IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| MARTIN A. STEINER, et al., | ) | No. S164928 |
| Plaintiff and Appellant | ) | |
| v. | ) | Appeal from Third District Court of Appeal No. C054605 |
| PAUL THEXTON, as Trustee, etc., et al., | ) | |
| Defendant and Respondent | ) | |
| SIDDIQUI FAMILY PARTNERSHIP, | ) | |
| Intervener and Appellant | ) | |



# BRIEF OF RESPONDENT PAUL THEXTON

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

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Attorney for Respondent
Paul Thexton

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Paul Thexton

AMENDED

# CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

## STEINER v. THEXTON (S164928)

| Full Name of Interested Entity/Person | Party | Non-Party | Nature of Interest |
|---|---|---|---|
| Paul Thexton | XX | ☐ | Defendant/Respondent, Co-Trustee of FAS Family Living Trust |
| Deborah A. Chesleigh | ☐ | XX | Recently added Co-Trustee of FAS Family Living Trust, owner of real property at issue. |
| | ☐ | ☐ | |
| | ☐ | ☐ | |
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Submitted by: DAVID L. PRICE, Attorney at Law

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## IV. STATEMENT OF THE CASE

The litigation between the parties to this appeal was commenced on October 20, 2004 with the filing of a complaint by Mark Steiner against Paul Thexton. The complaint described a written real estate purchase and sale agreement between Mr. Steiner and Mr. Thexton and contained only one cause of action. Mr. Steiner alleged a valid and enforceable agreement pursuant to which he was to acquire certain real estate from Mr. Thexton, and sought specific performance incident to that agreement. He did not seek any monetary damages. Clerk's Transcript (hereinafter, "C.T."), at 2.[1] Mr. Thexton answered the complaint on November 18, 2004, denying liability and asserting a series of affirmative defenses. Most significantly, for purposes incident to this appeal, Mr. Thexton alleged that the contract between the parties was a disguised option, and was void for lack of adequate consideration. C.T. 19. On March 3, 2006, shortly before trial was scheduled to begin, the Siddiqui Family Partnership[2] petitioned the trial court to join the lawsuit as a plaintiff-in-intervention. That petition was granted on March 17, 2006 (C.T. 256) and the trial was continued to allow the defendant to address the new complaint-in-intervention. Trial ultimately commenced on August 7, 2006 before the Honorable Lloyd A.

[1] The Complaint also did not reference or otherwise assert a claim based upon promissory estoppel on which Appellants so heavily rely on appeal.

[2] "Appellant", in the singular, shall refer only to Mr. Steiner. "Appellants", in the plural, shall refer to both Steiner and the Siddiqui Family Partnership.

Phillips, Jr., sitting without a jury. The trial proceedings lasted five days at the conclusion of which His Honor requested written closing arguments and supplemental trial briefs.

The issues presented at trial involved disputed questions of both law and fact. Essentially, Appellants, as plaintiffs, asserted that the parties had a valid written agreement and they asked the court to compel performance thereunder. They sought an order requiring Mr. Thexton ("Respondent") to convey title to the real property in question. C.T. 321-330; 374-416. Respondent asserted a series of defenses, any one of which would have required the court to deny relief to the plaintiffs/Appellants. Respondent alleged, for example, that the contract was void for lack of consideration; that it had resulted from undue influence, rendering it voidable; that there had been no meeting of the minds; and that the Respondent lacked capacity to contract. C.T. 306-320; 528-558.

On October 30, 2006, Judge Phillips served an intended decision. His Honor concluded that the underlying agreement was in fact both a purchase contract and an option and that it was not enforceable because there was no separate consideration for the option.[3] Because that

[3] The parties' written agreement recited the terms of the option - e.g. that appellant Steiner could, if he opted to do so, purchase the underlying property at any time over up to three years - as well as the terms incident to the purchase. As the court concluded, adequate consideration was provided incident to the potential purchase. However, no separate consideration was provided for the option and for Respondent's separate promise to keep the property off the market for those three years. C.T. 600-602.

determination was a complete defense to the Appellants' claims, the court did not rule on any of the other defenses raised by Respondent. The intended decision was to deny any relief to the Appellants. C.T. 600-602. At His Honor's request, drafts of a proposed statement of decision and a proposed judgment were prepared by the parties and debated before the court. On December 5, 2006, Judge Phillips issued a written Statement of Decision. C.T. 626. Judgment was also entered on December 5, 2006. C.T. 632-633.

On December 13, 2006, Mr. Thexton filed a Memorandum of Costs and a motion seeking attorneys' fees. C.T. 645-671. Appellants moved to tax costs and opposed the request for attorneys' fees. C.T. 677-724. Both motions were heard on January 23, 2007. The court approved attorneys' fees in the amount of $85,279.00 and court costs in the amount of $5,560.00. C.T. 751-753.

On January 5, 2007, Appellants filed their Notice of Appeal incident to the Judgment. C.T. 722. A separate Notice of Appeal incident to the post judgment orders was filed on March 16, 2007. C.T. 771.

On May 28, 2008, the Court of Appeal for the Third Appellate District, in a unanimous decision written by Justice Sims, affirmed in its entirety the decisions of Judge Phillips. On or about June 12, 2008 Appellants filed a petition for rehearing in the Court of Appeal, which petition was denied without further opinion. On or about July 8, 2008 Appellants filed a petition seeking review in this Court, which petition was

granted by the Supreme Court on September 17, 2008.

## V. STATEMENT OF FACTS

Respondent Paul Thexton owns that parcel of real property commonly described as 8585 Chris Lane, Orangevale, CA (the "Property"). The Property consists of approximately 12.5 acres and has been in the Thexton family for several generations. Mr. Thexton was, at the time of trial, 62 years old and (excluding his brief military service) had lived in a residence 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.[4] Mr. Thexton has never had any intention of selling the Property and fully intended for his children and grandchildren to continue to occupy the Property after his death. R.T. 367:25 - 369:13; 378:4-9.

Beginning in approximately the fall of 2002, developer (and Appellant) Mark Steiner was searching for real estate which he could develop for residential purposes. More specifically, he was looking for desirable but undeveloped lots in that part of the unincorporated portion of Sacramento County known as Orangevale. R.T. 15:19 - 16:1. He happened

[4] Mr. Thexton moved out of his grandparents' house when he married, moving into a mobile home on the Property. When he later divorced and then re-married, he replaced the mobile home, testifying that his second wife did not want to live in the same home in which he had lived with his first wife. The second mobile home, in which Mr. Thexton still lives, is also on the Property. R.T. 342:19 - 344:17.

upon Respondent's parcel and was immediately interested. 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, he made clear his intention 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 clear that he had no desire to sell the Property but Appellant nonetheless continued to come by seeking to induce him to sell. R.T. 528:4-8; 529:9-15.

Although the trial 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 or about September 4, 2003, the parties in this action signed a Real Estate Purchase Contract (the "Contract"). See Trial Exhibit 1.[5] The Contract was subsequently modified on or about January 8, 2004 by a First Addendum to the Contract. Trial Exhibit 2.[6] On or about October 4, 2004, Mr. Thexton

[5] Appellants' Opening Brief ("AOB") infers that the parties had spent much of a year "negotiating" the terms and condition of the Contract. AOB at 5. 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 that he should consider selling the Property. The parties then did not speak for some eight to nine months before further discussions took place. R.T. 23:10-18.

[6] Appellants would have this Court believe that the Addendum was prepared at Respondent's request and that it benefitted Respondent. AOB, p.10. The evidence was to the contrary. The Addendum was prepared at the insistence of Appellants. As the writing itself establishes, the Addendum deleted the requirement that the Buyer (Mr. Steiner) allow an easement for Seller's (Mr. Thexton's) access to the Property. The

contacted Stewart Title of Sacramento, the designated escrow agent for the then-still-pending transaction, and requested the cancellation of escrow and the return of funds to Appellant. R.T. 47:18-24; Trial Exhibit 5. As was asserted at trial, Respondent based his attempted rescission of the Contract on a number of factors, including the incapacity of Respondent to enter into a binding agreement, the Appellants' misrepresentations, a lack of consideration to Respondent, a fundamental change in pertinent circumstances (i.e. a failure of consideration), and the failure of the Appellant to comply with the terms as set forth in the purchase and sale agreement. 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. As a result of these conditions, 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. Thexton (who never

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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.

completed high school)[7] realized that he was no longer capable of handling his own personal or financial affairs. Accordingly, Mr. Thexton signed 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 was hired to care for Mr. Thexton's grandfather before his death. In fact, the POA had actually remained unsigned for many months before Mr. Thexton finally got around to having it fully executed. R.T. 357:22 - 358:23.) This 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 well as Mr. Thexton's alcoholism and lack of memory) as far back as their very first meeting. R.T. 530:14-18; 530:28 - 531:12. 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. R.T. 535:16 - 542:8. He knowingly obtained Respondent's signature on the Contract at a time when Ms. James was out of the room and was unaware that the Contract was being presented to Respondent for signature. R.T. 538:28 - 539:27.

