G052348

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE

ALBERT KANNO,
Plaintiff and Respondent,

v.

MARWIT CAPITAL PARTNERS II, LP and MARWIT PARTNERS, LLC,
Defendants and Appellants.

APPEAL FROM ORANGE COUNTY SUPERIOR COURT
MICHAEL BRENNER, JUDGE • CASE NO. 30-2011-00441894

APPELLANTS' OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION THREE	Court of Appeal Case Number: G052348
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APPELLANT/PETITIONER: Marwit Capital Partners II, LP; Marwit Partners, L RESPONDENT/REAL PARTY IN INTEREST: Albert Kanno	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party (*name*): Marwit Capital Partners II LP; Marwit Partners LL

2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☑ Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest *(Explain):*
(1)	Chris Britt	More than 10% owner in Marwit Partners LLC
(2)	Matt Witte	More than 10% owner in Marwit Partners LLC
(3)		
(4)		
(5)		

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: January 15, 2016

Steven S. Fleischman
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules of Court

Miscellaneous

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APPELLANTS' OPENING BRIEF

INTRODUCTION

The question presented by this appeal is whether a complex written $23.5 million transaction to purchase all of the assets of plaintiff's company—negotiated by Sheppard Mullin for plaintiff and Paul Hastings for defendants and including multiple separate integrated agreements comprising two binders of materials—can be anything other than a fully integrated agreement. Or, as the trial court found, can such a lengthy and comprehensive written agreement be of no consequence and readily contradicted by a supposed oral side agreement? In short, this appeal confronts Samuel Goldwyn's famous maxim that "[o]ral contracts . . . are not

worth the paper they are written on." (*Caro v. Smith* (1997) 59 Cal.App.4th 725, 728 [Fourth Dist., Div. Three]; see also *Phillippe v. Shapell Industries* (1987) 43 Cal.3d 1247, 1269 [same].)

Plaintiff and respondent Albert Kanno owned several companies in Hawaii engaged in the traffic control and sign business. Kanno decided to sell the companies' assets to defendants and appellants Marwit Capital Partners II, L.P. and Marwit Partners, LLC in 2007 for $23.5 million. As part of the deal, Marwit paid Kanno $21 million in cash and provided 250,000 preferred shares in the new company Marwit created to hold the assets purchased in the deal (Traffic Control). At Kanno's request, the Traffic Control shares were issued to Brandy Signs, a company owned by Kanno. As one would expect for any commercial transaction of this magnitude negotiated by large law firms on both sides, the transaction was heavily documented in several written agreements that collectively comprised two binders and which each contain integration clauses. Nowhere in this mountain of paper is there any reference to the alleged oral agreement that is the subject of this case, i.e., an alleged oral promise by Marwit to purchase the stock issued to Brandy Signs for $3.1 million (including interest) within three years. In fact, Kanno's counsel at Sheppard Mullin issued an opinion letter specifically stating that there were no such oral side agreements in this transaction.

Following the severe economic downturn in 2008, Traffic Control went bankrupt, rendering worthless the stock issued to Brandy Signs. Three years after the transaction closed, Kanno filed this lawsuit, alleging that Marwit breached a supposed oral contract

in which Marwit promised to purchase the shares issued to Kanno's company for $3.1 million—a promise that is not documented anywhere in the written agreements or even in a confirming email. Kanno readily admits that the entire purpose of the alleged oral agreement was to avoid paying taxes, in that he was advised that if a stock-repurchase guarantee had been included in the written integrated contracts, that would have triggered immediate tax liability for Kanno.

The jury in this case agreed with Kanno that there was an oral agreement and awarded him $3.1 million in damages. The trial court then held a bench trial and ruled that the oral agreement was valid notwithstanding the parol evidence rule and the integration clauses in the three relevant contracts. In particular, the trial court found that the parol evidence rule was not applicable because Kanno and the Marwit parties were not all signatories to the same agreements that made up the broader transaction.

The trial court's decision should be reversed. First, contrary to the trial court's ruling, one of the three key documents at issue *is* undisputedly signed by all three of the parties to this appeal and, in any event, the other two contracts are binding on the parties pursuant to their terms. Moreover, neither California nor Delaware law (two of the three contracts have Delaware choice of law provisions) requires an identity of the parties in order for the parol evidence rule to apply. Consequently, under the parol evidence rule of Delaware and California, a party cannot prove the existence of an oral agreement that varies or contradicts an integrated written agreement. If the parties had truly agreed to give Kanno a

mandatory right to sell the stock issued to Brandy Signs, that agreement must have been documented in at least one of the many written agreements that made up the transaction. Instead, the written documentation for the transaction is clear that there was no right to sell the stock at issue for any price at any time. Therefore, Kanno's claim for breach of oral contract is barred, as a matter of law, by the parol evidence rule.

Second, Kanno lacks standing to enforce the alleged oral agreement to purchase shares that were issued to Brandy Signs. The trial court held that Kanno had standing to pursue this action even though it was undisputed that the stock at issue was issued to Brandy Signs, rather than to Kanno himself. This ruling effectively allowed Kanno to pierce his own corporate veil in order to obtain standing. Because Kanno never owned the shares at issue (he still does not to this day), he was not a proper plaintiff in this action. To the contrary, Kanno filed this action in his own name, rather than in the name of Brandy Signs, because one of the written agreements signed by Brandy Signs specifically disavows any right of Brandy Signs to sell the shares at any time for any price. Ultimately, Kanno cannot have it both ways. He cannot contend that he is not bound by agreements that Brandy Signs entered into that specifically disavow the alleged oral agreement and yet, at the same time, enforce an alleged oral contract to sell shares issued to Brandy Signs under that same contract.

The judgment in this case should be reversed with directions to enter a new judgment in favor of the Marwit parties.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

A. Kanno sells his business to Marwit in a complex transaction where both parties are represented by large, international law firms. Kanno claims Marwit made an oral promise during the negotiations that contradicts the written deal documents.

Albert Kanno owned Safety Systems Hawaii, Brandy Signs and Maui One Shot, each of which were companies based in Hawaii involved in the sale of traffic and safety equipment.[2] (1 RT 179-182.) Kanno owned 100 percent of all of these companies. (1 RT 182.) Defendant/appellant Marwit Capital Partners II, L.P. is a Delaware limited partnership (1 AA 137 [¶ 2]) whose general partner is defendant/appellant Marwit Partners, LLC, a Delaware limited liability company. (1 AA 138 [¶¶ 3-5].)

Kanno entered into a letter of intent with Marwit Capital dated March 7, 2007 for the sale of assets of Safety Systems Hawaii, Brandy Signs, and Maui One Shot. (1 RT 197-198; 9 AA 2117-2125.) The letter of intent is signed by defendant Chris Britt as the managing partner of Marwit Capital, and by Kanno as the

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[1] The Marwit parties are not challenging any of the jury's findings for lack of substantial evidence. Therefore, this statement of facts is limited to the issues raised on appeal, i.e., the integration clauses and standing.

[2] Attached as an appendix to this brief is a list of the parties and entities involved in this transaction.

president of his companies and as sole shareholder. (9 AA 2125.) The letter of intent states that the assets of Kanno's companies will be purchased by "Safety Systems Acquisition Corporation, or a related entity to be formed by" Marwit Capital. (9 AA 2118.) The letter of intent states in three places that the transaction is subject to a "definitive Purchase and Sale Agreement" to be executed by the parties. (9 AA 2118, 2121 [¶ 10], 2124 [last paragraph].) The letter of intent provided that the purchase price was $23.5 million with $19.5 million paid in cash, $1 million placed into an escrow account and $3 million in the form of Class A preferred stock in the company Marwit forms to hold the assets purchased in the transaction. (9 AA 2119.) The letter of intent stated that the $3 million in Class A Preferred shares would be subject to a three-year mandatory redemption period (i.e., to be purchased within three years) and that the stock portion of the transaction would be structured for tax deferral purposes. (*Ibid.*)

During the negotiations that followed, Kanno and his companies were represented by the law firm of Sheppard Mullin.[3] (4 RT 667-668.) The Marwit parties were represented by the law firm of Paul Hastings, a firm with 19 offices and over 1,100 lawyers. (5 RT 756-757.) Paul Hastings represented both Marwit and Traffic

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[3] "Sheppard Mullin is a full service Global 100 firm handling corporate and technology matters, high stakes litigation and complex financial transactions. From our 15 offices in North America, Europe and Asia, we offer global solutions to our clients around the world, providing seamless representation in multiple jurisdictions." (Sheppard Mullin Fact Sheet <http://goo.gl/1hkUQO> [as of Jan. 11, 2016].)

Control, an entity that Marwit controlled that was formed by Paul Hastings on Marwit's behalf after the March 7, 2007 letter of intent. (5 RT 758-759.)

During the negotiations over a definitive agreement, the parties reached an impasse over the tax treatment for the 250,000 Class A Preferred Shares. Both sides agreed that the transaction could not be structured as set forth in the letter of intent, namely that Kanno could not receive both a right of redemption for the shares and a tax deferral because any re-purchase guarantee triggered an immediate taxable event. (4 RT 674-676, 681; 5 RT 762-764; 7 RT 1415-1418; 9 AA 2119.) As Kanno's attorney for the transaction summarized: "[W]e realized they couldn't have both. Both the redemption feature and the tax deferral. Something had to be adjusted." (4 RT 676.)

