IN THE SUPREME COURT OF OHIO

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

REPLY BRIEF OF APPELLANT
ACE CAPITAL TITLE REINSURANCE CO.

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INTRODUCTION

It is impossible to read the Title Agencies' brief without seeing how the positions they advocate, if adopted by this Court, will seriously erode fundamental tenets of contract law. Ohio will be left with no clear rule of law and a Statute of Frauds eviscerated by the courts if "he said/she said" disputes over contract formation and claims of "handshake deals," "contemplated" contracts, or "business plans" are enough to override the Statute even where businesses are negotiating complex, multiyear written contracts with the assistance of legal counsel.

Despite having the right to try their fraud and promissory estoppel claims to a jury, the Title Agencies still paint themselves as victims for being denied their contract claim. But no party is prejudiced by the Statute of Frauds' neutral and clear rule that there is no enforceable multiyear contract without a signed writing. What will victimize all persons conducting business in Ohio is to render the consequences of their words and actions ambiguous, thereby subjecting them to years of expensive, easily avoidable litigation, even when their contemporaneous writings undisputedly reflect a concerted effort to prevent such ambiguity or litigation.

A. This Case Well Illustrates The Wisdom Of Maintaining The Statute Of Frauds Without Promissory Estoppel Or Fiduciary Duty Exceptions.

This dispute illustrates precisely why any estoppel exception to the Statute of Frauds invites into the law the very evil that the Legislature intended to prevent with the Statute; that is, parties coming into court swearing that they had a multiyear agreement without a signed writing establishing the agreement and its terms. The Title Agencies have kept alive their breach-of-contract claim for expectation damages by nothing more than their own self-serving statements that ACE Capital promised it would sign the "contract." The "undisputed testimony" the Title Agencies rely upon for this alleged promise is nothing more than the self-serving testimony of their principals.[1] They claim to have "crushing admissions" from ACE Capital's former COO, Richard Reese, but Reese just stated that it was "contemplated" that ACE Capital would execute a Reinsurance Agreement after the Title Agencies acquired Olympic Title.[2] Of course Reese *contemplated* a signed agreement; ACE Capital had been negotiating terms, doing due diligence, writing business plans and exchanging drafts with the Title Agencies for months. It hardly would have invested this amount of energy and expense if it did not "contemplate" that a deal would someday be consummated. Reese *contemplated* that a deal would close, but he also made clear to the Title Agencies that any agreement "needed to be written out and executed" and approved by ACE Capital's Credit Committee, which did not occur. This testimony is not addressed by the Title Agencies.[3]

The Title Agencies' principals, moreover, were sophisticated businessmen, represented by counsel, who well knew that the deal would not be effective until there was a final, written agreement signed by all parties. Every draft of the Reinsurance

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[1] Appellees' Brief at 13-14, n. 32.

[2] Compare Appellees' Brief at 14 with 26. See, also, Reese Tr. 456; Olympic Supp. 568 ("[t]ruly, that was what was contemplated. Promise means there were no steps that could get in the way. We still had to go to the Credit Committee with that final agreement. I think 'promise' is a bit strong.")

[3] Reese Tr. 342-43, 346; ACE Supp. 654-55. The Title Agencies hammer on Reese's comment that ACE Capital acted "unethically" to them and to him. But they fail to note that, in the very same breath, Reese refused to admit that ACE Capital "breached" any agreement with the Title Agencies and instead acknowledged that ACE Capital had a right to decide that it did not want to be in the business. Reese clarified that what he believed "business ethics" required was for ACE Capital to offer to sell its title reinsurance business so there was the option of implementing the reinsurance program. Reese Tr. 684-85; Olympic Supp. 599-600. At Reese's urging, ACE Capital suggested an alternative to the Olympic Group in January 2004. *Id.* at 686; Olympic Supp. 600

Agreement (Residential), including the draft submitted by the Title Agencies to the Ohio Department of Insurance ("ODI"), and even the draft attached to their Complaint, states that the agreement "will not be effective until each party has executed at least one counterpart."[4] Every draft prepared by ACE Capital also contained the following disclaimer:

> This document is intended for discussion purposes only. Neither this document nor any other statement (oral or otherwise) made at any time in connection herewith is an offer, invitation or recommendation to enter into any transaction. Any offer would be made at a later date and subject to contract, satisfactory documentation and market conditions.[5]

The undisputed evidence thus shows a clear intent not to be bound without a signed writing. See *Berjian v. Ohio Bell Tel. Co.* (1978), 54 Ohio St. 2d 147, 151 ("[C]ourts will give effect to the manifest intent of the parties where there is clear evidence demonstrating that the parties did not intend to be bound by the terms of an agreement until formalized in a written document and signed by both.")

