The Los Angeles County Bar Association
Appellate Courts Section Presents

The Argument Clinic

Thursday, February 28, 2019

Program - 4:30 PM - 6:00 PM
California Court of Appeals, Los Angeles
1.5 CLE Hours (INCLUDES 1.5 HRS OF APPELLATE COURTS SPECIALIZATION CREDIT)

Provider #36
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“An oral argument has the potential for magic. It’s the thrill of an intellectual and moral competition. Which side has outprepared the other? One usually does. Which side has it right? Often you can’t really tell and won’t really know for months. But it’s always fascinating to watch and predict.”

Bryan Garner, *The Winning Oral Argument*
Contents Of The Hand-Out

Program Participants

The Case Before The Court

  Appellant’s Opening Brief
  Respondent’s Brief
  Appellant’s Reply Brief
  Tentative Opinion

Some Read-Worthy Articles

  Grimes, Tentatively Speaking: The Value Of
  Appellate Court Tentative Opinions
  Shatz, What to Know When You Don't Know
PROGRAM PARTICIPANTS

THE COURT

THE HONORABLE ARTHUR GILBERT
Justice Gilbert is the Presiding Justice, Court of Appeal, Second District Division 6 and previously served as an Associate Justice of that Division. He was appointed as Associate Justice in 1982. Justice Gilbert served on the Los Angeles Superior Court from 1980 to 1982. He served on the Los Angeles Municipal Court from 1975-1980.

He has received many awards, including LACBA’s Outstanding Jurist Award, 2016; the Los Angeles Criminal Courts Bar Assn’s Journalism Excellence Award, 2015; and the Los Angeles Law Library’s Beacon of Justice Award, 2008.

Justice Gilbert is a frequent speaker and lecturer. He has been the keynote speaker at the California State Bar Appellate Conference, 2011; a speaker in Bernard Witkin Lecture Series, 2010; a Distinguished Speaker, Stephen E. O’Neil Memorial Lecture Series, Loyola Law School, 2005; and a member of the faculty, Program for Serbian Judges, Prague, Czech Rep., "Judging in a Democratic Society," 2001. He is also the author of countless articles, including his monthly column "Under Submission" for the Los Angeles Daily Journal.

Justice Gilbert received his bachelor's degree from UCLA and his LLB from University of California, at Berkeley, Boalt Hall School of Law.

THE HONORABLE ELIZABETH A. GRIMES
Justice Elizabeth A. Grimes was confirmed as an Associate Justice of the Second District Court of Appeal, Division Eight, in April 2010. Formerly, she served on the Los Angeles Superior Court starting in January 1998. Prior to her appointment to the Court of Appeal, from August 2004 through March 2005, Justice Grimes was assigned as a justice pro tempore to Division Four of the Second District Court of Appeal. Before her appointment to the bench, she was a partner at the firm of Gibson, Dunn & Crutcher, engaged in a business litigation practice.

Justice Grimes has served on the Judicial Council Appellate Practice Curriculum Committee; the Second Appellate District Technology and Library Committee and Rules Committee, and is also on the Editorial Board of California Litigation. While on the Superior Court, she was a member of
the Executive Committee and other committees of the LASC, including the Research Attorneys Committee, Media Committee and Bench Bar Committee.

Justice Grimes is a frequent lecturer on legal education topics, having been a panelist for CJA/Rutter Group Employment Litigation Programs and a guest lecturer at Stanford Law School, USC Gould School of Law and Pepperdine University School of Law. She has sponsored numerous educational programs for children; has served on the Board of Directors of Big Brothers Big Sisters of Los Angeles and the Inland Empire; chaired the mothers’ group of the Pinafores of the League for Crippled Children; and served as an AYSO coach and referee.

Justice Grimes received her B.A. (Phi Beta Kappa) from the University of Texas at Austin and her law degree from Stanford Law School, where she was an Associate Editor of the Stanford Law Review.

THE HONORABLE JOHN L. SEGAL
Justice Segal appointed to the Court of Appeal, Second Appellate District, Division Seven in July 2015. Previously, he served on the Los Angeles County Superior Court, from 2000 to 2015. He served as a justice pro tem in the Court of Appeal from January 2010 to June 2010, August 2012 to March 2013, and May 2013 to December 2014. Before his appointment to the bench, he practiced with the law firm of Mitchell, Silberberg and Knupp, where he helped run the Appellate Practice Group.

Justice Segal is involved in state and local bar associations. He has served on the Executive Committee of the Section of Litigation of the Los Angeles County Bar Association, the Board of Governors of the Beverly Hills Bar Association, the Board of Governors of the Los Angeles Chapter of the Association of Business Trial Lawyers, and as an advisor to the Executive Committee of the Litigation Section of the State Bar of California. He is participates in the Los Angeles County Bar Association Litigation Trial Practice Inn of Court and the Beverly Hills Bar Association Southern California Business Litigation Inn of Court. He teaches Remedies at the University of Southern California School of Law

Justice Segal received his Bachelor of Arts degree from Williams College in and his law degree from the University of Southern California School of Law. After law school he served as a law clerk for Judge Robert S. Vance of the United States Court of Appeals for the Eleventh Circuit.
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Steven Fleischman, Esq.
Steven Fleischman is a partner in the firm of Horvitz & Levy.

He is Chair of the Amicus Committee of the Association of Southern California Defense Counsel. He was for ten years a member of the Los Angeles County Bar Association’s Professional Responsibility and Ethics Committee, and he currently serves as an active member of the LACBA Amicus Committee and the LACBA Appellate Courts Section. He is the Vice-Chair—Appeals of the Insurance Law Committee of the California State Bar’s Business Law Section. He is a frequent lecturer on MCLE programs, and the author of multiple published articles.

Mr. Fleischman received his Bachelor of Arts from UCLA and his Juris Doctor from Boston University School of Law. During law school, he served as a judicial extern to the Hon. Robert Devich (Ret.) on the California Court of Appeal. Following law school, he served as law clerk to the Hon. Charles F. Eick, United States Magistrate Judge, in the Central District of California.

Robin Meadow, Esq.
Robin Meadow is a partner in the firm of Greines, Martin, Stein & Richland. Before joining GMSR in 1994, he tried jury cases for over 20 years at a commercial litigation firm, while also handling appeals.

Mr. Meadow is a past President of LACBA (2003-2004), a past President of the California Academy of Appellate Lawyers (2006-2007), a Fellow of the American Academy of Appellate Lawyers, and a past President of the Board of Directors of Public Counsel (1994-1995), among other professional and charitable activities.

He has received numerous awards, including our Section’s Pamela Dunn Appellate Justice Award (2014), and has been named California Lawyer of the Year by California Lawyer Magazine (2016), and Los Angeles appellate Lawyer of the Year by BestLawyers.com (2016).

Mr. Meadow received his bachelor’s degree from the University of California at Berkeley (1968) and his J.D. from Boalt Hall School of Law (1971).
The M.C.

Tyna Thall Orren is a State Bar certified appellate specialist, practicing with the Orren & Orren law firm in Pasadena, California, and is the managing attorney of Public Counsel’s Appellate Self-Help Clinic, located at the Court of Appeal, Second Appellate District in Los Angeles, California.

Ms. Orren is the Articles Coordinator for the Editorial Board of Los Angeles Lawyer, the magazine of the LACBA, a member and past chair of the Appellate Courts Section and a member of LACBA’s Amicus Committee. She is a past chair of the State Bar’s Appellate Law Advisory Commission, Board of Legal Specialization.

She received her B.A. from the University of California at Berkeley, a Ph.D. in English literature and linguistics from the University of Minnesota, and her law degree from Loyola Law School of Los Angeles. She is a former judicial attorney for the Hon. H. Walter Croskey in the Second District of the California Court of Appeal.
IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

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

ALBERT KANNO,
Plaintiff and Respondent,

v.

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Defendants and Appellants.

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

APPELLANTS’ OPENING BRIEF

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MARWIT CAPITAL PARTNERS II, LP AND MARWIT PARTNERS, LLC
1. This form is being submitted on behalf of the following party (name): Marwit Capital Partners II LP; Marwit Partners LLC.

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:

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<th>Full name of interested entity or person</th>
<th>Nature of interest (Explain):</th>
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<tr>
<td>(1) Chris Britt</td>
<td>More than 10% owner in Marwit Partners LLC</td>
</tr>
<tr>
<td>(2) Matt Witte</td>
<td>More than 10% owner in Marwit Partners LLC</td>
</tr>
<tr>
<td>(3)</td>
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[ ] 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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[as of Jan. 11, 2016]

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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

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

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. Kanno owned 100 percent of all of these companies. Defendant/appellant Marwit Capital Partners II, L.P. is a Delaware limited partnership whose general partner is defendant/appellant Marwit Partners, LLC, a Delaware limited liability company.

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. The letter of intent is signed by defendant Chris Britt as the managing partner of Marwit Capital, and by Kanno as the

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; 4 RT 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.)

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.) 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. Recital A in the Stockholder Agreement references the Contribution and Purchase Agreement. Articles II-IV of the Stockholder Agreement contain various restrictions, discussed below, on the sale and transfer of stock. The Stockholder Agreement provides that it is binding on the parties’ successors and assigns and contains a Delaware choice of law provision. Exhibit A reflects that Brandy Signs has 250,000 shares of Series A Preferred Stock and 51,724 shares of common stock. Marwit Capital has 693,000 shares of Series B Preferred Stock (93 percent) and 700,000 shares (81 percent) of common stock. The remaining shares of stock are held by non-party co-investors. 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. Again, nothing in the Stockholder Agreement references Kanno’s purported right to sell Brandy Signs’s shares in Traffic Control.

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. 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
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 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

“‘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.’”


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
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)
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 weights 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].)

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].)\(^\text{10}\)

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 unwieldy) 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

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\(^{10}\) 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 predetermined 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. 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 referral to purchase the shares at a negotiated price. 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. 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. 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.” 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.) 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.\(^\text{13}\) 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


“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 citable 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.\footnote{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. (\textit{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. (\textit{8 AA 2058:20-22.}) After the Marwit parties objected (\textit{10 RT 1978:9-13}) Kanno's counsel admitted that it was added for the first time in the proposed statement of decision (\textit{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 \textit{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' "]}; \textit{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' "]}; \textit{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
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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By: __________________________
    Steven S. Fleischman

Attorneys for Appellants
MARWIT CAPITAL PARTNERS II, LP and MARWIT PARTNERS, LLC
# LIST OF PARTIES AND ENTITIES

<table>
<thead>
<tr>
<th>Party</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kanno</td>
<td>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.)</td>
</tr>
<tr>
<td>Brandy Signs</td>
<td>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.)</td>
</tr>
<tr>
<td>Joji’s</td>
<td>Non-party, Joji’s Inc., the post-transaction name for Brandy Signs, still 100 percent owned by Kanno. (3 RT 406.)</td>
</tr>
<tr>
<td>One Shot</td>
<td>Non-party, One Shot Supplies, Inc., another company wholly owned by Kanno. (1 RT 180-182.)</td>
</tr>
<tr>
<td>Safety Systems Hawaii</td>
<td>Non-party Safety Systems Hawaii, wholly owned by Kanno. (1 RT 180-181.)</td>
</tr>
<tr>
<td>Marwit Capital</td>
<td>Defendant/appellant Marwit Capital Partners II, L.P., a Delaware limited partnership. (1 AA 137 [¶ 2].)</td>
</tr>
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<td>Marwit Partners</td>
<td>Defendant/appellant Marwit Partners, LLC, a Delaware limited liability company and the general partner of Marwit Capital. (1 AA 138 [¶ 5].)</td>
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<td>Traffic Control</td>
<td>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. <em>(4 RT 691-692.)</em> 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. <em>(3 RT 408.)</em> This is the stock that is the subject of the current action.</td>
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<td>Safety Systems</td>
<td>Safety Systems Acquisition Corporation, a non-party Delaware corporation which was the entity that acquired the assets of Kanno’s companies. <em>(4 RT 691-692.)</em></td>
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<td>Britt</td>
<td>Defendant Chris Britt, a managing member of Marwit Partners. <em>(3 RT 478:18-23.)</em> Judgment was entered in Britt’s favor against Kanno, who has not appealed that judgment. <em>(8 AA 2092:16-18.)</em></td>
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</table>
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.

_________________________________

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Trial Court Judge
Case No.: 30-2011-00441894

Clerk of the Court
California supreme Court
350 McAllister Street
san Francisco, California 94102

Electronic Copy
(CRC, Rule 8.212(c)(2)
Service on the California
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ALBERT KANNO,

Plaintiff and Respondent,

v.

MARWIT CAPITAL PARTNERS II, L.P., and
MARWIT PARTNERS, LLC,

Defendants and Appellants.

Appeal from the Orange County Superior Court
Case No. 30-2011-00441894
The Honorable Michael Brenner, Judge Presiding

RESPONDENT’S BRIEF

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Attorneys for Plaintiff and Respondent
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TO BE FILED IN THE COURT OF APPEAL

COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION THREE

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RESPONDENT/REAL PARTY IN INTEREST: Albert Kanno

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): INITIAL CERTIFICATE SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (name): Albert Kanno

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:

<table>
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<th>Full name of interested entity or person</th>
<th>Nature of Interest (Explain):</th>
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[ ] 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: May 18, 2016

David E. Hackett

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3. Marwit Capital sends additional letters of intent, eventually offering $20.5 million cash and $3 million in preferred stock; SSH, Brandy Signs, and One Shot sign the final letter. 23

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3. Appellants try to persuade Kanno to withdraw his demand for a put; he refuses.  

4. The Oral Agreement: During a June 4, 2007 telephone call, Britt promises Kanno that appellants will purchase the stock from Kanno no later than June 2010.  

5. Numerous witnesses hear Britt reaffirm the Oral Agreement.  

E. The Key Written Agreements.  

1. The Contribution and Purchase Agreement.  

2. The Stock Subscription Agreement.  

3. The Stockholder Agreement.  


F. Several Weeks Later, Britt Again Reaffirms That Appellants Will Purchase The Stock From Kanno.  


1. The businesses face challenges.  

2. Kanno responds to the challenges by temporarily foregoing his investment company’s right to collect and increase Safety Systems’ rent.  

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   a. Estoppel is available to Kanno because the Contribution and Purchase Agreement expressly provides for equitable limitations on enforcement.  
   b. Substantial evidence supports the finding that appellants are estopped to invoke the parol evidence rule.  

   1. The Oral Agreement is consistent with all of the written agreements and does not contradict any of them.  
      a. The Oral Agreement is completely consistent with the Contribution and Purchase Agreement.  
      b. The Oral Agreement is completely consistent with the opinion letter.  
      c. The Stock Subscription Agreement does not prohibit Kanno’s redemption of the Traffic Control stock under the Oral Agreement.  
      d. The Stockholder Agreement does not prohibit or restrain a Kanno-to-Marwit stock transfer.  
   2. Because they are strangers to the written agreements, appellants may not invoke the parol evidence rule.  
      a. Strangers to a contract may not invoke the parol evidence rule.
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INTRODUCTION

The jury found that appellants induced respondent Albert Kanno to sell his family businesses by orally agreeing to redeem $2.5 million in corporate stock no later than three years after that sale, and that appellants intended to perform that agreement. The trial court found that “[t]he deal would not have been made without the Oral Agreement” and that “the Oral Agreement was the only way to accomplish” respondent Albert Kanno’s adamant contractual demands. (8AA/2075.) Yet despite this and other amply-supported factual findings, appellants claim that the parol evidence rule bars Kanno’s claim for breach of that oral agreement.

How do they justify this impossible position?

Easy: They ignore the trial court’s factual findings and the overwhelming evidence that supports them. According to appellants, all that matters is the language of the agreements the parties signed, and the standard of review is therefore de novo.

They are utterly wrong. Review could only be de novo if there were no conflict in the evidence, but there definitely are conflicts—dramatic ones. And even if there were no conflicts, de novo review would not be limited to the language of the written agreements, as appellants urge. Well-settled law requires the Court to consider all evidence of the circumstances surrounding the making of the agreements and all evidence of the parties’ expressed intentions. Yet appellants never even describe that plentiful evidence, much less attempt to reconcile it with the parol evidence
rule. Indeed, even though it took months for the parties to negotiate their deal, appellants’ appendix includes only a signed letter of intent, some (not all) of the final signed agreements, and Kanno’s payment demand.

The evidence easily supports the trial court’s factual findings that the parties’ agreements were not integrated, including its key finding that Kanno would never have made a deal without the Oral Agreement.

Equally meritless is appellants’ argument that Kanno lacked standing to enforce the Oral Agreement, even though Kanno was the only party to the Oral Agreement on his side of the deal. To state the proposition is to refute it: No one but Kanno had standing.

There is not even a colorable basis for reversal. The judgment must be affirmed.
STATEMENT OF FACTS

As we explain below (see pp. 41-61), the underlying factual findings are reviewed for substantial evidence. We therefore recite the facts in the light most favorable to Kanno. (Los Angeles Unified School Dist. v. Casasola (2010) 187 Cal.App.4th 189, 194, fn. 1.)

A. The Parties.

1. Albert Kanno and his businesses.

For many decades, Albert Kanno was the majority shareholder of three Hawaii businesses.

Safety Systems Hawaii, Inc. (SSH) was an Oahu-based corporation that sold and rented traffic safety devices. (Respondent’s Appendix [RA], pp. 25-27, 36; Reporter’s Transcript [RT], Volume 1, pp. 180-181.)

Brandy Signs, Inc. was another Oahu-based corporation. (1RT/181-182; RA/36.) It manufactured a variety of signs and installed signage. (RA/26, 28; 1RT/181-182; 2RT/267.)

One Shot Supplies, Inc., a corporation with Oahu and Maui facilities, sold screen-printing supplies and equipment. (RA/36, 87.) Its Oahu division was a screen-printing supply store. (1RT/182; RA/36.) Its Maui division (Maui One Shot) operated an SSH/Brandy Signs satellite facility. (1RT/182; RA/26, 87.)
2. The Marwit parties.

*Marwit Capital Partners II, L.P.* (Marwit Capital) is a limited partnership and private equity fund that, at the time of trial, managed over $183 million in investment capital. (3RT/478-479; 5RT/828.) Marwit Capital acquires businesses with funds obtained from institutional investors. (3RT/479.)

*Marwit Partners, LLC* (Marwit LLC) is Marwit Capital’s general partner. (3RT/478.)

*Christopher Britt* is Marwit Capital’s managing partner. (RA/93-99, 246; 7RT/1221.) Britt is also a managing member of Marwit LLC. (3RT/478.) Britt testified that he was in charge of Marwit LLC and Marwit LLC was in charge of Marwit Capital. (*Ibid.*)

We refer to Marwit Capital and Marwit LLC together as the Marwit entities or appellants.

B. Kanno Leads His Family-Developed Businesses To Success.

In 1971, Kanno’s father started a company called K’s Rental. (1RT/181.) Upon graduating from college in 1973, Kanno joined his father’s business and they incorporated it as SSH. (RA/33; 1RT/181.)

A few years later, they formed Brandy Signs. (1RT/181; RA/33.) In order to install signs, Brandy Signs had to employ a licensed general contractor. (2RT/267.) Kanno had a contractor’s license and he served as
Brandy Signs’ “managing responsible engineer”—its only employee legally permitted to install signs. (2RT/267; 4RT/595.)

Kanno initially held a minority share in both companies, but he inherited a majority stake when his father died in the early 1980s. (RA/33; 1RT/182-183.) He soon became the businesses’ driving force, and he took numerous steps to grow them. He developed a deep understanding of Hawaii’s business culture and the construction supply industry. (6RT/1060-1061.) He built customer relationships with local governments and general contractors. (1RT/181; 4RT/633; RA/25-27, 34-35; Appellants’ Appendix, Volume 9, p. 2239.) And he developed a reputation of “good standing in” Hawaii. (6RT/917.)

Under Kanno’s leadership, the businesses’ annual revenues grew from just $3 million in 1983 to over $21 million in 2007. (1RT/182-183.)

C. Kanno Decides To Retire And Sell His Businesses; Marwit Capital Offers To Buy Them.

After many years running the businesses, Kanno obtained full ownership in 2004 when his mother died. (1RT/182-183.) A few years later, he decided to “completely retire” and spend time with his family. (1RT/183, 199.) Kanno hired an investment bank, Centerpoint M&A Advisors, to help sell the businesses; they sent a memorandum describing the businesses’ revenues to potential buyers, and advised them that Kanno “prefer[red] an all-cash” sale. (RA/21-92, 38; 5RT/821, 827-828.)
1. **Appellants decide to make Kanno’s businesses the platform of their strategy to “roll up” numerous safety-sign businesses.**

Britt received Centerpoint’s memorandum, and he and appellants became interested. (3RT/481-482; 5RT/828-829.)

But they had bigger plans—they wanted to pursue a “roll-up” strategy with Kanno’s businesses. (3RT/482; 6RT/1075-1076.) Under that strategy, Marwit Capital would form single-purpose entities that would (a) complete “an initial acquisition” of one company; (b) use it “as a platform to build upon”; (c) acquire other, similar businesses; (d) consolidate them; and (e) re-sell the consolidated businesses at a profit. (4RT/546-547, 637-638; 6RT/1075-1076; 7RT/1323-1324; RA/211.)

Appellants viewed Kanno’s businesses as their “anchor point” for a “roll-up” strategy in the safety equipment industry. (6RT/1075-1076, 973-974; 3RT/482-483; 7RT/1208-1209.) After forming single-purpose entities to acquire Kanno’s businesses, they would form other single-purpose entities to acquire and consolidate similar California businesses. (3RT/499, 482; 6RT/973-974.)
2. Marwit Capital sends initial purchase offers.


   In August 2006, Marwit Capital sent SSH, Brandy Signs, and One Shot a letter of intent outlining Marwit Capital’s proposals.

   (3RT/484-485.) The letter proposed:

   - The buyer would be a single-purpose entity formed by Marwit Capital (RA/93);

   - This entity would acquire SSH’s assets, Brandy Signs’ assets, and Maui One Shot’s “traffic control assets” (ibid.); and,

   - The purchase price would be $23 million cash (RA/94).¹

   Kanno signed the initial letter of intent on behalf of SSH, Brandy Signs, and One Shot. (1RT/190; RA/99.)

