IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MARTIN A. STEINER, Plaintiff and Appellant v. **PAUL THEXTON, as Trustee etc.,** Defendant and Respondent; **SIDDIQUI FAMILY PARTNERSHIP,** Intervenor and Appellant	**Supreme Court No.: S164928** **From Third District Court of Appeal No.: C054605**

ANSWER TO PETITION FOR REVIEW OF RESPONDENT PAUL THEXTON

Appeal from Sacramento County Superior Court,
Honorable Lloyd a. Phillips, Jr., Judge

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MARTIN A. STEINER,	)	**Supreme Court No.: S164928**
	)	
Plaintiff and Appellant	)	
	)	
v.	)	**From Third District Court of**
	)	**Appeal No.: C054605**
PAUL THEXTON, as Trustee etc.,	)	
	)	
Defendant and Respondent;	)	
	)	
SIIDDIQUI FAMILY PARTNERSHIP,	)	
	)	
Intervenor and Appellant	)	
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ANSWER TO PETITION FOR REVIEW

Respondent Paul Thexton hereby respectfully opposes the petition for review filed by Appellants Martin Steiner and Siddiqui Family Partnership and by which said Appellants ask this Supreme Court to review the May 28, 2008 decision of the Court of Appeal, Third Appellate District.

I. THE PETITION TO THE SUPREME COURT WAS NOT TIMELY FILED AS A RESULT OF WHICH THE COURT CANNOT CONSIDER APPELLANTS' PETITION FOR REVIEW

A petition for review must be filed within ten days after a Court of Appeal decision is final. California Rules of Court, Rule 8.500(e)(1). A Court of Appeal decision is final thirty days after its filing. CRC, Rule 8.264(b)(1). The decision of the Court of Appeal was filed on May 28, 2008. It became final thirty days thereafter, or on June 27, 2008. The last day to have filed the Petition to this Court was July 7, 2008. The Petition, according to the docket of the Court of Appeal, was not filed until July 8, 2008. The Petition is not timely and must be denied.

II. EVEN IGNORING THE LACK OF TIMELINESS OF THE PETITION, NO BASIS EXISTS FOR THE SUPREME COURT TO REVIEW THE DECISION OF THE COURT OF APPEAL

The Supreme Court may order review of a Court of Appeal decision when necessary to secure uniformity of decision or to settle an important

question of law. CRC, Rule 8.500(b)(1).[1] In the matter before this Court, no such "need" exists. Appellants have failed to demonstrate any inconsistencies between the Court of Appeal decision and any other portion of existing law. Even assuming *arguendo*, a timely filed Petition, there is simply no merit to the arguments presented and the request for review should be summarily denied.

III. PRELIMINARY STATEMENT

In seeking review in the Supreme Court, Appellants stubbornly adhere to the same erroneous perspectives which they unsuccessfully presented to both the trial court and the third appellate district. With respect to the underlying facts and circumstances, for example, Appellants fail (or perhaps refuse) to appreciate the distinction between contested allegations and adjudicated facts. Indeed, Appellants begin their legal analysis (Petition, page 2) by stating that "the facts relevant to this appeal are undisputed" only to then recite, in allegation after allegation, matters which are no more than their own unproven claims. For the most part, Appellants assert as "facts" matters on which the lower courts have specifically ruled against them.

Similarly, Appellants just as stubborn fail to recognize the legal and contractual distinctions which have been drawn by Respondents, the trial court and the Court of Appeal. Appellants, for example, may have correctly cited principles of contract law. However, they have applied them to the contract

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[1] Although Rule 8.500 provides three other bases for acceptance of review, none have any application to this matter.

for the purchase and sale of the Respondent's real property; not to the separate contract by which Appellants obtained an option to acquire that property. It is in ignoring this distinction that Appellants have mistakenly asserted an inconsistency between the Court of Appeal decision and existing law. The decision of the Court of Appeal did not make "new law" and is not inconsistent with existing law. It merely interpreted existing law in a manner which denied relief to Appellants. No basis for review exists.