Kanno testified that during an "all hands" conference call on or about June 4, 2007, Britt made an oral promise to Kanno that the Marwit parties would purchase the shares within three years for $2.5 million plus 8 percent interest. (2 RT 240-241; see also 4 RT 884; 6 RT 1002, 1072-1073; 7 RT 1156.) Kanno acknowledged that his claimed oral agreement was designed to allow him to avoid paying taxes on the preferred stock at the time of the transaction, although he could not explain why a supposedly binding *oral* promise to purchase shares would not create a taxable event when a *written* promise to purchase shares would. (2 RT 363:16-26.) Britt

denied making any such promise. (5 RT 751-752, 785-786, 815; 6 RT 931, 936-937.)[4]

B. The key transactional documents all contain integration clauses and also contain additional provisions inconsistent with the purported oral contract. Indeed, Kanno's law firm, Sheppard Mullin, wrote a formal opinion letter expressly disavowing any oral agreements in this deal.

The transaction was documented in numerous written agreements which comprised two binders. (4 RT 691:7-12.) Nowhere in any of the documentation for this complex multi-million transaction is there any reference to any oral agreement or any documentation of any $3.1 million stock repurchase agreement with interest. (2 RT 246:10-12; 4 RT 716-717, 724:7-725:16 [Kanno's attorney: "It is not in any of the agreements. It is not in any of the documents."].) Kanno's transactional attorney (formerly with Sheppard Mullin) explained on direct examination why there was no reference to any oral agreement in the written deal documents:

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[4] For purposes of this appeal, the Marwit parties acknowledge that there is substantial evidence of a purported oral agreement. The issues on appeal, therefore, are whether that purported oral agreement is enforceable under the parol evidence rule and whether Kanno has standing to enforce the sale of the stock that was owned by Brandy Signs, not Kanno. These are both legal questions analyzed in the context of the facts found by the jury.

Q: Is there a reference to the oral agreement that you've told us about in any of the written documents, to your memory?

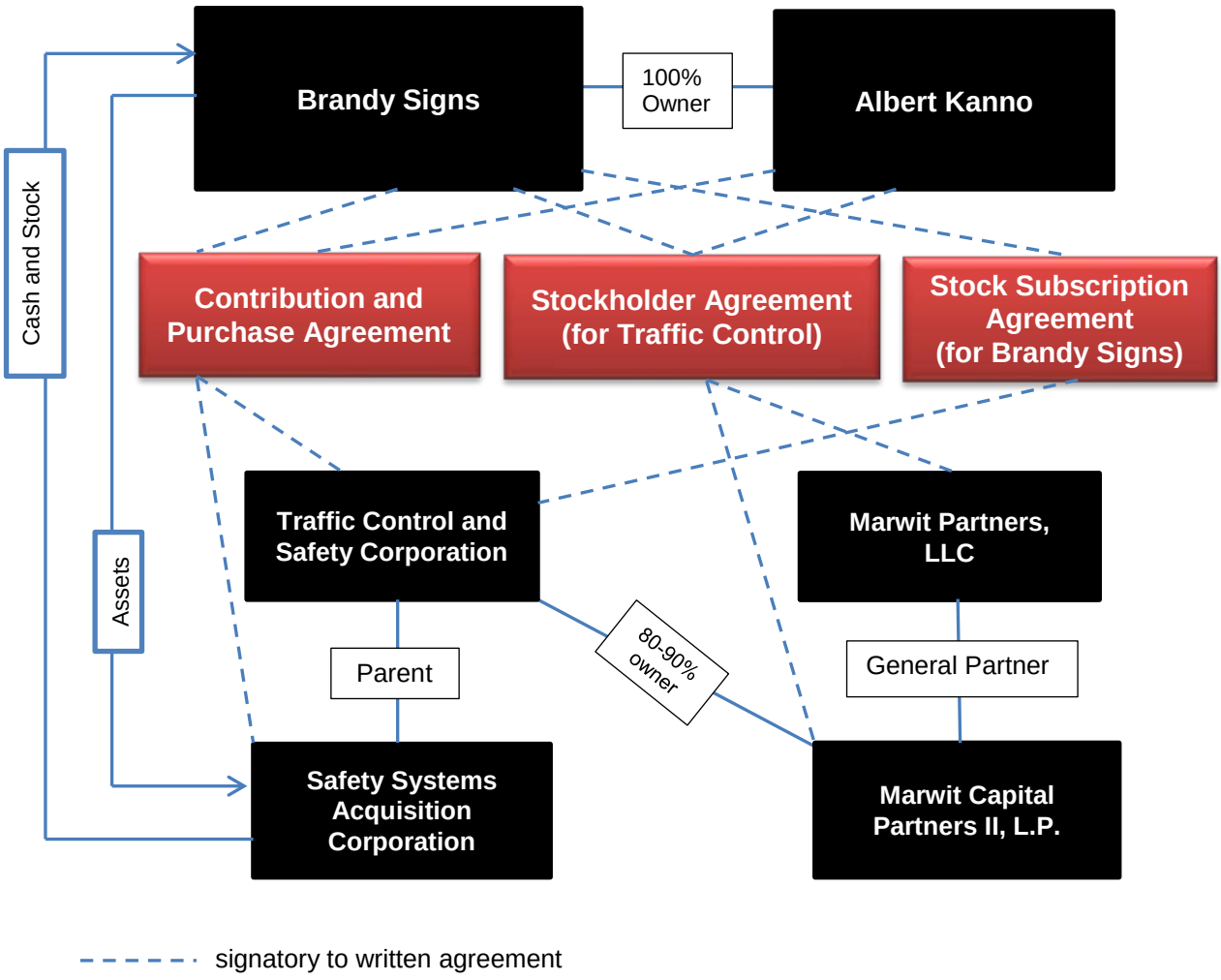
A: Not to my memory or knowledge.

Q: And why is that?

A: Because it was oral.

(4 RT 693:8-13.) Kanno's transactional counsel also explained that there was no reference to the claimed oral agreement in any of the emails leading to the transaction because she was never asked by Kanno to document it in a confirming email. (4 RT 716, 717-718, 721.)

The transaction closed on June 29, 2007. (4 RT 672:14-18.) The following chart summarizes this complicated transaction:



The key written documents regarding the transaction are summarized as follows:

Contribution and Purchase Agreement: By this 50-plus page written agreement (plus 62 pages of exhibits and schedules), Kanno individually, and his companies (Brandy Signs, Safety Systems Hawaii, One Shot) agreed to the sale of their assets to Safety Systems (the Marwit-created subsidiary of the Marwit-created Traffic Control) in exchange for $23.5 million (subject to adjustments). (9 AA 2126-2245.) The $23.5 million was broken out as follows: (1) $21 million cash; (2) 250,000 shares of Traffic Control

Series A Preferred Stock and 51,724 of common stock issued to Brandy Signs; and (3) another $1,633,910 in cash to Brandy Signs. (9 AA 2129 [§ 1.2].) This document contains an integration clause stating that it supersedes "all prior arrangements or understandings with respect thereto" (§ 8.3) and a California choice of law provision (§ 8.7). (9 AA 2169-2170.) The Contribution and Purchase Agreement is signed by Britt on behalf of Safety Systems and Traffic Control and by Kanno individually and on behalf of Safety Systems Hawaii, Brandy Signs, One Shot and as trustee of a family trust. (9 AA 2173-2175.) Nothing in the Contribution and Purchase Agreement references any right by Kanno or Brandy Signs to sell the shares in Traffic Control at any time for any price. (9 AA 2126-2183.)

Stock Subscription Agreement for Brandy Signs: This 8-page document is the agreement by which Brandy Signs obtained the 250,000 shares of Traffic Control Series A Preferred Stock and 51,724 shares of common stock specified in the Contribution and Purchase Agreement. (9 AA 2246-2253.)[5] Paragraph B.2 of the Stock Subscription Agreement states in relevant part:

> Investor is aware that Investor's purchase of the Shares is a speculative, risky and illiquid investment and will

[5] Paragraph A of the Stock Subscription Agreement contains a typographical error indicating that Brandy Signs was obtaining 2.5 million Class A shares. (9 AA 2246.) The number of shares at issue has never been in dispute and Kanno's second amended complaint admits that there were 250,000 Class A shares at issue. (1 AA 139 [¶ 14].) Moreover, the per-share value was never at issue since Kanno's position was that Marwit agreed to pay $2.5 million for all of the shares regardless of their value.

> require Investor's capital to be invested for an indefinite period of time, *possibly without return. It has never been guaranteed or warranted by the Company's management, or any person connected with or acting on the Company's behalf, that Investor will be able to sell or liquidate the Shares in any specified period of time or that there will be any profit to be realized as a result of this investment*.

(9 AA 2246 [¶ 2], emphasis added.) The Stock Subscription Agreement contains an integration clause stating that the agreement constitutes "the entire agreement between the parties pertaining to its subject matter and supersedes all prior written or oral agreements and understandings of the parties relating to the subject matter of this Agreement." (9 AA 2249 [¶ 5].) The Stock Subscription Agreement also contains a Delaware choice of law provision and provides that it shall be binding on the parties and their respective heirs, personal representatives, successors and assigns. (9 AA 2250 [¶¶ 6-7].) Nothing in the Stock Subscription Agreement references any purported right by Kanno to be able to sell Brandy Signs's shares for $2.5 million or any amount. (9 AA 2246-2253.) To the contrary, section B.2 provides exactly the opposite. (9 AA 2246.) The Stock Subscription Agreement is signed by Traffic Control and by Kanno, on behalf of Brandy Signs. (9 AA 2251-2253.)

