



## Wagenseller Law Firm

555 West Fifth Street  
31st Floor  
Los Angeles, California 90013

Tel: (213) 996-8338  
Fax: (213) 996-8339  
www.wagensellerlaw.com  
ltw@wagensellerlaw.com

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## Real Estate Tools: Options to Purchase

Options in a rising market can be a frequent source of litigation. A person who has given an option ("optionor") in the past may come to regret that option when rising prices force him to sell his property at a less than market rate to the person to whom he has given the option ("optionee").

### What is an Option?

"An option is a contract by which the owner of property invests another with the exclusive right to purchase said property at a stipulated sum within a limited or reasonable time in the future." *Nattress & Associates v. Cidco* (1986) 184 Cal.App.3d 55, 66. Donald Trump used an option to purchase the Hotel Commodore at Grand Central Terminal, his ground breaking first deal at 27

years old. More commonly, options are used in leases in which the landlord gives the tenant an option to buy the property during a certain period.

For example, the AIR Option to Purchase form provides that the lessee must provide written notice within a certain time period (i.e., April 1, 2004 to April 30, 2006), with the option expiring at the end of the option period. The form also sets forth the price, the escrow agent, a time period in which to close the sale and other instructions. After exercising an option, the parties should then enter into a Purchase & Sale Agreement, which addresses in more detail all of the minutiae of the sale transaction.

### An Option is Irrevocable.

An option supported by consid-

eration (even \$1) is an irrevocable offer, open for a prescribed period. The acceptance must be in accordance with the terms of the option agreement and must be free of conditions which the optionor is not bound to perform. *Riverside Fence Co. v. Novak* (1969) 273 Cal.App.2d 656, 660. The exercise of an option is merely the communicated election of the optionee to accept the option. *Id.* at 661. It is important to recognize that, in terms of the formation of a contract, an option is a contract. Therefore, the "offer" (option) is truly irrevocable and merely awaits acceptance.

### A Qualified or Conditional Acceptance

What is the effect of an accep-  
*(Continues on page 2)*

### Wagenseller Law Firm

- Full Service Business and Real Estate Law Firm
- Excellent Service in an efficient and cost-effective way
- Proven trial experience
- Results oriented
- Call us at (213) 996-8338 for any of your legal needs.

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## Results: Déjà vu? Another Case Dismissed...

We were recently successful in getting another case dismissed at the very beginning of the case. With this victory our clients retain their ownership of the property and will get a judgment against plaintiff for their costs.

**The Result:** Case dismissed.

**The Ruling:** Our demurrer to Plaintiff's Second Amended

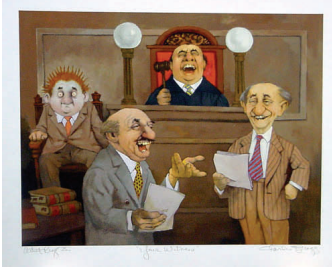
Complaint was sustained (granted) without leave to amend (i.e., Plaintiff gets no more chances and the case will be dismissed).

**The Case:** Two tenants-in-common own an apartment building. When the relationship deteriorated, one co-tenant sued the other (and related parties), seeking to quiet title in her name, to reform the deed to

reflect that she is the sole owner, and to allege breach of confidential relationship, slander of title and conspiracy.

The Plaintiff alleged that she had entered into an oral contract with the defendants in which the defendants would be on the deed to the property but would agree to convey the property to Plaintiff upon her demand.

*(Continues on Page 2)*



#### Did You Know?

Shareholders of a corporation may bring two types of actions:

(1) A **direct** action filed by the shareholder individually (or on behalf of a class of shareholders to which he or she belongs) for injury to his or her interest as a shareholder; or

(2) a **derivative** action filed on behalf of the corporation for injury to the corporation for which the corporation has failed or refused to sue.



## Results: Déjà vu? Another Case Dismissed... (cont'd)

**The Issues:** We challenged the complaint on a number of grounds. Because Plaintiff alleged an oral contract to convey real property, we argued that the Statute of Frauds barred a claim of oral contract. The Statute of Frauds generally requires that any contract to convey real property must be in writing. We further argued that the Plaintiff's purported oral contract did not include any consideration for Defendants (meaning that Defendants did not give any-

thing in exchange for this promise to make it enforceable). Plaintiff's facts did not fit within the parameters of a claim for breach of confidential relationship and actually contradicted the requirements of a claim for reformation of contract. Lastly, we noted that most of the defendants were legally incapable of slandering title, which mooted both the slander of title and conspiracy causes of action.