The most telling evidence that the Title Agencies understood the significance of this disclaimer is that, upon learning that ACE Capital was not going forward, the Title Agencies unilaterally signed a new draft of the Reinsurance Agreement (Residential) and their principals met to craft a "legal strategy to force [ACE Capital's] signature" on that "un-executed ACE reinsurance agreement."[6] Their strategy included: (1) "*tak[ing] the position* that the Parties have agreed to all aspects of the deal," even though there was only a "draft contract" for the residential reinsurance component and no "contract draft to look to" for "the rest of the dispute;" (2) commencing litigation in Ohio, which

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[4] ACE Supp. 73, 84 (Complaint version); ACE Supp. 128-321 (drafts); Olympic Supp. 1814 (version submitted to ODI).

[5] See, *e.g.*, ACE Supp. 129, 146, 163, 183, 204, 224, 244, 263, 283, and 303.

[6] *Id.* at 371-72..

was "much more likely to be friendly to our position vis a vis the New York based ACE;" (3) hiring counsel "well known and respected locally" rather than "any old 'local yokel'"; and (4) seeking "emergency injunctive relief" to create a "significant problem for [ACE Capital]." The Title Agencies' goal was to improve their "shot at *avoiding summary dismissal* of any of [their] core complaints."[7] The Title Agencies' principals are sophisticated businessmen and experienced litigants who plotted a way to cram down a deal on ACE Capital, just as they had on the former owners of OTIC in early 2003.[8]

The Title Agencies have since embellished their legal strategy. They now take the position that the parties agreed to all aspects of the deal as early as March 2003, and that all that remained, and everything that followed, was merely "execution and performance."[9] They suggest that an enforceable contract for a multimillion dollar, multiyear deal was made by a "handshake," before ACE Capital had done any due diligence or presented any business plans to its management and parent; before the necessary regulatory approvals were applied for, let alone granted; and before more than a dozen draft agreements were exchanged.[10] It takes only common sense, not an MBA, to see the patent absurdity of such a proposition. Businesses do not make binding, multiyear, multimillion dollar contracts before they conduct due diligence or obtain regulatory approvals. The Title Agencies crafted this overreaching position in order to achieve their pronounced legal strategy – *avoiding summary dismissal* of their contract claims with self-serving testimony to posture the case for a settlement or to get

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[7] ACE Supp. 374 (emphasis added).

[8] *Id.* at 450 (Olympic Holding Complaint versus OTIC); see, also, ACE Brief at 12-13.

[9] Appellees' Brief at 8.

[10] *Id.* at 9-12; see, also, ACE Brief at 8 re: drafts exchanged from Aug.-Nov. 2003).

a shot before a jury. The success of their strategy, however, still depends on this Court's willingness to write a judicial exception into the Statute of Frauds.

The Title Agencies cannot reconcile their view of the "deal" with the documents that they contend memorialize it. They cite their submission of a Reinsurance Agreement to ODI, which they contend was "fully negotiated and agreed to by the parties."[11] But that version does not match the agreement attached to their Complaint (or any of ACE Capital's drafts).[12] And both versions reference "residential transactions" only. The Title Agencies, however, are also pursuing contract claims against ACE Capital based on an alleged Reinsurance Agreement for "commercial transactions." While no agreement for commercial transactions was ever even *drafted*, the Title Agencies "take the position" that it, too, is part of the "deal."[13] They fail to explain how ACE Capital "promised to sign" one contract that was still under negotiation (Residential) and another contract that was never even drafted (Commercial).

There are more inconsistencies in their position concerning the Capital Support Agreement. The purpose of such an agreement was to assure ACE Capital that OTIC would have adequate capitalization to perform its obligations. The Title Agencies acknowledge that this issue was critical to closing the deal and surfaced in October 2003.[14] But that is seven months *after* they contend the parties had agreed on all "essential terms."[15] So the Title Agencies change their position mid-stream to say the

[11] Appellees' Brief at 13.

[12] Compare ACE Supp. 89 with Olympic Supp. 1830.

[13] Complaint, ¶ 1; ACE Supp. 3.

[14] Appellees' Brief at 12. See, also, Kopel Tr. (II) 71; ACE Supp. 637; Berliner Tr. 75; ACE Supp. 617.

[15] Appellees' Brief at 8.

"negotiation was *largely complete* by March 2003" but "pause[d]" to address the critical issue of capital support.[16] They then speciously contend that "the parties reached mutual agreement on the terms of the Capital Support Agreement" later in October 2003.[17] In support, they cite testimony of Ms. Bregman (an ACE Capital lawyer) that ACE Capital had agreed not to require personal guarantees from the Title Agencies' principals for the reinsurance of residential transactions.[18] Bregman also testified, however, that there was no agreement with respect to the proposed reinsurance of commercial transactions, and no agreement as to any expiration of the Title Agencies' capital support obligations for either the residential or the commercial components of the deal.[19] Thus, Bregman testified that, despite ACE Capital's concession to accept only corporate guarantees, the capital support arrangement, which the Title Agencies concede was necessary, remained "unagreed upon" as of the Title Agencies' ODI filing.[20]

The Title Agencies' assertion that the Capital Support Agreement was agreed to by late October 2003 exposes another inconsistency. If that were true, then the Title Agencies would have had no reason to strip, as they did, all references to the Capital Support Agreement from the version of the Reinsurance Agreement they submitted to ODI in early November 2003, and also from the version later attached to their Complaint in June 2006.[21] Omitting the references to a Capital Support Agreement

[16] Appellees' Brief at 12 (emphasis added).