Stockholder Agreement: The Stockholder Agreement for Traffic Control is a 20-plus page agreement. (9 AA 2254-2282.) The Stockholder Agreement recites that Kanno and Brandy Signs (defined as the "Seller") are purchasing 250,000 shares of Traffic Control Series A Preferred Stock and that Kanno, Brandy Signs and

others are purchasing common stock.[6] (9 AA 2255, 2280.) Recital A in the Stockholder Agreement references the Contribution and Purchase Agreement. (9 AA 2255.) Articles II-IV of the Stockholder Agreement contain various restrictions, discussed below, on the sale and transfer of stock. (9 AA 2259-2262.) The Stockholder Agreement provides that it is binding on the parties' successors and assigns (§ 10.2) and contains a Delaware choice of law provision (§ 10.3). (9 AA 2269.) Exhibit A reflects that Brandy Signs has 250,000 shares of Series A Preferred Stock and 51,724 shares of common stock. (9 AA 2280.) Marwit Capital has 693,000 shares of Series B Preferred Stock (93 percent) and 700,000 shares (81 percent) of common stock. (*Ibid*.) The remaining shares of stock are held by non-party co-investors. (*Ibid*.) The Stockholder Agreement is signed by, among others, Kanno as the Seller (i.e., individually and on behalf of Brandy Signs), Kanno individually, and by Britt as the managing partner of Marwit Partners, the general partner of Marwit Capital. (9 AA 2271-2273, 2277, 2279.) Again, nothing in the Stockholder Agreement references Kanno's purported right to sell Brandy Signs's shares in Traffic Control. (9 AA 2254-2282.)

Sheppard Mullin opinion letter: Section 5.1(m) of the Contribution and Purchase Agreement requires Kanno and his companies to obtain an opinion letter from their counsel, Sheppard Mullin. (9 AA 2158-2159.) Sheppard Mullin signed and sent such an opinion letter dated June 29, 2007 addressed to Safety Systems

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[6] Contractual recitals are conclusively presumed true as between the parties to a written agreement and their successors in interest. (Evid. Code, § 622.)

"c/o Marwit Capital, LLC." (4 RT 695-696; 9 AA 2283-2291.) The opinion letter states in part:

> *We also assumed that there are no extrinsic agreements or understandings among the parties to the Transaction Documents* that would modify or interpret the terms of the Transaction Documents or the respective rights or obligations of the parties thereunder.

(9 AA 2284 [last sentence, first full paragraph], emphasis added.) "Transaction Documents" are defined to include the Contribution and Purchase Agreement. (9 AA 2283 [second paragraph].) Kanno *personally verified* the Sheppard Mullin opinion letter in his individual capacity. (9 AA 2290-2291.) The introduction to the opinion letter states that it is based on the "current actual knowledge of" certain Sheppard Mullin attorneys including Brette Simon, who testified at trial that there in fact was an oral agreement notwithstanding the opinion letter. (9 AA 2284.)

When asked about the above-quoted provision of the introduction to the opinion letter at trial stating that there are no such oral agreements, Simon took the position that the letter was technically accurate because Marwit was not a party to the Contribution and Purchase Agreement. (4 RT 697-698.) Simon did not explain why Marwit could not rely on the opinion letter when it was addressed "c/o Marwit Capital, LLC" or why it would matter who was a party to the Contribution and Purchase Agreement when the opinion letter addressed whether there were *any* side oral agreements to "the Transaction documents," not simply one of the documents. (*Ibid*.)

Simon also relied on paragraph 9 of the opinion letter in which she disavowed that Sheppard Mullin was giving any opinion regarding oral agreements. (4 RT 699-700.) However, the language providing that there are no oral agreements appears in the introductory paragraphs to the opinion letter. (9 AA 2284.) The opinion letter goes on to set forth seven specifically lettered paragraphs. (9 AA 2284.) Paragraph 9, however, only qualifies those lettered paragraphs. (9 AA 2285 ["Our opinions set forth in paragraphs (a), (b), (c), (d) and (f) are further qualified by, and subject to, and we render no opinion with respect to, the following. . . . [¶ 9]".) Therefore, paragraph 9 does not qualify the introductory portions of the opinion letter including the express disavowal of any oral agreements.

C. Kanno sues the Marwit parties and Britt, alleging breach of an oral agreement. Marwit files a cross-complaint.

Kanno filed this action on January 19, 2011 against the Marwit parties and Britt alleging claims for breach of oral contract, specific performance and fraud. (1 AA 14-32.) Kanno was the sole plaintiff throughout this case even though, as discussed below, it is undisputed that the stock in dispute was held by Brandy Signs. The issues raised on appeal (integration clauses and standing) were raised by Marwit in connection with demurrers to Kanno's pleadings and in two motions for summary judgment/adjudication that were each denied. (E.g., 1 AA 94-95, 102, 121-124, 168-171.)

The same issues were also raised by motions in limine that were also denied. (E.g., 2 AA 284-288, 450-451; 4 AA 932; 1 RT 85-86.)

The operative pleadings are Kanno's second amended complaint and Marwit's answer and cross-complaint. (1 AA 137-157, 182-204.) Kanno's claim for specific performance in the second amended complaint was dismissed by demurrer. (1 AA 260-261.) Marwit's answer contains 40 affirmative defenses, including the integration clauses (26th defense) and Kanno's lack of standing (8th and 38th defenses) because Kanno was not the holder of the stock at issue. (1 AA 193-204.) Marwit's cross-complaint sought declaratory relief as to various issues, including whether Kanno could enforce the oral agreement even though he never owned the stock at issue (first and second causes of action) and whether the relief sought by Kanno was barred by the integration clauses in the various agreements (fourth and fifth causes of action). (1 AA 182-192.)

D. The jury finds there was an oral agreement. In the subsequent bench trial, the court rejects Marwit's integration and standing arguments as a matter of law.

A jury trial was held on Kanno's claims for breach of oral contract and fraud. The Marwit parties submitted a special jury instruction on the issue of the integration clause that was rejected by the trial court. (4 AA 1062; 9 RT 1558-1559.) The court also rejected special instructions submitted by Kanno related to the issue of standing. (4 AA 1045-1046; 9 RT 1558-1559.) The Marwit parties moved for nonsuit on the issue of standing and the

integration clause in the letter of intent; the nonsuit motion was denied by the trial court. (7 RT 1264-1272.)

The jury found for Kanno on the breach of oral contract claim as to the Marwit parties but found against Kanno as to his claims against Britt. (4 AA 1066-1074.) The jury also found against Kanno on his affirmative claim for fraud against the Marwit parties and Britt and found against the Marwit parties on their affirmative defense of fraud. (4 AA 1070-1071.) The jury awarded Kanno $2.5 million plus 8 percent interest until paid. (4 AA 1068.)

Following the jury's verdict, a dispute arose regarding the resolution of various questions of law and equitable defenses raised in Marwit's answer and cross-complaint, including with respect to the legal effect of the integration clauses and whether Kanno had standing. (10 RT 1828-1833.) The trial court directed the parties to file written briefs on this issue (10 RT 1833-1836), which the parties did. (4 AA 1075-1106.) At a hearing on February 27, 2015, the trial court stated that it agreed with the Marwit parties that the court needed to conduct a second phase of the trial to address these issues.[7] (10 RT 1837-1838.) This ruling makes sense given that there was no need for the trial court to address the legal effect of the integration clauses unless and until the jury found that there was an oral agreement, a factual issue that was hotly disputed.

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[7] Throughout the proceedings related to the second phase of the trial, the Marwit parties acknowledged that the jury's factual finding of the existence of an oral agreement was binding under *Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 159. (E.g., 4 AA 1108:19-26.)

After hearing arguments of counsel, the court ruled against the Marwit parties on the integration clause issue (10 RT 1877; 7 AA 1881) and on the issue of standing (10 RT 1941-1942; 7 AA 1881). Because the Marwit parties requested a statement of decision (10 RT 1839; 7 AA 1861-1862, 1880-1881), the trial court directed Kanno's counsel to prepare one. (10 RT 1944; 7 AA 1882.)

Kanno's counsel submitted a draft statement of decision (7 AA 1883-1893), as to which the Kanno parties filed written objections (7 AA 1897-1904.) At a subsequent hearing on April 24, 2015 with respect to the proposed statement of decision, after hearing arguments of counsel, the trial court directed Kanno's counsel to submit a modified statement of decision. (10 RT 1985-1986.) The trial court then signed the statement of decision on June 4, 2015 in essentially the identical form as submitted by Kanno. (8 AA 2070-2080.) In the statement of decision, the trial court held that the alleged oral agreement was not barred by the integration clauses in the written agreements because there was no single contract signed by Kanno and both of the Marwit parties, even though the Stockholder Agreement for Traffic Control is signed by all parties. (8 AA 2074:17-18; 9 AA 2271-2273.) The court also found that Kanno had standing to bring the claim for breach of oral contract because Kanno and not Brandy Signs was the party to the oral agreement, even though Brandy Signs owned the shares at issue. (8 AA 2079-2080.)

Judgment was entered on June 4, 2015 and the Marwit parties timely filed a notice of appeal from the judgment. (8 AA

2084-2096.) Kanno did not appeal the adverse findings on his fraud claim or his claims against Britt.

STATEMENT OF APPEALABILITY

The judgment is appealable as a final judgment. (Code Civ. Proc., § 904.1, subd. (a)(1).)

STANDARD OF REVIEW

Whether an oral agreement is foreclosed by an integrated written agreement is a question of law reviewed de novo. (*EPA Real Estate Partnership v. Kang* (1992) 12 Cal.App.4th 171, 176 (*EPA Real Estate*); *Wagner v. Glendale Adventist Medical Center* (1989) 216 Cal.App.3d 1379, 1385-1386 (*Wagner*); *Peden v. Gray* (Del., Oct. 14, 2005, 188, 2005) 2005 WL 2622746, at p. *2 [nonpub. opn.], 886 A.2d 1278 [table] (*Peden*).)

Whether Kanno has standing to bring this lawsuit is also a question of law reviewed de novo. (*IBM Personal Pension Plan v. City and County of San Francisco* (2005) 131 Cal.App.4th 1291, 1299 (*IBM Personal Pension Plan*).)

ARGUMENT

I. THE PAROL EVIDENCE RULE AND THE INTEGRATION CLAUSES IN THE VARIOUS CONTRACTS BAR KANNO'S CLAIM FOR BREACH OF ORAL CONTRACT AS A MATTER OF LAW.

