IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

REPLY BRIEF ON THE MERITS FOR APPELLANTS MARTIN A. STEINER and SIDDIQUI FAMILY PARTNERSHIP

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

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INTRODUCTION

In the Conclusion section of Respondent's Brief, defendant Thexton argues that "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." Respondent's Brief at 47. Plaintiffs Martin Steiner and Siddiqui Family Partnership ("SFP") agree that logic and common sense should be applied when interpreting the Contract and the parties' conduct, but disagree with defendant's suggestion that this approach is somehow inconsistent with the applicable law. To the contrary, this case demonstrates why the applicable law should reflect logic and common sense, and should enable private parties to structure binding agreements in a way that allows them to solve real world problems to their mutual benefit.

The most basic rule of contract interpretation is set forth in California Civil Code §1636: "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Civil Code §1643 confirms the fundamental purpose of contract law:

> A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties.

In this case, the mutual intent of the parties as it existed at the time of

contracting is perfectly clear: both parties wanted to determine whether defendant's property could be partioned so that defendant could sell a portion of his property, and both parties wanted Steiner (Buyer) to undertake the cost and risk of obtaining that partition, in exchange for a fixed sale price if Buyer was successful.

The intent of the parties can be easily ascertained from the writing alone, and is confirmed by the uncontested extrinsic evidence about the negotiations leading up to the Contract. See Civil Code §1639. There was no dispute in the evidence about what the parties agreed to do, or about the fact that plaintiffs substantially performed their part of the agreement before defendant attempted to reneg. There was nothing illegal, immoral, or objectively unreasonable about the mutual intent of the parties at the time of contracting, or about the solution they agreed upon to solve a mutual problem. The trial court below found no fraud or undue influence by plaintiffs and no lack of capacity by defendant. Accordingly, there is no reason for this Contract to be invalidated, at least not unless and until defendant Thexton is able to prove one of the 22 other affirmative defenses he raised before trial.

Defendant's attempt to reinterpret the Contract as an unenforceable disguised option – particularly *after* plaintiffs had substantially performed their obligations under the Contract – strains logic, common sense, and the

applicable law. Defendant's entire argument for invalidating the Contract appears to be premised on the suggestion that something about the Contract was unfair as to defendant, but defendant never explains exactly what that unfairness is – at least not in relation to the single affirmative defense adopted by the trial court below.

Defendant does try, repeatedly, to divert attention from the issue actually decided by the trial court by citing to *other* affirmative defenses and other evidence which *was* sharply disputed and which the trial court did *not* adopt, and which is therefore irrelevant to this appeal. For example, in the "Conclusion" of Respondent's Brief (at 48), defendant asserts:

> One cannot simply ignore reality just because one walks through the doors of the legal system. ... **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 !!** ... Common sense tells us that Mr. Thexton is clearly correct and that he was in fact duped and defrauded into selling the only property on which he has lived.

The fact of the matter is that plaintiffs entered into the Contract because, at the price and conditions agreed upon by the parties, plaintiffs were willing to take the chance that their investment of knowledge, skill, efforts and money would be successful in adding value to the Property.

The portion of Mr. Thexton's property that was the subject of the Contract was unsaleable and worth less than $500,000 when the parties entered into the Contract, but logic, common sense, and the undisputed evidence establish that it was worth considerably more than the sum of the original price and the monetary cost of plaintiffs' investment by the time plaintiffs had acquired a desirable access route to the Property and had obtained preliminary approval of a parcel map. See, e.g., R.T. 245:3-23.

Plaintiffs performed all their obligations under the Contract, invested the substantial money and effort expressly anticipated by the Contract (and conceded by defendant[1]), and achieved the objective both parties agreed to in the Contract. The results of plaintiffs' efforts and investment indisputably increased the value of all of defendant's property – both the portion defendant agreed to sell to plaintiffs, and the portion defendant wanted to retain for himself. However, rather than honor his obligations under the Contract, and rather than accept the substantial consideration he agreed to before plaintiffs' efforts proved successful, defendant came up with twenty-three reasons for refusing to perform and for keeping for himself all of the value added by plaintiffs' efforts.

Defendant attempts to further support his hints of unfairness by asserting, without citations to the record or supporting evidence:

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[1] Defendant *vastly* overstates the litigation expenses incurred by plaintiffs.

> **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.

Respondent's Brief at 49 (emphasis in original).

Defendant's argument is contrary to the evidence and contrary to logic and common sense. It is contrary to the evidence because Mr. Steiner's undisputed testimony establishes that his primary goal in entering into the Contract was so that he could build his personal residence on the Property. R.T. 15:13-16:22; 45:13-46:25; 71:21-72:18. Mr. Steiner's intent in entering into the Contract was not "to make the project financially successful," and defendant cites no evidence to support his assertion.

More importantly, defendant's suggestion that development expenses "are part of the routine costs of doing business" for any purchaser of real property and should therefore be disregarded borders on the absurd. The California legislature has passed no statute requiring a "developer" or Buyer of real property to absorb all the costs of obtaining required government approvals for parcel splits or development permits. Instead, the allocation of those and other expenses for developing real property is left for the parties to allocate as they see fit, as these parties did in the Contract at issue. Indeed, when defendant signed the Sacramento County Planning Department Application Information Form on May 15, 2004 (Exhibit 3, p.3.

para. 21), defendant expressly acknowledged that ***he*** "**agree[s] to pay all fees required to complete the processing of this application** ..." (emphasis in original).

Defendant cites absolutely no legal, evidentiary, or public policy basis to support his suggestion that Buyer's agreement to "expeditiously" provide the effort and substantial investment necessary to pursue the required parcel split and development approvals cannot constitute part of the consideration for the Contract. The fact that all parties knew there would be administrative and other expenses does not mean, as a matter of law, that the Buyer was responsible for paying them, nor does it mean that Buyer's agreement to pursue the development permits at Buyer's expense and risk had no value to the defendant. In fact, the undisputed evidence and the plain language of the Contract prove exactly the opposite – Buyer's investment of time, effort and money to expeditiously pursue the parcel split was an expressly bargained for portion of the exchange contemplated by both plaintiffs and defendant.

Defendant never explains why the Contract and plaintiffs' actual diligent performance of the Contract was unfair to defendant or put defendant at risk. The best defendant can offer is a series of hypothetical speculations that never occurred – *what if* plaintiffs had never started performance, *what if* plaintiffs had abandoned performance without

producing documentation, *what if* plaintiffs decided not to close escrow after they had obtained development approval, and so on. See, e.g., Respondent's Brief at 51. Each of these hypothetical speculations can be answered by referring to the Contract provisions that specify defendant's remedies if plaintiffs had to discontinue performance before close of escrow. For example, the Contract provided that Buyer would deliver "all information, reports, tests, studies and other documentation obtained by Buyer ...," so that defendant could use this valuable documentation to resell the Property. Exhibit 1, p. 2, para. 6. Furthermore, Buyer was obligated to indemnify defendant for all of the development fees and expenses incurred, regardless of whether the effort to obtain development approvals proved successful, or Buyer ended up taking title to the Property. Alternatively, defendant would have had the right to sue Buyer for monetary damages if plaintiffs had not "move[d] expeditiously with the parcel split," or had otherwise breached the Contract. Depending on the timing and nature of any hypothetical breach by plaintiffs, defendant may have had difficulty recovering much in the way of damages, but only because defendant probably would not have suffered much in the way of a loss.

The fact is that plaintiffs' conduct was completely consistent with their interpretation of the Contract, as requiring "expeditious" efforts and "substantial investment" during the development period expressly identified

in the Contract. R.T. 118:13-132:11; 258:22-260:20. The only ones actually at risk were the plaintiffs, who invested more than $60,000 in their efforts to carry out the Contract terms, while plaintiff assisted them and encouraged them on for more than a year. Just as it became obvious that plaintiffs would be successful, defendant suddenly "obstructed the thing and he canned the whole program .... He did it at the time it was all finished virtually. There was nothing more to do but sign his name." Trial Court comment at R.T. 240:26-241:3; see also R.T. 241:3-242:20.

Plaintiffs join with defendant in encouraging the Court to apply logic, common sense *and the applicable law* to reviewing the Contract and the parties' conduct in this case. Plaintiffs are convinced that logic and common sense will show that the mutual intent of the parties at the time of contracting was clear, the object of the Contract was valid, and the terms of the Contract were objectively fair and reasonable as to all parties. Moreover, by the time defendant attempted to cancel the Contract, plaintiffs had already performed virtually all of their obligations and plaintiffs subsequently performed the remaining obligations, including deposit of the full purchase price into escrow. The trial court erred in ruling that the applicable law required the Contract to be held unenforceable after plaintiffs had made a substantial investment of time and money and had substantially performed their part of the bargain.

