**FILED,** Clerk of the Appellate Division, June 15, 2023, **A-001749-22**, **AMENDED**

# Superior Court of New Jersey

**APPELLATE DIVISION**

**DOCKET NO. A-001749-22**

JARWICK DEVELOPMENTS, INC., ADA REICHMANN and RACHEL HALPERN, AS EXECUTRIX OF THE ESTATE OF JOSEF HALPERN,

*Plaintiffs-Respondents,*

—against—

JOSEPH WILF and THE ESTATE OF HARRY WILF, deceased, individually and as partners in the partnership known as J.H.W. ASSOCIATES; LEONARD A. WILF; ZYGMUNT WILF; MARK WILF; SIDNEY WILF; RACHEL AFFORDABLE HOUSING CO.; HALWIL ASSOCIATES, a partnership and PERNWIL ASSOCIATES, a partnership,

*Defendants-Appellants,*

—and—

MARVIN COHEN and MIRONOV, SLOAN & PARZIALE, LLC (f/k/a Beck, Weiss & Company, P.A.),

*Defendants.*

CIVIL ACTION

ON APPEAL FROM FINAL JUDGMENTS AND ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, MORRIS COUNTY

DOCKET NO. MRS-C-184-92

SAT BELOW: HON. FRANK J. DEANGELIS, P.J.CH.

## BRIEF FOR DEFENDANTS-APPELLANTS

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2. Final Judgment, dated January 4, 2023, with respect to Josef Halpern. (40005a).

3. Order dated November 16, 2022 regarding the remand from the Appellate Division. (39964a).

4. Order dated October 13, 2021 denying Defendants' motion to recuse Special Master Orlofsky. (39015a).

5. In accordance with *Synnex Corp. v. ADT Sec. Servs., Inc.*, 394 N.J. Super. 577, 587-88 (N.J. App. Div. 2007), all interlocutory orders upon which the judgments are based are appealed, including but not limited to, the October 13, 2021 Order denying Defendants' motion to recuse Special Master Orlofsky, and the November 16, 2022 Order regarding the remand from the Appellate Division listed above.

**6.** Additionally, for purposes of preserving the record for potential further appeals, all interlocutory orders and judgments that preceded the 2018 Appellate Division decision in this matter, *Jarwick Devs., Inc. v. Wilf*, 2018 WL 2449133, Docket No. A-2053-13T3 (N.J. App. Div. June 1, 2018) are also appealed.

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## PRELIMINARY STATEMENT

The Chancery Division has refused to follow this Court's remand directives after two prior appeals. Had the trial court followed this Court's directive after the first 2006 limited remand, the case would have concluded fifteen years ago with an accounting and valuation of Jarwick Developments, Inc.'s 25% partnership interest. Instead, the new judge assigned to the case after the 2006 remand allowed the intervention of Josef Halpern as a new plaintiff, at the supposed end of the litigation, and endorsed an unprecedented, unauthorized expansion of the case with new claims by both Plaintiffs that were never raised in the original seventeen years of the litigation.

Seven more years of post-remand litigation preceded entry of a new final judgment in 2013. After a second appeal was decided in 2018, two new trial judges again failed to adhere to this Court's directives. Four-and-a-half years after the second remand, the trial court re-issued most of its prior rulings that this Court vacated and directed be re-examined and modified.

The trial court's latest judgment against the Wilf Defendants must be reversed because it ignores the clear directives of this Court in the 2018 appeal, contravenes New Jersey law, and fails to tie findings of fact to the law or the claims at issue.

This case was originally filed more than three decades ago. Its post-appeal length and complication are directly correlated to the trial court's October 2009 massive expansion of the case, all after the case had reached a prior final judgment, appeal, and limited remand in 2006.

After the trial court allowed all of Plaintiffs' new claims in 2009, a bench trial lasted 220 days, and the trial court issued another final judgment in December 2013. On appeal, this Court in 2018 remanded the case again to correct errors below. The Court directed the trial court to: (1) determine Plaintiffs' non-RICO and RICO damages based on the appropriate statute of limitations periods; (2) reconsider whether any party was entitled to punitive damages and, if so, the amounts; and (3) reconsider attorneys' fees and allow attorneys' fees **only** for Plaintiffs' pursuit of their RICO claims within the relevant statute of limitations period. The trial court was to be guided by the directives of this Court. The trial court did not follow those directives.

With respect to punitive damages, this Court vacated the awards and directed the trial court to make specific findings of fact as to each individual defendant based upon conduct occurring in the limitations period to determine if punitive damages were warranted. On remand, however, the trial court's "findings" did not meet the threshold required for the award of punitive damages

against any Defendant, and it awarded punitive damages against two defendants in a purely economic case based merely on a lack of action.

Regarding attorneys' fees, this Court reversed and vacated the trial court's ruling, directing the trial court to "limit its award to the fees and costs **reasonably devoted** to plaintiffs' pursuit of their respective RICO claims." Unfazed by this directive and this Court's explicit statement that there was no common core of operative facts as to both RICO and non-RICO claims, the trial court awarded **the same amount** of attorneys' fees as it had in 2013, and further awarded attorneys' fees for Plaintiffs' unsuccessful work on the prior appeal. The award was premised on the report and recommendation of a Special Master who refused to depart from his original recommendation and, separately, had a disqualifying conflict of interest.

The trial court's errors on remand are manifested in yet another way that did not need to be addressed in this Court's 2018 decision. Without any findings or legal basis to support its ruling, the trial court awarded **compounded** prejudgment interest at excessive rates, contrary to the usual calculation of simple interest on judgments at rates established in the Court Rules.

Despite the length of this litigation, the trial court's several errors must be corrected.

## PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

This brief is submitted by Defendants-Appellants Joseph Wilf, the Estate of Harry Wilf, Leonard Wilf, Zygmunt Wilf, Mark Wilf, Sidney Wilf, Rachel Affordable Housing, and Halwil Associates (collectively, the "Wilf Defendants").[2] The core facts of this case were previously set forth by this Court in its 2006 opinion, *Jarwick Devs., Inc. v. Wilf*, No. A-5027-03T3 (App. Div. Dec. 15, 2006) (490a), and its 2018 opinion, *Jarwick Devs., Inc. v. Wilf*, No. A-2053-13T3 (App. Div. June 1, 2018) (38895a). While this appeal focuses on the errors of the trial court following the June 1, 2018 remand, the Wilf Defendants provide a more complete statement of facts for the benefit of the Court in understanding the issues in this appeal.

### A. Overview of Initial Litigation

Plaintiffs Jarwick Developments, Inc. and Ada Reichmann (together, "Jarwick") commenced this matter by filing a Complaint on September 11, 1992. (199a). The basis of the Complaint was a partnership dispute as to a 25% interest in Halwil Associates ("Halwil"), a partnership with a single asset: Rachel

[1] The facts and procedural history of this case are closely interwoven. For clarity, the Wilf Defendants have combined the statement of procedural history and facts, as much of the legal error stems from violations of well-established procedure.

[2] The dates of each volume of transcript and their numbered designation are provided in the Table of Transcripts.

Gardens, a 764-unit garden apartment complex in Montville, New Jersey (the "Project"). (200a). The Complaint alleged that the Wilf Defendants had been 50% partners, together with brothers Abe Halpern and Josef Halpern, in Halwil, which was formed for the purposes of developing, constructing, and operating the Project. (200a). The Complaint alleged that the Wilf Defendants had wrongfully transferred the asset of Halwil to a new entity, Pernwil Associates, in which the Wilf Defendants were 75% partners and Josef Halpern ("Halpern" and together with Jarwick, "Plaintiffs") was a 25% partner, thereby wrongfully excluding Abe Halpern. (203a). The Complaint alleged that Abe Halpern had transferred his interest in the Project to Jarwick and that the Wilf Defendants had wrongfully refused to recognize Jarwick's 25% partnership interest. (206a). The Complaint contained six counts, none of which had any reference or suggestion of RICO claims. (208a). Although he concurred in the determination to remove his brother Abe, Josef Halpern did not join the lawsuit even though he had the opportunity to do so, had consulted counsel, and had drafted a Complaint.

Jarwick conducted extensive discovery as to both liability and damages issues, during the course of which it obtained, in July 1995, all of the accountants' work papers for Rachel Gardens through the end of 1994.

(31538a). Jarwick obtained a real estate appraiser and a forensic accountant in support of its claims. (28627a-28638a; 28684a-28692a).

The parties had a trial before the Honorable Reginald Stanton in 1998, which, at Jarwick's request, was bifurcated as to liability and damages. During the liability portion of the trial, Jarwick elected to try only its claim that it held a 25% partnership interest. Judge Stanton determined that the Wilf Defendants had breached their agreement to recognize Jarwick as a 25% partner, and on March 11, 2000, entered an Order for Determining Liability, which "necessitated a trial on damages." (526a-528a); *Jarwick Devs., Inc. v. Wilf*, No. A-5027-03T3, 2006 WL 3685881, at *3 (App. Div. Dec. 16, 2006).

Jarwick then engaged in additional discovery, including a further review of the partnership's books and records and accounting work papers, and it obtained a new real estate appraisal in June 2001 and a new forensic accounting report in August 2001 that described in detail the partnership's financial transactions. (675a).

At no time during this period did Jarwick seek to amend its pleadings or assert any additional claims, despite the appraisals and accounting reports. Nor did Jarwick seek to assert any partnership rights beyond its claim that it was entitled to its 25% share of past profits and the then-current value of the partnership. Jarwick did not seek to be an active partner, but instead sought to

be "bought out" and paid the value of its partnership interest, including lost profits, as damages. (675a). At this time, Josef Halpern again declined to join the action, despite being deposed in 1997 (where he was represented by his own counsel) and participating in the preparation of the forensic accounting report.

On June 14, 2002, Judge Stanton fixed January 8, 1992 as the valuation date because that was the date on which defendant Zygmunt Wilf advised Jarwick that it was not a partner in the Project. (1973a). A trial on damages was conducted before the Honorable Kenneth MacKenzie in March 2004 only to determine the value of Jarwick's 25% partnership interest. (531a). Judge MacKenzie determined that Jarwick's 25% interest had a negative value as of January 8, 1992. (532a). As a result, the Court dismissed all allegations in the complaint with prejudice and entered a Final Judgment on April 5, 2004. (534a).

Jarwick appealed, raising as its only issues the court's fixing of January 8, 1992 as the valuation date and failure to award money damages through the date of the damages trial. (2643a).

### B. 2006 Limited Remand

On December 15, 2006, this Court reversed Judge Stanton's finding as to the valuation date. The Court held that Jarwick "was and is entitled to an accounting" as its remedy and remanded the case to the trial court for the sole purpose of conducting the accounting. *Jarwick*, 2006 WL 3685881, at *6.

In March 2007, the Supreme Court denied the Wilf Defendants' petition for certification. (2675a).

On the remand from the 2006 opinion, Jarwick moved before Chancery Division Judge Catherine Langlois for an Order recognizing Jarwick as an active partner by requiring Jarwick's signature, or the signature of Josef Halpern, on all checks. (479a). Halpern, a 25% partner, filed a certification in support of this motion. (481a). Judge Langlois followed this Court's mandate and denied the motion, holding that the *only* issue before the court was the accounting directed by the Appellate Division's remand. (2a; 31269a at 30:9-19). Judge Langlois further stated that the Appellate Division's decision was not a mandate for the trial court to become involved in issues related to partnership management. (31269a at 30:9-19). Jarwick then moved before this Court for clarification or modification of the order. This Court denied the motion. (3a).

Jarwick retained new (and current) counsel in October 2007, who proceeded to engage in additional extensive accounting discovery, resulting in a forensic accounting report and a real estate appraisal report in January 2009. Judge Langlois retired and a new trial judge, the Honorable Deanne M. Wilson, became the Chancery Judge presiding over the case.

In July 2009, the Wilf Defendants sought to add Halpern as an indispensable party to the action because he would share responsibility for any

accounting damages due to his 25% partnership share. (3981a). Jarwick **opposed** the application, arguing that the matter was **ready for trial and should not be delayed**. (2432a).

Shortly thereafter, Halpern, now also represented by new (and current) counsel, sought to join the case as a plaintiff and to file a new, much-expanded complaint in the litigation, although the case had been pending for nearly two decades and already had reached final judgment, appeal, and limited remand. (804a). At that stage, Jarwick changed its position, arguing that it now sought to file an amended complaint.

### C. Extraordinary Expansion of the Case after Remand

Departing from Judge Langlois's view of the trial court's limited role on remand, Judge Wilson did not confine the case to the straightforward accounting mandated by the Appellate Division. Instead, Judge Wilson permitted Jarwick and Halpern, on October 1, 2009, seventeen years after the filing of the original complaint, to exponentially expand this case by adding new tort and RICO claims to a breach of contract action after a Final Judgment, an appeal, and a limited remand. (16a). Despite Halpern's knowledge of and involvement in the case, and his decision not to join as a party, Judge Wilson allowed Halpern to join this post-appeal case as a Plaintiff, rather than requiring him to start his own separate action in the Law Division. The new complaints, for the first time,

asserted claims pursuant to state law civil RICO, *N.J.S.A.* 2C:41-2, and also added new defendants, the accountants Marvin Cohen and Mironov, Sloan & Parziale, LLC (collectively, "the Accountant Defendants"). (264a; 309a).

In March 2010, the Wilf Defendants moved to dismiss Jarwick's Amended Complaint and Halpern's Complaint, arguing that the trial court lacked jurisdiction to expand the case beyond this Court's remand order. (2481a). In April 2010, Judge Wilson deferred ruling on the Wilf Defendants' motion to dismiss. (2083a at 30:4-17).

Later that year, in November and December 2010, the Wilf Defendants and the Accountant Defendants moved for summary judgment on multiple grounds: (1) new claims were beyond the scope of the Appellate Division remand; (2) claims were barred by the statute of limitations; (3) absence of proof of the elements of RICO; and (4) absence of proof of reliance as required by fraud. (3512a). Plaintiffs also moved for partial summary judgment on various grounds, including the determination that the Wilf Defendants were not entitled to any management fees, or any compensation for their efforts in connection with the development of the project, and a determination that Jarwick was and is a full 25% partner, notwithstanding Judge Langlois' prior ruling to the contrary. (4429a-4430a; 4525a).

Nearly a year later, on February 9, 2011, Judge Wilson denied the Wilf Defendants' March 2010 motions to dismiss. (67a). Judge Wilson also granted certain relief to Plaintiffs, including an Order declaring Jarwick to be a full 25% partner and the Pernwil Agreement to be controlling. (87a). The Court also precluded the Wilf Defendants from receiving management fees, interest, or certain other payments going forward. (73a-74a). Subsequently, the Accountant Defendants settled with Plaintiffs, and were not involved further in the litigation.

Trial began in May 2011 and continued for 207 non-consecutive days through March 2013. On March 27, 2012, the Wilf Defendants moved to dismiss Jarwick's Amended Complaint and Halpern's Complaint at the close of Plaintiffs' case. (7466a). Judge Wilson refused to hear the motion until December 2012, by which time virtually all the evidence had been presented. At that point, Judge Wilson denied the motions. (198T; 199T).

Following the 207 trial days, Judge Wilson declined the parties' offers to submit proposed findings of fact and conclusions of law. Oral closing statements were completed in March 2013, at which time Judge Wilson took the matter under advisement.

Judge Wilson did not write an opinion. Rather, she delivered her rulings orally on the record over 13 days, specifically, on August 5, 6, 12, 13, 14, 15, 16, 19, 20, 22, 23 and 26, 2013, and September 3, 2013. Judge Wilson held that,

notwithstanding this Court's directions, the Wilf Defendants were entitled to zero management fees, zero interest, and zero compensation of any kind for any of the money they had lent or invested into the partnership, or any of their efforts in obtaining financing and developing the project. (223T at 88:19-90:6, 92:13-93:12; 228T at 40:24-41:6; 229T at 6:19-20). Judge Wilson also found that the money that the Wilf Defendants had caused to be paid to themselves for management fees, payroll, interest, and various other development and construction expenses constituted theft, and that the inaccurate financial statements never relied upon and, in some instances, never read by any of the Plaintiffs, constituted fraud, thereby subjecting the Wilf Defendants to liability for punitive damages. *Jarwick Devs., Inc. v. Wilf*, No. A-2053-13T3, 2018 WL 2449133, at *4 (App. Div. June 1, 2018). Judge Wilson also found that the Wilf Defendants and/or the partnerships constituted civil RICO "enterprises," thereby subjecting the Wilf Defendants to liability for treble damages, attorneys' fees, and costs pursuant to state law civil RICO. *Id*. As noted above, Plaintiff Josef Halpern, who alleged four civil RICO claims, was a 25% partner in the so-called "enterprises."

Plaintiffs thereupon submitted applications for attorneys' fees and costs, which Judge Wilson referred to a Special Master, former federal judge Stephen

M. Orlofsky. (14874a). Judge Wilson also directed further briefing and argument on the quantum of punitive damages.

On September 23, 2013, Judge Wilson awarded Plaintiffs punitive damages based solely upon the accounting reconciliation and over the entire period of the existence of the partnership, dating back to 1988. (109a-111a). Judge Wilson also determined that Plaintiffs were entitled to civil RICO damages dating back to January 2000, which Judge Wilson found to be the commencement date for Plaintiffs' claims. (*Id.*) Because the RICO treble damages were less than the punitive damages, Judge Wilson held those damages to be superseded by the punitive damages awards. (*Id.*) On December 11, 12, 13, 16, 17, 19 and 20, 2013, Judge Wilson adjudicated Plaintiffs' applications for attorneys' fees and costs, including two supplemental applications - the last of which Judge Wilson allowed to be made, over objection, on only two days' notice to Defendants. (14745a-14768a; 14773a-14795a; 14816a-14125a).

A Final Judgment was entered on December 20, 2013, which, in addition to awarding damages as previously set forth, also entered a Judgment of Dissolution of the partnership and sale of Rachel Gardens. (128a). Judge Wilson stayed the money judgment based upon the posting of a Supersedeas Bond, but refused to stay the Judgment of Dissolution or the property sale. (142a-143a). In July 2014, the property-at-issue was sold, the partnership was

dissolved, and both Jarwick and Halpern, and the Wilf Defendants, received approximately $30 million each. Plaintiff Halpern's attorney received 25% of Halpern's share of the sale's proceeds in addition to Judge Wilson's award of counsel fees. The total award to Plaintiffs was in excess of $103,000,000. (126a-127a).

### D. The Second Appeal and Partial Reversal

The Wilf Defendants appealed Judge Wilson's judgment, and Plaintiffs cross-appealed. On June 1, 2018, this Court affirmed in part, reversed in part, and remanded the matter to the trial court for further proceedings. *See Jarwick*, 2018 WL 2449133, at *1. In its decision, the Court recognized that, in the prior appeal of 2006, this Court "remanded the matter to the trial court for an accounting of Jarwick's interest in the partnership." *Id*.

As the Court noted in the 2018 opinion, the Wilf Defendants appealed and argued: (1) the trial judge violated the Appellate Division's Limited Remand Order, which only directed an accounting of Jarwick's partnership interest; (2) Plaintiffs' claims were barred by the statute of limitations, entire controversy doctrine, and other principles of law; (3) the trial judge had an unwaivable conflict of interest under the *Code of Judicial Conduct* and should have recused *sua sponte*; (4) the judge erred in finding the Wilf Defendants violated fiduciary duties owed to Plaintiffs; (5) the Wilf Defendants were entitled to compensation

for their management of and financial contributions to the Project; (6) the judge erred in finding the Wilf Defendants liable for the common law torts asserted; (7) the judge erred by awarding Plaintiffs punitive damages, and the punitive damages awarded were excessive; (8) civil RICO does not apply to a breach of contract dispute concerning a real estate partnership agreement; (9) the statute of limitations for civil RICO actions is 4 years, not 5 years; (10) the judge's RICO findings were fundamentally flawed; (11) the judge erred by imposing tort and RICO liability upon Mark Wilf, Leonard Wilf, and the Estate of Harry Wilf; (12) the judge erred by requiring public disclosure of the Wilf Defendants' minimum net worth statements; (13) the Wilf Defendants are entitled to a credit for the money Plaintiffs obtained in settlements with the Accountant Defendants; and (14) the attorneys' fees and costs awarded were excessive and unreasonable. *See id*. at *5.[3]

On its cross-appeal, Jarwick argued that the judge erred by: (1) excluding compensatory damages it sustained during a "carve-out" period from June 14, 2002 through December 15, 2006, in calculating punitive damages and damages under RICO; (2) failing to award Jarwick the maximum permissible amount of

[3] The Wilf Defendants provide in this brief a full list of the issues they previously appealed to preserve all issues for further petition to the Supreme Court, if necessary.

punitive damages; (3) failing to include conduct that pre-dated January 1, 2000 in the RICO claim; (4) imposing a capital contribution upon Jarwick for investments made in 1988; and (5) reducing by twenty-five percent co-counsel's fees. *See id*. Halpern argued that the judge erred by: (1) limiting Halpern's RICO damages; (2) failing to apply the parties' agreed-upon contractual waiver of the statute of limitations; and (3) failing to award Halpern the maximum amount of punitive damages allowable.[4] *See id*.

Rejecting some of the Wilf Defendants' arguments on appeal, this Court held that Jarwick could assert new claims after the prior appeal of 2006 because "[the Appellate Division's] mandate did not expressly bar Jarwick from asserting new claims." *Id*. at *9. Further, this Court determined that "Halpern was not a party to the appeal and generally court orders do not bind non-parties." *Id*. Agreeing with some the Wilf Defendants' arguments on appeal, the Court held that the trial judge erred by failing to apply the six-year statute of limitations to Jarwick's and Halpern's non-RICO claims and remanded "the matter to the trial court solely for the purpose of recalculating the damages on these claims." *Id*. at *22. This Court directed the trial court to limit the damages

[4] The Wilf Defendants provide a full list of Plaintiffs' arguments on the prior appeal because Plaintiffs were unsuccessful on **all points** raised in their cross-appeals. Yet the Special Master and the trial court awarded Plaintiffs attorneys' fees for their work on their unsuccessful appeals.

to the time period of October 1, 2003 through December 31, 2011. *See id*. This Court also determined that the trial court "erred by tolling the time for filing [the RICO] claims." *Id*. As such, the trial court was to "recalculate the damages on the RICO claims, which shall be limited to damages incurred from October 1, 2004 through December 31, 2011." *Id*.

This Court also ordered that "the punitive damages awards to Jarwick and Halpern must be vacated and the trial court must reconsider whether such damages should be awarded and, if so, in what amounts." *Id*. at *25:

> Any punitive damages awarded to Jarwick must be based on the damages related to its new, non-RICO tort claims which were asserted in the amended complaint, **not on the damages found in the accounting**. Similarly, any punitive damages awarded to Halpern must be based on the damages found on his non-RICO tort claims.

*Id*. (emphasis added). With respect to punitive damages, the Court further explained that:

> reversal of the awards [] is also required because in assessing whether such damages should be awarded, the judge considered and relied upon the fact that defendants' tortious conduct occurred over time, and was not an isolated incident . . . . [T]he judge considered acts that occurred outside the period permitted by the applicable statute of limitations for the non-RICO claims. Accordingly, on remand, the trial court shall reconsider the decisions to award Jarwick and Halpern punitive damages. **The court shall determine whether punitive damages should be awarded, and if so, in what amounts.**

*Id*. at *26 (emphasis added).

This Court vacated Judge Wilson's attorneys' fees awards, which were based upon the Special Master's recommendations. The Court "was convinced . . . that the awards of attorneys' fees and costs to Jarwick and Halpern must be reversed and the awards reconsidered." *Id*. at *28. The Court stated: "[t]he trial judge awarded the counsel fees and costs pursuant to RICO, and the judge limited Jarwick's and Halpern's RICO claims to conduct that occurred from 2000 to 2011. The court nevertheless awarded counsel fees and costs based on all of the time counsel devoted to the case." *Id*. "That includes the time spent by Jarwick's and Halpern's lawyers for the pursuit of the non-RICO claims." *Id*. Most notably, this Court was "convinced the court **erred** by finding that all of Jarwick's and Halpern's claims rested on a common core of operative facts." *Id*. at *29 (emphasis added).

This Court emphasized that, "the court must limit its award to the fees and costs reasonably devoted to plaintiffs' pursuit of their respective RICO claims." *Id*. This Court further noted that the trial court "may consider awarding counsel fees and costs for time spent establishing wrongful acts on the part of defendants that pre-dated the time for which the RICO claims could be asserted. However, the court must find that the time devoted to presenting that evidence was **reasonably required** to establish the RICO claims." *Id*. at *29 (emphasis added).

### E. The Remand Rulings

As noted, the trial court was directed to resolve three issues on remand: (1) a determination of the RICO and non-RICO damages in their respective appropriate time periods; (2) a reconsideration of whether any punitive damages should be awarded and, if so, the amount; and (3) a new analysis and recalculation of the amount of attorneys' fees and costs to award to Plaintiffs, limited to the work reasonably required in presenting evidence on their four RICO claims.

On November 18, 2019, over the Wilf Defendants' objection, the trial court re-appointed the same Special Master to provide a report and recommendation on the amount of attorneys' fees and costs to award to Plaintiffs. (38987a). Subsequent to that appointment, the Special Master accepted a paid mediation assignment from Jarwick's counsel, Michael Himmel of the Lowenstein Sandler law firm. (38995a; 38998a). Neither Jarwick nor the Special Master informed the Wilf Defendants about this paid mediation engagement. And, after the Wilf Defendants learned of the engagement, the Special Master refused to inform the Wilf Defendants whether he had accepted any *other* paid mediation engagements from the Lowenstein law firm.

In response to the Wilf Defendants' request, the Special Master declined to recuse himself. (39665a). On October 13, 2021, the Honorable Maritza

Berdote Byrne denied the Wilf Defendants' motion to disqualify the Special Master. (39680a). Finding that "Special Master Orlofsky had no reason to recuse," Judge Berdote Byrne held "in *dubitante* the applicability of [the] Code of Judicial Conduct to a special master." (39685a).

On August 4, 2022, the Special Master provided a Report and Recommendation to the trial court. (39028a). Despite this Court's remand on the issue, the Special Master recommended the same exact fee amount for both Jarwick and Halpern as had been ordered in the December 2013 Final Judgment. Additionally, on August 25, 2022, the Special Master provided a supplemental report that recommended that Plaintiffs be awarded attorneys' fees and costs on their cross-appeals, even though Plaintiffs did not prevail on **any** issue asserted in their cross-appeals. (39115a).

On November 16, 2022, the Honorable Frank J. DeAngelis, newly assigned to the case, issued an Order regarding all issues on remand. Judge DeAngelis provided new RICO and non-RICO damages calculations. (39968a-39970a). As to attorneys' fees, Judge DeAngelis fully adopted the Special Master's recommendations. (39989a-40077a). In doing so, Judge DeAngelis rejected a contrary evaluation and report from another former federal judge, former Chief Judge Jose L. Linares, that significantly reduced Plaintiffs' fees, adhering to this Court's instructions. (39502a-39505a; 39995a). Judge

DeAngelis also found that Jarwick and Halpern were entitled to punitive damages calculated again at 2.5 times the compensatory damages. (39978a). Judge DeAngelis assigned responsibility for punitive damages as 60% for Zygmunt Wilf, 20% for Mark Wilf, and 20% for Leonard Wilf. *Id*. Finally, Judge DeAngelis held that prejudgment interest accrued at 8.875% until the dissolution of the partnership in July 2014, then at 3.935% until he issued his remand decision on November 16, 2022, and then at the post-judgment interest rate of 2.25%. (40003a-40004a). Notably, the parties had **no** agreement to apply the 8.875% prejudgment interest rate beyond the December 20, 2013 Final Judgment.

On January 4, 2023, Judge DeAngelis issued separate Final Judgments for Jarwick and Halpern, based on the earlier November 16, 2022 Order. (40005a-40010a). Without making any findings of fact as to the applicability of compound interest, Judge DeAngelis also ordered that prejudgment interest be compounded. *Id*.

# ARGUMENT

## I. The Unjust Treatment of the Wilf Defendants Has Resulted in a Cascade of Errors.

**(*Jarwick Devs., Inc. v. Wilf*, No. A-2053-13T3, 2018 WL 2449133 (App. Div. June 1, 2018)).**

This is a limited appeal from the decisions of the trial court following this Court's June 1, 2018 remand. The decisions to be reviewed pertain to the award of attorneys' fees, punitive damages, and prejudgment interest. The Wilf Defendants respectfully disagree with certain other holdings and conclusions of this Court in its 2018 decision and intend to seek review of them by the Supreme Court.

Most prominently, although not to the exclusion of other issues, the Wilf Defendants adamantly maintain that the trial court erred in ignoring over 40 years of jurisprudence to sanction, after a limited remand, a vast expansion of the case after a final judgment was entered in 2004. This Court reversed and remanded the case in 2006 **only** to conduct an accounting to determine the value of Jarwick's 25% partnership interest. To the Wilf Defendants, the trial court's failure in 2009 to abide by this Court's remand directive reasonably appears to be related to the conflict of interest that the trial judge, Judge Wilson, had in presiding over the trial after the 2006 remand. Defendants maintain that the contemporaneous attorney-client relationship of Judge Wilson's attorney-husband with Jarwick's counsel, the Lowenstein firm, was an unwaivable

conflict of interest that required Judge Wilson's recusal or disqualification. The Wilf Defendants have an objectively reasonable perception that the judge's conflict of interest influenced her decisions in the trial of this case.

Judge Wilson's conflict of interest was later exacerbated by yet another conflicting relationship of the Lowenstein firm with a decision-maker in this case, the Special Master. As will be argued in Point II of this brief, the Special Master was bound by certain provisions of the *Code of Judicial Conduct* either not to accept, or at least to disclose, the financial benefit he received from his engagement by the Lowenstein firm and counsel Michael Himmel in conducting a paid mediation of another case, while he was simultaneously assigned to review and decide the attorneys' fees application of Himmel and Lowenstein in this case. Yet, the Special Master refused to recuse from his assignment, then issued decisions on attorneys' fees that ignored and disregarded this Court's remand directives.

The trial court's damages award also rests on the improper treatment of a partnership dispute as a civil racketeering proceeding. The RICO judgment against the Wilf Defendants mischaracterized payments made from partnership assets for contributions to the partnership as predicate acts of fraud and theft giving rise to RICO liability. This abuse of a statute intended to target organized crime enabled Plaintiffs to recover far in excess of their losses.

Ambushed by Judge Wilson's invariable rulings in favor of Plaintiffs, her vilification of the Wilf Defendants' character, and the exorbitant money awards to Plaintiffs, the Wilf Defendants naturally believe that the New Jersey courts have treated them unjustly. They recognize that the age of this case is overwhelming -- that the courts may be inclined to put the case to rest after decades of litigation between the affluent parties on both sides. But, an unjust result is not cured by its age. Had Judge Wilson followed this Court's original 2006 directive for an accounting and valuation of Jarwick's 25% interest in the partnership, and not allowed essentially a new tort and RICO case to be filed, the case would have been concluded by 2009. Had the new trial judge assigned to the case after the 2018 remand abided by this Court's directives, the issues now raised on this appeal may have become moot. This Court need not be confined by the previous errors in this litigation. *See Hart v. City of Jersey City.*, 308 N.J. Super. 487, 498 (App. Div. 1998) (finding that the law of the case doctrine "should not be used to justify an incorrect substantive result.").

