

IN THE SUPREME COURT OF OHIO

OLYMPIC HOLDING COMPANY LLC, et :
al., : Case No.: 08-0200
:
Plaintiffs/Appellees, :
:
v. : On Appeal From The Franklin
:
ACE Reinsurance Company, : County Court of Appeals,
:
Defendant/Appellant. : Case No. 07-APE-2-0618
:
:
:

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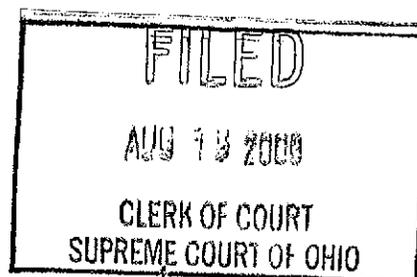


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I. STATEMENT OF THE CASE.

It is the Statute of Frauds, not the Statute for Frauds. That is why, since 1824, this Court has held that, to honor the legislative intent of the Statute of Frauds, Ohio courts must not allow the Statute of Frauds to be used in furtherance of a fraud. This Court held:

In giving a construction to any statute, the court must consider its policy, and give it such an interpretation as may appear best calculated to advance its object by effecting the design of the legislature. The great object of the statute in question is clearly expressed in the title prefixed to it. It is for the prevention of fraud and perjuries. It is not, therefore, to be presumed that it was intended, in any instance, to encourage fraud, and we may infer that any construction which would have a certain tendency to do so, would counteract the design of the legislature, by advancing the mischief intended to be prevented.

Wilber v. Paine (1824), 1 Ohio 251, 255. This is bedrock law in Ohio and indeed every jurisdiction: a party perpetrating a fraud is not allowed to invoke the Statute of Frauds in its defense. As the Sixth Circuit Court of Appeals has explained:

A contrary rule would sanction similar unscrupulous behavior, and would pervert the Statute of Frauds into a Statute for Frauds. On this score, we are in full agreement with Corbin: 'The purpose of the statute of frauds is to prevent the enforcement of alleged promises that were never made; it is not, and never has been, to justify contractors in repudiating promises that were in fact made.' Arthur Corbin, *The Uniform Commercial Code—Sales: Should It Be Enacted?*, 59 Yale L.J. 821, 829 (1950).

Customized Transportation, Inc. v. Bradford, No. 96-1110, 1997 U.S. App. LEXIS 13847, *15-16 (6th Cir. June 8, 1997) (emphasis added).

This black letter law principle has given rise to a related rule, which rule is uniformly and properly recognized by Ohio's appellate courts, all 21 other states that have considered the issue, and the learned treatises. That rule is as follows: a party that misrepresents its intent to produce a signed writing that would satisfy the Statute of Frauds, thereby inducing reliance on the part of the other party, is estopped from relying upon the Statute of Frauds as a defense.¹ The instant

¹ See, e.g., McCarthy, Lebit, Crystal & Haiman Co., L.P.A. v. First Union Mgt., Inc., 87 Ohio App.3d 613, 627 (Cuyahoga 1993); Olympic Holding Co., LLC v. ACE Capital Title Reinsurance Company, 2007-Ohio-6643, ¶48 (Franklin) ("Appellants have met their burden to

case presents facts squarely within this rule.

This is a summary judgment case, and the evidence presented by plaintiffs-appellees (“plaintiffs,” or “the Olympic Group”) must be accepted as true. Plaintiffs have adduced record evidence that they reached mutual agreement on all essential business terms of a deal with ACE, a New York-based company. The deal between the Olympic Group and ACE involved creation of a new title insurance underwriter based in Columbus, Ohio that would serve as a springboard for a joint venture. That joint venture was to combine the existing title insurance agency expertise and resources of plaintiffs, with the existing reinsurance resources of ACE and its family of Bermuda-based parent companies. Ohio was to be the starting point, with eight states to follow, and eventually national expansion of a new program of integrated title insurance agency, title insurance, and title reinsurance functions. The parties’ joint venture promised nothing less than the reformulation of how title insurance is carried out in this country. It was all to be based here in Ohio.

The deal was struck by spring 2003. Its terms were reflected in countless writings authored by and chargeable against ACE. The parties were in the process of performing throughout the remainder of 2003. ACE did its due diligence of plaintiffs’ title insurance agencies; ACE received official, written Board approval from its offshore parent companies to carry out the deal; ACE reduced the parties’ reinsurance agreement to a detailed writing, and told plaintiffs that the reinsurance agreement could be submitted to the Ohio Department of Insurance (“ODI”) for approval; ACE submitted its own 350-page signed application to the ODI to obtain licensure as a direct insurer in Ohio pursuant to the parties’ deal; it hired personnel and budgeted

present evidence that ACE should be equitably estopped from using the affirmative defense of the statute of frauds because of a misrepresentation to supply signed written memoranda of the parties' agreements.”).

for even more hires in anticipation of the deal; ACE told its reinsurance customers that it was ready to enter the market with plaintiffs. ACE did everything but sign the parties' agreements, including the reinsurance agreement that had been typed up and fully drafted.

In this respect, ACE promised and specifically assured plaintiffs that the parties' agreements would be signed as soon as plaintiffs received approval from the ODI to close on the acquisition of Olympic Title Insurance Company ("OTIC"). OTIC was a licensed title insurance company in Ohio that was to be acquired by the Olympic Group as part of the joint venture. OTIC was then to be based in Columbus—employing Ohio workers—as the nerve center for the joint venture's operations. Once OTIC was acquired by the Olympic Group, ACE was to direct business to OTIC, and reinsure it at extraordinarily low reinsurance rates. ACE explained to plaintiffs that it could not sign the agreements to reinsure OTIC until OTIC was actually owned by plaintiffs. Instead, ACE promised it would sign when the Olympic Group purchased OTIC.

So, in December 2003, as ODI approval of the OTIC acquisition looked imminent, plaintiffs' business principals each sought and received express assurances from ACE that the parties' agreements would be signed as soon as the OTIC acquisition closing occurred. ACE expressly, unequivocally, and—on this record—undisputedly told and promised plaintiffs in mid-December 2003 that its signature was forthcoming the moment closing occurred.

In direct reliance on these promises, and with ODI approval in hand by the end of the month, plaintiffs on December 29, 2003 closed on the acquisition of OTIC. Almost immediately thereafter, plaintiffs on January 2, 2004 contacted ACE to relay the happy news, and coordinate the promised signatures. ACE, however, had a "bombshell" to drop, in its words: it was not going to sign the parties' agreements after all, it was not going to honor those agreements, and it was getting out of the title insurance business altogether. Discovery in this case revealed that

ACE knew all of these things well in advance of making its December 2003 promises to plaintiffs to sign the parties' agreements.

The reason for ACE's change of heart? It had nothing to do with the terms of the parties' deal, or any inability to reach terms. Instead, ACE's offshore, Bermuda-based parent companies had decided to pursue a \$1 billion initial public offering, and thought the title insurance business would be a "distraction" to their IPO goal.

ACE admits that it treated the Olympic Group "absolutely unethically," in the sworn testimony of its Chief Operating Officer, Richard Reese, in destroying the deal in this fashion. Now, however, ACE has attempted to repudiate the very existence of the parties' deal, has done absolutely nothing to make plaintiffs whole, and instead has forced years of expensive litigation. ACE now appeals to this Court a unanimous 34-page Tenth District Court of Appeals decision reversing the trial court's grant of summary judgment for ACE on plaintiffs' contract and breach of fiduciary duty claims.

In doing so, ACE argues for a new rule in Ohio that would declare that sophisticated out of state companies like ACE can lie to their Ohio business partners with impunity regarding their intention to sign agreements that would satisfy the Statute of Frauds, and then can use the Statute of Frauds as an absolute defense to their fraudulent conduct. Perversely, ACE argues that such a rule, in which the Statute of Frauds would become a Statute for Frauds, just as this Court warned in 1824, would represent a "pro-business" result.

Indeed, ACE uses "pro-business" buzzwords loaded throughout its brief as though they were a magical incantation that could lull this Court into a hypnotic trance. There is absolutely nothing "pro-business" about allowing Ohio businesses to be lied to and destroyed by their out of state business partners. Undoubtedly, that is why the amici curiae that filed jurisdictional briefs,

the Ohio Manufacturers Association and the Ohio Chemistry Technology Council, have not supported ACE's merits position. The Ohio entities that comprise those organizations do not and should not advocate for a rule enabling a New York corporation to defraud Ohio companies.

The rule that ACE advocates to this Court is completely unprecedented in American jurisprudence, and would do violence to the legislative intent of the Statute of Frauds that this Court has recognized since 1824. On these facts, the Statute of Frauds does not stand as a bar to any of plaintiffs' claims—not the contract and breach of fiduciary duty claims currently before this Court, and not the remaining causes of action that are not part of this appeal. The trial court's grant of summary judgment to ACE on plaintiff's contract and fiduciary duty claims was properly overturned by the Tenth District Court of Appeals. This Court should affirm.

II. STATEMENT OF THE FACTS.

A. The Parties Agree To A Joint Venture To Use OTIC, A Title Insurer, To Carry Out A Unique Title Insurance And Reinsurance Arrangement.

In the first quarter of 2003, plaintiffs Sutton Land Services, LLC, Title First Agency, Inc., and Title Midwest, Inc., which are regional title insurance agencies based in New York, Ohio, and Kansas, respectively, agreed to join a joint venture proposed by defendant ACE.²

The joint venture called for Sutton, Title First, and Title Midwest, operating as the Olympic Group, to acquire OTIC, a small, Ohio-based title insurance company.³ It was ACE, through its Chief Operating Officer, Richard Reese, that brought OTIC to the Olympic Group.⁴

ACE's proposal for, and the agreed-upon structure of, the joint venture, was that the Olympic Group would acquire and operate OTIC through plaintiff Olympic Holding Company,

² See, e.g., Reese III (573) at 493:5-24 (all three agencies were part of strategic alliance).

³ See Reese II (515) at 63:14-19 (acquisition of OTIC was foundation for "whole relationship"). See also Kopel III (437-39) at 45-53 (summarizing evolution of joint venture).

⁴ See Reese II (514) at 50:5-51:4; Potts (497) [prior OTIC owner] at 219:2-220:3.

LLC, and thereafter plaintiffs and defendants would treat the “residential” and “commercial” title transactions in a unique way:

“Residential Transactions:” Sutton, Title First, and Title Midwest, as title insurance agencies, would use OTIC as their underwriter on all of their customers’ title insurance real estate transactions of less than \$1 million (“residential transactions”). ACE would reinsure OTIC for all of those transactions, taking on reinsurance responsibility for all policies exceeding \$10,000 at extraordinarily low reinsurance rates.⁵

“Commercial Transactions:” Meanwhile, ACE would become licensed as a direct title insurer, first in Ohio and then around the country, as a complement to its previous status as a reinsurer. Sutton, Title First, and Title Midwest, as agencies, would use ACE as their direct title insurer in all of their transactions greater than \$1 million (“commercial transactions”). OTIC, in turn, would act as a reinsurer for ACE on the \$1 million+ transactions, reinsuring only the first \$100,000 of each such policy, with ACE reinsuring the rest, up to \$200 million per policy at rates that were “astonishingly better” than what was available elsewhere in the market.⁶

See Reese II (516-17) at 87:24-91:8 (describing structure and deal); Pl. Ex. 34 (872) (Kopel Aff.)

at ¶¶24-36.⁷ The plan was to use OTIC and Ohio as the launching point for expansion of the joint venture into a succession of states. See Pl. Ex. 94 (899) (regarding initial key states). The goal was to create an entirely new system of title insurance and reinsurance in the United States.

B. The Parties’ Handshake Deal On The Essential Terms Of The Joint Venture Was Memorialized In Written Term Sheets.

By mid-2003, after extensive meetings, discussions, negotiations, and communications,⁸ the parties agreed on the essential business terms of the joint venture.⁹ Mr. Reese admitted ACE had a handshake deal with plaintiffs for the “Strategic Alliance” joint venture:

⁵ Mr. Reese, the COO for ACE, testified that the reinsurance premium to be paid by OTIC to ACE under the parties’ joint venture was “staggeringly small.” Reese II (534) at 239:24.

⁶ See Kopel I (426) at 172:24-173:13.

⁷ See also Reese II (537) at 269:15-271:6; Reese III (565) at 432:6-12 (“The value of that for using a – and I would put it as the added value of this relationship—is it bifurcates and gives to each party what each party is most competent to provide. For us it was capital and creativity; to the agency it was quality, you know, back office process. To put it more simply, people.”); *id.* (566) at 433:3-11 (discussing what each side “brings to the table”); *id.* (583) at 541:12-24 (discussing parties’ “complementary strengths”).

⁸ See Pl. Ex. 34 (872) (Kopel Aff.) at ¶24.

Q: My question was: did you feel you had a handshake deal with the folks at the Olympic Group?

A: Yes, I did.

Reese III (584) at 559:16-21. The essential terms of the joint venture were memorialized in written term sheets authored by Mr. Reese. See, e.g., Pls. Exs. 181 (1307), 187 (1311), 190 (1316).¹⁰ Mr. Reese repeatedly testified that the term sheets represented the parties' mutual understanding as to essential joint venture business terms:

Q: And those allocations of operating risk and fraud related losses, aggregate limits of loss and so forth that you have described here in the residential and commercial side, those were all items, again, that you had a mutual understanding with the Olympic Group about as of the time you were sending this to Ms. Turpin of Mercer Delta in June of 2003, right Mr. Reese?

A: If by mutual understanding, you mean that we had come to a pretty comfortable feeling that the term sheet represented a business deal we were both happy with, yes.

Reese II (539) at 293:5-18.

Q: But this value proposition section we've been talking about involving both the residential and the commercial components of the strategic alliance, you believed you had a mutual understanding with the Olympic Group that this was the program, correct?

A: Yes. I mean, that's actually what we do the term sheets for.

Id. (538) at 284:16-24.

