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To be Argued by:
HARLAN M. LAZARUS
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

Appellate Case No.: 2021-03689

CLARE MARIE STILE,

Plaintiff-Respondent,

– against –

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

Defendants-Appellants.

BRIEF FOR PLAINTIFF-RESPONDENT

LAZARUS & LAZARUS, P.C.
Attorneys for Plaintiff-Respondent
240 Madison Avenue
New York, New York 10016
(212) 889-7400
hlazarus@lazarusandlazarus.com

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I. PRELIMINARY STATEMENT

Plaintiff-Respondent Clare Marie Stile, as personal representative of the estate of Salvatore Joseph Stile aka Salvatore J. Stile (the "Estate" or "Plaintiff") by and through its undersigned attorney, respectfully submits this brief in opposition to Defendants-Appellants C-Air Customhouse Brokers-Forwards, Inc. ("C-Air NY"), C-Air International, Inc. ("C-Air LA"), Milton Heid ("Heid") and Augustus Antico ("Antico")[1] appeal from the Decision and Order (the "Decision")(R5-9) of the Supreme Court of the State of New York, New York County (Honorable Verna L. Saunders), (the "Supreme Court"), dated September 13, 2021 denying Defendants' Motion (the "Motion") for an Order Dismissing Plaintiff's November 25, 2020 Complaint (the "Complaint") pursuant to Civil Procedures Laws and Rules ("CPLR") Rule 3211(a)(1), (a)(5) and (a)(7).

The substance of Defendants' appeal is regarding whether the Supreme Court erred in its interpretation of the Order and Stipulation of Settlement entered in the Supreme Court of the State of New York, County of New York on May 26, 2010 (Lowe, J.) (the "Settlement Agreement")[2] and the releases associated with such Settlement Agreement (R29-43)(the "Releases"), which questions of interpretation in and of itself reflects that there is a sufficiently plead justiciable

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[1] C-Air NY, C-Air LA, Heid and Antico are collectively herein referred to as the "Defendants." C-Air NY and C-Air LA are collectively herein referred to as the "Companies."

[2] R39, the Settlement Agreement. All citations to "R" as used herein refers to the Record on Appeal.

controversy requiring a determination on the merits by a Court.[3]

Defendants would like this Court to interpret the Settlement Agreement as a total surrender of shareholder interests in exchange for certain income payments and benefits during Salvatore's lifetime (or upon a sale of the Companies) Appellants' Brief pg. 1. But such interpretation is illogical. Had the Companies been sold or Salvatore deceased a single day after the Settlement Agreement was entered Salvatore would have received nothing in exchange for what Defendants believe was a total surrender of one-third shareholder interests in two Companies.

The only logical interpretation of the Settlement Agreement was that there was no surrender of shareholder interests for the income payments provided for under the Settlement Agreement. Instead, Salvatore was entitled to receive certain income payments provided for under the Settlement Agreement, without any affect upon his one-third shareholder interests in the Companies.

Until such time as Plaintiff's shareholder status is determined by the Court, along with such rights, duties and obligations as attach to such shareholder status, it would be premature to dismiss any of Plaintiff's claims, which claims flow from

[3] Plaintiff's Tenth Count (R22,¶¶70-72) specifically seeks a declaration that Plaintiff is a one third shareholder of the Companies, citing an actual and justiciable controversy as existing between Plaintiff and Defendants and as reflected in correspondence with Defendants' counsel (R51(in which Defendants, by counsel, outright rejected Plaintiff's shareholder status, writing, "Please be advised that Mr. Stile is no longer a shareholder of either company".))

Plaintiff's shareholder status.

It is apparent that the Supreme Court's consideration of the facts as alleged in the Complaint as well as the documents annexed to the Complaint (i.e. the Settlement Agreement and Releases (R29- 43)) fit within cognizable legal theories sufficient to state claims against the Defendants at the pleading stage. The Settlement Agreement and Releases do not resolve the issues before the Court, which, in brief are Plaintiff's rights and entitlements as a one third shareholder in the Companies.

Accordingly, the Decision of the Supreme Court must be affirmed.

II. COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the Supreme Court correctly determined that issues lie with respect to whether Plaintiff is bound by the Settlement Agreement? Irrespective of the principles of estate succession, the Supreme Court correctly held that the Settlement Agreement fails to conclusively establish that all of Salvatore's rights in the Companies were extinguished at the time of his death.
2. Whether the Supreme Court correctly determined that a *res judiciata* defense is inapplicable to the claims raised in the underlying action (the "Action"). The Supreme Court tacitly implied that a *res judicata* defense does not lie, as the Plaintiff's claims in the Action are unrelated to those at issue in the

2008 Action and arise from circumstances that were not released.

3. Whether the Supreme Court correctly determined that the transfer restrictions set forth at ¶10(d) of the Settlement Agreement are inapplicable to Plaintiff. The Supreme Court correctly determined that that Plaintiff is not bound by the "transfer restrictions."
4. Whether the Supreme Court appropriately denied the motion to dismiss as to each count of the Complaint? The Supreme Court appropriately denied the Motion. The Complaint sufficiently states claims upon which relief can be granted. Nor does the Settlement Agreement, the Releases or the 2008 Action bar the claims.
5. Whether the Supreme Court correctly determined that Plaintiff states claims relating to the loans Salvatore extended to Defendants (the "Stile Loans")(Counts 14 and 15). The Supreme Court correctly determined that Plaintiff states claims relating to the Stile Loans, and held that such loans were not released under the Releases. Nor did Plaintiff agree to arbitrate claims relating to the Stile Loans.
6. Whether arguments raised for the first time on appeal are waived. Defendants' arguments, largely contained within Section IV of Defendants opening brief, were not raised before the Supreme Court and were therefore waived and should not be considered in connection with the Appeal.

III. COUNTER STATEMENT OF THE CASE AND FACTS

1. The 2008 Action

This lawsuit arises from a widow's, Plaintiff, attempt to ascertain her deceased husband's estate's rights and interests in two Companies, C-Air NY and C-Air LA, one-third of which Companies were indisputably owned by her husband, Salvatore J. Stile ("Salvatore") during his lifetime.

The co-owners of the Companies were parties to a previous litigation, captioned *Milton Heid et al. v. Salvatore J. Stile et al.,* Sup Ct, NY County, Index No. 603252/2008 (the "2008 Action") arising out of alleged breaches of the parties' shareholder agreement. The particular issues concerned whether Salvatore was "involved" in the Companies enough to receive a salary compensation and whether such salary or additional damages were owed from Salvatore to the Companies on account of alleged breaches by Salvatore. (R75- 85, Complaint in the 2008 Action). The 2008 Action did not concern a dispute over Salvatore's shareholder interests in the Companies. The 2008 Action resulted in the Settlement Agreement (R29- 38) at issue in the Action and this Appeal.

2. The Settlement Agreement

The Settlement Agreement, in pertinent part, provided for Salvatore's resignation as officer and director in the Companies (R32 ¶9), specific monthly income compensation to Salvatore that was to be treated as 1099 income (which

income compensation indisputably ceased upon his death or a sale of the Companies)(R29-30 ¶¶2, 3) the payment of certain legal expenses incurred by Salvatore in connection with the 2008 action (R31 ¶5), the exchange of releases (R39-43), and Salvatore's agreement to forebear from certain actions concerning the Companies' operations (R32- R37) and from commencing certain proceedings against Defendants (R31- 32 ¶7).

The Settlement Agreement separated Salvatore from the Companies, effectively making Salvatore a silent partner in the business. Despite Defendants categorization of the "Surrender Provisions" and "Transfer Restrictions" as an abandonment of shareholder interests, nowhere in the Settlement Agreement was Salvatore's shareholder interest in the Companies extinguished, either during his lifetime, upon the sale of the Companies or upon Salvatore's death. Rather, the Settlement Agreement included the "transfer provision" concerning the event of a sale, pledge, or transfer of Salvatore's interests in the Companies, and many other restrictions upon Salvatore's rights as a shareholder ,evidencing that Salvatore's shareholder interests in the Companies remained his post-Settlement (R35 ¶10(d)).

Moreover, the Settlement Agreement specifically provided for Salvatore to receive his "aliquot share of dividend" declared by the Companies (R30 ¶2). The entitlement to dividends is not in any form, fashion or manner circumscribed in the Settlement Agreement. The right to dividends attaches to the shares, which are

now held by the Estate. The Estate's right to dividends survives to the present and beyond, unrestricted by the Settlement Agreement.

Finally, the Settlement Agreement does not, by its own terms, bind "heirs, executors and assigns."

