No. 24-6888

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JEFFREY POWERS, et al.,

Plaintiffs-Appellees,

v.

BRENTWOOD SCHOOL

Intervenor-Appellant

On Appeal from the United States District Court
for the Central District of California

APPELLEES' ANSWERING BRIEF

MARK D. ROSENBAUM
KATHRYN A. EIDMANN
AMANDA K. PERTUSATI
AMANDA M. SAVAGE
AMELIA PIAZZA
PUBLIC COUNSEL LAW CENTER
610 S. Ardmore Avenue
Los Angeles, California 90005
(213) 385-2977

CARTER G. PHILLIPS
TACY F. FLINT
MARK C. PRIEBE
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, Illinois 60603
(312) 853-7000

Counsel continued to second page

EVE L. HILL
JAMIE STRAWBRIDGE
BROWN GOLDSTEIN & LEVY, LLP
120 E. Baltimore St., Suite 2500
Baltimore, Maryland 21202
(410) 962-1030

T.E. GLENN
AMANDA POWELL
CHARLES KOHORST
INNER CITY LAW CENTER
1309 East Seventh Street
Los Angeles, CA 90021
(213) 891-2880

ROMAN M. SILBERFELD
DAVID MARTINEZ
TOMMY H. DU
ROBINS KAPLAN LLP
2121 Avenue of the Stars, Suite 2800
Los Angeles, California 90067
(310) 552-0130

Counsel for Plaintiffs-Appellees, Deavin Sessom, Douglas Guthrie, Jeffrey Powers, Joseph Fields, Joshua Robert Petitt, Lavon Johnson, Laurieann Wright, and National Veterans Foundations

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUES 2

STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 2

I. The VA's Lease with Brentwood School 2

II. The OIG Reports 4

STANDARD OF REVIEW 4

SUMMARY OF ARGUMENT 5

ARGUMENT 5

I. The District Court's Findings of Fact Are Not Clearly Erroneous. 5

A. Brentwood's Settlement with Plaintiffs 7

B. The District Court's Preliminary Approval 8

II. Brentwood Lacks Standing to Appeal the Merits of the Court's Final Judgment. 9

A. Brentwood Is Estopped from Challenging the District Court's Findings Based on Its Representations in Court. 9

B. Brentwood is a Non-Party. 12

III. The District Court Properly Found that the Government's Lease with Brentwood Breached the VA's Fiduciary Duty 13

A. The Government's Lease with Brentwood Violates its Fiduciary Duty to Veterans 14

i. The District Court Correctly Interpreted WLALA. 14

ii. The Legislative History Offers Brentwood No Support. 15

iii. Brentwood's Lease Does Not Principally Benefit Veterans.18

IV. The District Court Properly Voided Brentwood's Lease as Violating the Administrative Procedure Act...19

CONCLUSION 20

STATEMENT OF RELATED CASES 22

CERTIFICATE OF COMPLIANCE...23

TABLE OF AUTHORITIES

Cases **Page(s)**

Alexander v. Sandoval,
532 U.S. 275 (2001) 17

City of Chicago v. Envtl. Def. Fund,
511 U.S. 328 (1994) 16

Connecticut Nat'l Bank v. Germain,
503 U.S. 249 (1992) 15, 17

Devlin v. Scardelleti,
536 U.S. 1 (2002) 12

Forest Grove Sch. Dist. v. T.A.,
557 U.S. 230 (2009) 18

Habelt v. iRhythm Techs., Inc.,
83 F.4th 1162 (9th Cir. 2023) 12

Hamilton v. State Farm Fire & Cas. Co.,
270 F.3d 778 (9th Cir. 2001) 10

Hardt v. Reliance Standard Life Ins. Co.,
560 U.S. 242 (2010) 19

Hilao v. Estate of Marcos,
393 F.3d 987 (9th Cir. 2004) 10

Lorillard v. Pons,
434 U.S. 575 (1978) 18

In re Mitchell,
977 F.2d 1318 (9th Cir. 1992) 4

New Hampshire v. Maine,
532 U.S. 742 (2001) 9

Nw. Env't Def. v. Bonneville Power Admin.,
477 F.3d 668 (9th Cir. 2007) 15

Oracle USA, Inc. v. Rimini St., Inc.,
879 F.3d 948 (9th Cir. 2018) 5

Perry v. Schwarzenegger,
628 F.3d 1191 (9th Cir. 2011) 9

Plaza Freeway Ltd Partnership v. First Mountain Bank,
81 Cal. App. 4th 616 (2000) 11

S.E.C. v. Wencke,
783 F.2d 829 (9th Cir. 1986) 12

Shannon v. United States,
512 U.S. 573 (1994) 15

Southern Cal. Edison Co. v. Lynch,
307 F.3d 794 (9th Cir. 2002) 13

United States ex rel Alexander Volkhoff, LLC v. Janssen Pharmaceutica N.V.,
945 F.3d 1237 (9th Cir. 2020) 12

Valentini v. Shinseki,
860 F. Supp. 2d 1079 (C.D. Cal. 2012), In 2011 ....3, 5, 7, 19

Yu v. Idaho State Univ.,
15 F.4th 1236 (9th Cir. 2021) 4

Statutes

5 U.S.C. § 706 19

California Civil Code § 1691 11

WLALA § 2(b)(2) 14

WLALA § 2(h)(1) 18

WLALA § 2(j)(3) 4

WLALA § 2(l) 14, 20

Other Authorities

H. Rep. No. 114-570 17

INTRODUCTION

Brentwood School ("Brentwood") declined the District Court's invitation to intervene seven months before trial. At trial, Brentwood's corporate representative testified extensively demonstrating that its lease principally benefits Brentwood School, not veterans. The Deputy Medical Director of the Department of Veterans Affairs ("VA") testified to the same end.

