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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN THE MATTER OF THE JEREMY PARADISE DYNASTY TRUST and THE ANDREW PARADISE DYNASTY TRUST,	§	No. 280, 2023
	§	
	§	Court Below: Chancery Court of the State of Delaware
	§	
	§	C.A. No. 2021-0354-KSJM

APPELLANT'S CORRECTED OPENING BRIEF

Dated: October 24, 2023

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GLOSSARY

1. **Jeremy**: Jeremy Paradise

2. **Andrew**: Andrew Paradise

3. **The Trust**: The Jeremy Paradise Dynasty Trust

4. **The Trust Agreement**: The Jeremy Paradise Dynasty Trust Agreement

5. **The Andrew Trust**: The Andrew Paradise Dynasty Trust

6. **The Andrew Trust Agreement**: The Andrew Paradise Dynasty Trust Agreement

7. **The Chancery Court**: The Delaware Chancery Court

8. **GFM**: Gordon, Fournaris, & Mammarella, P.A.

9. **Mintz**: Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo, P.C.

10. **Skillz**: Skillz, Inc.

11. **Trust Terms Email**: The December 12, 2018 email from Andrew to Jeremy re: Trust terms (A0056)

12. **GFM Outline**: The March 6, 2019 Memorandum Outline from GFM regarding the Jeremy Trust (A0091-A0103)

13. **Steinkrauss**: Mintz attorney Kurt Steinkrauss.

14. **Pomerance**: Mintz attorney John Pomerance

15. **Glover**: Mintz attorney Alison Glover

16. **Gordon**: GFM attorney Michael Gordon

17. **Hayward**: GFM attorney Daniel Hayward

18. **Bosik**: GFM attorney Joseph Bosik

NATURE OF PROCEEDINGS

This appeal seeks reversal of the judgment entered by the Chancery Court declining to reform Jeremy's Trust Agreement to revise Article 12(h) to place Jeremy, and not his brother Andrew, in the "first position" to appoint, remove, and replace the Trust Protector of that trust.[1] Jeremy sought to reform the Trust on the basis of unilateral mistake and fraud. Ex. A at 1. The Chancery Court found that Jeremy had no clear intent concerning the specific provision at issue, Article 12(h).[2]

In December 2018, Jeremy decided to create the Trust and place himself in the position of "lead trustee." *Id.* at 4-5. In 2019, Jeremy worked with Massachusetts lawyers at Mintz, whom Jeremy thought were representing him and safeguarding his interests. *Id*. at 6-7, 12. Jeremy is the sole Grantor of the Trust and donated all of its assets. *Id*. at 14-15. In 2021, Mintz claimed that they never represented Jeremy and were advancing Andrew's interests only as to the Trust but never disclaimed representation of Jeremy. *Id.* at 12.

Following Mintz's advice, on March 6, 2019, Jeremy engaged Delaware counsel (GFM) to draft the Trust and was provided with the GFM Outline which described the trust structure that GFM intended to create. *Id.* at 7. Although GFM

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[1] A Trust Protector plays a vital role in overseeing the trust and has the power to appoint and remove the Trustee, Investment Direction Advisors, the Distribution Advisors, and appoint other Trust Protectors. It may also decant the trust to remove certain beneficiaries.

[2] The Opinion terms this "Section 12(h)."

was drafting the Trust, Mintz remained involved. Ex. A at 11, 14. GFM's Outline stated GFM's intention to place Grantor (Jeremy) in first position of Article 12(h) because that was GFM's customary practice. *Id.* at 8. This would give Jeremy the sole right to replace the Trust Protector. *Id.* at 9. Jeremy received the initial version of the Trust on March 14, 2019.[3] *Id.* at 9. The draft had blanks for the names of certain parties for various roles (i.e., Trustee and Trust Protector) but was largely complete otherwise. Article 12(h) of that version had Jeremy in the first position of Article 12(h) as previously described by GFM. When Jeremy received the first draft of the Trust from GFM, he began to read it but "'couldn't understand' it." *Id.* at 10 fn. 55.

On March 19, 2019, a Mintz lawyer (Glover) called GFM and misrepresented that it was Jeremy's intent to place Andrew in the first position.[4] *Id.* at 11. Based on Mintz's misrepresentation, GFM made the instructed change to Article 12(h). *Id*. Jeremy never gave that instruction and was unaware of the change until 2021. *Id.* at 1, 11-12. GFM testified that, had they known that Mintz was not representing

[3] GFM provided this draft Trust Agreement for review following a call with Jeremy and Andrew regarding the terms of the Trust. A2947:15-A2951:14; A2987:15-A2993:19.

[4] Mintz's misrepresented instructions to GFM resulted in the only change to the Jeremy Trust that is a departure from GFM's "default" or "typical" Delaware Dynasty Trust form. Ex. A at 8, 27, 28; A2943:14-23, A2945:15-17; A2962:6-18.

Jeremy's interests, they would have discussed and confirmed directly with Jeremy that he intended Andrew to be in the first position of Article 12(h). A3004:2-9.

On April 23, 2019, the day Jeremy executed the Trust Agreement, GFM asked Mintz for confirmation that Jeremy intended Andrew to be in the first position of Article 12(h) and Mintz confirmed that "Andrew is fine the way it is. They are going to sign today." Ex. A at 14. Under the mistaken belief that Mintz was confirming that Jeremy intended the change, GFM did not alert Jeremy about the change or inquire whether he intended Andrew to be in the first position of Article 12(h). *Id*. at 29. Neither Mintz nor GFM spoke with Jeremy about changing Article 12(h) of the Trust and Jeremy did not authorize the change. *Id*. at 1. As a result, Jeremy was completely unaware that the change had been made when he executed the Trust and irreversibly placed his valuable assets into the Trust. *Id.*

It is undisputed that <u>but</u> <u>for</u> Mintz's instruction to GFM to change Article 12(h) of the Trust, Jeremy would have been in the first position in the final, executed Trust Agreement.

After discovering in early 2021 that he was not in control of his Trust, Jeremy petitioned the Chancery Court for reformation on the basis of unilateral mistake and fraud. *Id*. at 21. The Chancery Court declined to reform the Trust on the basis of unilateral mistake because "[t]he strongest inference from the record is that Jeremy had *no* clear intent regarding Section 12(h) at the time he executed the Jeremy Trust

Agreement because he had not read the documents, had no interest in their contents, and was focused on other life events." *Id.* at 36. The Court did not reach Jeremy's "alternative argument" on his "fraud theory" for this same reason. *Id*. at 38.

SUMMARY OF ARGUMENT

I. The Chancery Court erred in its interpretation and application of *Cantor*,[5] requiring a "particularized expectation about Section 12(h)" which directly contravenes established Delaware law and the Restatement (Third) of Trusts. As a result, the Chancery Court imposed a heightened burden on Jeremy that is unprecedented. The record evidence shows (and the Chancery Court confirmed) that Jeremy had a "general understanding" that he was the "trustee;" "lead trustee;" "in control" of the Trust; or that Andrew "lacks title" to the Trust and that GFM (Jeremy's attorney-agents) had Jeremy in the first position of Article 12(h) prior to being misleadingly told that Jeremy intended Andrew to be in control. Ex. A at 32 & 37.

