IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-897

L.T. CASE NOS. 4D09-5; 2004CA0111452XX

DK ARENA, INC.,

Petitioner,

v.

EB ACQUISITIONS I, LLC,

Respondent.
_____/

EB ACQUISITIONS I, LLC RESPONSE BRIEF

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STATEMENT OF THE CASE AND FACTS

A. INTRODUCTION

This case stems from a written contract for the purchase and sale of real estate for the purpose of a substantial mixed use commercial development. The evidence at trial established that, prior to the expiration of the due diligence period provided under the written contract, the parties agreed to hold the due diligence period in abeyance so that they could continue ongoing discussions toward a joint development of the property with the seller retaining equity in the deal. The trial court's evidentiary findings, and the overwhelming record support for those findings, were not appealed, and are the established facts before this Court.

Petitioner, DK Arena, Inc. ("DK Arena"), argues that because the underlying transaction involved the purchase and sale of real property, the statute of frauds renders its established promise to hold the due diligence under the contract in abeyance meaningless, even though the evidence established that Respondent, EB Acquisitions I, LLC ("EB"), relied upon this promise through forbearance of its right to terminate the contract.

The transaction ultimately failed and mutual demands were made upon a $1 million dollar escrow deposit paid by EB under the contract. The trial court

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concluded that EB had demanded return of the deposit while the due diligence period was open, and that DK Arena had breached material obligations found in the written contract, which were independent from the parties' agreement to suspend the due diligence period. *See* Final Judgment at p. 7 attached to Petitioner's Appendix at Tab 13.[1] The trial court's conclusion that DK Arena breached the contract irrespective of its determination that the parties suspended the due diligence period was not challenged by DK Arena in this Court, except for DK Arena's argument that legal effect should not be given to its indisputable promise regarding extension of the due diligence period, notwithstanding the injustice which such a conclusion would operate upon EB.

B. THE PROJECT

In 2004, EB learned of an opportunity to acquire real property known as the Mangonia Jai-Alai Fronton, located in Mangonia Park, Palm Beach County, Florida (the "property"). (App. 2, 123:1-123:15). The property was owned by DK Arena, Inc. ("DK Arena"), whose principal is the well-known boxing promoter, Don King ("King"). (*Id*., 17:22-18:11). EB envisioned redeveloping the property

[1] References to Petitioner, DK Arena, Inc.'s Appendix will be referred to "App. at _____." References to Respondent, E.B. Acquisitions I, LLC's Appendix will be "EB App. at _____." Items found in DK Arena's Appendix will not be duplicated in EB's.

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as a substantial mixed use project (the "project"). (*Id.*, 46:18-47:7; 123:16-124:3; 126:2-126:9; 127:14-127:18; App. 4, ¶ 14).

In meetings between King and EB's principal, John Markey ("Markey"), King represented that he carried the clout to secure the project's approval from the Mangonia Park Town Council and the county. (*Id.*, at 121:1; 128:17-128:22; 224:10-224: 17). King represented that he had a good relationship with Palm Beach County Commissioner Addie Greene ("Greene"), and that he would be able to deliver her support for the project. (*Id.*, at 128:14-128:22).

C. THE AGREEMENT AND KING'S DUTY TO SUPPORT THE PROJECT

On July 20, 2004, EB and DK Arena entered into a Purchase and Sale Agreement (the "Agreement"), pursuant to which EB agreed to purchase the property for $23 million, of which $1 million was deposited into escrow, with the balance payable at closing. (App. 3). An Addendum to the Agreement contained additional obligations in connection with the transaction. (App. 4).

One of the essential Addendum terms was DK Arena's and King's agreement to cooperate with EB in obtaining the necessary governmental approvals for the project, and with marketing and promotion. Paragraph 14 of the Addendum provides, in part:

> Buyer may in its discretion, at its sole cost and expense, apply for land use and other governmental and quasi-

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> governmental approvals relating to its proposed development of the property. Seller and its principal Mr. Don King, shall cooperate in the foregoing applications and processes. Seller and its principal, Mr. Don King, shall also reasonably cooperate in the marketing and promotion of the redevelopment of the property. . . . This clause shall survive closing. Seller's and Mr. King's agreement to cooperate with Buyer in connection with obtaining [ ] governmental approvals, marketing, and promotion is a material inducement of Buyer entering into this contract.

King testified, and the lower courts found, that King understood it was his personal obligation to do all that was reasonable to support the proposed project. (App. 2, at 41:4-41:8). This obligation included lobbying the Town Council to approve the project, and attending all public meetings where the proposed project was to be considered. (*Id.*, 41:9-41:20). Markey testified that paragraph 14 was "extremely significant" to EB because of King's clout and connections to the community, as well as the perception that Markey, a Maryland native, could be viewed as an "outsider." (*Id*., 127:25-128:16).

D. THE AGREEMENT TO HOLD THE DUE DILIGENCE DEADLINE IN ABEYANCE WHILE A JOINT VENTURE WAS PURSUED

The Agreement contained a sixty (60) day due diligence period, during which EB could terminate the Agreement without penalty. (App. 3, at ¶ 7(b)). The 60-day due diligence period was originally set to expire on or about September

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20, 2004, but was extended in writing for an additional fourteen (14) days to October 4, 2004. (App. 5).

During the due diligence period, the parties engaged in extensive discussions centered on DK Arena and/or King becoming co-venturers with EB in the project. (App. 2, at 131:3-132:21; 173:21-174:1). King, in particular, was "intoxicated" with the idea of getting into real estate development during the expanding real estate market. (*Id.*, at 130:14-131:17).

The discussions led to the dissemination of a term sheet on September 27, 2004 to DK Arena, setting forth revised terms of EB's acquisition of the property. (App. 7).[2] On September 29, 2004, EB sent Charles Lomax ("Lomax"), in-house counsel for DK Arena, a draft agreement memorializing the revised deal contained in the term sheet. (App. 8).

DK Arena then conducted its own analysis of the terms, (App. 12), and utilized its outside counsel, Donald P. Dufresne, Esq. ("Dufresne") to review the proposed agreement. (App. 9). Dufresne prepared an analysis of the proposed agreement which raised a number of issues, including pointing out that "it appears

[2] The term sheet contemplated a new single purpose LLC to develop the Property with EB owning a 75% interest and King a 25% interest. (*Id.*). The LLC would purchase the property from DK Arena for the same $23 million, with $8 million of that purchase price to be held as a second mortgage, contingent upon the granting of all approvals to develop the project. (*Id.*). The term sheet further provided that EB would fund all of the costs for securing the approvals, and that King would assist EB with obtaining approvals, public relations and marketing. (*Id.*).

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that [EB] may be requesting to extend the Due Diligence and Closing Dates." (*Id.*, p. 4). Dufresne's letter ultimately expressed his belief "[*t*]*hese may be details that can be worked out*" and spoke of the deal's upside. (*Id.*, at p. 4 - 5). Dufresne testified that despite the concerns raised in his letter, King wanted to pursue the revised deal with EB anyway. (App. 2, at 176:1-176:7).

On October 4, 2004, the date that the due diligence period was set to expire, a meeting was held at King's office between representatives of EB and DK Arena to discuss the proposed joint venture and the additional steps that needed to be taken to secure approval. (*Id.*, at 138:3-138:13; 138:22-139:11; 224:18-225:2). At this meeting, terms of an amended deal were agreed to in principle. (*Id.*, at 140:8-140:11; 200:11-203:4). Congressman Ron Klein ("Klein"), then EB's outside counsel who was present at that meeting, testified that the parties "agreed to change the agreement . . . to have Mr. King involved in a much broader aspect of the development of the property, which involved his personal participation and his agreement to defer a portion of the payment to some future time." (*Id.*, at 201:9-201:18). Although a formal written agreement was not signed by the parties at the October 4th meeting, Klein testified that "*there was a handshake and a[n] agreement*." (*Id..*, at 201:25-202:4). Markey also testified that it was his understanding that "*we were moving forward with this joint venture agreement*." (*Id.*, 140:8-140:11).