Only after the District Court issued its final order voiding the lease did Brentwood appear in court to promote the settlement it signed. The settlement was preliminarily approved by the District Court. Then, when final approval was deferred by this Court's stay order, Brentwood sought to intervene explicitly for the limited purpose of ensuring the District Court's approval of the settlement.

Yet its brief to this Court never mentions the settlement. Instead, it seeks to defend its lease with the VA under an opposing rationale and to upend the careful and thoughtful consideration of the evidence and judgment of the District Court. Brentwood's misrepresentation to the District Court and switch in position should not be countenanced.

In any event, as the District Court properly found, consistent with two prior independent reports from the Office of Inspector General ("OIG"), the VA's lease with Brentwood School does not principally benefit disabled veterans and their families and is thus void.[1]

STATEMENT OF JURISDICTION

Plaintiffs agree with Brentwood's statement of jurisdiction except to the extent that Plaintiffs, as asserted below, contest Brentwood's standing to appeal.

---

[1] It is noteworthy that the Government has not appealed the District Court's findings of fact and conclusions of law voiding its lease with Brentwood.

STATEMENT OF THE ISSUES

1. Whether the District Court's findings of fact relating to Brentwood were clearly erroneous.

2. Whether Brentwood School is judicially and contractually estopped from appealing based on its settlement and representations to the District Court.

3. Whether Brentwood School's failure to timely intervene waives its right to challenge the merits of the trial court's findings of facts and conclusions of law.

4. Whether the District Court correctly held, after a bench trial, that the lease for Brentwood School's athletic facilities violated the VA's fiduciary duty.

5. Whether the District Court correctly held, based on the administrative record, that the lease for Brentwood School's athletic facilities violated the Administrative Procedure Act ("APA").

STATUTORY PROVISIONS

Pertinent statutory provisions are reproduced in the addendum.

STATEMENT OF THE CASE

I. The VA's Lease with Brentwood School

Brentwood is a private school in West Los Angeles that was founded in 1972. 2-ER-175. It enrolls approximately 1100 students, with an endowment of $30 million and tuition ranging between $45,000 to $53,000 per student per year based on grade level, in addition to fees charged of most students. 2-ER-168, 2-ER-170–71. Since the mid-1970s, when the VA shifted its focus away from housing veterans, the VA has allowed Brentwood to use land on the VA's West Los Angeles Grounds ("WLA Grounds") for athletic facilities. 1-ER-72. For about the first two decades, until the late 1990s, Brentwood used land on the WLA Grounds rent-free. 1-ER-72–73; 2 ER 178–79.

Around 1999, the VA and Brentwood entered into a lease for Brentwood to build its athletic facilities on the WLA Grounds. 1-ER-73. Brentwood spent $15 million to develop its state-of-the-art athletic facilities, which sit on the WLA Grounds, and

now include a regulation size football field, a stadium track and field, an aquatic center,[2] three baseball fields, a soccer field, a basketball court, a lacrosse field, a volleyball and fencing pavilion, six tennis courts, a softball field, and a workout and weights facility. 1-ER-73; 2-ER-183–84; 1-SER-102–06. All students use these facilities during the course of their education at Brentwood. 2-ER-176–77, 2-ER-194.

Brentwood fields boys' and girls' athletic teams for all the sports listed. 2-ER-185, 2-ER-188–94. Regularly scheduled games, meets, and tournaments with other schools take place on these facilities. 2-ER-185, 2-ER-188–94. And Brentwood operates summer camps for fees for students across the city that use the aquatic center and tennis courts. 2-ER-196–97. Then and now, Brentwood prominently features its athletic programs and these facilities on its website and as part of its recruitment for students. 1-SER-107–08. In describing the school, Brentwood promotes athletics as an integral part of its educational mission. 1-SER-107–08.

In 1999, at the time of the agreement, the VA was only statutorily permitted to enter a third-party agreement if the agreement was "related to the provision of healthcare." 1-ER-73. The trial court in *Valentini v. Shinseki* ("*Valentini*"), 860 F. Supp. 2d 1079 (C.D. Cal. 2012)[3] held that "the lease for the Brentwood School to build student athletic facilities was clearly unrelated to healthcare, making it unlawful." 1-ER-73–74 (citing *Valentini*). The trial court in *Valentini* voided Brentwood's lease.

In 2016, instead of eliminating Brentwood's lease as void, the VA entered into a new lease with Brentwood. 2-ER-182–83. Brentwood's new lease allowed it to continue

[2] The aquatic center was built with a donation from a wealthy individual, which initially funded the project for $3 million, which was later raised to $10 million. 1-SER-167. No part of the donation was turned over to the VA. The aquatic center is divided into lanes and meets Olympic specifications. As such, it is not amenable to usual recreational activities.

[3] In 2011, ten unhoused veterans with severe disabilities sued the VA for its mismanagement of the WLA Grounds.

to occupy 22 acres—5.5% of the WLA Grounds—to maintain its student athletic facilities. 1-ER-6–7; 2-ER-152.