II. Misapplying *Cantor*, the Chancery Court erred in its application of the facts to find that Jeremy did not show a "mistaken intent about Section 12(h) at the time that he executed the Trust Agreement." This directly contravenes the Restatement's policy that the settlor need only show a mistake affected the terms, not prove granular intent about the precise provision at issue.[6]

First, the Chancery Court erred in ignoring GFM's clear intent to place Jeremy in the first position of Article 12(h), as reflected by the GFM Outline and GFM's

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[5] *Cantor Fitzgerald, L.P., v. Cantor,* 2000 WL 307370 (Del. Ch. Mar. 13, 2000).
[6] *See* Restatement (Third) of Trusts cmt. b.

initial draft of the Trust Agreement. The only reason GFM changed Article 12(h) to place Andrew, instead of Jeremy, in the first position was because Mintz falsely told them that was Jeremy's intent. On this basis alone, this Court should reform the Trust to the status quo ante, which is GFM's typical and customary practice of having the Grantor in the first position.

Second, the facts demonstrate clearly and convincingly that Jeremy intended to be in "control" of the Trust, but the Chancery Court erred by finding irrelevant statements reflecting Jeremy's intent or understanding that fell outside of a narrow date range chosen by the Chancery Court; or used "non-technical" terms for "control" such as "lead trustee" and "other trustee." Ex. A at 32-34. This was error by the Chancery Court because, while the relevant inquiry is "Jeremy's intent *at the time* of the trust's formation," Delaware law does not require Jeremy to have a particularized understanding of the Trust's specific terminology regarding control nor does it find ex post evidence "irrelevant." *Id*. at 25, 32, 35 (emphasis added).

III. The Chancery Court erred in failing to properly state the fraud alleged by Jeremy and consider relevant evidence of Mintz's misrepresentations.[7] In ignoring the evidence of Mintz's misrepresentations to Jeremy and GFM, the Chancery Court limited Jeremy's claimed misrepresentations (and therefore reliance) solely to misrepresentations directly concerning the written terms of the

[7] A2899-A2908; A3494-A3503; A3550-A3555.

Trust. Jeremy's claimed misrepresentations go beyond that and include: (1) Mintz's misrepresentations to GFM and Jeremy as to their allegiances to Jeremy; (2) Mintz's misrepresentations concerning Jeremy's intention to deviate from GFM's customary practice of having the Grantor in Article 12(h)'s first position; and (3) Mintz's failure to note or explain the change to Article 12(h) to Jeremy where it was misleading for them not to do so.

STATEMENT OF FACTS

A. JEREMY FORMS THE TRUST

Around 2012, Jeremy sold to Andrew the idea for what would ultimately become Skillz in exchange for 5% of the founding equity. Ex. A at 3; A3067:14-A3068:4. In December 2018, Jeremy decided to sell some of his Skillz stock and place the remaining stock into a trust.

The terms of the trust as Jeremy intended were first set forth in a December 12, 2018 email from Andrew to Jeremy, "capturing [their] conversation": Jeremy would be the "lead trustee" and Andrew "the other trustee." Ex. A 4-5, 32; A0056. Jeremy understood from his discussions with Andrew (as confirmed by this email) that Jeremy would be the "lead trustee" and "in charge of the trust and then investments and distributions" and Andrew "would be the backup" in the event something happened to Jeremy. Ex. A at 4-5, 32. A3071:18-A3072:3. Andrew forwarded the Trust Terms Email to Pomerance to set up the trust. Ex. A at 4, fn. 18. *Id*. at 149:16-150:9; A0057-A0062.[8] Pomerance then brought in Mintz partner Kurt Steinkrauss to help form the trust. Ex. A at 6. A3072:16-3076:7; A0057-0062.

[8] Pomerance is a longtime adviser and has served as legal counsel to both Jeremy and Andrew and their respective companies. A3379:2-A3383:9. Jeremy considered Pomerance their "family lawyer." A1639:7-16. Pomerance is the godfather of Jeremy's son and has stated that Andrew and Jeremy are like sons to him. A3073:5-A3074:2; A3383:16-A3384:9.

Neither Pomerance nor Steinkrauss informed Jeremy that they were representing Andrew only, and not him. A0057-0062.

Unbeknownst to Jeremy, Pomerance and Andrew had a call on December 11, 2018 where Andrew told Pomerance that Andrew intended to put himself in control of Jeremy's trust. A3407:11-A3409:6. Andrew testified to the contrary, claiming that Jeremy intended to be in control of his trust at that time,[9] but that Jeremy's intent changed at some unknown date in late February or early March 2019.[10]

Andrew further reinforced Jeremy's understanding that Jeremy would be the "lead trustee" by forwarding the Trust Terms Email again to Jeremy, on February 19, 2019. Ex. A at 32; A0063.

On February 24, 2019, Andrew asked Jeremy if he could have a call "with the lawyers for the trust setup." A3077:8-A3079:5; A0064. On February 25, 2019, Andrew and Jeremy consulted with Steinkrauss about the formation of Jeremy's Trust. Ex. A at 6; A3077:8-12; A0065. During this call, Steinkrauss advised Jeremy that he could not be both a beneficiary and trustee of his trust. Ex. A at 6-7, 15-16. A3080:5-21. Andrew then announced that he would create a trust similar to Jeremy's for the benefit of Jeremy. Ex. A at 6; A3082:15-A3083:10. Andrew and Steinkrauss cannot recall whether the call occurred, (but do not deny it occurred), even though

[9] A3323:4-22.
[10] A3334:24-A3337:7.

the documentary evidence shows Andrew and Jeremy planning it via text, and with a calendar "invite" that shows such a call occurring.[11] Ex. A at 6, fn. 26 & 34; A0064; A0065.

During the February 25th consultation, Steinkrauss advised Jeremy that he could control his trust by appointing a trust protector/trustee who was a trusted colleague/friend, and if that person was not acting as Jeremy wanted, Jeremy could remove them. Ex. A at 33, fn. 182 & 34; A3081:3-8. In this manner, Jeremy could form the Trust and control it, as was Jeremy's intention. Ex. A at 27 & 33, fn. 182. A3081:12-16.[12] Steinkrauss advised that the trusts should be formed in Delaware and the brothers should retain Delaware counsel. A3085:11-A3086:16. Jeremy recalls Steinkrauss telling him that he would "supervise everything" and "manage the construction of the trust."[13] A3086. Nothing Steinkrauss said during that call disabused Jeremy of his understanding that he would be in control of his trust. Ex. A at 34, fn. 185; A3225:8-11. At the conclusion of the February 25, 2019 call,

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[11] Andrew acknowledged that he and Jeremy "were advised at least by the lawyers their initial deal wouldn't work…" A3370:1-3371:6-7.

[12] As understood by Andrew and Steinkrauss, Jeremy's intention to control his trust was always a necessary feature in transferring his Skillz assets to the Trust. A3064:3-19. Jeremy testified that, consistent with the Trust Terms Email, he believed he would control his trust. A3224:22-A3225:7; A0056.

[13] Pomerance corroborated this, testifying, "[Steinkrauss] was overseeing Gordon's work on behalf of Andrew and Jeremy in putting together the trusts." A1014:12-14. Pomerance later tried to retract this statement via errata.

Jeremy's understanding remained that he would be the "lead trustee" or otherwise in control of the Trust. Ex. A at 4-5, 18-19; A3225:14-16; A0056.

B. JEREMY RETAINS DELAWARE COUNSEL TO DRAFT THE TRUST AGREEMENT

Around March 6, 2019, GFM sent Jeremy an engagement letter and the GFM Outline discussing the terms of the Trust (copying Steinkrauss). Ex. A at 7; A0066-0090. From the beginning of the engagement, GFM understood that there was going to be two trusts—one for Jeremy and one for Andrew. Ex. A at 7-8; A2940:23-A2941:3. Gordon and Hayward testified they believed that Steinkrauss was representing both Andrew and Jeremy.[14] Gordon testified that Steinkrauss never told him that he did not represent Jeremy and that Mintz's actions as to Jeremy were consistent with a lawyer representing a client. A2942:17-22. Hayward does not recall anyone at Mintz stating that they did not represent Jeremy. A2982:13-A2983:22; A3030:3-7; A3031:14-18. It was GFM's understanding that Mintz represented Jeremy in connection with the trusts through at least March 21, 2021. A3026:2-14; A0947-0949; A0962.