Q: Was there an understanding—based on what you have just read here, and what I read to you and what your reviewed with me, was there an understanding here with respect to the strategic alliance as to who would bear the operating risk and responsibility?

A: Understanding with whom?

Q: With your strategic alliance partners.

A: Oh, yes, that was the core of the policy. We talked about that a lot.

Id. (531) at 218:2-13.

⁹ See Reese I (508) at 339:17-340:25 (Olympic strategic alliance was agreement to come together for a common business purpose, with a division of responsibilities and profits).

¹⁰ Mr. Reese testified regarding Pl. Ex. 181 (1307), the first term sheet, at, inter alia, Reese II (519-20) at 98:21-101:10. He admits the second term sheet was meant to capture "the essential terms or elements of the strategic alliance." Id. (526) at 164:2-7. And he testified in depth about the terms of the third, final term sheet, Pl. Ex. 190 (1316), at, inter alia, id. (527-28) at 193-198.

Q: You said you worked this out together. Did you have a mutual understanding with the Olympic Group on this division of responsibility that we have just spoken of?

A: That's why I write the term sheets.

Q: So you did?

A: Yes.

Id. (532) at 223:2-9. Mr. Reese, who frequently used the phrase “strategic alliance” to describe the Olympic deal, admitted that he used this phrase interchangeably with “joint venture” and “strategic partnership.” Reese III (582) 534:24-535:22.¹¹ Contrary to ACE’s false representations in its merits brief, the Olympic principals all testified that the term sheets reflected the deal’s essential business terms.¹² Thus, mutual agreement on the essential terms of the parties’ business deal was achieved by spring 2003. Execution and performance followed.

C. The Parties Begin Executing On The Joint Venture Agreement.

By summer 2003, Sutton, Title First, and Title Midwest had formed plaintiff Olympic Holding Company, LLC for purposes of acquiring OTIC (which acquisition was described by ACE as a “key element” of the parties’ strategic alliance joint venture).¹³ The Olympic Group, with the assistance of ACE, on May 15, 2003 entered into a Stock Purchase Agreement to acquire OTIC from its existing owners.¹⁴ Contrary to ACE’s false representation in its brief, the

¹¹ See also Reese II (526) at 161:8-23 (admitting he used “strategic alliance,” “joint venture,” “partnership,” and “strategic partnership” the same way); id. (524) at 124:11-20 (admitting use of “joint venture”); id. (518-19) at 94:15-97:13 (same); id. (525) at 126:11-127:9; id. (543) at 309:3-9 (admitting Olympic “partnership” discussed in writing in Pl. Ex. 154); Reese III (573) at 494:12-25 (admitting ACE called Olympic Group deal a “strategic partnership” in its internal writings). See also Pl. Ex. 180 (1306); Pl. Ex. 182 (1310) (referencing “joint venture”).

¹² See Mosimann II (487) at 33:11-15 (term sheets reflected parties’ mutual agreement as to terms); id. (488-89) at 43:21-45:25 (describing terms of joint venture); id. (491) at 62:23-63:1; id. at 64:22-24 (final term sheet was “mutually agreed between all parties for our goals and objectives.”); Pl. Ex. 34 (872) (Kopel Aff., describing mutual agreement on deal terms); Henry (404) at 66:5-67:10 (parties had agreement as to terms of deal); Stauffer (611-12) at 91:1-93:25.

¹³ See Reese II (529) at 211:12-212:4; Pl. Ex. 34 (872) (Kopel Aff.) at ¶¶47,52. See also Pl. Ex. 191 (1321) at p. 1323 (ACE stating OTIC acquisition a “key element” of plan).

¹⁴ See Pl. Ex. 217 (1571) (Stock Purchase Agreement, expressly conditioned at p. 1615, subparagraph (e), upon entry into a “satisfactory title reinsurance agreement” with ACE).

business terms of the joint venture between ACE had already been agreed to (as reflected in the March 7, 2003 final term sheet; see Pl. Ex. 190 (1316)) well before the Olympic Group entered into the Stock Purchase Agreement to acquire OTIC on May 15, 2003. Indeed, it is undisputed that the Stock Purchase Agreement for the acquisition of OTIC was part and parcel of the ACE/Olympic joint venture. See, e.g., Reese III (598) at 666:17-21 (“Q: Was the acquisition by Olympic Holding of Olympic Title consistent with the strategic alliance business plan that we have been discussing in some detail? A. Yes.”). It was ACE, after all, that brought OTIC to the Olympic Group for purposes of the parties’ joint venture.¹⁵

Also by summer 2003, ACE had visited each plaintiff agency and conducted its due diligence on them, confirming that they exceeded expectations.¹⁶ Mr. Reese wrote many written descriptions of the deal, and testified regarding Pl. Ex. 194 (1366), for example, that the Olympic deal was his company’s top priority:

Q: You see it’s dated Wednesday, July 16, 2003, your cover note is. As of that date, the top three priorities were first “Complete the strategic alliance with the Olympic Group;” is that correct?

A: Yes.

Q: “Hire additional underwriting staff (proposal one senior underwriter and one paralegal);” is that correct?

A: Yes.

Q: And the last bullet point says “Develop mechanism to protect the long term viability of the strategic alliance with the Olympic Group;” is that true? Those were the top three priorities as of that date?

A: Yes.

Reese II (544) at 314:19-315:10.

¹⁵ See Reese II (514) at 50:5-51:4. See also Potts [prior OTIC owner] (497) at 219:2-6; 219:20-220:3 (ACE brought plaintiffs and former OTIC owners together); id. (496) at 98-99 (Potts told Reese ““You brought these guys to the table.””).

¹⁶ See, e.g., Reese II (533-34) at 236:21-237:5; id. (539) at 296:17-21.

1. ACE Obtains Written Board Approval For The Joint Venture.

As the parties' deal was moving forward, Mr. Reese as the COO of ACE was charged with developing a formal title business plan as part of the planning process for ACE and its offshore parent companies. Mr. Reese testified he authored "countless" documents reflecting the deal with plaintiffs as part of this planning process.¹⁷

In early September 2003, Mr. Reese flew to Bermuda to present the ACE business plan to its offshore parent corporations.¹⁸ The consolidated business plan set out the entirety of the Olympic joint venture in detail.¹⁹ In mid-November 2003, the offshore Board of Directors voted on and approved the detailed written business plan, thereby acknowledging and accepting the essential terms of the Olympic joint venture. See Pl. Ex. 27 (833) (Board packet describing Olympic joint venture starting p. 858) and Ex. 28 (870) (Board minutes approving plan).²⁰ Mr. Reese specifically communicated to plaintiffs that Board approval of the joint venture business plan had occurred.²¹

¹⁷ See e.g. Reese I (505) at 267:2-10 (describing "countless" detailed business plan documents describing Olympic strategic alliance). See also Pls. Exs. 154 (942), 191-198 (1321-1416) (regarding planning process).

¹⁸ See, e.g., Bregman II (387-88) at 160:25-161:17 (confirming discussion of Olympic Group during Bermuda presentation of ACE business plan). See also Reese II (547-48) at 332:5-335:21 (regarding his presentation of Olympic strategic alliance in Bermuda).

¹⁹ See Pls. Ex. 18 (643) (consolidated business plan, with "Title" starting p. 692). See also Reese II (535) at 257:4-258:2 (regarding presentation); Bregman I (368-375) at 161:13-189:13.

²⁰ See Reese II (531) at 217:22-25 (testifying with respect to offshore approval of Olympic strategic alliance business plan). See also id. (530) at 216:15-20 (same); Samson (608) at 153:14-154:6 (Board member testifying Pl. Ex. 28 (870) memorializes Board approval of business plan set forth in Pl. Ex. 27) (833); Bregman I (376) at 201:4-202:9; Bregman II (396) at 286:21-288:7 (Board approved ACE/Olympic business plan with no objections).

²¹ See, e.g., Kopel II (430) at 180:19-25 ("I do know that there were some internal goings-on for a while there which--which I believe was resolved more or less of the summer of '03. Some internal approvals. At which point I was told that all lights were green. We were the business plan for the U.S. operations of ACE for the years '04, '05, '06"). See also Reese II (549) at 337:15-338:13.

ACE also told its biggest traditional title insurer customer about the joint venture, and proceeded to tell all of its customers it soon would compete with them through the Olympic joint venture.²² ACE also authored detailed business plan packets describing the Olympic plan.²³

2. The Olympic Group And ACE File Signed, Sworn, Applications To The ODI; ACE Promises To Sign As Soon As ODI Approval Occurs.

As part of the joint venture, the Olympic Group had to gain permission from the ODI to buy OTIC (an existing title company) from its then-current owners. In addition, as a mutually-agreed critical step, ACE had to obtain permission from the ODI to become a direct title insurer in Ohio, as opposed to a reinsurer. Within a week of each other in November 2003, ACE filed a 350-page written, signed, sworn application with the ODI to become a direct title insurer pursuant to the parties' joint venture, see Pl. Ex. 165 (960) (ACE ODI application) and Ex. 199 (1410) (ACE letter to ODI), and the Olympic Group filed its own application with the ODI to purchase OTIC pursuant to the parties' joint venture. See Def. Ex. 8 (1631) (plaintiffs' ODI application). Mr. Reese repeatedly testified that ACE's November 2003 ODI application was part of and directly referable to the parties' strategic alliance joint venture.²⁴

For the Olympic Group's November 2003 ODI application for permission to acquire OTIC, the ODI had to approve the reinsurance agreement whereby ACE would reinsure OTIC once it was owned by the Olympic Group. The essential business terms of the reinsurance

²² See Reese III (557-58) at 387:13-390:20.

²³ See Pl. Exs. 203 (1491), 204 (1511), 214 (1544). See, e.g., Reese III (585) at 563:23-564:4.

²⁴ See, e.g., Reese III (553) at 365:13-366:8; id. at 368:10-18; id. (554) at 371:15-24; id. (555) at 374:10-16; id. at 375:6-23; id. (556) at 383:24-384:6; id. at (558) at 392:4-15; id. at 391:1-13 (regarding ACE's ODI application; "Q:...Is that referring to the commercial aspect of the joint venture with the Olympic Group? A: Yes."); Bregman II (387) at 158:17-159:14.

agreement had already been agreed to,²⁵ and transactional lawyers for the parties drew up a form reinsurance agreement on the basis of the already agreed-to terms.²⁶

The parties had only one pause with respect to negotiation of the reinsurance agreement (which negotiation was largely complete by March 2003, see Pl. Ex. 190 (1316)), and the issue was quickly resolved. In October 2003, ACE proposed that the Olympic Group be required to stand behind OTIC in the form of a personal financial guaranty provided by the individual principals of the Olympic Group. The Olympic Group principals were unwilling to provide such a personal guaranty. Thus, in a meeting at the end of October 2003, ACE proposed that plaintiffs provide a “Capital Support Agreement” that would require the plaintiff agency corporations (but not their individual principals) to provide a corporate financial guaranty to OTIC until OTIC achieved a certain size threshold. Contrary to ACE’s false representations to this Court, the parties reached mutual agreement on the terms of the Capital Support Agreement.²⁷ In fact, the parties’ agreed “Capital Support Agreement” arrangement was accepted by unanimous approval of ACE’s Credit Committee in late October 2003.²⁸

²⁵ See, e.g., Pl. Ex. 190 (1316). See also Reese II (539) at 293:5-18; id. (538) at 284:16-24; id. (531) at 218:2-13; id. (532) at 223:2-9.

²⁶ See, e.g., Kopel Depo. III (436A) at 34:20-35:1; id. at 37:2-38:25 (ACE told Mr. Kopel that lawyer George Wilkinson was assigned to merely “scribe” the parties’ deal).

²⁷ See Kopel III (441) at 78:5-79:6 (mutual agreement on Capital Support Agreement was reached in fall 2003); id. (447) at 159:4-18 (Mr. Reese said to submit ODI application without Capital Support Agreement because in house lawyer had not typed it yet); Kopel IV (460-61) at 44:14-45:8 (mutual agreement reached on Capital Support Agreement); Kopel II (432-33) at 204:3-205:2 and id. (434) at 213:9-18 (same); Henry (417-18) at 183:13-184:11 (parties had meeting of minds by late October 2003 on Capital Support Agreement); Bergman (353-54) at 112:3-113: 7 (transaction lawyer for Olympic testifies that agreement was reached).

²⁸ See Bregman II (393-95) at 224:23-229:3. Although the Capital Support Agreement was reached by early November 2003, ACE’s drafting lawyers did not produce written memorialization of it until January 15, 2004—after breach occurred. See, e.g., Pl. Ex. 152 (900) (attaching agreement); Reese III (602) at 693:11-696:15; Kopel IV (460-61) at 44:14-45:8; Kopel III (441) at 78:5-79:6.

The Olympic Group, with the knowledge and consent of ACE, attached to its November 10, 2003 ODI application the reinsurance agreement whereby ACE agreed to reinsure OTIC.²⁹ The reinsurance agreement was fully negotiated and agreed to by the parties. According to plaintiffs' testimony, ACE (1) knew the reinsurance agreement submitted to the ODI did not contain the agreed-to Capital Support Agreement, because ACE had not typed it up yet, and (2) told Mr. Kopel of the Olympic Group that the "footer/disclaimer" language (a disputed fact discussed at length in ACE's brief) could be removed.³⁰ ACE's quote from Robert Martyn on this issue—that he did not have a conversation with ACE about removing the footer (see ACE Merits Brf. at 13)—is misleading: ACE gave its permission to Howard Kopel (Mr. Martyn's boss), and not Mr. Martyn. See *supra* fn. 30.