The Wilf Defendants present the following issues for the Court's balanced, careful review in this limited appeal.

## II. Special Master Orlofsky Had a Disqualifying Conflict of Interest. (39680a).

While Plaintiffs' fee applications were pending before the Special Master — fee applications that required him to evaluate the reasonableness of fees of Jarwick's counsel, Lowenstein and Michael Himmel — the Special Master was selected by Lowenstein and Himmel to serve as a paid mediator in another action. (38995a; 38998a). Thus, Lowenstein created a financial benefit for the Special Master while he was simultaneously, on behalf of the trial court, evaluating the reasonableness of Lowenstein's fee application in this case. This dual role represented a disqualifying conflict of interest. Any judge would have known that a financial benefit provided by a party or attorneys appearing in the judge's courtroom is strictly forbidden by the *Code of Judicial Conduct*. *See DeNike v. Cupo*, 196 N.J. 502, 516-17 (2008).

But the Special Master and the trial court concluded that the *Code of Judicial Conduct* does not apply to Special Masters, and that, even if it did, it would not require recusal under these circumstances. (39685a). Both rulings are just plain wrong. The *Code of Judicial Conduct* binds Special Masters, at least in relevant part, because they exercise judicial power, and the *Code* requires recusal in the presence of a direct financial conflict of interest.

### A. The New Jersey *Code of Judicial Conduct* applies to Special Masters. (39680a).

A Special Master under New Jersey law wields judicial power and serves as an arm of the Court. *Rule* 4:41-3 of the New Jersey Rules of Court provides that, subject to "such specifications and limitations" as may be specified in the order of reference, a Special Master "has and shall exercise the power to regulate all proceedings in every hearing, to pass upon the admissibility of the evidence and to do all acts necessary or proper for the efficient performance of the duties directed by the order." *Rule* 4:41-5 provides that, for non-jury matters such as this case, "the court ***shall accept*** the master's findings of fact unless contrary to the weight of the evidence." (Emphasis added.) Under these rules, a Special Master has authority over the parties and is critical to the judicial fact-finding process. As the *Rule* articulates, a party against whom a Special Master has made an adverse factual finding has a heavy burden to overturn that finding. [5] A Special Master, therefore, must be subject to the *Code of Judicial Conduct*.

As set forth in Canon 1 of the *Code*, "[a]n independent and impartial judiciary is indispensable to justice." It cannot be that judicial officials who

[5] State courts elsewhere have rejected arguments that the limited role of a special master or similar officer legitimates conflicts of interest that would be disqualifying for a judge. In a case with factual similarities to this one, a Virginia appeals court set aside the report of a commissioner, a "quasi judicial officer," who had received a political contribution in a campaign for the state legislature from counsel to a party while the report was pending. *Brown v.*

issue orders to parties, make legal rulings, and decide questions of fact with presumptive binding force are somehow free of the obligation to "disqualify themselves in proceedings in which their impartiality or the appearance of their impartiality might reasonably be questioned." *See Code of Judicial Conduct*, Canon 3.17. Such an exclusion would subvert the purpose of the *Code* by permitting the judicial process — in which Special Masters play an essential part — to be tainted by the appearance of impropriety and bias.

Indeed, both federal courts and the majority of states apply equivalent rules to Special Masters as they do to sitting judges. The Code of Conduct for United States Judges classifies Special Masters as "judges pro tempore" and applies most of the Code to them, including the provisions governing impartiality and disqualification in Canon 3. *See* Code of Conduct for United States Judges, Compliance with the Code of Conduct; *see also* Fed. R. Civ. P. 53(a)(2) (subjecting Special Masters to the same standards of judicial disqualification as those set forth in 28 U.S.C. § 455). Similarly, as shown in a survey of state law that the Wilf Defendants submitted to the trial court, 32 states affirmatively require that Special Masters adhere to their respective code of

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*Brown*, 11 Va. App. 231, 233-36 (1990). The court rejected the argument that "a commissioner's report is of little consequence since a commissioner has no power to render final orders," noting that a commissioner's factual findings are presumed correct. *Id*. at 236.

judicial conduct, and 6 more likely do so based on applicable code language or court decisions construing ethical requirements. (*See* 38842a-38871a (50-State Survey)). Further, this Court has specifically applied the *Code of Judicial Conduct's* conflict-of-interest rules to Special Masters in the context of *Mount Laurel* litigation. *See Deland v. Twp. of Berkeley*, 361 N.J. Super. 1, 12 (App. Div. 2003).

In rejecting disqualification here, the Special Master and the trial judge referenced the differences between Special Masters and ordinary judges. The Special Master stated that "[s]pecial masters are most often attorneys in private practice who would be reluctant to take on appointments that would disqualify them from large swatches [sic] of potential work." (39677a). But the widespread practice of requiring Special Masters to abide by conflict-of-interest rules belies any notion that doing so is unfeasible. Requiring Special Masters to refrain from conflicts of interest with respect to the specific individuals and entities involved in their cases hardly disables them from continuing to be successful attorneys in private practice. To the extent certain other rules within the *Code of Judicial Conduct* are inappropriate to apply to Special Masters, such as the rules restricting judges from taking on non-judicial professional roles, Special Masters can be treated as akin to part-time judges, who are partially

exempt from those rules.[6] *See* New Jersey *Code of Judicial Conduct*, Applicability. However, it defies logic and reason to exempt Special Masters from the conflict of interest rules within the *Code of Judicial Conduct*.

The trial judge viewed the Special Master's role as narrower than that of a judge, in that "a special master is appointed to carry out limited and specific tasks." (39686a). But the importance of the appearance of impartiality applies to each task within a case, and a Special Master can be responsible for resolving highly consequential issues. Here, for example, the Special Master's ruling on attorneys' fees led to an award of more than $19 million. (40005a-40010a). The resolution of such an issue requires the appearance of impartiality, consistent with the *Code*'s exhortation that "[a]n independent and impartial judiciary is indispensable to justice." *Code of Judicial Conduct*, Canon 1.

[6] The holding of disqualification sought in this case is quite limited. It would only prevent an individual from acting as a Special Master when he or she is *simultaneously* handling a separate paid matter for one of the parties or their attorneys. Or, if not disqualification outright, it would require that the Special Master disclose the conflict to the attorneys and the trial court, which, under appropriate circumstances, could be waived.

### B. Under the *Code of Judicial Conduct*, the conflict here required recusal. (39680a).

The *Code of Judicial Conduct* required the Special Master's recusal. *Rule* 3.17 of the *Code of Judicial Conduct* requires judges to "disqualify themselves in proceedings in which their impartiality or the appearance of their impartiality might reasonably be questioned . . . ." *See also Rule* 1:12-1(g). In this case, the appearance of impartiality is appropriately questioned where: (1) the Special Master was considering a fee application requiring him to evaluate the reasonableness of Lowenstein's fee request, (2) Lowenstein offered the Special Master a paid opportunity to serve as a mediator and the Special Master accepted, and (3) the offer and the acceptance took place **during the pendency of the fee application**.

Here, the Special Master's mandate was to evaluate the applications for attorneys' fees. (39650a). The Special Master, therefore, had to assess the reasonableness of the work Lowenstein carried out and the rates it charged. (*See, e.g.,* 39087a-39089a (rejecting Defendants' reasonableness challenges to certain work performed by Lowenstein)).

"[A] judge simply cannot have a prospective financial relationship with one party and expect to persuade the other, or the public, that the court can nevertheless fairly assess the case." *DeNike*, 196 N.J. at 517. It is of no moment whether the Special Master was paid by Lowenstein or by the parties to the

mediation. Lowenstein requested the Special Master to serve as mediator, giving him a financial benefit upon Lowenstein's selection. Critically, the mediator request, the Special Master's agreement, and the Special Master's service as mediator all occurred contemporaneously with the Special Master's service in this case. (38995a; 38998a). Thus, even as the Special Master was reading Mr. Himmel's brief on his firm's fee application, the Special Master was taking a paid opportunity to serve as a mediator, at Lowenstein's instigation, in another matter handled by Mr. Himmel. *See DeNike*, 196 N.J. at 517 (distinguishing negotiations for employment taking place "toward the close of the case" from ones "start[ing] a reasonable period of time after the case ended"). Under such circumstances, it is eminently reasonable to question the Special Master's appearance of impartiality. *Rule* 1:12-1(g) requires a judge, as impartial decision maker, to recuse, or grant a motion to disqualify, when a party or counsel "might reasonably . . . believe" the judge might be unable to conduct and render "a fair and unbiased hearing and judgment," as here.

The trial court and the Special Master gave inadequate reasons for holding that recusal was not required. The trial court analogized these facts to Lowenstein representing a party in two unrelated matters before the same judge. (39021a-39022a). That analogy is inapposite. Judges have a fixed salary. Parties do not select the judge in litigation and do not offer the judge

compensation. In contrast, Lowenstein picked the Special Master to be a mediator, work for which he received specific and direct additional compensation as a result of Lowenstein's selection.

The trial court also minimized the impact of the mediation, stressing that it was a "court-ordered, two-hour mediation." (39022a). But there is no exception to the conflicts rules based on the size of a financial interest or the time involved. Thus, when a judge has "ownership of a legal or equitable interest, ***however small***," in "an enterprise related to the litigation," disqualification is required. *Code of Judicial Conduct*, *Rule* 3.17(B)(2) (emphasis added). Moreover, this Court will be hard-pressed to establish a minimum threshold of compensation or time invested in a matter before a disqualifying conflict of interest occurs. The mere existence of a financial benefit delivered by the law firm whose work the Special Master was evaluating, without disclosure to the Wilf Defendants or the trial court, disqualified the Special Master from further service in this case.

The Special Master took the extraordinary position that recusal was unnecessary here because there was no "direct financial link" between Lowenstein and the Special Master. (39673a-39675a). The Special Master asserted that he was paid in the mediation by the parties, not the law firms, and, in his view, there was no evidence that Lowenstein had a direct financial stake

in the fee award. (*See id.*) But the Wilf Defendants were not permitted to develop a record to test that assertion. Moreover, this novel standard created by the Special Master ignores the broad language of *Rule* 3.17, requiring judges to recuse where "their impartiality or the appearance of their impartiality might reasonably be questioned," and the principle that some "scenarios" in which a judge must disqualify "cannot be neatly catalogued." *In re Advisory Letter No. 7-11 of the Supreme Court Advisory Comm.*, 213 N.J. 63, 73 (2013). Here, regardless of which entity paid the mediation fee, Lowenstein referred a paid mediation assignment to the Special Master. And regardless of whether Lowenstein has a direct financial stake in the fee award, it is Lowenstein's work and Lowenstein's fees that were being evaluated by the court. Under these circumstances, it is reasonable to question the Special Master's appearance of impartiality, and the Special Master should have been disqualified. Since he was not, the attorneys' fees award should be vacated.

## III. The Attorneys' Fees Award was Erroneous in Multiple Respects (40005a-40010a; 39989a-40001a)

In the prior appeal, this Court vacated the attorneys' fees award, explaining that "the court **erred** by finding that all of Jarwick's and Halpern's claims rested on a common core of operative facts." *Jarwick*, 2018 WL 2449133, at *29 (emphasis added). This Court required that the award be limited to "the fees and costs reasonably devoted to plaintiffs' pursuit of their respective RICO claims." *Id*. Plaintiffs asserted only four civil RICO claims out of over a dozen claims for each Plaintiff. Instead of modifying the fee award in light of this Court's directive, the Special Master disregarded the Court's opinion and affirmed his own prior decision, again recommending Plaintiffs be awarded all the fees he previously had recommended. (39056a-39058a). The trial court accepted the Special Master's recommendation in full. (39994a; 39996a; 40001a). This award is inconsistent with this Court's directive and also suffers from multiple independent flaws.

### A. The Trial Court and Special Master erred by awarding fees for work done years before any suggestion of a RICO claim. (39067a-39068a).

Work done before any RICO claim was contemplated could not be "reasonably devoted" to the pursuit of Plaintiffs' RICO claims. Here, no RICO claims were brought before October 1, 2009, when they were introduced to the case by Halpern, who had not previously been a party. *See supra* at 8-10; (256T

at 87:2-4). Plaintiff Jarwick's counsel fees for 2007, 2008, and most of 2009 cannot form part of any fee award in the absence of any evidence in the record that Jarwick was considering RICO claims. During those years, the sole issue in the litigation was valuing Jarwick's 25% share of the partnership, and there is no indication that Jarwick's counsel was investigating potential RICO claims. Plaintiffs argued, and the Special Master found, that Jarwick's work prior to October 2009 was designed to, or helped, develop Jarwick's RICO claims. (39067a-39068a). The record refutes that notion. In July 2009, Jarwick opposed the Wilf Defendants' motion to join Halpern as a party because it would delay the trial on the accounting and valuation case, and pressed to begin trial in September 2009 on the accounting and valuation case, at which time there were no RICO claims asserted. (2427a-2437a). As such, the pre-September 2009 services could not have been related to RICO claims, and Jarwick produced no invoice or time records suggesting that RICO claims were then being advanced.

The Special Master rejected this conclusion as imposing an unsupported "subjective intent requirement to the fee award standard." Instead, relying on *Silva v. Autos of Amboy, Inc.*, 267 N.J. Super. 546 (App. Div. 1993), he stated that such work could be covered by a fee award if it was "part of the pursuit of the ultimate result achieved." (39067a-39068a). But *Silva*'s language about work "in pursuit of the ultimate result achieved" is based on a situation where

claims subject to fee-shifting are combined with claims not subject to fee-shifting — in that case, "consumer fraud [wa]s alleged in a multi-count complaint containing nonconsumer fraud claims." 267 N.J. Super. at 554. Nothing in *Silva* suggests that fees can be awarded for work done at a time when there was no claim subject to fee-shifting.

Similarly unavailing is the Special Master's reliance on the fact that fee-shifting is available for the "costs of investigation" of RICO claims. *N.J.S.A.* 2C:41-4(c); (39068a). Such costs *might* include some fees incurred before the RICO claims were actually filed on October 1, 2009 *if* Plaintiffs were able to establish that particular work was done to investigate or develop the RICO claims. "[T]he party seeking to be awarded attorneys' fees ordinarily bears the burden of proving that they are reasonable." *Green v. Morgan Properties*, 215 N.J. 431, 455 (2013). But Plaintiffs did not prove that investigative work on future RICO claims was conducted before September 2009. The Special Master made no specific findings about particular RICO time entries, instead characterizing *all* the work before the RICO claims were filed as compensable. This included the work performed by Jarwick's counsel in preparation for trial on the valuation of Jarwick's 25% partnership interest, when there were no RICO claims in the case. Jarwick did not communicate to **any party or the**

**trial court**, in 2007, 2008, or through September 2009, that RICO claims would arise.

The Special Master and the trial court should have applied the standard set forth by this Court in its 2018 decision: that "there was no common core of operative facts" and that compensable work must be limited to that which was "reasonably devoted to plaintiffs' pursuit of their respective RICO claims." *Jarwick*, 2018 WL 2449133, at *29. Under that correct standard, fees incurred before any RICO claim was investigated or brought are simply not recoverable.[7]

### B. The Trial Court and Special Master erred by awarding fees for work that was not "reasonably required to establish the RICO claims." (39089a-39090a; 40005a-40010a).

In its 2018 decision, this Court required a close relationship between the RICO claims and the fees and costs awarded. For "fees and costs for time spent establishing wrongful acts on the part of defendants that pre-dated the time for which the RICO claims could be asserted," this Court required a finding that "the time devoted to presenting that evidence was reasonably required to

[7] The Wilf Defendants do not bear the burden of determining precisely when RICO claims were first investigated. Plaintiffs bear that burden, and have failed to establish in their own time records how any fees prior to the filing of the October 1, 2009 Complaints are entitled to recovery. "[A]pplications for counsel fees are to 'be accompanied by contemporaneously recorded time records that fully support the calculation of hours expended by all attorneys who participated in the matter.'" *Hansen v. Rite Aid Corp.*, 253 N.J. 191, 201, 290 A.3d 159, 164 (2023).

establish the RICO claims." *Jarwick*, 2018 WL 2449133, at *29. It is not enough for work to have some bearing on the RICO claims; it must be "reasonably devoted" to or be "reasonably required" for them.

The trial court did not correctly apply this standard. It treated the analysis as all-or-nothing, stating that "[i]t would be illogical to state the facts discovered from 1992 to 2009, which gave rise to and informed plaintiffs' understanding that defendants had violated the RICO statute, had nothing to do with plaintiffs' prosecution of their RICO claims." (39996a). The standard is **not** "nothing to do with" RICO claims. Neither is the standard whether the facts had *anything* to do with the RICO claims. Rather, the test is whether *all* of the work done to establish *all* of the facts was "reasonably devoted to plaintiffs' pursuit of their respective RICO claims." *Jarwick*, 2018 WL 2449133, at *29. This Court has rejected precisely such an undifferentiated approach adopted on remand. *Id*. Likewise, the New Jersey Supreme Court recently approved a trial court's "meticulous analysis" reviewing counsel time entries to exclude unreasonable expenditures and "categories of legal work that did not further plaintiff's cause." *Hansen v. Rite Aid Corp.*, 253 N.J. 191, 221 (Mar. 15, 2023). The Court here should follow the guidance from *Hansen*.

Similarly, the Special Master's conclusion that all the claims rested on a common core of operative facts, notwithstanding this Court's contrary holding,

relied on a general high-level analysis of certain broad categories of facts from before the RICO limitation period that he found were relevant to the RICO claims. These facts were never tied or related to the relevant time periods or RICO elements. And even taking the Special Master's findings at face value, does that mean that *everything Plaintiffs did* to establish contract claims and facts supporting non-RICO tort claims was "reasonably devoted" to establishing the RICO claims? The Special Master's report does not engage in the required granular analysis of time entries or specific projects. Further, it provides no reason for equating what Plaintiffs, in fact, did to gather evidence *before* the RICO limitation period (October 1, 2004) to establish non-RICO claims with what would have been reasonable to support, or provide background for, the facts supporting the RICO violations during the limitations period. Thus, for example, even if both Plaintiffs' breach of contract claims and Plaintiffs' RICO claims required *some* showing as to the formation and terms of the partnership agreement, it does not follow that the showing Plaintiffs made as to what occurred in the partnership in the 1980s or 1990s was "reasonably necessary" to prove their RICO claims. The trial court merely adopted the Special Master's Report without meaningful analysis, comment, or thoughtful consideration of the report of former Chief Judge Jose Linares.

These errors by the trial court and the Special Master led to a fee award that compensated Plaintiffs for several categories of work that were *not* reasonably devoted to pursuit of the RICO claims, as illustrated by some of the following examples:

*Punitive Damages*. Plaintiffs' punitive damages claims do not share a common core of operative facts with Plaintiffs' RICO claims. Plaintiffs sought and initially received punitive damages based on accounting damages calculated after the 2006 remand and conduct dating back to 1989, a ruling reversed by this Court. *Jarwick*, 2018 WL 2449133, at *25-26. By contrast, the appropriate statute of limitations for the RICO claims commenced on October 1, 2004. *Id*. at *17. A punitive damages analysis involves several fact issues immaterial to RICO claims, such as "[t]he profitability of the misconduct to the defendant" and "[t]he financial condition of the defendant." *See* N.J. Stat. § 2A:15-5.12(c); *see also Brokerage Concepts, Inc. v. U.S. Healthcare*, *Inc.*, No. CIV.A. 95-1698, 1996 WL 741885, at *5 (E.D. Pa. Dec. 10, 1996) (holding that a claim for punitive damages is distinct from a RICO claim for purposes of attorneys' fees). The Special Master's finding of some factual overlap does not justify an award of all fees expended on the punitive damages claims — particularly not work spent researching and briefing legal issues related to punitive damages, which have no bearing on the RICO claims.

*Pre-trial Motions*. The Special Master's recommendation that *all* fees be awarded to Plaintiffs for work on *all* pre-trial motions was accepted by the trial court. That ruling failed to adhere to this Court's standard. The Special Master awarded fees for motions without considering whether the work was "reasonably devoted" to *establishing* the RICO claims. (*See* 39071a-39073a (discussing Halpern's Motion for Statutory and Equitable Relief); 39077a (discussing Jarwick's Motion for Equitable Relief)). For example, the Special Master also blanketly approved fees on discovery motions, without considering the relevance of the particular discovery at issue to the RICO claims. (39076a). The Special Master awarded fees for Plaintiffs' opposition to the Wilf Defendants' motion to amend their counterclaims without finding factual or legal overlap with the RICO claims, instead speculating that the counterclaim "could have greatly reduced any damages awarded to Halpern at best and mean that Halpern's affirmative claims would be dismissed at worst." (*Id*.) Such overbroad reasoning by the Special Master highlights his refusal to follow this Court's directive. Work to avoid liability for Halpern on a non-RICO theory is not work "reasonably devoted" to establishing the RICO claims.

*Witnesses.* The Special Master rejected the Wilf Defendants' arguments that work preparing certain witnesses on contract claims, that had little to do with their RICO claims, should be excluded. (39079a-39082a). The Special

Master's analysis on this point reflects his broader error of awarding fees for work that might have some small, tangential connection to the RICO claims, instead of adhering to this Court's requirement to only include such fees if the work was "reasonably required" for those claims. Thus, the Special Master found that fees for the testimony of Joseph Schochet and Michael Rottenberg were recoverable, notwithstanding that they testified about contract claims; that is, the partnership's inception in the 1980s long before the RICO limitations period. (39060a). But the Special Master made no finding that the actual testimony elicited, in its entirety, was reasonably required to show whether the parties "had agreed to distribute money in a particular way or allow for self-dealing." (39080a). Similarly, as to the testimony of Linda White, Thomas Collins, and Dr. John Crow, who testified about the initial development of the Project, the Special Master found that this testimony was "relevant" to the RICO claims because these witnesses testified that they interacted with Halpern, not with the Wilf Defendants, and Halpern's work developing the Project helped rebut the Wilf Defendants' entitlement to development fees. (39081a). The tangential relevance of a small piece of these witnesses' testimony does not establish that the entirety, or even most, of their testimony was "reasonably required" for the RICO claims.

*Defendants' Appeal.* The Special Master awarded fees for Plaintiffs' counsel's work opposing almost all of the Wilf Defendants' arguments on appeal, including that the Wilf Defendants did not violate their fiduciary duties and that the punitive damages award was erroneous and excessive. (39118a-39121a). Here again, the Special Master erred by conflating the presence of some overlap with work on these non-RICO issues being "reasonably devoted" to establishing Plaintiffs' RICO claims. On fiduciary duties, the Special Master reasoned that if the Wilf Defendants had a fiduciary duty to disclose financial records, the Wilf Defendants' failure to do so would be "circumstantial evidence of their mental state" for RICO predicate act purposes. (39120a). This tangential connection — itself based on conflating the legal question of the Wilf Defendants' fiduciary duties with the factual question of their mental state — is insufficient as a matter of law. On punitive damages, the Special Master again overlooked the factual differences between a RICO claim and a claim for punitive damages. *See supra* at 40-42; *N.J. Stat.* § 2A:15-5.12; *Brokerage Concepts,* 1996 WL 741885, at *5.

The Special Master narrowly read this Court's ruling to simply imply that the trial court used the incorrect statute of limitations period. (39057a). But this Court did not merely remand for the trial court to apply the correct statute of limitations; it vacated the fee awards, which it explained "must be

reconsidered for ***several reasons***," and it flatly held that the trial court erred in holding that all the claims involved "a common core of operative facts." *Jarwick*, 2018 WL 2449133, at *29 ("We are convinced the court erred by finding that all of Jarwick's and Halpern's claims rested on a common core of operative facts.") This Court's directive bound the trial court, and the trial court had no discretion to disregard the Appellate Division's clearly stated determination. *See*, *e.g.*, *Jersey City Redevelopment Agency v. Mack Props. Co. No. 3*, 280 N.J. Super. 553, 562 (App. Div. 1995) ("It is the peremptory duty of the trial court, on remand, to obey the mandate of the appellate tribunal precisely as it is written.") Because the Special Master and the trial court failed to comply with this Court's directive, the fee award should be vacated in its entirety.

### C. The Trial Court and Special Master erred by awarding fees for Plaintiffs' unsuccessful cross-appeals. (39173a-39177a; 40005a-40010a).

As the Special Master acknowledged, Plaintiffs did not prevail on *a single point* in their cross-appeals and petitions for certification. (39117a; 39154a). As a result, Plaintiffs were not prevailing parties for purposes of the RICO fee-shifting statute. Nonetheless, the Special Master awarded Plaintiffs fees incurred on their cross-appeals. (39117a-39118a; 39154a-39155a). This award was plainly wrong.

*Silva* requires consideration of "'the amount involved and the results obtained' when devising a reasonable fee award." 267 N.J. Super. at 559 (quoting RPC 1.5(a)(4)). On Plaintiffs' cross-appeals and petitions for certification, there were **no** successes; only failures. Every challenge Plaintiffs made to the trial court's judgment was rejected, and their petitions for certification were denied. The Special Master failed to properly consider this factor and, as such, this Court should reverse the trial court's award of fees for Plaintiffs' cross-appeals and petitions for certification, based upon the Special Master's flawed analysis.

## IV. The Trial Court Erred by Awarding Punitive Damages to Plaintiffs. (39970a-39989a).

A trial court's award of punitive damages is a legal determination subject to *de novo* review. *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 436 (2001); *Rusak v. Ryan Auto., L.L.C.*, 418 N.J. Super. 107, 118 (App. Div. 2011). As such, there is no deference to the trial court's award of punitive damages. *Baker v. Nat'l State Bank*, 353 N.J. Super. 145, 153 (App. Div. 2002) ("The trial court's characterization of the evidence in support of the award of punitive damages is of little significance.")

In its 2013 decision, the trial court awarded Plaintiffs punitive damages. (39002a). In its 2018 decision, this Court **vacated** the punitive damages award and mandated that the trial court make specific findings of fact as to each

individual Defendant to determine whether each engaged in conduct within the tort limitations period (October 1, 2003 to December 31, 2011) that warranted the award of punitive damages. (38964a-38965a). The trial court failed to follow that directive.

### A. The record before the trial court did not warrant punitive damages. (39970a-39989a).

Punitive damages are disfavored under New Jersey law. Under the Punitive Damages Act ("PDA"), punitive damages are only awarded if the plaintiff proves "by clear and convincing evidence, that the harm suffered was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions." *N.J.S.A.* 2A:15-5.12(b). This burden is not met simply with "proof of any degree of negligence including gross negligence." *Id.* In determining whether punitive damages should be awarded, the court may also consider: (1) the likelihood, at the relevant time, that serious harm would arise from the defendant's conduct; (2) the defendant's awareness of or reckless disregard for the likelihood that the serious harm at issue would arise from the defendant's conduct; (3) the conduct of the defendant upon learning that his initial conduct would likely cause harm; and (4) the duration of the conduct or any concealment of it by the defendant. *Id.*

In addition to meeting the requirements under the PDA, a punitive damages award must satisfy the due process clause of the Fourteenth Amendment, which prohibits grossly excessive or arbitrary punishments on a tortfeasor. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003); *Bonda v. City of Elizabeth*, No. A-4970-16T1, 2019 WL 2559724 at *19 (App. Div. June 21, 2019). The court should consider three guideposts in awarding punitive damages: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *State Farm*, 538 U.S. at 418. The Supreme Court further pointed out that "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Id.* at 419. To determine the degree of reprehensibility, courts should consider whether: (1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit, or mere accident. *Id.* Whether the harm was physical or economic in nature is

a particularly important factor in determining the degree of reprehensibility. In *BMW of North America, Inc. v. Gore*, the Supreme Court reversed an award of punitive damages, finding that "the harm BMW inflicted on Dr. Gore was purely economic in nature" and "BMW's conduct evinced no indifference to or reckless disregard for the health and safety of others." 517 U.S. 559, 575–76 (1996).

Punitive damages are particularly disfavored in a commercial case with economic injuries instead of physical injuries, such as here. Other than in exceptional circumstances, "[w]here the essence of a cause of action is limited to a breach of such a contract, punitive damages are not appropriate regardless of the nature of the conduct constituting the breach." *Sandler v. Lawn-A-Mat Chem. & Equip. Corp.*, 141 N.J. Super. 437, 449 (App. Div. 1976), holding modified by *Ellmex Const. Co. v. Republic Ins. Co.*, 202 N.J. Super. 195 (App. Div. 1985); *see also Buckley v. Trenton Saving Fund Soc.*, 111 N.J. 355, 369-70 (1988).

**1. Zygmunt Wilf's conduct does not permit an award of punitive damages. (39970a-39982a).**

The trial court erred in finding that the actions of Zygmunt Wilf warranted an award of punitive damages.

Here, the main issue was whether a group of sophisticated and wealthy businesspeople were compensated properly under the guidelines of the agreement among the partners. Indeed, this Court recognized that the partners

had an understanding that money would be shifted between entities: "the parties involved were all sophisticated businesspersons who would often use multiple partnership during the course of one project in order to limit their financial exposure at various stages." (498a). This type of commercial dispute does not warrant punitive damages. The harm at issue is purely economic and Plaintiffs were not financially vulnerable parties.

In analyzing the degree of reprehensibility of Zygmunt Wilf, the trial court itself acknowledged that there was no "violence or irreparable harm," and only pointed to the fact that Zygmunt transferred money out of the partnership against his fiduciary duty to his partners. (39981a). But "[a]n award of punitive damages requires 'a showing of culpability in excess of that needed to state the bare bones elements of the underlying tort.'" *Sacchi v. ABC Fin. Servs., Inc.*, No. CIV. 14-1196 FLW, 2014 WL 4095009, at *5 (D.N.J. Aug. 18, 2014) (quoting *Lo Bosco v. Kure Engineering Ltd.*, 891 F. Supp. 1020, 1034 (D.N.J. 1995)). It was clear that the harm articulated by the trial court was purely economic in nature; there was no indifference to, or reckless disregard for, the health and safety of these wealthy Plaintiffs. Under the guideposts articulated in the United States Supreme Court's decision in *State Farm*, the punitive damages award was clearly erroneous.

The trial court cited *Saffos v. Avaya*, 419 N.J. Super. 244 (App. Div. 2011), in support of its finding that punitive damages were warranted here. However, *Saffos* illustrates precisely the sort of aggravating factors that are **not** present here. *Saffos* was an age discrimination suit involving a "financially vulnerable" elderly plaintiff. *Id.* at 267. There, the court found that the defendant disregarded the mental health of the plaintiff by creating a hostile work environment. *Id.* In contrast, there was no financially vulnerable party in this case. Plaintiffs were wealthy and sophisticated businesspeople. There were also no concerns about personal health or safety; the alleged harm was purely economic. As such, the award of punitive damages against Zygmunt, as well as against Leonard and Mark Wilf, was in error.