Gordon testified that it is his customary practice to write and send an outline with the engagement letter for the purpose of getting the client to think about the terms and conditions of the trust agreement. Ex. A at 7; A2943:14-A2944:3. In the

[14] *See* A2937:4-9; A2958:8-A2959:3; A2971:5-22; A7982:13-A2983:22.

GFM Outline, Gordon wrote to Jeremy, "[y]ou will need to decide who you would like to appoint as the initial Trust Protector of the Trust." Ex. A at 8. A0091-0103. Gordon testified that appointing the trust protector is "an integral position within the trust agreement, and the grantor typically selects who will serve as the initial trust protector for the trust." A2944:12-21.

As to removal and replacement of the trust protector, the GFM Outline states, "I typically provide in my trusts that the grantor, while living and competent, followed by the beneficiaries of the trust have the authority to remove and replace the Trust Protector." Ex. A at 8; A0091-0103. Gordon testified, "[i]t's common practice for the grantor, followed by the beneficiaries, to hold the power to remove and replace the trust protector." A2945:15-17.

GFM then had a call with Andrew and Jeremy and it appears that no one discussed altering the order of the brothers in Article 12(h) from GFM's typical practice during that call. A2992:7-21; A0102. This conclusion is supported by the subsequent drafting notes of a GFM paralegal from a March 11, 2019 office conference with Gordon, which read: "R+R (1) Grantor (2) Grantor's Brother …." Ex. A at 27; A0134. Gordon testified that it is the "typical succession" to have the grantor as "the first one" with the power to remove and replace the trust protector and that this order reflected GFM's "normal process." Ex. A at 27-29; A2821:18-A2822:11. However, it was not GFM's standard practice to list the grantor's brother

as someone who could remove and replace the trust protector. Ex. A at 28; A2990:21-A2991:2. Gordon testified that he suspected that somebody told him to draft the Trust Agreement having the Grantor followed by Grantor's Brother in the second position to remove and replace the trust protector. Ex. A at 28; A2945:7-A2946:21.

On March 14, 2019, GFM sent an initial draft of the Trust Agreement to Jeremy with a summary letter, copying Steinkrauss.[15] Ex. A at 9; A3090:24-A3091:14. In the initial draft of the Trust Agreement, Jeremy, as Grantor was in first position to remove and replace the trust protector and "Grantor's Brother" (Andrew) was in the second position in Article 12(h). Ex. A at 9; A2946:2-7; A3093:4-23; A0135-0201. Jeremy began to read the first version of the Trust Agreement, but "it was confusing" and he "couldn't understand" it. Ex. A at 10, fn. 55 & 13, fn. 74; A3092:18-22; A3094:8–9. Gordon testified that GFM "assumed that Jeremy and Andrew would be reviewing the[se] documents with the assistance of their counsel [Mintz]." A2827:4-12. Virtually every clause contained in the GFM Outline was incorporated into the initial Jeremy Trust Agreement. A0135-0201; A0516-0537; A0550-0709.

[15] Hayward testified that Steinkrauss was copied because "[he] was representing Andrew and Jeremy and wanted to review the draft trust agreements" and there was a "general understanding that came from the call I had with Andrew and Jeremy that Mintz Levin…should be copied as part of this process." A2983:9-18.

C. ANDREW, THROUGH MINTZ, INSTRUCTS GFM TO CHANGE THE TRUST AGREEMENT

Jeremy never told anyone to change the order of removal in Article 12(h). A3093:4-A3094:15. Andrew states that the terms contained in the Trust Terms Email were originally "the deal," but at some unknown time "the deal changed."[16] Andrew claimed that when the deal changed, Jeremy changed his intent and agreed to place Andrew in the first position of Article 12(h) of the Trust.[17] Apart from Andrew's testimony, there is no evidence or writings reflecting Jeremy's supposed change of intent. A3329:7-A3330:13, A3340:9-15; A3353:18-A3354:16. Andrew's testimony is contradicted by Pomerance's testimony. A3406:22-A409:6.

On March 18, 2019, Steinkrauss had a call with Andrew and the next day instructed Glover[18] to contact GFM and change the Trust Agreement to put Andrew in the first position of Article 12(h). Ex. A at 10; A0210. On March 19, 2019, Glover called GFM.[19] Ex. A at 11; A2994:3-A2947; A3233:11-15. Glover testified that, at the time of the call, she did not believe Jeremy was Mintz's client. A3238:13-16. During the call, Glover told GFM that "Andrew [was] to have the power to remove

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[16] *See* Ex. A at 34-35; A3322:14-A3323:22; A3334:24-A3335:7; A3339:12-21; A3370:1-24.
[17] *See* Ex. A at 6, fn. 29 & 30; A3327:7-A3330:13; A3334:24-A3335:7; A3339:22-A3340:4; A3370:1-A3371:6.
[18] A3234:21-A3235:6; A3262:9-21.
[19] Glover testified that she could not recall the conversation with GFM, but knew it happened. A3234:14-A3238:12; A3243:5-21.

and replace the trust protector of Jeremy's trust." *Id*. Glover claims these communications were "proposed changes" to Jeremy's Trust on Andrew's behalf. A3238:13-316:15; *see also* Ex. A at 11 (noting these were "Andrew's changes"). Mintz has characterized Glover's change as a "suggestion," or "discussion point." A1945:11-20; A2279:13-A2280:7. GFM notes from the March 19, 2019 call with Glover reflect the substance of Glover's instructions: "Both Trusts // → Andrew has power to remove/ replace TP[.] Followed by Jeremy." Ex. A at 11, fn. 59; A0212.

Hayward testified that Glover misled him into believing that Jeremy was making the change to Article 12(h) of the Trust and that the "intro to that conversation [with Glover] was these were…changes that Andrew and Jeremy wanted to the trusts."[20] A2995:15-23. Gordon testified that one of the changes that was "made by virtue of the telephone conversation" with Glover on March 19, 2019 to the Trust Agreement "was who can remove and replace the trust protector." Ex. A at 11; A2831:5-10. This was the only substantive change made to the Trust Agreement—the rest were inputs of information. A0336-0395. Glover also told GFM to send the revised drafts only to her. Ex. A at 11, fn. 59; A2997:11-22; A0212.

[20] GFM's testimony that they believed that Jeremy knew of the change to 12(h) as instructed by Glover is evidenced by Hayward's email to Gordon following the call with Glover, stating, "she gave us some minor changes from the clients..." A0207-0208.

GFM sent the revised and redlined version of the Trust Agreement, which included the change to Article 12(h), to Glover only and not Jeremy. Ex. A at 11, fn. 60. *Id*. at 74:11-76:12; A0123-0273. On March 20, 2019, Glover emailed Jeremy and Andrew, copying Steinkrauss (but not GFM), attaching the clean and redlined copies of Andrew's and Jeremy's trust agreements. Ex. A at 11, fn. 61; A3245:22-A3246:14; A0274-0515.

In her email, Glover advised Jeremy on potential tax consequences of the appointment of Pomerance as trust protector and explained most of the edits to the Trusts. Ex. A at 11, fn. 61; A0274. Glover did not note the material change to the Trust Agreement, and made statements that indicated Jeremy would maintain control of the trust vis-à-vis the trust protector and that Jeremy could replace Pomerance as trust protector. Ex. A at 11, fn. 61. *Id*. Jeremy mistakenly understood that all the changes to the Trust Agreement were summarized in the body of Glover's email. A3094:16-A3096:9. Jeremy was unaware of the change to Article 12(h) until two years later. A3096:10-A3097:20.

