
No. 09-20155

In the
**United States Court of Appeals
For the Fifth Circuit**

Addicks Services, Inc.,
Plaintiff-Appellant,

v.

GGP-Bridgeland, L.P., formerly known as Rouse-Houston, L.P.,
Bridgeland GP, LLC, and Safeco Insurance Company of America,
Defendants-Appellees.

*Appeal from the United States District Court
for the Southern District of Texas, Houston Division
No. 4:06-cv-03478*

Brief of Appellees
**GGP-Bridgeland, L.P., formerly known as Rouse-Houston, L.P., Bridgeland GP,
LLC, and Safeco Insurance Company of America**

Lee A. Collins
Craig D. Dillard
Boyar & Miller, P.C.
4265 San Felipe, Suite 1200
Houston, Texas 77027
Telephone: 713.850.7766

Attorneys for Appellees
GGP-Bridgeland, L.P., formerly known as Rouse-
Houston, L.P.; Bridgeland GP, LLC; Safeco
Insurance Company of America

Oral Argument Requested

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Interested Party	Connection to or Interest in Case
Addicks Services, Inc.	Plaintiff-Appellant
C. Nelson Barfield, Jr. David Norris	Owners of Plaintiff-Appellant
GGP-Bridgeland, L.P., formerly known as Rouse-Houston, L.P.	Defendant-Appellee
Bridgeland GP, LLC	Defendant-Appellee and General Partner of GGP-Bridgeland, L.P.
LP Rouse-Houston, LLC	Limited partner of GGP-Bridgeland, L.P.
Howard Research and Development Corporation	Sole member of Bridgeland GP, LLC and LP Rouse-Houston, LLC
Safeco Insurance Company of America	Defendant-Appellee
Allison J. Snyder Cynthia A. Holub Nancy H. Elliott Porter & Hedges, LLP 1000 Main, 36 th Floor Houston, Texas 77002	Counsel for Plaintiff-Appellant
Lee A. Collins Craig D. Dillard Boyar & Miller, P.C. 4265 San Felipe, Suite 1200 Houston, Texas 77027	Counsel for Defendants-Appellees

/s/ Lee A. Collins _____
Lee A. Collins
Attorney of Record for Appellees

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Defendants-Appellees hereby submit the following corporate disclosures:

GGP-Bridgeland, L.P. f/k/a Rouse-Houston, L.P. is a Maryland limited partnership with its principal office in Chicago, Illinois. **GGP-Bridgeland, L.P. f/k/a Rouse-Houston, L.P.**'s partners are its general partner, **Bridgeland GP, LLC**, a Delaware limited liability company with its principal office in Chicago, Illinois, and its limited partner, **LP Rouse-Houston, LLC**, a Maryland limited liability company with its principal office in Chicago, Illinois.

The only member of both **Bridgeland GP, LLC** and **LP Rouse-Houston, LLC** is **The Howard Research and Development Corporation**. **The Howard Research and Development Corporation** is a corporation incorporated under the laws of the state of Maryland with its principal place of business in Columbia, Maryland, or alternatively, Chicago, Illinois.

Safeco Insurance Company of America is a corporation incorporated under the laws of the state of Washington with its principal place of business in Seattle, Washington.

Addicks Services, Inc. is a Texas corporation with its principal place of business located in Houston, Harris County, Texas.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a) and Fifth Circuit Rule 28.2.3, Appellees believe that oral argument would be helpful in this case.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES	i
CORPORATE DISCLOSURE STATEMENT	ii
STATEMENT REGARDING ORAL ARGUMENT	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
FACTUAL BACKGROUND	2
STANDARD OF REVIEW	6
SUMMARY OF THE ARGUMENT	6
ARGUMENT	9
I. THE DISTRICT COURT CORRECTLY FOUND THAT THE RELEASES ARE NOT AMBIGUOUS.	9
II. THE DISTRICT COURT CORRECTLY FOUND THAT GGP-BRIDGELAND’S CONDUCT DID NOT WAIVE ITS RIGHT TO ENFORCE THE RELEASES.	17
III. THE DISTRICT COURT CORRECTLY FOUND THAT GGP-BRIDGELAND IS NOT ESTOPPED FROM RELYING ON THE RELEASES.	26
CONCLUSION AND PRAYER	31
CERTIFICATE OF COMPLIANCE	33
CERTIFCATE OF SERVICE	34

TABLE OF AUTHORITIES

Cases

<i>Associated Employers Lloyds v. Howard</i> , 294 S.W.2d 706 (1956).....	15
<i>Associated Mechanical Contractors, Inc. v. Martin K. Eby Const. Co., Inc.</i> , 964 F.Supp. 1576 (M.D.Ga. 1997)	23
<i>Coats v. Ruiz</i> , 198 S.W.3d 863 (Tex. App.—Dallas, 2006, no pet.)	10, 16
<i>Coker v. Coker</i> , 650 S.W.2d 391 (Tex. 1983).....	9, 10, 11
<i>Cooper Tire & Rubber Co. v. Farese, Farese & Farese Prof'l Ass'n</i> , 423 F.3d 446 (5 th Cir. 2005)	6
<i>English v. Fischer</i> , 660 S.W.2d 521 (Tex. 1983).....	26
<i>Fasken Land and Minerals, Ltd. v. Occidental Permian Ltd.</i> , 225 S.W.3d 577 (Tex. App.—El Paso 2005, pet. denied).....	27
<i>Gillum, D.O. v. Republic Health Corp.</i> , 778 S.W.2d 558 (Tex. App.—Dallas 1989, no writ).....	26, 28
<i>Global Integrated Bldg. Systems v. Target Logistics, LLC</i> , 2009 WL 259360 (S. D. Tex. Feb. 3, 2009)	28
<i>Green Int'l, Inc. v. Solis</i> . 951 S.W.2d 384 (Tex. 1997).....	21, 25
<i>Industrial Window Corp. v. Federal Ins. Co.</i> , 609 F.Supp.2d 329 (S.D.N.Y. 2009)	23
<i>Kay-R Electric Corp. v. Stone & Webster Construction Co.</i> , 23 F.3d 55 (2d Cir. 1994)	24
<i>Metric Constructors, Inc. v. United States</i> , 314 F.3d 578 (Fed. Cir. 2002)	23