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Because the October 4th meeting coincided with the expiration of the revised due diligence deadline, the parties orally agreed that DK Arena would hold all due diligence deadlines in abeyance pending the joint venture. (*Id.*, at 139:12-141:12; 143:10-143:15; 184:4-184:12). The suspension of the due diligence period was to enable the parties to finalize transaction documents reflecting DK Arena's participation as a joint venture partner, and further allow sufficient time for the parties to seek approval and guidance from the Town. (*Id*., 140:23-141:5; 143:16-143:15; 177:9-178:5). All parties left the October 4, 2004, meeting believing that they were moving forward as partners. (*Id.*, at 140:3-140:11; 143:16-143:22).

E. KING MEETS WITH THE TOWN COUNCIL, DESCRIBES HIMSELF AS EB'S "PARTNER," AND PROMISES TO ATTEND THE OCTOBER 26, 2004, SPECIAL TOWN COUNCIL MEETING

On October 5, 2004, King, together with representatives from EB attended a Town Council meeting to discuss the project. (*Id.*, 28:15-28:21; 143:23-144:18). The parties made brief presentations and fielded questions from the members of the Council. (*Id.*, 68:2-68:5). King spoke in favor of the project. (*Id.*, 67:22-68:1; 143:23-144:18). He specifically told the Town Council that: (1) he was putting his "own money" into the deal, (2) he was going to be a "part owner" of the project, and (3) he was going to be involved "in all aspects" of the project from beginning to end. (*Id.*, 68:20-72:21; 144:11-144:18).

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During the meeting, King was directly asked by a member of the Town Council if he was going to be a "part-owner" or investor in the project. (*Id.*, 70:23-70:24). King responded emphatically, "[*y]es, yes, yes. I will be a partner owner. I will be a part owner as well as a seller*." (*Id.*, 70:25-71:2). He also reassured the Town Council that he would remain personally involved in the project "from the beginning to the end, because I'll be a large minority owner in the thing." (*Id.*, 71:23-71:25). At the conclusion of the meeting, the Town Council announced that it would convene a special meeting on October 26, 2004, to consider the project. (*Id.*, 145:20-145:24). King reassured EB and the Council that he would attend the October 26, 2004, meeting. (*Id*., 146:9-146:18).

On October 12, 2004, Ron Klein met with the City Attorney and City Manager of Mangonia Park to discuss zoning issues for the proposed project. (EB App. A). King was supposed to attend that meeting, but did not. (App. 2, 148:3-148:14). The next day, Markey sent a letter to King explaining that the approval process has been "handicapped" by King's absence, and reiterated that King's "participation is the key component." (EB App. A).

On October 18, 2004, well after the date that DK Arena claims that the due diligence period had expired, new outside counsel for DK Arena, sent Klein proposed revisions to the parties' joint venture agreement. (EB App. B; App. 2, at

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108:13-108:15; 150:6-150:19). EB's Markey was "encouraged" by this because it meant that "we were very close to getting it memorialized." (*Id.*, 150:16-150:19).

F. KING FAILED TO ATTEND THE OCTOBER 26, 2004, MEETING AND WAS SECRETLY BACKING A RIVAL PROPOSAL

On October 26, 2004, the Town Council conducted its special meeting on the project. King admitted that he was present in Palm Beach County that day, but failed to appear at the meeting despite promising that he would attend. (App. 2, at 37:5-37:7; 88:22-89:13; 152:9-152:11). King made no effort to have the meeting rescheduled, nor advise EB of his intention not to attend. (*Id.*, 89:4-89:9; 91:25-93:16). King's conspicuous absence created the public perception that as the owner of the property, DK Arena, did not support the project. (App. 2, at 152:12-152:19). EB's efforts without King were met with harsh skepticism.

Commissioner Greene, however, did attend the meeting. Despite King's claim to have personally lobbied her, she spoke out in opposition to the project, and she spoke for King. (*Id.*, 152:20-152:24; 153:22-154:12). Commissioner Greene told the Council that she had spoken with King prior to the October 26 meeting, and that King told her he was considering another project for the property. (*Id.*, 157:9-157:25). She testified under oath that "Mr. King has been to my office twice. Don King came to my office about this project. *He came to my*

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office about the other project. . . . The owner is looking at 2 different projects . . . ." (EB App. C, at DKA01088).

Greene then elaborated, telling the Town that "[t]*here is another project, there's another project on the board. And, that project that we really want, that the county wants will bring over 2,000 jobs. It is not housing. It's under MGM. That's what we want*." (App. 2, at 103:19-103:23). Greene made clear that it was King himself who brought up the prospect of bringing MGM to the Property. (*Id.*, at 104:7-104:17; EB App. C, at DKA01088). King was not present to refute or challenge Commissioner Greene's statements (App. 2, 106:6-106:18), and as a result, EB's proposal was sunk. (*Id.*, 152:12-152:24; 154:13-154:24; 156:17-156:19).

At trial, King confirmed that he was dealing with other purchasers while still under contract with EB. He admitted fielding other deals before the October 26 meeting. (*Id*., 107:21-107:22). On October 27, 2004, DK Arena received another offer to purchase the property for $24 million. (*Id*., 110:11-110:14). The prospective buyer was interested in building an entertainment complex on the property. (*Id.*, 110:15-110:19). When questioned about the timing of the offer, coming one day after EB's proposal was defeated, King admitted that he knew beforehand that another offer was imminent. (*Id*., 110:20-111:5).

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G. KING'S DEMAND FOR THE ESCROWED MONEY ON THE DAY OF THE MISSED MEETING

On October 26, 2004, instead of fulfilling its obligation to support the project, DK Arena made its initial demand for the release of the $1 million escrow deposit. (EB App. D). In its letter to the escrow agent, DK Arena first claimed that it was entitled to the deposit because the due diligence period had expired without EB having given notice of its intent to terminate. (*Id.*). Despite DK Arena's claim that the due diligence period expired weeks earlier, it never made any demand for release of the escrow deposit until after King's calculated failure to attend the October 26, 2004 special meeting.

EB did not learn of the demand until October 27, 2004, the day after the Town Council meeting. (App. 13 at pp. 7 – 8) App. 2, 186:4-187:2). On that same day EB's attorney, Klien, sent a facsimile to DK Arena's counsel disputing DK Arena's entitlement to the deposit, claiming that DK Arena was in breach by virtue of "King's failure to cooperate in governmental and quasi-governmental processes." (EB App. E.). Klein's letter closed by demanding the return of EB's $1 million deposit in accordance with section 9 of the Agreement. (*Id.*).

H. LOWER COURT PROCEEDINGS

Following a bench trial on November 10, 2008, the trial court entered judgment for EB on its claims of breach of the Agreement, breach of an oral joint

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venture agreement and breach of fiduciary duty. (App. 13, at p. 10). The trial court found that DK Arena had waived the due diligence deadline by parol, and committed independent breaches of the Agreement (*Id.* at 7). The trial court ruled the EB was entitled to the return of its deposit. (*Id.* at 10). The Fourth District Court of Appeal affirmed the trial court's conclusion on the contract issues, specifically holding that DK Arena waived the due diligence deadline contained in the contract. (App. 1).