STANDARD OF REVIEW

Defendant continues to assert that this appeal is governed by three standards of review, ranging from de novo to an abuse of discretion, even though the Court of Appeal expressly based its decision on a de novo standard of review (Opinion at 12, 24-27). Respondent is wrong. All issues raised in plaintiffs' appeal are subject to the de novo standard of review, because all involve the application of law to uncontested facts.

As noted in plaintiffs' Opening Brief:

> Whether an issue is one of "law" or "fact" is generally a question of whether its resolution turns on the *evidence* or the *application of law* ....

Eisenberg, et al., *California Practice Guide: Civil Appeals and Writs* (Rutter Group 2006) "Scope And Limits Of Appellate Review" ¶8:3, p. 8-1.

Nevertheless, defendant argues – without citation to the record – that:

> Appellants, endeavoring to avoid the trap created by the trial judge in claiming that Respondent was provided with 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.

Respondent's Brief at 11, fn. 10.

Defendant is correct to the extent that he concedes that plaintiffs base their claim of consideration on their interpretation of the plain language of the Contract. Respondent's Brief several times concedes that the major issue in this case is one of contract interpretation:

> 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. [Italics added.]

Respondent's Brief at 9. And (at 14):

> 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. [Emphasis in original.]

As defendant concedes, "the analysis and evaluation of the parties' written agreement is entirely a question of law." Respondent's Brief at 10. As defendant also concedes, the questions of whether the Contract is bilateral or a unilateral option, and of whether any of the consideration described in the Contract can be attributed to any "option" portion of the Contract, are purely questions of contract interpretation and are therefore subject to de novo review.

Despite defendant's own description of the issues as based on the interpretation of the Contract, defendant nevertheless also asserts that factual disputes remain concerning consideration, although defendant never

identifies exactly what these supposedly disputed issues are. See, e.g., Respondent's Brief at 10-11, fn. 10; 25. Contrary to defendant's ill-defined and unsupported arguments for a substantial evidence standard of review, and unlike *Bard v. Kent* (1942) 19 Cal.2d 449, 452, there is no dispute in this case about whether or what consideration was promised or delivered by plaintiffs, or whether defendant made a promise upon which plaintiffs could reasonably rely to their detriment. Thus defendant concedes that Buyer provided "**at least $60,000 in development fees (not to mention hundreds of hours of their own professional time),**" it is undisputed that Buyer deposited more than $500,000 into escrow shortly after defendant attempted to reneg, once plaintiffs had obtained preliminary approval for the parcel split and subdivision map, and defendant's promises upon which plaintiffs relied are recorded in the written Contract.

There also is no issue in this case about *the adequacy* of the consideration, as Respondent's Brief expressly concedes (at 8) that:

> Respondent has never asserted that these, along with other provisions contained in the written document, constituted inadequate consideration ***for the sale of the Property*** (assuming that the option were exercised and the sale consummated). [Emphasis in original.]

Moreover, there can be no question about *the adequacy* of any consideration attributable to any option portion of the Contract, because California law has long provided that "[a]ny consideration, however small,

has been held sufficient for an option contract." *Kowal v. Day* (1971) 20 Cal.App.3d 720, 726; see also *Torlai v. Lee* (1969) 270 Cal.App.2d 854, 858-59, noting that "the proverbial peppercorn" would be sufficient consideration to sustain an option.

Finally, defendant argues that, because plaintiffs asked the trial court to apply the equitable doctrine of promissory estoppel, this Court cannot reverse unless it finds an abuse of discretion by the trial court. Respondent's Brief at 11.

"Judicial discretion" has long been defined as "the sound discretion of the court, to be exercised according to the rules of law." *Lent v. Tilson* (1887) 72 Cal. 404, 422. As defendant acknowledges, "*[s]o long as the trial court applied the governing rules of law* in exercising its discretion, the trial court's decision **cannot** be reversible abuse of discretion." Respondent's Brief at 37 (italics added), citing *Department of Parks & Recreation v. State Personnel Bd.* (1991) 233 Cal.App.3d 813, 831. As California courts and commentators have explained:

> "The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown." [Citations omitted.]

Westside Community For Independent Living, Inc. v. Obledo (1983) 33 Cal.3d 348, 355, quoting 6 Witkin (2d ed. 1971) Appeal, §244, p. 4235.

In this case, it is precisely the trial court's failure to apply the governing rules of law that plaintiffs are challenging. Plaintiffs are not asking this Court to substitute its discretion for the discretion of the trial court; plaintiffs are asking this Court to instruct the trial court to apply the proper rule of law before exercising its discretion. *Department of Parks & Recreation, supra*, 233 Cal.App.3d at 832. Since plaintiffs are challenging the trial court's interpretation and application of the legal principles that govern the trial court's discretion, rather than the exercise of discretion itself, the trial court's refusal to apply promissory estoppel should be subject to de novo review in this case.

In short, none of the issues raised in Appellants' Opening Brief rely on any disputed facts, or the credibility of any witnesses, or the exercise of the trial court's discretion within applicable legal principles. All of the issues raised by Appellants request this Court to apply legal principles to the plain language of a Contract and the uncontested extrinsic evidence presented to aid in the interpretation of that Contract, including the parties' performance of the Contract up to the point of defendant's repudiation. Plaintiffs do not seek review of the trial court's resolution of any evidentiary dispute; plaintiffs *do* request review of trial court rulings concerning the legal significance of certain facts and the legal principles applied to those facts. Accordingly, the appropriate standard of review of all

issues raised in the petition for review is de novo.

FACTUAL AND PROCEDURAL ISSUES

Although Respondent's Brief begins with an alternate statement of facts and procedural history, the relevant facts set forth in Appellants' Opening Brief remain undisputed.

Defendant expressly concedes that he executed the Contract on or about September 4, 2003, that he subsequently executed the First Addendum to the Contract on January 8, 2004, and that the First Addendum modified the original Contract. Respondent's Brief at 5. Defendant does not deny, and therefore implicitly concedes, that defendant assisted Buyer's performance of the Contract by executing a "County of Sacramento Planning Department Application Information Form" on or about May 15, 2004, and by providing a photograph and by signing a letter on August 19, 2004 attesting to the lack of historical significance and defendant's intent to raze his grandparents' abandoned residence on the Property. R.T. 41:28-43:20.

Defendant concedes that the Contract provided adequate consideration for the sale of the Property. Respondent's Brief at 8. Defendant concedes that, "[u]ntil 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)."

Respondent's Brief at 16. Defendant also concedes that obtaining the required approvals "involve significant expense and foreseeable risk. (R.T. 195:7-23.)" Respondent's Brief at 16. Defendant appears to concede that defendant Thexton turned down an offer from another developer for $750,000 ($250,000 more than Steiner offered) for the same parcel because that offer required Thexton to provide the required approvals and permits. See Respondent's Brief at 25-26.

Defendant does not dispute, and therefore implicitly concedes, that Steiner began expeditious performance of the Contract immediately after it was signed, and that plaintiffs obtained a title report, performed a survey, and provided defendant with a preliminary lot configuration by January 8, 2004, when defendant executed the First Addendum to the Contract (Exhibit 2). Defendant concedes that plaintiffs (Buyer) subsequently performed their obligations under the Contract, and more particularly, that plaintiffs provided "**at least $60,000 in development fees (not to mention hundreds of hours of their own professional time)**...." Respondent's Brief at 48. Defendant has never disputed the fact that plaintiffs deposited in excess of the $500,000 purchase price required by the Contract into escrow after Buyer obtained preliminary approval of the lot split, shortly after defendant attempted to cancel the escrow. In fact, defendant has never disputed the fact that plaintiffs performed all of Buyer's obligations under

the Contract except those that defendant prevented plaintiffs from performing. R.T. 65:19-67:26; 68:24-69:23; 207:7-208:12; 223:1-225:10; 229:21-231:26.

Respondent's Brief also makes several factual and procedural assertions that are worthy of comment, not because they involve disputed facts, or are particularly relevant to the issues on appeal, but because defendant makes factual assertions that do not exist in the record and that appear to be intended to confuse the issues on appeal.

For example, Respondent's Brief asserts (at 4) that:

> 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.

Similarly, Respondent's Brief asserts (at 5):

> 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.

