IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION ONE

GROSVENOR GIBRALTAR ASSOCIATES,	Case no. A166226
Plaintiff and Appellant,	San Francisco Superior Court
v.	case no. CGC-21-594639
McMILLAN ELECTRIC, INC.,	Hon. Kathleen A. Kelly Judge of the Superior Court
Defendant and Respondent.	
_____/	

APPELLANT'S OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL FIRST **APPELLATE DISTRICT, DIVISION** ONE	COURT OF APPEAL CASE NUMBER: A166226
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 90744 NAME: Elliot L. Bien FIRM NAME: Bien & Summers STREET ADDRESS: 829 Las Pavadas Avenue CITY: San Rafael STATE: CA ZIP CODE: 94903 TELEPHONE NO.: (415) 472-1500 FAX NO.: (800) 308-9352 E-MAIL ADDRESS: elb@biencounsel.com ATTORNEY FOR (*name*): Grosvenor Gibraltar Associates	SUPERIOR COURT CASE NUMBER: CGC-21-594639
APPELLANT/ PETITIONER: GROSVENOR GIBRALTAR ASSOCIATES RESPONDENT/ REAL PARTY IN INTEREST: McMILLAN ELECTRIC, INC.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (*Check one*): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE	

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PRELIMINARY STATEMENT

This appeal turns on stipulated facts, undisputed correspondence between a commercial landlord and tenant, and the proper construction of their lease with no extrinsic evidence about it proffered below. The appeal thus presents a classic case for *de novo* review on the main question presented: whether the Superior Court correctly held that the appellant landlord, Grosvenor Gibraltar Associates ("Grosvenor"), had waived a provision in the lease and suffered a huge consequence as a result. As the court below pointed out, quoting *DuBeck v. California Physicians' Service* (2015) 234 Cal.App.4th 1254, 1265: "while waiver is ordinarily a question for the trier of fact, where there are no disputed facts and only one reasonable inference may be drawn, the issue can be determined as a matter of law." (Joint Appendix [hereafter "JA"] at 171) That rule applies equally on this appeal.

On the merits, however, the *DuBeck* opinion is irreconcilabe with the finding of a waiver below. On the same page the court cited below, *DuBeck* sets forth this established "general rule for finding a waiver":

> there must be an existing right, a knowledge of its existence, an actual intention to relinquish it, or conduct so inconsistent with the intent to enforce the right as to induce a reasonable belief that it has been relinquished. (234 Cal.App.4th at 1265, cit. and internal quots. omitted)

In this case, the court held Grosvenor had waived any reliance on an undisputed requirement in the lease: that the tenant, respondent McMillan Electric, Inc. ("McMillan"), had to give notice of an intent to

renew the lease before its rules for determining the new rental amount became operative. So the *DuBeck* rule, underscored by its specific holding (*post*, pp. 21-24), rejects any waiver unless Grosvenor made clear to McMillan that a renewal notice didn't matter — that the lease's rent-determination rules were operative and binding anyway. But the undisputed record reveals no such communication by Grosvenor or implication by conduct.

McMillan certainly appeared to exercise its renewal option on January 20, 2021. Its letter that day stated: "This letter serves to notify [Grosvenor] that [McMillan] will be exercising its option to renew the leases noted above for another 5 year term. . . ." (JA 104) Accordingly, after several months of unsuccessful rent negotiations predicated on that renewal notice, Grosvenor sent an email on June 30, 2021, invoking the rent-determination rules under the lease (JA 107), beginning with a simultaneous exchange of consultants' opinions about the "fair market rent" for the renewal term. (See § 3.1.3(b) of the lease at JA 23.)

The Superior Court held that Grosvenor's foregoing email waived the notice requirement. (JA 153-157) But the court cited no language to that effect, and the first sentence of the email refuted such a waiver by confirming the fact and effect of McMillan's January renewal notice. The first sentence stated: "You have exercised your option to renew this lease for another 5-year term. . . ." (JA 104) Only then did Grosvenor propose to start the rent-determination process with an exchange of consultant opinions. In short, its opening confirmation of McMillan's

option exercise unmistakably treated it as a condition precedent for the proposed exchange. That hardly satisfied *DuBeck's* requirement for a waiver: conveying "an actual intention to relinquish" that condition. (234 Cal.App.4th at 1265)