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal properly upheld the trial court's ruling that EB is entitled to the return of its deposit. The court found, in response to DK Arena's assertion that the parties' oral agreement waiving the due diligence deadline violated the statute of frauds, that DK Arena was estopped due to EB's detrimental reliance on the waiver.

This finding is the most recent in a long line of Florida cases applying the universally accepted doctrine of waiver and estoppel to prevent the unjust application of the statute of frauds. Waiver and estoppel, as applied by Florida courts, has been upheld where there exists: (1) a written contract signed by all parties; (2) parol waiver of a contractual provision by the other party for whose benefit the provision was made; and (3) detrimental reliance on the waiver by the

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other party. In such circumstances, the doctrine bars the party approving the waiver from invoking the statute of frauds to enforce the original terms of the written agreement. With all prerequisites for waiver and estoppel having been established at trial, the Fourth District Court of Appeal properly held that DK Arena could not raise the statute of frauds as a defense to its liability.

The doctrine of waiver and estoppel has been specifically endorsed by this Court as one pillar of a judicial construction that disallows the statute of frauds to be utilized as a tool of injustice. While this Court and the various District Courts of Appeal have held that certain parol agreements and/or contractual modifications violate the statute of frauds, these holdings in no way conflict with the appellate court's decision in this matter. Not a single case offered by DK Arena involves application of the doctrine of waiver and estoppel; the underlying facts in every case cited by DK Arena fail to meet at least one factor compelling application of the doctrine to avoid injustice.

DK Arena's claim of conflicting authority rests upon a strained reading of the appellate court's decision. The Fourth DCA did not rely on promissory estoppel. The court did not find that a promise as to a future act served to prevent DK Arena from invoking the statute of frauds to avoid the consequences of its promise to EB. The agreed suspension of the due diligence period was made in the present. DK's assent resulted in a waiver of a present right, the right to claim the

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$1,000,000.00 on deposit, upon which EB contemporaneously relied by forbearing on its right to terminate the contract on October 4, 2004.

In the absence of any conflict with Florida precedent, and given that the Fourth District Court of Appeal merely followed a long line of Florida cases applying established judicial doctrine, this Court should affirm the decision of the lower courts as to the legal effect of the verbal agreement to suspend the due diligence period.

Irrespective of the suspension of the due diligence period, the trial court found, and the appellate court affirmed, that DK Arena breached paragraph 14 of the Addendum to the Agreement. DK Arena has not challenged the lower courts' determination of contractual breaches by DK Arena independent of the due diligence issue, which should not be re-opened by this Court.

The record shows that DK Arena took no action to obtain release of the escrow deposit until after King's failure to attend the pivotal meeting for project on October 26, 2004. On the record before this Court, failure of the deposit to have been automatically delivered to DK Arena can amount to no more than a non-material breach of the Agreement.

The record shows no evidence that EB prevented the release of the escrow deposit at any time prior to its receipt of DK Arena's initial demand, on October 27, 2004. However, the record does prove duplicitous dealings by DK Arena with

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respect to other potential purchasers for the property, and through conversations with influential county commissioner Greene while DK Arena was under contract with EB. DK Arena beached its obligation to support the project with EB through its inexcusable failure to attend the pivotal meeting on October 26, 2004, which lead to the project's demise, and also through secret negotiations and dealings with other potential purchaser and commissioner Greene.

The record amply supports the lower courts' finding of breaches by DK Arena, independent of the due diligence issue, further compelling affirmance that EB is entitled to the return of its deposit.

ARGUMENT

I. STANDARD OF REVIEW

The findings of a trial court are presumptively correct and must stand unless clearly erroneous. *See Chiles v. State Employees Attorneys Guild*, 734 So. 2d 1030, 1034 (Fla. 1999). Questions of law, however, are reviewed *de novo*. *See D'Angelo v. Fitzmaurice*, 863 So. 2d 311, 314 (Fla. 2003).

II. THE STATUTE OF FRAUDS MAY NOT BE USED AS A TOOL OF INJUSTICE

This Court has specifically held, with regard to the statute of frauds, that courts have a responsibility to avoid unjust outcomes in applying the statute:

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> If we were to confine ourselves to the strict letter of the statute, and say that no power resides in the courts of equity to decree a conveyance of land in pursuance of a parol agreement to convey…we should go far towards abdicating one of [our] most important functions.

Tate's Adm'r v. Jones' Ex'r, 16 Fla. 216 (Fla. 1877). According to this Court, the purpose of the statute is to bar "actions based on nothing more than loose verbal statements or mere innuendos." *Yates v. Ball*, 132 Fla. 132, 138 (Fla. 1937). The statute "should be strictly construed" insofar as its application prevents "the fraud it was designed to correct." *Id.* These pronouncements, read together, demonstrate that this Court requires that the statute of frauds be strictly construed to prevent lawsuits within its ambit based upon disagreements as to oral statements so as to prevent fraudulent outcomes. However, the district court below correctly stated, "it should not be used as an instrumentality in aid of fraud or as a stumbling block in the path of justice." *DK Arena, Inc.*, 31 So. 3d at 323 (quoting *Kramer v. Ballard*, 24 N.W. 2d 80, 86 (Mich. 1946) (*Boyles, J., concurring)).*

This Court has also held that the statute of frauds is not to be used as a "sword" by a litigant, i.e., that a party may not induce action by a parol agreement then assert the statute of frauds as a means of escaping its resulting obligations. *See Carson v. Tanner*, 101 So. 2d 811, 813 (Fla. 1958). In *Carson*, the defendants sold property to the plaintiffs, with an understanding, unwritten and outside the

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written contract of sale, that plaintiffs would have an easement to access their newly-acquired property through other land retained by defendants. *Id.* at 812. After four years, during which time plaintiffs accessed their property via the easement, defendants built a fence that blocked it. *Id.* Defendants then argued that because no easement was contained in the contract for sale of plaintiff's land—a contract where all essential terms must be reduced to writing under the statute of frauds—the statute of frauds barred the claim of easement. *Id.* This Court rejected defendant's argument, describing it as bringing "forth the statute of frauds to act as their sword to destroy what they had sold the plaintiffs." *Id.* at 813. The Court affirmed the lower court's findings and restated the principle that the statute of frauds is not a tool to create unjust outcomes.

The principle that the statute of frauds is not to be used in aid of injustice has led this Court to engraft upon the statute of frauds exceptions to the requirement that all contracts within its ambit be memorialized in writing. Most notable of these exceptions is the doctrine of partial performance. *See,* e.g., *Tate's Adm'r v. Jones' Ex'r*, 16 Fla. 216 (Fla. 1877); *Cottages, Miami Beach v. Wegman*, 57 So. 2d 439 (Fla. 1952); *Burton v. Keaton*, 60 So. 2d 770 (Fla. 1952). Under the doctrine of partial performance, an oral contract for the transfer of real property is

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enforceable, despite the requirements of the statute of frauds, if the claimant can demonstrate compliance with certain conditions.[3]

For example, in *Wegman*, claimant, at the written request of her father, relocated from New York City to Miami Beach to assist him in management of certain real property that he had purchased. 57 So. 2d at 440. In exchange for her assistance, claimant's father promised her a half-interest in the property at issue. *Id.* The correspondence outlining the promise did not meet the requirements of the statute of frauds. *Id.* Upon the death of her father, claimant sued for a decree entitling her to the interest in the real property promised. This Court, despite the agreement's clear violation of the statute of frauds, nonetheless awarded claimant

