EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

216 JAMAICA AVENUE, LLC,	)	**CASE NO. 1:06CV1288**
	)	
Plaintiff,	)	**JUDGE CHRISTOPHER A. BOYKO**
	)	
v.	)	
	)	**REPLY BRIEF IN SUPPORT OF**
S & R PLAYHOUSE REALTY CO.,	)	**DEFENDANT'S *INSTANTER***
	)	**MOTION FOR LEAVE TO FILE**
Defendant.	)	**SUPPLEMENT TO**
	)	**DEFENDANT'S MOTION FOR**
	)	**SUMMARY JUDGMENT AND IN**
	)	**RESPONSE TO PLAINTIFF'S**
	)	**SUPPLEMENTAL BRIEF IN**
	)	**OPPOSITION.**

Plaintiff 216 Jamaica Avenue LLC ("Jamaica") has opposed defendant S&R Playhouse Realty Co.'s ("S&R") Motion for Leave to File Supplement to Defendant's Motion for Summary Judgment by attempting to block the affidavit of the only person in this case to date who was involved in the 1982 Assignment. Jamaica relies upon the 1982 Assignment in making a claim for an extraordinary increase in rent. Jamaica argues that Mr. Ketteler's affidavit is "inadmissible parol evidence offered to vary the unambiguous terms of the Lease and the 1982 Assignment and Assumption." Jamaica dodges the issue.

Contrary to Jamaica's argument, S&R contends that Mr. Ketteler's testimony sheds further light upon the parties' intent, and is perfectly consistent with the plain terms of the Lease. To the extent, however, that Jamaica argues that in the 94th year of a 99 year Lease, a complex index (found nowhere in any of the relevant documents) based upon the value of gold is to be used to increase rent from $35,000 annually to $1,000,000 annually, then Mr. Ketteler's

testimony goes toward showing both the parties' intent in connection with the 1982 Assignment and that S&R relied upon the fact that rent was $35,000 when it entered into the 1982 Assignment.

Jamaica begins its argument in its Supplemental Brief in Opposition to Defendant's *Instanter* Motion For Leave to File Supplement to Defendant's Motion for Summary Judgment ("Supplemental Brief") with a litany of bullet points attempting to show Mr. Ketteler's lack of recall related to the Lease and 1982 Assignment. (Supplemental Brief at pp. 1-2.) None of Jamaica's points, however, nor its Supplemental Brief, say anything about what Mr. Ketteler remembers and knows:

1. Mr. Ketteler was, before and after the 1982 Assignment, CFO of Schottenstein Stores and oversaw financial information passed to Mr. Jerome Schottenstein.[1] (Ketteler dep. at 8-9.)[2]

2. Mr. Ketteler oversaw the financial records and established the banking relationships for the Halle Brothers Company. (Id. at 10.)

3. Mr. Ketteler worked with Mr. Jerome Schottenstein on the 1982 Assignment. (Id. at 13.)

4. Mr. Ketteler was familiar with the property central to this dispute, knew that it was losing approximately $6 million a year, and remembers that Mr. Schottenstein felt that it was economically necessary to redevelop the property from a retail department store into an office complex. (Id. at pp. 15-16.)

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[1] Jerome Schottenstein owned Halle Brothers Company, the other party to the 1982 Assignment upon which Jamaica relies in an attempt to show a novation of the 1912 Lease.

[2] Mr. Ketteler's deposition transcript is attached to plaintiff's Supplemental Brief as Exhibit B.

5. Mr. Ketteler stated that Mr. Schottenstein felt the Lease would have to be assigned to accomplish redevelopment because he lacked the necessary expertise. (Id. at p. 16.)

6. Mr. Ketteler recalled that rent under the Lease was $35,000 per year. (Id. at p. 32.)

7. Mr. Ketteler stated that he was involved with the Halle Building both before and after the 1982 Assignment. (Id. at p. 33.)