[17] *Id.*

[18] *Id.* at n. 28.

[19] Bregman Tr. (II) 225; Olympic Supp. 394.

[20] *Id.* at 223; Olympic Supp. 393.

[21] Bregman Tr. (II) 229; Olympic Supp. 395. See Reinsurance Agreement submitted to ODI (Olympic Supp. 1814-31); version attached to Complaint (ACE Supp. 73-90).

from the Reinsurance Agreement (Residential) submitted to ODI is all the more curious given the Title Agencies' *inclusion* of a "Capital Maintenance Agreement" in their ODI submission. That Capital Maintenance Agreement, however, differs substantially from the Capital Support Agreement sent to them by ACE Capital on October 8, 2003.[22]

ACE Capital points out just these few (there are many more) holes in the Title Agencies' story not only to show, based upon the contemporaneous documents, that the parties were still negotiating material terms, but also to demonstrate the fundamental wisdom in enforcing the Statute of Frauds *as it is written*. The Title Agencies belittle ACE Capital's assertion that the Statute of Frauds is important to all parties doing business in Ohio. But they fail to explain how parties will be able to transact complex commercial deals in the future if there is no predictable rule of law to guide their negotiations. The Statute gives parties a simple, neutral and predictable standard for how to make enforceable contracts and a safe harbor from years of expensive breach-of-contract litigation based on nothing more than alleged oral promises, prefatory term sheets, ambiguous agreements-to-agree, and unsigned drafts expressly disclaiming any oral agreements and requiring signature to be bound. It is inexplicable that the Title Agencies denigrate this statutory rule of law by suggesting that its recognition here will transform Ohio into a "haven for frauds," particularly in light of their own behavior.

B. A Judge-Made Exception To The Statute Of Frauds Is Not Necessary Because There Are Existing, Effective Remedies For Fraud And Misrepresentation.

The rejection of a judge-made estoppel exception to the Statute of Frauds will not, as the Title Agencies so hyperbolically predict, make Ohio a haven for fraud and

[22] Compare "Capital Maintenance Agreement" (Olympic Supp. 1836-38) to draft "Capital Support Agreement" (ACE Supp. 344-47). Material differences include obligation amount, agreement term, ACE Capital rights, and governing law.

liars. Other equitable and common law remedies already protect parties who have been defrauded. A party who claims to have been defrauded may pursue claims for equitable promissory estoppel or common law fraud – claims the Title Agencies are pursuing here. The trial court did not enter summary judgment dismissing those claims; they remain for trial. ACE Capital is not suggesting, as Appellees ridiculously claim, that the Court "should do away with principles of equity and estoppel altogether."[23] ACE Capital is suggesting only that the Court direct the lower courts to apply existing common law remedies and equitable principles, where appropriate, and not create exceptions to the Statute of Frauds, particularly exceptions that nullify the Statute by allowing contract claims to proceed based on a swearing contest about whether a party orally promised to make or sign an agreement. The avoidance of such disputes is precisely what prompted enactment of the original Statute of Frauds. See *Cole v. Mordaunt* (1676), 4 Ves. 196. This Court criticized equitable exceptions to the Statute in *Yeager* – a case the Title Agencies confront weakly in a footnote. *Yeager v. Tuning* (1908), 79 Ohio St. 121, 126-27 ("nothing can be more manifest *** than that the relaxation of that statute has been a ground of much perjury and much fraud.") It is perhaps unsurprising that the Title Agencies tread so lightly around *Yeager*. Otherwise lost in much of their argument in support of creating exceptions to the Statute is the striking irony that the Statute, by its terms and as the *Yeager* Court recognized a hundred years ago, exists to prevent just the sort of frauds that its abrogation would inevitably encourage.

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[23] Appellees' Brief at 39.

C. The Title Agencies Wrongly Suggest That Court-Made Exceptions To Legislative Enactments Are The Norm In Ohio.

The Title Agencies represent at page 39 and note 63 of their Brief that this Court has a long history of making fraud exceptions to legislative enactments. Not one of the cases they cite stands for such proposition. Four of the cases did not even involve statutory issues. *Ohio State Bd. of Pharmacy v. Frantz* (1990), 51 Ohio St. 3d 143, holds that the common law doctrine of equitable estoppel does not apply to the State. *Wing v. Anchor Media Ltd.* (1991), 59 Ohio St. 3d 108, analyzed whether the common law doctrine of promissory estoppel should apply to the common law doctrine of employment-at-will. *Galmish v. Cicchini* (2000), 90 Ohio St. 3d 22, interpreted the common law parol evidence rule. *Boone v. Vanliner Ins. Co.* (2001), 91 Ohio St. 3d 209, concerns the Court's inherent authority to define the scope of the attorney-client privilege, under its authority to regulate the practice of law.

