To be Argued by:
JOHN H. CHUN
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

CLARE MARIE STILE,

Appellate Case No.: 2021-03689

Plaintiff-Respondent,

– against –

C-AIR CUSTOMHOUSE BROKERS-FORWARDS, INC., C-AIR INTERNATIONAL, INC., MILTON HEID and AUGUSTUS ANTICO,

Defendants-Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS

SCOTT MOLLEN
JOHN H. CHUN
HEATHER M. ZIMMER
HERRICK, FEINSTEIN LLP
Attorneys for Defendants-Appellants
Two Park Avenue
New York, New York 10016
(212) 592-1400
smollen@herrick.com
jchun@herrick.com
hzimmer@herrick.com

New York County Clerk's Index No. 656575/20

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

STATEMENT OF QUESTIONS PRESENTED.....7

BACKGROUND 8

A. In 2008, After Years of Disputes, Defendants Antico and Heid Sued Mr. Stile for Shirking His Obligations and Violating His Fiduciary Duties.....8

B. Defendants and Mr. Stile Entered into the Settlement Agreement to Resolve Their Years of Litigation and Effectuate Their Business Divorce.....10

1. Under the Settlement Agreement, Defendants Agreed to Provide Mr. Stile with a Generous Stream of Payments and Benefits with No Work Requirements.....11

2. In Return for the Payments and Benefits Under the Settlement Agreement, Mr. Stile Released All Claims and "Forever" Surrendered His Shareholder Rights 13

3. Mr. Stile Agreed, And the Court-Ordered Settlement Agreement Required, that Any "Transferee" of the Stile Shares—Including Plaintiff—Be Bound to the Surrender Provisions.....16

C. Plaintiff Commenced This Action in Breach of the Settlement Agreement.....17

D. The Motion Court Erroneously Denied Appellants' Motion to Dismiss 19

STANDARD OF REVIEW 21

ARGUMENT 23

I. PLAINTIFF IS BOUND TO THE SURRENDER PROVISIONS UNDER WELL-ESTABLISHED PRINCIPLES OF ESTATE SUCCESSION.....23

II. PLAINTIFF IS BOUND TO THE SURRENDER PROVISONS UNDER WELL-ESTABLISHED PRINCIPLES OF *RES JUDICATA*.....27

III. PLAINTIFF IS BOUND TO THE SURRENDER PROVISIONS PURSUANT TO THE TRANSFER RESTRICTION 29

A. The Conveyance of Mr. Stile's C-Air Shares to the Stile Estate Is A "Transfer" 29

B. Nothing in the Transfer Restriction or Surrounding Terms Supported Limiting the Restriction to *Inter Vivos* Transfers 31

IV. EACH OF PLAINTIFF'S CLAIMS IS BARRED BY THE SETTLEMENT AGREEMENT, *RES JUDICATA* OR IS OTHERWISE DEFICIENT 34

A. Count 1 (Shareholder Distributions) Is Barred by the Settlement Agreement 34

B. Count 2 (Minority Shareholder Oppression) Is Barred By The Settlement Agreement 35

C. Counts 3 to 6 (For Dissolution, Fair Value, and Appointment of Receiver) Are Barred By the Settlement Agreement 37

D. Count 7 (Conversion) and Count 8 (Unjust Enrichment) Are Duplicative of Plaintiff's Other Defective Claims 38

E. Counts 9 to 13, For Accounting, Declaratory Relief, Breach of Fiduciary Duty, and Constructive Trust, Should Also Be Dismissed 39

F. Plaintiff's Claims for the Repayment of Loans—Count 14 (Breach of Contract) and Count 15 (Money Had and Received)—Have Been Released Or Are Subject to Binding Arbitration 42

CONCLUSION 43

TABLE OF AUTHORITIES

Page

Cases

45 Broadway Owner LLC v. NYSA–ILA Pension Trust Fund,
107 A.D.3d 629 (1st Dep't 2013) 29

Abrams v. Donati,
66 N.Y.2d 951 (1985) 37

Aetna Cas. & Sur. Co. v. Aniero Concrete Co.,
404 F.3d 566 (2d Cir. 2005) 32

Albany Plattsburgh United Corp. v. Bell,
307 A.D.2d 416 (3d Dep't 2003) 37

Alvarez v. Amicucci,
82 A.D.3d 687 (2d Dep't 2011) 29

Am. S.S. Owners Mut. Prot. & Indem. Ass'n, Inc. v. Am. Boat Co.,
No. 11-cv-6804, 2012 WL 527209 (S.D.N.Y. Feb. 17, 2012) 34

Ark Bryant Park Corp. v. Bryant Park Restoration Corp.,
385 A.D.2d 143 (1st Dep't 2001) 21

Artists Rts. Enf't Corp. v. Robinson,
67 Misc. 3d 1213(A), 2020 WL 2366496
(Sup. Ct. N.Y. Cnty. 2020), *aff'd*, 192 A.D.3d 573 (1st Dep't 2021) 30

Ashwood Capital, Inc. v. OTG Mgmt., Inc.,
99 A.D.3d 1 (1st Dep't 2012) 26, 30

Aviall, Inc. v. Ryder Sys., Inc.,
913 F. Supp. 826 (S.D.N.Y. 1996), *aff'd*, 110 F.3d 892
(2d Cir. 1997) 34

Bartley v. Walentas,
78 A.D.2d 310 (1st Dep't 1980) 41

BML Props. Ltd. v. China Constr. Am., Inc.,
No. 657550/2017, 2020 WL 1274238
(Sup. Ct. N.Y. Cnty. Mar. 17, 2020) 36

Boccardi Capital Sys., Inc. v. D.E. Shaw Laminar Portfolios, L.L.C.,
355 F. App'x 516 (2d Cir. 2009) 39

Borriello v. Jersey Lynne Farms, Inc.,
No. 515269/2016, 2017 WL 2152577
(Sup. Ct. N.Y. Cnty. May 17, 2017).....38

Buccini v. Paterno Constr. Corp.,
253 N.Y. 256 (1930).....4, 24

Calderwood v. Ace Grp. Int'l. LLC,
No. 650150/2015, 2017 WL 543354
(Sup. Ct. N.Y. Cnty. Feb. 10, 2017),
aff'd, 169 A.D.3d 552 (1st Dep't 2019).....31

Celle v. Barclays Bank PLC,
48 A.D.3d 301 (1st Dep't 2008).....41

Chamberlain v. Dunlop,
126 N.Y. 45 (1891).....23

Condor Capital Corp. v. CALS Inv'rs, LLC,
179 A.D.3d 592 (1st Dep't 2020).....32

Cuttler v. Cuttler,
130 A.D.3d 672 (2d Dep't 2015).....30

In re Deyette,
6 Misc. 3d 1124(A), 2007 WL 2325181
(Sup. Ct. Nassau Cnty. 2007).....31

Duafala v. Globecomm Sys. Inc.,
91 F. Supp. 3d 330 (E.D.N.Y. 2015).....43

In re Estate of Violi,
65 N.Y.2d 392 (1985).....40

In re First Cent. Fin. Corp.,
377 F.3d 209 (2d Cir. 2004).....40

Flink v. Smith,
66 Misc. 3d 1229(A) (Sup. Ct. Albany Cnty. 2020).....37

Franklin v. Winard,
199 A.D.2d 220 (1st Dep't 1993).....22

Ganzi v. Ganzi,
144 A.D.3d 510 (1st Dep't 2016).....36

Giaimo v. EGA Assocs. Inc.,
68 A.D.3d 523 (1st Dep't 2009).....31

Grika v. McGraw,
55 Misc. 3d 1207(A), 2016 WL 8716417
(Sup. Ct. N.Y. Cnty. 2016), *aff'd sub nom. L.A. Grika on behalf of McGraw*, 161 A.D.3d 450 (1st Dep't 2018).....41

Hesek v. 245 S. Main St., Inc.,
170 A.D.2d 956 (2d Dep't 1991).....38

IB. Trading, Inc. v. Tripoint Glob. Equities, LLC,
280 F. Supp. 3d 524 (S.D.N.Y. 2017).....40

Inter-Reco, Inc. v. Lake Park 175 Froehlich Farm, LLC,
106 A.D.3d 955 (2d Dep't 2013).....22, 27, 30

Int'l Longshoremen's Ass'n v. Hellenic Lines, Ltd.,
549 F. Supp. 435 (S.D.N.Y. 1982).....42

Jackson v. Gross,
150 A.D.3d 710 (2d Dep't 2017).....21, 35

Johnsen v. ACP Distrib., Inc.,
31 A.D.3d 172 (1st Dep't 2006).....32

In re Johnson,
14 Misc. 2d 138 (Sur. Ct. N.Y. Cnty. 1958).....23

Kamerman v. Ockap Corp.,
112 F.R.D. 195 (S.D.N.Y. 1986).....24

Kolchins v. Evolution Mkts., Inc.,
128 A.D.3d 47 (1st Dep't 2015), *aff'd*, 31 N.Y.3d 100 (2018).....21

Kolmer-Marcus, Inc. v. Winer,
32 A.D.2d 763 (1st Dep't 1969), *aff'd*, 26 N.Y.2d 795 (1970).....43

Manda Int'l Corp. v. Yager,
139 A.D.3d 594 (1st Dep't 2016).....37

Marini v. Lombardo,
79 A.D.3d 932 (2d Dep't 2010).....40

Matter of Di Bona (Gen.l Rayfin Ltd.),
45 A.D.2d 696 (1st Dep't 1974).....38

Mencher v. B. & S. Abeles & Kahn,
274 A.D. 585 (1st Dep't 1948).....42

Nissan Motor Acceptance Corp. v. Scialpi,
30 Misc. 3d 1240, 2011 WL 1044605 (Sup. Ct. Nassau Cnty. 2011), *aff'd*, 94 A.D.3d 1067 (2d Dep't 2012).....37

Olsen v. N.Y. State Dep't of Envt'l Conservation,
307 A.D.2d 595 (3d Dep't 2003).....41

Olympic Tower Assocs. v. City of N.Y.,
81 N.Y.2d 961 (1993).....27

Painless Med., P.C. v. GEICO,
32 Misc. 3d 715 (City Civ. Ct. Kings Cnty. 2011).....31

Pappas v. 38-40 LLC,
No. 650251/2017, 2018 WL 1030312 (Sup. Ct. N.Y. Cnty. Feb. 22, 2018), *aff'd*, 172 A.D.3d 409 (1st Dep't 2019).....37

P.C. Films Corp. v. MGM/UA Home Video Inc.,
138 F.3d 453 (2d Cir. 1998).....25

People ex rel. Spitzer v. Applied Card Sys., Inc.,
11 N.Y.3d 105 (2008).....27

In re Refco, Inc. Secs. Litig.,
No. 07-cv-11604, 2008 WL 2185676 (S.D.N.Y. May 21, 2008).....34

