriment of having to make the identified payments *resulted from* reliance on plaintiffs' delay. However, as explained in the opening brief (AOB 39-40) and elaborated further in Section III of this reply, the rescission argument doesn't work: Either the Bank, always fully apprised concerning the factual circumstances and potential legal repercussions of their deal with Triangle, made no mistake of law that would permit it to rescind; or, if the Bank can make out a claim of mistake of law based on the outcome of this lawsuit, its rescission claim has not yet matured. Thus, the rescission argument does not supply a basis for the necessary finding of detrimental reliance.

III.

PLAINTIFFS' CLAIMS ARE NOT 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.

The trial court ruled that plaintiffs' claims are barred by laches. (CT 1750.) Laches is an unreasonable delay in asserting an equitable right, which causes such prejudice to an adverse party as to render 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.) As the opening brief demonstrated (AOB 42-48), the trial court's 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 sufficient to support a finding of laches. Nothing in the Respondent's Brief (RB 16-22) detracts from plaintiffs' position as to either point.

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

Laches can be asserted *only* in an action in equity. A legal claim for money damages is not subject to the defense, and this remains true even if equitable claims are also joined. (11 Witkin, Summary of Cal. Law, *supra*, Equity, § 14, p. 692; *Abbott v. City* *of Los Angeles* (1958) 50 Cal.2d 438, 462.) This lawsuit states two causes of action. Both are about money damages. One, for breach of contract, is the paradigm action at law for damages; the other, for declaratory relief, at its crux is also a dispute about money. Accordingly, laches is unavailable in this lawsuit. (See AOB 42-44.)

The Bank responds to this argument by turning the lawsuit inside out. It argues that the breach of contract claim is cumulative to the declaratory relief action, because the damage claim cannot be resolved without interpreting the lease. (See RB 22 ["Without a court declaration that the gold clause is enforceable, Appellants cannot sue for breach of lease for failure to pay rent, because Respondents have not failed to pay the rent"].) This is sophistry. Interpretation of the contract is intrinsic to the resolution of any breach of contract action. Determination of the enforceability of the gold clause would be necessary here even if the lawsuit had never included a declaratory relief claim.[13/] Laches simply does not apply to the breach of contract claim.

Nor does it properly apply to the declaratory relief claim. While declaratory relief is an equitable proceeding, whether laches is available in a declaratory relief proceeding turns on the nature of the underlying claims. For example, in *Mandracio v. Bartenders Union, Local 41* (1953) 41 Cal.2d 81, 85, the Supreme Court reversed a finding of laches in an action which was formulated as a declaratory relief action, but which was really an action for damages. That is the situation here. This whole lawsuit is about money: How much rent are plaintiffs entitled to be paid for their Beverly Hills

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13/ The Bank indicates that the trial court limited its laches finding to the declaratory relief action. (RB 22.) At the hearing, this appeared to be the court's intention. (RT 54 ["Laches will lie as to the declaratory relief action. Estoppel lies as to both causes of action"].) However, this distinction did not make it into the judgment. (CT 1750 ["Plaintiffs' claims also are barred by laches and estoppel"].)

property? Is it $2,000 per month or is it the gold clause rate that would yield them more than 15 times that much? The defense of laches is unavailable in a lawsuit founded on this type of claim.

B. Even If Laches Were Available, The Trial Court Still Abused Its Discretion Because The Bank Proved Neither Unreasonable Delay Nor Resulting Prejudice.

The opening brief set forth a chronology of plaintiffs' delay before initiating this lawsuit and demonstrated it was not the *unreasonable* delay required to support a finding of laches. (AOB 45-46.) Plaintiffs further demonstrated that even if their delay could be characterized as unreasonable, the Bank did not sustain any prejudice *resulting from* the delay, as is also required to establish the laches defense. (AOB 47-48.) The Bank challenges both points, but its efforts are ineffectual.

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

The Bank asserts that plaintiffs' claim hinges upon knowledge of just three facts--the gold clause, the 1977 gold clause legislation, and the Bank's purchase of the lease--and that plaintiffs had actual or constructive knowledge of all three by 1981. (RB 18.) According to the Bank, the claim should have been brought at that point, and any delay was unreasonable.