While the remaining cases involve some analysis of statutory law, they did not create a judge-made exception. *Basil v. Vincello* (1990), 50 Ohio St. 3d 185, held that because the statutory requirements for executing a quitclaim deed were not satisfied, legal title to the property did not pass, and the purchaser thus had only equitable title. The holding in *Basil* did not contradict the statute. It is akin to the distinction correctly noted by the trial court here. Allowing an equitable claim for promissory estoppel (or common law fraud) to proceed does not conflict with the Statute of Frauds because it is not a contractual remedy. In *Investors REIT One v. Jacob* (1989), 46 Ohio St. 3d 176, the statute itself included an exception tolling the limitations period for fraud; the Court refused, however, to extend the discovery rule to non-fraud situations "absent legislative action" on the matter. *Id.* at 182.

The Title Agencies also wrongly suggest that "[e]very Ohio appellate case" supports their position.[24] Indeed, their own authority notes that the law on the subject is "mixed." *Eske Prop., Inc. v. Sucher*, 2003-Ohio-6520, ¶ 64. Moreover, the most recent Ohio appellate decision in the Title Agencies' list, *Spectrum Benefit Options, Inc. v. Medical Mut. of Ohio*, 2007-Ohio-5562, actually supports ACE Capital's position. *Spectrum* concerned an alleged agreement by Medical Mutual of Ohio ("MMO") to provide medical insurance to a consortium of schools at reduced rates. MMO expressed a keen interest in the proposed deal, reviewed outlines and drafts of the proposed agreement, was described as a "partner" in the deal, issued a quote to a consortium member, and its underwriter asserted that it was "ready to fly." Yet MMO ultimately declined to sign the proffered agreement. When the consortium sued MMO for breach of an unsigned "Alliance Agreement" attached to its Complaint, the trial court awarded summary judgment to MMO. The court of appeals affirmed, holding that the parties had not entered into a binding written contract and that the Statute of Frauds barred any claims for breach of an oral or implied contract. *Spectrum*, 2007-Ohio-5562, at ¶¶ 30, 41. The court of appeals thus applied no promissory estoppel exception to override the Statute, instead enforcing it as enacted. Respectfully, this Court should do likewise.

D. The Title Agencies Have Given The Court An Incomplete And Inaccurate Analysis Of The Estoppel Exception In Other States.

The Title Agencies' assertion that *all* states to have looked at the issue recognize the promissory estoppel exception they seek to invoke simply is not accurate.[25] The

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[24] Appellees' Brief at 31.

[25] ACE Capital brought the contrary law of Florida to the Title Agencies' attention (ACE Jurisdictional Memo at 9) but they omitted Florida from their chart. In *Tanenbaum v. Biscayne Osteopathic Hosp., Inc.* (Fla. 1966), 190 S. 2d 777, the Florida Supreme Court noted that the legislature declined to incorporate a promissory estoppel exception into

Title Agencies have so distorted the state of the law in their "other states chart" that a reply is needed to ensure that the Court is not left with the incorrect and unwarranted impression that it will be a lone wolf if it enforces the Statute of Frauds in Ohio.

__Alaska__: The Title Agencies cite *Alaska Airlines v. Stephenson* (C.A.9, 1954), 217 F. 2d 295. Forty years later, however, the Supreme Court of Alaska noted "[w]e have never specifically adopted a promissory estoppel exception to the statute of frauds." *Reeves v. Alyeska Pipeline Serv. Co.* (1996), 926 P. 2d 1130, 1138. In *Reeves,* the court declined to apply an estoppel exception despite the plaintiff's allegation that the defendant promised to draw up the agreement in question, and even though a "reasonable juror could find from [the plaintiff's] account *** that the promise to draw up the agreement included a promise to execute." *Id.* at n.10. The Court noted: "To hold otherwise would allow the statute of frauds to be circumvented merely by asserting that the parties orally agreed to put the contract in writing." *Id.* at 1140.