No one at GFM discussed the change to Article 12(h) with Jeremy. A3000:7-21. GFM understood that Mintz represented Jeremy and was communicating with Jeremy about the change to Article 12(h). A3001:4-20. Had GFM known that Mintz did not represent Jeremy, Hayward testified that it is "very likely [he] would have followed up directly with Jeremy regarding the changes. A3004:2-9.

Andrew never told Jeremy about the change to Article 12(h).[21] On March 18, 2019, Andrew texted Jeremy that there were "blanks" in the trust agreements that were being "filled" in but did not tell Jeremy that he was changing the Trust.[22] Ex. A at 10, fn. 52; A0202-0206. Andrew testified that he did not change the Trust Agreement draft, but was only fixing a "mistake" because "[he] was supposed to be in charge of both [trusts] as a trust protector and one of them was flip-flopped—flip-flopped or just incorrect." A3334:6-10. Contradicting Andrew's testimony, Glover did not claim that she was fixing a mistake. A2995:24-A2296:4. Not a single witness deposed (including Mintz, GFM and Respondents) corroborated Andrew's claim of "mistake."

D. JEREMY SIGNS THE TRUST AGREEMENT AND TRANSFERS HIS ASSETS INTO THE TRUST

As of April 2, 2019, Andrew knew that Jeremy had not reviewed the trust agreement containing the change to Article 12(h), as Jeremy had explicitly told him: "I'm just going to trust your edits." Ex. A at 13, fn. 72; A0540-0543. On April 9, 2019, GFM again sent a draft of the Trust Agreement to Mintz. Ex. A at 14; A0546-0549. Relying on his belief that Mintz was executing his intent and acting in his interests, among other reasons (*i.e.*, his distractions with his newborn and work),

[21] *See* Ex. A at 10; A3335:15-A3337:14; A3341:7-A3342:16.
[22] The change to Article 12(h) of the Trust was the only substantive change. The other redlines reflected blanks being filled in. A0724-0515.

Jeremy did not review any drafts of the Trust Agreement beyond the first. Ex. A at 13.

On April 22, 2019, Andrew had a call with Steinkrauss. A3267:18-24; A0649. Thereafter, Steinkrauss "replied all" to GFM's April 9, 2019 email which attached the final versions of the trust agreements to "confirm a few items" but intentionally removed Jeremy from the reply. Ex. A at 14; A3266:3-A3268:21; A0546-0549. GFM did not realize that Jeremy was no longer on this email chain. A3009:7-24. Steinkrauss asked GFM to confirm that Andrew and Jeremy were to have "joint control" over the Jeremy Trust.[23] Hayward responded to Steinkrauss, in part, that, "[i]n both trusts, Andrew alone has the authority to remove and replace the Trust Protector." JX-100. Hayward requested that "[i]f that should be changed, please let me know." Ex. A at 14, fn. 79; A0646. Steinkrauss responded "Andrew is fine the way it is. They are going to sign today." Ex. A at 14, fn. 80; A0646. It was GFM's understanding at this time that Steinkrauss represented Andrew and Jeremy and that Steinkrauss was communicating with GFM as counsel for both Jeremy and Andrew.[24]

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[23] *See* Ex. A at 14, fn. 78; A3269:12-A3270:6; JA0647.

[24] Gordon testified he assumed Steinkrauss meant both Jeremy and Andrew. A2841:4-8. Hayward testified he "assumed [Steinkrauss] was communicating on behalf of both of them." A3010:22-A3012:22.

Jeremy signed the altered Trust Agreement on April 23, 2019, at the Boston office of Mintz.[25] Ex. A at 14, fn. 81; A0716-0775; A3106:3-14. Although Andrew was texting with Jeremy about the Trust that day, Andrew never raised Steinkrauss's email discussion with GFM or the topic of his change to Article 12(h) with Jeremy. A0710-0715; A3351:8-A3353:7.

GFM believed that the final, executed version of the Trust Agreement reflected Jeremy's intent because that is what Mintz told GFM. A2954:17-19; A2955:10-18; A2965:10-18. Gordon stated, "when [GFM] receive[s] comments from counsel, it's our understanding that that counsel is representing the client" and accordingly understood that Mintz proposed revisions to the Trust on behalf of Jeremy. A2807:1-8; A2808:1-A2809:10. Further, when the Trust Agreement was prepared and signed, it was Gordon's (and GFM's) understanding that Mintz was communicating with Jeremy and advising him about the terms of the trust agreement.[26] A2955:10-18. Gordon testified that the way GFM drafted the Trust

[25] Around May 10, 2019, Jeremy – still unaware of the change to the Trust Agreement – transferred 3,006,620 shares of Old Skillz Class B common stock to the Trust. JX-116. This transfer was conducted by Mintz. Ex. A at 15, fn. 87. A3106:15-A3107:2; A0843-0898.

[26] Glover's April 2, 2019 email response, "Thanks Dan" to Hayward's email wherein he referred to "Kurt Steinkrauss and Alison Glover of Mintz Levin" as Jeremy and Andrew's "estate planning counsel" bolstered his belief that Mintz was representing Jeremy as Glover did not clarify that Mintz was representing Andrew only. A0538-0539; A3006:10-17.

Agreement is the way GFM believed Jeremy wanted it based on GFM's discussions with Mintz. A2965:16-18; A2841:16-19.

After execution of the Trust, Jeremy continued to believe that he was in control of the Trust. For example, on September 9, 2020, Jeremy texted Pomerance saying: "there are two trusts. Your [sic] trustee of one that I'm beneficiary of. I'm trustee of the other that [Jeremy's son] and my mom are beneficiaries of." Ex. A at 31, fn. 175; A0899-0912. Further, on December 17, 2020, Jeremy's text to Pomerance shows that Jeremy believed that Andrew had no authority as to the Trust, stating, "Andrew has no legal title on my trust[.]" Ex. A at 31, fn. 176; A0913-0927.

E. JEREMY LEARNS OF ANDREW AND MINTZ'S MISREPRESENTATIONS

On January 22, 2021, Casey Chafkin (Skillz CRO and Board Member) and Charlotte Edelman (then Skillz VP of Legal) were appointed to the Trust as fiduciaries. Ex. A at 18, fn. 106; A0928-0939. Jeremy was not consulted about their appointment and objected when he learned of it. A3098:16-A3099:3; A3116:16-A3118:16.

Upon learning that they had been appointed to the Trust, Jeremy forwarded the Trust Terms Email to Andrew, stating "[s]ee below for the terms we both agreed

on when we put the trust together."[27] The same day, Jeremy also forwarded the Trust Terms Email to Pomerance. Ex. A at 31, fn. 178; A0940.

In or around March 2021, Jeremy requested his confidential legal files from both Mintz and GFM. Ex. A at 20; A0942-0946; A0950. Andrew and the Fiduciaries objected to the release of GFM's legal files to Jeremy. A0942-0946. GFM determined it had an ethical duty to release the file to Jeremy and it did so in March 2021. Ex. A at 20; A0942-0946; A0957-0960.

At that time, Jeremy pressed Pomerance to reform the Trust, telling him "to instruct your council [sic] to fix the Grantor order in my trust immediately so that I have control over the trust protector and fiduciaries in my trust that was built with stock that was GRANTED by me for the benefit of my family." Ex. A at 20.

Unable to come to terms with Andrew or the Trust fiduciaries, Jeremy filed a petition with the Chancery Court on April 26, 2021 seeking reformation of the Trust Agreement based on unilateral mistake (Count I) and fraud (Count II), among other relief. Ex. A at 20-21. A two-day trial was held on May 3 and May 4, 2022. Ex. A at 21.