3. The Releases

In connection with the Settlement Agreement, Releases were also exchanged between the Defendants and Salvatore. The Releases were general releases relating to:

> any matter, cause or thing whatsoever from the beginning of the world to the day of the date of this RELEASE, provided however that any obligation of the RELEASEES pursuant to the Order and Stipulation of Settlement entered in the action entitled *Milton Heid and Augustus Antico v. Salvatore J. Stile*, Index No. 603252/08 (Supreme Court of New York, County of Westchester) shall not be released; and provided further that the obligation of RELEASEE C-Air International Inc. to reimburse the RELEASOR for all outstanding loans shall not be released.(R39)

The Releases did not include matters, causes and things arising subsequent to the date of the Release (R39). The Releases specifically excluded outstanding loans due Salvatore (R39). The Releases do not purport to release the Parties from obligations arising after the death of Salvatore. Nor do the Releases purport to relinquish Salvatore's shareholder interest in the Companies.

4. Notice of Inspection

Since the Settlement, and to the best of Plaintiff s knowledge, Heid, Antico

and Salvatore co-existed as equal shareholders in the Companies through the remainder of Salvatore’s lifetime. Salvatore regularly and consistently received tax filings clearly listing Salvatore as a one-third shareholder in each of the Companies prepared by Liberta & Milo, LLP, the accountants for Defendants (R17, Complaint ¶25)

Upon Salvatore's death and Plaintiff's appointment as personal representative of the Estate, Plaintiff retained Lazarus & Lazarus P.C. to investigate her rights in her capacity as personal representative with respect to any and all obligations owed by the Defendants to the Estate (R15, Complaint ¶20).

On September 25, 2020, Lazarus at Plaintiff's direction, sent correspondence to each Defendant, requesting the right to the inspection and copying of the accounting books and records of the Companies ("Demands for Inspection")(R44-50). In response, on September 29, 2020 (the “Response”), Defendants, through their counsel, responded by rejecting same, citing the Settlement (R51). The Response sets forth the false claim that Salvatore was no longer a shareholder in either C-Air NY or C-Air LA and ignored the request for records.

5. Procedural Summary

In response, on November 25, 2020, Plaintiff commenced the Action (R10-28). On or about January 29, 2019, Defendants moved pursuant to Civil Procedures Laws and Rules (“CPLR”) Rule 3211(a)(1), (a)(5) and (a)(7) to dismiss the

Complaint.

By Decision & Order dated September 13, 2021 the Supreme Court denied the Motion. In doing so, the Supreme Court held 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, it fails to conclusively establish that all of Stile's rights in the companies were extinguished at the time of his death." (R8).

The Supreme Court correctly held that ¶10(d) the "Transfer Restrictions" requiring an agreement in writing to transfer shares from the deceased, Salvatore, to his Estate, were inapplicable to the Estate. "That provision contemplates events where Stile "sells, pledges, encumbers, transfers, or otherwise disposes of, or agrees to sell, pledge, encumber or otherwise dispose of, any interest in his shares of stock of [the companies]" and concerned conduct contemplated during Salvatore's lifetime. " [A]nd to the extent to which it was meant to apply to the estate is not expressly denoted."

As to the Releases, the Supreme Court held that the Releases failed to preclude potential claims arising after the execution of the Releases (R8).

IV. ARGUMENT

1. Standard On A Motion To Dismiss.

When considering a motion to dismiss under CPLR 3211(a)(7), a court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). See also *Gomez-Jimenez v. N.Y. Law Sch.*, 103 A.D.3d 13, 16 (1st Dep't 2012) (the court must "accord the plaintiff the benefit of every possible favorable inference, and must determine whether the facts as alleged fit within any cognizable legal theory").

"The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action." *Bank of New York Mellon v. WMC Mortgage, LLC*, 41 Misc.3d 1230(A), 2013 WL 6153207, at *2 (Sup. Ct., N.Y. Cty. 2013).