<i>Nat’l Union Fire Ins. Co. of Pittsburgh, PA v. CBI</i> , 907 S.W.2d 517 (Tex. 1995).....	9
<i>Nationwide Mut. Ins. Co. v. Toman</i> , 660 S.W.2d 574 (Tex. App.—San Antonio 1983, no writ).....	10, 15
<i>Navillus Tile, Inc. v. Turner Const. Co.</i> , 770 N.Y.S.2d 3 (N.Y. App. Div. 2003).....	23
<i>Neeley v. Bankers Trust Co. of Texas</i> , 757 F.2d 621 (5th Cir.1985).....	26
<i>Robert E. McKee, Inc. v. City of Atlanta</i> , 431 F. Supp. 1198 (N.D. Ga. 1977).....	23
<i>Stafford v. Allstate Life Ins. Co.</i> , 175 S.W.3d 537 (Tex.App.—Texarkana 2005, no pet.).....	10
<i>Sun Exploration & Prod. Co. v. Benton</i> , 728 S.W.2d 35 (Tex. 1987).....	17
<i>Tenneco, Inc. v. Enter Prods. Co.</i> , 925 S.W.2d 640 (Tex. 1996).....	10
<i>United States of America for the Use and Benefit of F&G Mechanical Corporation v. Manshul Construction Corporation</i> , 1998 WL 849327 (E.D.N.Y. 1998).....	24
<i>Weitzman v. Steinberg</i> , 638 S.W.2d 171 (Tex. App.—Dallas 1982, no writ).....	27
<i>West End Interiors, Ltd. v. Aim Const. & Contr. Corp.</i> , WL 1201389 (S.D.N.Y. 2000).....	23
Statutes	
28 U.S.C. § 636(c).....	6
Rules	
Federal Rule of Appellate Procedure 28(b).....	2, 6

No. 09-20155

**In the United States Court of Appeals
For the Fifth Circuit**

ADDICKS SERVICES, INC.,

Plaintiff-Appellant,

v.

**GGP-BRIDGELAND, L.P., formerly known as Rouse-Houston, L.P.;
BRIDGELAND GP, LLC; SAFECO INSURANCE COMPANY OF AMERICA,**

Defendants-Appellees.

**On appeal from the United States District Court
for the Southern District of Texas, Houston Division
No. 4:06-cv-03478**

BRIEF OF APPELLEES

**TO THE HONORABLE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT:**

DEFENDANTS-APPELLEES GGP-BRIDGELAND, L.P., formerly known as Rouse-Houston, L.P., BRIDGELAND GP, LLC, and SAFECO INSURANCE COMPANY OF AMERICA (hereinafter referred to as “GGP-Bridgeland”) file this Brief of Appellees and request that this Court affirm the District Court’s Judgment Granting Appellees’ Motion for Partial Summary Judgment.

GGP-Bridgeland is dissatisfied with portions of Addicks Services, Inc.’s (“ASI”) statement of facts. Pursuant to Federal Rule of Appellate Procedure 28(b), GGP-Bridgeland submits the following clarifications:

FACTUAL BACKGROUND

ASI was awarded a contract with GGP-Bridgeland to perform clearing, grubbing, soil disposal, excavation, and rough grading on the first phase of its master planned community known as Bridgeland in the summer of 2004. R.1412 at ¶3. The \$4,582,721.79 contract provided for ASI to perform the excavation of 2,052,473 cubic yards of dirt in 150 calendar days. R.1412-13 at ¶¶3-4. GGP-Bridgeland issued ASI notice to proceed on or about August 6, 2004. R.1413 at ¶5; R.1580 at ¶3.d.; R.1694 at 2. Although the 150 calendar days expired on or about January 3, 2005, ASI did not achieve substantial completion on the Bridgeland project until November 30, 2005, nearly eleven months late. R.1413 at ¶5; R.1580 at ¶3.d.; R.1694 at 2. Over the course of the contract, ASI submitted and GGP-Bridgeland certified and paid for an additional \$1,763,503.38 in work pursuant to approved change orders.¹ R.1413 at ¶4. Upon completion of the Bridgeland project, GGP-Bridgeland’s project engineer calculated and certified the total amount of dirt excavated by ASI to be 2,341,877 cubic yards. R.1413 at ¶6.

¹ \$4,582,721.79 was the amount of ASI’s bid for the project.

ASI does not challenge the amount certified, and ASI has been paid in full for the excavation of the dirt. R.1413 at ¶6.

Before even bidding on the project, ASI received copies of, among other items, the contract documents and a copy of the monthly “WAIVER AND RELEASE OF LIEN UPON PROGRESS PAYMENT” (“Waiver & Release”). R.1580 at ¶3.e.; R.1699-1700 at 229:13-230:6. The contract documents and the Waiver & Release were reviewed by ASI’s acting project manager for the Bridgeland project, George Joiner (“Joiner”). R.1580 at ¶3.e.; R. 1700 at 230:3-6. Joiner testified the release language was “pretty much standard.” R.1580 at ¶3.e.; R. 1701 at 231:8-15.

As Joiner testified, each month during the course of the project, ASI, GGP-Bridgeland, and the project engineer completed a written Pay Estimate which documented the current contract amount (including any approved change orders), the dollars of work completed by ASI to date, the retainage withheld by GGP-Bridgeland, previous payments to ASI, and the current progress payment due to ASI. R.1413 at ¶¶7-8; R.1415-16, R.1423-24, R.1431-32, R.1439-40, R.1447-48, R.1455-56, R.1463-64, R.1472-73, R.1482-83, R.1492-93, R.1503-04, R.1514-15, R.1527-28, R.1540-41, R.1553-54. In conjunction with each monthly progress payment, ASI executed a sworn and notarized written Waiver & Release, in which it expressly waived and released:

“its lien and right to claim a lien for labor, services, or materials furnished through [date of Waiver & Release]....[and] **any claim** for damages due to delay, hindrance, interference, acceleration, inefficiencies or extra work, or any other claim of any kind it may have...” R.1413 at ¶¶7-8; R.1415-16, R.1423-24, R.1431-32, R.1439-40, R.1447-48, R.1455-56, R.1463-64, R.1472-73, R.1482-83, R.1492-93, R.1503-04, R.1514-15, R.1527-28, R.1540-41, R.1553-54. (emphasis added).

Joiner acknowledged in his deposition that, except for what was specifically noted on the release, all claims up through the date of the Waiver & Release were being released upon signing. R.1580 at ¶3.e.; R. 1700 at 230:15-22; R.1702-03 at 247:20-248:2.