II. The OIG Reports

Under the West Los Angeles Leasing Act ("WLALA"), the Office of the Inspector General of the Department of Veterans Affairs ("OIG") was required to prepare and submit reports to Congress "on all leases carried out at the Campus" to determine whether the VA was complying with WLALA. WLALA § 2(j)(3). In 2018, the OIG prepared its first report. As part of its findings in 2018, the OIG concluded, in relevant part, that the VA's lease with Brentwood violated WLALA "because the principal purpose of this lease was to provide the Brentwood School continued use of the athletic facilities," not to principally benefit veterans and their families. 2-ER-256. The OIG also found that the in-kind consideration provided by Brentwood was not authorized by law. 2-ER-256. Further, the OIG concluded that the VA accepted consideration below the appraised amounts for its agreement with Brentwood. 1-SER-115. The VA took no action to rectify the violations.

In 2021, the OIG prepared and submitted its next report to Congress. 1-SER-121–36. Again, the OIG found that the VA's lease with Brentwood violated the WLALA. 1-SER-126–28. And again, the VA refused to remedy its violation of the law. 1-SER-129–36.

STANDARD OF REVIEW

Following a bench trial, this Court reviews the District Court's "findings of fact . . . for clear error." *Yu v. Idaho State Univ.*, 15 F.4th 1236, 1241 (9th Cir. 2021). Findings of fact "must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." *Id.* The District Court's "conclusions of law . . . are reviewed *de novo*." *Id.* And statutory constructions are reviewed *de novo*. *In re Mitchell*, 977 F.2d 1318, 1320 (9th Cir. 1992).

Finally, the decision to grant or deny permanent injunctive relief is subject to three separate standards of review: this Court reviews "the legal conclusions de novo, the factual findings for clear error, and the decision to grant a permanent injunction, as well as its scope, for an abuse of discretion." *Oracle USA, Inc. v. Rimini St., Inc.*, 879 F.3d 948, 964 (9th Cir. 2018), *rev'd in part on other grounds*, 586 U.S. 334 (2019).

SUMMARY OF ARGUMENT

The District Court properly found that Brentwood's lease was illegal and it had ample basis to void the lease. The District Court properly interpreted WLALA, and found that the VA had breached its fiduciary duty and the APA, and correctly voided the lease. Moreover, Brentwood lacks standing to appeal, as its intervention was permitted based on its representation to Plaintiffs and the District Court that its intervention was limited to protecting the Settlement Agreement with Plaintiffs.

ARGUMENT

I. The District Court's Findings of Fact Are Not Clearly Erroneous.

On August 6, 2024, the District Court commenced the first day of trial.[4] On the seventh day of trial, on August 14, 2024, Brentwood's representative, Gennifer Gae Yoshimaru, appeared on behalf of Brentwood to testify about Brentwood's lease with the VA. Ms. Yoshimaru acknowledged that *Valentini I* held that Brentwood's prior agreement with the VA was illegal. 2-ER-182. Nonetheless, as described above, in 2016, Brentwood entered into another agreement with the VA.[5] While recognizing that the OIG found that Brentwood's new lease with the VA violated WLALA, Ms. Yoshimaru testified that no one conducted an evaluation to determine the fair market value of the

---

[4] On or about January 31, 2024, Brentwood was informed that it was identified as a party to land use agreements or easements with the Department of Veterans Affairs that plaintiffs purport to challenge in this lawsuit, and that such land use agreements may potentially be impacted by this litigation. Brentwood chose not to intervene. 1-SER-190–201.

[5] The District Court found that the VA negotiated a new lease with Brentwood because the VA feared a lawsuit from Brentwood. 1-ER-103.

land when Brentwood entered into the new lease with the VA. 2-ER-182–83. Ms. Yoshimaru further noted that notwithstanding the lack of an evaluation of fair market value, the lease required Brentwood to pay $850,000 annually to the VA and to provide in-kind consideration of $918,000, which consisted of upkeep and maintenance of the 22 acres and other services, such as special events for veterans and scholarships. 1-SER-177. Since 2020, neither the VA nor Brentwood have conducted an audit to determine whether Brentwood is, in fact, complying with its lease with the VA. 1-SER-172.

Ms. Yoshimaru also testified that the lease required Brentwood to provide veterans with limited access to the athletic facilities. Brentwood, not the VA or veterans, determined the hours of access, which resulted in veterans being allowed access to the pool only from 5:30 a.m. to 7:30 a.m. (on weekdays), and from 11 a.m. to 3 p.m. (on weekends). 1-ER-73. While 30-50% of the school's students, and over 100 coaches, used these athletic facilities in any one year, 1-ER-198; 1-SER-160, no records were kept of the number of student hours that used the athletic facilities compared to the number of veteran hours that used the athletic facilities, 1-SER-163–64.

In recognition of the importance of the athletic facilities to its operations, Brentwood hired a law firm and spent approximately $1 million to lobby Congress to have WLALA amended. 1-SER-153–55, 158. That effort has been unsuccessful to date. 1-SER-160. John Kuhn, the Deputy Medical Center Director of the VA Greater Los Angeles Healthcare System ("VAGLAHS"), testified at trial that the VA could not defend the in-kind contribution that Brentwood made and acknowledged that the VA's lease with Brentwood does not principally benefit veterans. 1-SER-187–88.

