IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

REPLY IN SUPPORT OF PETITION FOR REVIEW OF APPELLANTS MARTIN A. STEINER and SIDDIQUI FAMILY PARTNERSHIP

Appeal From Sacramento County Superior Court No. 04AS04230,
Honorable Lloyd A. Phillips, Jr., Judge

KLAUS J. KOLB (SBN 146531)
400 Capitol Mall, 11th Floor
Sacramento, CA 95814
Telephone: (916) 558-6160
Facsimile: (916) 492-0598

Attorney for Appellant
SIDDIQUI FAMILY PARTNERSHIP

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Attorney for Appellant
SIDDIQUI FAMILY PARTNERSHIP

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INTRODUCTION

The Answer To Petition For Review submitted on behalf of defendant Paul Thexton ("Thexton" or "defendant") actually supports plaintiffs' reasons for seeking review of the Court of Appeal's Opinion. The bulk of Thexton's Answer attempts to defend the legal conclusions announced by the Court of Appeal. In so doing, Thexton's Answer demonstrates how the Court of Appeal's opinion may be construed by attorneys and trial courts. The notable absence of authority cited in support of defendant's arguments confirms the fact that the Court of Appeal's Opinion creates new law on contract interpretation and the doctrine of promissory estoppel, with potentially broad application to a wide variety of contracts that have already been partly performed. Appellants Siddiqui Family Partnership ("SFP"), and Martin A. Steiner ("Steiner"), plaintiff (collectively "plaintiffs") respectfully renew their request for this Court to grant their Petition for Review.

ARGUMENTS IN REPLY TO ANSWER

A. The Petition For Review Is Timely.

As defendant Thexton acknowledges, the last day for plaintiffs to file their petition for review was July 7, 2008. The petition for review was deposited with the U.S. Postal Service, pre-paid for Express Mail delivery on the Supreme Court, on July 7, 2008. Pursuant to California Rule of

Court ("CRC") Rule 8.25(b)(3), the petition is deemed filed on July 7, 2008, and is therefore timely filed.

B. The Facts Relevant To The Petition For Review Are Undisputed.

Thexton asserts that, "[f]or the most part, Appellants assert as 'facts' matters on which the lower courts have specifically ruled against them." Answer at 2. However, Respondent then fails to identify these allegedly disputed facts or trial court findings.

The facts relevant to the Petition for Review are indeed undisputed. Respondent's answer points to no specific evidence to the contrary. The facts set forth in the Answer's "Statement of Facts" are generally consistent with the facts summarized in the Petition for Review, with the exception of a few allegations that are not relevant to this appeal and are not supported by the record.

The Answer spends almost two pages (5-7) describing Thexton's drunken incapacity defense. The facts relevant to that affirmative defense *were* sharply disputed by the parties, and plaintiffs put on substantial evidence – including Thexton's own prior deposition testimony – to show that Thexton's drunken incapacity defense was concocted after the fact, in an attempt to excuse Thexton's breach of the Real Estate Purchase Contract ("Contract" – Trial Exhibit 1). Unfortunately, the trial court never ruled on that, or any of Thexton's 22 other affirmative defenses – *except for* the

claim that the Contract was a disguised option and void for lack of consideration. The Court of Appeal expressly noted that all of the evidence about Thexton's alleged alcoholism was "not relevant to our resolution of this appeal, ..." Opinion at 2, fn. 1.

Thexton's Answer also asserts (at 3) that "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." Thexton does not have any children or grandchildren (R.T. 315:1-3) (although some of his ex-wives had children). More importantly, Thexton specifically denied ever suggesting to anyone that he or she would inherit his property. R.T. 403:27-404:10.

In response to his counsel's questions, Thexton testified at trial that he currently had no intention of selling his Property (R.T. 367:25-369:13) and that he *would* not have agreed to sell the Property "*had you understood what you were doing*" (R.T. 378:4-9 [italics added]).

