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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

SINGPOLI CAPITAL CORPORATION,

Plaintiff and Respondent,

v.

TIMOTEO LAND INVESTORS, LLC,

Defendant and Appellant.

E065245

(Super.Ct.No. RIC1511948)

O P I N I O N

APPEAL from the Superior Court of Riverside County. John W. Vineyard, Judge.

Reversed.

TroyGould, Jeffrey W. Kramer and Arvin Tseng for Defendant and Appellant.

Curd, Galindo & Smith and Joseph D. Curd for Plaintiff and Respondent.

I

INTRODUCTION

Defendant and appellant, Timoteo Land Investors, LLC (Timoteo), appeals from a prejudgment right to attach order and order for issuance of writ of attachment, in the

amount of \$1,081,000, in favor of plaintiff and respondent, Singpoli Capital Corporation (Singpoli Capital). The writ secures Timoteo's repayment of \$1 million to Singpoli Capital, plus \$81,000 in estimated costs and attorney fees, and encumbers Timoteo's 420-acre parcel of undeveloped real property located south of State Route 60 in Beaumont (the property).

The pertinent facts are undisputed. Pursuant to a purchase and sale agreement (PSA) dated September 14, 2015, Timoteo agreed to sell the property to Singpoli MMK JV, LLC (Singpoli MMK), a joint venture between Singpoli Capital and MMK & Associates, Inc. (MMK), for \$15,487,694.45. The PSA provided that the sum of \$1,904,093.33 in "good faith, non-refundable deposits," would be credited against the purchase price but would be *forfeited* in the event Singpoli MMK did not pay the balance of the purchase price into escrow by the closing date, September 30, 2015. Of the \$1,904,093.33 in "non-refundable deposits," \$1 million was paid by Singpoli Capital; the balance by other investors. Singpoli Capital was unable to obtain financing to close escrow by September 30, and Timoteo refused to extend the closing date or refund the \$1 million.

In issuing the attachment orders, the trial court concluded that the "non-refundable deposits" and concomitant forfeiture provisions of the PSA were invalid because the PSA did not contain a valid liquidated damages clause in the form required by Civil Code section 1677. The statute requires a liquidated damages clause in a printed contract for the purchase and sale of real property to be separately signed and initialed by each party,

and be set out in at least 10-point bold type or in contrasting red print in at least eight-point bold type. The court rejected Timoteo's claim that undisputed extrinsic evidence showed that Singpoli Capital's \$1 million portion of the deposits, which were paid to Timoteo in two \$500,000 installments on August 9 and September 10, 2015, were in consideration for Timoteo's agreement twice to extend previous deadlines on MMK's option to purchase the property, and *that was the reason* the PSA provided that the deposits were nonrefundable and were to be forfeited in the event escrow did not close by September 30. The trial court observed that the PSA was a bilateral contract, not an option to purchase the property, and "[a]lthough there may have been earlier option agreements between MMK and Timoteo, the final contract between the parties [the PSA] is a bilateral purchase agreement which indicates that the money paid by Singpoli Capital was held as a deposit to be used to offset the purchase price."

On appeal, Timoteo claims Singpoli Capital did not establish the probable validity of its claim for the \$1 million sum. (Code Civ. Proc., § 484.090, subd. (a)(2).)<sup>1</sup> Timoteo argues, as it did in the trial court, that undisputed extrinsic evidence, including writings and discussions preceding the PSA, shows that Singpoli Capital's two \$500,000 payments were in consideration for Timoteo's agreement twice to extend the closing date to purchase the property, whether by MMK or its assignee Singpoli MMK, from August 9 to September 10 and from September 10 to September 30, 2015.

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<sup>1</sup> All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

We agree with Timoteo. When, as here, *undisputed* parol or extrinsic evidence is offered to *explain* rather than vary or contradict the terms of an integrated agreement, the interpretation of the agreement is a question of law and an appellate court independently construes the writing. (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165-1166; § 1856, subds. (a), (b).) Undisputed extrinsic evidence, including the declarations of Singpoli Capital’s officers Kin Hui and William Chu, shows Singpoli Capital made the two \$500,000 payments for Timoteo’s agreements to extend the deadline for purchasing the property, and this evidence is entirely consistent with the terms of the PSA.

