

**Supreme Court**  
**State of New York**  
**Appellate Division – Third Department**

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In the Matter of Application for Judicial Dissolution  
of Sunburst Associates, Inc., by MICHAEL VILARDI, 50% Shareholder,

Petitioner,

-against-

FRED BABBINO,

Respondent.

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**APPELLANT'S BRIEF**

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### PRELIMINARY STATEMENT

Appellant Michael Vilardi seeks reversal of the trial court's finding that he is not a shareholder in Sunburst Associates, Inc. ("Sunburst"), a New York State "S corporation".

Appellant Vilardi, considering himself a fifty percent (50%) shareholder, sought to dissolve Sunburst by a petition under BCL § 1104. [R9]. Respondent Fred Babbino, a fellow Sunburst shareholder, answered, alleging that Mr. Vilardi had gratuitously transferred Mr. Vilardi's entire interest in Sunburst to Mr. Babbino in July 2007 and therefore that Mr. Vilardi lacked standing to petition for Sunburst's dissolution. [R435].

On September 15, 2010, the court below held an evidentiary hearing to determine whether Mr. Vilardi was a shareholder in Sunburst. [R9]. At that hearing, it was revealed that in June 2007, Mr. Vilardi was undisputedly the owner of ten (10) shares of Sunburst stock, representing a fifty percent (50%) interest in Sunburst. [R193; R448-514]. In June 2007, Mr. Vilardi and Mr. Babbino signed an escrow agreement ("escrow agreement") by which Mr. Babbino would have held Mr. Vilardi's stock in escrow in a manner that did "not change, alter or amend Michael [Vilardi's] voting rights or status as an officer, director or shareholder of the corporation". [R193; R448-514]. When the escrow agreement was created, Sunburst corporate attorney, Dennis Irwin, who now represents just Mr. Babbino, added language to Stock Certificate 5, the certificate representing Mr. Vilardi's ten (10) shares in Sunburst, for the purpose of transferring said certificate to Mr. Babbino to be held in escrow. [R77-79, 81, 107-09, 256, 259-60, 266, 283-84]. Mr. Vilardi did not receive any consideration for this alleged transaction. [*Id.*].

Mr. Babbino's answer to Mr. Vilardi's petition was the first time Mr. Babbino had claimed that Mr. Vilardi was not a Sunburst shareholder. Mr. Babbino had acknowledged Mr.

Vilardi's shareholder status in all of Sunburst's corporate tax filings and in the IRS form 1099s issued to Mr. Vilardi and Mr. Babbino, and in Mr. Babbino's personal tax filings. [R28-36, 138-39, 180-85; R305-394]. Mr. Babbino identified Mr. Vilardi as a fifty percent (50%) shareholder to Sunburst's employees and agents between July 2007 and the beginning of these proceedings. [Id.].

The court below issued an order without decision or explanation that Mr. Vilardi was not a Sunburst shareholder and thereby dismissed Mr. Vilardi's petition. [R3].

## **STATEMENT OF FACTS**

### *Background*

Prior to January 1996, appellant Vilardi and his wife managed a tanning salon. [R25]. Appellant Vilardi, in need of capital after acquiring a second location, approached respondent Babbino, a professional acquaintance, in late 1995 about investing in his and his wife's business and joining it as a partner. [R25]. Mr. Babbino agreed and, as part of that agreement, in December 1995 Sunburst was incorporated to manage what had been solely Mr. Vilardi and his wife's tanning salon. [R66]. Sunburst issued twenty (20) shares of stock which were split evenly between Mr. Vilardi and Mr. Babbino. [R193]. Though the number of Sunburst's stock and each party's ownership interest in Sunburst changed a number of times prior to July 2007, at all times relevant, Mr. Vilardi and Mr. Babbino each owned ten (10) shares of Sunburst's twenty (20) stock. [R108, 193; R515]. Mr. Vilardi's ten (10) shares were represented by a document entitled 'Stock Certificate 5'. [R193; R515].

Respondent Babbino managed Sunburst's finances and human resources, while appellant Vilardi managed "construction and maintenance, advertising, training sales staff . . . setting up systems, the electronic draft computer systems, networking, [and] any computer problems."

[R193]. As Sunburst expanded to include five (5) locations, both Mr. Vilardi and Mr. Babbino worked to finance Sunburst, with Mr. Vilardi investing his own money into the company and with both Mr. Vilardi and Mr. Babbino securing loans and making investments. [R27-29, 83, 188]. At all times relevant, both Mr. Vilardi and Mr. Babbino received an annual salary of twenty-eight thousand and nine hundred dollars (\$28,900.00) from Sunburst. [R28-29].