The Bank's reasoning is far too facile. For example, citing the general proposition that "knowledge of the law is presumed" (*Macfarlane v. Dept. Alcoholic Bev. Control*

(1958) 51 Cal.2d 84, 90), the Bank contends plaintiffs are charged with constructive knowledge of the 1977 gold clause legislation as soon as it was enacted. (RB 18.) The trouble is, this general proposition has no application in this context. "For laches to be invoked as a bar to the assertion of a right, knowledge of the existence of a right and an apparent willingness to waive it must be shown." (*Eischen v. Eischen* (1959) 172 Cal.App.2d 158, 162; see, e.g., *McNulty v. Lloyd* (1957) 149 Cal.App.2d 7, 10-11 ["In order to impute laches to one who seeks relief in equity, it should clearly appear that he either had actual knowledge of the facts or failed to acquire such knowledge after having notice thereof].) Since the required showing of a "willingness to waive" logically must be founded on some level of conscious conduct, mere constructive knowledge is not an adequate foundation for a finding of laches.

Further, laches requires more than delay; it requires a lack of diligence. (E.g., *City of Davis v. Coleman* (9th Cir. 1975) 521 F.2d 661, 677.) Although 10 years elapsed between the Bank's purchase of the lease and the initiation of this lawsuit, plaintiffs' conduct was diligent and their delay reasonable. (See AOB 45-46.) For a long time, they were ignorant of the facts. (See AOB 45.) Then, although they pursued a cautious course in awaiting the outcome of *Fay*, they began making clear to the Bank their intention to enforce the lease and collect rent at the gold clause rate. Finally, once that case became final they began an unexpectedly arduous search for counsel. (See AOB 46.) Once they found counsel, the lawsuit was on file within two months. This evidence depicts only reasonable delay; it does not support a finding of laches.

2. The Bank Was Not Prejudiced By Plaintiffs' Delay.

Mere delay isn't enough to support a finding of laches. There must also be prejudice, and the prejudice must result from the delay. (See AOB 47-48; 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 caused by the delay]; *Butler v. Holman*, *supra*, 146 Cal.App.2d at p. 29 ["Unless the party asserting the defense of laches had 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].) The Bank cannot demonstrate the prejudice element of the laches defense.

The Bank's efforts to establish prejudice rely on the same points raised in support of its estoppel claim. They are as insufficient to establish laches as estoppel. For instance, the Bank says it paid Triangle $4,225,000 in 1986 "on the reasonable assumption that the rent would continue to be $2,000 per month." (RB 20.) No, it didn't. It paid Triangle the money pursuant to a contractual obligation created in 1981. Likewise, the Bank's expenditures of $840,000 in property taxes and unspecified amounts in routine building maintenance were not made as a result of plaintiffs' delay; rather, they were made as a result of the Bank's obligations under the lease. In sum, none of the cited expenditures *resulted from* plaintiffs' delay in bringing this lawsuit.

Once again, the Bank's effort to prove otherwise is superficial at best. The Bank merely states without elaboration that it would have avoided, rescinded or renegotiated the entire transaction with Triangle had plaintiffs filed suit earlier. (RB 20.) How it would have accomplished any of these imagined options is a mystery. Avoidance seems impossible, since the Bank contracted with Triangle first and notified plaintiffs later; the

Bank points to nothing in its agreement with Triangle that would have permitted it to avoid its contractual obligations upon enforcement of the gold clause, and Triangle's refusal to indemnify the Bank in the event of such enforcement seems inconsistent with any such opportunity. Whether renegotiation would have been possible is entirely speculative and, again, the Bank points to nothing in the record that would remove it from the realm of speculation. And as for rescission, the opening brief explained in some detail (AOB 39-40) why it is either premature (because the Bank's supposed mistake of law will not be determined until this lawsuit is concluded), or unavailable (because the Bank, knowing all the facts and law, elected to take a calculated risk that the gold clause would never be enforced against it).

Plaintiffs' claims are not 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. The finding of laches must be reversed.

CONCLUSION

Please keep in mind the realities of this case. The 1933 invalidation of gold clauses created a remarkable windfall for tenants with long-term leases. For decades, plaintiffs and their predecessors had no choice but to accept token rent of $2,000 per month on their prime Beverly Hills real estate. But now the current law, 31 U.S.C. § 5118(d)(2), makes gold clauses enforceable in obligations entered into after October 27, 1977. In 1981, after consultation with counsel and advisement that the gold clause might be enforceable against it, the Bank decided to purchase the lease, thus gaining full control of the property for the more than 50 years of its term that remained. The purchase price necessarily took into consideration the possibility that the gold clause would be enforced, as the previous lessees refused to indemnify the Bank against such enforcement. Because the 1981 transaction by which the Bank purchased the lease was a novation, and therefore a new contract, it *is* an obligation entered into after October 27, 1977. Its gold clause is therefore enforceable, and the Bank is legally obliged to pay plaintiffs the real rent contemplated under the lease.

For all the reasons stated in the opening brief and in this reply, plaintiffs urge the Court to reverse the judgment of the superior court and to direct that a new judgment be entered in plaintiffs' favor.

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Respectfully submitted,

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