IN THE MATTER OF THE ESTATE OF HARRIET COHEN,

Deceased

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-002446-23

On Appeal From:
BERGEN COUNTY,
CHANCERY DIVISION

DOCKET NO: P-218-22

Sat Below:
EDWARD A. JEREJIAN, P.J.S.C.

CIVIL ACTION

BRIEF OF DEFENDANT-APPELLANT SAMANTHA O. PERELMAN

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Date: August 28, 2024

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PRELIMINARY STATEMENT

This case revolves around Defendant Samantha Perelman's ("Perelman") right to an interest in a beachfront property in Palm Beach, Florida ("Palm Beach Property"). Perelman inherited a percentage interest in the Palm Beach Property from her grandmother, Harriet Cohen ("Harriet"). However, Plaintiff James Cohen ("Cohen") (who is Perelman's uncle and Harriet's son) filed this case to keep Perelman from asserting that interest in the Palm Beach Property, claiming that Perelman released it in a September 13, 2021 Settlement Agreement ("Settlement Agreement") that Perelman and Cohen entered after Harriet died to resolve issues over various family trusts.

The Probate Court erred as a matter of law by holding that (1) Perelman released her right to Harriet's interest in the Palm Beach Property in the Settlement Agreement and that (2) in the alternative, Perelman would not have inherited that property interest under Harriet's estate plan in any event. The Probate Court relied solely on the language of the Settlement Agreement, Harriet's living trust, and the Probate Court's own speculation about their drafters' intent. Accordingly, the question before the Court is simple – this is a *de novo* review of the Probate Court's interpretation of the Settlement Agreement and Harriet's living trust. The Probate Court interpreted both incorrectly and contrary to principles of interpretation.

With respect to the Settlement Agreement, the Probate Court disregarded clear provision in which the parties expressly agreed that Perelman preserved all rights to any interest passing from Harriet's estate. In holding that Perelman waived her right to the property interest, the Probate Court improperly relied on a different provision of the Settlement Agreement that clearly did not apply to any property Perelman inherited from Harriet. The Probate Court's misinterpretation of the Settlement Agreement was wrong as a matter of law and is subject to de novo review.

The Probate Court's alternative holding that Perelman would not have inherited Harriet's share of the Palm Beach Property in any event was also erroneous as a matter of law. The Probate Court erred by misapplying the doctrine of probable intent to contradict the plain language of Harriet's living trust. The Probate Court did so not based on any extrinsic evidence, but instead based on speculation about Harriet's testamentary wishes. In so doing, the Probate Court effectively removed Harriet's interest in the Palm Beach Property from her trust's residue, even though it was also not the subject of any specific bequest, meaning that there would be no testamentary disposition of that property. That violates basic rules of trust construction.

The result of the Probate Court's errors was to deprive Perelman of a portion of her inheritance and to thwart Harriet's wishes. The Probate Court erred as a matter of law and should be reversed.

PROCEDURAL HISTORY

On April 29, 2022, Plaintiff James Cohen filed a Verified Complaint and Order to Show Cause seeking a declaratory judgment preventing Defendant Samantha Perelman from asserting an interest in the Palm Beach Property and compelling her to execute certain documents. (Da1, Da7). He made four claims for relief:

Count I: Request for a Declaratory Judgment that Perelman had surrendered all rights to assert an interest in a property held in Harriet's Trust (Da14);

Count II: Claim for Breach of the Covenant of Good Faith and Fair Dealing for Perelman's refusal to execute documents in connection with the administration of Harriet's Trust (Da15);

Count III: Claim for attorneys' fees and costs (Da17);

Count IV: "Reservation of Future Claims" (*Id.*).

In Count One, Cohen specifically sought a "declaratory judgment" "[d]eclaring that Perelman is prohibited" from asserting any future claim or

interest in the property interest at issue.[1] (Da15)

The case proceeded as a summary proceeding pursuant to *R.* 4:83-1 and *R.* 4:67-1. The Probate Court accepted briefs and heard argument but ordered no discovery and conducted no evidentiary hearing. (T1, T2).[2]

On May 1, 2023, the Probate Court issued an opinion and order. (Da267-81). The Probate Court ordered that Perelman was barred from asserting any claim to the property at issue except as provided for in Paragraph 24(F) of the Settlement Agreement (which, as described below, relates to a separate interest in the Palm Beach Property that passed to Perelman from her late grandfather). (Da281). The Probate Court further held that Perelman breached the Settlement Agreement, and awarded Cohen attorneys' fees under the Settlement Agreement's fee shifting provision. (*Id.*). The Probate Court denied Plaintiff's remaining requests. On March 8, 2024, the Probate Court further issued an order and opinion awarding Cohen $279,596.02 in fees and costs. (Da282).

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[1] At least part of Cohen's request seems aimed towards obtaining injunctive relief instead of declaratory relief under the New Jersey Declaratory Judgment Act, 2:16:50, *et seq.* This procedural issue was not addressed below.

[2] Transcripts are designated as follows:

1T: July 15, 2022
2T: December 16, 2022
3T: November 6, 2023 (fees only)

STATEMENT OF FACTS

This dispute arises from the disposition and administration of the Estate of Harriet Cohen ("Harriet's Estate").

I. The Cohen Family History

Harriet Cohen ("Harriet") was the matriarch of the Cohen family and the wife of Robert Cohen ("Robert"). In the 1970s, Robert purchased a bankrupt newsstand at Newark Airport and built it up into the now ubiquitous Hudson News chain, substantially increasing the family's wealth. *Cohen v. Perelman*, No. BER C-94-12, 2014 WL 2921601, at *1 (Ch. Div. June 24, 2014), *aff'd*, 2018 WL 6034978 (App. Div. Nov. 19, 2018), *certif. denied*, 237 N.J. 187.[3] Harriet and Robert had three children: James (the Plaintiff), Claudia, and Michael. *Id.*, at *2. Claudia had one daughter, Samantha Perelman (the Defendant). *Id.* Claudia and Michael both pre-deceased their parents. *Id.*

Cohen is Robert and Harriet's surviving child. (Da9, at ¶ 8). He is the executor of both Robert and Harriet's estates, the trustee of several of their respective trusts, and a beneficiary of several of their respective trusts.

[3] The Court may take judicial notice of these undisputed background facts from this opinion concerning a dispute over the Estate of Robert Cohen, upon which Plaintiff also relied in the Verified Complaint. (*See* Da10, at ¶ 13); N.J.R.E. 201(b), 202(b).

Perelman is Claudia's only child and a beneficiary of both Robert and Harriet's estates and several of their respective trusts. (Da9, at ¶ 10).

The locus of this case revolves around the Palm Beach Property, a property located in Palm Beach, Florida. Just before Harriet's death, the Estate of Robert Cohen ("Robert's Estate") held a 21.5 percent interest in the Palm Beach Property. (Da11, at ¶ 22). Harriet held a separate 21.5 percent interest in the Palm Beach Property, making her a tenant in common with Robert's Estate and the owner of the remaining interest in the Palm Beach Property (not relevant to this appeal). (*Id.*, at ¶ 21). Each of Robert and Harriet's respective interests in the Palm Beach Property is divisible and freely assignable. *See Gonzalez v. Wilshire Credit Corp*., 207 N.J. 557, 564 n.2 (2011) (noting that, "absent some contractual undertaking," the interest of a tenant in common can be transferred without the consent of the other tenants) (quoting *Cap. Fin. Co. of Del. Valley, Inc. v. Asterbadi*, 389 N.J. Super. 219, 225 (Ch. Div. 2006)).

II. The Litigation over Robert's Estate

Robert died on February 1, 2012, leaving behind a considerable estate, governed by a will and a living revocable trust ("Robert's Estate Plan"). (Da9-10, at ¶ 11). Cohen was the executor and trustee of Robert's will and trust.

(Da10, at ¶ 12). Both Cohen and Perelman are beneficiaries under Robert's Estate Plan.

There was substantial litigation between the parties over Robert's Estate Plan before and after his death. (*See id.* at ¶ 13, Da139, Da192); *Cohen*, 2014 WL 2921601. Their disputes culminated in a lengthy trial in the Chancery Division of the Bergen County Superior Court, which was resolved by an opinion and order issued on June 24, 2014 (the "Prior Litigation"). *See Cohen*, 2014 WL 2921601.

The distribution of Robert's interest in the Palm Beach Property became an important issue in the Prior Litigation. *See id.*, at *42 (describing the Palm Beach Property as a major source of contention). The court in the Prior Litigation eventually held that, under Robert's Estate Plan, Perelman received a lifetime license to use the property twenty-one days per year, and a right to participate in the proceeds of any sale. *Id.*, at *18. At the time of the Prior Litigation, Harriet was still alive, but suffering from advanced Alzheimer's Disease. *See id.*, at *3. No aspect of Harriet's Estate Plan was at issue in the Prior Litigation. *See id.*, at *30 n.45 (noting Harriet's wills were not in evidence).

III. Harriet's Estate Plan

Harriet died on July 5, 2020, also leaving behind a considerable estate governed by a will ("Harriet's Will") and the Harriet Cohen Living Trust (the "Trust" or "Harriet's Trust"), both dated March 9, 2007. (Da7; Da88). Cohen is the sole executor of Harriet's Will and the sole Trustee of the Trust. (Da8, at ¶ 4a). Cohen and Perelman are both beneficiaries of the Will and Trust. (Da8-9, at ¶¶ 4a-b). Article four of Harriet's Will directs that all assets not specifically disposed of are to be held and distributed in accordance with the terms of her Trust. (Da10, at ¶ 18; Da27). Harriet's 21.5 percent interest in the Palm Beach Property was not specifically disposed of in the Will and therefore is subject to the terms of the Trust. (*Id.*).

Two provisions of the Trust are relevant to this appeal. Section 3.3(A) places certain real property in a marital trust, excluding the Palm Beach Property, for Robert's benefit should he outlive Harriet. (Da51). Section 3.3(A) names Perelman as the contingent beneficiary of the real property in the marital trust should Robert pre-decease Harriet, as happened here.[4] Section 3.3(A) reads, in relevant part:

[4] The first contingent beneficiary for the marital trust and for many of the bequests at issue here was Claudia Cohen, Perelman's mother. As Claudia predeceased both her parents, Perelman became the beneficiary. In the interest

> If my Husband survives me, my Trustee (i) shall hold in a residence marital trust all of my right, title and interest (including, without limitation, any leasehold interest and stock in cooperative housing or any leasehold interest in rented property) in all of my residences located in Englewood, New Jersey and New York, New York, and in any other property used or occupied by me as my residence, other than Palm Beach, Florida (the "Residences") which is includible in the Trust Estate and all policies and proceeds of insurance thereon[.]
>
> …
>
> If my Husband does not survive me, my Trustee (i) shall distribute to CLAUDIA, if she survives me, or if she does not survive me, to her descendants who survive me, per stirpes, subject to Article IV of this Agreement, the Residences, and all policies and proceeds of insurance thereon and (ii) shall pay any mortgage indebtedness or other indebtedness thereon as an administration expense as provided in Paragraph A of Section 3.1 of this Agreement.

(Da51, at § 3.3(A)).

The Trust also contains a residuary clause in Section 3.6(A)(7) that provides for the distribution of "the remaining assets of the Trust Estate" not specifically bequeathed (the "Residuary Clause"). The Residuary Clause names Perelman as the beneficiary of the residue of Harriet's Estate:

> My Trustee shall distribute to CLAUDIA, if she is then surviving, or if she is not then surviving, to SAMANTHA PERELMAN, if she is then surviving,

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of clarity, Claudia has been omitted from the analysis unless specifically relevant.

> subject to Article IV of this Agreement, the remaining assets of the Trust Estate after the distributions provided in subparagraphs (2) through (4) of this Paragraph A.
>
> If neither CLAUDIA nor SAMANTHA PERELMAN is then surviving, my Trustee shall distribute from such remaining assets (a) a sum equal to one-half of the value of all assets which would have passed to CLAUDIA under this Agreement and my Will, if she had survived me, to MICHAEL SPENCER COHEN, if he is then surviving, subject to Article IV of this Agreement, and (b) the balance to JAMES.

(Da58, at § 3.6(A)(7)) (white space added for clarity).

The Trust does not specifically dispose of Harriet's interest in the Palm Beach Property in subparagraphs (2) through (4) of Paragraph A. The interest is thus a part of the residuary of the Trust, and passes to Perelman by operation of the Residuary Clause.

IV. The Settlement Agreement

On September 13, 2021, following Harriet's death, the parties executed a Settlement Agreement to resolve "certain issues [that] have arisen in connection with the administration of Harriet's Estate, Harriet's [] Trust," and two other trusts not relevant to this appeal. (Da91, at ¶ 12).

Paragraph 23 of the Settlement Agreement included a standard general release and waiver by Perelman as to several Cohen family trusts and estates. (Da94). In Paragraph 24, the parties expressly excluded ten categories from the general release and waiver:

> Notwithstanding anything contained in this Agreement to the contrary, the Parties acknowledge that the release and discharge set forth in Paragraph 23 shall not apply to any of the following:

(*Id.*).

Paragraph 24(F) excludes from Perelman's general release and waiver and preserves Perelman's ability to enforce rights bequeathed through Robert's Estate Plan, as previously adjudicated: 21 days of use per year and the right to participate in the proceeds of sale. (Da95-96). Paragraph 24(F) reads:

> Samantha's rights and interest in the Palm Beach Property as set forth in Section 3.3(A)(4)(d) of Robert's Revocable Trust including, without limiting any other rights, interests or obligations that Samantha may have as expressly provided by Section 3.3(A)(4)(d), the following:
>
> (i) her right to make use of the Palm Beach Property for a period of not more than twenty-one (21) days per year; and
>
> (ii) her right to receive a portion of the sale proceeds in the event of a sale of the Palm Beach Property as provided therein.
>
> The Parties acknowledge that Samantha's portion of the proceeds of any sale shall be reduced by the amount of any and all legal fees, other professional fees and expenses described more fully in Section 3.3(A)(4)(d) of Robert's Revocable Trust and the Parties acknowledge that such fees and expenses total fifty-three million, seven-hundred forty-nine thousand, eight hundred and three dollars ($53,749,803).
>
> For the avoidance of doubt, Samantha agrees to comply with all conditions and obligations imposed upon her

> by Section 3.3(A)(4)(d) and to refrain from asserting any Claims, rights or interests with respect to the Palm Beach Property other than as may be necessary to enforce the rights and interests provided to her by Section 3.3(A)(4)(d);

(*Id.*, at ¶ 24(F)) (white space added for clarity).

Paragraph 24(G) excludes from Perelman's waiver and release and preserves *all* of her rights to *any* property from Harriet's Estate or Trust. It even has an express statement by both parties acknowledging that Perelman preserves all rights to any asset passing from Harriet:

> Samantha's right to receive any remaining amount of the Reserve or any other assets that are distributable to Samantha from Harriet's Estate and Harriet's Revocable Trust pursuant to this Agreement.
>
> The Parties acknowledge that Samantha is not releasing her right to receive any property to which she is entitled as a beneficiary of Harriet's Estate or Harriet's Revocable Trust;

(Da96, at ¶ 24(G)) (white space added for clarity).