   But Marwit Capital’s anticipated lenders did not like the all-cash proposal. (6RT/917.) It was clear to them and Marwit Capital that Kanno was “important to the business” and had “good standing” in Hawaii. (3RT/494-495; 6RT/917.) They became “very worried” that if Kanno did not have a financial stake after the sale, he might not remain involved with the businesses. (6RT/917.) The lenders told Marwit Capital that in order to

¹ This and other proposals contemplated escrowing some cash consideration for a year “to secure the Shareholders’ [i.e., Kanno’s] obligations, representations, warranties and covenants” under the acquisition agreement. (RA/94.)
finance the deal, they would require that Kanno keep “skin in the game” —a “financial stake in the company.” \textit{(Ibid.; 3RT/493-495.)}

Marwit Capital contacted Centerpoint and asked “to restructure the deal” by reducing the cash payment by $5 million and, “in lieu” of that cash, providing $5 million of preferred stock in the acquiring entity. \textit{(3RT/496; 5RT/833-835.)} Centerpoint responded that Kanno did not want stock. \textit{(5RT/834-835.)}

\textbf{b. Marwit Capital’s second letter of intent}

proposes a mix of cash and stock with terms favorable to Kanno.

Britt’s solution was to try to improve the cash-and-stock proposal: “[A]s an incentive to get [Kanno] to move forward,” he would offer Kanno preferred stock with attractive features. \textit{(3RT/494-495; 5RT/834-835.)} To that end, he sent a revised letter of intent offering to buy the businesses for $18 million in cash and $5 million in preferred stock. \textit{(RA/100-103; 5RT/832-835.)} The preferred stock would have: (a) “Mandatory redemption three (3) years from closing, at [Kanno’s] option,” (that is, Kanno would have a “put”); (b) a “[d]ividend rate of 8% per year, simple, which shall accrue until redemption”; and (c) a “tax deferral” under which Kanno “would not pay any taxes on the $5,000,000 or the dividends” until after redemption. \textit{(1RT/199; 6RT/917-918; RA/101-102.)}

Kanno told Centerpoint that this “wasn’t what [he] originally agreed to” but that he would move forward. \textit{(5RT/833-834.)} Kanno also
explained that if the transaction were to include stock, the proposed put and tax deferral were critical. (5RT/841-842; 1RT/198-199.) He wanted to “completely retire” and “cash out” without putting “money at risk” or paying tax on the stock’s value before he “put” it back. (1RT/199.)

Centerpoint conveyed Kanno’s concerns to appellants, and Kanno reiterated those concerns to them directly. (5RT/841-842; 6RT/953-954.) Kanno and Centerpoint “repeated many times” that the put and tax deferral were important to him. (6RT/953-954.)

Appellants “dropped out of the picture for a period of time.” (3RT/499.) They had decided to conduct further investigation regarding the California businesses they wanted to acquire, and Marwit Capital wanted to find and hire outside management to run the businesses post-acquisition. (1RT/193; 3RT/499; 5RT/839-840; 6RT/989-990, 1075.)

3. Marwit Capital sends additional letters of intent, eventually offering $20.5 million cash and $3 million in preferred stock; SSH, Brandy Signs, and One Shot sign the final letter.

Several months later, Britt emailed Centerpoint that Marwit Capital wanted “to pick up the remaining and updated due diligence.” (RA/104.) Marwit Capital had advanced its investigation about the California businesses and had “cultivated a CEO” for Kanno’s businesses. (3RT/500, 504-505; RA/104.) Britt attached a third letter of intent, which offered
$20 million in cash and $3 million in preferred stock, again with an 8% dividend, a three-year put, and a tax deferral. (RA/106.)

Two weeks later, Marwit Capital sent another revised letter of intent. This letter retained the cash and preferred stock deal structure, as well as the stock’s 8% dividend, three-year put, and tax deferral. (1RT/198-199; 9AA/2118-2119.) However, the total price increased to $23.5 million, with $20.5 million as the initial cash payment. (1RT/198-199; 9AA/2118-2121; cf. RA/106; RA/101-102; RA/93-95.)

Kanno signed this version on behalf of SSH, Brandy Signs, and One Shot. (9AA/2125; 1RT/197-198.) The parties’ counsel began negotiating the final deal terms. (1RT/199-200; 5RT/758-759; 3RT/508-510.)

Among other things, appellants directed their counsel to form single-purpose entities to acquire the businesses’ assets. (RA/220-237; 4RT/569-570.) Traffic Control and Safety Corporation (Traffic Control) and Safety Systems Acquisition Corporation (Safety Systems) were formed, and Britt was appointed chairman of each entity’s board. (3RT/520-523.) Traffic Control owned 100 percent of Safety Systems’ stock; Marwit Capital and many other investors owned Traffic Control’s stock. (5RT/740-741; 2RT/247; 9AA/2255, 2280.)
D. When It Becomes Clear That The Mandatory Redemption (Kanno’s “Put”) Cannot Be Tax-Deferred, Kanno And The Marwit Entities Seek To Preserve The Deferral By Making Kanno’s Put Into An Oral Rather Than A Written Agreement.

1. Kanno learns that he may not be entitled to defer tax on the preferred stock.

While drafting the purchase agreements, Traffic Control’s counsel proposed that Kanno, SSH, Brandy Signs, and One Shot receive shares of Traffic Control’s “Series A Preferred Stock.” (5RT/759-762; 3RT/376-377; 2RT/366; RA/141-142, 145; see also 9AA/2118-2119.) Counsel also circulated drafts of Traffic Control’s Certificate of Incorporation, under which Traffic Control’s Series A Preferred Stock would be redeemable at its holder’s option in 2010 and subject to an annual 8% dividend. (RA/113-114, 116, 123.) The deal appeared to be coming together, and appellants targeted June 30, 2007, for the closing. (3RT/528-529.)

But in early May 2007, a significant problem arose when Kanno’s counsel asked how the tax deferral would be accomplished. (2RT/290; RA/141, 145.) Traffic Control’s counsel reported that if the parties used preferred stock with a put, “there is no way to make the issuance tax deferred.” (RA/208.) Kanno and appellants directed their advisors to
research alternatives, but no one came up with a satisfactory proposal. (1RT/205-208, 210-211; 3RT/526-531; RA/210-212.)

2. Britt proposes a “gentleman’s understanding” that appellants will “do our utmost” to purchase the stock no later than June 2010; Kanno declines.

With the closing date looming, appellants proposed to “[g]et rid of” the put in the written agreements, and instead have “a gentleman’s understanding that we would do our utmost” to redeem the preferred stock “after 3 years if [Kanno] so desires.” (RA/209; 1RT/209-210.)

Kanno declined. (1RT/210-211; RA/210.) He did not want an agreement by which anyone “would do their utmost” to buy his stock; “it would have to be a sure thing for me to get my money, not possibly get my money.” (1RT/210-211.) The issue remained unresolved, and the time and legal costs devoted to it increased. (1RT/211; RA/210-212.)

3. Appellants try to persuade Kanno to withdraw his demand for a put; he refuses.

Appellants then tried to persuade Kanno to give up the put by touting their successful track record. (4RT/552; 5RT/850.)

Britt emailed Centerpoint, arguing that appellants were “paying $24MM+ for the company, all cash, with the exception of this $3 million . . . . [W]e do not get a red cent out of this deal until [Kanno] is FULLY repaid. I call that NO risk” for Kanno. (RA/211-212.) Because appellants
had an “investment horizon” and would resell the businesses, Kanno’s “likely redemption is less than 5 years away if not 3-4 years away, even without a Put.” (RA/211.) According to Britt, “[t]he risk [to Kanno] of not having a Put is miniscule” because the businesses were likely to increase in value; it “is a waste of money to continue spending legal dollars on this.” (4RT/549-550; RA/212.)

Britt testified that when he sent the email, he felt “[i]t was time to put [the issue] to bed” by eliminating the put entirely. (4RT/551-552.) But that didn’t happen. Kanno was “adamant” that he did not want to eliminate the put; giving it up was “pretty much a deal breaker.” (6RT/997-998.)

4. The Oral Agreement: During a June 4, 2007 telephone call, Britt promises Kanno that appellants will purchase the stock from Kanno no later than June 2010.

The mandatory redemption issue came to a head during a June 4, 2007 telephone call involving Kanno, Britt, Kanno’s key Centerpoint advisor Scott Berejikian, and another Marwit employee. (2RT/227-228; 5RT/853-854; RA/213-218.) During the call, Kanno and Britt discussed two issues:

They addressed some pending repairs to an SSH facility’s roof. (RA/217-218; 2RT/389-393, 230.) They agreed to increase the cash portion of the purchase price by $500,000 to pay for the repairs, and the amount of Traffic Control’s Series A preferred stock would be decreased
from $3 million to $2.5 million. (RA/217-218; 2RT/230-231; 5RT/854-855, 859-861.)

They also discussed the put and tax deferral for the $2.5 million in preferred stock. (2RT/231-232, 236, 238.) Britt once again proposed that he and appellants would do their “utmost” to purchase the stock at its full value within three years after the deal closed. (5RT/855; 2RT/231-232.) But Kanno persisted: “It would have to be all, not at utmost.” (2RT/232.) “I kept saying, ‘I need to get the money at the end of three years, at least by the end of three years.’” (2RT/232.)

Finally, Britt agreed: He told Kanno “[t]hat he would purchase the stock, he or Marwit would purchase the stock by the end of three years with the 8 percent interest or coupon. And [Kanno would] be tax deferred that way.” (2RT/231.) After Berejikian “reaffirmed” the terms of this agreement (the Oral Agreement), the call concluded. (2RT/232-233.)

5. Numerous witnesses hear Britt reaffirm the Oral Agreement.

Britt reaffirmed the Oral Agreement in another conference call a few days later. (RA/219; 2RT/239-240; 4RT/688-689; 6RT/999-1001, 1071-1073; 5RT/859-860, 862-863.)

During the call, an attorney mentioned the mandatory redemption issue and advised that the parties could “handle this” by way of “an oral agreement.” (2RT/241; 6RT/1001-1002; 5RT/862-863.) Berejikian reiterated the prior terms: “Marwit or Chris would purchase the stock back
within three years and pay the coupon 8 percent. That way it would be tax
defferred.” (2RT/241; 6RT/1073-1074.)

Initially, Britt stated, “‘Okay, Albert, we can take care of that, that’s
fine. We’ll do that.’” (6RT/1002.) But Kanno insisted on absolute clarity:
“‘Well, you know, I need you to promise this to me.’” (Ibid.; see
2RT/241.) Then, as one of the many witnesses recalled:

[I]t went back two, three, four times. And then finally Albert
insisted. He said, “No, I want you to promise me.”

And that’s when Chris Britt kind of paused and said, “Okay,
Albert, I promise.”

And it was memorable to me because, in my head I was
thinking this is so strange, the situation. I never witnessed
anything like this before.

(6RT/1002; see 2RT/242.) With that promise made, Kanno and appellants
agreed that the “conversion feature” and the “put feature of the preferred
stock” would be removed from the written agreements in “order to get the
tax-deferred treatment.” (5RT/862-863, 886-889; 6RT/1003.)

The documents were finalized without the put and executed on
June 29, 2007.
E. The Key Written Agreements.

1. The Contribution and Purchase Agreement.

Under the terms of the Contribution and Purchase Agreement (a) SSH agreed to convey all of its assets to Safety Systems, (b) One Shot agreed to convey Maui One Shot’s “traffic control and safety-related assets” to Safety Systems, and (c) Brandy Signs agreed to convey all of its assets to Traffic Control. (9AA/2128.)

The total consideration for these transfers was $23,500,000, subject to various adjustments. (9AA/2129-2131.) It specifically included 250,000 shares of Traffic Control’s Series A preferred stock, valued at $2.5 million. (9AA/2129, 2194.)

2. The Stock Subscription Agreement.

Brandy Signs and Traffic Control executed a Stock Subscription Agreement, which prescribed the terms for Brandy Signs’ acquiring Traffic Control’s Series A Preferred Stock. (9AA/2246.)

3. The Stockholder Agreement.

Multiple Traffic Control stockholders executed a Stockholder Agreement memorializing their stockholdings and the conditions of stock ownership. (9AA/2254.) Among other things, the stockholders agreed that (a) Traffic Control would issue multiple classes of stock; (b) Brandy Signs would receive Series A preferred stock and common stock; and (c) Marwit Capital and the institutional investors would receive Series B preferred stock.
stock and common stock. (9AA/2255, 2258, 2271-2279.) They also agreed that (with numerous exceptions) Traffic Control’s stockholders could not transfer stock without first notifying Marwit Capital and offering it the right to purchase the stock. (9AA/2259, 2262.)

4. **Kanno becomes Safety Systems’ president and his investment company becomes Safety Systems’ landlord.**

Alongside these agreements, two other contracts governed Kanno’s future relationship with Safety Systems:

- Kanno signed an employment contract and agreed to serve as Safety Systems’ president. (RA/247-264; 4RT/729-731.)
- Because Kanno’s real estate investment company owned multiple facilities that SSH had occupied, Safety Systems leased those facilities from Kanno’s company. (9AA/2154, 2158, 2159, 2203; RA/36, 38; 4RT/596-598; 7RT/1227-1228.) The leases provided for periodic rent increases. (4RT/596-598; RA/244.)
F. Several Weeks Later, Britt Again Reaffirms That Appellants Will Purchase The Stock From Kanno.

After the written agreements were executed, Kanno and appellants scheduled a celebratory dinner at SSH’s Hawaii facility. (RA/238; 6RT/1077-1078; 7RT/1232-1233.) Before the dinner, Kanno and Britt met with a few other managers. (6RT/1077, 1079.) According to Scott Metko, Britt’s hand-picked CEO for Safety Systems, Kanno brought up the Oral Agreement and “again requested that Mr. Britt make a commitment and a promise that he’d be taken care of on his preferred stock redemption.” (6RT/1079-1080.)

Britt reiterated his promise: “‘I will take care of it, I promise, Albert.’” (Ibid.)


1. The businesses face challenges.

With Kanno’s businesses successfully acquired, Marwit Capital began its roll-up strategy. Traffic Control acquired numerous California-based signage businesses. (3RT/500-502; 6RT/1075-1076; 2RT/244-245; 4RT/587, 734; 6RT/973-976.) And both Safety Systems and Traffic Control began managing the Hawaii businesses. (6RT/1061; 4RT/587.)

Unfortunately, the businesses faced numerous challenges. (4RT/589-590.) Some were related to the 2008 recession (4RT/589-590),
but others resulted from mismanagement. Scott Metko had no “experience in the traffic control business” and limited familiarity with Hawaii’s culture. (2RT/259; 3RT/500, 504-505; 6RT/1060-1061; RA/104.) Within a few months, Metko resigned because he found Britt’s financial goals “unattainable.” (6RT/1080-1081.) Following Metko’s resignation, Britt could not maintain stable Safety Systems leadership. Over the next two years, he had to hire four different CEOs. (2RT/257-262.) Three of them were based in California, an ocean away from the businesses. (6RT/950-951, 974-975.)

2. Kanno responds to the challenges by temporarily foregoing his investment company’s right to collect and increase Safety Systems’ rent.

None of the companies performed as expected, and Kanno knew Safety Systems was facing financial difficulties. (4RT/589-590; RA/244.) He responded by temporarily foregoing the monthly rent that his investment company was owed, and he decided that his company would not impose rent increases. (RA/244; 7RT/1227-1228; 4RT/596-597; 9AA/2154, 2158, 2159, 2203.)
3. **Kanno grows dissatisfied with management decisions and tenders his resignation.**

As the troubles continued, Kanno grew discontented. When Safety Systems’ CEO emailed Kanno about cutting costs and reducing overtime for Safety Systems employees, Kanno became frustrated. (2RT/266-267; RA/239-242.) He “had a paternal relationship [with his] employees” and did not agree with those or other initiatives that Safety Systems’ leadership was pursuing. (Ibid.; 4RT/588-589, 659-660.)

Kanno responded to the cost-cutting email by tendering his resignation. He told Britt that “I don’t feel that I am contributing to the benefit of my employees and the company.” (RA/241-242.)

4. **Britt meets with Kanno, discusses appellants’ promise to redeem the Traffic Control stock, and convinces Kanno to stay.**

After receiving the email, Britt arranged a meeting with Kanno. (2RT/267; 4RT/592-595; 7RT/1325-1326.) He believed that Kanno was “very important” to Safety Systems and that appellants “needed him” to remain involved. (4RT/663-664.) He also knew that Safety Systems and Traffic Control needed Kanno’s contractor’s license to continue their sign installation business, because they had never hired a replacement licensee. (4RT/594-595; 2RT/272, 267; 9AA/2196-2197, 2207.)

Eventually, Britt met with Kanno in Hawaii. (7RT/1325-1326; 2RT/267.) Britt’s list of topics for that meeting included the topic
“$2.5 [million] Series A repayment?” (7RT/1325-1326; RA/243.) Kanno testified that during the meeting, Britt “talked me into staying” with Safety Systems. (2RT/267; 4RT/592-595; 3RT/413-415.)

5. Britt meets with Kanno in California and once again promises that appellants will purchase the Traffic Control stock.

A month later, Britt met with Kanno in California and reiterated appellants’ stock purchase commitment. (4RT/661-662; RA/245; 2RT/268-272.) Kanno emailed Britt after their discussion under the subject “payment 6/30/10”:

Thanks for the time you gave me last Wednesday. I am very happy that you will be paying me off in 6/09 [sic] for the A Preferred stock of TCSC. I am counting on this money.

As we had agreed when I sold the company to Marwit, which is not in the sales purchase agreement but given to me as your personal word, you would pay me the 2.5 million and the interest accrued on the anniversary in the 3rd year of the purchase of Safety Systems Hawaii . . . .

I know that you have done a great job in investing in a business endeavor that will reward you handsomely in the future and I am proud to be a part of the company.
Again, I am very grateful that you are abiding by your word that I will be paid off in June [sic] 2010.

(RA/245.)

H. Kanno Demands That Appellants Buy His Stock As The Oral Agreement Requires; They Ignore Him.

Kanno continued working at Safety Systems until June 2010, three years after the closing. (2RT/273-274.) On multiple occasions, he mentioned Marwit’s stock-purchase commitments to Safety Systems’ and Marwit’s leadership “to make sure” he would “get paid,” but he was ignored. (2RT/270, 273.)

In November 2010, Kanno again demanded that appellants perform the Oral Agreement and purchase the Traffic Control stock from him. (9AA/2299-2300.) They refused. (2RT/274.)

I. Procedural History.

1. Kanno sues.

Kanno sued appellants and Britt for breach of the Oral Agreement or, in the alternative, promissory fraud. (1AA/14-32, 137-157.) As relevant to this appeal, the defendants denied the Oral Agreement’s existence, asserted that Kanno lacked standing, and claimed that enforcement of the Oral Agreement was barred by the parol evidence rule. (1AA/199; 5AA/1136-1138; 1AA/193-204.)
The case proceeded through a two-phase trial. (8AA/2071.) In Phase I, a jury heard Kanno’s breach of contract and fraud claims. (Ibid.) In Phase II, the court considered various legal defenses to enforcement of the Oral Agreement. (8AA/2071, 2073.)

2. Phase I: The jury finds that appellants orally agreed to buy the Traffic Control stock and breached the agreement.

The jury found that appellants, but not Britt, entered into and breached the Oral Agreement. It rejected Kanno’s promissory fraud claim. (4AA/1067, 1070; 8AA/2071.)

3. Phase II: The trial court finds there was an oral agreement and rejects appellants’ defenses.

After the verdict, the trial court conducted Phase II. It reviewed briefing, considered the trial evidence, and heard further argument regarding appellants’ defenses. (8AA/2071-2073.)

In its Statement of Decision, the court rejected application of the parol evidence rule, finding that neither the documents themselves nor the extrinsic evidence supported it.

On the face of the documents, the court ruled that there “is no document that binds both Kanno and the Marwit Parties.” (8AA/2074, original italics.) Accordingly, appellants were strangers to the written
agreements, and “the parol evidence rule does not apply in an action between a party to a contract and a third party.” (Ibid.)

The court also made factual findings based on extrinsic evidence that precluded application of the parol evidence rule:

No integration. Having independently reviewed the evidence, the court found that there was no integration. (8AA/2073-2075.) Kanno and appellants “did not intend for them [the written agreements] to be the final and complete expression of the parties’ agreement.” (8AA/2075.)

Oral Agreement intended to be effective. The court found that Kanno and appellants intended the Oral Agreement to be effective “regardless of what the various agreements say.” (8AA/2075.)

The court explained why the evidence supported this conclusion:

• Appellants “could not move Kanno off his insistence that he have a right to payment after three years and that the deal be structured in such a way that, at least in his view, tax on that payment could be deferred.” (8AA/2075.)

• “The deal would not have been made without the Oral Agreement; defendants were prepared to make the Oral Agreement in order to accomplish the deal; and the jury, by rejecting Kanno’s promissory fraud claim, implicitly found that the Marwit Parties fully intended to perform.” (8AA/2075.)
**Estoppel.** In any event, the trial court found, appellants were estopped from invoking the parol evidence rule. (8AA/2075.) Although “the parol evidence rule ordinarily cannot be overcome by estoppel,” the “facts of this case so strongly support an estoppel that if there is any room for an exception to that rule, this case would fit into it.” (Ibid.) The court further concluded that because the Contribution and Purchase Agreement itself provides that its enforceability is limited by “general principles of equity,” enforcing that document’s integration clause (and thus precluding the Oral Agreement) “would be inequitable and thus contrary to the very agreement defendants rely on.” (8AA/2075-2076.)

**Oral Agreement consistent with written agreements.** In any event, the court explained, none of the written agreements was “fully integrated, in the sense that it encompasses the entirety of the agreements among the parties.” (8AA/2074.) “[T]he parties contemplated that there could be additional agreements, as long as the subject of those agreements was not explicitly comprehended within the particular documents.” (8AA/2074.)

The court found that this was exactly what happened. The “Oral Agreement is collateral to all of the [written agreements] and is in no way inconsistent with anything in any of them.” (8AA/2075.) The Oral Agreement “merely supplements the provisions” of the Stockholder Agreement “by establishing an outside performance date and purchase price for the [Traffic Control] stock.” (Ibid.)
Standing. The trial court rejected appellants’ claim that Kanno could not be “the real party in interest” with standing to sue because he did not own the Traffic Control stock (Brandy Signs did).  (8AA/2079-2080.) It ruled that Kanno was a party to the Oral Agreement and that this gave him standing to sue; whether he could deliver the stock was merely an issue of enforcement. (Ibid.)


The trial court entered judgment for Kanno. (8AA/2084-2092.) Appellants timely appealed. (8AA/2094-2096.)