The undisputed evidence shows the PSA does not contain a liquidated damages clause because the deposits, including the two \$500,000 payments, were not intended to cover or liquidate Timoteo’s damages in the event of any breach, including Singpoli MMK’s failure to close escrow and purchase the property by September 30, 2015. Though the deposits were to be credited against the purchase price in the event escrow closed by September 30, they were “non-refundable” and were to be forfeited if escrow did not close by September 30, because the deposits, or at least the two \$500,000 payments, were in consideration for Timoteo’s agreement twice to extend the purchase date of a purchase option originally held by MMK and assigned to Singpoli MMK pursuant to the PSA.

## II

### ADDITIONAL FACTUAL BACKGROUND

Between December 2013 and April 2014, MMK, on behalf of three investors, lent Timoteo the total sum of \$778,000, pursuant to a loan agreement evidenced by a note and deed of trust against the property. The note granted MMK the exclusive right to purchase the property (the First Option). Of the \$778,000 sum, \$678,000 was loaned on behalf of another Singpoli entity, Singpoli (Hop Kin) Construction & Decoration (Nevada), Inc. (Singpoli (Hop Kin)), and \$100,000 was loaned on behalf of two other investors.<sup>2</sup>

MMK's managing director, Mitchell Kitayama, believed the \$678,000 had been advanced by Singpoli Capital, not Singpoli (Hop Kin). Mr. Kitayama dealt with Singpoli Capital and Singpoli (Hop Kin) through William Chu, whom he had known for many years. Mr. Chu was Singpoli Capital's chief financial officer and he was also an officer of Singpoli (Hop Kin). Mr. Kin Hui was the chief executive officer of both Singpoli Capital and Singpoli (Hop Kin).

In support of its attachment application, Singpoli Capital adduced original and supplemental declarations of Messrs. Hui and Chu. In opposition, Timoteo relied on the declaration of Mr. Kitayama and deposition testimony from Mr. Chu.

Mr. Chu averred that in 2013 he spoke with Mr. Kitayama, who wanted to develop the property. Mr. Kitayama asked Mr. Chu whether he would help with the financing,

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<sup>2</sup> Neither Singpoli (Hop Kin), MMK, Singpoli MMK, or the two other investors are parties to this appeal.

and Mr. Chu agreed. Mr. Chu then spoke with Mr. Hui who agreed to advance \$678,000 to Timoteo through MMK; \$478,000 was paid in January 2014, and the \$200,000 was paid in April 2014. MMK raised the other \$100,000. By an assignment agreement dated January 2014, MMK assigned a \$478,000 interest in the note and deed of trust to Singpoli (Hop Kin), but Singpoli (Hop Kin)'s other \$200,000 was not part of the assignment because it was advanced later, in April 2014.

Mr. Chu was also assisting Mr. Kitayama in obtaining financing to purchase the property. In November 2014, MMK, Timoteo, and Timoteo's members entered into a "Note Cancellation, Purchase Option and Member Admission Agreement" (the November 2014 agreement) which, among other things, admitted MMK as an additional member of Timoteo and gave MMK the option to acquire 100 percent of Timoteo's other membership interests (the Second Option).<sup>3</sup> In exchange, MMK agreed to cancel the \$778,000 note, reconvey the deed of trust, and terminate the First Option. If MMK did not exercise the Second Option before its expiration date, January 31, 2015, Timoteo agreed to issue MMK a new \$778,000 promissory note (the contingent note). By exercising the Second Option, MMK would acquire the property indirectly by acquiring Timoteo.

According to Mr. Kitayama, the November 2014 agreement was amended four times to, "among other things, extend the expiration date" for MMK to exercise the

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<sup>3</sup> The record does not include a copy of the November 2014 agreement or any of its extensions, and it does not appear these documents were presented to the trial court.

Second Option. Timoteo “required a payment or other consideration” for each extension. In consideration for the first extension, which extended the expiration date of the Second Option from January 31 to June 3, 2015, MMK agreed to reduce the contingent note by \$500,000. For the second extension, which extended the expiration date from June 3 to July 3, 2015, MMK made a mortgage payment to Timoteo’s lender. For the third extension, which extended the expiration date from July 3 to August 10, 2015, MMK made an additional mortgage payment and reduced the contingent note “by approximately \$250,000, from an aggregate principal amount of \$369,021 to \$118,848.88.” Finally, the fourth amendment extended the expiration time from August 10 to September 10, 2015, and for this extension, MMK agreed to pay \$500,000 to an affiliate of Timoteo.

