(ORAL ARGUMENT NOT YET SCHEDULED)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CASE NO. 11-7048

THE ARMENIAN GENOCIDE MUSEUM AND MEMORIAL, INC., *et al.*
Plaintiffs/Appellants/Cross-Appellees

v.

GERARD L. CAFESJIAN, *et al.*
Defendants/Appellees/Cross-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FINAL REPLY BRIEF OF APPELLEES / CROSS-APPELLANTS

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*Authorities upon which we chiefly rely are marked with an asterisks.

GLOSSARY

AGM&M	The Armenian Genocide Museum and Memorial, Inc.
Adalian	Rouben Adalian, AGM&M employee
Adjacent properties	1334-36, 1338, 1340, and 1342 G Street, adjacent to the Bank Building
Assembly	The Armenian Assembly of America
Bank Building	The National Bank of Washington Building
BOC	AGM&M Building and Operations Committee
CFF	The Cafesjian Family Foundation, Inc.
Cafesjian	Gerard L. Cafesjian, head of CFF and former AGM&M chairman
Families USA building	Building at 1334-36 G Street
Grant Agreement	Grant Agreement dated November 1, 2003 between CFF, Cafesjian and the Assembly
Grant Properties	Bank Building and adjacent properties
TomKat	TomKat Limited Partnership, an entity controlled by Cafesjian
Transfer Agreement	Transfer Agreement dated November 1, 2003 between the Assembly and AGM&M
Waters	John J. Waters, Jr., former AGM&M trustee and Secretary/Treasurer

Appellees and cross-appellants Gerard L. Cafesjian, the Cafesjian Family Foundation, and John Waters, Jr. submit this reply brief in support of their cross-appeal.

With respect to the sole issue on cross-appeal—the court's holding that the Armenian Genocide Museum & Memorial validly leased property to the Armenian Assembly of America, and the Assembly's leasehold interest survived the 2010 reversion of the property to Cafesjian—Appellants' Response and Reply Brief ("R&R Br.") ignores most of appellees' critical arguments. Appellants[1] fail to explain how the court's interpretation of the Grant Agreement between Cafesjian and the Assembly gives meaning to the requirement that the property Cafesjian donated be used as "part of" the museum project. They fail to acknowledge the overwhelming evidence that Cafesjian and the Assembly agreed that the Assembly would *never* occupy the donated property. They ignore the absence of any evidence to support the court's finding that the lease was approved by AGM&M's Building and Operations Committee. They pretend that the Assembly's right to the purchase of the property from Cafesjian's affiliate TomKat Limited Partnership, a

[1] It bears repeating that while the nominal parties to this litigation are Cafesjian and AGM&M, the litigation, as the court recognized, is really a dispute among the trustees of a divided AGM&M. (March 14, 2011 Order at 2) (JA-1284). AGM&M is a party only because the three AGM&M trustees other than Cafesjian claimed to control AGM&M and authorized this litigation against Cafesjian over his objection. And it bears further note that the three AGM&M trustees other than Cafesjian control both the Assembly and AGM&M.

right subsequently transferred to and exercised by the AGM&M, was completely unrelated to Cafesjian's philanthropy, even though Cafesjian donated the funds to effectuate that purchase. They do not address the fact that the Assembly assumed its leasehold interest with full knowledge that the conditions of Cafesjian's donation would expire in less than two years. And they respond to the manifest inequities of permitting the Assembly to use a self-dealing lease to circumvent the Grant Agreement's reversion by pretending that those inequities simply do not exist.

For all of these reasons, the court's September 2011 holding permitting the Assembly to lease the property through 2015 should be reversed.

SUMMARY OF ARGUMENT

The court should have held the lease invalid *ab initio* because leasing office space to the Assembly violated the Grant Agreement's requirement that the donated property be used as "part of" the museum project. While appellants argue that using the property to generate rental income from the museum meets this requirement, such an interpretation would render the "part of" provision redundant of the Grant Agreement's requirement that the Assembly transfer the donated property to AGM&M. AGM&M's possession of the property already ensured that the property would be used for the benefit of the museum project, since the museum project was the sole purpose of AGM&M's existence. Therefore, the

"part of" provision can be construed only as a limitation on *how* AGM&M could use the property to benefit the museum project—specifically, a requirement that the property be used to house the museum project.