Following Ms. Yoshimaru's and Mr. Kuhn's testimony, as well as several additional days of testimony, on September 6, 2024, the District Court issued its Post-Trial Opinion; Findings of Fact and Conclusions of Law. 1-ER-47. As part of the District Court's findings and based on the record and the testimony of Ms. Yoshimaru, the District Court concluded the VA's lease with Brentwood violated the VA's fiduciary

duty to the Plaintiff Class and the APA. Specifically, the District Court properly found that the "lease principally benefits the Brentwood School, not veterans." 1-ER-72. Similar to the court in *Valentini*, the District Court voided the VA's lease with Brentwood as breaching the VA's fiduciary duty and as violating the APA.

A. Brentwood's Settlement with Plaintiffs

Following the District Court's order voiding Brentwood's lease, on or about, September 12, 2024, the District Court issued a Minute Order setting a hearing on injunctive relief and, again, inviting Brentwood's participation. 1-SER-92–93. Brentwood appeared as a non-party and engaged in extensive settlement discussions to resolve the matter with Plaintiffs. 1-SER-77.

Brentwood's counsel negotiated a settlement with Plaintiffs to preserve its use of the land. In doing so, Brentwood's counsel conceded that the land it occupied was not Brentwood's property, that Brentwood was just a tenant, and the land was "veterans land." 1-SER-83–85 ("Mr. Miller [Brentwood counsel]: I should apologize to everybody. It's not our land. Okay? All we want to do is use it. It's their land, it's the veterans land. And if I gave everybody the wrong impression, I'm sorry."). Indeed, at various hearings, counsel for Brentwood represented that Brentwood wanted to improve its relationship with veterans, that the proposed Settlement Agreement would be a "win especially for the veterans," and that settlement was "important to Brentwood School." 1-SER-69. Brentwood's counsel further acknowledged that it wanted to proceed with settlement so that the substantial additional revenue provided by the agreement would principally benefit veterans because "[i]t's what the law requires and that's what [Brentwood] want[s]." 1-SER-61. As such, in order to make up for the deficiencies in its old lease, Brentwood agreed to make a $5 million payment over two years and agreed to increase the hours of usage for the athletic facilities to rebalance the hours that were grossly in favor of students, instead of veterans. 1-SER-35–40. And importantly, in order to continue to have access to certain facilities on one-year

renewable terms, Brentwood agreed to return acres of land that it had been occupying in an acknowledgement that the land belongs to the VA, to be held in trust for veterans. 1-SER-38–39.

Plaintiffs and Brentwood, with the participation of the Court's Special Monitor and with notice to the VA, ultimately signed a Settlement Agreement, and on October 15, 2024, Plaintiffs moved for preliminary approval. As Plaintiffs and Brentwood recognized in the final Settlement Agreement, "[t]he land at issue in this settlement agreement . . . belongs to the United States and was and is to be kept for the benefit of veterans who served in the United States Miliary as deeded in 1888 to the Federal Government." 1-SER-31. Brentwood further agreed that, except and unless the Settlement Agreement was terminated (i.e., paragraph 10 of the Settlement Agreement), Brentwood "specifically waive[d] any and all rights to post-trial motions, motions for reconsideration, motions to intervene and rights of appeal or extraordinary relief from a reviewing court as a material term of this agreement with reference to this settlement and any of the Court's findings of fact, conclusions of law, the Court's Post Trial Opinion, [and] any emergency orders issued by the Court that refer to the factual background of the former Brentwood School leased premises." 1-SER-46.

B. The District Court's Preliminary Approval

On October 18, 2024, the District Court gave preliminary approval of the Settlement Agreement. Dist. Ct. 1-ER-7. On November 4, 2024, Brentwood moved to intervene based on the VA's representation that the VA was moving to stay Brentwood's settlement with Plaintiffs. 1-SER-21. On November 8, 2024, Brentwood expressly informed the District Court that it sought to intervene ***because the VA's newly filed motion "jeopardize[d] or potentially jeopardize[d] the settlement agreement."*** 1-SER-9 (emphasis added). With final approval of the settlement set for November 13, 2024, this Court, on November 8, 2024, issued a temporary stay resulting in the District Court continuing the final approval hearing, but allowing Brentwood to

intervene "***to defend its negotiated settlement with plaintiff veterans on appeal***." 1-SER-4 (emphasis added).

II. Brentwood Lacks Standing to Appeal the Merits of the Court's Final Judgment.

Brentwood's intervention was based on various misrepresentations made to Plaintiffs and the District Court regarding its scope and purpose. Accordingly, based on Brentwood's prior misrepresentations, it is estopped from asserting the positions it has taken in this appeal, and stands in the same position as a non-party when attempting to appeal an adverse judgment. *See Perry v. Schwarzenegger*, 628 F.3d 1191, 1195 (9th Cir. 2011) ("Having been granted intervention in the district court is not enough to establish standing to appeal . . . .").

A. Brentwood Is Estopped from Challenging the District Court's Findings Based on Its Representations in Court.

The Supreme Court has identified three factors that courts should consider in determining the application of judicial estoppel: "First, a party's position must be 'clearly inconsistent' with its earlier position. Second . . . whether the party has succeeded in persuading a court to accept that party's earlier position . . . . A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire v. Maine*, 532 U.S. 742, 751 (2001). Here, Brentwood is estopped from asserting the positions it has taken in this appeal. Brentwood's arguments challenging the District Court's findings and challenging the enforceability of the 1888 Deed are clearly inconsistent with the positions that Brentwood took in the District Court.