The alleged testimony cannot be found at the record citations provided by defendant because Mr. Thexton never gave such testimony. To the contrary, at trial, Mr. Thexton claimed he could not remember any of his discussions with Mr. Steiner leading up to the Contract, and testified, that as far as he knew, Mr. Steiner "could be telling the truth." R.T. 446:10-447:20. Mr. Steiner testified that during his first meeting with Mr. Thexton,

Thexton said he was thinking about selling a portion of his property, and he invited Mr. Steiner to make suggestions about how that might be done. R.T. 18:2-25:11. In his deposition before trial, Mr. Thexton also expressly recalled requesting a proposal for sale of the Property from Mr. Steiner, and Mr. Thexton recalled insisting that the proposal included certain terms. R.T. 419:7-24; 443:14-22. Further, at trial Mr. Thexton expressly denied having promised the Property to either his step-daughter or to anyone else. R.T. 381:3-383:5; 403:27-404:10. According to Mr. Steiner, Mr. Thexton subsequently contacted Mr. Steiner on multiple occasions, and negotiated the terms of the Contract over the course of several months. R.T. 18:2-25:11.

Finally, in light of defendant's repeated comments about how Mr. Thexton had lived on his property most of his life, it is worth emphasizing that the whole purpose of the Contract and all of the contingencies it contained was to allow Mr. Thexton to keep his home and the most important portion of his property, while allowing him to sell the remainder for half a million dollars.

Respondent's Brief to this Court asserts for the first time that the First Addendum "was prepared at the insistence of Appellants," that the Addendum did not provide a benefit to defendant, and that the provision in the Addendum that required Mr. Steiner to demolish an old barn on

defendant's remainder portion of the property was solely for Mr. Steiner's benefit rather than defendants. Defendant provides no record citations to support these new allegations, and no witness testified to any of it. It is curious how defendant suddenly came up with these new allegations after Mr. Thexton testified he had no recollection of his negotiations with plaintiffs, and his sole supporting witness denied that there were any negotiations whatsoever. Furthermore, defendant's new allegations do not explain why Mr. Steiner would insist on providing an additional water source to Mr. Thexton at no cost to Mr. Thexton, or why Mr. Steiner would insist on offering additional monetary compensation to Mr. Thexton. The truth of the matter is as Mr. Steiner and Mr. Siddiqui explained at trial: the First Addendum was prepared after plaintiffs had obtained a title report, performed a survey, and – with Mr. Thexton's assistance – had more clearly determined the boundaries of the portion of the property that Mr. Thexton wanted to keep, and what he was prepared to sell. R.T. 34:1- 38:13. The more clearly defined boundaries made some of the provisions of the original Contract – such as the set back and farming easements – unnecessary, and allowed Mr. Thexton to substitute other consideration, such as the promise to demolish the old barn and to provide Mr. Thexton with a free water connection.

Respondent's Brief asserts (at 6-7):

> Beginning in approximately 1999 or 2000, Mr. Thexton ... 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.

Once again, the record citations provided do not provide testimony by Mr. Thexton to support the assertion. Mr. Thexton did not testify that he signed a formal power of attorney because he "realized that he was no longer capable of handling his own personal or financial affairs," or because he wanted to relinquish control of his personal or financial affairs. Instead, Mr. Thexton testified that he requested an attorney to prepare a power of attorney in 2001 because:

> Well, it would not be a bad idea, maybe to - - since I did not have anybody at the time and knowing my wife, it would not be a bad idea to designate someone to assist if maybe I needed health care or possibly just assistance, that's all.

R.T. 357:18-28. Mr. Thexton went on to testify that in 2003, he designated Ms. James for the power of attorney because:

> Well, we kind of - - after she took care of my grandfather we became friends and I trusted her and that's the reason I gave her the power of attorney.

R.T. 358:24-28.

Moreover, a power of attorney is generally defined as a written instrument giving authority to an agent. 3 Witkin *Summary of California Law* (10th ed. 2005) "Agency And Employment" §207, p. 260. A power of

attorney is not the same thing as a conservatorship, and it does not prevent a person from exercising control over his person or estate. Defendant Thexton's testimony and conduct confirm that he never intended to relinquish control over his person and estate to Ms. James or anyone else. For example, defendant Thexton admitted that he did not request Ms. James to sign the notice by which he attempted to cancel escrow (Exhibit 5), and Thexton admitted that, as of the time of trial, he was in complete control of his financial affairs despite the fact that the power of attorney in favor of Ms. James had never been canceled or revoked. R.T. 403:3-25; 404:17-406:5; 415:23-417:6. Similarly, it is undisputed that Ms. James never felt it necessary to give any written notice to Mr. Steiner objecting to or seeking to revoke or cancel Mr. Thexton's execution of the Contract or the First Addendum to the Contract, or objecting to plaintiffs' year-long efforts to perform the Contract, even though she testified that she knew about all of the above.

In short, neither Mr. Thexton nor Ms. James ever acted as if either one of them intended the power of attorney to be a form of conservatorship for Mr. Thexton, nor did either one of them give any third party verifiable notice that Mr. Thexton was incapacitated or intended to relinquish control over his financial affairs. Perhaps for these reasons, the trial court did not rule on or rely on defendants' lack of capacity, fraud, or any other

affirmative defense that was based on the power of attorney.

Respondent's Brief asserts (at 7) that Mr. Steiner "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." Defendant's citations to the record do not support this allegation, because it is contrary to all testimony presented at the trial. Ms. James testified that she wandered out of Mr. Steiner's office into the hallway while Mr. Steiner and Mr. Thexton were engaged in "car talk," and that she happened to look in the doorway as Mr. Thexton finished signing the Contract. R.T. 538:26-540:10. Ms. James did not immediately object, nor did she ever provide any written or verifiable notice of objection to Mr. Steiner or anyone else. R.T. 542:28-544:16. Mr. Steiner testified that all of his discussions about the Property and the Contract were with Mr. Thexton because he was the owner of the Property, and Mr. Thexton never indicated that Mr. Steiner should deal with anyone else.

No witness ever claimed that Mr. Steiner intentionally obtained Mr. Thexton's signature on the Contract while Ms. James was out of the room, nor does this assertion explain how or why Mr. Thexton signed the First Addendum to the Contract (Exhibit 2), or the Sacramento County Planning Department Application Information form (Exhibit 3), or the letter

confirming the lack of historical significance of the abandoned residence on the Property (Exhibit 4). Defendant's assertion also does not explain why Ms. James never created a written objection to any of the above, or why she did not use her asserted power of attorney to commence legal action to protect Mr. Thexton when Mr. Steiner allegedly "intentionally went behind her back to induce Respondent, with no knowledge or intent of the Contract, to sign the Contract." Respondent's Brief at 7. In any event, the trial court refused to base its decision on any such allegation by defendant, so it should be irrelevant to the issues presented in this appeal.

Respondent's Brief alleges (at 17, 19) that Steiner "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." Defendant provides no citations to the record for this assertion, because no evidence exists to support it. To the contrary, Mr. Steiner testified unambiguously that the price he offered Mr. Thexton was based in part on Mr. Steiner's willingness to assume the risk that the County would approve only a single lot, and that Mr. Steiner was prepared to purchase the Property and use the entire ten acre parcel for his personal residence if the County approved only a single lot. R.T. 15:13-16:22; 45:13-46:25; 71:21-72:18.

Respondent's Brief alleges (at 19) that: "Appellants, consistent with

the custom and practice of the real estate development world, drafted the agreement and wrote themselves an iron-clad escape clause." Defendant again provides no citations to the record to support this assertion. Respondent's Brief goes on to assert (at 34, see generally 33-36) that:

> 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.

Defendant blatantly misrepresents the record. The truth is that plaintiffs repeatedly objected to defendants' expert testimony, beginning with his qualifications to give an expert opinion, and continuing with the relevance of the proffered testimony. R.T. 588:12-599:3. The trial court *repeatedly* ***sustained*** plaintiffs' objections to defendant's attempt to elicit testimony about alleged "customary" manner in which residential real estate developers purchase property, or acquire an option, or decide to abandon a particular project. R.T. 590:18-599:3. As the trial court correctly informed defendant's counsel at the time, "the basis upon which I ruled on it is that, again, virtually every real estate transaction had a little different deal, a little different agreement between the parties." R.T. 598:1-13.

Respondent's Brief asserts (at 40) that: "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." Once again, defendant offers no citations to the record to support this assertion, because there is no supporting evidence. To the contrary, the Contract itself hows that the three year time limit was included because: "It is anticipated it [the parcel split] will take one to three years, due to existing governmental requirements." Exhibit 1, "CLOSE OF ESCROW," para. 2.