[3] This Court's doctrine is in accord with the common law principle established in other jurisdictions. *See*, e.g., *Purcell v. Miner*, 71 U.S. 513, 518 (1866); *B & A Pipeline Co. v. Dorney*, 904 F. 2d 996 (5th Cir. 1990); *Podolsky v. Alma Energy Corp.*, 143 F. 3d 364 (7th Cir. 1998)(applying Illinois law); *Merrill Lynch Interfunding, Inc. v. Argenty*, 155 F. 3d 113 (2d Cir. 1998)(citing New York law); *Rennick v. O.P.T.I.O.N. Care, Inc.*, 77 F. 3d 309 (9th Cir. 1996)(citing California law); *Chevron U.S.A. Inc. v. Schirmer*, 11 F. 3d 1473 (9th Cir. 1993)(citing Arizona law); *Johnson v. University Health Services, Inc.*, 161 F. 3d 1334 (11th Cir. 1998)(citing Georgia law); *Nelson v. Elway*, 908 P. 2d 102 (Colo. 1995); *Montanaro Bros. Builders, Inc. v. Snow*, 460 A.2d 1297 (Conn. 1983); *Simons v. Simons*, 11 P. 3d 20 (Idaho 2000); *Pollmann v. Belle Plaine Livestock Auction, Inc.*, 567 N.W. 2d 405 (Iowa 1997); *Beall v. Beall*, 434 A.2d 1015 (Md. 1981); *Schwedes v. Romain*, 587 P. 2d 388 (Mont. 1978); *Matthews v. Matthews*, 341 N.W. 2d 584 (Neb. 1983); *Delfino v. Paul Davies Chevrolet, Inc.*, 209 N.E. 2d 194 (Ohio 1965); *Engelcke v. Stoehsler*, 544 P. 2d 582 (Or. 1975); *Player v. Chandler*, 382 S.E. 2d 891 (S.C. 1989); *Bradshaw v. McBride*, 649 P. 2d 74 (Utah 1982);*Runion v. Helvestine*, 501 S.E. 2d 411 (Va. 1998); *Matter of Lade's Estate*, 260 N.W. 2d 665 (Wis. 1978).

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the contested interest in land sought, holding that refusal to do so "would have been tantamount to countenancing an injustice amounting to a fraud upon appellee." *Id.* at 442. This Court has routinely and consistently held that the statute of frauds is not to be used as an instrument of injustice, but rather is limited to preventing litigation based on potentially fraudulent claims.

III. THE STATUTE OF FRAUDS DOES NOT BAR PAROL WAIVER OF CONTRACTUAL PROVISIONS

True to the principle that the statute of frauds is not to be used as an instrument of fraud, this Court has held that "the statute of frauds cannot be invoked where non-performance of the original terms has been occasioned by…oral modification…." *Gilman v. Butzloff*, 22 So. 2d 263, 265 (Fla. 1945). In *Gilman*, the plaintiff entered into a written contract for the sale of real property with the defendants requiring tender of the premises within 35 days of the date of the contract. *Id.* at 264. After execution of the documents, however, the parties verbally agreed that the plaintiff would take possession of the property only after the tenants residing on the premises vacated. *Id.* The defendants then did not turn over the premises to the plaintiff for nearly six (6) months after the date called for in the contract. *Id.* The plaintiff sued for damages resulting from the delay in possession. This Court found for the defendants, holding that the doctrine of *waiver* allowed for oral modification of a written contract:

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> [a] waiver of a covenant by the party for whose benefit it is inserted may be made by parol. Such waiver is held not to be a modification or change in the terms of the original agreement, but is deemed within the rule that a contract under seal may be released, surrendered, or discharged by matters in pais.

Id. (citing *Masser v. London Operating Co.*, 145 So. 79, 84 (Fla. 1932)). This Court further noted that waiver "may be inferred from conduct or acts putting one off his guard and leading him to believe that a right has been waived." *Id.* (citing *Kreiss Potassium Phosphate Co. v. Knight*, 124 So. 751 (Fla. 1930)).[4]

This Court reiterated the principles set forth in *Gilman* eight (8) years later in *Forbes v. Babel*, 70 So. 2d 371, 372 (Fla. 1953), where another a real estate transaction did not close in perfect accord with the timing required by the written contract. In *Forbes*, the contract required that the purchaser make payment within 30 days of the delivery of certain paperwork necessary for closing. *Id.* When the purchaser did not complete closing on the property by the designated time, the seller sought to retain the purchaser's deposit. *Id.* This Court found, however, that—much like the situation at issue in the instant matter—the seller had waived the time limit designated by contract: "there was discussion between the parties

[4] It is noteworthy that this Court used the term "estop" in relation to its discussion of the doctrine of waiver. *Id.* ("Where the acts or conduct of a party are such as to estop him from insisting upon the right claimed to have been relinquished, no consideration is necessary.")

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about closing it several times. Waiver of performance was shown and no definite time was set for closing." *Id.* This Court then held, simply and clearly, that "[t]he law is well settled that the vendor cannot take advantage of a delay in performance which he condoned or was a party to." *Id.* In such a circumstance the result is that the vendor could not take a benefit from a contractual provision waived.

Consistent with these holdings, the Second District Court of Appeal described the rule with regard to waiver of deadline provisions in contracts:

> where performance by the plaintiff within a specified time was a condition precedent to the defendant's duty to perform his part-if the plaintiff has been caused to delay his performance beyond the specified time by the request or agreement or other conduct of the defendant, the plaintiff can enforce the contract in spite of his delay.

Young v. Pottinger, 340 So. 2d 518, 520-21 (Fla. 2d DCA 1976).[5] In *Young*, the court found that the statute of frauds would not act as a bar to an oral extension of the closing date for a contract to convey real property as the parol agreement amounted to a waiver of the contractual deadline. In support of its finding, the court did not specify reliance on either equitable estoppel or promissory estoppel, but referred to the authority of 2 A. Corbin, Corbin on Contracts, § 310 (1950), the

[5] DK Arena incorrectly asserts that the Second District Court of Appeals "found no support in Florida jurisprudence" for its decision; the *Young* court specifically refers to this Court's holding in *Gilman* in its opinion. *See Young*, 340 So. 2d at 521.

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title of which reads "Oral Waiver of Conditions and Estoppel to Assert Them—Effect of a Substituted Performance by the Plaintiff."

Subsequent *Young,* the First District Court of Appeals reversed a trial court dismissal with prejudice of the plaintiff/purchaser's complaint for damages and specific performance of a real estate purchase agreement where the seller was alleged to have induced delays in closing. *Affordable Homes, Inc. v. Devils Run, Ltd.,* 408 So. 2d 679 (Fla. 1st DCA 1982). The court explained application of the doctrine of waiver and estoppel to prevent unjust consequences resulting from reliance upon verbal representations by seller, which vary from written terms of a contract:

> [a] cause of action can be stated under that theory if the appellant pleads that it detrimentally relied on an oral modification, such as an extension of the time of performance agreed to by the appellant….The basis of this theory is not contractual: "(t)he party estopped is merely held to his written promise, but on different conditions."

Affordable Homes, Inc. v. Devil's Run, Ltd., 408 So. 2d 679, 680 (Fla. 1st DCA 1982)(citing *Young*). The court correctly noted that application of waiver or estoppel in this context is "inaccurately referred to as an exception to the statute of frauds." *Id.* Instead, the doctrine holds that the statute of frauds may not be used offensively, subsequent to an oral modification agreed to by the parties to a

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contract and acted upon in reliance thereof by a party, to enforce the written terms of the contract.