While the District Court allowed Brentwood's intervention, it did so based on Brentwood's representation that it was ***intervening solely to defend its negotiated settlement with Plaintiffs***, a fact that is mentioned nowhere in Brentwood's brief.

Brentwood's intervention motion, which was unopposed by Plaintiffs, represented that it was only intervening to protect its settlement with Plaintiffs. 1-SER-26. ("Because the September 6, 2024 Order rules that Brentwood School's lease is void, and the settlement agreement reached with the Plaintiffs is in jeopardy, Brentwood School has an interest related to the subject of this litigation."); *see also Hilao v. Estate of Marcos*, 393 F.3d 987, 993 (9th Cir. 2004) ("A party (or, in this case, a nonparty) is bound by concessions made in its brief or at oral argument.").

Indeed, the District Court initially denied Brentwood's intervention for the purposes of filing this appeal based on a finding that an intervention to challenge the District Court's findings would be untimely. 1-SER-11–12 ("The Court: But right now I don't see why I'm going to allow you to intervene at this late stage."). The Court only allowed Brentwood to intervene, not to file this appeal, because Brentwood represented to Plaintiffs and the Court that its intervention was necessary and limited to defending the negotiated settlement with Plaintiffs. 1-SER-4 ("The Court: Brentwood's motion is timely because it now wants to defend its negotiated settlement with plaintiff veterans on appeal, which is a change in circumstances since the start of this litigation."). Brentwood did not object to the Court's recitation of the limited purpose of the intervention or the Court's request that Brentwood submit a proposed order consistent with the District Court's finding. 1-SER-4 ("The Court: The parties shall submit a proposed order signed by all parties that explains why there's a change in circumstances that would justify Brentwood School's intervention. And that could be brief. Mr. Miller [Brentwood Counsel]: Okay."). As such, this Court should find that Brentwood is judicially estopped from taking a position that is inconsistent with its representations to Plaintiffs and the District Court. *See Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) ("This court invokes judicial estoppel not only to prevent a party from gaining an advantage by taking inconsistent positions, but also because of general consideration[s] of the orderly administration of justice and regard for the dignity of

judicial proceedings, and to protect against a litigant playing fast and loose with the courts.") (internal quotation marks omitted).

Not only is Brentwood judicially estopped, it is also contractually estopped based on its fully executed Settlement Agreement with Plaintiffs. Indeed, the positions that Brentwood has taken are an express breach of the Settlement Agreement with Plaintiffs.[6] Specifically, Paragraph 31 of the Settlement Agreement provides: "Except as to the rights of Brentwood School under paragraph 10 [if the Settlement Agreement is terminated, which is not applicable as the Agreement has not been terminated] the Parties to this agreement specifically waive any and all rights to post-trial motions, motions for reconsideration, ***motions to intervene and rights of appeal*** or extraordinary relief from a reviewing court as a material term of this agreement with reference to this settlement and ***any of the Court's findings of fact, conclusions of law, the Court's Post Trial Opinion, [and] any emergency orders issued by the Court that refer to the factual background of the former Brentwood School leased premises***." 1-SER-46 (emphasis added). Under California law, specifically Evidence Code § 622, Brentwood is barred from disputing the terms set forth in the Settlement Agreement and has explicitly waived the right to appeal that it now purports to assert. California has codified the common-law doctrine of estoppel by contract. *Plaza Freeway Ltd Partnership v. First Mountain Bank*, 81 Cal. App. 4th 616, 619 (2000) (noting that even if the contract contains an erroneous recitation, "the facts contained in the [contract] are conclusively presumed to be true under section 622").

Accordingly, based on Brentwood's prior representations and because a comprehensive and fully executed Settlement Agreement exists and remains operative,

[6] Notably, Brentwood's decision to breach the settlement agreement is a breach excusing any future performance by Plaintiffs and serves as a basis for Plaintiffs' recission of the agreement, at their election, pursuant to California Civil Code § 1691.

Brentwood is both judicially and contractually estopped from espousing the positions it has taken in this appeal, or for that matter, from further pursing this appeal.

B. Brentwood is a Non-Party.

Generally, "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Devlin v. Scardelleti*, 536 U.S. 1, 7 (2002). This Court hears non-party appeals only under two "exceptional circumstances": when (1) the appellant significantly "participated in the district court proceedings," and (2) the equities of the case weigh in favor" of hearing the appeal." *United States ex rel Alexander Volkhoff, LLC v. Janssen Pharmaceutica N.V.*, 945 F.3d 1237, 1241–42 (9th Cir. 2020).