A. Delaware law governs the two agreements with Delaware choice of law provisions.

The Stock Subscription Agreement and the Stockholder Agreement contain Delaware choice of law provisions. (9 AA 2250, 2269.) California courts enforce contractual choice of law provisions when there is a reasonable basis for the parties' selection of the foreign state's law and when to do so would not violate a fundamental public policy of the State of California. (*Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459, 466 (*Nedlloyd*).) "California strongly favors enforcement of choice-of-law provisions." (*Harris v. Bingham McCutchen LLP* (2013) 214 Cal.App.4th 1399, 1404.)

The Marwit parties and Traffic Control are all Delaware entities. (1 AA 137-138 [¶¶ 2-3].) Because they are parties to the Stock Subscription Agreement and the Stockholder Agreement, there is a reasonable basis for the selection of Delaware law. "If one of the parties resides in the chosen state, the parties have a reasonable basis for their choice" of that state's law. (*Nedlloyd, supra,* 3 Cal.4th at p. 467, internal quotation marks omitted.)

Application of Delaware's parol evidence rule does not implicate any fundamental public policy of California, particularly in this commercial dispute between a resident of Hawaii (Kanno) and two Delaware companies (the Marwit parties).

Therefore, this court should apply Delaware law to the application of the parol evidence rule to the Stock Subscription Agreement and the Stockholder Agreement, although as discussed below the result is the same whether California or Delaware law is applied.

B. Under the parol evidence rule, a plaintiff cannot prove an oral agreement which varies or contradicts the terms of an integrated agreement.

1. Delaware law

"The parol evidence rule bars 'evidence of additional terms to a written contract, when that contract is a complete integration of the agreement of the parties.' " (*Peden, supra*, 2005 WL 2622746, at p. *2 [¶ 10]; accord, *Husband (P. J. O.) v. Wife (L. O.)* (Del. 1980) 418 A.2d 994, 996 [same].) "[T]he parol evidence rule bars the admission of evidence from outside the contract's four corners to vary or contradict that unambiguous language." (*GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.* (Del. 2012) 36 A.3d 776, 783 (*GMG Capital*); see also *J.A. Moore Const. Co. v. Sussex Associates Ltd. Partnership* (D.Del. 1988) 688 F.Supp. 982, 987 (*J.A. Moore*) [applying Delaware law].)

" 'Where the parties have made a contract and have expressed it in writing to which they both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understanding and negotiations will not be admitted for the purpose of varying or contradicting the writing.' " (*Scott v. Land Lords, Inc.* (Del., Sept. 22, 1992, 34, 1992) 1992 WL 276429, at p. *3 [nonpub. opn.], 616 A.2d 1214 [table]; see also *Taylor v. Jones* (Del.Ch., Dec. 17, 2002, CIV. A. 1498-K) 2002 WL 31926612, at p. *3 [nonpub. opn.] ["The parol evidence rule is a principle of substantive law that prevents the use of extrinsic evidence of an oral agreement to vary a fully integrated agreement that the parties have reduced to writing"]; *Coram Healthcare Corp. v. Aetna U.S. Healthcare, Inc.* (E.D.Pa. 1999) 94 F.Supp.2d 589, 592 [applying Delaware law; "the parol evidence rule renders evidence of prior or contemporaneous agreements, whether written or oral, inadmissible to the extent they are inconsistent with the parties' written, final agreement"]; *VR Partners SRS, LLC v. Staubach Retail Services, Inc.* (Ariz.Ct.App., Jan. 20, 2015, 1 CA-CV 13-0504) 2015 WL 246874, at p. *4 [nonpub. opn.] (*VR Partners*) ["In Delaware, the parol evidence rule prohibits a court from considering evidence of a prior oral agreement to supplement or contradict the terms of a fully integrated writing"].)[8]

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[8] "Unpublished decisions have precedential value in Delaware." (*VR Partners, supra,* 2015 WL 246874, at p. *4, fn. 3; see also *Wisdom Import Sales Co., L.L.C. v. Labatt Brewing Co., Ltd.* (2d Cir. 2003) 339 F.3d 101, 115, fn. 14 [Delaware rules of court permit citation to unpublished opinions].)

2. California law

The California parol evidence rule is codified in subdivision (a) of Code of Civil Procedure section 1856, which reads:

> (a) Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to the terms included therein may not be contradicted by evidence of a prior agreement or of a contemporaneous oral agreement.

(Code Civ. Proc., § 1856, subd. (a); see also Civ. Code, § 1625 ["The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument"].) The parol evidence rule is not merely an evidentiary rule, but is a rule of substantive law. (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 343 (*Casa Herrera*).)

"When the parties to a written contract have agreed to it as an 'integration'—a complete and final embodiment of the terms of an agreement—parol evidence cannot be used to add to or vary its terms." (*Masterson v. Sine* (1968) 68 Cal.2d 222, 225 (*Masterson*).) Under the parol evidence rule, a party cannot introduce evidence that varies or contradicts the terms of a written agreement. (*Wagner, supra,* 216 Cal.App.3d at p. 1385.) When there is an integrated agreement, that writing becomes final and "may not be contradicted by even the most persuasive evidence of collateral agreements. Such evidence is legally irrelevant." (*EPA Real Estate, supra,* 12 Cal.App.4th at p. 175.) "In other words, the law 'presumes a written contract supersedes all prior or contemporaneous oral agreements' [citation] and, where the writing

is integrated, the presumption cannot be overcome." (*Wagner*, at p. 1385.) "*No matter how persuasive the evidence* [of an oral contract]" when an integrated contract exists, evidence of the oral agreement is "legally irrelevant and cannot support a judgment." (*Banco Do Brasil, S. A. v. Latian, Inc.* (1991) 234 Cal.App.3d 973, 1000 (*Banco Do Brasil*), overruled on other grounds by *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169.)

C. The multiple documents in the transaction all contain integration clauses which reflect the integrated nature of the transaction, as would be expected in any commercial transaction of this magnitude.

1. The Stock Subscription Agreement and the Stockholder Agreement are integrated under Delaware law.

"The parol[] evidence rule bars evidence of prior or contemporaneous agreements or negotiations that contradict the terms of an 'integrated,' i.e., complete, writing." (*J.A. Moore, supra*, 688 F.Supp. at p. 987.) Under Delaware law, the existence of an integration clause in a written agreement is "conclusive evidence" that the parties intended the written contract to be "their complete agreement" unless there are "unconscionable or other extraordinary circumstances." (*Ibid.*; accord, *Progressive Intern. Corp. v. E.I. Du Pont de Nemours & Co.* (Del.Ch., July 9, 2002, C.A. 19209) 2002

WL 1558382, at p. *7 [nonpub. opn.] [same]; *Newport Disc, Inc. v. Newport Electronics, Inc.* (Del.Super., Mar. 11, 2013, N12C-10-228 MMJ CCLD) 2013 WL 987936, at p. *4 [nonpub. opn.] [same].)

Here, both the Stock Subscription Agreement and the Stockholder Agreement contain Delaware choice of law provisions and integration clauses. (9 AA 2250, 2269.) The integration clauses both provide that the written agreements constitute the entire agreement between the parties. (9 AA 2249 [¶ 5], 2270 [§ 10.10].) The integration clause in the Stock Subscription Agreement further states that it "supersedes all prior written or oral agreements and understandings of the parties related to the subject matter of this agreement." (9 AA 2249 [¶ 5].) In *J.A. Moore*, the court held that a virtually identical integration clause reflected a fully integrated agreement which barred evidence of a prior oral agreement. (*J.A. Moore, supra,* 688 F.Supp. at pp. 987-988.)

Therefore, the Stock Subscription Agreement and the Stockholder Agreement are integrated contracts under Delaware law.

2. The Contribution and Purchase Agreement is integrated under California law.

Under California law, whether a contract is integrated is a question of law reviewed de novo. (*Wagner, supra*, 216 Cal.App.3d

at p. 1386.)[9] In determining whether a contract is integrated, the court considers whether the contract has an integration clause. (*Wagner*, at p. 1386.) The court may also consider the surrounding circumstances and prior negotiations to determine this issue. (*Ibid.*) The court may consider the purported oral agreement, but only to the extent that it does not contradict the written agreement. (*Ibid.*) That is because " 'it cannot reasonably be presumed that the parties intended to integrate two directly contradictory terms in the same agreement.' " (*Ibid.*)

Consideration of this issue involves two primary policy issues. First, is the assumption that written evidence is more reliable than human memory. (*Banco Do Brasil, supra,* 234 Cal.App.3d at p. 1002.) This factor weighs heavily in favor of the Marwit parties, particularly given that the evidence of whether there was an oral agreement was hotly disputed at trial. (Compare 2 RT 241; 5 RT 884; 6 RT 1002, 1072-1073; 7 RT 1156 [evidence of oral agreement] with 5 RT 751-752, 785-786, 815-816; 6 RT 931, 936-937 [evidence refuting oral agreement].)

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[9] "Whether a contract is integrated is a question of law when the evidence of integration is not in dispute." (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 954.) Here there have never been any disputed facts about the *integration* of the various written agreements and the trial court's statement of decision (drafted by Kanno's counsel) does not purport to resolve any disputed factual issues regarding that issue. Instead, the statement of decision simply recites the trial court's legal conclusion why the parol evidence rule is not a bar to Kanno's claim and acknowledges that the integration clauses in the various agreements are not "meaningless." (8 AA 2071-2076.)