**The Court's Order:** The Court agreed with us on each and every argument. Moreover, the Court noted, based on our argument, that "it is probable from the nature of the complaint and the previous unsuccessful attempt to plead that the plaintiff cannot state a cause of action." The Court therefore sustained the demurrer without leave to amend. We will now seek an Order of Dismissal and a judgment against plaintiff for our clients' legal costs.

## Real Estate Tools: Options to Purchase (cont'd)

(Continued from page 1)

tance which adds additional terms or is made conditional? "Any tender of performance is ineffective if it imposes conditions upon its acceptance which the offeror is not entitled to demand." *Riverside Fence Co., supra.*, at 662. However, the fact that a purported acceptance adds a qualification to the agreed-upon option does not in and of itself terminate the option. As long as the option period has not yet expired, a party may still exercise the option without qualification or condition (even though a prior [ineffective] acceptance may have added such qualifications). Again, the option is truly irrevocable.

The courts have explained that "if the person offering to perform is acting in good faith, and makes the mistake of demanding something to which he is not entitled, he ought to be given the same opportunity to recede from such demand that he is allowed for tendering the correct amount where he has tendered too little, or the right thing where he has tendered the wrong thing..." *Nattress & Associates, supra.*, at 67.

### Waiver of Conditions

In the event that a party imposes additional conditions on the exercise of an option, the offeree must specifically point out the alleged defects in the tender or he waives the right to object to the conditions. *Civil Code §1501; Code Civ. Proc. §2076.* The rationale of this requirement is that the offeror should be allowed to remedy any defects in his tender. Therefore, the offeree should not be allowed to remain quiet at the time of the tender and later surprise the offeror with hidden objections. *Riverside Fence Co., supra.*, at 662.

In addition, an optionor may not do any act or omit to perform any duty calculated to cause the optionee to delay exercising the option within the specified period. A court will look at the good faith of the optionor. If he attempts to prevent the exercise of the option, his behavior may excuse a failure to perform and other conditions precedent to acceptance by the optionee. For example, in the *Riverside Fence* case, the optionor failed to sign the escrow instructions but would not explain why. The optionee offered to make corrections but the optionor refused to identify any defects in

the exercise of the option. The court found that, although plaintiff had not performed, she had attempted in good faith to tender performance and that defendant's evasive conduct was calculated to prevent timely performance. The court therefore precluded the optionor from asserting that there had not been a timely or proper exercise of the option.

We are handling a case in which our client (the tenant exercising an option) sought to exercise the option but added "and/or assignee" to the purchase agreement. While options (like most contracts) are typically assignable, this option prohibited assignment. Landlord therefore objected. When our client sought to remove this additional condition and close the purchase, the landlord claimed that the option had expired because the tenant had added the additional condition. We will seek to show (in a motion for summary judgment) that the option, which does not expire until later this year, is irrevocable during the option period and that the tenant has the right to withdraw the assignment language and exercise the option without condition or qualification.

## Message from Laine Wagenseller... *Solutions and Results*

Our tag line at WLF is “**Results-Oriented Legal Services.**” And results are our primary goal in every lawsuit or deal that we handle. It is our position that clients hire us not for the particular services we provide but for the solutions and results we achieve. While we always inform the client of the specific steps we are taking to achieve our goals, we are guided in those actions by the result that the client seeks.

In a recent seminar, one speaker explained the focus on results as follows: When you hire a contractor to remodel your kitchen, you do not choose the contractor based on whether he will be using a Makita power drill or a DeWalt power drill. You choose the contractor based on other kitchens he has built and what he can build for you. In other words, the result.

With every new client, we sit down and discuss the outcome

the client seeks to reach. By specializing in real estate and business, lecturing and attending lectures in those fields and actively handling a variety of cases, we have some of the best ‘tools’. But we know that what our clients want is results.