Indeed, ASI does not dispute that all fifteen (15) of the Waivers & Releases that were executed by C. Nelson Barfield, Jr. (“Barfield”) as owner & President of ASI were authentic, and that Barfield had authority to execute the releases on behalf of ASI. R.1580 at 3.b.; R.1591-1682.² Further, ASI admits paragraph three (3) of each Waiver & Release contained a direction and space for ASI, as the releasor, to list any pending or unresolved claims in order to exclude their value

² See RFA Nos. 1, 32, 63, 94, 125, 156, 187, 218, 249, 280, 311, 342, 373, 404, 435 (true and correct copies of each Waiver & Release); RFA Nos. 2, 33, 64, 95, 126, 157, 188, 219, 250, 281, 312, 343, 374, 405, 436 (each Waiver & Release executed by C. Nelson Barfield, Jr.); *Id.* at RFA Nos. 3, 34, 65, 96, 127, 158, 189, 220, 221, 282, 313, 344, 375, 406, 437 (signature on each Waiver & Release is that of C. Nelson Barfield, Jr.); RFA Nos. 4, 35, 66, 97, 128, 159, 190, 221, 252, 283, 314, 345, 376, 407, 438 (each Waiver & Release executed by C. Nelson Barfield, Jr. in his capacity as President of ASI); and RFA Nos. 5, 36, 67, 98, 129, 160, 191, 222, 253, 284, 315, 346, 377, 408, 439 (C. Nelson Barfield, Jr. had authority to execute each Waiver & Release).

from that month's Waiver & Release. R.1591-1682.³ Although ASI could have used this space to except any unresolved claims, if any, ASI confessed to leaving these lines blank on all fifteen (15) of the Waivers & Releases. R.1591-1682.⁴

The final contract amount, including approved changed orders, totaled \$6,110,752.83 and ASI has been paid this amount in full. R.1414 at ¶11. But despite payments totaling more than six million dollars, ASI filed a lien in the amount of \$2,257,394.97 (37% of the final contract amount), and claims damages of \$2,160,957.00 (35% of the final contract amount) stemming from its alleged mechanic's and materialman's lien rights and breach of contract, quantum meruit, and promissory estoppel claims. *See* Plaintiff's Second Amended Complaint at R.1198-1238. As detailed below, the Waivers & Releases executed by ASI over the course of the Bridgeland project conclusively demonstrate ASI waived and released its claims for and right to claim a lien for labor, services, or materials furnished to GGP-Bridgeland for work performed through November 25, 2005, the date of the last Waiver & Release, including any claim for damages due to delay, hindrance, interference, acceleration, inefficiencies or extra work, or any other claim of any kind it may have. R.1413 at ¶¶7-8; R.1415-16, R.1423-24, R.1431-32, R.1439-40, R.1447-48, R.1455-56, R.1463-64, R.1472-73, R.1482-83, R.1492-

³ *See* RFA Nos. 19, 50, 81, 112, 143, 174, 205, 236, 267, 298, 329, 360, 391, 422, 453 (paragraph three (3) of each Waiver & Release provided blanks for ASI to identify any exceptions to the Waiver & Release contained therein).

⁴ *See* RFA Nos. 20, 51, 82, 113, 144, 175, 206, 237, 268, 299, 330, 361, 392, 423, 454 (ASI did not identify any exceptions on the blanks in paragraph (3) of each Waiver & Release).

93, R.1503-04, R.1514-15, R.1527-28, R.1540-41, R.1553-54. Therefore, the District Court correctly ruled that, summary judgment on all of ASI's claims accrued through November 25, 2005 was proper.⁵

STANDARD OF REVIEW

Pursuant to Federal Rule of Appellate Procedure 28(b), GGP-Bridgeland does not dispute a summary judgment is reviewed *de novo* on appeal. *Cooper Tire & Rubber Co. v. Farese, Farese & Farese Prof'l Ass'n*, 423 F.3d 446, 454 (5th Cir. 2005).

SUMMARY OF THE ARGUMENT

The crux of this appeal is whether the Waivers & Releases executed by ASI are enforceable and, if so, whether ASI may avoid their enforcement based on its claims of ambiguity, waiver and promissory estoppel. The District Court properly determined the Waivers & Releases executed by ASI were enforceable and granted GGP-Bridgeland's Motion for Partial Summary Judgment because: (1) the releases were not ambiguous; (2) GGP-Bridgeland's conduct did not waive its right to enforce the releases; (3) GGP-Bridgeland was not estopped from relying on the releases; and (4) the parties did not make a mutual mistake.

⁵ This case was originally assigned to the Honorable Lynn N. Hughes. Pursuant to 28 U.S.C. § 636(c), the parties consented to have Magistrate Judge Stephen W. Smith conduct "all further proceedings, including trial and judgment." R.666.

ASI contends the District Court erred and improperly granted summary judgment because there were genuine issues of material fact with respect to: (1) ASI's claim the releases were ambiguous; (2) ASI's claim GGP-Bridgeland waived any right to rely on the lien releases; and (3) ASI's claim GGP-Bridgeland was estopped from relying on the lien releases.⁶

First, contrary to ASI's assertions, the Waivers & Releases are not ambiguous. As the District Court properly found, the plain and clear meaning of the language in the Waivers & Releases, which operates to release ASI's "lien and right to claim a lien" and "... any claim for damages due to delay, hindrance, interference, acceleration, inefficiencies or extra work, or any other claim of any kind it may have" related to its "labor, services, or materials furnished through the [date of the Waiver & Release]." R.2460. ASI's interpretation of the Waiver & Release would ignore basic rules of contract construction because, as the District Court correctly noted, ASI's theory would render the releases as nothing more than receipts for payment. R.2462. Moreover, most of ASI's arguments raised in its Brief of Appellant Addicks Services, Inc. ("Brief") are contingent upon this Court's overruling the District Court's findings that the Waivers & Releases are

⁶ In its Response to Defendants' Motion for Partial Summary Judgment, ASI also argued mutual mistake precluded GGP-Bridgeland's motion for partial summary judgment. R.1737-40. ASI's Brief, however, does not argue mutual mistake as a basis for reversal. *See* Brief of Appellant ASI Services, Inc. at 19-20.

unambiguous.⁷ In sum, the plain, clear, and expansive description of the claims released (as well as the specific claims not released) unambiguously shows the parties' intent—namely, ASI released any claim of any kind accrued through November 25, 2005, the date of the last Waiver & Release.

Second, ASI's waiver argument fails to acknowledge that, even though GGP-Bridgeland may have paid previously released claims in connection with a later executed change order, such payments were made only upon securing **another subsequent release** that released the claims related to the change order. Every change order authorized and paid by GGP-Bridgeland was followed by further releases signed by ASI. R.1415-1578. GGP-Bridgeland's conduct in executing change orders to the contract and subsequently obtaining a new Waiver & Release is not inconsistent with enforcement of the releases. Unlike the releases in the cases relied upon by ASI, the releases executed by ASI specifically and unambiguously waived the very claims for which ASI now seeks recovery.

Finally, and contrary to ASI's protestations, the District Court did not ignore GGP-Bridgeland's course of conduct and ASI's promissory estoppel argument. Rather, the District Court looked at the facts and determined the evidence cited by ASI established nothing more than the existence of an ongoing dispute regarding

⁷ ASI also points to the self serving affidavit of Barfield for the proposition that the first time GGP-Bridgeland raised the Waivers & Releases as a defense to payment was in connection with this litigation and thus, ASI alleges that GGP-Bridgeland waived its right to rely on the Waivers & Releases. See R. 1746. Even if true, this simply does not equate with conduct inconsistent with enforcing a known right and is immaterial to the issues on appeal. Indeed, this assertion does not change ASI's understanding of the release language, or the fact that the 15 Waivers & Releases unambiguously released all claims up through November 25, 2005.