The Third District Court of Appeal has also held that a party to a real estate contract, having agreed to an extension of time for the purchaser to secure financing for the deal, cannot invoke the statute of frauds to defeat the purchaser's claims when the purchaser acted in reliance upon the oral modification. *See United of Omaha Life Ins. Co. v. Nob Hill Assoc.*, 450 So. 2d 536, 539 (Fla. 3d DCA 1984). In *United of Omaha*, the court held that:

> We agree with United that there can be no oral modification of an agreement which was required to be in writing by the statute of frauds…. However, this does not relieve United from liability. On the record before us, it is clear that United has waived its right to utilize the statute of frauds as a defense. In reliance upon United's oral agreement with Tower that it would allow Nob Hill a reasonable time to comply with the conditions precedent to the loan, Tower entered into a binding written contract with Nob Hill…Because Tower has changed its position in reliance upon United's consent to the new time, United is estopped from claiming that it did not agree to a longer period of time for compliance.

Id. (emphasis added). This discussion of the record regarding the facts of the dispute in *United* belies DK Arena's assertion that the court "did not conduct any meaningful analysis of the facts" in the case. *See* DK Arena, Inc.'s Initial Brief, p.

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13. This Court denied review of the Third District's decision. *See United of Omaha Life Ins. Co. v. Nob Hill Assoc.*, 458 So. 2d 274 (Fla. 1984).

Courts in other jurisdictions which have considered whether the statute of frauds can be used to shield the party to whom performance is owed under a written contract from the consequences of variant promises have uniformly found exactly as this Court and the District Courts of Appeal have, i.e., that a party to a contract subject to the statute of frauds may waive a condition of that contract and then be estopped from using the statute as a defense against the modification. *See* e.g., *Johnson v. Kaeser*, 239 P. 324, 328 (Cal. 1925); *Dreier v. Sherwood*, 238 P. 38, 39-40 (Colo. 1925); *Wolf v. Crosby*, 377 A.2d 22, 27 (Del. Ch. 1977); *Landow v. Georgetown-Inland West Corp.*, 454 A.2d 310 (D.C. 1982); *Kelly v. Hodges*, 811 P. 2d 48, 51 (Idaho 1991); *Stearns v. Hall*, 63 Mass 31, 35-36 (Mass. 1851); *Zannis v. Freud Hotel Co.*, 240 N.W. 83, 85 (Mi. 1932); *C.S. Brackett Co. v. Lofgren*, 167 N.W. 274 (Minn. 1918); *Bolz v. Myers*, 651 P. 2d 606, 612 (Mont. 1982); *Hecht v. Marsh*, 181 N.W. 135, 137 (Neb. 1920); *Bower v. Davis & Symonds Lumber Co.*, 406 A.2d 119, 122 (N.H. 1979); *Sturgeon v. Hanson*, 245 N.W. 481, 482-83 (N.D. 1932); *Thompson v. Poor*, 42 N.E. 13, 15 (N.Y. 1895); *Negley v. Jeffers*, 28 Ohio St. 90, 100 (Ohio 1875); *Kingsley v. Kressly*, 118 P. 678, 680-81 (Ore. 1911); *Novice v. Alter*, 139 A. 590, 591 (Pa. 1927); *Dracopoulas v. Rachal*, 411 S.W.2d 719, 721 (Tex. 1967); *Marsh v. Bellew*, 45 Wis. 36 (Wis.

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1878); *Roussalis v. Wyoming Medical Center, Inc.*, 4 P. 3d 209, 242-43 (Wyo. 2000). This universal principle is perhaps stated most succinctly by the New York Court of Appeals, the highest court of that state: "[t]he rule is well understood that, if there is forbearance at the request of a party, the latter is precluded from insisting upon nonperformance at the time originally fixed by the contract as a ground of action." *Thompson*, 42 N.E. at 15. This Court and all Florida District Courts of Appeal have consistently followed this established principle for decades.

IV. DK ARENA HAS NOT DEMONSTRATED ANY CONFLICT BETWEEN THE APPELLATE COURT'S DECISION AND ANY OTHER FLORIDA HOLDING

DK Arena has not presented a single case where the rule announced by this Court in *Tanenbaum v. Biscayne Osteopathic Hosp., Inc.*, 190 So. 2d 777 (Fla. 1966), that promissory estoppel cannot be used to circumvent the requirements of the statute of frauds, acts to negate the established doctrine of waiver and estoppel.[6] The waiver and estoppel cases described above, when read together,

[6] It seems a split of authority, nationally, has emerged as to whether promissory estoppel can serve as a basis circumvent of the statute of frauds. Most jurisdictions, unlike Florida to date, recognize at least some exceptions where promissory estoppel may be invoked despite the statute of frauds. *See* e.g., *Alaska Democratic Party v. Rice*, 934 P. 2d 1313, 1316 (Alaska 1997); *Waugh v. Lennard*, 211 P. 2d 806, 812 (Ariz. 1949); *Taylor v. Eagle Ridge Developers, LLC*, 29 S.W. 3d 767 (Ark. App. 2000); *Redke v. Silvertrust*, 490 P. 2d 805, 808-809 (Cal. 1971); *American Pride Co-op. v. Seewald*, 968 P. 2d 139 (Colo. Ct. App. 1998); *SKB Industries, Inc. v. Insite*, 551 S.E. 2d 380 (Ga. App. 2001); *McIntosh v. Murphy*, 469 P. 2d 177, 181 (Hawaii 1970); *Coca-Cola Co. v. Babyback's Intern., Inc.*, 841

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reflect three common characteristics to support application of the doctrine to prevent injustice. Those characteristics, which are present in the matter at bar, are: (1) a written contract, signed by all parties; (2) parol waiver of a contractual provision by the party for whose benefit the provision was made; and (3) detrimental reliance on the waiver by the party whose obligation was owed. In such circumstances, the doctrine bars the party approving the waiver from invoking the statute of frauds to enforce the original terms of the written agreement.

None of the cases cited in DK Arena's Initial Brief involve waiver and estoppel. Several of its cases simply do not involve written contracts, and are

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N.E. 2d 557 (Ind. 2006)(recognizing rule); *Union Pacific R. Co. v. Cedar Rapids and Iowa City R. Co.*, 477 F. Supp. 2d 980 (N.D. Iowa 2007)(applying Iowa law); *Rector v. Tatham*, 196 P. 3d 364 (Kan. 2008); *Harvey v. Dow*, 962 A.2d 322 (Me. 2008); *Cellucci v. Sun Oil Co.*, 320 N.E. 2d 919, 921-22 (Mass. App. 1974); *Industrial Maxifreight Services, LLC v. Tenneco Automotive Operating Co., Inc.*, 182 F. Supp. 2d 630 (W.D. Mich. 2002)(applying Michigan law); *Berg v. Carlson*, 347 N.W. 2d 809, 812 (Minn. 1984); *Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163 (Mo. App. 1959); *Harmon v. Tanner Motor Tours, Ltd.*, 377 P. 2d 622 (Nev. 1963); *Osan Ltd. v. Accenture LLP*, 454 F. Supp. 2d 46 (E.D. N.Y. 2006) (applying New York law); *Jamestown Terminal Elevator, Inc. v. Hieb*, 246 N.W. 2d 736, 740 (ND 1970); *Gathagan v. Firestone Tire & Rubber Co.*, 490 N.E. 2d 923, 924-25 (Ohio App. 1985); *Lacy v. Wozencraft*, 105 P. 2d 781 (Okla. 1940); *Franklin v Stern*, 858 P. 2d 142 (Or. App. 1993); *Durkee v. Van Well*, 654 N.W. 2d 807 (S.D. 2002). *Moore Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 938 (Tex. 1973); *Fericks v. Lucy Ann Soffe Trust*, 100 P. 3d 1200 (Utah 2004)(recognizing rule); *T — v. T —*, 224 S.E. 2d 148 (Va. 1976); *Klinke v. Famous Recipe Fried Chicken, Inc.*, 616 P. 2d 644 (Wash. 1980). *But see First Nat. Bank in Staunton v. McBride Chevrolet, Inc.*, 642 N.E. 2d 138, 142 (Ill. App. 4th Dist. 1994) ("Promissory estoppel is not an exception to the statute of frauds.").