Finally, Respondent's Brief (at 3) asserts that "drafts of a proposed statement of decision and proposed judgment were prepared by the parties and debated before the court." Defendant provides no citations to the record for this assertion, because it is not true. The trial court directed defendant to prepare a statement of decision, and the trial court adopted that statement of decision without change over plaintiffs' written objections, without oral argument or debate. C.T. 601, 608-615, 626-630.

Appellants' Opening Brief accurately summarized the record before the trial court on the issues relevant to this appeal. Except as noted above, Respondent's Brief does not point to any dispute about any fact material to this appeal.

ARGUMENT

A. The Contract Is Valid, Enforceable And Supported By Adequate Consideration.

1. The cancellation clause should not be interpreted as converting the Contract into an option.

Defendant barely addresses plaintiffs' explanation of why the Contract qualifies as a valid bilateral executory contract, supported by adequate consideration. Instead, Respondent's Brief appears to be based to a large degree on circular reasoning:

> Of course he intended an option (he just did not want to call it an option. He did not want 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.

Respondent's Brief at 17 (emphasis in original).

What is missing from defendant's conclusory argument is the key fact that plaintiffs were legally prevented from committing to purchase the Property *unless and until they could obtain a parcel split* and development approvals, and no one knew whether plaintiffs would be able to obtain those approvals, or at what cost and in what amount of time. Accordingly, the parties entered into an agreement in which they made promises to one another about how they would allocate the cost and risk of attempting to obtain those approvals. Buyer agreed to bear the cost and risk of pursuing approvals, and promised to do so expeditiously. Seller agreed to sell the

Property to Buyer at an agreed upon price if Buyer were successful in obtaining the necessary permits. Buyer kept an escape hatch so Buyer could abort if the cost and difficulty of obtaining the necessary approvals became too great. Seller kept an escape hatch of three years – if Buyer's could not obtain the required approvals in three years, regardless of the cost and effort up to that time, Buyer lost the opportunity to purchase at the agreed-upon price.

According to the plain language and structure of the Contract, Buyer had discretion to abandon the effort with notice to Seller, but Buyer did *not* have discretion to delay the start of efforts to pursue the parcel split, or to provide regular progress updates on the efforts to obtain the parcel split, and Buyer had an obligation to indemnify Seller and to provide the results of all "information, reports, tests, studies and other documentation obtained by Buyer from independent experts and consultants concerning the Property" if Buyer decided it could not proceed. On the other hand, Seller agreed to keep the Property available for Buyer to purchase at the agreed upon price, but only during the period that Seller was actively pursuing the development approvals and making progress reports to Seller, *and for no more than three years*; Seller did not promise unconditionally to hold the property available for sale at an agreed upon price for three years, regardless of whether or not Buyer expeditiously pursued the development

approvals in the meantime.

These mutual bargained-for promises by Buyer and Seller clearly conferred a benefit on the receiving party, and clearly constituted a "prejudice suffered or agreed to be suffered" by the promising party. As such, the mutual promises qualified as consideration under the definition set forth in Civil Code §1605, and the Contract is enforceable as a binding bilateral contract.

Defendant falsely asserts that: "The decision to work or not work 'expeditiously' is certainly a contingency mentioned in the Contract." Respondent's Brief at 18. Defendant misstates the Contract. The requirement that "Buyer will move expeditiously with the parcel split" and the requirement that "Buyer will give quarterly reports to Seller as to progress of the parcel split are ***NOT*** in the "CONTINGENCIES" portion of the Contract; those requirements for the Buyer to "move expeditiously" and to give regular progress reports on the progress of efforts to obtain the parcel split" are express requirements of the "CLOSE OF ESCROW" section of the Contract (Exhibit 1, p. 3).

Defendant goes on to argue that:

> Had Appellants' [sic] subsequently failed to do **anything** in furthering the parcel split, Respondent may, at some point in the three years, have had grounds to terminate the agreement.

Respondent's Brief at 18-19 (emphasis in original). Plaintiffs' immediate

efforts to perform the Contract and to pursue the parcel split confirms their promise and understanding that proceeding expeditiously was a material term of the Contract.

> The conduct of the parties may be, in effect, a practical construction thereof, for they are probably least likely to be mistaken as to the intent. "This rule of *practical construction* is predicated on the common sense concept that 'actions speak louder than words.' ..."

Witkin, supra, §749, p. 838, quoting *Crestview Cemetary Assn. v. Dieden* (1960) 54 Cal.2d 744, 754 (italics in original). Plaintiffs' conduct confirms their understanding that failing to comply with that term would have been a material breach, which would have allowed defendant to terminate the Contract and sue for damages within a very short period of time after execution of the Contract. Respondent's Brief provides no legal or logical reason to conclude otherwise.

For the reasons set forth in greater detail in Appellants' Opening Brief, the fact that Buyer kept an escape hatch as part of the "Contingency" section of the Contract should not invalidate the entire Contract, *particularly after plaintiffs' had substantially performed their obligations under the Contract.* Defendant argues that the escape hatch or cancellation clause meant that:

> There was no obligation imposed upon Appellant Steiner. He was not obligated to purchase unless and until he elected to do so.

> ... Consequently, Appellants "agreed" to do nothing. They bound themselves to do nothing and were obliged to do nothing.

Respondent's Brief at 16-17.

Plaintiffs maintain that there is no fair way to read the Contract, in its entirety, to come to that conclusion. As Civil Code §1636 and §1643 confirm:

> A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties.

Buyer clearly did agree to do "something," and Buyer's immediate efforts to perform and plaintiffs' ultimate complete performance of their contractual obligations confirm their understanding of the Contract. It is undisputed that the "something" that Buyer agreed to perform ended up costing plaintiffs some $60,000, and conferred a market value of $80,000 to $100,000 on defendant,[2] – and that does not include SFP's costs or lost value in marketing and selling real property it owned for the 1031 exchange that was intended to pay the contractual purchase price for defendant's Property. R.T. 218:8-223:28; 228:21-229:17.

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[2] Steiner and Siddiqui testified that the cost of preparing the survey, tentative maps, participating in reviews and hearings, and obtaining the tentative approvals was somewhere in the neighborhood of $60,000, and that the market value of providing those services was approximately $80,000 to $100,000. R.T. 43:25-44:15; 52:4-55:21; 118:13-119:9; 133:8-23; 207:1-6; 213:18-214:24.

2. <u>The implied covenant of good faith and fair dealing defines any ambiguity in a contract in a way that gives effect to the expressed mutual intention of the parties and avoids a finding that a promise is illusory.</u>

Defendant barely addresses the authorities cited in Appellant's Brief, such as *Fosson v. Palace (Waterland), Ltd.* (1996) 78 F.3d 1448, 1454, *Bleecher v. Conte* (1981), 29 Cal.3d 345, 350; *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 372; *Storek & Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44, 57; and *Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 805-808, in which courts applying California law have upheld the validity of conditional contracts because:

> First, "in every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement." *Bleecher v. Conte* (1981), 29 Cal.3d 345, 350. [Citations omitted.]
>
> Second, if a contract is capable of two constructions, the court must choose that interpretation which will make the contract legally binding if it can be so construed without violating the intention of the parties. (citations omitted).

Fosson v. Palace (Waterland), Ltd., supra, 78 F.3d at 1454.

As explained in Appellants' Opening Brief, a contract in which one party has "discretion and control" over whether the other party will receive a benefit is valid under California law if the party who has the discretion has also assumed enforceable obligations to the other party upon exercise of

that discretion. See, e.g., *Fosson, supra*, 78 F.3d at 1454: "we hold that a valid contract arose by virtue of the obligations the Producers agreed to assume in the event the Composition was used." In *Bleecher v. Conte, supra*, 29 Cal. 3d at 352, this Court held that express and implied obligations to proceed in good faith were sufficient to make a conditional promise valid consideration for a bilateral contract. In *Storek & Storek, Inc. v. Citicorp Real Estate, Inc., supra*, 100 Cal.App.4th at 57, the court plainly restated the rule that directly contradicts defendants' arguments in this case:

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

In light of the authorities cited and quoted in Appellants' Opening Brief, defendant cannot simply assert that the cancellation clause or the conditional nature of the Contract requires that it be considered a disguised option. The plain language of the Contract taken as a whole, the obvious intent of the parties in entering into the Contract, and the substantial performance of the Contract by Buyer before defendant attempted to reneg, all support using the implied covenant of good faith and fair dealing to limit Buyer's discretion to cancel to avoid a finding that Buyer's promises are illusory.