V. The Current Litigation

Sometime after the execution of the Settlement Agreement, Cohen demanded that Perelman execute certain documents in connection with the Florida probate and administration of Harriet's and Robert's Estates. (Da13, at ¶ 28). Perelman refused and asserted her rights to receive Harriet's 21.5

percent interest in the Palm Beach Property, which passed to her through the Residuary Clause of Harriet's Trust. (Da14, at ¶ 30).

On April 29, 2024, Cohen filed the Verified Complaint and Order to Show Cause. (Da1; Da7). Cohen sought a "declaratory judgment" that prohibits Perelman from asserting an interest in the Palm Beach Property aside from what is expressly identified in Paragraph 24(F) of the Settlement Agreement and an order compelling Perelman to execute documents in Florida. (Da14-15). Cohen also made a claim for breach of the covenant of good faith and fair dealing, and for attorneys' fees under the fee shifting provision of the Settlement Agreement. (Da15-17).

Cohen argued that Perelman waived her rights to receive Harriet's Interest in the Palm Beach Property in Paragraph 24(F). (Da279). Cohen also argued that Harriet never intended to pass her interest in the Palm Beach Property to Perelman in the Trust, such that the Trust Agreement should be read to preclude the interest from passing to Perelman despite the operation of the Residuary Clause. (Da275-76). Perelman argued that Paragraph 24(F) concerned only rights flowing from Robert's Estate, and that the plain language of Paragraph 24(G) preserved all rights flowing from Harriet's Estate, including to Harriet's interest in the Palm Beach Property. (Da273).

Perelman also argued that Harriet's interest in the Palm Beach Property passes to her through the Residuary Clause of the Trust Agreement. (Da277).

The Probate Court received briefs and heard oral argument, but did not order discovery or conduct an evidentiary hearing. The Probate Court ultimately rendered its decision based on the language of the Settlement Agreement, the Trust and the argument of the parties—not on any extrinsic evidence. The Probate Court held that Perelman released her rights to make a claim to Harriet's interest in the Palm Beach Property in Paragraph 24(F) of the Settlement Agreement. (Da281). The Probate Court held that Paragraph 24(F) is specific and 24(G) is general, therefore 24(F) controls. (Da274-75). The Probate Court also found that Harriet's probable intent was to exclude the Palm Beach Property from Perelman, thereby modifying the Trust to exclude the interest from passing in accordance with the Residuary Clause. (Da277).

ARGUMENT

I. THE PROBATE COURT MISINTERPRETED THE SETTLEMENT AGREEMENT TO FIND THAT PERELMAN WAIVED HER RIGHT TO HARRIET'S INTEREST IN THE PALM BEACH PROPERTY (Da265 – Da266; Da274 – Da275).

This Court should reverse the Probate Court's ruling that Perelman waived her rights to receive Harriet's 21.5 percent interest in the Palm Beach Property. The Probate Court failed in its obligation to attempt to read Paragraphs 24(F) and 24(G) in harmony before applying canons of

construction to modify an unambiguous term. The Probate Court also improperly applied canons of construction to use Paragraph 24(F) (concerning assets from Robert's Estate Plan) to modify and limit Paragraph 24(G) (concerning Harriet's Estate). The Probate Court's ruling modifies an unambiguous contract and misapplies the canons of construction to create an unreasonable reading.

A. The Standard of Review and Canons of Construction

The Court reviews the interpretation of a Settlement Agreement *de novo*. *Kieffer v. Best Buy*, 205 N.J. 213, 222-23 (2011) ("The interpretation of a contract is subject to de novo review by an appellate court."); *In re Est. of Balk*, 445 N.J. Super. 395, 399-400 (App. Div. 2016) (noting that a settlement agreement is a contract, subject to the "ordinary principles of contract law" and is reviewed *de novo*). The Court "pay[s] no special deference to the trial court's interpretation" of a contract and should "look at the contract with fresh eyes." *Kieffer*, 205 N.J. at 223; *see also Balk*, 445 N.J. Super. at 400.

The primary intent of a court reviewing a contract is to give effect to the parties' expressed intent. *Ace Am. Ins. Co. v. Am. Med. Plumbing, Inc.*, 458 N.J. Super. 535, 539-40 (App. Div. 2019) ("[I]t is not the real intent but the intent expressed or apparent in the writing that controls.") (quotation omitted); *C.L. v. Div. of Med. Assistance & Health Servs.*, 473 N.J. Super. 591, 599

(App. Div. 2022) (noting if the terms of a contract are clear and unambiguous then there is "no room for construction" and it must be enforced as written) (internal quotation omitted). A court must "strive to give effect to 'all parts of the writing and every word of it,' to the extent possible." *Id.* (quoting *Washington Constr. Co. v. Spinella*, 8 N.J. 212, 217 (1951)). The Probate Court violated this principle by grafting an unexpressed limitation onto Paragraph 24(G) that limited its application, despite a reasonable reading that gave full effect to all terms. (Da274-75).

A court also "should construe the provisions of a contract so that its terms do not conflict." *89 Water St. Assocs. v. Reilly*, No. A-3366-17T1, 2019 WL 4793073, at *7 (App. Div. Oct. 1, 2019) (citing *Silverstein v. Dohoney*, 32 N.J. Super. 357, 364 (App. Div. 1954)); *Universal N. Am. Ins. Co. v. Bridgepointe Condo. Ass'n, Inc.*, 456 N.J. Super. 480, 494 (Law Div. 2018) ("[I]n the event of potentially contradictory terms, the 'several parts of a contract should be so construed as to avoid conflict.'") (quotations omitted); *see also Forman v. Levenson*, No. A-3518-17T4, 2020 WL 359672, at *7 (App. Div. Jan. 22, 2020) (reading terms of a specific provision identifying the scope of an arbitral clause as non-exclusive so as to harmonize two contractual provisions).

A specific term modifies a general term only if conflict is unavoidable. *89 Water Street*, 2019 WL 4793073, at *7; *see also C.L.*, 473 N.J. Super. at 599 (indicating that specific language controls over general language only as "long as it leads to a result in harmony with the contracting parties' overall objective") (internal quotation omitted); *Grossman v. United States*, 57 Fed. Cl. 319, 323-24 (Fed. Cl. 2003) (stressing that the "specific governs the general" maxim "applies only where the conflict between two provisions is inescapable, with the decided preference being instead to harmonize the provisions, if possible").

Further, a specific provision only controls a general provision if the two terms deal with the same subject. *C.L.*, 473 N.J. Super. at 599-600 ("Therefore, when both general language of a contract and specific language address the same issue, the specific language controls."). The Probate Court relied on the canon that a specific term controls over a general term, finding Paragraph 24(F) limits Paragraph 24(G). (Da274). The Probate Court erred by not reading Paragraphs 24(F) and 24(G) in harmony and by comparing two provisions that deal with different subjects.

B. The Probate Court disregarded the text and structure of the Settlement Agreement to invent a non-existent conflict that it resolved through the improper use of construction tools.

The Probate Court skipped the crucial step of first identifying a conflict between two terms dealing with the same subject.

Paragraph 24(F) and 24(G) do not conflict because they do not deal with the same subject matter. Each deals with separate assets flowing through separate instruments. *See C.L.*, 473 N.J. Super. at 599-600 ("Therefore when both the general language of a contract and specific language *address the same issue*, the specific language controls.") (emphasis added). They cannot, therefore, be modified by reference or comparison to each other. To hold otherwise would be to fail to give full effect to both provisions.

Paragraph 24(F) excludes from the release the limited lifetime license (21 days per year) and right to a portion of the sale proceeds that accrue to Perelman through Robert's Estate Plan. (Da95-96, at ¶ 24(F)). As apparent from the plain language of Paragraph 24(F), it deals only with Perelman's rights to Robert's interest in the Palm Beach Property.

Paragraph 24(F) cites only to Robert's Estate, referencing a specific provision of Robert's Trust. (*See id.*, at ¶ 24(F)). It cites this provision at least five times. (*Id.*). The clause "for the avoidance of doubt," on which

Cohen relied heavily below, contains no waiver, release, or reference to Harriet at all. It references only Robert's Trust:

> Samantha's rights and interest in the Palm Beach Property as set forth in Section 3.3(A)(4)(d) of Robert's Revocable Trust including, without limiting any other rights, interests or obligations that Samantha may have as expressly provided by Section 3.3(A)(4)(d), the following:
>
> (i) her right to make use of the Palm Beach Property for a period of not more than twenty-one (21) days per year; and
>
> (ii) her right to receive a portion of the sale proceeds in the event of a sale of the Palm Beach Property as provided therein.
>
> . . .
>
> For the avoidance of doubt, Samantha agrees to comply with all conditions and obligations imposed upon her by Section 3.3(A)(4)(d) and to refrain from asserting any Claims, rights or interests with respect to the Palm Beach Property other than as may be necessary to enforce the rights and interests provided to her by Section 3.3(A)(4)(d);

(*Id.*, at ¶ 24(F)) (white space added for clarity).

Paragraph 24(F) contains no waiver, release, or other restriction of Perelman's rights outside the express subject of Paragraph 24(F). There is no mention of Harriet, Harriet's Estate Plan, or Harriet's interest in the Palm Beach Property. The only waiver and release is the one the Probate Court read into Paragraph 24(F).

On the other hand, Paragraph 24(G) could not be clearer. It excludes from the general release and waiver:

> Samantha's right to receive any remaining amount of the Reserve *or any other assets* that are distributable to Samantha from Harriet's Estate and Harriet's Revocable Trust pursuant to this Agreement.
>
> The Parties acknowledge that Samantha *is not releasing her right to receive any property* to which she is entitled as a beneficiary of Harriet's Estate or Harriet's Revocable Trust;

(Da96, at ¶ 24(G)) (emphasis added) (white space added for clarity).

By the plain language of the Settlement Agreement, Paragraph 24(G) concerns Harriet's Estate Plan and Perelman's rights arising from it. (*Id.*, at ¶ 24(G)). This is an entirely separate basket of rights, of which Harriet's interest in the Palm Beach Property is one aspect. Through her Trust's Residuary Clause, Harriet gave to her granddaughter, Perelman, the remainder of her assets not otherwise disposed of. This includes Harriet's 21.5 percent interest in the Palm Beach Property, which is separate from Robert's interest, and freely assignable at Harriet's discretion. There is no conflict between Paragraphs 24(F) and 24(G) if meaning is given to the plain language of these separate contractual terms.

The only way that Paragraphs 24(F) and 24(G) can be read in conflict is if Robert's interest and Harriet's interest are improperly conflated into one,

indivisible and unitary asset. The more reasonable reading, one that gives effect to all terms of the Settlement Agreement, is that these two paragraphs address separate issues. Paragraph 24(F) preserves Perelman's Palm Beach Property rights to enforce her access to and her share of the sale proceeds derived through Robert's Estate Plan. (*See* Da95-96, at ¶ 24(F)). Paragraph 24(G) preserves Perelman's Palm Beach Property rights as part of an separate basket of assets derived through Harriet's Estate (*See* Da96, at ¶ 24(G)).

This reading, entirely reasonable from the face of the Settlement Agreement, harmonizes and gives full effect to both provisions. The Probate Court chose a reading that creates a conflict and modifies the clear terms of the provisions. The Probate Court never attempted to read the two provisions in harmony – it never addressed the issue at all. (*See* Da274-75). The Probate Court improperly created conflict when a reasonable reading exists that avoids conflict. That was error.

Second, the Probate Court misapplied the one canon it did use. Paragraph 24(F) is, in fact, the more general and Paragraph 24(G) the more specific. Paragraph 24(F) is only "specific" if it addresses Robert's Estate Plan and Robert's bequest to Perelman. The Probate Court read Paragraph 24(F) to operate as a general waiver and release, relinquishing all rights to the Palm Beach Property from any source. (*See* Da274). This is broad and non-

specific. It is *general*. Paragraph 24(G), on the other hand, specifically identifies a basket of assets in which Perelman reserves all rights. It is the specific provision to the non-specific general waiver the Probate Court read into Paragraph 24(F). Paragraph 24(G) is the more specific and should control should resort to such analysis be necessary.[5]

Third, the structure of the Settlement Agreement undermines the Probate Court's interpretation. *See* Cathy Hwang and Matthew Jennejohn, *Deal Structure*, 113 Nw. U. L. Rev. 279, 327 (2018) (noting in modern contract interpretation that ignoring contract structure is "tantamount to ignoring evidence of parties' intent"). Paragraph 23 contains the Settlement Agreement's general release and waiver by Perelman. (Da94). It is the only general release by Perelman in the document.[6] Paragraph 24 and its subparts

[5] The difficulty of distinguishing which provision is the specific one illustrates the problems created by skipping the step of first identifying conflicting provisions. The specific/general canon of construction requires the comparison of two terms, which only works if they concern the same, or roughly the same, thing. Paragraphs 24(F) and 24(G) are not easily analyzed in this fashion because they each deal with two different topics rendering a comparative analysis difficult if not impossible. This is the reason that the canon should be employed only *after* a conflict is established.

[6] The general release by Cohen is at Paragraph 25 of the Settlement Agreement. (Da96-97). That release is not at issue in this litigation.

are paragraphs of *exclusion*, limiting the scope of the general release and preserving Perelman's right to enforce claims.

The Settlement Agreement employs clear, specific, and unambiguous language in the limited instance in which the parties chose to limit the scope of the exclusions in Paragraph 24. For example, Paragraph 24(B) provides:

> Any purported Claims arising from, related to or concerning the administration of Harriet's Estate, as determined by a court of competent jurisdiction, *with the exception of* any and all Claims based upon conduct, actions or omissions occurring from July 5, 2020 to August 9, 2021, which is the period of administration covered by the interim informal accounting for Harriet's Estate that has been supplied to Samantha and is attached hereto as Exhibit H.
>
> *The Parties acknowledge that Samantha is releasing* any and all such excepted Claims based upon conduct, actions, or omissions occurring from July 5, 2020 to August 9, 2021 and arising from, related to or concerning Harriet's Estate, but is not releasing any Claims against Harriet's Estate based on conduct, actions or omissions occurring after August 9, 2021.

(Da95, at ¶ 24(B) (emphasis added); *see also id.* at ¶ 24(C) (containing similar language)).

These paragraphs are notable for the separate and express acknowledgment of waiver and release. Likewise, when the parties intended one clause to modify another, they stated as much. Paragraph 24(J), which relates to Robert's Estate Plan and Marital Trust, begins with the phrase, "[i]n

addition to the exceptions set forth in Paragraphs 24 D, E and F of this Agreement . . .” (Da96).