[7] 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.

Appellant did so fully aware that this was the only home in which Mr. Thexton had ever lived.

In early October of 2004, Respondent ceased his alcoholic drinking. (He had remained sober through the time of trial.) 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 also recognized that Appellant was 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.[8]

The Contract states that the Appellant, as buyer, would provide the seller with a deposit of $1,000. The purchase price is identified and stated to be $500,000. Trial Exhibit 1. Respondent has never asserted that these, along with other provisions contained within the written document, constituted inadequate consideration ***for the sale of the Property*** (assuming that the option were exercised and the sale consummated). However, the Contract also recites the terms of an option agreement between the parties,

[8] Several weeks before trial, the Siddiqui Family Partnership ("SFP") intervened and, by its complaint-in-intervention, joined as a party-plaintiff. SFP claimed that it had "joint-ventured" the underlying purchase arrangements with the Appellant and that the Respondent's unwillingness to sell the Property has resulted in the SFP suffering monetary losses. However, its claims for damages were dropped before trial so that the only claim presented at trial remained the claim for specific performance. See for example, R.T. 292:20-21; 294:10-11.

explaining 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 or expense to the buyer. Trial Exhibit 1. Nonetheless, the Contract does not identify anything of value to Respondent 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. As the existence or non-existence of consideration (as well as the adequacy thereof) are questions of fact, Respondent was essentially left to argue the proverbial negative, i.e. that consideration does not and did not exist. For purposes incident to this appeal, Respondent reiterates that Appellants have failed to carry their burden of proof in that they have failed to establish, either at the time of trial or incident to the appeals herein, that there had been any consideration whatsoever provided to Respondent for the option.

## VI. STANDARD OF REVIEW ON APPEAL

This appeal, like that presented to the Court of Appeal, presents two separate and distinct legal issues (see Statement of Issues on Appeal, *infra*)[9], each of which is governed by a separate standard of review. The claim brought by the Appellants, as plaintiffs in the trial court, sought

[9] The third "issue" enumerated in section VII *infra* is not so much a legal disagreement between Appellants and Respondent as it is a point of interest raised in the effort to obtain the consent of the Supreme Court to review the decision of the Court of Appeal. Respondent submits that the Supreme Court's decision incident to this third "issue" will have no bearing on its substantive decision regarding Appellants and Respondent.

specific performance as the remedy in a breach of contract claim. Although Respondent, as defendant, asserted a series of defenses, the trial court ruled only on one such defense, concluding that a finding for the defendant on that defense made it unnecessary to address any of the other defenses. Appellants now challenge: (1) the determination that the parties' written contract constituted an option agreement, and (2) the further determination that Appellants did not provide adequate consideration to Respondent to support the option.

**(1)** The analysis and evaluation of the parties' written agreement is entirely a question of law. This Court's review of that portion of the judgment interpreting the agreement is therefore governed by the independent or de novo review standard. *Ghirardo v. Antonioli* (1994) 8 Cal. 4th 791, 799.

**(2)** Whether the (option) agreement was supported by adequate, bargained-for consideration is primarily a question of fact (*Bard v. Kent* (1942) 19 Cal. 2d 449, 452) and is therefore subject to the substantial evidence standard which applies whenever an appealed ruling turns on the trial court's determination of disputed factual issues. The resolution of disputed facts will be affirmed so long as supported by substantial evidence. *Winograd v. American Broadcasting Co.* (1998) 68 Cal. App. 4th 624, 632. In other words, an appellate court must examine whether the record as a whole demonstrates substantial evidence in support of the appealed judgment. *Bowers v. Bernards* (1984) 150 Cal. App. 3rd 870, 872-3. See,

also, *SFPP, L. P. v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal App. 4th 452, 462.[10] However, because Appellants also asked the trial court to impose equitable remedies (using promissory estoppel as a "substitute" for consideration) and because the court, in evaluating the issues presented at trial, was required to determine whether injustice would be suffered by denying relief to the plaintiff/Appellants, the Supreme Court cannot reverse the trial court's decisions without also concluding that the court abused its discretion. *Blank v. Kirwan* (1985) 39 Cal. 3d 311, 331; *Denham v. Superior Court* (1970) 2 Cal. 3d 557, 566.[11]

## VII. STATEMENT OF ISSUES ON APPEAL

**(1)** Did the trial court (and thereafter, the Court of Appeal) err in determining that the written agreement between Mark Steiner and Paul Thexton was, at least in part, an agreement to extend an option to purchase

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[10] Appellants assert that there are no longer any disputed facts and that this Court therefore has the legal ability to interpret all pending issues *de novo*. To the contrary, factual disputes remain. Appellants claim that they provided consideration to Respondent and that such consideration was legally adequate. Respondent denies that any consideration whatsoever was provided. Appellants, endeavoring to avoid the trap created by the trial judge in claiming that Respondent was provided nothing of value, have been very creative in attempting to generate "consideration" from the proverbial whole cloth. They have asserted that consideration could be interpreted from the purported obligation to "move expeditiously", and from the separate "promise" to provide information to Respondent. Respondent has denied that any of these various matters provided any benefit to him, particularly at the time when consideration must be evaluated. The perceived "value", if any, of such items (and in fact whether they were delivered at all) is certainly a factual issue pending in this matter.

[11] The substantial evidence rule measures the quantum of proof adduced at trial. The abuse of discretion standard measures whether the trial court action falls within the permissible range of options set by legal criteria. *Robbins v. Alibrandi* (2005) 127 Cal. App. 4th 438, 452.

real property?

**(2)** Did the trial court (and thereafter, the Court of Appeal) err in determining that the written agreement between Mark Steiner and Paul Thexton was unenforceable as the result of a lack of consideration? Moreover, did the trial court abuse its discretion in denying equitable relief to Appellants?

**(3)** Finally, with respect to this appeal to the Supreme Court, is any portion of the Court of Appeal decision inconsistent with existing law?

## VIII. SUPREME COURT REVIEW OF THE LEGAL DISTINCTIONS BETWEEN UNILATERAL AND BILATERAL AGREEMENTS DOES NOT AFFECT THE COURT OF APPEAL'S ANALYSIS OF THE RELATIONSHIP BETWEEN APPELLANTS AND RESPONDENT[12]

[12] Appellants' primary contentions on appeal are based upon their continued insistence (AOB, page 21) that the Contract between Appellants and Respondent is a fully enforceable bilateral agreement, i.e. a promise for a promise. Although the trial court and the Court of Appeal have both disagreed, Appellants assert again that the Contract is not an option. Following the Appellants' earlier Petition to this Court, the Supreme Court received numerous letters from third parties describing a potential concern arising from the Court of Appeal decision. The focus of the various letters involved the legal distinctions between unilateral and bilateral contracts [more specifically, between contractual contingencies with a discernible standard (e.g., good faith) and contingencies that are subject to no standard whatsoever (e.g., an absolute cancellation provision)]. The argument presented was that the standard practice involving the purchase and sale of residential real estate might be affected because of the Court of Appeal decision in this matter. While Respondent disagrees, Respondent appreciates that Appellants have not raised this issue, at least directly, in their opening brief. Respondent also appreciates that the pertinent letters ask this Court to issue what could be considered an advisory opinion as such issue is not now directly before this Court and need not be addressed

### A. No Legal Issue is Presented Challenging Existing Law that an Agreement to Extend an Option Can Be a Binding Contract.

As the Court of Appeal noted in its written decision (Opinion at p. 13), "(W)hen by the terms of an agreement the owner of property binds himself to sell on specified terms, and leaves it discretionary with the other party to the contract whether he will or will not buy, it constitutes simply an optional contract." *Johnson v. Clark* (1917) 174 Cal. 582, 586. Certainly Appellants do not content that there is no such thing as an option. They merely assert that the underlying agreement before this Court is not an option.

### B. No Legal Issue is Presented Challenging Existing Law that *Any* Contract Requires Consideration to be Enforceable.

