

1 **UNITED STATES COURT OF APPEALS**
2 **FOR THE SECOND CIRCUIT**

3
4 August Term, 2015

5
6 (Submitted: November 4, 2015 Decided: July 11, 2016)

7
8 Docket No. 14-3447-cv
9

10
11 ALPHONSE HOTEL CORPORATION,

12
13 *Plaintiff-Counter-Defendant-Appellee,*

14
15 - v. -

16
17 NAM T. TRAN,

18
19 *Defendant-Counter-Claimant-Appellant.*
20

21
22 ON APPEAL FROM THE UNITED STATES DISTRICT COURT
23 FOR THE SOUTHERN DISTRICT OF NEW YORK
24

25 Before:

26 HALL and LYNCH, *Circuit Judges*, RAKOFF, *District Judge*.^{*}
27

28 Appeal from a judgment of the United States District Court for the
29 Southern District of New York (Cote, J.) granting plaintiff Alphonse Hotel
30 Corporation's ("AHC") motion for partial summary judgment seeking a
31 declaratory judgment that a lease and a purported joint venture agreement
32 between plaintiff and defendant Nam Tran were invalid and unenforceable. The
33 district court also denied defendant's request for additional discovery. We

^{*} The Honorable Jed S. Rakoff, of the United States District Court for the Southern District of New York, sitting by designation.

1 consider (1) whether Nam's requests for additional discovery in his Rule 56(d)
2 motion identified specific materials in AHC's possession that were sufficiently
3 germane to the case and not cumulative such that the district court abused its
4 discretion in denying that motion for production; (2) whether under New York
5 law a lease between the parties, which was executed by defendant's father in his
6 former capacity as president of AHC, is void as a gift or corporate waste; and (3)
7 if the lease is void, whether under Pennsylvania law the integration clause
8 contained in the lease survives such that a separate prior-in-time oral agreement
9 to enter a joint venture is voided by that clause.

10
11 AFFIRMED.

12
13 KEVIN L. SMITH, DAVID A. SIFRE, Stroock &
14 Stroock & Lavan LLP, New York, NY, *for Plaintiff-*
15 *Counter-Defendant-Appellee Alphonse Hotel*
16 *Corporation.*

17
18 GEORGE BOCHETTO, ALBERT M. BELMONT, DAVID
19 P. HEIM, Bochetto and Lentz, PC, Philadelphia,
20 PA, *for Defendant-Counter-Claimant-Appellant Nam*
21 *T. Tran.*

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23
24 HALL, *Circuit Judge:*

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26 This case concerns a lease ("the Lease") and a purported joint venture
27 agreement ("the Joint Venture Agreement") entered into between a son and his
28 father, the now-deceased former president and majority shareholder of a real
29 estate development corporation. The Lease grants the son, defendant-counter-
30 plaintiff-appellant Nam T. Tran ("Nam"), control over a multi-million-dollar
31 property for a period of 20 years in exchange for a payment of \$20. The Joint

1 Venture Agreement covers Nam's development of this property. After the
2 father's death, the corporation, plaintiff-counter-defendant-appellee Alphonse
3 Hotel Corporation ("AHC"), under the control of a court-appointed temporary
4 administrator, sought damages for Nam's use and occupancy of the property
5 and a judgment declaring that the Lease and Joint Venture Agreement were void.
6 Nam counterclaimed, seeking a declaratory judgment that those agreements
7 were valid and seeking damages for AHC's breaches of both agreements. The
8 district court granted AHC's motion for partial summary judgment on its
9 declaratory judgment claims and denied Nam's requests for additional
10 discovery. On appeal, we consider: (1) whether Nam's requests for additional
11 discovery in his Rule 56(d) motion identified specific materials in AHC's
12 possession that were sufficiently germane to the case and not cumulative such
13 that the district court abused its discretion in denying that motion for
14 production; (2) whether under New York law the Lease, which was executed by
15 Nam's father in his former capacity as president of AHC, is void as a gift or
16 corporate waste; and (3) if the Lease is void, whether under Pennsylvania law the
17 integration clause contained in the Lease survives such that a separate prior-in-
18 time oral agreement to enter a joint venture is voided by that clause. For the

1 reasons that follow, we affirm the district court's rulings denying Nam's
2 discovery request and granting summary judgment to AHC.