The second factor is the fear of unintentional invention by witnesses in the outcome of the litigation which will mislead the finder of fact. (*Banco Do Brasil, supra*, 234 Cal.App.3d at p. 1002.) This factor again weighs heavily in favor of a finding that the transaction documents are integrated. It was not until nearly three years after the transaction was consummated that Kanno claimed the existence of this oral agreement. (9 AA 2299-2300.) By that time, there had been the severe economic downturn of 2008 and Traffic Control had filed for bankruptcy rendering Brandy Signs's stock worthless. (1 RT 49-51; 3 AA 574:18-21.) Had the value of the Traffic Control stock gone up instead of being rendered worthless, of course Kanno would have disavowed any obligation to sell the stock to Marwit at any below-market price.

The existence of an integration clause in a written agreement is "persuasive, if not controlling" evidence that the parties intended an integrated agreement. (*Banco Do Brasil, supra,* 234 Cal.App.3d at pp. 1002-1003; see also *Thrifty Payless, Inc. v. Mariners Mile Gateway, LLC* (2010) 185 Cal.App.4th 1050, 1061 [Fourth Dist., Div. Three] (*Thrifty Payless*) [holding integration clause in contract means contract is integrated and "extrinsic evidence cannot be used to vary or contradict the instrument's express terms"].) When there is a written integration clause, "[i]t is difficult to imagine how the parties could have more clearly expressed their intent to make the written agreement a full and complete expression of their agreement." (*Banco Do Brasil,* at p. 1003.)

In addition, the court may consider the surrounding circumstances to the transaction to determine if the agreement is

integrated. (*Wagner, supra,* 216 Cal.App.3d at p. 1386.) This is exactly the type of complex commercial transaction where one would expect integrated written contracts. Sophisticated parties were represented by two international law firms which drafted two binders of closing documents. (See 4 RT 667-668; 5 RT 756-757.) A purported $3-plus million "side deal," which represents over 10 percent of the overall size of the transaction, would undoubtedly have been documented in at least one, if not more, of the various written agreements—all of which contain integration clauses. Written contracts provide certainty for complex business transactions and the parol evidence rule protects against post hoc revisionary claims of purported oral agreements. Moreover, the letter of intent states three times that the transaction is subject to a "definitive Purchase and Sale Agreement" to be executed by the parties. (9 AA 2118, 2121 [¶ 10], 2124 [last paragraph].) Thus, the parties clearly contemplated from the inception of the transaction that there would be a definitive written agreement, not an oral one. This is *precisely* the type of case where the court should hold that the written agreements are integrated agreements and that the parol evidence rule applies.

Accordingly, this court should hold that the Contribution and Purchase Agreement is also an integrated contract. (*Thrifty Payless, supra*, 185 Cal.App.4th at p. 1061 [commercial lease fully integrated]; *EPA Real Estate, supra,* 12 Cal.App.4th at pp. 176-177 [real estate agreement held fully integrated]; *Banco Do Brasil, supra,* 234 Cal.App.3d at p. 1007 [alleged oral agreement to extend

further credit to guarantors would have necessarily been included in the written agreement; holding fully integrated agreement].)[10]

3. The trial court's rationale for not enforcing the agreements' integration clauses is contrary to the law.

The trial court's statement of decision did not hold that any of the three key written agreements were not integrated. (8 AA 2072-2076.) Indeed, the trial court recognized that it could not find the integration clauses to be "meaningless." (8 AA 2074:8-12.) Instead, the trial court's rationale was that because there were multiple written agreements executed as part of the same transaction, each written agreement, therefore, contemplated other additional agreements, which could include Kanno's alleged oral contract. (8 AA 2074 [¶ 1].) Under this rationale, any complex transaction, which inevitably include multiple agreements as this one did, would lose the protection of the parol evidence rule and would permit the enforcement of contrary oral side agreements. This is not and cannot be the law. The parties here could have entered into one single (and unwieldly) written agreement which would have been two binders long in length. But they should not be required to do so in order to ensure that the entire transaction is integrated. The fact that the parties divided this complex transaction into separate

[10] For the same reasons, the Stockholder Agreement and Stock Subscription Agreement would be deemed integrated under California law if Delaware law were, for some reason, inapplicable.

written agreements which contain integration clauses (which is a common business practice for transactions of this type) does not make the transaction any less integrated. Three separate integrated agreements for the same transaction are just as integrated as if they were combined into a single integrated agreement.

Indeed, the Restatement defines an integrated agreement as "a writing *or writings* constituting a final expression of one or more terms of an agreement." (Rest.2d Contracts, § 209, subd. (1), emphasis added.) Thus, the fact that this complex transaction was documented in multiple written agreements does not make it any less integrated. Therefore, this court should hold that each of the agreements are integrated.

D. Kanno's claimed oral agreement is contrary to the terms of various agreements.

1. The claimed oral contract is inconsistent with the Stockholder Agreement because it purports to convert Marwit's optional right of first refusal to purchase Brandy Signs's shares into a mandatory contractual obligation to do so at a pre-determined set price. The purported oral agreement is therefore barred by the parol evidence rule.

Under Delaware law, when there is an integrated agreement, a party cannot prove the existence of an alleged oral contract which varies or contradicts the integrated agreement. (*GMG Capital, supra,* 36 A.3d at p. 783; *J.A. Moore, supra,* 688 F.Supp. at pp. 987-988; *Scott, supra*, 1992 WL 276429, at p. *3.)

Article 4.1 of the Stockholder Agreement provides that the transfer of any shares contrary to the provisions of the agreement "shall be null and void." (9 AA 2262.) Article 4.2 provides for certain permitted transfers, but none of the permitted transfers allows for a sale of stock from Brandy Signs to Marwit.[11] (9 AA 2262.) Under Article II of the Stockholder Agreement, therefore,

[11] Under section 4.2, Brandy Signs was permitted to transfer its shares to Kanno. (9 AA 2262.) Kanno, however, never transferred the shares (10 RT 1933:9-1934:21), apparently to try to avoid the consequences of the provisions of the Stock Subscription Agreement as discussed in the next section.

any such transfer of shares has to comply with Articles II and III. (9 AA 2259-2260.) Under Articles 2.1 and 2.2, if Brandy Signs wanted to sell its shares it had to give appropriate notice and Marwit had an unfettered right of first refusal to purchase the shares at a negotiated price. (*Ibid*.) But Marwit's right to exercise its right of first refusal was discretionary, not mandatory. This is made clear by Article 3.1, which refers to scenarios in which Marwit has declined to exercise its right of first refusal. (9 AA 2260-2261.) Moreover, if Marwit declined to exercise its right of first refusal, then Kanno/Brandy Signs had to offer the shares to the other shareholders under Articles 3.1-3.6. (9 AA 2260-2262.) Again, this provision is inconsistent with a purported mandatory obligation by Marwit to purchase the shares held by Kanno/Brandy Signs at a pre-determined set price. Certainly, if there were any limitations or modifications to Marwit's unrestricted right of first refusal, one would naturally expect that they would appear in that agreement.

The trial court's statement of decision held that the oral agreement was not barred by the integration clause in the Stockholder Agreement because the oral agreement simply "establish[ed] an outside performance date and purchase price for the [Traffic Control] stock." (8 AA 2075:8-9.) This is incorrect. The oral agreement did not merely establish a performance date and a purchase price. It converted Marwit's *optional* right of first refusal (included in the written contract) into a *mandatory* obligation to purchase the stock (contrary to the written contract), and converted Marwit's ability to negotiate the price as set forth in the written contract into an obligation to purchase the stock at a wildly inflated

pre-determined price in a manner contrary to the written contract. Accordingly, the purported oral agreement is contradictory to the provisions of the Stockholder Agreement.

Kanno's claim is barred by the Delaware Supreme Court's decision in *ev3, Inc. v. Lesh* (Del. 2014) 114 A.3d 527, 537-538 (*ev3*), as revised April 20, 2015. In *ev3*, a group of former shareholders in a corporation sued the company that purchased the corporation. (*Id.* at p. 528.) The former shareholders claimed that the purchasing corporation violated a term in a non-binding letter of intent which purportedly required the purchasing corporation to commit to certain funding. (*Ibid.*) However, the later-executed and integrated written merger agreement only required the purchasing corporation to exercise its " 'sole discretion [in] good faith' " to determine whether to commit to the funding. (*Ibid.*) The former shareholders prevailed in the trial court. The Delaware Supreme Court reversed holding that under the parol evidence rule the written, integrated merger agreement controlled over the earlier agreement. (*Id.* at pp. 537-538; see also *J.A. Moore, supra,* 688 F.Supp. at pp. 987-988; *Scott, supra,* 1992 WL 276429, at p. *3.) Because the provision of the letter of intent relied on by the former shareholders was inconsistent with the merger agreement, the latter controlled as a matter of law and the earlier agreement "has no force or effect." (*ev3*, at p. 538.) In reaching its holding, the Delaware Supreme Court reiterated the strong policy in the State of Delaware to "ensure freedom of contract and promote clarity in the law in order to facilitate commerce" and that the state " 'prides itself on having commercial laws that are efficient.' " (*Id.* at p. 529, fn. 3.)

The trial court here refused to apply the parol evidence rule purportedly because not all of the parties were signatories to the Stockholder Agreement. (8 AA 2074 [¶ 2].) This ruling is also incorrect. The Stockholder Agreement is signed by Kanno individually and by Marwit Partners as general partner of Marwit Capital. (9 AA 2271-2273.) As the general partner of Marwit Capital, Marwit Partners is, of course, liable for all contractual obligations of Marwit Capital. (*In re LJM2 Co-Investment, L.P.* (Del.Ch. 2004) 866 A.2d 762, 772.) Thus, the trial court erred in ruling that all of the parties did not sign this agreement. Moreover, section 10.2 of the Stockholder Agreement provides that it is binding on the parties' successors and assigns, including the transferees of any stock. (9 AA 2269.) Therefore, to the extent that Kanno has standing because Brandy Signs can transfer its shares to Kanno, this agreement is binding on Kanno as transferee and/or assignee. (*Ibid*.)