__California__: By citing a sixty-year-old California case, *Wilk v. Vencill* (Cal. 1947), 30 Cal. 2d 104, the Title Agencies overlook significant developments in California that limit the extent to which plaintiffs may rely on any equitable exception to the Statute of Frauds. Forty years after *Wilk,* in *Phillippe v. Shapell Indus., Inc.* (Cal. 1987), 43 Cal. 3d 1247, 743 P. 2d 1279, the Supreme Court of California decided that equitable exceptions to a statutory writing requirement should not be available to plaintiffs who should be aware of the requirement, such as a licensed real estate broker trying to recover on an

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the Statute of Frauds and thus declined to do so itself. See, also, *Specialized Transp. of Tampa Bay, Inc. v. Nestle Waters North Am., Inc.* (M.D.Fla. March 20, 2008), No. 8:06-CV-421-T-30EA, 2008 U.S. Dist. LEXIS 21987, at *13 (granting summary judgment to defendant despite allegation that defendant "indicated that it would sign the written document later.")

oral commission agreement. *Phillippe* discusses at length the policy reasons for strictly applying the Statute of Frauds, one of which resonates strongly in this case:

> We are inclined to believe that the business community in general may favor written contracts. They provide certainty and predictability. *** More than 50 years ago, one of the leading commentators on contracts observed that the statute of frauds was even then becoming more useful due to the increasing volume and complexity of commercial transactions. The commercial world is now even more complex, and Llewellyn's observation appears to remain sound, perhaps more so than when he made it.

Phillippe, 43 Cal. 3d 1247, 1269; see, also, *id.* at 1265 ("We have no prerogative to create an exception that would effectively render this durable and important statute a nullity.")

Illinois: The Title Agencies cite *Roti v. Roti* (Ill. App. 2006), 364 Ill. App. 3d 191. Yet in *Roti,* the court of appeals *affirmed* dismissal of the plaintiff's breach-of-contract claim on the basis of the Illinois Frauds Act. *Id.* at 199. And the Illinois Supreme Court has stated that "[w]hile agreeing to work for an employer and giving up other employment opportunities can clearly be described as reliance on the employer's oral promises concerning the terms of employment, *promissory estoppel does not bar the application of the Statute of Frauds in Illinois.*" *McInerney v. Charter Golf, Inc.* (Ill. 1997), 176 Ill. 2d 482, 493, 680 N.E. 2d 1347 (emphasis added).

Kansas: The Title Agencies cite a sixty-year old decision, *Hazen v. Garey* (Kan. 1949), 168 Kan. 349. The *Hazen* court found the agreement at issue capable of being performed in one year, so the statute of frauds did not apply, making its discussion of any estoppel exception *dicta.* *Id.* at 359. Moreover, the Title Agencies ignore later decisions from the Kansas Supreme Court imposing limits on the ability of plaintiffs to invoke an estoppel exception. In one decision, the Supreme Court stated that "[b]efore the doctrine of promissory estoppel can be invoked in a case involving the statute of frauds the promisee must first show by competent evidence that a valid and otherwise enforceable contract was entered into by the parties." *Decatur Coop. Assn. v. Urban* (Kan. 1976), 219 Kan. 171, 547 P. 2d 323, syllabus para. 6. In another, the Supreme Court found *Decatur*'s limitations dispositive where, as here, "the terms and conditions of the contract had not been established" when the plaintiff acted in reliance. *Bittel v. Farm Credit Serv.* (Kan. 1998), 265 Kan. 651, 663-64, 962 P. 2d 491.

Michigan: For Michigan, the Title Agencies cite *Jim-Bob, Inc. v. Mehling* (Mich. App. 1989), 178 Mich. App. 71. But "[t]he Michigan Supreme Court has never cited *Jim-Bob.*" *Urban Assocs., Inc. v. Standex Electronics, Inc.* (C.A. 6 2007), 216 Fed. Appx. 495, 514, n14. And the law in Michigan remains in flux after *Jim-Bob.* Another Michigan court of appeals, after *Jim-Bob,* questioned

> the wisdom of such judicially created exceptions to the statute of frauds as equitable estoppel, ratification, and part performance. Rather than deferring to the Legislature to address through the Legislative amendment process any perceived inequity in the statute of frauds, Michigan courts have by judicial fiat created gaping holes in the statute of frauds that are inconsistent with the express language of the statute and the policy supporting it. *** Allowing judge-made doctrines such as estoppel to override and preclude the application of legislatively created laws such as the statute of frauds is "contrary to well-founded principles of statutory construction and is inconsistent with traditional notions of the separation of powers *** ."

Kelly-Stehney & Assocs., Inc. v. MacDonald's Indus. Prods., Inc. (Mich. App. 2003), 254 Mich. App. 608, 615-16. The Michigan Supreme Court granted leave to review *Kelly-Stehney* but then remanded the case without opinion, causing a dissenting Justice to remark that "the case may come to this Court a second time for a decision on whether the doctrine of equitable estoppel can be used as an exception to the statute of frauds." *Kelly-Stehney* (Mich. 2004), 469 Mich. 1046, 1049 (Weaver, J., dissenting).