On January 31, 2023, after post-trial briefing and oral argument, the Chancery Court declined to reform the Trust for unilateral mistake or fraud stating that "Jeremy

[27] Ex. A at 18, 19, fn. 110, 31 fn. 177 & fn. 178; A0941.

has failed to prove he had any intent at all when executing the agreement, and *ex post* desires will not suffice." Ex. A at 2.

ARGUMENT

I. The Chancery Court's Misreading of *Cantor* Imposes an Erroneous Standard

A. Question Presented

Whether the Chancery Court erred in concluding that *Cantor Fitzgerald, L.P., v. Cantor*, 2000 WL 307370 (Del. Ch. Mar. 13, 2000) requires Jeremy to demonstrate a "particularized expectation about Section 12(h)" and not just a "'general understanding' of control" of the Trust? The question was raised below (A2863; A2869-A2872; A3482-A3488; A3527-A3528; A3539-A3542) and considered by the Chancery Court (Ex. A at 25-37).

B. Scope of Review

This issue involves a question of law. "This Court reviews questions of law *de novo*."[28]

C. Merits of Argument

In assessing whether Jeremy met his burden of showing that he intended to be in control of the Trust, the Chancery Court set an impossibly high bar that is unprecedented under Delaware law—requiring that Jeremy show a "particularized

[28] *Wilmington Trust, N.A. v. Sun Life Assurance Company of Canada*, 294 A.3d 1062, 1071 (Del. 2023).

expectation about Section 12(h)" and not just his mistaken "'general understanding' of control" as a term of the Trust.[29] Ex. A at 32.

The relevant facts in *Cantor* are stated by the Chancery Court:

> [D]efendants sought to reform a commercial contract, but admitted during discovery not to have an independent understanding of the agreement when they signed it. One of the defendants then proceeded to testify that she had a "general understanding" that she would be able to develop a "free, independent, strong company" based on a conversation with the plaintiff's representative where the representative told the defendant that she could "trust him" and that he would "never harm" her company.

Ex. A at 36 quoting *Cantor,* 2000 WL 307370 at *7. From those facts, the Chancery Court declared that a general understanding of intent was insufficient as a matter of law. Ex. A at 25, 32.

First, *Cantor* does not stand for the proposition that a general understanding of an expected term (here, "control") is insufficient. The *Cantor* Court did not deny "defendants' reformation [counter]claims based on insufficient evidence of defendants' intent" as the Opinion asserts. Ex. A at 37. The *Cantor* Court found defendants' claim of a "general understanding" devoid of merit, stating, "[t]o the extent [] that Defendants argue that [Iris] Cantor believed, *at any time prior to the 1996 Settlement Agreement amendments*, that she would obtain a free, independent and strong MDC [Iris Cantor's company] that could freely engage in Competitive

[29] Petitioner does not challenge the Chancery Court's application of the "clear and convincing" standard.

Activities and to compete with [Plaintiff's] competitors, *this argument is without merit*. Cantor's contentions are not credible." *Id.* (emphasis in original). As the *Cantor* Court further opined, "the fairest reading of the [evidence]…leads to the inescapable conclusion that both [Iris Cantor and Plaintiff] knew that the issue of a 'free, strong and independent' [competing company]…loomed as a gut-wrenching deal-breaker issue that neither party wished to raise" and it "could not be put on the table and discussed by either party because it served as a Gordian knot neither party wished to untie." *Id.*

Second, there is no conclusion in the *Cantor* opinion that a "general understanding" of the terms of the agreements at issue would be insufficient evidence of intent. *See Cantor*, 2000 WL 307370. It noted instead that defendants "candidly admitted under oath that they had *no relevant understandings*…" concerning the agreement at issue. *Id*. at *8 (emphasis added). In fact, the *Cantor* Court implies that if Iris Cantor's claims of understanding about that her company would be "free, strong and independent" were credible, they might suffice, by stating that "even if one were able to conclude that Defendants had an understanding that the Agreements provided what they now seek to obtain through reformation, there is no evidence that Defendants acted under the influence of fraud [as required for reformation under mutual mistake]." *Id.*

In contrast, the Chancery Court rejected Jeremy's and Andrew's prior expressions of Jeremy's intent of the terms of his trust ("trustee" or "lead trustee") specifically because they only show a "'general understanding of control' rather than a particularized expectation about Section 12(h)."[30] Ex. A at 32-33. That is not only a misreading of *Cantor*, but it conflicts with other language of the Opinion—which recognizes that an expression of intent concerning a term "need not be in formal terms." Ex. A at 25, n. 144 citing *Kalil*, 2018 WL 793718, at *6 (Del. Ch. Feb. 7, 2018). In relying on *Cantor*, the Chancery Court also failed to properly apply Section 2.03 in its decision. *See* Restatement (Third) Of Agency § 2.03 (2006).

The Chancery Court recognized that Jeremy read the GFM Outline and "read the first version [of the Trust] at some point but said he 'couldn't understand' it." Ex. A at 10 fn.55, 27-28. Nonetheless, the Chancery Court required more: that Jeremy show he specifically understood Article 12(h) of the Trust Agreement. *See* Ex. A at 37 (criticizing Jeremy for "seeking reformation claims based on a general understanding (at best) of the written instrument at issue rather than a particular provision"). But reading and understanding the at-issue agreement is not the law in Delaware, as this Court's holding in *Cerberus International, Ltd. v. Apollo*

[30] This is one reason why the Chancery Court rejected Jeremy's statements that "Andrew has no legal title to my trust." Ex. A at 32 (stating that "this statement at most reflects a 'general understanding' of control rather than a particularized expectation about Section 12(h).)"

Management, L.P., 794 A.2d 1141 (Del. 2002) demonstrates, because: "[a]ny mistake claim by definition involves a party who has not read, or thought about, the provisions in a contract carefully enough" and "it is not difficult to believe that lay persons…failed to understand all of the provisions." *Id.* at 1154.

The Court of Chancery's interpretation of *Cantor* also clashes with this Court's ruling in *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665 (Del. 2013), which involved a series of five separate real estate joint venture projects between The Scion Group, LLC ("Scion") and ASB Capital Management, LLC ("ASB"). *Id.* at 669-675. A scrivener's error was made in the agreement underlying deal number three that went unnoticed by ASB and which substantially benefitted Scion. *Id.* That same error was repeated in the agreements underlying deals four and five. *Id.* Evidence showed that ASB had not read the agreements underlying those "Disputed Agreements." *Id*. After Scion tried to enforce the Disputed Agreement as written, ASB filed a claim for reformation. *Id.* After trial, the Chancery Court found for ASB and reformed the three Disputed Agreements. *Id.* Scion appealed claiming that the Chancery Court erred because "failure to read a contract bars a claim for equitable reformation," among other reasons. *Id.*

Upon review, this Court found that, while a party cannot seek *avoidance* of an agreement that he did not read, reformation is permissible, "so long as the party's

conduct does not amount to a failure to act in good faith and in accordance with reasonable standards of fair dealing." *Id.* at 677. Accordingly, the Court found that "even assuming [ASB] did not read the Disputed Agreements, [it] acted in good faith and in accordance with reasonable standards of fair dealing."[31] *Id.*