Accordingly, the judgment should be reversed with directions to enter judgment for the Marwit parties based on the parol evidence rule.

2. The Stock Subscription Agreement specifically disavows any claim that Kanno or Brandy Signs will be able to sell the shares at any time or for any price. Accordingly, the parol evidence rule bars the purported oral agreement.

Paragraph B.2 of the Stock Subscription Agreement states in relevant part:

> Investor is aware that Investor's purchase of the Shares is a speculative, risky and illiquid investment and will require Investor's capital to be invested *for an indefinite period of time, possibly without return. It has never been guaranteed or warranted by the Company's management, or any person connected with or acting on the Company's behalf, that Investor will be able to sell or liquidate the Shares in any specified period of time or that there will be any profit to be realized as a result of this Investment*. Investor has adequate means to provide for its current and expected financial needs and reasonable contingencies, can bear the economic risks (including a complete loss of the purchase price) associated with its purchase of the Shares and has no need for liquidity in this investment.

(9 AA 2246, emphasis added.) Thus, the Stock Subscription Agreement contains an express disavowal of any purported representation regarding the purchase of the shares of stock being issued pursuant to that agreement, including the 250,000 shares of Series A Preferred Stock that is the subject of this lawsuit. Indeed, the Stock Subscription Agreement disavows any promise that the stock can be sold at any time or at any price, fully disclosing that any investment may be rendered worthless. (*Ibid*.)

The trial court held that Kanno's claim was not barred by this provision in the Stock Subscription Agreement because Kanno and Marwit were not parties to this agreement. (8 AA 2074.) This ruling is both legally and factually incorrect. Legally, as discussed in Section E below, the parol evidence rule can be enforced by a non-party to the contract. Factually, the trial court's ruling overlooks paragraph C.7 of the Stock Subscription Agreement, which provides that the agreement "shall be binding upon and inure to the benefit of the parties and their respective heirs, personal representatives, successors and assigns." (9 AA 2250.) Certainly, Kanno, as the president and sole owner of Brandy Signs, is a "representative" of Brandy Signs and is, thus, bound by this agreement. Indeed, Kanno signed the agreement as the president of Brandy Signs. (9 AA 2252.) Who else would be a "representative" of Brandy Signs if not its president and sole shareholder? Moreover, the stock at issue was always owned by Brandy Signs and Kanno repeatedly took the position (successfully) in the trial court that he had standing to bring the claim for the purported sale of the stock because he could transfer the shares to himself at any time. (E.g., 2 AA 557:10-12.) If true, and Kanno had standing on this basis, then he is also a successor and/or assign under paragraph C.7. Indeed, it is a reasonable (and perhaps unmistakable) inference to draw that the only reason Kanno filed this action in his own name (as opposed to bringing the action on behalf of Brandy Signs, which actually owned the stock) was precisely to try to avoid the consequences of this express provision of the Stock Subscription Agreement. Kanno should not be permitted to benefit from such duplicity.

As for the Marwit parties, there was no reason for these parties to be signatories to the Stock Subscription Agreement since that document conveyed stock in Traffic Control to Brandy Signs. In any event, as anticipated by the letter of intent, Marwit Capital created Traffic Control specifically and solely for this transaction to take control of the assets that Marwit purchased from Kanno. (2 RT 569:23-571:2.) Moreover, Marwit was an 80-90 percent shareholder in Traffic Control and under the Stockholder Agreement, Marwit Capital appointed all five members of the original board of directors for Traffic Control. (9 AA 2268 [§ 8.1], 2280.)[12] Thus, Marwit effectively controlled Traffic Control from its inception and should be considered a "representative" of Traffic Control under paragraph C.7 of the Stock Subscription Agreement and enabled to enforce its terms. (Cf. 8 RT 1417:24-1418:13.) As for Marwit Partners, as the general partner of Marwit Capital, a limited partnership, it can control the partnership's actions and, thus, should also be deemed a representative of Traffic Control.

Moreover, whether or not deemed a party to the agreement, the Marwit parties should be able to enforce the Stock Subscription Agreement *against* Kanno, who is undoubtedly a representative, successor or assign under the agreement and, thus, bound by its terms. (*ev3, supra,* 114 A.3d at pp. 528, 537-538 [parol evidence rule enforced against former shareholders in merged corporation].)

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[12] The Traffic Control Board could not exceed seven members with the additional board members chosen by the original five members selected by Marwit. (9 AA 2268 [§ 8.1], 2280.)

Therefore, because the purported oral agreement is directly contrary to the terms of the fully integrated Stock Subscription Agreement, the oral agreement is barred by the parol evidence rule and judgment should be entered for the Marwit parties. (*ev3, supra,* 114 A.3d at pp. 528, 537-538; *J.A. Moore, supra,* 688 F.Supp. at pp. 987-988; *Scott, supra,* 1992 WL 276429, at p. *3.)

3. The claimed oral contract is also inconsistent with the Contribution and Purchase Agreement and the Sheppard Mullin opinion letter. The parol evidence rule therefore bars enforcement of the purported oral agreement.

As this court has explained, under California's version of the parol evidence rule, "extrinsic evidence cannot be used to vary or contradict the instrument's express terms." (*Thrifty Payless, supra,* 185 Cal.App.4th at p. 1061.) "This rule is based on sound logic and policy; when a contract is reduced to writing, it is presumed to contain all of the material terms, and it cannot be reasonably presumed that the parties would intend two contradictory terms to be part of the same agreement." (*Ibid.*; accord, *Hot Rods, LLC v. Northrop Grumman Systems Corporation* (Nov. 6, 2015, G049953) __ Cal.App.4th __ [2015 WL 8057959, at p. *5] [Fourth Dist., Div. Three] [same].)

Here, the purported oral agreement is contrary to the Contribution and Purchase Agreement in at least two respects. First, section 1.2 of the agreement recites the consideration that

Kanno and his companies are receiving as consideration for their assets, including the 250,000 shares of Preferred A Stock. (9 AA 2129.) Nowhere in section 1.2 is there any reference whatsoever to an additional $3.1 million right by Kanno or Brandy Signs (both of whom are signatories to the agreement) to be able to sell their shares to Marwit. (*Ibid*.) Under California law, when there is an integrated agreement, the parties cannot "add to or vary its terms." (*Masterson, supra,* 68 Cal.2d at p. 225; accord, *In re Ins. Installment Fee Cases* (2012) 211 Cal.App.4th 1395, 1413.) If there was an additional $3.1 million consideration flowing to Kanno and/or Brandy Signs (especially since this is a significant taxable event), one would fully expect to see it included in section 1.2 along with the other consideration for the transaction.

Second, section 5.2(m) of the Contribution and Purchase Agreement requires Kanno and his companies to deliver an opinion letter from Sheppard Mullin substantially in a form of an attachment. (9 AA 2156-2159.) The actual opinion letter sent by Sheppard Mullin (c/o Marwit Capital) specifically recites that its attorneys are not aware of any "extrinsic agreements among the parties to the Transaction Documents," which includes the Contribution and Purchase Agreement. (9 AA 2284.) Kanno personally verified the opinion letter (9 AA 2290-2291) and is a signatory to the Contribution and Purchase Agreement (9 AA 2175). Therefore, Kanno should be bound by the provisions of these agreements. (As discussed in Section E below, California no longer prohibits a "stranger" to a contract from enforcing its provisions and the parol evidence rule.)

Therefore, this court should hold that the purported oral agreement is barred by the parol evidence rule under California law and the Contribution and Purchase Agreement. (*Masterson, supra,* 68 Cal.2d at p. 232 [under parol evidence rule, party cannot add to the terms of an integrated agreement]; *Thrifty Payless, supra,* 185 Cal.App.4th at p. 1061 [parol evidence rule bars claim contrary to terms of written agreement]; *Alling v. Universal Manufacturing Corp.* (1992) 5 Cal.App.4th 1412, 1433 ["The parol evidence rule generally prohibits the introduction of any extrinsic evidence, whether oral or written, to vary, alter or add to the terms of an integrated written instrument"].)

E. The trial court erred as a matter of law in refusing to apply the integration clauses under the purported "stranger to a contract" doctrine, which is no longer a defense under Delaware and California law.

The gravamen of the trial court's ruling was that Kanno's claim for breach of an oral contract was not barred by the parol evidence rule because a non-party to a contract cannot enforce the parol evidence rule. (8 AA 2073, citing *Carlson v. Industrial Acc. Com.* (1931) 213 Cal. 287, 290, quoting *Luckie v. Diamond Coal Co.* (1919) 41 Cal.App. 468, 478.) The statement of decision goes on to note purported uncertainty about this issue under the 1978 amendments to Code of Civil Procedure section 1856. (*Ibid.*, citing *Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 608 (*Thomson*).) The statement of decision made the same finding with respect to

Delaware law. (8 AA 2073-2074.) This ruling was incorrect because neither California nor Delaware follow the so-called "stranger to a contract" doctrine as described by the trial court.

At the outset, it is important to note that this issue, even if applicable, does not apply to the analysis regarding the Stockholder Agreement because that agreement is signed by Kanno, individually, and by Marwit Partners as general partner on behalf of Marwit Capital. (9 AA 2271-2273.) Thus, all the parties to this litigation are parties to that agreement and the trial court erred in concluding otherwise.