Mr. Chu did not know about the November 2014 agreement or its first three extensions until after the options described therein had expired. Mr. Chu was “upset” that Mr. Kitayama “would agree to cancel the Note,” but Mr. Kitayama told him “the Note would be revived and he would get it back if he didn’t exercise the option. If he did exercise the option, then the deal would close and everyone would get their money. Since I did not believe at the time it would be that difficult to get a loan, I decided it would be simply best to move forward and obtain the financing and close the transaction.” Mr. Chu made the \$500,000 payment for the fourth extension, and the money came from one of Singpoli Capital’s investors.

Mr. Chu explained he “was told that we could only get further extensions if we paid in another \$500,000. MMK did not have the money and asked if I could secure it. I agreed to find and, in turn, loan, \$500,000 to MMK in order to keep the transaction alive. I thought at the time that we would obtain the financing shortly and the money would be recouped. I caused the money to be wired directly to [Timoteo]. I did not yet advise Mr. Hui at the time that those additional funds had been advanced as I felt financing was imminent and the deal would close shortly.”

Mr. Kitayama averred that, through 2015, he was “working with Mr. Chu to obtain a third-party loan that would enable MMK and Singpoli [Capital] to acquire the Property,” but as the September 10, 2015, expiration date drew near, they had still not obtained the financing they needed to acquire the property or Timoteo. Mr. Chu complained that MMK “never exercised its option under [the November 2014 agreement or any of its extensions], kept running out of time, never obtained financing, and never put up any of its own money towards the transaction.” Mr. Kitayama claimed the difficulty in obtaining financing was the reason *Mr. Chu* asked MMK to obtain “multiple extensions” of MMK’s Second Option. By September 10, 2015, MMK had still not obtained the necessary financing to purchase the property, either directly or through purchasing Timoteo’s membership interests.

According to Mr. Chu, Mr. Hui agreed to help him find another \$500,000 payment to further extend the purchase option, but only if they could “have better control of this transaction with MMK.” On September 10, MMK and Singpoli Capital entered into an

“Assignment and Assumption Agreement” (AAA). Pursuant to the AAA, MMK assigned its rights to purchase the property to Singpoli Capital, including the Second Option.

The AAA indicated that, in consideration for MMK’s assignment of its purchase options to Singpoli Capital, Singpoli Capital deposited \$500,000 into escrow “to extend the closing date under the PSA to September 30, 2015.”<sup>4</sup> The AAA expressly acknowledged that the \$778,000 loaned to Timoteo through MMK, plus \$126,093.34 in interest on that amount, plus the \$500,000 payment by Singpoli Capital on August 10, 2015, were funds that MMK borrowed from Singpoli Capital, and these funds, along with the additional \$500,000 that Singpoli Capital agreed to pay in consideration for the assignment of MMK’s purchase rights, would be offset against the purchase price for the property. Mr. Chu advised Mr. Hui that, unless a further extension was obtained and another \$500,000 was advanced by 5:00 p.m. on September 10, all of the financing that had been advanced to Timoteo, through MMK, “[would be] in jeopardy along with the transaction [or deal to purchase the property].”

On September 14, 2015, Timoteo and Singpoli MMK—the joint venture between MMK and Singpoli Capital—entered into the PSA. Pursuant to the PSA, Singpoli MMK

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<sup>4</sup> The PSA referred to in the AAA is dated September 10, 2015, and is apparently not the PSA dated September 14, 2015, because the AAA contemplated that, pursuant to the PSA, *Singpoli Capital* would purchase the property from Timoteo and pay MMK a compensation based on Singpoli Capital’s net profits from its resale of the property. The PSA, by contrast, contemplated that *Singpoli MMK* would purchase the property from Timoteo.

agreed to purchase the property from Timoteo for \$15,487,694.45. The PSA terminated all prior agreements between MMK and Timoteo, including the Second Option, and provided that a sum totaling \$1,904,093.33 would be treated as “good faith, non-refundable deposits” against the purchase price for the property, but would be forfeited in the event escrow did not close by September 30, 2015. The \$1,904,093.33 included the original note for \$778,000, plus interest of \$126,093.34, the amount the parties agreed would have accrued on the unreduced principal balance of the note, plus Singpoli Capital’s two \$500,000 payments made on August 10, 2015 and September 9, 2015, respectively.<sup>5</sup> The balance of the purchase price was to be paid by September 30, 2015.