*Mr. Vilardi endorses Stock Certificate 5 in Blank*

In 2007, at some time prior to July 30, 2007, appellant Vilardi received an offer from a rival tanning salon chain to buy his fifty percent (50%) interest in Sunburst. [R196]. As the negotiations evolved, Mr. Vilardi endorsed in blank Stock Certificate 5 and placed it in Sunburst's company safe. [R196-97]. Although the deal ultimately fell through, Mr. Vilardi left the signed Stock Certificate 5 in the Sunburst company safe. [R196-97]. At no time did Mr. Vilardi deliver or transfer Stock Certificate 5 to respondent Babbino or anyone else. [R197].

*Parties sign an unenforceable agreement to have Mr. Vilardi's stock held in escrow*

On July 30, 2007, attorney Irwin drafted a written escrow agreement whereby Mr. Vilardi's shares in Sunburst would be transferred to Mr. Babbino to be held in escrow by Mr. Babbino. [R109, 262-63; R515]. Although both Mr. Vilardi and Mr. Babbino signed the escrow agreement, the agreement left the consideration for the transfer into escrow blank. [R515; R190]. Indeed, the place on the escrow agreement where such consideration was to have been agreed upon was left blank:

WHEREAS, Michael is indebted to Fred in relation to corporate activities in the amount of \$\_\_\_\_\_; and

WHEREAS, Fred and Michael desire to enter into an Agreement to secure Fred as to *such* indebtedness. [R515] (emphasis supplied)

Dennis Irwin, Sunburst's corporate and Mr. Babbino's personal attorney, testified that under the escrow agreement Mr. Vilardi's stock could be returned to Mr. Vilardi from escrow at Mr. Vilardi's option at any time. [R267]. However, the escrow agreement as written contains no terms for what conditions Mr. Vilardi's stock would be released from escrow, where the escrowed stock was to be held, or the length of the escrow's term. [R288; R515].

Even if the escrow agreement was enforceable, its terms explicitly left untouched Mr. Vilardi's status as a fifty percent (50%) shareholder of Sunburst:

Effective with the signing of this [escrow] Agreement, Michael [Vilardi] shall hereby execute and deliver the original of his stock certificate for all of his 10 shares in Sunburst to Fred [Babbino], *who shall hold said stock certificate in escrow* under the terms hereinafter set forth to secure the payment of such indebtedness. [R515] (emphasis supplied)

Additionally, the escrow agreement also explicitly states that Mr. Vilardi's rights as well as status as a Sunburst shareholder were to be unchanged by the escrow agreement:

The *execution and delivery of such stock certificate* to Fred [Babbino] by Michael [Vilardi] for 10 shares of stock in Sunburst *shall not change, alter or amend Michael's voting rights* or status as an officer, director *or shareholder of the corporation*, and in that regard, *the corporation shall transact such business and activities as if 10 shares of stock had not been transferred to Fred [Babbino] by Michael [Vilardi]*. [R515](emphasis supplied).

Sunburst attorney Irwin, who drafted the escrow agreement, agreed that the escrow agreement, even if enforceable, did not divest Mr. Vilardi of his Sunburst stock ownership. [R262-66].

Pursuant to this purported escrow agreement, appellant Vilardi's Stock Certificate 5 was removed from the Sunburst company safe on or around July 30, 2007 by attorney Irwin and writing was added in furtherance of the transfer to escrow, but without the escrow language on the certificate itself (ie. it did not read to Mr. Babbino as *escrow agent* but rather just to Mr. Babbino outright). [R283-84]. Although the language assigning the stock to Mr. Babbino is not



qualified, it was a companion to the escrow agreement and the corporate attorney Dennis Irwin testified that the transfer was to Mr. Babbino *as* escrow agent:

Q(court): On July 30, 2007, you prepared and [Mr. Vilardi and Mr. Babbino] signed an escrow agreement, is that correct?

A(Irwin): Yes, this is Exhibit B.

Q: And *Mr. Vilardi put his 50 percent in escrow to be held by Mr. Babbino as escrow agent?*

A: *Correct. Yes,* or the corporation.

Q: And you testified *it's normally your practice and you endorse a check over or anything else to put so and so as escrow agent,* is that correct?

A: Well, *yes, but in this case I had to.*

Q: *But you didn't.*

A: *Because I had this [Escrow] Agreement. [R283-84]* (emphasis supplied).