Reiss v. Fin. Performance Corp.,
97 N.Y.2d 195 (2001).....26

Remora Capital S.A. v. Dukan,
175 A.D.3d 1219 (1st Dep't 2019).....39

Ruttenberg v. Davidge Data Sys. Corp.,
215 A.D.2d 191 (1st Dep't 1995).....30

In re Shaw,
54 Misc. 3d 1224(A), 2016 WL 8461443 (Sur. Ct. Broome Cnty. Feb 9, 2016).....31

SmartStream Techs., Inc. v. Chambadal,
No. 17-CV-2459 (VSB), 2018 WL 1870488 (S.D.N.Y. Apr. 16, 2018).....40

Stortini v. Pollis,
No. 2680/14, 2015 WL 292026 (Sup. Ct. Dutchess Cnty. 2015), *aff'd*, 138 A.D.3d 977 (2d Dep't 2016).....41

Style Acupuncture v. Geico Indem. Co.,
33 Misc. 3d 1231(A), 2011 WL 6115895
(Civ. Ct. Kings Cnty. 2011) 22

Swezey v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
87 A.D.3d 119 (1st Dep't 2011), *aff'd*, 19 N.Y.3d 543 (2012) 28

Tavoulareas v. Bell,
292 A.D.2d 256 (1st Dep't 2002) 22

Trio Asbestos Removal Corp. v. Marinelli,
22 A.D.3d 746 (2d Dep't 2005) 31

U.S. Truck Co. v. Nat'l Am. Ins. Co.,
186 F. Supp. 2d 1184 (W.D. Ok. 2002) 28

Warberg Opportunistic Trading Fund, L.P. v. GeoResources, Inc.,
112 A.D.3d 78 (1st Dep't 2013) 21

Watts v. Swiss Bank Corp.,
27 N.Y.2d 270 (1970) 27, 28

In re Werger's Est.,
64 Misc. 2d 1094 (Sur. Ct. N.Y. Cnty. 1970) 28

William Kaufman Org., Ltd. v. Graham & James LLP,
269 A.D.2d 171 (1st Dep't 2000) 41

Wolf v. Wahba,
164 A.D.3d 1405 (2d Dep't 2018) 43

In re Young's Estate,
81 Misc. 2d 920 (Sur. Ct. N.Y. Cnty. 1975) 23, 25, 26

Yudell v. Gilbert,
99 A.D.3d 108 (1st Dep't 2012) 37

Statutes

CPLR 3016(b) 37, 41

CPLR 3211(a)(1) 4, 19, 21

CPLR 3211(a)(5) 4, 19, 22

CPLR 3211(a)(7) 4, 19, 22

N.Y. BCL § 1104-a 36

N.Y. BCL § 1113 ..... 37, 38

Miscellaneous

41 N.Y. Jur. 2d Decedents' Estates § 1413 (2021) 24, 31
Black's Law Dictionary (11th ed. 2019) 25, 29, 30
Restatement (Second) of Judgments § 43 (1982) 28
Restatement (Second) of Contracts § 328 (1981) 34

Defendants-Appellants C-Air Customhouse Brokers-Forwarders, Inc. ("C-Air NY"), C-Air International, Inc. ("C-Air LA," and together with C-Air NY, the "C-Air Companies"), Augustus Antico ("Antico") and Milton Heid ("Heid" and together with Antico and the C-Air Companies, "Defendants"), respectfully submit this brief in support of their appeal from the Decision and Order on Motion ("Decision") of the Supreme Court of New York, County of New York (Honorable Verna L. Saunders), dated September 13, 2021 ("Motion Court").

PRELIMINARY STATEMENT

This appeal concerns an Order and Stipulation of Settlement ("Settlement Agreement") entered in the Supreme Court of the State of New York, County of New York on May 26, 2010 (Lowe, J.), which resolved years of contentious litigation among the three shareholders of the C-Air Companies—Defendants Antico and Heid, and Salvatore Stile (now deceased)—each of whom owned a 1/3 share of the businesses.

Under the Settlement Agreement, Defendant Antico and Heid agreed to provide Mr. Stile a stream of payments and other benefits until the earlier of his death or the sale of the companies, in return for Mr. Stile's total surrender of rights as a C-Air shareholder on behalf of himself and his heirs. Specifically, in addition to a general release of all claims (the "Stile General Release"),[1] Mr. Stile surrendered

[1] R.39 (Settlement Agreement). All citations to "R." refer to the Record on Appeal.

his rights to (a) "any other payments, profits" or "interest in the operations" of the C-Air Companies;[2] (b) participate in the operations and governance of the C-Air Companies, unless first consented to by their Boards of Directors, and (c) vote his shares other than as directed by the companies' Boards.[3]

Moreover, to ensure that Mr. Stile's surrender was perpetual (and not contingent upon his survivorship), Mr. Stile further agreed (a) to "forever forbear from" seeking to enforce any of his putative rights, including "commencing, prosecuting, and/or participating in, directly or indirectly, any action or proceeding against [Defendants] concerning . . . any . . . matter related to the operation and/or business of [the C-Air Companies]" (collectively referred to herein as the "Surrender Provisions"),[4] (b) that all of the "transferees" of his shares—including his estate and heirs (the "Stile Estate")—would be bound to the Surrender Provisions (the "Transfer Restriction"),[5] and (c) that his heirs would not be entitled to any further payments—referred to as "death benefits"—from Defendants, including any buy-out of Mr. Stile's shares at the time of his death (the "No Death Benefits Provision").[6] In other words, the Settlement Agreement represented a complete and

[2] R.31-32 ¶ 7 (Settlement Agreement).

[3] R.31-34 ¶¶ 7, 10(a), 10(b), 10(c) (Settlement Agreement).

[4] R.31 ¶ 7 (Settlement Agreement).

[5] R.35 ¶ 10(d) (Settlement Agreement).

[6] R.36-37 ¶¶ 14-15 (Settlement Agreement).

total business divorce between Mr. Stile and Defendants after years of dysfunction, under which Mr. Stile, on behalf of himself and his heirs, agreed to renounce his status as a C-Air shareholder, other than the specific rights to payments and benefits he retained under the Settlement Agreement during his lifetime.

Mr. Stile accepted this bargain. The C-Air Companies were not sold. Thus from 2010 to April 16, 2020, when Mr. Stile passed away, Defendants delivered to him all of the payments and benefits to which he was due (worth well over $1 million), with no work or other requirements other than that Mr. Stile comply with the Stile General Release, the Surrender Provisions and the Transfer Restriction. Mr. Stile, for his part, accepted these valuable payments and benefits, and turned over all control of the C-Air Companies to Defendants Antico and Heid. When Mr. Stile died, Defendants' obligations to Mr. Stile ceased but the surrender of his rights did not. As noted above, such surrender endures "forever" and Plaintiff Clare Marie Stile, as the personal representative of the Stile Estate and a "transferee" of his shares, is bound to the Surrender Provisions.

Unfortunately, Plaintiff has chosen not to honor Mr. Stile's end of the bargain. Despite standing in Mr. Stile's shoes as his successor, and being bound to his contractual commitments under both common law estate succession and *res judicata* principles, Plaintiff has filed this action, demanding further payments, access to company books and records, and the dissolution or liquidation of the C-Air

Companies, in direct breach of the Surrender Provisions, Transfer Restriction and No Death Benefits Provision, including Mr. Stile's promise to "forever forbear from" commencing such lawsuits.

The Motion Court should have thus dismissed the Complaint pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7). It did not do so, however. Although the Motion Court did not disagree that (a) Defendants had complied with their obligations under the Settlement Agreement, including all of the payment and benefit provisions thereunder, and (b) Mr. Stile was bound to the Surrender Provisions, the Motion Court declined to find the Surrender Provisions "would apply after [Mr. Stile's] death and, thus, to his estate."[7] The Motion Court also declined to find that Plaintiff was subject to the Transfer Restriction on the basis that the restriction putatively applied only to *inter vivos* transfers "during Stile's lifetime," and did not apply to other transfers, including transfers of Mr. Stile's shares to the Stile Estate upon his death.[8] This was error.

First, the Motion Court's Decision overlooked long-standing, black-letter precedent that parties to a contract presumptively "intend to bind, not only themselves, but their personal representatives."[9] The Motion Court should have thus

[7] R.8 (Decision).

[8] R.8 (Decision).

[9] *Buccini v. Paterno Constr. Corp*., 253 N.Y. 256, 259 (1930).

found that Plaintiff was presumptively bound to the Settlement Agreement, including the Surrender Provisions. Nothing in the Settlement Agreement supported the Motion Court's disregard of this presumption. Indeed, the parties clearly foresaw the contingency of Mr. Stile's death and accordingly limited the payment and benefit provisions to his lifetime. In contrast, no such limitation was imposed on the Surrender Provisions. In fact, Mr. Stile agreed that the Surrender Provisions would endure "forever" (i.e., for all future time), including his commitment to "forever forbear from" commencing any action to enforce his putative shareholder rights. Accordingly, the Motion Court should have found that Plaintiff, who stands in Mr. Stile's shoes, is bound by the Settlement Agreement, including the Surrender Provisions.

Second, the Motion Court's decision violated well-established principles of *res judicata*, under which the Settlement Agreement (which was so-ordered by Justice Lowe) should have been given preclusive effect against those in privity with Mr. Stile. As the personal representative of the Stile Estate, Plaintiff is unquestionably in privity with Mr. Stile and is thus bound to the terms of the Settlement Agreement, including the Surrender Provisions, the No Death Benefit

Provision, and the Transfer Restriction. The Motion Court erred in failing to accord the Settlement Agreement preclusive effect and dismissing the Complaint.

Third, the Motion Court further erred by limiting the Transfer Restriction to just *inter vivos* transfers. No such limitation appears in the Transfer Restriction and the Motion Court had no basis to rewrite the Transfer Restriction in this fashion. Indeed, surrounding provisions in the Settlement Agreement make clear that the parties wished to restrict in the broadest possible terms any "dispos[al] of" Mr. Stile's shares, whether by "sale, pledge, encumbrance, transfer" or assignment, and cut off Mr. Stile's rights upon his death (and not grant his heirs additional rights). Indeed, the No Death Benefits Provision makes clear that the parties had no intention of according any further rights—to payments or otherwise—to Mr. Stile's heirs after his death. The Motion Court thus had no basis to find that the parties intended to apply the Transfer Restriction only to "transferees" during Mr. Stile's lifetime. The opposite is true and the Motion Court should have accorded the terms "transfer" and "transferee" their plain and ordinary meanings, which includes "transfers" of a decedent's assets to his estate upon his death. The Court erred in failing to hold that Plaintiff is bound to the Surrender Provisions pursuant to the Transfer Restriction.