**2. Leonard Wilf's and Mark Wilf's inaction does not permit an award of punitive damages. (39982a-39989a).**

The trial court erred for an additional reason in awarding punitive damages against Leonard and Mark Wilf. Plaintiffs failed to prove by any evidence, much less clear and convincing evidence, that Leonard Wilf and Mark Wilf individually engaged in **any** conduct in the period from October 1, 2003 through December 31, 2011 that warranted a punitive damages award. The record before the trial court is devoid of any specific facts that meet the high threshold for this award under the PDA. The trial court cited no evidence, and there was none, demonstrating that Leonard's and Mark's acts or omissions were

actuated by actual malice or accompanied by a wanton and willful disregard, as required by the PDA.

The record is clear that Leonard and Mark were not involved in the day-to-day management of the partnership's assets. The trial court only pointed to Leonard's and Mark's silence in the face of Zygmunt's transfer of funds from the partnership with "indifference to the financial well-being of [other] partners." (39985a, 39988a). As the trial court found, "Leonard did not know why those management fees were taken from the partnership" and "d[id] not know how [Zygmunt] calculate[d] management fees." (39975a). Mark only received financial statements at yearly meetings and "just left the finances to [Zygmunt]." (39975a-39976a). As a matter of law, these findings are insufficient to award punitive damages under the PDA. While the trial court conclusorily stated that "Leonard Wilf knew a wrong was being committed" and that Mark "knew about the wrongdoing," the trial court's citations to the factual record simply show that Leonard and Mark knew about the fees and may have considered them excessive, not that they knew or believed the fees were fraudulent or amounted to conversion. (39982a-39983a, 39985a-39986a). The trial court conflated knowledge of arguably questionable fees in financial statements - without knowledge of all relevant factual context - with the statutory requirement of "actual malice" or "wanton and willful disregard." At

most, these facts amount to negligence. That threshold does not permit punitive damages. Even gross negligence is insufficient for punitive damages under the PDA. *N.J.S.A.* § 2A:15-5.12(a) ("This burden of proof may not be satisfied by proof of any degree of negligence including gross negligence."); *see Mendez v. United States*, No. CV 14-7778(NLH/KMW), 2017 WL 477693, at *4 (D.N.J. Feb. 6, 2017) (finding that the failure of defendant to perform a number of her responsibilities and her "continuous pattern of negligence" demonstrates, at most, negligence or gross negligence and, thus, does not warrant punitive damages).

There was certainly no unconscionable or outrageous conduct here. Failure to act, under the facts of this case, does not meet the necessary burden under the PDA to prove "actual malice" or "wanton and willful disregard."

Accordingly, the trial court's award of punitive damages is not supported by the PDA or the record in this case and does not comport with due process under the Fourteenth Amendment. It should be reversed and vacated.

### B. The award of punitive damages was excessive. (39970a-39989a).

Even if punitive damages awards were warranted, and they were not, the trial court's award was excessive. The trial court awarded punitive damages that were 2.5 times the amount of the compensatory damages. (39978a). The

disparity between the actual harm suffered and the punitive damages awarded is substantial, unreasonable, and unjustified.

"When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of due process guarantee." *State Farm*, 538 U.S. at 419; *see also Exxon Shipping Co. v. Baker*, 554 U.S. 471, 515 (2008) (finding a punitive-to-compensatory ratio of 1:1 yields maximum punitive damages); *Jurinko v. Medical Protective Co.*, 305 Fed. Appx. 13, 28 (3d Cir. 2008) (limiting punitive damages to 1:1 where "the compensatory damages are substantial, [the damaged party] suffered only economic harm, and the harm was easily measured.").

Here, Jarwick was awarded more than $12 million in compensatory damages and more than $33 million in prejudgment interest. (40008a-40010a). Halpern was awarded more than $3 million in compensatory damages and more than $5 million prejudgment interest. (40005a-40007a). It is undisputed that the compensatory damages are substantial. Plaintiffs are more than sufficiently compensated and have been made whole for their purely economic injuries by the award of compensatory damages. Additional punitive damages, especially 2.5 times the amount of compensatory damages, are inequitable and contrary to New Jersey law and Due Process principles.

## V. The Trial Court Erred in Its Award of Prejudgment Interest. (40006a-40007a; 40009a-40010a).

The trial court awarded an excessive amount of prejudgment interest, and failed to adequately explain its basis for doing so. First, the trial court has made no finding that compound interest is appropriate here. Second, prejudgment interest was awarded at a rate in excess of the standard rate provided in *Rule* 4:42-11 without an appropriate basis for departing from the standard rate.

While the trial court has discretion in the award of prejudgment interest, *Tobin v. Jersey Shore Bank*, 189 N.J. Super. 411, 414 (App. Div. 1983), appropriate exercise of discretion means that "the trial judge must take account of the law applicable to the particular circumstances of the case and be governed accordingly. Implicit is conscientious judgment directed by law and reason and looking to a just result." *Kavanugh v. Quigley*, 63 N.J. Super. 153, 158 (App. Div. 1960).

The trial court awarded Jarwick prejudgment interest in the amount of $33,689,845 and Halpern prejudgment interest in the amount of $5,948,025. (40006a; 40009a). This interest was based on an interest rate of 8.875% "to obtain an investment return on rate of interest on partnership distributions." (40002a-40003a). The prejudgment interest rate was set by agreement of the parties for a specific period, which Judge Wilson specifically found ended upon entry of the 2013 Final Judgment. (124a-128a; 251T at 4:13-16, 13:25-14:1, 56:20-22, 78:7-9).

The trial court first erred in the calculation of prejudgment interest for the Plaintiffs because of the *compounded* nature of the interest at the 8.875% interest rate. This compounded interest certainly is not compensatory. It was improper to compound interest annually for the period December 13, 2013[8] through and including July 9, 2014, and further compound interest at the average prime rate of 3.935% compounded annually, for the period July 10, 2014 through and including November 16, 2022. (40003a-40004a). Such an award of compounded prejudgment interest was unjustified under New Jersey law, is inequitable, and far exceeds an award that would fairly compensate Plaintiffs. For that reason, compound interest is disfavored by courts because it is unfairly "harsh and oppressive" and "unduly hastens the accumulation of debt." *Henderson v. Camden Cnty. Mun. Util. Auth.*, 176 N.J. 554, 560 (2003).

Like an award of counsel fees, the trial court must "make appropriate findings of fact" within the appropriate "analytical framework" to avoid abusing its discretion. *Yueh v. Yueh*, 329 N.J. Super. 447, 466 (App. Div. 2000). Instead, the court below imposed two separate rates of interest greater than is provided by *Rule* 4:42-11 without appropriate justification, and calculated the amount

[8] This date is in reference to the calculations of prejudgment interest specifically in this remand. Jarwick's compounded prejudgment interest award of $33,689,845 includes prejudgment interest awarded before this period.

owed as compound rather than simple interest, without explanation. (40005a-40010a).

An award of prejudgment interest is not punitive, but compensatory to indemnify plaintiff for his economic loss. *Cnty. of Essex v. First Union Nat. Bank*, 186 N.J. 46, 61 (2006) ("the award of prejudgment interest on contract and equitable claims is based on equitable principles."); *Busik v. Levine*, 63 N.J. 351, 358 (1973); *Milazzo v. Exxon Corp.*, 243 N.J. Super. 573, 577 (1990) ("the purpose of prejudgment interest is not punitive but rather compensatory in nature . . . ."). *Rule* 4:42-11 governs the award of post-judgment interest and prejudgment interest in tort actions. In commercial contract disputes as well, absent exceptional circumstances, "the rate of return earned by the State Treasurer contemplated by *Rule* 4:42-11(a)(ii) is the standard to which trial judges should adhere" for prejudgment interest. *Benevenga v. Digregorio*, 325 N.J. Super. 27, 35 (App. Div. 1999); *see also Litton Indus., Inc. v. IMO Indus., Inc.*, 200 N.J. 372, 390-91 (2009) (affirming trial court ruling applying *Rule* 4:42-11(a)(ii) interest rate in the absence of unusual circumstances).

*Rule* 4:42-11 prescribes simple post-judgment interest at the rate of return of the State of New Jersey Cash Management Fund: "[e]xcept as otherwise ordered by the court or provided by law, judgments, awards and orders for the payment of money, taxed costs and attorney's fees **shall bear simple** interest."

(emphasis added). The interest rates of 8.875% and 3.935% far exceed the rate of 2.25% provided under *Rule* 4:42-11. In the absence of a contractual agreement, which does not exist after the December 20, 2013 Final Judgment in this case, or specific findings of fact justifying a higher rate of interest, the rate of return provided by the rule, calculated as simple interest, should govern the award of prejudgment interest.

Given the punitive nature of deviations from the statutorily imposed rate of interest, generally, and compounded rates of interest, specifically, this Court has required detailed findings by trial courts who award interest outside the structure of *Rule* 4:42-11 or other appropriate statute. In *Township of West Windsor v. Nierenberg*, this Court approved the trial judge's prejudgment interest award at the prime rate compounded annually. 345 N.J. Super 472 (App. Div. 2001). The trial court specifically made findings as to why the prime rate (rather than the rate in *Rule* 4:42-11) was more appropriate, and why the judgment should compound annually rather than compound at different intervals or not compound at all. *Id.* By contrast, in *AGS Computers, Inc. v. Bear, Stearns & Co.*, this Court reversed the wholesale denial of prejudgment interest because the trial judge's findings on the question were simply that interest "was not expected by plaintiff. . . ." 244 N.J. Super. 1, 5 (App. Div. 1990). But even the *AGS* court's analysis surpasses what the trial court engaged in below.

In 2013, Judge Wilson awarded $19,435,326 in prejudgment interest to Jarwick, and $10,100,950 in prejudgment interest to Halpern based on an interest rate of 8.875%. (126a-127a). The trial court compounded the interest as set forth in the schedule attached to the December 20, 2013 Final Judgment. (135a-140a). In 2018, this Court affirmed the prejudgment interest awarded to Jarwick but vacated entirely the award as to Halpern. (38974a-38975a). Importantly, neither Judge Wilson nor the Appellate Division made any findings or ruling that compound interest was warranted. Equally as important, in its remand direction, this Court did not direct that interest be compounded with respect to the recalculation of damages for either Jarwick or Halpern. Judge Wilson in her December 20, 2013 decision did not make any finding on the merits as to whether compound interest was justified and appropriate. Absent a finding and/or appellate ruling, only simple interest should be applied to Plaintiffs' damage awards.[9]

[9] The Wilf Defendants submit to the Court that the complete prejudgment interest award is subject to review for such error, as the affirmance of the $19,435,326 prejudgment interest to Jarwick did not address the interest compounded by the trial court without findings. However, to the extent the Court declines to address that subset of $19,435,326 of prejudgment interest, which was affirmed, the Court should rectify the trial court's error for the remainder of the prejudgment interest award that was not at issue in the prior appeal.

Yet, on remand, the trial court continued the compounded 8.875% interest rate from the date of the December 20, 2013 Final Judgment, through and including the date of the sale of the property at issue, July 9, 2014. (40077a-40080a). Additionally, the trial court imposed a new *compounded* interest rate of 3.935% from the date of the sale of Rachel Gardens through and including November 16, 2022. (40079a-40080a). The award of prejudgment interest, which now is $22 million more than the compensatory damages in this case, is not compensatory. It is punitive. This Court should mandate the award of prejudgment interest be calculated at the simple interest rate in accordance with *Rule* 4:42-11.

A recent case from the District of New Jersey, applying New Jersey law, is analogous and instructive. In *Int'l Transp. Mgmt. Corp. v. Brooks Fitch Apparel Grp., LLC*, the District Court awarded plaintiff in a high-value contract action simple interest at the rate supplied by *Rule* 4:42-11. No. CV111921ESJAD, 2020 WL 5525510, at *5 (D.N.J. Sept. 14, 2020). In doing so, the court found that compounding interest over "a long period of time (eight years) on a substantial sum ($4,195,000)" was "harsh and oppressive." *See id.*

In this case, the trial court awarded compound interest on more than $15 million in compensatory damages beginning in 1994 for Jarwick and Halpern. (126a-127a; 40006a-40007a; 40009a-40010a). The award far exceeds the

"period of time" and "substantial sum" that the District Court addressed in *Brooks Fitch*, and should likewise be rejected by this Court as incompatible with New Jersey law.

There is neither an equitable mandate nor adequate explanation for imposing the 8.875% interest rate after December 20, 2013 and adding compounded interest. Furthermore, any prejudgment interest awarded for the period after the December 20, 2013 Final Judgments must be based exclusively on the rate embodied in *Rule* 4:42-11 without compounding.

## CONCLUSION

For the aforementioned reasons, the Wilf Defendants respectfully urge this Court to vacate the punitive damages award. The Wilf Defendants further respectfully request that this Court vacate the award of attorneys' fees, and remand for consideration by a different Special Master or by the trial court independently of Special Master Orlofsky's recommendations. The Wilf Defendants further respectfully urge this Court to reverse the excessive prejudgment compounding interest awarded to Plaintiffs.[10]

DATED: May 8, 2023 Respectfully Submitted,

[10] Defendants incorporate and preserve for possible petition for certification if needed following this appeal, all arguments and points decided against them by this Court in its opinion of June 1, 2018.

By:

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# Superior Court of New Jersey

## APPELLATE DIVISION

## Docket No. A-001749-22

JARWICK DEVELOPMENTS, INC., ADA REICHMANN and RACHEL HALPERN, AS EXECUTRIX OF THE ESTATE OF JOSEPH HALPERN,

*Plaintiffs-Respondents*,

- against –

JOSEPH WILF and THE ESTATE OF HARRY WILF, deceased, individually and as partners in the partnership know as J.H.W. ASSOCIATES; LEONARD A. WILF; ZYGMUNT WILF; MARK WILF; SIDNEY WILF; RACHEL AFFORDABLE HOUSING CO., HALWIL ASSOCIATES, a partnership and PERNWIL ASSOCIATES, a partnership,

*Defendants-Appellants*,

MARVIN COHEN and MIRONOV, SLOAN & PARZIALE, LLC (f/k/a Beck, Weiss and Company, P.A.),

*Defendants*.

CIVIL ACTION

ON APPEAL FROM FINAL JUDGMENTS AND ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, MORRIS COUNTY

DOCKET NO. MRS-C-184-92

SAT BELOW:

HON. FRANK J. DEANGELIS, P.J.CH.

# BRIEF FOR PLAINTIFF-RESPONDENT RACHEL HALPERN

On the Brief

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## PRELIMINARY STATEMENT

More than forty (40) years ago, a young man named Josef Halpern, known to his friends as "Yussi," entered into a real estate joint venture with the Wilfs to develop Rachel Gardens. It became the work of his life. Yussi's relationship with the Wilf family was built on a historical foundation of trust – a relationship which in subsequent years was shattered by the abject greed of Zygi Wilf, the "master chef" of deceit and deception. Yussi is now gone but this lawsuit has lived on for more than thirty-one (31) years. In the interests of justice and the Halpern family, it is time for this litigation odyssey to be put to its fitting end.

Fairly put, the Wilfs' Brief on appeal reads as a Machiavellian fantasy. To suggest that the Courts' treatment of the Wilfs has been "unfair" or "unjust," or that it has been Josef Halpern's conduct which has resulted in a "cascade of errors," is nothing short of unconscionable, if not immoral. As established by Halpern's counsel through years of grueling discovery and a 207-day trial, as found by multiple Judges of this Court – both at the trial and appellate level – and as documented at length herein, during the applicable SOL tort and NJRICO periods, the Wilfs engaged in a systematic and continuing campaign of theft, deception and concealment, resulting in the misappropriation of more than $50 million in partnership funds. As previously found by Judge Wilson after trial and by Judge DeAngelis on remand, the Wilfs' wanton, willful and malicious

conduct justified the imposition of punitive damages equal to 2.5 times Halpern's compensatory damages, whether measured by the entire length of the Wilfs' criminal conduct, or limited to the eight-year period from October 1, 2003 through 2011, when it finally was enjoined. Indeed, as established before the Chancery Court on remand, during the 8-year SOL period, the Wilfs engaged in even more egregious conduct resulting in greater damages to Plaintiffs than they had in the preceding 16-year period.

Similarly, after an exhaustive review of the substantial efforts undertaken and work performed by Halpern's counsel, Judges Orlofsky and DeAngelis both found that the attorney's fees and costs of investigation expended prior to the SOL period were "reasonably related" to establishing Halpern's NJRICO claims and were "reasonably devoted" to that endeavor. In fact, as concluded by both the Special Master and Chancery Court on remand, but for the work performed by Halpern's counsel in investigating and establishing the pre-SOL facts, Halpern's NJRICO claims could not have been proven. Although many examples were given, perhaps the most compelling was the work performed by Halpern's counsel in negating the Wilfs' "claim of right" and "true-up" defenses, which were asserted with respect to their purported entitlement to take millions of dollars in management and other fabricated fees from the partnership. Had the claimed basis for those fees not been eviscerated by

discovery of the historical facts, the predicate NJRICO acts of theft could not have been established. Tellingly, the Wilfs' response to that rather basic proposition, whether before Judge Orlofsky, Judge DeAngelis or this Court, has been a deafening silence.

In a final, desperate attempt to obfuscate, delay and prolong this litigation, perhaps into the next decade, the Wilfs' attack the character and integrity of both Judges Wilson and Orlofsky. Although utterly shameful and proffered without even a scintilla of merit, it is significant to note that the Wilfs' allegations of "conflict" and "appearance of impropriety" do not in any manner involve or affect the Special Master's award of attorney's fees and costs to Halpern. Consequently, although Halpern's counsel joins in Jarwick's and its counsel's arguments with respect to the Wilfs' baseless claims in this regard, as to Halpern they are a non-sequitur. The Final Judgments below should be affirmed.

## COMBINED STATEMENT OF PROCEDURAL HISTORY AND MATERIAL FACTS

As the Court is aware, the facts and procedural history pertaining to this 31-year-old odyssey are extensive. Insofar as they substantially have been recounted in this Court's 2006 and 2018 remand opinions, Halpern will restrict their recitation here to the facts and procedural history pertinent to the Wilfs' current appeal.

### A. The Trial Court's Binding Findings of Fact and Conclusions[1]

After months of deliberation over a 15-day period in 2013, the Trial Court placed on the record its detailed Findings of Fact and Conclusions of Law. 221T-235T, 237T-238T, and 242T. By clear and convincing evidence, the Honorable Deanne M. Wilson (P.J.Ch) found that the Wilfs intentionally and deliberately had misappropriated – and then fraudulently concealed from their partners – tens of millions of dollars from the subject real estate project, Rachel Gardens (the "**Project**"). As found by the Trial Court, the Wilfs' actions "were much more than a breach of fiduciary duty and a breach of contract;" "they evidence[d] deliberate and intentional misconduct, and misconduct made with the specific intent of taking money from Jarwick and Joe Halpern;" their actions were "a

[1] The Trial Court's "findings are binding on remand." Jarwick Developments, Inc. v. Wilf, A-2053-13T3, 2018 WL 2449133, at *26 (N.J. Super. Ct. App. Div. June 1, 2018) (the "**2018 Opinion**" or "**2018 Op. at __**" or "**Jarwick II**").

violent violation of our common and our statutory law;" "there was actual malice here, ... there was an intentional wrongdoing in the sense of an evil minded act." "The Wilf Defendants cheated [Halpern] out of millions of dollars by engaging in wide-scale fraud and deception over the course of many years." "It was done not with a reckless, but a willful disregard of the rights of the partners.... And it was clearly not negligent. It was not even grossly negligent. It was grossly willful. And it was done repeatedly." In short, Judge Wilson concluded that the Wilfs "robbed their partners." (242T67:15-17)

The Wilfs stole $50 million from their partners by, among other methods: (i) paying to themselves, or to one of their straw man entities, millions of dollars in bogus "fees" (25294a; 228T; 118T83:10-17; 118T82:22-83:6; 118T83:24-84:9; 118T55:14-20; 118T56:18-23; 118T120:13-18; 121T85:3-86:1-5; 129T108:17-109:10; 132T162:12-20; 132T156:12-17 and 89T228:16-19) 223T85:16-89:22; 228T5:6-7:10; 3558a and 15563a); (ii) charging the Project with salaries and benefits of Wilf employees who rendered little or no services to the partnership (26602a; 224T79:12-80:2; 27932a; 27933a; 130T80:19-24; 142T77:15-18; 142T73:17-76:24; 102T82:2-17; (iii) causing the partnership to pay phantom "rent" to Wilf affiliates (26779a; 8647a; 234T90:1-116:13; 129T142:7-24; 27929a; 26779a; 8647a; 223T99:14-100:6); (iv) paying to themselves hundreds of thousands of dollars in unauthorized "salaries" (34588a

at p.18; 117T68:2-8; 117T73:18-74:1); (v) inflating the Project's insurance costs and profiting therefrom (234T6:20-89:22; 237T19:10-20:18); (vi) charging phony "commissions" (124T17:3-19:12); (vii) charging to the partnership millions of dollars in fabricated loan "interest," including on (a) "related party loans" which the Wilfs advanced solely for the purpose of improperly funding payments to themselves, or (b) on fictitious "loans" which never were made (223T92:13-93:12; 122T57:3-6; 122T52:24-53:5; 9407a; 122T57:15-19; 120T143:24:144:4; 122T113:18-23 and 122T49:8-20),(224T9:2-24 and 224T19:9-17), (224T77:3-77:22);[2] (viii) charging the partnership for advertising expenses incurred for the benefit of other Wilf projects, and/or by pocketing discounts received from publishers on ads placed for and paid by Rachel Gardens (224T80:3-81:6; 4321a; 122T72:20-73:4; 89T164:18-22); (ix) pocketing discounts received from the partnership's vendors (89T128:9–129:19); (x) purloining fees paid vendors for the benefit of the partnership (235T25:3-31:6); (xi) engaging in "reclassifications" of expenses on the partnership's books, and/or payments made to themselves or their affiliates, for the purpose of fraudulently concealing their defalcations (224T103:1-17;

[2] "There never was a calculation…. There was no recordkeeping of it, there was nothing. It was just simply reaching in to the cookie jar and taking whatever was there…." 237T23:8-17.

25350a; 8643a); and (xii) falsifying the partnership's financial statements and tax returns (224T98:10-19).

Based upon its factual findings, the Trial Court determined that the Wilfs had: (i) violated NJRICO by "purposely" and "knowingly" engaging in the criminal acts of theft, theft by deception, misappropriation of entrusted funds, falsification of records, mail fraud and wire fraud, as well as engaging in a NJRICO conspiracy; (ii) fundamentally violated their fiduciary duties; (iii) breached the Partnership Agreement; (iv) breached the implied covenant of good faith and fair dealing; (v) violated the NJUPA; (vi) converted partnership funds; and (vii) engaged in common law fraud. 223T57:5-58:2 In so finding, the Court expressly rejected the Wilfs' "claim of right" defense to their theft offenses (see N.J.S.A. 2C:20-2c), exclaiming Zygmunt's "insistence on truing up and then counsel's ... assertion of the claim of right theory … were really quite incredible, because there is no possible explanation for what [Zygmunt] did except that he knew it was wrong and he wanted to do it anyway." (223T65:4-67:21, 227T19:23-49:10, 237T24:4-9)

The sheer breadth, longevity, continuity and magnitude of the Wilfs' intentional misconduct was extraordinary, leading Judge Wilson to find that "[t]he number of breaches of fiduciary duty in this case are really quite unprecedented…." 224T8:14-8:16. The Wilfs concealed their theft of

partnership funds by systematically falsifying the Project's books and financial statements, without any "accounting" or "legal" justification. 224T98:10-19.

Judge Wilson found that, although Zygmunt Wilf personally had committed the lion's share of partnership misappropriation, Mark Wilf and Leonard Wilf understood the objectives of the Wilfs' scheme, accepted them, agreed explicitly to do their part to further them, and fulfilled their agreed-upon roles. Judge Wilson made specific findings as to Mark's and Leonard's liability:

> The Wilfs associated with each other with cooperation, coordination. They worked with their accountants to delineate what was happening and what money was available, what money wasn't available…. Mark Wilf is aimed more toward payroll, benefits, and things of that nature. Hiring important and key people. That he reviews financial statements not only of Rachel Gardens, but of the entities that are the Wilf owned entities that are intertwined with Rachel Gardens …. Leonard is a tax lawyer, he reviews the financials, the drafts and the financial statements. And Zygi Wilf is the self-described master chef, … he's the conductor, he's the overseer of this -- not only this Wilf project, but many other Wilf projects, to a very large extent. And the three of them work together … the Wilfs operated on consensus, … this was a very coordinated team. (198T28:16-31:14; see also 223T51:23-54:12; 223T99:7-13; 225T56:15-58:21) (223T52:20-54:7)

Perhaps one of the most vivid examples of Mark Wilf's dishonesty and wanton and willful disregard for Halpern's rights occurred immediately following the issuance of this Court's December 2006 decision. In January 2007, as found by the Trial Court, Mark added three (3) Wilf headquarters' employees to Pernwil's payroll, "not one of them having anything to do with Pernwil..."

(25333a; 8643a*;* 225T56:15-58:21; 25532a; 27356a; 27355a) Mark could not provide any legitimate justification for his actions, because there was none. (224T79:12-80:2; see also 25333a, 25532a and 27356a)

With respect to Leonard Wilf – a lawyer who possessed an L.L.M. in Taxation, yet whose demeanor left little doubt as to his purposeful and knowing participation in Zygmunt's schemes (as Judge Wilson Court found) – failed to offer any legitimate explanation for his purported acquiescence in the face of the Wilfs' continuing thefts of the Project's funds. (225T54:20-24; 225T55:8 – 56:9)

**B. The Trial Court's Punitive Damage Findings**

In support of Her Honor's decision to award punitive damages, Judge Wilson found that the Wilfs' actions "were much more than a breach of fiduciary duty and a breach of contract;" "they evidence[d] deliberate and intentional misconduct, and misconduct made with the specific intent of taking money from Jarwick and taking money from Joe Halpern;" their actions were "a violent violation of our common [law] and our statutory law;" "there was actual malice here, . . . there was an intentional wrongdoing in the sense of an evil minded act." 235T60:9-10, 235T61:10-14, 235T87:3-5, 235T73:1-3, 235T70:21-23.

> The [Wilfs] … take the position that there isn't any outrageous conduct here, that it's just simply a breach of fiduciary duty and a breach of contract. It's much more than a breach of fiduciary duty and a breach of contract…. (235T59:11-60:14)

> The Wilfs brought value to the property. That was supposed to excuse the misappropriation of tens, tens and tens of millions of dollars, and it doesn't. This is why the elements that have to be proven under the Punitive Damages Act seem so self-evident in this case. The likelihood at the relevant time that serious harm would arise from the defendant's action, a hundred percent likelihood. (235T74:2-9)
>
> [The Wilfs' conduct] was a consistent, pervasive method of removing funds from this entity so that they would not reach the partners.
>
> ***
>
> I am awarding punitive damages because what was done in this case … was done not with a reckless, but a willful disregard of the rights of the partners, Jarwick and Josef Halpern. And it was clearly not negligent. It was not even grossly negligent. It was grossly willful. And it was done repeatedly. And the outcome was foreordained when the act itself, or the acts themselves were committed. 223T62:5-62:14, 223T77:17-78:1.

Judge Wilson specifically found that the Wilfs' intentional and malicious conduct continued unabated during the years 2003 through and including 2011, justifying an award of punitive damages. (225T43:19-45:2)

Further addressing the statutory factors for punitive damages, Judge Wilson found the Wilfs were aware that their actions would result in serious harm, particularly to Halpern, who they knew to be financially vulnerable compared to them:

> This was money that was taken in secrecy away from those who were the rightful . . . recipients. And to say that it was taken with knowledge of a high degree of probability of harm, there's a hundred percent probability of harm because the money was taken, unless somebody discovered it. (235T73:15-21)

> [W]hether the target of the conduct had financial vulnerability is relevant here. The Wilfs had to know that they really had Josef Halpern by the throat. He has a very large family, and this was his sole means of support, at least during the course of this litigation, I haven't seen any other means of support, and was the object of all of the labors of his work life. And in comparison to the Wilfs, Josef Halpern was extremely financially vulnerable.
>
> Now, Joe Halpern filed his complaint in October of '09, and the Wilfs cut off -- after having reduced his compensation during the year, cut off all of his compensation. The Wilfs knew that Joe's income was gained solely from [the Partnership], [its asset] Rachel Gardens, and they also knew that he had ten children. …. Josef's counsel filed a motion for statutory and equitable relief, in order to relieve the adverse economic impact on Joe Halpern, and the Wilfs opposed it [with a certification in support]. … And paragraph four of that certification, signed by Zygi, says, ["]Halpern complained that we have recently ceased making distributions to him. We have in fact ceased making distributions to any of the partners in Pernwil, based largely upon increased vacancies and decreasing revenue. There has never been any agreement that Halpern would continue to receive distributions indefinitely in any particular amount or at all.["] And it was later shown that there was no striking increase in vacancies at Rachel Gardens and that the revenue was ever increasing."[3] (224T32:4-33:10)

Judge Wilson determined that further punitive damages were warranted because the Wilfs accelerated their thefts during the years 2003 through 2011, in response to "litigation events" (including this Court's 2006 decision):

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[3] 235T77:12-20. "[T]he bad faith and evil motive [of the Wilfs] were demonstrated by the testimony of Zygi Wilf himself." (223T42:20-23) The "statements made by Zygi Wilf in his Certification, in opposition to the resumption of distributions to Josef in 2009 and 2010, was clearly false and knowingly false." (224T48:22-25; see also 224T48:22-49:3)

> [U]pon learning that [their] initial conduct would likely cause harm …. [The Wilfs] … never made an attempt to lessen the obvious ramifications of [their] action[s]. And as I set forth in my opinion on the Wilfs reaction to various litigation events, ***[Zygi] essentially tried to increase the monetary value of his position, depending on what was happening in the court room***.[4] So it certainly did appear and I found that he was very much aware of the problem that he had created for his partners ... there wasn't any change in conduct except to change the various ways that the Wilfs took money out of the partnership so that they would be less compromised in their position or so that the takings would be less detectable.... So there wasn't any change in conduct once they learned that the initial conduct would cause harm, did cause harm, and that their initial conduct was not correct and improper …. (242T204:2-207:1)
>
> [I]t didn't make any difference [to the Wilfs] that [the harm they caused] would be discovered by one of [their] partners, but it [should have] ma[d]e a difference [to the Wilfs] that a court was going to be doing an accounting. But oddly enough, the conduct didn't cease. ***It continued in an exacerbated fashion after the Appellate Division decision that an accounting was going to take place***. (235T75:5:16)
>
> [With respect to the whether] the conduct of the defendant upon learning that its initial conduct would likely cause harm. Well, there wasn't any change in conduct except to change the various ways that the Wilfs took money out of the partnership so that they would be less compromised in their position or so that the takings would be less detectable. And there certainly was no effort made to decrease the amount of punitive damages, to make distributions to the Wilfs (sic.) despite the Appellate Division's declaration [in 2006] that they were a partner…. So there wasn't any change in conduct once they learned that the initial conduct would cause harm, did cause harm, and that their initial conduct was not correct and improper. (242T203:4-207:1)

[4] Unless state otherwise, italics and bold in citations do not appear in the original text, but have been added by counsel for emphasis.