Defendant notes that *Bleecher v. Conte, supra*, 29 Cal.3d at 351, distinguished an earlier case, *County of Alameda v. Ross* (1939) 32

Cal.App.2d 135, in which the Court of Appeal held a contract void because one party could revoke "at any time for any reason." However, there is no indication that the party with discretion to revoke in *County of Alameda v. Ross* had any obligation at all toward the other party.

In this case, on the other hand, plaintiffs had express obligations to move expeditiously immediately upon executing the Contract, to provided regular progress updates to defendant, to indemnify defendant, and to deliver valuable documentation in the event Buyer could not continue performing the Contract. As in *Fosson, supra*, 78 F.3d at 1454, plaintiffs had defined obligations to defendant in the event they exercised their discretion to discontinue performance, and those specific obligations were negotiated by the parties before they entered into the Contract. Like *Bleecher*, and unlike *County of Alameda*, plaintiffs in this case had enforceable obligations to defendant that had value whether or not plaintiffs were ultimately able to complete performance of the Contract. Nothing in the Contract or California law would have prevented Thexton from suing Buyer for breach if Buyer did not perform the contractual obligations identified above, and nothing would have prevented Thexton from immediately declaring a material breach and selling the Property to someone else if Buyer failed to "move expeditiously with the parcel split" or if Buyer "elect[ed] not to continue in this transaction" at any time before

September 1, 2006. Exhibit 1, p. 3, "CLOSE OF ESCROW," para. 2; p.2, "CONTINGENCIES," para. 7.

3. Buyer's partial performance made up for any alleged defects in consideration and made the Contract enforceable.

As in the trial court and in the Court of Appeal, defendant continues to completely ignore the fact that defendant executed the First Addendum to the Contract (Exhibit 2) on January 8, 2004, four months after he signed the original Contract. By the time defendant executed the First Addendum, plaintiffs had conferred an actual benefit on defendant by surveying the Property, preparing a tentative parcel plan, and a preliminary lot configuration. R.T. 37:17-38:1. Further, defendant requested and received additional consideration from plaintiff Steiner in the form of a promise to provide defendant with a free water hookup and to demolish certain abandoned structures for defendant, which the undisputed testimony of Mr. Steiner valued at between ten and fifteen thousand dollars. R.T. 34:5-37:2; 38:20-39:7; 136:10-138:8; 148:17-149:2.

Defendant does not even attempt to argue that the consideration actually provided by plaintiffs as of the time defendant executed the First Addendum to the Contract was insufficient consideration to support a bilateral contract. Instead, defendant repeats his previous argument that "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." Respondent's Brief at 24 (emphasis in original).

Defendant's arguments misses the point for at least four reasons. First, all of the authorities cited by defendant consider the "adequacy" of consideration for purposes of ordering the equitable remedy of specific performance pursuant to Civil Code §3391. None of the authorities cited by defendant hold that a contract must be invalidated because the consideration was supplied after formation, through partial performance or detrimental reliance. See *Drullinger v. Erskine* (1945) 71 Cal.App.2d 492, 496; *O'Connell v. Lampe* (1929) 206 Cal. 282, 285; *Anderson v. Charles* (1921) 52 Cal.App. 290, 293; *Morrill v. Everson* (1888) 77 Cal. 114, 116. Second, the most recent of the cases relied on by defendant is 64 years old, and all predate more modern decisions applying promissory estoppel (e.g., *Drennan v. Star Paving Co.* (1958) 51 Cal.2d 409) or partial performance to enforce a contract (e.g., *Burgermeister Brewing Corp. v. Bowman* (1964) 227 Cal.App.2d 274, 280). Third, the consideration at issue in this case was provided at the time of contract formation, in the form of "benefits conferred, or agreed to be conferred," and "prejudice suffered, or agreed to be suffered." Civil Code §1605. Nothing in the authorities cited by defendant or in the statute defining "consideration," Civil Code §1605, requires that consideration be physically transferred between the parties at the time of contract formation. Finally, and most importantly, defendant

simply ignores the fact that as of the time defendant executed the First Addendum modifying and ratifying the Contract, plaintiffs had already delivered partial performance, and had obligated themselves to deliver additional consideration, regardless of whether or not they chose to abandon their efforts immediately after executing the First Addendem.

As explained in greater detail in Appellants' Opening Brief (at 9-11, 39-40) it is an undisputed fact that plaintiffs had actually provided consideration in the form of part performance by the time defendant ratified and modified the Contract by executing the First Addendum to the Contract. This undisputed fact should be sufficient, in and of itself, to reject defendant's claim that all of plaintiffs' consideration for the Contract was illusory.

Moreover, it is undisputed that *as of the time defendant attempted to cancel escrow, Buyer had performed substantially all of Buyer's obligations under the Contract.* By the time Thexton attempted to cancel, Steiner and SFP had already performed somewhere between 75% and 90% of the work required to obtain the approvals necessary to close escrow on the Contract. R.T. 50:18-52:3; 59:20-61:14; 240:26-241:3; 248:25-250:26. It was undisputed at trial that Steiner and SFP completed all of the remaining work – except what was prevented by Mr. Thexton's refusal to sign the final parcel map and to close escrow – and deposited the full Contract price into

escrow shortly after Thexton submitted his note attempting to cancel escrow. R.T. 65:19-67:26; 68:24-69:23; 207:7-208:12; 223:1-225:10; 229:21-231:26. Siddiqui and Steiner both testified that the reports, investigations, and preliminary approvals obtained by plaintiffs had substantial value to Thexton, because Thexton would be able to use those documents to continue with a parcel split and development of the Property. R.T. 118:13-119:9; 122:15-134:26; 146:14-147:23.

Defendant once again completely ignores and fails to address the fact that the undisputed substantial performance of the Contract by Buyer as of the time defendant Thexton attempted to reneg is a separate and independent basis for enforcing the Contract. California courts and respected commentators agree that partial performance should be used to enforce a contract if a promise might otherwise be considered illusory. "An agreement that is otherwise illusory may be enforced where the promisor has rendered at least part performance. [Citations omitted.]") *The Money Store Investment Corporation v. Southern California Bank* (2002) 98 Cal.App.4th 722, 728; accord *Burgermeister Brewing Corp. v. Bowman, supra*, 227 Cal.App.2d at 280 (quoting 1A Corbin on Contracts, §163, p.76).

As explained in greater detail in Appellants' Opening Brief, the holdings of *Bleecher, supra; Storek & Storek, Inc., supra*, and *Third Story*

Music, Inc., supra, are also consistent with the well-established rule that partial performance should be used to enforce a contract if a promise might otherwise be considered illusory. The fact that defendant steadfastly refuses to address these authorities or this argument in general should be considered a concession that the plaintiffs' partial performance is sufficient to enforce the Contract. *Marriage of Falcone* (2008) 164 Cal.App.4th 814, 830. No further analysis is required to reverse and remand with directions to enforce the Contract, subject to defendant being permitted to retry is remaining affirmative defenses.

B. The Contract Is Enforceable Even If It Is Deemed To Include A "Disguised Option" Component Because Of The Cancellation Clause.

As Respondent's Brief concedes, "it is not fatal to Appellants' claim" if the Contract is determined to be an option. An interpretation of the Contract as containing an option only results in a judgment for defendant if: (1) defendant proves a complete absence of any consideration for the alleged option; and (2) the Court concludes that the doctrine of promissory estoppel cannot be used to supply any allegedly missing consideration for the option. Respondent's Brief fails to support either required condition to sustain a judgment for defendant.

1. The Contract provided for consideration that must be allocated to any alleged option component of the Contract.

As the Court of Appeal's Opinion correctly notes (at 16-17):

> "An option based on consideration, whether it be the proverbial peppercorn or some other detriment, is itself a binding contract and is mutually enforceable. [Citations.] ..." (*Torlai v. Lee* (1969) 270 Cal.App.2d 854, 858-859.).

Defendant therefore must make and prove the allegation restated in Respondent's Brief (at 21) that: "Appellants failed to provide Respondent with a shred of consideration for Respondent's promise to suspend his alienability rights for (potentially) three years." Similarly, Defendant's Statement of Decision, adopted by the trial court, incorrectly ruled that "[t]here was no evidence that ... defendant received any other benefit or thing of value in exchange for the option."

Defendant does not and cannot deny that plaintiffs kept their promise to "move expeditiously with the parcel split," to indemnify and hold harmless the Seller for all of plaintiffs' development efforts, and to provide regular progress updates to defendant. Contract (Exhibit 1), "CLOSE OF ESCROW," paras. 2, 3; "CONTINGENCIES," paras. 4, 6. These efforts indisputably qualify as consideration and are worth more than the proverbial peppercorn. Civil Code §1605; *Kowal v. Day, supra*, 20 Cal.App.3d at 726; Civil Code §3386.

