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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	)	C.A. No. 280, 2023
	)	On Appeal from the Court of Chancery of the State of Delaware
	)	C.A. No. 2021-0354-KSJM

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Dated: November 9, 2023

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

GLOSSARY

Andrew: Andrew Paradise

Andrew Trust: The Andrew Paradise Dynasty Trust

Andrew Trust Agreement: The Andrew Paradise Dynasty Trust Agreement

Annino: Patrica M. Annino, Esq.

Brothers: Andrew Paradise and Jeremy Paradise

Chafkin: Casey Chafkin

Edelman: Charlotte J. Edelman, Esq.

Elliott: Crosby Elliott, Esq.

Fiduciaries: Casey Chafkin, Charlotte J. Edelman, Esq., and John R. Pomerance, Esq.

GFM: Gordon, Fournaris & Mammarella, PA

Glover: Alison I. Glover, Esq.

Gordon: Michael M. Gordon, Esq.

Hayward: Daniel F. Hayward, Esq.

Jeremy: Jeremy Paradise

Jeremy Trust: The Jeremy Paradise Dynasty Trust

Jeremy Trust Agreement: The Jeremy Paradise Dynasty Trust Agreement

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

Pomerance: John R. Pomerance, Esq.

Skillz: Skillz Inc.

Steinkrauss: Kurt R. Steinkrauss, Esq.

Trusts: The Andrew Paradise Dynasty Trust and The Jeremy Paradise Dynasty Trust

Trust Agreements: The Andrew Paradise Dynasty Trust Agreement and The Jeremy Paradise Dynasty Trust Agreement

NATURE OF PROCEEDINGS

Jeremy's reformation claims, which were a misguided attempt to gain control of "all the money" in the Jeremy Trust, were correctly rejected by the Court of Chancery (the "Court"). Under well-established Delaware law, Jeremy was required to prove by clear and convincing evidence that he had a "specific prior understanding" at the time he executed the Jeremy Trust Agreement and that the agreement failed to reflect his intent through mistake or fraud.[1]

After a full trial on Jeremy's reformation claims, which included 258 trial exhibits, live testimony from five witnesses (including Jeremy), video deposition testimony from three witnesses, deposition transcripts from ten witnesses, twenty-three stipulated facts, pre-trial and post-trial briefing, and closing arguments, the Court unequivocally found "Jeremy has failed to prove that he had **any intent at all when executing the [Jeremy Trust Agreement],** and *ex post* desires will not suffice."[2] The Court methodically evaluated each piece of evidence on which Jeremy relied, explained why such evidence failed to support Jeremy's purported intent, and found the "strongest inference from the record is that Jeremy had *no* clear intent regarding Section 12(h) at the time he executed the Jeremy Trust

[1] *See, e.g.*, *Parke Bancorp Inc. v. 659 Chestnut LLC*, 217 A.3d 701, 710 (Del. 2019).
[2] January 31, 2023 Post-Trial Memorandum Opinion ("Op.") at 2 (emphasis added).

Agreement because he had not read the documents, had no interest in their contents, and was focused on other life events."[3] Jeremy failed to establish he had "any intent at all," much less by clear and convincing evidence, and the Court therefore denied Jeremy's claims seeking reformation.[4]

Jeremy noticed this appeal on August 10, 2023, and filed his opening brief on October 10, 2023. To avoid the "clear error" standard applicable to factual determinations, Jeremy's appeal attempts to frame the Court's decision as an "unprecedented" application of Delaware law.[5] This argument, however, ignores clear Delaware precedent addressing the requirements for reformation and the Court's extensive factual findings. Accordingly, Jeremy's appeal predominantly asks this Court to overturn the Court's factual findings as "clear error."

[3] *Id.* at 26-36.
[4] *Id.* at 2, 36, 38-39.
[5] Appellant's Opening Brief ("Open. Br.") at 5.

SUMMARY OF ARGUMENT

I. **Denied**. The Court unequivocally found that "Jeremy has failed to prove that he had any intent at all when executing the agreement, and *ex post* desires will not suffice."[6] Jeremy was required to show, by clear and convincing evidence, that he "came to a specific prior understanding that differed materially from the written agreement."[7] The Court's factual determination that Jeremy failed to establish he had any intent whatsoever when he executed the Jeremy Trust Agreement precludes reformation thereof.

There is nothing "unprecedented" about requiring a party to establish by clear and convincing evidence that he had a "specific prior understanding" of the provision of the agreement he seeks to reform. Indeed, if a party never had a "specific prior understanding" with respect to the at-issue provision, a party cannot show he was mistaken.[8] Delaware law requires a party to show a "specific prior understanding" so that courts know "exactly what terms to insert in the contract rather than being put in the position of creating a contract for the parties."[9] And, although evaluating intent in the trust modification context generally does not

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[6] Op. at 2.
[7] *Id.* at 25 (citing *Parke Bancorp Inc.*, 217 A.3d at 710); *see also Nationwide Emerging Managers, LLC v. Northpointe Holdings, LLC*, 112 A.3d 878, 891 (Del. 2015), *as revised* (Mar. 27, 2015); *Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1152 (Del. 2002).
[8] *See* Op. at 25 (citing *Cerberus*, 794 A.2d at 1155).

require the "expression [of intent to] be in formal terms," the "[e]xtrinsic evidence must establish, by clear and convincing evidence and with ***particularity***, that a mistake 'affected…***specific terms*** in the document.'"[10] Thus, Jeremy's position that requiring him to establish a "particularized expectation about Section 12(h)" is an "impossibly high bar that is unprecedented under Delaware law" is wrong and ignores the caselaw on which the Court relied throughout its decision.[11]

Jeremy's attacks regarding the Court's application of *Cantor* are similarly misguided. Throughout its opinion, the Court painstakingly evaluated the evidence to determine whether Jeremy established he had an expectation that he would "control" the Jeremy Trust when he executed the Jeremy Trust Agreement and found he did not.[12] The Court then noted that Jeremy's *ex post* statements about his "general understanding" of the Jeremy Trust are factually analogous to arguments

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[9] *Cerberus*, 794 A.2d 1141 at 1152.

[10] *In re Est. & Tr. of Kalil*, 2018 WL 793718, at *6, 9 (Del. Ch. Feb. 7, 2018) (Magistrate's Report), *adopted*, 2018 WL 11028294 (Del. Ch. June 11, 2018) (emphasis added).

[11] Open. Br. at 23-24.

[12] *See, e.g.*, Op. at 26 ("To recap, Jeremy claims he 'intended to be in charge of (or maintain control over) the Jeremy Trust' … None of these communications evidence the intent Jeremy seeks to show in this litigation."); *see also id.* at 24, n.138 (discussing Jeremy's burden to show he actually intended to have control of the Jeremy Trust).

rejected in *Cantor*.[13] The Court's application of *Cantor* is consistent with Delaware law.

II. **Denied.** The Court correctly found Jeremy lacked any intent with respect to the Jeremy Trust Agreement—general or specific.[14] Indeed, Jeremy essentially concedes he cannot establish he had any intent to "control" the Jeremy Trust at the time, instead arguing that his attorneys, GFM, somehow had a "clear intent" with respect to the Jeremy Trust.[15] Delaware law is clear, however, that the only intent relevant to Jeremy's reformation claims is his own.[16] Nor did the Court commit "clear error" in finding Jeremy's *ex post* communications related to the Jeremy Trust, which were both vague and contradictory, were insufficient to meet his burden of establishing his intent at the time he executed the Jeremy Trust Agreement.