Moreover, the first sentence of the email quickly proved prescient. Only two days later, on July 2, 2021, an attorney for McMillan responded that his client's January renewal notice did not, and legally could not, effectively exercise its renewal option. (JA 112) McMillan's attorney said the notice "merely referenced an intention to exercise the renewal option. [McMillan] never followed up with an actual exercise of the renewal option." (Original emphasis) In addition, the attorney said the notice came several days before the earliest time the lease allowed for one. (*Ibid*.)[1]

While Grosvenor respectfully disagrees with both propositions, their very assertion by McMillan further refutes the waiver holding below. McMillan's emphatic disavowal of a valid notice proves it fully understood Grosvenor's position in its June 30 email: that a renewal notice was a condition precedent for the proposed exchange of consultant opinions. Why else would McMillan respond with an attorney's lecture disavowing its notice, not simply proceeding with the exchange? The lecture proves beyond doubt that Grosvenor's email had

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[1] As documented later in this brief, McMillan waived any such objections several months later by unconditionally confirming the validity of its renewal notice and accepting substantial benefits from Grosvenor as a result.

not done what *DuBeck* required: "induce[d] a reasonable belief" by McMillan (234 Cal.App.4th at 1265) that Grosvenor had somehow waived the notice requirement and rendered it superfluous.

Nor, finally, can a waiver be predicated on an acceptance of benefits as the Superior Court held (at JA 172), citing *Gould v. Corinthian Colleges* (2011) 192 Cal.App.4th 1176, 1179. *Gould* predicated a tenant's waiver on its retention of $256,000 from the landlord in payments required for its early termination of the lease. Here, by contrast, Grosvenor's purported benefit, an opinion from McMillan's consultant about renewal rent, was a threat to heavily reduce such rent to Grosvenor's severe detriment. (*Post*, p. 18) And even after McMillan finally confirmed the validity of its renewal notice during the litigation below, the Superior Court still enforced every penny of its threatened rent reduction.

The court held that Grosvenor's June 30 email had waived the notice requirement and invoked one of the rent-determination rules set forth in Section 3.1.3 of the lease. Because McMillan had released its own consultant opinion on July 9, 2021 — while repeating its disavowal of its renewal notice (JA 115) — the court held that Grosvenor's failure to reciprocate not only violated "its own letter of June 30" according to the court (JA 171:10-12), but also invoked a lease provision making McMillan's consultant opinion binding. (Section 3.1.3(b) at JA 23, last sentence) And that ruling cost Grosvenor a $3.5 million reduction of the

rent its consultant deemed proper over the five years of the renewal term. (*Post*, p. 18)

For all the reasons documented in this brief, this Court should reverse the rulings below and hold that rent determination should go forward as Grosvenor requested below, with both sides' consultant opinions submitted to a neutral arbitrator. That result is eminently fair and reasonable given McMillan's multiple changes of position about its renewal notice. And the reversal should be with directions to order all necessary financial adjustments to achieve the status that would have prevailed under the correct ruling below. (*Post*, pp. 26-27)

THE UNDISPUTED FACTS

We now briefly summarize the relevant facts, all of which are undisputed as set forth and documented below in a Joint Statement of Stipulated Facts and Exhibits, etc. (JA 99 *et seq*.) While both sides also filed declarations by their principals (JA 93-95 & 145-148), they mainly described the parties' internal reasoning. But only Grosvenor's communications or conduct could establish a waiver, and the Superior Court thus properly cited neither declaration in its ruling.

1. The Renewal Provisions in the Lease

On September 23, 2021, the parties entered into identical leases for two related commercial properties owned by Grosvenor. (JA 100, ¶ 4) The full text appears at JA 11 *et seq*.

Section 2.6(b) (JA 20-21) conferred on McMillan "the right and option . . . to extend the Original Term," but "only by giving [Grosvenor]

written notice of the exercise of the Renewal Option" within a certain time period. If for any reason McMillan did not "validly exercise" the option, it "shall terminate or be deemed to have terminated."

The same subsection (b) also provided that, if McMillan did "validly exercise" the renewal option by its required notice, the rent for the renewal term was to be "the Base Rent provided in Section 3.1.3(b)" of the lease. (*Ibid*.) The lease thus made clear, and with obvious logic, that the rent-determination rules in Section 3.1.3(b) only applied if McMillan did, in fact, "validly exercise" a renewal option pursuant to Section 2.6. Otherwise it would make no sense to require the rent-determination procedure or enforce its rules out of context.