Moreover, it is undisputed that plaintiffs delivered partial performance of these obligations *before* defendant executed the First Addendum (Exhibit 2) in which he affirmed and modified the Contract, so there can be no question that plaintiffs actually provided consideration at

the time of contract formation. Defendant therefore must come up with an argument about why this consideration should be disregarded, because otherwise the "disguised option" portion of the Contract would still be enforceable, and defendant would be in breach of the Contract when he repudiated the Contract before the option period had expired.

Not surprisingly, Respondent's Brief takes two tacks to convince this Court that the consideration provided during the alleged option period does not matter. First, defendant argues that all consideration described in the Contract must be allocated to the ultimate purchase price, instead of to any disguised option. Second, defendant argues that any consideration that was provided during the alleged option period was worthless. Both arguments are illogical, and would require the Court to ignore the plain language and obvious intention of the parties when they entered into the Contract. See Civil Code §1636 and §1643, requiring Courts to give a contract an interpretation that will make it "capable of being carried into effect, if it can be done without violating the intention of the parties."

The Contract expressly provides that the obligations by Buyer to move expeditiously with the parcel split, to provide regular progress reports, to indemnify and hold harmless, and to provide "information, reports, tests, studies and other documentation" in the event Buyer was unable to proceed, are to be performed during the period of time "from date

of acceptance until the closing of escrow ...." The only reasonable construction of the Contract is that these benefits conferred on Seller and prejudice assumed by Buyer must be allocated to any alleged "option" period of time during which Buyer was attempting to accomplish the parcel split. Any other interpretation of the Contract would make no sense, because if the Contract were truly a disguised option with no obligations on Buyer until acceptance of the offer to sell, Buyer's acceptance would be completed with tender of only the purchase price and the necessary development approvals. If the Contract were interpreted as containing a disguised option period that expired in three years, there would be absolutely no reason for the Contract to include requirements that the Buyer "move expeditiously," provide regular progress reports, indemnify and hold harmless the Seller during the investigation period, or agree to provide any tests, reports or documentation procured during the investigation period. *The **only purpose** of these provisions is to provide consideration for the time period during which Buyer was performing the investigation and during which Seller was agreeing to hold the Property off the market.*

Respondent's Brief argues (at 26) that all of Buyer's obligations assumed during the time in which Buyer was pursuing the parcel split must be allocated to the ultimate purchase price, because defendant Thexton turned down an offer that was $250,000 higher than plaintiffs' offer but that

required Thexton to obtain the required development approvals himself. In defendant's words (Respondent's Brief at 26):

> 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 <u>for the purchase itself.</u>

The logical fallacy in defendant's argument is to equate the value of "an approved parcel split" with the value of the same property without an approved parcel split, and with great uncertainty as to whether approval for a parcel split could be obtained, and at what cost in time, effort, and money.

The fact that defendant was unwilling to accept an additional $250,000 as compensation to assume the cost and risk of obtaining an approved parcel split proves the obvious point that plaintiffs' agreement to assume the cost and risk of obtaining a parcel split had value to defendant. Since plaintiffs could not guarantee that they would be successful in obtaining a parcel split, the $750,000 offered to defendant by another party conditioned on defendant providing an approved parcel split has no real relevance in interpreting the Contract at issue here. The $750,000 offer conditioned on a hypothetically approved parcel split certainly does *not* mean that all of the consideration provided by plaintiffs in their Contract with defendant must be allocated to the final purchase price rather than to

an implied option portion of the Contract.

Simply put, there is no chain of logic that leads from a third party offer of $750,000 for the Property *with an approved parcel split* to a conclusion that none of the consideration provided by Buyer in this Contract can be allocated to the period of time that defendant agreed to allow plaintiffs to expeditiously, and at their own cost, pursue actual development approvals for the Property. Moreover, the third party offer of $750,000 for the Property with a hypothetical parcel split does not even begin to address the specific obligations plaintiffs assumed in this Contract to "move expeditiously" with the parcel split, to provide regular updates to defendant, to indemnify and hold harmless defendant, and to provide all tests and reports obtained by plaintiffs in the event they had to abort the effort.

Defendant's attempt to minimize the value of Buyer's promises is no more convincing than his attempt to argue that any value must be allocated entirely to the ultimate purchase price. Contrary to defendant's suggestion, plaintiffs were under no pre-existing legal obligation to "move expeditiously," indemnify or hold harmless the Seller, provide regular updates, or to provide copies of tests and reports obtained at Buyer's cost. Because defendant was "not lawfully entitled" to these obligations and Buyer was not "lawfully bound to suffer" the "prejudice ... agreed to be

suffered," these obligations qualify as consideration under Civil Code §1605.

Ultimately, defendant's attempt to minimize the value of the promises and performance provided by plaintiffs only goes to the value of the consideration, not the existence of consideration, and therefore fails to carry defendant's burden of proving a complete absence of consideration for the alleged option. Similarly, defendant's unsupported suggestion that these obligations were nothing more than "routine costs of doing business" does not mean that the obligations were without value or that plaintiffs were legally required to provide them to defendant Seller without any return consideration from defendant.

To sum up, any reasonable interpretation of the Contract requires a finding that a portion of the consideration plaintiffs provided and promised to provide must be allocated to any alleged disguised option period – i.e., the time during which plaintiffs agreed to expeditiously pursue the required development approvals and defendant agreed to hold the Property available for sale to plaintiffs at an agreed upon price. Since defendant cannot carry his burden of proving a complete absence of consideration for the alleged disguised option, the Contract is still enforceable against defendant, whether it is considered a partial option or a completely bilateral contract.

2. The doctrine of promissory estoppel should be applied to supply any consideration otherwise missing from the Contract, even if it is interpreted to be an option contract.

Defendant appears to concede that the conditions for applying promissory estoppel would be met in this case except for the fact that defendant contends that this Contract is a disguised option. As defendant explains: "Stated another way, if an option were not at issue, then Appellants [sic] actions might well be construed as sufficient partial performance for an estoppel argument." Respondent's Brief at 30.

Respondent's Brief asserts four different reasons why promissory estoppel should not be applied to save an option contract. Each of these grounds is addressed in turn below:

a. A promise to hold open an option is not inconsistent with detrimental reliance on the option by the option holder.

Respondent's Brief (at 27-29) clearly asserts that the doctrine of promissory estoppel can ***never*** be available to supply substitute consideration for an option contract. As Respondent's Brief puts it (at 28):

> First, since what is at issue is an **option** contract, the prejudice which the Appellants assert can never constitute consideration, substitute or otherwise. [Emphasis in original.]

Although it has been prominently featured in every brief submitted by plaintiffs since at least Plaintiffs' Joint Post-Trial Brief, submitted to the

trial court in lieu of closing arguments,[3] defendant persists in refusing to discuss, or even refer to, this Court's landmark decision applying promissory estoppel, *Drennan v. Star Paving Co.* (1958) 51 Cal.2d 409, 413. Respondent's Brief also fails to address the fact that no published California authority precludes application of the doctrine of promissory estoppel to option contracts.

In *Drennan v. Star Paving Co., supra,* this Court enforced a subcontractor's promise, made without consideration, to perform paving work for a set price. The subcontractor's offer was in the nature of an option, because the subcontractor knew that the contractor could not accept the offer until the general contract was awarded. This Court held that the subcontractor should be held to his promise because he "had reason not only to expect plaintiff to rely on its bid but to want him to." *Drennan v. Star Paving Co., supra*, 51 Cal.2d at 415.

As explained in some detail in Appellants' Opening Brief, in this case, defendant not only "reasonably expect[ed] a substantial change of position" by plaintiff Steiner based on defendant's promises in the Contract, defendant *wanted* Steiner to spend time and money pursuing a parcel split – in fact, he wanted Steiner to do so "expeditiously." Over the course of the next twelve months, defendant then observed and assisted plaintiffs in

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[3] See C.T. 391:1-394:1; 580:22-581:17.

substantially changing their position to their detriment in reliance on the Contract – by observing and assisting plaintiffs in performing the survey and preliminary lot configuration, by executing the First Addendum to the Contract ratifying the Contract and increasing the benefits to defendant *after* plaintiffs had begun to perform, and by executing documents and providing information in support of plaintiffs' efforts until at least August 19, 2004 (Exhibits 3, 4).

Defendant never denies that plaintiffs reasonably relied on defendant's promise, nor does he deny that plaintiffs invested substantial time, effort and money because of defendant's promises, as set forth in the Contract. Instead, defendant argues (Respondent's Brief at 28-29):

> 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**. [Emphasis in original.]