Similarly, no challenge is presented to the legal premise that an option, like any other type of contract, must, to be enforceable, be based upon and include: parties capable of contracting, mutual assent, a lawful object, and adequate consideration. Civil Code 1550, et seq., 1605, et seq.

### C. The Issue Presented to This Court Is Whether The Contract in Question Created an Option, Not Whether Every Due

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to fully adjudicate this controversy. However, it remains the proverbial elephant in the room and must be examined, even if only superficially. Nonetheless, while this Court's perspective on the distinction between unilateral and bilateral agreements may be important to an understanding of this matter, it is not critical to a determination thereof. See further discussion in section C(3), *infra*.

**Diligence or Feasibility Period Also Constitutes an Option.**

The trial court properly entered judgment for Respondent because the Contract is unenforceable. The Court of Appeal properly affirmed that judgment for the same reason. "It is . . . well established that the form and name of an instrument are not controlling, for the law looks through the form to substance and gives effect to the intention of the parties." *Welk v. Fainbarg* (1967) 255 Cal. App. 2d 269, 272-273. In this instance, the trial court and the Court of Appeal properly looked through the form and title of the written agreement at issue and correctly determined, from the four corners of that written agreement, that the Contract was, in reality, an option and that the option itself was unsupported by good and valuable consideration. After hearing and viewing all of the evidence presented at trial, the trial court recognized that Appellants did not meet their burden of proof because they failed to present evidence illustrating even a modicum of bargained-for consideration for the **option** and for the time during which Respondent had agreed to suspend his alienability rights to his property. Appellants' (untimely) recourse to the doctrine of promissory estoppel and its equitable principles (discussed further, *infra*) is unavailing: (i) as the doctrine is inapplicable when dealing with option contracts, and (ii) because no merit exists with respect thereto in this matter. Finally, even if this Court disagrees with the assessments of the trial court and the Court of Appeal that the Contract is an option contract, and determines that the agreement was, in fact, a bilateral executory contract, the Contract is still

void as a matter of law.

*1. The Agreement Between Appellants and Respondent is an Option Agreement.*

An option is a form of real estate agreement. *Alegretti v. Gardner* (1925) 74 Cal. App. 564. Like any other contract, an option requires the consent of parties capable of contracting with respect to a lawful object, and sufficient consideration. Cal. Civil Code §1550. An option provides one with the legal right to purchase property at a specified price and within a specified time. The court, in *Auslen v. Johnson* (1953) 118 Cal. App. 2d 319, 321, summarized the nature of an option:

> The nature of such an option is too well settled to require much discussion. **It is a unilateral agreement**. The optionor offers to sell the subject property at a specified price or upon specified terms and agrees, **in view of the payment received**, that he will hold the offer open for the fixed time. Upon the lapse of that time the matter is completely ended and the offer is withdrawn. If the offer be accepted upon the terms and in the time specified, **then a bilateral contract arises** which may become the subject of a suit to compel specific performance, if performance by either party thereafter be refused (emphasis added).

In *Yeng Sue Chow v. Levi Strauss & Co.* (1975) 49 Cal. App. 3d 315, 324, the court noted that "[a]s far as the issue of lack of mutuality goes, we point out that an option, by definition, is a unilateral contract which binds only the optionor but does not impose upon the optionee any obligation to exercise the option and thereby to enter into a bilateral agreement. Hence, mutuality is neither required nor is it an element of the option contract." On its face, the Contract appears to be a bilateral

executory contract as the parties agreed to exchange money for real property. However, a closer look at the all of the relevant provisions of the Contract reveals that it is in fact unilateral in nature: a disguised option. In this case, there was no mutuality. There was no obligation imposed upon Appellant Steiner. **He was not obligated to purchase unless and until he elected to do so.**[13]

Even ignoring the unilateral right of Appellant to repudiate the Contract merely by failing to exercise the option, the obligations of the parties (indeed, the legal *ability* of the parties) to tender performance were contingent upon the occurrence of at least two events. First, Sacramento County had to approve a parcel split. Until the parties received such administrative approval, the property described in the Contract (ten acres of what was still a 12.5 acre parcel) did not actually exist (and therefore could not be sold). At trial, Appellants' own witness admitted that County approval is not mechanically granted and that the pertinent processes involve significant expense and foreseeable risk. (R.T. 195:7-23.) Second, and more important to this analysis, Appellants had to choose "at [their] absolute and sole discretion" NOT to "elect not to continue in this transaction." (Trial Exhibit 1.)[14] Consequently, Appellants "agreed" to do

[13] As Justice Sims wrote for the Court of Appeal, "(T)he agreement did not require plaintiffs to do anything" (Opinion at p. 19).

[14] The double negative is intentionally employed here to emphasize that Appellants provided themselves with an absolute right to walk away from the "Contract" at any time, at will. This point will become crucial below, but it is discussed here to reveal the optional nature of the

nothing. They bound themselves to nothing and were obliged to do nothing. This is the essence of an option contract. Respondent became an offeror, offering his Property in exchange for (1) $500,000 and (2) Appellants' promise to work on the parcel split. As the agreement was contingent upon County approval for the parcel split AND Appellants' choice to not abort the deal on a whim, a contract could only really exist between the parties upon actual performance. Until then, only one "obligation" had been created: Respondent could not alienate the Property for three years. (Opinion, p.15.) During that entire time, however, Appellants could have terminated the relationship at any time - the essence of an option.

Appellants, in their Opening Brief, make a half-hearted attempt to argue that the Contract is not an option. With all due respect, such a contention is absurd. Appellants assert first that Mr. Steiner did not *intend* the Contract as an option. While Appellant's subjective intention is legally irrelevant absent a finding that the Contract is ambiguous (discussed further, *infra* in footnote 18), such a contention flies in the face of Appellant's own trial testimony and admissions. Of course he intended an option (he just did not want to call it an option). He did not want to be obligated to purchase anything unless and until he determined that it was financially feasible to proceed, e.g. unless and until the county approved enough marketable lots that they could be sold at a profit. Appellant

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agreement.

Steiner, in response to a series of questions posed by the trial judge, repeatedly admitted that he was free to walk away, at any time, "at a moment's notice, without notice, without anything." He agreed that he could pick up his deposit and "say goodbye." He agreed that he could walk if he "found a better deal" and that he could do so at any time "until the day of the payoff." R.T. 121:5 - 124:25. If Appellants did not want the Contract to be an option, they could have written a more "typical" purchase and sale agreement and they, rather than Respondent, would have had the risk of awaiting a grant of governmental entitlements.[15]

Appellants next argue that nothing in the Contract required Respondent to keep the Property off of the market during the three year pendency of the Contract. They assert that the only time limit was the "drop dead" date of September 1, 2006 (the three year period), although they also concede that Respondent was required to keep his property off the market as long as Appellants proceeded "expeditiously" with the parcel split. This argument is illogical based on the terms of the agreement itself. The decision to work or not work "expeditiously" is certainly a contingency mentioned in the Contract. Had Appellants' subsequently failed to do **anything** in furthering the parcel split, Respondent may, at some point in

[15] To the extent that Appellants will point out that they could not have closed escrow until a lot split was approved, the Contract could nonetheless have merely included that requirement as a condition precedent to the duty to close escrow, just as one inserts such a condition relative to the duty to obtain financing for a purchase of real property. Appellants did not need to also include the right to cancel at any time for any reason (or no reason).

the three years, have had grounds to terminate the agreement. However, at the time the parties entered into the agreement, the understanding between them (at least according to Appellants) was that the parcel split process would take significant time. (R.T. 195:7-13.) Appellants therefore demanded the three year window in which to determine the feasibility of the development of the Property. Certainly, Appellant would have had a claim against Respondent if he had sold the property while the option was pending[16] (assuming that the option itself was not void as a matter of law, as discussed below).

Viewed as a whole (and as determined by both the trial court and the Court of Appeal), the Contract cannot be anything other than an option to purchase land (on pre-negotiated terms and conditions) that had not yet ripened into a bilateral agreement. Appellants, consistent with the custom and practice of the real estate development industry, drafted the agreement and wrote themselves an iron-clad escape clause. They did not want to be bound to purchase the Property until after they knew, at the very least: (1) that a parcel split had been granted, (2) that they had negotiated and successfully obtained access to each of their lots, and (3) that enough lots had been approved to allow them to profit by their development and subsequent sale.[17] Appellants supplied themselves with a legal right (i.e. an option) to purchase the Property, but did not bind themselves to do so. The trial court and the Court of Appeal were correct in their respective

[16] See Opinion at p. 15.