As it relates to the Contribution and Purchase Agreement, which is governed by California law, the trial court's ruling no longer accurately reflects California law (if it ever did). As explained in Witkin, prior to 1978, Code of Civil Procedure section 1856 limited the application of the parol evidence rule to " 'between the parties and their representatives, or successors in interest.' " (2 Witkin, Cal. Evidence (5th ed. 2012) Documentary Evidence, § 113, p. 254.) This limitation was criticized by commentators "on principle" and deleted by the Law Revision Commission's amendment to Code of Civil Procedure section 1856. (*Id.* § 114, p. 255.) Since that time, all of the cases to have addressed this issue have held that the 1978 amendment deleted the "stranger to a contract" exception to the parol evidence rule. (*Kern County Water Agency v. Belridge Water Storage Dist.* (1993) 18 Cal.App.4th 77, 86 (*Kern County*) [explaining history to 1978 amendment; "We adopt Witkin's interpretation of the statutory amendment. . . . One can only conclude that by eliminating the limitation language, the

Legislature intended to eliminate the limitation"]; *Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337, 350, fn. 8 ["Before 1979, the parol evidence rule did not apply in an action between a contracting party and a stranger to the contract. The Legislature abolished this limitation in 1978 by revising section 1856. Therefore, Fredericks is free to object on parol evidence grounds."].) Federal courts applying California law are in agreement.[13] The one post-1978 case cited by the trial court (8 AA 2073) assumed this change in the law, but did not expressly decide this issue. (*Thomson, supra,* 198 Cal.App.4th at p. 608 ["We will assume that California law permits third parties to invoke the parol evidence rule in the proper context"].)

Post-1978, California courts have permitted non-parties to enforce the parol evidence rule. Thus, for example, in *Kern County* the court held that a water district had standing to enforce the parol evidence rule with respect to an amendment to a water supply

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[13] See *Sussex Financial Enterprises, Inc. v. Bayerische Hypo-Und Vereinsbank AG* (9th Cir. 2011) 460 F.App. 709, 711 [nonpub. opn.] ["The [parol evidence] rule also applies against non-contracting third parties"]; *Roots Ready Made Garments v. Gap Inc.* (N.D.Cal., Aug. 29, 2008, C 07-03363 CRB) 2008 WL 4078437, at pp. *5-7 [nonpub. opn.], affd. *sub nom. Roots Ready Made Garments Co., W.L.L. v. Gap, Inc.* (9th Cir. 2010) 405 F.App. 120 [nonpub. opn.]; *In re Century City Doctors Hosp., LLC* (Bankr. C.D.Cal., Nov. 2, 2011, 2:08-bk-23318-PC) 2011 WL 7637255, at p. *4, fn. 26 [nonpub. opn.] ["California has abolished the so-called " 'Stranger Rule' " as an exception to the parol evidence rule"].

"Although not binding, unpublished federal district court cases are citable as persuasive authority." (*Aleman v. AirTouch Cellular* (2012) 209 Cal.App.4th 556, 576, fn. 8.) Ninth Circuit memorandum decisions issued after January 1, 2007 are citeable pursuant to Ninth Circuit Rule 36-3(b).

contract between it and the state which was incorporated by reference into contracts with other districts. (*Kern County, supra,* 18 Cal.App.4th at pp. 86-87.) Because of the overlapping interests of each district in the other contracts, there was a "sufficient basis for allowing each to rely on the parol evidence rule when the court is asked to interpret provisions in *any* of the contracts." (*Id.* at p. 87, emphasis added.) Here, the Marwit parties unquestionably have a significant interest in the Contribution and Purchase Agreement and they should be able to invoke the parol evidence rule against Kanno.

In this case, there is no reason for this court to create a split of authority on this issue, particularly given that Kanno individually is a party to the Contribution and Purchase Agreement and is claiming a right to sell stock issued to Brandy Signs which is a party to all three agreements. "He who takes the benefits must bear the burden." (Civ. Code, § 3521.)

However, even under pre-1978 California law, the Marwit Parties would still be able to enforce the parol evidence rule against Kanno. Pre-1978 California law allowed the parol evidence rule to be applied to parties to a contract and those in privy with them, including successors in interests and assigns. (See *Jackson v. Donovan* (1963) 215 Cal.App.2d 685, 689-690 ["successor or assign" of party to the contract]; *Penberthy v. Vahl* (1951) 101 Cal.App.2d 1, 4-5 [privy]; *Jegen v. Berger* (1946) 77 Cal.App.2d 1, 8 ["successor or assign of a party to" the contract]; *Lynn v. Herman* (1946) 72 Cal.App.2d 614, 617 [successors in interest].) Here, Kanno is a party to the Contribution and Purchase Agreement and the Marwit

parties have a close and controlling relationship with the signatory to the agreement (Traffic Control), such that they should be able to enforce the integration clause against Kanno. (*Kern County, supra,* 18 Cal.App.4th at pp. 86-87; see 8 RT 1417:24-1418:13.)

Delaware law is substantially similar and permits the enforcement of the integration clauses and other contractual provisions against non-signatories to the contract at issue. For example, in *ev3* the Delaware Supreme Court enforced the parol evidence rule against the plaintiffs, who were former shareholders in a corporation which merged with the defendant. (*ev3, supra,* 114 A.3d at pp. 528, 537-538.) The court did so without any indication that the plaintiffs were personally parties to the merger agreement. (*Ibid.*)[14] In other circumstances, Delaware courts have also enforced contractual provisions against non-signatories when the non-signatory is closely aligned with the signing party or when to do so would be reasonably foreseeable. (See *Ashall Homes Ltd. v. ROK Entertainment Group Inc.* (Del.Ch. 2010) 992 A.2d 1239, 1249 & fn. 51 [non-parties to contract may enforce forum selection clause because they were " 'closely related to one of the signatories such that the non-party's enforcement of the clause is foreseeable by virtue of the relationship between the signatory and the party sought to be bound' "]; *Ishimaru v. Fung* (Del.Ch., Oct. 26, 2005, Civ. A. 929) 2005 WL 2899680, at p. *18 [nonpub. opn.] [enforcing arbitration provision against non-signatory to contract under

[14] The court's opinion refers to the plaintiffs by the name of the corporation in which they formerly owned stock. (*ev3, supra*, 114 A.3d at p. 528.)

doctrine of equitable estoppel]; *Wilcox & Fetzer, Ltd. v. Corbett & Wilcox* (Del.Ch., Aug. 22, 2006, CIV.A.2037-N) 2006 WL 2473665, at p. *5 [nonpub. opn.] [same].) Here, the Marwit parties are closely affiliated with Traffic Control, the signatory to the Stock Contribution Agreement, and it is entirely foreseeable that the Marwit parties would seek to enforce the terms of that provision when sued by Kanno over the very same stock that was delivered to Brandy Signs under that agreement. (See, e.g., 4 RT 672:24-673:4 [referring to Traffic Control being affiliated with Marwit]; 8 RT 1417:24-1418:13 [expert testimony defining what an affiliate means and explaining why Marwit was an affiliate of Traffic Control].)

The one case cited by the trial court to support its holding under Delaware law (8 AA 2074), is a footnote in a California bankruptcy court opinion, *In re Century City Doctors Hosp., LLC* (Bankr. C.D.Cal. 2012) 466 B.R. 1, 15, fn. 39. That case is not to the contrary. All *In re Century City Doctors Hospital* noted is the general rule that "[o]rdinarily" under Delaware law " 'a stranger to a contract acquires no rights thereunder.' " (*Ibid.*) The court then applied that general rule to hold that a bankruptcy trustee steps into the shoes of an unsecured creditor who was deemed a stranger to the contract at issue because the creditor is a " 'third person, not a party to, nor representing a party to, the act.' " (*Ibid.*) This holding has no bearing on this case which involves parties closely affiliated with the contracting parties. Moreover, *In re Century City Doctors Hospital* does not in any way discuss the Delaware authorities cited in the preceding paragraph, which discuss

circumstances in which a non-party may enforce contractual provisions against a signatory.

As noted in Witkin (2 Witkin, Cal. Evidence, *supra*, Documentary Evidence, § 114, p. 255), secondary sources are also generally critical of the "stranger to a contract" exception to the parol evidence rule. (See 6 Corbin on Contracts (Rev. ed. 2010) The Parol Evidence Rule, § 25.24, p. 322 ["Corbin was skeptical of the stranger rule"; the exception should be "thoroughly disapproved of it is used to establish the validity of some oral agreement (or written one) that has been effectively discharged by a subsequent fully integrated writing"].)

Therefore, whether Delaware or California law governs, the integration clauses in all three of the written agreements at issue may be enforced against Kanno.

F. Estoppel is not a defense to the parol evidence rule.

The trial court also ruled that, if it was applicable, the doctrine of estoppel was a defense to the parol evidence rule. (8 AA 2075:20-23.) However, as the trial court acknowledged (8 AA 2075:20.), estoppel is not a defense to the parol evidence rule under California law. (*Casa Herrera, supra,* 32 Cal.4th at p. 346 ["the doctrine of estoppel may preclude the application of the statute of

frauds but has no force against the parol evidence rule"].) Therefore, the judgment cannot be affirmed on that basis.[15]

Nor is estoppel a defense to the parol evidence rule under Delaware law. (*Brandywine Shoppe, Inc. v. State Farm Fire & Cas. Co.* (Del.Super. 1973) 307 A.2d 806, 809 ["As a general rule, the doctrines of estoppel and waiver may not be invoked to make a new contract, or to change radically the terms of the policy to cover additional subject matter"].) In any event, to establish estoppel under Delaware law, "it must appear that the party claiming the

