IN THE SUPREME COURT OF OHIO

Olympic Holding Co. LLC, *et al.*,	:	
	:	Case No. 08-0200
Plaintiffs-Appellees	:	
	:	ON APPEAL FROM THE
v.	:	FRANKLIN COUNTY
	:	COURT OF APPEALS,
ACE Capital Title	:	TENTH APPELLATE DISTRICT
Reinsurance Co.	:	
	:	Court of Appeals
Defendant-Appellant.	:	Case No. 07-AP-168

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STATEMENT OF INTEREST

The Ohio Manufacturers Association ("OMA") is a statewide association of approximately 2,000 manufacturing companies which collectively employ the majority of the 800,000 men and women who work in manufacturing in the State of Ohio. The OMA's members have a vital interest in ensuring that Ohio remains a desirable place to do business.

The Ohio Chemistry Technology Council ("OCTC") is a trade association representing over 80 chemical industry and related companies that do business in Ohio. The OCTC engages in activities to support its members' efforts to maintain and expand their business operations in Ohio. Given the large number of mergers, acquisitions, and divestitures in the chemical industry in recent years, the issues before the Court affecting businesses' ability to enter into complex contractual arrangements is an important one to the OCTC's members.

EXPLANATION OF WHY THIS CASE IS A CASE OF BOTH PUBLIC AND GREAT GENERAL INTEREST

This case is of great interest to the business community of the State of Ohio and of public interest. If, as the Court of Appeals' opinion suggests, sophisticated business entities engaged in arms-length negotiations for complex contractual arrangements may be bound – and even incur fiduciary duties – by statements made in the course of such negotiations, Ohio will be a much less desirable place to do business. The prospect of unpredictable liability for Ohio businesses makes this case critically important to the OMA and its members, to the OCTC and its members, and to Ohio's business community as a whole. What affects Ohio's business community affects Ohio's economy and therefore is of public and great general interest.

Through the Statute of Frauds, Ohio law recognizes that certain agreements must be in writing to ensure that certain transactions are "commemorated with sufficient solemnity" to provide "greater assurance that *the parties* and the public can know when such a transaction

occurs." *North Coast Cookies, Inc. v. Sweet Temptations, Inc.* (8th Dist. 1984), 16 Ohio App. 3d 342, 348, 476 N.E.2d 388 (emphasis added). The Statute deliberately prevents a plaintiff from relying on an oral promise in such situations, avoiding the difficult problems of proof and the potential for fraud that may otherwise arise. See *Seale v. Citizens Savings & Loan Assn.* (C.A.6 1986), 806 F.2d 99, 102 ("The statute of frauds was designed precisely to prevent litigation such as this, where the parties are entangled in a dispute over what was or was not promised * * *.").

Nonetheless, some of Ohio's lower courts have created a judicial exception to the Statute Frauds that is not found anywhere in its text. This Court should reject such an exception. Sound policy reasons support the Statute of Frauds, and it is not for the courts to second-guess the legislature by creating an exception to this statute. People doing business in Ohio should have confidence that the State's statutes will be upheld as written and that the law will not be subject to case-by-case exceptions based upon subjective determinations of what "justice" requires.

Even if this Court would recognize a judicially created promissory estoppel exception to the Statute of Frauds, that exception should not encompass arms-length negotiations between businesses, as in this case. Such business transactions are "formal transactions involving large sums of money" and, therefore, are precisely the types of agreements for which a *writing* – rather than one party's controverted oral testimony – is most critical. See *Seale*, 806 F.2d at 102. Sophisticated entities represented by counsel have constructive notice of the Statute of Frauds: they know or should know that for either party to be bound where the Statute applies, there must be a signed, written agreement. For such an entity to rely on an oral representation for a transaction that falls within the Statute is unreasonable as a matter of law, and thus cannot entitle the plaintiff to relief. See *Royal Doors, Inc. v. Hamilton Parker-Co.*, Franklin App. No. 92AP-938, 1993 Ohio App. LEXIS 2310, *12. Indeed, if the exception could apply under such

circumstances, businesses' ability to freely negotiate would be undermined. There would always be some concern for the adverse party running to a court to enforce an agreement that was never reduced to writing and thus, under the law, never made. This would make Ohio a more difficult, less desirable place to do business.

Finally – and equally troubling – the lower court's decision holds that *adversaries* in negotiations to create a multi-year joint venture may somehow incur fiduciary duties toward one another even though they never entered into a written joint-venture agreement. The possibility of incurring such duties – and the prospect of enormous liability for simply looking out for one's own interests in contract negotiations – is likely to chill such commercial activity in the State of Ohio. The effect of this chill would negatively impact the business climate in Ohio.

STATEMENT OF FACTS

Amici curiae adopts the Statement of Facts in Appellant's' jurisdictional brief.

ARGUMENT

Proposition of Law No. I: Ohio recognizes no promissory estoppel exception to the Statute of Frauds that would permit an action upon an unwritten or unsigned agreement that is not to be performed in one year.