III. **Denied**. Whether based on mistake or fraud, Jeremy was required to meet the standard for reformation under Delaware law.[17] Namely, Jeremy was required to show by clear and convincing evidence that a mistake of fact or law caused him to sign the Jeremy Trust Agreement because, as written, he thought

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[13] Op. at 36-37 (citing *Cantor Fitzgerald, L.P. v. Cantor*, 2000 WL 307370, at *7-9 (Del. Ch. Mar. 13, 2000)).
[14] *Id.* at 2.
[15] Op. at 5.
[16] *Kalil*, 2018 WL 793718, at *9.
[17] *Cerberus*, 794 A.2d at 1151-52.

Article 12(h) reflected his intent.[18] Even under a traditional fraud theory, Jeremy was required to show that he genuinely intended to control the Jeremy Trust and that he relied on misrepresentations regarding the same to his detriment.[19] Because the Court found Jeremy failed to establish he had any intent with respect to the Jeremy Trust Agreement when he signed it, and Jeremy "cannot show that he relied on any representations made to him throughout the trust agreement drafting process," the Court correctly rejected Jeremy's fraud claim.[20]

[18] Op. at 24-25; *Parke Bancorp*, 217 A.3d 701, 710.
[19] Op. at 24 n.138 (citing *In re Swervepay Acq., LLC*, 2022 WL 3701723, at *23 (Del. Ch. Aug. 26, 2022)).
[20] Op. at 2, 38.

STATEMENT OF FACTS

A. Jeremy and Andrew Agreed to Establish the Trusts

i. Andrew Negotiated for Jeremy to Transfer His Skillz Shares into a Trust Out of Concern for Jeremy's Behavior

In 2012, Andrew co-founded a company that later became known as Skillz.[21] At Andrew's direction, Jeremy received 5% of the equity of Skillz when it was still a private company.[22]

Over the years, Jeremy's behavior, including his alcohol consumption, marital discord, and spending habits, raised concerns among his family and friends regarding Jeremy's physical and financial wellbeing.[23] Jeremy frequently "squander[ed] away the money he [had] access to" and would then turn to Andrew for loans.[24] After hearing testimony, the Court confirmed "it was obvious that both Andrew and Pomerance genuinely held such beliefs and concerns regarding Jeremy."[25] Out of concern, Andrew sought to have Jeremy transfer his Skillz shares (which were illiquid at the time but had potential to be very valuable) into a trust to protect Jeremy and his family—a concept that Jeremy initially resisted.[26]

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[21] Op. at 3.
[22] *Id.*
[23] Op. at 2-3; *see also, e.g.*, A3373:1-19, A3384:14-A3386:10; B0001-08; B0155, 165, 168.
[24] Op. at 2-3.
[25] *Id.* at 3.
[26] *Id.* at 3-4.

For instance, in May 2018, Jeremy asked Andrew for yet another loan, this time related to his home.[27] In response, Andrew offered Jeremy two options, one of which required Jeremy to transfer "the [loan] property + your skillz stock [] into a trust."[28] Jeremy rejected Andrew's offer, stating that "skillz stock never was discussed going into trust," and telling Andrew not to "bring [Andrew's] opinions about [Jeremy's] money management or business acumen into it either . . .[You are] not taking anything of mine and putting it into a trust."[29]

It was not until later that year, when Jeremy once again needed money, that Jeremy became receptive to putting his Skillz stock into a trust for his protection.[30] Specifically, Andrew told Jeremy he would facilitate Jeremy selling some of Jeremy's then-illiquid Skillz shares, but he would do so only if Jeremy agreed to put his remaining Skillz shares into a trust.[31] Jeremy agreed, and the Brothers discussed proposed terms for the trust.[32]

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[27] *Id.* at 3.
[28] *Id.* at 4 (citing B0009).
[29] *Id.* (citing B0009, 16-17).
[30] Op. at 4.
[31] *Id.*
[32] *Id.*

ii. Preliminary Deal Points Exchanged Whereby Andrew Had Control Over More Than 50% of the Trust's Assets

On or about December 11, 2018, Andrew emailed Jeremy to "captur[e] [the Brothers'] conversation" prior to speaking with an estate planning attorney.[33] Andrew proposed:

> *move your Skillz stock into a trust whose beneficiary is your unborn son
>
> *make you the lead trustee & **me the other trustee in charge of managing it**
>
> *execute a sale of $2M worth of stock in the next 90 days, **$1.6M for the home TBD to be managed by the trustees**, $400K for discretionary purposes to be managed by the lead trustee **upon agreed upon categories**
>
> *future sales of stock proceeds to be managed 50% by the lead trustee **solely upon agreed upon categories and 50% to [*sic*] by the trustees**[34]

At trial, Jeremy relied almost exclusively on this December 2018 email, drafted by Andrew (not Jeremy), as evidence of his purported intent to maintain "control" over the Jeremy Trust.[35] Jeremy testified he understood these preliminary deal points to mean he was to be the "lead trustee" that would be "in charge of the trust" and that Andrew "would be the backup person in case I was killed."[36] But the

[33] Op. at 4.
[34] A0061-62 (emphasis added).
[35] A3467-71, 73, 85-88, 96, 99.
[36] A3071:18-3072:3.

preliminary terms reflected in this email specifically did not provide Jeremy with unimpeded "control" over the trust's assets as "lead trustee." Rather, Andrew would also be a trustee "in charge of managing" the trust. And, as outlined in the email, Jeremy needed Andrew's express approval to take any action with respect to more than 50% of the proceeds of any stock sales. Thus, on its face, these preliminary deal terms evidence significant control vested in Andrew and limited control by Jeremy to investment categories agreed upon in advance by Andrew.[37] The only response from Jeremy to this email addressed the timing of the sale of Skillz stock relative to the setup of the trust—*not* the substantive terms of control Andrew described.[38] Andrew's ability to approve all decisions on more than 50% of the trust's assets in this initial proposal makes sense given that the purpose of the trust from Andrew's perspective was to protect against Jeremy's poor decision-making.[39]

A few months later, on February 20, 2019, Jeremy text-messaged his mother that he was "[t]alking to Andrew at 9pm [a]bout skillz stock sale[.] Hopefully [i]t's not going to devolve in huge argument."[40] Jeremy's mother responded, "Just say yes," to which Jeremy responded: "I'm not going to say yes to what [Andrew]

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[37] *See* Op. at 33 (finding the most logical inference from this email is an initial agreement whereby the Brothers would share control of the proposed trust).
[38] *Id*.
[39] A3373:1-A3372:13.

wants [a]s it won't work. He wants me to put all my stock in a trust for my unborn child [w]hich will not let me tap it if I need it[.] That makes no sense."[41] Jeremy's contemporaneous message to his mother demonstrates Jeremy understood he would not have "control" over the assets in his trust, and could not "tap it if [he] need[ed] it," directly contradicting Jeremy's *ex post* interpretation of the December 2018 email at trial.[42]

iii. Jeremy and Andrew Were Told the Terms in the December 2018 Email Would Not Work and Agreed to a New, Two-Trust Deal

Andrew then copied Mintz into the discussion of the contemplated trust.[43] Pomerance responded to Andrew's email asking who the client would be for the requested legal services, and Andrew responded to the group (including Jeremy) that Mintz should "set [Andrew] up for billing."[44] Pomerance and Steinkrauss (individually and on behalf of Mintz) testified that Mintz understood it represented Andrew.[45]

On or around February 2019, Steinkrauss informed the Brothers that the structure proposed in their December 2018 email would not work, and Jeremy

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[40] Op. at 5 (citing B0019).
[41] *Id*. (citing B0020-21).
[42] Open. Br. at 32-34; A3467-68.
[43] A0057.
[44] *Id.*
[45] A3287:3-7, A3381:3-A3383:15, A3414:4-A3415:3.

could not be the trustee of his own trust.[46] Andrew then agreed, in addition to facilitating Jeremy's liquidation of $1 million in Skillz shares, to create a separate trust funded with approximately 2 million shares of ***Andrew's*** Skillz stock for Jeremy's benefit in exchange for Jeremy's agreement to transfer the remainder of Jeremy's Skillz shares into a trust.[47] Jeremy admitted at trial that Andrew offered to establish this trust for Jeremy's benefit to "try[] to get [Jeremy] to go do the deal."[48]

Andrew testified that when they reached this new deal, Jeremy agreed Andrew would be in control of both Trusts given the several million dollar value Andrew personally added to the deal.[49] Andrew testified he had multiple conversations with Jeremy whereby Jeremy specifically agreed Andrew would control both Trusts.[50] This agreed-upon structure was important for Andrew to protect against what he perceived as Jeremy's concerning behavior.[51] Jeremy offers no explanation why Andrew added 2 million Skillz shares to the deal and still agreed to get Jeremy $1 million for Jeremy's Skillz shares in exchange for *less* control and protections than contemplated by Andrew's December 2018 email.