Section 3.1.3(b) reconfirmed that intent. It provided that the rent-determination procedure did not commence until a "negotiation period" ended unsuccessfully (JA 23), and that period did not commence until "fifteen (15) days following [Grosvenor's] receipt of [McMillan's] notice of its exercise of the option. . . ." (*Ibid*.) Once again, therefore, the lease made clear that the rent-determination procedure and rules were conditioned on a valid renewal notice by McMillan.

Finally, if all the foregoing conditions were satisfied, Section 3.1.3(b) required the parties to exchange the consultant opinions cited earlier in this brief. (JA 23) If only one party provided an opinion it was binding (*ibid*.), but if there were two competing opinions the rent was to be set by a neutral arbitrator. (*Ibid.*, subdivision (c))

2. McMillan's Renewal Notice

On January 20, 2021, McMillan sent Grosvenor a letter which, as stipulated by the parties below, "indicat[ed] its intent to exercise a 5-year option for each lease." (JA 100, ¶ 8) As quoted previously, McMillan wrote as follows: "This letter serves to notify [Grosvenor] that [McMillan] will be exercising its option to renew the leases noted above for another 5 year term. . . ." (JA 104)

3. Unsuccessful Rent Negotiations

McMillan's foregoing notice led to negotiations over the renewal rent lasting much longer than the 15 days contemplated by the lease. (Section 3.1.3(b) at JA 23) As the parties stipulated: "Between April 2021 to June 2021, the parties unsuccessfully attempted to negotiate, both orally and in writing, the monthly rent for the applicable option terms for each premises identified in each lease." (JA 100, ¶ 9)

4. Grosvenor Conditionally Invokes the Rent-Determination Rules

On June 30, 2021, Grosvenor sent McMillan an email invoking the lease's rent-determination rules conditionally. It was based on the assumption plainly stated in the email's first sentence: "You have exercised your option to renew this lease for another 5-year term . . . ." (JA 107) The email then stated that "the Negotiation Period is over," implicitly waiving the lease's 15-day negotiation limit but waiving nothing else. Accordingly, the email concluded by attaching a PDF of a rent opinion by Grosvenor's consultant but with password protection,

explaining that it would provide the password if McMillan promptly supplied its own consultant opinion. That would make the exchange simultaneous as required by Section 3.1.3(b). (JA 23)

5. McMillan Disavows its Renewal Notice

On July 2, 2021, McMillan mailed and emailed Grosvenor a letter emphatically disavowing its renewal notice of January 2021. (JA 112-113) As shown previously, it argued that the notice was both too early and too provisional ("merely referenced an intention") to be effective. (JA 112) It also argued that Grosvenor's invocation of the rent-determination rules was ineffective because the 15-day negotiation period under the lease had expired. (JA 113) But the letter concluded by implicitly waiving the 15-day rule as Grosvenor had done before: "We suggest that the parties confirm a reasonable period of time to negotiate the fair market rent." (*Ibid*.)

6. McMillan Disavows its Notice Again but Provides a Consultant's Opinion on the Renewal Rent

One week later, on July 9, 2021, McMillan mailed and emailed Grosvenor a letter repeating that "our position is that the renewal option was not exercised. . . ." (JA 115) But it also enclosed a consultant's opinion about the renewal rent (JA 116-121) with this caveat: that the enclosure was "solely for the purpose of satisfying any obligations that may arise under Section 3.1.3(b) of the Lease (<u>if any</u>) . . . ." (JA 115; emphasis added) Nothing was certain, in other words, except its disavowal of its renewal notice.

7. Grosvenor Responds by Offering To Invoke the Rent-Determination Rules if McMillan Confirmed the Validity of its Renewal Notice

On July 25, 2021, Grosvenor emailed a response to McMillan's latest communications. (JA 123-124) While confirming its position that McMillan had effectively exercised the renewal option — and threatening to enforce that contention in court if necessary — Grosvenor said "t]he more productive route, however, would be to proceed to reach agreement regarding the applicable Fair Market Rent. . . . ." (JA 123) And for that purpose it offered to release its password-protected consultant opinion, and proceed accordingly as contemplated by the lease, but "only if [McMillan] retracts its position that the option term has not been exercised, and affirmatively client represents in writing that it is bound by the lease process to determine [fair market rent]." (JA 124) In short, Grosvenor made clear to McMillan that an effective renewal notice remained a condition for Grosvenor's willingness to invoke the rent-determination rules.