The fully-negotiated, agreed-to reinsurance agreement submitted to the ODI was unsigned, because everyone acknowledged the "chicken and the egg" problem as to which should come first: OTIC (the company to be purchased) could not sign the reinsurance agreement until the Olympic Group actually owned OTIC; on the other hand, the Olympic Group had to have the ODI's approval of the reinsurance agreement before it could purchase OTIC.³¹ To solve that predicament, the undisputed testimony by plaintiffs and each of their principals is that ACE promised the Olympic Group in December 2003 that the parties' agreements were being signed and would be presented immediately after the ODI approved the OTIC acquisition, and the Olympic Group bought OTIC. Each principal of the Olympic Group received a personal

²⁹ See, e.g., Pl. Ex. 34 (872) (Kopel Aff.) at ¶62; Kopel III (448-49) at 168:11-170:17; *id.* (445-46) at 152:6-154:16.

³⁰ See Kopel III (442-43) at 121:7-122:25; *id.* (445) at 152:14-25; *id.* (447) at 159:4-18; *id.* (448) at 168:17-169:4.

³¹ See, e.g., Reese III (591) at 628:6-15 (Mr. Reese explaining that signature cannot occur until change in control of OTIC happens); see also Kopel IV (457) at 25:7-26:9 (plan always was for ACE to execute upon OTIC acquisition).

promise from Mr. Reese of ACE that ACE would sign the parties' agreements once the OTIC closing occurred.³² Even Mr. Reese agrees that signature was contemplated:

Q: Did you tell the members of the Olympic Group that you would execute, that is, ACE would execute, a reinsurance agreement with Olympic Title after the Olympic Group acquired Olympic Title?

...

A: Was that what was contemplated? Yes.

Reese III (568-69) at 456:23-457:13; see also id. at 455:14-456:18. ACE's contemporaneous business records confirm this intent.³³

The parties also reached agreement on the form and substance of an agency agreement between the plaintiff agencies and OTIC, and exchanged written memorializations of it.³⁴ That

³² See, e.g., Henry (402-04) at 60:9-68:11 (describing in detail December 2003 telephone conversation in which Mr. Reese assured him agreements would be signed); Reese III (593) at 647:17-21 ("Q: Were you seeking to reassure Mr. Henry during that telephone call that the deal was going forward? A: Yes."); Henry (416) at 179:22-25 ("We thought we had an agreement. I had a promise from Dick Reese that ACE would sign").

See also Mosimann I (481-82) at 132:4-134:3 (testifying with respect to December 11, 2003 meeting that "my first question upon entering the meeting was Mr. Reese, is the agreement completed? Is it signed? And quote his comment was the agreement has been completed. The agreement is agreed upon. Not to worry. It has just gone upstairs for signature. Let's move on with the business plan. Please have a seat, to which he went on to explain for the next two days his business plan with the strategic alliance with us and where we fit in."); id. (483) at 231:5-232:12; Mosimann II (492-93) at 104:6-106:23 (describing in detail the December 2003 meeting in New York in which Mr. Reese specifically told him the agreements were being signed).

See also Stauffer (613) at 141:22-143:12 (Mr. Reese said at December 2003 meeting that agreements were being signed; "And Dick Reese went through another round of assurances the documents were ready and they were being signed and -- and everything was go, and no problems.").

See also Kopel IV (462) at 69:15-18 (Mr. Reese "told me that he was going to sign all the documents moving—or completing the joint venture immediately upon our acquisition of OTIC"); id. (463) at 117:23-25 ("We were told all along that the moment we concluded the purchase the agreements would be signed.").

³³ See Pl. Ex. 9 (615) at p. 617 (Dec. 8, 2003 ACE Memo to offshore defendants, listing next step in business plan to "Execute reinsurance agreement with Olympic Title upon completion of the change of control Olympic Title to the Olympic Group.").

³⁴ See Pl. Ex. 201 (1432) (Nov. 13, 2003 E-mail from ACE attaching agency agreement); see also Kopel IV (457) at 26:16 ("That clearly was an agreed-to document."); Henry (413) 135:20-21 (testifying "we had agreed on a standard agency agreement.").

agency agreement was then to serve as the template for an agency agreement between the plaintiff agencies and ACE as well.³⁵

As of December 5, 2003, Mr. Reese stated the joint venture would be writing business in the early first quarter of 2004, just weeks away. See Reese III (581) at 525:13-20. In performance of the parties' deal, ACE hired another underwriting counsel specifically to handle the incremental business anticipated from the joint venture with the Olympic Group.³⁶

D. ACE's Parents Announce A \$1 Billion IPO On December 2, 2003; ACE Says IPO Does No Harm; Olympic Group Buys OTIC On December 29, 2003.

On December 2, 2003, the ACE Group of Companies announced a \$1 billion initial public offering. See Pl. Ex. 206 (1539). When they inquired, plaintiffs were told by ACE that the IPO would help, and not harm, the parties' deal:

- In mid-December, George Henry, a principal of plaintiffs, personally called Mr. Reese to inquire whether the IPO harmed the parties' dealings, to ask whether the parties' agreements would be signed, and to ask whether the deal was on. Mr. Reese expressly assured him "yes" on all fronts.³⁷
- On December 11 and 12, 2003 William Mosimann and John Stauffer, principals of plaintiffs, flew from Kansas to New York to meet with Mr. Reese. They were specifically assured that the deal was on, the agreements were being signed, and that the IPO, if anything, was a help to the joint venture.³⁸

³⁵ See, e.g., Reese III (563) at 418:25-419:7; Pl. Ex. 202 (1452); Kopel IV at 26:10-28:18. The parties decided that the agreed-upon terms of their commercial relationship, see, e.g., Pl. Ex. 190 (1316), would be reflected in stock documents. See, e.g., Kopel III (440A-440B) at 73:16-74:16; id. (451) at 185:20-188:25; Def. Ex. 88 (1856).

³⁶ See, e.g., Reese II (543) at 309:10-22; Reese III (561) at 410:4-7; Pl. Ex. 200 (1418) (offer to new hire).

³⁷ See Henry (402-04) at 60-68. See also Reese III at 647:17-21 ("Q: Were you seeking to reassure Mr. Henry during that telephone call that the deal was going forward? A: Yes.").

³⁸ See, e.g., Mosimann I (481-82) at 132:4-134:3 ("It was also explained to us at that meeting on December 11th of the re-org and the [IPO] spin-off. And Mr. Reese's direct quote to me was this will be very well, good for us. That removes another layer. That allows us to attach to a higher layer of ACE, and not to be concerned, that this will move quickly because it has been approved. It's just awaiting signature."); id. (483) at 231:5-232:12; Mosimann II (492-93) at 104:6-106:23; Stauffer (613) at 141-143 (Mr. Reese said IPO put deal in "a stronger position, a more direct position, and a better position so that we would go forward very rapidly."); Reese

- Howard Kopel, also a principal of plaintiffs, testified regarding the assurances he received from ACE in December 2003 that the IPO did not harm the parties' deal.³⁹

In reliance on these assurances that the parties' fully negotiated agreements would be signed as soon as the OTIC acquisition was complete, plaintiffs obtained approval from the ODI to acquire OTIC, see Pl. Ex. 34 (872) (Kopel Aff.) at ¶69 and Kopel IV (463) at 117:18-22, and closed on OTIC on December 29, 2003. ACE admitted that the December 29 closing on OTIC was reasonable, and consistent with the parties' deal:

Q. So you were aware then as of Friday, January the 2nd of 2004 that there had been a closing on the Olympic Title Insurance Company on December 29th, 2003?

A. Yes.

Q. Was the acquisition of Olympic Holding by Olympic Title consistent with the strategic alliance business plan that we have been discussing in some detail?

A. Yes.

Q. To your knowledge, did anyone, not just yourself, but did anyone on behalf of ACE on or before the December 29th, 2003 closing communicate to the Olympic Group that they should not go forward with the acquisition of Olympic Title Insurance Company?

A. I didn't.

Q. Do you know of anyone else who did?

A. No.

Q. Do you believe that the Olympic Group was reasonable to believe as of December 29th, 2003 that the strategic alliance was still on?

A. Until we got Andy's final word, yes.

Q. Yes, that it was reasonable to believe as of December 29th, 2003 that the strategic alliance was still on?

A. Yes.

Reese III (598) at 666:12-668:7.⁴⁰ With the OTIC closing complete on December 29, 2003, the Olympic Group was ready to move forward with full implementation of the parties' deal.

III (592) at 637:14-25 (admitting he told Mr. Mosimann and Mr. Stauffer at December 2003 meeting that IPO would not negatively impact the parties' deal, and would be an advantage).

³⁹ See Kopel III (452) at 196:21-197:17. See also Pl. Ex. 207 (1542); Kopel IV (455-56) at 16:18-18:17.

E. After The New Year And OTIC Closing, ACE Breaches.

Mr. Kopel of the Olympic Group called Mr. Reese on January 2, 2004 to relay the good news regarding the OTIC acquisition. See Reese III (589-90) at 608:19-609:6. Mr. Reese, however, had what he called a “bombshell”: ACE was not going forward with the parties’ joint venture, and would not sign the agreements. See Reese III (594-95) at 652:16-653:5 (“A...And we had a brief happy conversation about OTIC being purchased, then we had the bombshell”).⁴¹

What happened? The offshore parent companies had decided the title business was a “distraction” to the IPO, see Pl. Ex. 17 (620) at 639 (offshore executives concluding title was not “worth the distraction for so little money and so much exposure”), and no one had the “appetite” to look after it.⁴² Mr. Reese told plaintiffs that the offshore IPO was the issue.⁴³

ACE knew by early December, prior to plaintiffs’ closing on OTIC, that it was not going forward with the deal. Ms. Bregman, General Counsel for ACE (and officer and/or director of multiple offshore ACE companies), testified that it was the IPO restructuring of early fall 2003 that caused ACE’s business plan to be changed.⁴⁴ She testified that ACE’s November 2003 ODI application, made in furtherance of the Olympic Group strategic alliance, was no longer an accurate depiction of ACE’s business plan as of, at the latest, December 2, 2003⁴⁵--well before Mr. Reese on behalf of ACE was blithely assuring plaintiffs that the IPO would not harm, and would actually help, the parties’ deal, and that the parties’ agreements would be duly signed.

⁴⁰ See also Pl. Ex. 34 (872) (Kopel Aff.) at ¶70.

⁴¹ See also Kopel IV (456) at 19:3-20:24 (describing his “total and utter shock, and disappointment, and fear” upon learning of ACE’s intent to renege).

⁴² See Samson (605) at 23:4-24:9; id. (605A) 41:3-17 (Offshore executive testifying he reviewed ACE business plan, and had no “appetite” for title business).

⁴³ See Kopel I (427) at 184:14-23.

⁴⁴ See Bregman II (389) at 169:17-170:16; id. (392) at 185:17-188:11.

⁴⁵ See Bregman II (389) at 169:17-171:5 (IPO carve out caused uncertainty); see also id. (391) at 182:5-24 (decision to carve out ACE from IPO occurred by Dec. 2, 2003).

See supra n. 37; 38; 39. Unfortunately, no one told the Olympic Group that the IPO restructuring of December 2, 2003 would cause their deal—and ACE itself—to implode.

Ms. Bregman began secretly working on the IPO as early as August 2003.⁴⁶ She knew by December 2003 that ACE was being excluded from the IPO by the offshore defendants.⁴⁷ All the while, she knew of the business plan with the Olympic Group.⁴⁸ In fact, she had written portions of the business plan.⁴⁹ Nonetheless, Ms. Bregman testified she said nothing about the changed plans to plaintiffs, and did not direct anyone to do so. See Bregman II (386) at 155:20-156:5.

Moreover, the other offshore executives who were making the decisions regarding ACE's future had actual knowledge of the business plan with the Olympic Group at the time they made their IPO restructuring decisions.⁵⁰ Despite the knowledge that ACE's executives had of the IPO and its effect on ACE and its deal with plaintiffs, no one at ACE spoke up sooner to correct Mr. Reese's misstatements to plaintiffs. That includes the company president, Joe Swain, whose own knowledge of and involvement in the IPO predated even Ms. Bregman's.⁵¹ The direct communications with the Olympic Group instead were left to Mr. Reese. And by the company's own admission, no one was monitoring the representations Mr. Reese was making to others.⁵²

⁴⁶ See Bregman I (365) at 121:6-122:20. The IPO was known as "Project Field Goal."

⁴⁷ See Bregman I (367) at 131:22-132:15.

⁴⁸ See Bregman I (372) at 178:6-14 (admitting she understood Olympic plan by August 2003); Bregman II (387-88) at 160:25-161:17 (admitting she was personally present for Mr. Reese's offshore presentation of the business plan with Olympic).

⁴⁹ See Bregman I (374) at 186:7-187:16; id. (372) at 179:4-180:2 (Ms. Bregman allocated personnel hours to the Olympic Group alliance in the Board approved business plan).

⁵⁰ See, e.g., Samson (605A) 41:3-42:6; (606) 45:3-46:6; 47:13-21 (offshore executive admitting his prior knowledge and review of the business plan involving the Olympic Group).

⁵¹ See Bregman II (389-90) at 172:23-173:7 (Mr. Swain working on IPO even before Ms. Bregman); id. (385) at 150:24-151:16 (Mr. Swain was aware of plan to run off ACE but did not tell Olympic).

⁵² See Pl. Ex. 17 (620) at 15 (e-mail in which offshore executives note Mr. Reese is not being kept in the loop, and no one has stepped up to monitor his representations to others).

On December 17, 2003, ACE was instructed by the offshore defendants in an internal written memorandum to “hang fire,” or, in the words of Mr. Reese, its Chief Operating Officer, “Hurry up and wait.” It did not relay this secret information to plaintiffs.⁵³

By December 22, 2003, word came from the offshore defendants that ACE was to cease writing new business immediately.⁵⁴ Mr. Reese did not inform plaintiffs of this secret development, and did not instruct anyone else to, either. See Reese III (595-96) at 655:23-657:6. Asked if this information would have been important to the Olympic Group, Mr. Reese testified: “Of course it would have been, yes.” Id. (597) at 661:21-662:3. Knowing nothing of ACE’s secret internal communications, the Olympic Group closed on OTIC on December 29, learning nothing of the turmoil at ACE until January 2, 2004. See supra n. 41.