Moreover, appellants' interpretation cannot apply to the period after December 31, 2010, when the property reverted to Cafesjian/CFF, because at that point it became impossible for *AGM&M* to use the property as "part of" the museum project. Finally, appellants' interpretation is inconsistent with other evidence, both within and outside the Grant Agreement, that the parties did not intend to permit such a lease.

Even if the lease had been valid when formed, the court erred by permitting the Assembly to remain on the property after the exercise of the reversion. The Assembly is not a bona fide lessee, and the Assembly and AGM&M's conduct in creating the lease was fundamentally inconsistent with principles of equity. Contrary to appellants' argument that appellees' equity arguments were not raised below, appellees argued throughout their motion to enforce the court's judgment that it would be inequitable to permit the Assembly to benefit from its own underhanded conduct. This Court should not permit the Assembly and AGM&M to circumvent the reversion—and basic property law—through self-dealing.

I. THE LEASE WAS INVALID *AB INITIO*

The Assembly should never have been allowed to remain in the Families U.S.A. building following the exercise of the reversion because, as shown in appellees' opening brief, the lease was invalid *ab initio.* The Grant Agreement expressly required, as a condition of Cafesjian's donation of the Families U.S.A. building, that the building be used only as part of the museum project. Notwithstanding appellants' argument that the building *is* being used as part of the museum project, basic principles of statutory construction, the remainder of the Grant Agreement, and extrinsic evidence dictate otherwise. Moreover, even if the lease did comply with the Grant Agreement, it would be invalid because AGM&M's entry into the lease was an *ultra vires* act.

A. The Lease Violated The Grant Agreement

Appellants wrongly argue that because rental income from the Families U.S.A. building is being used to support the museum project, the building is being used as "part of" the museum project as the Grant Agreement requires. Appellants' argument, however, fails to address the principal flaw in this interpretation of the Grant Agreement: it renders the "part of" requirement superfluous.

In any event, this interpretation, even if valid as to the pre-reversion period, cannot be applicable post-reversion, because AGM&M is no longer entitled to use

the property for a museum project at all. The Assembly's continued possession of a leasehold interest in the Families U.S.A. building is also at odds with both the remainder of the Grant Agreement and—should the Court find any ambiguity—extrinsic evidence that the parties never intended the Assembly to lease office space in the building.

1. The Court's Interpretation Is Overbroad

As shown in appellees' opening brief, the court's interpretation of Section 3.1(A) of the Grant Agreement, if correct, would render meaningless the requirement that all of the donated property be used as "part of" the museum project. If, as the court held, leasing the property to a third party to finance the museum project constituted using the property as "part of" the project, then *any* use to which AGM&M put the property would necessarily suffice. Leasing the property to an unrelated third party, such as the operator of a fast food restaurant, would be a permissible use under this reasoning, so long as the *income* from that rental were used for the museum project.

But the "part of" limitation of Section 3.1(A) was imposed *in addition to* the requirement in Section 4.3 that the Assembly transfer the property to AGM&M. AGM&M, in turn, "was established for the purpose of constructing, owning, operating, and maintaining" the museum. (Jan.Op., 9) (JA-1072). Any rental income AGM&M generated from the property necessarily would benefit the

museum project, since the museum project was AGM&M's sole reason for existence. Thus, if the parties intended for AGM&M to be able to raise funds by leasing the donated property to third parties, the "part of" limitation would have been unnecessary.

"The court construing a contract cannot ignore a contract term; each provision must be given meaning if at all possible." *Capital City Mortg. Corp. v. Habana Village Art & Folklore, Inc.*, 747 A.2d 564, 579 (D.C. 2000). A court interpreting a contract "must strive to give reasonable effect to all its parts and eschew an interpretation that would render part of it meaningless or incompatible with the contract as a whole." *District of Columbia v. Young,* 39 A.3d 36, 40 (D.C. 2012) (internal quotations omitted). Here, the only meaning that can be ascribed to the "part of" limitation is that the donated property must physically house the museum project. If renting the property were permissible, the "part of" limitation would be redundant of the requirement that the property be transferred to AGM&M.