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[46] Op. at 6.
[47] *Id.*
[48] A3210:17-22, A3213:13-A3214:8; B0316.
[49] A3370:1-A3372:15.
[50] Op. at 16.
[51] *Id.*

B. Initial GFM Drafts Reflected GFM's Typical Practice, Were Not Based on Any Input from Jeremy, and Jeremy Did Not Read Them

The Brothers retained Delaware law firm GFM to draft the trust documents.[52] GFM attorney, Hayward, confirmed that GFM was not provided the December 2018 email and the Jeremy Trust Agreement GFM drafted looked nothing like the terms in that email.[53] GFM's attorneys also testified that Jeremy did not express any intent to anyone at GFM with respect to his ability to "control" the Jeremy Trust.[54] Nor did Jeremy have any specific recollection of any conversation with GFM.[55] Indeed, GFM's only recollection of who should "control" the Jeremy Trust was attorney Gordon's testimony that he recalled being told Jeremy was a "problem brother" with financial issues, and there were concerns raised about Jeremy exercising control over the assets of the Jeremy Trust when the Brothers were referred to GFM by J.P. Morgan.[56]

On March 6, 2019, GFM emailed the Brothers draft engagement letters, which attached a memorandum from Gordon outlining GFM's typical trust terms "to provide [Jeremy] with a structure for the Trust and to highlight some key issues

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[52] *Id.* at 7.
[53] A3036:23-A3037:2.
[54] A2954:15-A2955:4, A3042:14-23; A3051:21-A3052:1; A3054:9-A3055:6.
[55] *Id.* at A3064:10-19, A3173:7-14.
[56] A2954:13-22, A2965:4-9; B0023 (referring to Jeremy as "problem brother").

for [Jeremy] to consider as part of the Trust planning."[57] In the outline, the powers of a Trust Protector were described, and Gordon stated: "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."[58] Gordon testified that GFM's initial outline consisted of GFM's "default language," and was not based on any input from Jeremy.[59] At trial, Jeremy confirmed he did not recall reading the March 6, 2019 outline—or any other document GFM sent to him for that matter.[60] Jeremy did not respond to GFM's email, discuss it with anyone, or allege he formed any understanding with respect to his ability to remove and replace the Trust Protector based on reading the outline.[61]

GFM also produced notes of an internal March 11, 2019 meeting that included the notation: "R+R (1) Grantor (2) Grantor's Brother."[62] Again, no one at GFM recalled anyone telling GFM to draft the Jeremy Trust in that manner.[63] Instead, Hayward testified: "to the best of my recollection, [we] just made some

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[57] Op. at 7.
[58] *Id.* at 8.
[59] A2962:6-24; Op. at 27-28.
[60] Jeremy's claim that he recalled reading the March 6, 2019 outline (Op. at 27-28) is contradicted by his trial and deposition testimony. A3173:23-A3174:2; A1451:23-A1452:3, A1625:9-17.
[61] Op. at 27-28.
[62] A0134.
[63] A2946:13-21; A2950:5-18, A2991:3-10.

assumptions to get something on paper."[64] Gordon similarly testified that, in a situation like this one where the beneficiaries are minors, GFM often puts a family member, such as a sibling, in backup positions to remove and replace the Trust Protector.[65]

On March 14, 2019, Hayward emailed the Brothers initial drafts of the Trust Agreements for "review and comment."[66] The initial draft of the Jeremy Trust Agreement included GFM's default language for Article 12(h), which placed the Grantor (Jeremy) in the first position to remove and replace the Trust Protector.[67] Hayward confirmed he did not have any conversation with Jeremy regarding Article 12(h) or control of the Jeremy Trust.[68] And Jeremy testified he read only the first few pages of the initial draft of the Jeremy Trust Agreement, did not understand them, and therefore did not read any further.[69] The Court found Jeremy clearly did not familiarize himself with any terms of the Jeremy Trust Agreement, including Article 12(h).[70] Nor did Jeremy contact GFM or anyone else to attempt to understand the draft.[71]

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[64] A2991:20-A2992:6.
[65] A2946:8-21.
[66] Op. at 9.
[67] *Id.*
[68] A3041:5-A3042:23.
[69] A3092:18-A3093:3.
[70] Op. at 10, n.55.
[71] A3174:9-21.

C. Andrew Told Jeremy He was Making Changes to the Initial Draft of the Jeremy Trust and Encouraged Jeremy to Read His Revisions

Unlike Jeremy, Andrew reviewed the initial draft of the Jeremy Trust Agreement and noted that it did not accurately reflect the Brothers' deal because Andrew was supposed to be in first position to remove and replace the Trust Protector under both Trust Agreements.[72] On March 18, 2019—approximately two business days after GFM circulated initial drafts—Andrew sent Jeremy a text message asking if Jeremy had reviewed the documents.[73] Jeremy stated he had not yet read GFM's initial drafts.[74] Andrew then told Jeremy the drafts still required input, that "they're fixing it," and Jeremy could wait to review the updated drafts of the Trust Agreements later that week so he could review the updated versions incorporating Andrew's edits.[75] At trial, Jeremy confirmed he understood this text message meant that "changes [were] being made" to the Jeremy Trust Agreement.[76] And Jeremy confirmed to Andrew that once Jeremy received the revised drafts, he would "read them and be ready to sign."[77] Thus, Andrew—who understood at the time that Jeremy would review the drafts— affirmatively asked

[72] Op. at 10.
[73] *Id.*
[74] *Id.*
[75] *Id.* (citing A0203-04).
[76] A3177:13-16, A3178:17-23.
[77] Op. at 10.

Jeremy to review the revised draft that put Andrew in the first position to remove and replace the Trust Protector.

The next day, Andrew emailed GFM and Jeremy, informing them that Mintz would be contacting GFM to provide Andrew's input on the draft Trust Agreements.[78] At trial, Jeremy again confirmed he understood from Andrew's email that changes were being made to the Jeremy Trust Agreement at Andrew's direction.[79] Andrew therefore informed Jeremy both via text and email that, through Mintz, he would be making edits to the Jeremy Trust Agreement.