On January 6, 2004, ACE secretly withdrew its sworn application to the ODI, and asked the ODI for all copies to be returned.⁵⁵ Ms. Bregman testified that she would have withdrawn the ODI application even sooner if she had not been busy with the IPO.⁵⁶

In sum, having reached agreement with the Olympic Group in March 2003 on the terms of the parties’ deal, after mutual execution by the parties on the deal throughout the rest of 2003, after making express promises to sign the parties’ agreements in December 2003, and after expressly assuring plaintiffs that the IPO would help, not hurt, the parties’ deal, ACE reneged on its promises to sign, and breached its joint venture deal with plaintiffs. Mr. Reese testified that

⁵³ See Pl. Ex. 10 (619). See also Reese III (595) at 653:10-654:24; id. at 654:25-655:4 (“Q: You never told them that you were supposed to be holding fire until the 1st of the year? A: No.”).

⁵⁴ See Pl. Ex. 213 (1543); see also Reese III (595) at 655:5-656:11.

⁵⁵ See Pl. Ex. 161 (958) (Jan. 6, 2004 withdrawal letter from ACE to ODI). See also Bregman II (384) at 147:12-148:9 (regarding withdrawal); id. (389) at 169:17-170:16 (decision to carve ACE out of IPO caused withdrawal of ODI application by changing business plan); id. (386) at 155:20-156:5 (ACE did not tell Olympic it withdrew ODI application).

⁵⁶ See Bregman II (385-86) at 151:17-154:14.

his company's conduct towards the Olympic Group, in walking away from the parties' deal, was "absolutely unethical." Reese III (599) at 684:5-22. He also testified that the president of ACE, Joe Swain, acknowledged the business obligation the company owed to the Olympic Group:

Q. So Mr. Swain was the president of ACE?

A. Even going all the way back to Capital Re, the senior executive of the financial services group were presidents of all subsidiaries.

Q. And Mr. Swain said to you and you heard him say that he thought he had a business obligation to the Olympic Group?

A. Yes.

Id. (600) at 687:7-16.

F. The Trial Court Granted Summary Judgment On Certain Claims.

On June 2, 2006, the members of the Olympic Group filed a 70-page, 422-paragraph complaint in the Franklin County Common Pleas Court (1). The case, designated a refiled action,⁵⁷ was assigned Case No. 06-CV-7238. The complaint set forth causes of action for breach of the reinsurance agreement, breach of the joint venture agreement, specific performance of the reinsurance and joint venture agreements, promissory estoppel, breach of fiduciary duty, negligent misrepresentation, tortious interference with contract, tortious interference with business relations, and fraud against ACE, as well as its four offshore parents.

On August 22, 2007, the offshore ACE defendants moved to dismiss this action for lack of personal jurisdiction, and on September 18, 2006, plaintiffs filed their memorandum in opposition to that motion.

On September 20, 2006, the remaining defendant, ACE, moved for summary judgment on all claims, except the two tortious interference claims that had been asserted only against the

⁵⁷ A prior action involving these plaintiffs (as well as several others), and these defendants (as well as several others) had been filed in Franklin County Common Pleas Court on January 27, 2004, bearing Case No. 04-CV-939. That prior action was voluntarily dismissed by the plaintiffs without prejudice on or about May 19, 2006, pursuant to Civ. R. 41 (A)(1).

offshore parent companies. On October 18, 2006, plaintiffs filed their opposition to ACE's motion for summary judgment. The related summary judgment Record is extensive, containing, inter alia hundreds of documentary exhibits, and dozens of deposition transcripts. Indeed, tens of thousands of pages of documents relating to the joint venture were produced by both sides in discovery. There are some 35 deposition transcripts in the record. The cited excerpts alone that plaintiffs filed in conjunction with their opposition brief is many volumes of record evidence.

On December 18, 2006, the trial court issued a decision granting the offshore ACE defendants' motion to dismiss for lack of personal jurisdiction.

On January 26, 2007, the trial court issued its decision on ACE's summary judgment motion (146). Thereafter, on February 21, 2007, the Court caused an entry to be filed regarding its summary judgment decision. That entry was stamped "Final Appealable Order," and stated: "Pursuant to Civ. R. 54(B), the Court expressly determines that there is no just reason for delay." February 21, 2007 Entry (169) at 2. Through these, the trial court, inter alia:

- Granted summary judgment to ACE on all of plaintiffs' contract-related claims, including breach of joint venture agreement, breach of reinsurance agreement, and specific performance of both the joint venture and reinsurance agreements;
- Granted summary judgment to ACE on plaintiffs' claims of breach of fiduciary duty and negligent misrepresentation claims; and
- Sua sponte (and without briefing from the parties), wrongly limited the kinds of damages plaintiffs may seek and the types of evidence they may introduce regarding plaintiffs' fraud claim—but held that claim should proceed to trial.

G. The Tenth District Court Of Appeals Issued A Unanimous Decision Reversing In Part, Affirming In Part, And Holding Other Issues Moot.

This case bore case number 07 APE-2-0168 before the Tenth District Court of Appeals. Plaintiffs presented twelve assignments of error to the Tenth District. After briefing by the parties, and oral arguments, the Tenth District issued a unanimous written decision on December 13, 2007 ("COA Dec.") (252). That decision affirmed the trial court in some respects,

reversed the trial court in other important respects, and found two assignments of error to be moot in light of its other holdings. The assignments of error considered by the Tenth District (other than those related to personal jurisdiction, which have been excluded for space), and their disposition in the unanimous December 13, 2007 decision, are as follows:

<u>Assignment of Error</u>	<u>Disposition By Tenth District</u>
I. The Trial Court Erred In Granting Summary Judgment On Plaintiffs' Contract Claims Where There Were Fact Disputes Regarding Whether Defendants Are Estopped From Relying Upon A Statute Of Frauds Defense.	Sustained (p. 17 of COA Decision)
II. The Trial Court Erred In Granting Summary Judgment On Plaintiffs' Contract Claims Where The Parties' Agreements Were Capable Of Performance In One Year And Thus Fall Outside The Statute Of Frauds.	Held to be moot in light of AOE I and IV (p. 17 of COA Decision)
III. The Trial Court Erred In Granting Summary Judgment On Plaintiffs' Contract Claims Where There Were Signed Writings Chargeable Against The ACE Defendants That Satisfy The Statute Of Frauds.	Held to be moot in light of AOE I and IV (p. 17 of COA Decision)
IV. The Trial Court Erred In Granting Summary Judgment On Plaintiffs' Contract Claims Where There Was Ample Record Evidence Of Enforceable "Agreements To Agree."	Sustained (p. 16 of COA Decision)
V. The Trial Court Erred In Granting Summary Judgment On Plaintiffs' Breach Of Fiduciary Duty And Fraudulent Concealment Claims Where There Was A Disputed Factual Record.	Sustained as to breach of fiduciary duty (p. 19 of COA Decision)
VI. The Trial Court Erred In Granting Summary Judgment On Plaintiffs' Negligent Misrepresentation Claim Given The Record Evidence Before It.	Overruled (p. 21 of COA Decision)
VII. The Trial Court Erred In Sua Sponte Limiting Plaintiffs' Damages Regarding Promissory Estoppel And Fraud.	Held premature ; no jurisdiction to hear these arguments yet (p. 21 of COA Decision)

H. ACE Addressed Only Two Of The Twelve Assignments Of Error.

On January 25, 2008, ACE filed a jurisdictional memorandum with this Court claiming that the Tenth District's disposition of two of the twelve assignments of error constituted an issue

of public and great general interest. ACE asserted only two propositions of law in its jurisdictional memorandum.

In Proposition of Law I of its jurisdictional brief, ACE challenged the Tenth District's unanimous holding, pursuant to Assignment of Error No. I, that a party that lies about whether it will sign an agreement, in order to induce reliance by the other party, is estopped from relying upon a Statute of Frauds defense to excuse its misconduct. In its Proposition of Law II, ACE also challenged the Tenth District's unanimous holding, pursuant to Assignment of Error No. V, that behaving "absolutely unethically" towards one's admitted "strategic partner" may constitute a breach of fiduciary duty. Specifically, ACE set forth the following propositions of law in its jurisdictional memorandum to this Court:

Proposition of Law No. 1: 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.

Proposition of Law No. 2: 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 only Assignments of Error that ACE addressed in its jurisdictional memorandum were Nos. I and V. In a 4-3 decision, this Court accepted ACE's arguments that the two foregoing Propositions of Law, concerning Assignments of Error Nos. I and V, constituted issues of public and great general interest. Since this Court's jurisdictional decision, ACE has now filed a merits brief that invites, for the first time, this Court to review not just Assignments of Error Nos. I and V, but also Assignments of Error Nos. II, III, and IV—never mentioned in its jurisdictional memorandum.⁵⁸

⁵⁸ ACE's improper inclusion of these additional assignments of error in its merits brief is the subject of plaintiffs-appellees' pending July 24, 2008 motion to dismiss this appeal as

III. LAW AND ARGUMENT.

A. This Is A Summary Judgment Case, In Which The Court Is Not Entitled To Decide Disputed Issues Of Material Fact.

Largely absent from ACE's merits brief is any reference to the fact this is a summary judgment case, in which summary judgment could only be granted if the strict mandates of Civil Rule 56 are met. "Civ. R. 56 defines the standard to be applied when determining whether a summary judgment should be granted." Todd Dev. Co., Inc. v. Morgan (2008), 116 Ohio St.3d 461, 463, ¶11. Summary judgment only is proper when the moving party demonstrates:

(1) no genuine issue of material fact exists, (2) the moving parties are entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, when the evidence is construed in the light most favorable to the non-moving party.

Wooster v. Graines, (1990) 52 Ohio St.3d 180, 184-85. "Before ruling on a motion for summary judgment, the trial court's obligation is to read the evidence most favorably for the nonmoving party to see if there is a 'genuine issue of material fact' to be resolved." Byrd v. Smith (2006), 110 Ohio St.3d 24, 27, ¶12. Accordingly, summary judgment "must be awarded with caution. Doubts must be resolved in favor of the non-moving party." Sinnott v. Aqua-Chem, Inc. (2007), 116 Ohio St.3d 158, 164. "Even the inferences to be drawn from the underlying facts contained in the evidentiary materials, such as affidavits and depositions, must be construed in a light most favorable to the party opposing the motion." Hannah v. Dayton Power & Light Co. (1998), 82 Ohio St.3d 482, 485. The Court is not entitled to weigh the evidence or determine witness credibility in deciding summary judgment. See Turner v. Turner (1993), 67 Ohio St.3d 337, 341, 344 (holding that credibility is a question of fact to be decided and weighed by the jury, not by the court at summary judgment). Plaintiffs here, as the party opposing summary judgment, "are

improvidently granted, or in the alternative, to strike arguments regarding Assignments of Error Nos. II, III, and IV (286).

entitled to have any conflicting evidence construed in their favor.” Bowen v. Kil-Kare, Inc. (1992), 63 Ohio St.3d 84, 88.

ACE, unfortunately, invites this Court to do exactly what it must not do in deciding summary judgment: ignore record evidence supporting plaintiffs’ claims, construe all evidence in favor of the moving party’s one-sided recitation of disputed facts, and weigh witness credibility in the process. Civil Rule 56 cannot abide such an approach.

B. A Party Is Not Entitled To Lie About Signing A Writing That Would Comply With The Statute Of Frauds, And Then Rely Upon The Statute.

Plaintiffs have presented overwhelming record evidence of specific facts showing that at the time ACE promised to sign the parties’ agreements, mutual agreement already had been reached regarding the essential terms of the parties’ deal (section 1, below). The universally accepted rule in all jurisdictions that have looked at the issue is that a party that misrepresents its intent to produce a signed writing is estopped from relying upon the Statute of Frauds (section 2, below). Ohio courts have properly recognized this rule (section 3, below). The rule is consistent with this Court’s long-held position that the Statute of Frauds is not to be used as an instrument of fraud (section 4, below). That is not “judicial activism” (another hypnotic buzzword ACE uses so often). That is honoring legislative intent.

1. ACE’s Promises To Sign The Parties’ Agreements Came *After* Mutual Agreement Had Already Been Reached On The Business Terms.

Because this is a summary judgment case, this Court cannot substitute itself for the jury (that would be “judicial activism”). The parties’ respective positions boil down to two opposing views of the facts: the view of plaintiffs-appellees that the parties had a deal, and reached mutual agreement on all essential terms of the deal prior to the time that ACE promised to sign the parties’ agreements, and ACE’s view that there was no deal, no mutual agreement on business

terms, and that no promise to sign writings can be enforced in the alleged absence of mutual agreement on the business terms of the deal.

The fact is that plaintiffs have adduced specific record evidence that the parties achieved mutual agreement on all essential terms of their business deal by spring 2003. See supra pp. 6-8. Specifically, the record evidence shows that at the time ACE promised in December 2003 that signatures were forthcoming (see supra n. 32), mutual agreement already had been reached on the terms of the parties' deal. The Tenth District agreed so held:

appellants have presented evidence that Reese promised that ACE would sign the agreements once appellants acquired OTIC. Reese also testified that the parties *had* reached agreement and were implementing and memorializing the terms of the joint venture. Appellants were told that the agreement was completed and had just gone upstairs for signature.

COA Dec. (252) at ¶46 (emphasis in the original). Despite this, contrary to the crushing admissions of ACE's COO, and contrary to plaintiffs' evidence, ACE persists in arguing "significant disagreements still existed between the parties" as to the terms of the deal. See ACE Merits Brf. at 2. ACE is entitled to dispute plaintiffs' facts at trial, but not at summary judgment.