IV. STATEMENT OF FACTS

Respondent Paul Thexton owns a 12.5 acre parcel of real property (the "Property"). The Property has been owned by the Thexton family for generations. Mr. Thexton was, at the time of trial, 62 years old and (excluding his brief military service) had lived on the Property his entire life. Reporter's Transcript (hereinafter, "R.T."), at 399:22-340:9. Mr. Thexton's grandparents lived on the same Property. In fact, the home in which Respondent's grandparents lived still sits (albeit abandoned) on the Property. R.T. 359:20-360:4. Mr. Thexton has never had any intention of selling the Property and fully intends for his children and grandchildren to continue to occupy the Property after his death. R.T. 367:25-369:13; 378:4-9.

In the fall of 2002, Appellant Mark Steiner was searching for land which he could develop for residential purposes. More specifically, he was looking for desirable but undeveloped lots in that part of Sacramento County known as Orangevale. R.T. 15:19-16:1. He happened upon Respondent's

parcel and was immediately interested.[2] Appellant went to the Property on several occasions, trying to meet with the owner to convey his interest in acquiring the Property. R.T. 18:2-15. Eventually, the parties met. According to Appellant, Appellant made clear his desire to purchase the Property and he offered what he considered to be "fair value" for the Property. R.T. 21:18-22:23. According to Respondent, Respondent made equally clear that he had no intention to sell the Property but Appellant nonetheless continued to try to induce him to sell. R.T. 528:4-8; 529:9-15.

Although the testimony concerning the parties' encounters (particularly those prior to the execution of the written agreement between them) varied dramatically, certain of the facts were clear. On September 4, 2003, the parties signed a Real Estate Purchase Contract (the "Contract").[3] The Contract was subsequently modified by a First Addendum in January, 2004.[4] On October

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[2] The Property sits immediately adjacent to a well established subdivision of million dollar and multi-million dollar homes.

[3] The Petition states that the parties had spent much of a year negotiating the terms of the Contract. Petition at 12. Most of the evidence at trial was to the contrary. Admittedly, Appellant went to the Property several times in the fall of 2002 trying to convince Respondent to sell the Property. However, the parties then did not speak for some eight to nine months thereafter before further discussions took place. R.T. 23:10-18.

[4] Appellants would have this Court believe that the Addendum was prepared at Respondent's request and that it benefitted Respondent. Petition at 16. Again, the evidence is to the contrary. The Addendum was prepared at the insistence of Appellants. As the writing itself establishes,

4, 2004, Mr. Thexton contacted Stewart Title, requested the cancellation of escrow, and approved the return of funds (the fully refundable $1,000 deposit) to Appellant Steiner. R.T. 47:18-24. Respondent based his attempted rescission on a number of factors, including his incapacity to enter into a binding agreement, the Appellants' misrepresentations, a lack of consideration to Respondent, and a fundamental change in pertinent circumstances. Most significantly, Respondent submitted that he lacked the capacity to understand and appreciate the purported contractual relationship, that there was no meeting of the minds with respect to the formation of an agreement, and that the resulting writing could not be enforced against Respondent.

For many years, Respondent Thexton struggled with chronic alcoholism that greatly hindered his ability to make rational decisions. Mr. Thexton experienced total black-outs, memory loss and disorientation. R.T. 353:12-16; 365:10-15; 367:20-24. Beginning in approximately 1999 or 2000, Mr.

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the Addendum deleted the requirement that the Buyer (Mr. Steiner) allow an easement for Seller's (Mr. Thexton's) access to the Property. The Addendum deleted the prohibition which would have prevented the Buyer from building within 100' of the Seller's home. Perhaps most interestingly, the Addendum "required" the Buyer to demolish the barn on the Property. Contrary to Appellants' contentions, Respondent did not want the barn demolished. Rather, Buyer did not want the dilapidated barn to be a portion of the view from the million dollar home he intended to build immediately adjacent thereto.