In order to prevail on a motion to dismiss pursuant to CPLR 3211(a)(1), the moving party must "present documentary evidence that will definitively dispose of the claim." *Fischbach & Moore, Inc. v. E.W. Howell Co.*, 240 A.D.2d 157, 157 (1st Dep't 1997) (internal quotation omitted). "[T]he documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively

dispose of the plaintiff's claims." *Raske v. Next Mgm't, LLC*, 40 Misc.3d 1240(A), 2013 WL 5033149, at *6 (Sup. Ct., N.Y. Cty. Sept. 12, 2013) (citing *511 W. 232nd Owners Corp. v Jennifer Realty Co*., 98 N.Y.2d 144, 152 (2002)). See also *McCully v. Jersey Partners, Inc*., 60 A.D.3d 562, 562 (1st Dep't 2009) (motion to dismiss pursuant to CPLR § 3211(a)(1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law.'")

Here, Plaintiff's Complaint sufficiently states the elements of legally cognizable causes of action against the Defendants. Further, the Settlement Agreement and Releases do not utterly refute Plaintiff's factual allegations. Accordingly, the Supreme Court appropriately denied the Motion.

2. The "Surrender Provisions" Of The Settlement Agreement Do Not Equate To A Surrender Of Ownership For Stile Or His Estate.

On Appeal, as well as in the underlying Motion, Defendants allege that the so called "Surrender Provisions" of the Settlement Agreement amount to Salvatore's surrender of ownership in the Companies in exchange for certain lifetime payment and benefits and that such surrender is binding upon the Estate due to principles of estate succession.

As the Supreme Court correctly held 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, it 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 (Salvatore's) death and, thus, to his estate." (R8).

Salvatore's agreement via that "Surrender Provisions" that he has no interest in the operations of the Companies was not an agreement that Salvatore has no shareholder interest in the Companies, either during his lifetime, or that his Estate has no shareholder interest in the Companies upon his death. Nowhere does the Surrender Provision provide for a surrender of ownership interests in the Companies at all.

The Supreme Court correctly found that the Settlement Agreement "fails to conclusively establish that all of Stile's rights in the companies were extinguished at the time of his death." (R8)

Quite contrary to a surrender of shareholder interests, the Surrender Provisions imply Salvatore's maintenance of his shares in the Companies, and only the surrender of certain rights or actions with respect to such shares such as abandoning voting rights (R34¶10(c)(ii), requiring a proxy vote to be delivered to Heid or Antico (R34¶10(c)(iii), and abandoning the ability to commence a

derivative suit or class action suit for the Companies (R33, ¶10(b)(xi))[4]. Such provisions infer the maintenance of Salvatore's shareholder interests in the Companies.

Moreover, absent from the Settlement Agreement is the usual "boilerplate" clause binding heirs, successors and assigns to the agreement in question." If parties to a contract omit terms—particularly, terms that are readily found in other, similar contracts—the inescapable conclusion is that the parties intended the omission." *Quadrant Structured Products Co., Ltd. v Vertin*, 23 NY3d 549, 560 [2014]

The Court in *Gilmore v. Jordan*, 132 A.D.3d 1379, 17 N.Y.S.3d 545 (2015) examined a right of first refusal for a 29-acre parcel that was first drafted into a purchase and sale agreement for an adjacent 71-acre parcel (which expressly bound heirs and assigns) and then documented in the subsequent warranty deed conveying the 71-acre parcel (which did not expressly bind heirs and assigns). The Gilmore Court held, there is nothing in the [Settlement Agreement] to indicate that the right of first refusal was meant to be anything other than "a personal agreement

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[4] Moreover, the Settlement Agreement does not explicitly prohibit a suit by Plaintiff against the Companies. The constitutional right to seek redress before the courts cannot be waived by implication, or silence, rather the Court's review must be relinquished in a clear and unequivocal manner *FCI Group, Inc. v City of New York*, 54 AD3d 171, 175 [1st Dept 2008] citing *Matter of Waldron [Goddess],*61 N.Y.2d 181, 183–184, 473 N.Y.S.2d 136, 461 N.E.2d 273 [1984]).

[between the parties], binding on themselves only and not their [heirs] and assigns." Citing *Gilmore* (supra), the First Department wrote in *Meiri v. McNichols*, 53 NYS 3rd 534 [1st Dept. 2017], "Since the right of first refusal in the lease between plaintiff and decedent, William Cornwell, did not refer to their heirs, successors or assigns, it expired upon decedents death."

See also *Herrmann v. AMD Realty Inc*., 779 NYS 2nd 560 [2004] wherein the Second Department wrote, "the fact that there was no provision in the surrender agreement binding Herbert's successors implies that no such provision was intended."