Paragraph 24(F) and 24(G) contain no such language limiting the scope of the respective exclusions from the general release and waiver or providing that one of those provisions modifies the other. (*See* Da95-96). The Probate Court’s reading renders Paragraph 24(F) unlike any other clause in the Settlement Agreement by creating an implied, unexpressed, general waiver and release in what is otherwise a section dedicated to the preservation of rights. It also redrafts Paragraph 24(G) to limit an otherwise unlimited and expressly acknowledged reservation of rights.

Finally, the Probate Court’s ruling does not interpret the Settlement Agreement; it redrafts it. The Probate Court’s ruling requires a judicial modification to Paragraph 24(F) to include a release and waiver of any right to the Palm Beach Property from *any* source. That language is not stated in the text. It also redrafts Paragraph 24(G) to insert a limitation to the unambiguously complete preservation of rights. This redrafting of the Settlement Agreement is improper.

It is further worth noting that Paragraph 24(F) is right on top of Paragraph 24(G). (*See* Da95-96). These are not provisions buried in separate parts of a complex document. If the parties intended Paragraph 24(F) to

restrict Perelman's rights in Harriet's Estate and Trust, the parties would not immediately implement a full and complete preservation of all rights to Harriet's Estate and Trust in the next paragraph. Instead, the parties included additional language affirming the full and complete scope of Perelman's preservation of rights by "acknowledg[ing] that [Perelman] is not releasing her right to receive any property" from Harriet's Estate.[7] (Da96, at ¶ 24(G)).

The Probate Court's holding is incorrect as a matter of law because it violates a preliminary canon of construction that contract terms be read in harmony. The Probate Court created an unnecessary conflict between Paragraphs 24(F) and 24(G) when a reasonable interpretation existed that harmonizes and gives full effect to both provisions. The Probate Court's error is illustrated by the fact that its interpretation requires multiple modifications

[7] Cohen will likely point to an email included in his filings in which Perelman's prior attorney purportedly stated that the Palm Beach Property "was specifically devised to Jim." (Da273, n.3). No doubt Cohen will use this email to argue that the parties never contemplated that Perelman would receive the Palm Beach Property under the Trust. There were myriad problems with this email from a factual and evidentiary standpoint and the Probate Court expressly did not rely on the document. (*Id.*). Reliance on it would have been improper, in any event, as parol evidence may not be used to modify the terms of a contract. *Conway v. 287 Corp. Ctr. Assocs.*, 187 N.J. 259, 269-70 (2006) (noting that "[e]xtrinsic evidence may be used to uncover the true meaning of contractual terms," but not "to vary the terms of the contract"); *see also* (Da98, at ¶ 27 (acknowledging that the parties did not rely on any statement of law or fact outside the Settlement Agreement)).

of the agreement, while Perelman's interpretation does not. Moreover, the canon of construction employed by the Probate Court was misapplied. The Probate Court's decision was error and this Court should reverse.

II. THE PROBATE COURT ERRED IN HOLDING THAT THE TRUST AGREEMENT PRECLUDES PERELMAN FROM RECEIVING HARRIET'S INTEREST IN THE PALM BEACH PROPERTY. (Da275 – Da278)

The Probate Court made the ancillary finding that Harriet's interest in the Palm Beach Property did not pass to Perelman through the Residuary Clause because "[i]t is clear [Harriet] did not intend for [Perelman] to receive the Palm Beach Property." (Da277). The Probate Court relied on the Trust document and considered no extrinsic evidence. (Da275-78). The Court thus reviews the decision *de novo*. *Davidovich v. Israel Ice Skating Fed'n*, 446 N.J. Super. 127, 158 (App. Div. 2016) (noting that a trial judge's assessment of the documentary record receives no special deference and is reviewed *de* novo); *Belmont Condo. Ass'n, Inc. v. Geibel*, 432 N.J. Super. 52, 86 (App. Div. 2013) ("Of course, the construction of a written document solely on the basis of its own terms, is a question of law . . . and we review legal issues de novo . . . ."); *Matter of Ventre*, No. A-0011-21, 2022 WL 2542293, at *5 (App. Div. July 8, 2022) ("[A] trial court's legal determinations are not entitled to any special deference [and are] reviewed de novo.").

The Probate Court's speculative and highly suspect reading of the Trust Agreement is contrary to New Jersey law and the text of the Trust. The Court should reverse.

A. The legal standard.

In considering a trust, a court should strive to give effect to the intent of the testator. *Matter of Tr. of Nelson*, 454 N.J. Super. 151, 158 (App. Div. 2018). This may take the form of interpretation or reformation of a trust. *Id*. at 159. Interpretation of a trust "involves finding the meaning of language already in the instrument." *Id*. (quoting Uniform Trust Code, cmt. to § 4). Reformation "involves remaking or modifying an instrument, to correct mistakes, to fulfill an unexpressed intention, or to address circumstances that were unforeseen." *Id*. at 160.

"Examining the probable intent of a trust is a two-step process." *Schultz by Schultz v. Glasser*, No. A-5239-18T3, 2021 WL 269674, at *4 (App. Div. Jan. 27, 2021). The first step "involv[es] the interpretation of the existing trust, and then, when warranted by evidence, reformation." *Id.* A court will thus use extrinsic evidence twice: first, to determine if there is an ambiguity and then in an attempt to resolve it. *Nelson*, 454 N.J. at 162. An interpretation of a trust requires a showing of the testator's intent by a preponderance of the evidence; modification requires a showing by clear and convincing proof. *Id*. at 160.

B. The Probate Court identified no patent or latent ambiguity in the Trust that subjected it to the need for modification.

As with the Settlement Agreement, the Probate Court skipped the first step. Cohen offered no extrinsic evidence pointing to a latent ambiguity, and the Probate Court cited to none.

The doctrine of probable intent does not give free rein to a court to read ambiguities into otherwise clear documents. A court may not "conjure up an interpretation or derive a missing testamentary provision out of whole cloth." *Id.* at 158 (quoting *Engle v. Siegel*, 74 N.J. 287, 291 (1977)). It cannot "write a will the testator did not write." *In re Est. of Gabrellian*, 372 N.J. Super. 432, 441 (App. Div. 2004).

A court can and should rely on extrinsic evidence to identify a possible latent ambiguity (an ambiguity not clear from the four corners of the document). For example, in *Nelson*, this Court held that the trial court should have considered extrinsic evidence demonstrating that the decedent had a definition of "grandchildren" that was personal to her. 454 N.J. Super. at 164-65. The Court held that extrinsic evidence can be used to identify such "latent" ambiguities. *See id.* But, *Nelson* does not endorse the wholesale redrafting of a trust absent a patent (obvious) ambiguity or extrinsic evidence identifying latent ambiguities.

The doctrine of probable intent cannot be used to alter documents that are clear on their face absent the presentation of some extrinsic evidence revealing a latent ambiguity. *See Ventre*, 2022 WL 2542293, at *6 (noting that the probable intent doctrine is inapplicable where documents are clear and discussing the importance of extrinsic evidence to establish the existence of an ambiguity and to illuminate the testator's intent); *Matter of Est. of Alfieri*, No. A-2847-16T4, 2019 WL 4879852, at *11 (App. Div. Oct. 3, 2019) (holding that "bare conclusory assertions without factual support in the record" did not suffice to alter the clear terms of a will).

The terms of the Trust are clear and unambiguous. Perelman is the sole beneficiary of the residue of Harriet's Trust:

> My Trustee shall distribute to CLAUDIA, if she is then surviving, or if she is not then surviving, to SAMANTHA PERELMAN, if she is then surviving, subject to Article IV of this Agreement, the remaining assets of the Trust Estate after the distributions provided in subparagraphs (2) through (4) of this Paragraph A.
>
> If neither CLAUDIA nor SAMANTHA PERELMAN is then surviving, my Trustee shall distribute from such remaining assets (a) a sum equal to one-half of the value of all assets which would have passed to CLAUDIA under this Agreement and my Will, if she had survived me, to MICHAEL SPENCER COHEN, if he is then surviving, subject to Article IV of this Agreement, and (b) the balance to JAMES.

(Da58).

Harriet's 21.5 percent interest in the Palm Beach Property is not disposed of elsewhere. It therefore must pass in accordance with the terms of the Residuary Clause.

Notwithstanding this clear language, the Probate Court held that Harriet's probable intent was to exclude her interest in the Palm Beach Property from Perelman. (Da277). To reach this conclusion, the Probate Court relied on Section 3.3(A) of the Trust. (*Id.*).

As noted above, Section 3.3(A) of the Trust places certain real property in a marital trust for Robert's benefit. (Da51). The real property to be placed in the marital trust is identified as "all of my residences located in Englewood, New Jersey and New York, New York, and any other property used or occupied by me as my residence, other than Palm Beach, Florida. . ." (*Id.*). Perelman is the contingent beneficiary and was to take the property in the marital trust only if Robert died before Harriet, as came to pass. (*Id.*).

The Probate Court reasoned that because Section 3.3(A) excluded the Palm Beach Property from the real property placed in the marital trust, it evinced Harriet's intention to exclude the "Palm Beach Property" from any direct bequest to Perelman. (Da277 ("The Palm Beach Property was excluded from the other properties bequeathed to Defendant which were specifically stated in Section 3.3(A) of Harriet's [] Trust."). The Probate Court thus

modified the Residuary Clause at Section 3.6(A)(7) to exclude Harriet's interest in the Palm Beach Property from the residue of Harriet's Trust.

The Probate Court's analysis was not prompted by any extrinsic evidence revealing a latent ambiguity. Nor did the Probate Court identify any patent ambiguity or contrary intent. This was error. In the absence of a patent ambiguity, the Probate Court must remain faithful to the clear language of the Trust absent extrinsic evidence showing a latent ambiguity or contrary intent. This requires more than conclusory assertions by a party or the court's own speculation.

The language of the Trust is clear: the residue of Harriet's Trust passes to Perelman. The Probate Court identified no extrinsic evidence giving rise to an inference that Harriet had a different probable intent. The Probate Court's disturbance of the unambiguous language of the document without any basis at all was error.

C. The Probate Court modified the Trust without clear and convincing evidence (or any evidence) of Harriet's probable intent.

Notwithstanding the lack of any ambiguity or evidence of contrary intent, the Probate Court modified the Trust. It did not interpret or give meaning to specific language or phrases. Rather, it drafted an exclusion into the Residuary Clause, based on the Probate Court's belief that the Residuary

Clause failed to capture of Harriet's unexpressed intention to exclude the Palm Beach Property from the residue of the Trust. This is a modification and requires a showing of Harriet's probable intent by clear and convincing evidence.

To begin with, this case is an inappropriate matter for summary disposition without reference to extrinsic evidence. *See, e.g.*, *Matter of Est. of Stumm*, No. A-0655-18T2, 2019 WL 4620342, at *4 (App. Div. Sept. 24, 2019) ("When there is an ambiguity in the will, the testator's intent is a fact issue."). Cohen had the burden to submit extrinsic evidence justifying the modification he sought. He failed to do so and failed to meet his burden of proof. The Probate Court's reliance on Cohen's bald conclusions was error.

To the extent the Probate Court identified evidence of probable intent in the text of the Trust, its reasoning is textually unsound. The Probate Court reasoned that Harriet excluded the Palm Beach Property from other properties bequeathed to Perelman in Section 3.3(A). Section 3.3(A), however, was not a bequest to Perelman. Instead, it established a marital trust for Robert's benefit if he survived Harriet. It is from that marital trust that the Palm Beach Property is excluded:

> If my Husband survives me, my Trustee (i) shall hold in a residence marital trust all of my right, title and interest (including, without limitation, any leasehold interest and stock in cooperative housing or any

> leasehold interest in rented property) in all of my residences located in Englewood, New Jersey and New York, New York, and in any other property used or occupied by me as my residence, other than Palm Beach, Florida (the "Residences"). . .

(Da51).

The Probate Court erred in speculating that because Harriet excluded the Palm Beach Property from the marital trust she meant to exclude it from any other bequest to Perelman. By the Probate Court's reasoning: (1) Harriet excluded the Palm Beach Property from the property bequeathed to the marital trust for Robert's benefit; (2) this means she intended the marital trust to limit a possible bequest to the contingent beneficiary; and (3) therefore Harriet intended to exclude any property not included in the marital trust from passing to the contingent beneficiary by any means. This logic fails. The object of Section 3.3(A) is a bequest to Robert. There can be any number of reasons why Harriet excluded the Palm Beach Property from the marital trust. Nothing in the record points to her intent, and it was inappropriate for the court to speculate why.

The Probate Court also created a far bigger "ambiguity" and a far bigger issue than it purported to solve. The purpose of a Residuary Clause is to dispose of assets that are not specifically bequeathed or devised. If Harriet's interest in the Palm Beach Property does not pass through the Residuary

Clause, where does it go? To whom? By what mechanism? The Probate Court addressed none of these issues, deciding that it need not determine to whom the interest goes, just that it does not go to Perelman. This makes no sense. This asset has to go *somewhere.* N.J.S.A. 3B:3-34 ("Unless a will expressly provides otherwise, it is construed to pass all property the testator owns at death including property acquired after the execution of the will, and all property acquired by the estate after the testator's death."). If not to Perelman through the Residuary Clause, then to whom?

There is also an evidentiary point. Harriet's decision to not specifically bequeath an asset pursuant to other provisions of the Trust is powerful evidence that it should pass through the Residuary Clause. What happens if there is no clear answer as to Harriet's probable intent? This just creates an orphaned asset, ironically the very evil a Residuary Clause exists to avoid.

No doubt, Cohen has a plan. With the interest removed from the Residuary Clause, the way will be clear for him to press his own claim, no matter how weak. He will, after all, be able to argue that the asset must go somewhere. With Perelman precluded from asserting a claim, he probably will not even need to present his case to a judge. This is a situation ripe for abuse.

Harriet's intent from the face of the Trust is clear. She wanted the residue of her Trust to go to Perelman. To modify that Residuary Clause to

exclude a specific asset, Cohen had to present clear and convincing evidence that the unlimited Residuary Clause was contrary to Harriet's intent. Cohen produced no evidence. The textual reading proffered by Cohen and adopted by the Probate Court is logically faulty, as evidenced by the myriad problems the interpretation creates. It certainly does not rise to clear and convincing evidence of Harriet's probable intent to exclude her interest in the Palm Beach Property from Perelman from any source. The Probate Court erred in its interpretation of the Trust and Cohen failed to present evidence supporting his claim. The decision should be reversed.

CONCLUSION

The Probate Court's order finding Perelman in breach of the Settlement Agreement and barring her from pursuing all her rights to Harriet's Trust, including Harriet's Interest in the Palm Beach Property, and awarding attorneys' fees was made in error. The Probate Court's further ruling that Harriet's interest in the Palm Beach Property was excluded from the Residuary Clause was also made in error. This Court should reverse the Probate Court's

May 1, 2023 Order and Opinion and should vacate the Probate Court's March 8, 2024 award of fees.

August 28, 2024

Respectfully submitted,

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SUPERIOR COURT OF NEW JERSEY

IN THE MATTER OF THE ESTATE OF HARRIET COHEN,

DECEASED.