Thexton (who never completed high school)[5] realized that he was no longer capable of handling his own personal or financial affairs. Accordingly, Mr. Thexton obtained a formal power of attorney (the "POA") by which he transferred control over his person and estate, and all material decisions with respect thereto, to a Ms. Michelle James. R.T. 357:27 - 359:3. (Ms. James had no personal relationship with Mr. Thexton. They had met when Ms. James cared for Mr. Thexton's grandfather before his death.) The POA was in effect at the time the Contract was signed. According to Ms. James, she had made Mr. Steiner fully aware of the POA as far back as their first meeting. R.T. 530:14-15; 530:28 - 531:2. (She had been present when Mr. Steiner initially came to the Property and introduced himself to Mr. Thexton.) Nonetheless, he intentionally went behind her back to induce Respondent, with no knowledge or understanding of the intent of the Contract, to sign the Contract. Appellant made no effort to present the Contract to Ms. James, to seek her consent or approval with respect thereto, or to obtain her signature thereon. Appellant did so fully aware that this was the only home in which Mr. Thexton had ever lived.

In early October, 2004, Respondent ceased drinking. He explained that he suddenly appreciated that Appellant was trying to steal his home and he promptly sought to terminate the sale. R.T. 359:4-16. (Respondent further

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[5] Mr. Thexton served in the Army and in fact is a veteran of service in Vietnam. He obtained a GED while serving in the military. R.T. 341:18-26; 399:18-19.

alleged that Appellants were trying to obtain the Property at a price which was perhaps half of its fair market value, and provided expert testimony, discussed further *infra*, of such value.) Ultimately, the trial court was called upon to evaluate several legal and factual issues and to determine whether the Appellants could establish an entitlement to enforce the Contract.

The Contract states that buyer would provide seller with a deposit of $1,000. The purchase price is identified and stated to be $500,000. Trial Exhibit 1. Appellants correctly note that Respondent never asserted an inadequacy of consideration ***for the sale of the Property*** (assuming that the option were exercised and the sale consummated). However, the Contract also very clearly recites the terms of an option agreement between the parties, detailing that the Buyer has a unilateral right to acquire the Property along with the accompanying right to cancel the transaction at any time, for any reason, and at no cost to Buyer. However, as the trial court found and as the Court of Appeal confirmed, the Contract does not identify anything of value to Respondent, as Seller, which could be deemed to be consideration to the Seller for extending an option to the Buyer and for agreeing to hold his home off the market for as long as three years. Ultimately, Appellants failed to carry their burden of proof in that they failed to establish that there had been any consideration whatsoever provided to Respondent for the option.

V. THE COURT OF APPEAL DECISION IS NOT INCONSISTENT WITH EXISTING PRINCIPLES OF CONTRACT LAW

Reduced to its core, Appellants' primary argument is not one of law but

one of fact. The Court of Appeal affirmed the trial court's determinations: (1) that the written agreement between the parties constituted **both** (a) an option allowing a potential buyer to acquire real property for a pre-determined price ($500,000), within a pre-determined period of time (three years), while simultaneously allowing that buyer to also walk away from such arrangements in his sole and exclusive discretion; and (b) a contract for the purchase and sale of that real property, assuming that the option were timely exercised; and (2) that Appellants had not provided consideration to support the option. Appellants do not appear to be contesting the former finding and are not contending that the contract does not constitute an option. Rather, they are asserting that adequate consideration existed for the option. They continue to assert that the purported promise "to move expeditiously" constituted "adequate consideration." However, the adequacy of consideration is a question of fact to be determined based upon applicable facts and circumstances and is not something which this Court should (or can) consider anew on this Petition. See 13 Witkin, *Summary of California Law*, 10th, Equity, § 38, citing, *inter alia*, *Gomes v. Borba* (1950) 99 Cal. App. 2d 38, 42. See also, *Helbing v. Helbing* (1948) 89 Cal. App. 2d 224, 228, relying primarily on this Court's decision, almost 100 years ago, in *Schrader v. White* (1916) 173 Cal. 441, 446. It is equally clear (again, as found by both lower courts) that any promise by Appellants, assuming that it existed at all, is

consideration, not for the option, but for the purchase itself.[6]