ASI's right to additional payments. R.2466. As such, ASI cannot show the requisite promise necessary to support a promissory estoppel claim. In fact, the evidence reflects the monthly waiver and lien releases in dispute are "pretty much standard" in the construction industry and ASI deals with similar releases on every construction project. R.1580 at ¶3.e, R.1701 at 231:8-15. ASI understood—from the very beginning—that all claims not specifically excepted in the space provided on the Waivers & Releases were waived when ASI executed the monthly waivers and lien releases. Genuine issues of material fact do not exist on ASI's claims of ambiguity, waiver and estoppel. This Court should therefore affirm the District Court's granting of summary judgment.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND THAT THE RELEASES ARE NOT AMBIGUOUS.

Deciding whether a release is ambiguous is a question of law for the Court. *Coker v. Coker*, 650 S.W.2d 391, 394 (Tex. 1983). A release is unambiguous if it can be given one certain or definite legal meaning or interpretation. *See Coker*, 650 S.W.2d at 393 ("If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law."). Conversely, a release is only found to be ambiguous if it is amenable to more than one reasonable interpretation. *See Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. CBI*, 907 S.W.2d 517, 520 (Tex.

1995). An ambiguity does not necessarily arise simply because the parties advance different interpretations of the contract's language. *Coats v. Ruiz*, 198 S.W.3d 863, 879 (Tex. App.—Dallas, 2006, no pet.). Rather, an ambiguity only exists if a genuine uncertainty exists on the face of the document as to which of two or more meanings is the proper one. *See Nationwide Mut. Ins. Co. v. Toman*, 660 S.W.2d 574, 576 (Tex. App.—San Antonio 1983, no writ). When the language is susceptible to only one reasonable meaning or construction, the release is unambiguous and the court must ascertain the true intent of the parties from the language printed within the “four corners” of the release. *Id.*; *see also Boales v. Brighton Builders, Inc.*, 29 S.W.3d 159, 167 (Tex. App.—Houston [14 Dist.] 2000, pet. denied) (*citing Coker*, 650 S.W.2d at 391). In other words, the language must be given its plain grammatical meaning, because to rewrite the release “to insert provisions parties could have included or to imply restraints for which they have not bargained” would defeat the parties’ intent. *Stafford v. Allstate Life Ins. Co.*, 175 S.W.3d 537, 541 (Tex.App.—Texarkana 2005, no pet.) (*citing Tenneco, Inc. v. Enter Prods. Co.*, 925 S.W.2d 640, 646 (Tex. 1996); *see also Williams v. Glash*, 789 S.W.2d 261, 264 (Tex. 1990).

Here, the Waivers & Releases are capable of only one certain or definite legal meaning or interpretation, and thus effect must be given to the parties’ intent as expressed therein. R.1413 at ¶¶7-8; R.1415-16, R.1423-24, R.1431-32, R.1439-

40, R.1447-48, R.1455-56, R.1463-64, R.1472-73, R.1482-83, R.1492-93, R.1503-04, R.1514-15, R.1527-28, R.1540-41, R.1553-54; *see also*, *Coker*, 650 S.W.2d at 393. Specifically, the plain and clear meaning of the language in the Waivers & Releases is to release ASI's "lien and right to claim a lien" and "... any claim for damages due to delay, hindrance, interference, acceleration, inefficiencies or extra work, or any other claim of any kind it may have" related to its "labor, services, or materials furnished through the [date of the Waiver & Release]." R.1415-16, R.1423-24, R.1431-32, R.1439-40, R.1447-48, R.1455-56, R.1463-64, R.1472-73, R.1482-83, R.1492-93, R.1503-04, R.1514-15, R.1527-28, R.1540-41, R.1553-54.

Although the Waivers & Releases provided space to list any pending or unresolved claims in order to exclude their value from the monthly progress payments, ASI chose not to note any exceptions on the fifteen (15) Waivers & Releases it executed. R.1591-1682.⁸ If ASI intended to limit the Waivers & Releases, it could have specifically done so; however, having expressly chosen not to do so, ASI cannot now assert an intent that does not exist within the four corners of the document. *Id.*; *see also* *Boales*, 29 S.W.2d at 167 (*citing Coker*, 650 S.W.2d at 391).

⁸ *See* RFA Nos. 19, 50, 81, 112, 143, 174, 205, 236, 267, 298, 329, 360, 391, 422, 453 (paragraph three (3) of each Waiver & Release provided blanks for ASI to identify any exceptions to the Waiver & Release contained therein); and RFA Nos. 20, 51, 82, 113, 144, 175, 206, 237, 268, 299, 330, 361, 392, 423, 454 (ASI did not identify any exceptions on the blanks in paragraph (3) of each Waiver & Release).

ASI relies on the title of the document, “Waiver & Release *Upon* Progress Payment,”⁹ in support of its interpretation that each release covers a claim only to the monthly progress payment itself. ASI’s interpretation is unreasonable and ignores the express language of the body of the release.¹⁰ As the District Court noted, the use of the word “upon” in the title refers to the timing of the release. “Upon” is followed by the words “progress payment” to describe the consideration given in return for the release. R.2461. ASI’s interpretation would ignore these basic rules of contract construction because, as the District Court correctly noted, ASI’s theory would render the release as nothing more than a receipt for payment. R.2462.

ASI also argues, for the first time on appeal, “Work” is a defined term under the Contract, and therefore, the language of the Waivers & Releases does not include extra-contractual work. ASI’s “new” ambiguity theory is equally without merit.

⁹ Emphasis added.

¹⁰ Paragraph 3 of each Waiver & Release states: “...*the payment referenced above, once received, constitutes full and complete payment for all work performed*, and all costs or expenses incurred (including, but not limited to, costs for supervision, field office overhead, home office overhead, interest on capital, profit, and general conditions costs) relative to the work or improvements at the Project as of the date of this Waiver, except for the payment of retainage. *The undersigned hereby specifically waives, quitclaims and releases any claim for damages due to delay, hindrance, interference, acceleration, inefficiencies or extra work, or any other claim of any kind it may have against the Owner, the Developer...as of the date of this Waiver, except as follows: _____.*” (emphasis added).

The Contract defines “Work” as:

Scope of Work. Contractor shall furnish all labor, materials, equipment, supervision and other services to perform the work described in the Drawings and Specifications attached as **Exhibit A**, and any requirements set forth in any other Contract Documents enumerated in Article XIX (hereinafter the “Work”). R.1959.

Article XIX, referenced in the definition, is an integration clause which states:

19.1 **Integration Clause.** This Contract, in conjunction with all exhibits and documents incorporated by reference, represents the entire agreement between the parties and supersedes all prior negotiations, representations or agreements, either oral or written. This Contract may only be amended or modified in writing, as signed by both Contractor and Owner, on Change Order forms approved by Owner.