Appellants do not even address this point. Appellants' sole defense of the court's interpretation of Section 3.1(A) is the utterly immaterial assertion that AGM&M's use of the property to generate rental income was "eminently reasonable." (R&R Br., 51). The reasonableness of the lease, however, is not at

issue. Section 3.1(A) prohibits the use of the donated property, whether reasonable or not, for any purpose other than as "part of" the museum project.

Appellants similarly miss the point when they argue that allowing the Families U.S.A. building to sit unproductive while museum construction is pending would be an "absurd result" and contrary to a "reasonable construction" of the Grant Agreement. Appellants do not attempt to answer the question: If the "part of" provision does not prohibit lease of the property to a third party, then what *does* it prohibit? Giving meaning to *all* of the language in the Grant Agreement, including the "part of" provision, requires that the "part of" provision be interpreted as prohibiting *something*.

Moreover, appellants' argument disregards the obligation to construe a contract as of the time of its formation. *Debnam v. Crane Co.*, 976 A.2d 193, 197 (D.C. 2009). No one is suggesting that when the Grant Agreement was formed, the parties intended for the Families U.S.A. building to "sit vacant and unproductive." (R&R Br., 51). To the contrary, the parties intended for the building, like the other buildings on the donated property, to be *demolished* prior to construction of the museum project. (Jan.Op., 61) (JA-1124). Indeed, the buildings would have been torn down by now but for the Assembly's refusal to vacate the property.

There was nothing "absurd" about the parties' desire to prevent the leasing of buildings that were slated for razing. Leasing the property during the seven-year period between the execution of the Grant Agreement and the 2010 project deadline would certainly have interfered with the construction of the museum project—just as the Assembly lease is doing now. Appellants cannot, through the Assembly's presence, prevent the museum project from moving forward while simultaneously arguing that the lack of progress permits them to remain on the property.

Because neither the court nor appellants have offered an alternative interpretation of the Grant Agreement that gives meaning to the "part of" provision, the only permissible interpretation of the "part of" provision is that the property must physically house the museum project. The lease to the Assembly violated this provision.

2. The Court's Interpretation Is Inapplicable To The Post-Reversionary Period

Even if the "part of" provision could be interpreted as permitting AGM&M to use the property to generate rental income pending museum construction prior to the reversion, as the court held, the validity of this interpretation evaporated the moment the property reverted to Cafesjian/CFF. The court's rationale—that AGM&M *might* use the Families U.S.A. building to physically house the museum project once construction on the museum began—depended on AGM&M's

continued ownership of the building. As a result of the reversion, however, AGM&M no longer owns the building, and thus it can *never* use the property—either to house the museum or for any other purpose. Stated differently, while the court found it "premature to conclude that the Properties have not been used as part of the museum project" (Jan.Op., 183) (JA-1246), such a conclusion is no longer premature. CFF now owns the Families U.S.A. building, wants to use the building as part of a museum project, and is *prevented* from doing so by the Assembly's continued presence as a tenant.

Appellants wrongly argue that declaring the lease invalid as of the reversion "depends on Defendants' incorrect assumption that CFF/Cafesjian had a reversionary interest as a matter of property law." (R&R Br., 52 n.13). No such assumption is required. The lease is invalid as of the reversion, at a minimum, because any possible claim that *AGM&M* was using, or might use, the building as part of the museum project was extinguished the moment AGM&M transferred the property to CFF.

3. The Court's Interpretation Is Inconsistent With The Rest Of The Grant Agreement

Permitting AGM&M to raise money for the museum project by leasing the property is inconsistent with the requirement in the Grant Agreement that the Assembly terminate preexisting leases—leases that, if not terminated, could have continued to provide the museum project with rental income and obviated the need

for the Assembly lease. If the parties intended that the property be leased, why did they require the termination of existing leases?

Appellants' argument that this requirement "was included to ensure that AGM&M was not saddled with tenants who had established leasing arrangements with the prior owner" (R&R Br., 52) is completely devoid of factual support.[2] There is no evidence in the record that any of the parties were concerned that AGM&M's possession of the property would be encumbered by lease terms previously negotiated by Cafesjian/CFF or previous owners. Neither can appellants credibly make such an argument, given their principals' own failure at trial to recall any of the Grant Agreement negotiations—a failure that the court characterized as "a convenient lack of memory" and "an attempt . . . to minimize their involvement in an agreement that turned out badly for the Assembly." (Jan.Op., 47) (JA-1110).[3]

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[2] In fact, Appellants' entire brief is riddled with wholly unsupported assertions, and in many instances is *directly contradicted* by the factual record and the court's own findings.