Accordingly, the Decision should be reversed, and the Complaint dismissed with prejudice. All but two of Plaintiff's claims (Counts 14 and 15) seek to enforce rights that Mr. Stile (and Plaintiff, as his personal representative and "transferee")

expressly surrendered under the Settlement Agreement, are barred by principles of *res judicata*, or otherwise fail to state a claim. Further, Counts 14 and 15, which seek repayment of loans that Mr. Stile allegedly extended to the Defendants, have either been released pursuant to the Stile General Release, or are subject to mandatory arbitration.

STATEMENT OF QUESTIONS PRESENTED

1. Whether Plaintiff, as the personal representative of the Stile Estate who stands in Mr. Stile's shoes under well-established principles of estate succession, is bound to the Settlement Agreement, including the Surrender Provisions?

The Motion Court erroneously answered no.

2. Whether Plaintiff, as the personal representative of the Stile Estate who stands in privity with Mr. Stile under *res judicata* principles, is bound to the Settlement Agreement, including the Surrender Provisions?

The Motion Court implicitly and erroneously answered no, although it did not expressly render a finding as to res judicata.

3. Whether Plaintiff is subject to the Transfer Restriction, and thus bound to the Surrender Provisions as a "transferee" of Mr. Stile's shares?

The Motion Court erroneously answered no.

4. Whether the Complaint should be dismissed with prejudice because Plaintiff's claims (other than Counts 14 and 15) are barred by the Settlement Agreement, principles of *res judicata*, or otherwise fail to state a claim?

The Motion Court erroneously answered no.

5. Whether Counts 14 and 15—concerning loans Mr. Stile allegedly extended to Defendants—should be dismissed because they were released under the Stile General Release, or are subject to mandatory arbitration?

The Motion Court erroneously answered no.

BACKGROUND

A. In 2008, After Years of Disputes, Defendants Antico and Heid Sued Mr. Stile for Shirking His Obligations and Violating His Fiduciary Duties

In 2008, Defendants Antico and Heid sued Mr. Stile in the Supreme Court of the State of New York, County of New York (the "2008 Litigation"), alleging breaches of the parties 1996 shareholder agreement—referred to as the "Deal Structure" agreement—and fiduciary duties to the C-Air Companies.[10] According to their verified complaint, despite receiving salary payments totaling over $3.6 million,[11] Mr. Stile had long shirked his duties to the companies and "[f]or years . . . [had] not been involved" in the businesses.[12] Their complaint further alleged that

[10] *See* R.75 (Steele Affidavit, Ex. A).

[11] R.77 ¶ 17 (Steele Affidavit, Ex. A).

[12] R.79 ¶ 22 (Steele Affidavit, Ex. A).

Mr. Stile had engaged in numerous acts of disloyalty, including "solicit[ing] and compet[ing] for customers of the [C-Air Companies], solicit[ing] employees of the companies and misappropriat[ing] the companies' confidential information and breach[ing] his fiduciary duties to the companies."[13] Further evidencing a complete breakdown in their shareholder relationship, Defendants Antico and Heid also alleged that Mr. Stile "regularly sought to disrupt, interfere with and dissolve the business of [the C-Air Companies]," including by filing numerous harassing lawsuits against Defendants, all of which had been "dismissed and/or discontinued without any recovery to defendant [Mr. Stile]."[14]

As a result of such misconduct, Defendants Antico and Heid sought, *inter alia*, a declaratory judgment that Mr. Stile was not entitled to any further payments from the C-Air Companies.[15] The lawsuit further alleged that Defendants Antico and Heid were entitled to money damages as a result of Mr. Stile's breaches of restrictive covenants and his fiduciary duties.[16]

[13] R.5 (summarizing the verified complaint in the 2008 Litigation) (Decision); R.77-81 ¶¶ 7, 27-29, 36 (Steele Affidavit, Ex. A).

[14] R.77 ¶¶ 13-14 (Steele Affidavit, Ex. A).

[15] *See* R.81 ¶¶ 30-33 (Steele Affidavit, Ex. A).

[16] *See* R.81 ¶¶ 34-44 (Steele Affidavit, Ex. A).

B. Defendants and Mr. Stile Entered into the Settlement Agreement to Resolve Their Years of Litigation and Effectuate Their Business Divorce

In 2010, the parties agreed to settle their differences in the 2008 Litigation, as well as yet another lawsuit that Mr. Stile had initiated against C-Air LA in the Superior Court of California, and to part ways as shareholders in the C-Air Companies. The terms of this business divorce are set forth in the Settlement Agreement.[17]

As described below, in exchange for a series of generous payments and benefits worth hundreds of thousands of dollars that would end upon his death or the sale of the C-Air Companies (whichever occurred earlier), Mr. Stile (a) agreed to a general release of all of his claims, (b) "forever" surrendered his rights and interests as a shareholder in the C-Air Companies, (c) obligated his "transferees"—including Plaintiff—to bind themselves to such surrender, and (d) agreed that his heirs would not be entitled to any other "death benefits," or other payments upon his death.[18] In other words, the Settlement Agreement represented a total and complete surrender of Mr. Stile and his heirs' rights as C-Air shareholders, other than the payments and benefits set forth in the Settlement Agreement.

The Settlement Agreement's (a) payment and benefit provisions, (b) Surrender Provisions and (c) Transfer Restriction, are discussed below.

---

[17] *See* R.29 (Settlement Agreement).

[18] R.31-35, 36, 39 ¶¶ 7, 10, 14-15, Ex. B (Settlement Agreement).

1. Under the Settlement Agreement, Defendants Agreed to Provide Mr. Stile with a Generous Stream of Payments and Benefits with No Work Requirements

Under the Settlement Agreement, Defendants agreed to provide Mr. Stile with the following payments and benefits until his death, or the sale of the C-Air Companies, whichever occurred first:

(a) Annual Base Income and Expense Reimbursement Payments: Under the Settlement Agreement, Defendants Antico and Heid agreed that the C-Air Companies would pay $100,000 a year to Mr. Stile, as well as payments of $7,500 towards unaudited expenses.[19]

(b) Additional Income Payments in the Event Defendants Antico and Heid Were Paid Above Certain Thresholds: To ensure relative parity in their incomes, the Settlement Agreement also provided for additional income payments to Mr. Stile in the event the C-Air Companies paid salaries above certain thresholds to Defendants Antico and Heid.[20]

(c) Shareholder Distributions: The Settlement Agreement further provided that, to the extent either C-Air NY or C-Air LA received net income of $400,000 or more in any given year, the company would pay Mr. Stile a distribution of $25,000 for that year. In the event both companies separately received net income of less than $400,000 for a particular year, but in combination received a net income in excess of $500,000, the companies would together pay Mr. Stile a distribution of $25,000.[21]

[19] R.29-30 ¶ 2 (Settlement Agreement).

[20] R.30 ¶ 3 (Settlement Agreement).

[21] R.30-31 ¶ 4 (Settlement Agreement).

(d) Health and Auto Insurance: Defendants Antico and Heid further agreed to provide Mr. Stile health insurance as well as thousands of dollars towards his auto insurance.[22]

In addition to the above amounts, the Settlement Agreement also provided that the C-Air Companies would pay Mr. Stile $50,000 for legal expenses incurred in connection with the 2008 Litigation.[23]

The Settlement Agreement imposed no work or other requirement on Mr. Stile to earn any of these payments and benefits, other than to comply with the Settlement Agreement and the Surrender Provisions thereunder.[24]

Moreover, nothing in the Settlement Agreement required Defendants to continue to make these or any other payments to Mr. Stile or his heirs after his death. To the contrary, each of the payment provisions expressly terminated upon the earlier of "the death of Stile" or the sale of the C-Air Companies.[25] Further confirming that all payments on account of Mr. Stile's shares were to cease upon his death (and none were to be paid to his heirs), the Settlement Agreement provides that (a) unless the parties were able to agree to the terms of a share buyout within six months of the Settlement Agreement, no such payments or any other "death benefits" would be paid following the death of any C-Air shareholder, including to

[22] R.35 ¶ 11 (Settlement Agreement).

[23] R.31 ¶ 5 (Settlement Agreement).

[24] R.31-33, 35 ¶¶ 7, 8, 10(b), 10(e) (Settlement Agreement).

[25] R.30-31, 35, 37 ¶¶ 2, 3, 4, 11, 16 (Settlement Agreement).

Mr. Stile's heirs,[26] and (b) Mr. Stile's right to receive the C-Air Companies' "monthly income and expense statements"—which permitted him to verify that he was receiving the payments to which he was entitled—ceased upon "the death of Stile."[27]

2. In Return for the Payments and Benefits Under the Settlement Agreement, Mr. Stile Released All Claims and "Forever" Surrendered His Shareholder Rights

In return for the payments and benefits discussed above, Mr. Stile agreed to the Stile General Release as well as the Surrender Provisions. Specifically, in addition to agreeing to resign as a director or officer of C-Air LA,[28] Mr. Stile agreed that he (a) "shall not be entitled to any other payments, [or] profits" of the C-Air Companies; (b) had no further "interest in the operations of" the C-Air Companies and (c) would not take any of the actions specified in Paragraph 10(b) of the Settlement Agreement "without the written consent of the Board of Directors of [the C-Air Companies], including actions to:

> (i) initiate, propose or submit one or more stockholder proposals or induce or attempt to induce any other person to initiate any stockholder proposal;

[26] R.36 ¶ 14 (discussing the buyout provision which would be calculated, in part, by reference to the "2008 salary for decedent") (Settlement Agreement); R.36-37 ¶ 15 (if parties are unable to agree to such buyout within six months of the Settlement Agreement, the "parties hereto shall thereafter have no death benefits") (Settlement Agreement).

[27] R.37 ¶ 16 (Settlement Agreement).

[28] R.32 ¶ 9 (Settlement Agreement).