Attorney Irwin testified that the transfer language he wrote on the back of Mr. Vilardi's Stock Certificate 5 was not understood by Mr. Vilardi, Mr. Babbino, or himself to constitute an outright transfer of Mr. Vilardi's interest in Sunburst to Mr. Babbino, especially given that Mr. Vilardi received no consideration of any kind for that transfer. [R266]. Similarly, though the language on Stock Certificate 5 states that it was transferred in return for "value received", the written escrow agreement remained blank as to what this "value received" was. [R515].

Appellant Vilardi testified that he was not present when the transfer language was written on Stock Certificate 5, that he did not know who had written that language, and that he did not even become aware of that language until the eve of the hearing below. [R196]. Attorney Irwin testified that he wrote the language on the back of Stock Certificate 5 and that Mr. Irwin "believed" that he had done so in the presence of Mr. Vilardi. [R247]. Mr. Irwin also "believed"

he witnessed Mr. Vilardi endorse the Stock Certificate 5 transfer in Mr. Irwin's presence "about the same time that the [escrow] agreement was signed", though he could also not "specifically recall" if Mr. Irwin witnessed Mr. Vilardi sign Stock Certificate 5. [R246-48]. Although Mr. Babbino emphatically asserted that he saw Mr. Vilardi sign Stock Certificate 5, he could not remember who had entered the language on the back of Stock Certificate 5, or whether Mr. Irwin was present for the signing of Stock Certificate 5. [R246-47]. Neither Mr. Babbino nor Mr. Irwin testified to having entered the "July 30, 2007" date on the back of Stock Certificate 5. [R110, 246-47].

The contradiction between Mr. Vilardi's and Mr. Irwin's accounts notwithstanding, it was the understanding of Mr. Babbino, Mr. Irwin, and Mr. Vilardi that according to the escrow agreement, Mr. Vilardi's Sunburst stock was to be held by Mr. Babbino in escrow. [R73, 220, 248]. Indeed, it is the testimony of attorney Irwin that Mr. Vilardi's stock remains *in escrow* to this day. [R288]. None of the purported participants in the transaction testified that they believed that this was a gratuitous transfer of Mr. Vilardi's Sunburst stock to Mr. Babbino.

#### *Corporate Status Document*

On August 31, 2007, appellant Vilardi signed a statement ("corporate status document") that declared to "those with whom Sunburst Associates, Inc. does business", that as of July 30, 2007, Mr. Babbino was the sole owner of Sunburst stock. [R78, 268; R463]. Mr. Vilardi and Mr. Irwin agree that the corporate status document was created to represent to lenders that Mr. Babbino, whose credit history was stronger than Mr. Vilardi's, was in control of Sunburst. [R87-88, 215-16, 287]. The corporate status document confirms that the document's sole purpose is to address a "*need to confirm to those with whom Sunburst Associates, Inc. does business* as to who the corporate officers are, and who has authority to act for and behalf of the Corporation."

[R463] (emphasis supplied). It was not an agreement to establish the ownership of the Sunburst shares as between Mr. Vilardi and Mr. Babbino. [R87-88, 215-16, 287; R463].

Respondent Babbino claims that the corporate status document transferred Mr. Vilardi's rights and interests in Sunburst from escrow and to Mr. Babbino in full. [R113-14]. However, the corporate action document nowhere references the escrow agreement, nowhere references any transfer of Sunburst stock, and nowhere references what consideration, if any, Mr. Vilardi may have received for such a transfer. [R463]. Attorney Irwin testified explicitly that the corporate status document had no effect on the escrow agreement and that Mr. Vilardi's stock remains in escrow to this day. [R288]. The corporate status document was the only instance in which respondent Babbino made any claim or took any action on the basis of his claimed sole ownership of Sunburst.

*The corporation and Mr. Babbino continued to function with Mr. Vilardi as a shareholder and Mr. Vilardi continued to act as a shareholder between July 2007 and these proceedings*

Neither appellant Vilardi nor respondent Babbino changed their behavior in any way in relationship to Sunburst after the escrow agreement and corporate status documents were created. Between the creation of the escrow agreement in July 2007 and the filing of Mr. Vilardi's dissolution petition, Mr. Vilardi invested at least fifty thousand dollars (\$50,000.00) each year into Sunburst and continued to collect his annual twenty-nine thousand, five hundred dollar (\$29,500.00) salary, the same amount as before the July 2007 escrow agreement. [R29]. Mr. Vilardi's fifty percent (50%) stock ownership continued to be reflected in Sunburst's tax returns and in the form 1099s for both Mr. Babbino and Mr. Vilardi, the day-to-day management of Sunburst (with Mr. Babbino handling the companies human resources and finances and Mr. Vilardi handling everything else) remained unchanged, and Mr. Vilardi and Mr. Babbino continued to hold shareholder's meetings. [R37-39, 136-39, 144-45, 180; R295-394]. Not even

Sunburst's accountant, Donna Sidoti, was informed of a claimed ownership change until after these proceedings were commenced. [R24].