It is undisputed that the contingent nature of the Contract was a direct result of the parties' attempt to find a way for Thexton to sell part of his Property, *while retaining the portion around his home and selected out buildings.* Plaintiffs were required to seek a parcel split and development approvals precisely because the parties were attempting to preserve Thexton's home and selected property while also allowing Thexton to sell

the remaining portion of his Property. Thexton's Answer does not explain the fact that Thexton previously testified to requesting a proposal from Steiner (R.T. 418:28-420:6), negotiating for specific provisions in the Contract such as keeping the well and a farming access easement (R.T. 443:4-445:12), and specifically recalled signing the First Addendum To The Real Estate Purchase Agreement (Ex. 2) "on the back gate of Mr. Steiner's Tahoe vehicle, on the rear." R.T. 426:5-427:15. After Thexton's counsel took the deposition of plaintiffs' expert witness on alcoholism and learned that the "partial blackouts" that Thexton had previously described were a medical impossibility, Thexton changed his testimony at trial and claimed that he could not remember signing, or any discussion of, the Contract, the First Addendum[1], or the other documents he executed in support of plaintiffs' efforts to obtain a parcel split and development approvals (Trial Exhibits 1- 4). R.T. 408:11-412:6; 417:7-420:6. Thexton also does not address the fact that he sought to negotiate a higher sale price for his

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At page 4, footnote 4, the Answer asserts that the Addendum "was prepared at the insistence of Appellants," and that the requirement that "Buyer will demo the old barn/cattle yard and old home at no cost to Seller" benefitted only Steiner. The Answer does not provide any citations to the record to support this new assertion, which was never mentioned at trial. The also Answer does not explain why it was in Buyer's interest to insist that Thexton receive "a standard water hookup at no cost to Seller," or that Thexton's remaining parcel "will not be less than 2 acres." Trial Ex. 2. The Answer also does not explain Thexton's subsequent letter to the County in which he states that "I plan on razing it [the old home] in the near future." Trial Ex. 4.

Property by telling Steiner that he had another offer for $750,000 that would have required Thexton to secure a parcel split and development approvals as a condition of sale. R.T. 23:19-25:11; 122:1-9; see Opinion at 26. In response to questions from his own attorney, Thexton testified that Steiner "could be telling the truth" about Steiner's negotiations with Thexton and how Thexton requested specific Contract provisions concerning mineral rights and water rights, but that Thexton simply could not remember. R.T. 445:18-446:23; see also R.T. 409:6-412:6.

In any event, the Court of Appeal's holding does not defer to alleged factual findings by the trial court. As the Court of Appeal confirmed: "The interpretation of the contract, which does not involve conflicting extrinsic evidence, is a question of law subject to de novo review." Opinion at 12. Further, the Court of Appeal held that, "even under a de novo standard" of review, "there was no adequate consideration" to support a contract in this case. In short, the Court of Appeal expressly announced that it was deciding a question of law based on undisputed facts. Opinion at 12, citing *Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888. Based on how the Court of Appeal characterized its decision, the holding in this case will have precedential value because of its application and interpretation of California law, and will not be limited to alleged factual findings by the trial court.

C. The Court of Appeal's Decision Creates New Law That Is Inconsistent With Prior Decisions By This Court And Other Appellate Districts.

Although Thexton's Answer begins by asserting that plaintiffs' "primary argument is not one of law but one of fact" (Answer at 7-8), the majority (pages 7-20) of Thexton's Answer is devoted to addressing what are clearly questions of law, as identified in the Petition for Review.

1. No Prior California Cases Convert A Contract With A Cancellation Provision Into An Option That Requires Separate Consideration.

Thexton's Answer asserts that *Bleecher v. Conte* (1981) 29 Cal.3d 345, is distinguishable from this case because: "*Bleecher*, despite whatever similarities Appellants might allege, did not involve an option." Answer at 9.