[3] Appellants misinterpret the "reasonable person" standard governing contract construction to argue that their failure to negotiate, read, and understand the Grant Agreement before signing it is immaterial. (R&R Br., 23 n.8). When giving meaning to contractual terms, courts are obligated to determine "what a reasonable person in the position of the parties would have thought the disputed language meant." *Debnam*, 976 A.2d at 197. There is no dispute that the Grant Agreement required the termination of existing leases. Nothing in the "reasonable person" standard permits a party who has made no attempt to understand a contract at its formation to manufacture arguments as to *why* a particular provision, unambiguous in its language, was included.

More importantly, the notion that the lease termination provision was somehow intended for AGM&M's protection makes no sense. Nothing in this provision, or anywhere else in the Grant Agreement, freed AGM&M or the Assembly from any lease obligations that conveyed with the property; rather, the Grant Agreement *required* the Assembly (and subsequently the AGM&M) to terminate such leases "as soon as possible" and prohibited the Assembly or the AGM&M from renewing or extending such leases. Far from allowing AGM&M to "control how the properties would be used both on an interim and permanent basis," as appellants claim (R&R Br., 52-53), this requirement *forbade* AGM&M from consenting to any continuation of existing leases, no matter how advantageous the terms. This restriction was for the benefit of CFF/Cafesjian, not the Assembly/AGM&M—primarily to ensure that the property be used for the museum project only, but also to protect CFF/Cafesjian should the reversion be exercised. Either way, the import is clear: The Grant Property was to be used for the museum project only, and was not to be leased.

A contract "must be interpreted as a whole, giving a reasonable, lawful, and effective meaning to all its terms, and ascertaining the meaning in light of all the circumstances surrounding the parties at the time the contract was made." *Nest and Totah Venture, LLC v. Deutsch*, 31 A.3d 1211, 1219 (D.C. 2011) (internal quotations omitted). "The first step in contract interpretation is determining what a

reasonable person in the position of the parties would have thought the disputed language meant." *1010 Potomac Assoc. v. Grocery Manuf. of Am., Inc.*, 485 A.2d 199, 205 (D.C. 1984). It is unfathomable that a reasonable person in the position of Cafesjian, AGM&M, or the Assembly in November 2003, when the Grant Agreement was executed, would have thought that AGM&M was expected to terminate existing leases as soon as possible, without regard to their terms, only to seek new tenants to generate income for the museum project.

4. Extrinsic Evidence, If Considered, Further Undermines The Court's Interpretation

From the plain meaning of the "part of" provision, the need to give that provision meaning beyond the mere transfer of the property to AGM&M, and the requirement that all existing leases be terminated, it is abundantly clear that the Assembly lease violated the Grant Agreement, and this Court need look no further. Should the Court find any ambiguity in the "part of" provision, however, extrinsic evidence further undermines the court's—and appellants'— interpretation: the specific May 2002 decision by the museum planning committee that the Assembly offices would not be housed in the museum complex, as well as Cafesjian's intent in donating the adjacent properties to the Assembly.

Appellants' argument that the museum planning committee's decision "does not undermine the district court's interpretation of the Grant Agreement" misses the point. (*See* R&R Br., 53 n.14). To the extent that there is any ambiguity in the

Grant Agreement, and extrinsic evidence of the parties' intent is relevant, the court's own finding that the parties agreed to keep the Assembly out of the museum space is highly probative.

Appellants also fail to adequately address the court's finding that Cafesjian donated the adjacent properties to the Assembly "for the purpose of expanding the footprint of the museum project." (Jan.Op., 19) (JA-1082). Appellants simply argue, without explanation, that this intent "sheds no light on this issue." (R&R Br., 53 n.14). To the contrary, Cafesjian's intent further evidences his unwavering position that the donated property be used to physically house the museum project, and that it serve no other purpose. That is why Cafesjian went to the trouble of acquiring properties *adjacent* to the Bank Building, why he insisted in May 2002 that the Assembly's offices not be housed on the donated property, and why he conditioned his donation on the promise that the donated property be used only as "part of" the museum project. If Cafesjian intended merely to donate rental property to generate income for the museum project, none of these actions would have been necessary. Appellants' arguments ignore this reality.