Here, the personal obligations of Salvatore as set forth in the Settlement Agreement provide no express provision binding Salvatore's heirs to the personal obligations of Salvatore pursuant to the Settlement Agreement. Reference to the Release is ambiguous at best as the Release merely provides that "obligations" pursuant to the Settlement Agreement are not released, without expressly providing that the personal obligations of Salvatore as set forth in the Settlement Agreement are binding upon Salvatore's heirs, executors and assigns.

That the obligations under the Settlement Agreement were personal is manifest by the multiple references to, for example, payments due Salvatore under the Settlement Agreement terminating upon the death of Salvatore. There could be no purer example of a right being personal to Salvatore only and not binding upon

Salvatore's Estate. Accordingly, just as Defendants' obligation to pay monies to Salvatore terminated upon Salvatore's death, any right, duty, or obligation of Salvatore, exchanged for such payments, terminated upon Salvatore's death. In *Gilmore* (supra) the Court dealt with conflicting provisions in two documents and held the agreement in question not binding upon heirs. As in *Gilmore*, there is nothing in the [Settlement Agreement] to indicate that the right of first refusal was meant to be anything other than "a personal agreement [between the parties], binding on themselves only and not their [heirs] and assigns."

However, even if the surrender or rights relating to the operations of the Companies were applicable to the Estate, there is no surrender of shareholder interest anywhere in the Settlement Agreement. To assume that Salvatore exchanged his shareholder interests in exchange for income payments that could potentially cease a day after the Settlement Agreement was entered (i.e. if the Companies were sold a day later or Salvatore died the very next day) is illogical.

Accordingly, this Court should affirm the finding of the Supreme Court in its entirety.

3. **The Supreme Court Appropriately Rejected The *Res Judicata* Defense.**

Defendants would like this Court to find that the doctrine of *res judicata* bars the Action in its entirety. The argument in sum and substances is that the

Settlement Agreement, which was so ordered by a Court (Hon. Lowe, J.S.C.), is binding upon Plaintiff.

The Supreme Court correctly noted that such argument "is either without merit or need not be addressed (R8) because of the Supreme Court's holdings that it is unclear from the Settlement Agreement to what extent: a) Salvatore's rights in the Companies were extinguished upon his death; and b) the Settlement Agreement would apply to Salvatore's Estate (R8).

Res judicata serves as a bar to subsequent litigation concerning only those issues or questions that were once litigated and determined. Preclusive effect will not be given if the particular issue…was not "actually litigated, squarely addressed and specifically decided. " *Singleton Mgt., Inc. v Compere*, 243 AD2d 213, 217 [1st Dept 1998]

The claims in this Action i.e. what rights and interests Plaintiff has in the Companies was not in issue or determined in the 2008 Action. The claims in this Action in sum and substance arise out of the Settlement Agreement, did not preexist the Settlement Agreement and therefore, were not the subject of or litigated in the 2008 Action. The 2008 Action concerned Salvatore's entitlement to a salary from the Companies and alleged breaches of fiduciary duty by Salvatore (R75- 85, Complaint in the 2008 Action). The 2008 Action did not seek any sort of remedy, damages or declaration as to Salvatore's shareholder interests in the

Companies and most certainly did not pertain to the Estate's interests in such Companies.

Accordingly, the *res judicata* defense does not bar the Action, and the decision of the Supreme Court should be affirmed.

4. **The Transfer Restrictions Contained In The Settlement Agreement Do Not Bar The Action.**

With respect to the "Transfer Restrictions" found at ¶10(d) of the Settlement Agreement, the Supreme Court held that the limitations set forth at ¶10(d) "concerns conduct contemplated during Stile's lifetime and the extent to which it was meant to apply to the estate is not expressly denoted" (R8).

Defendants' underlying Motion admits just that (R69). The Motion ¶III (A) specifically provides that:

> "The foregoing language from ¶10(d) of the Settlement Agreement was included to protect against a sale or transfer by Mr. Stile during his lifetime–something Mr. Stile did not attempt to do." (R69)

Defendants cannot contradict their prior statement and argue that ¶10(d) also concerns a transfer upon the death of Salvatore. Even if Defendants now maintain that ¶10(d) did concern a transfer upon death, the ambiguity in Defendants' arguments reflects that at a minimum there is an issue as whether a transfer upon death is included at ¶10(d) on the Settlement Agreement that requires a determination by a Court.