8. Mr. Ketteler stated that any negotiation regarding a rent payment in gold that would have increased rent under the Lease from $35,000 to more than $500,000 (such as under plaintiff's theory) would have been astounding and remarkable. To Mr. Ketteler's knowledge, no such conversations ever took place. (Id. at pp. 33-34.)

Jamaica attempts to seize upon the instances where Mr. Ketteler lacks knowledge to argue that the Court should disregard all of Mr. Ketteler's testimony. Jamaica misleadingly cites *MGPC, Inc. v. Duncan*, where "officials" possessing records showing that certain meetings took place, but having no present recollection of those meetings, did not mean that the opposing party's rendition of events were untrue and thus there was no genuine issue of fact. *MGPC,* 581 F. Supp. 1047, 1060 (D. of Wyo. 1984). This line of reasoning is not analogous to the facts in this case. Unlike the "officials" in *MGPC*, Mr. Ketteler remembers many things.

In addition, regarding a "gold clause" discussion in 1982, Mr. Ketteler states that such a negotiation concerning payment in gold would have been *remarkable.* (Ketteler dep. at 33.) Mr. Ketteler's lack of knowledge of such a remarkable discussion is evidence that it did not occur. Moreover, unlike the plaintiff in *MGPC,* Jamaica has not and cannot adduce contrary evidence. Here, such evidence would be that the parties did discuss a gold clause at the time of the 1982 Assignment. Such evidence does not exist.

In the absence of a discussion of the "gold clause," and in light of the lessor's and lessee's conduct over the past quarter century, there was no meeting of the minds as required by Ohio law on an escalation of rent under the Lease.[3] *See Bahner's Auto Parts v. Bahner*, No. 97CA2538, 1998 Ohio App. LEXIS 3453, at *23 (Scioto Cty. July 23, 1998) (holding that "[n]ovation is based upon the theory that a new contract has been made, in which there has been a *complete* meeting of the minds) (emphasis added; attached as Exhibit F to Defendant's Reply Brief in Support of Summary Judgment).

Further, it is clear that S&R relied upon the amount of rent to be paid under the Lease in entering into the 1982 Assignment. Mr. Ketteler's testimony tends to prove that rent was $35,000 at the time S&R entered into the 1982 Assignment. Jamaica has offered no evidence to suggest otherwise. Further, it defies sense to suggest that rent was being paid in gold under plaintiff's theory in an amount of approximately $500,000 prior to the 1982 Assignment and that after that assignment, S&R paid only $35,000. The available evidence and all logic shows that S&R's predecessor lessee paid $35,000 annually in rent.

It follows that S&R was induced to enter into the 1982 Assignment by the language of the Lease and by the amount of rent being paid by its predecessor lessee. S&R would not have entered into the 1982 Assignment had the lessor or prior lessee informed S&R that rent was

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[3] S&R's 24 years of paying $35,000 in rent is itself strong evidence of the intent of the lease's provisions. It is within the province of the Court to consider course of conduct evidence to divine the parties' intent. *Lincoln Elec. Co. v. St. Paul Fire & Marine Ins. Co.*, 210 F.3d 672, 687 (6th Cir. 2000). Consideration of a course of conduct is permissible because silence can sometimes reflect the contracting parties' contemporaneous belief. Cf. *United States v. Hoosier*, 542 F.2d 687 (6th Cir. 1976) (per curiam) (silence as an admissible party admission under Fed. R. Evid. 801(d)(2)(B)). The existence of such a contemporaneous belief would suggest a particular contract meaning. That meaning, in turn, would preclude the existence of an ambiguity or clarify a facially ambiguous term. *Lincoln Elec. Co.*, 210 F.3d at 687. S&R has a well established course of conduct—for 24 years $35,000 per year was paid for S&R's space under the 1912 Lease. For 24 years, $35,000 was accepted as payment in full and no objection was made by the lessor. That course of conduct leaves no question that the rent due under the lease was $35,000, and not some other amount. Here, the 24 years of silence and acceptance of $35,000 clarifies any ambiguity alleged about the amount of rent due. If the rent was not $35,000 dollars per month, Jamaica's predecessor would have objected, insisted upon a change, and halted the parties' course of conduct.