Appellants argue that the Court of Appeal decision is inconsistent with this Court's holding in *Bleecher v. Conte* (1981) 29 Cal. 3d 345. They compare the factual circumstances under which *Bleecher* found adequate consideration with the factual circumstances in this case. The argument is that both cases addressed "promises" to, for example, proceed with diligence and that because such "promises" were acceptable to one finder of fact, they should, as a matter of law, be acceptable to another. However, the arguments presented by Appellants have no bearing on the legal issue before this Court.[7]

Bleecher, despite whatever similarities Appellants might allege, did not involve an option. The buyer had entered into a binding contract to purchase property. Because the defendant/seller sought to avoid the transaction, the plaintiff/buyer sought specific performance. (The similarities to this case end there.) In *Bleecher,* the "escape clause" contained language in which the buyer **expressly promised** to refrain from withholding performance "unreasonably." (*Bleecher*, *supra*, 29 Cal.3d at 351.) The Court of Appeal below recognized this distinguishing factor in Bleecher and found the case to be inapposite.

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[6] See, also, *Cooper v. Cereghino* (1929) 101 Cal. App. 290 and *Foley v. Cowan* (1947) 80 Cal. App. 2d 70 holding that the requirement of adequate consideration is an element of the cause of action for specific performance which must be pleaded and proven by the plaintiff.

[7] Respondent also objects to the entirety of Appellants' argument that this Court must, by operation of law, read a good faith requirement into the escape clause of the Contract. This argument was not raised before either court below. See *People v. Randle* (2005) 35 Cal. 4th 987, 1001.

Nonetheless, in their Petition to this Court, Appellants confuse the unilateral rights of an optionee with the contingencies in an otherwise mutual and reciprocal (bilateral) contract. *Bleecher* involved failed contractual contingencies. It did not involve an option. A buyer seeking to escape a bilateral agreement by refusing to approve conditions precedent to performance has an obligation to consider those conditions in accordance with the implied covenant of good faith and fair dealing. Respondent does not deny the application of the covenant to a bilateral agreement. However, such principles have no application to a unilateral right.[8] The Contract explicitly left Appellants with an absolute right, at any time and for any reason, to abandon their relationship with Respondent and to do so at no cost to Appellants. Again, there is nothing inconsistent between *Bleecher* and the Court of Appeal decision herein. A more appropriately analogous situation is that presented by *County of Alameda v. Ross* (1939) 32 Cal. App. 2d 135 in which the court invalidated a contract for lack of mutuality of obligation. *Bleecher* did not involve that lack of mutuality because the parties explicitly

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[8] See, *Foley v. Euless* (1931) 214 Cal. 506, 611 holding that a covenant will not be implied to contradict the express terms of a contract. See also, 1 Witkin, *Summary of California Law*, Contracts, § 797 citing extensive authorities. Because a unilateral contract includes the right of one party to **elect** whether or not to perform, the covenant cannot impose an obligation compelling performance, at least until the option is exercised. (See Witkin, *id*, at section 801 noting that the essence of the good faith covenant is objectively reasonable conduct and concluding that a party with a unilateral right to change contract terms is not acting in an objectively reasonable manner when it endeavors to do so.)

bargained for a reasonableness restriction on the power of the buyer to walk away. The matter at bar does lack mutuality, and does by the express design of Appellants. It is readily apparent that the promise to perform in *Bleecher* has no materiality incident to the option in this case because the latter is expressly superceded by contractual language (written by Appellants) to the contrary.

Finally, notwithstanding the arguments made above, Appellants continue to contend that they had this alleged duty to proceed expeditiously. It is readily apparent however - and was so found by both lower courts - that no such duty existed. The Contract provides that:

> "**It is expressly understood that the Buyer may, at its absolute and sole discretion during this period, elect not to continue in this transaction and this purchase contract will become null and void**".