8. McMillan Next Disavows any Desire or Plan To Renew the Lease

McMillan responded with an email from a new attorney on July 30, 2021. (JA 126-128) It began with a surprising statement that McMillan "no longer wishes to renew the Lease." (JA 126) But it also stated that McMillan still "disagree[d]" with Grosvenor's "claim that the expression of our intent to exercise an option" was sufficient to commit to that option. (*Ibid*.) While citing no supporting language in the lease,

the email insisted that "signing the Lease renewal" was the only way to commit itself to a renewal (*ibid*.) — which would of course render the commitment-by-notice provision in the lease completely nugatory.

Nonetheless, the email next made the argument upheld by the Superior Court. Ignoring the condition of a valid renewal notice in both the lease and Grosvenor's communications, McMillan argued that, pursuant to Section 3.1.3(b) in the lease, its mere release of a consultant opinion to Grosvenor on July 9, 2021, compelled Grosvenor to do the same or McMillan's opinion became binding. (JA 127) The email stated later, however, that "I cannot emphasize strongly enough: this does not mean that we are agreeing to a renewal term. . . ." (JA 128)

9. Grosvenor Repeats its Position that a Valid Notice Is a Condition for the Rent-Determination Rules

By email on August 26, 2021 (JA 130-131), Grosvenor repeated its position that the rent-determination rules in the lease were only operative if McMillan validly exercised its renewal option:

> In effect, your client wants to negotiate a fair market rent and if it does not achieve a desired result then claim it has no obligation under the option term that our client contends has been duly exercised. This is a fundamental first step before option term rent can be negotiated. Either the option term is in play or it is not. (JA 130)

The email went on to state Grosvenor's intent to seek "declaratory relief" to that effect "if we cannot reach agreement going forward to resolve this dispute." (JA 130-131) But the email still offered to enter

into "lease negotiations" with McMillan if it agreed in writing that they would "not constitute any waiver of [Grosvenor's] lease rights" (JA 131) — such as the requirement of a valid renewal notice.

10. Grosvenor Files its Complaint for Declaratory Relief

Two weeks later, on September 7, 2021, Grosvenor filed its complaint below (JA 4 *et seq*.), but another exchange of communications bearing on the waiver issue took place the following month. As for the complaint, however, it alleged that Grosvenor had "accepted" McMillan's renewal notice, McMillan thereafter "reneged" on it, and declaratory relief was therefore required as to the validity of the renewal notice (JA 5-6, ¶ 7, & JA 6, ¶ 8(A)) and, if relevant, the procedure for rent determination. (JA 6, ¶ 8(B); see also JA 7-8)

11. Grosvenor Expresses Openness to a Subtenancy Proposed by McMillan But Only if It Finally Confirmed the Validity of its Renewal Notice

On November 15, 2021, a proposed subtenant of McMillan's sent an email to Grosvenor requesting its consent to change the use and use permit for part of the subject property. (JA 133, third email on that page) Grosvenor responded by repeating its insistence on McMillan's confirmation of its renewal notice, with a copy to McMillan: "Please have [McMillan] confirm that the option to extend the lease term has been exercised. Until that issue has been resolved, ownership will not consider a change of use." (JA 133, second email on the page)

12. McMillan Finally Confirms the Validity of its Renewal Notice, and Grosvenor Accepts the Requested Subtenancy on that Basis

Two days later McMillan finally complied with the condition Grosvenor had long insisted on. Its email to Grosvenor on November 17, 2021, stated: "we hereby confirm, as requested by your e-mail, that the option to extend the lease term has been exercised. . . ." (JA 133, first email on the page) As set forth in the parties' Joint Statement of Stipulated Facts, etc., McMillan's email "confirmed that it had exercised [the] five-year option terms for each lease. . . ." (JA 101, ¶ 19) And as a result, it was further stipulated that Grosvenor consented to the subtenancy arrangement on December 10, 2021. (*Ibid*., ¶ 20)