In contrast to this Court's holding in *Scion*, the Chancery Court found that "Jeremy had *no* clear intent regarding Section 12(h) at the time he executed the Trust Agreement because he had not read the documents, had no interest in their contents, and was focused on other life events." Ex. A at 36 (emphasis in original). To support its finding, the Chancery Court cites to *Cantor* but never *Scion*. *Id.*; *see also* Ex. A at 37 (stating "[h]ere, as in *Cantor*, Jeremy seeks reformation claims based on a generalized understanding (at best) of the written instrument at issue rather than a particular provision") citing *Cantor*, 2000 WL 307370, at *7-9. The Chancery Court's Opinion conflicts with this Court's holding in *Scion*. 68 A.3d at 678 (stating

[31] Jeremy did not violate any standard of good faith and fair dealing. It is undisputed that he read the December 12, 2018 and February 19, 2019 Trust Terms emails that clearly articulated that Jeremy was to be the "lead trustee" of the Trust, as well as the GFM Outline, explaining that "typically…the grantor…ha[s]the authority to remove and replace the Trust Protector." A2945:5-17; A3071:18-A3072:3; A3076:17-A3077:7; A0056; A0063; A0091-0103. Further, given that Jeremy was relying on Mintz (or GFM) as his lawyers, his actions are not a breach of good faith and fair dealing. *See Scion*, 68 A.2d at 678 (noting that ASB's President "relied on his employees and advisors to alert him to any significant changes in the later agreements"). This was not an affirmative defense of Respondents in any event.

"we hold that [ASB's] failure to read the Disputed Agreements ***does not*** bar ASB from seeking to reform those agreements") (emphasis added).

The error of the Chancery Court's reading of *Cantor* is similarly apparent when compared to the facts of *Collins v. Burke*, 418 A.2d 999 (Del. 1980). Although *Collins* concerns reformation of a real estate deed and not an agreement such as a trust, the Court's examination of intent in the context of reformation is informative. *Id.* at 1002-1003. There, the parties were not held to understand the exact wording of the mistaken deed or the specific demarcations of the at-issue property because the Court (correctly) found that the parties "did have a specific agreement that the line would be drawn *wherever it had to be* in order to establish a lot of three-quarters of an acre, contiguous to the [defendant's] property, and excluding the barn." *Id.* at 1002 (emphasis added). The logic in *Collins* should apply here and reformation granted because the facts show that Jeremy's "ultimate intention" (as discussed in Section II below) was to be in control of his Trust *however it had to be* expressed in the Trust Agreement. *Id.* at 1003. Under a proper interpretation of *Cantor* and Delaware law, reformation is warranted.

II. The Chancery Court Erred in its Application of the Facts

A. Question Presented

Did the Chancery Court err in its application of the facts to find that Jeremy did not have a "mistaken intent about Section 12(h) at the time that he executed the Trust Agreement?"

This issue was raised below (A3484-A3490; A3539-A3541) and considered by the Chancery Court (Ex. A at 26-36).

B. Scope of Review

This issue involves a mixed question of fact and law. This Court "review[s] questions of law *de novo*" and "review[s] a trial judge's factual findings for clear error."[32]

C. Merits of Argument

1. The Chancery Court Erred in Ignoring GFM's Customary Practice of Placing the Grantor First

The Chancery Court's Opinion acknowledges that: (1) Jeremy's lawyers at GFM communicated to Jeremy their intention place him in the first position of Article 12(h) through the GFM Outline unless instructed otherwise; (2) Jeremy read the GFM Outline; and (3) the only reason GFM departed from its typical practice of placing the Grantor in the first position was because Mintz called on March 19, 2019 and told them Jeremy had an intention varying from GFM's typical practice. Ex. A

[32] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010).

at 7-9, 27-29; A010-0102. But the Chancery Court refused to consider GFM's intention as evidence of Jeremy's intent stating, "[b]est understood, the outline reflects GFM's default (i.e., "typical") practice of giving first line removal power to a trust's grantor" "[b]ecause Jeremy did not discuss the outline with GFM before it was circulated." *Id.* at 28.

The Chancery Court erred by dismissing GFM's "typical" practice as not being evidence of intent because usual and customary practice is weighty evidence of prior intent and understanding. *See Parke Bancorp, Inc. v. 659 Chestnut, LLC,* 217 A.3d 701, 714 (Del. 2019) (noting that Defendant Parke's "customary practice" as well as the general practice of its Chief Credit Officer of not approving the proposed reformation term "weighed heavily" as to the prior understanding and intent of the parties). Further, the Chancery Court ignores its own statement that "GFM represented Jeremy in connection with the Trust and had authority to draft and edit the Trust Agreement on his behalf." Ex. A at 9. As Jeremy's agent, GFM's knowledge and intent is imputed to Jeremy.[33] *See Vance v. Irwin*, 619 A.2d 1163, 1165 (Del. 1993) (holding that "notice given to a retained lawyer-agent may be

[33] Whether the Chancery Court recognized this principle but chose to ignore it, it is error. As this Court's opinion in *Scion* makes clear, "actual intent" is not required. *See Scion,* 68 A.3d at 680-681 (noting that reformation requires that a party show, "by clear and convincing evidence…that [an] existing writing erroneously expresses the parties' true agreement" but then discussing that ratification cuts off imputed or constructive knowledge and requires "actual knowledge" of the error).

viewed as notice to the client-principal") citing Restatement (Second) of Agency § 9(3) (1957).

Imputing GFM's intent to Jeremy is not only consistent with established Delaware law, but also confronts the proverbial "elephant in the room" which the Chancery Court refused to acknowledge—the only reason that Jeremy was removed from the first position of Article 12(h) is because Glover called GFM and falsely told them that *Jeremy intended to have Andrew in the first position*.[34] GFM mistakenly believed that Mintz was representing Jeremy's interests in drafting the Trust and changed the Trust Agreement under that mistaken belief. A2937:4-9; A2958:8-A2959:3; A2971:5-22; A2982:13-A2983:22. GFM's mistake regarding Jeremy's intent is a mistake in the inducement.[35] "A mistake in in the inducement arises when a donative document includes a term that was intended to be included or fails to include a term that was not intended to be included, but the intention to include or not to include the term was the product of a mistake of fact or law." Restatement (Third) of PrEx. A; Wills and Donative Transfers Sec. 12.1 (2003).

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[34] Ex. A at 11.

[35] The Chancery Court's Opinion stated "that GFM later asked for confirmation on who should be in first position in Section 12(h)" was not evidence of Jeremy's intent because "these notes followed GFM's typical practice to keep the grantor in the first position [of Article 12(h)] until otherwise instructed." Ex. A at 28 (emphasis added). But the Chancery Court ignores that GFM was otherwise instructed—by Mintz, who falsely conveyed Jeremy's intent.

2. The Chancery Court Erred by Ignoring Relevant Evidence Showing Jeremy's Intent to be in Control

In its Opinion, the Chancery Court declines to consider evidence from what it considers *before* the drafting of the Trust (apparently, February 25, 2019) and *after* its execution (April 23, 2019). Ex. A at 31-34. This is error.

First, the Chancery Court inexplicably ignored Andrew's December 12, 2018 and February 19, 2019 emails to Jeremy confirming that Jeremy is to be the "lead trustee" of the Trust and Andrew is to be "the other trustee in charge of managing it," calling the emails "weak evidence" simply because they were written by Andrew. Ex. A at 33. But Andrew specifically noted that he was "**capturing our [Jeremy's and Andrew's] conversation** before we ask an attorney to paper this." A0056. Jeremy testified that he understood that, according to the Trust Terms Email, he would be the "lead trustee" and "in charge of the trust and then investments and distributions." Ex. A at 4-5, 32; A3071:18-A3072:3. Jeremy further understood that Andrew "would be the backup." Ex. A at 4-5. *Id*.