Thexton's argument highlights precisely why the Court of Appeal's Opinion is inconsistent with *Bleecher*. Contrary to Thexton's assertion in his Answer, the Contract in this case does ***NOT*** "very clearly recite[] the terms of an option agreement between the parties, ..." Answer at 7. To the contrary, the Contract on its face purports to be a bilateral Real Estate Purchase Contract. Nor does anything in the Contract create a fixed three-year option period, during which Buyers need do nothing but wait and consider whether to purchase the Property. The Contract only required Thexton to keep the Property off the market for so long as plaintiffs were

"expeditiously" moving forward with the work and "substantial investment"[2] required to accomplish the purpose of the Contract – approval of the parcel split that was required before Thexton could legally sell any portion of the Property to anyone. The Court of Appeal's Opinion (at 13) recognizes that the parties to the Contract did not "clearly recite the terms of an option agreement between the parties":

> We shall conclude (a) the agreement, despite its label as a real estate purchase contract, was really an attempt to create an option agreement; and (b) the attempt to create an option failed due to lack of consideration, such that the "contract" was nothing more than a continuing offer to sell which could be revoked by Thexton at any time.

The only reason this case involves an option, is because the Court of Appeal converted a bilateral contract with an escape clause into an option contract, instead of using standard rules of contract interpretation to give effect to the obvious mutual intention of the parties to enter into a binding bilateral contract. In so doing, the Court of Appeal declined to follow rules of contract interpretation that have been accepted in California since long before the *Bleecher* decision was issued by this Court. Thus in *Bleecher*, this Court upheld a bilateral contract with an escape clause based on the "well-established rules" requiring an implied duty of good faith and fair dealing in every contract, and requiring courts to "choose that interpretation

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[2] Trial Exhibit 1, p. 3, para. 2; p.2 "Contingencies" para. 3.

which will make the contract legally binding if it can be so construed without violating the intention of the parties." *Bleecher v. Conte, supra*, 29 Cal.3d at 350.

In *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 372, this Court explained.

> The covenant of good faith finds particular application in situations where one party is invested with discretionary power affecting the rights of another. Such power must be exercised in good faith.

The First and Second District Courts of Appeal followed this rule in *Storek & Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44, 57, and *Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 808:

> [W]hen a party is given absolute discretion by express contract language, the courts will imply a covenant of good faith and fair dealing to limit that discretion in order to create a binding contract and avoid a finding that the promise is illusory.

In *Carma*, this Court recognized that defining what is required by the covenant of good faith is not always easy, but cited with approval a commentator's suggested definition:

> In the case of a discretionary power, it has been suggested the covenant requires the party holding such power to exercise it "for any purpose within the reasonable contemplation of the parties at the time of formation – to capture opportunities that were preserved upon entering the contract, interpreted objectively." (Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith* (1980) 94 Harv.L.Rev. 369, 373, fn. omitted.)

Carma, supra, 2 Cal.4th at 372 [footnote omitted.]

The definition of what is required by the covenant of good faith cited in *Carma* applies perfectly to the facts relevant to this appeal. The escape clause at issue in this Contract (para. 7, p.2) provides:

> It is the intent of Buyer that the time period from execution of this contract until the closing of escrow is the time that will be needed in order to be successful in developing this project. 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.

Had the Court of Appeal followed the contract interpretation rules summarized in *Bleecher, supra*; *Carma, supra*; *Storek & Storek, supra*; *Third Story Music, Inc. v. Waits, supra,* and *Fosson v. Palace (Waterland), Ltd.* (1996) 78 F.3d 1448, 1454, the Court of Appeal could and should have concluded that the escape clause was reasonably limited to allowing Steiner to escape the Contract if obtaining the parcel split and development approvals required by the Contract became unreasonably expensive or time-consuming. This interpretation is supported by the fact that the Contract expressly referred to the "substantial investment" required by Buyer, and specified that all of Buyer's rights would end if the parcel split were not accomplished within three years. As explained in *Third Story Music, supra*, 41 Cal.App.4th at 805-806:

> "The tendency of the law is to avoid the finding that no contract arose due to an illusory promise when it appears that

> the parties intended a contract. . . . An implied obligation to use good faith is enough to avoid the finding of an illusory promise." (2 Corbin, Contracts [(rev. ed. 1995)] §5.28 at pp. 149-150.)

The Court of Appeal, however, rejected plaintiffs' common-sense explanation of the purpose of the escape clause:

> Although plaintiffs assert the only risk they intended was that the county might refuse to approve the parcel split, this intent does not appear in the written document, and any ambiguity would be resolved against Steiner as the drafter of the document.