3 **BACKGROUND**

4 AHC is a New York closely held corporation that owns and manages real
5 estate, including, among other properties, the former Franklin Chocolate Factory
6 in Philadelphia, PA ("the Property"), which is the subject of this case. Nam, a
7 Pennsylvania citizen, is the eldest son of AHC's former president, Truong Dinh
8 Tran ("Truong"). Upon his death in 2012, Truong owned 80% of AHC's shares,
9 and the four mothers of his children, Sang Kay Nguyen, Hung Nguyen
10 ("Hung"), Cham Nguyen ("Cham"), and Hoa Pham, each owned 5%. Truong
11 served as AHC's president and sole director until September 2008, when he
12 suffered a stroke, at which point he added two seats to the board of directors and
13 appointed two of the mothers, Hung and Cham, to fill those seats. Truong
14 resigned as president in September or October 2010, and Hung was elected
15 president.

16 Truong died intestate in May 2012; control of AHC and Truong's estate
17 was contested. Shareholders of AHC along with claimants to Truong's estate
18 commenced litigation. The New York State courts overseeing these actions

1 appointed a temporary administrator of the estate, who took control of Truong's
2 80% share of AHC and, in April 2013, assumed the roles of president and sole
3 director.

4 Nam alleges that sometime around 2007 he entered into the Joint Venture
5 Agreement with Truong, who was acting on behalf of AHC, to develop the then
6 dilapidated Property into a mixed-use development. Nam submitted no
7 documentary evidence of this agreement, only his own declaration testifying to
8 its existence and a declaration of his wife testifying to actions, purportedly taken
9 in the name of the Joint Venture, toward securing design and regulatory
10 approvals for redevelopment of the Property. According to Nam, under the Joint
11 Venture AHC would provide the capital for redevelopment and pay to maintain
12 the Property, and in exchange Nam and his family would provide the "sweat
13 equity" to design and manage the redeveloped property. As Nam explains in his
14 declaration, AHC facilitated this Joint Venture Agreement by leasing the
15 property to Nam for 20 years, with rights to sublet the property. During the
16 leasehold period, Nam would benefit through receipt of rents and other fees
17 from operation of the redeveloped property, while AHC would benefit by
18 receiving, at the end of 20 years, a higher-value property.

1 As for the Lease, AHC has no corporate records of it ever being approved,
2 and no copies could be found among the corporation's files. The Lease that has
3 been admitted into evidence is the one that Nam produced when AHC's director
4 asked him about the Property after discovering a record indicating that Nam was
5 the lessee. According to its terms, the Lease is between AHC, as lessor, and
6 Nam, as lessee. Although the parties dispute the effective dates of the Lease and
7 Truong's resignation, and, depending on that timing, whether Truong actually
8 had the authority to execute the Lease on behalf of AHC, the parties agreed for
9 purposes of the summary judgment motion to assume that the signatures were
10 effective.¹

11 The Lease provides that Nam will pay AHC a total of \$20 in rent for the
12 entire term of 20 years. The Lease states that AHC "will not sell the . . . property
13 during the 20 years term of this Lease." J.A. at 376. The Lease does not mention
14 the Joint Venture Agreement, but contains several provisions relevant to its
15 existence.

16 First, the Lease contains an integration clause:

¹ In its appellate brief, AHC obliquely contests Truong's authority based on the effective dates of his resignation and the Lease, but that issue turns on contested facts and would not be appropriate for disposition on summary judgment. In any event, we need not reach this fact-fraught argument because, as we explain below, we agree with the district court and hold that the Lease is unenforceable as a gift or an act of corporate waste.

1 The Lessor and Lessee hereby agree that this Lease sets forth all the
2 promises, agreements, conditions and understandings between the
3 Lessor . . . and the Lessee relative to the demised premises, and that
4 there are no promises, agreements, conditions or understandings,
5 either oral or written, between them other than as herein set forth,
6 and any subsequent alteration, amendment, change or addition to
7 this Lease shall not be binding upon the Lessor or Lessee unless
8 reduced to writing and signed by them.

9
10 J.A. at 380.

11 Second, the Lease provides that AHC has no obligation to make alterations
12 to the Property:

13 The Lessor has let the demised premises in their present condition
14 and without any representation on the part of the Lessor, his
15 officers, employees, servants and/or agents. It is understood and
16 agreed that the Lessor is under no duty to make alterations at the
17 time of letting or at any time thereafter.

18
19 J.A. at 378.

20 The Lease also prohibits Nam from leasing the Property, or making any
21 improvements, without the written consent of AHC:

22 [L]essee covenants and agrees that he will do none of the following
23 things without the consent in writing of lessor: . . . (b) . . . sub-lease
24 the demised premises, or any part thereof, or permit another
25 person . . . to occupy the demised premises, or any part
26 thereof (d) Make any alternations, improvements, or additions
27 to the demised premises

28
29 J.A. at 378.