The fallacy of the trial court's summary judgment decision is that it accepted ACE's disputed factual arguments hook, line, and sinker—despite overwhelming contrary facts in the record. See Trial Court SJ Dec. (146) at 10 (claiming terms of parties' agreements "were in flux and still open to negotiation"). The record does not support this conclusion. The promises that were made by ACE in December 2003 to sign the parties' agreement came:

- after the parties' had reached agreement on the essential terms of their deal in the form of the March 7, 2003 term sheet (see Pl. Ex. 190 (1316); see also supra pp. 6-8),
- after they reached mutual agreement on the Capital Support Agreement (see supra n. 27),
- after they reached mutual agreement on the agency contract (see supra n. 34 and 35),
- after Mr. Reese told the Olympic Group that the footer could be removed from the agreed-to form of reinsurance agreement (see supra n. 30), and

- after ACE and the Olympic Group each submitted signed, sworn applications to the ODI in furtherance of the joint venture (see Pl. Ex. 165 (960), Def. Ex. 8 (1637)).

Thus, the business terms were agreed to and in place at the time ACE promised that it would produce signed written agreements as soon as the Olympic Group acquired OTIC, and could sign on OTIC's behalf. Mr. Henry, Mr. Mosimann, Mr. Stauffer, and Mr. Kopel of the Olympic Group all testified to ACE's promise to sign, made personally to each of them in mid-December 2003. See supra fn. 32 (compiling testimony). The Olympic Group relied on these promises and assurances to close on OTIC on December 29, 2003.

ACE does not dispute that such promises to sign were made. See, e.g., COA Dec. (252) at ¶47 ("ACE does not dispute the appellants' evidence that it made express promises to produce signed written memoranda of the parties' agreements."). ACE does not dispute that such promises were broken. ACE does not dispute that at the time it made promises to plaintiffs to sign the agreements in December 2003, its officers knew its business future already had been disrupted by restructuring decisions made in connection with its parent companies' IPO. See Bregman II (392) at 187:19-188:11 (excluding ACE from IPO was operative act leading to demise of ACE business plan); id. (391) at 181:5-182:10 (decision to exclude ACE from IPO had been made by December 2, 2003).⁵⁹ ACE admits, moreover, that the Olympic Group was reasonable to believe as of December 29, 2003 that the deal was still on, and admitted that the December 29 closing was consistent with the parties' deal. See Reese III (598) at 666:12-668:7.

Instead, ACE now argues that its broken promises to produce signed writings are irrelevant in the face of the Statute of Frauds. Because the parties had reached mutual agreement

⁵⁹ Ms. Bregman was an officer and/or director of defendant ACE, as well as two offshore ACE defendants. She also participated at the behest of the offshore defendant ACE Limited in preparations for and consummation of the IPO. See Bregman I (365-66) at 121-127. Her actual knowledge of the IPO beginning in September 2003, id., is imputed to ACE as a matter of law. See Arcanum Nat'l Bank v. Hessler (1982), 69 Ohio St.2d 549, 557 (holding "knowledge of officers of a corporation is at once knowledge of the corporation.").

on the business terms of their deal, and ACE thereafter made false promises to sign writings that would satisfy the Statute of Frauds at a time it knew it had no intention to perform, thereby inducing reliance on the part of plaintiffs, ACE is estopped from relying on the Statute. That is the law everywhere. ACE does not, and cannot, cite to a single case or authority, anywhere in the country, in which a party that has lied about its intent to produce a signed writing that would satisfy the Statute of Frauds is then permitted to rely upon the Statute of Frauds as a defense.

2. Every Treatise And Case To Look At The Issue Agrees That Estoppel Applies Under These Facts.

The treatises are in accordance: a party that induces reliance by lying about or misrepresenting its intent to produce a signed writing that would satisfy the Statute of Frauds may not rely upon the Statute of Frauds as a defense. See 9 Williston on Contracts §21:7 (4th Ed. 1999) (“Agreement To Execute Written Memorandum”) (“[I]f the plaintiff has acted on the promise to reduce the contract to writing, and changed his position so that it would be unconscionable not to enforce the promise and the underlying contract, an estoppel will be erected to prevent the defendant from invoking the Statute.”); 4-12 Corbin on Contracts § 12.8 (2007) (“Promises to Execute a Sufficient Memorandum”) (“Equitable estoppel bars assertion of the statute as a defense” where there is “a promise...to execute a sufficient memorandum at a future time.”); Restatement of Contracts (1932), § 178, Comment f (“[A] promise to make a memorandum, if similarly relied on, may give rise to an effective promissory estoppel if the Statute would otherwise operate to defraud.”).

All of the states that have looked at this issue agree: a party that induces reliance by lying about its intent to produce a signed writing that would satisfy the Statute of Frauds may not then rely upon the Statute of Frauds as a defense:

State:	Case:
Alaska:	<u>Alaska Airlines v. Stephenson</u> , 217 F.2d 295, 298 (9th Cir. 1954) (analyzing

	Restatement of Contracts 2d, Section 178, Comment f, and Williston on Contracts (1936), Sec. 533A, to “conclude that there was an intention to carry promissory estoppel (or call it what you will) into the statute of frauds if the additional factor of a promise to reduce the contract to writing is present.”);
<u>Arizona:</u>	<u>Mullins v. S. Pac. Transp. Co.</u> , 174 Ariz. 540, 542-43 (Ariz. Ct. App. 1992) (“In Arizona, the doctrine of promissory estoppel applies to a contract otherwise barred by the Statute of Frauds <u>only</u> [...] where the party asserting the Statute of Frauds defense has misrepresented that the statute’s requirements have been met or promises to put the agreement in writing.”);
<u>California:</u>	<u>Wilk v. Vencill</u> , 30 Cal. 2d 104, 108 (Cal. 1947) (applying estoppel to defeat a Statute of Frauds where the defendant represented that she “consented to the sale and that she would sign the agreement in the near future[.]”);
<u>District of Columbia:</u>	<u>Rafferty v. NYNEX Corp.</u> , 744 F. Supp. 324, 330 (D.D.C. 1990) (“[Party’s] alleged promise to reduce the contract to writing ‘as soon as possible’ and his subsequent failure to do so, brings the contract within the [estoppel] doctrine for purposes of a motion for summary judgment.”), aff’d in part & rev’d in part, 314 U.S. App. D.C. 1 (D.C. Cir. 1995);
<u>Illinois:</u>	<u>Roti v. Roti</u> , 364 Ill. App. 3d 191, 199 (2006) (“In order to trump the Statute of Frauds, a party must invoke the doctrine of equitable estoppel [in which] the party asserting it must additionally allege words or conduct amounting to a misrepresentation or concealment of material facts.”) (citation omitted);
<u>Kansas:</u>	<u>Hazen v. Garey</u> , 168 Kan. 349, 351, 359 (Kan. 1949) (defendant estopped from asserting Statute of Frauds where he falsely “promised to plaintiffs that he would cause the oral agreement to be reduced to writing, [and] execute the same”);
<u>Maine:</u>	<u>Chapman v. Boman</u> , 381 A.2d 1123, 1129 (Me. 1978) (defendant’s promise to make a memorandum gave rise to a genuine issue of material fact as to whether defendant was estopped from using Statute of Frauds);
<u>Massachusetts:</u>	<u>Cellucci v. Sun Oil Co.</u> , 2 Mass. App. Ct. 722, 729-30 (Mass. Ct. App. 1974) (defendant estopped from asserting Statute of Frauds given the “repeated assurances that the deal was... ‘all set,’ ...and that the signature by a vice president at the home office was a purely formal or perfunctory matter.”);
<u>Michigan:</u>	<u>Jim-Bob, Inc. v. Mehling</u> , 178 Mich. App. 71, 88-89 (Mich. Ct. App. 1989) (holding “the trial court properly submitted the estoppel question to the jury” where commercial lessors misrepresented their intent to sign a new lease with plaintiff lessee);
<u>Minnesota:</u>	<u>Del Hayes & Sons, Inc. v. Mitchell</u> , 304 Minn. 275, 283-84 (Minn. 1975) (estoppel bars Statute of Frauds “when the promise relied upon is a promise to reduce the contract to writing.”);
<u>Missouri:</u>	<u>Davis v. Nelson</u> , 880 S.W.2d 658, 666-67 (Mo. Ct. App. 1994) (Statute of Frauds barred where defendant falsely promised that “[h]e was going to sign”);
<u>Montana:</u>	<u>Northwest Potato Sales v. Beck</u> , 208 Mont. 310, 316-17 (Mont. 1984) (Statute of Frauds barred where defendant refused to sign contract);
<u>New Jersey:</u>	<u>Pop’s Cones, Inc. v. Resorts Intern. Hotel, Inc.</u> , 307 N.J. Super. 461, 465 (N.J. Super. Ct. App. Div. 1998) (Statute of Frauds barred where defendant misrepresented that agreement was “95% there, we just need [the COO’s] signature on the deal” and COO would “approve the deal”);

<u>Nevada:</u>	<u>Harmon v. Tanner Motor Tours</u> , 79 Nev. 4, 16 (Nev. 1963) (party estopped from relying on Statute of Frauds where it made false assurances “a formal written agreement would be prepared for signature.”);
<u>Oklahoma:</u>	<u>Gibson v. Arnold</u> , 288 F.3d 1242, 1245 (10th Cir. 2002) (“Under Oklahoma law, a defendant must make false representations or conceal facts before he will be estopped from asserting the statute of frauds as a defense to an oral agreement, and the Oklahoma Supreme Court has interchangeably referred to this form of estoppel as both equitable and promissory estoppel.”);
<u>Pennsylvania:</u>	<u>Du Seso v. United Refining Co.</u> , 549 F. Supp. 1289, 1296-97 (W.D. Pa. 1982) (“[P]revailing authority indicates that the bar of the statute will be removed only when a party has misrepresented his intention to reduce an agreement to writing.”);
<u>Tennessee:</u>	<u>Interstate Co. v. Bry-Block Mercantile Co.</u> , 30 F.2d 172, 176 (W.D. Tenn. 1928) (“The statute of frauds has no application to a case where the agreement ... was intended by the parties to be reduced to writing, but has been prevented from being done by the fraud or breach of promise of one of the parties.”);
<u>Texas:</u>	<u>Moore Burger, Inc. v. Phillips Petroleum Co.</u> , 492 S.W.2d 934, 937 (Tex. 1972); <u>Frost Crushed Stone Co. v. Odell Geer Constr. Co.</u> , 110 S.W.3d 41, 46 (Tex. App. 2002) (“To avoid the statute of frauds defense to a contract, the promissory estoppel exception set forth in ‘Moore’ Burger applies when the party promises to sign a written agreement which itself complies with the statute of frauds.”);
<u>Washington:</u>	<u>Klinke v. Famous Recipe Fried Chicken, Inc.</u> (1980) 94 Wn.2d 255, 259-62 (Washington Supreme Court holding “[b]ecause on motion for summary judgment, facts have been asserted which show Famous' agent, Skinner, promised to make and execute a written franchise agreement... Klinke may bring this action notwithstanding the statute of frauds.”); <u>In re Estate of Nelson</u> , 85 Wn.2d 602, 610-11 (Wash. 1975) (“A party who promises, implicitly or explicitly, to make a memorandum of a contract in order to satisfy the Statute of Frauds, and then breaks that promise, is estopped to interpose the Statute as a defense to the enforcement of the contract by another who relied on it to his detriment”) (citing cases and treatises);
<u>Wisconsin:</u>	<u>Klein v. Kelly</u> , 95 Wis. 2d 733, 733 (Wis. Ct. App. 1980) (party estopped to rely on Statute of Frauds where he misrepresented intent to sign);
<u>Wyoming:</u>	<u>Vogel v. Shaw</u> , 42 Wyo. 333, 341 (Wyo. 1930).

ACE wants Ohio to become a haven for frauds. If ACE’s argument is accepted, this Court will have the distinction of being known as the only court, anywhere in the country, at any time, to hold that a party to a transaction that lies about its intent to comply with the Statute of Frauds may nonetheless rely upon the Statute of Frauds as a defense. That is not a legacy this Court, or any other, should embrace. A party is not entitled to promise that signed writings are

forthcoming, that “the agreements had just gone upstairs for signature,” in order to induce reliance by the other side, only to renege on the promise to sign, and invoke the Statute of Frauds as a defense to the underlying agreement.