The Statute of Frauds is plain in its meaning: an alleged oral agreement that is not to be performed in one year is not enforceable. See R.C. 1335.05. The Statute contains no exception that would allow a contract claim within its scope to go forward simply because one party claims to have relied on an oral promise. Although Ohio's courts have appropriately recognized a cause of action for promissory estoppel generally, this doctrine should not be extended so that it essentially nullifies the Statute of Frauds, allowing a party to proceed on a contract claim when a written agreement fails to materialize out of arms-length negotiations.

Although courts in some states may have created such an exception to "do justice" and achieve public-policy ends they deem appropriate, this Court typically rejects such judicial encroachments on legislative authority. It should reject this one as well.

The Florida Supreme Court rightly has resisted calls to judicial activism and has taken a strong stance against a promissory-estoppel exception to the Statute of Frauds. In rejecting the exception, it noted that if that state's legislature had wanted to enact an exception to the Statute of Frauds, then it could have done so. But because the legislature chose not to enact the exception, it was not the Court's place to make it the law of the land based on the Court's own policy preferences. *Tanenbaum v. Biscayne Osteopathic Hospital, Inc.* (Fla. 1966), 190 S.2d 777, 779. Whatever the "modern trend" may be, Florida courts have remained firm in this view. See, e.g., *Topp, Inc. v. Uniden Am. Corp.* (S.D. Fla. 2007), 483 F.Supp.2d 1187, 1219; *Lynkus Comms., Inc. v. WebMD Corp.* (Fla. Ct. App. 2007), 965 So. 2d 1161, 1167; *Collier v. Bolling Brooks*, 632 So. 2d 149, 156 (Fla. Ct. App. 1994).

Courts in Illinois have also rejected a promissory estoppel exception to the Statute of Frauds. The Court of Appeals there correctly stated: "Where * * * a case is clearly within the Statute of Frauds, promissory estoppel is inapplicable, for *the net effect would be to repeal the Statute completely*." *Sinclair v. Sullivan Chevrolet Co.* (Ill. Ct. App. 1964), 45 Ill. App. 2d 10, 17, 20, 195 N.E.2d 250, *aff'd* 31 Ill. 2d 507 (emphasis added).

It is especially appropriate for the Court to reject a promissory estoppel exception where sophisticated parties have engaged in arms-length negotiations and should know better than to rely on an oral promise that the law requires to be in writing. See *Royal Doors, Inc. v. Hamilton Parker-Co.*, Franklin App. No. 92AP-938, 1993 Ohio App. LEXIS 2310, *12 (refusing to make an exception to the Statute of Frauds for "an arms-length transaction between two parties with

considerable background in the construction supply field"); see also *Shampton v. City of Springboro* (2003), 98 Ohio St. 3d 457, 461 (unreasonable as a matter of law for a party to rely on a promise to make a contract from a government entity because private party has constructive notice that government entity lacks statutory authority to do so); *Carcorp, Inc. v. Chesrown Oldsmobile-GMC Truck, Inc* (Jan. 30, 2007), Franklin App. No. 06AP-329, 2007 WL 259248, *4 ("Reliance on a statement of future intent made prior to the conclusion of negotiations in a complex business transaction is unreasonable as a matter of law.").

The well-established Statute of Frauds should be applied by Ohio courts without judicially created exceptions. This is particularly important where, as here, it is necessary to foster the predictability and stability on which businesses rely when negotiating complex agreements. Because the Court of Appeals' decision opens the door to a "promissory estoppel" exception to the Statute of Frauds, this Court should accept jurisdiction over the Appellant's discretionary appeal and reject a promissory estoppel exception to the Statute of Frauds.

<u>Proposition of Law No. II:</u> A joint venture agreement that cannot be performed in one year is subject to Ohio's Statute of Frauds, and where that Statute bars the agreement, a joint venturer's claim for breach of fiduciary duty against a co-venturer is also barred as a matter of law.

The Court of Appeals' suggestion that a party may incur fiduciary duties to another as part of a joint venture to last more than one year – even though there is no written joint-venture agreement between them – is also contrary to law and should be overturned.

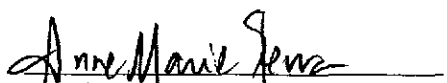
The Statute of Frauds, of course, provides that any agreement that cannot be performed within one year must be in writing; it contains no exception for joint ventures. At least one Ohio Court of Appeals has had occasion to rule, quite correctly, that an alleged agreement that fails to comply with the Statute of Frauds cannot give rise to fiduciary duties between the parties. See *Garg v. Venkataraman* (9th Dist. 1988), 54 Ohio App. 3d 171, 173.

The Court of Appeals' decision in this case creates an unsound rule of law with respect to potential liability for breach of fiduciary duty. This Court should accept the Appellant's discretionary appeal and hold that an alleged oral joint venture agreement that does not satisfy the Statute of Frauds cannot give rise to fiduciary duties as a matter of law.

CONCLUSION

Ohio's law is unsettled and confusing with regard to the existence and extent of a promissory estoppel exception to the Statute of Frauds. To clarify Ohio law, this Court should accept jurisdiction over this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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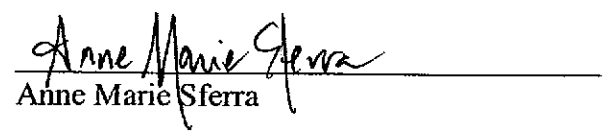

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