APPELLATE DIVISION
DOCKET NO. A-002446-23

Civil Action

Appeal From The Superior Court of New Jersey, Bergen County, Chancery Division, Probate Part

Trial Docket No.: P-218-22

Sat Below:

Hon. Edward A. Jerejian, P.J.Ch.

Submitted: October 4, 2024

AMENDED BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT JAMES S. COHEN

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PRELIMINARY STATEMENT

This appeal arises from the most recent in a series of protracted litigations involving defendant-appellant Samantha O. Perelman ("Perelman") and plaintiff-respondent James S. Cohen ("Cohen") concerning the estates of Cohen's parents and Perelman's grandparents: Harriet Cohen ("Harriet") and Robert B. Cohen ("Robert"). Central to this case is a September 13, 2021 Settlement Agreement ("Settlement Agreement"), which was heavily negotiated by Cohen and Perelman over a period of months (with both parties represented by counsel) in the hope of ***finally*** putting an end to over a decade of contentious and costly litigation. The Settlement Agreement—ironically intended to avoid further family strife—clarified the parties' respective rights and obligations regarding a number of different assets, estates and trusts. Through this appeal, Perelman now seeks to unravel that agreement with claims that are legally baseless in numerous respects.

The main point of contention concerns a valuable parcel of real property located in Palm Beach, Florida (the "Palm Beach Property"). The Estate of Harriet Cohen ("Harriet's Estate") holds an undivided 21.5% ownership interest in that asset, which passed upon her death into the Harriet Cohen Revocable Trust, dated March 9, 2007 ("Harriet's Revocable Trust"). The Settlement Agreement unambiguously establishes that Perelman released and discharged

any claims, rights or other interests in the Palm Beach Property with the exception of certain limited rights afforded to her under the Robert B. Cohen Living Trust dated April 12, 1993. To solidify that point, the parties included a sentence expressly stating that "***for the avoidance of doubt***" Perelman would "refrain" from asserting any other claims, rights or interests to the Palm Beach Property.

Despite agreeing to the Settlement Agreement's terms with the benefit of her prior attorneys' advice, Perelman (after several changes of counsel) attempted to disavow the parties' agreement by advancing a claim to the Palm Beach Property that directly contradicts the Settlement Agreement. The Trial Court, however, correctly regarded Perelman's attempt to claim the interest of Harriet's Estate in the Palm Beach Property as "wholly illogical and contradictory" to the plain language of the Settlement Agreement, which both parties asserted is clear and unambiguous.

Perelman's argument below did not stop there. She also advanced a flawed reading of the terms of Harriet's estate planning documents in the hope of misleading the Trial Court into believing that she is entitled to the Estate's interest in the Palm Beach Property. As explained below, however, Harriet's Will and Revocable Trust demonstrate the Palm Beach Property was ***never*** intended to pass to Perelman. Thus, the Trial Court similarly rejected

Perelman's position in that regard as "wholly illogical" and inconsistent with Harriet's probable intent as reflected by her estate planning documents.

The story here is simple. Having failed to achieve her objectives in years of prior litigation that cost Robert's Estate over $50 million in legal fees and other expenses, Perelman is now trying to rewrite the Settlement Agreement and undermine its chief purpose, which was to prevent the additional contentious litigation now before this Court. The Trial Court saw through Perelman's transparent efforts to renegotiate the Settlement Agreement and enforced it as written. The Trial Court also found that, even without the agreement, Perelman had no valid claim to the Palm Beach Property. Because those holdings are correct based on the plain reading of the pertinent documents, Cohen respectfully requests that this Court affirm the Trial Court's May 1, 2023 Order and Opinion in its entirety and bring this matter to a long-awaited conclusion.

PROCEDURAL HISTORY[1]

Cohen[2] commenced this action on April 29, 2022 by way of Verified Complaint and Order to Show Cause seeking, among other relief, a declaratory

[1] "1T" shall refer to the transcript dated July 15, 2022. "2T" shall refer to the transcript dated December 16, 2022. "3T" shall refer to the transcript dated November 6, 2023.

[2] Cohen brought the action individually, as well as in his capacity as Executor of the Estate of Harriet Cohen and as Trustee of the Harriet Cohen Living Trust, dated November 2, 2001, as amended and restated.

judgment enforcing the Settlement Agreement and specifically Perelman's release of all "Claims, rights or interests" in the Palm Beach Property. (Da001a-022a.) On or around June 27, 2022, Perelman filed her Answer and opposition to Cohen's Verified Complaint and Order to Show Cause, respectively. (Da214a.)

The Court heard initial oral arguments on the Order to Show Cause application on July 15, 2022. (See generally 1T.) At oral argument, Perelman's counsel requested (and received) permission to file a sur-reply, which ultimately was filed on or around August 1, 2022. (1T:29:23-25.) Subsequently, Cohen (with the Trial Court's approval) filed a response to Perelman's sur-reply on or around August 12, 2022. Importantly for purposes of this appeal, during the July 15, 2022 oral argument, the Court recognized that "both sides . . . indicat[ed] that [the Settlement Agreement] is clear so that the Court could, in essence, decide it on the papers," and that "both" parties "fe[lt] strongly that [the Settlement Agreement] speaks for itself and the Court can decide it that way." (1T:35:4-7; 44:13-14.) Perelman's prior counsel did not object or disagree with the Trial Court's observations and noted only that discovery may be warranted in the event the Trial Court found any "ambiguity" in the Settlement Agreement's terms. (1T:44:17-21.)

The Trial Court ultimately held another round of oral argument concerning Cohen's application on December 16, 2022. (See generally 2T.) Once again, at no point in any of the supplemental briefing did Perelman request discovery, nor did Perelman's prior counsel waver in its position that the Settlement Agreement was unambiguous. Indeed, during the December 16, 2022 hearing, Perelman's prior counsel stated "we believe that the settlement agreement is unambiguous," and again argued that only in the event "the Court finds [the Settlement Agreement] is ambiguous, then discovery is needed." (2T:16:23-25.) At no point thereafter did either party request discovery, and both parties argued—and maintain—the Settlement Agreement is clear and unambiguous.

Ultimately, the Trial Court entered the May 1, 2023 Order and Opinion. The Trial Court agreed with Cohen's interpretation of the Settlement Agreement. Specifically the Trial Court held that Perelman unambiguously agreed to refrain from asserting any claims, rights, or interests in the Palm Beach Property, and that she maintains no interest in the property except as provided for within Paragraph 24(F).[3] In addition, as discussed in greater detail below,

[3] In footnote 1 on page 4 of her brief Perelman incorrectly characterized Cohen's declaratory judgment application as one "aimed towards obtaining injunctive relief." To the contrary, Cohen properly sought a declaratory judgment from the Trial Court that, *under the Settlement Agreement*, Perelman agreed—voluntarily—to "refrain" from asserting the very claims to the Palm

the Trial Court found it was "clear [Harriet] did not intend for [Perelman] to receive the Palm Beach Property" under Harriet's estate planning instruments, even in the absence of the Settlement Agreement. (Da277a.) The Trial Court described Perelman's assertion that the Palm Beach Property somehow passes to her under the residuary clause of the Revocable Trust as "wholly illogical and contradictory to [Harriet's] intent." (Id.)

Finally, the Trial Court awarded Cohen reasonable attorneys' fees and costs pursuant to the fee shifting provision in Paragraph 35 of the Settlement Agreement. (See Da266a.) The specific amount of the fee award was fixed and memorialized in the Trial Court's March 8, 2024 Order, which was preceded by additional briefing and a November 6, 2023 hearing as to the reasonableness of Cohen's counsel fee application. (See Da282a-89a.) Perelman has abandoned her appeal from the March 8, 2024 Order and any challenge as to the reasonableness of the Trial Court's fee award to Cohen.

On April 15, 2024, Perelman filed her initial Notice of Appeal and Case Information Statement. (Da290a.) Perelman subsequently filed an Amended Notice of Appeal on April 23, 2024. (Da295a.) On August 21, 2024, Perelman

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Beach Property she is now asserting. The Trial Court agreed, and thus found that under the terms of the agreement, Perelman is "prohibited" from asserting said released claims. (Da281a.)

filed her Brief and appendix, along with a revised Case Information Statement noting she was no longer appealing the Trial Court's March 8, 2024 Order.

STATEMENT OF FACTS

I. Cohen Family History.

Cohen is the son of Harriet and Robert. (Da268a.) Harriet and Robert were predeceased by their daughter (and Cohen's biological sibling), Claudia Cohen ("Claudia"), who died on June 15, 2007. (Id.) Perelman is Claudia's daughter and the granddaughter of Harriet and Robert. (Id.) Perelman also is Claudia's sole surviving descendant, as well as Cohen's niece. (Id.; Da009a.)

Robert predeceased Harriet on February 1, 2012, leaving a Last Will and Testament, dated July 17, 2009 ("Robert's Will"), and a revocable trust known as the Robert B. Cohen Living Trust dated April 12, 1993, as subsequently amended and restated by way of an agreement dated March 31, 2010 ("Robert's Revocable Trust"). (Da268a.) Robert's Will was admitted to probate by the Surrogate of Bergen County on February 8, 2012, and Letters Testamentary were issued authorizing Cohen to serve as the Executor of Robert's Estate on February 21, 2012.[4] (Da010a.) Cohen is the current Trustee of Robert's Revocable Trust. (Da268a.)

[4] In prior litigation between Cohen and Perelman, the Superior Court of New Jersey, Bergen County, Chancery Division found that Robert's Will was

II. Harriet's Will and Revocable Trust.

Harriet died on July 5, 2020, and Harriet's Will (the "Will") was admitted to probate by the Surrogate of Bergen County on July 17, 2020. (Id.) Cohen was appointed as the Executor of Harriet's Estate, as evidenced by the Letters Testamentary authorizing him to serve in that capacity, on July 20, 2020. (Da010a.) Cohen also currently serves as Trustee of Harriet's Revocable Trust. (Da268a.)

Article THIRD of the Will governs the disposition of Harriet's tangible personal property. (Da010a.) Pursuant to Article FOURTH of the Will, the remainder of Harriet's assets are to be distributed in accordance with Harriet's Revocable Trust.[5] (Id.)

"the true and valid last will and testament of Robert Cohen" and that Robert was domiciled in New Jersey at his death. (Da268a.)

[5] Notably, the Trial Court was not asked to determine who ultimately should receive Harriet's former 21.5% interest in the Palm Beach Property. Rather, the Trial Court was asked only to find Perelman did not have any rights or interests in the Palm Beach Property except those referenced specifically in Paragraph 24(F) of the Settlement Agreement. (Da015a) ("A judicial declaration is necessary at this time to conclusively adjudicate this dispute and confirm that ***Perelman is prohibited*** from asserting any claims, rights or interests with respect to the Estate's 21.5% share of the Palm Beach Property, and that her interest in the property is limited to those rights expressly set forth in Paragraph 24(F) of the Settlement Agreement.") (emphasis added).

III. The Settlement Agreement Intended to Avoid Further Litigation.

The parties previously were involved in a protracted and wildly expensive litigation concerning Robert's Estate. (See generally Da140a.) Specifically, Perelman commenced litigation in 2012 involving Robert's Estate in the Superior Court of the State of New Jersey, Bergen County, Chancery Division, that caused the estate to incur over $50 million in legal fees and resulted in a trial spanning eighty-five days in which over fifty witnesses proffered testimony. (See Da140a; Da096a at Paragraph 24(F.)) Tellingly, all four (4) of Perelman's baseless causes of action in that matter were dismissed with prejudice following trial. The Appellate Division subsequently affirmed in a lengthy 2018 opinion. (See generally Da193a.)

In an effort to avoid a repeat of the acrimony and astronomical expense of the prior litigation concerning Robert's Estate, the parties—each of whom were represented by competent counsel—spent months negotiating the September 13, 2021 Settlement Agreement. (Da269a.) During the negotiation process and prior to the execution of the Settlement Agreement, Cohen provided Perelman with an "Administrator's Account in the Matter of the Estate of Harriet Cohen" (the "Estate Accounting") and an "Administrator's Account in the Matter of the Trust of the Harriet Cohen Living Trust" (the "Trust Accounting"), covering the period from July 5, 2020 to August 9, 2021. (Da011a.) The Estate Accounting

and Trust Accounting identified the assets owned by Harriet and Harriet's Revocable Trust at the time of her death, including her 21.5% interest in the Palm Beach Property. (Id.) Specifically, Harriet's ownership of a 21.5% undivided interest in the Palm Beach Property was disclosed in Schedule A of the Estate Accounting provided to Perelman's representatives. (Id.) Robert's Estate also holds a separate 21.5% undivided interest in the Palm Beach Property, and its distribution is controlled by the terms of Robert's Revocable Trust. (Id.)

Under the Settlement Agreement, and in exchange for substantial consideration,[6] Perelman executed a broad release. Perelman specifically released and discharged any and all "Claims" relating to, among other things, (i) Cohen (ii) Harriet's Estate, and (iii) Harriet's Revocable Trust. (Da094a.) That release, contained in Paragraph 23 of the Settlement Agreement, defines the term "Claims" specifically and broadly:

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[6] As the Trial Court recognized in its analysis, Perelman received substantial consideration under the Settlement Agreement, including: (i) the net proceeds from the sale of two properties owned by Harriet or Harriet's Revocable Trust in Englewood, New Jersey and New York, New York; (ii) all of the assets held under [the 1992 Trust and the Claudia Cohen Survivor Trust]; (iii) half of the insurance proceeds of the James S. Cohen Irrevocable Trust (valued at approximately $2.65 million) and half of the insurance proceeds of the Claudia Cohen Survivor Trust (valued at approximately $1.75 million) for a total amount of approximately $4.4 million; and (iv) jewelry from Harriet's Estate appraised at over $2 million. (Da269a.)

> In consideration of the promises set forth in this Agreement, and except as otherwise expressly stated in this Agreement, [Perelman] and her respective trustees, agents, attorneys, heirs, beneficiaries, spouses, employees, consultants, representatives, executors, administrators, successors, predecessors and assigns (collectively, "[Perelman]") ***hereby completely release and forever discharge [Cohen], Robert's Estate Plan, the Marital Trusts, Harriet's Estate, Harriet's Revocable Trust, the Claudia Cohen Survivor Trust, the 1992 Trust, and the James S. Cohen Irrevocable Trust*** along with their respective trustees, agents, attorneys, heirs, beneficiaries, employees, spouses, consultants, representatives, executors, administrators, successors, predecessors and assigns ***from any and all duties to account, actions, causes of action, duties of indemnification, rights, claims, debts, liabilities, obligations, costs, expenses (including attorneys' fees), liens, suits, losses, damages, judgments, and demands of any nature whatsoever, whether known or unknown, vested or contingent, without limitation (collectively, "Claims")*** including, but not limited to, any and all Claims that [Perelman], whether directly or indirectly (by assignment, succession, acquisition or otherwise), ever had, presently has, or may have, from the beginning of the world through the date of this Agreement.
>
> [Da094a, at Paragraph 23 (emphasis added).]