On October 10, 2013, AHC, through its director, filed an action in the New York Supreme Court seeking both a declaratory judgment that the Lease was invalid and money damages for Nam's use and occupancy of the Leased property. In November 2013, Nam removed the action to federal court pursuant to 28 U.S.C. § 1441.² AHC filed an amended complaint, seeking an additional declaration that the alleged oral Joint Venture Agreement was invalid. Nam answered, pleading eight counterclaims which collectively seek a declaration that both the Lease and the Joint Venture Agreement are enforceable and seek money damages for AHC's breaches of both agreements. AHC moved for partial summary judgment, arguing that the Joint Venture Agreement and Lease are void as a matter of law. The district court granted summary judgment in favor of AHC. This appeal followed.

DISCUSSION

I. Nam's Motion for Additional Discovery

In response to AHC's motion for partial summary judgment, Nam contended that he had been denied discovery necessary to oppose that motion and submitted an affidavit pursuant to Fed. R. Civ. P. 56(d) describing the

² Nam later filed a substantially similar action in the Pennsylvania Court of Common Pleas, which was removed to the United States District Court for the Eastern District of Pennsylvania, and which the federal court stayed pending the resolution of this case.

1 discovery materials he wanted produced. The district court denied his request.
2 Nam renews this argument on appeal. We review the district court's denial of
3 Nam's Rule 56(d) motion for abuse of discretion. *See Miller v. Wolpoff &*
4 *Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir. 2003).

5 A party seeking to delay resolution of a summary judgment motion on
6 grounds that he has been deprived of certain discovery materials "must show
7 that the material sought is germane to the defense, and that it is neither
8 cumulative nor speculative, and a bare assertion that the evidence supporting a
9 plaintiff's allegation is in the hands of the defendant is insufficient." *Paddington*
10 *Partners v. Bouchard*, 34 F.3d 1132, 1138 (2d Cir. 1994) (quotation omitted).

11 The district court correctly concluded that none of the items specifically
12 requested in Nam's Rule 56(d) affidavit is germane to the issues before the court.
13 For instance, Nam requested documents regarding the investigation of the
14 temporary administrator appointed to run AHC, architectural/construction
15 drawings of the Property, and "different types of documents that go towards
16 valuing the Property and its condition." J.A. at 490. Based on those descriptions
17 alone, these documents do not contain information that would change the
18 outcome of the summary judgment motion seeking a declaration that the Lease

1 and Joint Venture Agreement are void. Moreover, Nam described the requested
2 material that could potentially be germane in such general terms that he failed to
3 explain with any specificity “how the facts sought are reasonably expected to
4 create a genuine issue of material fact.” *Paddington Partners*, 34 F.3d at 1138. For
5 example, Nam requested “communications between the parties, or with the
6 parties and other third-parties, concerning the Property, the Joint Venture
7 Agreement and the Lease.” J.A. at 490. He failed, however, to explain his basis
8 for believing that these documents exist. Such bare, generalized assertions
9 cannot justify delaying the resolution of a summary judgment motion. The
10 district court did not abuse its discretion in so ruling.

11 II. Choice of Law

12 In their summary judgment briefing in the district court, the parties
13 disagreed as to which state’s law should apply, but on appeal, they do not
14 contest the district court’s decision in that regard. Indeed, following the district
15 court’s lead, both parties on appeal argue that Pennsylvania law is applicable to
16 the parol evidence issue and New York law to the corporate waste issue. In a
17 diversity case such as this one, the choice-of-law rules of New York, the forum
18 state, govern. *See Krauss v. Manhattan Life Ins. Co.*, 643 F.2d 98, 100 (2d Cir. 1981).

1 Under New York choice-of-law rules, “where the parties agree that [a certain
2 jurisdiction’s] law controls, this is sufficient to establish choice of law.” *Fed. Ins.*
3 *Co. v. Am. Home Assur. Co.*, 639 F.3d 557, 566 (2d Cir. 2011); *see also Krumme v.*
4 *WestPoint Stevens Inc.*, 238 F.3d 133, 138 (2d Cir. 2000) (“The parties’ briefs
5 assume that New York law controls, and such ‘implied consent . . . is sufficient to
6 establish choice of law.’” (quoting *Tehran-Berkeley Civil & Envt’l Eng’rs v. Tippetts-*
7 *Abbett-McCarthy-Stratton*, 888 F.2d 239, 242 (2d Cir. 1989))). We therefore apply
8 Pennsylvania law to our analysis of the joint-venture dispute and New York law
9 to the lease dispute.