(ii) seek to call or to request the call of, a special meeting of the Companies' stockholders, or make a request for a list of the Companies' stockholders;

(iii) vote for any nominee or nominees for election to the Board, other than those nominated or supported by the Board, or consent to become a nominee for election as a member of the Board unless nominated by the Board;

(iv) seek, alone or in concert with others, to place a representative or other affiliate or nominee on the Board or seek the removal of any member of the Board or a change in the size or composition of the Board;

(v) deposit any stock in a voting trust or enter into any other arrangement or agreement with respect to the voting thereof except as provided herein;

(vi) acquire or agree, offer, seek or propose to acquire, or cause to be acquired, ownership (including beneficial ownership) of any of the assets or business of the Companies or any rights or options to acquire any such assets or business from any person;

(vii) seek, propose, or make any statement with respect to, or solicit, negotiate with, or provide any information to any person with respect to, a merger, consolidation, acquisition of control or other business combination, tender or exchange offer, purchase, sale or transfer of assets or securities, dissolution, liquidation, reorganization, recapitalization, dividend, share repurchase or similar transaction involving the Companies or its business, whether or not any such transaction involves a change of control of the Companies;

(viii) take any action, alone or in concert with any other person, advise, finance, assist or participate in or encourage any person to take any action which is prohibited to be taken by Stile or any of his affiliates or associates pursuant to this stipulation, or make any investment in or enter into any arrangement with, any other person that engages, or offers or proposes to engage in any of the foregoing;

(ix) disclose publicly, or privately in a manner that could reasonably be expected to become public, any intention, plan or arrangement inconsistent with the foregoing;

(x) make any request or demand to inspect the records of the Companies or to obtain a shareholders list for the Companies or encourage any shareholder or other persons to do so;

(xi) commence, encourage, or support any derivative action in the name of the Companies or any class action against the Companies or any of its officers or directors;

(xii) take any action challenging the validity or enforceability of any provisions of this paragraph.[29]

To the extent Paragraph 10(b) left any doubt as to the total surrender of Mr. Stile's rights as a C-Air shareholder, Paragraph 10(c) of the Settlement Agreement required Mr. Stile to agree to vote his shares only as recommended by the Board and/or deliver executed proxies naming the proxies appointed by the Board to vote his shares at shareholder meetings.[30]

Nothing in the Surrender Provisions indicated that these provisions ceased upon Mr. Stile's death, or were conditioned on his survivorship. Indeed, unlike the payment and benefit provisions discussed above, no duration (e.g., Mr. Stile's death or the sale of the C-Air Companies) was imposed on the Surrender Provisions.[31] Moreover, to confirm that these restrictions were perpetual and would apply to his heirs, Mr. Stile expressly agreed (a) in the No Death Benefit Provision that neither he nor his heirs would be entitled to further payments following his death, and (b)

[29] R.31-33 ¶¶ 7, 10(b) (Settlement Agreement).

[30] R.34 ¶ 10(c)(ii)-(iii) (Settlement Agreement).

[31] *Compare* R.31-35 ¶¶ 7, 10 (Surrender Provisions) (Settlement Agreement); *with* R.30-31, 35, 37 ¶¶ 2, 3, 4, 11, 16 (payment and benefit provisions) (Settlement Agreement).

that he would "forever forbear" from pursuing or enforcing any of his putative rights as a C-Air shareholder, including forbearing from "commencing, prosecuting, and/or participating in, directly or indirectly, any action or proceeding against [the Defendants] concerning . . . any . . . matter related to the operation and/or business of [the C-Air Companies]."[32]

3. Mr. Stile Agreed, And the Court-Ordered Settlement Agreement Required, that Any "Transferee" of the Stile Shares—Including Plaintiff—Be Bound to the Surrender Provisions

Under the Settlement Agreement, Mr. Stile agreed that "no transfer shall be authorized unless and until the buyer, transferee, assignee or pledgee . . . shall agree in writing to be bound by the terms and conditions of paragraphs 7, 10 and 13 hereof."[33] He further agreed that he would forfeit his rights to any payments and benefits under the Settlement Agreement in the event he "sells, pledges, encumbers, transfers, or otherwise disposes of . . . any interest in his shares of" the C-Air Companies.[34]

Paragraphs 7 and 10 contain the Surrender Provisions.[35] To ensure that all transferees of Mr. Stile's stock would be bound to the Surrender Provisions, Paragraph 13 of the Settlement Agreement provided that the court would "maintain

[32] R.31-32, 36-37 ¶¶ 7, 14-15 (Settlement Agreement).

[33] R.35 ¶ 10(d) (Settlement Agreement).

[34] R.35 ¶ 10(d) (Settlement Agreement).

[35] R.31-35 ¶¶ 7, 10 (Settlement Agreement).

continuing jurisdiction over the parties" to the Settlement Agreement and any of Mr. Stile's transferees "for the purposes of enforcing the terms and conditions of" the Settlement Agreement.[36]

C. Plaintiff Commenced This Action in Breach of the Settlement Agreement.

Mr. Stile passed away on April 16, 2020.[37] According to Plaintiff's Complaint, Mr. Stile's wife, Clare Marie Stile, was thereafter appointed as the personal representative of the Stile Estate and succeeded to his obligations under the Settlement Agreement.[38]

On September 25, 2020, Plaintiff's counsel sent a letter to Defendants demanding the right to inspect and copy the accounting books and records of the C-Air Companies.[39] On September 29, 2020, Defendants' counsel denied this request, as Mr. Stile, on behalf of himself and his "transferees," including the Stile Estate, had surrendered all rights to "make any request or demand to inspect the records of the" C-Air Companies.[40] Furthermore, Mr. Stile had also agreed to "forever forebear" from pursuing or enforcing his putative shareholder rights, including

[36] R.36 ¶ 13 (Settlement Agreement).

[37] R.108 (Stile Affidavit, Ex. A).

[38] R.14 ¶ 15 ("During Salvatore's lifetime, he was a one-third (1/3) shareholder, along with Reid and Antico, in the Companies and upon his death, the Estate succeeded to his rights to same.") (Cmpl.).

[39] R.15 ¶ 21 (Cmpl.); R.44 (Cmpl., Ex. B).

[40] R.15 ¶ 22 (Cmpl.); R.51 (citing Settlement Agreement ¶ 10(b)(x) whereby Mr. Stile waived the right to inspect books and records) (Cmpl., Ex. C).

"commencing, prosecuting, and/or participating in . . . any action or proceeding against [Defendants] concerning . . . any . . . matter related to the operation and/or business of" the C-Air Companies.[41]

In breach of such Surrender Provisions, Plaintiff commenced this action by filing her Complaint on November 25, 2020.[42] The Complaint asserts 15 causes of action, all but two of which (Counts 14 and 15) are predicated on putative rights that Mr. Stile explicitly surrendered in the Settlement Agreement, including the right to seek: (i) "other payments [or] profits" from the C-Air Companies (*e.g.*, Counts 1, 2, 7, 8, 10-13 (seeking additional shareholder distributions, and alleging oppression, conversion, unjust enrichment, breach of fiduciary duty and constructive trust, and requesting declaratory relief, in respect of such allegedly withhold distributions)); (ii) the "dissolution" or "liquidation" of the C-Air Companies (Counts 3 to 6); and (iii) the "inspect[ion of] the records of the" C-Air Companies (Count 9 (Accounting).[43] Further, as to Counts 14 and 15 regarding certain unidentified loans that Mr. Stile allegedly extended to Defendants, all such claims were either released pursuant to the Stile General Release or are subject to mandatory arbitration.[44]

[41] R.31-32 ¶ 7 (Settlement Agreement).

[42] R.12 (Cmpl.).

[43] R. 31-33 ¶¶ 7, 10(b)(vii), (x) (Settlement Agreement); *see also* R.12 (Cmpl.).

[44] R.37, 39 ¶ 17, Ex. B (Settlement Agreement).

Accordingly, on January 29, 2021, Defendants moved to dismiss Plaintiff's Complaint with prejudice, pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7) (the "Motion to Dismiss").[45]

D. The Motion Court Erroneously Denied Appellants' Motion to Dismiss

On September 13, 2021, the Motion Court (Saunders, J.) issued its Decision denying the Motion to Dismiss.[46]

In reaching its Decision, the Motion Court did not disagree that Mr. Stile had (a) released his claims pursuant to the Stile General Release and (b) surrendered his shareholder rights pursuant to the Surrender Provisions.[47] Indeed, the Motion Court found that the "settlement agreement explicitly provides that Stile forfeited, in exchange for lifetime payments, certain rights, i.e., participating in the operation of the companies; commencing any action against defendants concerning the issues of petty cash, credit card charges, loans and/or other matters regarding the operation and/or business of the companies; and making requests or demands for inspection of the records of the companies."[48]

The Motion Court, however, declined to find that the Surrender Provisions

[45] R.54 (Notice of Motion).

[46] R.5 (Decision).

[47] R.8 (Decision).

[48] R.8 (Decision).

applied to the Stile Estate.[49] According to the Motion Court, the Settlement Agreement "fails to conclusively establish that all of Stile's rights in the companies were extinguished at the time of his death. While it does appear that the settlement agreement, sought to enjoin Stile from conduct believed to be potentially detrimental to defendants, it is unclear from said instruments whether it would apply after his death and, thus, to his estate."[50]

The Court further declined to find that Plaintiff was bound to the Surrender Provisions pursuant to the Transfer Restriction.[51] Although the Transfer Restriction broadly requires all "transferees" of Mr. Stile's shares to bind themselves to the Surrender Provisions as a condition of any "transfer," the Motion Court concluded, without basis, that such provision applied only to *inter vivos* transfers "during Stile's lifetime," and excluded the transfer of his shares to the Stile Estate upon his death.[52]

The Motion Court therefore denied Defendants' Motion to Dismiss.[53] Although acknowledging that Defendants had also sought to dismiss the Complaint

---

[49] *See* R.8 (Decision).

[50] R.8 ("[T]his court finds that defendants fail to conclusively establish that the settlement agreement intended for Stile's right to be terminated upon death.") (Decision).

[51] *See* R.8 (Decision).

[52] R.8 (Decision).

[53] R.8 ("Since defendants' motion is premised on plaintiff's rights to the companies, which is not resolved by neither [sic] the settlement agreement nor the release, plaintiff's causes of action are not ripe for dismissal. All remaining arguments have been considered and are either without merit or need not be addressed.") (Decision).

pursuant to *res judicata*, the Motion Court did not explicitly address this argument.[54]

On October 5, 2021, Defendants timely filed a notice of appeal.[55]

STANDARD OF REVIEW

An appeal from an order denying a motion for dismissal is reviewed *de novo*.[56] A motion to dismiss will be granted under CPLR 3211(a)(1) when "a defense is founded upon documentary evidence."[57] "If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(1) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action."[58] Under CPLR 3211(a)(1), "[t]he interpretation of an unambiguous contract is a question of law for the court, and the provisions of a contract addressing the rights of the parties will prevail over the allegations in a complaint… [and] where factual allegations and legal conclusions are flatly contradicted by documentary evidence, they are not presumed to be true, or even accorded favorable inference."[59]

---

[54] R.7 (Decision).

[55] R.3 (Notice of Appeal).

[56] *See Warberg Opportunistic Trading Fund, L.P. v. GeoResources, Inc.*, 112 A.D.3d 78, 82-83 (1st Dep't 2013).

[57] CPLR 3211(a)(1).

[58] *Kolchins v. Evolution Mkts., Inc.*, 128 A.D.3d 47, 58 (1st Dep't 2015), *aff'd*, 31 N.Y.3d 100 (2018).