[17] Nevertheless, Appellants could cancel even at that time.

assessments of the "Contract" as a disguised option.[18]

*2. The Agreement Between Appellants and Respondent is Void for Lack of Consideration.*

a. Respondent Received no Consideration for the Option.

Certainly, it is not fatal to Appellants' claim that the Contract was in fact an option. However, it *is* fatal that Appellants failed to provide to Respondent any bargained-for consideration for the legal rights to which they, as the holders of the option, were entitled. In this context, perhaps the *Torlai* court best summarized the nature of consideration in an option contract:

> . . . an option based on consideration contemplates two separate contracts, i.e., the option contract itself, which for something of value gives to the optionee the irrevocable right to buy under specified terms and conditions, and the mutually enforceable agreement to buy and sell into which the option ripens after it is exercised. Manifestly, then, an irrevocable option based on consideration is a contract as defined by Civil Code, sections 1549 and 1550.

*Torlai v. Lee* (1969) 270 Cal. App. 2d 854, 858. Crucial here is the idea that until the option (the first contract) is exercised, the second (main) contract is little more than an unfulfilled expectation. The same court

[18] The Court of Appeal decision also notes that even if the Contract were not so clearly an option, it would, at worse, have been deemed ambiguous, thereafter pointing out that any such ambiguity would have been construed against Appellants (because they drafted the Contract). Indeed, the Court of Appeal correctly distinguished *Patty v. Berryman* (1949) 95 Cal. App. 2d 159, the same authority cited by Appellants to this Court. See Opinion at p. 23 relying upon Civil Code 1654 and *Zipusch v. LA Workout, Inc.* (2007) 155 Cal. App. 4th 1281.

completed its analysis by further highlighting the **absolute legal necessity** of consideration:

> On the other hand, an option without consideration is not binding on either party until actually exercised, and is not a contract in the traditional sense, nor is it a contract under section 1550 of the Civil Code. In short, '(i)t is essential to the existence of a contract that there be sufficient cause or consideration, for a promise unsupported by consideration has no binding force. (Citations omitted.) In other words, an option given without any consideration contemplates only one contract, the one which comes into existence after it is exercised. Thus, until exercised such an option is merely a continuing offer **which may be revoked at any time**. (Citations to the California Supreme Court omitted; emphasis added.)

*Ibid.* Therefore, an option lacking consideration is really an as-yet-unaccepted offer. Consequently, an offeror who has **not** received good consideration for the promise to keep his property off the market during the offeree's contemplation period is free to revoke the offer and terminate the relationship (at any time). See Opinion at p.16 citing *Kelley v. Upshaw* (1952) 39 Cal. 2d. 179, 191.

In this instance, Appellants failed to provide Respondent with a shred of consideration for Respondent's promise to suspend his alienability rights for (potentially) three years. Appellant Steiner is an experienced real estate developer. (R.T. 14:11-27; 15:11-12.) He drafted an agreement that made no recitations with respect to the form of consideration tendered to Respondent **for the option** (because there was no such consideration). Although the Contract required Appellants to place $1,000.00 in an escrow account, Steiner admitted that he believed he was entitled to a refund of the

deposit as that money was intended to go toward the purchase price for the Property. (R.T. at 81:14-22).

Appellants argue that the consideration element is met by a combination of their part performance and the purported promise to move expeditiously with the parcel split. (They also assert that consideration is established by their "substantial investment" in the project and the further promise to deliver to Respondent the documentation of their efforts with respect to the Property.) However, as the Court of Appeal concluded, Appellants' assertions that these items in the agreement created valid consideration **for the option** are without merit.

The obscure promise to "move expeditiously with the parcel split" cannot, in any way, be construed as good consideration **for the option** as it fails to address the universal escape clause drafted by Mr. Steiner (and which he now calls the "cancellation clause"). For example, if Respondent had actually wanted the sale to occur, but Appellants had been remiss in their duty to move expeditiously, Respondent would have had no remedy against Appellants because any threat of legal action for specific performance would most certainly have been answered by a disaffirmation of the Contract, a right Appellants conveniently reserved for themselves in that Contract.

Similarly, Appellants discuss their "substantial investment" in the Property and their efforts to move forward with the requested lot split. First, a simple reading of the Contract reveals the fallacy in the argument.

The applicable provision does not state a duty at all: it merely suggests that there is *potential* for substantial investment. Not only does it fail to set the parameters for a duty, it implies that there is a chance there also could **not** be substantial investment. Second, even if some semblance of a duty could be extracted from the provision, such a duty, again, is illusory because it is trumped by Appellants' right to walk away from the deal without any remedy available to Respondent. R.T. 121:5 - 124:25. For example, Appellants could have spent a substantial amount of money investigating the parcel split only to find out that the Property was worth only a small fraction of what they agreed to pay for it (even after it was eventually developed). Appellants may similarly have completed the administrative process only to have the County approve no more than two lots – which Appellants may have concluded did not make the project financially feasible.[19] Any savvy developer in Appellants' position, armed with the escape clause in the Contract, would have walked away from the agreement in order to mitigate against future losses.

Far more significantly, however, any question of duty or part performance is legally irrelevant to the question of consideration because it did not constitute consideration **at the time the option was granted**. See *Drullinger v. Erskine* (1945) 71 Cal. App. 2d 492. There was no obligation

[19] For the Contract to be truly bilateral and fully enforceable, Appellants would have to acknowledge that they would be **compelled** to purchase upon approval of a lot split. However, they reserved the right to cancel right up "until the day of the payoff" (R.T. 121:5-124:25) and certainly could have cancelled, even upon county approval of the lot split, if, for example, only two lots were authorized. (R.T. 259:21 - 260:6.)

on Appellants' part ever to commence performance. Appellants argued at trial that they in fact began administrative efforts and endeavored to create the lot split. However, the adequacy of option consideration must be examined **as of the formation of the contract** and is not a function of hindsight and subsequent efforts. *(See, Drullinger*, 71 Cal. App. at 496; *O'Connell v. Lampe (1929)* 206 Cal. 282, 285; *Morrill v. Everson* (1888) 77 Cal. 114, 116; *Andersen v. Charles* (1921) 52 Cal. App. 290, 293. As the Supreme Court held in *O'Connell*, and as has been the law in California for well over a hundred years, "(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. 282, 285.) See also, Opinion at p. 18. If Appellants had elected to walk away from the Contract before commencing work on the lot split, there would have been no part performance, no documentation to deliver to Respondent, and, even by their admissions, nothing of value for Respondent. As the Court of Appeal concluded, this duty is illusory because it begs the question as to whether Appellants had any real obligation to do *anything* that would lead to such reports ever being created. Appellants' never really had a contractual obligation to do anything to effectuate the parcel split and the sale, and Respondent lacked any remedy to enforce the duty. The Court of Appeal therefore wrote: "As of the date the agreement was executed, the agreement did not require plaintiffs to do anything." Opinion, p. 19.

The trial court in this case heard evidence on the adequacy of consideration and determined that the Contract was a disguised option lacking consideration. Although this Court certainly has jurisdiction over the trial court's legal analysis, the question of whether consideration was adequate or bargained-for (or even existed at all) presents an issue of fact. See *Bard v. Kent* (1942) 19 Cal. 2d 449, 452. Appellants provide no compelling justification to reconsider any portion of the trial court's determinations.

In that regard, one additional factor cannot be overlooked. In fact, Appellants may have inadvertently made the best argument for Respondent. Although each "item" referenced by Appellants fails as consideration on an analytical level, Appellants turn their own argument on its head and provide this Court with perhaps the clearest explanation demonstrating why the Contract is not supported by consideration. Appellants argue that the contractual obligations imposed upon them should be taken as a whole in order to determine whether Appellants suffered prejudice in the execution of the Contract and/or whether Respondent enjoyed benefits conferred in the same pursuits. This analysis presumably is offered to establish that Appellants fit within the strictures of Civil Code §1605 and its statutory definition of consideration. In doing so, Appellants prove Respondent's argument.