The last sentence quoted above exposes the logical fallacy of defendant's argument – for promissory estoppel to apply to the alleged option, it was not necessary for defendant to reasonably expect plaintiffs to

exercise the option; *it was only necessary for defendant to reasonably expect plaintiffs to detrimentally rely* ***on having the option itself available.*** In *Drennan v. Star Paving Co., supra*, 51 Cal.2d at 415, for example, the subcontractor also had no way of knowing whether the contractor would ultimately accept the subcontractor's offer, but the subcontractor did have reason to know that the contractor was relying on the offer remaining open until the contractor had an opportunity to act on it after the general contract was awarded. In this case, the plain language of the Contract and defendant's own observations of plaintiffs' actual efforts to perform were sufficient for any reasonable person to conclude that plaintiffs were investing time, money and effort in pursuing a parcel split in reliance on defendant's promise to allow them a certain period of time to close the deal.

Defendant goes on to argue that if promissory estoppel were allowed to supply consideration for an option, then no one would ever pay money for an option because:

> 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.

Respondent's Brief at 29 (emphasis in original).

Of course, parties have continued to provide monetary and other consideration for options despite the application of promissory estoppel by

this Court in *Drennan v. Star Paving Co., supra*, more than fifty years ago. The reason is that California law has so far held that the primary factors to consider in determining whether promissory estoppel applies are whether the promisor should reasonably expect to induce detrimental reliance, and whether the promise actually did induce detrimental reliance. *C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 6; *Raedecke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 672, fn. 1. As this Court explained in *Drennan v. Star Paving Co., supra,* 51 Cal.2d at 414:

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

Contrary to defendant's suggestion, a promisee cannot unilaterally create the conditions required for promissory estoppel to apply, because the promisor must first make a promise that creates reasonable reliance by the promisee. If these conditions are not met, promissory estoppel will not supply substitute consideration, regardless of whether or not the promisee has begun performance. For example, in *Bard v. Kent* (1942) 19 Cal.2d 449, 453, this Court refused to apply promissory estoppel because defendant's preparations to perform a contract were not made in reliance on any promise by plaintiff.

> ... 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.

In this case, on the other hand, it is clear that defendant expressly requested exactly the detrimental reliance that plaintiffs provided, and defendant then observed and assisted plaintiffs as they continued to detrimentally rely on defendant's promises.

b. <u>Promissory estoppel can provide substitute consideration for illusory bargained-for consideration</u>.

Defendant's second argument against applying promissory estoppel is that plaintiffs' detrimental reliance cannot be used as substitute consideration if the detrimental reliance is the same conduct that was bargained for as consideration. In the words of the Respondent's Brief (at 30):

> 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**. [Emphasis in original.]

The problem with defendant's argument is that it ignores defendant's previous contention that the consideration promised in the Contract for the alleged option was illusory. If Buyer's promises in the Contract are not deemed to be illusory, then the Contract is binding on the parties, and there is no need to consider the doctrine of promissory estoppel. However, if

defendant's position prevails and the consideration promised by Buyer for the alleged option or the Contract as a whole is illusory, then there is no logical reason why promissory estoppel should *not* be available to supply substitute consideration for the illusory consideration. All of the conditions and reasons for applying promissory estoppel are still met if a promise is deemed illusory, just as in *Drennan v. Star Paving Co., supra*, and every other case applying promissory estoppel.

Defendant again cites no authority or public policy reason in support of his argument, other than his previous claim that "*[a]ny 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*. Respondent's Brief at 31 (emphasis in original). Defendant's assertion that promissory estoppel has no limits is no more convincing in this context than in support of his preceding argument. To the contrary, applying promissory estoppel to salvage a contract that would otherwise be invalid because of illusory consideration is entirely consistent with the purposes of the doctrine – to bind a promisor "when he should reasonably expect a substantial change of position ... in reliance on his promise, if injustice can be avoided only by its enforcement." *Raedecke v. Gibraltar Sav. & Loan Assn.*, *supra*, 10 Cal.3d 665, 672, fn. 1. What could be more fair than holding a promisor to the promise he made, when the other party relied on the promise to provide

exactly what the promisor bargained for?

Applying promissory estoppel as substitute consideration in this Contract would give the parties exactly what they thought they were bargaining for at the outset. After all, defendant's reason for contending that Buyer's promises were illusory consideration is that the Contract did not really bind Buyer to deliver what Buyer promised. If Buyer relies on defendant's promise to actually deliver what Buyer promised, then defendant has received what he bargained for, and it is only fair to hold defendant to his end of the bargain. Put another way, once Buyer begins performance in reliance on defendant's promise, the Buyer has added value above and beyond the promises of the contract to Buyer's side of the contractual equation. The fact that the original Contract may have been unenforceable is no reason to preclude promissory estoppel from being available to save the contract.

c. Plaintiffs do not need promissory estoppel to supply a missing acceptance.

Defendant next argues that since an option unsupported by consideration is nothing more than an irrevocable offer, and since promissory estoppel supplies only substitute consideration, formal acceptance by plaintiffs is still required to make an enforceable contract. Respondent's Brief at 31-32.

The problem with this argument is that it is based on the false

assumption that plaintiffs are relying on promissory estoppel to provide an acceptance for the Contract. Plaintiffs are ***not*** relying on promissory estoppel to supply a missing acceptance, because it is undisputed that plaintiffs attempted to accept the Contract during the supposed option period, but defendant refused to perform. Thus it is an undisputed finding of the trial court that plaintiffs deposited the purchase price for the Property into escrow, and it is undisputed that plaintiffs performed all obligations of the Contract that they were not prevented from performing by defendant's repudiation. In the words of the trial court, defendant "obstructed the thing and he canned the whole program ... at the time it was all finished, virtually,"[4] and just before plaintiffs would have been entitled to their benefit of the bargain. It is well-settled that:

> [A] definite and unconditional repudiation of the contract by the promisor communicated to the promisee, being a breach of contract, creates an immediate right of action even though it takes place long before the time prescribed for the promised performance and before conditions specified in the contract have ever occurred.

Daum v. Superior Court (1964) 228 Cal.App.2d 283, 287.

If the Contract is deemed to contain a disguised option, and if the Court determines that there was no consideration for the option or that such consideration was illusory, all that is necessary to make a binding Contract

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[4] Trial Court's comments at R.T. 240:26-241:3.

is for promissory estoppel to supply the missing consideration. It is undisputed that the only thing that prevented the Contract from being fully performed is defendant's refusal to sign the final parcel map, refusal to cooperate with the 1031 exchange contemplated by the Contract, and refusal to close escrow after plaintiffs' deposited the Contract price into escrow. Once promissory estoppel is applied to provide substitute consideration for the disguised option, the option is enforceable, and defendant is clearly in breach for refusing to perform his obligations under the Contract.

d. Promissory estoppel should be applied to prevent injustice in this case.

Defendant argues that the trial court correctly determined that plaintiffs suffered no injustice as a result of defendant's breach of his promise to allow them to purchase the Property at an agreed upon price if plaintiffs undertook the expense, risk, and effort of obtaining a parcel split. Unfortunately, for the reasons set forth in detail in Appellants' Opening Brief, it appears the trial court and the court of appeal applied the wrong legal standard in reaching this conclusion, which requires reversal of the trial court's decision.

Defendant again argues that because developers allegedly routinely use options and because developers are aware of the cost, risk and time required to obtain development approvals, there is nothing unfair about

requiring plaintiffs to absorb the costs of pursuing the parcel split in this case. Respondent's Brief at 33-38. As noted above, this argument is based on presumptions that are not supported by any citations to evidence in the record. Defendant's attempts to introduce evidence of what other developers might agree to do was rejected by the trial court. Furthermore, defendant's presumptions of what developers allegedly do as a matter of routine is not a substitute for an evaluation of what the parties to this case agreed to do in this particular Contract.

Defendant once again ignores the undisputed evidence of prejudice and injustice suffered by plaintiffs, as summarized in Appellants' Opening Brief. The fact that plaintiffs spent in excess of $60,000 attempting to obtain a parcel split in obvious reliance on defendant's promise is an obvious indication of prejudice and injustice. The fact that defendant is free take for himself all of the value added as a result of plaintiffs' efforts is a further clear indication of injustice if promissory estoppel is not used to force defendant to honor his contractual obligations.