ARGUMENT

I. THE PAROL EVIDENCE RULE DOES NOT APPLY.

A. The Parol Evidence Rule.

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.’” (Casa Herrera, Inc. v. Beydoun (2004) 32 Cal.4th 336, 343 (Beydoun); see also Carey v. Shellburne, Inc. (Del. 1966) 224 A.2d 400, 402, citing Hull v. Brandywine Fibre Products Co. (D.Del. 1954) 121 F.Supp. 108 (Hull).) Nevertheless, the parol

2 We do not believe this appeal requires the Court to choose between California and Delaware law. A choice of law is not required unless “there is a material difference” between the law of California and Delaware. (Nedlloyd Lines B.V. v. Superior Court (1992) 3 Cal.4th 459, 477.) As our citations will demonstrate, there is no material difference between California’s and Delaware’s parol evidence rules.
evidence rule is “subject to several exceptions,” which are “as firmly fixed in the law as the rule itself.” *(Bank of America v. Lamb Finance Co. (1960) 179 Cal.App.2d 498, 501-502; Hull, supra, 121 F.Supp. at p. 112.)*

We will demonstrate that the trial court correctly rejected application of the parol evidence rule, both factually and legally.

**B. Substantial Evidence Supports The Trial Court’s Conclusion That The Parol Evidence Rule Does Not Apply.**

1. As with any other question of contract interpretation, resolving parol evidence questions requires the consideration of relevant extrinsic evidence.

   a. Extrinsic evidence, whether or not conflicting, is relevant.

Although appellants cite the seminal case of *Masterson v. Sine* (1968) 68 Cal.2d 222 (*Masterson*) for general rules on the operation of the parol evidence rule (AOB 34, 50, 51), they ignore its primary focus: the central role of extrinsic evidence in determining whether the rule applies.

*Masterson* directs trial courts to consider a wide variety of evidence regarding the parties’ intent, *including any claimed oral agreement.* Although “[t]he instrument itself may help to resolve that issue” by stating that “there are no previous understandings,” that is not dispositive; the
“collateral agreement itself must be examined”; and “[c]ircumstances at the time of the writing may also aid in the determination of such integration.” (68 Cal.2d at pp. 225-226.) Why? Because ultimately, determining the extent of integration is an exercise in contract interpretation. “The crucial issue in determining whether there has been an integration is whether the parties intended their writing to serve as the exclusive embodiment of their agreement.” (Ibid., italics added.)

It follows that in determining whether a writing is integrated, “the court must consider all the facts and circumstances surrounding the instrument” and “all credible evidence” regarding the parties’ intentions. (Salyer Grain & Milling Co. v. Henson (1970) 13 Cal.App.3d 493, 499 (Salyer), internal quotation marks omitted.) This is hardly an aberrational proposition. The Restatement Second of Contracts says the same thing: “Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish (a) that the writing is or is not an integrated agreement; (b) that the integrated agreement, if any, is completely or partially integrated; . . . .” (Rest.2d Contracts, § 214.)

Where, as here, the trial court weighs all the evidence, including conflicting extrinsic evidence, to determine the contracting parties’ intent, its findings are factual determinations that are reviewed for substantial evidence. (Salyer, supra, 13 Cal.App.3d at pp. 499-500; Mobil Oil Corp. v. Handley (1978) 76 Cal.App.3d 956, 961 (Handley); Heller v. Pillsbury Madison & Sutro (1996) 50 Cal.App.4th 1367, 1382.) Under that standard,
this Court must view the evidence in the light most favorable to Kanno and “indulge all intendments and reasonable inferences which favor sustaining” the findings.  (*Salyer, supra, 13 Cal.App.3d at p. 500.)*[^3]

**b. Appellants fail to address the extrinsic evidence.**

There is no merit to appellants’ effort to avoid substantial evidence review by claiming that the Court can determine the application of the parol evidence rule solely by reference to the terms of the written agreements. *(AOB 36-37.)* Their premise, relegated to a footnote, is that “there have never been any disputed facts about the integration of the various written agreements.” *(AOB 37, fn. 9, original italics.)*

They are wrong for two fundamental reasons.

[^3]: Delaware follows substantially the same approach. There, the parol evidence rule applies “only if the contract is completely integrated,” and an agreement is completely integrated only where it is “meant to be final and complete.” (*McKinney Family Ltd. Partnership v. Stubbs* (Del. 2007) 931 A.2d 1006 [table], 2007 WL 1885121, *2 & fn. 8, internal quotation marks omitted; see also *Husband (P.J.O.) v. Wife (L.O.)* (Del. 1980) 418 A.2d 994, 995 [parol evidence rule excludes additional terms “when th[e] contract is a complete integration”].)

First, the absence of a conflict in the extrinsic evidence does not make it irrelevant. Quite the contrary, Masterson makes clear that this evidence is highly relevant. But appellants ignore it entirely. Their statement of facts devotes just one page to the genesis and purpose of the Oral Agreement (AOB 18), and after that they limit their discussion to the language of the written agreements. Indeed, the only exhibits in their appendix are the final letter of intent and the written agreements. Even if they were right about the absence of evidentiary conflicts, their failure to present and discuss the relevant extrinsic evidence undermines, if indeed it does not waive, their argument. (Foreman & Clark Corp. v. Fallon (1971) 3 Cal.3d 875, 881 [error waived by failure to present all material evidence on a point].)

Second, as we demonstrate more fully below, the issue of whether the written agreements fully and finally expressed the parties’ agreement was hotly disputed:

- Kanno said “no”: He never would have made the deal without the Oral Agreement; appellants agreed to perform it; and they further agreed that, for tax-deferral reasons, the put would not appear in the written agreements. (2RT/231, 241; 1RT/209-210; 5RT/862-868; 6RT/1001-1002, 1073-1074.) Kanno successfully demanded that Britt speak the words, “I promise.” (6RT/1002; 2RT/242.)
• Appellants said “yes”: Kanno agreed to remove the put from the written agreements and the overall deal because, in a negotiation, “you give and you take”; appellants “increased the cash by 500,000, reduced the amount of stock that he would be required to hold to 2.5 [and] Albert would put up [i.e., surrender] the put.” (6RT/970; 4RT/565.)

In the following sections, we demonstrate why the evidence overwhelmingly supports the trial court’s findings.

2. Substantial evidence supports the trial court’s finding that that there was no integration.

a. The evidence supporting the trial court’s findings.

“The crucial issue in determining whether there has been an integration is whether the parties intended their writing to serve as the exclusive embodiment of their agreement.” (Masterson, supra, 68 Cal.2d at p. 225.) Accordingly, the existence of an integration turns on “the determination of the trial judge as to the intent of the parties.” (Salyer, supra, 13 Cal.App.3d at p. 500; Code Civ. Proc., § 1856, subd. (d).)\(^4\)

Absent an integration, parol evidence is “admissible to establish the complete agreement between” the parties. (McLain v. Great American Ins. Companies (1989) 208 Cal.App.3d 1476, 1485; Harden v. Maybelline Sales Corp. (1991) 230 Cal.App.3d 1550, 1556 (Harden) [absent “integrated agreement, the parol evidence doctrine does not preclude consideration of contemporaneous oral agreements”].)

The trial court considered the evidence and found there was no integration: “[R]egardless of what the various agreements say, Kanno and the Marwit Parties did not intend for them to be the final and complete expression of the parties’ agreement.” (8AA/2073, 2075, italics added.)

Here is a partial summary of the supporting evidence:

• The linchpin of appellants’ “roll-up” strategy was Safety Systems and Traffic Control’s acquisition of the assets of Kanno’s businesses. (6RT/1075-1076, 973-974; 3RT/482-483; 7RT/1208-1209.) And the linchpin of the acquisition was Kanno’s agreement to have “skin in the game”: The lenders would not finance the deal unless Kanno agreed to remain financially involved. (3RT/493-495; 6RT/917; 7RT/1218.)

• Kanno did not want any delayed payment—the original proposal didn’t include one—and he did not want the purchase price to include any stock unless it was subject to
a three-year put and tax deferral. (5RT/833-834, 841-842; 1RT/192-194, 198-199.)

- After counsel advised that the put and tax deferral were mutually exclusive, Kanno told Britt and appellants that they would have to agree to purchase the preferred stock—he would “need to get the money at the end of three years.” (RA/208; 2RT/232.)

- Kanno absolutely refused to give up his demand for a put and tax deferral. (1RT/210-211; 2RT/232; 3RT/528; 6RT/997-998.)

- In the trial court’s words, Britt “finally cried uncle.” (7RT/1266.) He orally agreed that “Marwit would purchase the stock by the end of three years with the 8 percent interest or coupon. And [Kanno would] be tax deferred that way.” (2RT/231.)

Thus, Kanno and appellants agreed, as a prerequisite to the execution of the written agreements, that Kanno would receive a put and an 8% dividend on the preferred stock, and that the Marwit entities—rather than Traffic Control or Safety Systems—would perform under that agreement. (8AA/2075 [appellants “could not move Kanno off his insistence that he have a right to payment after three years” and a tax deferral; the “Oral Agreement was the only way to accomplish that goal” and the “deal would not have been made without the Oral Agreement”].)
They also agreed that those deal terms would not be included in the written agreements, because keeping them oral was the only way—at least, in Kanno’s view—that the payment could “be tax deferred.” (2RT/231, 241; 1RT/209-210; 5RT/862-864, 886-887; 6RT/1001-1003, 1072-1074; 8AA/2075; RA/209.)

These circumstances easily support the trial court’s conclusion that the parties intentionally omitted some terms from the written agreements. That did not make the Oral Agreement any less binding. Rather, it meant that, even taken together, the written agreements did not contain all the deal terms, and therefore were not intended as a “final and complete expression” of the parties’ agreement. (8AA/2075.)

Kanno and appellants’ post-closing conduct further confirmed that they did not view the written agreements’ terms as the “final and complete expression” of their contractual obligations. (8AA/2075.) Quite the contrary, they all continued to recognize that they were bound by the Oral Agreement. (RA/245, 243; 6RT/1079-1080; 7RT/1325-1326; 4RT/662; 2RT/268-270, 272-273.) Indeed, Britt reaffirmed his promise shortly after the closing and again two years later. (6RT/1079-1080; 2RT/272-273; RA/245.)
b. Appellants’ meritless counterarguments.

(1) The trial court made factual findings regarding integration, and in any case such findings must be implied.

Appellants claim that the Statement of Decision “does not purport to resolve any disputed factual issues” regarding integration. (AOB 37, fn. 9, italics omitted.) Not so.

The Statement of Decision states that one of the “principal controverted issues” for resolution is whether the integration clauses “bar enforcement of the Oral Agreement.” (8AA/2072.) It goes on to resolve that issue, concluding that “none of these documents precludes enforcement of the Oral Agreement.” (8AA/2074.) One of “multiple reasons” for this conclusion is that “Kanno and the Marwit Parties did not intend for [the written agreements] to be the final and complete expression of the parties’ agreement.” (8AA/2074-2075.)

Where, as here, a court reviews conflicting extrinsic evidence and finds that the parties did not intend to express their “entire agreement” in a writing, that is a ruling “on an issue of fact.” (Handley, supra, 76 Cal.App.3d at p. 961, citing Salyer, supra, 13 Cal.App.3d at pp. 498-502.)

If the trial court’s integration finding were somehow ambiguous, it was appellants’ burden to object to any supposed ambiguity. (Ermoian v. Desert Hosp. (2007) 152 Cal.App.4th 475, 494.) They didn’t. At the
hearing regarding Kanno’s First Revised Proposed Statement of Decision, appellants objected on numerous other grounds, but they did not identify any ambiguities or omissions on the integration question. (10RT/1949-1986.) Nor did they file any written objections to that revised proposed statement of decision.\(^5\) The failure to object is fatal. (Fladeboe v. American Isuzu Motors, Inc. (2007) 150 Cal.App.4th 42, 59-60.) If necessary to affirm the judgment, this Court must infer that the trial court made a factual finding in Kanno’s favor on the integration issue. (Ibid.)

(2) That the Stockholder Agreement and Stock Subscription Agreement contain integration clauses is not conclusive.

Appellants claim that under Delaware law, the Stockholder Agreement and Stock Subscription Agreement’s integration clauses (9AA/2249, 2270) are “‘conclusive evidence’” of integration that cannot be overcome absent “‘unconscionable or other extraordinary circumstances.’” (AOB 35-36, citing J.A. Moore Const. Co. v. Sussex Associates Ltd. Partnership (D.Del. 1988) 688 F.Supp. 982, 987 (Moore), Progressive Intern. Corp. v. E.I. du Pont de Nemours & Co. (Del.Ch., July 9, 2002, No. C.A. 19209) 2002 WL 1558382, *7 (Progressive), and Newport Disc, \(^5\) Appellants’ objections to Kanno’s initial proposed statement of decision do not fill this gap. The initial proposed statement of decision did not include the finding that “Kanno and the Marwit Parties did not intend for [the written agreements] to be the final and complete expression of the parties’ agreement,” and appellants’ objections did not discuss the absence of such a finding. (Compare 8AA/2075 and 8AA/2058 with 7AA/1887-1888; see 7AA/1897-1904.)

That is not the current state of Delaware law. In Otto v. Gore, supra, 45 A.3d 120, the Delaware Supreme Court stated that it has “approved the use of extrinsic evidence” in determining whether a contract is integrated, and it credited a chancery court’s analysis that used “‘extrinsic evidence to discern if the contract is completely or partially integrated.’” (Id. at pp. 131 & fn. 45, citing Addy v. Piedmonte (Del.Ch., Mar 18, 2009, No. 3571-VCP) 2009 WL 707641, *9 (Addy).) Consistent with California law, “‘in deciding whether a writing is final the most important issue is the intent of the parties.’” (Otto, supra, 45 A.3d at p. 131, fn. 45, citing Middletown Concrete Products, Inc. v. Black Clawson Co. (D.Del. 1992) 802 F.Supp. 1135, 1143 (Middletown), italics added.)

Addy and Middletown confirm that integration clauses are not conclusive. (See Addy, supra, 2009 WL 707641, at p. *9 [integration clauses “create a presumption of integration,” but are not dispositive; courts can “consider extrinsic evidence” and must evaluate whether the writing expresses the parties’ final intentions]; Middletown, supra, 802 F.Supp. at p. 1143 [quoting Corbin: “‘No written document is sufficient, standing alone, to determine [if a writing is an integration], . . . however long and detailed it may be, however formal, and however many may be the seals and signatures and assertions,’” alterations in Middletown].) In short, “the intent of the parties always controls” whether a writing is an integration. (MicroStrategy, supra, 2010 WL 5550455, at p. *13.)

And, perhaps most important, none of these decisions involved the introduction of extrinsic evidence on the integration issue.

(3) **The parol evidence rule’s underlying policies do not support Marwit.**

Contrary to appellants’ arguments, the parol evidence rule’s two “policy issues” do not help their position. (*AOB 37-38.*)

The first policy is “based on the assumption that written evidence is more accurate than human memory.” (*Masterson, supra,* 68 Cal.2d at p. 227.) But Kanno did not rely on memory alone. He also relied on multiple writings showing that the put was initially included in the deal (RA/101-102) and that it continued to be part of the deal after the written agreements were executed (RA/243, 245). Marwit’s own documents reflect
that long after the closing it still considered its “$2.5 [million] Series A repayment” to be a live issue. (RA/243; 7RT/1325-1326.) Regardless, the policy “can be adequately served by excluding parol evidence of agreements that directly contradict the writing,” but there is no contradiction here. (See pp. 61-69, post.)

The second policy is derived from “the fear that fraud or unintentional invention” by interested witnesses will mislead the fact-finder. (Masterson, supra, 68 Cal.2d at p. 227.) But that policy is founded on the assumption that the party introducing parol evidence is “the economic underdog” and could cause “the jury to find through sympathy” for him “that the parties made an oral agreement.” (Ibid.) Here, appellants themselves noted that both sides were “[s]ophisticated parties [that] were represented by two international law firms.” (AOB 39.)

In any case, these policy concerns are mitigated by the fact that there was a full trial after which both the jury and the trial court independently concluded that there was, in fact, an oral agreement. It is surely a rare case that includes such an unqualified endorsement of a party’s position.

Appellants also make three additional claims that they throw in with, but are irrelevant to, their policy arguments.

First, they rely on a letter of intent stating that the deal is subject to a “definitive Purchase and Sale Agreement.” (AOB 39.) But like all letters of intent, it is expressly not binding, and does not in any way limit the existence of the Oral Agreement. (8AA/2074 [letter of intent is a
Second, they contend that Kanno never claimed that the Oral Agreement existed until nearly three years after the closing. (AOB 38.) Even if the point were relevant, it flatly contradicts Kanno’s trial evidence, which the Court must assume the jury and trial court accepted. The evidence established that Kanno urged Britt to acknowledge the Oral Agreement just one month after the closing; that Britt did so; and that Britt again reaffirmed the Oral Agreement in July 2009. (See pp. 32, 34-36, ante; RA/245; 2RT/268-269.) Kanno demanded that appellants perform the Oral Agreement well before three years passed, but they ignored him. (2RT/270, 273.)

Third, appellants contend the “purported” Oral Agreement “would undoubtedly have been documented.” (AOB 39.) That’s a jury argument, and it failed. The jury found that the Oral Agreement did exist. So did the trial court. In so doing, they necessarily considered and rejected appellants’ closing argument that “[i]t doesn’t make any sense” that the Oral Agreement wouldn’t be in writing and that there were many documents where “you would expect to find a reference to the Oral Agreement, if it actually existed.” (9RT/1727-1728.)

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6 This is not the only place where the opening brief belies appellants’ claim that they “are not challenging any of the jury’s findings for lack of substantial evidence.” (AOB 16, fn. 1, 19, fn. 4.) Appellants repeatedly refer to the Oral Agreement as a “purported” or “alleged” agreement. (E.g., AOB 13, 15, 19 & fn. 4, 49, 51, 59.) And much of their statement of facts
3. Substantial evidence establishes that appellants and Kanno intended the Oral Agreement to be effective alongside the written agreements.

   a. The parol evidence rule does not apply when the parties intend a collateral oral agreement to be effective.

   Another reason that the parol evidence rule does not bar the Oral Agreement is that it is a collateral oral agreement that the parties intended to be effective. As Masterson explained, “oral collateral agreements should be excluded only when the fact finder is likely to be misled,” and “judges are not likely to be misled by their sympathies.” (Masterson, supra, 68 Cal.2d at pp. 227-228 & fn. 1.) Therefore, an “alleged oral collateral agreement” is not barred by the parol evidence rule “if the court believes that the parties intended [the] collateral agreement to be effective.” (Id. at p. 228, fn. 1.)
b. The trial court’s finding that Kanno and
appellants intended the Oral Agreement to
be effective is conclusive.

The intent of the parties to an oral agreement is “determined by their
words, acts, conduct and the circumstances” at the time of the agreement.
(Platt v. Union Packing Co. (1939) 32 Cal.App.2d 329, 333.) It is the trial
court’s province to find that intent. (Baggesi v. Baggesi (1950)
100 Cal.App.2d 828, 834 (Baggesi).) That finding cannot be disturbed if
“supported by the testimony and legitimate inferences that could be drawn
therefrom.” (Ibid.)

The trial court found that Kanno and appellants intended the Oral
Agreement to be effective. No one could “move Kanno off his insistence”
on a put and tax deferral; “the Oral Agreement was the only way to
accomplish that goal. The deal would not have been made without the Oral
Agreement; defendants were prepared to make the Oral Agreement in order
to accomplish the deal; and the jury, by rejecting Kanno’s promissory fraud
claim, implicitly found that the Marwit Parties fully intended to perform.”
(8AA/2075.)

The evidence easily supports these findings. To recap, the lenders
required Kanno to keep “skin in the game,” and appellants tried to make
that happen by including Traffic Control stock in the purchase price.
(6RT/917; 3RT/493-495; 7RT/1218; 2RT/366; RA/143, 104-112; see also
9AA/2118-2120.) Kanno was not willing to have “skin in the game”
without assurances that he could get the skin out by the end of three years and defer taxes. (5RT/833-834, 841-842; 1RT/192-194, 198-199.) Britt tried to make Kanno back down, but he refused. (2RT/231-232.) Finally, in the trial court’s words, Britt “cried uncle” and agreed. (7RT/1266; 2RT/232.) And both sides further agreed to remove the put from the writings and keep that part of the agreement oral, so that Kanno could (in his view) defer taxes. (2RT/231-232, 241; 1RT/209-210; 5RT/862-868; 6RT/1001-1003, 1072-1074.)

In sum: Both sides wanted the asset transfer to go forward. Both sides knew it would not go forward unless the deal included both Kanno’s put and tax deferral. Both sides viewed the Oral Agreement as the means to that end. That being so, the trial court’s finding regarding the parties’ intent is well supported and cannot be disturbed. (Baggesi, supra, 100 Cal.App.2d at p. 834.) It bars application of the parol evidence rule.
4. Substantial evidence establishes that appellants are estopped to invoke the parol evidence rule.

a. Estoppel is available to Kanno because the Contribution and Purchase Agreement expressly provides for equitable limitations on enforcement.

The Contribution and Purchase Agreement provides that it “is enforceable against [Kanno] in accordance with its terms, except as such enforceability may be limited by . . . general principles of equity.” (9AA/2133, italics added.) One of these “general principles of equity” is equitable estoppel. (Cordova v. 21st Century Ins. Co. (2005) 129 Cal.App.4th 89, 96 [“equitable estoppel takes its life from” equitable principles].) An equitable estoppel arises when a party deliberately leads another to believe that a fact is true and to act on that belief.  

7 See Feduniak v. California Coastal Com. (2007) 148 Cal.App.4th 1346, 1359 (Feduniak) (listing equitable estoppel elements: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true facts; and (4) he must rely upon the conduct to his injury); Bantum v. New Castle County Vo-Tech Educ. Ass’n (Del. 2011) 21 A.3d 44, 51 (party claiming estoppel must show (1) she lacked knowledge or the means of obtaining knowledge of the truth of the facts in question, (2) she relied on the conduct of the party to be estopped, and (3) she thereby suffered a prejudicial change of position).
b. **Substantial evidence supports the finding that appellants are estopped to invoke the parol evidence rule.**

The existence of an estoppel is a factual question, and the trial court’s ruling on that issue is reviewed for substantial evidence. (*Feduniak, supra, 148 Cal.App.4th at p. 1360; U.S. Bank v. Swanson* (Del. 2006) 918 A.2d 339 [table], 2006 WL 3952032, *2.)