Judge Wilson concluded that it was the Wilfs themselves who perversely viewed this Court's 2006 mandate for an accounting as a license to steal. Following this Court's 2006 Opinion, the Wilfs claimed that their taking of "management fees," "interest" on "loans" and other "fees" (however recorded in the partnership's financial records) did not constitute theft, or any of the other predicate crimes that formed the basis of Halpern's NJRICO claims, but rather a "trueing-up" for the monies owed to them:

> [Zygmunt] kept saying, you know, I just did it that way because I was truing up for things that happened 10 years or 20 years before, and since the Appellate Division said [in 2006] that there was going to be an accounting, I was relying on the Court to make it right. … (235T72:7-13)
>
> …. It was a true up to make up for past expenses. … It was an arbitrary grab at whatever was left in Pernwil, allegedly, to make up for fees that had not been charged to Pernwil in the past. … (223T98:10-99:6)

Judge Wilson further found that the Wilfs' thefts continued even while Her Honor attempted to conduct the partnership accounting ordered by this Court in its 2006 Opinion, and that the Wilfs' lack of candor unnecessary prolonged those proceedings:

> The conduct continued … through to 2000 -- it was August of 2011 I believe, which was two years after I started presiding over this case, and it was during the pendency of this trial. … And during the pendency of this litigation, this trial that took place here in my courtroom, when it should have been obvious to the Wilfs that we were trying this case, we were getting to the bottom of it, they just continued. (235T75:13-25 and 248T20:16-21:17; 490a)

> I believe, even after I have entered an order [in 2011], and reeled off … payments that were no longer to be made by Pernwil [to the Wilfs] so that I could have a still [i.e., non-moving] target in this litigation, there was still expenses that were paid to the Wilfs during the very course of this trial, just a few weeks after I entered the order.… (224T20:3-21)

## C. The Trial Court's NJRICO Findings

As noted supra, Judge Wilson found that the Wilfs' thefts and concealment thereof constituted multiple violations of the NJRICO statute. The Wilfs' principal defense and justification for their thefts during the RICO SOL Period was premised on their fabricated "claim of right" defense – to wit, that the Wilfs had the right to take the millions they took from the partnership because they were entitled to be paid "builders," "developers" and "management" fees ("**Theoretical**" and "**Hypothetical**" fees as they came to be known), based upon their further claim that they, as opposed to Halpern, primarily were responsible for the development (1984-1988), construction (1988 and 1999) and management (1985-2011) of Rachel Gardens. Those self-serving claims were invented by Zygmunt – as found by Judge Wilson (see, supra) – only after this Court's 2006 Opinion, in which this Court, in remanding the matter to the lower court to conduct an accounting, held that:

> [W]e are confident that the court on remand will take into consideration the many delays between bringing this claim to court and final judgment and, as a result, the disproportionate amount of capital and man-hours put into this project by

> defendants [the Wilfs]. …. The adjustments of debits and credits may be made accordingly. (504a)

Immediately following this Court's decision, the Wilfs claimed that their taking of Theoretical and Hypothetical "fees" (however recorded in the partnership's financial records) did not constitute "theft", or any of the other predicate crimes that formed the basis of Halpern's NJRICO claims because during the RICO SOL Period, they were "trueing-up" for monies owed to them for prior years. (223T98:10-99:6)

Thus, it was the Wilfs themselves who placed the pre-SOL facts at the center of Halpern's NJRICO (and related tort) claims. It was the Wilfs' patently false narrative – to wit, that they were the "developers," "builders" and "managers" of Rachel Gardens and thus were "entitled" to the funds they stole – that compelled Halpern's counsel to spend the time necessary to investigate and establish the actual facts outside the RICO SOL Period. To refute that narrative, Halpern was required to despose and/or to present the live testimony of numerous non-party witnesses who had actual knowledge: (i) of Halpern's role as the sole on-site partner in charge of developing and constructing the Project, working with land use professionals, and overseeing and making the final decisions down to the smallest details; and (ii) that it was Halpern, and not the Wilfs (as Zygmunt falsely claimed at trial), who was the project's representative before all relevant governmental bodies, appearing at public

meetings and offering testimony where required, and thereafter supervising the build-out of Rachel Gardens and ultimately its management once tenanted. To that end and at trial, Halpern proffered the testimony of a number of witnesses upon whose testimony Judge Wilson expressly relied to find that the Wilfs had no "entitlement" or "honest claim of right" to the "fees" they sought, and that the Wilfs' "true-up" defense was an utter sham. (230T55:24-10)

Judge Wilson properly relied upon pre-SOL period facts to support the Court's finding of a RICO "enterprise" and "pattern" – findings which were upheld by this Court in its 2018 decision and are consistent with its instructions on remand:

> Now, I realize that the '93, '94 financial statements are going to be outside the limitations period for RICO, but … you can use predicate acts from before the statute of limitations period begins, not for damages, but to show an enterprise, and these activities are fairly uniform throughout the period under study by this litigation. (225T58-59:5)

Judge Wilson also found that in order for the unlawful nature of the Wilfs' NJRICO conduct during the RICO SOL Period "to be fully understood," the Court necessarily "ha[d] to go through the entire sequence of events" leading to said conduct, which often required the Court to understand predicate acts that occurred outside the RICO SOL Period:

> Some of the predicate acts, some of the specific conduct I am alluding to, in a general way. I'm not going into each financial statement, for instance, that was not accurate by year, but I am

> intending to rely only on these kinds of conducts that are within the statute of limitations period that I have set for RICO. …
>
> And I am only mentioning conduct that I believe fal[ls] within the RICO statutory -- statute of limitations, period. Some of the conduct begins prior to the, what I'm going to call, RICO time period, but finishes inside the RICO time period. And in order for it to be fully understood, you have to go through the entire sequence *of events*. (224T70:21-72:1).

As aptly summed-up by the Trial Court:

> There is not a doubt in my mind, and I certainly do hope that I put a preamble to the hypothetical, theoretical fee findings in this case, that those were theories that were offered by the defendants to cut short or to truncate the plaintiff's allegation that management fees were taken without authorization[ and a]bsolutely improperly, with no agreement. … And just in case … the management fee theory didn't work, the theoretical fee and the hypothetical fee theories were used. (236T19:22-19)
>
> ***
>
> [T]he defendants were … attempting to support their taking of management fees from the partnership by proffering the theory that they were entitled to theoretical and hypothetical management fees. And there was further evidence that was presented with regard to the true up. ***And all of this was to undermine the plaintiff's [NJRICO] allegation of theft by deception with regard to the management fees that were taken***. (236T19:2-11).

## D. The 2013 Judgment

On December 20, 2013, Judge Wilson entered a Judgment (the "**2013 Judgment**"), pursuant to which she "awarded Halpern $6,559,213 in compensatory damages and $10,100,950 in prejudgment interest on his non-RICO claims; $16,396,895 in punitive damages; $16,007,361 in trebled

damages on the RICO claims; and attorneys' fees and costs in the amount of $6,861,098." See 2018 Op. at *4; (126a).

The amount of compensatory damages – by category of the Wilf's misconduct and year – were determined by agreement of the parties and their respective forensic accountants, whose calculations were then adopted by Judge Wilson and included in damage schedules attached to the 2013 Judgment (the "**Damage Schedules**;" 128a-139a; 39968a). The parties and their accountants also agreed upon the appropriate "equity rate" of interest – i.e., the rate that would fairly compensate Plaintiffs as real estate investors for their lost use of funds – to be applied to the compensatory damages as prejudgment interest, which also was embodied within the Damage Schedules. The agreed-upon equity rate was 8.875%. Finally, it was agreed by the parties and their accountants that prejudgment interest at the equity rate would be compounded. (136a; 251T48:25-19, 251T111:19-23, 251T112:22-113:4)

## E. This Court's 2018 Opinion and Mandate on Remand

In its 2018 Opinion, this Court affirmed Judge Wilson's findings of fact and conclusions of law as to liability, holding, pursuant to Rule 2:11-3(e)(1)(E), that the Wilfs' "arguments regarding the trial judge's findings of fact on the RICO claims," as well as their "contentions" with regard to Halpern's "non-RICO claims … lack[ed] sufficient merit [even] to warrant discussion." See

2018 Op. at *22-23. Specifically, this Court affirmed the Trial Court's determination that the Wilfs had engaged in racketeering conduct in violation of NJRICO – N.J.S.A. 2C-41-2(c) and (d) – by having committed "the predicate acts of theft by unlawful taking, N.J.S.A. 2C:20-3; theft by failing to make the required disposition of property, N.J.S.A. 2C:20-9; misapplication of entrusted property, N.J.S.A. 2C:21-15; theft by deception, N.J.S.A. 2C:20-4; falsification or tampering with records, N.J.S.A. 2C:21-4; and mail and wire fraud, 18 U.S.C. §§ 1341, 1343. The Court also affirmed the Trial Court's findings that the partnership and the related entities constituted a "racketeering enterprise" under N.J.S.A. 2C:41-1(c), and that [the Wilfs] had engaged in a conspiracy to violate RICO, which is unlawful under N.J.S.A. 2C:41-2(d)."[5] As to Halpern's non-RICO claims, this Court affirmed the Trial Court's determination that the Wilfs violated their fiduciary duties, breached the Partnership Agreement, breached the implied covenant of good faith and fair dealing, committed common law fraud and engaged in acts of conversion. See 2018 Op. at *19-23.

Contrary to the Wilfs' current argument on appeal, this Court also affirmed Judge Wilson's findings that the Wilfs individually (Zygi, Mark and Lenny) were liable for ***punitive*** damages, concluding:

[5] Even at this late date, the Wilfs have no shame. On appeal, they state that "Halpern was a 25% partner in the so-called enterprises." (Db12) Halpern was hardly a partner in the Wilfs' criminal enterprises. He was one of their victims.

> [T]here is sufficient evidence in the record to support the award of compensatory, ***punitive***, and RICO damages against both Mark and Leonard [and thus necessarily, against Zygi Wilf].
>
> The record does not support defendants' claim that Mark and Leonard only performed ministerial functions and essentially acquiesced in Zygmunt's management of the partnership. Rather, the record supports the trial judge's finding that Mark and Leonard engaged in conduct that warrants imposition of liability upon these defendants. In her decision, the judge [Wilson] found that the Wilfs had operated their businesses with cooperation and coordination. The judge noted that they worked with their accountants in determining the monies that were and were not available. The judge stated that Zygmunt was the 'self-described master chef' and he was the "overseer" of Rachel Gardens and many other Wilf projects. The judge found, however, that Zygmunt, Mark, and Leonard worked together and operated on consensus.
>
> We therefore reject defendants' contention that there was insufficient evidence for the award of compensatory, ***punitive***, RICO damages, or attorneys' fees against Mark and Leonard. (Id. at *30; emphasis added)[6]

The foregoing notwithstanding, this Court vacated and remanded those portions of the 2013 Judgment that might have been impacted by its opinion that

[6] The Wilfs, contrary to reality, incredibly argue that "this type of commercial dispute does not warrant punitive damages;" "there was certainly no unconscionable or outrageous conduct here;" and that "the facts of this case [do] not meet the necessary burden under the PDA to prove 'actual malice' or 'wanton and willful disregard.'" (Db48-49, 52) Perhaps by the time of oral argument, the Wilfs will have read this Court's decision more carefully and particularly its affirmance of Judge Wilson's findings that "punitive damages should be awarded to plaintiffs because defendants repeatedly acted with a 'willful disregard' of their partners[;] acted with actual malice and a reckless indifference to the rights of their partners" and with "'a hundred percent probability of harm.'" (2018 Op. at *25).

Judge Wilson improperly had tolled the SOL applicable to Halpern's RICO and non-RICO claims (its "**SOL Ruling**"). Specifically and only as a result, this Court directed the Chancery Division to: (i) re-calculate the damages to be awarded to Halpern on both his RICO and non-RICO claims; (ii) determine whether the Court's SOL Ruling required recalculation of Halpern's NJRICO attorney's fee award; and (iii) determine whether Judge Wilson's decision to award punitive damages against the Wilfs at a multiple of 2.5 times compensatory damages was still appropriate. In sum, the prior panel of this Court did not question Halpern's entitlement to be awarded punitive damages based upon the Wilfs' malicious conduct; to the contrary, it confirmed same.

**a. This Court's Mandate Regarding NJRICO Attorney's Fees**

This Court remanded Halpern's NJRICO fee award for reconsideration because and only because, as it explicitly stated, it simply was "not convinced … that [Judge Wilson was] justifie[d in] awarding … attorneys' fees [to Halpern] as far back as 1988" based upon its subsequent determination that his "non-RICO claims were limited to conduct that occurred after October 1, 2003." 2018 Op. at *29. It is important here to emphasize, however, that the Appellate Division did **not** determine that Judge Orlofsky's fee decision and the Trial Court's award to Halpern based upon his counsel's expenditure of time and effort in investigating and in then establishing the facts, circumstances and

events that occurred prior to the RICO SOL Period, was erroneous; nor did this Court determine that those efforts by Halpern's counsel were not compensable. Instead, this Court left that determination to the Chancery Court on remand.

In remanding the attorney's fees issues, this Court did affirm key components of Halpern's NJRICO fee award, including Judge Orlofsky's and Judge Wilson's award to Halpern's counsel of a 25% fee enhancement.[7]

In reconsidering Halpern's NJRICO fee award, initially the Honorable Maritza Berdote-Byrne and ultimately Judge Frank J. DeAngelis were required to review the record before the Trial Court in order to determine whether the time "reasonably devoted" by Halpern's counsel in investigating, ferreting out and presenting the critical facts relating to the period prior to October 1, 2004, was "reasonably required to establish [Halpern's] RICO claims." In providing guidance to the lower Court, this Court directed:

> The special master and the judge correctly noted that when a plaintiff presents claims for which fees can be awarded along with claims for which such fees cannot be awarded, attorneys' fees for all of the time devoted by counsel to the case can be awarded if the work on the unrelated claims 'can[ ] be deemed to be part of the

[7] "We also reject defendants' contention that the judge erred by awarding Halpern's attorneys a fee enhancement…." (2018 Op. at *28) In their Brief, the Wilfs falsely state that "Halpern's attorney received 25% of Halpern's share of the sale's proceeds *in addition to Judge Wilson's award of counsel fees,*" as if to disparage Halpern's counsel's fee arrangement (Db14). Halpern's counsel's modified contingent fee was based upon Halpern's aggregate monetary recovery, including the attorney's fees which were and will be again awarded to Halpern, not Mr. Lebensfeld or his firm.

> pursuit of the ultimate result achieved.' Silva v. Autos of Amboy, Inc., 267 N.J. Super. 546, 556 (App. Div. 1993) (citing Hensley v. Eckerhart, 461 U.S. 424, 434–35 (1983)). A suit will not be considered a collection of separate discrete claims if it rests on 'a common core of facts' or is 'based on related legal theories.' Ibid. (quoting Hensley, 461 U.S. at 435).
>
> ***
>
> Moreover, '[i]f a plaintiff achieves excellent results in a lawsuit, counsel fees should not be reduced on the ground that the plaintiff did not prevail on each claim advanced.' Ibid. (citing Hensley, 461 U.S. at 435). Litigants may in good faith raise alternative legal theories for relief, and the court's 'rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee.' Ibid. (citing Hensley, 461 U.S. at 435).
>
> ***
>
> Here, the special master determined that plaintiffs had achieved outstanding results and, therefore, they should be awarded fees for the time their attorneys devoted to presenting the common core of facts that pertained to both the RICO and non-RICO claims. The trial judge agreed…
>
> ***
>
> We recognize that in determining whether plaintiff sustained injuries actionable under RICO, *the court may consider RICO violations that occurred prior to the prescribed limitations period*….
>
> ***
>
> On remand … [t]he court must limit its award to the fees and costs *reasonably devoted* to plaintiffs' pursuit of their respective RICO claims. … *The court may consider awarding counsel fees and costs for time spent establishing wrongful acts on the part of defendants that pre-dated the time for which the RICO claims could be asserted. However, the court must find that the time devoted to presenting that evidence was reasonably required to establish the RICO claims*. See 2018 Op. at *28-29.

As will be discussed in the argument section of this Brief, the attorney's fees and costs devoted by Halpern's counsel to the facts and events that occurred prior to October 1, 2004 were not only "reasonably devoted" and "reasonably

required to establish the RICO claims," they were indispensable to Halpern's establishment of NJRICO liability and to his recovery of NJRICO damages.

**b. This Court's Mandate Regarding Punitive Damages**

Although determining that Halpern was entitled to an award of punitive damages against each of the Wilfs, this Court nonetheless required the amount to be reconsidered because the prior appellate panel was not convinced whether, in awarding those damages, Judge Wilson had relied in part upon acts "that occurred outside the period permitted by the applicable statute of limitations for the non-RICO claims." (Id. at *25-26) As the prior panel observed:

> [T]he trial judge awarded plaintiffs punitive damages based upon the damages calculated on their respective non-RICO claims for the period from 1989 to 2011. We have determined that the trial court erred by failing to limit Jarwick's and Halpern's non-RICO claims to the time required by the statute of limitations. **Because the punitive damage awards are based on compensatory damages determined for a period beyond the time allowed by the statute of limitations, the punitive damage awards cannot stand**.[8]

Id. at *25. The panel thus directed that Halpern's punitive damages "must be … limited to the period permitted by the applicable statute of limitations." In so ruling, the Court: (i) directed the Chancery Court "to make its determinations

[8] In reaching that conclusion, the Court specifically cited to Jarwick's initial Complaint and claim for punitive damages based upon the Wilfs' "diversion of opportunity" in 1992 of Halwil's assets to Pernwil, as an example of its concern that Judge Wilson might have awarded punitive damages to Jarwick based on that event. Halpern did not become a plaintiff until 2009.

based on the existing trial court record, any relevant findings of fact found by the trial judge, and such additional testimony or evidence the court may deem necessary for its decision;" and (ii) warned the Wilfs that "[t]his should not be viewed as an opportunity to re-litigate any finding of fact or conclusion made by the trial judge, which has been affirmed on appeal. Those findings are binding on remand." (Id. at *25-26) Nevertheless, once again evidencing their recurrent disdain for judicial authority, the Wilfs on appeal seek to reargue Judge Wilson's affirmed and now binding findings of fact and conclusions regarding Halpern's entitlement to an award of punitive damages. The Wilfs' arguments in that regard should warrant no further discussion.

## F. The Chancery Court's Findings on Remand

By Order entered November 16, 2022 (the "**Order on Remand;**" 39964a) and a Final Judgment entered January 4, 2023 (40005a), Judge DeAngelis, P.J.Ch., utilized the parties' previously agreed-upon Damage Schedules attached to the 2013 Judgment and awarded to Halpern the following amounts:

- $3,425,185 in compensatory non-RICO damages (the "**Compensatory Damages**"), incurred from October 1, 2003 through December 31, 2011 (the "**Non-RICO SOL Period**") – a $3,133,028 reduction from that previously awarded by Judge Wilson;

- $2,607,348 in NJ RICO base damages, incurred from October 1, 2004 through December 31, 2011 (the "**RICO SOL Period**"), trebled pursuant to N.J.S.A. §2C:41-4(C) to $7,822,044 – an $8,125,317 *reduction* from that previously awarded by Judge Wilson;

- $8,562,962.50 in punitive damages, an award equal to 2.5 times Halpern's compensatory damages – a $7,833,932.50 *reduction* from that previously awarded by Judge Wilson;

- $7,599,188.64 in NJRICO attorney's fees and costs for services rendered through and including the prior 2018 appeal;

- $5,948,025 in prejudgment interest from October 1, 2003 through November 16, 2022 – a $4,152,292.50 *reduction* from that previously awarded by Judge Wilson – broken down as follows:

    - From October 1, 2003 through December 31, 2013, prejudgment interest compounded at the "equity rate" of 8.875%, as jointly determined and previously agreed upon by the Wilfs' and Halpern's forensic accountants at trial, and as incorporated by Judge Wilson into the 2013 Judgment;

    - From January 1, 2014 through July 9, 2014, prejudgment interest compounded at the "equity rate"; and

    - From July 10, 2014 through November 16, 2022, prejudgment interest compounded at a rate of 3.935%, equal to the average prime rate during that period; and

- Post-judgment interest from November 17, 2022 at the Rule interest rate of 2.25%.[9]

In support of its Order on Remand, the Chancery Court included a detailed, 39-page statement of reasons, the relevant portions of which are addressed below.

[9] Thus, based upon the prior appellate panel's strict application of the discovery rule, Halpern's damages were *reduced* by $23,244,570, leading to the rather unjust result that the Wilfs were permitted to retain the millions of dollars in partnership funds which they had misappropriated during the pre-SOL period.

### a. The Punitive Damages Award

After engaging in an extensive review of Judge Wilson's and Judge Berdote-Byrne's prior findings,[10] Judge DeAngelis determined that the Wilfs had engaged in the same egregious conduct ***during the Non-RICO SOL Period***, as they had prior thereto, warranting an award of punitive damages equal to 2.5 times the compensatory damages suffered by Halpern during that latter period. Judge DeAngelis found the facts revealed that the Wilfs' repertoire of theft techniques had expanded during the Non-RICO SOL Period. Echoing Judge Wilson's findings, Judge DeAngelis found the Wilfs' wrongful conduct during that Non-RICO SOL Period to be qualitatively more reprehensible than that which occurred during the preceding 16 years, finding it particularly disturbing that despite being members of the Bar, the Wilfs continued to steal and conceal from their partners in spite of – and in response to – "litigation events," including this Court's 2006 Opinion:

> As part of a larger scheme of fraud and criminality, … "the Wilfs were forced by what the accountants uncovered to admit that they took funds from [the Partnership] without authorization, without rationale, ... or disclosure. It was simply an arbitrary removal of funds to the detriment of non-Wilf partners." (224T10: 8-21). *That type of activity persisted ... all the way through the conclusion of trial.* (40043a)
>
> ***
>
> *[T]he Wilfs stole [partnership] money ... every single year*: "what

[10] Until her elevation to the Appellate Division, Judge Berdote-Byrne presided over this matter on remand.

> occurred for absolute certainty at the end of almost every year of [the Partnership]'s existence was that all of the money that was left in [the Partnership] at the end of the year was removed . . . *So this was conduct that was repeated over and over and over and over again . . . And certainly after the Appellate Division decision in December of 2006 [holding] the Wilfs had a fiduciary duty to Jarwick, and they had a fiduciary duty to Josef Halpern . . . And so this was not an isolated incident*." *(242T212:21-214:15). .... "[Even after the Appellate Division opinion was rendered [in 2006] ..., they continued. And during the pendency of this litigation, this trial . . . when it should have been obvious to the Wilfs that we were trying this case, we were getting to the bottom of it, they just continued." (235T75:13-25 and 248T20:16-21:17)*. (40048a)
>
> ***
>
> *The Wilfs even refused to stop taking money after Judge Wilson so ordered [in 2011].* (72a, 40049a)

Indeed by orders of magnitude, Judge DeAngelis found that the harm the Wilfs inflicted upon Halpern was quantifiably greater during the 6-year Non-RICO SOL Period, than it was during the preceding 16 years. As the Judge found:

> The below table [derived from the parties' agreed upon Damage Schedules], represents the amounts of money the Wilfs removed from the partnership through various means, all of which were determined by Judge Wilson and affirmed on appeal:[11]

[11] In determining the Wilfs' thefts of partnership funds during the applicable NJRICO and tort SOL periods, Judge DeAngelis' relied on the Certification of Jeffrey D. Barsky, CPA, Plaintiffs' forensic accountant. (HPa1-34) Mr. Barsky utilized the Damage Schedules previously agreed upon with the Wilfs' accountant and adopted by Judge Wilson, to calculate, by substantive category of misconduct, the amount of partnership funds misappropriated by the Wilfs, both prior to and during the SOL periods. He then prepared detailed schedules containing the results of his forensic analysis. (HPa11-29 ) The Wilfs have not challenged those calculations.

| **Misappropriation by Category of Fake Expense** | **Amount Converted Between 1998 and September 30, 2003** | **Amount Converted Between October 1, 2003 and 2011** |
|---|---|---|
| Management Fees | $11,248,000 | $13,321,285 |
| Interest Expense | $7,686,295 | $6,868,285 |
| Non-Pernwil Employee Payroll and Fringe Benefits | $1,663,110 | $3,986,381 |
| Wilf Salaries | $306,000 | $1,017,999 |
| Commissions | $259,000 | $45,000 |
| Rent and Office Expenses | $552,465 | $93,450 |
| Other Expenses | $138,440 | $544,903 |
| Insurance Expenses | $192,600 | $935,771 |
| Advertising Expenses | $138,439 | $149,495 |
| **Totals** | $22,366,349 | $26,962,569 |

As indicated above, the Wilfs improperly converted $13,321,285 in fraudulent management fees after October 1, 2003 and through 2011, which includes the five years after the Appellate Division's decision.... That is $2,053,285 more in misappropriated management fees (from 2003 to 2011) than the entire 15-year period leading up to 2003. After the trial court erroneously ruled the valuation of the property to be zero in March of 2004, the Wilfs ... increased their take of management fees from $495,285 in 2003 to $1.5 million in 2004, a 300% increase. The Wilfs did not stop there. After the 2006 Appellate Division decision, ... the Wilfs increased their "management fees" from $1.6 million in 2006 to $1,975,000 in 2007 and to $2,143,000 in 2008. ....

After Halpern filed his Complaint ... in 2009, ... the Wilfs converted a total of $2,130,000 in 2009.

***The above provides just a few examples of a much larger and more pervasive scheme of fraud***. The court need not recite every single

> example of theft over the Wilfs' 21-year history of fraud. The Court notes that the above recitation is not only non-exhaustive but shows only a small part of the fraud orchestrated against the Plaintiffs. (33975a)

As did Judge Wilson, Judge DeAngelis found it particularly reprehensible that the Wilfs began their ill-conceived "true-up" exercise – one of their defenses to Halpern's NJRICO and common law claims – only after and in response to this Court's 2006 Opinion:

> [A]fter the 2006 Appellate Division [Decision], the Wilfs claimed they were entitled to $19 million dollars in theoretical management fees and $9 million in hypothetical management fees. Zygmunt testified the Wilfs were justified in taking that money after the 2006 Appellate Division decision because he was "truing-up" for fees that had not been paid to the Wilfs and had been due since 1985. In reality, and as Judge Wilson noted, these "true-ups" were false justifications to steal money from the partnership. (224T14:13-17). All of this occurred after the Appellate Division ruled the Wilfs owed plaintiffs a fiduciary duty. (235T72:7-17). (33973a-74a; emphasis supplied)

In determining that a 2.5 multiple was necessary to punish the Wilfs for the egregious conduct in which they engaged during the Non-RICO SOL Period and in apportioning liability for punitive damages among Zygi, Mark and Leonard Wilf, Judge DeAngelis opined:

> Judge Wilson imposed punitive damages on the Wilfs in a way that reflected the[ Wilfs'] respective responsibility. Zygmunt was assigned 60% of the punitive damages because he was the self-proclaimed "master chef," leading and directing the scheme of fraud and thievery. Mark and Leonard were [each] assigned 20% responsibility because they were co-conspirators, merely following everything Zygmunt did without ever objecting or questioning

> Zygmunt's decisions and receiving enormous financial benefits throughout the entire time period. (40049a)
>
> ***
>
> [Thus, w]hile Zygmunt was primarily responsible for misappropriating partnership funds, Leonard and Mark abdicated their responsibilities as partners by knowingly permitting Zygmunt to illegally distribute partnership assets. …. (40051a)
>
> ***
>
> … [This] court also again finds punitive damages should be awarded in the amount of 2.5 times plaintiffs' compensatory damages. Likewise, the court also assigns responsibility for punitive damages as follows: Zygmunt[] shall be responsible for 60% of punitive damages, Mark[] shall be responsible for 20% of damages, and Leonard[] shall be responsible for 20% of punitive damages. (40054a)

Pursuant to this Court's mandate, Judge DeAngelis meticulously supported his punitive damages decision with findings tailored to each Wilf Defendant individually, as follows:

- ***Zygmunt Wilf***

> … Zygmunt knowingly took money …, which he knew belonged to the partnership, and transferred it to Wilf-owned companies for services … never performed. Zygmunt established wholly owned companies for the sole purpose of syphoning … money he knew Jarwick and Halpern were entitled to ... Those facts demonstrate Zygmunt was not only aware of foreseeable harm, but consciously committed that harm. As such, [N.J.S.A. § 2A:15-5.12(a)] is satisfied. ….
>
> …. [T]he likelihood of harm resulting from Zygmunt[]'s conduct *during the non-RICO [SOL P]eriod* was 100%. N.J.S.A. § 2A:15-5.12(b)(l). Zygmunt knowingly transferred over $13 million dollars out of the partnership, which he knew should not have been taken … [and] with no intention of returning [it]. There is no conceivable way in which harm would not occur. For that reason, the likelihood

of harm ***during*** *the non-RICO [SOL P]eriod* was absolute. …. [Thus], [N.J.S.A. § 2A:15-5.12(b)(l)] is satisfied. …

[N.J.S.A. § 2A:15-5.12(b)(2)] is also met. The same facts in the paragraph (a) analysis are relevant here. ….

The evidence also established that [N.J.S.A. § 2A:15-5.12(b)(3)] is met. Zygmunt[] knew the entire time his actions were causing harm and continued to wrongfully take [partnership] money …. *This callous disregard for the rule of law, demonstrates the need for the award of punitive damages*. ...

***

[Regarding] the profitability of defendants' conduct, when they stopped their illegal conduct, and defendants' financial condition ...[:] *Zygmunt[, Leonard and Mark] profited in the amount of $13,321,285 in fraudulent management fees taken during the non-RICO [SOL P]eriod*. N.J.S.A. § 2A:15-5.12(c)(2). *Zygmunt[] did not stop stealing after multiple court orders and an Appellate Division decision [in 2006], and only stopped stealing money in 2011*. N.J.S.A. § 2A:15-5.12(c)(3). Finally, defendants here are extraordinarily wealthy. They own a National Football League football team. Thus, the Wilfs will not be burdened by the imposition of punitive damages. Nonetheless, the court is compelled to impose punitive damages to deter future illegal conduct. N.J.S.A. § 2A:15-5.12(c)(4).

*....[T]he court finds the award of 2.5 times the amount of compensatory damages to be reasonable under all the circumstances to punish Zygmunt[] for his brazen conduct. N.J.S.A. § 2A:15-5.14(a). Zygmunt[] owed his partners* the highest duty of loyalty and honesty. Plaintiffs entered into a relationship of trust that was secured by their partnership agreement and partnership law. They expected Zygmunt to uphold that trust. Instead, he broke that trust by intentionally misappropriating partnership assets for his own personal benefit. Because Zygmunt[]'s conduct was so brazen and so contrary to any notion of a partnership or any notion of general equity, the imposition of punitive damages is reasonable and serves the purpose of punishing Zygmunt[] for his actions. N.J.S.A. § 2A:15-5.14(a).