Mr. Steiner retained for himself the right, at any time, to abandon the contract. He could have made that decision the minute after the contract was signed, a day later, a week later, or three years later. Because he could have abandoned the contract, there was no obligation to "proceed expeditiously" or even to proceed at all. Clearly, there was an option and just as clearly, no consideration was provided to Respondent for that option. There is absolutely nothing in the Court of Appeal decision which is inconsistent with *Bleecher*

or with any of its progeny.[9]

VI. THE COURT OF APPEAL DECISION IS NOT INCONSISTENT WITH THE DOCTRINE OF PROMISSORY ESTOPPEL

The arguments in opposition to Appellants' contentions with respect to the doctrine of promissory estoppel are far too numerous to make in the limited space allotted for an Answer to this Petition. Indeed, the largest portion of the Respondent's opposition brief in the Court of Appeal was devoted to this very issue. Nonetheless those arguments, a confluence of public policy and long standing legal precedent, must be summarized for this Court.

A. The Equities In This Matter Do Not Support Appellants' Appeal To The Doctrine Of Promissory Estoppel.

Promissory estoppel is, in essence, am **equitable** principle. As a result, Appellants' arguments with respect thereto are unpersuasive. Appellants

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[9] Appellants end their discussion of *Bleecher* by referencing several other cases which they claim support the argument advanced in this matter. (See Petition at 4-5.) None of such authorities has any bearing on this case. In *Carma Developers, Inc. v. Marathon Development California, Inc.* (1992) 2 Cal. 4th 342, for example, this Court addressed the application of the implied covenant against the party who had the contractual right to exercise broad discretion and did so in order to limit that discretion. *Ibid.* @ 371. Here, that "broad discretion" is held by Appellants, the party seeking to impose the covenant against Respondent. Also, *Carma* confirms (as otherwise cited, *supra)* that the covenant cannot be utilized to vary the express terms of a contract. *Ibid.* @ 374. For the same reasons, *Storek & Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal. App. 4th 44 and *Third Story Music, Inc. v. Waits* (1995) 41 Cal. App 4th 798 are similarly inapplicable.

assert that the Court of Appeal erred by "conducting a far-ranging re-examination of the equities of the original promise." (Petition, page 28.) Respondent cannot help but notice the irony of the Appellants' contentions. Appellants note (Petition, page 7) that the Court of Appeal decision creates a new test by which a litigant could ask a court, applying hindsight, to evaluate potential claims of injustice. Far from creating a "new test," the Court of Appeal performed the precise analysis required: it looked first to the equities involved to determine whether or not even to begin to adopt the doctrine in this case. **Appellants'** entire presentation, both at trial and on appeal, has been to play "Monday morning quarterback" and to assert (entirely in hindsight) that they **did** begin to perform, and that they **did** take steps in furtherance of their intentions. Respondent has just as consistently argued that such an after-the-fact analysis has no part in this case. Respondent relied at trial and on appeal on the principles of *Drullinger v. Erskine* (1945) 71 Cal. App. 2d 492, *O'Connell v. Lampe* (1929) 206 Cal. 282 and the cases cited therein. The Court of Appeal expressly agreed, recognizing, as this Court held almost 80 years ago, that: "(T)he accepted rule in this state is that the question of the inadequacy of the consideration relates to the time of the formation of the contract, that is, the time the contract was made." *O'Connell v. Lampe* (1929) 206 Cal. at 285. Respondent has never asked any court to perform any type of hindsight analysis - although Appellants have certainly done so.

Respondent is equally disturbed by the inference that Appellants have somehow been victimized in this case. If a court is being asked to consider

equitable principles and ultimately to consider "doing equity", it is clearly Respondent who has been "victimized" by Appellants' efforts to steal from him the only home in which he has ever lived - and at a price which is less than half of its value. As Respondent argued previously, one cannot simply ignore reality just because one walks through the doors of the legal system.