Here, the evidence fully supports the trial court’s ruling. (8AA/2075.) Appellants repeatedly told Kanno they would purchase the Traffic Control stock within three years. (2RT/232-233, 239-241; RA/213-218; 4RT/688-689; 5RT/859-860, 862-863; 6RT/999-1001, 1071-1073.) Kanno relied on those representations, which were central to his willingness to pursue the deal. He spent time, effort, and money conveying the businesses to Safety Systems and Traffic Control. Both before and after the closing, appellants represented that they would abide by their Oral Agreement commitments, thereby demonstrating they did not intend to rely on the integration clauses to bar the Oral Agreement. (2RT/239-241, 268, 270-273; 4RT/662; 6RT/1079-1080; 7RT/1325-1326; RA/243, 245.) After Kanno tendered his resignation (thereby threatening to deprive the businesses of an essential contractor’s license), Britt met with him and assured him appellants would buy the stock. (7RT/1325-1326; 2RT/266-270, 272; 4RT/662; RA/239-240, 243, 245.)
meetings, Kanno recommitted to Safety Systems and informed Britt that he was “proud to be a part of the company.” (2RT/267; RA/245.)

Eventually, appellants changed their mind. They decided to seek to escape their promises and, if push came to shove, to rely on the integration clauses. Kanno never knew—or could have known—that appellants would refuse to honor their word. But he never would have made the deal without their promises.

We recognize that estoppel generally “has no force against the parol evidence rule.” (Beydoun, supra, 32 Cal.4th at p. 346.) But Beydoun had no occasion to consider, and thus did not address, a contract expressly providing that equitable principles limit its enforcement. Brandywine Shoppe, Inc. v. State Farm Fire & Cas. Co. (Del.Super. 1973) 307 A.2d 806, which appellants cite, states that estoppel “may not be invoked to make a new contract” or radically change a contract. (307 A.2d at p. 809.) But applying estoppel here does not make a new contract or change anything; it just enforces the “general principles of equity” that the contract itself imposes. (9AA/2133.)

“[P]arties can agree to contractual terms that place certain restrictions” on legal rights that might otherwise be available; “if the parties have done so, the courts of this state can interpret and enforce those contractual limitations . . . .” (Gibson v. World Savings & Loan Assn. (2002) 103 Cal.App.4th 1291, 1306, discussing contractual and regulatory limits on loan insurance premiums.) Enforcing equitable principles against
appellants here does just that. Given their conduct, they were correctly estopped to invoke the parol evidence rule.⁸


1. The Oral Agreement is consistent with all of the written agreements and does not contradict any of them.

None of the written agreements contains an integration clause that purports to gather all the written agreements into a single, integrated whole. But even if, contrary to the trial court’s express findings, one were to assume that the parties intended the written agreements to be partially integrated—in other words, each would individually be final with respect to its own “particular subject matter”—that would not make any difference here. (Harden, supra, 230 Cal.App.3d at p. 1555.) The parol evidence rule still would not apply, because the Oral Agreement is not inconsistent with anything in the written agreements.

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⁸ Appellants suggest there is something infirm about the trial court’s estoppel findings because, they claim, estoppel first surfaced in Kanno’s proposed statement of decision. (AOB 58, fn. 15.) In fact, however, as their own citations show, it emerged from the court’s comments during argument. (10RT/1877, 1879-1880.) Regardless, there is no basis for what appellants call “special scrutiny.” (AOB 58, fn. 15; see J.H. McKnight Ranch Inc. v. Franchise Tax Bd. (2003) 110 Cal.App.4th 978, 984 [adopting draft findings “creates no inference that [the trial court] has failed to engage in a thoughtful weighing of the evidence”; the “traditional substantial evidence test” applies to adopted findings].)
A writing is partially integrated where it “finally and completely express[es] only certain terms” of an agreement, “rather than the agreement in its entirety.” (Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc. (2003) 109 Cal.App.4th 944, 953.) In cases of partial integration, certain types of parol evidence are barred, but parol evidence is still admissible “to prove an oral term of the contract not inconsistent with the written memorialization.” (Esbensen v. Userware Internat., Inc. (1992) 11 Cal.App.4th 631, 638.) Put another way, if the oral contract terms and the partially-integrated writing are consistent, the parol evidence rule does not apply.

Here, the Oral Agreement and the written agreements are consistent. None of appellants’ claimed inconsistencies withstands scrutiny.

a. The Oral Agreement is completely consistent with the Contribution and Purchase Agreement.

Appellants claim the Oral Agreement is contrary to the Contribution and Purchase Agreement because that agreement recites the consideration for the transfer of the SSH, Brandy Signs and Maui One Shot assets, but does not also discuss a right by Kanno or Brandy Signs to sell their Traffic Control shares to the Marwit entities. (AOB 49-50.) But that’s not a contradiction—it’s just silence.

Section 1.2 of the Contribution and Purchase Agreement explains that: (1) SSH, Brandy Signs, and One Shot will transfer their assets to
Safety Systems and Traffic Control; (2) Safety Systems will give SSH $21 million as consideration for the entirety of the assets; and (3) Traffic Control will give Brandy Signs preferred stock and additional cash as consideration for Brandy Signs’ assets. (9AA/2129.) But Section 1.2 does not say that those conveyances are the only consideration, obligations, or promises exchanged, and Section 1.2 does not address whether Kanno (or anyone else connected with the deal) might have additional rights or obligations. All Section 1.2 discusses is the “Purchase Price and Payment Terms” that Safety Systems and Traffic Control must satisfy. (Ibid.)

The Oral Agreement, on the other hand, concerns a different and distinct subject. It addresses Kanno’s rights vis-à-vis Marwit Capital and Marwit LLC. It identifies the separate consideration they will provide to Kanno personally, in return for his agreement to cause his wholly-owned corporations to transfer their assets. That separate consideration is a promise: Appellants will “purchase the stock by the end of three years with the 8 percent interest.” (2RT/231.)

Thus, nothing in the Oral Agreement contravenes Section 1.2; it is just a supplemental deal term that the writing does not address. The parol evidence rule does not bar a consistent additional term like this. (See 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 349, p. 396 [parol evidence rule does not render “inadmissible proof of contemporaneous oral agreements collateral to, and not inconsistent with, a written contract where the latter is either incomplete or silent on the subject”].)
b. The Oral Agreement is completely consistent with the opinion letter.

Appellants’ claim that the Oral Agreement is inconsistent with Kanno’s counsel’s opinion letter fares no better. (AOB 50.)

The opinion letter recites that “there are no extrinsic agreements or understandings among the parties to the Transaction Documents.” (AOB 50; 9AA/2284.) But the term “Transaction Documents” is a defined term that refers to just three writings:

1. A “Purchase Agreement” executed by SSH, Brandy Signs, One Shot, Kanno, Safety Systems, and Traffic Control (9AA/2283);
2. An “Escrow Agreement” executed by SSH, Brandy Signs, One Shot, Kanno, Safety Systems, and Comerica Bank (9AA/2283, 2294); and

Neither Marwit LLC nor Marwit Capital is a party to any of these agreements. Accordingly, the opinion letter’s representation that there are “no extrinsic agreements or understandings among the parties to the Transaction Documents” is entirely consistent with the Oral Agreement. (9AA/2284, italics added.)
c. **The Stock Subscription Agreement does not prohibit Kanno’s redemption of the Traffic Control stock under the Oral Agreement.**

Appellants also point to the Stock Subscription Agreement’s disclaimer stating that 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 Traffic Control preferred stock “in any specified period of time” or at any profit. (9AA/2246, italics added; AOB 46.) Accordingly, they claim, that representation is “an express disavowal of any purported representation” regarding stock purchase rights. (AOB 46.) Not so.

The most important term in the disclaimer provision is “Investor.” That term is defined just three paragraphs earlier as “Brandy Signs, Incorporated, a Hawaii corporation.” (9AA/2246.) Thus, the Stock Subscription Agreement states that “[i]t has never been guaranteed or warranted” that Brandy Signs “will be able to sell or liquidate the Shares in any specified period of time.” (Ibid.) But nothing disclaims stock purchase guarantees/warranties to Kanno. If the parties had intended to include a broad and all-encompassing disclaimer of all warranties and guarantees in the Stock Subscription Agreement, they could easily have done so. They did not.

That the Stock Subscription Agreement is “binding upon” the parties’ “heirs, personal representatives, successors and assigns” makes no
difference here. (9AA/2250; AOB 47.) Of course, if Kanno were an assignee-holder of the Traffic Control preferred stock, in that capacity he could not claim that Brandy Signs received any guarantees. (9AA/2246, 2250.) But Brandy Signs isn’t seeking to enforce any guarantee, and Kanno isn’t seeking to enforce any claim of Brandy Signs—he seeks to enforce his personal claim under the Oral Agreement. That guarantee was made directly to him, and nothing in the Stock Subscription Agreement can affect that.

d. The Stockholder Agreement does not prohibit or restrain a Kanno-to-Marwit stock transfer.

Appellants claim the Stockholder Agreement’s transfer restrictions give Marwit Capital an “unrestricted right of first refusal” before Traffic Control’s preferred stock may be transferred, and the Oral Agreement’s mandatory redemption is inconsistent with those restrictions. (AOB 42-43.) Again, not so.

9 Appellants offer no legal or factual support for their claim that Kanno is Brandy Signs’ “representative” because he is its “president and sole shareholder.” (AOB 47.) In any event, the Stock Subscription Agreement refers to “personal representatives,” not just “representatives.” (9AA/2250.) The term “personal representative” is a probate concept. (Prob. Code, § 58; Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Memorial Hosp., Inc. (Del. 2012) 36 A.3d 336, 344 [“personal representative is ‘A person who manages the legal affairs of another because of incapacity or death . . .’.”].) Especially given that it follows “heirs,” it could not mean anything else under the principle of ejusdem generis—irrelevant though both terms are without a human party.
The Stockholder Agreement does render certain “voluntary transfer[s] of Shares or Options” subject to Marwit Capital’s right of first refusal, but it also provides that “a Permitted Transfer” is not subject to those conditions. (9AA/2259-2260.) The Stockholder Agreement defines a wide variety of such “Permitted Transfers.” (9AA/2262.) Among these are: (1) transfers between Marwit Capital and its “Affiliates,” like Marwit LLC (9AA/2255, 2262); (2) transfers from Brandy Signs to Kanno (9AA/2262); (3) certain transfers between Traffic Control’s institutional investors (9AA/2255, 2262); and (4) transfers between Brandy Signs or Kanno, on the one hand, and “a corporation, partnership, limited liability company or other Person controlled by any of the foregoing,” on the other (ibid., italics added).\(^\text{10}\)

Thus, the Stockholder Agreement contemplates two types of transfers: (a) transfers to outsiders, which would be subject to Marwit’s first-refusal rights; and (b) “Permitted Transfers” between insiders—the parties executing the Stockholder Agreement and entities that they or their Affiliates “control[],” which would be effective without regard to the first-refusal rights. (9AA/2259-2262.)

\(^\text{10}\)Marwit LLC and Marwit Capital are each other’s “Affiliates.” An “Affiliate” is defined as a “Person controlling, controlled by, or under common control with” another person. (9AA/2255.) Britt testified that Marwit LLC “is in charge of” Marwit Capital (3RT/478), and general partners generally have “control of the limited partnership.” (Macklowe v. Planet Hollywood, Inc. (Del.Ch., Oct. 13, 1994, No. 13689) 1994 WL 586838, *5.)
The Oral Agreement falls squarely in the latter category. It contemplates two Permitted Transfers: (a) the Permitted Transfer from Brandy Signs to Kanno (9AA/2262; see AOB 42, fn. 11 [appellants concede that Brandy Signs could “transfer its shares to Kanno” as a Permitted Transfer]); and (b) the Permitted Transfer from Kanno to a “partnership” or “limited liability company” that is “controlled by” either Marwit Capital or its “Affiliates” (9AA/2262, 2255). Both Marwit entities plainly match that definition.

Even if the second, Kanno-to-Marwit transfer were somehow subject to Marwit Capital’s first-refusal rights under Sections 2.1 and 2.2 of the Stockholder Agreement, there still would be no inconsistency. (AOB 42-43.) Under Section 2.1(a), Marwit Capital must be notified of any stock transfers by a written “Transfer Notice,” and the Transfer Notice “shall constitute an offer to sell the offered Shares” to Marwit Capital on the terms specified therein. (9AA/2259.) Under Section 2.2, Marwit Capital then has “the right to purchase all of the Offered Shares” at the specified price within 20 days. (Ibid.) That is not inconsistent with the Oral Agreement. All these provisions do is give Marwit Capital the right to say “yes” or “no” to any offer to transfer stock. But nothing prohibits Marwit Capital from separately agreeing that: (a) if Kanno offers to transfer the stock to it, Marwit Capital will exercise its right to say “yes”; and (b) both Marwit entities will pay Kanno for the stock. In effect, the Oral Agreement
is simply advance consent—and one that the Marwit entities would certainly be estopped to deny.\footnote{That Traffic Control had a comparable first-refusal right makes no difference. (9AA/2259-2260.) If Traffic Control exercised that right, then the Oral Agreement would simply “supplement[] the provisions of the Stockholder Agreement” (8AA/2075) by providing that the Marwit entities will pay Kanno for the stock on Traffic Control’s behalf (or at the very least, guarantee Traffic Control’s payment).}

Accordingly, the Oral Agreement does not contradict the first-refusal rights. Instead, as the trial court correctly observed, it “merely supplements the provisions of the Stockholder Agreement by establishing an outside performance date and purchase price for the [Traffic Control] stock.” (8AA/2075.)

Appellants’ reliance on \textit{ev3, Inc. v. Lesh} (Del. 2014) 114 A.3d 527 (\textit{ev3}), is misplaced. (AOB 44.) There, an initial letter of intent required a purchaser to “commit to funding” its target, but the final agreement only required funding in the purchaser’s good faith discretion. (114 A.3d at p. 528.) Although the court held that the letter of intent was “plainly inconsistent” with the later agreement and “thus has no force or effect,” that holding was premised on the existence of an irreconcilable inconsistency. (114 A.3d at pp. 537-538 & fn. 32.) Here, there is no inconsistency between any of the written agreements and the Oral Agreement.
2. Because they are strangers to the written agreements, appellants may not invoke the parol evidence rule.

a. Strangers to a contract may not invoke the parol evidence rule.

Appellants’ parol evidence defense fails for the further independent reason that appellants are strangers to the relevant agreements, and “‘[i]n an action between one party to the contract and a stranger, both are at liberty to introduce evidence contradicting the terms of the writing.’” (Gordon v. D&G Escrow Corp. (1975) 48 Cal.App.3d 616, 626 (Gordon).)

(1) The stranger exception is alive and well in California.

California courts have long recognized the stranger exception to the parol evidence rule. (E.g., Jackson v. Donovan (1963) 215 Cal.App.2d 685, 690 (Jackson); Luckie v. Diamond Coal Co. (1919) 41 Cal.App. 468, 478.) However, these cases were decided under former Code of Civil Procedure section 1856, which stated that the parol evidence rule applied “between the parties, their representatives, or successors in interest.” (Former Code Civ. Proc., § 1856 (enacted 1872).)\(^{12}\)

\(^{12}\) As relevant, the prior statute stated: “When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms
When the Legislature amended section 1856, it deleted this phrase. (§ 1856, Stats. 1978, ch. 150, pp. 374-375, § 1.) Appellants and some courts have seized on this change as signaling the death of the stranger exception. They are mistaken.

There isn’t a single word in the extensive legislative history of the 1978 amendment (Senate Bill 1395) that says anything at all about the stranger rule, or anything at all about why the Legislature (and the Law Revision Commission Recommendation on which the legislation was based) chose to eliminate the “parties” language. (See Respondent’s Motion for Judicial Notice (MJN) filed concurrently herewith, pp. MJN3-MJN4.)

What the legislative history does show, repeatedly, is that SB1395 aimed “to accurately codify case law statements of the parol evidence rule” and to revise the statute “to conform to existing law.” (MJN9, MJN15; see also Recommendation relating to Parol Evidence Rule (Nov. 1977) 14 Cal. Law Revision Com. Rep. pp. 148-149 [statute “should at least accurately state the law” and “be revised to conform to existing law”]; MJN18-MJN22; MJN14 [“Bill seeks to clarify and codify case law interpretations of parol evidence rule . . . ”].) 13

13 of the agreement other than the contents of the writing, except in the following cases: . . . ” (Former Code Civ. Proc., § 1856 (enacted 1872).) Further undesignated statutory citations are to the Code of Civil Procedure.
Although, as appellants note, Witkin does say that commentators have criticized the rule (AOB 52, citing 2 Witkin, Cal. Evidence (5th ed. 2012) Documentary Evidence, § 114, p. 255), no such criticism appears anywhere in the legislative history—whether in the Law Revision Commission’s recommendation, in the comments of numerous persons who provided feedback to the Commission, or in anything written by the Legislature itself. And none of the cases addressing this point have reviewed the legislative history in any detail. Kern County Water Agency v. Belridge Water Storage Dist. (1993) 18 Cal.App.4th 77 (AOB 52-54) described the Legislature’s elimination of the prior statutory language as “substantive,” but its support was just one law review article that likewise did not examine the legislative history. (18 Cal.App.4th at p. 86, citing Review of Selected 1978 California Legislation (1979) 10 Pacific L.J. 247, 275-276.) Neverkovec v. Fredericks (1999) 74 Cal.App.4th 337, 350, fn. 8, likewise did not examine the legislative history.

So why did the Law Revision Commission and SB 1395 eliminate the “parties” language? The likely explanation is the common-sense recognition that contracts generally bind only the parties and, possibly,
third-party beneficiaries. (Berglund v. Arthroscopic & Laser Surgery Center of San Diego, L.P. (2008) 44 Cal.4th 528, 536 [“‘It goes without saying that a contract cannot bind a nonparty,’” quoting EEOC v. Waffle House, Inc. (2002) 534 U.S. 279, 294]; Civ. Code, § 1559 [third party may enforce contract if it was “made expressly for” his benefit].)

Regardless, the bottom line is that SB 1395’s legislative history consistently shows a desire to conform section 1856 to then-existing parol evidence case law. That then-existing law included Gordon, which was decided just a few years earlier and held that parol evidence “contradicting the terms of the writing” is admissible against a stranger. (48 Cal.App.3d at p. 626.) The stranger rule therefore survived the amendment.

(2) Delaware law does not contradict California law.

We have found no authoritative Delaware cases explicitly addressing the stranger exception to the parol evidence rule. But Delaware does

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14 The issue surfaced in Chakov v. Outboard Marine Corp. (Del.Super., Apr. 8, 1980, No. 79C-JL-67) 1980 WL 615345 (Chakov), where the court considered whether a settlement released claims against a company that was not a party to the agreement. (1980 WL 615345, at pp. *1-2.) The court noted that Delaware courts had not reached the stranger issue in the release context, but “the Restatement of Torts supports a rejection of the parol evidence rule as to third parties. ‘The agreement as to the effect of the release may be proved by external evidence; and the objection of the parol evidence rule is met by the fact that the second tortfeasor who raises the question is not a party to the instrument.’” (Ibid., quoting Rest.2d Torts, § 885, com. d.) The court requested briefing and apparently ended up applying the parol evidence rule, but the Delaware Supreme Court decided the case on other grounds and found it “unnecessary to analyze
recognize that “a stranger to a contract acquires no rights thereunder unless it is the intention of the parties to confer a benefit upon such a third-party.”

(Guardian Const. Co. v. Tetra Tech Richardson, Inc. (Del.Super. 1990) 583 A.2d 1378, 1386.) Delaware courts have applied this rule in the somewhat similar context of estoppel by deed, holding that in suits between a party to a written agreement and a stranger to the agreement, the party is not barred from urging positions inconsistent with those in documents.

For example, in State v. Phillips (Del.Ch. 1979) 400 A.2d 299, 310 (Phillips), two landowners claimed title to certain property through adverse possession against the state. (400 A.2d at p. 301.) The state argued that because conveyances by the landowners and their predecessors “recognize[d] the existence of State lands,” the landowners were estopped from challenging the State’s title. (Id. at p. 310.) The court held that estoppel by deed generally “precludes one party to a deed and his privies” from asserting rights “in derogation of the deed,” but “strangers to the deed are not bound, nor can they invoke the estoppel.” (Ibid., internal quotation marks omitted; see Farkas v. Jarrell (Del.Ch., Sept. 17, 1993, No. A-1197) 1993 WL 401878, *1-2 [plaintiffs were not estopped to deny their own deed’s property description as against defendants, because defendants were “strangers to the deed”].)

decisively the parole (sic) evidence issue posed by the parties.” (Chakov v. Outboard Marine Corp. (Del. 1981) 429 A.2d 984, 985.) In any case, whether a release extends to unnamed parties is more a question of the law governing third-party beneficiaries than of the parol evidence rule.
In *Robinson v. Ortiz* (Del.Super. 1917) *100 A. 408*, a homeowner hired a contractor who gave the homeowner’s husband a bond to secure his performance and hired a subcontractor, who became a “surety on the bond.” *(Id. at p. 409.)* In the subcontractor’s suit to enforce a mechanic’s lien, the homeowner claimed that he was “barred and estopped” by the terms of the bond. *(Ibid.)* The court disagreed: “An estoppel by deed is operative only between parties to the deed and their privies; strangers to the deed are not bound by, nor can they invoke the estoppel.” *(Ibid.)*

Appellants appear to claim that ev3, *supra*, *114 A.3d 527*, abrogated the “stranger” rule, because the court applied the parol evidence rule to the plaintiffs before it “without any indication that the plaintiffs were personally parties to the merger agreement.” *(AOB 55.)* But the trial court decision indicates that the ev3 plaintiffs were parties to that agreement. *(Lesh v. ev3, Inc. (Del.Super., Aug. 29, 2013, No. 05C-05-218-CLS) 2013 WL 6040418, *1 [“Plaintiffs, former Appriva, Inc. (‘Appriva’) shareholders (‘Plaintiffs’) and ev3 entered into a merger agreement . . . .”].)* In any event, ev3 did not expressly consider the “stranger” exception, and it therefore is not authority on that issue. *(Humm v. Aetna Cas. and Sur. Co. (Del. 1995) *656 A.2d 712, 716 [opinion not controlling on issue it “did not consider”].)*

Appellants’ other authorities discuss third-party enforcement of arbitration and forum-selection clauses, not the parol evidence rule. *(AOB 55-56.)* None sheds light on whether a stranger to a contract can rely on the rule.
b. Under the “stranger” exception, neither of appellants can invoke the parol evidence rule.