19.2 **List of Contract Documents.** This Contract includes the following documents, and any other documents incorporated by reference into this Contract...

...
(b) Exhibits to this Agreement;¹¹

...
(k) All Change Orders and written modifications that amend or supplement the Contract Documents pursuant to the Contract Documents;... R.1967.

The Waivers & Releases expressly include extra work in stating the “...undersigned hereby specifically waives, quitclaims and releases any claim for damages due to delay, hindrance, interference, acceleration, inefficiencies **or extra work, or any other claim of any kind it may have against the Owner**...as of the

¹¹ Which includes Exhibit E, the form of the Waivers & Release.

date of this Waiver, except as follows:_____.” See, e.g., R.1415. For these reasons, ASI’s “new” ambiguity theory likewise fails.

Contrary to ASI’s assertions, the Waivers & Releases in this instance contain clear and unambiguous language. In fact, Joiner, ASI’s acting project manager, acknowledged the following in his deposition:

Q In reviewing those release and lien waivers, did you notice that in return for payment, all claims other than those that were expressly accepted under the release and lien waiver were waived?

...

A: Yes.

R.1700 at 230:15-22.

Q: And once again, it was your understanding that in signing this release, all claims up through the date of the release were being released, correct?

...

A: Correct.

R.1702-03 at 247:20-248:2.

Q: Is that pretty standard in the industry?

...

A: Yes.

...

Q: Okay. And that's – that's something that ASI deals with on any project, correct?

A: Correct.

R.1700-01 at 230:23-231:6.

Accordingly, ASI understood that upon executing each Waiver & Release, all claims were being released up through the date of the Waiver & Release. Such testimony, coupled with the fact that Barfield, ASI's owner and President, had authority to and did in fact execute each Waiver & Release conclusively negates any fraud, accident, or mistake defense. R.1580 at 3.b.; R.1591-1682;¹² *see also Associated Employers Lloyds v. Howard*, 294 S.W.2d 706, 708 (1956) (generally speaking, absent proof of mental incapacity a person who signs a contract is presumed to have read and understood the contract, unless he was prevented from doing so by trick or artifice). “It is well-settled that the effect of a written release cannot be avoided on the ground that the releasor was ignorant of, or mistaken as to the contents of the release, or failed to read the same before signing it” in the

¹² See RFA Nos. 1, 32, 63, 94, 125, 156, 187, 218, 249, 280, 311, 342, 373, 404, 435 (true and correct copies of each Waiver & Release); *Id.* at RFA Nos. 2, 33, 64, 95, 126, 157, 188, 219, 250, 281, 312, 343, 374, 405, 436 (each Waiver & Release executed by C. Nelson Barfield, Jr.); RFA Nos. 3, 34, 65, 96, 127, 158, 189, 220, 221, 282, 313, 344, 375, 406, 437 (signature on each Waiver & Release is that of C. Nelson Barfield, Jr.); and RFA Nos. 4, 35, 66, 97, 128, 159, 190, 221, 252, 283, 314, 345, 376, 407, 438 (each Waiver & Release executed by C. Nelson Barfield, Jr. in his capacity as President of ASI); *Id.* at RFA Nos. 5, 36, 67, 98, 129, 160, 191, 222, 253, 284, 315, 346, 377, 408, 439 (C. Nelson Barfield, Jr. had authority to execute each Waiver & Release).

absence of fraud or some other improper influence. *Nationwide*, 660 S.W.2d at 576.

In sum, the plain, clear, and expansive description of the claims released (as well as the specific claims not released) unambiguously shows the parties' intent—namely, ASI released any claim of any kind accrued through November 25, 2005, the date of the last Waiver & Release. *See Coats*, 198 S.W.3d at 880. A plain reading of the language of the Waivers & Releases shows it was intended to apply to all extra work and any and all other claims arising as a consequence of ASI's work on the Bridgeland project as of the date of each Waiver & Release. Accordingly, the District Court properly found that ASI waived and released its claims for and right to claim a lien for labor, services, or materials furnished to GGP-Bridgeland for work performed through November 25, 2005 (the date of the last Waiver & Release), including any claim for damages due to delay, hindrance, interference, acceleration, inefficiencies or extra work, or any other claim of any kind.

Because the clear and unambiguous language of the Waivers & Releases released all of ASI's claims up through November 25, 2005, ASI turns to its contractual "avoidance" defenses of waiver and estoppel in an attempt to avoid the effect of the fifteen (15) Waivers & Release executed by Barfield, its owner and President.

II. THE DISTRICT COURT CORRECTLY FOUND THAT GGP-BRIDGELAND'S CONDUCT DID NOT WAIVE ITS RIGHT TO ENFORCE THE RELEASES.

ASI argues that the execution of change orders during a construction project is conduct inconsistent with enforcing GGP-Bridgeland's right to enforce the Waivers & Releases. These arguments were correctly disregarded by the District Court. R.2463-65.

A. The Change Order Process Does Not Constitute Waiver.

Waiver is an intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right. *Sun Exploration & Prod. Co. v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987). ASI argues GGP-Bridgeland's conduct in paying for "thirty-four" claims for certain extra contractual work after ASI executed some, but not all, of the Waivers & Releases is inconsistent with enforcement of those releases.¹³ As the District Court correctly pointed out even though GGP-Bridgeland may have paid previously released claims in connection with a later executed change order, such payments were made only upon securing another subsequent release that released the claims related to the change order. R.2464.

¹³ ASI exaggerates the number of claims in an attempt to avoid the 15 Waivers & Releases they executed. In reality, 28 of ASI's 34 "extra work" claims are contained in 4 Change Orders (3 were executed on the same day – July 28, 2005, the 4th was executed six days earlier on July 21, 2005). As the District Court correctly noted, change orders, which are common in the construction industry, involve the process of serially modifying the contract and the releases in writing by both ASI and GGP-Bridgeland. *See* R.2464.

For 16 months — from August 2004 through November 2005 — ASI submitted a monthly bill to GGP-Bridgeland for work performed pursuant to the contract during the preceding month, as well as for work covered by approved change orders. On certain occasions, ASI would perform work at GGP-Bridgeland's request before a written change order was issued. Therefore, instances existed where work was actually performed during a month prior to the one in which it was billed pursuant to a subsequent change order. For example, from December 2004 through February 2005, ASI performed extra contractual work of "Additional Pumping" related to pumping the Detention Basin. R.1845-R.1847. On April 20, 2005, ASI requested a change order for this work and sought \$48,250.00 in additional costs related to this work. R.1845. GGP-Bridgeland approved \$4,825.00 of those additional costs. On July 28, 2005 ASI and GGP-Bridgeland executed a change order for \$4,825.00 for the "Additional Pumping." R.1846-47. This change order was "Recommended" and executed by the Engineer, "Approved" and executed by GGP-Bridgeland and "Accepted" and executed by Barfield on August 1, 2005. *Id.*

ASI then submitted Pay Estimate 13 for the Estimate Period of July 29, 2005 – August 25, 2005 totaling \$287,845.80. This amount included an itemization in the amount of \$4,825.00 for change order 12 "Pump Detention Basin". Following

payment of Pay Estimate 13, on August 25, 2005, ASI executed a Waiver & Release which stated, in pertinent part:

The undersigned, in consideration of the sum of \$287,845.80, hereby waives and releases its lien and right to claim a lien for labor, services, or materials furnished through 8-25-05...