Consistent with its description of the \$1,904,093.33 sum as “good faith, non-refundable deposits,” the PSA provides that, “it being the intention of the parties that in no event do [Singpoli MMK] or any of its affiliates . . . have any claims against [Timoteo] for any amounts previously paid pursuant to the [\$1,904,093.33 deposit] (which entire amount will be deemed to have been forfeited to [Timoteo] upon termination of this [PSA] and, if this [PSA] is terminated, neither [Singpoli MMK] or any of its affiliates (including but not limited to [MMK]) will have any rights, options or interest whatsoever with respect to the Property or [Timoteo].” The PSA also provides that Singpoli MMK “absolutely and unconditionally agrees to purchase the Property on the terms hereof . . . .”

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<sup>5</sup> These amounts total \$1,904,093.34, one cent more than the total deposits described in the PSA.

Unlike the AAA, which acknowledged that the second \$500,000 payment was needed to obtain Timoteo's agreement to extend the deadline to purchase the property to September 30, 2015, the PSA did not expressly indicate that either of the two \$500,000 payments were made in exchange for extending the purchase date deadline. Following the AAA, which assigned MMK's purchase options to Singpoli Capital, the PSA assigned Singpoli Capital's right to purchase the property to Singpoli MMK.

The PSA includes an integration clause: "All discussions, negotiations, letters of intent, understandings, and agreements between the parties regarding the Property are merged in this Agreement, which alone fully and completely expresses the agreement of the parties regarding the Property." The PSA does not include a liquidated damages clause, which, in order to be valid in a printed contract for the purchase and sale of real property, must be (1) "separately signed or initialed by each party to the contract" and (2) "set out either in at least 10-point bold type or in contrasting red print in at least eight-point bold type." (Civ. Code, § 1677.)

Around September 28, 2015, two days before escrow was to close on the purchase of the property pursuant to the PSA, Singpoli Capital notified Timoteo that it needed additional time to obtain financing to purchase the property, but Timoteo refused to grant any further extensions. When escrow did not close on September 30, 2015, Timoteo also refused to refund any portion of the nonrefundable deposit.

### III

#### PROCEDURAL BACKGROUND

In October 2015, Singpoli Capital, Singpoli (Hop Kin), and Singpoli MMK filed a complaint against Timoteo, MMK, and the two investors who advanced the \$100,000 portion of the \$778,000 note. A first amended complaint was filed in November 2015. Together, plaintiffs sought the return of \$1,787,890.34 from Timoteo. Of this amount, plaintiffs alleged \$1 million was owed to Singpoli Capital and \$787,890.34 was owed to Singpoli (Hop Kin).<sup>6</sup>

On the same day the first amended complaint was filed, Singpoli Capital filed its application for a right to attach order and order for issuance of writ of attachment against Timoteo. The application sought to secure the sum of \$1,081,000, through a writ of attachment or lien against the property. The \$1,081,000 claim is comprised of Singpoli Capital's two \$500,000 payments to Timoteo through MMK, \$6,000 in estimated costs,

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<sup>6</sup> The first amended complaint specifically alleges that, of the \$778,000 originally loaned to Timoteo through MMK, Singpoli (Hop Kin) advanced \$678,000 and the two other defendants each loaned \$50,000. In January 2014, MMK assigned a \$478,000 interest in the deed of trust to Singpoli (Hop Kin), and assigned two \$50,000 interests in the deed of trust to the two other defendants. The assignment was not in recordable form, however, and Singpoli (Hop Kin) later contributed an additional \$200,000, bringing its contributions to \$678,000. Singpoli Hop Kin was owed \$787,890.35 (\$678,000 plus \$109,890.35 in interest); the two other defendants were owed \$116,202.99 (\$100,000, plus \$16,202.99 in interest), and Singpoli Capital was owed \$1 million. These amounts comprised the \$1,904,093.33 "good faith, non-refundable deposits" described in the PSA. Plaintiffs alleged causes of action against Timoteo for money had and received, unjust enrichment, conversion, and breach of implied covenant of good faith and fair dealing. Singpoli (Hop Kin) alleged a fifth cause of action for judicial foreclosure against all defendants.

and \$75,000 in estimated attorney fees.<sup>7</sup> (§ 483.015.) Along with the application, Singpoli Capital submitted a July 17, 2015, appraisal which valued the property on an “as is” basis at \$34.9 million, but the parties dispute whether Timoteo could sell the property for this amount.