Marwit LLC is not a party to any of the written agreements, and Marwit Capital is not a party to the Contribution and Purchase Agreement or the Stock Subscription Agreement. Therefore, the Oral Agreement is fully enforceable against Marwit LLC, and only the Stockholder Agreement might limit its enforceability against Marwit Capital. Appellants’ efforts to avoid this reality contradict the record and the law.

Marwit LLC apparently claims that because it signed the Stockholder Agreement as Marwit Capital’s “general partner,” it actually is a party to that contract. (AOB 45.) Yet again, not so. Britt testified that Marwit Capital and Marwit LLC were “separate entities” that filed “separate tax returns.” (3RT/478-479; see also 6RT/940-941.) And Delaware law recognizes that limited partnerships like Marwit Capital comprise at least two separate legal persons, a general partner and a limited partner. (Del. Code Ann., § 17-101, subds. (5), (8), (9).) In any case, where a writing manifests “that the agent is acting only for the principal”—as Marwit LLC did for Marwit Capital (9AA/2271)—it is “the instrument of the principal and not of the agent.” (Brandt v. Rokeby Realty Co. (Del.Super., Sept. 8, 2004, No. 97C-10-132-RFS) 2004 WL 2050519, *10; Ronay Family Limited Partnership v. Tweed (2013) 216 Cal.App.4th
830, 837-838 [“Where the signature as agent and not as a principal appears on the face of the contract, the principal is liable and not the agent.”].)

Appellants also argue that they are Traffic Control’s “representatives” and therefore can assert Traffic Control’s Stock Subscription Agreement rights. (AOB 48; see fn. 9, ante.) They cite no authority for this counterintuitive proposition, and in any case there is no evidence that Traffic Control ever designated either Marwit entity as a “representative” for any purpose.

Nor can appellants avoid the “stranger” rule by claiming to be Traffic Control’s successors or assigns. (AOB 54-56.) They cite no evidence indicating that they succeeded to Traffic Control’s interests; the record rather shows that appellants “eventually lost” Traffic Control “to a corporation that was restructuring.” (6RT/911; 3AA/574.) Nor are appellants Traffic Control’s “privies.” The record demonstrates that they are both separate legal entities, and they simply do not “represent the same legal rights” as Traffic Control. (See Clemmer v. Hartford Insurance Co. (1978) 22 Cal.3d 865, 875 [reciting various formulations of privity, none of which applies here]; 4RT/623-624; 5RT/740-741.)

The overarching fact of this case is that “[t]he deal would not have been made without the Oral Agreement . . . .” (8AA/2075.) There is a good reason why appellants cannot point to a single case that barred proof of an oral agreement under facts remotely like ours: If the oral agreement
is an essential component of a deal—so essential that without it there never would have been a deal—no principle of law or equity permits the parol evidence rule to apply.

II. KANNO HAS STANDING.

A. Kanno Is A Party To The Contract That Appellants Breached.

Kanno has standing to bring this suit because he is a party to the Oral Agreement. (Market Lofts Community Association v. 9th Street Market Lofts, LLC (2014) 222 Cal.App.4th 924, 932-933 [“party to a contract” may bring suit on contract]; Triple C Railcar Service, Inc. v. City of Wilmington (Del. 1993) 630 A.2d 629, 633 [“either party to an agreement may enforce its terms for breach thereof”].) Indeed, no one else could have standing.

Appellants claim that Kanno lacks standing because he did not cause Brandy Signs to transfer the Traffic Control preferred stock to him—that is, he “lacks standing to bring a claim for the sale of stock that he never owned.” (AOB 61.) That is irrelevant to standing.

As the trial court explained, “[t]his misconceives the nature of standing.” (8AA/2080.) If “Kanno proved unable to deliver the stock when payment was due, he would have been unable to perform,” but that has nothing to do with his “standing to assert the breach of a contract to which only he, and not [Brandy Signs], was a party.” (8AA/2080.)
Regardless, there can be no doubt that Kanno would have been able to obtain the stock and transfer it to appellants if they hadn’t ignored him. (2RT/270, 273.) The Stockholder Agreement provided that Brandy Signs could transfer the preferred stock to Kanno as a “Permitted Transfer” (9AA/2262.) As Brandy Signs’ sole shareholder, Kanno could have caused that transfer to occur whenever he wished (1RT/181-183.) That evidence fully supports the jury’s and trial court’s factual findings that Kanno did everything required of him for performance of the Oral Agreement. (4AA/1067, 1069; 8AA/2080.)

B. Appellants Will Not Be Subject To A Second Lawsuit.

The purpose of the standing requirement is procedural—to prevent multiple lawsuits by different parties for the same harm. (Giselman v. Starr (1895) 106 Cal. 651, 657 (Giselman) [standing saves defendants “from further harassment or vexation” by “other claimants to the same demand”].) Kanno’s suit fully serves that purpose. There is no threat of a “second lawsuit by Brandy Signs.” (AOB 61.) The Oral Agreement is the contract by which appellants must purchase the Traffic Control stock. Brandy Signs isn’t a party to that contract; Kanno is.
CONCLUSION

As the trial court found, the Oral Agreement was the only way that appellants could meet Kanno’s unalterable demand of a promise of payment and a tax deferral. “The deal would not have been made without the Oral Agreement . . . .” (8AA/2075.) And, as the jury impliedly found, appellants not only made this agreement but intended to perform it.

These findings render appellants’ parol evidence arguments untenable. Appellants’ failure even to acknowledge the overwhelming evidence against them—evidence that would undermine their claims even on de novo review—is by itself a sufficient basis to reject their arguments. The evidence itself nails the coffin shut.

The Court must affirm.

Date: July __, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rules 8.204(c) and 8.486(a)(6), I certify that this RESPONDENT'S BRIEF contains 13,999 words, not including the cover, the certification of interested parties, the tables of contents and authorities, the caption page, the verification page, the signature blocks, or this Certification page.

DATED: July 8, 2016

[Signature]
David E. Hackett
PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On July 8, 2016, I served the foregoing document described as: RESPONDENT’S BRIEF on the parties in this action by serving:

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[Attorneys for Defendants and Appellants, Marwit Capital Partners II, LP and Marwit Partners, LLC]

Hon. H. Michael Brenner
California Supreme Court
[Electronically served pursuant to CRC Rule 8.212(c)(2)]
Dept. C33
Orange County Superior Court
Central Justice Center
700 Civic Center Drive West
Santa Ana, California 92701

(X) BY MAIL: As follows: I am “readily familiar” with this firm’s practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on July 8, 2016, at Los Angeles, California.

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

Leslie Y. Barela
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’ REPLY BRIEF

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MARWIT CAPITAL PARTNERS II, LP AND MARWIT PARTNERS, LLC
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The 13,999-word respondent’s brief does not cite a single appellate case from any jurisdiction holding that a written contract containing an integration clause was not in fact integrated and instead could be contradicted by an alleged oral agreement which preceded execution of the written agreement. Yet, that is precisely what Albert Kanno asks this court to be the first appellate court to do. Kanno’s argument is even more challenging given the undisputed facts here: two sophisticated parties represented by leading law firms documented a $20 million plus complex business transaction with multiple written agreements, each containing an
integration clause. Even the one trial court decision that Kanno has cited where a contract’s written integration clause was not given effect did not present a fact pattern at all similar to the one here. In short, based on overwhelming authority, there can be no doubt that the three written contracts at issue here are in fact integrated and that an alleged $3.1 million “side deal” would undoubtedly have been documented as part of such a complex transaction of this magnitude.

In addition to requiring this court to do what no other appellate court has ever done, Kanno’s arguments on appeal also require this court to (1) reject the vast majority of cases holding that the question of whether a contract is integrated is a legal question solely for the court to decide de novo and instead apply a small line of minority cases saying that review of the integration question is for substantial evidence, (2) reject the unanimous California authority holding that a stranger to the contract can still enforce an integration clause and instead create a split of authority by holding otherwise, and (3) reject binding California Supreme Court authority holding that estoppel is not a defense to the parol evidence rule. These are bold strategic choices for a respondent seeking to affirm the judgment of the trial court and for obvious reasons, should be rejected by this court. As we explained in our opening brief and reaffirm below, this court should apply well established existing authority which compels a reversal here.

Even the trial court’s statement of decision (drafted by Kanno’s counsel) acknowledges that the integration clauses in the three agreements are not “meaningless” and that there cannot be an
oral agreement contradicting the written agreements. (See 8 AA 2074 [¶ 1].) Thus, whether the transaction was fully integrated (as Marwit Capital Partners II, LP and Marwit Partners, LLP (collectively Marwit) contend) or whether each contract was partially integrated but contemplated further agreements (as the trial court found), an oral agreement still cannot contradict the terms of any of the three written agreements.

Here, the alleged oral contract,¹ in which Marwit supposedly promised Kanno that it would purchase his stock at a set price, is directly contrary to each of the three agreements, summarized as follows:

<table>
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<th>Agreement</th>
<th>Provisions contradicted by the alleged oral agreement</th>
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<td>Stock Subscription Agreement (Delaware law)</td>
<td>Paragraph B.2 explicitly provides that no representations have been made about the ability to sell the stock at any time for any price. (9 AA 2246.) Paragraph C.7 provides that the agreement is binding on Brandy Signs’s successors and assignees and anyone else who ever acquires the stock at issue. (9 AA 2250 [¶ C.7].) Kanno concedes that under the oral agreement, he must</td>
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¹ As noted in the opening brief (AOB 16, fn. 1), the Marwit parties are not challenging the jury’s finding that an oral agreement was reached. We refer to the oral agreement as “claimed,” “alleged” or “purported,” because we challenge the validity of that agreement on appeal as a matter of law based on the parol evidence rule, which is an issue not decided by the jury.
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<tr>
<td>Stockholder Agreement (Delaware law)</td>
<td>This agreement, which is signed by all of the parties, provides that the Marwit parties will have a discretionary right of first refusal to purchase the stock. (9 AA 2259 [Arts. 2.1-2.2].) The claimed oral agreement purports to convert this discretionary right of first refusal to purchase the stock into a mandatory purchase obligation of the same stock.</td>
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<tr>
<td>Contribution and Purchase Agreement (California law)</td>
<td>Section 1.2 recites the “total purchase price” for the transaction and does not list any purported right to sell the stock at any time for any price. (9 AA 2129 § 1.2.) The oral agreement is also contrary to the Sheppard Mullin opinion letter, which was sent “c/o Marwit Capital,” which disavows the existence of any oral agreements. (9 AA 2284.) The opinion letter is personally verified by Kanno. (9 AA 2290-2291.)</td>
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This case is simply no different than every other parol evidence case where one party is trying to assert the right to enforce an alleged oral agreement notwithstanding that they later signed a written agreement with an integration clause that varies or conflicts with the supposed oral agreement. Every Delaware and
California case cited to the court has held that such an oral agreement is invalid under the parol evidence rule.

Finally, with respect to standing, Kanno concedes that the stock at issue was issued to Brandy Signs and that he had to transfer the stock to himself in order to perform under the alleged oral agreement. (RB 79.) As such, he would be bound by paragraph C.7 of the Stock Subscription Agreement which provides that it is binding on any Brandy Signs’s successors, assignees and anyone else who acquires the stock. (9 AA 2250 [¶ C.7].) Kanno cannot have it both ways; he cannot contend that he has standing because he could have transferred the stock to himself, yet disavow that he is bound by the Stock Subscription Agreement which specifically provides that there is no right to sell the stock at any time for any price. (9 AA 2246 [¶ B.2].)

As then-judge Ruth Bader Ginsburg wrote: “Were we to permit plaintiffs’ use of the defendants’ prior representations . . . to defeat the clear words and purpose of the Final Agreement’s integration clause, contracts would not be worth the paper on which they are written.” (One-O-One Enterprises, Inc. v. Caruso (D.C. Cir. 1988) 848 F.2d 1283, 1287 (Ginsburg, J.), internal quotation marks omitted.)
I. DELAWARE LAW GOVERS THE INTERPRETATION OF THE STOCK SUBSCRIPTION AGREEMENT AND STOCKHOLDER AGREEMENT.

Under California choice of law rules, a separate conflict of laws inquiry must be made with respect to each issue in the case. (Washington Mutual Bank v. Superior Court (2001) 24 Cal.4th 906, 920.)\(^2\) As explained in the opening brief, California courts enforce contractual choice of law provisions unless doing so would violate a fundamental public policy of the State of California. (AOB 31, citing Nedlloyd Lines B.V. v. Superior Court (1992) 3 Cal.4th 459, 466.) The respondent’s brief does not identify any fundamental California public policy implicated by this commercial dispute between Kanno, a citizen of Hawaii, and the Marwit parties, Delaware entities based in Orange County.

Instead, Kanno argues that this court should not enforce the Delaware choice of law provisions in the Stock Subscription Agreement and the Stockholder Agreement because California and Delaware law are not materially different. (RB 40, fn. 2.) That is true as far as it goes. Delaware and California both seek to enforce integrated contracts in order to promote freedom of contract and facilitate commerce (ev3, Inc. v. Lesh (Del. 2014) 114 A.3d 527, 530, fn. 3 (ev3)), and to provide legal certainty to business transactions

\(^2\) Analyzing different issues in a single case under the laws of different jurisdictions is known as depecage. (Brown v. Grimes (2011) 192 Cal.App.4th 265, 275; Broome v. Antlers’ Hunting Club (3d Cir. 1979) 595 F.2d 921, 923, fn. 5 (Aldisert, J.).)

However, as relevant here, and as explained in greater detail below, there are at least two material differences between California and Delaware parol evidence law. First, 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.” (J.A. Moore Const. Co. v. Sussex Associates Ltd. (D.Del. 1988) 688 F.Supp. 982, 987 (Moore) [applying Delaware law]; see also Section III.A, post.) Under California law, the existence of an integration clause is “very persuasive, if not controlling” to demonstrate whether an agreement is integrated. (Banco Do Brasil, S.A. v. Latian, Inc. (1991) 234 Cal.App.3d 973, 1002-1003 (Banco Do Brasil).)

Second, under Delaware law, it is undisputed that de novo review applies in determining whether or not a contract is integrated. (Peden v. Gray (Del., Oct. 14, 2005, No. 188,2005) 2005 WL 2622746, at p. *2 [nonpub. opn.], 886 A.2d 1278 [table] (Peden).) In contrast, under California law, there is a split of authority regarding whether the standard of review is de novo or substantial evidence (although the clear majority rule requires de novo review). (See Section II.B, post.)
Kanno is correct in one respect—the judgment could be easily reversed under either California or Delaware law, and in that situation it would make little difference which state’s law this court applies. However, if this court were to accept the various minority rules that Kanno is advancing under California law, then Delaware law would plainly be different and should be applied to compel reversal.

II. THIS COURT DETERMINES DE NOVO WHETHER THE CONTRACTS ARE INTEGRATED.

A. It is undisputed that de novo review applies under Delaware law.

Under Delaware law, whether a contract is integrated is a question of law reviewed de novo. (Peden, supra, 2005 WL 2622746, at p. *2.) The respondent’s brief does not cite any contrary Delaware authority, thereby conceding that de novo review is appropriate. (Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc./Obayashi Corp. (2003) 111 Cal.App.4th 1328, 1345, fn. 16 [failure to address point in respondents’ brief “is equivalent to a concession”; collecting cases].) Therefore, this court should apply de novo review to the application of the parol evidence rule under Delaware law.
B. De novo review also applies under California law.

1. The plain language of the parol evidence statute, great weight of authority, and legislative history all support the use of de novo review.

The parol evidence statute provides that the “court shall determine whether the writing is intended by the parties as a final expression of their agreement with respect to the terms included therein and whether the writing is intended also as a complete and exclusive statement of the terms of the agreement.” (Code Civ. Proc., § 1856, subd. (d), emphasis added.) Given the plain language of the statute, the vast majority of California cases have held that de novo review applies in determining whether a contract is integrated. Federal courts applying California law are in

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agreement. The leading practice guide is also in accord. (Eisenberg, Horvitz & Wiener, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2016) ¶ 8:114.5, p. 8-80 [“Application of the parol evidence rule to exclude evidence of a collateral oral agreement raises a question of law for the trial court’s determination, subject to de novo review on appeal”].) De novo review is also appropriate because contract interpretation is a question of law. (MacKinnon v. Truck Ins. Exchange (2003) 31 Cal.4th 635, 647; TRB Investments, Inc. v. Fireman’s Fund Ins. Co. (2006) 40 Cal.4th 19, 27.)

Applying de novo review is further supported by the legislative history of the 1978 amendments to the parol evidence statute of which Kanno has asked this court to take judicial notice. The legislative history repeatedly confirms that “[t]he question of integration is one for the court rather than the jury” (Kanno MJN 26), and that “[t]he issues of completeness and exclusivity are matters for court determination under subdivision (d)” (Kanno MJN 28; see also Kanno MJN 39, 46, 51, 66, 78, 80, 90, 92, 114, 119). In particular, the legislative history cites frequently with approval to the 1972 decision in Brawthen, supra, 28 Cal.App.3d 131, where the court held the question of whether a contract is integrated is a question of law reviewed de novo. (Id. at p. 137.)

Notably, the legislative history does not cite to the 1970 decision in

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Salyer Grain & Milling Co. (1970) 13 Cal.App.3d 493 (Salyer), which as discussed in the next section is the lynchpin of Kanno's argument supporting the minority rule that the substantial evidence standard should apply. (See RB 42.)

2. The substantial evidence cases Kanno relies on are a small minority view and are inconsistent with the plain language of the statute and its legislative history.

Without acknowledging that he is advocating for this court to apply a distinct minority rule, Kanno cites only three cases holding that the substantial evidence rule should apply to determine whether a contract is integrated: Salyer, supra, 13 Cal.App.3d at pp. 499-500; Heller v. Pillsbury Madison & Sutro (1996) 50 Cal.App.4th 1367, 1382 (Heller); and Mobil Oil Corp. v. Handley (1978) 76 Cal.App.3d 956, 961 (Mobil). (RB 42.) For this proposition, Heller only cites Mobil and Salyer, and Mobil in turn cites only to Salyer. In short, the veracity of Kanno’s position comes down to the soundness of Salyer’s analysis from 1970—an opinion not cited to or relied on by the Legislature in its 1978 amendments.

Salyer involved review of a trial court’s decision excluding extrinsic evidence of an alleged release. (Salyer, supra, 13 Cal.App.3d at pp. 497-498.) The trial court conditionally admitted the evidence and reserved ruling. (Id. at p. 497.) Thereafter, the court issued a memorandum holding that such evidence was precluded by the parol evidence rule. (Id. at pp. 497-
The defendant appealed contending that the evidence should have been admitted to show “additional” terms of the written agreement. (Id. at p. 498.)

The Court of Appeal affirmed the exclusion of the extrinsic evidence. The court held that the trial court's exclusion of the evidence under the parol evidence rule was “entitled to no less weight than other determinations of fact made by him” under the substantial evidence test. (Salyer, supra, 13 Cal.App.3d at p. 500.) But in doing so, the court cited only to cases involving interpretation of an ambiguous contractual term. (Ibid., citing Smith v. Arthur D. Little, Inc. (1969) 276 Cal.App.2d 391, 401 [interpretation of a lease based on the parties' acts and conduct before a dispute arises]; see also Salyer, at p. 500, fn. 6, citing Hynum v. First Nat. Bank of San Diego (1968) 267 Cal.App.2d 540, 542-543 [holding it was proper to admit extrinsic evidence to interpret a facially ambiguous promissory note].)

Thus, Salyer confused two different aspects of the parol evidence rule: (1) the prohibition on alleged oral agreements when the parties subsequently execute a written integrated agreement; and (2) the admission of extrinsic evidence to interpret an ambiguous term in a written agreement. (See Ri-Joyce, Inc. v. New

Salyer also cited Skone v. Quanco Farms (1968) 261 Cal.App.2d 237, 243. (Salyer, supra, 13 Cal.App.3d at p. 500, fn. 6.) Skone's discussion of the parol evidence rule, however, did not discuss the standard of review or state that it was reviewing the trial court's ruling for substantial evidence. (Skone, at p. 243.) The snippet from Skone, which was cited by Salyer, addressed a different issue (a sufficiency of evidence challenge to a breach of fiduciary duty claim). (Ibid.; Salyer, at p. 500, fn. 6.)
Motor Vehicle Bd. (1992) 2 Cal.App.4th 445, 452, fn. 1 [explaining the two different aspects of the parol evidence rule]; BMW of North America, Inc. v. New Motor Vehicle Bd. (1984) 162 Cal.App.3d 980, 990-991, fn. 4 [same].) As explained in Section A above, the first aspect of the parol evidence rule is a question of law reviewed de novo. (Code Civ. Proc., § 1856, subd. (d).) The second aspect of the parol evidence rule (interpretation of ambiguous contractual provisions) is a question of fact for the fact finder to determine. Thus, there are numerous CACI jury instructions regarding rules for interpretation of the meaning of an ambiguous contractual term (see CACI Nos. 314-320), but no such jury instruction exists for the first aspect of the parol evidence rule because it is simply not a factual question.

Moreover, none of the three cases cited by Kanno held that an alleged oral agreement was valid in light of a subsequent integrated written agreement; indeed, they each found the contract to be integrated. (See Salyer, supra, 13 Cal.App.3d at pp. 499-502 [alleged oral agreement barred by parol evidence rule]; Heller, supra, 50 Cal.App.4th at p. 1382 [law firm partnership agreement was integrated notwithstanding absence of integration clause]; Mobil, supra, 76 Cal.App.3d at p. 961 [written agreement was integrated].) Kanno also cites Masterson v. Sine (1968) 68 Cal.2d 222 (Masterson) to support his standard of review argument. (RB 41-42.) But Masterson did not address the standard of review to apply to a question of integration. Instead, the court simply held that the determination of whether a contract is integrated is not determined exclusively from the face of the written agreement, but
that extrinsic evidence should also be considered. *(Masterson, at pp. 225-231.)* The fact that extrinsic evidence should be considered, in addition to the language of the written agreement itself, does not convert a question of law into a question of fact, particularly in light of subdivision (d) of Code of Civil Procedure section 1856, which provides that the “court” shall determine integration. Therefore, *Masterson* has no bearing on the standard of review.