Opinion at 25.

Instead of interpreting the Contract "to give effect to the mutual intention of the parties as it existed at the time of contracting" (Civil Code §1636), and instead of interpreting the Contract "so as to give effect to every part, if reasonably practicable" (Civil Code §1641), according to the plain meaning of the language used (Civil Code §1644) and "by reference to the circumstances under which it was made" (Civil Code §1647), the Court of Appeal chose to invalidate the Contract by resolving any ambiguity "against Steiner as the drafter of the document." Opinion at 25, citing Civil Code §1654. The Court of Appeal's holding is inconsistent with a long line of California cases and makes most of the accepted rules of contract interpretation irrelevant, by focusing only on a presumption against the party who prepared the written contract.

The Court of Appeal's Opinion and Defendant's Answer also persist

in ignoring the undisputed fact that plaintiffs substantially performed their obligations under the Contract before defendant attempted to cancel. In fact, it is undisputed that plaintiffs' completed a survey and preliminary lot configuration – and thereby provided consideration – before defendant even ratified the Contract by executing the First Addendum (Trial Exhibit 2). See Petition for Rehearing at 3-8; R.T. 34:5-37:2; 37:3-38:1; 38:20-39:7; 136:10-138:8; 148:17-149:2. Thexton's Answer and the Court of Appeal's Opinion both disregard the well-established rule that partial performance should be used to enforce a contract if a promise might otherwise be considered illusory. *Burgermeister Brewing Corp. v. Bowman* (1964) 227 Cal.App.2d 274, 280; *The Money Store Investment Corporation v. Southern California Bank* (2002) 98 Cal.App.4th 722, 728.

For the reasons summarized above and in the Petition for Review, the Court of Appeal's decision in this case is inconsistent with well-established California law, including the holdings in *Bleecher, supra*; *Carma, supra*; *Storek & Storek, supra* (1st Dist.); *Third Story Music, Inc. v. Waits, supra* (2d Dist.), *The Money Store Investment Corporation v. Southern California Bank , supra* (4th Dist.), and *Fosson v. Palace (Waterland), Ltd.* (9th Cir. 1996) 78 F.3d 1448, 1454.[3]

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[3] Footnote 7, page 9, of the Answer asserts that plaintiffs did not previously raise the argument that a good faith requirement must be read into the escape clause of the Contract. Thexton is clearly wrong. Plaintiffs discussed the

2. No Prior California Cases Hold That The Doctrine Of Promissory Estoppel Is *NOT* Available To Support An Option Contract.

Thexton's Answer first asserts that the equities in this case do not support application of the doctrine of promissory estoppel as a substitute for consideration for the alleged option portion of the Contract. In support of his argument, Thexton again cites other factual allegations and affirmative defenses on which the trial court did not rule, and which were not cited by the Court of Appeal. Thus the trial court never found that Thexton was fraudulently induced to sell his Property, or that plaintiffs offered to pay less than fair market value for the Property at the time they entered into the

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Bleecher and *Fosson* cases extensively in their Appellants Brief (e.g., pp. 31-34) and Reply Brief (e.g., 13-15, 19). For example, plaintiffs argued below:

> "In *Bleecher v. Conte, supra*, 29 Cal.3d at 352, the Supreme Court held that express and implied obligations to proceed in good faith were sufficient to make a conditional promise valid consideration for a bilateral contract."

Appellants' Reply Brief at 13-14. And Reply Brief at 19:

> "Defendant's argument requires the Court to assume that plaintiffs would try to defeat plaintiff's right to receive benefits under the Contract instantly upon signing the Contract. The undisputed evidence is to the contrary (see, e.g., R.T. 118:13-132:11; 258:22-260:20), and the holdings in *Bleecher v. Conte, supra,* and *Fosson v. Palace (Waterland), Ltd., supra,* 78 F.3d at 1454, instruct that Courts should not assume such unlikely and bad faith actions by parties to a contract."