Montana: The Title Agencies rely on *Northwest Potato Sales v. Beck* (Mont. 1984), 208 Mont. 310. *Northwest,* however, was a case under the Uniform Commercial Code. As the court noted, the UCC "expressly mentions estoppel as one of the general principles of law that supplement the UCC." *Northwest,* 208 Mont. 310, 315. That makes the UCC different from Ohio's Statute of Frauds, which contains no reference to an estoppel exception. Notably, after *Northwest,* the Montana Supreme Court stated:

> [W]here a case is clearly within the statute of frauds, promissory estoppel is inapplicable, for the net effect would be to repeal the statute completely. *** [T]he moral wrong of refusing to be bound by an agreement because it does not comply with the statute of frauds, does not of itself authorize the application of the doctrine of estoppel, because the breach of a promise which the law does not regard as binding is not a fraud.

Austin v. Cash (Mont. 1995), 274 Mont. 54, 906 P. 2d 669, 674.

New Jersey: The Title Agencies' case from New Jersey, *Pop's Cones, Inc. v. Resorts Internatl. Hotel, Inc.* (N.J. App. 1998), 307 N.J. Super. 461, is inapposite because it was *not* a breach of contract case – it was only a promissory-estoppel case. As the *Pop's Cones* court noted, "[p]laintiff's complaint neither seeks enforcement of the lease nor speculative lost profits which it might have earned had the lease been fully and successfully negotiated. Plaintiff merely seeks to recoup damages it incurred *** in reasonably relying to its detriment upon defendant's promise." *Id.* at 473. In contrast, the issue before this Court is *not* whether the Title Agencies can seek reliance damages on a promissory estoppel claim. They will have that chance. The Title Agencies seek to invoke an equitable exception to the Statute of Frauds in order to obtain precisely the kind of relief that was not at issue in *Pop's Cones;* that is, their speculative lost profits on a proposed five-year deal, the negotiation of which was never completed, and which was never agreed to, much less signed.

Pennsylvania: Next to "Pennsylvania" the Title Agencies cite *DuSesoi v. United Refining Co.* (W.D. Pa. 1982), 549 F. Supp. 1289. In *DuSesoi*, the district court was not even applying Pennsylvania law to the breach-of-contract claim. *Id.* at 1296. Further, the court *dismissed* the plaintiff's breach-of-contract claim despite his reliance on an estoppel exception to the Statute of Frauds. *Id.* at 1297. Finally, the Title Agencies omit authority from the Pennsylvania Supreme Court stating "[t]his Court has consistently held that principles of estoppel may not be invoked against operation of the Statute of Frauds." *Del Borrello v. Lauletta* (Pa. 1974), 455 Pa. 350, 352 (internal citations to fifty years of precedent omitted).

Washington: The year after the Title Agencies' cited case, *Klinke v. Famous Recipe Fried Chicken, Inc.* (Wash. 1980), 94 Wn. 2d 255, the Washington Supreme Court declined, on a question certified from the Ninth Circuit Court of Appeals, to permit promissory estoppel to avoid the Washington UCC's statute of frauds. *Lige Dickson Co. v. Union Oil Co.* (Wash. 1981), 96 Wn. 2d 291, 296-99 ("[W]e must hold that promissory estoppel cannot be used to overcome the statute of frauds in a case which involves the sale of goods."). Fifteen years after *Klinke*, the Washington Supreme Court declined to adopt Section 139 of the Restatement of Contracts, 2d, which restates the promissory-estoppel exception to the Statute. *Greaves v. Medical Imaging Sys., Inc.* (Wash. 1994), 124 Wn. 2d 389, 399 (affirming summary judgment for employer despite plaintiff's claim that he relied upon promise of employment).

Clearly, the Title Agencies' chart of citations from other jurisdictions fails at many levels to tell the full story about how other states resolve the questions presented here.[26]

[26] The Title Agencies' chart is so flawed that a full critique is impossible within this Reply. ACE Capital briefly notes that the Title Agencies' remaining reported research

E. The Court Of Appeals Erred In Recognizing An "Agreement To Agree" Exception To The Statute Of Frauds.

This Court should reject the "agreement to agree" exception recognized by the Court of Appeals because it, too, is an inappropriate judge-made exception to the Statute. The Court should follow its holding in *M.J. DiCorpo Inc. v. Sweeney* (1994), 69 Ohio St. 3d 497, and hold that preliminary letters of intent, term sheets, business plans or other "agreements in principle" do not constitute enforceable agreements to agree, especially where they are, as here, unsigned, and the agreement to be enforced is subject