13. Grosvenor Invokes a Lease Provision Setting Temporary Renewal Rent Pending a Decision by the Neutral Arbitrator

On February 20, 2022, Grosvenor mailed and emailed a letter to McMillan (JA 135 *et seq*.) citing Section 3.1.3(e) of the lease. (JA 23) That section prescribed what happens if the rent-determination process "has not been concluded prior to the commencement of the option term." (JA 23) And that appeared very likely as the term was set to commence only 9 days later, on March 1, 2022. (JA 20, § 2.6(b) of the lease) If so, Section 3.1.3(e) provided that the temporary rent would be the amount stated by Grosvenor's consultant. (JA 23) But once "a decision is reached" by the neutral arbitrator, then the "amount

previously paid" during the renewal term shall be subject to "any adjustment required" to implement the arbitrator's figure. (*Ibid*.)

Accordingly, Grosvenor's letter of February 20 released its consultant opinion (JA 140-141) by providing the password cited earlier. And it was stipulated below that McMillan began complying with that consultant's rent figure in March 2022 under protest. (JA 101, ¶ 22)

14. McMillan's Response Confirms the Huge Effect of the Superior Court's Subsequent Rulings

As stipulated, McMillan sent Grosvenor a letter on March 7, 2022 (JA 138) enclosing its first monthly rent payment of $130,983, the temporary amount established by Grosvenor's consultant. But McMillan's letter also claimed the monthly rent should be only $71,977 according to its own consultant, and repeated its position that its lower figure was binding. So when the Superior Court later upheld that position, it reduced the rent Grosvenor deemed proper by $59,006 each month. That reduction totaled $3,540,360 over the five-year renewal term in question.

THE DISPOSITION BELOW AND ITS APPEALABILITY

As stated in Grosvenor's notice of appeal (JA 176), the disposition at issue is set forth in an "Order After Trial" entered on August 2, 2022. (JA 162 *et seq*.; hereafter, "the order") And for the following reasons, the notice of appeal states that the order was a "final declaratory judgment denominated as 'order after trial.'" (JA 176, item no. 1)

As correctly stated in the order itself, "the only issue presented for the Court's determination was the manner of establishing the Base Rent for the renewal term of the commercial leases at issue." (JA 162: 23-24) Although Grosvenor's complaint had also requested a declaration as to McMillan's renewal notice (JA 5-6, ¶ 7, & JA 9, ¶¶ 1 and 3), Grosvenor's trial brief pointed out that "[t]he issue of whether [McMillan] exercised the option terms has been resolved." (JA 77:4-5) The trial brief cited Exhibit 7 to the parties' stipulated facts (JA 99 *et seq*.), which was their email exchange in November 2021 cited previously. (JA 133) There, after Grosvenor repeated its request for confirmation of McMillan's renewal notice, McMillan finally provided it by stating: "the option to extend the lease term has been exercised. . . ."

Accordingly, Grosvenor's trial brief only addressed "the remaining declaratory relief issue," namely, "the applicable *protocol* for determining FMR [fair market rent] for the option terms. . . . ." (JA 77:11-13; original italics) And its brief concluded by asking the Court to "declare that under Sections 3.1.3(c) and (d) [of the lease], the parties' consultants shall appoint a third-party neutral arbitrator to determine FMR as provided therein." (JA 83:1-2)

McMillan likewise limited its trial brief (JA 85 *et seq*.) to the issue of rent determination. The only relief it sought on the merits was an "order that the rent figure proposed by its consultant . . . be established as the Base Rent for the first renewal term." (JA 92:14-15)

Finally, the ensuing order resolved that dispute plainly and finally, leaving no further steps to be taken on the merits of the only issue presented. (Only a prevailing-party attorneys' fee issue remained, as stated at JA 173:21-23.) The court held that, in light of Grosvenor's purported waiver, McMillan's consultant opinion was binding — which, as shown previously, reduced Grosvenor's rent for the renewal term by over $3.5 million.

That disposition is appealable for the reasons stated in Grosvenor's civil case information statement filed on October 11, 2022:

> Although the order is not entitled "judgment," a leading treatise correctly points out that "[t]he substance and effect of the judgment — not its label — determines whether it is 'final' and thus appealable. . . ." (Eisenberg et al., *Civil Appeals and Writs* (Rutter, Nov. 2021 update), § 2:38) As held in *Estate of Miramontes-Najera* (2004) 118 Cal.App.4th 750, 755, for example: "we may consider orders a final judgment for purposes of appeal when as here, they have all the earmarks of a final judgment." Here, too, the substance and effect of the order is a full and final declaratory judgment on the only substantive issue presented to the Superior Court for a decision.