3. ACE Misstates Ohio Appellate Law.

Ohio courts, just like the other 21 states and learned treatises that have looked at the issue, agree that a party that lies about its intent to produce a signed writing is estopped from relying upon that Statute of Frauds. Every Ohio appellate case agrees with this rule:

- McCarthy, Lebit, Crystal & Haiman Co., L.P.A. v. First Union Mgt., Inc., 87 Ohio App.3d 613, 627 (Cuyahoga 1993 (“[T]he doctrine of promissory estoppel may be used to preclude a defense of statute of frauds, but only when there has been (1) a misrepresentation that the statute’s requirements have been complied with or (2) a promise to make a memorandum of the agreement.”));
- Gnomes Knoll Farm, Inc. v. Aurora Inn Operating Partnership, Case No. 93-G-1772, 1994 Ohio App. LEXIS 2904, *18-19 (Geauga June 30, 1994 (trial court erred in granting summary judgment on contract claim where defendant reneged on promise “that a lease agreement would be sent to appellants within thirty days,” and was estopped from relying upon Statute of Frauds);
- Saydell v. Geppetto’s Pizza and Ribs Franchise Sys., 100 Ohio App.3d 111, 121-22 (Cuyahoga 1994 (Ohio law recognizes that promise to reduce agreement to writing can estop a party from relying upon the Statute of Frauds) (citing McCarthy);
- Beaverpark Assoc. v. Larry Stein Realty Co., Case No. 14950, 1995 Ohio App. LEXIS, *13 (Montgomery Aug. 30, 1995) (same, citing McCarthy);
- Jones v. R/P Int’l. Technologies, Inc., Case No. C-940567, 1995 Ohio App. LEXIS 4187, *8 (Hamilton Sept. 27, 1995) (adopting McCarthy and Beaverpark);
- Assoc. For Responsible Dev. v. Fieldstone Ltd. P’ship, Case No. 16994, 1998 Ohio App. LEXIS 5388, *20 (Montgomery Nov. 13, 1998) (same, citing McCarthy);
- Alford v. Moore, Case No. CA98-04-026, 1998 Ohio App. LEXIS 5613, *13 (Clermont Nov. 30, 1998) (same, citing McCarthy);
- Miami Valley United Meth. Mission Society v. White-Dawson, Case No. 17873, 2000 Ohio App. LEXIS 740, *10-11 (Montgomery Mar. 3, 2000) (citing McCarthy regarding “breach of a promise to make a memorandum of the agreement.”);
- Landskroner v. Landskroner, 154 Ohio App.3d 471, 489 (Cuyahoga 2003) (parties have been barred from invoking Statute of Frauds in “cases where there has been...a promise to make a memorandum out of the agreement.”) (citing McCarthy);

- Eske Prop., Inc. v. Sucher, 2003-Ohio-6520, ¶24 (Montgomery) (defendant estopped from relying on Statute of Frauds “where one party promises to formalize an agreement in writing, but does not.”) (citing McCarthy at ¶¶56-57);
- Lowe v. Phillips, 2005-Ohio-2514, ¶29 (Montgomery) (“As to the...requirement that a promise to make a memorandum of the agreement in writing must occur in order to rely on the promissory estoppel exception to the Statute of Frauds, the evidence supports that such a promise occurred....Thus, we agree with the trial court that Lowe established the exception of promissory estoppel.”);
- Martin v. Friedberg, 2007-Ohio-3932, ¶20 (Morgan) (finding “appellant is estopped from raising the defense of the statutes of fraud.”) (citing McCarthy);
- Spectrum Benefit Options, Inc. v. Medical Mut. of Ohio, 2007-Ohio-5562, ¶40 (Athens) (“[F]or the promissory estoppel exception to apply, there must be ‘either a misrepresentation that the statute of fraud’s requirements have been complied with or a promise to make a memorandum of the agreement.’”) (citing McCarthy) (citations omitted).

ACE, for its part, does not cite to a single contrary Ohio case.

Instead, ACE claims “confusion” reigns in Ohio as to a “promissory estoppel” exception to the Statute of Frauds. That is false. As to the issue before this Court—whether a party that lies about its intent to produce a signed writing is entitled to rely on the Statute of Frauds—there is absolutely no confusion. The Statute of Frauds cannot be invoked in those circumstances. No case says otherwise. Every court has adopted McCarthy, Lebit, Crystal & Haiman Co., L.P.A. v. First Union Mgt., Inc., 87 Ohio App.3d 613, 627 (Cuyahoga 1993), in which a defendant’s false promises that a written lease was forthcoming were found to estop it from relying on a Statute of Fraud’s defense when it later reneged on its promises, and the parties’ contract. As stated in McCarthy and so many other Ohio cases, the rule is that a defendant is estopped to rely upon the Statute of Frauds where there has been “(1) a misrepresentation that the statute’s requirements have been complied with or (2) a promise to make a memorandum of the agreement.” Id.

Even ACE's cited cases agree with McCarthy that a party that misrepresents its intent to produce a signed writing is estopped to rely upon the Statute of Frauds.⁶⁰ Faced with a clear rule, ACE tries desperately to muddy the waters by claiming there is confusion as to whether a broader "promissory estoppel" exception should apply in other circumstances that are not raised in McCarthy or by this appeal. In this regard, ACE cites to a few cases (often employment law cases), in which courts have considered whether a plaintiff's reliance alone on the existence of an oral contract is sufficient to create a promissory estoppel claim, even without any misrepresentation about complying with the Statute of Frauds, or false promise to produce a signed writing. That broader issue of whether promissory estoppel is generally available, absent misrepresentation, as an alternative theory in the face of the Statute of Frauds, is not a question before this Court pursuant to this appeal.

This appeal involves the question of whether a party that actually has engaged in fraudulent conduct regarding misrepresenting its intent to comply with the Statute of Frauds is still entitled to avail itself of the Statute of Frauds to defend that conduct. This is not a mere "reliance" case. Plaintiffs here are not arguing inapplicability of the Statute of Frauds simply because they acted in reliance on their reasonable belief that an oral agreement existed. Instead, plaintiffs here are arguing that affirmative acts of fraud by ACE (lying about whether signed agreements were forthcoming, at a time in which the company knew it had no intention of honoring the deal) estop ACE from invoking the Statute of Frauds in its defense. Thus, this case is about far more than the mere reliance at stake in a run-of-the-mill promissory estoppel case.

⁶⁰ See, e.g., Seale v. Citizens Savings & Loan Ass'n, 806 F.2d 99, 103 (6th Cir. 1986) (citing cases, and explaining "[t]here must be reliance on a further promise to reduce the first promise to writing."); Niemi v. NHK Spring Co., Ltd., 481 F.Supp.2d 869, 874 (N.D. Ohio 2007) (holding Statute does not apply "if there was a misrepresentation that the statute had been complied with, or if there was a promise to reduce the oral agreement to writing later."); Heffner Investments, Ltd. v. Piper, 2008-Ohio-2495, ¶19 (Mercer) (setting forth McCarthy rule).

For example, ACE's cited case of Connolly v. Malkamaki, 2002-Ohio-6933 (Lake), is one of Ohio's employment law cases holding that in that context, reliance alone on an oral promise of employment is enough to give rise to a promissory estoppel claim. Connolly noted that the Eighth District has limited promissory estoppel to cases in which there has been "either (1) a misrepresentation that the statute's requirements have been complied with or (2) a promise to make a memorandum of the agreement." Id. at ¶23. The Connolly court declined to impose that limitation on plaintiffs in employment cases, thereby recognizing an "unrestricted" view of promissory estoppel in such cases. Connolly broadens the availability of promissory estoppel when it comes to reliance on oral employment contracts.

In Eske Properties, Inc. v. Sucher, 2003-Ohio-6325 (Montgomery), also cited by ACE, the Second District Court of Appeals explained the distinction at hand. It explained that undisputedly, Ohio law recognizes the narrow McCarthy rule under which plaintiffs are proceeding here: a party that misrepresents its intent to produce a signed writing is estopped to rely upon the Statute of Frauds. Id. at ¶¶55-62. It further explained that other courts (like Connolly) have grappled with the broader question—not presented here—of whether reliance alone, with no misrepresentation, can establish a promissory estoppel claim in the face of the Statute of Frauds. The Eske court explained that there are thus two strains of estoppel cases: in the first, set out in McCarthy and adopted by Eske, the plaintiff must allege defendants "either misrepresented compliance with the statute or failed to make a promised memorandum." Id. at ¶64. In the second strand of cases, some Ohio courts have adopted an "unrestricted general principle" that says that reliance alone is sufficient to create promissory estoppel, id. at ¶70, without need to prove misrepresentation.

The Eske court held that “we cannot say without reservation that the Ohio Supreme Court would apply promissory estoppel in cases involving interests in land, without the restrictions outlined in McCarthy[.]” Id. at ¶77. Thus, Eske predicted that this Court would adopt the “restrictive” McCarthy view of promissory estoppel as it relates to the Statute of Frauds, i.e., that such a claim is available only where the defendant has (1) misrepresented whether the Statute has been complied with, or (2) failed to make a promised signed memorandum.

In this case, this Court need not answer (and indeed, on this record cannot answer) whether the “unrestricted” view of promissory estoppel found in some employment law cases is better policy in those cases. That is because this case falls squarely within the “restrictive” McCarthy approach to estoppel in the face of the Statute of Frauds. ACE undisputedly promised to produce signed memoranda of the parties’ agreement, see supra n. 32, and then reneged on supplying the promised signatures. All of Ohio’s state and federal courts have adopted McCarthy in these circumstances. This Court should make it irrefutably clear that McCarthy’s rule represents the law of Ohio, and that those who would convert the Statute of Frauds into a Statute for Frauds will find no shelter in Ohio’s courts. A party that misrepresents its intent to produce a signed writing should be estopped from then relying on the Statute of Frauds in its defense.

Shifting gears, ACE then takes the position that the Tenth District ruling in this case creates an “irreconcilable conflict” with the Tenth District case of Carcorp, Inc. v. Chesrown Oldsmobile-GMC Truck, Inc., 2007-Ohio-380 (Franklin). Notably, ACE made the same Carcorp arguments to the Tenth District below, which unanimously rejected them. In fact, in Carcorp, the words “Statute of Frauds” are not even mentioned in the decision, and the trial court’s grant of summary judgment on the contract claim was reversed. Thus, Carcorp hardly presents the same legal issues.

Moreover, Carcorp presents completely different facts. Here, there is record evidence that the parties reached mutual agreement on all essential terms of their business deal. See COA Dec. (252) at ¶45 (“[W]e find genuine issues of material fact exist on the question of whether the parties reached mutual agreement on all essential terms of the agreements.”). In contrast, in Carcorp, the Tenth District held “[i]t is undisputed that the parties did not discuss, let alone agree upon, most of the contract terms that would be necessary to complete this complex business transaction.” Carcorp, 2007-Ohio-380 at ¶20. Thus, Carcorp is of no factual help to ACE when here, the terms had been discussed, agreed upon, reduced to writing, and all that was missing was ACE’s promised signature. This is not a conflict case, and Carcorp creates no conflict.

Finally, ACE claims that this Court’s decisions in Marion Production Assn. v. Cochran (1988), 40 Ohio St.3d 265, and Ed Schory & Sons, Inc. v. Francis (1996), Ohio St.3d 433, support its position. They do not. Both of those decisions involved situations in which a party claimed reliance on an oral promise that was directly contradicted by the writing it signed. Each held that a party is presumed to have knowledge of that which it signed, and cannot claim reliance on a differing oral promise in such a circumstance. Here, in contrast, the promise upon which the Olympic Group relied—that the parties’ agreements would be signed as soon as they closed on OTIC—is perfectly consistent, not inconsistent, with the terms of the written agreements awaiting signature. The Marion and Ed Schory cases do not help ACE here.⁶¹

4. It Has Never Been Ohio Law And Policy To Encourage Fraud.

Finding no Statute of Fraud cases to support its position, ACE turns to legislative intent and policy arguments. ACE argues that recognizing the universally-accepted rule that a party

⁶¹ ACE’s cited case of Yeager v. Tuning (1908), 79 Ohio St.121, is even further afield. It says nothing more than easements must be recorded to be binding on subsequent purchasers. Id. at syllabus.

who lies about its intent to produce a signed writing is estopped from relying on a Statute of Frauds defense is nothing more than “mischievous judicial activism.” ACE Merits Brf. at 5. Not true. It never has been the law or policy of this state, nor any other, to encourage parties to defraud one another in their dealings. Recognizing that a party who lies about complying with the Statute of Frauds is barred from defending itself with the Statute of Frauds is consistent with legislative intent, not inconsistent, as this Court explicitly recognized in Wilber v. Paine (1824), 1 Ohio 251, 255 (quoted on page 1 of this brief, and explaining legislative intent of Statute).

In Wilber v. Paine, supra p.1, this Court observed that reliance on the Statute of Frauds by a wrongdoer “would not only be repugnant to justice, but would make the statute a shield and protection for injustice.” Id. To adopt ACE’s approach here would be to overturn nearly 200 years of Ohio precedent holding that it would counteract the design of the legislature to allow the Statute of Frauds—intended to prevent fraud—to be used as a sword to perpetrate a fraud and defeat enforcement of a contract claim. That would be “judicial activism.”

This Court in Wilber v. Paine further observed that the instant rule—that the Statute of Frauds may not be relied upon by a party perpetrating a fraud—is no different than the fraud exception to the parol evidence rule. Id. That is, where there is evidence of fraud in the making of a contract, a defendant cannot then rely upon the parol evidence rule as a contract defense, or as a bar to introducing extrinsic evidence of its fraud. In Galmish v. Cicchini (2000), 90 Ohio St.3d 22, 28, moreover, this Court confirmed that where there is evidence of fraud, a defendant may not simply invoke the parol evidence rule as an affirmative defense shield against any further inquiry into its fraudulent conduct. As the Court observed in Wilber v. Paine, supra, the same should apply to the affirmative defense of the Statute of Frauds. Where there is evidence of fraud (here, fraud relating to the very issue of a party’s stated intent to comply with the Statute

of Frauds, no less), a defendant should not be able to invoke the Statute of Frauds as a defense. The Statute of Frauds does not operate as a free pass to fraud, any more than the parol evidence rule does.

This Court's precedent does not stand alone. The Statute of Frauds has never been interpreted to allow use by a party in perpetration of a fraud. As aptly stated by the Sixth Circuit Court of Appeals (and cited on page 1 of this brief), it is not supposed to be a Statute for Frauds. See Customized Transportation, Inc., 1997 U.S. App. LEXIS 13847 at *15-16 (citing Corbin).⁶² ACE's cited cases hold no differently. See, e.g., Marion Production, 40 Ohio St.3d at 273 ("The law, through application of principles of equity, has refused to allow the Statute of Frauds to be interposed in furtherance of fraud.").