Appellants are experienced real estate developers and engineers. They seek to build homes on the Property. They agreed to pay $500,000 and testified that they would be paying fair value for the Property. Respondent, among the various defenses which he asserted (and one which was not ruled upon by the trial court), claims that he was fraudulently induced to sell his home and to sell it at a price far less than its fair market value. Significantly, Respondent provided expert testimony that the Property (as of the date of the Contract) was worth approximately $900,000. R.T. 647:25-648:3. Appellants, on the other hand, contended that the Property, considering its highest and best use, was only worth $435,000. In other words, Appellants would have this esteemed Court believe that they are prepared to spend $60,000 in development fees (not to mention hundreds of hours of their own professional time), and another $200,000 to $300,000 in litigation expenses, all to then obtain the right to purchase for $500,000 a parcel of property which is only worth $435,000. Common sense tells us that Appellants are being less than candid and that Mr. Thexton is correct when he asserts that he was in fact duped into selling the only property on which he has lived. Can the Court of Appeal seriously be questioned for concluding that Appellants had not

demonstrated injustice?

Similarly, the judicial system cannot ignore the reality of the development world. Real estate development and residential home construction is a slow, expensive and sometimes agonizing process. Land has to be subdivided and mapped. One has to examine property for soil compaction and capacity; toxics; environmental, water and wetlands issues; and title, administrative and topographical concerns. One has to go through months or even years of administrative processes to seek approvals of zoning, density, lot sizes, roads, easements, access, utilities and a myriad of related concerns. **No developer actually buys land before knowing if he can acquire sufficient governmental approvals to make a project financially successful.** Developers know full well that these administrative expenses are a part of their costs of doing business and it is unconscionable for a developer to come to this Court and assert otherwise. Development fees were a routine expense anticipated and budgeted by Appellants, particularly in this case where they were seeking to acquire what they admitted was a land-locked parcel. Appellants' cost of doing business was not ever considered a part of the consideration to be delivered to Respondent.

B. The Doctrine Of Promissory Estoppel Is Unavailable As A Consideration Substitute For An Option Contract.

In focusing on an **option** contract, the prejudice which the Appellants assert cannot constitute consideration, substitute or otherwise, and Appellants'

efforts to apply estoppel principles to this matter must fail. To hold otherwise would essentially stand jurisprudence on its head and destroy the consideration requirement for contractual options. After all, *any promisee could simply begin performance and then claim its acts as consideration*. In other words, in the context of the customary practice by which one **pays** another to hold property off of the market, the former would **never** make payments to the latter. It would simply contend, as have these Appellants, that the steps undertaken to evaluate the merits of acquisition (i.e. the buyer's due diligence or, as in this case, the buyer's "expeditious movements") constituted adequate consideration. However, such "contentions" would never come close to compensating the promisor for the loss of alienation rights because the promisee could still claim the unfettered discretion to repudiate the agreement at the end of the diligence period. The buyer must still establish **independent** consideration for the option. See, *Marsh v. Lott* (1908) 8 Cal. App. 384, 389.

This Court adopted the definition of promissory estoppel from Section 90 of the Restatement 2d of Contracts:

> "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

C & K Engineering Contractors v. Amber Steel Co. (1978) 23 Cal. 3d 1, 6. Appellants argue that their performance with respect to the development

process constituted a detrimental change of position and should qualify as a consideration substitute. However, Appellants have also consistently argued that such performance was actually a portion of the final purchase price (i.e. Respondent agreed to a reduction in price in exchange for Appellants' agreement to handle the parcel split process). R.T. 23:25-25:11. Appellants' dilemma becomes clear: in order to even get to the promissory estoppel claim, this Court must assume that the option-lacking-consideration analysis is correct. This means that the contingencies described in the Contract were necessarily consideration for the actual purchase of the Property. However, if their performance (i.e. the steps undertaken as a part of the administrative processes) was bargained-for as consideration for the purchase price, Appellants can not **also** be allowed to claim that the **same actions** are consideration substitutes **for the option**. Quite simply, if Appellants' argument were to be accepted, it would effectively *destroy* the separate consideration requirement for option contracts. *Any promisee would simply need to perform (in whole or in part) on the actual contract itself in order to avoid tendering consideration for an option*. Consequently, invoking the doctrine of promissory estoppel is substantively impossible in this instance.