***

- ***Leonard Wilf***

….Leonard[] was a partner and thus owed the other partners and the partnership itself a fiduciary duty. At trial, he testified he was aware of Zygmunt[]'s improper taking of partnership funds and was aware of discrete events constituting theft, conversion, and breach of fiduciary duty, all from which Leonard benefitted financially. In fact, Leonard[] testified he received the partnership's financial statements and was specifically aware of the exorbitant "management fees," but elected not to say anything about them to Zygmunt. Leonard[] knew a wrong was being committed and was benefitting from that wrong by failing to stop Zygmunt's theft; therefore, Leonard[]s omission was committed with actual malice and with a wanton and willful disregard of the other partners from whom he was stealing. ….

Leonard's omissions were certain to result in harm during the non-RICO [SOL P]eriod. …. From 2004 [forward], Leonard received the partnership's financial statements and was aware of Zygmunt's theft, but never interfered with his theft because "that [was] what we do." (225T54:10-56:2). As such, Leonard knew for an absolute certainty that if he did not interfere with Zygmunt[]'s theft, as was his fiduciary obligation, then plaintiffs would be harmed because Zygmunt[] was taking their money.

***

Leonard[] testified he was aware that Zygmunt was taking enormous funds from the partnership, and witnessed sharp and unjustified increases in management fees depending on the year (e.g., $1.5 million in fees in 2004 increased to $1.760 million in 2005). Leonard[] testified he did not interfere even though he himself thought the fees were excessive. As such, he was aware that the fees were unjustifiable and thus aware that the taking of those "fees" would harm the partnership and were a direct result of (1) Zygmunt[]'s stealing and (2) his failure to stop Zygmunt[]. …. Accordingly, he was aware that serious harm would result if he did not stop his [cousin] from stealing from the partnership. ….

[With respect to] the profitability [and] financial condition[,] … Leonard is financially secure, and the imposition of punitive damages will not burden him in any material way. …. Despite the limited sting of punitive damages in this case, considering [his]

expansive wealth, the court must nonetheless impose punitive damages to deter future illegal conduct. ….

Leonard will be responsible for 20% [of the punitive damages awarded]. …. Leonard owed the partnership and his partners the highest duty of loyalty and honesty. He was tasked with upholding the trust they placed in him as a business partner. For over 20 years, and during the entire non-RICO [SOL P]eriod, Leonard[] rebuffed that duty. He kept quiet in the shadows, saying not a word as … Zygmunt[] stole millions of dollars from their partners. Leonard[] was complicit in Zygmunt[]'s scheme of manipulation, fraud, theft, and conversion by remaining silent and quietly accepting his share of the stolen funds. As such, the award of punitive damages is proper and reasonable to punish Leonard for his omissions. ….

- ***Mark Wilf***

… Mark was a partner and owed a fiduciary duty to the partnership and other partners. At trial, Mark testified he was aware of the extraordinary fees and testified he knew there was no agreement for management fees, development fees, or general contract fees·. (225T56:15-5:7). Further, Mark stated he attended year-end meetings and received financial statements for the partnership, but nonetheless, left the finances to Zygmunt despite being aware of the allegations of illegal conduct during the non-RICO [SOL P]eriod. (227T47:21-48:8). *Accordingly, Mark knew about the wrongdoing, benefitted financially from the wrongdoing, but failed to stop the wrongdoing despite having a fiduciary obligation to do so. As such, his omission was committed with actual malice and with a wanton and willful disregard of the other partners from whom he was stealing*. ….

Mark was aware Zygmunt was stealing money from the partnership and therefore from the plaintiffs. Mark was aware of this the entire time it was happening. Mark was specifically aware during the non-RICO [SOL P]eriod that Zygmunt was stealing, admitting at trial that he noticed the sharp increases in "management fees" for some years (e.g., 2005), but nevertheless remained silent. Ibid. As such, Mark was aware the fees were unjustified, the theft of those fees would harm the partnership and the plaintiffs and were a direct

> result of (1) Zygmunt[]'s stealing and (2) his failure to stop Zygmunt[]. … Accordingly, he was aware that serious harm would result if he did not stop [Zygmunt] from stealing from the partnership.
>
> ***
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> … As noted, due to their theft of partnership assets, the Wilf[s] profited $13,321,285 during the non-RICO [SOL P]eriod. …. Mark[] received those stolen funds throughout the entire non-RICO [SOL P]eriod and remained silent regarding the theft until trial. …. Lastly, Mark is financially secure, and the imposition of punitive damages would not burden him in any material way. …. Regardless of whether punitive damages have any effect on the Wilfs, the court must nonetheless impose punitive damages to deter future illegal conduct. …. (39978a-40064a)

The Chancery Court also found that each of its punitive damage awards "comports with the strictures of due process" under the guideposts of State Farm. (40057a) Judge DeAngelis found that "the *relative degree of reprehensibility* in this case cannot be overstated." The Court found that:

> [even a]bsent any violence or irreparable harm, Zygmunt[]'s conduct was repugnant and done with malevolent intent. The law required him to honor his partners and their trust with perfect loyalty. … Instead, he schemed, deceived, manipulated, and stole from his partners. Compared to the duty to which he owed his partners, Zygmunt[]'s conduct demonstrates a prolonged disregard for his partners and the harm caused was the direct result of intentional malice, trickery, and deceit. (40057a)

The Court then considered the second State Farm guidepost – "the disparity between the actual harm suffered and the punitive damages award." With respect to Zygmunt, Judge DeAngelis found the disparity to be "*substantial, but [nonetheless] reasonable considering the [his] actions and the*

*need to deter and punish this type of conduct.*" (40057a) The Court noted that holding Zygmunt responsible for only 60% of a 2.5 multiple "falls within the statutorily allowed amount of punitive damages" (i.e., 5x), rendering "the disparity … not so great as to require further process and thus does not deprive defendant of his due process rights." (40057a) Similarly, the Court found "[t]he disparity between the actual harm suffered and the punitive damages [awarded against Leonard and Mark to be] substantial but [nonetheless] reasonable," and that holding them each responsible for only 20% of a 2.5 multiple "is well within the amount statutorily permitted by the PDA," ensuring the "disparity [does] not … violate due process." (40061a, 40064a)

Judge DeAngelis further found that "the third guidepost" of State Farm "is met because this case is analogous to other cases in which punitive damages have been awarded for similar conduct," specifically Saffos v. Avaya Inc., 419 N.J. Super. 244, 267 (App. Div. 2011). Like the Wilfs here, the "defendants in Saffos [had] engaged in a 'deliberate, systematic campaign' to harm plaintiffs and 'violated long-established' legal principles and 'engaged in prohibited conduct while knowing or suspecting that it was unlawful.'" (40058a, 40061a, 40065a) Like the Defendants in Saffos, "the Wilfs are extremely wealthy and so punitive damages are not unduly burdensome and are proper to hold the Wilfs accountable for their actions." (40058a, 40061a, 40065a)

### b. The Award of Halpern's Attorney's Fees and Costs

Judge Berdote-Byrne appointed Stephen M. Orlofsky, U.S.D.J. (ret.) as Special Master to make recommendations regarding the NJRICO attorney's fees and costs to be awarded to Plaintiffs. (38991a-94a)[12] After considering the parties' extensive submissions and hearing lengthy oral argument, Judge Orlofsky issued two Reports and Recommendations (hereinafter "**R&R1**" and "**R&R2**") exceeding 130 pages of analysis,[13] in which he recommended awarding to Halpern: (i) $6,861,098 for fees and costs incurred in connection with trial; and (ii) $738,090.64 for fees and costs performed before the Appellate Division and New Jersey Supreme Court. (39024a; 39089a; 39108a; 39177a) Judge Orlofsky's relevant findings and conclusions, as adopted by Judge DeAngelis, follow.

- ***Halpern's Claims Contained a "Common Core of Operative Facts"***

In compliance with this Court's mandate, Judge Orlofsky determined that "a combination of proving the elements of RICO claims, rebutting defenses, and the forensic accounting needed to prove post-2004 damages, demonstrates the RICO and non-RICO claims were intertwined" (39058a), explaining as follows:

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[12] Having served in that same capacity in connection with Plaintiffs' original 2013 fee applications – for which he issued two Reports and Recommendations (11480a, 14707a, 14826a) – Judge Orlofsky possessed intimate familiarity with the extensive record in this action.

[13] The Reports themselves belie the Wilfs' assertion to the contrary (Db38).

> … the question [is] whether the facts or legal theories that underpinned Plaintiffs [non-RICO claims] … also underpinned their RICO claims. …. As Judge Wilson previously noted, that answer is undoubtedly yes. (247T37:8-23 … Each of these claims centered around a singular question: did the Wilfs ***purposefully*** take money from the partnership that should have gone to the Plaintiffs?
>
> The fact that the different claims deal with different time periods does not change this analysis, because the facts surrounding those earlier time periods were still relevant to proving the post-October 2004 violations. Put another way, had Plaintiffs' original complaint only contained RICO claims for post-October 2004 violations, the litigation would have looked almost entirely the same. See Silva, 267 N.J. Super. at 558 (noting that a prevailing party should be compensated for fees "he would have borne if his suit had been confined" only to compensable claims).
>
> First, to establish a "pattern of racketeering activity" a plaintiff may point to conduct as far back as ten years prior to the statute of limitations. …. This encompasses evidence of wrongful acts starting in October of 1994. I recognize that it may not have been necessary to include the entirety of this time period simply to establish a pattern, especially given the quantity of violations both in and out of the statute of limitations period. However, the pre-October 2004 violations also help establish the important element of mens rea. For each of the theft-based predicate acts Plaintiffs were required to demonstrate that Defendants acted purposefully, i.e. it needed to be Defendants' "conscious object to engage in conduct" or "to cause" a particular "result." N.J.S.A. 2C:2-2(b)(1). By establishing that the Defendants' wrongful conduct was not limited in time and voluminous, Plaintiffs established that these acts were not an honest bookkeeping error, but a conscious pattern and practice.
>
> Next, although taking place before 1994, evidence regarding the formation of the partnership and its terms was imperative to establishing RICO violations within the statute of limitations period. As the trial court found, and the Appellate Division affirmed, the predicate acts underpinning Defendants' RICO violations were acts of theft by unlawful taking, theft by failing to make the required disposition of property, misapplication of

> entrusted property, theft by deception, falsification or tampering with records and mail and wire fraud. …. All of these predicate acts stem from the same question: whether the Defendants mishandled partnership funds to increase distributions to themselves, at the expense of their partners. Inherent in that factual determination is then the terms of the partnership agreement -- were Defendants authorized to act as they did with the partnership funds. If they were, then the actions would not constitute theft or fraud. If they were not -- as the Court found -- the actions did. It would be impossible to prove that Defendants actions were unauthorized without establishing the source of authorization -- the partnership agreement. Therefore, to establish RICO damages for <u>any</u> timeframe, Plaintiffs still would have had to establish the facts leading to the formation of the partnership regardless of how far that preceded the statute of limitations period.
>
> Additionally, background information regarding the various entities involved in the partnership and the Rachel Garden project were relevant to establish that Defendants acted within an "enterprise" as defined by the RICO statute. N.J.S.A. 2C41-1(c) (defining enterprise, in part, as any partnership, corporation, or association). (39060a-62a)

Judge Orlofsky rejected the Wilfs' disingenuous assertion (made again on this appeal [Db3, 37]) that, even before remand proceedings had begun, this Court had definitively held that "there was no common core of operative facts" overlapping Plaintiffs RICO and non-RICO claims. As His Honor explained:

> I recognize that the sentence [from the 2018 Opinion] "We are convinced the court erred by finding that all of Jarwick's and Halpern's claims rested on the same common core of operative facts," taken in isolation, would tend to demonstrate otherwise.[14] However, once the context of the sentence is reintroduced, it demonstrates that the basis for that decision was the Trial Court's

[14] The Wilfs' assertion that "the Special Master disregarded the Court's opinion" (Db34) obviously but characteristically is patently false.

> failure to draw its conclusion with the correct statute of limitations for RICO damages in mind. Defendants also argue that the Appellate Division's decision not to affirm the attorney fee award demonstrates that the Appellate Division disagrees with this outcome. …. However, there is a large distance between the Appellate Division remanding an issue back to the trial court for reconsideration, and the Appellate Division barring the same decision from being made again.
>
> The Appellate Division stated it was "not convinced" that, given the new statute of limitations period, an award of attorneys' fees that accounted for time used to uncover "wrongful acts committed as far back as 1988" was "justifie[d]." Jarwick II, at *80. This is unsurprising given that this question within the contours of the 2004 statute of limitations period was not a question raised on appeal, and therefore was not briefed by the parties. Now, with the benefit of the arguments by the parties, for the reasons stated infra I am convinced that this award is justified and make a recommendation for the same attorney fees. (39057a-58a)

Judge Orlofsky further rejected the Wilfs' specious assertion (again raised here [Db30]) that this Court's decision to reverse Judge Wilson's SOL and punitive-damage rulings was tantamount to holding that Plaintiffs' RICO and punitive damages claims shared no "common core of operative facts." As explained by Judge Orlofsky:

> [T]he Appellate Division instructed the trial court to "determine whether each of these defendants engaged in conduct in the period from October 1, 2003, through December 2011, which rises to the level required for the award of punitive damages." Id. at *72. The Appellate Division's instruction to the trial court to reconsider the quantum of punitive damages based on a changed statute of limitations for liability has no bearing on my reasoning for recommending that Plaintiffs RICO claims and punitive damages claims stem from a common core of facts. (39071a)

- ***The Work Expended on the Accounting Was Critical to Determining NJRICO Damages and Thus Was Reasonably Devoted to Establishing Halpern's NJRICO Claims***

In emphasizing the common core of facts that existed between Halpern's NJRICO and common law claims, Judge Orlofsky opined:

> *... [T]he nature of the damages calculation and the methods of theft employed by Defendants necessitated Plaintiffs expert to reconstruct the entirety of the partnership's books, from inception*. It is true that the reconstruction of the partnership books also served to further Plaintiffs' accounting claim. However, those same reconstructions and calculations later became the basis for the calculation of RICO damages. Therefore, absent the accounting claim the books still would have had to be reconstructed if Plaintiffs were only asserting RICO claims. The importance of the accounting to Plaintiffs' RICO claims was repeatedly emphasized by Judge Wilson who noted that the Defendants' "conduct cannot be proven without an account of the monies that were taken, because the monies that were taken were the essence of the misconduct," and that the "accounting has everything to do with RICO." (236T15:11-12, 236T16:10-13.) (39062a)

Judge Orlofsky expounded that the "calculation of RICO damages within the statute of limitations period required a retrospective accounting of the partnership's finances from the beginning of the Rachel Gardens project in 1985 --- a methodology both Plaintiff and Defendants' accounting experts applied." (39052a)

As the testimony at trial revealed, the Wilfs' and Halpern's forensic accountants had agreed that in order to determine whether Halpern had suffered NJRICO damages during <u>any</u> period of time including, but not limited to, the

NJRICO SOL Period – that is, whether he had been denied his lawful share of partnership distributions by reason of the Wilfs' commission of Predicate Acts – a "**retrospective accounting**" of the partnership's revenues, loans, advances, payments and expenses (i.e., its cash flows) had to be performed and the partnership's financial records had to be reconstructed from the commencement of Rachel Garden's operations in 1985, through and including 2011. (167T69:15-24; see also 167T69:70:18-71:14 and 72:3-9)

Thus, in order to determine Halpern's accounting damages (which constituted his NJRICO damages as both the Trial Court and this Court found), Halpern's counsel, assisted by Plaintiffs' forensic accountant (Jeff Barsky), was required to conduct extensive, tedious and time-consuming document discovery relating to the Wilfs' "hide the ball accounting" (as characterized by Mr. Barsky) and thereafter to examine multiple Wilf witnesses, both at depositions and at trial, in order to ferret out the relevant facts and documents required by Mr. Barsky in order to perform his retrospective accounting. Only once all of the Wilfs' improper payments were uncovered and figuratively deposited back into the Partnership's hypothetical bank account could Mr. Barsky then perform a proper analysis of cash flows and ultimately determine the amount of money (i.e., damages) Halpern should have received during the NJRICO SOL Period.

- ***The Pre-SOL Facts Were "Necessary" to Rebut the Wilfs' Affirmative Defenses to Halpern's RICO Claims***

Turing his attention to the Wilfs' purported defenses to Halpern's NJRICO claims, Judge Orlofsky stated:

> I recognize that it is a close call as to whether the full volume of pre-October 2004 activity was reasonable to establish the goals stated above in proving Plaintiffs' affirmative case. *However, the rebuttal of Defendants' defenses pushes that decision firmly in Plaintiffs' corner. A number of the post-October 2004 transactions in this case* were justified by Defendants based on activities that occurred prior to the statute of limitations period, based on Defendants' assertion that they had "true[d] up" work performed for the partnership at an earlier date. (See, e.g., 124T17:25-18:6 (testifying that an October 2000 journal entry creating a balance owed from the partnership to a Defendant company was "part of the million dollars that was set up as a credit balance . . . to be trued up later"); 125T91:6-94:6 (testifying that based on the Appellate Division's 2006 decision, Defendant Zygi Wilf made a number of "true ups" to compensate Defendants for "fees that we were entitled to" for work previously performed); 129T99:8-101:19 (testifying that true-up payments were meant to compensate for a multitude of past expenses such as health insurance, construction liability insurance, advertising and rent).) (39062-63a)

The Special Master anticipated and rejected the Wilfs' argument – raised for the first time on this appeal, and thus waived – that "work done to avoid liability for Halpern on a non-RICO theory is not work 'reasonably devoted' to establishing [his] RICO claims" (Db41). As explained by Judge Orlofsky, the work undertaken by Halpern's counsel to debunk the Wilfs' claimed entitlement to bogus "developers," "construction," and "management fees" was the very same work necessary to defeat the Wilfs' equally bogus "claim of right" defense

to all of Halpern's RICO claims:

> [T]he [Wilfs] asserted they were actually owed money. …. Had the Court agreed …, it would have disproven that [the Wilfs] had taken benefits from the partnership beyond what they were owed -- negating the predicate acts for Plaintiffs RICO claims. [The Wilfs' expert] reached his conclusion by:
>
> - Adjusting the partnership's financials to include a management fee of 5% on rental income;
>
> - Adding in overhead costs for rent, office space, payroll and benefits;
>
> - Adding a general contractor and/or construction manager fee of 10% of the construction costs under the assumption that [the Wilfs] acted as general contractors for Rachel Gardens;
>
> - Adding a development fee of 10% of development costs under the assumption that [the Wilfs] acted as developers for Rachel Gardens; and
>
> - Adding interest for loans provided by defendant-related parties.
>
> ([1651a; 1669-70a; 3108a; 3114-16a; 3108a; 3152-55a]) Those adjustments were applied from ***1985-2009***. A defense against these arguments required producing evidence: (1) to rebut the presumption that [the Wilfs] solely acted as the general contractor, and were therefore owed general contractor / construction manager fees from the years 1987 to 1999; (2) to rebut the presumption that [the Wilfs] solely acted to develop Rachel Gardens, and were therefore owed developer fees from the years 1985 to 1999; (3) to determine if the rent, office space, and payroll being added for the years 1986 and 1989 through 2009 were for costs that actually benefitted the partnership.
>
> *Had the Court believed these pre-October 2004 services been rendered as claimed by [the Wilfs], and appropriate amounts charged to the partnership in this post-October 2004 book*

> *reconstruction and true-up exercise, it would have negated Plaintiffs' predicate acts and demolished their RICO claims during the statute of limitations period. Therefore, Plaintiffs were forced to develop a factual record regarding* the development, construction and management of Rachel Gardens from inception, to disprove that the alleged services were rendered, and demonstrate whether fees were appropriately charged. (39062a-64a)

As astutely observed by Judge Orlofsky, the Wilfs "made no rebuttal" to this argument, notwithstanding the fact that it had been asserted "in Halpern's moving brief, …, reply brief, …, and at oral argument ([256T]31:9-39:8) …. At oral argument, Halpern's counsel directly pointed out this silence, … and when given an opportunity to reply, [the Wilfs]' Counsel declined ([256T][85:10-20 and 256T]91:8-23)." (39064a) The Wilfs' continued refusal to address or rebut in their Appellant's Brief, the fundamental necessity for the pre-SOL period investigation and work performed by Halpern's counsel should inform this Court of all it needs to know in affirming Judges Orlofsky's and DeAngelis' determination of attorney's fees.

- ***The Evidence Establishing Punitive Damages was "Necessary" to Establish Halpern's RICO Claims***

The Special Master also found that the facts establishing punitive damages were not only "inextricably intertwined" with Plaintiffs' NJRICO claims, those facts were "necessary" therefor:

> When considering whether to award punitive damages, the fact finder must determine that a defendant acted with "actual malice or accompanied by a wanton and willful disregard of persons who

foreseeably might be harmed by those acts or omissions." N.J.S.A. 2A:15-5.12(a). This is determined by considering the likelihood that serious harm would arise from defendant's conduct, the defendant's awareness of that likelihood, defendant's conduct after that awareness, and the duration and concealment of the conduct. N.J.S.A. 2A:15-5.12(b).

*The factual basis that underpins each of these considerations is inextricably intertwined with Plaintiff's proofs for its RICO claims*. In prevailing on its punitive damages claims, Plaintiffs demonstrated that [the Wilfs] knew their actions would deprive Plaintiffs of significant assets and did so for a number of years. They took great pains to conceal this deprivation through withholding financial information, and fraudulent charges for payroll, loans, insurance and management fees. (223T88:19-103:2 (recounting the various types of improper payments [the Wilfs] made to themselves); 233T87:18-88:19 (describing use of partnership as a "piggy bank" and [the Wilfs]' refusal to produce financial information to Plaintiffs).) *This same evidence was necessary for Plaintiffs to establish their RICO claims*. To prove that [the Wilfs] committed the predicate acts of theft, they needed to demonstrate that [the Wilfs] purposefully deprived Plaintiffs of their rightful payments from the partnership -- i.e. that it was their conscious object to deprive the Plaintiffs of money owed to them. See N.J.S.A. 2C:20-3; N.J.S.A. 2C:20-4; N.J.S.A. 2C:20-9; N.J.S.A. 2C:2-2(b)(1).

*Therefore, by proving that [the Wilfs] acted purposefully to establish the requisite mens rea for the predicate acts of the RICO claims, Plaintiffs also established the relevant criteria for punitive damages (acting with actual malice or wanton and willful disregard of Plaintiffs' rights for a prolonged period of time and with the intent to conceal its actions) and vice versa*. This "common core of facts" demonstrates that these claims are related, and therefore work on Plaintiffs' punitive damages claims is compensable. (39069a-70a)

- ***Pre-Trial Motion Practice was Necessary to Establish and/or Protect Halpern's NJRICO Claims***

Judge Orlofsky thoroughly addressed and rejected the Wilfs' arguments (also re-asserted on this appeal [Db41]) that fees for pre-trial motions should be disallowed. (39071a-79a) His Honor specifically found each such motion was reasonably devoted to the pursuit (or defense) of Plaintiffs' NJRICO claims. For example, in recommending that Halpern's Motion for Statutory and Equitable Relief (Db41) "remain in the fee award," Judge Orlofsky found that motion …

> .... sought a variety of relief all centered around halting [the Wilfs]' persistent misuse of partnership funds and gaining access to documents that would further help Halpern prove that misuse. As previously noted, [the Wilfs]' ongoing misuse of partnership funds -- to the detriment of Plaintiffs -- formed the basis for the predicate acts needed to establish Halpern's RICO claims. …
>
> In support of the[] motion, Halpern submitted, among other evidence, a detailed certification from their accounting expert laying out the various ways in which [the Wilfs] misused partnership funds -- the actions that later formed the predicate acts of Plaintiffs' RICO claims. This shared factual basis demonstrates that this motion is based on the same common core of facts, and therefore should be compensable. Even if Halpern's only claim in his complaint had been under RICO, this motion still likely would have been filed, as the basis for the relief was also the basis for the RICO claims. See Silva, 267 N.J. Super. at 558 (noting that a plaintiff "should be compensated for the legal expenses he would have borne if his suit had been confined to the ground on which he prevailed"). (39072a-73a)

In recommending that work done in connection with "discovery motions" (Db41) be included in the fee award, the Special Master noted that *"*[the Wilfs]

do not argue that the testimony at these depositions was unrelated to RICO, but merely that the motion practice to ensure those depositions happened should not be compensated." (39076a) Judge Orlofsky found, however, that:

> Even if the [discovery] motions were purely procedural, *they were still necessary to further the uncovering of evidence to support Plaintiffs' RICO claims*, and therefore were part of "the pursuit of the ultimate result achieved." Jarwick II at *79. Put another way, the costs of litigating these procedural issues would have been borne by Plaintiffs whether or not they had claims in addition to their RICO claims. Silva, 267 N.J. Super. at 558. (39076a)

In recommending that services rendered in opposing the Wilfs' "motion to amend their counterclaims" (Db41) be included in the fee award, the Special Master explained that:

> Had the counterclaim been successful, it could have greatly reduced any damages awarded to Halpern at best and mean that Halpern's affirmative claims [including his RICO claims] would be dismissed at worst. Therefore, any opposition to those allegations -- either through blocking the amendment from being filed or later substantively disproving the allegations -- would further the ultimate result achieved. (39076a)

- ***Testimony Regarding Pre-SOL Facts was "Reasonably Required" to Establish Halpern's RICO Claims within the SOL Period***

The Special Master also expressly found that adducing testimony of pre-SOL facts – even with respect to events that occurred in the 1980s – was, in fact, "reasonably required" to establishing NJRICO liability after October 1, 2004. With respect to the testimony of Joseph Schochet and Michael Rottenberg (Db42), Judge Orlofsky found …

> th[at] evidence, although of events long before the statute of limitations period, was still relevant to proving that actions taken after October 2004 were RICO violations. Evidence regarding the partnership agreements went towards establishing who were members of the partnership, and the terms of the agreement.
>
> The [Wilfs]' thefts were not robbing by gunpoint or breaking into Plaintiffs' homes -- they were committed by misusing funds entrusted to them as part of a partnership. Whether or not [the Wilfs] were justified in their use of those funds hinged upon the agreement between the parties. If they had agreed to distribute money in a particular way or allow for self-dealing, all of those facts would be relevant to the ultimate issue of whether [the Wilfs]' particular distributions or payments were an act of theft or proper. This analysis is necessary to assess [the Wilfs]' actions at any time during the partnership -- including after October 2004. Similarly, although [the Wilfs] are correct that this evidence was relevant to breach of contract claims, that fact does not exclude it from also of proving Plaintiffs' RICO claims. (39079a-80a)

Judge Orlofsky similarly found that, despite constituting evidence of only pre-SOL facts, the testimony of Linda White, Thomas Collins, and Dr. John Crow was essential to defeating the Wilfs' "claims of right" defense which, if left unrebutted, would have defeated *all* of Halpern's NJRICO claims. Excluding the work done to adduce this testimony from a fee award would be to improperly…

> … ignore[] the relevancy that the Wilfs' [own] defenses give to this testimony. [The Wilfs] argued that they were entitled to various payments because of additional services they rendered to the partnership for the development and management of the Rachel Gardens project, referred to as "theoretical" or "hypothetical" fees. Jarwick II at *55-*56. Judge Wilson held, and the Appellate Division affirmed, that there was sufficient evidence to demonstrate "the amount of work [the Wilfs] put into the

> development or management of Rachel Gardens 'was never quantified in any way whatsoever'" and that there was "no basis whatsoever to award [the Wilfs] the theoretical fees they were seeking." Id. at *56. That finding turned those fees into improper payments and in turn the basis for various RICO violations.
>
> *[The Wilfs] attempt to justify fees given after October 2004 with work performed prior to October 2004 squarely puts those events at issue for all of Plaintiffs claims, including RICO.* Whether or not these hypothetical or theoretical fees were validly earned would depend not only on the agreement and the individual [Wilfs]' actions, but also Halpern's actions in developing the Project; if Halpern had done the work developing Rachel Gardens, it would demonstrate that any development fees to [the Wilfs] were improper. As [the Wilfs] concede, each of these witnesses testified about important steps in the initial development of the Rachel Gardens project, and that they had interactions with Halpern but little to no interaction with any of the individual Defendants. Db at 40-41. (39080a-81a)

- ***Halpern Should Not Be Awarded Fees for "All of the Work Done to Establish All of the Facts" at Trial" (Db38)***

Judge Orlofsky recommended that "despite the changed statute of limitations window for Plaintiffs' NJRICO claims, Plaintiffs' NJRICO and non-RICO claims still shared the same common core of facts, and therefore the previous fee award should not be reduced for trial-level work." (39064a) However, in recommending the original fee award not be reduced, Judge Orlofsky did *not*, as the Wilfs disingenuously assert on this appeal, simply award Halpern fees for "everything Plaintiffs did to establish contract … and non-RICO claims" at trial. (Db39) To the contrary, and as memorialized in his original 2013 Reports and Recommendations, Judge Orlofsky expressly

recommended a "$100,000 reduction [of Halpern's lodestar amount] for time spent on non-RICO issues …." (14598a-99a).