Contract, or that the effort and expenditure invested by plaintiffs in seeking a parcel split and development approvals "were a routine expense anticipated and budgeted by Appellants." Answer at 13-15.

The Court of Appeal's opinion does not mention, let alone rely on, any such findings, and the precedential effect of the Opinion will not be limited or defined by defendant's attempt to infuse the Opinion with factual findings not in the record. In effect, the Answer suggests that, as a matter of law, anyone defined as a "developer" should be required to pay investigation and development fees, and that payment of these fees can never constitute a "benefit" or consideration to a seller, regardless of what the parties agree to in a written contract. Defendant cites no authority to suggest that this is currently the law in California or elsewhere.

The second and primary argument raised in the Answer in support of the Court of Appeal's refusal to apply promissory estoppel begins with the heading:

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

Answer at 15. The Answer goes on to argue (at 16) that:

> 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.*

Defendant's interpretation of the Court of Appeal's Opinion once

again supports plaintiffs' Petition for Review. The Answer cites no authority in support of the asserted rule that the doctrine of promissory estoppel is unavailable as substitute consideration for an option contract. To the contrary, in *Drennan v. Star Paving Co.* (1958) 51 Cal.2d 409, 414, this Court held that promissory estoppel *was* available to enforce "an offer for a bilateral contract" – i.e., an option.

The rule asserted by defendant and apparently adopted by the Court of Appeal is contrary to the accepted definition and purpose of the doctrine of promissory estoppel:

> 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. Nothing in this definition of promissory estoppel precludes application of the doctrine to option contracts.

A promise to hold a property for sale at a given price if the prospective purchaser bears the expense of obtaining approvals necessary for a parcel split is just as capable of inducing detrimental reliance as any other type of promise. There is no obvious reason for allowing a seller to intentionally induce detrimental reliance and cause a prospective purchaser to pay for development approvals, and then deny any relief to the purchaser

if the seller refuses to perform after the purchaser has delivered what was requested. As this Court explained in *Drennan v. Star Paving Co.* (1958) 51 Cal.2d 409, 414:

> Reasonable reliance resulting in a foreseeable prejudicial change in position affords a compelling basis also for implying a subsidiary promise not to revoke an offer for a bilateral contract.

The Answer (at 16) argues that detrimental reliance and payment of all development costs by a developer:

> ... would never come close to compensating the promisor for the loss of alienation rights because the promisor could still claim the unfettered discretion to repudiate the agreement at the end of the diligence period.

Defendant's assertion is neither logically self-evident, nor is it factually supported by anything in this record. In further support of his argument, defendant asserts (at 17) that all of the consideration provided as part of this Contract must be allocated to the purchase price, and not to consideration for the Option. Defendant's attempt to allocate all the consideration provided in the Contract to the purchase price as opposed to the option is an inevitable complication resulting from the Court of Appeal's approach of converting a bilateral contract with an escape clause into a separate option contract and purchase contract. Contrary to the allegations in the Answer (at 17), plaintiffs have consistently maintained that the contractual requirements to "move expeditiously with the parcel

split," to provide quarterly updates and hold harmless the Seller, and "to deliver to Seller ... all information, reports, tests, studies or other documentation obtained by Buyer" in the event the Contract is terminated, were all part of the consideration to defendant for holding the Property while plaintiffs were attempting to perform.[4] More importantly, the Court of Appeal did not base its decision on defendant's attempt to allocate all of the consideration to only the purchase price of the property. Once again, the precedential value of the Court of Appeal's Opinion will not be limited by defendant's attempt to infuse a factual finding into the Court of Appeal's ruling on questions of law.

Plaintiffs' substantial performance of the Contract is undisputed. The fact that Plaintiffs attempted to accept the Contract by depositing the purchase price into escrow after defendant attempted to cancel is also undisputed.[5] The doctrine of promissory estoppel is consistent with the doctrine of partial performance, and with California courts' previous reluctance to invalidate a contract based on a discretionary escape clause. In all cases, established California precedent requires that courts attempt to enforce the mutual intent of the parties at the time of contracting, rather than look for ways to allow one party to escape the intended effect of his

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[4] See, e.g., Brief of Appellants at 38-40; Reply Brief of Appellants, at 19-23.