The Court must also appreciate that so long as the written "Contract" constitutes only an offer (see *Torlai v. Lee* (1969) 270 Cal. App. 2d 854 holding that an option unsupported by consideration constitutes merely a revocable offer), Appellants are deficient in **two** of the three necessary elements for the formation of a valid contract: consideration **and** acceptance.

Promissory estoppel can only be invoked as a consideration substitute, not a consideration and acceptance substitute. *Bard v. Kent* (1942) 19 Cal. 2d 449, 453.

VII. CONCLUSION

The doctrine of promissory estoppel, as a "tool" of equity, provides courts with wide discretion in its application. Even if a court finds, in a particular instance, that basic elements are met, it should only apply the doctrine "if injustice can be avoided only by enforcement of the promise." *C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal. 3d 1, 6. Assuming *arguendo* that Appellants' actions in furtherance of the Contract functioned as a substitute for their lack of consideration for the option, if injustice can otherwise be avoided **or if no injustice is actually present,** the doctrine should not be applied. The Court of Appeal correctly concluded that Appellants suffered no real injustice. Appellants are experienced real estate developers. (R.T. 15:11-12; 193:6-8.) Respondent has never been involved in a **real property** transaction in his life. (R.T. 376:21-28.) Appellants drafted the Contract and were responsible for preparation and clarification of its terms. Respondent presented substantial evidence, including expert testimony, all of which was uncontested, concerning the manner in which residential real estate developers evaluate development projects before deciding whether to proceed therewith. (R.T. 587-596.) Developers understandably do not want to risk their own money each time they evaluate a particular project. Rather, they attempt to determine the financial feasibility

before committing to purchase the underlying real estate. Appellants wanted a "free look" at the Property without compensating Respondent for the time he agreed to keep the Property off the market. However, Appellants failed miserably at demonstrating any actual prejudice, let alone the injustice required by law. No basis was established to support estoppel and both the trial court and the Court of Appeal properly denied Appellants' contention.

Appellants also argue that this Court should apply promissory estoppel because Respondent should have reasonably expected that his promise would induce Appellants' detrimental reliance, thus explaining their partial performance. (Petition, page 27.) The "contingency" in the Contract to which they point is that "[b]oth Buyer and Seller understand that Buyer **could have** substantial investment during this development period." It is from this "could have" language that Appellants take the massive and generally illogical leap to infer that "it is indisputable that Thexton 'should reasonably expect' his promise to induce detrimental reliance by appellants." (*Ibid.*) The actual language of the Contract "contingency" belies this point: "could have" does not mean "will have." Appellants then take the "contingency" even further claiming that the Contract "**required** appellants to provide 'substantial investment during the development period...'" (Petition, page 29.) Appellants' argument is a gross mischaracterization of both the actual language of the Contract provision and the overall issue before the Court. The escape clause essentially forecloses the promissory estoppel argument by Appellants precisely because, given Appellants' unfettered discretion to walk

away from the deal, Respondent could **never** have "reasonably expected" that any action on his part would "induce" any reliance on Appellants' part. At any point in time, Appellants could have abandoned the Contract, leaving Respondent with no absolutely no rights and with no legal remedy.

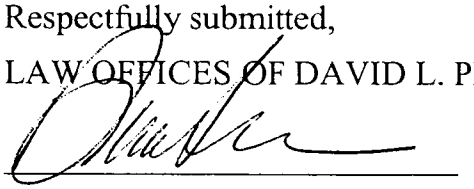
Respondent's promise was made at formation, i.e. "I will sell the subject property when you tender the agreed upon price to me." That promise is explicit in the Contract. That promise is also made **at the same time** that Appellants reserved to themselves the right to walk away at any time and for any reason, prior to payment. Because of this, the reasonable expectation prong of the promissory estoppel test can never be met where an option is involved.