- ***Opposing the Wilfs' Appeal was Necessary to Preserve Halpern's Successful NJRICO Claims During the SOL Period***

In recommending that fees be awarded for work done in defending against the Wilfs' unsuccessful appeal from the Trial Court's findings in his favor with respect to NJRICO, as well as its rulings on non-RICO causes of action – specifically breach of fiduciary duty and punitive damages – Judge Orlofsky found more than just "some overlap" or "tangential connection" between the appeal and Halpern's NJRICO claims (Db43). In fact, the Judge found that opposing the appeal was essential to preserving all of Halpern's NJRICO claims, including those in the SOL Period. As Judge Orlofsky explained:

> [A] key issue in this case is whether [the Wilfs] <u>believed</u> they were acting appropriately in their use of partnership funds, as the predicate acts for Plaintiffs' RICO claims required a knowing or purposeful *mens rea*. [The Wilfs]' failure to produce financial records is circumstantial evidence of their mental state, as a failure to produce could be interpreted as a means of hiding their conduct from Plaintiffs. … (39120a)

In fact, Judge Wilson did find the Wilfs liable for RICO predicate acts based in part on her concurrent finding that they deliberately withheld information concerning the partnership's finances from Halpern, notwithstanding their known fiduciary duty to disclose without demand. On appeal, the Wilfs attempted to upend the predicate for those findings, and

specifically appealed from Judge Wilson's finding that they ever were bound by such a duty to their partners. (39120a) Thus, Judge Orlofsky properly found that Halpern's "opposition to this argument furthered Plaintiffs' RICO claims." (39120a)

The Special Master recommended awarding NJRICO fees for work done opposing the Wilfs' appeal from the Trial Court's punitive damage ruling for similar reasons. Having read the parties' Briefs on appeal, Judge Orlofsky aptly noted that *the Wilfs themselves conceded* that reversing the Trial Court's findings regarding their "mental states" for purposes of vacating punitive damages would also be grounds for vacating the Court's RICO liability determination:

> [The Wilfs] … argu[ed on appeal] that … punitive damages were improper because: (1) they did not act with "actual malice or accompanied by a wanton and willful disregard," which made the award both improper and excessive; and (2) the Trial Court erred in failing to allocate punitive damages between the different tort claims. (Dab at 52-55.) Arguments regarding [the Wilfs]' mental states overlaps with the mental states needed to satisfy the mens rea requirements for the RICO predicate acts, and stem from the same factual basis. See Remand R&R 1 at V(B). *Had the Appellate Division determined there was no evidence on the record to establish the necessary mental state for punitive damages, it would have also meant there was insufficient evidence on the record to establish the predicate acts necessary for Plaintiffs' RICO claims* (*an argument [the Wilfs] also made on appeal, see Dab at 66-67)*. Therefore, I recommend opposing this argument was in furtherance

of Plaintiffs' RICO claims. (39121a)[15]

### c. Judge DeAngelis Adopted the Special Master's Remand R&Rs

Judge DeAngelis rejected the Wilfs' objections to Judge Orlofsky's comprehensive Reports and Recommendations finding, among other things:

> Special Master Orlofsky conducted a rigorous and detailed analysis of the claimed fees and costs. He fully explained why, even with the new limitations period set by the Appellate Division, the attorneys' fees award should include fees incurred prior to the beginning of the limitation period.
>
> As Special Master Orlofsky recognized, the work performed by plaintiffs' counsel prior to October 1, 2004, established the existence of the RICO claim and provided the evidence in support of plaintiffs' RICO claim. Special Master Orlofsky determined that the work performed before and after October 1, 2004, relating to the common law claims were inextricably intertwined with the plaintiffs' RICO claims. Special Master Orlofsky provided extensive detail regarding the billings, the reasonableness of the billings and the work performed. Additionally, he provided a comprehensive explanation as to why, even with the Appellate Division's decision, he concluded that his previous attorneys' fees award determination of … $6,861,098.00 to Halpern should not be disturbed.
>
> ***
>
> Special Master Orlofsky's Report explains in detail how the facts as found by Judge Wilson, combined with his review of the billing records provided by plaintiffs demonstrate that plaintiffs are entitled to attorneys' fees and costs incurred before October 2004. Contrary to defendants' arguments, Special Master Orlofsky did not "rubber-stamp" his 2013 Report. Special Master Orlofsky provided support for his recommendation that the legal work on the non-

[15] Significantly, Judge Orlofsky excluded from his recommendation any fees incurred in opposing the Wilfs' arguments regarding "the apportionment of punitive damages between different tort claims … as the outcome of that argument would have no effect on Plaintiffs' RICO awards." (39122a)

> RICO claims before October 2004 provided evidence that was reasonably required to establish the RICO claims. Further, he provided support for his determination that the work performed on the non-RICO claims was intertwined with and could not be separated from the legal work that resulted in the discovery of the RICO violations. (40066a-70a)

Judge DeAngelis also conducted his own independent review of Halpern's fee application, explaining:

> The Court also had the benefit of reviewing the billing records submitted and reviewed by Special Master Orlofsky. The findings by Special Master Orlofsky are consistent with the Court's review of the billing records. The records contain detailed explanations of the work performed and the amount of time expended. The Court agrees that certain reductions, as determined by Special Master Orlofsky, are appropriate. (40067a)
>
> ***
>
> Aside from Special Master Orlofsky's findings, *the substantial factual record elicited during trial supports a finding that the legal work performed prior to October 2004 elicited the evidence necessary to prosecute the RICO claims*. (40071a)

**d. The Award of Prejudgment Interest**

Citing relevant opinions of this Court and of our Supreme Court, Judge DeAngelis recognized that prejudgment interest is intended to be "compensatory" and that the rate thereof, although set within the sound "discretion of the Court," must be "based on equitable principles." (40079a) "With this guidance in mind," for the period October 1, 2003 through July 9, 2014 (when Rachel Gardens was sold), Judge DeAngelis awarded prejudgment interest to Halpern at the parties' previously agreed upon "investment return on

rate of interest on partnership distributions that plaintiffs were not properly provided, "the equity rate of 8.875%," compounded.[16] (40001a-3a, 40005a, 40009a) However, Judge DeAngelis found that equity required applying a different rate of prejudgment interest from July 10, 2014 through November 16, 2022, holding:

> …[A]fter the distribution of the partnership assets in July 2014, it would be inequitable to continue prejudgment interest at 8.875%. Likewise, applying the much lower post-judgment statutory interest rate of 2.25% would not fairly compensate plaintiffs for the loss of the use of the funds that they were entitled to pending the Final Order. Thus, for the period of time from the distribution of partnership assets (July 2014) to the entry of the accompanying Order (November 16, 2022), prejudgment interest shall accrue at the average prime interest rate for that period of time, 3.935%. (40003a)

The Chancery Court concluded its findings by holding that Halpern is entitled to post-judgment interest at the Rule rate (2.25%) November 16, 2022 forward.

[16] As the Court will note, there was a typographical error contained in point "6" of Judge DeAngelis' Order entered on November 16, 2022 (39965a), insofar as it stated "[t]he damage awards are subject to prejudgment interest *up to the date of this Order* at a rate of 8.875% until the distribution of partnership assets," which was on July 9, 2014, earlier in time. That error was corrected in the Court's Statement of Reasons section of the Order (40003a) and in the Final Judgment on remand, entered on January 4, 2023. (40005a)

# ARGUMENT

## POINT I

## THE PUNITIVE DAMAGE AWARD IS PROPER AND COMPLIES WITH DUE PROCESS

### A. The Award Is Supported by Clear, Convincing and Substantial Evidence

The Wilfs' rather offensive assertion that "the record before the trial court did not warrant punitive damages" (Db46) is belied, both on the facts and law, by this Court's recent and remarkably analogous decision in Devli v. Tasci, A-2573-20, 2022 WL 17491290 (N.J. Super. Ct. App. Div. Dec. 8, 2022).

In Devli – a partnership dispute in which the defendant (like the Wilfs here) was found to have engaged in a systematic and deliberate campaign of theft and deceit designed to loot the assets of the parties' joint real estate venture – this Court affirmed the Trial Court's award of punitive damages in an amount equal to 2.3 times the compensatory damages suffered by the plaintiff, emphasizing that defendant --

> as the managing co-venturer, had a fiduciary obligation to his co-venturers, and that he breached that obligation. In his position of management and control, [defendant] treated the venture's bank accounts as his own, knowing ... [plaintiff] would not be monitoring or reviewing the day-to-day activities. He freely moved money in and out of venture accounts, into and through his personal accounts. ... The net result of his actions is that he withdrew from the venture substantial sums that belonged to [plaintiff] ... by abuse of his fiduciary position.
>
> ***

> Defendant's conduct was willful, wanton, and evidenced deceit such that it met the measure of reprehensibility warranting a punitive damage award.

Devli, 2022 WL 17491290 at *4-6.[17]

Based upon the Trial Court's factual findings at bar, as re-focused and applied on remand by Judge DeAngelis to the SOL period in question, an award of punitive damages at a 2.5 multiple is even more appropriate. Following a 207-day trial and by clear and convincing evidence, Judge Wilson determined that the Wilfs, motivated by unfathomable greed and extraordinary arrogance, intentionally and purposefully misappropriated – and then fraudulently concealed from their partners – more than $50 million from the Rachel Gardens Project in wanton and willful breach of their fiduciary duties, in violation of the New Jersey Code of Criminal Justice, N.J.S.A. 2C:1-1 *et. seq.*, and in violation of New Jersey's racketeering statute, N.J.S.A. 2C:41-1 *et. seq*. In Judge Wilson's own words: "[T]he Wilf Defendants cheated [Halpern] out of millions of dollars by engaging in wide-scale fraud and deception …." (14480a) "The Wilfs didn't just take a little extra money. They robbed their partners." (246T67:15-17)

> And if compensatory damages are to be the only damages awarded in this case, then there is absolutely no motivation for any managing

[17] The Wilfs undoubtedly will argue that this Court's decision in Devli was unpublished; but so was its 2018 Opinion at bar. That fact does not make either of those decisions any less instructive.

> partner to run a partnership equitably because, if somebody catches him or her, they will just bring them to court and then they will have to compensate with … no additional damage. … (223T77:17-78:8)
>
> ***
>
> [R]emoving all of the monies for your own benefit from a partnership at the end of the year and calling them whatever you particularly feel like calling them at that time is inappropriate. It is willful, wanton disregard for the rights of your partners. …. (225T43:19-45:2)
>
> ***
>
> The Wilfs are lawyers, they have been lawyers for extended periods of time. Zygi Wilf is the principal partner in his own law firm, but not only are they lawyers, they are lawyers who absolutely must be familiar with real estate law. They have to be, because that's what they do. They have several hundred real estate entities …, some of them all over the world, they have over 200 garden apartment projects, and they have been in this business for over 50 years as a family, so they must know what the law is associated with real estate partnerships.… (237T17:18-19:1)

On appeal, this Court agreed, finding that there was "sufficient evidence in the record to support the award of compensatory, punitive, and RICO damages" against the Wilfs (2018 Op. at *30), although remanding it for the purpose of ensuring that punitive damages are awarded based solely upon the Wilfs' misconduct during the SOL period. [18]

[18] Every liability finding affirmed by this Court in its 2018 Opinion justified Judge Wilson's decision to award punitive damages. See 2018 Op. at *19 ("the record fully supports the … determination that defendants had misused partnership funds …."); id. at 20 ("The record … supports the … determination that defendants improperly withdrew partnership funds to pay themselves management fees."); id. ("there is sufficient credible evidence in the record … that defendants had not shown they were entitled to the hypothetical and theoretical management fees they were seeking"); id. at 22 ("there is sufficient credible evidence … to support the … findings of fact and conclusions of law

The Wilfs' suggestion on appeal that Judge DeAngelis was required to completely re-consider Judge Wilson's determination that the Wilfs' criminal conduct warranted the imposition of punitive damages borders on the farcical, particularly in view of the established and binding facts of this case.

Nonetheless, on remand, Judge DeAngelis conducted a full, independent review of the trial record. Armed with a subsequent forensic analysis performed by Plaintiffs' forensic accountant (Mr. Barsky) determining the magnitude of the Wilfs' misappropriation of partnership funds during the applicable SOL period (HPa11-29), Judge DeAngelis found an award of substantial punitive damages against the Wilfs to be warranted. Judge DeAngelis amply supported his decision with a painstaking application of many – but certainly not all – of the Trial Court's binding findings and conclusions, satisfying each and every element of the Punitive Damages Act. (39970a-89a).[19]

By orders of magnitude, Judge DeAngelis found that the monetary harm inflicted by the Wilfs upon Halpern was quantifiably greater during the 6-year,

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on plaintiffs' non-RICO claims"); id. at 23 ("there is sufficient credible evidence in the record to support the … findings of fact and conclusions of law on plaintiffs' RICO claims")

[19] Halpern will not here burden the Court with a redundant and unnecessary recitation of the law on punitive damages, which was set forth at length by this Court in its 2018 Opinion and which properly was applied to the Trial Court's binding findings of fact and conclusions of law by both Judge Wilson initially, and by Judge DeAngelis on remand.

Non-RICO SOL Period, than it was during the preceding 16 years. During the period 1998 through September 30, 2003, the Wilfs misappropriated a total of $22,366,349 in partnership funds. During the non-RICO SOL Period, they stole $26,962,569. (39972a -73) Moreover, the trial evidence revealed that the Wilfs insidiously increased their misappropriation of partnership funds – both in terms of methodology and amount – in direct response to the Court's decisions that confirmed their partners' rights.

The Wilfs' continuing attempt to frame this action as nothing more than a "commercial case," "the essence of [which] … is limited to a breach of contract" (Db48), should offend this Court; indeed, it is utterly insulting. Judge Wilson roundly rejected such specious characterization, finding the Wilfs' actions to be "much more than a breach of fiduciary duty and a breach of contract." See 235T60:6-14. And this Court, in its 2018 Opinion, soundly rejected the Wilfs' identical aversions, finding that it was "convinced th[e Wilfs'] contention[] lack[ed] sufficient merit [even] to warrant discussion." (2018 Op. at *22)

The cases cited by the Wilfs in an attempt to escape the inevitable yet earned consequences of their own malfeasance are inapposite. In Sandler, only contract claims were upheld on appeal. Even so, this Court nonetheless recognized that punitive damages can be awarded in "contractual litigation … involving a fiduciary relationship …." See Sandler v. Lawn-A-Mat Chem. &

Equip. Corp., 141 N.J. Super. 437, 449 (App. Div. 1976), holding modified by Ellmex Const. Co. v. Republic Ins. Co., 202 N.J. Super. 195 (App. Div. 1985). The issue of punitive damages never reached appeal in Ellmex. By contrast here, this Court has affirmed the Trial Court's findings and conclusions that the Wilfs repeatedly and deliberately violated the fiduciary duties they owed to Halpern in the most fundamental of ways.

The Wilfs' reliance on Buckley is similarly misplaced. Buckley had nothing to do with the propriety of awarding punitive damages against partners who have been found to have breached their fiduciary duties. "The fundamental question in th[at] case," as explained the Supreme Court, "[wa]s whether a customer may recover against a drawee bank for mental anguish and punitive damages caused by the bank's wrongful dishonor of the customer's check drawn payable to a third party." Buckley v. Trenton Saving Fund Soc., 111 N.J. 355, 357 (1988). Even so, the Supreme Court held in Buckley that "[p]unitive damages are allowable … when the wrongful dishonor reflects actual malice by a bank officer toward the customer." See id. If punitive damages can be awarded for dishonoring a check, they certainly are proper where, as here, partners maliciously dishonor their fiduciary duties and steal millions of dollars from their partners.

The Wilfs' further assertion that "Leonard[]'s and Mark[]'s [purported] inaction does not permit an award of punitive damages" (Db50-51) must be rejected. As set forth in this Court's 2018 Opinion (which is law of the case):

> The record does *not* support defendants' claim that Mark and Leonard only performed ministerial functions and essentially acquiesced in Zygmunt's management of the partnership.
>
> *Rather, the record supports the trial judge's finding that Mark and Leonard engaged in conduct that warrants imposition of liability upon these defendants.* In her decision, the judge found that the Wilfs had operated their businesses with cooperation and coordination. The judge noted that they worked with their accountants in determining the monies that were and were not available.
>
> … [T]he evidence showed Mark dealt with payroll and benefits, and the hiring of key people. Mark also reviewed the financial statements for Rachel Gardens. Leonard reviewed the project's financial statements and other financial documents.
>
> *We therefore reject defendants' contention that there was insufficient evidence for the award of ... punitive ... damages against Mark and Leonard*.

2018 Op. at *30. Similarly, Mendez is inapposite on the facts and the law. The plaintiffs in that case proved nothing more than a "continuous pattern of negligence" in support of their unsuccessful bid for punitive damages. Mendez v. United States, CV 14-7778(NLH/KMW), 2017 WL 477693, at *3 (D.N.J. Feb. 6, 2017). By contrast here, the Chancery Court awarded punitive damages

because what was done in this case was done with "a willful disregard of the rights of the[ir] partner[] … Josef Halpern. And it was clearly not negligent. It was not even grossly negligent. It was grossly willful." (39970a)

Even more absurd is the Wilfs' assertion that "Zygmunt Wilf's conduct does not merit an award of punitive damages." (Db48). The "issue was [not, as Zygmunt suggests] whether a group of sophisticated and wealthy business people were compensated properly" by him. (Db48) Rather, "this case involved a massive accounting fraud" in which the Wilfs "cheated [Halpern] out of millions of dollars by engaging in wide-scale fraud and deception over the course of many years" (14480a; 14581a); and it was "Zygi who described himself as the master chef. He was the conductor. He was the overseer of the enterprise …." (225T66:20-67:4). That the harm Zygmunt caused Halpern was "purely economic" or that Halpern might not have been "financially vulnerable" (Db49) does not detract from the reprehensibility of his conduct. In all events, this Court has upheld an award of punitive damages where the harm was purely economic and vulnerability was not an issue. See Devli, 2022 WL 17491290 at *6.[20]

[20] As found by Judge Wilson, "it is very clear from New Jersey case law and our punitive damages statute that economic harm can be awarded punitive damages and in some instances punitive damages have been awarded in the case of economic harm many times the compensatory damages." (242T210:20-211:7) See, e.g., Baker v. National State Bank, 161 N.J. 220 (1999); Saffos v. Avaya,

### B. A Ratio of 2.5x Compensatory Damages is Anything But Excessive in Light of the Serious Harm Done to Halpern and the Degree of Reprehensibility of the Wilfs' Conduct

The Wilfs assert that the "disparity between the actual harm suffered [by Halpern] and the punitive damages awarded [against them] is … unreasonable, … unjustified[,] … inequitable and contrary to New Jersey law and Due Process principles." (Db53) Here again, Devli is instructive.

> Due process requires appellate review of the award for reasonableness. … Our Supreme Court recently addressed this issue in Pritchett v. State, 248 N.J. 85, 112-13 (2021). The Court held that while BMW "introduced the consideration of ratios between compensatory and punitive damages ... *mathematical formulae alone cannot encapsulate the multiple facets of the Due Process Clause or address all of its concerns*...." Id. at 112 (citing BMW, 517 U.S. at 582). Thus, "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." Ibid. (citing State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425-26 (2003)). *Punitive damage awards with a single-digit ratio, i.e., less than ten, generally do not violate due process*. Id. at 112-13 (citing State Farm, 538 U.S. at 425).

Devli, 2022 WL 17491290 at *6. The trial court in Devli had determined that an appropriate punitive damage ratio in that case to be 2.3 times compensatory damages. Affirming on appeal, this Court held: "the punitive damage amount

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Inc., 419 N.J. Super. 244, 266-67 (App. Div. 2011); and McConkey v. AON Corp., 354 N.J. Super. 25, 56 (App. Div. 2002).

was well within the bounds of the single-digit ratio. Given defendant's conduct, the award amount did not violate due process." Id.[21]

The Wilfs' conduct in this case was, by orders of magnitude, more reprehensible than that of the defendant in Devli, and the actual harm to Halpern was far greater than his compensatory damages awarded on remand reflect.[22] Thus, the 2.5 ratio found by the Chancery Court to be appropriate, both after trial and on remand, did not violate due process, nor was it excessive. Instead, it properly served to effectuate the dual purposes of an award of punitive damages, which is "to penalize and to provide additional deterrence against a defendant to discourage similar conduct in the future." See 2018 Op. at *24 (quoting N.J.S.A. 2A:15-5.10). As stated by our Supreme Court in Tarr v. Bob Ciasulli's Mack Auto Mall, Inc., 194 N.J. 212, 218 (2008), an award of punitive

[21] See Saffos (approving 5x multiple); Baker (6x multiple); McGinnis v. Am. Home Mortg. Servicing, Inc., 901 F.3d 1282, 1290 (11th Cir. 2018) (5.9x multiple); Saccameno v. Ocwen Loan Servicing, LLC, No. 15 CV 1164, 2019 WL 1098930, at *31-32 (N.D. Ill. Mar. 1, 2019) (5:1x multiple); John Ernest Lucken Revocable Tr. v. Heritage Bancshares Grp., Inc., No. 18-3012, 2018 WL 7821656 (8th Cir. Nov. 14, 2018) (8:1x multiple); Yung v. Grant Thornton, LLP, 563 S.W.3d 22, 72 (Ky. 2018) (4.1x multiple); and First Gov't Lease Co. v. Nw. Scott Cty. Volunteer Fire Dep't, 2018 Ark. App. 419, 17 (2018), reh'g denied (Oct. 31, 2018) (8:1x multiple).

[22] As noted herein above, this Court's prior panel's strict application of the SOL reduced Halpern's damages by over $23 million, including a reduction in the amount of $3,133,028, representing his 25% share of partnership funds purloined by the Wilfs prior to October 1, 2003.

damages "should be loud enough to be heard, [as the] "wrongdoer must feel the sting of an appropriately sized punitive damage penalty." Id. at 219-20.

## POINT II

## THE ATTORNEY'S FEES AWARD TO HALPERN ON REMAND SHOULD NOT BE DISTURBED

### A. The Standard on Appeal

As this Court is aware, trial courts are invested "with wide latitude in resolving attorney-fee applications." Furst v. Einstein Moonjy, 182 N.J. 24, 25 (2004). For that reason, appellate courts "review the trial court's award of fees and costs in accordance with a deferential standard." Such an award "will be disturbed only on the rarest occasions, and then only because of a clear abuse of discretion." Rendine v. Pantzer, 141 N.J. 292, 317 (1995). See also Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001) (Rendine's "deferential standard of review guides our analysis"). An appellate court should reverse a trial court's award of fees for abuse of discretion only when the court's decision "was based on irrelevant or inappropriate factors, or amounts to a clear error in judgment." Garmeaux v. DNV Concepts, Inc., 448 N.J. Super. 148, 155-56 (App. Div. 2016).

In Furst, our Supreme Court "strongly discourage[d] the use of an attorney-fee application as an invitation to become mired in a second round of litigation." 182 N.J. at 24. In this case, the "second round of litigation" on

attorney's fees resulted from this Court's prior disagreement with Judge Wilson's liberal application of the SOL. The Wilfs' current, perfunctory assertions notwithstanding, pursuant to N.J.S.A. 2C:41-4c and settled case law, Halpern was entitled to, and properly has been awarded, fees and costs in the amount determined by two experienced jurists. By virtue of Judge Orlofsky's and Judge DeAngelis' thorough and painstaking reconsideration, analysis and confirmation of Halpern's fee award on remand, this Court should not accept the Wilfs' invitation to further prolong this 31-year old litigation by requiring yet a "third round of fee litigation." There has been no "abuse of discretion," no "irrelevant or inappropriate factors" utilized and "no clear error in judgment" on remand.[23] The fee award should be affirmed.

## B. The Fee Award to Halpern is Proper and Should Stand

As this Court previously recognized, where, as at bar, a plaintiff presents claims for which fees can be awarded along with claims for which such fees cannot be awarded, attorneys' fees for all of the time devoted by counsel to the case can be awarded if the work on the unrelated claims

> "can[] be deemed to be part of the pursuit of the ultimate result achieved." …. A suit will not be considered a collection of separate

[23] Rule 4:41-5(b) further commands that the court "shall accept the master's findings of fact unless contrary to the weight of the evidence." Furthermore and as the Wilfs' counsel correctly points out, "a party against whom a Special Master has made an adverse factual finding has a heavy burden to overturn that finding." (Db26) As set forth herein, the Wilfs have not met that burden.

> discrete claims if it rests on "a common core of facts" or is "based on related legal theories." … Moreover, "[i]f a plaintiff achieves excellent results in a lawsuit, counsel fees should not be reduced on the ground that the plaintiff did not prevail on each claim advanced." …. Litigants may in good faith raise alternative legal theories for relief, and the court's "rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee."

See 2018 Op. at *28.[24] Following Hensley v. Eckerhart, 461 U.S. 424, 435 (1983). Accord Silva v. Autos of Amboy, Inc., 267 N.J. Super. 546, 558-59 (App. Div. 1993); Singer v. State, 95 N.J. 487, 500 (1984); DePalma v. Bldg. Inspection Underwriters, 350 N.J.Super. 195, 218-19 (App. Div. 2002); and Northeast Women's Ctr. v. McMonagle, 889 F.2d 466, 476-77 (3d Cir. 1989).

Here, Judges Orlofsky and DeAngelis correctly found that all of Halpern's claims were premised upon the identical underlying facts – the Wilfs' theft and concealment of partnership funds. (39036a, 39056a-64a, 39996a-40001a). Indeed, the Wilfs themselves previously have conceded that very point, stating:

> [E]very bad act of which the Wilfs are accused is alleged to constitute a RICO predicate act. *However the Wilfs' supposed misconduct is characterized, it ultimately consists of a single set of actions* -- making payments to themselves or related entities out of the partnership which should have remained to be distributed to the partners. No matter how many different labels are placed on the identical conduct, the Court has found such conduct to constitute RICO predicate acts. (14265a)

[24] Contrary to the Wilfs' assertion, this Court did *not* hold that "compensable work must be limited to that which was 'reasonably devoted to [Halpern's] pursuit of [his] … RICO claims.'" (Db37) Nor is "the test … whether *all* of the work done to establish *all* of the facts 'was reasonably devoted to [Halpern's] pursuit of [his] RICO claims.'" (Db38; emphasis supplied)

Contrary to the Wilfs' assertions in their Appellant's Brief (Db39) and as detailed herein above, on remand both Judges Orlofsky and DeAngelis – and in particular Judge Orlofsky – "tied" and "related" the work performed by Halpern's counsel in developing the pre-SOL facts to establishing his RICO claims within the RICO SOL Period.[25] Both jurists also found that the work Halpern's counsel undertook to establish the pre-SOL facts was critical to debunking the Wilfs' "claim of right" and "true-up" defenses which, if proven, would have sounded the death knell of Halpern's NJRICO causes of action. Finally, both jurists determined that in order to prove the damages incurred by Halpern during the RICO SOL Period, a retrospective accounting of the facts and finances back to "day one" of the partnership was required. See 14510a-11a, 39035a, 390337a-38a, 39062a. See also Bingham v. Zolt, 823 F. Supp. 1126, 1137 (S.D.N.Y. 1993), aff'd, 66 F.3d 553 (2d Cir. 1995).

The record facts, as detailed by Judges Orlofsky and DeAngelis and set forth at length supra, also refute the Wilfs' assertion that Judge Orlofsky improperly recommended an award of fees to Halpern in connection with his counsel's procurement of evidence from witnesses who possessed personal

[25] The Order on Remand itself puts the lie to the Wilfs' demonstrably false assertion that Judge DeAngelis "merely adopted the Special Master's Report without meaningful analysis, comment, or thoughtful consideration of the report of former Chief Judge Jose Linares." (39992-5a)

knowledge of the pre-SOL facts found relevant to establishing Halpern's NJRICO claims during the SOL Period (as well as debunking the Wilfs' affirmative defenses thereto); e.g., the agreements reached between the Wilfs and Halpern at the inception of their joint venture, as well as their respective roles in the buildout and management of Rachel Gardens. Furthermore, neither of the remand Judges "treated the analysis [of Halpern's fee application] as all-or-nothing." (Db38) As explained herein and as set forth in the Remand R&Rs, the lodestar – both for trial work and on appeal – was reduced by Judge Orlofsky to eliminate "categories of legal work" based upon his "granular analysis of time entries [and] specific projects" (Db39). See 14548a-67a, 14593a-99a, 39036a-37a, 39149a-154a; 39165a-67a, 39171a-73a, 39179a-39494a-39360a.[26]

NJRICO Fee awards are not, as the Wilfs speciously suggest, contingent upon how many RICO claims a party does or does not assert. (Db12) See Silva, N.J. Super. at 559 (holding lower court's division of counsel fee demand by number of counts for relief alleged improper).

Halpern's fee award is *not* "inconsistent" with this Court's prior directives. (Db34) As explained by Judge Orlofsky, this Court did not, as the

[26] The assertion that Judge Orlofsky "did not engage in the required granular analysis of time entries or specific projects" (Db39) is demonstrably false.

Wilfs assert, hold that "there was no common core of operative facts" between Halpern's RICO and non-RICO claims (Db37):

> I recognize that the sentence [from the 2018 Remand] "We are convinced the court erred by finding that all of Jarwick's and Halpern's claims rested on the same common core of operative facts," taken in isolation, would tend to demonstrate otherwise.[27] However, once the context of the sentence is reintroduced, it demonstrates that the basis for that decision was the Trial Court's failure to draw its conclusion with the correct statute of limitations for RICO damages in mind. …
>
> The Appellate Division stated it was "not convinced" that, given the new statute of limitations period, an award of attorneys' fees that accounted for time used to uncover "wrongful acts committed as far back as 1988" was "justifie[d]." Jarwick II, at *80. This is unsurprising given that this question within the contours of the 2004 statute of limitations period was not a question raised on appeal, and therefore was not briefed by the parties. Now, with the benefit of the arguments by the parties, for the reasons stated infra I am convinced that this award is justified and make a recommendation for the same attorney fees. (39057a-58a)

Judge Orlofsky's understanding of this Court's mandate on remand is sound. See e.g. F.J.C. v. J.L.C., A-1776-20, 2022 WL 1633799, at *5 (N.J. Super. Ct. App. Div. May 24, 2022) (explaining: "although our prior opinion suggested … plaintiff had acted in bad faith …, we do not interpret our remand instructions to require the [remand] court to find bad faith on the part of plaintiff …. Rather, we interpret our … instructions to require the … court to consider plaintiff's

[27] The Wilfs' assertion that "the Special Master disregarded the Court's opinion" (Db34) is patently false.

conduct as part of the totality of the circumstances for determining whether to award counsel fees.")

The fact that Judge Orlofsky confirmed his original fee recommendation did not, as the Wilfs suggest, violate this Court's mandate. As cogently explained by Judge Orlofsky, "there is a large distance between the Appellate Division remanding an issue back to the trial court for reconsideration, and the Appellate Division barring the same decision from being made again." (39058a) See e.g. F.J.C. v. J.L.C., 2022 WL 1633799 at *5 (affirming remand court's decision to again decline to award attorney's fees). In all events, Judge Orlofsky's determination of fees on remand was made only after a thoughtful and thorough analysis of the facts and parties' arguments, and was memorialized in a 64-page detailed report. (39024a-89a)

The Wilfs' assertion that Halpern's lodestar should be reduced for work done in connection with his unsuccessful cross-appeal (Db44) – which contention fails to address Halpern's counsel's work in defending the Wilfs' appeal – is wrong as a matter of law. Courts uniformly have held that a reduction of the lodestar would be inappropriate where, as here, in order to obtain a favorable result on his successful claims, a plaintiff "had to litigate everything else." See e.g. Eichenlaub v. Twp. of Indiana, 214 F. App'x 218, 222 (3d Cir. 2007); Abrams v. Lightolier Inc., 50 F.3d 1204, 1222 (3d Cir. 1995). See also

L.T. v. Mansfield Twp. Sch. Dist., 2009 WL 1971329 (D.N.J. 2009); and Tran v. Tran, 166 F. Supp. 2d 793, 802-03 (S.D.N.Y. 2001).

Finally and contrary to the Wilfs' suggestion, the Supreme Court in Hansen did not impose any new or more exacting standard for evaluating fee applications. In fact, after reviewing its longstanding precedent under "Rendine and its progeny," the Supreme Court expressly affirmed "[t]hat standard" as what "govern[ed] [its] determination of th[e Hansen] appeal." See Hansen v. Rite Aid Corp., 253 N.J. 191, 219 (2023), reconsideration denied, 253 N.J. 552 (2023). In all events, the record here unequivocally establishes that the Judges on remand did, in fact, "undert[a]k[e] the meticulous analysis that [the Supreme Court] envisioned in Rendine." Hansen, 253 N.J. at 221. "In [his] detailed [and several recommendations] and [tables], [Judge Orlofsky] [did] identif[y] categories of legal work that were improperly included in [the parties'] fee application, … [and] excluded time spent on … categories of legal work that did not further plaintiff's cause." Hansen, 253 N.J. at 221 (2023). See 14547a-67a, 14529-31a, 14566a-68a, 14578a-80a, 14593a-99a, 14711a, 14717a-18a, 14727a-28a, 14733a-35a, 14739a-40a, 14743a-44a, 39036a-37a, 39149a-154a; 39165a-67a, 39171a-73a, 39179a-39494a-39360a.