...

The undersigned hereby specifically waives, quitclaims and releases any claim for damages due to delay, hindrance, interference, acceleration, inefficiencies or extra work, or any other claim of any kind it may have against the Owner....as of the date of this Waiver, except as follows: _____.

As with the other 14 Waivers & Releases it signed, ASI did not write anything in the space provided on this Waiver & Release. Yet, ASI now seeks to recover the full value of these “Additional Pumping” claims – in this instance the full \$48,250.00 for “Additional Pumping” related to pumping the Detention Basin – despite “Accepting” a lower amount on August 1, 2005 and executing a Waiver & Release related to the claim for payment of \$4,825.00 on August 25, 2005. This example demonstrates that GGP-Bridgeland’s conduct was not inconsistent with enforcing a claimed right and thus, GGP-Bridgeland has not waived its right to enforce the Waivers & Releases. Further, ASI’s attempt to recover the full value of its claims after executing releases and accepting payment for lesser amounts and executing corresponding releases is not supportable.

ASI's "extra work" claims chart attached as Exhibit A to ASI's Brief contain other examples of similar conduct in which ASI submitted a request for payment of one amount, accepted payment of a lower amount, submitted this change on a pay estimate and executed a Waiver & Release – yet now, ASI seeks to obtain the full amount or the original "request for payment."¹⁴

GGP-Bridgeland's conduct in executing change orders to the contract is not inconsistent with enforcement of the Waivers & Releases. As the District Court correctly noted, this conduct actually weighs against finding an intentional waiver by GGP-Bridgeland because every change order and payment from GGP-Bridgeland was followed by further Waivers & Releases signed by ASI. R.2465.

ASI does not dispute that GGP-Bridgeland has not made a single payment following the execution of the final Waivers & Releases on November 25, 2005. Further, GGP-Bridgeland's conduct in executing change orders to the contract followed by obtaining a new Waiver & Release is not inconsistent with enforcement of the releases and it is an important distinction noted by the Texas Supreme Court in *Green Int'l, Inc. v. Solis*.

¹⁴ As another example, on March 9, 2005, ASI sought \$12,867.00 in additional costs related to "Enforcement of TPDES Increase in Lump Sum Unit Price." R.1790.¹⁴ GGP-Bridgeland approved \$2,900.00 of those additional costs. On July 28, 2005, ASI and GGP-Bridgeland executed a change order for \$2,900.00 for the "Additional TPDES." R.1791-93. This change order was "Recommended" and executed by the Engineer, "Approved" and executed by GGP-Bridgeland and "Accepted" and executed by Barfield on July 28, 2005. R.1791-93. Consistent with the release of those claims, GGP-Bridgeland would always obtain a subsequent release immediately following the execution of any change order.

B. *ASI Improperly Construes Green Int'l, Inc. v. Solis.*

ASI relies heavily on *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384 (Tex. 1997) for its argument that GGP-Bridgeland's intentional conduct was inconsistent with claiming the right to enforce the Waivers & Releases. As the District Court correctly held, ASI's expansive reading of *Solis* is unsupported by the Texas Supreme Court's opinion. R.2463. The issue analyzed in *Solis* was how to approach an approved change order for extra work executed months **after** the last waiver and release had been signed. The Texas Supreme Court in *Solis* held the previously executed lien waivers **did not apply to new claims created** by the parties' execution of a change order months **after the release** had been signed. The Texas Supreme Court in *Solis* explained:

“These change orders explicitly revised the contract amount due, and thus, modified the Subcontracts. The **waivers of liens were executed months before these written modifications** were made, and therefore, **the releases cannot apply to these subsequent revisions.**” *Solis*, 951 S.W.2d at 389 (emphasis added).

Except for the work specifically contemplated by the newly executed “change orders,” the Court in *Solis* held the subcontractor waived its remaining claims by executing written contracts releasing those claims (including the subcontractor's delay damages.) ASI improperly attempts to stretch the *Solis* holding in its effort to avoid the effect of the fifteen (15) Waivers & Releases it executed.

Unlike the case in *Solis*, ASI cannot claim any of the change orders for extra work were executed **after** November 25, 2005, which is the date of the last Waiver & Release executed by ASI. In fact, GGP-Bridgeland secured subsequent releases following the execution of **every** change order ASI executed.

ASI is a sophisticated earthwork contractor familiar with executing monthly waivers and releases of lien on construction projects. Barfield executed fifteen (15) Waivers & Releases of lien releasing “**any claim for damages due to delay, hindrance, interference, acceleration, inefficiencies or extra work**, or any other claim of any kind it may have against the Owner.” R.1415-16, R.1423-24, R.1431-32, R.1439-40, R.1447-48, R.1455-56, R.1463-64, R.1472-73, R.1482-83, R.1492-93, R.1503-04, R.1514-15, R.1527-28, R.1540-41, R.1553-54; R.2460. Again, each of these Waivers & Releases of lien provided space for ASI to carve-out and except any claims not being waived by the execution of the release up through the date of the release. *Id.* ASI never carved-out any alleged claims and, thus, waived its claims for damages up through November 25, 2005. *Id.*

ASI also cites to a series of “other courts around the nation considering similar facts” for the proposition that “inconsistent conduct will indeed waive the right to rely on lien releases or strict compliance with contract requirements to bar a contractor’s claims for extra work.” *See* Brief of Appellant ASI Services, Inc. at

25-30. However, ASI overstates the similarity of those cases to the present case because each case involved either: (1) payments made **after** any and all releases were executed; (2) a New York case evaluating a parties failure to comply with a contract provision requiring written documentation of “extra work,” as opposed to a contractor, such as ASI, who executed written documentation releasing specific claims; or (3) ambiguous documents which required an examination of the parties’ conduct to determine their intent.¹⁵

Unlike the cases relied upon by ASI, ASI does not dispute that: (1) GGP-Bridgeland has not made a single payment following the execution of the last Waiver & Release on November 25, 2005; (2) ASI executed each of the Waivers & Releases and, in doing so, specifically chose not to except any of its allegedly unresolved claims in the blank lines provided on the Waivers & Releases; and (3)