Ultimately, Appellants' arguments to this Court are nothing more than the inappropriate assumptions of their own unsupported (and unsupportable) conclusions. Their arguments may be logical, coherent and well written; but only when one accepts as a given either that there was not an option, or that the option is fully supported by consideration. For the same reasons that the courts below have rejected these contentions, this Court should similarly decline Appellants' request to apply promissory estoppel to the pending matter.

The Court of Appeal made no effort to create new law. Certainly, its decision is not inconsistent with existing law. The Court of Appeal quite properly applied the circumstances inherent in this matter to pending, applicable legal principles and determined that the trial court decision was legally sound and supported by an adequate factual basis. No justification has

been shown, because none exists, for the Supreme Court to accept this matter and Respondent Paul Thexton respectfully asks the Court to deny the Petition.

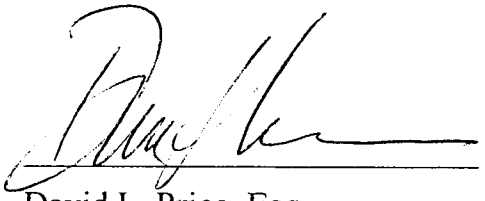
Respectfully submitted,
LAW OFFICES OF DAVID L. PRICE



David L. Price, Esq.
Attorney for Respondent Paul Thexton
Dated: July 22, 2008

VIII. CERTIFICATE OF WORD COUNT

I, the undersigned, as counsel for Respondent Paul Thexton, hereby certify that the text of this brief, the Answer to Petition for Review of Respondent Paul Thexton, consists of 5438 words, as counted by the Corel Wordperfect word-processing software which I used to prepare this brief.



David L. Price, Esq.
Attorney for Respondent Paul Thexton

Dated: July 22, 2008

PROOF OF SERVICE

Court: **SUPREME COURT OF THE STATE OF CALIFORNIA**

Case Name: ***MARTIN A. STEINER, et al. v. PAUL THEXTON as Trustee of FAS FAMILY TRUST, etc.***

Case Number: **Supreme Court No.: S164928**
Third District Court of Appeal No.: C054605
Sacramento County Superior Court No.: 04AS04230

I am a citizen of the United States and am employed in the County of Placer. I am over the age of eighteen (18) years and not a party to the within action; my business address is 3300 Douglas Blvd., Suite 125, Roseville, California 95661.

On **July 23, 2008**, I served the following document(s):

1. **ANSWER TO PETITION FOR REVIEW OF RESPONDENT PAUL THEXTON**

MANNER OF SERVICE

I served such party(ies) in the manner described below:

✓ (**BY MAIL**) I am familiar with this firm's practice whereby the mail, after being placed in a designated area, is given the appropriate postage and is deposited in a U.S. mailbox in the City of Roseville, California after the close of the day's business. I placed a true copy of the above-described document in a sealed envelope with postage thereon fully prepaid, in the designated area for outgoing mail.

Counsel for Plaintiff Martin A. Steiner: **Robert Vaughan, Esq.** 11879 Kemper Road, Suite 1 Auburn, CA 95603		**Counsel for Plaintiff in Intervention Siddiqui Family Partnership:** **Klaus J. Kolb, Esq.** 400 Capitol Mall, 11th Floor Sacramento, CA 95814

I served such party(ies) in the manner described below:

✓ (**BY PERSONAL SERVICE**) I caused a copy of the above-described document to be delivered by hand to the address(es) listed below:

California Supreme Court c/o Sacramento Location at Stanley Mosk Library and Courts Building 914 Capitol Mall Sacramento, CA 95814 (1-original; 13 - copies)	**Court of Appeal (Third District)** 900 "N" Street, Rm. 400 Sacramento, CA 95814 (1 - copy)	**Trial Court:** **Sacramento County Superior Court** The Honorable Lloyd A. Phillips, Jr. c/o The Honorable Judge James M. Mize, Presiding Judge 720 Ninth Street, Dept. 47 Sacramento, CA 95814 (1 - copy)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Proof of Service was executed on **July 23, 2008**, at Roseville, California.

Mary A. Martinez