Mr. Vilardi's investment in Sunburst since July 2007

Since 2007, after Mr. Babbino asserts Mr. Vilardi was supposedly no longer a shareholder, Mr. Vilardi has invested approximately fifty thousand dollars (\$50,000.00) per year in Sunburst through a company, Vilabino, Inc., of which Mr. Vilardi was an owner and manager. [R27-28].<sup>1</sup> Mr. Babbino claims that this investment was to "offset" Mr. Vilardi's yearly twenty-eight thousand nine hundred dollar (\$28,900.00) salary he earned as (according to Mr. Babbino) a mere employee of Sunburst. [R30].

This fifty thousand dollar (\$50,000.00) per year investment into Sunburst by Mr. Vilardi was entirely unmanaged by Mr. Babbino:

Q (Luibrand): *What was the money from Vilabino going into Sunburst for?*

A (Babbino): *To offset his payroll.*

Q: . . . *Was it a loan by Vilabino to Sunburst?*

A : *I don't know how [Sunburst accountant Donno Sidoti] was recording that to be honest with you. She was going, she said she was going to take care of it and I left it up to her.*

Q: You didn't even ask [Ms. Sidoti] what the basis was? As the president of the company, didn't you ask, and a hundred percent shareholder, you're claiming, you didn't ask her?

A: Ah, I am not claiming I am.

Q: Why? \$50,000 a year is a large amount of money from Vilabino corporation and it was going into Sunburst every single week. You never asked her why?

A: She knew why.

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<sup>1</sup> Though Mr. Babbino claims to have been an owner of Vilabino, that assertion is based solely on the alleged representations of Mr. Vilardi and his wife and is nowhere else supported in the record. [R25].

...  
Q: *Did you tell her how to handle it?*

A: *No, I didn't.* [R30-31].

Mr. Vilardi's continued fifty thousand dollar (\$50,000.00) investment in Sunburst was nearly twice his annual salary from Sunburst and went directly into Sunburst's coffers without any oversight whatsoever from Mr. Babbino. [R28-31].

*Mr. Vilardi's continued fifty percent interest in Sunburst was reflected in dozens of tax filings*

Since July 30, 2007, Sunburst, with respondent Babbino's direct participation, represented to state and federal tax authorities and appellant Vilardi that Mr. Babbino and Mr. Vilardi's each had a fifty percent (50%) ownership interest in Sunburst. Sunburst's corporate tax returns for 2007, 2008, and 2009 identify both Mr. Vilardi and Mr. Babbino as fifty percent (50%) shareholders, including on each return's coverpage. [R305-394]. For each of these returns, there are attached K-1<sup>2</sup>, 1099<sup>3</sup>, and 1120-S<sup>4</sup> forms issued to both Mr. Babbino and Mr. Vilardi showing vividly each as a fifty percent (50%) shareholder. [*Id.*; R136-38]. Mr. Babbino "believes" he signed Sunburst's 2007 tax filings, does "not recall" having signed Sunburst's 2008 filings, and did not sign Sunburst's 2009 filings before they were sent out. [R27-28; R397-427].

Both Mr. Babbino and Mr. Vilardi's 2007, 2008, and 2009 *personal* tax returns stated that they were each fifty percent (50%) shareholders in Sunburst. [R305-394]. Mr. Babbino testified that he did sign these personal tax returns and therefore knew well that he was only a fifty percent (50%) shareholder in Sunburst. [R27-28].

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<sup>2</sup> K-1 forms document shareholder income from an S-corporation.

<sup>3</sup> 1099 forms document certain classes of business transactions.

<sup>4</sup> 1120-S forms document corporate income.

Between July 2007 and 2009 Mr. Babbino received from Sunburst's accountant copies of all of Sunburst's tax filings, a total of fifteen (15) documents, which contained twenty-two (22) references to Mr. Vilardi's fifty percent (50%) interest in Sunburst. [R129]. However, Mr. Babbino, Sunburst's president, claims to have missed seeing every one of these twenty-two (22) references:

Q (Luibrand): And *after the tax returns were filed, was a copy of the tax returns sent to you?* The federal, the corporate tax returns for Sunburst Associates, Inc.?

A (Babbino): *I think so.*

Q: And *did you have occasion to look at those returns* when you received them?