Subdivision (d)’s requirement for the court to make this determination makes sense, and is constitutional, only if integration is an issue of law rather than an issue of fact. Courts appropriately determine questions of law, but if integration is indeed a question of fact, as Kanno contends, then parties are being deprived of their constitutional right to have that “factual” issue decided by a jury. *(See Dixon v. Superior Court (1994) 30 Cal.App.4th 733, 746 [Fourth Dist., Div. Three] [party has a right to a jury trial on factual issues]; Hung v. Wang (1992) 8 Cal.App.4th 908, 927 [under jury trial right in California Constitution, article I, section 16, “it is the function of the jury to determine questions of fact”].)* Indeed, the trial court in this case rejected the Marwit parties’ proposed jury instruction on the parol evidence rule *(4 AA 1062; 9 RT 1558-1559)* and instead decided the integration issue in a bench trial as a matter of law. Thus, adoption of Kanno’s minority rule would render the parol evidence statute unconstitutional because it would require courts to make factual findings and deprive parties of their right to a jury for such questions. This court should avoid interpreting the parol evidence statute in a manner that would render it unconstitutional. *(See Traverso v. People ex rel. Dept. of*
In short, Kanno’s argument for application of the substantial evidence rule relies on questionable authority which represents the minority view and is contrary to the parol evidence statute (Code Civ. Proc., § 1856, subd. (d)), its legislative history, and the constitutional difference between judges and juries. The court should apply de novo review to all issues in this appeal.

3. In any event, the trial court did not resolve any disputed issues of historical facts. Therefore, de novo review is appropriate even if the minority rule advocated by Kanno is adopted by this court.

Some courts have attempted to harmonize this split of authority by holding that the issue of whether a contract is integrated is a question of law unless the foundational evidence is disputed. (See Esbensen v. Userware Internat., Inc. (1992) 11 Cal.App.4th 631, 638, fn. 4; Thrifty Payless, Inc. v. Mariners Mile Gateway, LLC (2010) 185 Cal.App.4th 1050, 1060 (Thrifty Payless).) But, even under that line of authority, when the “evidentiary facts themselves are not in dispute” and the parties only dispute the inferences to be drawn from those evidentiary facts, then de novo review applies to the integration issue. (Malmstrom v. Kaiser Aluminum & Chemical Corp. (1986) 187 Cal.App.3d 299, 315)
As we explain, even if this third line of cases were applicable (which it is not under the correct majority rule), then de novo review should still apply because the trial court failed to make any findings on disputed issues of historical fact relevant to the integration issue.

“[A] determination is one of ultimate fact if it can be reached by logical reasoning from the evidence, but one of law if it can be reached only by the application of legal principles.” (Board of Education v. Jack M. (1977) 19 Cal.3d 691, 698, fn. 3.) In this case, the historical facts are not disputed. Indeed, the only historical fact ever disputed was whether the parties entered into the claimed oral agreement, which is of course the dispute in every case applying the parol evidence rule in which de novo review is routinely applied. The question on appeal here is whether the oral agreement the jury found is enforceable under the parol evidence rule given the following undisputed historical facts:

- Before the written agreements, all of the parties, including Kanno, signed a letter of intent stating that there would be no enforceable sales agreement until a “definitive Purchase and Sale Agreement” is executed by the parties. (9 AA 2118, 2121 [* 10], 2124 [last paragraph].) While the letter of intent may not be enforceable as a sales agreement, it demonstrates that all along the parties (as one would expect in a transaction of this size and complexity) specifically contemplated that only a comprehensive written agreement could govern any final deal between them and
not a $3.1 million oral “side deal.” Indeed, Kanno himself agreed that, under the letter of intent, nothing was binding unless it was put in writing (2 RT 304:26-305:13);

- The parties are sophisticated businesses and individuals, all represented by large experienced law firms (RB 53);

- After the alleged oral agreement, the parties entered into three written agreements, each of which contains an integration clause. Each of the written agreements addresses the subject matter of the alleged oral agreement, i.e., the stock and how and when it can be sold at what price; and

- The overall transaction was in excess of $20 million and carefully documented by sophisticated and experienced legal counsel.

Additionally, the trial court’s statement of decision, drafted by Kanno’s counsel, does not resolve any disputed issues of historical fact. Rather it simply makes legal conclusions based on undisputed historical facts. The statement of decision finds:

1. The letter of intent (Exhibit 8), which was signed by all parties, is not binding as a sales agreement. (8 AA 2074 [¶ 1].) The statement of decision does not address the additional legal point that the letter of intent contemplated subsequent binding written agreements, not an oral one—a point Kanno admitted. (9 AA 2118, 2121 [¶ 10], 2124 [last paragraph]; 2 RT 305:4-13.)

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6 Although the letter of intent is not a binding sales agreement, other aspects of it are binding, such as the requirement of a subsequent written agreement, confidentiality, and exclusivity. (9 AA 2118-2125.)
2. The remaining three agreements (i.e., the Contribution and Purchase Agreement, Stockholder Agreement and Stock Subscription Agreement) are not integrated. (8 AA 2074 ¶ 1.) This is the ultimate legal conclusion for this court to decide.

3. The “stranger to the contract” doctrine prohibits application of the parol evidence rule. (8 AA 2074 ¶ 2.) This is another legal conclusion that this court reviews de novo, not a resolution of a disputed historical fact. There has never been any factual dispute about which parties are signatories to the agreements.

4. The claimed oral agreement is collateral to the three written agreements and is not contrary to the terms of the integrated agreements. (8 AA 2075 ¶ 3.) This is another legal conclusion and does not resolve any disputed historical fact. (Banco Do Brasil, supra, 234 Cal.App.3d at p. 1007 [“Contrary to the trial court, we have no trouble whatever concluding” that the oral agreement was not collateral to the written integrated agreement and, thus, barred by the parol evidence rule].)

5. The alleged intent of the parties that “regardless of what the various agreements say, Kanno and the Marwit parties did not intend for them to be the final and complete expression of the parties' agreement.” (8 AA 2075:16-18.) This is the ultimate legal issue for this court to decide and is not the resolution of a disputed historical fact. (Malstrom, supra, 187 Cal.App.3d at p. 315; Okun, supra, 203 Cal.App.3d at p. 816.) As this court has held, the whole point of the parol evidence rule is that “when a contract is reduced to writing, it is presumed to contain all of the
material terms, and it cannot reasonably be presumed that the parties would intend two contradictory terms to be part of the same agreement.” (Hot Rods, supra, 242 Cal.App.4th at p. 1175.) The trial court’s conclusion that the oral agreement is valid “regardless” of the written, integrated agreements is the ultimate (and incorrect) legal conclusion. (Banco Do Brasil, supra, 234 Cal.App.3d at p. 1007.)

In sum, whether the written agreements at issue are integrated must be decided by application of legal principles and thus, is a question of law for this court to determine applying de novo review.

III. THE AGREEMENTS ARE INTEGRATED.

A. Under Delaware law, the integration clauses in the Stock Subscription Agreement and the Stockholder Agreement conclusively establish that the agreements are integrated.

Kanno does not contend that any “unconscionable or other extraordinary circumstances” apply. Instead, Kanno asserts that this line of Delaware cases is somehow no longer good law in light of Otto v. Gore (Del. 2012) 45 A.3d 120, 131 (Otto), in which the court held that extrinsic evidence is admissible to determine whether a settlor intended to create a trust. (RB 50-52.) The trust document at issue in Otto, however, did not contain an integration clause, and thus, the Otto court did not have occasion to address the conclusion presumption created by an integration clause. (See RB 75, citing Humm v. Aetna Cas. & Sur. Co. (Del. 1995) 656 A.2d 712, 716 [opinion is not controlling on an issue it “did not consider”].) Moreover, Otto did not permit the use of extrinsic evidence to “vary[] or contradict[] the express terms of the writing.” (Otto, supra, 45 A.3d at p. 131; see also Galantino v. Baffone (Del. 2012) 46 A.3d 1076, 1081 (Galantino) [cited in Otto for proposition that the parol evidence rule “bars the admission of extrinsic evidence to an unambiguous, integrated written contract for the purpose of varying or contradicting the terms of that contract” and that the policy underlying the parol evidence rule is to “avoid upsetting the sanctity of fully integrated written agreements”].)

Indeed, a Delaware court in Newport Disc. reiterated and applied Moore’s conclusive presumption rule one year after Otto was decided. (Newport Disc., supra, 2013 WL 987936, at p. *4 [“‘Absent fraud or other unconscionable circumstances, . . . the existence of an integration clause between sophisticated parties is conclusive

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 evidence that the parties intended the written contract to be their complete agreement’ ”; see also Realty Finance Holdings v. KS Shiraz MGR (Mass.App.Ct. 2014) 18 N.E.3d 350, 355, fn. 8 [applying conclusive presumption rule under Delaware law].)\(^7\)

Kanno also cites to Middletown Concrete Products v. Black Clawson Co. (D.Del. 1992) 802 F.Supp. 1135 and Addy v. Piedmonte (Del.Ch., Mar. 18, 2009, No. 3571-VCP) 2009 WL 707641 (Addy) [nonpub. opn.]. (RB 51.) Neither assists Kanno. Middletown applied Iowa, not Delaware law to the contract claims. (Middletown, at p. 1136.) Thus, it sheds no light on whether Moore’s conclusive presumption remains a valid statement of Delaware law. Moreover, the Middletown court concluded that the three written contracts at issue with integration clauses were integrated and, thus, “may not be contradicted by any prior or contemporaneous agreement.” (Id. at p. 1146.)

Addy is the only case cited by Kanno from any court in any jurisdiction in which a court concluded that a written contract with an integration clause was not in fact integrated. But Addy itself recognized that an integration clause creates “a presumption of integration” and held that the contracts at issue were not integrated only because of discrepancies in the signing dates of the various

documents which, if taken on their face, meant that one contract was terminated before it even went into effect. *(Addy, supra, 2009 WL 707641, at p. *9.)* In other words, the contracts in *Addy* were held not to be integrated because of drafting errors, not because the parol evidence rule was inapplicable.⁸

In short, the *Moore* line of cases remains good law and creates a conclusive presumption that the Stock Subscription Agreement and the Stockholder Agreement are integrated under Delaware law. To the extent that this court has any concerns regarding Delaware law on this conclusive presumption issue, this court should ask the California Supreme Court to certify the issue to the Delaware Supreme Court pursuant to Rule 41 of the Rules of the Delaware Supreme Court which permits certification of questions of Delaware law by the highest court of any state. This can be accomplished by this court by deferring submission and issuing an order asking the California Supreme Court to transfer this cause to that court for purposes of certifying the question to the Delaware Supreme Court. *(Cal. Rules of Court, rule 8.552; see *Nguyen v. Superior Court* (2007) 150 Cal.App.4th 1006, 1013 [Fourth Dist., Div. Three].)*

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⁸ Kanno also cites *MicroStrategy Inc. v. Acacia Research Corp.* (Del.Ch., Dec. 30, 2010, No. 5735-VCP) 2010 WL 5550455, at p. *13 [nonpub. opn.], but that case simply holds that there is a fraud exception to the parol evidence rule. Here, the jury rejected Kanno’s fraud claim. *(4 AA 1066-1074.)*
B. The Contribution and Purchase Agreement is integrated under California law.

1. The integration clause in the Contribution and Purchase Agreement along with the surrounding circumstances of this complex business transaction demonstrate that the contract is integrated under California law.

Kanno does not dispute that under California law 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.) As this court has held, “when a contract is integrated (as this one is under art. 46), extrinsic evidence cannot be used to vary or contradict the instrument’s express terms.” (Thrifty Payless, supra, 185 Cal.App.4th at p. 1061.) Even the primary case relied on by Kanno holds that the “instrument itself may help to resolve” whether the agreement is integrated, such as when it contains an integration clause. (Masterson, supra, 68 Cal.2d at pp. 225-226.)

Banco Do Brasil, a case inexplicably omitted from the respondent’s brief, is on point and demonstrates why the Contribution and Purchase Agreement is integrated under California law. In Banco Do Brasil, a bank appealed from a jury

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9 Banco Do Brasil was cited extensively in the opening brief. (AOB 35, 37-40.)
verdict finding that it had breached an alleged oral agreement to extend a $2 million line of credit purportedly entered into as part of a complicated business transaction; the jury awarded the cross-complainant $27 million for breach of the alleged oral agreement. *(Banco Do Brasil, supra, 234 Cal.App.3d at pp. 981-982.)* The trial court rejected the bank’s parol evidence defense holding that the alleged oral agreement was “‘naturally separate’” from the “extensively documented loan” and thus was not integrated. *(Id. at p. 983.)* As in this case, “[w]hile all other aspects of the transaction were fully documented, the alleged promise to extend additional credit, while assertedly critical, was never the subject of any writing and was vigorously disputed” by the bank, even though the jury found that such an oral agreement had been made. *(Id. at p. 982.)* The Court of Appeal reversed the judgment under the parol evidence rule and directed that judgment be entered in favor of the bank. *(Id. at pp. 1000-1001, 1018.)*

After explaining the substance of the parol evidence rule and that de novo review applies *(Banco Do Brasil, supra, 234 Cal.App.3d at p. 1000),* the court held that the agreement was integrated *(id. at pp. 1001-1002),* because “[m]ost importantly” the contract contains an integration clause which states that it is the entire agreement and supersedes all prior agreements and understandings *(id. at p. 1003).* The court explained that an oral agreement of the type claimed by the plaintiff would not naturally been made the subject of a separate agreement because the respondents were.

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10 The integration clause in the Contribution and Purchase Agreement is virtually identical. *(9 AA 2169 [§ 8.3].)*
“sophisticated and experienced businessmen” represented at all times by counsel of their choice. *(Banco Do Brasil, at p. 1005.)* “The record clearly reflects that respondents were both cautious and deliberate with respect to their negotiations and agreements in this matter.” *(Ibid.)* Notwithstanding the importance of the alleged oral agreement, “not one word about such line of credit appears in the documents or in any other contemporaneous writing or correspondence.” *(Ibid.)* The court held that notwithstanding some prior negotiations, and “*no matter how persuasive the evidence of additional oral understandings*” *(id. at p. 1000)*, if such an alleged oral agreement had actually existed, “it would seem obvious, if not compelling, that the terms of such a credit arrangement would have been included in the very written agreement which purported to fully describe the entire relationship of the parties” *(id. at p. 1007).*

Contrary to the trial court, we have no trouble whatever concluding that a binding agreement for further credit would *not* have been “naturally separate” from the Guaranty Agreement, but indeed would have necessarily been an integral part thereof; if in fact agreed upon, such a significant commitment would most certainly have been included in the written Guaranty Agreement.

*(Ibid.)*

The court concluded by stating that it disagrees with the “*concern expressed in some circles*” that parties to a contract in California are not capable of drafting a written instrument which will fully and completely “define a particular legal relationship.” *(Banco Do Brasil, supra, 234 Cal.App.3d at p. 1011.)* In language particularly appropriate to this case the court stated:
As we view it, it is the essence of the judicial function to contribute to legal certainty and reasonable predictability in the affairs of our citizens rather than to suggest that such goals are not attainable. Parties to a business or commercial transaction, such as those in this case, should be able to clearly express their intent as to the nature and scope of their legal relationship and then be able to rely on that expression. If, as in this case, they agree that their entire understanding is completely set forth in a particular writing then they are both entitled and required to live with the agreed terms. The courts simply cannot permit clear and unambiguous integrated agreements, such as the one before us, to be rendered meaningless by the oral revisionist claims of a party who, at the end of the game, does not care for the result.

(Ibid., emphasis added.) This court has voiced similar concerns. (Hot Rods, supra, 242 Cal.App.4th at p. 1176 [“Contracts must mean what they say, or the entire exercise of negotiating and executing them defeats the purpose of contract law—predictability and stability”].)

Similarly, here, both parties were sophisticated business parties represented by counsel who documented written integrated agreements for a complex business transaction. And the question of a $3.1 million stock purchase would obviously have been included in written contracts, much like the provision in the Stock Subscription Agreement providing that there is no guaranteed right to sell the stock to anyone at any price and the Stockholder Agreement which gave Marwit a discretionary right of first refusal to purchase such stock. As in Banco Do Brasil, this court should set aside the jury’s finding of an oral agreement because it is inconsistent with the written integrated contracts. (See also EPA Real Estate Partnership

The cases Kanno cites simply do not assist him. (See RB 46; see McLain v. Great American Ins. Companies (1989) 208 Cal.App.3d 1476, 1485 [the court specifically noted the “conspicuous[ ] absen[ce]” of an integration clause from the contract at issue]; Harden v. Maybelline Sales Corp. (1991) 230 Cal.App.3d 1550, 1555 [holding that the parol evidence rule does not apply to an employment application because an application is only a “mere solicitation of an offer of employment” and as “such the application cannot constitute an agreement, let alone a partially integrated agreement”].)
This court should not be the first appellate court to hold that a written contract containing an integration clause was not in fact integrated and should instead conclude that the Contribution and Purchase Agreement is integrated under California law.

2. The policies underlying the parol evidence rule support a finding of integration.

As explained in the opening brief, application of the parol evidence rule under California law must take into account two policy considerations: (1) “the assumption that written evidence is more reliable than human memory”; and (2) “fear of unintentional invention by witnesses in the outcome of the litigation.” (AOB 37-38; Banco Do Brasil, supra, 234 Cal.App.3d at p. 1002.) The opening brief explained that these two factors weigh heavily in favor of reversal of the trial court’s ruling because of the hotly disputed nature of the alleged oral agreement and the clear self-interest Kanno had in claiming there was a mandatory redemption at a set price after the stock became worthless (a claim he would never have made had the stock actually increased in value). (AOB 37-38.)

Kanno’s responses are unavailing. With respect to the first policy concern (written documentation is more reliable than human memory), Kanno simply relies on an early draft of the agreement which included the put option guaranteeing Kanno the right to sell the stock at a set price. (RB 52.) But there has never been a dispute that the put option was eliminated from later drafts and the
final versions of the agreements. The whole point of this appeal is that the put option was eliminated from the final written agreements and yet Kanno is trying to nonetheless enforce it as if it remained part of the written agreements. Indeed, the logical conclusion to reach after a term is eliminated from an earlier draft of an agreement is that the parties did not agree to it.

Kanno also relies on a post-closing email from Kanno to Britt dated August 1, 2009 in which Kanno purportedly confirmed a conversation with Britt in which Britt allegedly confirmed the existence of the oral agreement. (RB 54, citing RA 245.) But Kanno conveniently ignores that Britt responded to this email and specifically disavowed any such conversation. (RA 246.) In fact, the respondent’s brief goes so far as to selectively cite only to Kanno’s email and not to Britt’s response even though both emails appear together on the very next page of the respondent’s appendix. (RA 246.)

The simple fact remains that four witnesses testified as to the oral agreement being allegedly agreed to during a telephone call (2 RT 240-241; 5 RT 884; 6 RT 1001-1002, 1072-1073), and three witnesses denied that such a promise was made during the same call (5 RT 751-752, 785-786, 815-816; 6 RT 931, 936-937). This is a classic “he said/he said” scenario in which the parol evidence rule should apply because the written word is much more reliable than the conflicting memories of participants to a phone call years before trial.

With respect to the second policy consideration (fear of invention by self-interested witnesses), Kanno tries to disavow that
he is an “economic underdog” and, thus, this policy reason should not apply. (RB 53.) This is an odd position for Kanno to take since elsewhere, he tries to portray himself as the owner of a “family-developed business,” (RB 18) who became the business’s “driving force” (RB 19), contrasted with Marwit which is an investment firm managing $183 million (RB 18). These themes were also emphasized by Kanno during trial. (E.g., 1 RT 131:11-18 [Kanno’s counsel’s opening argument emphasizing that Kanno owned a family business].) In any event, Kanno does not dispute the substantive point that if the value of the stock had gone up instead of down, he would have disavowed any claimed oral obligation to sell the stock at a lower price. There were over 3.1 million reasons here for Kanno to lie. That is why we have a parol evidence rule.11

IV. THE ALLEGED ORAL AGREEMENT IS CONTRARY TO THE TERMS OF THE INTEGRATED AGREEMENTS.

A. The oral agreement found by the jury is directly contrary to the express provisions of the Stock Subscription Agreement which specifically disavows any right to sell the stock at any time for any price.

Kanno does not dispute that paragraph B.2 of the Stock Subscription Agreement directly contradicts the claimed oral

11 For the same reasons set forth in this section, if California law were applied to the integration question for the other two agreements instead of Delaware law, they too would be integrated.
agreement because that provision specifically warns that no representation has been made regarding the ability to sell the stock or that the stock can be sold at any time for any price: “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, emphasis added.)

Kanno argues that he is not bound by this agreement because it only binds Brandy Signs, one of Kanno’s many companies and the one to whom the stock was actually issued. (RB 79.) However, this argument ignores section C.7 of the Stock Subscription Agreement which provides that it is binding on the parties’ successors and assignees and that “[a]nyone who purchases or otherwise acquires any of the Shares shall acquire such Shares subject to the provisions of this Agreement, and shall make no transfers in violation of this Agreement.” (9 AA 2250 ¶ C.7, emphasis added.) Kanno concedes that he would only have been able to transfer the stock to Marwit under the alleged oral agreement if he first transferred the stock from Brandy Signs to himself. (RB 79.) Therefore, under the plain language of section C.7 of the Stock Subscription Agreement, Kanno is bound by the terms of that agreement including the express disavowal of any agreement to sell the stock at any time for any price. (9 AA 2246, 2250 ¶ C.7; RB 66 [Kanno admitting that he would be bound by the Stock Subscription Agreement if he were
Brandy Signs’s assignee or holder of the stock].) Although this issue was explicitly raised in the opening brief (AOB 47), the respondent’s brief provides no response, thereby implicitly conceding the point (RB 65-66). 12

Again, Kanno cannot have it both ways. He cannot contend that he has standing to sue to enforce the alleged oral agreement because he could have transferred the stock to himself (RB 79), and at the same time contend that he is not bound by the provisions of the Stock Subscription Agreement, which explicitly provides that it is binding on successors, assigns and anyone who subsequently acquires the stock (9 AA 2250 [¶ C.7]).

Under Delaware law, the policy underlying the parol evidence rule is “to avoid upsetting the sanctity of fully integrated written agreements.” (Galantino, supra, 46 A.3d at p. 1081.) The claimed oral agreement is directly contrary to the terms of the Stock Subscription Agreement and, thus, is barred by the parol evidence rule. Accordingly, the judgment should be reversed with directions to enter a new judgment in favor of the Marwit parties. 13

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12 For the court’s convenience, copies of the relevant pages of the Stock Subscription Agreement are attached as Exhibit 1.