Importantly, the term "Claims" was not limited to claims involving Robert's Revocable Trust as Perelman suggests in her brief (See Db10). To the contrary, the Trial Court correctly recognized that the term "Claims" applies to "any and all" claims against Cohen, Robert's Estate, Robert's Revocable Trust,

Harriet's Estate and Harriet's Revocable Trust, among other instruments and individuals as noted above. (Da094a; see also Da274a-75a.)

Immediately following Perelman's broad release, the parties included a paragraph that excepted certain rights from the breadth of the Paragraph 23 release. (Da094a-96a.) In a provision expressly addressing the Palm Beach Property, Paragraph 24(F) of the Settlement Agreement: (i) created a carveout allowing Perelman to retain certain limited rights to use the Palm Beach Property arising under Robert's Revocable Trust and; (ii) confirms her release of ***all*** other "Claims, rights or interests" in the property that carve out provision preserved:

> [Perelman]'s rights and interest in the Palm Beach Property ***as set forth in Section 3.3(A)(4)(d) of Robert's Revocable Trust*** including, without limiting any other rights, interests or obligations that [Perelman] may have as expressly provided by Section 3.3(A)(4)(d), the following: (i) her right to make use of the Palm Beach Property for a period of not more than twenty-one (21) days per year; and (ii) her right to receive a portion of the sale proceeds in the event of a sale of the Palm Beach Property as provided therein. The Parties acknowledge that [Perelman]'s portion of the proceeds of any sale shall be reduced by the amount of any and all legal fees, other professional fees and expenses described more fully in Section 3.3(A)(4)(d) of Robert's Revocable Trust and the Parties acknowledge that such fees and expenses total fifty-three million, seven-hundred forty-nine thousand, eight hundred and three dollars ($53,749,803). ***For the avoidance of doubt, [Perelman] agrees to comply with all conditions and obligations imposed upon her by Section 3.3(A)(4)(d) and to refrain from asserting any Claims, rights or interests with respect to the Palm***

> ***Beach Property other than as may be necessary to enforce the rights and interests provided to her by Section 3.3(A)(4)(d).***
>
> [Da095a-96a, Paragraph 24(F) (emphasis added).]

Accordingly, Perelman relinquished all "Claims, rights or interests" with respect to the Estate's 21.5% interest in the Palm Beach Property when she executed the Settlement Agreement. (Id.) As to the Palm Beach Property, she retained only her rights under Section 3.3(a)(4)(d) of Robert's Revocable Trust. Again, "Claims" was broadly defined in the release contained in Paragraph 23 of the Settlement Agreement and that same broadly-defined term was used again in Paragraphs 24(F) and (G). (Da094a-96a.)

IV. Perelman's Repudiation of the Settlement Agreement.

On February 8, 2022, Cohen, through counsel, served Perelman with correspondence and a detailed Schedule of Proposed Distributions (and related documents) identifying the manner in which Cohen planned to distribute the assets of Harriet's Estate and Harriet's Revocable Trust. (Da013a.) The February 8, 2022 correspondence also requested that Perelman facilitate the terms of the Settlement Agreement by: (a) executing Ancillary Probate Documents necessary to administer Robert's Estate's and Harriet's Estate's interests in the Palm Beach Property; and (b) filing a Notice of Withdrawal concerning a petition Perelman brought in Florida in connection with Robert's

Estate, which implicated claims that had been resolved against her in the Superior Court of New Jersey. (Da013a; Da106a-07a.) Because Perelman did not comply, Cohen commenced this litigation on April 29, 2022. (Da001a.)

Perelman's theory in this dispute is truly "illogical," to adopt the term used by the Trial Court. (Da277a.) Notwithstanding her clear and unequivocal release of all "Claims, rights, and interests" relating to Harriet's Estate's 21.5% share of the Palm Beach Property, Perelman contends she somehow recaptured that interest under Paragraph 24(G) of the Settlement Agreement, a general provision preserving Perelman's right to receive "other" property she is entitled to as a beneficiary of Harriet's Estate or Harriet's Revocable Trust.[7] The Trial Court flatly rejected Perelman's interpretation of Paragraphs 24(F) and 24(G) as directly belied by the Settlement Agreement's plain and unambiguous terms ***and*** Harriet's Will and Harriet's Revocable Trust. (See Da270a-278a.)

LEGAL ARGUMENT

I. STANDARD OF REVIEW.

No special standards of appellate review govern summary actions conducted pursuant to Rule 4:67. Rather, the usual standards of review for civil

[7] Paragraph 24(G) preserves "[P]erelman's right to receive any remaining amount of the Reserve or any ***other*** assets that are attributable to [Perelman] from Harriet's Estate and Harriet's Revocable Trust pursuant to this Agreement." (Da096a.)

cases apply. See, e.g., O'Connell v. N.J. Mfrs. Ins. Co., 306 N.J. Super. 166, 172-73 (App. Div. 1997), certif. granted, 153 N.J. 405, appeal dismissed, 157 N.J. 537 (1998). Accordingly, for purposes of this appeal, this Court reviews the Trial Court's legal interpretation of the Settlement Agreement, Harriet's Will, and Harriet's Revocable Trust *de novo*. The Borough of Fort Lee v. Hudson Terrace Realty Mgmt. Corp., 2005 WL 3108187, at *6 (App. Div. Nov. 22, 2005)[8] ("Here, there are no genuine issues of material fact [in connection with the summary action] but the parties dispute the legal significance of the facts . . . . The standard of review thus is de novo . . . .").

A. Summary Disposition Standard.

Pursuant to Rule 4:83-1, "all actions in the Superior Court, Chancery Division, Probate Part, shall be brought in a summary manner by the filing of a complaint and issuance of an order to show cause pursuant to R. 4:67." As noted in comment 1 to Rule 4:67-1, summary disposition:

> [I]s intended to accomplish the salutary purpose of swiftly and effectively disposing of matters which lend themselves to summary treatment while at the same time giving the defendant an opportunity to be heard at the time plaintiff makes his application on the question of whether or not summary disposition is appropriate.

[8] Pursuant to Rule 1:36-3, a true copy of Hudson Terrace Realty Mgmt. Corp., 2005 WL 3108187 (App. Div. Nov. 22, 2005) is included in Cohen's Appendix.

> [Pressler & Verniero, Current N.J. Court Rules, cmt. 1 to R. 4:67-1 (2024).]

Actions brought in a "summary manner," however, are distinguishable from summary judgment motions in that the trial court may make findings of fact, and accords no favorable inferences to the party opposing summary disposition. See id. If the trial court is "satisfied with the sufficiency of the application, [it] shall order defendant to show cause why final judgment should not be rendered for the relief sought." Courier News v. Hunterdon Cty. Prosecutor's Office, 358 N.J. Super. 373, 378 (App. Div. 2003) (quoting R. 4:67-2(a)). Trial court judges sitting in probate on summary proceedings have broad discretion in determining the genuine nature of the factual dispute and whether the issue may merit a plenary hearing. See Tractenberg v. Twp. of West Orange, 416 N.J. Super. 354, 365 (App. Div. 2010) (holding that a judge properly utilized a summary proceeding to determine whether facts supported the claim asserted).

As clearly reflected in the Trial Court record and the parties' briefing on appeal, the facts in this case are not subject to legitimate dispute, and the Trial Court therefore was correct in finding the matter was ripe for summary disposition. Moreover, as set forth in detail above, Perelman never sought discovery in this matter at any point, nor did she object to the Trial Court's repeated commentary that the matter was ripe for adjudication at any time. To

the contrary, Perelman agreed the Settlement Agreement, Harriet's Will, and Harriet's Revocable Trust are all unambiguous.

B. Declaratory Judgment Standard.

The Trial Court also correctly determined that Cohen was entitled to declaratory relief on a summary basis. The New Jersey Declaratory Judgment Act, N.J.S.A. 2A:16-50 to -62, authorized Cohen to request a judicial declaration determining the parties' respective rights under the Settlement Agreement. Specifically, N.J.S.A. 2A:16-53 provides:

> Questions determinable and rights declarable.
>
> A person interested under a deed, will, written contract or other writing constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

In addition, N.J.S.A. 2A:16-55 provides, in relevant part:

> Declaration of rights or legal relations of interested parties in relation to estates, wills and other writings.
>
> A person interested as or through an executor, administrator, trustee, guardian, receiver, assignee for the benefit of creditors, or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust or the estate of a decedent, a minor, a person who is mentally incapacitated, a person who is insolvent, or other person, may have a declaration of rights or legal relations in respect thereto, to:

* * *

> c. Determine any question arising in the administration of the estate, trust, or guardianship, including the construction of wills and other writings.

That statute and Rule 4:95-2 both empowered the Trial Court to provide and render "instructions, advice, and determinations pertaining to the administration of an estate." In re A.N., 430 N.J. Super. 235, 245 (App. Div. 2013).[9]

The Settlement Agreement is an enforceable contract that governs the administration of Harriet's Estate and Harriet's Revocable Trust. The parties agree that the terms of the Settlement Agreement are unambiguous and that no factual disputes warranting discovery exist. (1T:35:4-7; 44:13-16.) The Trial Court applied the correct legal principles to the undisputed facts and properly found Cohen was entitled to entry of a declaratory judgment in his favor as a matter of law. Respectfully, this Court should affirm the Trial Court's ruling in its entirety.

[9] Rule 4:95-2 provides "[a] summary action pursuant to R. 4:83 may be brought by executors, administrators, guardians or trustees for instructions as to the exercise of any of their statutory powers as well as for advice and directions in making distributions from the estate."

II. THE TRIAL COURT PROPERLY CONCLUDED THAT PERELMAN HAS NO RIGHT TO ANY INTEREST IN THE PALM BEACH PROPERTY OWNED BY HARRIET'S ESTATE OR REVOCABLE TRUST (Da274a-75a).

Perelman argues the Trial Court erred in finding that she renounced all rights she may have had pertaining to the Palm Beach Property aside from those expressly delineated in Paragraph 3.3(A)(4)(d) of Robert's Revocable Trust. (Db14.) Perelman's argument, however, is premised upon a fundamental mischaracterization of both the terms of the Settlement Agreement and the Trial Court's analysis. Indeed, left with no meritorious or viable counterargument, Perelman now speciously asserts the Trial Court "violated the canons of construction" and "modified" or "redrafted" the Settlement Agreement. (See generally Db.) Nothing could be further from the truth, as the Trial Court did not "modify" or "redraft" ***any*** aspect of the Settlement Agreement. Rather, it enforced the agreement as written and in a manner consistent with the parties' expressed intent. Perelman's relinquishment of any right to the interest in the Palm Beach Property held by Harriet's Estate and Harriet's Revocable Trust, and her agreement to "refrain" from asserting any "Claims, rights or interests" thereto, is clear, and the Trial Court's interpretation was correct.

A. The Settlement Agreement Expressly Limited Perelman's Rights Concerning the Palm Beach Property (Da274a-75a).

Where, as here, the terms of a contract are clear, "it is the function of the court to enforce it as written and not to make a better contract for either party." Schenck v. HJI Assocs., 295 N.J. Super. 445, 450 (App. Div. 1996) (internal quotation omitted). "A basic principle of contract interpretation is to read the document as a whole in a fair and common sense manner." Hardy ex rel. Dowdell v. Abdul-Matin, 198 N.J. 95, 103 (2009).

Courts strive to give effect to all parts of a written instrument because "[a] contract 'should not be interpreted to render one of its terms meaningless.'" Porreca v. City of Millville, 419 N.J. Super. 212, 233 (App. Div. 2011) (quoting Cumberland Cty. Improvement Auth. v. GSP Recycling Co., 358 N.J. Super. 484, 497 (App. Div.) certif. denied, 177 N.J. 222 (2003)). It is axiomatic that "[s]pecific language in a contract controls over general language" and qualifies the meaning of any general language in the case of a conflict or inconsistency. Gil v. Clara Maass Med. Ctr., 450 N.J. Super. 368, 378 (App. Div. 2017) (quoting DCV Holdings, Inc. v. ConAgra, Inc., 889 A.2d 954, 961 (Del. 2005)); see also Bauman v. Royal Indem. Co., 36 N.J. 12, 22 (1961) ("In the interpretation of a contractual instrument, the specific is customarily permitted to control the general . . . ."); Homesite Ins. Co. v. Hindman, 413 N.J. Super.

41, 48 (App. Div. 2010) ("[W]hen two provisions dealing with the same subject matter are present, the more specific provision controls over the more general.").

Although Perelman attempts to downplay Paragraph 23 of the Settlement Agreement as a "standard general release and waiver by Perelman as to several Cohen family trusts and estates" (see Db10), the scope of Perelman's release is extremely broad and specifically identifies Harriet's Estate and Harriet's Revocable Trust. (See Da094a.) That is, Perelman explicitly agreed to "completely release and forever discharge [Cohen], Robert's Estate Plan, the Marital Trusts, ***Harriet's Estate***, [and] ***Harriet's Revocable Trust***," among others, "from any and all duties to account, actions, causes of action, duties of indemnification, rights, claims, debts, liabilities, obligations, costs, expenses (including attorneys' fees), liens, suits, losses, damages, judgments, and demands of any nature whatsoever, whether known or unknown, vested or contingent, without limitation (***collectively, 'Claims'***)." (Id. (emphasis added.)) That language makes clear the parties intended the term "Claims" to be read expansively.

Against that backdrop, in the ensuing Paragraph 24, the parties delineated certain limited carveouts or exceptions that "shall not apply to" Perelman's broad release in Paragraph 23. (See Da094a.) As to the Palm Beach Property specifically, Perelman preserved only her limited rights and interests under

Robert's Revocable Trust and nothing more. Paragraph 24(F) even closed with a sentence making that fact beyond legitimate dispute:

> [Perelman]'s rights and interest in the Palm Beach Property ***as set forth in Section 3.3(A)(4)(d) of Robert's Revocable Trust*** including, without limiting any other rights, interests or obligations that [Perelman] may have as expressly provided by Section 3.3(A)(4)(d), the following: (i) her right to make use of the Palm Beach Property for a period of not more than twenty-one (21) days per year; and (ii) her right to receive a portion of the sale proceeds in the event of a sale of the Palm Beach Property as provided therein. The Parties acknowledge that [Perelman]'s portion of the proceeds of any sale shall be reduced by the amount of any and all legal fees, other professional fees and expenses described more fully in Section 3.3(A)(4)(d) of Robert's Revocable Trust and the Parties acknowledge that such fees and expenses total fifty-three million, seven-hundred forty-nine thousand, eight hundred and three dollars ($53,749,803). ***For the avoidance of doubt, [Perelman] agrees to comply with all conditions and obligations imposed upon her by Section 3.3(A)(4)(d) and to refrain from asserting any Claims, rights or interests with respect to the Palm Beach Property other than as may be necessary to enforce the rights and interests provided to her by Section 3.3(A)(4)(d).***
>
> [Da094a-95a, at Paragraph 24(F) (emphasis added.)]