10 **III. The Validity of the Lease**

11 Nam next argues that the district court erred in finding the Lease was void
12 as a gift or as an act of corporate waste because AHC’s decision to enter the
13 Lease was protected by the business judgment rule and, in any event, the Lease
14 was supported by valid consideration. “The essence of a claim of gift is lack of
15 consideration and the essence of waste is the diversion of corporate assets for
16 improper or unnecessary purposes.” *Aronoff v. Albanese*, 446 N.Y.S.2d 368, 370
17 (2d Dept. 1982). In New York, “it is settled law that waste or a gift of corporate
18 assets are void acts and cannot be ratified by a majority of stockholders.” *Id.*

1 While the actions of corporate directors are ordinarily protected by the
2 business judgment rule, and thus “subject to judicial review only upon a
3 showing of fraud or bad faith,” *Stern v. Gen. Elec. Co.*, 924 F.2d 472, 476 (2d Cir.
4 1991) (applying New York law), where a corporate director “has an interest in a
5 decision, the business judgment rule does not apply,” *In re Croton River Club,*
6 *Inc.*, 52 F.3d 41, 44 (2d Cir. 1995) (applying New York law); *see also Auerbach v.*
7 *Bennett*, 393 N.E.2d 994, 1001 (N.Y. 1979). A director is considered “self-
8 interested” in a transaction where she “will receive a direct financial benefit from
9 the transaction which is different from the benefit to shareholders generally.”
10 *Marx v. Akers*, 666 N.E.2d 1034, 1042 (N.Y. 1996); *see also SantiEsteban v. Crowder,*
11 939 N.Y.S.2d 28, 30 (1st Dept. 2012). “Once a prima facie showing is made that
12 directors have a self-interest in a particular corporate transaction, the burden
13 shifts to them to demonstrate that the transaction is fair and serves the best
14 interests of the corporation and its shareholders.” *Norlin Corp. v. Rooney, Pace*
15 *Inc.*, 744 F.2d 255, 264 (2d Cir. 1984) (applying New York law). If the director(s)
16 fail to carry this burden, the transaction will be deemed void. *See Aronoff*, 446
17 N.Y.S.2d at 370. These principles apply to closely-held, as well as to publicly-
18 held, corporations. *See Global Minerals & Metals Corp. v. Holme*, 824 N.Y.S.2d 210,

1 214 (1st Dept. 2006); *see also Lewis v. S. L. & E., Inc.*, 629 F.2d 764, 770 (2d Cir.
2 1980).

3 We review *de novo* a district court's grant of summary judgment,
4 construing all evidence in the light most favorable to the nonmoving party.
5 *Rentas v. Ruffin*, 816 F.3d 214, 220 (2d Cir. 2016).

6 The district court in this case correctly concluded that the business
7 judgment rule should not apply to the Lease. It is undisputed that Truong was
8 the father of the lessee, that the Property was a corporate asset leased by Truong
9 in his capacity as president and majority shareholder of AHC, and that the terms
10 of the Lease required only nominal consideration for 20-year control over this
11 multi-million-dollar asset. As Nam acknowledges, Truong ran AHC for the
12 benefit of his family and frequently used corporate assets to "help out his family
13 members." Appellant's Br. at 7. Nam concedes that the Lease is similar to other
14 transactions that Truong executed as president and majority shareholder of AHC
15 by which Truong intended "to create financial security for his family and to
16 provide for his children." Appellant's Br. at 8. Truong's corporate decision thus
17 "lacked a legitimate business purpose or w[as] tainted by a conflict of interest."
18 *Amfesco Indus., Inc. v. Greenblatt*, 568 N.Y.S.2d 593, 596 (1st Dept. 1991). As a

1 result, Nam may not invoke the business judgment rule's protection, *id.*, and he
2 now bears the burden of showing that the Lease was objectively fair and
3 "serve[d] the best interests of the corporation and its shareholders," *Norlin*, 744
4 F.2d at 264.

5 Nam claims that the "sweat equity" provided by him and his family to
6 develop the Property under the Joint Venture Agreement constituted
7 consideration for the Lease and demonstrates the objective fairness of the
8 transaction. The evidence indicates, however, that the majority of this "sweat
9 equity" was contributed prior to the execution of the Lease. These past
10 contributions could not have counted as present consideration given in exchange
11 for a leasehold interest unless the Lease explicitly expressed that intention. *See*
12 N.Y. Gen. Oblig. Law § 5-1105 ("A promise . . . shall not be denied effect as a
13 valid contractual obligation on the ground that consideration for the promise is
14 past or executed, if the consideration is expressed in the writing and is proved to
15 have been given or performed and would be a valid consideration but for the
16 time when it was given or performed."); *see also United Res. Recovery Corp. v.*
17 *Ramko Venture Mgmt., Inc.*, 584 F. Supp. 2d 645, 656 (S.D.N.Y. 2008) (citing
18 *Umscheid v. Simnacher*, 482 N.Y.S.2d 295, 297 (2d Dept. 1984)). The Lease does not

1 mention anything about Nam's development of the Property. In fact, the Lease's
2 terms largely prevent Nam from taking steps to develop the Property. Nam's
3 argument regarding what constituted consideration raises no genuine issue of
4 material fact. No disinterested person could find that leasing a valuable real
5 estate property for twenty years in exchange for twenty dollars was a fair or
6 reasonable business decision. *See Meredith v. Camp Hill Estates, Inc.*, 430 N.Y.S.2d
7 383, 385 (2d Dept. 1980) (holding that "transfer without consideration" of
8 valuable corporate property was "so far opposed to the true interests of [the
9 corporation] as to lead to the clear inference that no one thus acting could have
10 been influenced by any honest desire to secure such interests." (quotation
11 omitted)). We thus affirm the district court's conclusion that the Lease was void
12 as a gift or act of corporate waste.