Appellants tell us at least three times (see AOB, pages 2, 6, 22) that Respondent turned down an offer of $250,000 more than Appellants were

willing to pay if Respondent would undertake the development efforts himself. At trial, Appellant Steiner testified that Respondent had informed him that he (Respondent) had received another offer for the parcel in the amount of $750,000.00. (R.T. 23:25 - 24:7.) Appellant Steiner informed Respondent that he was not willing to match that offer. (R.T. 24:8-11.) However, according to Mr. Steiner, Respondent turned down this higher offer because accepting it would have required Respondent to take on the administrative expenses which Appellants had later agreed to incur in the Contract. (R.T. 25:1-11.) This analysis is fatal to Appellants' case because it proves that the burdens which Appellants agreed to have placed on themselves (including the costs incident thereto) were specifically negotiated and bargained for as a part of the consideration **for the purchase price of the property and for nothing else.** If the higher offer of $750,000 represented what the market would bear for a particular piece of property already subject to an approved parcel split, then the agreement to shift the burden of obtaining that parcel split to the buyer in return for a reduction in the purchase price is clearly the consideration for that reduction in price, and a portion of the consideration for the purchase itself.

Quite simply, Appellants fail to follow their own argument to its logical conclusion as to do so would be an admission that they cannot point to a single item in or component of the agreement which serves as consideration **for the option**. The trial court was presented with substantial evidence on this very issue and correctly determined that Appellants did not

prove that they provided Respondent with separate, bargained-for consideration for the right to the option to purchase. This Court, even if it concludes, upon a review of the trial record, that it would have come to a different conclusion, cannot substitute its judgment for that of the trial judge who heard the evidence firsthand and who evaluated the credibility of the witnesses. See, *Berniker v. Berniker* (1947) 30 Cal. 2d 439, 444. Clearly, substantial evidence was presented to support the findings and the decision of the trier of fact. Those findings and that decision cannot be disturbed on this appeal. *Id.*

b. Appellants' Reliance on the Doctrine of Promissory Estoppel was Unsupported by the Facts and is Therefore Without Merit.

Appellants' primary contention is that the Contract is not an option, but a fully enforceable, bilateral agreement.[20] Appellants' "fall-back" or secondary perspective is that the agreement, even if deemed to be an option, is supported by adequate consideration. Appellants' last assertion, added almost as an "after-thought" arising for the first time in their post-trial briefs and since refined on appeal, is a plea in equity. They contend that the Court should apply the doctrine of promissory estoppel to prevent Respondent from asserting defenses to the validity of the underlying agreement. The

[20] As a matter of law, the contract cannot be deemed "bilateral" because a bilateral contract requires mutual promises, a promise being given in consideration for another promise. *Davis v. Jacoby* (1934) 1 Cal. 2d 370, 378. Appellants made absolutely no promises to Respondent and, as the Court of Appeal made very clear, were under no obligation to do anything.

crux of Appellants' reliance on promissory estoppel is that this Court should view the steps taken to achieve the parcel split as a consideration *substitute*, and therefore, the Court should invoke the doctrine as a matter of equity. This argument must be rejected for at least four separate and distinct reasons. (Moreover, even if this Court disagrees with the trial court's ultimate conclusion vis-a-vis the respective equities, the Supreme Court cannot reverse or otherwise overrule the decision of the lower court without an express finding that the trial court abused its discretion. (See further discussion below.)

First, since what is at issue is an **option** contract, the prejudice which the Appellants assert can never constitute consideration, substitute or otherwise. The California Supreme Court adopted the definition of promissory estoppel from Section 90 of the Restatement 2d of Contracts as the law of the State:

> "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. Even if Appellants performed an action or forbearance of a definite and substantial character to their detriment in reliance on a (perceived) promise on Respondent's part, there can be no showing of *Respondent's* reasonable expectation that his "promise" would **induce** such action. This element will **always** be missing when dealing with an option because the decision to

exercise or not exercise the option rests solely with the optionee, here the Appellants/buyers. As such, Respondent was never in a position to reasonably expect that his promise would induce action: **there was absolutely no way for Mr. Thexton to know whether or not Appellants would see the deal to its completion until the three year period was over.**

To hold otherwise would stand jurisprudence on its head and destroy the consideration requirement for contractual options. After all, *any promisee could simply begin performance and then claim his or her acts as the otherwise missing 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. He or she would simply contend, as have these Appellants, that the steps undertaken to evaluate the merits of acquisition (i.e. the buyer's due diligence) 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 ("cost free") at the end of the option period. Therefore, even if some of the promisee's actions in furtherance of the contract may be reasonably foreseeable to the promisor, the ultimate affirmation of the contract can never be foreseeable. The buyer must still establish **independent** consideration for the option. See, *Marsh v. Lott* (1908) 8 Cal. App. 384, 389. As such, on a fundamental level, Appellants'

estoppel argument fails as a matter of law.

Second, Appellants argue that, even if the various "contingencies" to which they agreed did not constitute bargained-for consideration **for the option**, their performance with respect to the development process constituted a detrimental change of position and should therefore qualify as a consideration substitute. However, as discussed above, Appellants have admitted to this Court that the very contingencies to which they refer were actually tied into and therefore were 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). Appellants' dilemma becomes clear: in order to even reach the promissory estoppel claim, this Court must assume first that the option-lacking-consideration analysis above is correct. This means that the contingencies described in the Contract were necessarily consideration for the actual purchase/sale 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 also consideration substitutes **for the option**. Stated another way, if an option were not at issue, then Appellants actions might well be construed as sufficient partial performance for an estoppel argument. However, because the contingencies had nothing to do with the option, there is no context in which Appellants' conduct could be construed as partial performance functioning as a substitute for the lack of consideration

for the option. If Appellants' promissory estoppel argument were to be accepted in this instance, it too 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.

Third, as noted *supra*, an option unsupported by consideration constitutes merely a revocable offer. *Torlai v. Lee* (1969) 270 Cal. App. 2d 854. In order to even entertain Appellants' promissory estoppel argument, it is again necessary to assume that we are dealing with an option that is otherwise lacking consideration. However, so long as the written "Contract" constitutes only an offer, Appellants are now deficient in **two** of the three necessary elements for the formation of a valid contract: consideration **and** acceptance (prior to a valid revocation of the offer.) Promissory estoppel can only be invoked as a consideration substitute, not a consideration and acceptance substitute. In *Bard v. Kent* (1942) 19 Cal. 2d 449, for example, this Court addressed this issue squarely. There, the appellant claimed that he had received an option to extend his lease on property and wanted to hold onto the option even after the promisor's death. Part of the discussions included an agreement with the appellant's sub-lessee to extend the lease if property improvements could be done by the sub-lessee for $10,000. The sub-lessee agreed to obtain an architect's report to determine the feasibility of the improvements for that amount of

money. The trial court found that no consideration was tendered to the promisor and that the option itself was therefore invalid. The appellant argued that even if there were no consideration for the option, his sub-lessee's actual performance in obtaining the architect's report was sufficient to invoke the doctrine of promissory estoppel. The Supreme Court disagreed, noting that:

> Defendant contends that in engaging the architect he acted in reliance upon the option given him by Miss Roland to extend the lease, and that under the doctrine of promissory estoppel a promisor who has received no consideration is nevertheless bound by his promise when he has induced another to suffer detriment in reliance thereon. See Rest. Contracts, § 90; 1 Williston, Contracts (Revised Ed.), § 139. There must, however, be a promise on which reliance may be based (citations). Defendant did not plead the issue of promissory estoppel at the trial, and there is nothing in the record to show that Miss Roland at any time promised to keep the option open or made any other promise on which defendant could rely. She merely made without consideration an offer, which was never accepted, to renew the lease.

*Bard v. Kent*, *supra*, 19 Cal. 2d at 453. This analysis is also crucial to the matter at bar. Before the promissory estoppel argument can be considered, this Court must determine the actual status of the parties' agreement. Respondent recognizes, for example, that courts have the discretion to apply promissory estoppel in certain limited circumstances. *C & K Engineering Contractors v. Amber Steel Co., supra*, 23 Cal. 3d at 7-8. However, although courts have done so where consideration is lacking, there is no authority that supports the proposition that promissory estoppel can **also** be applied as an acceptance substitute. As the proper interpretation of the

agreement reveals that the Contract is, in reality, merely a revocable offer, and as Respondent revoked the offer prior to acceptance (the actual exchange of consideration described in the Contract), promissory estoppel is not available to Appellants.

Finally and most significantly, the doctrine of promissory estoppel, as a "tool" of equity, provides courts with wide discretion in its application. *Id.* 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., supra*, 23 Cal. 3d at 6. Even assuming *arguendo* that Appellants in this instance are somehow correct, and their actions in furtherance of the Contract can function as a substitute for their lack of consideration for the option (something the trial court expressly rejected - C.T. 629), **the doctrine should not be applied if injustice can otherwise be avoided or if no injustice is actually present**.