We also note that the parties' agreed statement of October 7, 2022 (JA182 *et seq*.) likewise concluded: "despite the title used, [the order] is in fact a final declaratory judgment on the only substantive issue presented to the Superior Court for a decision." (JA 184)

In sum, the order satisfied all the requirements for a final and appealable declaratory judgment. And Grosvenor's notice of appeal (JA 176), filed and served on September 27, 2022, came less than 60 days after entry of the Order After Trial on August 2, 2022.

LEGAL ARGUMENT

I.

THE STANDARD OF REVIEW IS *DE NOVO*

It is well settled that the *de novo* standard of review applies to "the application of law to undisputed facts or the interpretation of a statute or contract. . . ." (*Brown v. City of Sacramento* (2019) 37 Cal. App.5th 587, 598) And the present appeal involves both categories: undisputed facts as well as the interpretation of the parties' lease. Moreover, even if extrinsic evidence of contractual intent had been submitted below, the *de novo* standard would still apply "unless the interpretation depends upon credibility." (*BRE DDR BR Whittwood CA LLC v. Farmers & Merchants Bank of Long Beach* (2017) 14 Cal.App.5th 992, 999) And here, the declarations submitted below raised no credibility dispute (or any other kind) about the intent of the relevant lease provisions.

II.

UNDISPUTED FACTS COMPEL A REVERSAL OF THE WAIVER RULING BELOW

The waiver case cited by the Superior Court below, *DuBeck v. California Physicians' Service, supra*, 234 Cal.App.4th 1254, does not

merely state the "general rule" on this subject (*id*. at 1265) quoted earlier in this brief. (*Ante*, p. 6) *DuBeck*'s specific holding eliminates any doubt that no waiver occurred in this case. The holding establishes what Grosvenor *would have had* to say or do to establish a waiver, and it manifestly did not. Moreover, this Court should so hold even if it finds the question at all doubtful. As held in the leading case of *Church v. Public Utilities Commission of State* (1958) 51 Cal.2d 399, 401:

> a waiver of a right cannot be established without a clear showing of an intent to relinquish such right and doubtful cases will be decided *against* a waiver. (Italics added)

To summarize the rule set forth in *DuBeck*, waiver requires "an actual intention to relinquish" a known right or "conduct so inconsistent with the intent to enforce the right as to induce a reasonable belief that it has been relinquished." (234 Cal.App.4th at 1265) And that rule has been cited in many other cases as well. (*E.g.*, *Pacific Business Connections, Inc. v. St. Paul Surplus Lines Ins. Co.* (2007) 150 Cal.App. 4th 517, 525; *Rheem Mfg. Co. v. U. S.* (1962) 57 Cal.2d 621, 626)

DuBeck's holding under this rule was that the respondent medical insurer, known as Blue Shield of California ("Blue Shield"), had waived its option under the policy to rescind it altogether if a misrepresentation by a policyholder came to light. Under that option, Blue Shield "would have been required to return to appellant the premiums she had paid. . . ." (*Id*. at 1266) Instead, it informed her it "was electing to cancel coverage prospectively, rather than rescind the policy, and that any

claims for covered services incurred prior to the cancellation would be covered." (*Id*. at 1257) That option, by contrast, allowed for "retaining the profit" by Blue Shield (*id*. at 1266), and it did so by retaining all the premiums it had received from appellant up to that point.

Not surprisingly, then, *DuBeck* held that Blue Shield's communication and conduct waived the full rescission option by unmistakably electing the more profitable cancellation option. (*Id*. at 1266) Its cancellation letter and retention of premiums were "so inconsistent with the intent to enforce the [rescission] right as to induce a reasonable belief that it ha[d] been relinquished." (*Ibid*., cit. and internal quots. omitted) And other cases are fully in accord with *DuBeck's* holding. (*E.g.*, *Pacific Business Connections, Inc., supra,* 150 Cal.App.4th 517, 525 [rejecting insurer's alleged waiver because it had previously "notified the parties that it was canceling the insurance policy for nonpayment"])

In sharp contrast to *DuBeck*, however, nothing Grosvenor said or did communicated in any way a waiver or disavowal of the requirement of a valid renewal notice as a condition for invoking the lease's rent-determination procedures and rules. To the contrary, starting from its first letter proposing an exchange of consultant opinions (JA 107), Grosvenor unmistakably and repeatedly treated McMillan's renewal notice of January 2021 as a condition for proceeding to rent determination.