[59] *Ark Bryant Park Corp. v. Bryant Park Restoration Corp.*, 385 A.D.2d 143, 150 (1st Dep't 2004); *see also Inter-Reco, Inc. v. Lake Park 175 Froehlich Farm, LLC*, 106 A.D.3d 955, 955 (2d Dep't 2013) (dismissing complaint because it was barred by a stipulation of settlement to which the

Under CPLR 3211(a)(5), a complaint should be dismissed where "the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds."[60] Courts will dismiss complaints where a settlement agreement resolves all asserted claims.[61]

Under CPLR 3211(a)(7), a complaint may be dismissed if it "fails to state a cause of action."[62] While facts in a complaint are presumed to be true and accorded a favorable inference, "allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration."[63]

---

parties had previously entered and to which covered all the issues alleged in the complaint); *Jackson v. Gross*, 150 A.D.3d 710, 711 (2d Dep't 2017) ("Here, the documentary evidence, i.e., the settlement agreement, utterly refutes the factual allegations of the first cause of action to the extent it seeks damages and a turnover of [] stock power, and conclusively establishes a defense to those claims as a matter of law.").

[60] CPLR 3211(a)(5).

[61] *Tavoulareas v. Bell*, 292 A.D.2d 256, 257 (1st Dep't 2002) (dismissing complaint under 3211(a)(5) where settlement agreement resolved all claims between the parties); *Style Acupuncture v. Geico Indem. Co.*, 33 Misc. 3d 1231(A), 2011 WL 6115895, at *1 (Civ. Ct. Kings Cnty. 2011) ("There can be no dispute that the parties' comprehensive and unambiguous settlement agreement effectively discontinued the instant action and relieved the defendant of any liability to the plaintiff in this action.").

[62] CPLR 3211(a)(7).

[63] *Franklin v. Winard*, 199 A.D.2d 220, 220 (1st Dep't 1993) (dismissing complaint, including claim for conversion, which pled "in conclusory fashion" that defendants exercised unauthorized and unlawful control over plaintiff's property and interfered with their rights to the property).

ARGUMENT

I. PLAINTIFF IS BOUND TO THE SURRENDER PROVISIONS UNDER WELL-ESTABLISHED PRINCIPLES OF ESTATE SUCCESSION

In their Motion to Dismiss, Defendants argued that Plaintiff's Complaint should be dismissed because Mr. Stile had surrendered all of his shareholder rights in the C-Air Companies in exchange for a lifetime stream of payments under the Settlement Agreement.[64] The Motion Court disagreed. Although the Court did not disagree that Mr. Stile had surrendered his rights, the Court declined to find that such Surrender Provisions "would apply after his death and, thus, to the" Stile Estate.[65] This was error.

As the Court of Appeals held over a century ago in *Chamberlain v. Dunlop*, the "presumption is that the party making a contract intends to bind his executors and administrators" and thus "the executor is not permitted to violate the contract of his testator after the latter's death."[66] Indeed, even in the absence of an express provision in a contract "that it is binding on executors or other successors," a decedent's personal representative is "bound by the commitments of and restrictions on the rights of its decedent" set forth in the contract.[67] Put another way, a decedent's

---

[64] R. 68-71 (Memorandum of Law in Support of Motion to Dismiss).

[65] R.8 (Decision).

[66] 126 N.Y. 45, 52 (1891); *see also In re Johnson*, 14 Misc. 2d 138, 141 (Sur. Ct. N.Y. Cnty. 1958) ("There can be no doubt that the terms and conditions of the contract bind the personal representatives" of the decedent.).

[67] *In re Young's Estate*, 81 Misc. 2d 920, 923 (Sur. Ct. N.Y. Cnty. 1975) ("It is settled contract law that 'since the assignee's contractual rights are derivative, it may not receive what its assignor

contract "limit[s]" his personal representative "at every turn. She cannot stir a step without reference to the contract, nor profit by a dollar with adherence to its covenants."[68]

Under this well-established precedent, the Motion Court had no basis to question whether the Surrender Provisions "apply after [Mr. Stile's] death and, thus, to his estate."[69] The Surrender Provisions presumptively bind the Stile Estate and Plaintiff as the personal representative of that estate, and nothing in the Settlement Agreement warranted a deviation from this presumption. Indeed, unlike the payment and benefit provisions, which explicitly ceased on Mr. Stile's death (or the sale of the C-Air Companies), the Surrender Provisions had no such limitation.[70] As further confirmation of the parties' intention that the Surrender Provisions were perpetual and would extend beyond Mr. Stile's death, Mr. Stile agreed to (a) the No Death Benefit Provision, under which neither he nor his heirs were entitled to any further "death benefits" or other buyout payments upon Mr. Stile's death and (b)

---

could not.' . . . 'A personal representative * * * acquires only such title as the decedent had * * *'") (internal citations omitted).

[68] *Buccini*, 253 N.Y. at 258-59; *Kamerman v. Ockap Corp*., 112 F.R.D. 195, 196 (S.D.N.Y. 1986) ("The executor stands in the shoes of the decedent.") (internal citations omitted); 41 N.Y. Jur. 2d Decedents' Estates § 1413 (2021) ("The representative may enforce only the rights the decedent had.").

[69] R.8 (Decision).

[70] *Compare* R.29-31, 36, 37 ¶¶ 2, 3, 4, 11, 16 (Settlement Agreement); *with* R.31-35 ¶¶ 7, 10 (Settlement Agreement).

"forever forbear" (i.e., "for all future time") from pursuing or enforcing any of his putative rights as a shareholder in the C-Air Companies, including "commencing, prosecuting and/or participating in, directly or indirectly," including through Plaintiff, "any action or proceedings against [Defendants] concerning . . . . any . . . matter related to the operation and/or business of" the C-Air Companies.[71]

The case of *In re Young* is instructive.[72] There, the executors of the decedent brought an action pursuant to a royalties contract with the publisher of the decedent's books, and argued that the contract was terminable upon the decedent's death given that the contract "did not contain any words of survivorship."[73] The Court disagreed and noted that, although the author's death was "within the contemplation of reasonable persons in the positions of the contracting parties," the contract did not "provide for a change in its payment terms on or after death."[74] The Court accordingly found that the author's death did not "require the termination of the contract," especially where it would be unjust to "nullify express contract provisions . . . which have been observed and relied upon [by the parties] for many

---

[71] R.31-32, 36-37 ¶¶ 7, 14-15 (Settlement Agreement); *see also P.C. Films Corp. v. MGM/UA Home Video Inc.*, 138 F.3d 453, 457 (2d Cir. 1998) ("the dictionary definition of 'perpetual' includes 'continuing forever'"); *Perpetuity*, Black's Law Dictionary (11th ed. 2019) ("The state of continuing for all future time; the condition of persisting forever.").

[72] 81 Misc. 2d at 922.

[73] *Id.*

[74] *Id.* at 921.

years, simply because the decedent's executors have decided . . . that it no longer suits the purpose of this estate or certain of its beneficiaries to continue to be bound by portions of their contracts."[75]

Here, as in the *Young* case, Mr. Stile's death was clearly within the contemplation of the parties to the Settlement Agreement. Indeed, the parties expressly conditioned the payment and benefit provisions on Mr. Stile's survivorship and agreed that such provisions would cease upon his death.[76] The fact that they did not make the Surrender Provisions similarly contingent upon Mr. Stile's survivorship, or provide that the Surrender Provisions were extinguished upon Mr. Stile's death, makes clear that the parties intended for the Surrender Provisions to continue after his death and to apply to the Stile Estate, consistent with the well-established presumptions articulated by the New York courts for over a century.[77] Accordingly, the Motion Court should have found that Plaintiff was bound to the Surrender Provisions. The Motion to Dismiss should have been granted.

---

[75] *Id.* at 922-24.

[76] R.29-31, 35, 37 ¶¶ 2, 3, 4, 11, 16 (Settlement Agreement).

[77] *See Ashwood Capital*, *Inc. v. OTG Mgmt., Inc.*, 99 A.D.3d 1, 8-9 (1st Dep't 2012) (holding that where parties omitted a "contingency from their agreement . . . it is not for the court to 'imply a term where the circumstances surrounding the formation of the contract indicate that the parties, when the contract was made, must have foreseen the contingency at issue and the agreement can be enforced according to its terms.'") (citations omitted); *Reiss v. Fin. Performance Corp.*, 97 N.Y.2d 195, 199 (2001) (declining to imply terms into contract where "contingency was clearly foreseeable" to the parties).

II. PLAINTIFF IS BOUND TO THE SURRENDER PROVISIONS UNDER WELL-ESTABLISHED PRINCIPLES OF *RES JUDICATA*

The Motion Court should have also found that Plaintiff is bound to the Surrender Provisions under the doctrine of *res judicata*, which gives "binding effect to the judgment of a court of competent jurisdiction and prevents the parties to an action, and those in privity with them, from subsequently relitigating any questions that were necessarily decided therein."[78] It is well-settled that "[p]ublic policy favors the enforcement of settlements," and thus settlement agreements have the same preclusive effect as judgments.[79]

Under the Settlement Agreement (which Justice Lowe so-ordered), Mr. Stile: (a) surrendered any putative rights to "payments, profits," and any other "interest in the operations of" the C-Air Companies following his death; (b) agreed that he would not take any action as a shareholder of the C-Air Companies without the consent of the Boards of Directors; (c) agreed to vote his shares only as directed by the Boards and/or deliver executed proxies naming the proxies appointed by the Boards to vote his shares at shareholder meetings; (d) agreed that he and his heirs would not be entitled to further payments or "death benefits" following his death; and (e) agreed to "forever forbear from commencing, prosecuting and/or

[78] *Watts v. Swiss Bank Corp.*, 27 N.Y.2d 270, 277 (1970).

[79] *Inter-Reco, Inc.*, 106 A.D.3d at 955; *see also People ex rel. Spitzer v. Applied Card Sys., Inc.*, 11 N.Y.3d 105, 123 (2008) (finding settlement agreements entitled to res judicata effect); *Olympic Tower Assocs. v. City of N.Y.*, 81 N.Y.2d 961, 963 (1993) (same).

participating in, directly or indirectly, any action or proceedings against [Defendants] concerning . . . . any . . . matter related to the operation and/or business of" the Companies or interests.[80]

Plaintiff, as the personal representative of the Stile Estate, is in direct privity with Mr. Stile.[81] Plaintiff is thus bound under the principles of *res judicata* to the Surrender Provisions, the No Death Benefit Provision, as well as the Stile General Release, to the "same extent" as Mr. Stile.[82] The Motion Court thus had no basis to question whether the Surrender Provisions would "apply . . . to [Mr. Stile's] estate"—they clearly did, under well-established *res judicata* principles.[83] The Court should have dismissed the Complaint.

---

[80] R.31-37 ¶¶ 7, 10, 14-15 (Settlement Agreement).

[81] *In re Werger's Est.*, 64 Misc. 2d 1094, 1097-98 (Sur. Ct. N.Y. Cnty. 1970) ("[T]he executor and the grandchildren of the decedent are in privity with the decedent as to rights with respect to the decedent's property" and are thus bound to "any judgment to which [the decedent] was a party adjudicating rights to his property" or "any obligation incurred by the decedent . . . in his lifetime or by operation of law during [his] lifetime."); *see also Watts*, 27 N.Y.2d at 277 ("[Privity] includes those who are successors to a property interest.").