Despite knowing since at least January 2024 that its lease was at risk, and likely earlier when Plaintiffs filed their Complaint identifying Brentwood in November 2022, Brentwood deliberately chose not to intervene in the proceedings below until after trial and after the District Court issued its Post-Trial Opinion. 1-SER-14. On or about January 31, 2024, the Government sent a letter to Brentwood informing Brentwood that it had been identified as a party with a land use agreement that Plaintiffs challenged. 1-SER-190–201. Brentwood chose not to intervene. Plaintiffs deposed Brentwood's 30(b)(6) witness and subpoenaed Brentwood to provide trial testimony. 2-ER-166–67. Brentwood, again, chose not to intervene. Only after the District Court voided Brentwood's lease in September 2024 did Brentwood even attempt to join this case. 1-SER-14; *cf. Habelt v. iRhythm Techs., Inc.*, 83 F.4th 1162, 1167 (9th Cir. 2023) (it may be equitable to hear appeal where party "haled" non-party into court against its will and without notice); *S.E.C. v. Wencke*, 783 F.2d 829, 834–35 (9th Cir. 1986) (finding that non-appellant had standing to appeal when he made a special appearance, filed briefs, and was treated by the district court "as if he were a party"). It is precisely under these circumstances that this Court refuses to hear non-party appeals. *Volkhoff*, 945 F.3d at 1242 ("[W]e have denied nonparties the right to appeal when they choose not to meaningfully involve themselves in the district court proceedings."); *id.* ("In *Citibank*,

we dismissed a nonparty's appeal from a judgment when the nonparty 'was well-apprised of the proceedings' but 'chose not to intervene, join or make an appearance to contest jurisdiction' below, 'even though it had actual knowledge of the proceedings and their substance.'").

As such, this Court should hold Brentwood to its word that it be allowed to intervene for the limited purpose of protecting its settlement with Plaintiffs, a position that Brentwood chose not to take before this Court. *See Southern Cal. Edison Co. v. Lynch*, 307 F.3d 794, 804 (9th Cir. 2002) (finding that "there is nothing inequitable about limiting [a non-party's] participation in th[e] appeal").[7]

III. The District Court Properly Found that the Government's Lease with Brentwood Breached the VA's Fiduciary Duty.

While Brentwood has asserted in its Opening Brief that no charitable trust was created, and that the Government has not assumed any fiduciary duties, again, Brentwood's representations to this Court contradict the representations to the District Court. Its representations are, in fact, irreconcilable with its position before this Court. Brentwood Opening Br. at 38–42.

At a hearing with the District Court, Brentwood's counsel represented at various times that the land it occupies belongs to veterans and is "veterans land." 1-SER-83–85. Brentwood's oral representations to the District Court were consistent with its recognition in the Settlement Agreement that "[t]he land at issue in this settlement agreement . . . belongs to the United States and was and is to be kept for the benefit of veterans who served in the United States Miliary as deeded in 1888 to the Federal Government." 1-SER-31. As such, Brentwood should be estopped from arguing anything to the contrary, particularly given its agreement to waive its right to challenge the District Court's findings and conclusions of law.

[7] In the interest of brevity and efficiency, Plaintiffs refer the Court to their Answering Brief to the VA's appeal that addresses the creation of the charitable trust and the Government's acceptance of enforceable fiduciary duties.

A. The Government's Lease with Brentwood Violates its Fiduciary Duty to Veterans.

As the OIG and the District Court both found, the VA's lease with Brentwood did not comply with WLALA and its 2021 Amendment. The execution of this lease, to provide Brentwood with continued use of the athletic facilities, was a clear breach of the VA's fiduciary duty. Brentwood's challenge focuses on the District Court's interpretation of the WLALA, which Plaintiffs address below:

i. <u>The District Court Correctly Interpreted WLALA.</u>

Brentwood advances the argument that the District Court "invalidated the lease by erroneously reading a ***fourth*** requirement into the Leasing Act . . . [that] requires the 'predominant purpose' of the ***entire lease*** to 'principally benefit veterans and their families.'" Brentwood Opening Br. at 22. Brentwood's position finds no support in the plain language of WLALA and was considered and rejected by the District Court.

WLALA generally authorizes the VA to enter into third-party leases "to provide services that principally benefit veterans and their families." WLALA § 2(b)(2). WLALA defines "'principally benefit' . . . with respect to services provided by a person or entity under a lease of property or land-sharing agreement" to mean "services (A) provided exclusively to veterans and their families; or (B) that are designed for the particular needs of veterans and their families, as opposed to the general public, and any benefit of those services to the general public is distinct from the intended benefit to veterans and their families." WLALA § 2(l).

The District Court correctly found that the phrase "principally benefit veterans and their families" refers to and modifies the sentence's subject—leases. The phrase does not modify "services." 1-ER-68. The District Court concluded that "Section 2(b)(2) of the Leasing Act, by its plain text, requires that the underlying lease's predominant purpose is to provide services that principally benefit veterans and their families." 1-ER-68.

Rather than requiring the entire lease, as a whole, to principally benefit veterans and their families, Brentwood takes the position that any lease for any purpose is valid so long as the lease provides for some service that principally benefits veterans, no matter how minute a part of the lease that service is. For example, under Brentwood's interpretation, a third party may enter into an agreement with the VA for the entirety of the WLA Grounds for luxurious homes for private individuals; so long as the third party provides any service to veterans (i.e., bus transportation from and to the medical center). That agreement would be valid, according to Brentwood, because there is a single provision that "principally benefits veterans." It is Brentwood's interpretation that would lead to this absurd result.

Brentwood's lease was for the purpose of maintaining its athletic facilities, not to benefit veterans. 1-ER-77–78; 1-ER-113. As such, it violates WLALA, the VA's fiduciary duty, and the APA.

ii. The Legislative History Offers Brentwood No Support.