13 **IV. The Validity of the Joint Venture Agreement**

14 We now address the purported Joint Venture Agreement. The district
15 court found the alleged Agreement to be unenforceable on grounds that, by
16 operation of the parol evidence rule, the fully integrated Lease discharged any
17 prior-in-time oral agreement relative to the Property.

1 The Pennsylvania Supreme Court has explained that:

2 the parol evidence rule forbids the introduction of parol evidence of
3 antecedent or contemporaneous agreements, negotiations and
4 understandings of the contracting parties for the purpose of varying
5 or contradicting the terms of a contract which both parties intended
6 to represent the definite and complete statement of their agreement.

7
8 *Am. Bank & Trust Co. of Pa. v. Lied*, 409 A.2d 377, 381 (Pa. 1979).

9 Where the parties, without any fraud or mistake, have deliberately
10 put their engagements in writing, the law declares the writing to be
11 not only the best, but the only, evidence of their agreement. All
12 preliminary negotiations, conversations and verbal agreements are
13 merged in and superseded by the subsequent written contract . . .
14 and unless fraud, accident or mistake be averred, the writing
15 constitutes the agreement between the parties, and its terms and
16 agreements cannot be added to nor subtracted from by parol
17 evidence.

18
19 *Yocca v. Pittsburgh Steelers Sports, Inc.*, 854 A.2d 425, 436 (Pa. 2004) (quoting

20 *Gianni v. Russell & Co.*, 126 A. 791, 792 (Pa. 1924)).

21 An integration clause which states that a writing is meant to
22 represent the parties' entire agreement is . . . a clear sign that the
23 writing is meant to be just that and thereby expresses all of the
24 parties' negotiations, conversations, and agreements made prior to
25 its execution. Once a writing is determined to be the parties' entire
26 contract, the parol evidence rule applies and evidence of any
27 previous oral or written negotiations or agreements involving the
28 same subject matter as the contract is almost always inadmissible to
29 explain or vary the terms of the contract.

30
31 *Id.* at 436-37 (citations omitted).

1 Nam contends that the parol evidence rule does not bar the introduction of
2 evidence to show the existence of the purported oral Joint Venture Agreement
3 because the Lease and the Joint Venture are separate agreements. The former, he
4 claims, “creat[ed] a leasehold interest in Nam,” while the latter “creat[ed] Nam’s
5 rights to compensation (in the form of rents from the future commercial and
6 residential tenancies) in exchange for his efforts in developing and managing the
7 Property for AHC.” Appellant’s Br. at 25. As did the district court, we find this
8 argument unavailing.

9 Both agreements address the same subject—the terms of Nam’s use and
10 development of the Property. Indeed, Nam’s Answer and Counterclaim contains
11 a section titled, “AHC and Nam Enter Into a Lease to Protect Nam’s Interests in
12 the Joint Venture.” J.A. at 44. Yet the core terms of the Lease and the purported
13 Joint Venture Agreement are in conflict. The Lease’s integration clause states in
14 relevant part: “[AHC] and [Nam] hereby agree that this lease sets forth all the
15 promises, agreements, conditions and understandings between [AHC] and
16 [Nam] *relative to the [Property]*, and that there are no promises, agreements,
17 conditions or understandings, either oral or written, between them other than as
18 are herein set forth.” J.A. at 380 (emphasis added). According to Nam AHC’s

1 primary obligation under the Joint Venture Agreement is to pay for all
2 renovations and maintain the Property, but the Lease provides that AHC is
3 “under no duty to make alterations at the time of letting or at any time
4 thereafter.” J.A. at 378. Furthermore, while Nam claims that his consideration
5 for the Joint Venture Agreement is his management and development of the
6 Property, and that he would derive profits from sub-leasing the Property, the
7 Lease states that Nam may not “sub-lease the [Property],” or “[m]ake any
8 alterations, improvements, or additions to the [Property]” without AHC’s
9 written consent. J.A. at 378. Enforcing the purported Joint Venture Agreement
10 thus would “vary[] or contradict[] the terms of a contract which both parties
11 intended to represent the definite and complete statement of their agreement.”
12 *Lied*, 409 A.2d at 381.