B. AGM&M's Entry Into The Lease Was An *Ultra Vires* Act

The lease was signed on behalf of AGM&M by Rouben Adalian, who was neither an officer nor a director of AGM&M. Unless Adalian's execution of the lease was approved by either AGM&M's Board of Trustees or, through properly

delegated authority, the Building and Operations Committee ("BOC"), AGM&M's entry into the lease was an *ultra vires* act. Appellants do not contend that the Board of Trustees itself approved the lease, nor is there evidence to support such a contention. Thus, the lease can be valid only if the BOC (i) approved the lease and (ii) had the authority to do so. Neither is the case.

There is not a shred of evidence that the BOC approved the lease. Appellants do not cite to any meeting minutes, any committee resolution, or any other document memorializing the BOC's approval of the lease. Neither did the court cite to any evidence in finding that "the record shows that the Assembly's lease in the Families U.S.A. building was approved by the Building & Operations Committee." (Jan.Op., 183) (JA-1246).

Unable to cite to evidence that the BOC *did* approve the lease, appellants chide appellees for failing to produce evidence that the BOC *did not* approve the lease. True enough—appellees are unaware of a single document referencing *inaction* by the BOC, and they cannot prove a negative. But it is not appellees' burden to produce evidence to refute the court's finding. A finding of a district court that lacks substantial evidentiary support is clearly erroneous and should be set aside. *See, e.g., Cuddy v. Carmen*, 762 F.2d 119, 124 (D.C. Cir. 1985). Here, the court's finding that the BOC approved the lease lacks *any* evidentiary support, and is therefore clearly erroneous.

Even if the BOC had attempted to approve the lease, the lease still would be invalid, because the BOC lacked the authority to approve the lease. As the court found, the BOC's authority was limited to "building management" and did not include the functions of "selling property" or "raising funds," that one trustee had sought to add in falsifying the minutes of the May 2007 Board meeting. (Jan.Op., 123) (JA-1186).

Appellants assert, without any factual support, that the "plain meaning" of "building management" includes leasing space because "the building manager—as opposed to the owner—is *often* the party responsible for leasing space in a building," (R&R Br., 54 (emphasis added)). While appellants' argument might have more credibility in the commercial real estate world, they ignore the fact that Cafesjian did not acquire and donate the Families U.S.A. building for use as an office building. Unlike commercial landlords and professional building management companies, AGM&M was not in the business of leasing space, and had not previously done so. It is inconceivable that the AGM&M Board of Trustees, having been required to terminate existing leases upon receipt of the building, and having never agreed or attempted to lease space in the building, would delegate the authority to *decide* to lease office space—not merely to select and negotiate a tenant—without doing so explicitly.

Finally, even if the BOC had approved the lease, and even if the BOC's "building management" authority could somehow be construed to authorize converting AGM&M into a commercial landlord, the "building management" authority itself was not validly delegated. The court found that the AGM&M Board's exclusion of Cafesjian's representative, John Waters—which occurred at a May 2007 meeting, prior to the Board's purported delegation of authority to the BOC—was not "presumptively valid." (Jan.Op., 168) (JA-1231). Appellants ignore this finding. They focus entirely on the court's finding that Waters left the May 2007 Board meeting voluntarily (Jan.Op., 183) (JA-1246), without attempting to explain how this finding can possibly be reconciled with the court's earlier finding about the invalidity of Waters' exclusion. Since appellants do not challenge this earlier finding, any action taken by the AGM&M Board following Waters' exclusion—including the delegation of authority to the BOC—is necessarily invalid as well, and the court's finding to the contrary is clearly erroneous.