Plaintiffs maintain that WLALA is clear and unambiguous, and this Court need not review the legislative history for guidance. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last.") (cleaned up). Indeed, this Court and the Supreme Court have recognized the perils of legislative history and have instructed courts to use it only in limited circumstances, to define ambiguous or vague phrases, not to analyze a committee's vague reference to a yet-to-be-determined lease agreement. *See Nw. Env't Def. v. Bonneville Power Admin.*, 477 F.3d 668, 682 (9th Cir. 2007); *Shannon v. United States*, 512 U.S. 573, 579 (1994) (refusing to give "authoritative weight to a single passage of legislative history that is in no way anchored to the text of the statute"); *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 337 (1994) ("[I]t is the

statute, and not the Committee Report, which is the authoritative expression of the law.").

In support of its position, Brentwood first focuses on the 2016 Draft Master Plan for support. However, the 2016 Draft Master Plan does not constitute legislative history for WLALA. Moreover, the 2016 Draft Master Plan emphasized that the VA was committed to revitalizing the Grounds and the VA pledged, "Going forward, VA's efforts to revitalize the campus will ***only include*** 'Veteran-focused' agreements, or agreements that result in additional healthcare, benefits, services, or resources being provided directly to Veterans and/or their families on the [West LA VA Grounds]." 1-SER-143. The then-VA Secretary, Robert McDonald, acknowledged in the 2016 Draft Master Plan that the WLA Grounds "was deeded for the benefit of Veterans in 1888 to serve as a home for our nation's heroes. This plan brings us one step closer to getting the land back to its intended purpose as an inviting, welcoming, community for Veterans and their families." 1-SER-139. The existence of Brentwood's athletic facilities does not align with the goals of the 2016 Draft Master Plan.

Further, Brentwood asserts that the legislative history acknowledged Brentwood's potential lease with the VA. However, this was an argument that Brentwood previously advanced, which the District Court and the OIG soundly rejected. 1-ER-70–72, 77–79. Specifically, the OIG noted that Brentwood's argument "is asking the OIG to ignore the clear language of the [WLALA] and instead focus on the limited legislative history, the Congressional visits to the campus, and the long history of the Brentwood School on campus . . . . If Congress had intended to provide different language for the Brentwood School . . . it could have done so." 1-SER-116–17; 1-SER-133–34. And, Congress indeed did so with UCLA, where Congress crafted language for UCLA different than language for Brentwood. This was not done for Brentwood and it is presumed that the legislature "meant what it said and said all it intended to say." *Connecticut Nat'l Bank,* 503 U.S. at 253–54. WLALA provides no

provision for Brentwood and no mention of Brentwood. Had Congress intended to exempt Brentwood from WLALA, it could have done so. It did not.

Moreover, the legislative history characterized Brentwood's lease as a "misuse" of the land and noted that Brentwood "provide[s] services to the general public" and "any use of or benefit of the leased space by veterans or their families was ancillary." H. Rep. No. 114-570 at 7. As the District Court also properly noted, the Committee Report, upon which Brentwood relies, predated the renewed lease between the VA and Brentwood. Therefore, there was no way for the Committee to know the precise contours of the agreement and whether it would measure up to WLALA's requirement that the ***lease principally benefit*** veterans and their families. The Committee Report was also not ratified by the House, nor voted on by the Senate, nor signed by the President. 1-ER-77–78.

Indeed, if Brentwood truly believed its interpretation of WLALA was correct, Brentwood would not have spent close to $1 million to try to amend WLALA. 1-ER-76; 1-SER-154–58. The fact that Brentwood was unsuccessful in its lobbying efforts means that no change was made to WLALA, and Brentwood continues to be in violation of it. 1-ER-76.

Brentwood also asserts that Congress, despite receiving reports from the OIG regarding its violation of the law, chose not to invalidate Brentwood's lease, and therefore Congress was adopting Brentwood's interpretation of WLALA. Brentwood's strained interpretation is nonsensical. Attempting to determine what Congress intended based on its non-action amounts to pure speculation. *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) ("And when, as here, Congress has not comprehensively revised a statutory scheme but has made only isolated amendments, we have spoken more bluntly: It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation.") (internal quotation marks omitted).

Lorillard and *Forest Grove* offer Brentwood no support. Each stand for the proposition that "Congress is presumed to be aware of administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change." *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009). Congress's inaction can equally be interpreted as Congress agreeing with the OIG reports, deciding not to amend WLALA despite Brentwood's lobbying efforts, and allowing the OIG to continue doing its job as required by WLALA in auditing third-party leases. Indeed, it is not Congress's job to identify each violation of a statute and amend a statute to specifically identify a violation (i.e. Brentwood's lease). Congress authorized the OIG to prepare reports to Congress, and the OIG determined that Brentwood's lease violated the law, notwithstanding Brentwood's position. WLALA § 2(h)(1).

iii. <u>Brentwood's Lease Does Not Principally Benefit Veterans.</u>

Nor do the "services" Brentwood provides to veterans transform the lease into one that "principally benefit[s]" veterans. As the District Court found, the lease obligated Brentwood to provide veterans with some access to athletic facilities, but it was Brentwood that determined the time and manner of access, not the VA or veterans. 1-ER-74. Specifically, this resulted in highly restricted access for veterans in favor of access for students during usual school hours and times for team practices and competitions:

- Pool: Mondays, Wednesdays, and Fridays: 5:30 a.m. to 7:30 a.m.
- Pool: Saturdays and Sundays: 11:00 a.m. to 3:00 p.m.
- Track: Weekdays: 5 a.m. to 11 a.m.