Moreover, McMillan's response to that first letter, emphatically disavowing the renewal notice cited by Grosvenor (JA 112-113), further refutes any waiver. The disavowal proves McMillan fully understood that Grosvenor was, in fact, insisting on a valid renewal notice as a condition. It proves there was no "reasonable belief" to the contrary as required by the *DuBeck* rule — or any such belief at all.

Grosvenor also confirmed its position by its conduct, notably including the very act declared below to determine the renewal rent: its refusal to release the password for its consultant opinion in July 2021 in response to McMillan's transmittal of its own opinion. Grosvenor expressly predicated that refusal on McMillan's disavowal of its renewal notice. (*Ante*, p. 14) The very act of refusal, in other words, unmistakably confirmed Grosvenor's position that a renewal notice was required, further refuting any waiver of that requirement.

Grosvenor again confirmed its position several months later, when McMillan requested its cooperation with a subtenancy arrangement for a renewal term. (JA 133) Grosvenor's communication and conduct in response made crystal clear that it still insisted on McMillan's confirmation of its renewal notice as a condition for accepting the subtenancy arrangement and proceeding to rent determination. And Grosvenor kept its word by accepting that arrangement once McMillan finally confirmed its renewal notice. (*Ante*, p. 17) Accordingly, and just as in the previous months, there could be no mistaking Grosvenor's

communications or conduct as a waiver of the renewal-notice condition for rent determination.

Nor did Grosvenor's waiver of the 15-day negotiation limit in any way imply a waiver of the fundamental renewal requirement it repeatedly insisted on. Neither verbally nor otherwise was the timing waiver inconsistent with Grosvenor's position on the renewal requirement. If anything, its flexibility about timing further confirmed its seriousness in moving forward if McMillan finally confirmed the validity of its renewal notice.

Finally, the record refutes the Superior Court's holding that Grosvenor received a sufficient "benefit" from McMillan's consultant opinion to impose the waiver in question. (JA 172) Unlike the receipt and retention of a cash benefit of $256,000 in *Gould v. Corinthian Colleges, supra*, 192 Cal.App.4th 1176, all Grosvenor received was McMillan's threat of a huge rent reduction for the renewal term, "if any." (JA 115) Nor did Grosvenor's receipt of that threat give it any advantage for the rent-determination process it sought unsuccessfully below. It had already provided its own consultant opinion and, wisely, never attempted to retract or modify it thereafter in response to McMillan's consultant opinion. Accordingly, Grosvenor's mere receipt of that opinion conferred no benefit that could possibly establish a waiver of the notice requirement despite its repeated insistence on that requirement.

In sum, the undisputed facts of the case compel a reversal of the waiver ruling below and, as we now demonstrate, a reversal of rulings on rent and attorneys' fees below that were predicated entirely on the waiver ruling.

III.

THE COURT SHOULD ALSO REVERSE THE RULING ON RENT BELOW, WITH SPECIFIC DIRECTIONS TO INITIATE THE REQUIRED ARBITRATION AND ENFORCE ALL FINANCIAL ADJUSTMENTS REQUIRED BY THE OUTCOME

As shown previously, the waiver ruling below was the sole predicate for the ruling on the proper renewal rent: adopting McMillan's position and rejecting Grosvenor's request to invoke the neutral arbitration process. The court thus held that the rent for the renewal term was to be the amount stated by McMillan's consultant. (JA 173:14-21) Accordingly, if this Court reverses the waiver ruling it should also reverse the rent ruling that resulted, and hold instead that the arbitration Grosvenor requested should proceed and be binding. There is no need for further litigation on that issue when it was so sharply defined below and decided on waiver grounds alone.

As shown previously, though, the lease also required temporary rent payments pursuant to Grosvenor's consultant opinion. (*Ante*, pp. 17-18) Then, once "a decision is reached" by the neutral arbitrator, the "amount previously paid" during the renewal term shall be subject to "any adjustment required" to implement the arbitrator's figure. (JA 23, Section 3.1.3(e)) For that reason, this Court should reverse with

directions not only to order the rent arbitration to proceed, but also to order the financial adjustment required by the lease predicated on the arbitrator's decision.