Later that day, Glover of Mintz contacted GFM and provided Andrew's input to the initial drafts, including his edit to Article 12(h) of the Jeremy Trust Agreement.[80] On March 20, 2019, GFM incorporated Andrew's changes and sent the revised drafts—including redlines—to Glover for her review.[81] That same day, Glover sent the revised drafts and redlines prepared by GFM to Jeremy and Andrew.[82] The redline sent to Jeremy clearly showed that Article 12(h) had been changed to provide the authority to "The Grantor's Brother," *i.e.*, Andrew, in the first instance, and the "Grantor~~'s Brother~~", *i.e.*, Jeremy, thereafter (coloring and

[78] *Id.* at 11 (citing A0210).
[79] A3178:12-23.
[80] Op. at 11.
[81] *Id.*
[82] *Id.*

alteration in original).[83] It is undisputed that Jeremy received this redline.[84] And as the Court found, "[a]nyone who opened and scrolled through the redline would have been able to identify that Section 12(h) was edited and [understood] the nature of that edit."[85] At trial, Jeremy admitted that Andrew's actions of reviewing the Trust Agreements, calling in the changes he wanted, expressly telling Jeremy changes were being made, and asking Jeremy to review the documents were those of a reasonable businessperson, and Andrew was not trying to hide anything.[86]

D. Jeremy Executed the Jeremy Trust Agreement After Receiving Multiple Drafts Showing Andrew with the Primary Power to Remove and Replace the Trust Protector

On March 28, 2019, GFM circulated updated drafts of the Trust Agreements to the Brothers for review, which incorporated edits from J.P. Morgan.[87] This draft of the Jeremy Trust Agreement also had Andrew in the first position to remove and replace the Trust Protector.[88]

On April 2, 2019, Andrew again texted Jeremy to encourage him to review J.P. Morgan's edits, asking Jeremy: "did you look at the docs btw? We gotta setup

[83] *Id.* at 11-12 (citing A0374).
[84] A3179:14-A3180:1.
[85] Op. at 12.
[86] A3184:17-A3185:1.
[87] Op. at 12 (citing B0024).
[88] *Id.*

the trusts."[89] In response, Jeremy told Andrew "I'll sign whenever you tell me they are ready…I'm just going to trust your edits."[90] At trial, Jeremy testified regarding his complete disinterest in the contents of the Jeremy Trust Agreement when it was being drafted and explained he simply "did not want to go and get involved with all of this stuff," "did not feel like participating or editing anything anymore," and "hadn't paid … that much attention in the beginning of the creation process of [the Jeremy Trust]."[91]

On April 9, 2019, GFM sent the Brothers execution versions of the Trust Agreements for final review and signature.[92] Like the prior two drafts, the execution version of the Jeremy Trust Agreement had Andrew in the first position to remove and replace the Trust Protector.[93] Jeremy was in possession of the final version of the Jeremy Trust Agreement a full two weeks before he executed it.[94] Hayward testified that he called Jeremy to confirm he was okay with how things were proceeding and the only question Jeremy asked was how close GFM was to

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[89] *Id.* at 13 (citing A0640).
[90] *Id*. (citing A0640-42). Notably, the changes Jeremy told Andrew he would "trust" related to J.P. Morgan and had nothing to do with Article 12(h)—which had been changed two weeks earlier. Jeremy's false suggestion that Andrew used this text message to take advantage of Jeremy ignores the drafting timeline. *See* Open. Br. at 17.
[91] *Id.*; *see also* A3104:14-A3105:3, A3115:14-A3116:2, A3184:1-7.
[92] Op. at 14.
[93] *Id.*
[94] *Id.*

finishing.[95] Thus, despite receiving every draft of the Jeremy Trust Agreement, being represented by counsel at GFM, and having ample time to review the final documentation, Jeremy did not read the documents, ask any questions, or provide any feedback to his attorneys before executing the Jeremy Trust Agreement on April 23, 2019.[96]

E. Jeremy Received the Benefit of His Bargain: $1 Million For His Private Stock Sale and Beneficiary Status in the Andrew Trust

On May 10, 2019, Jeremy and Andrew executed a Stock Power transfer in which Jeremy transferred 3,006,620 Skillz shares to the Jeremy Trust, and Andrew transferred 2,036,025 Skillz shares into the Andrew Trust for Jeremy's benefit.[97] Also as agreed, on May 23, 2019, Jeremy sold certain Skillz shares for $1 million in a private sale facilitated by Andrew.[98] That same day, Jeremy excitedly texted Pomerance: "I got my money!!!!! :)."[99] At the time Jeremy transferred his Skillz shares to the Jeremy Trust, the value of the (then-illiquid) shares was approximately $3,006,620.[100]

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[95] A3050:11-A3052:1.
[96] Op. at 7-14; *see also* A3051:7-A3052:1, A3172:6-A3174:21.
[97] Op. at 15.
[98] A0870.
[99] B0153.
[100] A0887; A0839.

F. Jeremy Confirmed He Understood Andrew Controlled the Jeremy Trust in Connection with Requesting Another Loan from Andrew

Approximately 6 to 7 months after receiving the $1 million from his stock sale caused by Andrew, Jeremy already was out of money and asked Andrew for a $125,000 loan.[101] On December 14, 2019, Jeremy texted Pomerance because he was upset Pomerance told Andrew about his ongoing drinking.[102] According to Jeremy, because Pomerance told Andrew that Jeremy was day-drinking, Andrew was now threatening to withhold his latest loan.[103] Pomerance responded that he told Andrew because they "worry about [his] health" and it "[c]ame from concern-only," but that Andrew would lend him the money.[104] During the exchange, Jeremy acknowledged to Pomerance that Jeremy understood that Andrew was in the control position of the Jeremy Trust, stating: "Btw I signed millions in Skillz shares over to him…Cause of trust."[105]

[101] A3203:16-23; B0231-37.
[102] B0155-60.
[103] B0176, 181-84; A3203:21-A3204:4.
[104] B0165, 168, 208-09.
[105] B0210-11.

G. The Value of Skillz Increased and Jeremy Began to Demand Large Distributions and Investments from the Trusts

In late 2020, Skillz went public, which greatly increased the value of the Skillz shares held in the Trusts.[106] On December 17, 2020, the day after Skillz went public, Jeremy excitedly texted Pomerance, "My stakes worth like $90m???? Wtf."[107]

At this time, Jeremy began to insist to Pomerance that he was entitled to all the income both Trusts generated, and that he would go to court if he did not get what he wanted.[108] As to the Jeremy Trust, of which he is not a beneficiary, Jeremy complained, "What's the point of a trust if it doesn't provide benefit to me[?]"[109] Around the same time, Pomerance testified Jeremy began to badger him continually about large distributions from the Trusts, including requests for $2.5 to $3 million per year, purchasing a house in Nantucket, purchasing a partial ownership in an airplane to take him back and forth, and payment of private chef bills that Jeremy claimed were for his infant child.[110]

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[106] Op. at 16.
[107] *Id.*
[108] *Id.* at 16-17; A0919, 922.
[109] Op. at 17 (citing A0925).
[110] *Id.*; *see also* B0309-314; B0522-23.

H. Jeremy Retained Counsel, Reviewed the Trust Agreements, and Did Not Claim the Jeremy Trust Agreement Contained a Mistake

On January 25, 2021, in reaction to Pomerance's decision not to have one of the Trusts purchase a residential investment property for $2 million at Jeremy's request, and Pomerance's appointment of Chafkin and Edelman as fiduciaries of the Jeremy Trust, Jeremy sent Andrew a text message stating:

> This is a binary decision you need to make. Honor the deal we agreed to together when we setup the trusts. I.e. remove [Edelman] and [Chafkin] from my trust and let me continue to build the real estate management company with the 50 percent of assets We agreed are under my control or I'm going to be forced to hire attorneys and get this straightened out by a probate judge."[111]

In other words, Jeremy acknowledged: (1) he did not believe he was in "control" of all assets in the Jeremy Trust; and (2) Andrew (not Jeremy) had the authority to remove and replace the fiduciaries of the Jeremy Trust.

The next day, on January 26, 2021, Jeremy retained Elliott to review the Trust Agreements and provide legal advice relating to the Trusts.[112] Jeremy had access to all of GFM's drafts of the Jeremy Trust Agreement at the time and testified he "sent a bunch of documents" to Elliott's firm when he retained them.[113]

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[111] Op. at 19 (citing B0246).
[112] B0524.
[113] B0091; A3142:9-22, A3157:19-A3158:3.

Two days later, Elliott sent Jeremy a "summary of existing trusts."[114] Elliott provided Jeremy with his analysis of the trust dispute the following day.[115] After receiving this summary and analysis of the Jeremy Trust from his attorney, there is no evidence that Jeremy or his counsel at the time claimed to anyone that there was a mistake in Article 12(h), and Jeremy should be in the first position to remove and replace the Trust Protector.