## POINT III

## THE CHANCERY COURT'S EQUITABLE AWARD OF PREJUDGMENT INTEREST WAS APPROPRIATE

"The awarding of prejudgment interest is subject to the trial judge's broad discretion in accordance with principles of equity." Musto v. Vidas, 333 N.J. Super. 52, 74 (App. Div. 2000). Courts on appeal "defer to the trial judge's exercise of discretion involving prejudgment interest unless it represents a manifest denial of justice." Id. As this Court has explained:

> The primary consideration in awarding prejudgment interest is that "the defendant has had the use, and the plaintiff has not, of the amount in question; and the interest factor simply covers the value of the sum awarded for the prejudgment period during which the defendant had the benefit of monies to which the plaintiff is found to have been earlier entitled."

Id. at 74 (App. Div. 2000) (quoting Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474 (1974)). Accord West Virginia v. United States, 479 U.S. 305, 310 n.2 (1987). As further expounded by our Supreme Court:

> This consideration has controlled, and interest has been imposed even where … the defendant had in good faith contested the validity of the claim. Thus, in *Kamens v. Fortugno, Supra*, 108 N.J.Super. at 552—553, 262 A.2d 11, it was held that prejudgment interest on a claim, the amount of which is ascertained, is not avoided [even] by honest disputation over legal liability. *The court observed that 'defendants had the use of the money and presumably earned such interest, dividends or other benefits therefrom as were available,' whereas the plaintiff was deprived of any such enjoyment.*

Rova Farms, 65 N.J. at 506. The Chancery Court properly found on remand that prejudgment interest should run through the date of entry of its new "final" judgment. See Bussell v. DeWalt Products Corp., 259 N.J. Super. 499 (App. Div. 1992).[28]

Contrary to the Wilfs' assertion, Judge DeAngelis was well within his discretion to find that: (i) prejudgment interest should be compounded; (ii) equity required applying different interest rates to different periods of time; and (iii) the rate should be set at the parties' agreed upon "equity rate" (8.875%) through the sale of the partnership's assets, and at the average prime rate (3.395%) thereafter.[29] Judge DeAngelis more than "adequately explain[ed]" the "bas[es] for doing so" (Db54) – clearly, cogently and succinctly at that – in his Order on Remand and Final Judgment. The fact that neither Judge Wilson, nor this Court, made any findings or ruling regarding compound interest (Db58) is not surprising or relevant. As the Wilfs conceded, the parties stipulated after trial, based upon their forensic accountants' recommendation, to prejudgment interest at the equity rate of 8.875%, compounded. Thus, Township of West Windsor and AGS Computers, Inc. are inapposite.[30] The Wilfs' further assertion

[28] The Wilfs do not challenge this determination on appeal.
[29] In Devli, the Court awarded prejudgment interest at 4.5%.
[30] These cases are also distinguishable on the ground that neither involved claims for breach of fiduciary duty, conversion, RICO or tort claims.

that "compound interest … is not compensatory" is refuted by the legal authority upon which they rely on this appeal. See Db57 (noting the Court in Township of West Windsor approved prejudgment interest on a compounded basis). See also Musto, 333 N.J. Super. at 75 (finding "no abuse of discretion in the trial judge's decision to award compound rather than simple interest").

The Wilfs' characterization of the prejudgment interest awarded to Halpern as "excessive" (Db54-60) is risible, particularly in light of the fact that they succeeded in retaining – and benefiting from the use of – **$22,366,349** which they stole from their partners prior to October 1, 2003.[31]

## CONCLUSION

For all of the foregoing reasons and based upon the authorities set forth herein above, the Wilfs' appeal should be denied and the Remand Decision and Final Judgment should be affirmed in its entirety.

**Dated: August 23, 2023**

**LEBENSFELD SHARON & SCHWARTZ P.C.**

By: /s *Alan M. Lebensfeld*
Alan M. Lebensfeld

On the Brief:
David M. Arroyo

[31] Henderson, cited by the Wilfs, is inapposite as it involved application of the Municipal and County Authorities Law, which this Court held to permit only simple interest. The District Court's decision in Int'l Transp. Mgmt. Corp is also inapposite, as same involved nothing more than a contract claim for indemnification.

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| JARWICK DEVELOPMENTS, INC., ADA REICHMANN and RACHEL HALPERN, AS EXECUTRIX OF THE ESTATE OF JOSEF HALPERN,<br><br>Plaintiffs-Respondents,<br><br>-against-<br><br>JOSEPH WILF and the ESTATE OF HARRY WILF, deceased, individually and as partners in the partnership known as J.H.W. ASSOCIATES; LEONARD A. WILF; ZYGMUNT WILF; MARK WILF; SIDNEY WILF; RACHEL AFFORDABLE HOUSING CO.; HALWIL ASSOCIATES, a partnership; and PERNWIL ASSOCIATES, a partnership,<br><br>Defendants-Appellants,<br><br>-and-<br><br>MARVIN COHEN; and MIRINOV, SLOAN & PARZIALE, LLC (a/k/a Beck, Weiss & Company, P.A.),<br><br>Defendants. | SUPERIOR COURT OF NEW JERSEY<br>APPELLATE DIVISION<br>DOCKET NO. A-001749-22<br><br>CIVIL ACTION<br><br>ON APPEAL FROM FINAL JUDGMENTS AND ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, MORRIS COUNTY<br><br>DOCKET NO. MRS-C-184-92<br><br>SAT BELOW:<br>HON. FRANK J. DEANGELIS, P.J.CH. |

# PLAINTIFFS-RESPONDENTS JARWICK DEVELOPMENTS, INC.'S AND ADA REICHMANN'S BRIEF IN OPPOSITION TO THE WILF DEFENDANTS' APPEAL

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Plaintiffs Jarwick Developments, Inc. and Ada Reichmann (collectively, "Jarwick") submit this brief in opposition to the appeal of Defendants Joseph Wilf, the Estate of Harry Wilf, Leonard Wilf, Zygmunt Wilf, Mark Wilf, Sidney Wilf, Rachel Affordable Housing Co., Halwil Associates, and Pernwil Associates (collectively, the "Wilfs").

## PRELIMINARY STATEMENT

This appeal is the latest in a thirty-one-year campaign by the Wilfs to evade liability to Jarwick and its co-plaintiff Josef Halpern ("Halpern," and together with Jarwick, "Plaintiffs") for the Wilfs' history of theft, deception, and breaches of fiduciary duties over the lifetime of their partnership with Plaintiffs. In 2013, the Chancery Division entered final judgment against the Wilfs for violations of New Jersey's Racketeer Influenced and Corrupt Organizations Act ("RICO") and for numerous contract and tort claims and awarded attorneys' fees and costs to Plaintiffs. Five years ago, the Appellate Division issued a comprehensive decision rejecting a litany of unfounded challenges by the Wilfs to the final judgment, affirming virtually all of the Chancery Division's factual findings and conclusions, and remanding this matter on a few limited grounds.

Consistent with the unprincipled strategy they have employed throughout this litigation, after the Appellate Division's remand, the Wilfs sought at every

turn to delay this matter's conclusion, including filing and appealing from an unsuccessful motion to recuse as Special Master an esteemed former federal judge who had previously served in the role and who was appointed again upon remand to resolve Plaintiffs' fee applications, and presenting meritless legal arguments based on factual misrepresentations and convoluted interpretations of the Appellate Division's prior decision, all in an effort to muddy the record and the Appellate Division's instructions to the trial court on remand. These efforts have proven unsuccessful. But the Wilfs remain undeterred. On this third appeal, the Wilfs similarly resort to hyperbole, misstatements of fact and law, self-invented bright-line rules, and attempts to relitigate issues that the Appellate Division has already decided against them. They also tack on a fanciful claim that for three decades the New Jersey courts have held a personal grudge against them that has led to a cascade of errors.

Once the Wilfs' efforts at misdirection are set aside, it is clear that their challenges to the Chancery Division's decision and judgment on remand find no support in the law or the record. First, the Wilfs' accusation that the New Jersey courts have treated them unjustly is unfounded and nothing but an attempt to convince this Court that it should revisit binding decisions. Second, contrary to the Wilfs' contention, the Special Master was not required to recuse from deciding Jarwick's fee application due to participating in a two-hour, court-

ordered mediation in an unrelated matter involving unrelated parties simply because Jarwick's counsel represented a party in that case. Third, no matter how the Wilfs try to twist the Appellate Division's remand mandate on attorneys' fees, the trial court and the Special Master properly followed the panel's instructions and made careful and detailed factual findings to determine the appropriate fee award to Jarwick. Fourth, the trial court's punitive damages award, apportioning liability for individual Wilf Defendants, is well-supported by the factual findings of the Honorable Deanne M. Wilson, P.J.Ch. (ret.), all of which the Appellate Division affirmed. Finally, the trial court did not abuse its broad discretion to apply compound (as opposed to simple) interest to Jarwick's prejudgment interest award, as for decades Jarwick has not had the use of monies to which it is entitled, but which the Wilfs have been free to use and invest at Jarwick's expense.

For all these reasons and the reasons that follow, the Appellate Division should affirm the Chancery Division's judgment.

## COUNTERSTATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

The prolonged (beginning in 1985) and complex factual and procedural history of this case has been set forth in detail by the Appellate Division in its

[1] Jarwick presents the intertwined facts and procedural history relevant to this appeal together for ease of reference.

prior decisions in Jarwick Developments, Inc. v. Wilf, No. A-5027-03T3 (App. Div. Dec. 15, 2006) (Da490) and Jarwick Developments, Inc. v. Wilf, No. A-2053-13T3, 2018 WL 2449133 (N.J. Super. Ct. App. Div. June 1, 2018) (Da38895), by former United States District Court Judge Stephen M. Orlofsky in his Report and Recommendations dated August 4, 2022, (Da39090), and by the Honorable Frank J. DeAngelis, P.J.Ch., in his November 16, 2022 decision, (Da39964). Jarwick thus provides only a synopsis of this tortured history that is pertinent to the panel's resolution of the issues raised in this appeal.

## I. The Chancery Division's 2013 Judgment and the Subsequent Appeal

In 2013, following a 207-day bench trial that spanned twenty-two months, Jarwick and Halpern prevailed on numerous RICO and non-RICO claims they asserted against the Wilfs. The parties thereafter proceeded to post-judgment proceedings, and Jarwick and Halpern each submitted petitions for attorneys' fees and costs pursuant to N.J.S.A. 2C:41-4(c) and Rule 4:42-9(a)(8). Judge Wilson appointed Judge Orlofsky as Special Master to determine Plaintiffs' fee applications. (See Da38729.) Special Master Orlofsky, who sat as a federal judge for thirteen years before joining Blank Rome LLP, was highly qualified for this task. In November and December 2013, after carefully considering Plaintiffs' applications, Special Master Orlofsky issued three detailed Reports

and Recommendations, awarding fees and costs to Plaintiffs. (Da14480-611; Da14707-44; Da14826-41.)

On December 20, 2013, Judge Wilson entered judgment for Plaintiffs. (Da38999-9014.) Judge Wilson reviewed Judge Orlofsky's analysis de novo and affirmed almost all of his recommendations. As to Jarwick, Judge Wilson awarded: (1) $12,624,516 in compensatory damages; (2) pre-judgment interest upon such compensatory damages, at the rate of 8.875% per annum through the date of entry of the judgment, in the amount of $19,435,326; (3) $10,666,468 for attorneys' fees and costs of investigation and litigation through December 13, 2013; (4) $20,370,869 in punitive damages; and (5) $17,974,491 in trebled damages on Jarwick's RICO claims, which was "not . . . collectable or payable because it is exceeded by the punitive damages awarded." (Da39000-02.) Judge Wilson also awarded $39,918,156 to Halpern. (Da39001-02.)

The Wilfs appealed, and Plaintiffs cross-appealed from the judgment. (Da38895.) On June 1, 2018, the Appellate Division issued an opinion, which rejected the bulk of the Wilfs' challenges and affirmed virtually all of Judge Wilson's decision. The panel remanded the matter and vacated the fee award on narrow grounds. First, the panel found that Judge Wilson erred by allowing Plaintiffs to recover damages on their RICO and non-RICO claims based on conduct that occurred outside their respective five-year and six-year statutes of

limitations. Jarwick Devs., 2018 WL 2449133, at *15-26. The panel remanded this issue "solely for the purpose of recalculating damages on those claims" based on the pertinent statutes of limitations and held that the recalculation must be "based on the trial judge's findings of fact and the accounting damages found by the judge, with such additional submissions or evidence the court deems necessary." Id. at *22.

Second, as to attorneys' fees, the Appellate Division found that "the court erred by finding that all of Jarwick's . . . claims rested on a common core of operative facts" because "[t]hat finding ignores the time-limitations that apply to the non-RICO and RICO claims." Id. at *29. Because Plaintiffs' "RICO claims were limited to the five years before October 1, 2009, which was the date the RICO claims were first asserted," the panel reasoned that "[t]he core of operative facts pertains to the claims asserted for this period, whether those claims are asserted under RICO or some other legal theory." Ibid. The panel therefore reversed the fee award and advised that on remand the trial court "may consider RICO violations that occurred prior to the prescribed limitations period" and may award "attorneys' fees for all of the time devoted by counsel to the case . . . if the work on the unrelated claims 'can[] be deemed to be part of the pursuit of the ultimate result achieved.'" Id. at *28 (emphasis added) (citation omitted). The panel further instructed that the trial court may include

in the award "time spent establishing wrongful acts on the part of [the Wilfs] that pre-dated the time for which the RICO claims could be asserted," so long as that time "was reasonably required to establish the RICO claims." Ibid. The Appellate Division did not foreclose that the trial court, with appropriate findings, could find that Plaintiffs' RICO and non-RICO claims shared a common core of facts or were based on related legal theories. See id. at *28-29.

Jarwick subsequently moved before the Appellate Division for attorneys' fees and disbursements in connection with the appeal. On August 29, 2018, the Appellate Division remanded that motion for disposition on remand. The parties thereafter petitioned for certification, which the Supreme Court denied. Jarwick Devs., Inc. v. Wilf, 236 N.J. 68 (2018); Jarwick Devs., Inc. v. Wilf, 236 N.J. 47 (2018); Jarwick Devs., Inc. v. Wilf, 236 N.J. 16 (2018).

## II. The Remand

On remand, this matter was reassigned to the Honorable Maritza Berdote Byrne, who was appointed as the Presiding Judge of the Morris County Chancery Division after Judge Wilson retired in January 2014. The parties briefed the issues, including: (1) the recalculation of RICO damages based only on injuries that occurred on or after October 1, 2004; (2) the recalculation of non-RICO tort damages and punitive damages based only on injuries that occurred on or after October 1, 2003; and (3) the recalculation of attorneys' fees.

On November 18, 2019, Judge Berdote Byrne appointed Judge Orlofsky as Special Master to resolve Plaintiffs' renewed applications for fee awards on remand. (Da38991-94.) The Order of Reference directed the Special Master "to review and report to th[e] Court in accordance with the directions set forth by the Appellate Division" in its June 1, 2018 opinion. (Da38992.) The Court further ordered that when undertaking this review, the Special Master "shall review the Fee Applications, Jarwick's Amended Complaint, Halpern's Complaint, the Wilf Defendants' Answers and Cross-claims thereto, and the findings of fact and conclusions rendered by the Honorable Deanne M. Wilson, P.J.Ch. (ret.) following trial that were affirmed on appeal by the Appellate Division, together with any additional documents submitted by Plaintiffs . . . or by the Wilf Defendants, as well as the written submissions of the parties and arguments of counsel." (Da38993.)

### A. The Recusal Motion

The parties completed briefing before the Special Master on October 28, 2020. Two weeks before the scheduled oral argument on those applications, the Wilfs asked for an adjournment because they learned that several months earlier, Judge Orlofsky conducted a court-ordered mediation session in Sinatra Properties, LLC v. Berdan Court, LLC, No. MON-C-59-20, a case involving another, unrelated client represented by Jarwick's counsel, Lowenstein Sandler

LLP. (Da38877-78.) Judge Orlofsky granted the Wilfs' adjournment request and directed that any motion by the Wilfs be filed and made returnable to be argued during oral argument on Plaintiffs' fee applications. (Da38878.)

On December 4, 2020, the Wilfs moved to recuse Judge Orlofsky on the grounds that Judge Orlofsky and Lowenstein were involved in Sinatra Properties at the same time that Judge Orlofsky was serving as Special Master in this matter. (Ibid.) The Wilfs also requested that Judge Orlofsky stay the proceedings on the merits of Plaintiffs' fee applications until the recusal motion was resolved. (Ibid.) Judge Orlofsky granted the Wilfs' stay request. (Ibid.) On December 21, 2020, Judge Orlofsky denied the Wilfs' recusal motion. (Da38873-91.)

The Wilfs appealed Judge Orlofsky's decision, and Judge Berdote Byrne affirmed. (Da38728-36.) While Judge Berdote Byrne expressed doubt that the Code of Judicial Conduct applied to Special Masters, she noted that she "need not reach the issue of whether Special Master Orlofsky erred in refusing to apply the Code . . . because even pursuant to the Code and its concomitant legal standards, Special Master Orlofsky had no reason to recuse." (Da38733.) Applying the Code standard, Judge Berdote Byrne found that "[n]o fully informed reasonable person" would conclude that Special Master Orlofsky, who has worked on the within matter since 2013 on substantial but specific, discreet

issues would . . . lose the ability to assess the matters in this case impartially and make a non-binding recommendation to the court" based on his unrelated mediator role. (Da38736.) Judge Berdote Byrne explained that the Wilfs "fail[ed] to present any reason within the rules or case law requiring Special Master Orlofsky's recusal," and that "[t]he only fact the Sinatra Properties case and this case have in common" according to the court, "is that Lowenstein represents a party." (Da38735-36.) Thus, "[n]o reasonable person would infer Special Master Orlofsky has a bias from the simple fact he interacted with the same firm more than once." (Da38735.)

On November 29, 2021, a two-judge Appellate Division panel that included the Honorable Patrick DeAlmeida, J.A.D., the only judge from the 2018 appellate panel who had not retired, denied the Wilfs' motion for leave to appeal. (Da39690-91.) The Wilfs then sought certification by the New Jersey Supreme Court, which the Supreme Court denied on April 8, 2022. (Da39693.)

### B. The Special Master's Reports and Recommendations and the Trial Court's Decision

On August 4, 2022, Special Master Orlofsky issued a robust, sixty-four page Report and Recommendations ("Remand R&R 1"), which framed the "question posed on remand by the parties [as] whether the Appellate Division's decision to limit the statute of limitations on RICO damages should change [the Special Master's] and the Trial Court's prior analysis that Plaintiffs' RICO and

non-RICO claims arose from the same common core of facts, making the majority of Plaintiffs' fees compensable." (Da39056-57.) Based on a meticulous review of the panel's decision and the record, the Special Master recommended that "the Appellate Division's decision does not alter that prior holding." (Da39057.) The Special Master then described in detail the specific bases for his findings and recommendations, all of which properly followed the Appellate Division's mandate on remand. (Da39057-89.) The Special Master recommended an award to Jarwick in the amount of $10,666,468 for the work Jarwick's counsel performed at the trial court level. (Da39089.) The Special Master requested, however, that the parties submit for review certain documents related to the work counsel performed before the Appellate Division and New Jersey Supreme Court. (Da39029.)

After the parties submitted the requested documentation, on August 25, 2022, the Special Master issued a sixty-five page Supplemental Report and Recommendations ("Remand R&R 2"), which completed his recommendations to the trial court. In Remand R&R 2, the Special Master provided a thorough analysis of his findings with respect to Plaintiffs' applications for costs and fees associated with the work their counsel performed before the Appellate Division and the Supreme Court. The Special Master recommended an award to Jarwick for that work totaling $937,912.76. (Da39176.)

The Wilfs filed objections to Remand R&Rs 1 and 2, which Plaintiffs opposed. On November 16, 2022, the Honorable Frank J. DeAngelis, P.J.Ch.,[2] issued an Order and corresponding thirty-eight page Statement of Reasons, addressing each issued remanded by the Appellate Division and adopting Special Master Orlofsky's recommendations for Plaintiffs' fee applications in full. (Da39964-40004.)

## LEGAL ARGUMENT

### I. THE WILFS' MERE DISSATISFACTION WITH BINDING DECISIONS BY THE NEW JERSEY JUDICIARY THROUGHOUT THIS LITIGATION AND UNFOUNDED BELIEF THAT OUR COURTS HAVE TREATED THEM UNJUSTLY ARE IRRELEVANT TO THIS APPEAL.

At each stage in this decades-long litigation, the Wilfs repeatedly have ignored the settled record, rejected the factual findings and conclusions of the Chancery Division and the Appellate Division that do not favor them, made legal submissions that plainly misstate and grossly mischaracterize binding decisions and orders, and twisted the ethical rules to accuse two highly regarded jurists of unfounded conflicts of interest. As these deceptive and distracting tactics have proven unsuccessful time and time again, the Wilfs attempt to bolster them on

[2] On June 20, 2022, the New Jersey Supreme Court temporarily assigned Judge Berdote Byrne to the Appellate Division, and, in Judge Berdote Byrne's place, the Court assigned Judge DeAngelis to be the General Equity Presiding Judge for Vicinage 10 (Morris and Sussex Counties).

this appeal by resorting to an absurd "Hail Mary" in a last-ditch effort to delay the inevitable entry of a final judgment against them: they claim that they have fallen victim to a grand vendetta of the "New Jersey courts [to] treat[] them unjustly." (Db24.) The frivolity of this melodramatic allegation is clear from its face, and Jarwick will not waste much time addressing it here. But a couple of salient points are worthwhile.

First, the Wilfs' "Hail Mary" is nothing but an attempt to relitigate long decided issues related to prior trial court proceedings that are foreclosed from review on this appeal. Those issues are: (1) the propriety of the Appellate Division's conclusions on appeal in 2018, (Db22), on which the Wilfs already sought certification from the New Jersey Supreme Court, and the Court denied their petition, Jarwick Devs., Inc. v. Wilf, 236 N.J. 47 (2018); (2) the Chancery Division's decision in 2009 to permit amendment of the pleadings to allow the inclusion of RICO claims, (Db22), which the Appellate Division affirmed, Jarwick Devs., Inc., 2018 WL 2449133, at *9-10; (3) the purported conflict of interest of former Chancery Division Judge Wilson, (Db22-23), which the Appellate Division decided adversely to the Wilfs, Jarwick Devs., Inc., 2018 WL 2449133, at *5-9; and (4) the Chancery Division's factual findings and conclusions concerning Plaintiffs' claims against the Wilfs, (Db23-24), which the Appellate Division affirmed, see generally id. The Wilfs' contention that

this Court "need not be confined by the previous errors in this litigation," (Db24), is wrong. "[W]hen an issue is once litigated and decided during the course of a particular case, that decision should be the end of the matter" and is "binding" upon "a different appellate panel which may be asked to reconsider the same issue in a subsequent appeal." State v. Hale, 127 N.J. Super. 407, 410 (App. Div. 1974); see also Elmora Hebrew Ctr., Inc. v. Fishman, 239 N.J. Super. 229, 232 (App. Div. 1990) (rejecting appellant's "attempts to reargue various matters which were previously decided by" prior panel, as prior panel's decision was "binding on the parties"). The Wilfs had a full and fair opportunity on the prior appeal to litigate the issues they attempt to reargue here, and their dissatisfaction with the rulings on those issues is irrelevant to this appeal. The Appellate Division's decision in that prior appeal is binding on the parties and this Court.

Second, the Wilfs' claim that our courts have treated them "unjustly" is just another tactic pulled from the Wilfs' playbook to distract from the egregious misconduct that caused them to be liable to Plaintiffs for tens of millions of dollars. In extensive and detailed findings, the Chancery Division found that the Wilfs treated the partnership's accounts as their "personal piggy bank." Jarwick Devs., Inc., 2018 WL 2449133, at *19. The Wilfs' conduct included, among other things: the fabrication of expenses, fees, and debts so that they

could reap the profits of the partnership without sharing those benefits with Plaintiffs; putting employees of their other entities on the partnership's payroll to siphon more money out of it; and misdirecting discounts to which the partnership was entitled so that those discounts would instead benefit the Wilfs' other businesses. The Wilfs persistently stole from the partnership even after our courts issued orders compelling them to stop and to treat Jarwick as a partner. It is this unlawful conduct that led the Chancery Division to enter a final judgment for Plaintiffs and the Appellate Division to affirm all of the Chancery Division's factual findings and conclusions. The Wilfs are not victims of an unjust judiciary but of their own misconduct.

## II. THE TRIAL COURT CORRECTLY FOUND THAT SPECIAL MASTER ORLOFSKY HAD NO REASON TO RECUSE HIMSELF.

The Chancery Division appointed former United States District Court Judge Stephen M. Orlofsky as Special Master on Plaintiffs' fee applications twice in this matter: first, after Judge Wilson entered final judgment against the Wilfs in December 2013; and second, on remand to resolve Plaintiffs' fee applications on remand in 2018. The Wilfs, who posed no challenge to Special Master Orlofsky's first appointment, sought his recusal the second time around, accusing him of partiality based on his service as a mediator during a court-ordered mediation in an unrelated matter in which Jarwick's counsel,

Lowenstein Sandler, represented an unrelated party, while briefing on Plaintiffs' fee applications was ongoing.

On appeal, not only do the Wilfs regurgitate the same unpersuasive arguments they presented to the trial court, but they go further to misrepresent the trial court's opinion to muddy the record in their latest effort to delay the inevitable imposition of the judgment against them. The record is clear, however, that the trial court did not abuse its discretion in denying the Wilfs' recusal motion, and this Court should affirm.

### A. The Trial Court's Conclusion that the Code of Judicial Conduct's Conflict of Interest Rules Did Not Require Special Master Orlofsky's Recusal was not an Abuse of Discretion.

The Wilfs dedicate five pages of their opening brief arguing that the Code of Judicial Conduct should apply to special masters. (Db25-29.) But this Court need not address this issue because the trial court agreed to accept the Wilfs' premise that the Code applied in deciding the Wilfs' recusal motion. (Da38372.) The actual issue on this appeal is one that the Wilfs entirely fail to address: whether the trial court abused its discretion in finding that the Code did not require Special Master Orlofsky's recusal. State v. McCabe, 201 N.J. 34, 45 (2010) (explaining that motions for recusal are "are entrusted to the sound discretion" of the trial court and "subject to review for abuse of discretion"). That is, whether the trial court's decision was made "without a rational

explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" State v. Chavies, 247 N.J. 245, 257 (2021) (citation omitted). Undertaking that relevant analysis draws no other conclusion but that the trial court's decision should not be disturbed.

Canon 2 of the Code states that a judge must avoid "the appearance of impropriety." Consistent with this requirement, Rule 3.17(B) of the Code requires judges to "disqualify themselves in proceedings in which their impartiality or the appearance of their impartiality might reasonably be questioned." To determine the need for disqualification, "the applicable standard is as follows: Would a reasonable, fully informed person have doubts about the judge's impartiality." Id. cmt. 2 (citing DeNike v. Cupo, 196 N.J. 502 (2008)) (emphasis added). Similarly, Rule 1:12-1(g) states that a "judge of any court shall be disqualified" if there is a "reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so."

The trial court correctly applied this standard to conclude that Special Master Orlofsky did not create an appearance of impartiality "by accepting and mediating a case in which Lowenstein was involved while also acting as a special master in a case in which Lowenstein was involved." (Da38735.) The court found, among other things, that the parties to the case in which Special

Master Orlofsky served as a mediator -- not counsel or the law firms representing the parties -- paid the mediator's fee. (Da38735.) According to the court, "the only fact that the Sinatra Properties case and this case have in common is that Lowenstein Sandler represents a party," and no reasonable person would conclude that Special Master Orlofsky has a bias from the simple fact that he interacted with the same firm." (Da38736.) The court acknowledged that "there may be occasions where a special master's work with a law firm may warrant recusal of other work with that firm," but that "the facts of this case do not support recusal even minimally." (Da38735.)

The Wilfs assert that the trial court's sound findings were "inadequate" to hold "that recusal was not required." (Db32.) While at the same time advocating without equivocation that the Code applies to special masters, the Wilfs encourage this Court to disregard the trial court's application of the Code and instead adopt a novel, self-serving standard for disqualifications. Under the Wilfs' proposed standard, an individual, without exception, would be "prevent[ed] . . . from acting as a Special Master when he or she is simultaneously handling a separate paid matter for one of the parties or their attorneys." (Db29.) According to the Wilfs, applying this categorical rule here would mean that Special Master Orlofsky's limited role as a paid mediator in Sinatra Properties while he was "evaluating" Lowenstein's work to resolve

Jarwick's fee application in this case "disqualified the Special Master from further service." (Db32.)

The Wilfs' disqualification standard suffers from a number of incurable flaws requiring its rejection. First, the Wilfs provide no precedent endorsing their standard over the objective standard courts apply to recusal motions, which is not surprising, because none exists. There is no requirement in New Jersey that private attorneys may not serve as special masters or mediators in alternative dispute resolution matters involving the same law firm at the same time. The Wilfs likewise fail to cite to any cases with comparable facts that would support their view.

Second, the Wilfs' new standard would be unworkable in practice, as it ignores the realities of private attorneys acting as third-party neutrals. Third-party neutrals and judges serve different roles that affect any financial-interest analysis in determining whether there is a conflict. For example, the New Jersey Constitution forbids Judges in the Superior Court from "engag[ing] in the practice of law or other gainful pursuit" while in office. N.J. Const. Art. VI, § VI, ¶ 6. Special masters, on the other hand, "are often practicing attorneys" who "wear different hats depending upon the professional function they are performing from one day to the next." Jenkins v. Sterlacci, 849 F.2d 627, 632 (D.C. Cir. 1988). That "duality of roles" does not require a special master to

"place his life as an advocate in a state of suspended animation." Ibid. To the contrary, "[s]uch a requirement would be counterproductive, since many of the best qualified candidates would certainly forego service as a special master if, during that service, they were required to forego completely their private practice." Ibid. Courts accordingly have resolved special master disqualification motions by balancing the practical demands of special masters as third-party neutrals against the realities of private practice. See, e.g., In re Joint E. & S. Dists. Asbestos Litig., 737 F. Supp. 735, 737 (E.D.N.Y. 1990) (Special Master not conflicted from asbestos litigation despite prior representation of "other asbestos manufacturers in connection with public education and legislative efforts aimed at promoting alternative compensation systems to mass tort litigation"); Nuckel v. Borough of Little Ferry, No. A-4940-11, 2013 WL 4104100, at *20 (N.J. Super. Ct. App. Div. Aug. 15, 2013) (finding no conflict where special master in case against municipality also served as counsel to New Jersey State League of Municipalities and holding that because special master "did not have a lawyer-client relationship" with party-municipality, "his role as special master did not create an appearance of impropriety"); Fuhrmann v. Wolf, No. A-6031-07, 2009 WL 4255529, at *7 (N.J. Super. Ct. App. Div. Nov. 19, 2009) (no appearance of impropriety where

special master's law firm was client of defendant's counsel's law firm while case was ongoing).