13 For the same reasons, if California law were applied, the alleged oral agreement would likewise be inconsistent with the Stock Subscription Agreement and barred by the parol evidence rule. (See Section IV.C, post.)
B. **The purported oral agreement is also contrary to the provisions of the Stockholder Agreement.**

The opening brief explains that the alleged oral agreement is also inconsistent with the Stockholder Agreement because it converts Marwit’s optional right of first refusal to purchase the stock into a mandatory obligation to do so. (AOB 42-45.) Kanno has two responses, both of which miss the mark.

First, Kanno contends that a Kanno-to-Marwit transfer of the stock would have been a “permitted transfer” under Article 4.2 of the Stockholder Agreement. (RB 67-68.) Not so. Under the plain language of Article 4.2, there are four types of permitted transfers (numbered to correspond to Article 4.2): (i) Marwit may transfer shares to affiliated entities; (ii) Brandy Signs may transfer shares to Kanno;14 (iii) “Co-Investor[s]” may transfer shares among themselves;15 and (iv) Management Holders (including Marwit) and Sellers (including Kanno) may transfer shares to a family member or trust controlled by the Management Holder or Seller transferring the shares. (9 AA 2262 [¶ 4.2].) In other words, each of the three specified categories of stockholders may transfer shares internally among related entities. However, Article 4.2 does not permit, as Kanno contends, transfers from Kanno to Marwit. Kanno appears to be relying on the language “controlled by any of the foregoing” in subdivision (iv) and attempting to apply it to subdivision (i) to

14 See AOB 42, fn. 11.
15 “Co-Investor” is a defined term which does not include Kanno or Marwit. (9 AA 2255.)
broaden the scope of transfers from Marwit. If Kanno’s interpretation of Article 4.2 were correct, there would be no need for Article 2’s notice provisions for any possible transfer between Kanno and Marwit under Marwit’s right of first refusal, because any transfer of stock by Kanno to Marwit would be exempted from such provisions as a permitted transfer; yet a transfer from Kanno to Marwit clearly falls within the scope of Article 2.1(a). The right of first refusal provisions in Article 2 are optional and not mandatory as the oral agreement would make them. (AOB 43, citing 9 AA 2260-2262; RB 31.)

Even if Kanno’s interpretation of Article 4.2 were correct (and it is not), then Kanno still had to comply with the requirements of Article 4.3 in order to effectuate a permitted transfer under Article 4.2. Article 4.3 requires that for any permitted transfer under Article 4.2, appropriate documentation must be submitted to and approved by Traffic Control. (9 AA 2255, 2262 [¶ 4.3].) However, it is undisputed that Kanno never even

16 Under the last antecedent rule, the phrase “controlled by any of the foregoing” in subdivision (iv) modifies the immediately preceding phrases in that subdivision and does modify the more remote phrases in subdivisions (i)-(iii). (People ex rel. Lockyer v. R.J. Reynolds Tobacco Co. (2003) 107 Cal.App.4th 516, 529 [explaining the last antecedent rule of contractual interpretation].)

17 “[W]hen interpreting a contract, we strive to interpret the parties’ agreement to give effect to all of a contract’s terms, and to avoid interpretations that render any portion superfluous, void or inexplicable.” (Brandwein v. Butler (2013) 218 Cal.App.4th 1485, 1507.)

18 Traffic Control is the entity whose shares were issued to Kanno. (3 RT 408; 4 RT 691-692.)
attempted to comply with Article 4.3’s requirements and he never contends otherwise. (3 RT 651:10-653:17; RB 66-69.) Therefore, Kanno cannot rely on the permitted transfer exception under the Stockholder Agreement in order to justify the claimed oral agreement.

Kanno’s second response is that the alleged oral agreement is somehow consistent with the optional right of first refusal because Marwit could have separately agreed to purchase the stock. (RB 68.) Not so. Under the right of first refusal (9 AA 2259-2260), Marwit clearly had the right to say “no” if Kanno offered to sell it the stock. Eliminating Marwit’s option to decline to purchase the stock is, thus, plainly inconsistent with the purported oral contract under which Marwit was purportedly obligated to purchase the stock.

The Delaware Supreme Court’s decision in ev3 is instructive. In ev3, the plaintiffs (who as discussed in Section V.B. below were not parties to the relevant agreement) contended that the defendant had an obligation to commit to certain funding even though the subsequent written, integrated agreement provided that the defendant’s obligation to provide the funding was in its “‘sole discretion.’” (ev3, supra, 114 A.3d at p. 528.) The Delaware Supreme Court held that the alleged obligation to provide funding was plainly inconsistent with the discretionary right to do the same thing and thus, barred by the parol evidence rule. (Id. at pp. 537-538 & fn. 32.) Thus, Kanno’s contention that converting an optional right of first refusal into a mandatory obligation to purchase the stock is clearly foreclosed under Delaware law by ev3.
Therefore, the alleged oral agreement is contrary to the terms of the Stockholder Agreement and thus, is barred by the parol evidence rule under Delaware law. Even if California law were applied, the result would be the same as explained in the next section.

C. The oral agreement found by the jury is contrary to the Contribution and Purchase Agreement and the Sheppard Mullin opinion letter.

The oral agreement is similarly contrary to Section 1.2 of the Contribution and Purchase Agreement which states what the “total purchase price shall be” and includes many terms, none of which is a mandatory stock purchase agreement at a set price. (9 AA 2129 § 1.2.) Kanno contends that the oral agreement is consistent with Section 1.2 because it only addresses alleged “additional rights or obligations[ ].” (RB 63.) Kanno is wrong. Section 1.2 states what the “total purchase price shall be.” (9 AA 2129 § 1.2, emphasis added.) The operative word is “total,” which Kanno simply ignores. Any additional consideration would have to be included in Section 1.2 and the alleged oral agreement plainly is not.20

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19 Black’s defines “total” as “Whole, not divided, lacking no part, entire, full, complete, the whole amount. Utter, absolute.” (Black’s Law Dict. (6th ed. 1990) p. 1490.)

20 Moreover, even though the parties allocated $2.5 million to the stock being issued to Brandy Signs (both the preferred stock that is the subject of this action and common stock), nowhere in the (continued...)
Under California’s parol evidence rule, parties cannot “add to or vary” the terms of an integrated agreement. (Masterson, supra, 68 Cal.2d at p. 225, emphasis added; accord, In re Ins. Installment Fee Cases (2012) 211 Cal.App.4th 1395, 1413; Alling, supra, 5 Cal.App.4th at p. 1433.) Kanno is plainly trying to “add” $3.1 million of additional consideration to the Contribution and Purchase Agreement (which he signed in his individual capacity) by adding to the total guaranteed purchase price even though Section 1.2 of that agreement states in an integrated writing what the “total purchase price shall be.” (9 AA 2129 [§ 1.2].) Although Masterson and In re Ins. Installment Fee Cases were cited in the opening brief (AOB 50), Kanno provides no response to these cases (RB 62-63), thereby conceding the point.

Kanno personally signed the Contribution and Purchase Agreement. (9 AA 2175.) There is no reason not to apply the integration clause in that agreement against him.

The alleged oral agreement is also inconsistent with the Sheppard Mullin opinion letter which Kanno personally verified. (9 AA 2290-2291.) In that opinion letter, Sheppard Mullin (who represented Kanno in negotiating this complex transaction) states 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 contends that the claimed oral agreement is consistent with this

(...continued)

Contribution and Purchase Agreement is there any reference to the alleged 8 percent dividend.
letter because the Marwit parties are not signatories to the Contribution and Purchase Agreement (RB 64), yet he does not explain why the Marwit parties should not be able to rely on the opinion letter when it was sent “c/o Marwit Capital” (9 AA 2283). In any event, it is undisputed that Kanno verified an opinion letter issued by his counsel broadly proclaiming there were no oral side agreements. To now say that there was such an oral side agreement creates the exact form of mischief the parol evidence rule is intended to avoid.

V. THE “STRANGER TO THE CONTRACT” DOCTRINE IS INAPPLICABLE.

A. Unanimous California authority confirms that nonparties can enforce the parol evidence rule.

Kanno contends that the Marwit parties cannot enforce the parol evidence rule against him because they are not signatories to the Contribution and Purchase Agreement. (RB 70.) He is mistaken because California law now permits the application of the parol evidence rule by and against nonsignatories.

Every California and federal case to address the impact of the 1978 amendment to the California parol evidence statute has concluded, consistent with Witkin, that the amendment eliminated
the “stranger to the contract” exception Kanno relies on.21  (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.”].)22

Kanno, in a novel move for a respondent, invites this court to create an explicit split of authority based solely on the absence of an

21  The issue of whether California law acknowledges a “stranger to the contract” exception to the parol evidence rule is only applicable with respect to the interpretation of the Contribution and Purchase Agreement as the other two contracts have Delaware choice of law provisions.

express statement in the legislative history that this was the intent of the 1978 amendment. (RB 71-73.) However, this argument ignores that the “stranger to the contract” exception to the parol evidence rule was based on prior language in the parol evidence statute which limited its application to “between the parties and their representatives, or successors in interest.” (RB 70, fn. 12 [citing former version of the statute]; see Broder v. Epstein (1950) 101 Cal.App.2d 197, 198-199 [confirming that under prior rule, nonparties to contract could not enforce parol evidence rule based on limiting language in prior version of statute].) The 1978 amendment to the parol evidence statute deleted the provision that limited application of the rule to “parties and their representatives.” (Code Civ. Proc., § 1856, subd. (a).)

“When a statute is amended to delete an express provision, the presumption is that the Legislature intended to change the law.” (Kern County, supra, 18 Cal.App.4th at p. 86.) By deleting the language limiting application of the parol evidence rule to “between the parties,” the legislature deleted the basis for “stranger to the contract” exception.

Moreover, it “is only when the meaning of the words is not clear that courts are required to take a second step and refer to the legislative history.” (Mt. Hawley Ins. Co. v. Lopez (2013) 215 Cal.App.4th 1385, 1397.) Here, since it is clear from the face of the statute that the limiting language was omitted, there is no reason to consider the legislative history which, in any event, is silent on the issue. “When the reason of a rule ceases, so should the rule itself.” (Civ. Code, § 3510.) Because the “stranger to the
contract” exception was based on clear statutory language which has now been eliminated, the exception itself no longer has any support.

In addition, the legislative history demonstrates that one intention of the legislature was to conform California’s parol evidence rule with section 2-202 of the Uniform Commercial Code. (RB 71-72, fn. 13.) However, as Kanno concedes, no case has ever applied the “stranger to the contract” exception under the UCC. (Ibid.) Therefore, to the extent the legislative history is relevant, it supports Witkin’s conclusion that the 1978 amendment eliminated the “stranger to the contract” exception to the parol evidence rule. Contemporaneous commentary to the 1978 amendment is in agreement. (Review of Selected 1978 Legislation (1979) 10 Pacific L.J. 275 [“In addition, Chapter 150 deletes the limitation on who may assert the inadmissibility of parol evidence”].) Certainly the absence of anything relevant in the legislative history should not be used by Kanno to override the plain impact of the deletion of the language in the statute on which the “stranger to the contract” exception was formerly based.

This court should decline Kanno’s invitation to create a split of authority on this issue and should hold that the Marwit parties can enforce the integration clause in the Contribution and Purchase Agreement against Kanno, who personally signed that agreement. (9 AA 2175.)
B. Nonparties can enforce contractual provisions under Delaware law.

Kanno acknowledges that no Delaware case has applied the “stranger to the contact” exception to the parol evidence rule (RB 73) and for good reason: Delaware law permits enforcement of contractual provisions by and against nonparties to an agreement.23

In ev3, the Delaware Supreme Court applied the parol evidence rule to bar the plaintiffs’ claims even though the plaintiffs were not parties to the merger agreement at issue. (ev3, supra, 114 A.3d at pp. 529, 537-538 & fn. 32.) Because the plaintiffs sought to enforce an agreement which predated and contradicted the later-executed merger agreement, the Delaware Supreme Court held that the merger agreement controlled under the parol evidence rule. (Id. at p. 538 & fn. 32 [an earlier agreement “‘may not contradict a binding integrated agreement’”].) Kanno contends that ev3 is distinguishable because the plaintiffs were, in fact, parties to the merger agreement. (RB 75.) However, the very first paragraph of the Delaware Supreme Court’s opinion states that the parties to the merger agreement were the two corporations and the next paragraph states that the plaintiffs were former shareholders in one of the corporations. (ev3, at p. 528.) Marwit has obtained the record on appeal which shows, in fact, that the plaintiff shareholders in ev3

23 By making this concession, Kanno concedes that the one case cited by the trial court in its statement of decision (drafted by Kanno’s counsel) (8 AA 2074 ¶ 2], citing In re Century City Doctors Hosp. LLC (Bankr. C.D.Cal. 2012) 466 B.R. 1, 15, fn. 39), sheds no light on this issue (AOB 56-57).
were *not* parties to the merger agreement, precisely as recited in the Delaware Supreme Court’s opinion. (Marwit RJN, **exh. A, pp. 10** showing parties to merger agreement were Microvena Corporation and APPIAVA Medical, Inc., **71-72** [signature blocks for merger agreement showing that only corporations and not shareholders signed agreement].) Therefore, Kanno’s attempt to distinguish *ev3* is factually incorrect.

Other Delaware cases confirm that nonparties can be bound by or enforce contractual provisions. In *Chakov v. Outboard Marine Corp.* (Del. 1981) **429 A.2d 984**, the Delaware Supreme Court held that a nonparty could enforce a release in a settlement agreement against the plaintiff who signed the agreement. (*Id. at pp. 985-986.*) Similarly, other Delaware courts have enforced contractual provisions by or against nonsignatories when the nonsignatory 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** [nonparties to contract may enforce forum selection clause because they were “‘closely related to one of the signatories such that the nonparty’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 nonsignatory to contract under 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].) Kanno has made absolutely no
showing (nor could he) refuting the fact that he is closely aligned with Brandy Signs; nor does he dispute that the Marwit parties are closely aligned with Traffic Control. (See AOB 56.)

All Kanno can say about these cases is that they do not involve the parol evidence rule. (RB 75.) True (except as to ev3, which does involve the parol evidence rule), but that begs the question: if under Delaware law nonparties can enforce various contractual provisions—including general releases, arbitration provisions, and forum selection clauses—why can’t they also enforce an integration clause? Certainly doing so is consistent with ev3 and Kanno has provided no cogent explanation why an integration clause is substantively different from those other contractual provisions, particularly given Delaware’s stated policy of providing certainty in the enforcement of contracts to promote efficient corporate law and facilitate commerce. (NAF Holdings, LLC v. Li & Fung (Trading) Ltd. (Del. 2015) 118 A.3d 175, 181.) Nor can Kanno point to any Delaware authority barring nonparties from enforcing the parol evidence rule.

Confronted with these Delaware authorities, Kanno resorts to reliance on the obscure doctrine of estoppel by deed, which prevents a party from disputing facts recited in a deed. (RB 74-75.) But Kanno has cited no Delaware case extending estoppel by deed beyond real property disputes and for good reason; the doctrine appears to be limited to real property disputes (see 31 C.J.S. (2016) Estoppel and Waiver, § 60 (“An estoppel by deed is limited to questions directly concerning the deed”)), and is based on the need for certainty in examining record title to real property.
(28 Am.Jur.2d (2016) Estoppel and Waiver, § 5). In any event, even when estoppel by deed applies, it extends to the parties and their privities. (State v. Phillips (Del.Ch. 1979) 400 A.2d 299, 310.) Here, as explained above, since Kanno could only perform the alleged oral contract by transferring the stock from Brandy Signs to himself (RB 79), he is necessarily in privity with Brandy Signs for purposes of the Stock Subscription Agreement and, thus, the doctrine of estoppel by deed does not save Kanno’s position.

Kanno personally signed the Stockholder Agreement in his individual capacity twice (9 AA 2273, 2279) and Marwit Partners signed that document on behalf of Marwit Capital Partners II, L.P. (9 AA 2271).24 With respect to the Stock Subscription Agreement, that document is signed by Brandy Signs and binds all of its successors, assigns, and anyone who acquires the stock at issue, including Kanno had he ever performed the alleged oral agreement. (9 AA 2250 [¶C.7], 2252.) Kanno has failed to cite any Delaware authority remotely suggesting that under these circumstances a Delaware court would not enforce the integration clauses in those written, integrated agreements against Kanno.

24 Kanno contends that Marwit LLC is not a party to the Stockholder Agreement because it signed in its capacity as an agent for Marwit Capital. (RB 76.) However, Kanno fails to cite any evidence in the record supporting the assertion that Marwit LLC was merely acting as an agent for Marwit Capital. In any event, Kanno does not dispute that under Delaware law a general partner is liable for the contractual liabilities of the limited partnership. (In re LJM2 Co-Investment, L.P. (Del.Ch. 2004) 866 A.2d 762, 772.) Given that, Marwit LLC should be able to enforce the Stockholder Agreement against Kanno under the Delaware authorities cited in this section.
VI. EQUITABLE ESTOPPEL IS NOT A DEFENSE TO THE PAROL EVIDENCE RULE.

A. California law precludes application of equitable estoppel to this case.

In another unusual maneuver for a respondent, Kanno argues that a binding California Supreme Court decision must be overruled in order to support the judgment. (RB 58-61.)

In Casa Herrera, the California Supreme Court clearly and unambiguously held that estoppel cannot be invoked to avoid application of the parol evidence rule: “Likewise, the doctrine of estoppel may preclude the application of the statute of frauds but has no force against the parol evidence rule.” (Casa Herrera, Inc. v. Beydoun (2004) 32 Cal.4th 336, 346 (Casa Herrera), emphasis added, citing Alameda County Title Ins. Co. v. Panella (1933) 218 Cal. 510, 515-516; see also Salton Community Services Dist. v. Southard (1967) 256 Cal.App.2d 526, 531 [“A lessee may not add to the terms of a lease by use of an estoppel based upon representations of the lessor made prior to its execution”].) Aside from the fact that Casa Herrera is binding authority (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455), the rule also makes sense. If the parol evidence rule, which is a substantive rule of law (Casa Herrera, at p. 343), can be avoided by estoppel, this new exception will swallow the rule removing the certainty the parol evidence rule provides to contracting parties.
Kanno contends that Casa Herrera is distinguishable because the Contribution and Purchase Agreement states that it is subject to equitable principles. (RB 60.) So what? Equitable principles apply in all civil actions. (E.g., C & K Engineering Contractors v. Amber Steel Co. (1978) 23 Cal.3d 1, 10 [“Equitable principles are a guide to courts of law as well as of equity”].) Therefore, the fact that the Contribution and Purchase Agreement states that it is subject to equitable principles adds nothing.

Moreover, adopting Kanno’s rule that equitable principles can trump the parol evidence rule violates other principles of equity jurisprudence. (See, e.g., Jiagbogu v. Mercedes-Benz USA (2004) 118 Cal.App.4th 1235, 1244 [“principles of equity [cannot] be used to avoid a statutory mandate”]; Maryland Casualty Co. v. Bailey & Sons, Inc. (1995) 35 Cal.App.4th 856, 873 [“equity rarely interferes with a contract knowledgeably executed’’]; AB Group v. Wertin (1997) 59 Cal.App.4th 1022, 1028 [“Equity can hardly tolerate—much less impose as a duty—the deliberate attempt to deprive a contracting party of the fruits of his or her bargain, even if the bargain is a loan transaction”].)

At its base, Kanno’s equitable estoppel argument is an attempt to resurrect his fraud claim in that he is seeking to hold the Marwit parties liable for a representation that he allegedly relied on. (RB 59.) However, Kanno sued for fraud, the jury rejected that claim (4 AA 1070-1071), and Kanno did not appeal that ruling. Moreover, Kanno never alleged a cause of action for equitable estoppel so it is far too late now to resurrect that claim. (1 AA 137-145.)
Therefore, there is no merit to Kanno’s contention that equitable estoppel applies under California law.

B. Under Delaware law, Kanno’s equitable estoppel theory fails.

Kanno’s equitable estoppel claim fares no better under Delaware law, which prohibits equitable claims, including equitable estoppel, when there is a binding contract. In Olson v. Halvorsen (Del.Ch., May 13, 2009, No. CIV.A. 1884-VCL) 2009 WL 1317148, at p. *8, affd. (Del. 2009) 986 A.2d 1150, the plaintiff brought a lawsuit alleging multiple contract-based claims and also brought claims for equitable and promissory estoppel. The court rejected both estoppel claims “for the additional reason that the alleged promises on which he bases his [estoppel] claims are inconsistent with the terms of the operating agreements of each Viking entity. Under Delaware law, ‘a party cannot assert a promissory estoppel claim based on promises that contradict the terms of a valid, enforceable contract.’” (Olson, at p. *12, quoting Weiss v. Northwest Broad., Inc. (D.Del. 2001) 140 F.Supp.2d 336, 345.) Similarly, in Genencor, the Delaware Supreme Court held that because there was a contract between the parties, the remedy the plaintiff sought was for breach of contract, not equitable estoppel. (Genencor, supra, 766 A.2d at p. 12; see also Weiss, at p. 344 [“Because the court has

25 Under Delaware law, equitable and promissory estoppel are “based on similar principles.” (Genencor Intern., Inc. v. Novo Nordisk A/S (Del. 2000) 766 A.2d 8, 12, fn. 7 (Genencor).)
determined that the [agreement] is a valid contract, [the plaintiff] cannot recover under a theory of promissory estoppel” which is an equitable doctrine]); Austost Anstalt Schaan v. Net Value Holdings, Inc. (D.Del., Aug. 10, 2001, No. CIV.A.00-771-SLR) 2001 WL 908996, at p. *7 [nonpub. opn.] [“While plaintiffs have argued that the Agreements do not accurately represent the full and complete agreement between the parties, one thing is abundantly clear—agreements did exist. In light of this finding, the court will dismiss plaintiffs’ estoppel claim.”]; Fox v. Rodel, Inc. (D.Del., Sept. 13, 1999, No. C.A. 98-531-SLR) 1999 WL 803885, at p. *9 [nonpub. opn.] [“It is axiomatic that a claim for promissory estoppel is applicable only in the absence of an enforceable contract”]; Ameristar Casinos, Inc. v. Resorts Intern. Holdings, LLC (Del.Ch., May 11, 2010, No. CIV.A. 3685-VCS) 2010 WL 1875631, at p. *13 [nonpub. opn.] [rejecting claim for quantum meruit and unjust enrichment and noting “if a contract covers the subject matter, the defendant’s conduct either violates the contract or not. If the defendant did not violate the contract governing the subject of the dispute, then the plaintiff cannot attempt to hold the defendant responsible by softer doctrines, and thereby obtain a better bargain than he got during the contract negotiations.”].)