On February 2, 2021, Jeremy engaged another specialist trust attorney, Annino, to review the Jeremy Trust Agreement and provide legal advice.[116] On February 5, 2021, Annino also received an executed version of the Jeremy Trust Agreement from Steinkrauss.[117] Jeremy's privilege log shows Annino provided analysis to Jeremy of the "key trust provisions" and summaries of "legal arguments" over the coming weeks.[118] Again, despite retaining a second law firm to review the key provisions of the Jeremy Trust, there is no evidence that, as of February 2021, Jeremy or either of his attorneys claimed to anyone that there was a mistake in Article 12(h).

Indeed, on February 28, 2021, Jeremy, with the assistance of Annino, prepared a memorandum titled the "History of the Andrew Paradise Dynasty Trust

[114] B0524.
[115] *Id.*
[116] *Id.*
[117] B0247.

and Jeremy Paradise Dynasty Trust," which he sent to his mother.[119] Jeremy stated: "I decided to document the history of the two trusts. Attached is a timeline and what actually happened to the best of my recollection to create the two trusts."[120]

Jeremy then detailed his version of the formation of the Trusts and his current complaint.[121] Jeremy stated Andrew told Jeremy "he could help him liquidate $1M worth of his shares but he would only do so if Jeremy agreed to put the remaining shares in a trust" and that "Jeremy went along with Andrew's proposal to gain some liquidity."[122] Notably absent from Jeremy's history of "what actually happened"—which was drafted after reviewing the Jeremy Trust Agreement with two different law firms—is any statement by Jeremy that he intended to maintain control over the Jeremy Trust or that there was a mistake in Article 12(h).[123] Instead, Jeremy acknowledged Andrew's control, and wrote: "Jeremy seeing that his brother had exhibited more and more erratic behavior decided that the control of the trusts had to change."[124]

At trial, Pomerance confirmed that in January and February 2021, Jeremy never claimed that he was supposed to be in the first position to remove and

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[118] B0525-26.
[119] Op. at 19 (citing B0315).
[120] B0315.
[121] Op. at 19 (citing B0316-17).
[122] B0316.
[123] B0316-17.

replace the Trust Protector, that Jeremy should be in control of the Jeremy Trust, or that he had been tricked or made a mistake.[125] Rather, after the dispute arose, Jeremy explained to Pomerance he was desperate for cash when he formed the Jeremy Trust and would have signed anything to get the million dollars.[126]

I. Jeremy Invented His "Control" Story After Reviewing GFM's File

On March 19, 2021, Jeremy and Annino received GFM's file regarding its representation of Jeremy.[127] Shortly thereafter, a new theory emerged. Jeremy sent Pomerance a text message referencing the March 20, 2019 change to the initial draft of Article 12(h) of the Jeremy Trust and alleged the document should be modified to give Jeremy the power to remove and replace the Trust Protector.[128] Pomerance testified this was the first time Jeremy ever claimed he should be in the first position to remove and replace the Trust Protector.[129] On the same day Jeremy filed his Petition, Jeremy's private text messages with his girlfriend stated his intent for his lawsuit was to "squeeze Andrew into a vise" to get his hands on "both trusts…and all the cash in it."[130]

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[124] Op. at 20 (citing B0317).
[125] A3400:24-A3401:22.
[126] *Id.* at A3402:3-16.
[127] Op. at 20.
[128] *Id.* (citing A0956).
[129] *Id.*
[130] B0340-41, B0402-06.

J. The Post-Trial Opinion

After a fulsome trial, on January 31, 2023, the Court issued a 39-page Post-Trial Memorandum Opinion that carefully assessed the evidence presented by the parties. The Court unequivocally rejected Jeremy's narrative and found "Jeremy has failed to prove that he had any intent at all when executing the [Jeremy Trust Agreement.]"[131] The Court further found the "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."[132] The Court continued that Jeremy's "lack of understanding" regarding the contents of the Jeremy Trust Agreement and "after-the fact regret" is not the sort of clear intent needed to support reformation under Delaware law, and declined Jeremy's invitation "to rewrite trust terms which [he] comes to dislike years after executing [the] trust agreement."[133]

[131] *Id.* at 2.
[132] *Id.* at 36.
[133] *Id.* at 35-36.

ARGUMENT

I. The Court Applied the Correct Reformation Standard.

A. Question Presented

Whether the standard for reformation under Delaware law required Jeremy to show by clear and convincing evidence that he "came to a specific prior understanding that differed materially from the written agreement," and whether the Court's factual finding that Jeremy "failed to prove that he had any intent at all when executing the [Jeremy Trust Agreement]" precludes Jeremy's reformation claims.[134]

B. Scope of Review

The determination of the applicable standard for reformation claims under Delaware law is a question of law and subject to *de novo* review.[135] The Court's factual determinations are reviewed for "clear error."[136]

C. Merits of Argument

1. Jeremy's Failure to Establish Any Intent with Respect to the Jeremy Trust Precludes His Reformation Claims.

It cannot reasonably be disputed that Jeremy was required to establish his intent with respect to the Jeremy Trust Agreement at the time he executed it.

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[134] Op. at 2, 25-26, 36.
[135] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010).
[136] *Id.*

Delaware courts have uniformly held reformation is an equitable remedy that "requires the [party seeking reformation] to **establish by clear and convincing evidence**: (1) that a mistake of fact or law…affected the specific terms of the document; and (2) **the settlor's intention**."[137] "A settlor's intent at the time a trust is established is the controlling inquiry; an intent developed after creating a trust is irrelevant for purposes of construing the trust."[138] A party who "has no belief [at all] is not mistaken."[139]

The Court's factual finding regarding Jeremy's intent with respect to the Jeremy Trust Agreement was unequivocal: "Jeremy has failed to prove that he had **any intent at all** when executing the agreement[.]"[140] Under Delaware law, this factual finding is dispositive of Jeremy's mistake and fraud claims seeking reformation. Because Jeremy cannot show the Court committed "clear error" in

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[137] *Kalil*, 2018 WL 793718, at *9 (emphasis added); *see also Parke Bancorp*, 217 A.3d at 712 ("Reformation is based on expressed intent[.]").
[138] Op. at 25 (citing *Raymond L. Hammond Irrevocable Trust Agreement*, 2016 WL 359088, at *5 (Del. Ch. Jan. 28, 2016); *Emmert v. Prade*, 711 A.2d 1217, 1219 (Del. Ch. 1997) ("Plaintiff seeks reformation in order to bring the documents into conformity with an intention that arose (if at all) several years after the original contracts were executed. This is not the purpose of reformation.")).
[139] Op. at 25 (citing *Cerberus*, 794 A.2d at 1155).
[140] Op. at 2 (emphasis added).

finding Jeremy failed to meet his burden of establishing his intent by clear and convincing evidence, Jeremy's appeal must be denied.[141]

2. Jeremy Was Required to Show He Had a "Specific Prior Understanding" Regarding Article 12(h).

Jeremy's argument that requiring him to demonstrate he had a "particularized expectation" of the provision he sought to reform is "unprecedented" and amounts to an "impossibly high bar" similarly ignores both Delaware law and the factual findings of the Court.[142]

A party seeking reformation must show by clear and convincing evidence that he "came to a specific prior understanding that differed materially from the written agreement."[143] "Absent such an understanding, there cannot possibly be a basis for reformation."[144] Imposing the heightened clear and convincing evidentiary burden for a claim for reformation "preserve[s] the integrity of written agreements[.]"[145] Clear and convincing evidence of a "specific prior understanding" is required so the Court knows "exactly what terms to insert in the