13 Nam argues as he did below, however, that if the Lease is void as a gift or
14 for lack of consideration, the Lease’s terms cannot bar evidence of the Joint
15 Venture Agreement because a void contract has no preclusive effect.³ The
16 district court rejected this contention, explaining that “a written and integrated

³ AHC argues that Nam did not preserve this argument because Nam raised it below only in a footnote to his summary judgment memorandum and provided no citations to authority. Because the district court explicitly considered and rejected Nam’s argument to this effect, however, we too consider it.

1 contract does not have to be enforceable to bar the terms of prior inconsistent
2 agreements if the circumstances demonstrate that the parties intended the
3 integrated contract to displace prior agreements.” Special App’x at 18. The court
4 cited no case law for this proposition but instead cited the parol evidence section
5 of the Restatement (Second) of Contracts. The relevant provision of the
6 Restatement states:

7 An integrated agreement that is not binding or that is voidable and
8 avoided does not discharge a prior agreement. But an integrated
9 agreement, even though not binding, may be effective to render
10 inoperative a term which would have been part of the agreement if
11 it had not been integrated.

12
13 Restatement (Second) of Contracts, § 213(3) (1981). Comment d to this section
14 further explains that:

15 An integrated agreement does not supersede prior agreements if it is
16 not binding, for example, by reason of lack of consideration, or if it is
17 voidable and avoided. The circumstances may, however, show an
18 agreement to discharge a prior agreement without regard to
19 whether the integrated agreement is binding, and such an
20 agreement may be effective.

21
22 *Id.* cmt. d. Indeed, one of the Restatement’s illustrations corresponding to
23 comment d is analogous to the contract dispute in this case:

24 A and B enter into a contract that B will build a house on A's land
25 for a price. Later B offers to add a porch if A will sign a new
26 contract. They then enter into an integrated agreement in which B

1 promises to build according to the original plans and A promises to
2 pay an extra \$2,000. If the integrated agreement is inconsistent with
3 the porch offer, or if it is a completely integrated agreement and the
4 matter of the porch is within its scope, the integrated agreement is
5 effective to discharge the porch offer but is not binding for lack of
6 consideration.

7
8 *Id.* cmt. d, illus. 6. The Restatement thus provides support for the proposition
9 that an integration clause in a contract that is void for lack of consideration, but is
10 otherwise valid, still precludes evidence of prior agreements within the scope of
11 that integration clause. Pennsylvania courts, however, do not appear to have
12 adopted the pertinent Restatement provision. *But see Daset Mineral Corp. v. Indus.*
13 *Fuels Corp.*, 473 A.2d 584, 591-93 (Pa. Super. Ct. 1984) (quoting the entirety of §
14 213 of the Restatement, including subsection (3), but relying upon Restatement
15 provisions other than subsection (3) pertaining to parol evidence). Indeed, our
16 research indicates that this issue would be one of first impression in
17 Pennsylvania.

18 When faced with a question of state law that, like this one, is dispositive of
19 the case before us and has not yet been decided by the highest tribunal of the
20 state whose law we are applying, it is sometimes prudent and appropriate to
21 certify the question of law to that tribunal. Under Second Circuit precedent, the
22 decision whether to certify is discretionary. *See 10 Ellicott Square Court Corp. v.*

1 *Mtn. Valley Indem. Co.*, 634 F.3d 112, 125 (2d Cir. 2011) (“The rules of this court
2 provide that ‘[i]f state law permits, the court may certify a question of state law
3 to that state's highest court.’” (quoting 2d Cir. Local R. 27.2(a))). While we
4 recognize that

5 [t]he procedure must not be a device for shifting the burdens of this
6 Court to those whose burdens are at least as great[,] . . . the
7 certification procedure is a valuable device for securing prompt and
8 authoritative resolution of unsettled questions of state law,
9 especially those that seem likely to recur and to have significance
10 beyond the interests of the parties in a particular lawsuit.

11
12 *Kidney by Kidney v. Kolmar Labs., Inc.*, 808 F.2d 955, 957 (2d Cir. 1987).

13 The Pennsylvania Supreme Court, for its part, accepts certification
14 petitions from any United States Court of Appeals. *See* 42 Pa. Cons. Stat.,
15 Internal Operating Procedures of the Supreme Court, § 8; 204 Pa. Code § 29.451.
16 But that court appears to have a stringent standard, at least as compared with a
17 number of other states, for accepting certification petitions.⁴ *Compare* 210 Pa.
18 Code § 3341(c) (“The Supreme Court may accept certification . . . only where
19 there are special and important reasons therefor,” i.e., “[t]he question of law is
20 one of first impression and is of such substantial public importance as to require

⁴ We have never before certified a question to the Pennsylvania Supreme Court, so we base our understanding of its standards for accepting such petitions on the analyses of other courts that have certified questions to it and on our plain reading of Pennsylvania’s codified standards.