A: *I did not.*

...  
Q: You didn't look at the numbers? You didn't look at the tax returns? *You didn't look at anything, right?*

A: *Right.* [R27-28](emphasis supplied).

Mr. Babbino testified that he was so confident in accountant Sidoti's work that he did not feel the need to review it, even though he did not inform accountant Sidoti that he had purportedly become Sunburst's sole owner until nearly three (3) years after he alleges that event occurred and one (1) month after these proceedings began:

Q (Luibrand): Did you ever tell Miss Sidoti that Mr. Vilardi was no longer a 50 percent shareholder?

A (Babbino): In 2007?

Q: You told her in 2007?

Q (court): He said, did you ever.

A: Did I ever, yes, I did.

Q (Luibrand): When?

A: In May of 200 -- recently. 2010. [R24]<sup>5</sup>.

Regardless, Mr. Babbino admitted that he did sign Sunburst's 2007 returns before they were submitted, though he could "not recall" having signed Sunburst's 2008 returns. [R27-28].

Mr. Babbino further asserts that, despite being Sunburst's sole owner and overseer of its finances, he spoke with accountant Sidoti, who prepared Sunburst's weekly payroll and quarterly reports in addition to its tax returns, only "*once or twice a year* or if we had a problem". [R23-24, 126] (emphasis supplied). This contradicts not only Mr. Babbino's testimony that he was in control of Sunburst, but also the testimony of Ms. Sidoti who testified that between 2007 and May 2010 that "she would have a conversation with [Mr. Babbino] about something" roughly "*three or four times in a month's* period of time". [R128] (emphasis supplied). Ms. Sidoti further testified that at tax time she would speak with Mr. Babbino "as much as *two times a day* when we needed to get the corporate return information finished". [R128] (emphasis supplied). Those corporate returns showed Mr. Vilardi with a fifty percent (50%) interest in Sunburst, and never did Mr. Babbino tell accountant Sidoti about any change in Sunburst's ownership. [R24].

Mr. Vilardi and Mr. Babbino treated one another as shareholders in their dealings with one another.

Mr. Babbino also continued to treat Mr. Vilardi as a Sunburst shareholder and to represent to Sunburst's employees that Mr. Vilardi was a Sunburst shareholder. On February 27, 2010, just four (4) months before this litigation began, Mr. Babbino phoned Mr. Vilardi to request Mr. Vilardi join him for a "shareholders' meeting". [R295-296]. Mr. Vilardi responded in writing to Mr. Babbino that "I acknowledge your telephone call *seeking to schedule a shareholders meeting.*" [R297]. Mr. Babbino responded in writing on March 5, 2010 and did not

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<sup>5</sup> Mr. Babbino "immediately fired" Ms. Sidoti in May 2010 when Mr. Babbino "discovered" that Ms. Sidoti believed Mr. Vilardi to still be a Sunburst shareholder. [R49-50].

dispute that the proposed meeting would be a shareholders' meeting and instead sought to reschedule the shareholders' meeting for another time. [R298-299; R36]. Mr. Vilardi rescheduled the meeting, again referring to it as a "shareholders' meeting", without objection from Mr. Babbino, for March 18, 2010, and set forth an agenda for that meeting that dealt explicitly and solely with Sunburst's investment issues. [R37-39; R300-304, R428-432].

This shareholders' meeting was held on March 18, 2010 at Sunburst's corporate offices where long-time Sunburst office manager Megan Brady was working. [R178, 180-85]. Mr. Vilardi arrived first for the shareholders' meeting and when Mr. Babbino arrived later, Mr. Babbino told Ms. Brady that she "needed to go upstairs because Fred [Babbino] and Mike [Vilardi] were going to have a *shareholder[sic] meeting*." [R180] (emphasis supplied).

Between the creation of the corporate status document in August 2007 and the beginning of these proceedings, Mr. Babbino represented to no one that he was the sole owner of Sunburst and in fact represented that both he and Mr. Vilardi were Sunburst's shareholders to his employees, his accountant, and the state and federal government.

### ARGUMENT

Respondent Babbino's tortured explanation of how he came to own appellant Vilardi's shares in Sunburst is not supported by the record and cannot, as a matter of law, support Mr. Babbino's allegations that Mr. Vilardi is no longer a Sunburst shareholder. The escrow agreement and the accompanying writing of attorney Irwin on Stock Certificate 5 cannot be enforceable as that agreement was not supported by consideration. Even if the escrow agreement was enforceable, it only moved Mr. Vilardi's shares into escrow and explicitly maintained Mr. Vilardi's rights and status as a fifty percent (50%) shareholder in Sunburst. Additionally, the corporate status document, also unsupported by consideration, nowhere claims to affect any



stock transfer whatsoever and, as a statement made to outside parties, cannot be read to alter the Sunburst's actual, internal structure or ownership. Finally, any argument that Mr. Vilardi transferred his Sunburst stock to Mr. Babbino in July or August of 2007 is untenable in light of Mr. Babbino's continued treatment of Mr. Babbino as a Sunburst shareholder up to the beginning on these proceedings.