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[141] *Bäcker v. Palisades Growth Capital II, L.P.*, 246 A.3d 81, 86, 95-96 (Del. 2021).
[142] Open. Br. at 23-24.
[143] Op. at 25 (citing *Parke Bancorp Inc*., 217 A.3d at 710); *see also Cantor*, 2000 WL 307370, at *8 ("Reformation, when granted, reforms an agreement to match the expectation and understanding of the party seeking reformation."); *Nationwide Emerging Managers*, 112 A.3d at 891.
[144] *Cantor*, 2000 WL 307370, at *8.

contract rather than being put in the position of creating a contract for the parties."[146] In other words, the requirement to prove the "actual agreement between the parties elucidates the specific correction the Court must make to the[] written agreement.[147] A party's inability to allege "'a definitive agreement of the parties to which the Court can refer when forming the Agreement' is fatal to a claim for reformation based on mistake[.]"[148] Thus, there can be no reformation when a party fails to point the Court to a "definitive, clear and particular agreement" with respect to the provision at issue.[149]

Notwithstanding this precedent, Jeremy argues it would be "unprecedented" to require him to demonstrate a specific understanding with respect to Article 12(h) of the Jeremy Trust Agreement.[150] Unsurprisingly, Jeremy fails to cite a single case in which reformation was granted where the party seeking reformation had no particularized understanding of the provision he sought to reform.

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[145] *Glidepath Ltd. v. Beumer Corp.*, 2018 WL 2670724, at *10 (Del. Ch. June 4, 2018).
[146] *Cerberus*, 794 A.2d at 1152.
[147] *AECOM v. SCCI Nat'l Holdings, Inc*., 2023 WL 6294985, at *6 (Del. Ch. Sept. 27, 2023).
[148] *Id.* at *8.
[149] *Id.*
[150] Open. Br. at 23-24.

Jeremy first attempts to rely on *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Est. Fund*.[151] But *Scion* does not support Jeremy's argument that he was not required to show any "specific prior understanding" with respect to Article 12(h) of the Jeremy Trust Agreement. In *Scion*, the parties specifically negotiated a waterfall provision governing compensation for the transaction, which was documented in emails and in the executed versions of the parties' first and second joint venture agreements.[152] In the third joint venture agreement between the parties, the waterfall provision from the second joint venture agreement was copied into the new agreement, but an attorney for one of the parties mistakenly made an edit that changed the economics of the waterfall provision.[153] The parties also entered into fourth and fifth joint venture agreements including the same error in the waterfall provision.[154]

After reviewing the record, the Court in *Scion* found that there was clear and convincing evidence the parties had not meant to change the economics of the waterfall provision from the parties' prior joint venture agreements, and the third, fourth, and fifth joint venture agreements therefore needed to be reformed.[155] Accordingly, in *Scion*, emails between the parties documenting their specific

[151] 68 A.3d 665 (Del. 2013).
[152] *Id.* at 670-71.
[153] *Id.* at 671-72.
[154] *Id.* at 673.

agreement with respect to the waterfall provision and the prior joint venture agreements provided the clear and convincing evidence of a "specific prior understanding" between the parties required for reformation. *Scion* does not, however, provide any support for the proposition that reformation may be granted even though the party seeking reformation had no prior understanding of the specific provision he seeks to reform.[156]

Jeremy's reliance on *Collins v. Burke*, a real property case involving a deed that incorrectly described a property line decided more than 40 years ago, fares no better.[157] Even under the language relied on by Jeremy, the *Collins* Court found the parties had "a **specific agreement** that the [property] line would be drawn wherever it had to be in order to establish a lot of three-quarters of an acre,

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[155] *Id.* at 672-75.

[156] *Scion*'s holding that a party's failure to read an agreement does not categorically bar a reformation claim does not help Jeremy. Open. Br. at 27-28. Unlike in *Scion*, where the party expressly negotiated the waterfall provision, read the first joint venture agreement, and reasonably believed the provision was faithfully carried over in subsequent agreements, the Court found Jeremy's intentional failure to read any draft of the Jeremy Trust Agreement was **evidence** that Jeremy had no particular expectation with respect to Article 12(h) and did not care about the contents of the Jeremy Trust Agreement. Op. at 36. The Court did not find Jeremy's failure to read the final draft of the Jeremy Trust Agreement categorically barred his reformation claims. However, the Court's factual finding that Jeremy failed to read drafts of the Jeremy Trust Agreement before he signed it, despite being asked and given multiple opportunities to do so, was sufficient to demonstrate Jeremy failed to act in "good faith and in accordance with reasonable standards of fair dealing," thereby precluding his reformation claims. Op. at 28; *Scion*, 68 A.3d at 676-77.

contiguous to the Burke property, and excluding the barn."[158] The parties' "unbending intentions as to lot size, which were clearly proven," provided the Court the "comparative standard" it needed to reform the agreement to fit the parties' expressed intentions regarding the sale.[159] Jeremy's vague references to "control" do not provide the clear and convincing evidence of a "specific prior understanding" necessary for the Court to know "exactly what terms to insert in the contract."[160]

Jeremy's reliance on Andrew's December 2018 email proposing initial trust terms as clear and convincing evidence of Jeremy's purported intent to "control" the Jeremy Trust is illustrative of the baseless nature of Jeremy's "general understanding" argument.[161] As discussed in Statement of Facts Section A(ii), *supra*, Andrew's December 2018 email does not contemplate Jeremy's unimpeded "control" of the Jeremy Trust. Rather, Andrew's December 2018 email contemplated a single trust whereby Andrew would serve as a co-trustee in charge of managing the trust, Andrew was given control of more than 50% of the trust's

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[157] 418 A.2d 999 (Del. 1980).
[158] *Id.* at 1002.
[159] *Id.* at 1002-03.
[160] *AECOM*, 2023 WL 6294985, at *6 (Del. Ch. Sept. 27, 2023) (finding a party "must demonstrate that the parties had 'a complete mutual understanding of all the essential terms of their bargain, for otherwise there would be no standard by which the writing could be reformed'").
[161] Open. Br. 33-35.

assets, and the trust's assets within Jeremy's control would be limited to agreed-upon categories.[162] As the Court found, the most logical inference to draw from Andrew's December 2018 email is that the Brothers agreed to **share control** of the trust, and there is no evidence regarding how an agreement to share control of the trust translates into who would have the power to remove and replace the Trust Protector.[163] In other words, Jeremy's inability to show a "specific prior understanding" with respect to Article 12(h) failed to provide the Court "exactly what terms to insert in the contract," and instead asked the Court to "create[e] a contract for the parties."[164] The Court correctly denied Jeremy's invitation to deviate from well-established precedent applicable to reformation.[165]

3. The Court Did Not Commit Clear Error in Finding Jeremy Did Not Establish He Sought to Have "Control" of the Jeremy Trust.

As detailed above, the Court's application of *Cantor* to require a "particularized expectation about Section 12(h)" is wholly consistent with the "specific prior understanding" requirement for reformation under Delaware law.[166]

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[162] A0061-62.
[163] Op. at 33. Moreover, the firm that drafted the Jeremy Trust Agreement, GFM, was never given a copy of Andrew's December 2018 email; GFM never knew about it or heard anything about it before drafting the Jeremy Trust Agreement. A3036:23-A3037:2.
[164] *Cerberus*, 794 A.2d at 1152.
[165] Op. at 37.
[166] Open. Br. 23-24.