When Paragraphs 23 and 24(F) are read together, it is clear Perelman released all potential claims to the Palm Beach Property under Harriet's Will and Harriet's Estate, and retained ***only*** the limited "rights and interests provided to her by Section 3.3(A)(4)(d)" of Robert's Revocable Trust. (See Da095a.)

The "for the avoidance of doubt" language in Paragraph 24(F) highlights that Perelman was releasing all other claims to the Palm Beach Property by explicitly agreeing to "refrain" from asserting such "Claims . . . ***other than as may be necessary to enforce the rights and interests provided to her by Section 3.3(A)(4)(d)***" of Robert's Revocable Trust. (Id.)

Stated simply, Perelman agreed to forgo the very claim she is now asserting. Like the Trial Court, this Court should reject her blatant attempt to circumvent the Settlement Agreement.

B. Perelman's Argument That Paragraph 24(G) Preserves Her Right to Any Interest Held by Harriet's Estate in the Palm Beach Property is Without Merit (Da274a-75a).

Perelman attempts to cast Paragraph 24(F) as a provision that relates only to Robert's Revocable Trust. (See Db18.) Yet, its plain terms demonstrate that Paragraph 24(F) is in no way limited to Robert's Revocable Trust's interest in the Palm Beach Property—it deals with the Palm Beach Property in general. (See Da094a-95a.) Perelman attempts to turn on its head the requirement that the Settlement Agreement be read consistently with the "intent expressed or apparent in the writing." Friedman v. Tappan Dev. Corp., 22 N.J. 523, 531 (1956).

Perelman erroneously argues that the specific exception in Paragraph 24(F) to her general release regarding the Palm Beach Property is somehow

wholly undone by Paragraph 24(G), which excepts from the release any "***other***" property Perelman receives as a beneficiary of Harriet's Estate or Harriet's Revocable Trust:

> [Perelman's] right to receive any amount of the Reserve or any ***other*** assets that are distributable to [Perelman] from Harriet's Estate and Harriet's Revocable Trust pursuant to this Agreement. The Parties acknowledge that [Perelman] is not releasing her right to receive any property to which she is entitled as a beneficiary of Harriet's Estate or Harriet's Revocable Trust [.]
>
> [Da096a, at Paragraph 24(G) (emphasis added.)]

Perelman's contention that the terms of Paragraph 24(G) control over Paragraph 24(F), however, is fatally flawed. Paragraph 24(F) is the ***only*** provision in the Settlement Agreement that addresses with specificity Perelman's rights and interests concerning the Palm Beach Property. Paragraph 24(G) on the other hand—which by no coincidence immediately ***follows*** Paragraph 24(F)—is nothing more than a general "catchall" provision that preserves Perelman's rights to "other" assets distributable to her under Harriet's Will or Harriet's Revocable Trust. (See Da094a-96a.)

The Trial Court agreed that Perelman's logic was simply untenable, noting: (i) that "[n]othing in Paragraph 24(F) is limited to Robert's Revocable Trust nor Harriet's Revocable Trust," and; (ii) that "Paragraph 24(G) of the Settlement Agreement does not even mention the Palm Beach Property."

(Da274a-75a.) The Trial Court further noted that Paragraph 24(F) "clearly states that '[for] the avoidance of doubt [Defendant] . . .' is 'not to assert any further Claims, rights, or interests with respect to the Palm Beach Property,' again, outside what is necessary to enforce the rights and interests, which entitles her to twenty-one (21) days personal usage each year." (Da274a.) That interpretation is abundantly clear from the face of the document. The Trial Court's determination can, and should, be affirmed on that basis alone.

Put plainly, adopting Perelman's interpretation would render Paragraph 24(F)'s restriction a meaningless nullity, which runs counter to the basic principle that courts should strive to give meaning to all parts of a written instrument and avoid "render[ing] one of its terms meaningless." Porreca, 419 N.J. Super. at 233 (quoting Cumberland Cty. Improvement Auth., 358 N.J. Super. at 497)). The only way to harmonize both provisions is to conclude, as the Trial Court did, that Perelman gave up any claim to Harriet's Estate's 21.5% share of the Palm Beach Property in Paragraph 24(F) and, therefore, that interest is ***not*** one of the distributable assets that Perelman preserved her right to receive under Paragraph 24(G). (See Da274a-75a.)

C. Perelman's "Canon of Construction" Argument is Entirely Without Merit (Not Raised Below).

Unable to directly assail the Trial Court's sound interpretation of Paragraphs 24(F) and (G), Perelman conjures an argument that the Trial Court "invent[ed] a non-existent conflict" when it deemed Perelman's attempt to manipulate the reach of Paragraph 24(G) "illogical and contrary to the plain meaning of the Settlement Agreement." (See Da275a.) The Trial Court, however, did no such thing. Specifically, the Trial Court did not "disregard the text and structure of the Settlement Agreement," nor did it "invent a non-existent conflict" as Perelman's brief misstates. (See Db18.) In fact, the Trial Court did the exact opposite, and Perelman's argument falls flat in numerous respects.

Perelman relies upon C.L. v. Division of Medical Assistance and Health Services and the unpublished opinion in 89 Water Street Associates v. Reilly for the premise that "[a] specific term modifies a general term only if conflict is unavoidable." (Db17.) Perelman is simply wrong. In the first instance, the text Perelman cites in her brief is not found in either opinion. Moreover, ***nothing*** in 89 Water Street or C.L. even implies a requirement that trial courts "identify" a "conflict" between two contractual provisions before harmonizing specific and general language therein to give effect to the parties' expressed intent. In fact, this Court in Gil v. Clara Maass Medical Center held that "[e]ven absent a true

conflict, specific words will limit the meaning of general words if it appears from the whole agreement that the parties' purpose was directed solely toward the matter to which the specific words or clause relate." 450 N.J. Super. 368, 378-79 (App. Div. 2017) (quoting 11 Williston on Contracts § 32.10, at 744 (4th ed. 2012)).[10] A contract provision specifically addressing a particular subject matter (as Paragraph 24(F) concerning the Palm Beach Property does here) controls over another provision that generally addresses that same subject matter. See id. at 378; see also In re Cedant Corp. Securities Litigation, 454 F.3d 235, 246 (3d Cir. 2006), as amended (Aug. 30, 2006) ("Although the specific usually controls the general in contract construction, we are to construe a contract as a whole.").

Here, the "conflict" is self-evident, and is illustrated by the parties' conflicting viewpoints as to the scope of Perelman's release of Claims to the Palm Beach Property. Although the Trial Court did not use the literal term "conflict" in the Opinion, Perelman omits any reference to the nearly four (4)

[10] Despite Perelman's flawed contention that the Trial Court "erred" by not "identifying a conflict" between Paragraphs 24(F) and (G) before finding that the specific language concerning the Palm Beach Property in Paragraph 24(F) governs over the general preservation of "other" assets in Harriet's Estate and Harriet's Revocable Trust in Paragraph 24(G), Perelman acknowledges the existence of a conflict by now asking this Court to find that "Paragraph 24(F) is, in fact, the more general and Paragraph 24(G) the more specific." (Db21.)

full pages of analysis the Trial Court undertook in summarizing the two conflicting paragraphs before ultimately (and correctly) finding that "[t]he specific terms of . . . [Perelman's] release are clear, ***especially when the agreement is read as a whole***." (See Da274a (emphasis added.)) In fact, the Trial Court performed the *exact* analysis for which Perelman now advocates: it harmonized Paragraphs 24(F) and 24(G) by interpreting them in the only way that gave effect to ***both*** provisions without rendering one or the other meaningless. (See Da272a-75a.)

Perelman's other contention that the Trial Court erred in its analysis because Paragraphs 24(F) and (G) "do not deal with the same subject matter" (see Db18) is equally meritless, and can be quickly disposed of by this Court. As previously explained, Paragraph 23 establishes a global release by Perelman of all "Claims" that she could assert against identified individuals, estates and trusts. (See Da094a, at Paragraph 23.) Paragraph 24 then contains multiple subparagraphs that carve out specific exceptions to the broad release contained in Paragraph 23. (See Da094a-96a, at Paragraph 24.)

Perelman ignores the fact that both Paragraphs 24(F) and (G) facially concern the same subject matter in that they both address rights Perelman retained following execution of the Settlement Agreement. Paragraph 24(F), however, ***specifically*** addresses the Palm Beach Property while Paragraph 24(G)

is a general "catch all" provision as to "other" rights Perelman retained. (See id.) Nothing in the Settlement Agreement indicates that the language in subparagraph (G) was somehow intended to supersede, eliminate or modify subparagraph (F). Perelman's arguments likewise ignore that Paragraph 24(G) was placed ***immediately after*** the paragraph delineating her rights to the Palm Beach Property (Paragraph 24(F)), which further demonstrates the parties intended it as a safeguard to preserve ***other*** rights or interests Perelman may have as a beneficiary of Harriet's Estate or Harriet's Revocable Trust ***not*** including an interest in the Palm Beach Property. (See id.)

As set forth above (and as the Trial Court correctly recognized), the only way to harmonize both provisions is to conclude that Perelman gave up any claim to Harriet's Estate's 21.5% share of the Palm Beach Property in Paragraph 24(F), and therefore that share is ***not*** a distributable asset or property that Perelman retained to receive under Paragraph 24(G). (See Da274a-75a.) The Trial Court's analysis was sound and should not be disturbed.

III. THE TRIAL COURT PROPERLY DETERMINED, EVEN ABSENT THE SETTLEMENT AGREEMENT, PERELMAN LACKS ANY INTEREST IN THE PALM BEACH PROPERTY UNDER HARRIET'S WILL AND REVOCABLE TRUST(Da276a-77a).

Perelman next argues the Trial Court erred in finding that, even in the absence of the Settlement Agreement, Perelman is not entitled to Harriet's

Estate's interest in the Palm Beach Property based on Harriet's estate planning documents. (See Db26.) Much like Perelman's attempt to mischaracterize the Trial Court's thorough analysis of the Settlement Agreement as a "modification" of same, Perelman also falsely claims the Trial Court "modified" Harriet's Revocable Trust. (See id. at p. 28.) To be clear, and as set forth above, the Trial Court did not "modify" ***anything***—it determined Harriet's probable intent, which was readily apparent based upon the clear and unambiguous terms of Harriet's Revocable Trust. (See Da277a.) That interpretation should be affirmed.

The doctrine of probable intent is codified in N.J.S.A. 3B:3-33.1. See Matter of Trust of Nelson, 454 N.J. Super. 151, 159 (App. Div. 2018). That states:

> [T]he intention of a settlor as expressed in a trust, or of an individual as expressed in a governing instrument, controls the legal effect of the disposition therein and the rules of construction expressed in N.J.S. 3B:34 through N.J.S. 3B:3-48 shall apply unless the probable intent of such settlor or of such individual, as indicated by the trust or by such governing instrument and relevant circumstances, is contrary.
>
> [N.J.S.A. 3B:3-33.1(b).]

The judicial effort to fulfill a settlor's or testator's probable intent takes two forms: interpretation and reformation, and "[t]he former involves finding the meaning 'of language already in the instrument.'" Nelson, 454 N.J. Super.

at 159 (quoting Uniform Trust Code, cmt. to § 415, 7C U.L.A. 515 (2000)). The preponderance of the evidence standard of proof applies to interpretation, and the "rigorous clear and convincing standard" applies ***only*** in the context of reformation. See id. at 160.

Perelman's attempt to convince the Trial Court (and now this Court) to adopt her erroneous interpretation of Paragraphs 24(F) and 24(G) is rooted in her flawed belief that she is entitled to Harriet's Estate's interest in the Palm Beach Property under the residuary provision found at Section 3.6A(7) of Harriet's Revocable Trust.[11] A careful reading of Harriet's Revocable Trust, however, demonstrates that Perelman's position is simply wrong. Thus, even if Paragraph 24(F) of the Settlement Agreement did not apply here (which it does), Perelman still cannot assert a viable claim to Harriet's Estate's interest in the Palm Beach Property.

Section 3.3A of Harriet's Revocable Trust addresses distribution of Harriet's residences, including the Palm Beach Property:

> If . . . [Robert] survives me, my Trustee (i) shall hold in a residence marital trust all of my right, title and interest (including, without limitation, any leasehold interest and stock in cooperative housing or any

[11] Pursuant to Harriet's Will and Harriet's Revocable Trust under Article FOURTH of the Will, the remainder of Harriet's property (after payments and distributions under the Will are satisfied) are to be distributed or "poured over" into the Revocable Trust.

> leasehold interest in rented property) ***in all of my residences located in Englewood, New Jersey and New York, New York, and in any other property used or occupied by me as my residence, other than Palm Beach, Florida (the "Residences")*** which is includible in the Trust Estate and all policies and proceeds of insurance thereon and (ii) shall pay any mortgage indebtedness or other indebtedness thereon as an administration expense as provided in Paragraph A of Section 3.1 of this Agreement. ***If . . . [Robert] does not survive me, my Trustee (i) shall distribute to CLAUDIA, if she survives me, or if she does not survive me, to her descendants who survive me, per stirpes, subject to Article IV of this Agreement, the Residences***, and all policies and proceeds of insurance thereon and (ii) shall pay any mortgage indebtedness or other indebtedness thereon as an administration expense as provided in Paragraph A of Section 3.1 of this Agreement. If none of . . . [Robert], CLAUDIA, or any of the descendants of CLAUDIA survives me, I direct my Trustee to sell the Residences.
>
> [Da051a (emphasis added.)]

Harriet's late daughter (Claudia) was thus devised certain Residences owned by Harriet ***except for*** the Palm Beach Property pursuant to Section 3.3A of Harriet's Revocable Trust. (See id.) Because Claudia sadly failed to survive Harriet, those defined Residences expressly pass to Perelman as Claudia's only surviving descendant. Harriet's Will and Harriet's Revocable Trust do not specifically address disposition of the Palm Beach Property elsewhere, however, which means it now passes through the residuary clause found in Section 3.6A(7) of Harriet's Revocable Trust.

Nonetheless, ***Perelman*** has no right to Harriet's Estate's share of the Palm Beach Property as the remainder beneficiary under Section 3.6A(7) of the Revocable Trust because, as the Trial Court found, the foregoing exclusion of the Palm Beach Property in Section 3.3A makes clear Harriet ***never*** intended for Claudia (or Perelman) to receive that interest through the residuary clause. (See Da277a.) Rather, Section 3.6A(7) provides that 50% of any residuary assets that would have passed to Claudia under Harriet's Revocable Trust pass to Perelman or, if Perelman is not then surviving, to Michael Cohen,[12] with the balance of the residuary assets (including Harriet's Estate's ownership interest in the Palm Beach Property) passing to Cohen. (See Da058a.)