**Point I**

**THE ESCROW AGREEMENT DID NOT TRANSFER MR.  
VILARDI'S INTEREST IN SUNBURST TO MR. BABBINO.**

The escrow agreement signed by Mr. Vilardi is not enforceable because it was not supported by consideration. Even if it was enforceable, this escrow agreement never purported than to do more than transfer Mr. Vilardi's stock into an escrow overseen by Mr. Babbino. Even the language written on Stock Certificate 5 by attorney Irwin was not understood by any party to amount to an outright transfer of Mr. Vilardi's Sunburst stock to Mr. Babbino.

**A. The escrow agreement is unenforceable as not supported by consideration.**

In order for an agreement between two parties to be enforceable at law, the agreement must be supported by an exchange of consideration. Apfel v. Prudential-Banche Securities, Inc., 81 N.Y.2d 470, 475-76 (1993). Though the written escrow agreement purports to transfer Mr. Vilardi's stock to Mr. Babbino as an escrow agent, the escrow agreement does not purport to provide Mr. Vilardi with anything whatsoever in return. [R230-31; R515]. Specifically, the document which would represent that the escrow agreement, though containing a blank space where money consideration is to be entered, is silent as to anything given by Mr. Babbino to Mr. Vilardi in exchange for Mr. Vilardi's agreement to transfer his Sunburst stock to Mr. Vilardi in escrow. [R515]. Similarly, the writing on Stock Certificate 5 merely states that said certificate is to be transferred to Mr. Babbino and nowhere indicates what Mr. Babbino is to receive in return

for that transfer. [R281; R461]. Nor did Mr. Vilardi actually receive anything of value in exchange for the transfer which is simply not mentioned in the written agreement. [R227-28]. As such, the agreement is not supported by consideration and so it is unenforceable and cannot have legally transferred Mr. Vilardi's stock.

**B. The escrow agreement, even if enforceable did not transfer Mr. Vilardi's interest in Sunburst to Mr. Babbino.**

Even if the escrow agreement was enforceable despite the escrow agreement's lack of consideration, its terms did not affect a transfer of stock from Mr. Vilardi to Mr. Babbino. Rather, the escrow agreement explicitly states that Mr. Babbino was to hold Mr. Vilardi's Stock Certificate 5 in "escrow". [R515]. The escrow agreement emphasizes the limited nature of the alleged transfer by stating that the escrow agreement "shall not change, alter, or amend Michael [Vilardi's] voting rights or status as . . . a shareholder of the corporation, and . . . the corporation shall transact such business and activities as if 10 shares of stock had not been transferred to Fred [Babbino] by Michael [Vilardi]." [R515]. The escrow agreement included no provision whereby Mr. Babbino could come to own Mr. Vilardi's stock outright. [R515]. The escrow agreement also did not state how long the escrow was to last or under what conditions the stock could be removed from escrow. [R515]. Under no reading of the escrow agreement can it be said that appellant Vilardi transferred his ownership interest in his Sunburst stock to respondent Babbino.

**C. The language written by attorney Irwin on the back of Stock Certificate 5 cannot be considered separately from the escrow agreement.**

The language written by attorney Irwin on the back of Stock Certificate 5 must be considered as part of the escrow agreement and found to be unenforceable and legally deficient insofar as that language merely puts into effect that agreement.

- a. *The language written on the back of Stock Certificate 5 cannot be considered separately from the escrow agreement.*

Both Mr. Babbino and attorney Irwin testified that the language on the back of Stock Certificate 5 was entered as part of the escrow agreement. [R81, 107-09, 256, 259-60, 266, 283-84]. Specifically, Sunburst attorney Irwin, who was not a party to the alleged transfer, testified that when he wrote the language that now appears on the back of Stock Certificate 5 he only meant for that language to transfer the stock to Mr. Babbino to be held in escrow. [Tr.283-84]. In keeping with this, after writing the language on the back of Stock Certificate 5, Mr. Irwin entered Stock Certificate 5 in the corporate book as being in “escrow”. [R267]. Even Mr. Babbino testified that the transfer language on the back of Stock Certificate 5 was entered there pursuant to the escrow agreement. [R79-81]. Thus the writing on the back of Stock Certificate 5 is inextricably bound up with the escrow agreement, which itself cannot have transferred Mr. Vilardi’s stock to Mr. Babbino for reasons already discussed at Point I subpoints A and B.