Finally, the Court's remand directions should also specify that the foregoing adjustment must include the entire financial impact Grosvenor suffered as a result of the waiver ruling below — especially in light of the long delay of the rent arbitration pending this appeal. More specifically, the adjustment should reflect all the rental income Grosvenor should have been receiving, the lost value of that income reflected in an award of interest, and the interest it was forced to pay McMillan as documented in the following manner.

Accompanying this brief is Grosvenor's motion requesting an order of restitution, pursuant to Section 908 of the Code of Civil Procedure, if the Court does reverse. The motion documents exactly how McMillan responded to the waiver and rent rulings below. It promptly reduced its rent obligation to that stated by its consultant, and reduced it even further — charging Grosvenor interest as well — to compensate for the higher temporary rent McMillan had been paying until the Superior Court upheld its position. In sum, the restitution order should ensure that Grosvenor suffers in no way from the waiver and rent rulings below.

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IV.

FINALLY, THE COURT SHOULD REVERSE THE PREVAILING-PARTY RULING

Based on its foregoing waiver and rent rulings, the Superior Court held that McMillan was the prevailing party for attorneys' fee purposes. (JA 173:21-23) Accordingly, if this Court reverses the underlying rulings it should reverse the prevailing-party ruling as well. As held in *Shirvanyan v. Los Angeles Community College Dist.* (2020) 59 Cal.App. 5th 82, 107: "[b]ecause we reverse the judgment in [respondent] Shirvanyan's favor, it necessarily follows that she is not presently entitled to any award of attorney fees." And there is no need for further litigation on this issue either, except in the unlikely event the Court limits its reversal to the waiver issue and requires further proceedings to decide how the renewal rent should be determined.

Finally, this issue was not mooted by a subsequent ruling on November 15, 2022. (See accompanying motion for judicial notice.) While repeating that McMillan had prevailed on the waiver/rent issue presented at trial, the court held that it had lost much earlier on the underlying dispute over its exercise of the renewal option. The court referenced its November 17, 2021 email to Grosvenor so confirming (*ante*, p. 17) and thereby "submitting" on that issue. (See ruling at p. 2, ln. 6.) The court then made a discretionary ruling that neither side was entitled to a prevailing-party award. But if this Court reverses the waiver and rent rulings in McMillan's favor, Grosvenor will be the prevailing party on *both* issues presented below. Accordingly, such a reversal

would still call for a remand with directions for an award of fees and costs to Grosvenor in an appropriate amount.

V.

CONCLUSION

For all the foregoing reasons, this Court should reverse the waiver and rent rulings below; remand with directions to determine rent pursuant to the arbitration provisions of the lease; further direct that all appropriate financial adjustments must be made following the arbitrator's decision; and reverse the prevailing-party ruling below with directions to award Grosvenor a fee award in an appropriate amount to be determined.

DATED: December 16, 2022

Respectfully submitted,

BIEN & SUMMERS

By: /S/
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CERTIFICATE OF LENGTH OF BRIEF

The undersigned, counsel for the appellant named above, hereby certifies pursuant to Rule 8.204(c)(1), California Rules of Court, that the foregoing brief is proportionately spaced, has a 13-point typeface, and contains 5,586 words as computed by the word-processing program (WordPerfect 2021) used to prepare the brief.

DATED: December 16, 2022

/S/
ELLIOT L. BIEN

CERTIFICATE OF SERVICE

The undersigned declares:

I am over the age of 18 years and am not a party to or interested in the above entitled cause. I caused to be served:

APPELLANT'S OPENING BRIEF AND JOINT APPENDIX

(1) by requesting TrueFiling service of same on all registered counsel at the time I submitted the documents for filing through TrueFiling; and

(2) by enclosing a copy of the brief in a postage-prepaid envelope addressed as follows, and placing it for delivery by the United States Postal Service in my usual manner:

Clerk of the San Francisco County Superior Court
For Delivery to Hon. Kathleen A. Kelly
Civic Center Courthouse
400 McAllister Street
San Francisco, CA 94102-4514

The foregoing is true and correct. Executed under penalty of perjury at San Rafael, California.

DATED: December 16, 2022

/S/
ELLIOT L. BIEN