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either: 1) misstates the cited case or omits distinguishing facts, see *Mullins v. S. Pac. Transp. Co.* (Ariz. Ct. App. 1992), 174 Ariz. 540, 542 (exception requires "second promise not to rely on the statute"); *Cellucci v. Sun Oil Co.* (1974), 2 Mass. App. Ct. 722, 729-33 (key facts included unequal sophistication and knowledge of parties); *Harmon v. Tanner Motor Tours* (1963), 79 Nev. 4, 17 (only equitable claim, no claim for damages); *Gibson v. Arnold* (C.A. 10 2002), 288 F.3d 1242, 1246-47 (applying "judicial admission" exception to enforce settlement agreement); *Interstate Co. v. Bry-Block Mercantile Co.* (W.D. Tenn. 1928), 30 F. 2d 172, 174 (did not include damage claim for breach of contract); or 2) fails to note more recent case law from the state clarifying or limiting the doctrine of promissory estoppel, see *Daigle Comm. Group, Inc. v. Raymond St. Laurent* (ME 1999), 734 A. 2d 667, 672 ("Promissory estoppel *** cannot be applied to avoid the Statute of Frauds requirement that all employment contracts for more than one year must be in writing."); *Schumacher v. Schumacher* (Minn. Ct. App. 2001), 627 N.W. 2d 725, 728 (noting "apparent inconsistency in Minnesota decisions on whether promissory estoppel can apply where there is an actual agreement, albeit an unenforceable one by reason of the statute of frauds."); Luepke, *Promissory Estoppel and the Statute of Frauds in Missouri* (2002), 58 J. Mo. B. 132, 134, quoting *Geisinger v. A&B Farms, Inc.* (Ct. App. Mo. 1991), 820 S.W. 2d 96, 99 (Luepke explains that "Missouri courts have shown reluctance in expanding the use of promissory estoppel beyond the lack-of-consideration cases to cases in which promissory estoppel is invoked for the purpose of circumventing the Statute of Frauds" and that the *Geisinger* court noted "'an understandable concern that to completely embrace the doctrine [of promissory estoppel] would be to totally abrogate the Statute'"); *Mason v. Capitol Records, Inc.* (Tenn. App. 1999), Appeal No. 01A01-9807-CH-00389, 1999 Tenn. App. LEXIS 736, at *18-19 (declining to apply equitable exception to statute of frauds where plaintiff "knew that he had no binding agreement" when acting in reliance); *U.S. Oil. Co. v. Midwest Auto Care Serv., Inc.* (Ct. App. Wis. 1989), 150 Wis. 2d 80, 91-92 (holding statute of frauds did not bar claim for promissory estoppel, and noting that because such a claim is not a "breach-of-contract" claim, its conclusion did not annul the statute); *Parkhurst v. Boykin* (Wyo. 2004), 94 P. 3d 450, 457 (Wyoming Supreme Court cautioning that equitable exceptions to the statute "should be restricted, rather than expanded, even when hardship may result.")

to the Statute of Frauds. The Title Agencies have given the Court no explanation as to why *DiCorpo* was wrongly decided or should not be followed in this case.

The Title Agencies still hide from the fact that the issue before the Court is compliance with the Statute of Frauds. They proclaim at page 46 of their Brief that disclaimers and unfinished or unsigned documents will not defeat a contract claim in the face of documents which allegedly reflect a mutual understanding of essential business terms. But, with one exception, the cases on which they rely for this "general rule" did not implicate or address the Statute of Frauds.[27] See *Normandy Place Assocs. v. Beyer* (1982), 2 Ohio St. 3d 102; *Mandalaywala v. Zaleski* (Frankin 1997), 124 Ohio App. 3d 321; *26901 Cannon Rd., LLC v. PSC Metals, Inc.* 2002-Ohio-6050; *Long v. Commodore Bank*, 2002-Ohio-252. The one exception that *did* implicate or address the Statute, *McCarthy, Lebit, Crystal & Haiman Co., L.P.A. v. First Union Mgt., Inc.* (Cuyahoga 1993), 87 Ohio App. 3d 613, avoided its application only by invoking a promissory estoppel exception.

F. This Court Should Not Recognize A Joint Venture Exception To The Statute Of Frauds.

Curiously absent from Appellees' response to ACE Capital's Second Proposition of Law is any mention of the Statute of Frauds. Thus, the Title Agencies fail to confront the law of Ohio's appellate courts, previously cited by ACE Capital, that joint venture agreements, like all other agreements, are subject to the Statute of Frauds.[28] Instead, the Title Agencies argue only that they had a "special relationship" with ACE Capital and, therefore, were owed fiduciary duties. They ignore that the purported basis for the alleged special relationship was contractual only, and that the venture was intended to

[27] Appellees' Brief at n. 72.

[28] ACE Brief at 41.

be performed over a five-year period. Thus, to be enforceable, the joint venture agreement had to be both in writing and signed as required by the Statute of Frauds.

None of the cases cited by the Title Agencies for the general proposition that little formality is required to create a "joint venture" discusses whether a *multiyear* joint venture is subject to the Statute of Frauds. One of them, however, holds that the special trust required to establish fiduciary duties is negated where the parties are "dealing at arm's length, looking out for their own best interests." *Groob v. Keybank* (2006), 108 Ohio St. 3d 348, 354. The facts here are even more compelling than in *Groob*, because the parties here are sophisticated entities represented at all times by counsel. As this Court has noted, "[a] fiduciary may not possess an interest of any sort that might conflict with an interest of the person to whom he or she owes a duty." *Belvedere Condominium Unit Owners Assn. v. R.E. Roark Cos.* (1993), 67 Ohio St. 3d 274, 282 (declining to recognize fiduciary duties between condominium developers and owners' associations who administer the properties). It is inconceivable that the law would hold that sophisticated businesses negotiating at arm's length through counsel to consummate a multiyear deal owe fiduciary duties to each other during the process.