[82] *See* Restatement (Second) of Judgments § 43 (1982) ("A judgment in an action that determines interests in real or personal property: . . . [h]as preclusive effects upon a person who succeeds to the interest of a party to the same extent as upon the party himself."); *Swezey v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 87 A.D.3d 119, 127 (1st Dep't 2011), *aff'd*, 19 N.Y.3d 543 (2012) ("[W]e note that petitioner is in privity with the [] estate for these purposes—and as such bound by the determination . . . reached in the [prior] litigation . . . because her claim . . . derives entirely from the estate's purported title."); *U.S. Truck Co. v. Nat'l Am. Ins. Co.*, 186 F. Supp. 2d 1184, 118 (W.D. Ok. 2002) ("There is privity within the meaning of the doctrine of res judicata where there is an identity of interest and privity in estate, so that a judgment is binding as to a subsequent grantee, transferee, or lienor of property. This is in harmony with the view that a judgment is binding on privies because they are identified in interest, by their mutual or successive relationship to the same rights of property which were involved in the original litigation.").

[83] R.8 (Decision).

III. PLAINTIFF IS BOUND TO THE SURRENDER PROVISIONS PURSUANT TO THE TRANSFER RESTRICTION

The Motion Court declined to apply the Transfer Restriction to Plaintiff on the basis that this restriction was putatively limited to *inter vivos* transfers "during Stile's lifetime."[84] This was error as no such limitation exists in the Transfer Restriction or anywhere in the Settlement Agreement. Under its plain, ordinary, and well-accepted meaning, the term "transfer" includes the transfer of a decedent's property to his estate.[85] Accordingly, the Motion Court should have found that Plaintiff was bound by the Transfer Restriction to the Surrender Provisions.

A. The Conveyance of Mr. Stile's C-Air Shares to the Stile Estate Is A "Transfer"

The Transfer Restriction provides, in pertinent part, that "no transfer shall be authorized unless and until the . . . transferee, assignee . . . shall agree in writing to be bound by the terms of and conditions of" the Surrender Provisions in paragraphs 7 and 10, and submit to the court's continuing jurisdiction, under paragraph 13 of the Settlement Agreement.[86] Nothing in this provision limited "transfers" to just *inter vivos* transfers.

Under well-established law, courts are to interpret contracts according to their

[84] R.8 (Decision).

[85] *Transfer*, Black's Law Dictionary (11th ed. 2019).

[86] R.35 ¶ 10(d) (Settlement Agreement).

plain meaning.[87] A court "may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing."[88] Moreover, "[a]n interpretation that gives effect to all the terms of an agreement is preferable to one that ignores terms or accords them an unreasonable interpretation."[89] This is especially true where the writing at issue is a valid settlement agreement, which are favored by courts and "not lightly set aside or changed."[90]

The term "transfer" has a well-accepted meaning. It encompasses "[a]ny mode of disposing of or parting with an asset or an interest in an asset," whether "direct or indirect, absolute or conditional, voluntary or involuntary" and whether by "indorsement, by delivery, by assignment, and by operation of law."[91] Such definition comfortably includes both *inter vivos* and testamentary transfers of a

---

[87] *See 45 Broadway Owner LLC v. NYSA–ILA Pension Trust Fund*, 107 A.D.3d 629, 631 (1st Dep't 2013) (holding that "where a clause is unambiguous, contract language and terms are to be given their plain and ordinary meaning"); *Alvarez v. Amicucci*, 82 A.D.3d 687, 688 (2d Dep't 2011) ("A written agreement that is complete, clear, and unambiguous on its face must be enforced according to the plain meaning of its terms."); *Inter-Reco, Inc*, 106 A.D.3d at 956 (dismissing complaint where clear and unambiguous terms of a release barred claims against defendant).

[88] *Ashwood Capital*, 99 A.D.3d at 7; *see also Cuttler v. Cuttler*, 130 A.D.3d 672, 674 (2d Dep't 2015) (finding trust instrument proposed by plaintiff was contrary to clear and unambiguous terms contained in a stipulation of settlement).

[89] *Ruttenberg v. Davidge Data Sys. Corp.*, 215 A.D.2d 191, 195-96 (1st Dep't 1995).

[90] *Artists Rts. Enf't Corp. v. Robinson*, 67 Misc. 3d 1213(A), 2020 WL 2366496, at *9-10 (Sup. Ct. N.Y. Cnty. 2020), *aff'd*, 192 A.D.3d 573 (1st Dep't 2021) (enforcing liquidated damage provision under terms of settlement agreement despite arguments that provision may be against public policy).

[91] *Transfer*, Black's Law Dictionary (11th ed. 2019).

decedent's assets,[92] and courts therefore regularly and routinely refer to the disposal of a decedent's assets to his estate (by operation of law or otherwise) as a "transfer."[93] The Motion Court therefore had no basis to limit the Transfer Restriction to "transfers" solely within Mr. Stile's lifetime.[94] The Court's rewriting of the Transfer Restriction violated the "general rule [that] courts must enforce shareholder agreements according to their terms."[95]

B. Nothing in the Transfer Restriction or Surrounding Terms Supported Limiting the Restriction to *Inter Vivos* Transfers

Nothing in the Transfer Restriction or the Settlement Agreement indicates any intent by the parties to limit the definition of "transfer" to only *inter vivos* transfers,

---

[92] *Id.* (defining *inter vivos* transfer as "[a] transfer of property made during the transferor's lifetime," and testamentary transfer as "a transfer made in a will. The transfer may be of something less than absolute ownership.").

[93] *Painless Med., P.C. v. GEICO*, 32 Misc. 3d 715, 719 (City Civ. Ct. Kings Cnty. 2011) ("[E]state became a 'transferee as a matter [of] law' upon [decedent's] death."); *In re Deyette*, 6 Misc. 3d 1124(A), 2007 WL 2325181, at *2-5, (Sup. Ct. Nassau Cnty. 2007) (referring to transaction by operation of law upon decedent's death as "transfer"); *Calderwood v. Ace Grp. Int'l. LLC*, No. 650150/2015, 2017 WL 543354, at *3-4 (Sup. Ct. N.Y. Cnty. Feb. 10, 2017), *aff'd*, 169 A.D.3d 552 (1st Dep't 2019) (finding that the term "transfer" included "involuntary transfers by operation of law such as passage of Alex's rights to the Estate" upon his death.); *In re Shaw*, 54 Misc. 3d 1224(A), 2016 WL 8461443, at *2 (Sur. Ct. Broome Cnty. Feb 9, 2016) (referring to passage of decedent's interest in property by operation of law as a "transfer"). A personal representative of an estate is also routinely referred to as the decedent's "assignee." *See* 41 N.Y. Jur. 2d *Decedents' Estates* § 1413 (2021) ("The executor or administrator is in law the decedent's assignee.").

[94] R.8 (Decision).

[95] *Trio Asbestos Removal Corp. v. Marinelli*, 22 A.D.3d 746, 747 (2d Dep't 2005); *see also Giaimo v. EGA Assocs. Inc.*, 68 A.D.3d 523, 524 (1st Dep't 2009) (finding trial court should have enforced transfer restrictions, and that sale of stock from decedent to defendant was null and void *ab initio*).

to the exclusion of any other type of transfer, including transfers of Mr. Stile's shares to his estate upon his death.

Indeed, the fact that the parties wished to accord the term "transfer" its broadest possible scope is made clear from the first sentence of Paragraph 10(d) which provides that "in the event that [Mr. Stile] sells, pledges, encumbers, transfers, or otherwise disposes of . . . any interest in his shares of stock of" the C-Air Companies, then "all payments and benefits" under the Settlement Agreement would "immediately cease."[96] By specifically enumerating a variety of actions (including "transfers") that would subject Mr. Stile to the forfeiture of payments and benefits, and then inserting a catch-all to ensure that any other form of "dispos[al" of Mr. Stile's C-Air shares would subject him to forfeiture, the parties plainly intended to give each of these terms—including the term "transfer"—as broad a meaning as possible.[97]

Similarly, none of the Settlement Agreement's other provisions support the Court's re-writing of the term "transfer" to encompass just *inter vivos* transfers.[98]

---

[96] R.35 ¶ 10(d) (Settlement Agreement).

[97] *See Johnsen v. ACP Distrib., Inc*., 31 A.D.3d 172, 178 (1st Dep't 2006) (holding that parties' use of expansive, broad language to define the scenarios that would trigger a contractual obligation — "donate, hypothecate, pledge, transfer or otherwise dispose of his Stock in any manner whatsoever" — indicated that "the parties clearly intended to cover the broadest spectrum of events that would trigger" such an obligation.).

[98] *See Condor Capital Corp. v. CALS Inv'rs, LLC*, 179 A.D.3d 592 (1st Dep't 2020) ("[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms."); *Aetna Cas. & Sur. Co. v. Aniero Concrete Co*., 404 F.3d 566, 598

Under this unsupported reading, while all "transferees" during Mr. Stile's lifetime would be bound to the Surrender Provisions, his heirs and successors following his death would escape such restrictions. But this is entirely contrary to the purpose of the Settlement Agreement, which was intended to cut off Mr. Stile (and his heirs') rights after his death. Accordingly, the parties agreed that (a) all payments on account of Mr. Stile's shares in the C-Air Companies would cease upon his death and neither he nor his heirs would not be entitled to further "payments, profits" or other "interest in the operations" of the C-Air Companies; (b) unless an agreement could be reached within six months of the execution of the Settlement Agreement, there would be no "death benefits" to Mr. Stile's (or any shareholders') heirs; and (c) neither Mr. Stile nor his heirs would be entitled to receive "monthly income and expense statements" from the C-Air Companies, following his death.[99] In other words, the point of the Settlement Agreement was to extinguish Mr. Stile's and his heirs' rights following his death, not create new ones.

Accordingly, the Motion Court had no basis to find that the parties intended the term "transfer" in the Transfer Restriction to encompass only *inter vivos* transfers. To the contrary, consistent with the surrounding provisions in the

(2d Cir. 2005) ("[T]he language of a contract is not made ambiguous simply because the parties urge different interpretations. Nor does ambiguity exist where one party's view 'strains the contract language beyond its reasonable and ordinary meaning.'").

[99] R.29-32, 35-37 ¶¶ 2, 3, 4, 7, 11, 14-16 (Settlement Agreement).

Settlement Agreement, the Transfer Restriction was plainly intended to ensure that all "transferees" to Mr. Stile's shares—including the Stile Estate—were bound to the Settlement Agreement, including the Surrender Provisions.[100]

IV. EACH OF PLAINTIFF'S CLAIMS IS BARRED BY THE SETTLEMENT AGREEMENT, *RES JUDICATA* OR IS OTHERWISE DEFICIENT

Each of the claims asserted in Plaintiff's complaint is barred by the express terms of the Settlement Agreement, *res judicata*, or otherwise fails to state a claim. Accordingly, the Motion Court erred by failing to grant Defendants' Motion to Dismiss with prejudice.