Moreover, the limitation at ¶10(d) that "all payment and benefits due

pursuant to this Order and Stipulation shall immediately cease by C-Air NY and/or C-Air LA as the case may be" underscores that ¶10(d) transfers only pertained to *inter vivos* transfers. The payments and benefits due to Salvatore under the Settlement Agreement (¶¶2, 3, 4 and 5) expressly ceased upon the death of Salvatore. Thus, it would be superfluous and unnecessary for the Settlement Agreement to state that payments and benefits due pursuant to the Settlement Agreement ceased upon a transfer at the death of Salvatore- and implies that ¶10(d) only pertains to lifetime transfers. "[a] contract should be interpreted in a way [that] reconciles all [of] its provisions, if possible" *Frank v Metalico Rochester, Inc.*, 174 AD3d 1407, 1411 [4th Dept 2019]. Accordingly, ¶10(d) was plainly intended to insure that a lifetime transferee would not reap the salary and payment benefits provided to Salvatore under the Settlement Agreement.

Based on Defendants' prior position that ¶10(d) only concerned sales or transfers during Salvatore's lifetime, as well as construing the Settlement Agreement to give it a practical interpretation, the Supreme Court was correct in finding such limit to the Transfer Restriction section. Accordingly, the Decision should be affirmed.

5. **<u>Each Count Of The Complaint Was Appropriately Maintained By The Supreme Court.</u>**

As set forth above, due to the parties differing understanding of the Settlement Agreement (particularly whether and what restrictions contained in the

Settlement Agreement are binding upon the Plaintiff (Section IV (2) above)), and the Releases specific limitations (only claims through to the date the release and that the Release did not pertain to the loans from Salvatore (Section III(3) above)), Plaintiff's claims are all sufficiently stated.

Defendants' newly asserted argument as to why the claims are not sufficiently plead (i.e. all arguments outside of Defendants' *res judicata* and Settlement Agreement preclusion arguments) were not raised before the Supreme should not be considered by this Court for the first time on appeal. Regardless, plaintiff's counts are all sufficiently stated and should be maintained by the Court.

a. <u>Count One For Shareholder Distributions Is Properly Plead.</u>

Plaintiff's Count One for Plaintiff's distributions is sufficiently stated and is not otherwise barred by the Settlement Agreement. As set forth above, nowhere does the Settlement Agreement surrender any shareholder interests or payment of dividends to Salvatore as a shareholder owning one-third interests in the Companies. Defendants' understanding that Salvatore surrendered and disclaimed all rights to any dividends or distributions from the Companies after his death does not appear in the Settlement Agreement. Counsel's invented the "after his death" disclaimer. Salvatore's one-third shareholder interest in each of the Companies passed to his Estate, here represented by his widow, Clare Marie Stile as Personal Representative of the Estate.

Salvatore's agreement that itemized payments to Salvatore provided for in the Settlement Agreement cease upon his death is not an agreement that shares held by Salvatore at his death are renounced. The payment of income and benefits through Salvatore's lifetime does not serve as a bar to distributions at any point in time. Nor does the restriction on commencing certain litigation (concerning issues of petty cash, credit card charges, loans to the Companies and any other matter related to the operations and/or business of the Companies) expressly preclude proceedings relating to shareholder rights and interests to distributions (R31- 32, ¶7).

Defendants' reliance upon so much of the Settlement Agreement as provides for the termination of death benefits is beside the point. The parties, and their counsel, in executing the Settlement Agreement, can be presumed to have understood that the surrender of a "death benefit" is not a surrender of a shareholder interest[5]. Accordingly, the Complaint's First Count for Shareholder Distributions cannot be dismissed.

b. <u>Count 2 (Minority Shareholder Oppression) Is Properly Plead.</u>

Apart from Defendants' argument that this claim is barred by the Settlement Agreement, for the first time on appeal, Defendants argue that such claim must be

[5] The Shareholders initial 1996 agreement that may define the term "death benefit" is absent from the Record. A review of such document is needed in attempt to ascertain the meaning of "death benefit" as used in the Settlement Agreement.

plead with more particularity, must be brought derivatively and must be brought pursuant to N.Y. BCL §1104-a.