But even assuming a "general understanding" of "control" under Delaware law is sufficient to reform Article 12(h) of the Jeremy Trust Agreement (it is not), the Court's factual findings still bar Jeremy's reformation claims. Indeed, the Court evaluated Jeremy's argument that eleven communications support his position that he "intended to be in charge of (or maintain control over) the Jeremy Trust," and expressly found that "[n]one of these communications evidence the intent Jeremy seeks to show in this litigation."[167] The Court found the first two categories of evidence—communications authored by GFM and Mintz without Jeremy's input—do not reflect any intent from Jeremy.[168] As to the third and fourth categories of categories relied on by Jeremy, the Court found that while Jeremy can point to certain text messages he authored years after the formation of the Jeremy Trust in which he "manifested an expectation of complete control of the Jeremy Trust, Jeremy has not substantiated his *ex post* belief with the evidence from the time of trust formation two years prior."[169] Moreover, as noted above, there was considerable evidence that post-formation, Jeremy acknowledged he knew Andrew "controlled" the Jeremy Trust, and even confirmed that understanding in his "History of the [Trusts]" narrative he sent to his mother.[170]

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[167] Op. at 26.
[168] *Id.* at 27-31.
[169] *Id.* at 31-36.
[170] B0210-11; B0317.

The Court then found Jeremy's arguments attempting to use an *ex post*, "generalized understanding (at best)" regarding his purported control of the Jeremy Trust to reform Article 12(h) were factually analogous to the evidence found to be insufficient in *Cantor*.[171] The Court and Jeremy both characterized the facts of *Cantor* in similar fashion: (1) defendant sought to reform a contract, but admitted to not having an understanding of the specific provisions of the agreement it sought to reform; (2) a witness sought to rely on her "general understanding" that she would be able to develop a "free, independent, strong company" based on a conversation with plaintiff's representative to "trust him;" (3) the evidence indicated the purported "general understanding" was largely developed after the signing of the instrument; and (4) evidence of the *ex post* "general understanding" was not credible and insufficient to meet the clear and convincing evidence standard applicable to reformation.[172] Thus, Jeremy's challenge to the Court's application of *Cantor* is nothing more than a challenge of the Court's underlying factual findings.

Like in *Cantor*, the Court found Jeremy did not develop any independent understanding of the Jeremy Trust Agreement prior to executing it.[173] Although Jeremy presented some evidence of an *ex post* belief he controlled the Jeremy

[171] *Id.* at 36-37 (*citing Cantor*, 2000 WL 307370, at *7-9).
[172] Op. at 36-37; Open. Br. at 24-25.

Trust years after he executed the agreement, "the evidence indicates that Jeremy's reconstruction of what he intended at the time developed *after* the fact of signing the instrument."[174] In light of these factual findings, the Court did not err in finding Jeremy's evidence largely tracked the evidentiary record in *Cantor* and was similarly deficient.[175]

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[173] Op. at 1-2, 10 n.55.
[174] *Id.* 36-37.
[175] *Id.*

II. The Court Did Not Commit Clear Error in Making Its Factual Determinations.

A. Question Presented

Whether the Court committed clear error in finding Jeremy did not establish by clear and convincing evidence that Jeremy had a mistaken intent about Article 12(h) at the time Jeremy executed the Jeremy Trust Agreement.

B. Scope of Review

The Court's factual determinations regarding the weight of the evidence as to Jeremy's intent (or lack thereof) are reviewed for "clear error."[176]

C. Merits of Argument

1. GFM's "Customary Practices" Are Not Probative of Jeremy's Intent.

Claims seeking the reformation of a trust instrument derive from the settlor's intent at the time the trust was formed.[177] Tacitly admitting his inability to show his own intent regarding Article 12(h) prior to executing the Jeremy Trust Agreement,

[176] *Osborn*, 991 A.2d at 1158.
[177] *Kalil*, 2018 WL 793718, at *9 (requiring clear and convincing evidence of settlor's intention); *Hammond*, 2016 WL 359088, at *4 (finding settlor's intent at the time the trust is established is the controlling inquiry).

Jeremy attempts to argue GFM somehow had a "clear intent" that can be imputed to him. Jeremy's arguments regarding "GFM's intent" are meritless and waived.[178]

Jeremy's attempt to rely on initial GFM drafts to support Jeremy's "intent" was properly rejected by the Court.[179] It is undisputed that Jeremy did not speak with anyone from GFM regarding his intent to "control" the Jeremy Trust or to be in the first position to remove and replace the Trust Protector.[180] Nor is there any testimony from Jeremy that he read any draft from GFM, understood it, or relied on any such draft to believe he had the power to control the Jeremy Trust through the power to remove and replace the Trust Protector.[181]

The Court correctly found that GFM's "default practice" was not probative of Jeremy's intent.[182] While a **party's** "customary practice" may have probative value of the party's intent in some circumstances (e.g., a party's practice to always include a commission in an agreement may be probative of a party's intent to include such a provision in a subsequent agreement), Jeremy offers no explanation or legal authority to support his position that **GFM's "customary practice"** (a law

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[178] Jeremy's arguments regarding GFM's intent were raised for the first time in Jeremy's Post-Trial Reply Brief and were therefore waived. *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 62 (Del. Ch. 2001) (holding party waived argument by not including it in its opening post-trial brief); A3539-40.
[179] Op. at 27-29.
[180] *Id.*; *see also* A2954:15-A2955:4, A3042:14-23; A3051:21-A3052:1; A3054:9-A3055:6; A3064:10-19, A3173:7-14.
[181] *See* Open. Br. at 11-13.

firm Jeremy never used before) provides evidence of **Jeremy's intent**. Indeed, when asked about the initial draft of the Jeremy Trust Agreement, Hayward testified that "to the best of my recollection, [GFM] just made some assumptions to get something on paper."[183]

GFM's proposed, default trust structure cannot be characterized as "GFM's intent," and Jeremy offers no legal authority that a party can establish its own intent by clear and convincing evidence based on an attorney's initial draft of the document created before ever speaking to the party.[184] No GFM witness testified that GFM intended Jeremy to have the power to remove and replace the Trust Protector of the Jeremy Trust or drafted such a provision at Jeremy's behest. Moreover, GFM's edit to the Jeremy Trust Agreement to place Andrew in the first position to remove and replace the Trust Protector was indisputably intentional and consistent with GFM's understanding that Jeremy was the "problem brother."[185]

2. The Court Did Not Commit Clear Error by Finding Jeremy's Evidence Failed to Establish His Intent By Clear and Convincing Evidence.

Jeremy next challenges the Court's factual findings with respect to a variety of communications. First, Jeremy argues the Court "inexplicably ignored"

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[182] Op. at 29.
[183] A2991:20-A2992:6.
[184] Open. Br. at 31.
[185] Op. at 11; A2954:13-22, A2965:4-9; B0023.

Andrew's December 12, 2018 email (which was sent again on February 19, 2019).[186] But the Court did not ignore these emails; instead, it explained in detail its reasoning for why the emails were not sufficiently probative of Jeremy's intent.[187] Specifically, the Court found: (1) Andrew drafted the terms included in the email and Jeremy failed to provide any substantive response regarding the control of the trust; (2) the most logical inference from the emails (which include both Jeremy and Andrew as trustees) is that the Brothers agreed to share control of the contemplated trust and therefore do not show who Jeremy later intended would have the power to remove and replace the Trust Protector; and (3) counsel informed the Brothers after the emails were circulated that Jeremy could not be the trustee of his own trust, which changed the Brothers' approach to the trust structure altogether and demonstrated such terms were subject to later revision.[188] Again, GFM was never even given these emails or told about them.[189] The Court's analysis is grounded in the record, and Jeremy cannot show such findings were the result of clear error.

[186] Open. Br. at 33.
[187] Op. at 32-34.
[188] *Id*.
[189] A3036:23-A3037:2.