A. Count 1 (Shareholder Distributions) Is Barred by the Settlement Agreement

[100] R.35 ¶ 10(d) (Settlement Agreement). Plaintiff has not indicated in these proceedings whether it has in fact agreed in writing to be bound by the Settlement Agreement. To the extent Plaintiff has not done so, the Court maintains continuing jurisdiction pursuant to Paragraph 13 of the Settlement Agreement to order Plaintiff to promptly deliver such writing to Defendants. Alternatively, the Court should find that Plaintiff, as the putative successor to Mr. Stile's C-Air shares (R.13 ¶ 15, Cmpl.), has constructively bound itself to the terms of the Surrender Provisions. *See Aviall, Inc. v. Ryder Sys., Inc*., 913 F. Supp. 826, 834 (S.D.N.Y. 1996), *aff'd*, 110 F.3d 892 (2d Cir. 1997) ("[A]n assignee assumes the rights and obligations of the contract with its eyes open, and once a complete assignment is made, the assignee cannot pick and choose which provisions it will honor and which it will not."); *In re Refco, Inc. Secs. Litig.,* No. 07-cv-11604, 2008 WL 2185676, at *5 (S.D.N.Y. May 21, 2008) ("The lack of a signature on a contract does not affect its validity where the non-signing party received the contract and knowingly accepted its benefits."); *Am. S.S. Owners Mut. Prot. & Indem. Ass'n, Inc. v. Am. Boat Co.*, No. 11-cv-6804, 2012 WL 527209, at *4 (S.D.N.Y. Feb. 17, 2012) ("A party which is a non-signatory to a contract, but which nonetheless receives a direct benefit from that contract, is estopped from seeking exclusion from provisions of the contract."); Restatement (Second) of Contracts § 328 (1981).

Plaintiff's first cause of action alleges that Defendants are unlawfully "withholding distributions due to Plaintiff since the date of death of Salvatore."[101] This claim is barred by the Settlement Agreement under which Mr. Stile, in exchange for a lifetime stream of payments and benefits (a) surrendered any right to "any other payments" or "profits" from the C-Air Companies, including "death benefits"; (b) agreed that he had no further "interest in the operations of" the C-Air Companies; and (c) agreed to "forever forbear" in commencing or prosecuting any legal proceedings in respect of matters "related to the operation and/or business of" the C-Air Companies, including as to shareholder distributions.[102] As discussed above, Plaintiff is bound to these Surrender Provisions as Mr. Stile's personal representative, under principles of *res judicata*, and as a "transferee" pursuant to the Transfer Restriction.[103] Accordingly, the Motion Court should have dismissed this claim.[104]

B. Count 2 (Minority Shareholder Oppression) Is Barred By The Settlement Agreement

Plaintiff's second claim for minority shareholder oppression asserts that Defendants have acted oppressively through their (a) "refusal to, inter alia, permit

---

[101] R.16-17 ¶ 32 (Cmpl.).

[102] R.31-35 ¶¶ 7, 10 (Settlement Agreement).

[103] *See supra* Sections I-III.

[104] *See Jackson*, 150 A.D.3d at 711 ("Here, the documentary evidence, i.e., the settlement agreement, utterly refutes the factual allegations of the first cause of action . . . and conclusively establishes a defense to those claims as a matter of law.").

Plaintiff the inspections subject of Plaintiff's Demands for Inspection and Defendants refusal to recognize Plaintiff as a shareholder" in respect of those demands, and (b) alleged "illegal siphoning of the [C-Air] Companies' assets and entitlements to" other entities related to Defendants.[105]

The Motion Court erred in declining to dismiss this claim as well because: (a) the law does not recognize a common law damages claim for shareholder oppression (such claim must be brought pursuant to N.Y. BCL § 1104-a or as a common law claim for dissolution);[106] (b) this claim is barred by the Settlement Agreement under which Mr. Stile (and Plaintiff as his personal representative and "transferee") surrendered all rights to "make any request or demand to inspect the records of the Companies;"[107] and (c) the "illegal siphoning" claim is not plead with sufficient

[105] R.17-18 ¶¶ 38, 41 (Cmpl.).

[106] *See Ganzi v. Ganzi*, 144 A.D.3d 510, 510 (1st Dep't 2016) (claim for minority oppression seeks dissolution); *BML Props. Ltd. v. China Constr. Am., Inc.*, No. 657550/2017, 2020 WL 1274238, at *4 (Sup. Ct. N.Y. Cnty. Mar. 17, 2020) ("In New York, a cause of action for shareholder oppression is typically brought under § 1104-a of New York Business Corporation Law…[and] [i]n any event, BCL § 1104-a specifically provides for the remedy of dissolution in the case of alleged shareholder oppression, not damages.").

[107] *See* R.33 ¶ 10(b)(x) (Settlement Agreement).

particularity"[108] and in any event, must be brought derivatively on behalf of the C-Air Companies,[109] which Mr. Stile and Plaintiff are prohibited from doing.[110]

C. Counts 3 to 6 (For Dissolution, Fair Value, and Appointment of Receiver) Are Barred By the Settlement Agreement

The Settlement Agreement further bars Plaintiff's third, fourth, fifth, and sixth causes of action, which seek dissolution and/or liquidation of the C-Air Companies, the appointment of a receiver pursuant to N.Y. BCL § 1113 to oversee such dissolution and/or liquidation, and payment for Mr. Stile's shares "at fair value."[111]

---

[108] CPLR 3016(b) ("Where a cause of action is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail"); *see also Flink v. Smith*, 66 Misc. 3d 1229(A) (Sup. Ct. Albany Cnty. 2020) (dismissing claim that defendants diverted clients and assets where plaintiff failed to plead with particularity); *Manda Int'l Corp. v. Yager*, 139 A.D.3d 594, 594 (1st Dep't 2016) (dismissing claim based on allegation that defendant diverted corporation's funds, which were alleged "upon information and belief," because it did not meet heightened pleading standard); *Nissan Motor Acceptance Corp. v. Scialpi*, 30 Misc. 3d 1240, 2011 WL 1044605, at *8 (Sup. Ct. Nassau Cnty. 2011), *aff'd*, 94 A.D.3d 1067 (2d Dep't 2012) (finding claim, which alleged that defendants diverted funds, sounded in fraud, and failed to meet heightened pleading standard of particularity).

[109] *Yudell v. Gilbert*, 99 A.D.3d 108, 114 (1st Dep't 2012) (New York courts make the distinction between direct and derivative claims based upon "(1) who suffered the alleged harm. . . and (2) who would receive the benefit of any recovery or other remedy."). "[A]llegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually." *Albany Plattsburgh United Corp. v. Bell*, 307 A.D.2d 416, 419 (3d Dep't 2003) citing *Abrams v. Donati*, 66 N.Y.2d 951, 953 (1985); *Pappas v. 38-40 LLC*, No. 650251/2017, 2018 WL 1030312, at *6 (Sup. Ct. N.Y. Cnty. Feb. 22, 2018), *aff'd*, 172 A.D.3d 409 (1st Dep't 2019) (dismissing individual causes of action for declaratory relief, breach of operating agreement, breach of fiduciary duty, waste, unjust enrichment, breach of implied covenant of good faith and fair dealing, accounting, conversion, and permanent injunction, because these claims had to be asserted derivatively as claims addressed harm to company).

[110] *See* R.35 ¶10(b)(xi) (Stile may not "commence, encourage, or support any derivative action in the name of the Companies") (Settlement Agreement).

[111] R.18-20 ¶¶ 43-57 (Cmpl.).

As set forth *supra*, Mr. Stile (and Plaintiff, as the personal representative of the Stile Estate and his "transferee") relinquished all rights to "seek, propose, solicit, or make any statement with respect to" a "acquisition of control," "transfer of assets," "dissolution," "liquidation," or "share repurchase or similar transaction involving the Companies or its business, whether or not such transaction involves a change of control of the Companies."[112] Accordingly, Plaintiff's claims for dissolution/liquidation of the C-Air Companies, the payment for the fair value of its shares in the C-Air Companies, and the appointment of a receiver to oversee a liquidation and/or dissolution, should have been dismissed.[113]

D. Count 7 (Conversion) and Count 8 (Unjust Enrichment) Are Duplicative of Plaintiff's Other Defective Claims

Plaintiff's causes of action for conversion and unjust enrichment allege that Defendants have "exercised unauthorized dominion" over "distributions" and other "monies and properties" to which it is putatively entitled, and thereby have been

[112] R.33 ¶ 10(b)(vii) (Settlement Agreement); *see also Hesek v. 245 S. Main St., Inc*., 170 A.D.2d 956, 956 (2d Dep't 1991) (holding that shareholder's surviving spouse could not seek dissolution because shareholder agreement precluded such right).

[113] Furthermore, Count 6 (Appointment of Receiver) fails to state a claim because Plaintiff fails to allege the necessary elements, including that the C-Air Companies are insolvent, their assets are being diverted, or that there has been corporate waste, as required for a claim brought under N.Y. BCL § 1113. *See Matter of Di Bona (Gen.l Rayfin Ltd.)*, 45 A.D.2d 696 (1st Dep't 1974) (finding record did not justify appointment of receiver where there was insufficient demonstration that the corporation was insolvent, or that its assets were being diverted or wasted); *Borriello v. Jersey Lynne Farms, Inc*., No. 515269/2016, 2017 WL 2152577, at *2 (Sup. Ct. N.Y. Cnty. May 17, 2017) (same).

unjustly enriched.[114] As Plaintiff's putative rights to "distributions" and "monies and properties" are governed by an express written agreement—the Settlement Agreement—and these claims simply duplicate Plaintiff's other deficient claims, including for shareholder distributions and oppression (Counts 1 and 2), the Motion Court should have dismissed Counts 7 and 8 as well.[115]

E. Counts 9 to 13, For Accounting, Declaratory Relief, Breach of Fiduciary Duty, and Constructive Trust, Should Also Be Dismissed

Plaintiff's causes of action for accounting (Count 9), declaratory relief (Count 10), breaches of fiduciary duty (Counts 11 and 12), and constructive trust (Count 13)—like all of its other defective claims—are predicated on the incorrect allegation that the Stile Estate is entitled to further payments following Mr. Stile's death.[116] As noted above, this is incorrect, and thus these claims should have been dismissed on

---

[114] R.21 ¶¶ 59, 60, 64 (Cmpl.).

[115] *See Remora Capital S.A. v. Dukan*, 175 A.D.3d 1219, 1220-1221 (1st Dep't 2019) (dismissing conversion and unjust enrichment claims as duplicative of breach of contract claims because they arose from matters covered under the parties' contract); *Boccardi Capital Sys., Inc. v. D.E. Shaw Laminar Portfolios, L.L.C.*, 355 F. App'x 516, 519 (2d Cir. 2009) (finding plaintiff's "quasi-contractual claims, seeking imposition of a constructive trust and recovery under a theory of unjust enrichment, are precluded by the existence of an express written agreement governing the subject matter at issue.").