1 prompt and definitive resolution by the Supreme Court.”), *with, e.g., Nev. R.*
2 *App. P. 5(a)* (permitting the Nevada Supreme Court to answer “questions of law
3 of this state which may be determinative of the cause then pending in the
4 certifying court and as to which it appears to the certifying court there is no
5 controlling precedent”). Indeed, the Third Circuit in one case declined to certify
6 a question of first impression to the Pennsylvania Supreme Court because the
7 issue was “neither sufficiently important nor sufficiently difficult to command
8 the attention of that tribunal.” *Travelers Indem. Co. of Ill. v. DiBartolo*, 171 F.3d 168,
9 169 n.1 (3d Cir. 1999); *cf. Adelson v. Harris*, 774 F.3d 803, 808 (2d Cir. 2014) (noting
10 that “Nevada permits certification where an issue of state law ‘*may* be
11 determinative,’ and that such an approach permits us to certify without, at this
12 point, reaching the underlying constitutional question” (citation omitted)). In
13 light of these standards, we closely examine whether the question with which we
14 are presented here “seem[s] likely to recur and have significance beyond the
15 interests of the parties in a particular lawsuit,” *Kolmar Labs.*, 808 F.2d at 957, and
16 thus is one of “substantial public importance,” 210 Pa. Code § 3341(c).

17 For the following reasons, we conclude that the issue in this case involving
18 parole evidence does not meet the standards for certification to the Pennsylvania

1 Supreme Court. The issue may never arise again in Pennsylvania courts, and if it
2 did it would be rare. We recognize, for example, that if AHC was a Pennsylvania
3 corporation, and thus Pennsylvania law applied to the issue of corporate waste,
4 it is quite possible that the district court would have declared the Lease valid and
5 enforceable because it is unclear whether Pennsylvania adheres to a doctrine of
6 corporate waste similar to New York's. *See White v. George*, 66 Pa. D. & C. 4th
7 129, 149-50 (C.P. 2004) (noting that "there is no definition of [corporate] waste in
8 Pennsylvania case law"). Moreover, lack of consideration alone would not have
9 invalidated this lease given Pennsylvania's Uniform Written Obligations Act, 33
10 Pa. Cons. Stat. § 6, which provides that a promisor's express statement of his
11 intent to be bound satisfies the requirement of consideration. That is to say, if
12 Pennsylvania law applied across the board in this case, we would be faced with a
13 straightforward application of the parol evidence rule and would likely affirm
14 the district court's determination as to the Joint Venture on that basis.

15 To be sure, contract disputes between New York and Pennsylvania entities
16 may well arise again, especially given that the states share a border. But the
17 parol evidence issue in this case is recondite; more likely to be found on a law
18 school contracts exam than to be the subject of future litigation in Pennsylvania

1 courts. Indeed, it appears this issue is novel not only in Pennsylvania but across
2 the country. Neither party was able to cite a case considering the application of
3 the parol evidence rule to a void, or voidable and avoided, contract that is not
4 alleged to be the product of fraud. And our own research did not uncover a
5 single case that has addressed this issue or that has even cited the provision of
6 the Restatement relied upon by the district court here. This fact strongly
7 suggests that the issue is not likely to recur and is not sufficiently important to be
8 addressed on certification.

9 Nevertheless, we confidently predict that the Pennsylvania Supreme Court
10 would have reached the same result as the district court here if presented with
11 the parol evidence issue before us. *See Espinoza ex rel. JPMorgan Chase & Co. v.*
12 *Dimon*, 797 F.3d 229, 240 (2d Cir. 2015) (noting that “we normally strive to
13 carefully predict how the highest court of the . . . state [whose law we are
14 applying] would resolve uncertainty or ambiguity in state law,” but that
15 certification is appropriate where “we are unable to predict with any confidence
16 how the . . . courts [of that state] would evaluate” the issue at hand).
17 Notwithstanding the novelty of our precise issue, as we explain below, the
18 Pennsylvania Supreme Court has circumscribed, rather than expanded, existing

1 exceptions to the parol evidence rule. That court, moreover, often relies upon the
2 guidance of the Restatement in deciding questions of Pennsylvania contract law.