Second, Jeremy argues the Court did not consider Jeremy's *ex post* communications.[190] But again, the evidence was considered and the Court explained why Jeremy's vague, self-serving statements were not particularly probative of Jeremy's intent at the time the Jeremy Trust was formed given that "Jeremy has not substantiated his *ex post* belief with evidence from the time of trust formation two years prior."[191] Nor does Jeremy acknowledge his *ex post* statements that directly contradict his testimony and show he understood Andrew was in "control" of the Jeremy Trust.[192]

Lastly, Jeremy critiques the Court for not adopting his free-standing trial testimony regarding a February 25, 2019 phone call with Steinkrauss as clear and convincing evidence of Jeremy's intent when the Jeremy Trust was formed.[193] Specifically, Jeremy incredibly testified that Steinkrauss told him: (1) Jeremy would be able to spend the money in the Jeremy Trust as he saw fit, including on private jets so long as his son was with him; (2) Jeremy would be able to control the Jeremy Trust by appointing a friend that he would be able to remove if the person was not doing what he wanted; and (3) Steinkrauss would "supervise

[190] Open. Br. at 35-36.
[191] Op. at 31-32, 35-36.
[192] Statement of Facts Sections F and H, *supra*.
[193] Open. Br. at 37-38; Op. at 34.

everything" and "manage the construction of the trust."[194] Notably, when directly asked about his conversations with Steinkrauss and Mintz during his deposition, Jeremy did not claim Steinkrauss made any of these statements.[195] Instead, Jeremy specifically testified he could not "recall what [anyone at Mintz] specifically said to [him] or did not say to [him] when they were creating the trust."[196] Even further, Jeremy testified:

> Q: I'm saying prior to the creation of the trust was there any statement that was made to you by someone at Mintz that you contend today was false?
>
> A: As I said, I don't recollect specific statements from, you know, that would add up to fraud at that time from the Mintz people.[197]

Jeremy's completely contrary "recollection" of his Steinkrauss conversation at trial was also nowhere to be found in Jeremy's Verified Petition or Pre-trial Brief.[198] Accordingly, the Court had ample reason to find Jeremy's standalone trial

[194] Op. at 34; *see also* A3079:15-A3080:11, A3085:22-A3086:16.
[195] A1421:7-A1422:19; A1452:7-A1454:17.
[196] *Id.* at A1610:17-A1611:24.
[197] A1671:17-24.
[198] *See* B0467-521; A2857-2923.

testimony was not credible and did not commit clear error by not finding such testimony was case-dispositive.[199]

[199] The Court is not the first court to question Jeremy's credibility. In *Paradise v. Eagle Creek Software Servs., Inc.*, a federal judge found Jeremy's testimony "not credible" and that Jeremy had been "untruthful on multiple occasions." 989 F. Supp. 2d 132, 138 (D. Mass. 2013).

III. The Court Did Not Err in Concluding Its Factual Findings Preclude Jeremy's Fraud Claims Seeking Reformation.

A. Question Presented

Whether the Court erred in concluding that its factual findings that Jeremy failed to establish any intent with respect to the Jeremy Trust Agreement and that he failed to show he relied on any representations made to him throughout the trust agreement drafting process preclude his fraud claim seeking reformation.

B. Scope of Review

The determination of the applicable standard for claims seeking reformation under Delaware law is a question of law and subject to *de novo* review.[200] The Court's factual determinations are reviewed for "clear error."[201]

C. Merits of Argument

Because Jeremy's claims for unilateral mistake and fraud both seek the equitable relief of reformation, the Court correctly concluded that intent is a common element to both legal theories.[202] As discussed above, reformation of a trust instrument "requires the [party seeking reformation] to **establish by clear and convincing evidence**: (1) that a mistake of fact or law…affected the specific

[200] *Osborn*, 991 A.2d at 1158.
[201] *Id.*
[202] Op. at 24.

terms of the document; and (2) **the settlor's intention**."[203] Accordingly, the Court's factual finding that "Jeremy has failed to prove that he had any intent at all when executing the agreement" is fatal to his reformation claim based on fraud.[204]

Jeremy's reliance on *Haney v. Blackhawk Network Holdings, Inc.* illustrates this point.[205] In *Haney*, plaintiff sought to reform a merger agreement based on fraud in the inducement.[206] The *Haney* Court held that because plaintiff alleged the parties reached a "specific prior understanding" that the merger agreement would not preclude seller from entering a contract with Gamestop, plaintiff stated a claim for reformation.[207] In other words, *Haney* required plaintiff to plead he had a specific intent with respect to the agreement to proceed with his reformation claim.

Moreover, even if Jeremy's fraud claim sought a remedy other than reformation, the Court correctly found that its factual findings defeat any such claims.[208] As the Court found, in order to plead a claim of fraud … the **plaintiff** must in fact have acted or not acted in justifiable reliance on the representation."[209]

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[203] *Kalil*, 2018 WL 793718, at *9; *see also Cerberus,* 794 A.2d at 1151-52 ("Regardless of which doctrine [of reformation] is used, the plaintiff must show by clear and convincing evidence that the parties came to a specific prior understanding that differed materially from the written agreement.").
[204] Op. at 2.
[205] 2016 WL 769595 (Del. Ch. Feb. 26, 2016).
[206] *Id.* at *10.
[207] *Id.*
[208] Op. at 24 n.138, 38.
[209] Op. at 38 (citing *Swervepay*, 2022 WL 3701723, at *23)).

Accordingly, the Court's factual finding that Jeremy "cannot show that he relied on any representations made to him throughout the trust agreement drafting process," independently defeats his fraud claim.[210]

In a last-ditch effort to salvage his fraud claim, Jeremy points to GFM's confusion over Mintz's role with respect to Jeremy, arguing "there is no dispute that Glover called GFM … and falsely told GFM that Jeremy *intended* to have his brother Andrew in the first position of Article 12(h).[211] Jeremy then critiques the Court's factual finding that "Glover contacted GFM and provided *Andrew's* input to the initial drafts" as error.[212] Jeremy's argument to this Court, of course, ignores GFM's trial testimony admitting that no one at Mintz (which denied representing Jeremy) ever told GFM that Mintz represented Jeremy; GFM just assumed it.[213] And, notably, Jeremy failed to cite a single case to support his "general allegiances" or "representations to GFM" fraud theories.

Jeremy was provided every draft of the Jeremy Trust Agreement, was told to read them, said he would, and was given multiple opportunities to do so.[214] Although Jeremy complains about Mintz's actions, it is undisputed Mintz sent Jeremy a colored redline of the change to the Jeremy Trust Agreement when

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[210] *Id.* at 38.
[211] Open. Br. at 42.
[212] *Id.* at 43.
[213] A2957:17-A2958:18, A3031:14-A3032:7.

Andrew's edits were made, and "anyone who opened and scrolled through the redline would have been able to identify that Section 12(h) was edited and to understand the nature of that edit."[215] And Andrew told Jeremy to read the drafts and changes.[216] Indeed, the "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."[217] Jeremy cannot show any misrepresentations, much less reliance or non-disclosure. Based on the Court's detailed factual findings, Jeremy's fraud claim fails.

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[214] Op. at 1.
[215] Op. at 12.
[216] Statement of Facts, Section C-D, *supra.*
[217] Op. at 36.

CONCLUSION

For the foregoing reasons, the Court's decision should be affirmed.[218]

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[218] Jeremy's request to vacate the July 19, 2023 Order Granting Fiduciaries' Motion for Payment of Attorneys' Fees and Expenses ("Fee Order") if this Court reverses the judgment entered by the Court–improperly located in the conclusion of his opening brief–is meritless. In addition to finding that the case was resolved in the Fiduciaries' favor, which factored into an award of fees under 12 *Del. C.* § 3584, the Court found the Fiduciaries were independently entitled to indemnification under the Trust Agreements. Ex. C at 2. Jeremy does not challenge that aspect of the ruling, and therefore there is no basis to overturn the Fee Order even if Jeremy prevails on appeal. *See* Supr. Ct. R. 14(b)(vi)(A)(3).

CERTIFICATE OF SERVICE

I, Henry E. Gallagher Jr., hereby certify that on this 9th day of November, 2023, I caused a true and correct copy of the foregoing to be served on the following counsel of record via File&Serve*Xpress*:

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