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therefore inapposite to the line of cases applying waiver and estoppel to prevent unjust reliance on the statute of frauds. In *Tanenbaum*, there was simply no written contract between the parties at all. *See Tanenbaum*, 190 So. 2d at 778 ("There was evidence that petitioner importuned respondent to execute a written agreement but this was never accomplished."). DK Arena also relies on the authority of *City of Orlando v. West Orange Country Club*, 9 So. 3d 1268 (Fla. 5th DCA 2009), a case where the agreement at issue was never signed by the municipal plaintiffs. *Id.* at 1270. In *Bergman v. DeIulio*, 826 So. 2d 500 (Fla. 4th DCA 2002), while an agreement was drafted, it was signed by neither party. *Id.* at 502 ("An agreement was drafted by a lawyer. Despite an exchange of edits to the document, neither party signed it.") In *Shore Holdings, Inc. v. Seagate Beach Quarters, Inc.*, 842 So. 2d 1010 (Fla. 4th DCA 2003), the court specifically found that there was no enforceable contract in existence to be modified by the parties; the contract had already expired at the time of the alleged oral modification. *Id.* at 1012. The dispute in *Coral Way Properties, Ltd. v. Roses*, 565 So. 2d 372 (Fla. 3d DCA 1990), similarly involved an attempted enforcement of a purported oral agreement "notwithstanding the absence of a written lease agreement." *Id.* at 373-74.

Wharfside at Boca Point, Inc. v. Superior Bank, 741 So. 2d 542 (Fla. 4th DCA 1999), also lends no assistance to DK Arena. Unlike the matter before this

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Court, *Wharfside* involved a situation where a written real estate contract had expired, and long after the expiration, the purchaser sought to acquire the property for a reduced price which was never agreed to by the seller. The parties entered into a contract for the sale of real estate on December 30, 1992, with a scheduled closing date of March 30, 1993. *Id.* at 543. The deal did not close, and while the parties "began discussions about extending the closing date," they did not reach "an agreement for extension." *Id.* The following year, Wharfside discovered that the seller/bank was attempting to sell its interest in the project and made an offer to purchase by letter dated February 4, 1994. *Id.* The court found that *Wharfside's* correspondence of February 4, 1994, constituted an offer that did not satisfy the statute of frauds as it was not signed or accepted by the bank. *Id.* at 545. The issue, then, was not a modification of an existing contract, as DK Arena asserts, but the entire lack of a written contract between the parties under the terms alleged by Wharfside. Lack of a written contract renders the doctrine of waiver and estoppel inapplicable to the facts of that case.[7]

In *Eclipse Medical, Inc. v. American Hydro-Surgical Instruments, Inc.*, 262 F.Supp.2d 1334 (S.D. Fla. 1999), DK Arena offers a case that, while interpreting a properly executed contract, does not involve any alleged waiver, i.e., the second

[7] Similarly, where the alleged modification to the written agreement occurred after performance was due under the written agreement, as in *Wharfside* and *Shore Holdings*, *supra*, there could be no detrimental reliance, as discussed *infra*.

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common factor found in the statute of frauds waiver and estoppel cases. The plaintiff did not claim that American Hydro-Surgical Instruments ("AHSI") waived any provision made for its benefit, but rather that AHSI had made inchoate promises that, upon termination of the existing supply contract, it would enter into a new contract with plaintiff on the same terms and that AHSI would continue to do so annually, presumably in perpetuity. *Id.* at 1349-50. The plaintiff's position was contrary to express terms in the written agreement, which was fatal to plaintiff's claims. This decision by the United States District Court for the Southern District of Florida simply does not implicate the doctrine of waiver and estoppel.[8]

[8] DK Arena also cites *W.R. Grace and Co. v. Geodata Serv., Inc.*, 547 So. 2d 919 (Fla. 1989), stating that "this Court refused to enforce alleged oral promises by Defendant that Plaintiff's work would continue beyond the contract's specified duration term because promissory estoppel cannot be used to circumvent the Statute of Frauds." DK Arena's Initial Brief, p. 15 (emphasis in original). DK Arena misreads that decision; this Court set out clearly (in all capital letters) that the issues in that case involve contracts *outside* the statute of frauds. *Id.* at 920 ("CAN THE DOCTRINE OF PROMISSORY ESTOPPEL BE APPLIED TO ENFORCE ORAL PROMISES WHEN NECESSARY TO PREVENT INJUSTICE IN SITUATIONS NOT COVERED BY THE STATUTE OF FRAUDS WHERE A PROMISOR MAKES AFFIRMATIVE REPRESENTATIONS WHICH HE REASONABLY SHOULD EXPECT WOULD INDUCE THE PROMISEE INTO ACTION OR FORBEARANCE OF A SUBSTANTIAL NATURE IF THE PROMISEE CAN SHOW THAT HE DID IN FACT RELY ON THE REPRESENTATIONS TO HIS DETRIMENT?"). Regardless of DK Arena's reading, the contentions in *W.R. Grace*, like those in *Eclipse Medical*, did not involve a claim of waiver.

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With regard to the final factor for application of waiver and estoppel, DK Arena directs this Court to a case where there was no detrimental reliance by the party seeking to avoid the statute of frauds. In *Bradley v. Sanchez*, 943 So. 2d 218 (Fla. 3rd DCA 2006), the parties entered into a written agreement for the sale of real property—a house—on December 4, 2002. *Id.* at 220. The contract was contingent on the plaintiffs securing financing for the loan and required them to apply for such financing within five (5) days of the effective date of the contract. *Id.* When the deal fell through and litigation commenced, the plaintiff purchasers attempted to assert an estoppel claim, arguing that the provision requiring them to apply for financing had been waived by the defendants' real estate agent—an allegation she denied—on December 17, 2002. *Id.* The Third District Court of Appeal, implicitly recognizing the applicability of the doctrine of waiver and estoppel, held that the estoppel theory was not viable since plaintiff received the alleged waiver after the expiration of the time required by the contract, and thus "could not have relied upon her alleged representation to [their] detriment within the operative period", i.e., plaintiffs did not change their position by failing to apply for financing within the requisite time period as the alleged waiver occurred only after the time for fulfilling the contractual duty had expired. *Id.* at 221.

As discussed, *supra*, application of the doctrine of waiver and estoppel is supported by a detrimental change in position in reliance on the oral waiver, a

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requirement *Bradley*. The decision does not involve application of the doctrine of waiver and estoppel, except only to acknowledge it as a viable defense to an offensive invocation of the statute of frauds. *Accord, Shore Holdings,* 842 So. 2d at 1012 (purchaser could not have relied upon alleged oral modification after time for performance under written contract had already expired); *Wharfside,* 741 So. 2d at 545) (after expiration of contract, there can be no cognizable reliance on alleged oral agreement to subsequently convey property).

DK Arena cites to two (2) other cases in support of its arguments, neither of which involve the statute of frauds. *See South Inv. Corp. v. Norton,* 57 So. 2d 1 (Fla. 1952), and *Southeastern Sales and Serv. Co. v. T.T. Watson, Inc.*, 172 So. 2d 239 (Fla. 1965). Dicta in these cases, however, contradicts the proposition argued by DK Arena, i.e., that promissory estoppel, in and of itself, is an automatic bar to oral modifications of contracts.