On appeal, Appellants must establish both that the doctrine of promissory estoppel can be applied as a legal matter, and that the trial court abused its discretion in not finding, as a factual matter, that its application was appropriate and would benefit Appellants. Appellants have failed to point to any evidence improperly rejected by the trial court. Appellants similarly identify no evidence admitted over their objections. Finally, Appellants provide no authority holding that a reviewing court may substitute its judgment for that of the trial court in the application of equity.

The evidence in question was all presented to a trial judge who ruled against Appellants. As the trial court concluded and as the Court of Appeal expressly confirmed, **Appellants suffered no injustice**. In examining these determinations (even though this Court cannot replace the trial court's determinations with its own absent a finding that the trial judge abused its discretion), one cannot overlook the obvious. 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 any potential development project **before** deciding whether to proceed with that project. (R.T. 587-596.) Appellants and their principals (Mr. Steiner and Mr. Siddiqui) never questioned, denied or debated these particulars. Developers understandably do not want to risk (or tie up) their own money each time they evaluate a particular project. Rather, they attempt to determine the financial feasibility of a project **before** committing to purchase the underlying real estate. This feasibility process can take at least months and more likely even years, depending on the particular property in question. (R.T. 195:7-13.) A developer must be satisfied with zoning, potential lot size, density limitations and requirements, annexation, set-backs and adjoining land use, utilities, soil capacities and compaction, roads and

access. To determine if a project will be economically feasible, the developer must go through myriads of administrative reviews, including analyses of wetlands, toxics, water, environmental and topographical concerns. No experienced developer wants to commit financial resources - i.e. to buy real estate - until being convinced that a project will provide an adequate return. Developers therefore often evaluate multiple projects at the same time, eventually proceeding with the most economically viable acquisition(s).

**To enable one to analyze a particular project, developers routinely seek to put land under option, giving them the ability to buy if a project is deemed worthy of the risk, but allowing the flexibility to walk away if the project is too expensive or too risky, or if the governmental authorities do not provide all of the entitlements sought for the project.** (R.T. 592:22 - 593:9.)[21]

The impact of this evidence (evidence with which the Trial Court was armed when considering its final disposition) on the equities involved in this promissory estoppel claim cannot be overstated. In essence, Appellants bore the risk on this parcel split knowing full well that there was a chance the parcel split might not materialize. This is a risk which

[21] A simple example is illustrative. If a developer's financial pro forma demonstrates a need to obtain 10 "paper lots" on a particular parcel to make the development cost worth the risks of acquisition and engineering, and if the county officials only approve 7 lots, the developer wants the ability to abandon the project without having already committed to purchasing the underlying land. Closing an escrow is, for that reason, typically the **last step** in the approval process.

developers routinely and regularly undertake. It is a cost of doing business. These Appellants, however, wanted a "free look" at the Property without compensating Respondent for the time he agreed to keep the Property off the market. At trial, Appellants failed miserably at demonstrating any actual prejudice, let alone the injustice required by law. No basis was established to support estoppel and the trial court properly denied Appellants' contention. (C.T. 601, 629.)

The Court of Appeal went even further. First, it analyzed Civil Code 3386 and concluded that the role of the courts is to ensure that equity is done to both parties. (See, Opinion, p. 21 citing *Converse v. Fong* (1984) 159 Cal. App. 3d 86, 92. The Court of Appeal then concluded that plaintiffs had failed to demonstrate any injustice (Opinion, p. 24) and that "the equities do not support compelling Thexton to sell the property" (Opinion, p. 24). There could be no clearer rejection of the application of promissory estoppel to benefit Appellants, and this Court should similarly conclude that Appellants have provided no basis upon which to determine that the trial court abused its discretion. (A court adjudicating an equitable action may offer a remedy as justice allows, whether restitution, damages or other relief, measured **not** by the terms of the promise, but by the extent of the promisee's reliance. Rest. 2d, Contracts, section 90. See, also, *Swinerton & Walberg Co. v. Inglewood - Los Angeles County Civic Center Authority* (1974) 40 Cal. App. 3d 95, 105; *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transit Authority* (2000) 23 Cal 4th 305, 315.

In other words, even had the trial court been convinced that good cause existed to support Appellants' claim (which, it must be remembered, was **not** included in either the complaint or the complaint-in-intervention), that remedy may well have been limited to a refund of the time spent in pursuing the lot split. This Court cannot substitute its judgment with respect thereto. *Robbins v. Alibrandi* (2005) 127 Cal. App 4th 438, 452.)

Any one of these arguments (let alone their cumulative weight) is sufficient to deny Appellants' invocation of promissory estoppel. However, as the Supreme Court analyzes the trial court's decision, it must agree that Appellants have failed to carry their burden to demonstrate that the trial court's decision should even be reconsidered. *Blank v. Kirwan* (1985) 39 Cal. 3d 311, 331; *Denham v. Superior Court* (1970) 2 Cal. 3d 557, 566. Clearly, the trial judge, when asked to consider an equitable remedy (i.e. promissory estoppel as consideration) had the discretion to do so or to refuse to do so. That "judicial discretion" presupposes that the sound judgment of the court will be exercised according to the rules of law. *Lent v. Tilson* (1887) 72 Cal. 404, 422. Discretion is abused only when the trial judge exceeds the bounds of reason. *Denham v. Superior Court* (1970) 2 Cal 3d 557, 566. So long as the trial court applied the governing rules of law in exercising its discretion, the trial court's decision **cannot** be a reversible abuse of that discretion. *Department of Parks & Recreation v. State Personnel Board* (1991) 233 Cal. App. 3d 813, 831.

Appellants have had their proverbial day in court. The trial court

made its ruling after thorough and lengthy briefing and argument. Appellants' request that this Court should affirm the Contract by applying promissory estoppel principles differently than the trial court must be denied. It is after all no more compelling an argument when presented to this Supreme Court than it was to either the trial court or the Court of Appeal. As the latter concluded, recognizing that Mr. Steiner had given himself the express ability to walk away from the agreement at any time, "there is no injustice in a resolution of this case that effectively accords the reciprocal right to Thexton." Opinion, p. 24. Considering that no factual or legal basis has been demonstrated upon which this Court can conclude that the trial court abused its discretion in refusing to apply estoppel, the trial court's decision must be affirmed.

*3. The Mere Existence of a "Due Diligence" or "Feasibility" Period Does Not Turn an Otherwise Enforceable Contract into an Option.*

The argument advanced by the letters to the Supreme Court (and which Respondent anticipates will be pursued in requests to submit *amicus* briefs), is that the Court of Appeal decision potentially recasts as an option (and therefore a unilateral agreement requiring separate consideration) **any** contract which contains a due diligence clause. Admittedly, virtually any contract by which one agrees to purchase real property is going to have a provision entitling the buyer to examine certain particulars before committing to the purchase. Whether this opportunity (and the resulting

brief time frame for such inspection) is characterized as a contingency, a due diligence period, a right of inspection, a condition precedent, or a feasibility period (collectively, for purposes incident hereto, the "due diligence period"), there is absolutely no relationship between the typically very brief due diligence period and the generally quite lengthy period of a contractual option. More importantly, the contractual situations referenced by the various parties supporting review do not include the unilateral cancellation clause drafted by Mr. Steiner. For purposes of this appeal, there is no relationship between (i) the Steiner-Thexton agreement and (ii) this Court's evaluation of the legal effect of the standard due diligence provision. In other words, this Court may well choose to address the anticipated *amicus* briefs and the issues understandably raised therein. This Court may well determine that it needs to appropriately determine when, if at all, and under what circumstances a due diligence provision can become an option. However, no matter how the Court deals with these issues, and no matter how the Court distinguishes between the option and the diligence clause, there is no impact on the dispute between Appellants and Respondent. The agreement in question is so separate and distinct from the standard contract containing a diligence provision that a discussion vis-a-vis due diligence clauses in general is immaterial to a resolution of this case. The contract between Appellants and Respondents is clearly an option. Nothing else should matter with respect to these parties.