[5] See R.T. 224-12-225:10; contrary to the last argument in the Answer at 17-18.

promises. If an option contract can be supported by the "proverbial peppercorn" as consideration,[6] it makes no sense to create a new rule of law that allows courts to ignore the substantial detriment incurred and the significant benefit actually provided by one party, just because a court later determines that it would be equitable to give the other party a "reciprocal right" to cancel. See Opinion at 24. Whether the parties reserve reciprocal cancellation rights should be left to the agreement of the parties, and not for a court to add after-the-fact, when the parties clearly did not intend to do so at the time of contracting. See, e.g., *Drennan v. Star Paving Co., supra*, 51 Cal.2d at 416.

CONCLUSION

California law should not encourage a court to ignore the obvious mutual intention of the parties, or a promise that was intended and reasonably expected to induce detrimental reliance, plus actual substantial performance by the party that detrimentally relied, just because the court subsequently determines it would be more equitable to extend a reciprocal cancellation right to the promising party.

The Court of Appeal's decision in this case will inevitably result in litigation for parties to many contracts that have already been partly

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Torlai v. Lee (1969) 270 Cal.App.2d 854, 858-859; *Kowall v. Day* (1971) 20 Cal.App.3d 720, 726.

performed. Petitioners respectfully request this Court to settle and clarify the important legal issues raised by the Court of Appeal's Opinion.

Respectfully submitted July 29, 2008,

Klaus J. Kolb
Attorney for Appellant
SIDDIQUI FAMILY PARTNERSHIP

By Klaus J. Kolb
Robert Vaughan

Robert Vaughan
Attorney for Appellant
MARTIN A. STEINER

CERTIFICATE OF WORD COUNT

The text of PETITION FOR REVIEW OF APPELLANTS MARTIN A. STEINER and SIDDIQUI FAMILY PARTNERSHIP, consists of 4,165 words, as counted by the Corel WordPerfect version 12 word-processing software I used to generate this Brief.

Dated: July 29, 2008.

Klaus J. Kolb
Attorney for Appellant
SIDDIQUI FAMILY PARTNERSHIP

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, employed in SACRAMENTO County, California. I am over the age of eighteen years and not a party to the above-entitled action. My business address is: 400 Capitol Mall, 11th Floor, Sacramento, CA 95814. On: July 29, 2008, I served the following documents:

(1) **REPLY IN SUPPORT OF PETITION FOR REVIEW OF APPELLANTS MARTIN A. STEINER and SIDDIQUI FAMILY PARTNERSHIP**

MANNER OF SERVICE

XX U.S. MAIL: By causing a true copy of the above documents to be placed into a sealed envelope, addressed as listed below, and depositing with the U.S. Postal Service on the date indicated above, with postage prepaid. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing as stated above.

_____ PERSONAL SERVICE: By causing a true copy of the above documents to be personally delivered by hand to the offices of the addressee(s) listed below:

XX OTHER: By causing a true copy of the above documents to be delivered to the addressee(s) listed below by and/or through:

Express Mail on Supreme Court

PARTIES SERVED AND ADDRESSES

DAVID L. PRICE, ESQ.
3300 Douglas Blvd., Suite 125
Roseville, CA 95661
Fax: (916) 772-5357

Attorney for Defendant
PAUL THEXTON, Trustee of FAS Family Trust

ROBERT VAUGHAN, ESQ.
11879 Kemper Road, Suite 1
Auburn, CA 95603
Fax: (530) 823-6119

Attorney for Plaintiff
MARTIN A. STEINER

Clerk for Dept. 43 for
HONORABLE LLOYD A, PHILLIPS, JR.
SACRAMENTO COUNTY SUPERIOR COURT
720 Ninth Street
Sacramento, CA 95814

1 Copy

CALIFORNIA COURT OF APPEAL
900 N Street, Room 400
Sacramento, CA 95814

1 Copy

I declare under penalty of perjury that the foregoing is true and correct. Executed this July 29, 2008, in Sacramento, California.

Roxane Balison White

Roxane Balison-White