In *South Inv. Corp.*, this Court noted., that "[t]he authorities recognize and apply the doctrine of promissory estoppel when the promise or representation relates to the *abandonment of existing rights*." *South Inv. Corp.*, 57 So. 2d at 3 (emphasis added).[9] Waiver, as defined by this Court, is "voluntary and intentional

[9] *South Inv. Corp.* is, unsurprisingly, also a case acknowledging the doctrine of waiver and estoppel by this Court: "Since it is undisputed that the appellees had been in default under the leases for over seven years at the time this suit was filed, the leases were certainly not 'in good standing' at the time the option was

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relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right." *Raymond James Fin'l Servs., Inc. v. Saldukas*, 896 So. 2d 707, 711 (Fla. 2005). This Court did not draw the distinction between promissory and equitable estoppel urged by DK Arena when the promise related to waiver of an existing right. *See also Southeastern Sales*, 172 So. 2d at 241 (noting potential limited applicability of promissory estoppel by Supreme Court to abandonment of existing rights).

DK Arena has failed to identify any authorities where the application of promissory estoppel conflicts with the Florida jurisprudence applying the doctrine of waiver and estoppel to prevent unjust and unintended consequences from the blind application of the statute of frauds. In fact, authorities relied upon by DK Arena showed promissory estoppel as potentially applicable to overcome consequences not intended by the statute of frauds, when the promise in question amounts to a waiver of an existing right.

V. THE LOWER COURTS PROPERLY APPLIED AND RECOGNIZED THE DOCTRINE OF WAIVER AND ESTOPPEL TO THE FACTS OF THIS CASE

It is clear that the lower courts properly found that DK Arena was estopped from asserting the statute of frauds as a defense in this matter. Though the courts' rulings could have also included the term "waiver" more prominently, even a facile

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'accepted,' *unless the appellees could affirmatively show a waiver of the forfeiture on the part of the appellant*." *Id.* at 3 (emphasis added).

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reading demonstrates that the appellate court applied the longstanding doctrine of waiver and estoppel in upholding the trial court's ruling.

As explained, waiver and estoppel have been routinely recognized by Florida courts to prevent the unjust application of the statute of frauds where there exists: (1) a written contract signed by all parties; (2) parol waiver of a contractual provision by the party for whose benefit the provision was made; and (3) detrimental reliance by the party whose obligation was waived. There is no question that DK Arena and EB were parties to a written contract, the terms of which were discussed at length by the appellate court. (App. 1).

The appellate court, properly applying the required deferential standard to the findings of the trial court, acknowledged that the parties "agreed to hold the due diligence period 'in abeyance' until they could 'get the joint venture agreement memorialized.'" *Id.* at 319. This finding fulfills the waiver prong of the doctrine. Under Section 10(a) of the contract, as specifically cited in the Fourth DCA's opinion, DK Arena would have been entitled to release of the $1,000,000.00 in deposit money if EB failed to terminate the contract by the end of the due diligence period. It is axiomatic that this provision was made for the benefit of DK Arena—DK Arena, Inc., stood to gain $1,000,000.00 if EB did not cancel the deal by the prescribed time, whereas EB Acquisitions stood to gain nothing other than a duty to pay DK Arena an additional $22,000,000.00 within 30 days or senselessly

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forfeit $1,000,000.00. *See*, e.g., *Forbes*, 70 So. 2d at 371 (holding that vendor is contractual party with authority to waive deposit forfeiture clause). The oral agreement to hold the due diligence period in abeyance resulted in a waiver by DK Arena to claim the $1,000,000.00 deposit on October 4, 2004, as it was clear by the course of dealings between the parties that EB would continue to pursue a deal for the property past that date and would not be terminating the contract. *Id.* at 319-20.

The court then found that EB satisfied the third factor, i.e., "EB changed its position upon the oral agreement to extend the due diligence period—it did not give notice under paragraph 10 of the addendum that it intended to terminate the contract." *Id.* at 322. The opinion makes clear that EB's detrimental reliance on DK Arena's change in position is the basis for the holding that DK Arena is estopped from asserting the statute of frauds. *Id.* ("This is the basis of an estoppel that prevents DK Arena from avoiding the extension to which it agreed."). The Fourth District Court of Appeals did nothing more than apply well-established Florida law to the facts of this case in holding that, in light of DK Arena's waiver of its rights under the contract, it is estopped from asserting the statute of frauds to escape the consequences of its waiver.

The conclusion that the appellate court was merely applying black letter Florida law in its holding is buttressed by the cases cited as support for its decision.

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The court first cited to *Blue Paper, Inc., v. Provost*, 914 So. 2d 1048 (Fla. 4th DCA 2005), a classic waiver opinion wherein the court rejected the plaintiff's attempt to enforce a written contractual provision waived by the seller despite another clause specifically prohibiting oral modifications. *Id.* at 1050.[10]

The court also cited several waiver cases discussed, *supra*, including *Young*, *Affordable Homes*, *United of Omaha* and the New York case styled *Thompson v. Poor*. Each of these cases, as previously noted, specifically apply the doctrine of waiver and estoppel to attempts by parties to enforce contractual provisions affirmatively waived by the parties. While the appellate court only used the term "waiver" once in its opinion, referring to the line of cases instead as "the estoppel cases," this does not undermine the basis for its holding or negate the efficacy of the decisions cited.

DK Arena's framing of the issue before this Court demonstrates a strained reading of the appellate opinion. The appellate court did not apply promissory estoppel to circumvent the statute of frauds, but rather applied the doctrine of waiver to bar DK Arena from using the statute of frauds to create an injustice. The

[10] Speaking to this case, the court stated that: "Even where a written contract prohibits subsequent, unwritten amendments, 'a written contract may be modified by oral agreement if the parties have [1] accepted and [2] acted upon the oral agreement in a manner that would work a fraud on either party to refuse to enforce it.'" *Id.* at 1052 (quoting *W.W. Contracting, Inc. v. Harrison,* 779 So. 2d 528, 529 (Fla. 2d DC 2000)).

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doctrine of waiver and estoppel and the rule announced in *Tanenbaum* are not in conflict in any way; they peacefully coexist, as succinctly described in one treatise:

> Where an agreement is required by the statute of frauds to be in writing, a subsequent modification must also be in writing and cannot be made orally. However if there has been detrimental reliance upon an oral modification there maybe estoppels to rely on the statute of frauds.

8 Fla. Prac., Constr. Law Manual § 6:7 (2010-2011).

DK Arena attempts to engage this Court in an analysis of the character of the waiver itself, i.e., whether it is as to a future act, which is an analysis never undertaken by this Court or any other in any waiver case.[11] In addition to being irrelevant to the application of the doctrine, this Court, as well as the Second District Court of Appeal, have already indicated that "[t]he authorities recognize and apply the doctrine of promissory estoppel when the promise or representation relates to the abandonment of existing rights…." *South Inv. Corp.*, 57 So. 2d at 3; *Southeastern Sales*, 172 So. 2d at 241. In short, this Court has already addressed the purported issue, indicating that promissory estoppel is applicable when the

[11] DK Arena's argument that its agreement to suspend the due diligence period was an unenforceable promise as to a future event is also flawed. At the moment the parties agreed to suspend the due diligence period, the promise existed and reliance upon the promise by EB was contemporaneous. The agreement to hold the due diligence in abeyance was made on the date it was otherwise to expire, with EB's reliance upon the agreed suspension immediate. Consequently, the argument that DK Arena's promise was anything other than in the present tense when made fails under simple analysis.