Following a January 15, 2016, hearing, the court granted the application and confirmed its tentative ruling as its decision. Among other things, the court found Singpoli Capital established the probable validity of its claim for the return of the two \$500,000 payments it made to Timoteo through MMK. (Code Civ. Proc., § 484.090, subd. (a).) The court reasoned: “To establish the probable validity of the claims, Singpoli [Capital] must prove that the money it provided to Timoteo through MMK was a deposit rather than consideration for various purchase options and extensions.” The court noted that the PSA stated that the \$1,904,093.33 in “non-refundable deposits” would be offset against the purchase price, but the PSA did not include a “separately signed” or valid liquidated damages provision. (Civ. Code, § 1677.) Accordingly, the court implicitly concluded that the PSA’s “non-refundable deposits” and concomitant forfeiture provisions were invalid and unenforceable.

Timoteo timely appealed.

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<sup>7</sup> Singpoli (Hop Kin) filed an attachment application against Timoteo to secure \$200,000, the portion of its \$678,000 that it claimed was unsecured by the deed of trust, but its application was denied on the ground it failed to establish its claim was based on an express or implied contract with Timoteo. (§ 483.010.)

## IV

### DISCUSSION

#### A. *The Applicable Attachment Law*

Except as otherwise provided by statute, an attachment may be issued in an action on a claim or claims for money, based upon an express or implied contract, where the claim or claims are a fixed or readily ascertainable amount not less than \$500, exclusive of costs, interest and attorney fees. (§ 483.010, subd. (a).) An attachment may not be issued on a claim which is secured by an interest in real property. (§ 483.010, subd. (b).)

A court “shall” issue a right to attach order “if it finds all of the following: [¶] (1) The claim upon which the attachment is based is one upon which an attachment may be issued. [¶] (2) The plaintiff has established the probable validity of the claim upon which the attachment is based. [¶] (3) The attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based. [¶] (4) The amount to be secured by the attachment is greater than zero.” (§ 484.090, subd. (a).)

“A claim has ‘probable validity’ where it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim.” (§ 481.190; *Series AGI West Linn of Appian Group Investors DE, LLC v. Eves* (2013) 217 Cal.App.4th 156, 162; *Chino Commercial Bank, N.A. v. Peters* (2010) 190 Cal.App.4th 1163, 1169.) To determine whether a party has demonstrated the probable validity of its claim under the attachment law, the court must “consider the relative merits of the positions of the respective parties and make a determination of the probable outcome of the litigation.”

(Cal. Law Revision Com. com., 15A West's Ann. Code Civ. Proc. (2011 ed.) foll. § 481.190, p. 20; *Howard S. Wright Construction Co. v. Superior Court* (2003) 106 Cal.App.4th 314, 319-320.) “The court’s determinations shall be made upon the basis of the pleadings and other papers in the record; but, upon good cause shown, the court may receive and consider at the hearing additional evidence, oral or documentary, and additional points and authorities . . . .” (§ 484.090, subd. (d).)

*B. Analysis*

Timoteo claims the trial court erroneously ruled that Singpoli Capital established the probable validity of its claim for the return of its two \$500,000 payments to Timoteo, through MMK. (§ 484.090.) Timoteo argues that the trial court “ignored undisputed factual evidence” that the payments were nonrefundable because they were made in consideration for Timoteo’s prior agreements to twice extend the deadline to purchase the property, or exercise the purchase option, first from August 9 to September 10, and second from September 10 to September 30, 2015.

Timoteo argues the PSA’s failure to include a liquidated damages provision is “irrelevant” because the terms of the PSA and the undisputed extrinsic evidence show that the parties intended that Timoteo would keep the two \$500,000 payments, and the entire \$1,904,093.33 in deposits, if Singpoli MMK did not complete the purchase by September 30. Timoteo claims the two payments and the deposits were not intended to cover or liquidate Timoteo’s damages for any breach of the PSA, including Singpoli

MMK’s failure to complete the purchase, but to compensate Timoteo for allowing MMK to “tie up the property for 19 months” pursuant to the purchase options.

We agree that Singpoli Capital did not establish the probable validity of its claims as a matter of law. The PSA’s nonrefundable deposits and related forfeiture provisions are enforceable notwithstanding that the PSA is a bilateral agreement and does not include a valid liquidated damages provision. As Timoteo argues, the PSA and undisputed extrinsic evidence show that the two \$500,000 payments, and the rest of the deposits, were not intended to cover or liquidate Timoteo’s damages in the event of any breach of the PSA. Instead, the two payments were made in exchange for Timoteo’s agreement to twice extend the option purchase date from August 9 to September 10, and from September 10 to September 30, 2015.