payable in gold in an amount representing approximately a 1700% increase in rent. Mr. Ketteler was involved in the negotiations of the 1982 Assignment and states that such a suggestion would have been "astounding" and "remarkable." (Ketteler dep. at 33.) Thus, even if Jamaica's "gold clause" theory were right with respect to the language of the 1912 Lease, the lessor at the time—Jamaica's predecessor and in whose shoes Jamaica now stands—waived any different and higher rent. The course of conduct between the lessee and lessor, both before the 1982 Assignment and over the past 24 years after the 1982 Assignment, waives any requirement for a rent other than $35,000 per year. *See, e.g., Chicago Sugar Co. v. American Sugar Refining Co.*, 176 F.2d 1, 7 (7th Cir. 1949) (holding that that parties to a contract always have the right, by agreement or their course of conduct, to waive the requirements of their contract. And it has been held that one of the parties to the contract cannot by a long course of conduct lead the other party to believe that it will not insist upon a strict performance of a duty imposed by the contract, and then without notice insist upon strict performance).

Moreover, Jamaica's "gold clause" theory has no force whatsoever unless Jamaica can prove that the Lease was novated, as Congress rendered all gold clauses inoperative in 1933. Jamaica carries the burden of showing a novation. *Parkway Bus. Plaza Ltd. P'ship v. Custom Zone, Inc.*, 2006 Ohio 5255, P22 (Cuyahoga Cty. 2006).

As discussed above, novation under Ohio law requires a meeting of the minds. S&R read the plain language of the Lease in 1982 and accordingly paid rent under the Lease as did the prior lessee in the amount of $35,000 annually. Mr. Ketteler's testimony underscores that rent was and is $35,000 per year. A different rent under a theory of novation would have required a meeting of the minds. Indeed, it is Jamaica itself that makes the suggestion that a lack of consent to the gold clause may be inferred from Mr. Ketteler's lack of knowledge about discussion of a

particular clause of the Lease at the time of the 1982 Assignment. (Supplemental Brief at p. 4.) S&R understands that Jamaica finds this point concerning. Jamaica has the burden to show that the parties intended a novation. The facts of the case and the parties' conduct over almost the entirety of the 1912 Lease, however, defies Jamaica's claims and show compellingly that there was no novation because there was no melting of the minds.

It is beyond dispute that S&R has never paid more than $35,000 in annual rent. To suggest that the parties' minds met on the "gold clause" or that they agreed upon a highly-increased amount of rent in 1982 is nonsensical. The fact that Mr. Ketteler states that such a suggestion would have been "extraordinary" tends to prove that no such discussions occurred. Mr. Ketteler's testimony further shows that Jamaica has failed to meet its burden to show there was a meeting of the minds.

It follows that because Ohio requires a meeting of the minds for a novation, that Ohio law also requires that the parties *contemporaneously* consent to any novation of a lease, especially one where as here the resurrection of an inoperative clause would increase rent by many hundreds of percent. Mr. Ketteler's lack of knowledge of any such novation or "gold clause" discussion evidences that the parties did not contemporaneously consent to a novation reactivating the "gold clause" and thus there was no novation.

CONCLUSION

As a result of all the above, S&R respectfully asks that the Court grant S&R's motion to supplement its Motion for Summary Judgment with the Affidavit of Thomas Ketteler, as well as with his sworn deposition testimony taken by Jamaica.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing *Reply Brief in Support of Defendant's Instanter Motion for Leave to File Supplement to Defendant's Motion for Summary Judgment and in Response to Plaintiff's Supplemental Brief in Opposition* were filed electronically this 17th day of January, 2007. Parties will receive notice through the Court's electronic filing system.

/s/ Gary L. Walters
One of the Attorneys for Defendant
S & R Playhouse Realty Co.