The Chancery Court next faulted Jeremy's failure to respond to "the substantive terms of control that Andrew had laid out" in those emails, speculating that "Jeremy's silence on the issue of control might have been an implicit endorsement of Andrew's two-trustee proposal" or "a lack of [Jeremy's] interest in who would control the trust." Ex. A at 33. The Chancery Court's conclusion here is mistaken because the "two-trustee proposal" did not arise until February 25, 2019,

when the brothers spoke with Steinkrauss—which is after those emails were received by Jeremy on December 12, 2018 and February 19, 2019. *Id.*[36]

The Chancery Court's conclusion that Andrew's intent in using the words "lead trustee" and "other trustee" is unclear is further error. Ex. A at 33. The issue is not what Andrew understood them to mean, it is what *Jeremy* understood them to mean. At trial, Jeremy testified that he understood that a "trustee would be like the CEO of the trust…they would be in charge of finances, operations, and whatever else the trust [] might need."[37] A3090:16-23.

The Chancery Court also dismisses the December 12, 2018, and February 19, 2019 emails because "subsequent advice of counsel [i.e., Mintz] changed the brothers' approach to the trust structure" which "suggest[s] that Jeremy's anticipated role as 'lead trustee' was subject to later revision." Ex. A at 33-34. The Chancery Court did not find that Jeremy's intent changed—just that it *could change.* But there is no written record evidence that Jeremy ever changed his intent except for Andrew's contradicted testimony that Jeremy's intent changed when a two-trust

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[36] Jeremy is not required to show any specific degree of "interest," to demonstrate intent, only that he had a prior understanding that differed from the final version of the Trust. *See Cerberus*, 794 A.2d at 1152 (explaining prior intent is required so that the Chancery Court will know "exactly what terms to insert in the contract rather than being put in the position of creating a contract for the parties").

[37] Andrew himself used, "trustee" to mean control over the trust, and acknowledged, "I don't know if we knew the title of trust protector at the time until we went to the lawyers." A3371:4-6; A0056. Jeremy's terminology matched Andrew's and the semantics should not matter.

structure was implemented.[38] In fact, the absence of such evidence is further proof that Jeremy's intent *never* changed. *See Cerberus,* 794 A.2d at 1153-54 (noting that "a rational trier of fact would have expected to see some evidence that this point had been negotiated away…" and that "[a]bsent any evidence that this term was eliminated in the negotiation process (and there is none on the record), it is certainly a permissible inference that the parties had a prior agreement…"); *see also Scion,* 68 A.3d at 671-674 (noting that reformation is appropriate because of plaintiff's understanding based on the first of five agreements even where each successive agreement contained numerous other revisions).

The Chancery Court also erred by excluding consideration of record evidence from after the Trust's execution showing Jeremy's earlier belief of his control was still intact. Specifically, there is a September 9, 2020, text from Jeremy to Pomerance saying: "there are two trusts. Your [sic] trustee of one that I'm beneficiary of. I'm trustee of the other that [Jeremy's son] and my mom are beneficiaries of." Ex. A at 31, fn. 175; A0902-0903. There is a December 17, 2020, text from Jeremy to Pomerance stating, "Andrew has no legal title on my trust[.]" Ex. A at 31, fn. 176; A0920. Finally, there is a January 22, 2021, email to Andrew where Jeremy

[38] The Opinion omits reference to the full citation that cited in Jeremy's Post-Trial Brief. *See* Ex. A at 35 fn. 18 (citing to A3488 citing to A3370:1-24 but omitting Petitioner's reference to page A3371:1-6).

forwarded the Trust Terms Email stating "[s]ee below for the terms we both agreed on when we put the trust together."[39] Ex. A at 18, 19, fn. 110, 31 fn. 177 & fn. 178; A0941. The Chancery Court refused to consider these statements as evidence of Jeremy's intent because they occurred after the April 23, 2019 execution of the Trust Agreement. Ex. A at 36.

Excluding ex post evidence of Jeremy's intent is contrary to Chancery Court precedent holding that, when examining a contract, that the Chancery Court "may also consider other evidence, such as the parties' subsequent conduct, to determine whether or not the parties intended to be bound." *Aveta, Inc. v. Bengoa*, 986 A.2d 1166, 1187 (Del. Ch. 2009); *see also Foraker v. Voshell*, 2022 WL 2452396 at fn. 152 (Del. Super. Jul. 1, 2022) (quoting *Aveta* for same); *Green v. Wisneski*, 2021 WL 4999348 at *2 (Del. Ch. Oct. 15, 2021) (citing *Aveta* and stating that the Chancery Court may examine "the parties' subsequent conduct, to determine whether or not the parties intended to be bound").

That is not to say that such evidence outweighs contemporaneous evidence. To the contrary, "contemporaneous evidence is far more probative"…"but that does not mean that a party's subsequent conduct has no probative value…." *Shareholder Representative Services LLC v. Gilead Sciences, Inc.*, 2017 WL 1015621, at *24

[39] Jeremy also forwarded the Trust Terms Email to Pomerance on January 22, 2021. Ex. A at 31, fn. 178; A0940.

(Del. Ch. March 15, 2017). Here, Jeremy's 2020 statements that he is "trustee" of the Trust and that "Andrew has no legal title on my trust" as well his January 2021 statement telling Andrew that "he could not appoint…fiduciaries" to his Trust (and resending the Trust Terms Email as proof of that) all evidence Jeremy's understanding of his role and that his understanding of "control" of the Trust had not changed from December 2018 until early 2021. Ex. A at 31.

The Chancery Court compounded its error in refusing to consider these communications from outside that February 25 to April 23, 2019 time period because they corroborate Jeremy's uncontradicted testimony about the February 25th phone call with Steinkrauss and Andrew. Specifically, in the February 25th phone call, Jeremy recalls Steinkrauss saying that: (1) if Jeremy was the "lead trustee, [he] could essentially control the assets in the trust;" and (2) the trust would have a "trusted advisor and friend" in a control position and if that person "was not doing what you wanted, you'd remove them." *Id.* at 34. Neither Steinkrauss nor Andrew recalled whether or not that call occurred, or any substance of that call.[40] *Id.* at 6-7,

[40] While the Chancery Court claims that Jeremy's "uncorroborated memory" was "not sufficiently credible," Delaware courts have held "[w]here the testimony of an interested witness is uncontradicted, is clear and positive, and there are no circumstances in evidence tending to discredit or impeach such testimony, conclusive effect may be given thereto. The applicable rule is further strengthened where . . . . the opposite party had the means and opportunity of disproving the testimony, if it were not true, and failed to do so." *See Matter of McCall*, 398 A.2d 1210, 1215 (Del. Ch. 1978) (crediting surviving spouse's testimony regarding the intent of her deceased husband despite her obvious interest in the outcome). Neither

34. But because the Chancery Court limited its definition of the "trust drafting process" to that narrow window, it determined that Jeremy's recollection of the February 25, 2019 phone call with Steinkrauss was "free-standing" and "uncorroborated" when that is clearly not the case. Ex. A at 34.

Steinkrauss, nor Andrew disproved Jeremy's recollection of the call. *See* Ex. A at 34 (noting Steinkrauss' and Andrew's lack of recollection).

III. The Chancery Court Erred By Narrowly Framing Jeremy's Allegations of Misrepresentation and Ignoring Relevant Evidence

A. Question Presented

Did the Chancery Court err in limiting Jeremy's "fraud theory" to "the various promises by Steinkrauss, Andrew, and others that Jeremy would be in control of the Jeremy Trust" and ignoring relevant evidence about Mintz's misrepresentations? *See* Ex. A at 24, fn. 138.