3 In his appellate brief, Nam cites three cases to support his contention that
4 an integration clause in a voided contract has no operative effect and therefore
5 cannot bar evidence of a prior-in-time oral agreement. *Mellon Bank Corp. v. First*
6 *Union Real Estate Equity & Mtg. Invs.*, 951 F.2d 1399 (3d Cir. 1991); *Betz Labs., Inc.*
7 *v. Hines*, 647 F.2d 402 (3d Cir. 1981); *Murray v. Lichtman*, 339 F.2d 749 (D.C. Cir.
8 1964). None of these cases is on point. The *Murray* court held that a party could
9 attempt to prove that a written contract was void for lack of consideration by
10 introducing parol evidence to show that he had completely performed his
11 obligation under a prior oral agreement containing substantially similar terms as
12 the written contract. *Murray*, 339 F.2d 751-52. In contrast, Nam does not seek to
13 introduce evidence of the Joint Venture Agreement to show that the Lease is void
14 for lack of consideration, but instead to supplement and vary its terms.

15 *Mellon* and *Betz* provide some support for admitting parol evidence to
16 strike down a written contract (and the integration clause contained therein) that
17 is alleged to be tainted by fraud in the inducement. *See Mellon*, 951 F.2d at 1408;
18 *Betz*, 647 F.2d at 405-08. This principle is inapplicable here, however, because

1 Nam has not alleged that the Lease was the product of fraud. Moreover, it
2 appears that Pennsylvania no longer follows the fraud-in-the-inducement
3 exception to the parol evidence rule. See *Dayhoff, Inc. v. H.J. Heinz Co.*, 86 F.3d
4 1287, 1300 (3d Cir. 1996) (“The Supreme Court of Pennsylvania found that the
5 parol evidence rule barred consideration of prior representations concerning
6 matters covered in the written contract, even those alleged to have been made
7 fraudulently, unless the representations were fraudulently *omitted from the*
8 *contract.*” (citing *HCB Contractors v. Liberty Place Hotel Ass’n*, 652 A.2d 1278, 1279
9 (Pa. 1995))); see also *Bray v. Dewese*, No. 07-4011, 2008 WL 623824, at *2 & n.7 (E.D.
10 Pa. Mar. 6, 2008) (explaining evolution and abandonment of fraud-in-the-
11 inducement exception to parol evidence rule in Pennsylvania).

12 While the Pennsylvania Supreme Court has not ruled on the preclusive
13 effect of an integration clause held to be void as an act of corporate waste, that
14 court has carved out only a few discrete exceptions to the parol evidence rule.
15 Because the factual scenario here does not fall within one of these exceptions—
16 where one party has alleged that the written contract is the product of “fraud,
17 accident or mistake,” *Yocca*, 854 A.2d at 437—we conclude that the parol
18 evidence rule applies in this case and that the integration clause in the Lease

1 retains its preclusive effect. *See Hart v. Arnold*, 884 A.2d 316, 340 (Pa. Super. Ct.
2 2005) (“[P]arol evidence of prior representations is inadmissible as to a matter
3 covered by the written agreement with an integration clause, *unless* the parties
4 agreed that those representations would be added to the written agreement but
5 they were omitted because of fraud, accident or mistake.” (emphasis added)
6 (quotation omitted)).

7 This conclusion is bolstered by the fact that the Pennsylvania Supreme
8 Court generally adopts the principles of the Restatement of Contracts. *See, e.g.,*
9 *Harrison v. Cabot Oil & Gas Corp.*, 110 A.3d 178, 185 (Pa. 2015) (relying upon
10 Restatement (Second) of Contracts § 250 in deciding issue of first impression
11 certified by Third Circuit regarding repudiation of leases); *Shafer Elec. & Constr.*
12 *v. Mantia*, 96 A.3d 989, 995 (Pa. 2014) (quoting definition of expectation interest
13 from Restatement (Second) of Contracts § 344(a)); *Tayar v. Camelback Ski Corp.*, 47
14 A.3d 1190, 1200-03 (Pa. 2012) (citing and adopting Restatement (Second) of
15 Contracts § 195(1)). Of particular importance here, the court has relied upon the
16 Restatement in shaping the parameters of Pennsylvania’s parol evidence rule
17 and the exceptions thereto. *See Rempel v. Nationwide Life Ins. Co.*, 370 A.2d 366,
18 370-71 (Pa. 1977) (applying first Restatement of Contracts); *Hollander v. Friedman*,

1 59 A.2d 892, 894 (Pa. 1948) (same); *see also Daset Mineral Corp.*, 473 A.2d at 591-93
2 (discussing in depth and relying upon several provisions of the Restatement
3 (Second) of Contracts pertaining to parol evidence, including § 213). We see no
4 reason why the Pennsylvania Supreme Court would not follow its ordinary
5 course and apply § 213(3) of the Restatement to the facts of this case. We
6 therefore affirm the district court's grant of summary judgment to AHC with
7 respect to the purported Joint Venture Agreement.

8 CONCLUSION

9 For the foregoing reasons the district court's decision is **AFFIRMED**.