Again, Harriet's Revocable Trust ***explicitly*** precluded Claudia (or Perelman) from receiving the Palm Beach Property in Section 3.3A. (Da051a.) Therefore, construing Section 3.6A(7) of Harriet's Revocable Trust as Perelman desires—allowing the Palm Beach Property to nevertheless pass to Perelman (as Claudia's heir) through the residuary despite the clear and unequivocal exclusion of same in Section 3.3A—would contravene Harriet's stated intent and circumvent her testamentary wishes as clearly expressed in Section 3.3A.

[12] Michael Cohen is Harriet's grandson and the nephew of Cohen and Claudia. (Da276a.)

Perelman's tardy complaint that the Trial Court construed Harriet's probable intent with respect to Harriet's Estate's interest in the Palm Beach Property without extrinsic evidence is of no moment in numerous respects. First, the Trial Court was under no obligation to consider extrinsic evidence in deciphering Harriet's probable intent. See, e.g., Matter of Estate of Zahn, 305 N.J. Super. 260, 271 (App. Div. 1997) (stating that "in ascertaining the probable intent of [a] testator, courts . . . ***may*** look to extrinsic evidence" and that the "use of extrinsic evidence [] is limited" to address "ambiguities").

Moreover, the Trial Court did not require extrinsic evidence. Section 3.3A of Harriet's Revocable Trust unambiguously excluded Claudia (and therefore Perelman) from receiving Harriet's Estate's and Harriet's Revocable Trust's interests in the Palm Beach Property. (See Da051a.) And as set forth above, at no point in time did Perelman's prior counsel request discovery on this issue or object to the Trial Court proceeding in summary fashion.

To the contrary, like she did with regard to the interpretation of the Settlement Agreement, Perelman argued below, and maintains on appeal, that Harriet's estate planning documents are clear and unambiguous. (See Db28.) Perelman now is precluded under the invited-error doctrine from retroactively claiming the Trial Court erred in not considering extrinsic evidence to decipher Harriet's probable intent merely on the basis that Perelman's interpretation did

not carry the day. See State v. Williams, 219 N.J. 89, 100 (2014) ("[W]hen a defendant later claims that a trial court was mistaken for allowing him to pursue a chosen strategy—a strategy not unreasonable on its face but one that did not result in a favorable outcome—his claim may be barred by the invited-error doctrine . . . . The invited-error doctrine is intended to prevent defendants from manipulating the system and will apply when a defendant in some way has led the court into error while pursuing a tactical advantage that does not work as planned." (internal citations and quotation marks omitted.))

Accordingly, the Trial Court correctly held that irrespective of the Settlement Agreement, consideration of Harriet's overall estate plan eliminates any notion that Perelman has a viable claim to the Palm Beach Property through Harriet's Estate or Harriet's Revocable Trust. (Da277a.) Based on the standard for finding probable intent, "[i]t is clear [Harriet] did not intend for [Perelman] to receive the Palm Beach Property," as the property was expressly "excluded from the other properties bequeathed to [Perelman] which were specifically stated in Section 3.3(A) of Harriet's Revocable Trust." (Id.) The Trial Court characterized Perelman's argument that the Palm Beach Property somehow immediately passes to her under the residuary clause notwithstanding the exclusionary language in Section 3.3A as "wholly illogical and contradictory to

[Harriet's] intent." (Id.) That holding was sound and substantiated, and no basis in law or fact exists to overturn that decision. (Id.)

A. Although Not Relied Upon by the Trial Court, the August 26, 2021 E-mail Confirms the Intent of the Parties Regarding the Settlement Agreement (Da273a).

The Trial Court ultimately did not rely upon the August 26, 2021 e-mail from Perelman's prior counsel based upon Perelman's clear and unequivocal release of any rights to the Palm Beach Property and the plain intent of Harriet's own estate planning documents. Cohen nevertheless is compelled to address that matter here as Perelman has raised the issue on appeal. (See Db25.)

While the August 26, 2021 e-mail clearly was not essential to the Trial Court's determinations regarding the proper interpretation of the Settlement Agreement and Harriet's estate plan, that email certainly is consistent with the arguments Cohen advanced in this dispute. (See Da273a) (noting that "The Court did not consider or rely on the e-mail in rendering its' decision but mentions it was part of the pleadings.")) Critically, Perelman's own prior counsel—an experienced and reputable trusts and estate practitioner from a well-respected law firm—sent an e-mail to Cohen's counsel during the negotiation of the Settlement Agreement in which she explicitly acknowledged that Cohen, ***not*** Perelman, is to receive Harriet's Estate's interest in the Palm Beach Property:

> We recognize that Mrs. Cohen died in July 2020 and there is a certain amount of time required to get the estate administration under way ***and the Florida real property transferred to Jim***. Therefore, we are willing to recommend that [Perelman] approve the accountings and sign the Settlement Agreement (subject, of course, to her final approval, agreement and willingness to do so), provided that we have written confirmation that no further payments will be made from or allocated against the Estate and Trust after November 16, 2020 for expenses or costs related to or for the Florida real property . . . . As you know, [Perelman] is the sole residuary beneficiary and the Trust assets are residuary assets in so much as they are not specifically bequeathed or devised assets. Under the circumstances, we understand why the expenses of the New Jersey and New York properties were paid from the Trust, as the New Jersey and New York real properties were specifically devised to [Perelman]. ***The Florida real property was specifically devised to [Cohen], as you know. Paying expenses related to the Florida real property from the Trust results in [Perelman] bearing the expenses associated with real property that was not specifically devised to her.*** Given that the Florida real property was not sold, we presume it would have been transferred to [Cohen] within a reasonable period of time after Harriet's death in July 2020. (emphasis added).
>
> [Da137-38a (emphasis added.)]

Presumably, Perelman's counsel conducted her own analysis of Harriet's testamentary plan before arriving at the conclusion that Cohen, not Perelman, received Harriet's Estate's interest in the Palm Beach Property. The fact that the Trial Court opted not to rely upon the e-mail in rendering the May 1, 2023 Opinion in Cohen's favor does not empower Perelman to now disavow

representations made by an attorney who was acting as her agent in settlement negotiations under the feigned guise of purported "factual and evidentiary problems." (See Db25.); Hewitt v. Allen Canning Co., 321 N.J. Super. 178, 184 (App. Div.), certif. denied, 161 N.J. 335 (1999) ("It is clear that an attorney acts as an agent for his client."); Jennings v. Reed, 381 N.J. Super. 217, 231 (App. Div. 2005) (noting that "an attorney is presumed to possess authority to act on behalf of the client").

Notwithstanding Perelman's attempt to distance herself from the e-mail (and her prior counsel) in the settlement negotiations, Perelman's counsel ***twice*** confirmed therein that Cohen would receive Harriet's Estate's 21.5% interest in the Palm Beach Property, first noting that "there is a certain amount of time required to get . . . the [Palm Beach Property] transferred to [Cohen]," and then stating that the Palm Beach Property "was specifically devised to [Cohen]." (Da137a-38a.) In fact, Perelman's counsel was so adamant on that point that she even went so far as to seek confirmation that Perelman would not be required to absorb any future expenses relating to the Palm Beach Property, noting that Perelman should not "bear[] the expenses associated with [the Palm Beach Property] that was not specifically devised to her." (Da138a.) Perelman's unwillingness to pay those expenses is entirely inconsistent with her present

claim that she is entitled to Harriet's Estate's interest in the Palm Beach Property.

That said, just as consideration of the August 26, 2021 e-mail was not crucial to the Trial Court's determination, the record likewise provides an ample basis for this Court to affirm without considering the email. (Da273a.) Because the Parties agree the Settlement Agreement is unambiguous, there is no need for this Court to rely on extrinsic evidence, such as the e-mail, to interpret its meaning. (1T:35:4-7; 44:13-16.)

IV. THE TRIAL COURT CORRECTLY HELD THAT COHEN WAS ENTITLED TO AN AWARD OF ATTORNEYS' FEES AND COSTS UNDER THE SETTLEMENT AGREEMENT (Da280a-81a).

Perelman has abandoned her appeal from the Trial Court's order setting the amount of attorneys' fees and costs awarded to Cohen via the March 8, 2024 Order. Nonetheless, Perelman maintains that the Trial Court ultimately came to the wrong conclusion as to its interpretation of the parties' rights and obligations under the Settlement Agreement, and thus erred in awarding Cohen any amount for attorneys' fees and costs pursuant to Paragraph 35 of the Settlement Agreement. (See Db35.)

Courts routinely enforce contractual provisions awarding counsel fees to a party that prevails in a dispute concerning that contract. See Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 385 (2009) ("'a prevailing party can

recover [attorneys'] fees if they are expressly provided for by statute, court rule, or contract.'" (quoting Packard-Bamberger & Co., Inc. v. Collier, 167 N.J. 427, 440 (2001))). The prevailing party must demonstrate: (1) that the lawsuit was causally related to securing the relief obtained; and (2) that the relief obtained had some basis in law. See North Bergen Rex Transport, Inc. v. Trailer Leasing Co., a Div. of Keller Systems, Inc., 158 N.J. 561, 570-71 (1999).

Paragraph 35 of the Settlement Agreement provides that, "[i]f any action, suit or legal proceeding is brought by any Party to enforce or redress a breach of this Agreement, in addition to all other relief awarded by a court of competent jurisdiction, the prevailing Party shall be entitled to an award of reasonable attorney's fees and costs incurred in connection with such action, suit or legal proceeding[.]" (Da100a.) Because the Trial Court correctly granted Cohen's requested relief in the Verified Complaint as to the Settlement Agreement, the Trial Court also properly awarded Cohen his reasonable attorneys' fees and costs in connection with that favorable ruling.[13] Accordingly, this Court should affirm the Trial Court's award of costs and fees in its entirety.

[13] As set forth in Cohen's Case Information Statement, Cohen also reserves the right to seek reimbursement of his reasonable attorneys' fees and costs incurred in connection with this appeal pursuant to Paragraph 35 of the Settlement Agreement, should this Court affirm the Trial Court's ruling below.

CONCLUSION

For the foregoing reasons, plaintiff-respondent James S. Cohen respectfully requests that the Court deny defendant-appellant Samantha O. Perelman's appeal and affirm the Trial Court's May 1, 2023 Order and Opinion in its entirety. Perelman's appeal with respect to the March 8, 2024 Order has been abandoned and, therefore, it too should remain in full force and effect. Finally, Cohen reserves the right to seek recovery of the fees incurred in connection with this appeal.

Respectfully submitted,

COLE SCHOTZ P.C.
Attorneys for Plaintiff-Respondent, James S. Cohen

By: */s/ Warren A. Usatine*
Warren A. Usatine

DATED: October 4, 2024

IN THE MATTER OF THE ESTATE OF HARRIET COHEN,

Deceased

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-002446-23

On Appeal From:
BERGEN COUNTY,
CHANCERY DIVISION

DOCKET NO: P-218-22

Sat Below:
EDWARD A. JEREJIAN, P.J.S.C.

CIVIL ACTION

REPLY BRIEF OF DEFENDANT-APPELLANT SAMANTHA O. PERELMAN

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Date: October 16, 2024

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PRELIMINARY STATEMENT

Both Cohen and Perelman argued to the Probate Court that their interpretation of the Settlement Agreement was the correct one. However, only Cohen had the burden of proof. To satisfy that burden, Cohen either had to show that his interpretation of the Settlement Agreement was the *only* reasonable interpretation, or he had to produce extrinsic evidence that proved his interpretation was correct. Cohen did neither. Yet the Probate Court ruled, erroneously, in Cohen's favor.

The Probate Court's alternative justification for that decision – that Perelman was in all events not entitled to Harriet's interest in the Palm Beach Property – is simply puzzling. For starters, Cohen admits that Harriet's interest in the Palm Beach Property is disposed of through the Residuary Clause of her trust. Further, the Residuary Clause's plain language gives that property to Perelman. Cohen's interpretation necessarily adds language to the trust instrument. Once again, Cohen did not carry his burden of producing evidence to justify that result.

Cohen is right that the proceedings below are different from a summary judgment proceeding. For a plaintiff to survive summary judgment, the plaintiff need only show that a genuine dispute of material fact precludes judgment and that the case should proceed. By contrast, in this summary

proceeding, Cohen was actually required to *prove* his claims, and he failed to do so. Accordingly, the Probate Court's judgment should be reversed.

ARGUMENT

I. COHEN DID NOT MEET HIS BURDEN OF SHOWING THAT THE SETTLEMENT AGREEMENT ENTITLES HIM TO RELIEF

A. It was Cohen's burden to show that the Settlement Agreement, properly interpreted, entitled him to relief

Cohen argues repeatedly that Perelman did not take discovery and that Perelman did not argue that the Settlement Agreement was ambiguous. (*See* Pb4-5, 16-18, 34). However, it was not Perelman's burden to do so. Instead, it was Cohen's burden, as the plaintiff, to prove his claims. Cohen's primary causes of action were for a declaratory judgment (Count I) and for breach of the covenant of good faith and fair dealing (Count II). In a declaratory judgment action, "the person seeking the declaratory relief must prove his case, as must any plaintiff, and the burden of proof lies with him." *Concord Ins. Co. v. Miles*, 118 N.J. Super. 551, 555 (App. Div. 1972).[1] Likewise, the

[1] This is not a situation in which "the traditional positions of plaintiff and defendant are transposed." *See* 2 McCormick on Evid. § 337 n.21 (8th ed 2022). Instead, Cohen as the plaintiff sought "a declaratory judgment as a basis for some further affirmative claim against" Perelman, i.e., to prohibit her from asserting certain rights in the Palm Beach Property, and for breach of the Settlement Agreement's covenant of good faith and fair dealing. *Id.* (*See* Da14-16). As such, "there is no special problem; the burdens will be allocated as usual, with the major share going to the plaintiff." *Id.*

burden is on the plaintiff to prove each element of a breach of contract claim. *Globe Motor Co. v. Igdalev*, 225 N.J. 469, 482 (2016).

Cohen had the burden of proof on each claim before the Probate Court. That this was a summary action pursuant to *Rule* 4:67-1 did not in any way relieve Cohen of that burden. *See* R. 4:67-2(b) (providing that summary actions "shall be commenced, and proceedings taken therein, as in other actions, except as herein provided."); *see also, e.g., Matter of Estate of Perkel*, 2022 WL 17660550, at *4 (N.J. App. Div. Dec. 14, 2022) (Dra98) (finding that plaintiffs bore the burden of proof and failed to meet it in a will challenge that proceeded as a summary action); *C.E. v. Elizabeth Pub. Sch. Dist.*, 2023 WL 4571437, at *5-6 (N.J. App. Div. July 18, 2023) (Dra7-9) (plaintiff had burden of proof in a summary action under Rule 4:67-1).

B. Cohen failed to meet his burden because his interpretation of the Settlement Agreement violates its plain meaning.

Cohen failed to show that he was entitled to relief because his interpretation of the Settlement Agreement negated key provisions of the Settlement Agreement and was unreasonable as a matter of law.