As this Court noted in *Drennan v. Star Paving Co., supra*, 51 Cal. 2d at 414, injustice results "if the offer could be revoked after the offeree had acted in detrimental reliance thereon." Here, defendant induced plaintiffs to spend the time, money, and effort required to obtain a parcel split by promising to sell them the Property for an agreed upon price. There can be

no doubt that plaintiffs would not have undertaken this effort or financial burden unless defendant had promised to sell them the Property at the agreed upon price if they were successful. Defendant then watched, waited, and periodically encouraged plaintiffs on, only to attempt to revoke just as plaintiffs were about to earn their bargained-for reward for their efforts and risk-taking. Throughout this time, defendant suffered no prejudice and was subject to no risk of loss. If defendant is allowed to reneg, there is absolutely nothing to prevent him from cashing in on the added value created by plaintiffs' efforts and investment.

If this case does not present the epitome of injustice and prejudice, it is unclear what circumstances or conduct by a defendant would qualify for application of the doctrine of promissory estoppel. Moreover, allowing a defendant to avoid the consequences of a breach of contract because of a defendant's after-the-fact attempt to renegotiate a contract and reneg on a promise will inevitably encourage additional litigation and will undermine the certainty and predictability that parties attempt to achieve by entering into contracts.

3. Basing the doctrine of promissory estoppel on an after-the-fact assessment of the equities of a contract undermines the purpose of the doctrine and the fundamental goal of contract law.

Defendant makes no attempt to address plaintiffs' critique of the Court of Appeal's rationale for affirming the trial court, which appeared to

be based on an after-the-fact inquiry into whether a promise was in the promisor's best interest in the first place. Nor has defendant offered any argument or reason that addresses plaintiffs' concern that a broad, after-the-fact inquiry into the equities of the underlying exchange of promises that is not based on attempting to give effect to the expressed intentions of the parties will inevitably lead to increased uncertainty about the validity of contracts, increased litigation, and inequitable results. Plaintiffs therefore rely on the discussion set forth in Section B.4 of their Opening Brief. To the extent defendant uses his Respondent's Brief to address arguments raised in amicus briefs, plaintiffs will reserve their response for a future brief that directly addresses the amicus positions. For now, plaintiffs simply note that the *reasoning* of the Court of Appeal's Opinon obviously has a broader application than the facts of this case, regardless of whether or not the Contract at issue in this case was prepared solely for these parties, as opposed to a widely used form contract.

4. Defendant has effectively conceded that the trial court's refusal to apply promissory estoppel on procedural grounds is wrong as a matter of law.

Respondent's Brief essentially ignores the authorities and arguments cited in Appellants' Opening Brief on the issue of whether plaintiffs' failure to plead promissory estoppel should preclude plaintiffs from raising promissory estoppel at trial or on appeal. Thus defendant does not contest

the summary of California law set forth in *Frank Pisano & Associates v. Taggart* (1972) 29 Cal.App.3d 1, 16:

> It has long been settled law that where (1) a case is tried on the merits, (2) the issues are thoroughly explored during the course of the trial and (3) the theory of the trial is well known to court and counsel, the fact that the issues were not pleaded does not preclude adjudication of such litigated issues and a review thereof on appeal.

Respondent's Brief also does not address C.C.P. §469, which provides that:

> No variance between the allegation in a pleading and the proof is to be deemed material, ***unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits*** .... [Emphasis added.]

Nor does defendant contest the summary of law set forth in Weil and Brown, *California Practice Guide: Civil Procedure Before Trial* (Rutter Group Rev. #1 2006) "Pleadings," ¶6:10, p. 6-3:

> In determining the issues raised by the pleadings, the pleadings of *both* parties must be considered. Issues raised in the answer may support relief on theories not specifically raised in the complaint.

See also *Estrin v. Superior Court* (1939) 14 Cal.2d 670, 676. Defendant also cites no authority or reason to support his previous argument that plaintiffs were required to amend their complaint in response to defendant's 23 affirmative defenses, to respond in detail to each of those affirmative defenses.

Finally, defendant also fails to cite any evidence showing – or even allege the existence of – any prejudice to defendant as a result of an alleged

delay by plaintiffs in raising the promissory estoppel argument until trial. Defendant's passing suggestion that plaintiffs' contentions based on promissory estoppel are "untimely" (Respondent's Brief at 14) is obviously false, as is demonstrated by the record citations in Appellants' Opening Brief (e.g. at 47, R.T. 123:2-125:1; 280:20-284:24), and by the fact that Plaintiffs' Joint Post-Trial Brief and Plaintiff's Joint Post-Trial Reply Brief – submitted at the trial court's request in lieu of closing arguments – prominently raise plaintiffs' promissory estoppel arguments. C.T. 391:1-394:1; 580:22-581:17.

Defendant's procedural objections to plaintiffs' promissory estoppel arguments received only a "passing reference" in Respondent's Brief, remain essentially unsupported by any evidence or authority, and should therefore be considered abandoned. *Dills v. Redwoods Assocs., Ltd.* (1994) 28 Cal.App.4th 888, 890; see also *Miller v. Filter* (2007) 150 Cal.App.4th 652, 671. Alternatively, defendant's position is completely contrary to California law, for the reasons set forth in Appellants' Opening Brief, and should therefore be rejected on the merits.

CONCLUSION

Defendant does not and cannot deny that plaintiffs performed the core obligation of the Contract to "move expeditiously with the parcel split." Defendant does not and cannot deny that as of the date defendant modified

and then ratified the Contract by signing the First Addendum, plaintiffs had begun performance of their obligations, and had delivered a preliminary lot configuration to defendant. According to the plain language of the Contract, as of that date, plaintiffs were obligated to indemnify defendant and to provide copies of reports and surveys they had already obtained, regardless of whether or not plaintiffs could ultimately obtain a parcel split.

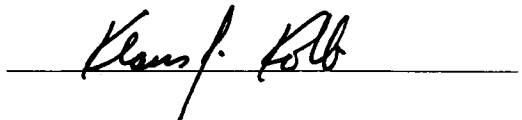
Defendant also does not and cannot deny that plaintiffs had substantially performed their obligations by the time defendant attempted to cancel escrow and effectively repudiated the Contract. Defendant does not and cannot deny that plaintiffs' performance was exactly what he bargained for when he signed the Contract, nor does defendant deny that he knew plaintiffs were performing right up to the time defendant gave notice of his intent to cancel. Defendant does not and cannot deny that plaintiffs completely performed all their obligations under the Contract a short time later, including depositing the entire Contract price into escrow.

The facts of this case demonstrate why the implied covenant of good faith and fair dealing should remain available to avoid a finding that a promise is illusory. See, e.g., *Bleecher v. Conte, supra*, and *Storek & Storek, Inc., v. Citicorp Real Estate, Inc., supra*. The facts of this case also fit perfectly within the rational of cases such as *Burgermeister Brewing Corp. v. Bowman, supra*, which use partial performance to save a contract that

might otherwise be invalidated due to illusory consideration. Finally, the facts of this case demonstrate why the doctrine of promissory estoppel should remain available to enforce a promise that is reasonably expected or even intended to induce detrimental reliance. It is not surprising that all three legal principles lead to the same result, because all are based on the primary goal of contract law: to give effect to the mutual expressed intention of the parties so long as that intention is ascertainable and lawful. Civil Code §1636.

Mr. Steiner and Siddiqui Family Partnership request the Court to resist defendants' attempt to create unnecessary legal technicalities and loopholes just so that someone in defendant's position can find an excuse to break a promise, and appropriate the value created by the parties that honored their end of the bargain. Contract law should assist parties in reaching enforceable agreements; it should not add burdens or unnecessary risk or uncertainty for parties who try to reach agreements. Mr. Steiner and Siddiqui Family Partnership therefore request the Court to reverse the trial court's decision.

Respectfully submitted January 12, 2009,



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CERTIFICATE OF WORD COUNT

The text of REPLY BRIEF ON THE MERITS FOR APPELLANTS MARTIN A. STEINER and SIDDIQUI FAMILY PARTNERSHIP consists of 13,985 words, as counted by the Corel WordPerfect version 12 word-processing software I used to generate this Brief.

Dated: January 12, 2008.

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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, employed in SACRAMENTO County, California. I am over the age of eighteen years and not a party to the above-entitled action. My business address is: 400 Capitol Mall, 11th Floor, Sacramento, CA 95814. On: January 12, 2009, I served the following documents:

(1) REPLY BRIEF ON THE MERITS FOR APPELLANTS MARTIN A. STEINER and SIDDIQUI FAMILY PARTNERSHIP

MANNER OF SERVICE

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

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

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

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I declare under penalty of perjury that the foregoing is true and correct. Executed this January 12, 2009, in Sacramento, California.

Klaus J. Kolb