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[15] This case provides the court with an opportunity to comment on the practice of counsel submitting proposed statements of decisions to a trial court which include legal holdings which were neither briefed by the parties nor ruled on by the trial court. Here, the trial court's parol evidence ruling was based solely on the identity of the parties to the various agreements. (10 RT 1877.) Although the issue of estoppel as a defense to the parol evidence rule was never briefed by the parties, Kanno's proposed statement of decision included that issue as a basis for the court's ruling. (8 AA 2058:20-22.) After the Marwit parties objected (10 RT 1978:9-13) Kanno's counsel admitted that it was added for the first time in the proposed statement of decision (10 RT 1980:17-19). In federal court, appellate courts give "special scrutiny" to a district court's order which simply adopts a party's proposed findings in such wholesale fashion. (See *Silver v. Executive Car Leasing Long-Term Disability Plan* (9th Cir. 2006) 466 F.3d 727, 733 ["[W]hen a district court 'engage[s] in the regrettable practice of adopting the findings drafted by the prevailing party wholesale'[,] . . . we review the district court's decision 'with special scrutiny' . . . to determine whether its findings were 'clearly erroneous' "]; *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.* (9th Cir. 2005) 431 F.3d 353, 373 [noting past Ninth Circuit criticism of "district courts that 'engaged in the "regrettable practice" of adopting the findings drafted by the prevailing party wholesale' "]; *Norris Industries, Inc. v. Tappan Co.* (9th Cir. 1979) 599 F.2d 908, 909 [holding that findings "prepared and submitted by counsel" are "suspect"].)

estoppel lacked knowledge of and the means of learning the true facts, that he relied upon the conduct of the party against whom the estoppel is claimed, and that he suffered a prejudicial change in his position as a consequence of such reliance." (*Ibid.*) Here, there is no evidence that Kanno either lacked knowledge or the ability to gain any knowledge of any of the facts. This was simply a "he said, he said" dispute over an alleged $3.1 million promise made during a telephone call; Kanno never claimed a lack of knowledge of any facts and, thus, he cannot rely on estoppel under Delaware law. (*Ibid.*)

Therefore, estoppel is not a valid basis to affirm the trial court's judgment.

II. BECAUSE A PARTY CANNOT PIERCE ITS OWN CORPORATE VEIL, KANNO LACKED STANDING TO ENFORCE A PURPORTED AGREEMENT TO PURCHASE STOCK HELD BY BRANDY SIGNS. HOWEVER, IF KANNO DOES HAVE STANDING BECAUSE OF A LOOSER VIEW OF CORPORATE FORMALITIES, THEN KANNO IS PLAINLY BOUND BY THE INTEGRATION CLAUSES.

"Standing is a question of law that we review de novo." (*IBM Personal Pension Plan, supra*, 131 Cal.App.4th at p. 1299.) "In general terms, in order to have standing, the plaintiff must be able to allege injury—that is, some 'invasion of the plaintiff's legally protected interests.' " (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 175.) Thus, Code of Civil Procedure section 367

requires that "[e]very action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." (Code Civ. Proc., § 367.)

Delaware law is similar:

> The requirements for standing to sue in Delaware courts are: [¶] (1) the plaintiff must have suffered an injury in fact-an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of-the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

(*In re Celera Corp. Shareholder Litigation* (Del. 2012) 59 A.3d 418, 429.)

In this case it has never been disputed that the shares at issue were owned by Brandy Signs, not Kanno. (2 RT 474;12-16; 7 RT 1341:20-1342:7.) As Kanno's counsel explained at the hearing on the second phase trial:

> Mr. Taitelman: Briefly, Your Honor.
>
> Again, there was lots of trial testimony about who owned the stock, and *undoubtedly the stock was issued to Brandy Signs*. There was also testimony in exhibit 75 that Brandy had the absolute right to transfer to Mr. Kanno, it was a permitted transfer and both Mr. Britt and Mr. Kanno said in their testimony, and I have cites, that Brandy could transfer that stock to Mr. Kanno. [¶] . . . [¶]
>
> Here's the problem. *He [Kanno] never owned the stock. He could have owned the stock. He had it*

> *transferred to Brandy, which became Jogi's, and he never attempted to transfer the stock to himself*. And counsel went on to argue that for this reason Mr. Kanno did not do what he was supposed to do under the agreement.

(10 RT 1933:9-1934:21, emphasis added.) Although Kanno had the right to transfer the shares from Brandy Signs to himself, he never actually did so. (*Ibid.*; 4 RT 652:1-653:17.)

"The plaintiff in a suit upon a chose in action, to qualify as the real party in interest, must have such a title thereto that a judgment against the defendant will protect the latter from future annoyance or loss." (*Greco v. Oregon Mut. Fire Ins. Co.* (1961) 191 Cal.App.2d 674, 687.) Here, because it is undisputed that Brandy Signs never transferred the shares to Kanno, the Marwit parties are still subject to a second lawsuit by Brandy Signs—a separate corporate entity—to bring a claim to force the sale of the same shares. Thus, Kanno lacks standing to bring a claim for the sale of stock that he never owned.

Moreover, under California law, a party cannot pierce its own corporate veil. "Ignoring a corporation's separate existence is a rare occurrence, particularly where it is the shareholders who seek to pierce its veil, and the courts will do so only 'to prevent a grave injustice.' " (*Seretti v. Superior Nat. Ins. Co.* (1999) 71 Cal.App.4th 920, 931.) Although standing is a procedural issue as to which California law should govern (see *Hollingsworth v. Perry* (2013) 570 U.S.__, [133 S.Ct. 2652, 2667, 186 L.Ed.2d 768] ["standing in federal court is a question of federal law, not state law"]), Delaware law is to the same effect. (See, e.g., *Case Financial, Inc. v. Alden*

(Del.Ch., Aug. 21, 2009, 1184-VCP) 2009 WL 2581873, at p. *4 [nonpub. opn.] ["Essentially, Case Financial seems to be trying to pierce its own corporate veil, which would be unusual to say the least"]; see also *In the Matter of Deist Forest Products, Inc.* (7th Cir. 1988) 850 F.2d 340, 341 [Easterbrook, J.] ["They are in no position to disregard the corporate form now—and [the corporation] may not pierce its own corporate veil"]; *United Continental Tuna Corp. v. U.S.* (9th Cir. 1977) 550 F.2d 569, 573 ["appellant is seeking to pierce its own veil for its own benefit. Appellant has cited no authority and we have found none which allows such a procedure"]; *McQuade v. Draw Tite, Inc.* (Ind. 1995) 659 N.E.2d 1016, 1020 [explaining that there is "little likelihood that equity will ever require us to pierce the corporate veil to protect the same party who erected it"].)

Kanno can't have it both ways. He cannot insist on strict corporate formalities when it comes to enforcement of the parol evidence rule and at the same time disregard corporate entities in order to obtain standing. Throughout the litigation Kanno took the position that he had standing because he could transfer the shares of disputed stock from Brandy Signs (now Joji's Inc.) to himself, an obvious ploy to avoid the consequences of the Stock Subscription Agreement. (E.g., 2 AA 557:10-12.) If Kanno is correct, then he is undoubtedly bound by the agreements that Brandy Signs signed, including the Stock Subscription Agreement that specifically disavows any right that the stock could be sold at any price for any time. (9 AA 2246 [¶ B.2]; see Civ. Code, § 3521 [party must take the burdens with the benefits].) Alternatively, if Kanno is not bound by

the various agreements, including the Stock Subscription Agreement, then he lacks standing to prosecute a claim for the sale of the stock owned by Brandy Signs. Either way, the judgment should be reversed.

CONCLUSION

For the foregoing reasons, the judgment should be reversed with directions to the trial court to enter a new judgment in favor of the Marwit parties on Kanno's complaint and in favor of the Marwit parties on their cross-complaint.

January 15, 2016

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LIST OF PARTIES AND ENTITIES

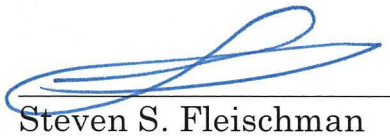
Kanno	Plaintiff/respondent Albert Kanno, a resident of Hawaii. Kanno owned several traffic control and sign companies in Hawaii (Brandy Signs, Safety Systems Hawaii and One Shot Supplies). (1 RT 180-182.)
Brandy Signs	Non-party Brandy Signs, Inc., a company in which Kanno owns 100 percent of the stock. (1 RT 180-182.) Brandy Signs owned the shares of stock in dispute. (3 RT 406.)
Joji's	Non-party, Joji's Inc., the post-transaction name for Brandy Signs, still 100 percent owned by Kanno. (3 RT 406.)
One Shot	Non-party, One Shot Supplies, Inc., another company wholly owned by Kanno. (1 RT 180-182.)
Safety Systems Hawaii	Non-party Safety Systems Hawaii, wholly owned by Kanno. (1 RT 180-181.)
Marwit Capital	Defendant/appellant Marwit Capital Partners II, L.P., a Delaware limited partnership. (1 AA 137 [¶ 2].)
Marwit Partners	Defendant/appellant Marwit Partners, LLC, a Delaware limited liability company and the general partner of Marwit Capital. (1 AA 138 [¶ 5].)

Traffic Control	Traffic Control Safety Corporation, a non-party Delaware corporation formed by Marwit Capital as the parent of Safety Systems, which was the purchasing entity for Kanno's companies. (4 RT 691-692.) Marwit Capital owned approximately 80-90 percent of the stock of Traffic Control and controlled the appointment of its Board of Directors. Brandy Signs held 250,000 shares of Series A preferred stock in Traffic Control. (3 RT 408.) This is the stock that is the subject of the current action.
Safety Systems	Safety Systems Acquisition Corporation, a non-party Delaware corporation which was the entity that acquired the assets of Kanno's companies. (4 RT 691-692.)
Britt	Defendant Chris Britt, a managing member of Marwit Partners. (3 RT 478:18-23.). Judgment was entered in Britt's favor against Kanno, who has not appealed that judgment. (8 AA 2092:16-18.)

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 12,641 words as counted by the Microsoft Word version 2010 word processing program used to generate the brief.

Dated: January 15, 2016



Steven S. Fleischman

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On January 15, 2016, I served true copies of the following document(s) described as **APPELLANTS' OPENING BRIEF** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 15, 2016, at Encino, California.

Linda Blake

SERVICE LIST
Kanno v. Marwit

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