G. This Court Should Rule On The Remaining Assignments Of Error.

When the Title Agencies opposed this Court's acceptance of jurisdiction, they complained that accepting the appeal "would leave the case a procedural mess, fractured between the issues that are now before the trial court, those remanded to the Court of Appeals, and this Court."[29] ACE Capital addressed this concern in its Merit Brief, asking this Court to resolve the two Assignments of Error previously deemed moot by the Court

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[29] Appellees' Stmt. Opposing Juris. at 15.

of Appeals.[30] Then the Title Agencies changed their tune, unsuccessfully moving to strike the portions of ACE Capital's brief addressing these Assignments of Error.[31] One wonders why the Title Agencies do not want the most expeditious appellate resolution of their own Assignments of Error.

With respect to Assignment of Error II, perhaps the Title Agencies lack confidence that they can convince this Court that the agreement at issue is outside the multiyear provision of Ohio's Statute of Frauds, given the longstanding rule that the issue turns on whether the parties *intended* to complete performance within one year rather than on whether complete performance was theoretically possible by some fluke within a year. *Lingo v. Ohio Central Ry., Inc.*, 2006-Ohio-2268, ¶¶ 44, 47, *appeal not allowed,* 2006-Ohio-2268. The Complaint of the Title Agencies,[32] the testimony of their principals,[33] and the plain language of the draft documents negotiated but never finalized,[34] all unequivocally show that the parties always intended their proposed agreement to last for years. Accord, *Lingo* at ¶ 47.[35]

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[30] ACE Brief at 42-44.

[31] See Appellees' Motion to Dismiss or Strike (denied on September 10, 2008).

[32] The Title Agencies admitted in their Complaint that the parties "reasonably expected the joint venture to last much longer than" one year. ACE Supp. 50.

[33] The Title Agencies' principal negotiator testified that the residential and commercial components of the proposed deal were "coextensive" and would not terminate until five years after notice. Kopel Tr. 169; ACE Supp. 635. See, also, Mosimann Tr. 44; ACE Supp. 641 ("[t]erm to run five years from inception"); Henry Tr. 235, ACE Supp. 621 ("*we actually thought it would last forever.*") (Emphasis added).

[34] See, *e.g.*, the term sheet that the Title Agencies allege as setting forth "essential" elements of the parties' proposed deal. Under "Program Term," the term sheet provided that "Cancellation is effective three years after the date of cancellation notice." ACE Supp. 379, 381. The unsigned draft agreement appended to the Title Agencies' Complaint also calls for a multiyear term. ACE Supp. 73, 75-76.

[35] In *Lingo,* the Tenth District explained: "The agreement, by its own terms, evinces an *intention* of the parties of an agreement incapable of being performed within one year.

With respect to Assignment of Error III, perhaps the Title Agencies fear this Court will be rightfully skeptical of their position that a draft term sheet e-mailed under cover of a note saying "I think this reflects what we agreed to" somehow constitutes a signed writing committing a corporation to a multiyear, multimillion dollar deal, even though the term sheet expressly states that it is only a "Discussion Outline" and "Not an Offer of Insurance," and even though the Title Agencies' own witnesses testified that term sheets are not contracts.[36] Perhaps they worry that this Court will not buy their theory that an internal business plan describing a *proposed* and unexecuted long-term deal with a third party somehow equates to a legally binding agreement, entitling that party to sue for hundreds of millions in alleged and fanciful lost profits.[37]

CONCLUSION

This Court should reverse the Court of Appeals' decision in part, reinstate the trial court's Decision, and remand the case for trial. The Title Agencies will have their day in court, but this Court will have drawn a bright line, protecting a salutary long-standing Statute from nullification by a judge-made exception, and protecting businesses from having long-term contractual duties foisted upon them by statements allegedly made during negotiations that never conclude with a signed agreement.

The *purpose* of the agreement was to inspect railcars over an extended period of time. Specifically, the oral contract is incapable of being performed *** in one year because the terms of the agreement itself reveal that the parties did not *intend* the agreement to be completed within one year *** [.]" (emphasis added; internal citations omitted).

[36] See Appellees' Brief at 49; see, also, Olympic Supp. 1316-17. See, *e.g.*, Henry Tr. 134-35, ACE Supp. 620 ("no, I don't believe they constitute an agreement by themselves."); Kopel Tr. 16-17; ACE Supp. 623-24 ("A term sheet does not constitute an agreement.")

[37] See Appellees' Brief at 49.

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CERTIFICATE OF SERVICE

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