¹⁵ See Brief of Appellant ASI Services, Inc. at 25-30 (citing *Robert E. McKee, Inc. v. City of Atlanta*, 431 F. Supp. 1198, 1200 (N.D. Ga. 1977) (involving payments made after the sole release in dispute was executed and after a lawsuit had been filed); *Industrial Window Corp. v. Federal Ins. Co.*, 609 F.Supp.2d 329, 343, (S.D.N.Y. 2009) (addressing the effect of a parties’ failure to comply with a contract provision requiring written documentation of extra work); *Associated Mechanical Contractors, Inc. v. Martin K. Eby Const. Co., Inc.*, 964 F.Supp. 1576, 1581 (M.D. Ga. 1997) (referencing the parties’ conduct to determine their intent surrounding ambiguous release language in pay applications); *West End Interiors, Ltd. v. Aim Const. & Contr. Corp.*, No. 99 CIV. 0199 DFE, 2000 WL 1201389, *2-3 (S.D.N.Y. Aug. 23, 2000) (involving payments made after the execution of multiple ambiguous and “garbled” releases); *Navillus Tile, Inc. v. Turner Const. Co.*, 770 N.Y.S.2d 3, 5 (N.Y. App. Div. 2003) (involving a dozen change orders issued after the date of the last partial release); *Metric Constructors, Inc. v. United States*, 314 F.3d 578, 579 (Fed. Cir. 2002) (involving a document “that was poorly drafted and thus left the parties in a state of legitimate disagreement as to its meaning,” as well as a “substantial payment” made after the date of the release.) *Gilbane Building Co. v. Two Turners Elec. Co.*, No. 14-05-00908-CV, 2007 WL 582252 at *10-11 (Tex. App.—Houston [14 Dist.] 2007 Feb. 27, 2007, pet. denied) (involving a release that did not provide a space for a party to except any outstanding claims in contended were not subject to the release.)

ASI understood that upon executing each Waiver & Release, all claims were being released up through the date of the Waiver & Release.

C. ASI's Interpretation of the Texas Property Code Section 53.152 is Unfounded.

ASI also directs this Court to Section 53.152 of the Texas Property Code for the proposition that the scope of the lien release is limited to “the extent of the indebtedness paid.” *See* Brief of Appellant ASI Services, Inc. at 35-37. ASI does not and cannot cite to any Texas law to support this interpretation of Section 53.152 to mean that parties are not free to contract the terms and scope of a waiver and release. Instead, ASI cites to *United States of America for the Use and Benefit of F&G Mechanical Corporation v. Manshul Construction Corporation*, No. 94 CV 2436 CLP, 1998 WL 849327 (E.D.N.Y. October 01, 1998), an unpublished opinion, for the argument that “this type of lien provision presents a problem to subcontractors where the timing of payments lags behind the actual completion of work.” Yet, as the *Manshul* court points out, a critical distinction exists when a release provides a space for a party to list any outstanding claims that it does not want to be considered subject to the Waiver & Release. 1998 WL 849327, at *9. In *Manshul*, the court distinguished the waiver provision of the release at issue from the language of a form in another case, *Kay-R Electric Corp. v. Stone & Webster Construction Co.*, 23 F.3d 55 (2d Cir. 1994). *Id.*

In *Kay-R Electric*, a case with almost identical facts to the present dispute, the release **contained several blank lines and a provision which allowed the sub-contractor to exclude material furnished, labor performed, or expenses incurred for which written authorization had not been given.** As the Court noted in *Kay-R Electric*:

It was not until December 27, 1990, months after the last requisition form was submitted, that Kay-R informed Stone & Webster of the expenses it claimed to have incurred from the delay-lost hours due to tardy concrete pours, bad weather, delay and disruptions caused by the masonry contractor... **Yet none of these misspent hours were listed in the blank lines on the requisition/release forms** appearing after the phrasing, “Above does not include material furnished, labor performed, or expense incurred for which written authorization has not been given, as follows” and appearing immediately above the language of certification that the requisition form is a true statement of account and a release “from any claim or claims of whatever nature for materials furnished, labor performed, or expense incurred to date which is not included in the above amounts or noted in the space above as provided therefore.” **By so stating, Kay-R manifested (through its President’s signature on the forms) assent to the release and by payment of the requisitions Stone & Webster made the assent mutual.**¹⁶

¹⁶ *Kay-R Electric Corp.*, 23 F.3d at 57-58 (emphasis added). ASI’s Brief also cites to a self serving affidavit of Barfield for the proposition that GGP-Bridgeland only permitted ASI to include on its pay estimates items authorized by GGP-Bridgeland. See Brief of Appellant ASI Services, Inc. at 43 (citing R.7.1747.) Even assuming this were true, as the District Court and the Second Circuit in *Kay-R Electric Corp.* noted – ASI could have, and should have, listed any items it was not waiving or releasing in the Waivers & Releases in the blank lines provided on the release forms. R.2470-71.

As in *Kay-R Electric*, ASI manifested its assent by executing each of the fifteen (15) Waivers & Releases without noting any of the allegedly unresolved claims in the blank lines provided. Because GGP-Bridgeland’s conduct did not support intentional waiver, ASI turns to its next contractual “avoidance” defense – promissory estoppel.

III. THE DISTRICT COURT CORRECTLY FOUND THAT GGP-BRIDGELAND IS NOT ESTOPPED FROM RELYING ON THE RELEASES.

Promissory estoppel requires: (1) a promise, (2) foreseeability of reliance by the promisor, and (3) substantial reliance by the promisee to his detriment. *English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983). If the alleged promise itself is too vague or indefinite, a party cannot prevail on a promissory estoppel theory as a matter of law. *Neeley v. Bankers Trust Co. of Texas*, 757 F.2d 621, 630 n.7 (5th Cir. 1985); *see also Gillum, D.O. v. Republic Health Corp.*, 778 S.W.2d 558, 570 (Tex. App.—Dallas 1989, no writ) (holding summary judgment on promissory estoppel was proper based on the court’s conclusion that no express or implied contract existed because the promises made were too vague and indefinite). In the present case, the vague and indefinite assurances allegedly made by GGP-Bridgeland and relied upon by ASI were not promises and, thus, are legally insufficient to support the doctrine of promissory estoppel.

