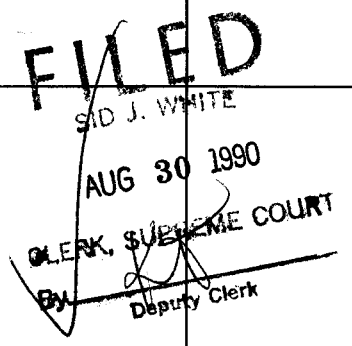
IN THE SUPREME COURT OF FLORIDA



CASE NO. 75,806

DANIEL LEFEMINE and
CATHERINE A. LEFEMINE,

Petitioners,

vs.

JUDITH W. BARON and
S & N KURASH, INC.,

Respondents.

REPLY BRIEF OF PETITIONERS ON THE MERITS

LAW OFFICES OF JOE N. UNGER, P.A.
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and

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TOPICAL INDEX TO BRIEF

TABLE OF AUTHORITIES

ARGUMENT

Petitioners will stand on the arguments made in their main brief. It is, however, necessary to respond to the argument that the theory of law in Pappas v. Deringer, 145 So.2d 770 (Fla. 3d DCA 1962) was **"changed"** by the decision of this Court in Hutchison v. Thompkins, 259 So.2d 129 (Fla. 1972). For the reasons set forth below, Hutchison did not change the theory of law set forth in the Pappas case.

Pappas, decided in 1962, is cited for the propositon that where a contract grants an option to either take the amount previously stipulated as damages or to refuse to be limited by that amount and sue for actual damages, the character of an agreed amount as stipulated damages is destroyed and the forfeiture provision containing the option becomes a penalty for default.

The Hutchison case deals with the issue of whether damages which parties could expect as a result of the breach were those not reasonably ascertainable at the time of executing the contract or at the time of the contractual breach. The decision in Hutchison adopts the rationale of Hyman v. Cohen, 73 So.2d 393 (Fla. 1954) as the **"sounder** approach to the problem of ascertainability of damages" (Hutchison v. Thompkins, supra at page 132) that a valid liquidated damage provision can exist onlywhere damages which the parties could expect as a result of a breach of the contract are not readily ascertainable as of the time the contract is executed. This determinaion has nothing whatever to do with whether an option given to accept a previously

determined sum as liquidated damages or to sue for actual damages destroys the character of the provision as a valid liquidated damage claus.

Affording both seller and buyer the same option cannot create a valid liquidated damage provision. If the option given to the seller is a penalty, the same option given to the buyer would be a penalty. A penalty is a penalty, whether given to one or both parties.

Petitioners will stand on the argument made in Point II of their brief that the amount awarded to the sellers was unconscionable under the facts of this case.

CONCLUSION

For the reasons and under the authority set forth above and in the main brief of petitioner, it is respectfully requested that this Court reverse the Second Amended Final Judgment with directions to order that the deposits paid to respondents be returned to petitioners.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail upon Joseph L. Schneider, Esquire, 1720 Harrison Street, Suite 1805, Hollywood, Florida 33020; and Rhea P. Grossman, Esquire, 2710 Douglas Road, Miami FL 33133, this 28th day of August, 1990.

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