The goal of contract interpretation is to give effect to the parties’ mutual intent at the time of contracting. (Civ. Code, § 1636; *Cedars-Sinai Medical Center v. Shewry* (2006) 137 Cal.App.4th 964, 979.) “When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible . . . .” (Civ. Code, § 1639.) Under California’s parol evidence rule, “[w]hen 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 [i.e., extrinsic] evidence cannot be used *to add to or vary its terms.*” (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 953, italics added, quoting *Masterson v. Sine* (1968) 68 Cal.2d. 222, 225; Code Civ. Proc., § 1856, subds. (a), (b); Civ. Code,

§ 1625.) The terms of an integrated agreement may be *explained*, though not added to or varied, by evidence of the parties' course of dealing and course of performance. (Code Civ. Proc., § 1856, subd. (c).) The court may also consider the circumstances under which the contract was made and the situation of the parties in construing the terms of an integrated agreement. (Code Civ. Proc., §§ 1856, subd. (g), 1860.)

The parol evidence rule does not prohibit the provisional introduction of extrinsic evidence to explain the meaning of a written contract if its terms are reasonably susceptible to the meaning urged. (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 343; *Winet v. Price, supra*, 4 Cal.App.4th at p. 1165 [parol evidence admissible to construe ambiguous language of written instrument].) “The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.” (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37; *Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744, 754.)

The decision whether to admit parol evidence involves a *two-step* process: “First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine ‘ambiguity,’ i.e., whether the language is ‘reasonably susceptible’ to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is ‘reasonably susceptible’ to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step—interpreting the

contract. [Citation.] [¶] Different standards of appellate review may be applicable to each of these two steps, depending upon the context in which an issue arises. The trial court’s ruling on the threshold determination of ‘ambiguity’ (i.e., whether the proffered evidence is relevant to prove a meaning to which the language is reasonably susceptible) is a question of law, not of fact. [Citation.] Thus the threshold determination of ambiguity is subject to independent review. [Citation.]

“The second step—the ultimate construction placed upon the ambiguous language—may call for differing standards of review, depending upon the parol evidence used to construe the contract. When the competent parol evidence is in conflict, and thus requires resolution of credibility issues, any reasonable construction will be upheld as long as it is supported by substantial evidence. [Citation.]” (*Winet v. Price, supra*, 4 Cal.App.4th at pp. 1165-1166; *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc., supra*, 109 Cal.App.4th at p. 953.) But when, as here, the parol evidence is not conflicting, construction of the writing is a question of law, and the court independently construes the writing. (*Winet v. Price, supra*, at p. 1166.)

As noted, the PSA includes an integration clause which merged all previous “discussions, negotiations, letters of intent, understandings, and agreements between the parties regarding the property” into the PSA, and provided that the PSA “alone fully and completely expresses the agreement of the parties regarding the property.” The PSA is a fully integrated agreement, and represents the final expression of the parties’ intent regarding their rights and obligations to the property and the \$1,904,093.33 in deposit,

including Singpoli Capital's two \$500,000 payments. (*Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169, 1174 [“An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement.”].)

Undisputed parol evidence, that is, the extrinsic evidence that predates the PSA, shows that the two \$500,000 payments were made in exchange for Timoteo's agreement twice to extend the deadline for purchasing the property, that is, for exercising MMK's purchase option, first from August 9 to September 10, and second from September 10 to September 30, 2015. The fourth extension to the November 2014 agreement between MMK and Timoteo acknowledged that the first \$500,000 payment was in consideration for the August 9 to September 10 extension. Likewise, the AAA between MMK and Singpoli Capital acknowledged that the second \$500,000 payment was made in consideration for the September 10 to September 30 extension. Messrs. Chu and Kitayama also agreed that the two \$500,000 payments were in consideration for Timoteo's agreement to grant these two extensions. Though nothing in the PSA indicates that either of the two \$500,000 payments were in consideration for any purchase date extensions, the undisputed extrinsic evidence shows they were. That evidence is entirely consistent with and *explains* rather than contradicts the PSA's “nonrefundable deposits” and related forfeiture provisions.