Such arguments are improperly raised as they were not raised in the Motion and were therefore waived. (See *U.S. Bank N.A. v. DLJ Mtge. Capital, Inc.,*146 A.D.3d 603, 603, 44 N.Y.S.3d 747 [1st Dept. 2017] declining to consider party's new theory, raised for the first time on appeal.)

The wrong, namely that Defendants refused to permit Plaintiff to inspect the Companies' books and records is sufficiently plead and supported by letters evidencing the wrong (R44- R51). Plaintiff's Second Count for Minority Shareholder Oppression, is further evidenced by Defendants' refusal to recognize Plaintiff's shareholder status, including the right to dividends –as set forth in Defendant's September 29, 2020 Response (R51). See *Matter of HGK Asset Mgt., Inc. (Greenhouse)*, 228 AD2d 246 [1st Dept 1996](one-third owner of a corporation who was denied compensation, benefits and access to corporate property sufficiently stated a cause of action for minority shareholder oppression).

Moreover, the claim does not need to be brought derivatively as it alleges harm and recovery independent to Plaintiff and not to the Companies. See *Yudell v Gilbert*, 99 AD3d 108, 110 (1st Dept 2012)(adopting *Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031, 1033 (Del 2004).

Accordingly, the Count is sufficiently stated and was appropriately

maintained by the Supreme Court.

c. Counts 3 to 6 (For Dissolution, Fair Value, And Appointment Of Receiver) Are Not Barred By The Settlement Agreement

Defendant's sole argument made in the Motion for the dismissal of Counts 3 through 6 pertains to a preclusion of the claims due to the Settlement Agreement. However, and as set forth above, the express terms of the Settlement Agreement do not preclude the relief requested within Counts 3-6. The Settlement Agreement does not state whether the Surrender Provisions are applicable upon Salvatore's death to his heirs and Estate or to what extent there was a surrender of shareholder interests in the Companies.

Defendant's new argument that Count 6 fails to state the necessary elements for the appointment of a receiver was not raised in the Motion, and was waived. *U.S. Bank N.A.* supra at 603 [1st Dept. 2017]. However, despite the belated argument, Count 6 is properly plead and the Decision must therefore be affirmed. See *Application of Androtsakis*, 139 AD2d 471, 471 [1st Dept 1988](The caselaw cited by Defendants is not persuasive as it concerned the *pendente lite* appointment of a receiver.)

d. Plaintiff's Seventh Count For Conversion And Eighth Count For Unjust Enrichment Are Properly Plead In The Alternative.

Defendant does not dispute that the seventh and eighth counts are properly plead, but again argues that the Settlement Agreement precludes such counts.

Plaintiff's right to distributions from the Companies and the Companies failure to provide such distributions and information pertaining to distributions is not expressly limited anywhere in the Settlement Agreement. The Settlement Agreement's silence as to distribution rights after the death of Salvatore and to what extent any waived rights under the Settlement Agreement can be imposed on successors to Salvatore are ripe for determination by a Court and should not be dismissed.

Additionally, Plaintiff is entitled to plead such theories of liability in the alternative to Plaintiff's other claims. See *Beach v Touradji Capital Mgt. L.P.*, 85 AD3d 674 [1st Dept 2011] "Plaintiffs should have been permitted to plead both contract and quasi-contract claims in the alternative.")

e. Counts 9 To 13 For Accounting, Declaratory Relief, Breach Of Fiduciary Duty And Constructive Trust Were Appropriately Maintained By The Supreme Court.

Again for the first time on appeal, Defendants raise new arguments as alleged bases for dismissing Count 9 for an accounting; Count
10 for declaratory relief, Counts 11 and 12 for breaches of fiduciary duty; and Count 13 for constructive trust. As none of the arguments, other than the terms of the Settlement Agreement, were raised on the Motion such arguments are improper for consideration on appeal. *U.S. Bank N.A.* supra at 603 [1st Dept. 2017]

With respect to the declaratory judgment claim, a declaration from the Court

as to the Plaintiff's equity stake in and to the Companies is necessary to resolve an actual and justiciable controversy between the parties. No remedy at law can establish or declare what the respective legal rights of the Estate are in the Companies. Accordingly, while Plaintiff may be owed alternate legal remedies stemming from Defendants' wrongful conduct to Plaintiff, a declaration as to Plaintiff's ownership rights is still necessary. See *Gowen v Helly Nahmad Gallery, Inc.*, 60 Misc 3d 963, 984 [Sup Ct 2018], affd, 169 AD3d 580 [1st Dept 2019]