A contract with terms and conditions requiring performance by both

parties (i.e. a promise for a promise) is, by definition, a bilateral agreement. The contract will be enforceable against either party whether the underlying contractual conditions are those deemed conditions precedent or conditions subsequent. In the context of this dispute, the concern being raised in the real estate community is that every contract subject to executory conditions **may**, as a result of the Court of Appeal decision, be deemed unilateral and thereby transformed into an option. The claimed fear is that if the buyer did not provide the seller with separate consideration to support that option, the seller will be entitled to terminate the contract while the buyer is otherwise undergoing his or her due diligence. There is simply no basis to support such a contention. However, to the extent that these Appellants have not raised these issues on their appeal to this Court, Respondent will defer further discussion regarding this matter. If the Court desires to consider the impact of its decision on the real estate industry in general, Respondent will provide further insight in responding to anticipated amicus briefs. If, on the other hand, the Court elects to focus only on these parties, such a discussion will be immaterial.

It is sufficient to note merely that Appellants in this case **demanded** that they be provided with up to three years to decide whether or not to purchase the Property. Appellants gave themselves the unilateral ability to walk away from the transaction and to cancel the potential sale at any time (and for any reason) within three years. They did not limit their request to a due diligence period (which is of course subject to specified articulable

grounds to be considered).[22] They sought and obtained an option to enable them three full years (without preconditions) to determine, in their own discretion, whether their project was physically and financially feasible.[23]

Because the Contract is unilateral in nature, and because one party is bound to perform while the other can cancel, there is an option and (despite Appellants' pleas to the contrary) the parties cannot be bound by the covenant of good faith. California law has long and consistently held that the covenant of good faith cannot be utilized either to vary the express terms of a contract or to supply a term on which the contract is silent. See, for example, *Carma Developers, Inc. v. Marathon Development California, Inc.* (1992) 2 Cal. 4th 342, 374 ("We are aware of no reported case in which a court has held the covenant of good faith may be read to prohibit a party from doing that which is expressly permitted by an agreement"); *Foley v. Euless* (1931) 214 Cal. 506, 511; *Third Story Music, Inc. v. Waits* (1995) 41 Cal. App 4th 798, 803. Because an option, as a matter of legal definition, provides the optionee with the contractual right to elect **not** to perform, the covenant cannot be adopted to impose a standard against which that

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[22] It should be noted that Appellants also obtained a due diligence period **in addition to** the option. Paragraph 4 on page 1 provided Buyer with 30 days to approve the preliminary title report. Trial Exhibit 1, page 1.

[23] It is important to appreciate that Appellants' conduct was precisely consistent with custom and practice as defined by expert testimony at trial. Developers routinely obtain options to tie up land and to avoid spending their own money before all of the requisite entitlements are obtained and the developer can independently determine that a project is financially feasible. Even the trial appreciated that "we all understand" and that "usually a developer will option a piece of land for a length of time in which he can get these matters concluded." R.T. 592:26 - 596:14.

election must be considered. In evaluating a claim of breach, a court will therefore be asked to determine whether a particular contract in question is intended to be unilateral or bilateral, e. g, whether one party has an absolute right to terminate (as Mr. Steiner reserved for himself in this case) or whether there are conditions to such a termination. Considering that California law has long held that the interpretation of a contract is a question of law, no new principles were created by the Court of Appeal decision and the Supreme Court need not address the legal distinctions between unilateral and bilateral agreements.

**D. <u>However the Supreme Court Distinguishes Between the Unilateral and the Bilateral Contract, the Agreement between Appellants and Respondent is Clearly an Option. The Decision of the Court of Appeal Must be Affirmed</u>.**

There is certainly nothing novel or unique about asking a court (particularly a Supreme Court) to evaluate the various shades of gray which fall between the "blacks" and "whites" constituting the ends of a legal spectrum. In this case, the parties focus on the written form of contract by which real estate was to have been purchased and sold. Clearly, there will be contractual situations where a due diligence provision is no more than one of several conditions precedent to a buyer's obligation to perform. It will be treated like any condition precedent - whether involving the pest inspection, the financing application, or the timely preparation of closing documents. No court would consider such terms as other than conditions

precedent within a fully enforceable, bilateral agreement. At the other end of the legal spectrum, there will just as clearly be those contracts by which a buyer has expressly obtained an option (adequately supported by separate consideration) providing an opportunity to purchase property (or to elect not to do so) within a designated time frame for a designated price.

It can reasonably be anticipated that there will of course be a contract with a purported condition (e.g., a lengthy due diligence clause) which is so vague that one party will argue that it constitutes an option. At some point, a court may well be asked to determine when, if at all, a conditional contract can become an option. The California Association of Realtors would like this Court to address this concern today so that its members will have a higher comfort level in drafting purchase and sale contracts. Perhaps the Supreme Court is prepared to do so, perhaps it is not. However, wherever (in the time spectrum) and however that determination is made has absolutely no bearing on these Appellants and this Respondent. As the Court of Appeal so eloquently determined, there is absolutely no question that the Contract prepared by Mr. Steiner was intended to be an option and was in fact an option. Mr. Steiner wanted three years to decide whether to be obligated to purchase the Property. He was not seeking the due diligence inherent in the sale of a residence. He was not looking to approve a pest report or a title report. (In fact, he added a **separate** thirty day period for those purposes.) Mr. Steiner wanted three years to decide whether development of the Property would be financially feasible. He wrote a

contract which contained an option and he thereby obtained an option. It is entirely immaterial how the Court addresses the public policy issue which will presumably be presented by any amicus curiae. The Court of Appeal decision must be affirmed.

**E. Assuming, *Arguendo*, that the Instant Contract Was Not an Option, the Contract Still Fails as a Matter of Law.**

The parties in this case entered into an option agreement that lacked consideration. However, Appellants continue to maintain that the trial court and the Court of Appeal were incorrect in construing the Contract as an option. They assert that the Contract was in fact bilateral and executory and therefore that their performance compels Respondent's performance. Assuming, for purposes of argument, that an option is not involved here, the agreement still fails by virtue of the escape clause (the ability to cancel the Contract at any time, for any reason – or no reason) which Appellants drafted and inserted into the Contract.

In their opening brief, Appellants cite to *Patty v. Berryman* (1949) 95 Cal. App. 2d 159 for the proposition that when there is doubt as to whether a contract is unilateral or bilateral, the presumption is in favor of interpreting the contract as bilateral. While this may be a correct statement of the law, it has little application in the instant case.

Appellants rely upon *Bleecher v. Conte* (1981) 29 Cal. 3d 345 (hereafter "*Bleecher*") in an attempt to argue that the "escape clause" is not fatal to their claims. Their reliance is misplaced for two reasons. First,

*Bleecher* involved a contract in which the final sale was contingent upon the buyer's approval of the title report, plat map, and soil, zoning and engineering reports, **but such approval could not be withheld unreasonably**. *Bleecher*, supra, 29 Cal. 3d at 348. The seller, citing *County of Alameda v. Ross* (1939) 32 Cal. App. 2d 135 argued that where a party can repudiate a contract at any time, the agreement lacks mutuality of obligation and fails as a matter of law.[24] *Bleecher, supra*, 29 Cal. 3d at 351-52. This Court rejected this appeal to *Ross* specifically because the escape clauses in *Bleecher* and *Ross* were **distinct**: *Bleecher* involved a reasonableness limitation on a buyer's power to withhold approval, whereas the *Ross* escape clause gave the U.S. Secretary of War an absolute right to cancel an agreement with Alameda County **without cause**. In its rejection of the seller's use of *Ross*, the California Supreme Court explicitly supported the *Ross* court's holding that where a contract allows a party an absolute right to void a contract, that contract fails for lack of mutuality of obligation. *Id.*

The instant case is much more like *Ross* than *Bleecher*. The Contract provision at issue recites that:

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[24] Ross involved an agreement between the United States Secretary of War and the County of Alameda in which the federal government granted the County a lease for use of bridges constructed by the federal government across areas of the San Francisco Bay. That lease was *expressly revocable* by the Secretary of War *for any reason or no reason at all*. When the County tried to withdraw funds to make certain repairs, the County Treasurer refused to release the funds on the grounds that the lease agreement contained illusory promises on the part of the federal government and, therefore, no contract existed for which he was authorized to release the funds.

> [i]t 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** (emphasis added).