As discussed above, it is the plaintiff's burden to prove *each element* of a breach of contract claim, including that "the parties entered into a contract containing certain terms" and that "defendants did not do what the contract required them to do[.]" *Globe Motor Co.*, 225 N.J. at 482 (quoting *Model Jury*

Charge (Civil) § 4.10A "The Contract Claim—Generally" (May 1998)) (brackets omitted). Moreover, "[e]ach element must be proven by a preponderance of the evidence" and "[u]nder that standard, 'a litigant must establish that a desired inference is more probable than not. If the evidence is in equipoise, the burden has not been met.'" *Id.* (quoting *Liberty Mut. Ins. Co. v. Land*, 186 N.J. 163, 169 (2006)). It follows that where a plaintiff suing for breach of contract cannot proffer a reasonable reading of a disputed contractual term, the plaintiff has failed to satisfy that burden. *See also, e.g., Comerata v. Chaumont, Inc.*, 52 N.J. Super. 299, 307 (App. Div. 1958); *Am. Litho. Co. v. Commercial Cas. Ins. Co.*, 81 N.J.L. 271, 274 (1911).

Cohen's interpretation of the Settlement Agreement begins with Paragraph 23. However, contrary to Cohen's assertion, Perelman did not "suggest[]" that the term "Claims" in Paragraph 23 is "limited to claims involving Robert's Revocable Trust." (*See* Pb11 (citing Db10, which actually and correctly described Paragraph 23 as including "a standard general release and waiver by Perelman as to several Cohen family trusts and estates.")) There is no dispute that "Claims" is broadly defined in Paragraph 23, but that is beside the point. The parties agree that Paragraph 24 includes exceptions to Paragraph 23's broad and general release, and it is the interpretation of Paragraph 24 that underlies the parties' dispute.

Cohen's interpretation of the Settlement Agreement is unreasonable as a matter of law because it does not give effect to all of its terms. Cohen purports to interpret Paragraphs 23 and 24(F) of the Settlement Agreement as a release by Perelman of her rights and interests in the Palm Beach Property, regardless of the source of those rights and interests, except for the "limited" rights provided under Section 3.3(A)(4)(d) of Robert's Trust. (Pb22-23). However, that interpretation improperly lumps together the several sources that comprise Perelman's interests in the Palm Beach Property. In fact, Perelman's interests in the Palm Beach Property derive from two separate sources: (1) Perelman's interest in the Palm Beach Property that flows from Robert's Estate; and (2) Perelman's interest in the Palm Beach Property that flows from Harriet's Estate. Reading Paragraph 24(F) as a whole makes clear that it only relates to Perelman's interest in the Palm Beach Property that flows from Robert's Estate. (*See* Db18-19). Likewise, Paragraph 24(G) relates to Perelman's interests in all of Harriet's Estate's property, including Harriet's separate interest in the Palm Beach Property that flows to Perelman. (Db20). The Probate Court missed that point when it stated that Paragraph 24(G) "does not even mention the Palm Beach Property." (Da274-75).

Cohen attempts to side-step this interpretation by pointing to the last sentence of Paragraph 24(F), prefaced with "[f]or the avoidance of doubt . . ."

(Pb2, 22-23). But that sentence is likewise focused only on Perelman's rights flowing from Robert's Estate. In particular, it refers to Perelman's rights "provided to her by Section 3.3(A)(4)(d)" of Robert's Revocable Trust. (Da96). The most reasonable interpretation of that sentence is that—like the rest of Paragraph 24(F)—it is specifically and only referring to Perelman's interest flowing from Robert's Estate. The fact that the sentence was inserted only "[f]or the avoidance of doubt" further confirms that it is not intended to fundamentally change the meaning of Paragraph 24(F). *See In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025, 1059 (Del. Ch. 2015). Instead, it merely confirms that Perelman is reserving the rights and interests that she already had flowing from Robert's Estate. *See Cohen v. Perelman*, 2014 WL 2921601, at *18 (Ch. Div. June 24, 2014) (Dra35-37) (describing Perelman's rights and interests in the Palm Beach Property from Robert's Estate).

Interpreting Paragraph 24(F) as relating to Perelman's interest in the Palm Beach Property that flows from Robert's Estate also avoids a conflict with Paragraph 24(G). To be clear, it is not Perelman's argument that the release in Paragraph 24(F) is "wholly undone" by Paragraph 24(G). (*See* Pb23-24). Instead, it is that Paragraph 24(F) and Paragraph 24(G) relate to two separate things – Paragraph 24(F) relates to Perelman's interest in the Palm Beach Property flowing from Robert's Estate, and Paragraph 24(G) relates to

Perelman's interests in the Palm Beach Property and all other assets flowing from Harriet's Estate. Otherwise—if Paragraph 24(F) constitutes a release of any interest in the Palm Beach Property from any source—then that negates the language in Paragraph 24(G) providing that "[Perelman] is not releasing her right to receive any property to which she is entitled as a beneficiary of Harriet's Estate or Harriet's Revocable Trust." (Da96).

Accordingly, the Probate Court's interpretation violates the principle that a specific term modifies a general term only if conflict is unavoidable. (*See* Db17). Cohen criticizes Perelman for having "conjure[d]" an argument based on that canon of construction. (Pb26). To the contrary, it is the logical corollary of a basic principle that is not in dispute: a court should, whenever possible, give effect to all of the provisions of a contract. It follows that only if there is a conflict between provisions of a contract should a court resort to other canons of construction, including that a specific provision takes precedence over a more general one. The reason is simple – if there is no conflict, there is no need to figure out which provision to follow and which not to. It is probably because this is the only principled way to decide between Cohen's and Perelman's interpretations that Cohen argues against it so strenuously.

Perelman's interpretation is the correct one because it is the interpretation that gives full effect to both provisions by recognizing that Paragraphs 24(F) and 24(G) relate to different things. Cohen relies on *Gil v. Clara Maass Medical Center*, but that case actually proves Perelman's point.[2] (*See* Pb26-27 (citing *Gil*, 450 N.J. Super. 368, 378-79 (App. Div. 2017)). There, this Court quoted Professor Williston's treatise, which teaches that "[e]ven absent a true conflict, specific words will limit the meaning of general words *if it appears from the whole agreement that the parties' purpose was directed solely toward the matter to which the specific words or clause relate*." *Gil*, 450 N.J. Super. at 378-79 (quoting 11 *Williston on Contracts* § 32.10, at 744 (4th ed. 2012)) (emphasis added). Here, the parties did *not* direct their purpose solely to the matter that Cohen asserts was more specific, i.e., the subject matter of Paragraph 24(F). They also dealt with, among other things, preserving all of Perelman's rights flowing through Harriet's Estate. Those subjects are dealt with in distinct paragraphs that can each be given full effect.

Another indication that the Probate Court erred is that the concept of "specific" and "general" does not neatly apply here. A clear example of

[2] Cohen claims that text cited in Perelman's brief is not found in two opinions Perelman cited. (Pb26). It is unclear what text he is referring to; in any event, the text appearing in quotes in Perelman's brief does appear in the cited cases.

"specific" and "general" would be a sign that says, "No vehicles in the park" and below that says "Bicycles Yield to Pedestrians." In that case, "Bicycles" is a specific member of the class "Vehicles", so it is apparent that the latter directive has precedence over the former. Here, in contrast, it is not clear that either Paragraph 24(F) or Paragraph 24(G) is the more specific. Cohen insists that Paragraph 24(F) is more specific because it is the only Paragraph that specifically mentions the Palm Beach Property. However, it is in fact Paragraph 24(G) that is the more specific provision because it is only in that Paragraph that Harriet's Estate (which includes the Palm Beach Property) is mentioned. In other words, the Probate Court's usage of that canon of construction was both unnecessary and incorrect.

C. Even if Cohen's interpretation was reasonable, so is Perelman's, and it was Cohen's burden to introduce evidence resolving the ambiguity.

For the reasons described above, Cohen's interpretation is unreasonable as a matter of law. As such, Cohen failed to satisfy his burden, and the Probate Court should have denied him relief on that basis. Even if Cohen's interpretation of the Settlement Agreement were reasonable, it is certainly not the only reasonable interpretation. Indeed, Perelman's interpretation of the Settlement Agreement is another if not the only reasonable interpretation of the agreement. Cohen argues to the contrary that Perelman's interpretation

would render Paragraph 24(F) a "meaningless nullity." (Pb25). As described above, that is wrong – Perelman's interpretation gives full effect to Paragraph 24(F), including its last sentence, by recognizing that its subject matter simply is distinct from the subject matter of Paragraph 24(G).

To the extent the Settlement Agreement were ambiguous, the Probate Court should still have denied Cohen relief because Cohen failed to come forward with evidence establishing that his interpretation was the correct one. Where an agreement is "susceptible to at least two reasonable alternative interpretations, an ambiguity exists." *Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am.*, 195 N.J. 231, 238 (2008). Where an ambiguity exists, a court may consider extrinsic evidence to resolve it. *Id.*

As described above, Cohen argues that Perelman did not seek discovery in the Probate Court. However, it was not her burden to do so. Instead, to the extent that Cohen's interpretation of the Settlement Agreement was reasonable at all, that created an ambiguity, and it was Cohen's burden as the party seeking relief to adduce evidence establishing that his interpretation was the correct one. Cohen did not provide such evidence. The only evidence he provided was an email to Cohen's counsel from Perelman's former counsel before execution of the Settlement Agreement stating, among other things, that "[t]he Florida real property was specifically devised to [Cohen.]" (Pb37

(quoting Da138)) (substitution in Cohen's brief). The Probate Court properly "did not consider or rely on the e-mail", which is inadmissible and unreliable for several reasons. (*See* Da273 n.3).

For starters, the email is simply incorrect as a matter of fact. Whatever argument Cohen may advance that he is entitled to the Palm Beach Property, it was never "specifically devised" to him. As he acknowledges, Harriet's interest in the Palm Beach Property passes through a Residuary Clause in her trust. (Pb32). Nowhere is the Palm Beach Property specifically identified as passing to Cohen. *See Estate of Lustgarten v. Director, Div. of Taxation*, 281 N.J. Super. 275, 279 (App. Div. 1995) ("[T]he defining characteristic of a specific legacy is that specifically identified property must pass in kind to a specifically identified beneficiary."); *Estate of Lansing v. Div. of Taxation*, 6 N.J. Tax. 137, 143 (1983).

Moreover, as Cohen insists, the issue in this case is whether Perelman released any claim to the Palm Beach Property in the Settlement Agreement, not who ultimately receives the Palm Beach Property under Harriet's Estate Plan. (Pb8 n.5). However, the interpretation of Harriet's Estate Plan is all that the email purports to speak to. The email does not discuss the language in the Settlement Agreement or how to interpret it. Moreover, the email specifically provides that Perelman's former counsel's recommendation that Perelman

execute the Settlement Agreement was "subject, of course, to [Perelman's] final approval, agreement and willingness to do so[.]" (Da137-38).

In fact, as described above, the parties' expressed intention in Paragraph 24(G) was that Perelman would not release *any* interest she may have had under Harriet's Estate and Trust. The language of Paragraph 24(G) makes clear that the distributions pursuant to Harriet's Estate Plan are unfinished. Accordingly, Perelman specifically reserved all her rights flowing from Harriet's Estate. An erroneous email sent three weeks earlier on a topic not directly pertinent to interpreting the Settlement Agreement is not probative of Perelman's intent three weeks later. At a minimum, Cohen cannot rely on one email, taken out of context, and then argue (as he did) that no further discovery is required. If Cohen sought or seeks to rely on extrinsic evidence, then the extrinsic evidence should be complete and put in context.

II. THE PROBATE COURT ERRED IN ITS ALTERNATIVE HOLDING THAT PERELMAN WAS NOT ENTITLED TO THE PALM BEACH PROPERTY UNDER HARRIET'S TRUST.

With respect to the interpretation of Harriet's Trust, Cohen again fails to satisfy his burden. He does not dispute that it is his burden to prove that his interpretation of the trust by *at least* a preponderance of the evidence and—if

he advocates for reformation of the trust—by clear and convincing evidence. (*See* Pb31). Cohen came forward with no such evidence[3].

Initially, Cohen's representation of the Trust language is misstated. Cohen states that Section 3.6A(7) provides that only "50% of any residuary assets that would have passed to Claudia under Harriet's Revocable Trust pass to Perelman . . ." (Pb33). However, Section 3.6A(7) clearly and expressly provides that 100% of the residuary assets go to Perelman, stating that:

> My Trustee shall distribute to CLAUDIA, if she is then surviving, or if she is not then surviving, to SAMANTHA PERELMAN, if she is then surviving, subject to Article IV of this Agreement, the remaining assets of the Trust Estate after the distributions provided in subparagraphs (2) through (4) of this Paragraph A.

(Da58).[4]

Notwithstanding his incorrect description of the Residuary Clause, Cohen admits that Harriet's interest in the Palm Beach Property "passes through the residuary clause found in Section 3.6A(7) of Harriet's Revocable

[3] Again, the *only* extrinsic evidence advanced by Cohen was the email discussed above. As discussed above, that email has no probative value and was properly not considered by the Probate Court. In addition, the email, drafted by Perelman's former counsel in August 2021, gives no insight as to Harriet's intent in drafting her amended trust in March 2007.

[4] The remainder of the Residuary Clause states that if *neither* Claudia nor Perelman survive, then 50% of such assets pass to Cohen, and 50% to Michael Cohen.

Trust." (Pb32; *see also* Db29). It is undisputed that (1) Claudia is not surviving; (2) Perelman is; and (3) the "distributions provided in subparagraphs (2) through (4) of [Section 3.6A]" are irrelevant to this dispute. It necessarily follows, as a matter of logic and by the plain text of the Residuary Clause, that the Palm Beach Property passes to Perelman. It really is that simple.

Cohen's only rejoinder is to insist that even though the Palm Beach Property passes through the Residuary Clause, the Residuary Clause should not be applied as written because Harriet did not include the Palm Beach Property in a separate gift to Perelman elsewhere in the Trust. (*See* Pb32-33). As Perelman explained, that defies logic – just because Harriet did not include a specific reference to property in one part of the trust does not imply an intention to exclude it from the Residuary Clause. (Db32-33).

Moreover, Cohen's argument clearly requires reformation of the trust instrument. Even if it were true that Harriet's wishes with respect to the Palm Beach Property could be inferred from another section of the Trust, Cohen's construction still requires that language be deemed to be written into the Residuary Clause and the clause to not be applied as written. That is the very definition of reformation. Cohen came forward with no evidence, much less the required clear and convincing evidence, to justify such a result.

CONCLUSION

The Probate Court's order finding Perelman in breach of the Settlement Agreement and barring her from pursuing all her rights to Harriet's Estate and Trust, including Harriet's Interest in the Palm Beach Property, and awarding attorneys' fees was made in error. The Probate Court's further ruling that Harriet's interest in the Palm Beach Property was excluded from the Residuary Clause was also made in error. This Court should reverse the Probate Court's May 1, 2023 Order and Opinion and should vacate the Probate Court's March 8, 2024 award of fees.

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Respectfully submitted,

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