Contrary to the trial court's reasoning, it was unnecessary to include a liquidated damages provision in the PSA, because there is no indication that the deposits were

intended to cover or liquidate Timoteo's damages in the event of any breach, including Singpoli MMK's failure to complete the purchase by September 30, 2015. (Civ. Code, § 1676 [provision in contract to purchase and sell real property "*liquidating the damages to the seller if the buyer fails to complete the purchase*" is valid if it satisfies the requirements of Civ. Code, §§ 1671, subd. (b), 1677, italics added].)

Indeed, a liquidated damages provision would have been inconsistent with the parties' intent, unequivocally expressed in the PSA and supported by the extrinsic evidence, to require the forfeiture of the deposits in the event escrow did not close by September 30, 2015. The "nonrefundable deposits" and related forfeiture provisions of the PSA, and the extrinsic evidence, unequivocally show that the deposits were *not* intended to compensate Timoteo for any damages it may have incurred in the event Singpoli MMK failed to complete the purchase.

*Horowitz v. Noble* (1978) 79 Cal.App.3d 120 is analogous and supports Timoteo's position. There, the parties entered into a written agreement to purchase real property. (*Id.* at p. 125.) Three months later, they signed a new agreement where the plaintiffs agreed to pay the defendants an additional \$20,000 to extend the escrow closing date by two months, with the additional payment to be applied to the total purchase price at close of escrow. (*Id.* at pp. 126-127, 135.) When the escrow did not close, the defendants were entitled to retain the \$20,000 payment because the new agreement showed the \$20,000 payment "was simply the consideration paid for [the] defendants' right to extend the date of performance under the original agreement." (*Id.* at p. 136.) The \$20,000

payment was not an unenforceable penalty, and the new agreement did not “create a liquidated damages provision” contrary to Civil Code former sections 1670 and 1671. The \$20,000 payment was separate consideration for the plaintiffs’ agreement to extend the closing date, and the new agreement provided that the payment was to be “irrevocably disbursed” to the defendants. (*Id.* at pp. 127, 135-136.)

*Kuish v. Smith* (2010) 181 CalApp.4th 1419 is inapposite. Pursuant to a written agreement, Kuish agreed to purchase the defendants’ Laguna Beach home for \$14 million and to make two “non-refundable” \$400,000 deposits against the purchase price. (*Id.* at pp. 1422-1423.) The agreement did not contain a liquidated damages provision and did not constitute an option contract to purchase the property. (*Id.* at p. 1423.) The agreement was later amended to extend the escrow closing date and, ultimately, to decrease the total deposits to \$620,000. (*Id.* at p. 1423.)

Kuish did not complete the purchase, and the defendants promptly sold the home for \$15 million, \$1 million more than Kuish had agreed to pay. The defendants refused to return the deposits, relying on the “non-refundable” deposits provision of the purchase and sale agreement. (*Kuish v. Smith, supra*, 181 Cal.App.4th at pp. 1422-1423.) The *Kuish* court ruled that the defendants were not entitled to keep the deposits, with the exception of a \$9,483.15 sum the parties stipulated the defendants were entitled to keep for roof damages that occurred while Kuish was “staking” the property, because the defendants did not claim they incurred any other damages as a result of Kuish’s breach. (*Id.* at pp. 1428-1429.) The *Kuish* court explained that, “[t]o construe the term

‘nonrefundable’ as establishing defendants’ entitlement to the full deposit without regard to actual damages would essentially create a liquidated damages provision,” and that provision “would be unenforceable because it would fail to meet the requirements of Civil Code section 1677 . . . .” (*Id.* at p. 1429.)

Distinguishing *Horowitz*, the *Kuish* court also ruled that the nonrefundable deposits provision in the purchase and sale agreement could not “constitute separate and additional consideration in support of subsequent agreements to extend the escrow closing date.” The nonrefundable deposits provision *predated* the agreement to extend the escrow closing date, and none of the escrow instructions reflected *Kuish*’s agreement to irrevocably disburse any portion of the deposits in consideration for extending the escrow closing date. (*Kuish v. Smith, supra*, 181 Cal.App.4th at p. 1431.)

*Kuish* is distinguishable because here, undisputed extrinsic evidence shows that the “nonrefundable” deposits provision of the PSA was intended to ensure that Timoteo would keep the deposits in consideration for its earlier grant of the purchase option to MMK and its various modifications and extensions of the purchase option.

## V. DISPOSITION

The judgment is reversed. Each party shall bear their respective costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON

J.

We concur:

RAMIREZ

P. J.

McKINSTER

J.