(Trial Exhibit 1.) This situation is nothing like that in *Bleecher*, which imposed a reasonableness standard for withholding (ultimate) buyer approval.[25] In this case, Appellants could "at [their] absolute and sole discretion . . . elect not to continue" with the purchase agreement, thus nullifying and voiding, in its entirety, the Contract. This is precisely the power which the Secretary of War reserved for himself in *Ross*, and exactly what **voided** the agreement in *Ross*. As the Ross court stated, "It has been frequently held that agreements are void which contain indefinite and uncertain provisions with respect to the obligations and for lack of mutuality, and consideration, particularly when they contain an absolute and unconditional right of revocation by either party." *Ross*, *supra*, 32 Cal. App. 2d at 145. Therefore, although Respondent submits that the Contract was a disguised option lacking consideration, even if it is not, the Contract nonetheless fails even as a bilateral executory contract because it

[25] It is true, as Appellants explain, that the *Bleecher* contract contained similar language to the instant Contract regarding duties to do all in the promisee's power to expedite the recordation of the final map and to proceed diligently. What distinguishes that language from the instant Contract, however, is that such language was read in tandem with the reasonableness limitations on the promisee's ability to withhold final approval. This was made clear when the *Bleecher* court adopted the *Ross* court's reasoning with respect to the absolute power of repudiation written into the contract itself.

completely lacked mutuality of obligation and therefore, Appellants' promises could not be construed as consideration for Respondent's promises. As such, this Court should uphold the trial court's decision and find that this Contract is void as a matter of law.

## IX. CONCLUSION

Appellants' arguments are, for the most part, internally inconsistent, intuitively illogical, and lacking in common sense. As a result, it is critical that the Supreme Court, in analyzing these arguments, look not only to applicable law, but also to logic and that very common sense. In essence, Appellants' arguments to this Court fly in the face of their own real world means of doing business.

One example of that internal inconsistency arises from Appellants' arguments concerning the time frame by which consideration is analyzed. Notwithstanding clear, undisputed law to the contrary, Appellants reject the approach examining the adequacy of consideration at the time of contracting (as required by *O'Connell v. Lampe*, *supra*, *Drullinger v. Erskine*, *supra* and their respective progeny) in favor of their own version of Monday-morning-quarterbacking (i.e. the hindsight analysis so frequently rejected by American jurisprudence). Yet at the same time, Appellants also reject the after-the-fact analysis performed by the Court of Appeal to evaluate the respective equities precipitated by this controversy. Rather, Appellants suggest that the court should look to the "intention of the parties at the time of contracting." (AOB at 53.)

One cannot simply ignore reality just because one walks through the doors of the legal system. Appellants Steiner and SFP are successful and experienced real estate developers. They claim that they want to acquire the Property so as to develop it for residential purposes (to build single family homes). They purportedly agreed to purchase the Property for $500,000 and testified that they would be paying Respondent fair value for the Property. Respondent, among the various defenses which he asserted (and one which was not ruled upon by the trial court[26]), claims that he was fraudulently induced to sell his home and to sell it at a price far less than its fair market value. Respondent provided expert testimony at trial 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 want us to believe that they will spend at least $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 (a sum which will increase significantly in light of this appeal and in the event of a remand for further proceedings), all to then purchase, for an additional $500,000, a parcel of property which is only worth $435,000** !! Obviously, Appellants do not take all of the participants in the legal system for fools. Common sense tells us that Mr.

[26] This contention, along with Respondent's other affirmative defenses, would need to be considered anew in the event of a possible remand.

Thexton is clearly correct and that he was in fact duped and defrauded into selling the only property on which he has lived.

Similarly, we 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. Sometimes it also needs to be annexed. As noted above, one has to examine property for soil compaction and capacity; toxics; environmental, water and wetlands issues; and title, administrative and topographical concerns. One then has to go through months or even years of administrative processes and hearings 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 the project financially successful.** Developers know full well that these administrative expenses are a part of their routine costs of doing business. 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. A part of the risk which Appellants undertook - and a reason why they did not want to purchase the Property before the governmental entitlement processes were completed - was proceeding in light of the need to obtain county permission to extend access through an adjoining high-end sub-division. This is why the Court

of Appeal, in *doing equity* to both parties, so eloquently concluded that Appellants had failed to show any injustice. The equities do not support compelling Respondent to sell his Property.

Again, what is "the obvious" which should not be ignored in this instance? Appellants came to trial asserting merely that they had a written contract which they wanted to have enforced. For two years, they had ignored even the remote possibility that there might be a consideration issue. In the middle of the trial, Respondent sought a non-suit claiming that the Appellants, in presenting their case as plaintiffs, had not established evidence of consideration. R.T. 280:20 - 296:25. The trial court was receptive to the motion and Appellants recognized that their collective backs were against the proverbial wall. For the first time, they began to argue that the procedural steps they would undertake or had undertaken were a part of the consideration provided to Respondent. They struggled unsuccessfully to convince a very learned and experienced trial judge. Their arguments to the Court of Appeal and those to this Court are no more convincing.

Appellants prepared and presented Respondent with a written contract. Whether or not Respondent understood the Contract, even had the mental capacity to understand it, or was induced to sign it, he in fact signed the Contract. That agreement was, without equivocation, an option to purchase real property. It was a unilateral agreement so long as Appellant

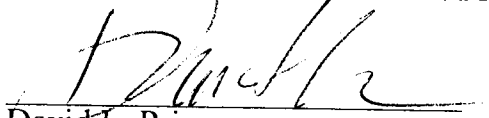
Steiner had the ability to walk away. Considering that Appellant continued to retain that right up to the moment that Respondent Thexton cancelled the pending escrow, the unilateral nature of the agreement never changed. It remained, at all times, an unexercised option. Just as unequivocally, Appellants never provided any benefit or consideration to Respondent **for the option**. Although they have asserted that just about every effort which they ever undertook was consideration, California law is clear that consideration must be examined and provided as of entry into the contract. Again, one cannot overlook the obvious. What if **one day** after signing the Contract, Appellant had been presented with a better investment/development alternative? What if **three days** after signing the Contract, he decided to pursue another project instead? What if he had not yet (ever) devoted any time, effort or expense to the Property? What then would have been the consideration provided to Respondent? Appellants cannot claim that because they in fact commenced work toward the lot split, they provided consideration **for the option**. We know full well that that time and expense was a part of the purchase consideration. We know that because Appellants tell us so in their brief to this Court. Again, common sense dictates that Appellants cannot continue to argue both sides of every issue. They did not prevail at trial or before the Court of Appeal and they should not prevail on this further and final appeal.

The Judgment entered by the trial court was reasonable, appropriate and proper in every manner. It was supported by existing law and the very

substantial evidence presented at trial. The decision of the Court of Appeal stands on firm legal ground. No basis exists to disapprove, overrule, reverse or remand any portion of the Judgment or the post trial orders. The appeal should be denied and the trial court's orders affirmed.

December 12, 2008

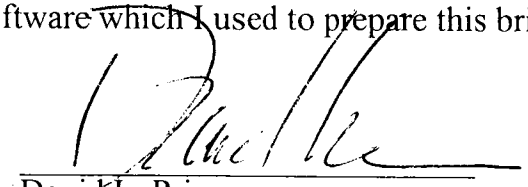
LAW OFFICES OF DAVID L. PRICE



David L. Price
Attorneys for Respondent Paul Thexton

## X. CERTIFICATE OF WORD COUNT

I, the undersigned, as counsel for Respondent Paul Thexton, hereby certify that the text of this brief, the Brief of Respondent Paul Thexton, consists of 13,999 words, as counted by the Corel Wordperfect, Version 12 word-processing software which I used to prepare this brief.



David L. Price
Attorney for Respondent Paul Thexton

Dated: December 12, 2007

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## 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 **December 15, 2008**, I served the following document(s):

1. **BRIEF 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.

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|---|---|---|
| **Counsel for Plaintiff Martin A. Steiner:**<br>**Robert Vaughan, Esq.**<br>11879 Kemper Road, Suite 1<br>Auburn, CA 95603 | | **Counsel for Plaintiff in Intervention Siddiqui Family Partnership:**<br>**Klaus J. Kolb, Esq.**<br>400 Capitol Mall, 11th Floor<br>Sacramento, CA 95814 |
| **Court of Appeal**<br>**(Third District)**<br>900 "N" Street, Rm. 400<br>Sacramento, CA 95814 | | **Trial Court:**<br>**Sacramento County Superior Court**<br>The Honorable Lloyd A. Phillips, Jr.<br>c/o The Honorable Judge James M. Mize,<br>Presiding Judge<br>720 Ninth Street, Dept. 47<br>Sacramento, CA 95814 |

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✓ **(BY FedEx Priority Overnight)** I caused a copy of the above-described document to be delivered by overnight delivery via FedEx Priority Overnight Services to the address listed below:

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| **California Supreme Court**<br>350 McAllister Street<br>San Francisco, CA 94102<br>(1-original; 13 - copies) |

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 **December 15, 2008**, at Roseville, California.

Mary A. Martinez