First, ASI argues that GGP-Bridgeland “repeatedly promised [ASI] that payment for extra work was forthcoming.” *See* Brief of Appellant ASI Services, Inc. at 19. Even if true, however, ASI’s own brief implicitly acknowledges that, at best, what GGP-Bridgeland may have said or done amounts to no more than a series of agreements to agree and, as such, ASI cannot show the requisite promise necessary to support a promissory estoppel claim. *See* Brief of Appellant ASI Services, Inc. at 40 (“To begin with, Bridgeland repeatedly promised it would deal with Addicks’ requests for payment on extra items **at a later date**, as the requested amounts had either **not been approved** for inclusion or the extra work was **not yet complete**.”)(emphasis added). As the District Court noted, “ASI seems to imply that it went out and performed millions of dollars worth of extra work at the job site based on GGP-Bridgeland’s implicit promise to pay for that extra work.” R.2467. Yet, only \$190,605 of its more than \$2 million in alleged damages is based upon extra work items. R.1967. Clearly there is no dispute of material fact that ASI did not continue to work and thereby incur delay costs in reliance upon a promise by GGP-Bridgeland to reimburse ASI for its lost productivity. *Id.*

Because ASI’s claims, at best, constitute an agreement to agree, and because GGP-Bridgeland consistently acted within its rights as provided in the Waivers & Releases, ASI’s promissory estoppel claim must fail. *See Weitzman v. Steinberg*, 638 S.W.2d 171, 176 (Tex. App.—Dallas 1982, no writ) (“Since the agreement

was only an agreement to agree, Weitzman cannot establish an enforceable contract by promissory estoppel where no enforceable contract existed.”); *see also*, e.g., *Fasken Land and Minerals, Ltd. v. Occidental Permian Ltd.*, 225 S.W.3d 577, 594 (Tex. App.—El Paso 2005, pet. denied) (“We simply fail to see how agreeing to the parties’ contract amounts to an inconsistent position with [a] later assertion of [] voting rights under that same contract . . .”).

Second, ASI relies upon a series of voice-mail messages by GGP-Bridgeland’s Project Manager, Patsy Morris, from August through November of 2005 to claim GGP-Bridgeland should be estopped from claiming ASI waived and released its claims for extra work. *See* Brief of Appellant ASI Services, Inc. at 15 (citing to R.2008); *see also* R.2004-13. ASI’s reliance upon this series of phone messages cannot support its theory that GGP-Bridgeland should be estopped from claiming ASI waived and released its claims for extra work. From the outset, it is important to note that all of the phone messages left by Patsy Morris—which, as the District Court noted, are not evidence by themselves of anything more than an ongoing dispute—occurred **prior** to the last November 25, 2005 Waiver & Release executed by ASI. R.2466; R.1553-54. Also, the telephone transcripts of Patsy Morris are, at most, vague and indefinite statements and, as such, cannot support a claim for promissory estoppel. *See Global Integrated Bldg. Systems v. Target Logistics, LLC*, No. H-06-2637, 2009 WL 259360, at *8 (S.D. Tex. Feb. 3, 2009)

(holding promissory estoppel claim cannot rely upon a vague and indefinite representation); *see also Gillum v. Rep. Health Group*, 778 S.W.2d 558, 570 (Tex. App.-Dallas 1989, no writ) (holding promises that “[defendant] would have sufficient funding to upgrade the hospital's equipment care; that the hospital would remain primarily a ‘D.O.’ hospital; that [plaintiff] could continue to make the changes to upgrade the level of health care at the hospital; and that a new hospital facility was to be constructed” were too indefinite and vague to constitute a promissory estoppel claim). Even the facts and arguments raised by ASI demonstrate ASI’s claim of promissory estoppel must fail because there was simply no actionable promise.

Further, neither the phone messages nor payment history reflects any conduct on the part of GGP-Bridgeland that reflects ASI was entitled to additional payments after the execution of the last Waiver & Release. ASI’s understanding as to the effect of each monthly Waiver & Release is explained through the testimony of Joiner, ASI’s project manager. As discussed above, according to Joiner’s own testimony, the monthly Waivers & Releases in dispute are “pretty standard” in the construction industry and ASI deals with similar releases on every construction project. R.1700-01 at 230:23-231:6. ASI understood—from the very beginning—that all claims not specifically excepted in the space provided were waived when

ASI executed the monthly Waivers & Releases. R.1700 at 230:15-22; R.1702-03 at.247:20-248:2.

ASI further understood that upon executing each Waiver & Release — including the November 25, 2005 Waiver & Release — all claims were being released up through the date of the Waiver & Release. R.1700 at 230:15-22; R1702-03 at.247:20-248:2; R1700-01 at 230:23-231:6. Such testimony, coupled with the fact ASI admitted its owner & President, with more than 30 years experience in the industry, understood the Waiver & Release’s effect and demonstrates that any and all claims were released. ASI’s position that “Bridgeland succeeded in inducing [ASI] to perform by repeatedly promising to pay [ASI’s] outstanding claims” is further belied by the fact that, as stated by the District Court, “the record is clear that [ASI] never even submitted a claim specifying an amount for delay and disruption costs until after this lawsuit was filed.” R.2467.

At most, ASI can only point to vague and indefinite assurances which are insufficient to support the doctrine of promissory estoppel. For these reasons, the District Court correctly held ASI cannot avoid summary judgment on such a theory.

CONCLUSION AND PRAYER

ASI cannot raise a genuine issue of material fact because: (1) ASI's claim of ambiguity ignores the plain and clear meaning of the language in the Waivers & Releases; (2) ASI's waiver argument fails because any payments of approved change orders were only made upon securing subsequent Waivers & Releases; and (3) ASI's estoppel claim does not amount to more than an agreement to agree and GGP-Bridgeland consistently acted within its rights as provided in the Waivers & Releases.

ASI understood—from the very beginning—that all claims not specifically excepted in the spaces provided on the Waivers & Releases were waived when ASI executed the monthly Waivers & Releases. Defendants-Appellees GGP-Bridgeland, L.P., formerly known as Rouse-Houston, L.P., Bridgeland GP, LLC and Safeco Insurance Company of America therefore request that the Court affirm the District Court's granting of summary judgment and also request such other and further relief as to which they may be entitled.

Respectfully submitted,

Boyar & Miller, P.C.

/s/ Lee A. Collins

Lee A. Collins

Federal ID: 19221

Texas State Bar No. 00790484

4265 San Felipe, Suite 1200

Houston, Texas 77027

Telephone: (713) 850-7766

Facsimile: (713) 552-1758

ATTORNEYS FOR DEFENDANTS-
APPELLEES GGP-BRIDGELAND, L.P.,
FORMERLY KNOWN AS ROUSE-
HOUSTON, L.P.; BRIDGELAND GP,
LLC; SAFECO INSURANCE COMPANY
OF AMERICA

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this Brief contains 7,626 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: June 29, 2009

/s/ Lee A. Collins _____
Lee A. Collins

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Appellees was filed with the Court via Federal Express and in electronic format, on the 29th day of June, 2009, and two copies of the brief and an electronic copy of the brief were served on all counsel of record, as listed below, via Federal Express on the same date:

Allison J. Snyder
Cynthia A. Holub
Nancy H. Elliott
Porter & Hedges, LLP
1000 Main Street, 36th Floor
Houston, Texas 77002-6336

/s/ Lee A. Collins _____
Lee A. Collins