II. THE COURT'S SEPTEMBER OPINION ERRONEOUSLY REFUSED TO INVALIDATE THE LEASE IN LIGHT OF THE EXERCISE OF THE REVERSION

Not only was the lease invalid as a matter of law, but given the exercise of the reversion, allowing appellants' self-dealing to frustrate Cafesjian/CFF's development of the museum project is inconsistent with fundamental notions of

equity. AGM&M and the Assembly fully understood that AGM&M was leasing property that it soon would not own, appeared to understand that the Assembly would be required to vacate the Families U.S.A. building upon exercise of the reversion, and now are relying on a technicality of property law to delay construction of the museum project.

Appellants' assertion that these equitable issues were not raised below is incorrect. Appellees' motion to enforce the court's May 2011 judgment specifically asked the court to "alter, amend, or make additional legal, *equitable,* and/or factual rulings with respect to" that judgment. Defendants' Motion to Enforce Judgment and for Amended Findings and Judgment at 1 (emphasis added). Appellees argued that "[t]he circumstances of this unusual lease show that the plaintiffs were engaged in an attempt to defy basic principles of property law by preserving some interest for themselves in the Grant Properties, lasting well beyond 2010." *Id.* at 4. Appellees referred to the inequities of the Assembly's holdover lease continuing beyond the date of reversion and through December 2015. *Id.* at 5. They argued that allowing the Assembly to remain on the property "would work a manifest injustice" to appellants. *Id.* at 11.

Appellants essentially ignored these arguments, as well as appellees' argument that the lease could not survive the reversion as a matter of property law. Appellants' sole argument, in effect, was that the Assembly should not have to

leave the Families U.S.A. building because the court had not previously ordered it to do so. The court effectively rejected both sides' arguments, holding *sua sponte* that because the Families U.S.A. building had been deeded to the AGM&M by a Cafesjian affiliate, rather than by Cafesjian or CFF, the transfer of the property to CFF was technically not a reversion. The court did not address the inequities of the Assembly's granting itself, through its control of the AGM&M Board, a lease that survived the return of the donated property to CFF.

A. The Assembly Is Not A Bona Fide Lessee

A purchaser of a leasehold interest "with actual knowledge of prior equities" takes the property "subject to the known equities, which are enforceable against him to the same extent that they are enforceable against the vendor." *Peruzzi Bros., Inc. v. Contee*, 527 A.2d 821, 826 (Md. 1987). Appellants do not dispute this "bona fide lessee" principle, but claim it is inapplicable to the Assembly because there is nothing "unfair or inequitable" in the Assembly's circumventing the reversion by effectively leasing the property to itself for a period five years beyond the reversion. (R&R Br., 55-56).

Again, as the court found, "AGM&M was effectively controlled by the leadership of the Assembly" in May 2009. (Jan.Op., 104) (JA-1167). The Assembly was well aware that the property was certain to revert to Cafesjian at the end of 2010. By entering into a lease that would extend until 2015, the Assembly

fully understood that it was performing an end run around the reversion and frustrating Cafesjian's possession of the property. Conduct that is more "unfair" and "inequitable" is difficult to imagine.

As to the payment of rent, the court found the record "unclear" as to whether the Assembly had paid rent to AGM&M in September 2009—even though the purported justification for the lease was to establish rental income to support the museum project. (Jan.Op., 138) (JA-1201). CFF's decision not to accept rent from the Assembly while the validity of the lease is the subject of pending litigation does not change the fact that the lease resulted from self-dealing, and the Assembly is not a bona fide lessee.

B. The Assembly Is Equitably Estopped From Seeking To Continue To Occupy The Property

The lease of the Families U.S.A. building was enabled only because (i) Cafesjian effectively donated the building to the Assembly for AGM&M's use as part of the museum project; (ii) Cafesjian donated the building only because the Assembly promised to return it at the end of 2010 if it were not developed, and because the Assembly agreed not to house its offices in the building; (iii) after the building was donated and transferred to AGM&M, Assembly insiders performed an end run around AGM&M's unanimity requirement to exclude Cafesjian from any AGM&M decisions about the building; and (iv) the same individuals, wearing their AGM&M and Assembly hats simultaneously, effectively leased the building

to themselves to ensure that they would not have to return the Grant Property to Cafesjian when promised.