1-ER-75.

Brentwood also relies on its provision of transportation to the athletic facilities for veterans. Again, it was Brentwood that determined the transportation times, which resulted in the transportation not aligning with the times that veterans may use the

facilities (i.e., shuttle operation from 9:00 a.m. to 2:00 p.m.). 1-ER-75. As described above, the District Court evaluated all of the testimonies, including Ms. Yoshimaru's and Mr. Kuhn's testimony, and concluded that Brentwood's "lease principally benefits the Brentwood School, not veterans." 1-ER-72. Similar to the court in *Valentini*, the District Court properly voided the VA's lease with Brentwood.

And if Brentwood earnestly believed that its lease was valid and in compliance with WLALA, it would never have voluntarily agreed, as it did in the Settlement Agreement, to pay an additional $5 million in rent, expand use of the athletic facilities to veterans, and limit its leased acreage by returning acres of land for the construction of housing for veterans. 1-SER-30–57.

IV. The District Court Properly Voided Brentwood's Lease as Violating the Administrative Procedure Act.

The APA requires a court to "set aside agency action" that is "not in accordance with law" or that is "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706. The analysis begins and ends with the statutory text. *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) (finding that the court "must enforce plain and unambiguous statutory language according to its terms").

As set forth above, WLALA authorizes the VA to enter into third-party leases only "to provide services that principally benefit veterans and their families." This statutory language is unambiguous: The primary purpose of any third-party lease of the WLA Grounds must be to provide services for veterans. Any lease that fails this standard is contrary to statutory authority and in violation of the APA.

The administrative record makes clear that Brentwood's use of the WLA Grounds is contrary to the plain terms of WLALA. 1-ER-88. The purpose of private school athletic facilities is not, of course, the provision of services to veterans; it is the provision of services to students. Brentwood's sprawling athletic complex is neither open "exclusively to veterans and their families" nor "designed for [their] particular

needs." WLALA § 2(l)(1)(A)–(B). The lease has it backwards: rather than provide services to veterans with ancillary benefits to non-veterans, Brentwood's athletic facilities principally benefit the school's students, with ancillary benefits to veterans such as use of those facilities when not otherwise occupied by said students. 1-ER-88. Nowhere in the administrative record is there evidence that Brentwood's lease principally benefits veterans and their families. The lease therefore violates WLALA and, in turn, the APA. Accordingly, the District Court properly found that Brentwood's lease violates the APA.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court affirm the District Court's judgment.

Dated: February 18, 2025

Respectfully submitted,

/s/ Mark D. Rosenbaum
Mark D. Rosenbaum
Kathryn A. Eidmann
Amanda K. Pertusati
Amanda M. Savage
Amelia Piazza
PUBLIC COUNSEL LAW CENTER
610 S. Ardmore Avenue
Los Angeles, California 90005
Telephone: (213) 385-2977
Facsimile: (213) 385-9089
mrosenbaum@publiccounsel.org
apertusati@publiccounsel.org
asavage@publiccounsel.org
apiazza@publiccounsel.org

/s/ *Carter G. Phillips*
Carter G. Phillips
Tacy F. Flint
Mark C. Priebe
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, Illinois 60603
Telephone: (312) 853-7000
Facsimile: (312) 853-7036
cphillips@sidley.com
tflint@sidley.com
mpriebe@sidley.com

/s/ Eve. L. Hill
Eve L. Hill
Jamie Strawbridge

/s/ Roman M. Siberfeld
Roman M. Silberfeld
David Martinez

BROWN GOLDSTEIN & LEVY, LLP
120 E. Baltimore St., Suite 2500
Baltimore, Maryland 21202
Telephone: (410) 962-1030
Facsimile: (401) 385-0869
ehill@browngold.com
jstrawbridge@browngold.com

/s/ T.E. Glenn
T.E. Glenn
Amanda Powell
Charles Kohorst
INNER CITY LAW CENTER
1309 East Seventh Street
Los Angeles, CA 90021
Telephone: (213) 891-2880
tglenn@innercitylaw.org
apowell@innercitylaw.org

Tommy H. Du
ROBINS KAPLAN LLP
2121 Avenue of the Stars, Suite 2800
Los Angeles, California 90067
Telephone: (310) 552-0130
Facsimile: (310) 229-5800
rsilberfeld@robinskaplan.com
dmartinez@robinskaplan.com
tdu@robinskaplan.com

Counsel for Plaintiffs-Appellees, Deavin Sessom, Douglas Guthrie, Jeffrey Powers, Joseph Fields, Joshua Robert Petitt, Lavon Johnson, Laurieann Wright, and National Veterans Foundation

STATEMENT OF RELATED CASES

This case is related to the four other appeals that have been filed in the same case: Case Nos. 24-6576, 24-6338, 24-6603, and 24-6578.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify this brief complies with Federal Rule of Appellate Procedure 27(d)(1)(E) because it has been prepared in 14-point Garamond, a proportionally spaced font, and that it complies with the type-volume limitation of Circuit Rules 27-1(1)(d) and 32-3(2) because it contains 6,011 words, according to Microsoft Word.

/s/ *Carter G. Phillips*
Carter G. Phillips