*b. The parol evidence rule does not require the court to consider the language on the back of Stock Certificate 5 as a stand-alone document.*

The parol evidence rule does not compel this court to ignore the escrow agreement, the corporate status document, and the behavior of the parties after the escrow agreement in considering the language on the back of Stock Certificate 5 because the parol evidence rule does not bar extrinsic evidence where an agreement is ambiguous or where there is evidence of fraud.

*i. The parol evidence rule does not bar the consideration of extrinsic evidence where the offered writing is ambiguous.*

“Extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is *complete* and clear and *unambiguous* upon its face.” W.W.W. Associates, Inc. v. Giancontieri, 77 N.Y.2d 157, 163 (1990) quoting Intercontinental Planning v. Daystrom, Inc., 24 N.Y.2d 372, 379 (1969) (emphasis supplied). See also Greenfield v. Philles Records, Inc. 98 N.Y.2d 562, 569 (2002). Ambiguity exists where an examination of a written agreement

will yield more than one reasonable interpretation. Chimart Associates v. Paul, 66 N.Y.2d 570, 573 (1986). Here, ambiguity exists insofar as the only obligation on Mr. Babbino's part which is imposed or referenced in the Stock Certificate 5 language is "value received". [R284]. The "value received" language is clearly susceptible of multiple interpretations, particularly in that there is no evidence anywhere on the record that Mr. Vilardi in fact received any value in return for the alleged transfer. Thus, extrinsic evidence, namely the escrow agreement in which the language on the back of Stock Certificate 5 is embodied and Mr. Babbino's continued treatment of Mr. Vilardi as a shareholder after July 2007, must be considered to resolve the language on Stock Certificate 5's ambiguity. Upon proper consideration, this extrinsic evidence makes clear that that language on the back of Stock Certificate 5 is not supported by consideration and did not in reality transfer Mr. Vilardi's Sunburst stock to Mr. Babbino outright. Instead, attorney Irwin's writing on Stock Certificate 5 did no more than transfer Mr. Vilardi's stock to Mr. Babbino to be held in escrow.

ii. The parol evidence rule does not bar the consideration of evidence of fraud.

Where a party alleges, as Mr. Vilardi has, that a written agreement was come about by fraud, the parol evidence rule will not bar consideration of the evidence of that fraud. Sabo v. Delman, 3 N.Y.2d 155, 161 (1957); Cleangen Corp. v. Filmax Corp., 3 A.D.3d 468, 469 (2d Dep't 2004). Mr. Vilardi's allegation that he only endorsed Stock Certificate 5 in blank and that the language transferring it to Mr. Babbino was added later amounts to one of fraud. [R196-97]. This allegation is corroborated by the contradictory testimony of attorney Irwin and Mr. Babbino. Attorney Irwin, who was also Mr. Babbino's personal attorney, could not remember whether Mr. Vilardi was present when the language was added to Stock Certificate 5, could only say that he "believed" he saw Mr. Vilardi and Mr. Babbino sign Stock Certificate 5. [R247-48].

Mr. Babbino, on the other hand, after first testifying that he could not remember whether attorney Irwin was present when Stock Certificate 5 was signed, later testified that attorney Irwin was there, and testified that Mr. Babbino could not remember how the language had come to be written on Stock Certificate 5. [R246-47]. This evidence, coupled with the escrow agreement, constitutes strong evidence of fraud which is not barred by the parole evidence rule.

### **Point II**

#### **THE CORPORATE STATUS DOCUMENT DID NOT TRANSFER MR. VILARDI'S INTEREST IN SUNBURST TO MR. BABBINO.**

The corporate status document could not, as a matter of law, have transferred Mr. Vilardi's interest in Sunburst to Mr. Babbino because the corporate status document did not purport to so transfer Mr. Vilardi's interest and because representations made to third parties do not, standing alone, alter the internal organization or ownership of a corporation.