[116] R.22 ¶ 67 ("The Defendants have failed and refused to account for and pay to Plaintiff what is due and owing.") (Cmpl,, Count 9); R.22 ¶ 71 ("As a result of the Parties' dispute concerning Plaintiffs equity stake in the Companies…") (Cmpl., Count 10); R.22 ¶ 72 (Cmpl., Count 10); R.23 ¶ 77 (Defendants Antico and Heid "personally gained a financial profit to which they were not legally entitled in violation of the Settlement") (Cmpl., Count 11); R.23-24 ¶ 86 (same, and alleging, without basis, that Defendants Antico and Heid violated the New York Limited Liability Company Law) (Cmpl., Count 12); R.25 ¶ 93 ("Plaintiff demands that the funds and property of the Companies in question thereof be held in a constructive trust for the benefit of Plaintiff and her family.") (Cmpl., Count 13).

this basis alone. In any event, numerous other bases exist for dismissing these claims.

First, under well-established law, a constructive trust is not a cause of action, but a remedy.[117] And Plaintiff fails to allege in any respect that Defendants have been unjustly enriched, a necessary element of a constructive trust claim.[118] Further, as Plaintiff's alleged right to payments and distributions from Defendants are expressly governed by a written agreement—the Settlement Agreement—Plaintiff plainly has an "adequate" remedy at law, thus obviating its alleged need for equitable relief.[119] Similarly, the accounting claim, which seeks the Companies' books and records, is barred by the Settlement Agreement, which prohibits Plaintiff from "request[ing] or demand[ing] to inspect the records of the [C-Air] Companies."[120]

---

[117] *See IB. Trading, Inc. v. Tripoint Glob. Equities, LLC*, 280 F. Supp. 3d 524, 545 (S.D.N.Y. 2017) ("[A] constructive trust is simply a remedy and is not the basis for a separate cause of action."); *Marini v. Lombardo*, 79 A.D.3d 932, 933 (2d Dep't 2010) ("A constructive trust is an equitable remedy.").

[118] *See In re Estate of Violi*, 65 N.Y.2d 392, 397 (1985) ("While a constructive trust may be imposed to prevent a wrongdoer's unjust enrichment, no wrongdoing is alleged here.") (citations omitted).

[119] *In re First Cent. Fin. Corp.*, 377 F.3d 209, 215 (2d Cir. 2004) ("[W]here a valid agreement controls the rights and obligations of the parties, an adequate remedy at law typically exists," and a claim for equitable relief such as constructive trust should be dismissed).

[120] R.33 ¶ 10(b)(xi) (Settlement Agreement); *see also SmartStream Techs., Inc. v. Chambadal*, No. 17-CV-2459 (VSB), 2018 WL 1870488, at *7 (S.D.N.Y. Apr. 16, 2018) (dismissing accounting claim because contract covered same subject matter and money damages were recoverable under other causes of action for same injury).

Second, Plaintiff has no need for declaratory relief. "A declaratory judgment action is generally appropriate only where a conventional form of remedy is not available. Where alternative conventional forms of remedy are available, resort to a formal action for declaratory relief is generally unnecessary . . . ."[121] That is exactly the situation here—Plaintiff's 14 other causes of action assert a variety of conventional remedies and obviate any need for declaratory relief.

Third, where breach of fiduciary duty claims are predicated upon alleged violations of a contract (here, the Settlement Agreement),[122] they should be dismissed as duplicative.[123] Indeed, one of Plaintiff's breach of fiduciary duty claims—Count 12—asserts a violation of the New York Limited Liability Company Law, without any basis or explanation, even though neither of the C-Air Companies is an LLC.[124]

---

[121] *Bartley v. Walentas*, 78 A.D.2d 310, 312 (1st Dep't 1980); *Olsen v. N.Y. State Dep't of Envt'l Conservation*, 307 A.D.2d 595, 596 (3d Dep't 2003) ("[A]n action for declaratory judgment is unnecessary where an action at law for damages is available.").

[122] R.23 ¶ 77 ("The Individual Defendants personally gained a financial profit to which they were not legally entitled in violation of the Settlement.") (Cmpl.).

[123] *See William Kaufman Org., Ltd. v. Graham & James LLP*, 269 A.D.2d 171, 173 (1st Dep't 2000) (stating that "[a] cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand."); *Celle v. Barclays Bank PLC*, 48 A.D.3d 301, 302 (1st Dep't 2008) (dismissing claim for fiduciary duty because the agreement "cover[s] the precise subject matter of the alleged fiduciary duty.") (internal quotations omitted).

[124] R.24-25 ¶ 86 (Cmpl.). The breach of fiduciary duty claims (Counts 11 and 12) should also be dismissed because they were not plead with sufficient particularity under CPLR 3016(b). *Grika v. McGraw*, 55 Misc. 3d 1207(A), 2016 WL 8716417, at *15 (Sup. Ct. N.Y. Cnty. 2016), *aff'd sub nom. L.A. Grika on behalf of McGraw*, 161 A.D.3d 450 (1st Dep't 2018) (dismissing breach of fiduciary duty claim where plaintiff failed to make specific allegations of wrongdoing and instead "impermissibly use[d] a 'group pleading' which does not comply with the heightened pleading

F. Plaintiff's Claims for the Repayment of Loans—Count 14 (Breach of Contract) and Count 15 (Money Had and Received)—Have Been Released Or Are Subject to Binding Arbitration

Counts 14 (Breach of Contract) and 15 (Money Had and Received) allege non-payment of certain unidentified loans that Mr. Stile allegedly extended to Defendants.[125]

Such claims should have been dismissed because Mr. Stile (and Plaintiff, as the personal representative of the Stile Estate and his "transferee") (a) agreed to release all claims relating to any loans extended to Defendants other than to C-Air LA pursuant to the Stile General Release,[126] and (b) agreed that the claims relating to the C-Air LA loans would be subject to mandatory and binding arbitration.[127] Accordingly Counts 14 and 15 should have been dismissed.

---

required of CPLR 3016(b)."); *Stortini v. Pollis*, No. 2680/14, 2015 WL 292026, at *2 (Sup. Ct. Dutchess Cnty. 2015), *aff'd*, 138 A.D.3d 977 (2d Dep't 2016) (dismissing breach of fiduciary duty claim where pleading failed to "particularize the facts allegedly giving rise to the fiduciary duties and the specific misconduct by defendants that are said to represent a breach of those fiduciary duties.").

[125] R.26 ¶ 95 ("The Defendants have denied Plaintiff's Demands for Inspection and have therefore failed and refused to account for and repay to Plaintiff what is due and owing in the loan(s) provided to the Companies by Salvatore.") (Cmpl. (Count 14); R.26 ¶ 99 ("The Defendants received money belonging to the Plaintiff by way of the loan(s) provided to the Defendants by Salvatore.") (Cmpl., Count 15).

[126] *See* R.39 (general release under which, in pertinent part, Mr. Stile on behalf of himself and his "successors and assigns" released Defendants as to, *inter alia,* all "debts, dues, sums of money, accounts" other than "outstanding loans" from C-Air LA) (Settlement Agreement).

[127] R.37 ¶ 17 (agreeing to appoint Ken Ayers to "resolve and determine the amount of loans made by each shareholder to C-Air LA" and agreeing to be "bound by the determination of Ken Ayers concerning the amount of shareholder loans to C-Air LA.") (Settlement Agreement); *see also Mencher v. B. & S. Abeles & Kahn*, 274 A.D. 585 (1st Dep't 1948) (provision providing for binding review by a third party clearly expresses an intention to arbitrate); *Int'l Longshoremen's Ass'n v.*

CONCLUSION

For the foregoing reasons, Defendants-Appellants respectfully request that this Court reverse the Decision in its entirety, and grant dismissal in favor of Defendants-Appellants dismissing the Complaint with prejudice.

Dated: New York, New York
December 6, 2021

HERRICK, FEINSTEIN LLP

By: _____

Scott Mollen
John H. Chun
Heather M. Zimmer

2 Park Avenue
New York, New York 10016
Tel: (212) 592-1400

Attorneys for Defendants-Appellants C-Air Customhouse Brokers-Forwarders, Inc., C-Air International, Inc., Milton Heid, and Augustus Antico

---

Hellenic Lines, Ltd., 549 F. Supp. 435, 437 (S.D.N.Y. 1982) (holding that clause which provided for a binding review by a designated third party is an arbitration clause even if not denominated as such in the contract); *Duafala v. Globecomm Sys. Inc.*, 91 F. Supp. 3d 330, 335 (E.D.N.Y. 2015) (same); *Wolf v. Wahba*, 164 A.D.3d 1405, 1406-08 (2d Dep't 2018) (finding representative of estate was bound by decedent's agreement to arbitrate); *Kolmer-Marcus, Inc. v. Winer*, 32 A.D.2d 763, 764 (1st Dep't 1969), *aff'd*, 26 N.Y.2d 795 (1970) (finding dispute concerning price for decedent's stock was subject to arbitration pursuant to terms of agreement because decedent's executor stood in place of testator and was bound by contractual arbitration provision).

PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

Type. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman
Point size: 14 point
Line spacing: Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service and this Statement is 11,579 words.

Dated: December 6, 2021

STATEMENT PURSUANT TO CPLR § 5531

New York Supreme Court

Appellate Division—First Department

CLARE MARIE STILE,

Plaintiff-Respondent,

– against –

C-AIR CUSTOMHOUSE BROKERS-FORWARDS, INC., C-AIR INTERNATIONAL, INC., MILTON HEID and AUGUSTUS ANTICO,

Defendants-Appellants.

---

1. The index number of the case in the court below is 656575/20.

2. The full names of the original parties are as set forth above. The full names of the original parties are as set forth above subject to the following clarifications: (a) pursuant to the Court's order granting Plaintiff-Respondent's cross-motion to amend the caption, Plaintiff is now referred to as "Clare Marie Stile, as personal representative of the estate of Salvatore Joseph

Stile aka Salvatore J. Stile is the new Plaintiff-Respondent" and (b) the correct name of defendant is "C-Air Customhouse Brokers-Forwarders, Inc."

3. The action was commenced in Supreme Court, New York County.

4. The action was commenced on or about November 25, 2020 by filing a Summons and Complaint. Issue was joined on or about January 29, 2021 by service of a Notice of Motion to Dismiss the Complaint in lieu of an Answer.

5. The nature and object of the action involves a dispute over an estate's obligations under a court-ordered settlement agreement entered into by its predecessor decedent.

6. This appeal is from the Decision and Order of the Honorable Verna L. Saunders, dated September 13, 2021, which denied Defendants' Motion to Dismiss the Complaint and granted Plaintiff's Cross-Motion to Amend the Caption.

7. This appeal is on the full reproduced record.