Incredibly, appellants now claim that they have not "misled anyone," that CFF/Cafesjian have in no way relied to their detriment on any of appellants' assurances, and that equitable estoppel therefore should not apply. (R&R Br., 57). They contend that Cafesjian's argument proceeds from "faulty assumptions" (R&R Br., 56), even though those "assumptions" are amply documented in the record and, in some cases, unnecessary to the application of equitable estoppel:

- It is not an "assumption" that AGM&M and the Assembly promised to return the property to Cafesjian if it were not developed by December 31, 2010. (*See* R&R Br., 56). The Assembly made this promise in Section 3.1(B)(ii) of the Grant Agreement, and AGM&M agreed to honor the promise in Section 1.2 of the Transfer Agreement.

- It is not an "assumption" that Cafesjian and the Assembly agreed that the Assembly offices would not be housed on the property. (*See* R&R Br., 56-57). The court found that the museum planning committee, which included "Assembly leadership and staff" (Jan.Op., 20) (JA-1083) as well as Cafesjian, agreed in 2002 "that the Assembly offices would not be housed within any portion of the museum complex." (Jan.Op., 35) (JA-1098). Nowhere do appellants suggest that this finding is erroneous.

- Regardless of whether the illegitimacy of the BOC's formation is a "faulty assumption," it is immaterial to the applicability of equitable estoppel. (*See* R&R Br., 56-57). Even if Waters' "voluntary" departure from the May 2007 AGM&M Board meeting permitted the Board to form the BOC as a matter of law, appellants' actions in driving Waters from the meeting—and, upon his departure, promptly acting to "delegate" critical Board decisions to a committee on which Cafesjian was unrepresented—smack of bad faith. Moreover, even if the lease were valid as a matter of law, its validity would not change the character of appellants' conduct in circumventing the reversion by entering into a self-dealing lease that extended beyond the reversion.

- It is not an "assumption" that appellants entered into the lease with the "specific intention" of undermining Cafesjian's taking of the property upon exercise of the reversion. (*See* R&R Br., 57). While the circumstances are strongly suggestive of such an intention, appellants' conduct would be no less inequitable had they extended the lease without the reversion in mind. It cannot be disputed that appellants were aware of the reversion, or that they knew when the lease was executed that the reversion would be triggered.

Appellants do not dispute the applicability of equitable estoppel where a party has relied to its detriment on materially false representations. *See, e.g., Cassidy v. Owen,* 533 A.2d 253, 255 (D.C. 1987). They contend only that there

were no false representations and that there was no reliance. The record evidence shows otherwise.

C. The Court Abused Its Discretion By Failing To Invoke Its Equitable Powers To Prevent The Assembly From Remaining On The Property

The court's holding elevated form over substance by distinguishing between TomKat—which deeded the Families U.S.A. building to AGM&M—on the one hand, and Cafesjian/CFF on the other. In doing so, the court ignored the obvious link between Cafesjian and TomKat, as well as Cafesjian's obvious intent to donate the Families U.S.A. building on the condition that it be returned to him if the property were not developed. This hypertechnical application of property law enabled appellants, in turn, to elevate form over substance themselves through a "lease" that enabled appellants to remain on the property after the Grant Agreement required them to return it to Cafesjian.

As explained in appellees' opening brief, if the court's decision were allowed to stand, any holder of property in fee simple could defeat an executory interest simply by deeding the property to an affiliate, then leasing the property back from its affiliate for decades. Brief of Appellees/Cross-Appellants at 57. Appellants do not dispute this possibility, nor do they attempt to defend such an obviously undesirable result.

Instead, appellants respond to "straw man" arguments immaterial to this appeal. They point out that a lease cannot defeat either a reversionary interest, as the court held below, or a contract that prohibits the holder of the property interest from leasing the property. But when an executory interest is on the verge of being triggered, what is to stop the property holder from entering into a sham "lease" with its functional alter ego that effectively allows it to remain on the property indefinitely? Only equity can address such an injustice. Appellants' failure to mount an argument to the contrary—and their complete silence as to the obvious public interest in developing the property and constructing the museum—speak volumes.

CONCLUSION

For the reasons set forth herein, appellees respectfully request that the Court reverse the district court's September 2011 opinion.

DATE: October 29, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October 2013, a copy of the foregoing document was filed electronically with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system.

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I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B) because this brief contains 5,297 words, excluding the part of the brief exempted by Fed. R. App. P. 32(a)(7(B)(iii).

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