Despite the clear state of the law regarding the Statute of Frauds, its purposes, and the bar against using it to defend fraudulent conduct, ACE's brief is riddled with references to "judicial activism" and "judge-made exceptions," and other buzzwords, as ACE argues that applying the McCarthy rule would defeat legislative intent. But courts are always called on to interpret statutes, and in doing so, undertake to give effect to legislative intent. The foregoing cases show

⁶² The Sixth Circuit consistently rejects ACE's approach. See also Jarrett v. Epperly, 896 F.2d 1013, 1018 (6th Cir. 1990) (quoting Tennessee Supreme Court regarding fact that "the Statute of Frauds was enacted for the purpose of preventing fraud, and shall not be made the instrument of shielding, protecting, or aiding the party who relies upon it in the perpetration of a fraud, or in the consummation of a fraudulent scheme."); Roth Steel Products v. Sharon Steel Corp., 705 F.2d 134, 142 (6th Cir. 1983) ("[N]o longer may a party admit the existence of a contract, or facts which may establish the existence of a contract, and simultaneously claim the benefits of the statute of frauds."); Oxley v. Ralston Purina Co., 349 F.2d 328, 335-36 (6th Cir. 1965)(quoting Williston regarding "the principle, established in equity, and applying in every transaction where the Statute is invoked, that the Statute of Frauds, having been enacted for purposes of preventing fraud, shall not be made the instrument of shielding, protecting, or aiding the party who relies upon it in perpetration of a fraud or in consummation of a fraudulent scheme. It is called into operation to defeat what would be an unconscionable use of the Statute, and guards against the utilization of the Statute as a means for defrauding innocent persons who have been induced or permitted to change their position[.]").

that for nearly 200 years, in interpreting the Statute of Frauds, this Court and others have held that keeping with legislative intent as to the Statute of Frauds means recognizing the rule that the unanimous Tenth District Court of Appeals applied here: where there is evidence that a defendant falsely promised to produce a signed writing that would comply with the Statute of Frauds, thereby inducing the plaintiff's reliance, the defendant is estopped from relying on the Statute of Frauds as a defense to the plaintiff's resulting claims. This is not "judicial activism." It is a statutory construction honoring the legislature's intent in creating the Statute of Frauds in the first place. The law of Ohio should not be the "Statute for Frauds" advocated by ACE here.

At their core, ACE's arguments really ask this Court to do away with all principles of equity, and always apply a statute only as written literally, with no further interpretation as to particular facts. That has never been the function of the courts (indeed, why would we even need courts in such a world?). In actuality, principles of equity prevent a defendant from relying upon fraud to defend its position. This Court has never turned a blind eye to fraud in the name of strict construction. For example, this Court recently explained when and how it is appropriate to use principles of equitable estoppel. See Doe v. Archdiocese of Cincinnati (2008), 116 Ohio St. 3d 538, 539-540, ¶7 (explaining important role of equitable estoppel since 19th Century "to prevent actual or constructive fraud and to promote the ends of justice," and citing cases).

ACE's radical suggestion to do away with principles of equity and estoppel altogether should be denied. ACE in effect argues that this Court is helpless to do anything but apply the Statute of Frauds blindly in the face of fraud. For nearly 200 years, thank goodness, this Court has always recognized that fraud changes the equation, and is not to be promoted.⁶³ This Court

⁶³ See, e.g., Ohio State Bd. of Pharmacy v. Frantz (1990), 51 Ohio St.3d 143, 145 ("The purpose of equitable estoppel is to prevent actual or constructive fraud and to promote the ends of justice."); Wing v. Anchor Media Ltd. (1991), 59 Ohio St.3d 108, 110 (fraud in the

should not upend its long-held precedent to allow the Statute of Frauds to be used to “advance[e] the mischief intended to be prevented.” Wilber v. Paine, 1 Ohio at 255.

C. ACE’s Alternative Arguments—That *McCarthy* Applies But Is Not Met On This Record—Do Not Hold Up.

1. ACE’s Argument That Plaintiffs Would Be Better Off If There Were No Writing At All Is Nonsensical.

In portions of its brief, ACE tellingly concedes that McCarthy may be an accurate statement of the law (it is), but claims that it should not apply factually to these circumstances. In this regard, one of ACE’s more curious arguments is that McCarthy applies only where there is no writing at all, and the defendant has promised to draft a written agreement, but fails to do so. ACE argues McCarthy does not apply where there is a drafted agreement (like the reinsurance agreement attached as Exhibit A to plaintiffs’ complaint, see 1 at 71) that the defendant has promised to sign. ACE says the existence of a written, agreed-to contract lacking only its promised signature leaves a plaintiff in worse shape, from a Statute of Frauds perspective, than if there were no writing whatsoever. See ACE Merits Brf. at 30-31.

McCarthy says no such thing. Its rule indeed applies where the promise broken by the defendant is one to sign an existing written agreement, and not just when the broken promise is to draft up the written agreement in the first place. In fact, as the Tenth District observed, McCarthy expressly adopted the Texas Supreme Court case of Moore Burger, Inc. v. Phillips Petrol. Co., 492 S.W.2d 934, 938 (Tex. 1972), which holds that a party that misrepresented its

inducement vitiates an employment contract); Basil v. Vincello (1990), 50 Ohio St.3d 185, 189 (despite the plain language of R.C. § 5301.01 regarding enforcing recorded deed, “where a deed is executed as the result of fraud, such instrument is ineffective to convey the land.”); Galmish v. Cicchini (2000), 90 Ohio St.3d 22, 28 (fraud bars application of parol evidence rule); Boone v. Vanliner Ins. Co. (2001), 91 Ohio St. 3d 209, 216 (despite the existence of statutory attorney-client privilege, “there is a well-established ‘crime-fraud exception,’ which denies the protection of the privilege when the client communicates with an attorney for the purpose of committing or continuing a crime or fraud.”); Investors REIT One v. Jacobs (1989), 46 Ohio St. 3d 176, 182 (despite the existence of statutory limitations period, fraud tolls statute of limitations).

intent to sign an agreement is estopped from relying upon the Statute of Frauds.⁶⁴ It would be strange indeed to hold that for Statute of Frauds purposes, no writing at all is better than an existing, agreed-to writing setting forth in detail all of the terms of the parties' agreement, and lacking only its promised signature.

2. ACE Misstates The Factual Record In Arguing That Its “Footer/Disclaimer” Carries The Day.

On pages 33 and 34, ACE claims there can be no enforceable agreement because of a “footer” on certain drafts of the reinsurance agreement that it refers to as a “No Contract Disclaimer.” Of course, this argument overlooks the fact that the reinsurance agreement attached to the complaint (identical to the one submitted to the ODI in November 2003) contains no such footer/disclaimer. That is because the undisputed record testimony is that Mr. Reese of ACE told Howard Kopel (not Robert Martyn, see supra p. 13 regarding ACE’s misleading Martyn quote) of the Olympic Group that the footer/disclaimer could be removed, and that the reinsurance agreement could be submitted to the Ohio Department of Insurance without it. See supra fn. 30. This summary judgment record fact is fatal to ACE’s footer/disclaimer argument.

ACE then argues that the lack of its promised signature bars enforcement of the reinsurance agreement. But the whole issue at stake in this appeal is that a party that has misrepresented its intent to sign cannot then point to the lack of its signature as a defense. ACE wants to claim that the absence of its promised signature means that there is no enforceable contract. On the contrary, there is an enforceable contract: the lack of ACE’s promised signature is evidence of its breach.

⁶⁴ See COA Dec. (252) at ¶39 (“In Moore Burger, Inc. v. Phillips Petroleum Co. (Tex.1973), 492 S.W.2d 934, a case cited with approval in McCarthy, the Supreme Court of Texas examined similar circumstances, and held that the determinative promise in that case was the promise to sign a written agreement which itself complied with the statute of frauds.”). See also Eske, 2003-Ohio-6520, at ¶24 (McCarthy rule applies “where one party promises to formalize an agreement in writing, but does not.”).

3. **“Sophistication” Is Not A Defense To Lying.**

ACE then argues that in “complex” transactions, parties represented by counsel in arms-length transaction should be entitled to defraud one another. Not surprisingly, ACE fails to cite to any case that so holds. In fact, the McCarthy case itself involved sophisticated parties represented by counsel: a law firm in downtown Cleveland negotiating at arms-length for the lease of high-rise office space. Despite the “sophistication” of the parties at issue, the court nonetheless held that the defendant was estopped from relying on the Statute of Frauds because of its false promise that a signed, written lease was forthcoming. Sophistication is no defense. The fact that attorneys were involved in perpetrating ACE’s fraudulent conduct makes its conduct more reprehensible, not less. New York attorneys working on deals in this state should not be advising their clients that they can lie about signatures and renege on deals so long as they have not signed anything yet. That kind of “gotcha” approach is not good business, and not good lawyering. This Court should not encourage it.

D. The Statute Of Frauds Does Not Excuse Violating Duties To A Co-Venturer.

Under Ohio law, the existence of a special relationship of trust and confidence between the parties is necessary for a breach of fiduciary duty claim.⁶⁵ Here, the special relationship and corresponding legal duty between the parties is created, inter alia, by virtue of their joint venture.

Under Ohio law, a joint venture only requires:

an association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business adventure for joint profit, for which purpose they combine their efforts, property, money, skill and knowledge, without creating a partnership, and agree that there shall be a community of interest among them as to the purpose of the undertaking, and that each coadventurer shall stand in the relation of principal, as well as agent, to each of the other coadventurers.

⁶⁵ See Groob v. Keybank (2006), 108 Ohio St.3d 348, 351 (“When both parties understand that a special trust or confidence has been reposed...a fiduciary relationship may be established.”).

Doctors Hosp. v. Hazelbaker, 106 Ohio App.3d 305, 310 (Franklin 1995) (emphasis in original, citation omitted). Moreover,

little formality is necessary to the establishment of a joint venture and an agreement therefore is not invalid because of indefiniteness in respect to its details. The contract need not particularly specify or define the rights and duties of the parties. The relationship may be formed by parol agreement, and the existence of the joint venture may be inferred from the conduct of the parties, or from the facts and circumstances which make it appear that a relationship was in fact entered into.

Estep v. Kirk, No. CA-74-01-0002, 1975 Ohio App. LEXIS 6092, at *16 (Butler Dec. 8, 1975)

(emphasis added). “[W]here the existence of the relationship of joint venturers is at issue, the question is one of fact for determination by the trier of fact.” Busler v. D & H Mfr., Inc., No.

94APE08-1137, 1995 WL 326193, *7 (Franklin May 30, 1995). Here, all the elements of a joint venture are admitted in defendants’ own deposition testimony, let alone in the hundreds of exhibits in this case, and hundreds of hours of plaintiffs’ testimony:

- See Reese I (508) at 339:17-340:25 (explaining that “Strategic Alliance” was an agreement to join together with the Olympic Group for a common business purpose, with an agreed division of responsibilities and agreed division of profits);
- See Reese III (584) at 559:16-21 (admitting handshake deal with Olympic Group);
- See Reese II (538) at 284:16-24 (admitting parties’ mutual agreement on business terms of strategic alliance); id. (539) at 293:5-18 (admitting parties’ mutual agreement on essential business terms of strategic alliance is reflected in written term sheets); id. (531) at 218:2-13 (admitting parties had a mutual understanding as to division of risk and responsibility associated with strategic alliance); id. (532) at 223:2-9 (same);
- See Reese II (526) at 161:8-23 (admitting ACE’s use of “strategic alliance,” “joint venture,” “partnership,” and “strategic partnership” were all synonymous); and
- See Reese II (524) at 124:11-20 (admitting “joint venture”); id. (518-19) at 94:15-97:13 (same); id. (525) at 126:11-127:9 (same).

Under Ohio law, “parties to a joint venture, like those in a partnership, owe each other the duties of fiduciaries. The fiduciary relationship created by a joint venture imposes a duty of full disclosure between the fellow venturers. It also imposes a duty against self dealing or secret

advantage.” Nilavar v. Osborn, 127 Ohio App.3d 1, 20 (Clark 1998). Thus, the existence of a joint venture itself creates the requisite duty for purposes of plaintiffs’ fiduciary duty claim.

The trial court began and ended its analysis here, concluding that because there was, in its view, no enforceable joint venture agreement between the parties, there could be no special relationship between them for purposes of establishing legal duties. This conclusion is erroneous in several respects. First, a fiduciary duty between joint venturers may exist even if the joint venturers have not signed a formal agreement.⁶⁶ Here, the parties did, in fact, have a joint venture, as the ACE defendants themselves admitted over and over again, see supra n. 11 and p. 43, and this created the applicable legal duty. Second, a joint venture is not the only way a fiduciary duty can be created. Partners also owe fiduciary duties to one another, for example.⁶⁷ Moreover, “[a] fiduciary relationship may be created out of an informal relationship...when both parties understand that a special trust or confidence has been reposed.” Umbaugh Pole Bldg. Co. v. Scott (1979), 58 Ohio St.2d 282, syllabus, ¶1.

The Record evidence demonstrates that ACE understood the special relationship between the parties.⁶⁸ ACE repeatedly referred to the Olympic Group as its “partners” or “strategic partners,” including in its written business records. For example, Mr. Reese testified regarding Pl. Ex. 27 (833, at 860), the ACE Board-approved business plan, as follows:

Q. The final bullet says, "Maintaining highest operating and ethical standards with strategic partners." Did that relate to the strategic alliance with the Olympic Group?

A. It would relate to the whole business.

Q. Okay. But it certainly, then, still also applied to the strategic alliance with the Olympic Group; did it not?

⁶⁶ See Doctor’s Hosp., 106 Ohio App.3d at 311-12 (“The facts as we find them in this case, therefore, may establish the existence of a fiduciary duty on the part of Doctors arising out of the joint venture prior to execution of the written agreement”).

⁶⁷ See Arpadi v. First MSP Corp. (1994), 68 Ohio St.3d 453, syllabus, ¶1 (“In a partnership, the partners of which it is composed owe a fiduciary duty to each other.”).

⁶⁸ See Pl. Ex. 196 (1384) at 1388 (ACE acknowledges duty to Olympic Group in writing).

A. Yes.

Q. That was a goal, Mr. Reese, that not only the company did seek to meet, but you personally also sought and did meet; is that correct; that is, maintaining the highest operating and ethical standards with strategic partners?

A. Yes.

...

Q. Did you not consider the Olympic Group to be your strategic partner, sir?

A. Yes.

Reese II (535-36) at 260:22-261. The Record contains numerous other examples. See, e.g., supra n. 11. Just as clearly as defendants recognized the duty owed to the Olympic Group, they also recognized they violated that duty.⁶⁹ Mr. Reese, in addition to testifying that his company behaved “absolutely unethically” to plaintiffs, id., also testified that ACE’s President admitted the obligation owed to the Olympic Group.⁷⁰ On this record, the Tenth District correctly overturned the trial court’s grant of summary judgment to ACE on the fiduciary duty claim.