B. Scope of Review

This issue involves a mixed question of fact and law. This Court "review[s] questions of law *de novo*" and "review[s] a trial judge's factual findings for clear error."[41]

C. Merits of Argument

"[A]n equitable fraud (or negligent misrepresentation) claim is essentially a fraud claim with a reduced state of mind requirement, requiring 'proof of all of the elements of common law fraud except that [the] plaintiff need not demonstrate that the misstatement or omission was made knowingly or recklessly.'" *Fortis Advisors LLC v. Johnson & Johnson*, 2021 WL 5893997, at *14 (Del. Ch. Dec. 13, 2021).

Despite the clear and well-established law regarding equitable fraud, the Chancery Court essentially ignores all of Jeremy's arguments and supporting

[41] *Osborn*, 991 A.2d at 1158.

evidence as set forth in Jeremy's Opening Pre-Trial Brief, Opening Post-Trial Brief and Post-Trial Reply Brief by limiting (without support) Jeremy's "fraud theory"[42] to the "various promises by Steinkrauss, Andrew, and others that Jeremy would be in control of the Trust…."[43] As *Haney v. Blackhawk Network Holdings, Inc*., 2016 WL 769595 (Del. Ch. Feb. 26, 2016) illustrates, the Chancery Court's artificial limitation is error because Delaware law does not restrict equitable fraud claims to terms of the at-issue document itself (as the Opinion implies). In *Haney*, plaintiff Haney ("Sellers") was the representative of the sellers of a company, Cardlab and Defendant Blackhawk was the buyer. *Id.* at *1-2. At the time of the merger, Cardstop was negotiating a lucrative deal with Gamestop (the "Gamestop Contract"). *Id*. Unbeknownst to Sellers, Blackhawk was a party to a separate contract (the "Exclusivity Provision") containing a provision that would prevent Cardlab from completing its deal with Gamestop if it merged with Blackhawk. *Id.* After the merger was complete, Haney brought suit seeking, among other relief, reformation based on fraudulent inducement, claiming Blackhawk knew about the Gamestop Contract, but concealed the Exclusivity Provision from Sellers. *Id.* at *3. In denying Blackhawk's motion to dismiss, the Chancery Court found that Sellers had sufficiently pled a specific intent as to the Gamestop Contract (i.e., that it would not be impeded by the

[42] Ex. A at 23.
[43] Ex. A at 24, fn. 138.

merger) and that Blackhawk had concealed the Exclusivity Clause from Sellers. *Id.* at 10. There was no allegation of concealment of the terms of the at-issue Merger Agreement. *Id*.

Jeremy produced clear and convincing evidence showing that (1) Mintz misrepresented to GFM and Jeremy their overall allegiances to Jeremy during the Trust formation process; (2) Mintz falsely told GFM (as Jeremy's attorney-agents) that Jeremy intended to deviate from GFM's customary practice of having the Grantor in Article 12(h)'s first position; and (3) Glover failed to explain to Jeremy the change to Article 12(h) where it was misleading not to do so. *See* A2898-A2908; A3498-A3503. The record evidence further demonstrates that Jeremy relied on Mintz's misleading allegiances, and GFM made the change to Article 12(h) and did not consult directly with Jeremy in reliance on Mintz's misrepresentations. It was error for the Chancery Court to ignore Jeremy's arguments and clear evidence of fraud. *See Pierce v. Wahl*, 86 A.2d 757 (Del. 1952) (holding "where decree of Chancellor did not result from application of recognized principles of law to the facts found the decree must be reversed."); *see also Brown v. Delaware Bd. of Examiners of Nursing Home Administrators*, 2021 WL 141203, at *4 (Del. Super. Jan. 15, 2021) (holding that the Board abused its discretion where it based its legal conclusion, which was adverse to Brown, on that fact that Brown provided no evidence, other than his testimony.)

First, the record evidence clearly shows that both Jeremy and GFM were misled as to Mintz's overall allegiances—which were to Andrew, not Jeremy.[44] This began even before GFM's engagement, as Mintz owed Jeremy a duty to inform him during that February 25th phone call that they were not representing him—but Mintz never made its required disclaimers. "[A] lawyer will typically need to identify the lawyer's client, and where necessary, explain that the client has interests opposed to those of the unrepresented person" because "the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel." *See* Mass. R. Prof. C. 4.3, cmts. 1, 2. Steinkrauss did not inform Jeremy that he was not representing him during the February 25th call. A3274:13-17.

Second, there is no dispute that Glover called GFM on March 19, 2019 and falsely told GFM that Jeremy *intended* to have his brother Andrew in the first position of Article 12(h). *See* A3475 (citing A2997:3-10) ("Hayward understood Glover to be saying that Jeremy authorized the change.").[45] GFM testified that they never told Jeremy about the change, relying on Mintz (as Jeremy's lawyers) to transmit and explain the revisions to Jeremy.[46] Yet, the Chancery Court erroneously

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[44] *See e.g.*, Ex. A at 14, 16, 30, 33-34; A2937:4-9; A2958:8-A2959:3; A2971:5-22; A2982:13-A2983:22; A3075:2-A3076:16.
[45] A3238:13-22 (Glover did not "believe[] Jeremy to be the client.").
[46] A3477; *see also* A3001:4-20.

states that "Glover contacted GFM and provided *Andrew's* input to the initial drafts." Ex. A at 11. The Chancery Court further states that "GFM later asked for confirmation on who should be in the first position of Section 12(h)" but fails to note that GFM *asked Mintz, not Jeremy* because GFM were misled into believing that Mintz was representing Jeremy's interests. Ex. A at 28. No one disputes that Steinkrauss removed Jeremy from his April 22nd email to GFM and that GFM did not notice the omission of Jeremy. Ex. A at 14; A3007:7-A3009:24. GFM's reliance on the misrepresentation by Mintz is clear—as GFM "assumed that Jeremy and Andrew would be reviewing the[se] documents with the assistance of their counsel [Mintz]." A2827:4-12.

Third, Mintz made misrepresentations when it misleadingly communicated with Jeremy about revisions to the Trust outside of GFM's presence on March 20, 2019; A0274. As an initial matter, Glover should not have been communicating directly with Jeremy under applicable ethical rules—so her communication itself is misleading as to her allegiances.[47] In addition, Glover owed Jeremy a duty to explain the change she instructed GFM make to Article 12(h), but never did so. A0274. "[A]n attorney owes a duty to nonclients who the attorney knows will rely on the

[47] Massachusetts Rule of Professional Conduct 4.2 states that "a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

services rendered" to a client. *Spinner v. Nutt*, 417 Mass. 549, 552 (Mass. 1994), quoting *Robertson v. Gaston Snow & Ely Bartlett*, 404 Mass. 515, 524, cert. denied, 493 U.S. 894 (1989).[48] Finally, at the time the final Trust Agreement was prepared and signed, GFM believed Mintz was communicating with Jeremy and advising him of the terms—had they known otherwise, GFM would have ensured that they directly informed Jeremy of the terms. A2955:10-15; A3004:2-9; A2827:4-12. Accordingly, GFM believed the final, executed Trust Agreement represented Jeremy's intent. A2955:16-18.

[48] Mintz's misrepresentations to GFM concerning Mintz's allegiances to Jeremy are fully discussed in Section II.C.1 above and incorporated by reference here.

CONCLUSION

For the reasons above, Petitioner respectfully requests reversal of the judgment below and reformation of the Trust as requested. Further, to the extent that this Court reverses the judgment entered by the Chancery Court, this Court should vacate the July 19, 2023 fee order awarding the Fiduciaries' fees on the grounds the that Chancery Court's ruling was based on the facts that the ruling was "resolved in [Fiduciaries'] favor." Ex. C at 55:16-56:3.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 24, 2023, true and correct copies of the foregoing were served upon the following counsel of record via File & ServeXpress:

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