With this in mind, I am happy to report in this issue on some of the results we have achieved for our clients.

*Laine*



## In The Works: Cases We Have Been Working On

- In two different cases against two different clients for **Americans With Disabilities Act** violations on their property, we were able to settle the cases quickly and for a minimal amount, allowing our clients to avoid the morass which is ADA litigation in the Federal court system.
- We recently helped a client **close two escrows** and complete the sales of two apartment buildings that had stalled. We also negotiated a reduced commission with the broker to compensate for the delay.
- To help our client buy two bars in the Hollywood and Mid-

Wilshire areas, we prepared **Asset Purchase and Sale Agreements**.

- We recently defeated a **Motion for Summary Judgment**. The defendant brought a motion asking for judgment based on the premise that the contract between the parties was an integrated contract (i.e., that it included a complete expression of the parties’ agreements and could not be varied by extrinsic evidence of an oral agreement). We were able to educate the judge about the prior dealings between the parties and impeach the defendant’s sworn affidavit in which he denied ever having any conversa-

tions about the property zoning at issue in the case. The court denied the motion.

- We are currently representing a homeowner sued by a former romantic interest after he told her to leave and she sued for **wrongful eviction and intentional infliction of emotional distress**.
- We have been retained in a **real estate partition case** in which one joint tenant has sued the other joint tenant to force a sale of the building.
- We have been retained to represent an office building owner in **negotiating a lease** with a movie studio.

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Legal Services*  
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## Sidelines... *‘Glorious Triumphs’*

“Far better it is to dare mighty things, to win glorious triumphs, even though checkered by failure, than to take rank with those poor spirits who neither enjoy nor suffer much, because they live in the gray twilight that knows neither victory nor defeat.” —Teddy Roosevelt

Failure is inevitable if you are trying for greatness. Accepting failure as a necessary part of your

climb to success allows you to set aside your fear of failure, pick yourself up and move on. People will not think poorly of you if you fail, only if you handle yourself poorly when you fail. As Margaret Thatcher said, “You may have to fight a battle more than once to win it.” —Chris Widener

Both success and failure involve future consequences, namely the

inevitable rewards or unavoidable regrets from past activities. If this is true, why don’t more people take time to ponder the future? The answer is simple: They are so caught up in the current moment that it doesn’t seem to matter. The problems of today are so absorbing to some human beings that they never pause long enough to think about tomorrow. —Jim Rohn







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### **Results Oriented Legal Services**

Wagenseller Law Firm is a full-service business and real estate law firm. Materials contained in this newsletter are for general information purposes and to permit you to learn more about the services that Wagenseller Law Firm offers its clients. These materials are not intended to constitute legal advice relating to any specific matter and do not create an attorney-client relationship. Please consult Wagenseller Law Firm for legal advice regarding specific matters of concern.

### **News and Happenings...**

• Laine Wagenseller spoke in San Diego and downtown Los Angeles at two seminars entitled **Real Estate Development from Beginning to End**.

• On February 21, Mr. Wagenseller attended the **Association of Business Trial Lawyer's** dinner program on impeachment of witnesses.

• In late February, Mr. Wagenseller met with **Phil Angelides**, a candidate for Governor, at a small gathering to hear the candidate speak about his campaign.

• "How to Get A Project Entitled in Los Angeles" was the topic at a recent **Los Angeles County Bar Association** seminar, which Mr. Wagenseller

attended.

• Laine Wagenseller joined the **USC Marshall School of Business** Dean's Breakfast with Donald Tang, Chairman of Bear Stearns International, who spoke about conducting business in China.

#### **Our Practice:**

**Business Disputes**, including partnership dissolution, investor claims, Director and Officers liability, business fraud and insurance claims.

**Real Property Disputes**, including disputed ownership, quiet title, boundary disputes, commercial landlord/tenant disputes and real estate development litigation.

**Breach of Contract**, including breach of lease, breach of guaranty, breach of purchase and sale agreements and breach of promissory note.

**Business Counseling**, including the formation of LLCs, drafting and negotiation of operating agreements, purchase and sale agreements, leases, asset purchase agreements, and other contract formation and review.

You can get more information on our practice as well as copies of our newsletter at our website at

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or by calling us at

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