The Defendants for the first time argue that the breach of fiduciary duty claims are duplicative of breach of contract claim. The breach of fiduciary claims do not relate to a breach of a contract, i.e. the Settlement Agreement, as no breach of any provision of the Settlement Agreement is alleged in the Complaint. Rather the breach of fiduciary duty arose out of Defendants' wrongful expulsion of Plaintiff from the Companies, failure to pay distributions to the Plaintiff, failure to allow Plaintiff to inspect the Companies books and records and failure and refusal to pay certain loans due Plaintiff (R19, ¶50).

Defendants also argue that the establishment of a constructive trust is an inappropriate remedy. However, the establishment of a constructive trust is an appropriate remedy for the Defendants wrongdoing of withholding distributions due to a minority shareholder and can be plead as an alternate basis for relief at the pleading stage. *Dolgoff v Projectavision, Inc.*, 235 AD2d 311, 312 [1st Dept 1997]

and *Jamison v. Lamborn*, 207 AD 375, 377 [1st Dept 1923].

f. Plaintiff's Claims 14 and 15 For The Repayment of Loans Can Be Maintained.

Despite Defendants' representations, the Settlement Agreement and Releases specifically carved out litigation arising out of C-Air International Inc.'s obligation to reimburse Salvatore for "all outstanding loans", thereby explicitly removing Plaintiff's 14th and 15th causes of action from Release.

The Settlement Agreement and Release plainly provide that loans due and payable to Salvatore were not discharged by the Settlement Agreement or Releases. Plaintiff has been unable to particularize the loan because of Defendants' denial of access to the books and records that would identify the loans outstanding and their payment status with particularity. However, such claims are sufficiently stated and the Supreme Court's maintenance of such claims should be affirmed.

Defendants' belated argument that the claims relating to the amount of the loans was subject to mandatory arbitration was not raised before the Supreme Court and was therefore waived *U.S. Bank N.A. supra at* 603 [1st Dept. 2017].

Nonetheless, the Settlement Agreement does not contain an unequivocal arbitration agreement as to outstanding loans that would be binding on the Plaintiff. The Settlement Agreements specifically permits Salvatore to commence an action and not arbitration relating to any and all outstanding Stile loans to the Companies (See R31-32 ¶7 "Stile agrees that he shall forever forebear from

"commencing, prosecuting, and/or participating in, directly or indirectly, any action or proceeding against Heid, Antico, C-Air NY and/or C-Air LA concerning the issues of petty cash, credit card charges, loans to C-Air NY and C-Air LA, and any other matter related to the operation and/or business of C-Air NY and C-Air LA (other than the issue of any sums due and owing to Stile for loans made or to be made by Stile to C-Air NY or LA)".

Reference to Ken Ayers in the Settlement Agreement (R35 ¶12) is in connection with determining the terms and conditions of future loans by Salvatore to the Companies and does not govern a dispute concerning the repayment of such loans, which according to the Settlement Agreement ¶7 could be litigated. (R31-32 ¶7). Without a "clear and unequivocal" agreement to arbitrate a claim, arbitration cannot be compelled. See *Whitelock v. Morgan Smith Barney LLC*, 82 A.D.3d 212 (2d Dep't 2011); *Allstate Ins. Co. v Roseboro*, 247 A.D.2d 379 (2d Dep't 1998).

Accordingly there is no express arbitration agreement as to the outstanding loans and the claims must be maintained at this juncture.

V. CONCLUSION

Plaintiff's allegations coupled with the parties differing interpretations of the Settlement Agreement are sufficient to withstand dismissal of the Action. The Supreme Court's denial of the Motion was appropriate and should be affirmed in its entirety. Based on the foregoing, Plaintiff respectfully requests that this Court

deny Defendants' Appeal and affirm the Supreme Court's Decision.

Respectfully Submitted,

LAZARUS & LAZARUS, P.C.

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New York, New York

Harlan M. Lazarus, Esq.
Yvette J. Sutton, Esq.
240 Madison Avenue, 8th Floor
New York, New York 10016
(212) 889-7400
hlazarus@lazarusandlazarus.com
Attorneys for Plaintiff-Respondent

APPELLATE DIVISION, FIRST DEPARTMENT
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