E. This Court Lack Jurisdiction Over Assignments Of Error II, III, and IV.

Plaintiffs filed Appellees’ Motion To Dismiss Appeal As Improvidently Granted, Or In The Alternative, To Strike Portions Of Appellant’s Merits Brief, on July 24, 2008 (286). That motion explained that Assignments of Error Nos. II, III, and IV are not properly before this Court, and that plaintiffs should not have to expend pages of their limited briefing allotment arguing them. ACE’s tactics leave plaintiffs in an unfortunate dilemma: brief the additional assignments of error and risk an argument that the issues are fully briefed, such that there is allegedly no prejudice in considering them prematurely, or decline to spend valuable pages briefing the additional, improper assignments of error, and risk an argument that they have waived the right to challenge ACE’s arguments regarding them. In the event this Court should

⁶⁹ See Reese III (599) at 684:5-22 (testifying defendants behaved “absolutely unethically” towards the Olympic Group).

⁷⁰ Id. (600) at 686:21-687:16 (“Q: And Mr. Swain said to you and you heard him say that he thought he had a business obligation to the Olympic Group? A: Yes.”).

decide to consider assignments of error that are not properly before it, plaintiffs incorporate by reference, as if fully set forth herein, their arguments concerning those assignment of error contained in their Tenth District briefs.⁷¹ Plaintiffs further offer these summary arguments.

Assignment of Error No. IV: The Tenth District unanimously sustained Assignment of Error No. IV. See COA Dec.(252) at ¶45. This correct holding, never cited in ACE’s jurisdictional brief, is amply supported in the record. The term sheets and business plans authored by ACE reflect the parties’ mutual understanding of essential business terms, and are enforceable even though certain formal transaction documents were not finalized before ACE’s breach. Neither a “draft” stamp, nor an unsigned agreement, nor a “disclaimer,” nor attorneys’ failure to finish drawing up formal transaction documents, will defeat a contract claim on facts such as these.⁷²

Here, there is Record evidences from which a reasonable jury could conclude that the term sheets reflect the parties’ definite and mutual agreement on all essential business terms.

- See, e.g., Henry (404) at 66:5-67:10; id. (413) at 133:16-17 (term sheets “outlined our agreement to form a joint venture and to reinsure OTIC.”); id. (414-15) at 140:22-141:1 (term sheets set forth “terms that had been spelled out and agreed on”);
- Kopel III (439) at 52:2-7; id. (440A) at 73:4-9 (term sheets described agreement);

⁷¹ See, e.g., Olympic Group’s Tenth District Appellants’ Brief (172) at 26-28 (Assignment of Error No. II); id. at 28-30 (No. III); id. at 31-34 (No. IV).

⁷² See, e.g., Normandy Place Assocs. v. Beyer (1982), 2 Ohio St.3d 102, 105-106 (“It is . . . not the law that an agreement to make an agreement is per se unenforceable. The enforceability of such an agreement depends rather on whether the parties have manifested an intention to be bound by its terms and whether these intentions are sufficiently definite to be specifically enforced.”); Mandalaywala v. Zaleski, 124 Ohio App.3d 321, 334, n.3 (Franklin 1997) (letter of intent enforceable); 26901 Cannon Rd, LLC v. PSC Metals, Inc., 2002-Ohio-6050, ¶¶17, 23 (Cuyahoga 2002) (overturning summary judgment where fact dispute existed regarding whether e-mailed term sheet set forth all essential terms of parties’ agreement); Long v. Commodore Bank, 2002 WL 109289, *2, Case No. 01-CA-14 (Perry, Jan. 15, 2002) (unfinished transaction documents stamped “draft” held enforceable as setting forth essential terms of parties’ deal); McCarthy, 87 Ohio App.3d at 626-28, 635 (contract enforceable despite defendant’s “disclaimer,” and fact paperwork was not yet finalized).

- Mosimann II (486-87) at 30:5-10 (“[W]e had mutually agreed documentation, mutually agreed communications, mutually agreed e-mails, terms sheets which constitute an agreement in principle with the joint venture”); id. at 30:20-25; id. at 32:8-35:15.
- See also supra pp. 6-8 (Mr. Reese of ACE admitting term sheets reflected parties’ mutual understanding of material terms of deal); supra n. 12 (compiling plaintiffs’ testimony).

On this Record, the jury is entitled to decide whether the parties manifested an intent to be bound before all of the final transaction documents were complete. The Tenth District’s decision as to Assignment of Error No. IV was correct, and should not be disturbed.

Assignment of Error No. II: The Tenth District did not have the opportunity to reach the question of whether the parties’ agreements are capable of performance in one year. “A promise unlikely to be performed within a year which is, in fact, not performed within a year, is still not within the Statute of Frauds if at the time of making there is a possibility that it can be entirely performed as the parties intended within a year.” Weiper v. W.A. Hill & Assoc., 104 Ohio App.3d 250, 264 (Hamilton 1995).

Under the reinsurance agreement, which is attached to the complaint (71), (whose term would be co-extensive with the commercial aspect, see Kopel I (424) at 148:18-22), there were express provisions that—while unlikely to ever have been triggered—could have caused the agreement to be performed as intended and pursuant to the agreement’s express terms in less than a year. Articles 1.1 (71) and 3.1 (75) of the reinsurance agreement set forth an “Aggregate Limit of Liability” of \$4 million that could be reached in less than a year, thereby causing the agreement to be fully performed and concluded in less than a year. In Article 2.2 (74), there are more than a dozen contingencies that could cause the agreement to be fully performed in less than a year. These provisions are enough to take the agreement out of the Statute of Frauds.

ACE calls these “early termination” provisions. Not so. For example, if there were losses under the reinsurance agreement in excess of \$4 million in year one of the joint venture,

then the reinsurance agreement would be tapped out, and no more coverage would be available. That does not mean the agreement would be “terminated.” It means that ACE would have fully performed all that agreed to do in a single year. These events, such as \$4 million in losses in a single year, may be unlikely to occur, but that is the very nature and purpose of insurance. And that is precisely why insurance contracts are deemed to fall outside the Statute of Frauds.⁷³

Consistent with the fact that insurance contracts fall outside the Statute of Frauds and do not have to be signed to be effective, this Court recently held that where parties have reached an insurance agreement, but the signed copy of that agreement has not yet been delivered, the unsigned agreement is still binding.⁷⁴ For his part, Mr. Reese of ACE freely admits that a reinsurance agreement can be effective even before it is signed. See Reese III (586) at 591:19-21 (“Q: Can effective dates predate the actual date of signature? A: Well, obviously.”). Insurance contracts do not require signatures to be effective, and the Statute of Frauds does not apply here.

Assignment of Error No. III: The Tenth District has not yet had the opportunity to decide if there are writings chargeable against ACE Capital Title that satisfy the Statute of Frauds. There are. The general test for sufficiency of a writing under the Statute of Frauds is whether it “(1) identifies the subject matter of the agreement; (2) establishes that a contract has been made; and (3) states the essential terms with reasonable certainty.” Busler v. D & H Mfg., Inc., 81 Ohio App.3d 385, 389 (Franklin 1992). However, “[i]t does not have to be a formal memorial of the agreement, nor does it need to contain all of the terms of the agreement.” Id.

⁷³ See 51 O. Jur. Frauds, Statute of § 67 (insurance agreements not within Statute of Frauds “since such contracts are possible of performance within the year, as the insured might die or another contingency covered by the contract might occur within that time.”) (emphasis added).

⁷⁴ Henderson v. Lawyer’s Title Ins. Corp. (2006), 108 Ohio St.3d 265, 268 (“The very reason for sustaining such contracts pending delivery of the policy is, that the parties may have the benefit of them during that incipient period when the papers are being perfected and transmitted.”) (emphasis added) (internal quotations omitted).

Under the Statute's plain language, "some memorandum or note thereof" is sufficient. See R.C. §1335.05. An e-mailed term sheet can constitute a writing to satisfy the Statute of Frauds.⁷⁵ The "signature" can be typed, and only requires authentication of the party to be charged.⁷⁶ Only the party to be charged need sign.⁷⁷ Board minutes can satisfy the Statute, and the Statute is satisfied by multiple writings that logically relate and refer to one another, even if some are unsigned.⁷⁸

Here, there are multiple, logically related writings chargeable against ACE:

1. The parties negotiated term sheets, authored by ACE, that set forth all of the essential elements of the parties' joint venture and its constituent agreements. See, e.g., Pl. Ex. 190 (1316)(final term sheet, with cover note electronically signed by Mr. Reese stating "I think this reflects what we agreed to yesterday."). See also Reese II (527-28) at 193-198.
2. ACE authored written business plans that set forth in detail the key elements of the parties' joint venture agreement. See Pl. Ex. 18 (643) ("Title" portion starting at p. 692). Those written business plans were voted on and approved by the offshore officers, which vote is reflected in written minutes. See Pl. Exs. 27 (833), 28 (870). See also Samson (608) 153:14-154:6 (Board member testifying Pl. Ex. 28 memorializes Board approval of business plan set forth in Pl. Ex. 27); Bregman I (376) at 201:4-202:9; Bregman II (396) at 286:21-288:7 (Board member testifying Board approved written business plan setting forth Strategic Alliance with Olympic with no objections).
3. ACE submitted a signed, sworn application to the ODI setting forth in writing the commercial component of the parties' joint venture agreement, see Pl. Ex. 165 (960), which application is in furtherance of and logically relates to the rest of the joint

⁷⁵ See 26901 Cannon Rd., LLC v. PSC Metals, Inc., 2002-Ohio-6050, ¶ 23 (Cuyahoga) (overturning summary judgment where fact dispute existed regarding whether e-mailed term sheet set forth all essential terms of parties' agreement).

⁷⁶ See 51 O. Jur. Frauds, Statute of §§ 104-105 (signature "may be by pen or typewriter or signed in any manner intended to authenticate it" and "it is not necessary that the party to be charged sign it with intent to comply with the statute" provided it is made with the "obvious intention of authenticating the writing"). See also Wayne Kulka, D.O. v. Hilltop Realty, Inc., No. 80CIV0765, 1983 WL 5038, *3 (Lake Dec. 9, 1983) (holding "writing may be validated by a party thereto in any manner which will indicate an intention to be bound thereby," and thus does not have to include a written ink signature).

This is consistent with the law of other jurisdictions determining what constitutes a "signature." See, e.g., Bradley v. Dean Witter Realty, Inc., 967 F. Supp. 2d 19, 27 (D. Mass. 1997) ("It is well established that a signature for purposes of the statute of frauds can be a written, printed, or typed name, a letterhead or billhead, or even a symbol, so long as the mark is inserted or adopted with an intent, actual or apparent, to authenticate a writing.") (applying New York law, knowledge of which is chargeable to ACE as a New York resident).

⁷⁷ See Thayer v. Luce (1871), 22 Ohio St. 62, 79.

⁷⁸ Soteriades v. Wendy's of Ft. Wayne, Inc., 34 Ohio App.3d 222, 225 (Franklin 1986).

venture.⁷⁹ ACE negotiated and agreed to written forms of the reinsurance agreement and agency agreement, which it promised to sign. See, e.g., Pl. Ex. 201 (1432) and 202 (1452); Kopel IV (463) at 117:23-25; Stauffer (613) at 141:22-25.

4. ACE gave to plaintiffs and the offshore defendants detailed writings it authored explicitly setting forth all of the elements of the joint venture agreement. See Pl. Ex. 203 (1491) at 1492-93; 1502-1508; Pl. Ex. 204 (1511) at 1514-1515; 1522-1528; 1534-1538; Pl. Ex. 214 (1544) at 1547-1550; 1557-1563. Mr. Reese testified at length regarding the fact that the business plans were intended to reflect the strategic alliance with the Olympic Group. See, e.g., Reese III (572-73) at 491-94 (Pl. Ex. 203 reflects “strategic partnership between ACE and the Olympic Group”); id. at 491:8-494:25 (regarding Pl. Ex. 203); id. (573-580) at 495-523 (explaining financial analysis of deal). This intent, authorship, and authentication satisfy the Statute of Frauds. See supra n. 76.

On this Record, at most, there is a fact dispute regarding the Statute of Frauds.⁸⁰ As Corbin stated, supra page 1, “[t]he purpose of the statute of frauds is to prevent the enforcement of alleged promises that were never made; it is not, and never has been, to justify contractors in repudiating promises that were in fact made.” Plaintiffs did not make up the fact that the parties had a deal; they did not imagine it. There is an extensive written record of documents authored and authenticated by ACE itself setting forth every essential element of this complicated deal in detail. On these facts, the Statute of Frauds does not apply to aid ACE in its after-the-fact efforts to repudiate the deal it struck with the Olympic Group. It was error for the trial court to fail to give proper effect to the multiple signed writings in the record.

IV. CONCLUSION.

For all of the reasons stated here, plaintiffs-appellees respectfully request that the decision of the Tenth District Court of Appeals be affirmed as it relates to the Assignments of Error properly before this Court.

⁷⁹ See, e.g., Reese III (553) at 365:13-366:8 (application made for parties’ deal); id. at 368:10-18; id. (554) at 371:15-24; id. (555) at 374:10-16; id. at 375:6-23; id. (556) at 383:24-384:6; id. at 392:4-15. See also Reese II (522-23) at 116:8-117:12 (commercial and residential components go together to create strategic alliance).

⁸⁰ Busler, 81 Ohio App.3d at 390 (holding that “a genuine issue of material fact exists” as to whether party’s letter constituted a signed acknowledgment to satisfy the Statute of Frauds).

Respectfully submitted,



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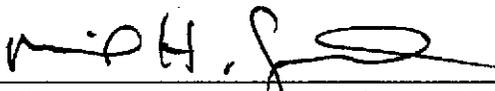
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Appellees' Merit Brief was served this 13th day of August, 2008, upon the following via ordinary U.S. mail, postage prepaid:

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