##### **A. The corporate status document did not purport to transfer Mr. Vilardi's stock to Mr. Babbino.**

Nowhere in the corporate status document is it stated that appellant Vilardi's stock was to be moved out of escrow, much less that it was to be transferred to respondent Babbino. [R463]. Indeed, the corporate status document does not reference either the escrow agreement or any stock transfer. [R463]. The corporate action document was meant merely to "confirm to those with whom Sunburst . . . does business" that Mr. Babbino was the sole owner of Sunburst. [R463]. Mr. Vilardi testified that the corporate status document was designed to assist the company apply for loans by presenting to potential lenders that Mr. Babbino, whose credit history was better than Mr. Vilardi's, was the leader of the company. [R221-22]. This account is corroborated by Sunburst's attorney, Mr. Irwin, who testified that the corporate status document was drafted in order to secure a loan. [R287].

The only evidence to the contrary is Mr. Babbino's lonely assertion that the corporate status document was meant to remove all of Mr. Vilardi's stock from escrow and transfer it to Mr. Babbino personally. [R87-88]. There is no evidence on or off the record to support this position, even if the underlying escrow agreement was enforceable.

**B. Representations to the outside world do not affect the internal structure or ownership of a corporation.**

A corporation's representations to those outside the corporation, even to government authorities, do not have a legal effect on the internal structure or ownership of the corporation. Heisler v. Gingras, 90 N.Y.2d 682, 688 (1997). Thus, as a matter of law, the corporate status document did not have an effect on Mr. Vilardi's ownership of Sunburst. This is particularly so given that the corporate status document did not purport to divest Mr. Vilardi of his existing interest and Sunburst attorney Dennis Irwin's testimony that the corporate status document had no actual effect on Mr. Vilardi's interest in Sunburst. [R273].

**C. The corporate status document was not supported by consideration and so could not have transferred Mr. Vilardi's Sunburst stock to Mr. Babbino.**

As with the escrow agreement, the corporate status document was not supported by consideration and so could not have constituted a binding transfer of Mr. Vilardi's interest in Sunburst to Mr. Babbino, even if such a transfer had been the document's purpose or subject.

**Point III**

**MR. BABBINO'S REPRESENTATIONS THAT MR. VILARDI WAS A SUNBURST SHAREHOLDER AND MR. BABBINO'S TREATMENT OF MR. VILARDI AS SUCH EVISCERATE MR. BABBINO'S CLAIMS THAT MR. VILARDI DIVESTED HIMSELF OF HIS SUNBURST STOCK IN JULY 2007.**

Mr. Babbino's continued treatment of appellant Vilardi as a Sunburst shareholder after signing the July 2007 escrow agreement and the August 2007 corporate status document make it

abundantly clear that Mr. Babbino's claims to sole Sunburst ownership are a recent fabrication. Aside from that signature and the filing of Mr. Babbino's response to the present petition, Mr. Babbino has not once represented himself to be or acted as if he were the sole owner of Sunburst. In every one of Mr. Babbino's personal tax filings since July 2007, Mr. Babbino represented that he was only a fifty percent (50%) shareholder in Sunburst. [R28-36, 138-39, 181-85; R305-394]. In every one of Sunburst's corporate tax filing since July 2007, Mr. Vilardi has been held out as a fifty percent (50%) shareholder in Sunburst. [R28-36, 138-39, 181-85; R305-394]. Mr. Babbino treated Mr. Vilardi as a shareholder by holding "shareholders'" meetings with Mr. Vilardi, by not taking any action with respect to Mr. Vilardi's fifty thousand dollar (\$50,000.00) per year investment in the company, and by allowing Sunburst's accountant to persist in creating paperwork on the company's behalf which held out that Mr. Vilardi was a Sunburst shareholder. [R24, 27-28,36; R295-297]. Similarly, nothing about Mr. Babbino and Mr. Vilardi's day-to-day relationship with Sunburst changed as a result of the creation of the escrow agreement and corporate status document. [R28, 193]. They each performed the same duties they had before those documents were created in July and August of 2007 between that time and the beginning of these proceedings. [R28]. Mr. Vilardi continued to invest twenty-one thousand and one hundred dollars (\$21,100.00) more into Sunburst each year than he got out of it in the form of a salary. [R29]. Mr. Vilardi also continued to cite his fifty percent (50%) ownership of Sunburst in his personal tax filings. [R305-394]. The fact that neither Mr. Babbino nor Mr. Vilardi's behavior towards Sunburst changed at all after the escrow agreement and corporate status document were created make it undeniable that neither of those documents terminated Mr. Vilardi's status as a shareholder in Sunburst.

### CONCLUSION

Based on the foregoing, the appellant respectfully requests that this Court reverse the lower court's ruling and find that Mr. Vilardi is a fifty percent (50%) shareholder in Sunburst Associates, Inc. as an owner of ten (10) shares of that company's stock and remand the case for further proceedings on appellant's petition.

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