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promise in question relates to waiver. In waiver cases, there is no operational distinction between promissory and equitable estoppel under Florida law.

VI. DK ARENA BREACHED THE AGREEMENT IRRESPECTIVE OF THE SUSPENSION OF THE DUE DILIGENCE PERIOD

The trial court expressly concluded that DK Arena's breach of the material obligations found in paragraph 14 of the Addendum provided an independent basis supporting the return of the escrow deposit to EB, irrespective of the suspension of the due diligence period. (App. 13 at p. 7). The court ruled that under the circumstances of this case, any failure to tender the escrow deposit to DK Arena, without demand from DK Arena, was at most a non-material breach which did not excuse DK Arena's performance. (*Id.* at pp. 7 – 8 n. 5).

The appellate court left undisturbed these findings and conclusions of the trial court, and thus affirmed them. Neither DK Arena's Jurisdictional Brief, nor its Initial Brief, challenge the determination of an independent breach compelling the release of the deposit back to EB, and thus the issue is not subject to review. *See, e.g., Kelly v. Community Hosp. of the Palm Beaches,* 818 So. 2d 469, 470 n. 1(Fla. 2002)(declining to address issue as beyond that invoking this Court's jurisdiction).

Nonetheless, the record demonstrates that DK Arena continued to owe duties to EB under the Addendum, and that DK Arena had actually breached those duties

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through its duplicitous dealing even prior to the lapse of the *written* due diligence period. Given the record evidence, any action or inaction by EB does not result in a breach on its part. *See*, e.g., *Beefy Trail, Inc. v. Beefy King Intern., Inc.*, 267 So. 2d 853, 857 (Fla. 4th DCA 1972) (failure to perform some minor part of a contractual duty cannot be classified as a material or vital breach); 5 A. Corbin, *Corbin on Contracts*, § 1104 (1964) (A minor breach by one party does not discharge the contractual duty of the other party).

The lower court found that King's failure to attend the October 26, 2004, Town Council meeting constituted a breach of paragraph 14 of the Addendum, which required DK Arena and King to "cooperate with [EB] in obtaining . . . governmental approvals, marketing and promotion." (App. 4, ¶ 14). As Paragraph 14 makes plainly clear, King's agreement to cooperate with EB was a "*material inducement*" for EB to enter into the Agreement. (*Id.*).

At trial, King conceded that his duties under paragraph 14 required him to do everything that was "reasonably asked" of him, including making "personal appearances" to support the project (App. 2, at 41:4-41:20), and DK Arena's general counsel, Lomax, understood that attendance at Town Council meeting was required. King had assured EB's Markey that he would attend the October 26, 2004 Town Council meeting. (*Id.*, at 146:9-146:18). Accordingly, the trial judge

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found, "DK [Arena] and . . . King understood their obligations included attendance at public meetings before the Town Council." (App. 13, at pp. 4-5).

The evidence proved that King's failure to attend the Town Council meeting and, specifically, to counter Commissioner Greene's opposition to the project (who claimed to speak for King), led to the project's doom.[12] Despite being in Palm Beach County that day,[13] King made no effort to have the meeting rescheduled, nor did he advise EB that he would not be attending,[14] leaving EB no ability to counter Commissioner Greene's opposition, including her testimony that King was supporting *another* project.[15]

At no time prior to the October 26, 2004, meeting did DK Arena seek release of the escrow deposit, nor did DK Arena or King inform EB that if the escrow was not released, King would not attend the special meeting. EB never took any action to prevent or resist the release of the escrow deposit prior to October 27, 2004, when it first received DK Arena's demand for release. DK Arena never made a demand on either EB or the escrow agent, and was silent as to the deposit's significance upon King's willingness to fulfill his duties to attend the

[12] (*Id.*, at p. 5; App. 2, at 106:6-106:18; 152:12-152:24; 154:13-154:24; 156:17-156:19).
[13] App. 2, at 37:5-37:7; 88:22-89:13; 152:9-152:11
[14] *Id.*, 89:4-89:9; 91:25-93:16
[15] *Id.*, at 103:19-103:23; 104:7-104:17; 106:5-106:18; EB App. C, at DKA01088.

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October 26, 2004, meeting or otherwise support the project.[16] The failure of the deposit to simply appear in DK Arena's possession was no default by EB. Given this record, King's failure to attend the October 26, 2004, Town Council Meeting was clearly a material breach of his contractual obligations under paragraph 14, thereby entitling EB to the return of its escrow deposit.

Furthermore, DK Arena's double-dealing, as found by the trial court, while under contract with EB constitutes a separate material breach entitling EB to the return of its deposit. App. 13 at p. 7. Contrary to the requirements of paragraph 14 of the Addendum, DK Arena was secretly dealing with other potential buyers for the same property.[17] Prior to the October 26, 2004, Town Council meeting, which King promised EB to attend, King met with Commissioner Greene to pitch another project for the same site--an entertainment complex with a different owner.[18] As a result of King's lobbying for a different project, Commissioner Greene opposed

[16] Paragraph 10 of the Addendum provides that upon the expiration of the due diligence period, the deposit was to be released to DK Arena, but no affirmative action on the part of EB was required for its release. If DK Arena believed the due diligence period had run, and it wanted the deposit released, it was incumbent upon DK Arena to request the funds from either EB or the escrow agent. DK Arena did neither.

[17] App. 13, at pp. 6-7; App. 2, at 103:19-103:23; 107:21-107:22; 110:11-111:5; 157:9-157:25; EB App. C, at DKA01088

[18] EB App. C, at DKA01088; App. 2, at 104:7-106:4.

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EB's project at the October 26, 2004, Town Council meeting, citing the other project touted by King.[19]

Discussion of a competing offer with an influential Commissioner, while still under contract with EB, can hardly be described as using reasonable efforts to support EB's project. Such duplicitous conduct is antithetical to the "cooperation" which was promised in paragraph 14, and amply supports the trial court's finding that DK Arena further breached the Agreement through its behind-the-scenes support for a competing project.[20]

This established evidence must be viewed in the light most favorable to EB, the prevailing party below. *See, e.g.*, *Blue Paper*, 914 So. 2d at 1049. The record emphatically supports the inference and conclusion that DK Arena's duplicitous dealings had taken place prior to even the expiration of the written due diligence period. As a result, even if this Court were to wholly relieve DK Arena of its established promise to suspend the due diligence period upon which EB relied, DK Arena was still first to breach the Agreement, compelling the return of the deposit to EB.

[19] *Id.*., at 103:19-103:23; 104:7-104:17; 157:9-157:25; EB App. C, at DKA01088
[20] App. 13, at pp. 6-7.

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CONCLUSION

EB Acquisitions I, LLC, respectfully requests that this Court affirm the Fourth District's holdings that: (1) DK Arena, Inc., is estopped from asserting the statute of frauds as a defense to its liability; and (2) EB Acquisitions I, LLC, is entitled to return of the $1,000,000.00 deposit as well as attorneys' fees through all appeals.

Respectfully submitted,

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CERTIFICATE OF FONT COMPLIANCE

WE HEREBY CERTIFY that pursuant to Florida Rule of Appellate Procedure 9.210(a), EB Acquisitions I, LLC Response Brief has been printed in Times New Roman with 14-point font.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by regular United States mail this ____ day of January, 2011 to: ALVIN B. DAVIS, ESQ., Squire, Sanders & Dempsey L.L.P., **A**ttorneys for Petitioner, 200 South Biscayne Boulevard, Suite 4000, Miami, Florida 33131-2398.

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