Therefore, equitable estoppel is unavailable to Kanno under Delaware law.26

26 Again, to the extent the court has questions about this issue, the court may wish to ask the California Supreme Court to certify the question of whether equitable estoppel applies in this case to the Delaware Supreme Court.
Even if equitable estoppel were available to Kanno under California or Delaware law (which it is not), that claim would require that Kanno lacked knowledge of and the means of obtaining the relevant facts. (RB 58, fn. 7.) There is no evidence in the record that Kanno lacked knowledge of anything. The statement of decision makes no such finding (8 AA 2075:20-2076:3), and the respondents’ brief cites no evidence in the record to support such a finding (RB 60). To the contrary, the record shows Kanno was a sophisticated businessperson represented by a large, experienced law firm. Therefore, the equitable estoppel claim (even if available) fails on the merits.

VII. KANNO CANNOT CLAIM STANDING TO SELL STOCK OWNED BY BRANDY SIGNS WHILE DISAVOWING BRANDY SIGNS’S CONTRACTUAL OBLIGATIONS.

The standing issue is very simple. It is undisputed the stock at issue was issued to Brandy Signs, not Kanno, and the stock has never been transferred to Kanno. (AOB 60-61; RB 78-79.) Kanno contends that he has standing to bring his claim to enforce the supposed oral contract because he could have caused Brandy Signs to transfer the stock to himself. (RB 79.) However, if Kanno has standing on this basis then he is necessarily bound by the provisions of the Stock Subscription Agreement which specifically provides that it is binding on Brandy Signs’s successors, assigns and anyone else who acquires the stock. (9 AA 2250 [¶C.7].) That agreement specifically disavows that any holder of the stock has
any right to sell the stock at any time for any price. (9 AA 2246 [¶ B.2].) Thus, if Kanno has standing to bring this lawsuit because he can cause the transfer the stock from Brandy Signs to himself at any time, then he can only take possession of that stock subject to the provisions of the Stock Subscription Agreement. (See also Civ. Code, § 3521 ["He who takes the benefit must bear the burden"].) If Kanno is not bound by the obligations of Brandy Signs, then he lacks standing to prosecute a claim for the sale of stock held by Brandy Signs since he does not dispute that he cannot pierce his own corporate veil. (AOB 61-63.)

Either way the judgment must be reversed.
CONCLUSION

Kanno is no different than any other plaintiff claiming the existence of an oral agreement which preceded the execution of an integrated agreement. If it is to have any meaning, the parol evidence rule must be applied in such cases in order to provide finality and certainty to commercial transactions. “Contracts must mean what they say, or the entire exercise of negotiating and executing them defeats the purpose of contract law—predictability and stability.” (Hot Rods, supra, 242 Cal.App.4th at p. 1176.)

For the foregoing reasons and those stated in the opening brief, 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.

September 29, 2016

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By: ____________________________
Steven S. Fleischman

Attorneys for Defendants and Appellants
Marwit Capital Partners II, LP and
Marwit Partners, LLC
CERTIFICATE OF WORD COUNT  
(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 12,836 words as counted by the Microsoft Word version 2010 word processing program used to generate the brief.

Dated: September 29, 2016

Steven S. Fleischman
EXHIBIT 1
STOCK SUBSCRIPTION AGREEMENT
(Brandy Signs, Incorporated)

TO: Traffic Control and Safety Corporation

A. Offering to Purchase Shares

Brandy Signs, Incorporated, a Hawaii corporation, ("Investor") hereby irrevocably offers to purchase, in consideration for its undertaking the obligations set forth in that certain Contribution and Purchase Agreement dated as of June 29, 2007, by and among Safety Systems Acquisition Corporation, Traffic Control and Safety Corporation, Safety Systems Hawaii, Inc. and the other Seller parties thereto, 2,500,000 shares of Series A Preferred Stock and 51,724 shares of Common Stock (collectively, the "Shares") of Traffic Control and Safety Corporation, a Delaware corporation (the "Company"), upon the terms and conditions described below.

B. Representations, Warranties and Agreements

In connection with Investor's subscription for and purchase of the Shares, Investor hereby represents and warrants to the Company and agrees as follows:

1. Investor is acquiring the Shares for its own account for investment and not with a view to or for sale in connection with any distribution of the Shares.

2. In making this investment, Investor is relying upon its own investigation and analysis and has determined that the Shares are a suitable investment for it. The Company has made available to Investor information, and the opportunity to question its President concerning the present and proposed activities of the Company. Investor has been furnished with such information as Investor has requested. Investor understands that any projections or predictions of future events Investor may have received from the Company are estimates only and non-binding, and Investor is not relying on any such projections or predictions in making this investment. 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.

3. The Company has advised Investor that the Shares are not being registered under the Securities Act of 1933, as amended (the "1933 Act"), in reliance upon the exemption from the registration requirements provided by Section 4(2) and/or Rule 506 of Regulation D under the 1933 Act, and are not being qualified under the Hawaii Uniform Securities Law in reliance upon the exemption from the qualification requirements in Section 485-6(9) of that law. Investor
6. This Agreement shall be construed under and governed by the laws of the State of Delaware, excluding conflict of law provisions.

7. This Agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, personal representatives, successors and assigns. Investor's right to purchase Shares under this Agreement may not be assigned or transferred to any other person without the Company's prior written consent and any assignment or transfer in violation of this sentence shall be void. Anyone who purchases or otherwise acquires any of the Shares shall acquire such Shares subject to the provisions of this Agreement, and shall make no transfers in violation of this Agreement.

8. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original agreement, but all of which together shall constitute one and the same instrument.

9. Whenever the context hereof so requires, use of either the masculine, feminine or neuter shall include the masculine, feminine and neuter, and use of the singular or the plural form shall include the singular and plural.

10. At the Company's request, Investor will promptly execute such other instruments or documents as may be reasonably required in connection with Investor's purchase of the Shares.

11. Neither this Agreement nor any provision hereof may be amended, waived or canceled except by an instrument in writing signed by the party against whom any such amendment, waiver or cancellation is sought.

12. No waiver of any of the provisions of this Agreement shall be deemed a waiver of any other provision, whether or not similar, nor will any waiver constitute a continuing waiver.

[Signature Page Follows]
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 September 29, 2016, I served true copies of the following document(s) described as APPELLANTS' REPLY 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.

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

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

Executed on September 29, 2016, at Encino, California.

Jill Gonzales
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<td>Trial Court Judge</td>
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We have received a request for oral argument from one or more of the parties to this appeal. Here is a summary of the court’s tentative opinion.

We are inclined to reverse and remand with instructions to vacate the judgment in favor Kanno and enter judgment in favor of the Marwit defendants.

This dispute arose three years after the purchase and sale of assets that plaintiff and respondent Albert Kanno agreed to sell to defendants and appellants Marwit Capital Partners II, and its general partner, Marwit Partners, for $23.5 million. Defendants were represented by Paul, Hastings. Plaintiff was represented by Sheppard Mullin. On behalf of defendants, Paul, Hastings formed Traffic Control, an entity controlled by defendants, and Safety Systems, a wholly owned subsidiary of Traffic Control. Traffic Control and Safety Systems were formed solely for the purpose of acquiring the assets in this transaction.

The transaction was documented in three key agreements, (1) the Contribution and Purchase Agreement, (2) the Stock Subscription Agreement, and (3) the Stockholder Agreement.

The signatories to the Contribution and Purchase Agreement were plaintiff Kanno and his three companies whose assets were acquired in the transaction, and the acquiring entities Safety Systems and Traffic Control. This agreement provides the total purchase price of $23.5 million was comprised
of $21 million cash paid to Safety Systems and 250,000 shares of Traffic Control preferred stock transferred to one of his companies, Brandy Signs (plus another 51,724 shares of Traffic Control common stock and $1.63 million cash to Brandy Signs). This agreement required Kanno and his companies to obtain an opinion letter from Sheppard Mullin that there were no extrinsic agreements among the parties. Kanno received and signed the opinion letter with this assurance as part of the transaction. Notably, in light of the issues raised in this lawsuit, the Contribution and Purchase Agreement does not mention any right of Kanno or Brandy Signs to require Marwit to repurchase their Traffic Control stock at any time.

The signatories to the Stock Subscription Agreement were Traffic Control and Kanno on behalf of Brandy Signs. This is the agreement by which Brandy Signs acquired the preferred and common stock of Traffic Control. This agreement states there is no guaranty or warranty that Brandy Signs can sell the Traffic Control stock at any specific time or at a profit. This agreement is binding on the parties and their past representatives, successors and assigns. We are persuaded that Kanno is bound by this agreement as a representative of Brandy Signs, and that Marwit is bound by this agreement as the owner of 80-90% of the Traffic Control stock and the entity which appointed the board of directors and therefore controlled Traffic Control.

The signatories to the Stockholder Agreement were Kanno individually and on behalf of Brandy Signs and defendant Marwit Partners, among others. In this agreement, the parties agreed that Kanno and Brandy Signs are acquiring the Traffic Control stock, Marwit Capital owns the lion’s share of the Traffic Control preferred and common stock, and other nonparty investors hold the rest of the stock. This agreement gives Marwit Capital a right of first refusal to buy the Traffic Control shares issued to
Brandy Signs, and states Marwit may choose not to exercise that right. The agreement states that if Marwit declines to exercise its right of first refusal, then Brandy Signs must offer the shares for sale by the other shareholders of Traffic Control. These provisions are inconsistent with any oral contract creating a mandatory duty by Marwit to buy the shares from Brandy Signs at an agreed price on a specific date.

We are inclined to find that Delaware law applies to the interpretation of the Stock Subscription Agreement and the Stockholder Agreement, and California law applies to the Contribution and Purchase Agreement.

Each of the three agreements has an integration clause, and together, they described the entire agreement of the parties for the purchase and sale of assets. We think the parol evidence rule applies to bar evidence of any oral agreement that is inconsistent with any of the agreements that comprise the written transaction among the parties.

Three years after the transaction closed, Kanno sued the Marwit defendants on various causes of action with the overall purpose of enforcing an oral contract made between between Kanno and Marwit before the written agreements were signed. Kanno claimed Marwit orally agreed to repurchase the Traffic Control preferred stock from Brandy Signs within three years for $2.5 million plus 8% interest. Kanno claimed he would never have signed the written agreements without the oral agreement, and that he told defendants he had to be fully cashed out within three years. He insisted there be no reference to the oral agreement in any written agreement because his lawyers told him he could not defer paying taxes on the $2.5 million and 8% interest if that were part of the written agreement.

Before this lawsuit was filed, and in defendants’ demurrers, two motions for summary judgment, and in motions in limine,
defendants consistently asserted the alleged oral contract was barred by the parol evidence rule, and Kanno lacks standing to enforce an oral contract for Marwit to buy shares from Brandy Signs. We are inclined to think the trial court erred by submitting to the jury the question whether there was an oral contract and whether defendants breached the oral contract.

The parties dispute the standard of review. We believe the standard of review in determining whether the parol evidence rule bars enforcement of the oral agreement is de novo. There is certainly substantial evidence of the oral agreement, but that evidence should have been excluded from the jury; or, having heard the evidence offered to the jury, the court should have directed the verdict for defendants; or the jury should have been instructed to disregard evidence of any oral agreement that was inconsistent with the written, integrated contract among the parties.

We are not persuaded that Kanno has standing to assert Brandy Signs’ alleged right to demand that Marwit purchase the Traffic Control shares in 2010 for $2.5 million plus 8% interest. We are inclined to think that, if Kanno has standing to enforce the oral agreement between Marwit and Brandy Signs, then he is bound by the provisions of the Stock Subscription Agreement in which Brandy Signs agreed there was no guaranty it could sell its Traffic Control stock at any specific time or at a profit. If Kanno is entitled to the benefits of the Stock Subscription Agreement, so too is he bound by the burdens, including the integration clause, which bars enforcement of any other contract that is contrary with its terms.

According to defendants, the issue of estoppel was not tried or briefed in the trial court and first appeared in Kanno’s proposed statement of decision after the trial. We are not
persuaded that equity may be invoked to bar enforcement of an integration clause in these circumstances.

The court will not entertain further briefing or grant a continuance based on the issuance of this tentative opinion.
SOME READ-WORTHY ARTICLES
Lawyers appearing in Los Angeles Superior Court have come to expect that judges will give tentative rulings before argument. In 2012, Division Eight of the Second Appellate District Court of Appeal launched an experimental process to provide summaries of our tentative opinions to counsel who request oral argument.

Those reading this article are familiar with the California requirement that appellate courts must dispose of cases by written opinion filed within 90 days of submission, which, as a practical matter, requires that we prepare draft opinions before oral argument. It often takes weeks to finalize an opinion. We would have to work in an environment of

Continued on Page 6...
constant, extreme time pressure if we were to begin writing our opinions after the cases are submitted, an environment inimical to appellate decision-making.

Initially, Presiding Justice Tricia Bigelow read a summary of our tentative opinion from the bench when counsel stated their appearances at the podium after each case was called. Later, we began providing written summaries of our tentative opinions for counsel to read when they check in with the clerk for oral argument. Our tentative opinions, whether oral or written, summarize our analysis on all decisive issues and state our proposed disposition.

In a few cases, we have sent counsel our draft opinion a few days before oral argument. Sometimes that helped us and counsel better prepare for argument in cases that would have been particularly difficult to discuss in court without counsel having read the entire draft opinion. Having our draft opinion before argument is the best way to enable counsel to point out what they believe to be factual errors or flawed logic, and to let us know when a word or phrase could lead to misinterpretation. In other cases, we have sent counsel a summary of the tentative opinion before oral argument.

Providing tentative opinions has not delayed the resolution of appeals in our division. Our calendar management has not changed since we began giving tentative opinions. I believe that disclosing our tentative opinions enables both counsel and the court to better prepare for oral argument. Disclosing our tentative opinions in advance of oral argument also enables counsel to make a more informed decision whether to waive oral argument.

Counsel have consistently expressed their gratitude for the tentative opinions, even when the tentative is against them. They know the panel members have confronted their theories and arguments and are prepared to engage in meaningful dialogue.

The appellant in whose favor the tentative is written may submit on the tentative and reserve time for rebuttal. After hearing respondent's arguments, and observing how we engaged with respondent's counsel, appellant's counsel may decide not to argue at all or to confine argument to the limited concerns raised during respondent's argument. The respondent in whose favor the tentative is written may choose to simply invite us to ask questions after appellant's argument.

After argument, we are sometimes persuaded to change our tentative opinion. There are those who think changing a tentative opinion is an admission of error in our initial analysis that may expose the court to criticism. Some counsel may feel misled. I do not think that changing a tentative opinion reveals a flaw or weakness. The purpose of oral argument is to give counsel a chance to answer our questions and persuade us to their view of the law. If we change our tentative opinion, that demonstrates counsel wisely chose to request argument and that we benefitted by it.

Critics of this process think it devalues argument, because courts may become locked into their opinions and unwilling or unable to listen to argument with an open mind. That has not been our experience on Division Eight. The only statistics of which I am aware indicate justices remain willing to modify the opinion or change the outcome of an appeal when argument was conducted after issuing tentative opinions. (Hollenhorst, Tentative Opinions: An Analysis of Their Benefit in the Appellate Court of California (1995) 36 Santa Clara L. Rev. 1, 28-29.)

Division Two of the Fourth Appellate District has successfully provided tentative opinions since 1991. The Conference of California Bar Associations recently proposed an amendment to rule 8.256 of the California Rules of Court that would require all Courts of Appeal to either issue tentative opinions or focus letters a week before oral argument to alert the parties to the bases for the court's likely ruling and/or the issues the parties should address at oral argument. Whether or not action is taken on that proposal, I expect there will be more calls for Courts of Appeal to issue tentative opinions or focus letters. My experience on Division Eight supports the broader use of tentative opinions.

Hon. Elizabeth A. Grimes is an Associate Justice of the California Court of Appeal, Second Appellate District, Division Eight.

“Terms of Use” Agreements…continued from Page 5
to review the terms and conditions as soon as he or she enters the website or before making a purchase, creating an account, or logging-in; (3) use color, size, and hyperlinks to make the “terms of use” conspicuous; and (4) place the “terms of use” in a prominent space on the website, in close proximity to any sign-up, purchase, or log-in buttons. Use of these practices will go a long way towards ensuring the courts will enforce arbitration clauses, choice of law provisions, forum selection clauses, and class action waivers contained in them.

Lisa Kim is a senior associate in Reed Smith LLP’s Commercial Litigation Group. Sara Stratton is a first-year associate in Reed Smith LLP’s Commercial Litigation Group
FOCUS (FORUM & FOCUS) • Jun. 15, 2009

What to Know When You Don't Know

FOCUS COLUMN

By Benjamin G. Shatz

The aphorism that the "lawyer well prepared for court never asks a question without already knowing the answer," is supposed to work both ways: The well-prepared lawyer should have an answer to any question asked by a judge or justice in court. But pithy maxims rarely reflect reality. At some point every lawyer will be placed in the uncomfortable position of being asked a question without having a handy answer. How should a lawyer best respond?

Preliminarily, of course, the careful lawyer already will have prepared for court by ruminating over all probable questions and planning appropriate responses. Thorough preparation and cogitation on the facts, the law, the weaknesses of one's case, and peripheral public policy concerns suffices to preconceive answers to most questions. And yet every day lawyers - even scrupulously prepared lawyers - confront unexpected questions to which they have no ready answer. Before addressing what a lawyer should do in that situation, there are three things a lawyer definitely should not do.

To quote Douglas Adams, "Don't panic." Although an unanticipated question will no doubt disconcert the lawyer in the spotlight, this predicament is more or less an ordinary occurrence and not worthy of provoking an apoplectic fit. Remaining calm before the bench at all times is an essential oral argument skill. The experienced advocate maintains a game face, never allowing physical manifestations or facial expression to reveal that something surprisingly unwelcome has happened. Effective advocates engage comfortably with the court - conversing, or at least displaying the appearance of conversing - with confidence and without visible agitation.

Never try to avoid the question. The playground ruse of misdirection rarely succeeds in court. There is no place to hide - neither behind the lectern or within the complexities of the issues raised in the case. Indeed, perhaps the most common judicial complaint lodged against lawyers regarding oral argument is that they too often fail (or downright refuse) to answer questions from the bench. When a question is posed, a direct answer is the polite, professional and expected response. As much as the lawyer may wish to respond, "Your honor, that's the wrong question," evasion will not work. From the court's perspective, there is no such thing as a "wrong question," because oral argument exists for the benefit of the judges and the whole point of allowing lawyers to speak at all is specifically for the purpose of answering questions. If the question truly is irrelevant, cautiously explain why that is so - but only after answering it first.

Thus, attempting to steer oral argument in a different direction, or even attempting to delay a direct response by promising to answer "in just a moment," cannot succeed. Dodging questions makes judges unhappy, and lawyers wishing a favorable result should avoid upsetting the decision-maker. Judges are not easily misdirected, do not take kindly to obfuscation and simply will repeat the question - perhaps with rising annoyance - until an answer emerges.

Never bluff. Like anyone else, judges do not appreciate being lied to. The proverbial silver-tongued lawyer, able to facilely talk a way out of any problem should not draw on that dubious ability in court. This should go without saying. Yet surprising numbers of lawyers apparently fail to adopt truthfulness as the underlying foundation for oral presentations in court. Many lawyers, not wishing to appear unprepared before the court, their peers and their clients, seem to believe that any answer is better than an embarrassing, "I don't know." This false bravado leads them down the destructive path of either making up an answer (i.e., lying)
or - just as ruinous - guessing at an answer asserted as truth. Losing credibility with the court is notoriously fatal to both the case at hand and one's precious professional reputation. It also, of course, may subject counsel to sanctions. In *Mammoth Mountain Ski Area v. Graham*, 135 Cal. App. 4th 1367 (2006), for example, "[a] serious mischaracterization of the record occurred, at oral argument." The court explained that, "whether it is to try to gain some advantage (on the assumption that judges will take what [counsel says] at face value) or perhaps simply because they are reckless with the truth, [lawyers' misrepresentations of the record] places an additional burden on the court."

The *Mammoth* court addressed this problem, in part, by forwarding its opinion to the State Bar to consider disciplinary action against the lawyer under Business & Professions Code Section 6068, subdivision (d). That statute requires lawyers to "employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." Or in plain English, lying in court is against the law.

Having explored items to avoid, here follow some points of affirmative advice. Think carefully to make absolutely sure the answer is not readily available, and if that is true, then candidly admit an inability to answer and seek an opportunity to answer later.

Under the pressures of judicial questioning, lawyers too often fail to pause and consider questions carefully. Stop and think. A moment of thoughtful contemplation might reveal that an unexpected or seemingly unanswerable question is not so difficult to answer after all. It is quite possible that the answer actually is known or can be formulated from counsel's pre-argument preparation. And while the time taken to pause to ponder a question may seem like an eternity, in fact short pauses are often imperceptible or at least unobjectionable to those watching or participating in an argument.

Most importantly, the lawyer truly stuck without an honest answer to a question in court must have the integrity and confidence to forthrightly admit to being stumped. Admitting ignorance to a fact or precedent may feel momentarily mortifying, but the best answer really may be "I'm sorry, but I don't know." Yet this is only the first half of such an answer.

While an honest "I don't know," may earn marks for candor, it may prove unsatisfying to the inquisitive judge. Therefore, expressing an honest lack of information is not enough. Think about why the answer is not readily available, and use that to conceive the second half of an "I don't know" answer.

For example, perhaps the answer to the question is unknown because it is outside the record. This provides justification for a non-answer, and therefore should be part of a complete response (i.e., "I'm sorry, your honor, but nothing in the record answers that question"). Perhaps the answer is buried somewhere in the record, not readily accessible. Or perhaps the inquiry relates to a case counsel did not study before argument. In such situations, the second half of the answer should be a request to file a response with the court promptly after the argument. This approach has many benefits. Such an offer portrays counsel favorably as trying to be as helpful and eager as possible to answer the question. Requesting permission to file a post-argument letter also may reveal the importance of the question. If the court denies the request, then it may be that the question was not crucial anyway, and therefore may safely remain unanswered.

Finally, obtaining additional time to provide an answer to an important question has the double-benefit of first being able to provide an answer at all, and second, providing possibly a better answer than one made during the heat of oral argument.

When stumped from the bench, recall the words of Federal Circuit Judge Daniel Friedman: "There is nothing wrong with saying 'I don't know' - provided you do not have to say it too often." Further, heeding the theory "better late than never," an effective strategy often is to offer to supply a short and prompt supplemental brief or letter.

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