Moreover, the Wilfs' position, if accepted, would mean that no retired judge (or any private attorney) could ever handle more than one ADR engagement involving the same law firm at the same time, even if the matters have no parties in common. This novel rule has no precedent or basis in the law and is untethered from anything having to do with assessing the existence of an appearance of impropriety. Indeed, in direct conflict with the Wilfs' proposed standard, courts have found that paid third-party neutral engagements involving the same law firm create no conflict where the parties -- not the law firm -- paid the third-party's fee. See, e.g., Cirba Inc. v. VMware, Inc., No. 19-742-LPS, 2022 WL 606655 (D. Del. Jan. 7, 2022) (finding no disqualifying financial relationship where law firm referred unrelated matter involving unrelated parties to special master's firm and the parties in unrelated matter paid special master fees). Similarly, here, the trial court aptly observed that the only link between this matter and Sinatra Properties is Lowenstein's appearance in each, and the parties in Sinatra Properties -- not Lowenstein -- paid the mediator fee. (Da38735.) Under the non-objective standard endorsed by the Wilfs, however, these facts, on which no reasonable person would find an appearance of impartiality, would be irrelevant. (See Db30-31.)

For similar reasons, the Wilfs' suggestion that some special impropriety exists where a special master mediates a matter involving a law firm while simultaneously resolving an application for attorneys' fees related to that law firm in another matter lacks merit. (Db31-32.) Jarwick's fee application has nothing to do with what Lowenstein will be paid; the fee award will reimburse Jarwick for fees it has already paid to Lowenstein. (Da38883-84.) The fee application is Jarwick's motion, and Jarwick -- not its counsel -- will benefit from the resulting award. See, e.g., Astrue v. Ratliff, 560 U.S. 586, 591-92 (2010) (rejecting argument that fee award is "payable directly to a prevailing party's attorney," explaining that "[w]e have long held that the term 'prevailing party' in fee statutes is a 'term of art' that refers to the prevailing litigant" (citing cases)); Evans v. Jeff D., 475 U.S. 717, 720, 730-32 (1986) (holding that fee-shifting statute does not "bestow[] fee awards upon attorneys").

The Wilfs' presentation of a new standard is nothing but a distraction from a fact they cannot ignore: the trial court applied the Code, as the Wilfs suggested it do, and found that Special Master Orlofsky's recusal was not required. The trial court did not abuse its discretion in reaching that conclusion.

### B. No New Jersey Court Has Ever Held That the Code of Judicial Conduct Applies to Special Masters.

Because the trial court resolved the Wilfs' recusal motion under the Code of Judicial Conduct's conflict rules, the issue whether the Code applies

identically to judges as special masters is irrelevant to this appeal. Nonetheless, it is worth noting that no New Jersey court has ever concluded that the Code applies to all special masters or third-party neutrals. Rather, the Appellate Division has held only that Mount Laurel special masters specifically are substantially subject to the Code because of their unique role in Mount Laurel cases. See Deland v. Twp. of Berkeley Heights, 361 N.J. Super. 1, 12 (App. Div.), cert. denied, 178 N.J. 32 (2003) (concluding "that in view of the sensitivity of Mount Laurel cases, the special masters who provide recommendations to judges in those cases must be subject to substantially the same conflict of interest rules as judges"); Nuckel, 2013 WL 4104100, at *20 (same). Since Deland, the Appellate Division has reaffirmed its distinction between Mount Laurel cases and other actions as to the conflicts rules applicable to special masters. See Snyder v. Snyder, No. A-4116-13, 2016 WL 4473254, at *4 (N.J. Super. Ct. App. Div. Aug. 25, 2016) ("Our holding in Deland . . . has not been extended to any non-Mount Laurel situation."); Fuhrmann, 2009 WL 4255529, at *7 (affirming denial of motion to disqualify special master and observing "[t]his was not Mount Laurel litigation").

The Wilfs point out that some jurisdictions have imposed codes of conduct that expressly address special masters, including some jurisdictions that apply different standards to judges than special masters. (Db27-28.) This fact is

singularly unhelpful to the Wilfs' position. Indeed, when the drafters of judicial codes of ethics want to capture nonjudicial decision makers such as special masters, they know the language to use. RPC 1.12(c), which addresses the duties of an "arbitrator, mediator, or other third-party neutral," does exactly that. The lack of reference to special masters in New Jersey's Code of Judicial Conduct thus signals a deliberate decision to exempt special masters from its scope.

There is good reason why courts have not subjected all special masters to the Code. Accommodations must be made to account for the reality that special masters, as private attorneys, are likely to be engaged in many paid matters other than those in which they serve as special masters. And special masters, as attorneys, are already subject to conflict of interest rules. For example, special masters must comply with the high ethical standards of the Rules of Professional Conduct, which support the application of an objective standard for disqualification. See RPC 1.12(c).

For these reasons, though irrelevant to the outcome of this case, New Jersey law counsels that the Code does not apply to special masters.

## III. THE TRIAL COURT PROPERLY AWARDED JARWICK ATTORNEYS' FEES CONSISTENT WITH THE APPELLATE DIVISION'S REMAND MANDATE.

"Our Supreme Court has 'strongly discourage[d] the use of an attorney-fee application as an invitation to become mired in a second round of litigation."

Triffin v. Automatic Data Processing, Inc., 411 N.J. Super. 292, 308 (App. Div. 2010) (quoting Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 24 (2004)). Trial courts thus have "wide latitude in resolving attorney-fee applications," ibid. (internal quotation marks and citation omitted), and an appellate court must not disturb a fee award except on "the rarest of occasions, and then only because of a clear abuse of discretion," Packard-Bamberger & Co., Inc. v. Collier, 167 N.J. 427, 444 (2001).

Here, on remand, the trial court agreed with Special Master Orlofsky's recommendations on Plaintiffs' fee applications and ordered the Wilfs to pay attorneys' fees in the amount of $11,604,380.76 to Jarwick. For the following reasons, the court did not abuse its discretion in awarding these fees to Jarwick.

### A. The Wilfs Deliberately Omit Critical Components of the Appellate Division's Narrow Remand Mandate for Plaintiffs' Fee Applications.

For the third time since the Appellate Division remanded this case in 2018, the Wilfs cherry-pick partial statements from the panel's decision, which taken out of context grossly misstate the panel's mandate to the Chancery Division to resolve Plaintiffs' fee applications. The Wilfs distill the Appellate Division's holding on this issue into a simple sentence: that "the court erred by finding that all of Jarwick's and Halpern's claims rested on a common core of operative facts." (Db34.) The panel's ruling, however, said much more than this.

The Appellate Division remanded the trial court's decision on Jarwick's original fee award only on one limited ground: that because the panel had narrowed the RICO limitations period "to the five years before October 1, 2009," the trial court needed to "re-determine the amount of fees and costs to be awarded to plaintiffs" and "limit its award to the fees and costs reasonably devoted to plaintiffs' pursuit of their respective RICO claims." Jarwick Devs., 2018 WL 2449133, at *28-29. This assessment, the panel acknowledged, permits a fee award "for all of the time devoted by counsel to the case," including time spent on "unrelated claims" so long as those claims "'can[] be deemed to be part of the pursuit of the ultimate result achieved.'" Id. at *28 (quoting Silva v. Autos of Amboy, Inc., 267 N.J. Super. 546, 556 (App. Div. 1993)). The panel also noted that "[a] suit will not be considered a collection of discrete claims" for purposes of this analysis "if it rests on 'a common core of facts' or is 'based on related legal theories.'" Ibid. (citation omitted) (emphases added). Consistent with these well-established principles, the panel explained that on remand the trial court may "consider awarding counsel fees and costs for time spent establishing wrongful acts on the part of defendants that pre-dated the time for which the RICO claims could be asserted" if it finds "that the time devoted to presenting that evidence was reasonably required to establish the RICO claims." Id. at *29 (emphasis added).

The Wilfs fail to present or address this critical context. Moreover, while the panel indeed found that "the court erred by finding that all of Jarwick's and Halpern's claims rested on a common core of operative facts," the Wilfs entirely ignore the explanatory language immediately following this sentence: "That finding [i.e., the Special Master's and the trial court's finding that all claims rest on a common core of operative facts] ignores the time limitations that apply to the non-RICO and RICO claims." Ibid. (emphasis added). Contrary to the Wilfs' suggestion, the panel did not foreclose the possibility that Jarwick may recover fees for time spent on the accounting and non-RICO claims, so long as Jarwick proved that such time "can[] be deemed part of the pursuit of the ultimate result achieved." Id. at *28. The panel also affirmed all of the trial court's factual findings, which were "binding on remand." (Id. at *26.)

In sum, the Appellate Division authorized the Chancery Division to engage in the same "common core of operative fact" analysis called for under New Jersey law that it employed the first time around, so long as it found the time spent on Jarwick's accounting and non-RICO claims "was reasonably required to establish the RICO claims." See id. at *29. The Wilfs do not dispute this directive. (Db37.) It is this remand mandate, and not the distorted one offered by the Wilfs, that must guide this Court's the analysis whether the Wilfs'

appeal presents the "rare occasion" when a trial court's fee award was a "clear abuse of discretion." Packard-Bamberger & Co., Inc., 167 N.J. at 444.

### B. The Trial Court and the Special Master Complied with the Appellate Division's Remand Mandate.

The Wilfs provide three unpersuasive reasons why this Court should reverse Jarwick's fee award. According to the Wilfs, the trial court, which adopted the Special Master's recommendations in full, erred by: (1) awarding fees for work Jarwick's counsel performed before October 1, 2009, when the RICO claims were filed in this lawsuit, because Jarwick had not considered any RICO claims until that time, (Db34-36); (2) awarding fees for work performed by Jarwick's counsel that was not "reasonably required to establish the RICO claims," (Db37-44); and (3) awarding fees for Jarwick's unsuccessful cross-appeal, (Db44). Neither the law nor the record support a finding on any of these grounds that the trial court abused its discretion in awarding Jarwick's counsel fees.

#### i. The trial court properly determined Jarwick was entitled to fees incurred before the RICO claims were filed.

The Wilfs' argument that any attorneys' fees Jarwick incurred in 2007, 2008, and "most of" 2009 are not recoverable because the record lacks evidence that "Jarwick was considering RICO claims" until they were first brought in this case, (Db35), is misleading and must be disregarded. The Appellate Division

did not, as the Wilfs suggest, foreclose the trial court on remand from awarding fees for counsel's work before the RICO claims were filed in October 2009. Rather, the panel authorized the trial court to award such fees so long as the court determined that the work performed before the RICO claims were filed "was reasonably required to establish the RICO claims." Jarwick Devs., 2018 WL 2449133, at *29 (emphasis added). If the panel meant to impose a bright-line rule that on remand the trial court could not award Jarwick any fees for work performed before a particular date, it could have said so. But it did not.

Nor does RICO support the Wilfs' bright-line rule requiring recoverable fees and costs to be separated based on the filing date of the RICO claims. In fact, RICO contemplates the exact opposite by allowing recovery of "costs of investigation and litigation." N.J.S.A. 2C:41-4(c) (emphasis added). If RICO only allowed recovery for fees incurred post-filing, then the statute's explicit, conjunctive inclusion of "investigation" would be superfluous. See, e.g., Sanchez v. Fitness Factory Edgewater, LLC, 242 N.J. 252, 261 (2020) (explaining that in interpreting a statute, courts "'strive for an interpretation that gives effect to all of the statutory provisions and does not render any language inoperative, superfluous, void[,] or insignificant'" (citation omitted)). Moreover, extensive and long-term investigation is the only way to root out the "highly sophisticated, diversified, and widespread activity that annually drains

millions of dollars from th[e] State's economy by unlawful conduct and the illegal use of force, fraud and corruption." N.J.S.A. 2C:41-1.1(b). The RICO statute thus makes clear that investigation is critical to its aims, and it does not support the Wilfs' position that pre-filing investigative costs are not recoverable.

The fee analyses were consistent with the Appellate Division's clear remand instructions and the RICO statute. The trial court committed no error in determining that Jarwick was entitled to fees incurred during 2007, 2008, and 2009.

**ii. The trial court did not abuse its discretion in determining that counsels' claimed fees were reasonably required to establish Jarwick's RICO claims.**

The Wilfs' next argument -- that the trial court improperly awarded attorneys' fees for certain categories of work that were not "reasonably required to establish the RICO claims" (Db37-44) -- is similarly littered with misrepresentations about the remand mandate and its purported improper application by the trial court and the Special Master. For example, the Wilfs wrongfully characterize the trial court's analysis as adopting an "all-or-nothing" approach that failed to apply "the test" of "whether *all* of the work done to establish *all* of the facts was 'reasonably devoted to Plaintiffs' pursuit of their respective RICO claims.'" (Db38 (citation omitted).) But this "test" is found nowhere in the Appellate Division's prior decision. The Wilfs further criticize

the Special Master for purportedly relying on "a general high-level analysis of certain broad categories of facts from before the RICO limitation period" instead of conducting "the required granular analysis of time entries or specific projects." (Db38-39.) But again, this "granular analysis" deemed "required" by the Wilfs is found nowhere in the Appellate Division's prior decision.[3] The Wilfs' critiques to the current fee award are based on these standards, which they have invented out of thin air in an effort to persuade this Court that the trial court abused its discretion and that reversal is required.

There is good reason why the Appellate Division's prior decision is silent on the standards the Wilfs present on this appeal. As the trial court observed, under New Jersey law, "in cases such as this, 'when the plaintiff's claims for relief involve a common core of facts or will be based on related legal theories, such a suit cannot be viewed as a series of discrete claims.'" (Da39997 (quoting Silva, 267 N.J. Super. at 556 (internal quotation marks omitted).) That is because breaking down attorneys' fees by claim in a fee-shifting case is often not possible. "Much of counsel's work will be devoted generally to the litigation

[3] Hansen v. Rite Aid Corp., relied on by the Wilfs, supports the trial court's fee award decision. 253 N.J. 191 (2023). Hansen affirmed a fee award on the grounds that the trial judge performed a "meticulous analysis" of the legal work that was included in the fee application. Id. at 221. The trial court here similarly engaged in a "meticulous analysis" of Jarwick's fee application, including by carefully reviewing the billing records and time entries submitted to render its conclusions.

as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." Hensley, 461 U.S. at 435. The court therefore "should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended in the litigation." (Da39997 (quoting Silva, 267 N.J. Super. at 556 (internal quotation marks omitted).)

Special Master Orlofsky and Judge DeAngelis each engaged in a careful, detailed analysis replete with specific findings on the time counsel spent that was reasonably necessary to establish Jarwick's RICO claims and as to every issue the Wilfs contested in their opposition to Plaintiffs' fee applications. Special Master Orlofsky's Reports and Recommendations memorialize his thorough review of Jarwick's fee application -- including the billing entries Jarwick submitted -- in compliance with the Appellate Division's mandate on remand. Indeed, it was only after conducting this thorough review that the Special Master found "the changed statute of limitations does not alter the Trial Court's previous findings regarding the inextricably interlinked nature of Plaintiffs' RICO and non-RICO claims given the common core of facts underpinning both sets of claims," (Da39029), and thus that "the previous award [should] remain unchanged," (Da39115).

The trial court acknowledged Special Master Orlofsky's "rigorous and detailed analysis of the claimed fees and costs" and that Special Master Orlofsky

provided ample support for his findings. (Da39994.) The trial court independently found that "the facts elicited at trial," which the Appellate Division affirmed in 2018, "the billing records provided by [P]laintiffs," and the Appellate Division's instructions" supported Special Master Orlofsky's conclusions and that "the legal work performed prior to October 2004 elicited the evidence necessary to prosecute the RICO claim." (Da39995-96.) The court observed that "it was only after years of discovery and litigation that [P]laintiffs realized and understood the magnitude of defendants' wrongdoing, and thus amended their Complaint" in 2009 to include the RICO claims. (Da39996.) For this reason, according to the court, "[i]t would be illogical to state the facts discovered from 1992 to 2009, which gave rise to and informed [P]laintiffs' understanding that [the Wilfs] had violated the RICO statute, had nothing to do with [P]laintiff's prosecution of their RICO claims." (Ibid.) Consistent with Silva and the United States Supreme Court's decision in Hensley, the court noted that in this case it would be "nearly impossible to disentangle the hours spent by attorneys (in the 21 years leading up to trial and in the 12 years before the RICO statute of limitations period) working to prove RICO claims and non-RICO claims," as "[s]o many of the same facts and witnesses are tied to both RICO and non-RICO causes of action." (Da39996-97.) The court then explained its reasons why this conclusion was supported. (Da39997-40001.)

The trial court's analysis, which incorporated Special Master Orlofsky's comprehensive findings, is far from the "all-or-nothing" approach the Wilfs claim the trial court undertook in error. Further, without support, the Wilfs claim that the trial court and Special Master's "errors . . . led to a fee award that compensated Plaintiffs for several categories of work" that they contend should have been excluded from the fee award. (Db40.) Because Remand R&R 1 and 2 and the trial court's Statement of Reasons thoroughly address each point complained of by the Wilfs, Jarwick refrains from addressing the fatal flaws of the Wilfs' arguments in extensive detail. Nevertheless, for the reasons that follow, it is clear that the trial court did not abuse its discretion in adopting Special Master Orlofsky's findings on these issues.

Punitive Damages. The Wilfs' assertion that the Special Master's finding that there was "some factual overlap" between Jarwick's punitive damages claims and RICO claims did not "justify an award of all fees expended on the punitive damages claims," is unsupported by the record. Special Master Orlofsky rejected this very argument in connection with his decision on Jarwick's fee application in 2013, and the Appellate Division did not disturb this finding. Moreover, in connection with Jarwick's fee application on remand, Special Master Orlofsky explained in detail the bases for his conclusion that "a changed statute of limitations for liability has no bearing on [his] reasoning for

recommending that Plaintiffs[’] RICO claims and punitive damages claims stem from a common core of facts.” (Da39069-71.) That is, Jarwick’s success on the non-RICO tort claims, including its punitive damages claim, led to its ability to prove the RICO claims.

Pre-trial Motions. The Wilfs claim that the Special Master misapplied the Appellate Division’s mandate and awarded fees on certain motions Jarwick filed without finding there was a “factual or legal overlap with the RICO claims.” (Db41.) Once again, the Wilfs present a stale argument dug up from former briefing that the Chancery Division and Special Master Orlofsky rejected in 2013, and a second time before this appeal. On this basis alone the Court should disregard the Wilfs’ complaint. In any event, the Special Master made specific and thorough findings in analyzing whether to award fees for counsel’s work on each motion under the remand mandate. (See Da39071-79.) The Wilfs wholly ignore those findings.

Witnesses and Appellate Work. The Wilfs make similar assertions about the Special Master’s findings concerning counsel’s time related to certain witness testimony and appellate work. (Db41-43.) There is no merit to these assertions. The Wilfs once again mischaracterize the nature of the Special Master’s findings, which describe how the disputed witnesses’ testimony furthered Plaintiffs’ pursuit of their RICO claims and the appropriateness of

Plaintiffs' billing practices for mediation and settlement. (Da39079-85.) The Special Master's final report similarly explains the bases for awarding costs and fees for Plaintiffs' appellate work. (See generally Da39108-77.)

Against this backdrop, there is simply no basis for the Wilfs' contention that the trial court and the Special Master misapplied the Appellate Division's mandate on remand, let alone committed any abuse of discretion.

### iii. The trial court properly awarded fees for Jarwick's cross-appeal.

The Wilfs do not offer any substantive challenge to Jarwick's entitlement to fees for opposing the Wilfs' appeal, nor do the Wilfs identify any unreasonable or improper activity in Jarwick's timesheets defending against the Wilfs' appeal. Instead, the Wilfs argue only that, because Jarwick's cross-appeal did not succeed, the Special Master erred in awarding Jarwick fees in connection with prosecuting that cross-appeal. Special Master Orlofsky rejected the Wilfs' bright-line rule, and this Court should too. (Da39117-18.) Relying on the plain text of the RICO statute, Special Master Orlofsky found that the statute lacks any language demonstrating "a legislative intent to carve out portions of the overall litigation that were unsuccessful based on motion or argument." (Da39117.) Instead, the "plain and unambiguous" statutory language is clear that "fees are awarded based on the successful litigation as a whole." (Ibid.)

Indeed, RICO entitles a prevailing party to "the cost of the suit, including a reasonable attorney's fee, costs of investigation and litigation." N.J.S.A. 2C:41-4(c) (emphasis added). Nowhere does RICO limit recovery to just those aspects of "the suit" on which the plaintiff succeeded. Rather, the statute recognizes that courts assess a successful investigation into criminal racketeering based on the whole suit. The Wilfs cite to no cases supporting the proposition that a plaintiff who prevails on a RICO claim must then examine whether it "prevailed" on each particular component of its pursuit of that claim. That is because none exists.

As there is no law supporting the Wilfs' bright-line rule, the trial court did not abuse its discretion in relying on the Special Master's findings to conclude that an award for Jarwick's cross-appeal was proper. The Court therefore should not disturb this portion of Jarwick's fee award.

## IV. THE WILFS CANNOT RELITIGATE THE TRIAL COURT'S FACTUAL FINDINGS ON LIABILITY, WHICH THE APPELLATE DIVISION AFFIRMED, AND THEIR EGREGIOUS MISCONDUCT DURING THE LIMITATIONS PERIOD WARRANTS PUNITIVE DAMAGES.

The Wilfs' challenge to the trial court's punitive damages award shares one thing in common with their other unfounded arguments on this appeal: they distort the Appellate Division's remand decision in hopes of convincing this Court that the trial court should have done something it was not instructed to do.

This time, the Wilfs suggest that the Appellate Division vacated the punitive damages award because of insufficient evidence in the record and that Judge DeAngelis failed to make proper liability determinations on remand. (See Db46 (arguing that "[t]he record before the trial court did not warrant punitive damages").) And, as a meager fallback position, the Wilfs argue that the punitive damages award was excessive.

### A. The Trial Court Apportioned Punitive Damages Against Each Individual Wilf Defendant According to the Appellate Division's Narrow Remand Mandate and the Law.

The Wilfs' assertion that the record is insufficient to award punitive damages against them fails against the Appellate Division's prior decision and the law. The panel concluded that the "punitive damages awards [could not] stand" for a limited reason: the trial court based its calculations on the "non-RICO claims for the period from 1989 to 2011," when the statute of limitations precluded non-RICO tort damages based on injuries that occurred before October 1, 2003." Jarwick Devs., Inc., 2018 WL 2449133, at *25. The panel thus remanded the punitive damages issue to the trial court to determine whether the Wilfs' tortious conduct from October 1, 2003 through 2011 -- the appropriate statute of limitations period -- merited punitive damages and "if, so, in what amounts." Id. at *26.

The Appellate Division did not, as the Wilfs suggest, vacate the punitive damages awards because the record lacked sufficient evidence to award punitive damages. Quite to the contrary, the panel held that "there is sufficient evidence in the record to support the award of . . . punitive . . . damages against both Mark and Leonard." Id. at *30. The panel explicitly rejected the Wilfs' argument (advanced again on this appeal) that Leonard and Mark had a limited role in the partnership that precluded a punitive damages award against them. (Compare Db50-52 with Jarwick Devs., Inc., 2018 WL 2449133, at *30-31.) The panel also acknowledged the trial court's findings about Zygmunt's lead role in the operation. Jarwick Devs., Inc., 2018 WL 2449133, at *30. Specifically, the panel determined that "the record supports the trial judge's finding that Mark and Leonard engaged in conduct that warrants the imposition of liability upon these defendants," as "the Wilfs had operated their businesses with cooperation and coordination" and with "Zygmunt [as] the 'self-described master chef'" of the unlawful conduct, "Zygmunt, Mark, and Leonard worked together and operated on consensus." Ibid. Thus, according to the Appellate Division, the trial court on remand was to make "specific findings as to each individual defendant" "based on the existing trial record, any relevant findings of fact found by the trial judge, and such additional testimony or evidence the court may deem necessary for its decision. " Ibid. (emphasis added). And, in direct

contradiction to the Wilfs' representations here, the panel cautioned that its remand decision "should not be viewed as an opportunity to re-litigate any findings of fact or conclusions made by the trial judge, which has been affirmed on appeal" and "are binding on remand." Ibid. (emphases added).

Judge DeAngelis' inquiry on remand therefore concerned the appropriate allocation of punitive damages to award to Jarwick "based on the damages related to [Jarwick's] new, non-RICO tort claims which were asserted in the amended complaint, not on the damages found in the accounting." Id. at *25. Judge DeAngelis properly relied on Judge Wilson's factual findings to conduct this inquiry for each individual Defendant, Zygmunt, Mark, and Leonard, under the new limitations period. Those factual findings included abhorrent acts of theft, fraud, concealment and other criminal misconduct that the Wilfs as a collective "repeated over and over and over and over again" even after the Appellate Division made clear in a 2006 holding that Jarwick and the Wilfs were partners and that "the Wilfs had a fiduciary duty to Jarwick." (Da39972 (internal quotation marks and citation omitted).) The trial court further found that the Wilfs' unlawful conduct, which included false representations to the court, continued through the trial. (Da39973.) The court highlighted the non-stop egregious conduct through the use of a chart documenting the amount of money

the Wilfs "removed from the partnership through various means, all of which were determined by Judge Wilson and affirmed on appeal." (Da39972-73.)

Contrary to the Wilfs' argument, the trial court also applied the requirements of the Punitive Damages Act to make specific factual findings about the appropriate amount of punitive damages assessed against each of the individual Defendants on remand. (Da39976-78.) With respect to Zygmunt, the trial court found, among other things, that he: (1) "was primarily responsible for misappropriating the partnership funds," (Da39975); (2) "caused harm through wanton and willful acts" by "knowingly t[aking] money from the partnership, which he knew belonged to the partnership and transferring it to Wilf-owned companies for services that were never performed," (Da39978); (3) "was fully aware of his acts and was fully aware that the result of those acts would cause harm to [P]laintiffs by depriving them substantial sums of money, (Da39979); and (4) "intensified" his continuous and repeated violations of the law by "increasing his misappropriation of partnership assets" despite "multiple court orders and an Appellate Division decision" about his illegal conduct, (Da39979-80). The trial court further found that "the likelihood of harm resulting from Zygmunt['s] conduct during the non-RICO statute of limitations was 100%, (Da39978 (emphasis added)), and that Zygmunt's "callous disregard for the rule of law demonstrates the need for the award of punitive damages," (Da39979).

The trial court conducted this same analysis for Mark and Leonard for the relevant statute of limitations period. With respect to Leonard, the trial court found, among other things, that he: (1) knew about Zygmunt's unlawful conduct, including "discrete events constituting theft, conversion and breach of fiduciary duty, all from which Leonard benefitted financially," but made no effort to stop Zygmunt's theft, (Da39982); (2) "knew for an absolute certainty that if he did not interfere with Zygmunt['s] theft, as was his fiduciary obligation, then [P]laintiffs would be harmed because Zygmunt . . . was taking their money, (Da39982-83); (3) "was aware that the [increased management] fees were unjustifiable and thus aware that taking those 'fees' would harm the partnership and were the direct result of" Zygmunt's unlawful conduct and Leonard's failure to stop him, (Da39983); and (4) "stayed silent until trial" about Zygmunt's theft despite Leonard's knowledge that it was ongoing. The trial court made similar findings on each of these points with respect to Mark, namely that Mark owed fiduciary duties to Plaintiffs, was aware of Zygmunt's continuous illegal conduct "the entire time it was happening" but failed to intervene, benefitted financially from Zygmunt's illegal conduct, and knew that Zygmunt's illegal conduct and Mark's failure to act would harm Plaintiffs. (Da39985-87.) Indeed, it were these very acts that led the Appellate Division on the prior appeal to conclude that the record contained sufficient evidence to award punitive

damages against Leonard and Mark. Jarwick Devs., Inc., 2018 WL 2449133, at *30. This holding was binding on Judge DeAngelis, and it is binding on this appeal.

Further, Judge DeAngelis found that a punitive damages award against each of Zygmunt, Leonard, and Mark would not violate the Fourteenth Amendment to the United States Constitution. "[T]he relative degree of reprehensibility in this case," according to the trial court, "cannot be overstated." (Da39981.) Zygmunt "schemed, deceived, manipulated, and stole from his partners" "with malevolent intent" in complete disregard for its partner, Jarwick. (Ibid.) Leonard and Mark owed Jarwick "the highest duty of loyalty and honesty" but instead gave Jarwick "silence in the face of his brother's theft," all while "he was secretly receiving millions of dollars belonging to his partners." (Da39985; see also Da39988.) Leonard and Mark, despite being attorneys, engaged in this unlawful conduct, and because the Wilfs are "extremely wealthy," punitive damages would cause them no undue burden and are proper to hold them "accountable for their actions." (Da39981-82, Da39984-85, Da39988-89.)

After making these careful individualized findings with respect to the Wilfs, Judge DeAngelis determined the proper apportionment of punitive damages to be 60% for Zygmunt and 20% each for Leonard and Mark. As the

record makes clear, the trial court's decision to award and apportion punitive damages comported with the Appellate Division's instructions on remand and the law. There is absolutely no support for the Wilfs' contentions that the trial court "failed to follow [the panel's] directive" and that the record does not warrant punitive damages. (Db46.)

**B. The Trial Court Properly Applied a 2.5 Multiplier.**

The Wilfs further argue that the trial court erred in applying a 2.5 multiplier to calculate the punitive damages award. This argument's lone predicate is a single phrase of dicta in which the United States Supreme Court stated that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." (Db53 (quoting State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).) The Wilfs' brief strategically omits the next sentence of State Farm: "The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." 538 U.S. at 425. Thus, consistent with the very authority on which the Wilfs rely, there is no "bright-line ratio which a punitive damages award cannot exceed." Ibid.; see also id. at 424-25 ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple

mathematical formula, even one that compares actual and potential damages to the punitive award." (emphasis added) (citation omitted)).

The trial court's analysis adhered to the applicable context-specific approach and addressed in detail the facts and circumstances of the Wilfs' far-reaching, sustained, and improper conduct that warranted and necessitated the punitive damages award it entered in Jarwick's favor. As set forth in the court's Statement of Reasons, a multiplier of at least 2.5 against each of Zygmunt, Leonard, and Mark is merited and totally appropriate; nothing in the Appellate Division's prior decision or the Supreme Court's due process jurisprudence requires anything less.

## V. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO AWARD COMPOUNDING PREJUDGMENT INTEREST BASED ON THE WILFS' EGREGIOUS CONDUCT THROUGHOUT THIS DECADES-LONG LITIGATION.

Relying on tortured interpretations of the Court Rules and overstatements about the trial court's reasoning to criticize its decision, the Wilfs' final complaint is that the trial court "awarded an excessive amount of prejudgment interest and failed to adequately explain its basis" for applying compounded interest to calculate the total award. (Db54-60.) The Wilfs' argument wholly disregards the well-established law affording trial courts discretion in entering prejudgment interest awards and must be rejected.

The Wilfs' prejudgment interest argument is premised on, yet another, bright-line rule they concocted solely to serve their interests and without any basis in the law. The Wilfs suggest, inaccurately, that Rule 4:42-11 requires application of a simple interest rate unless there is a contractual agreement "or specific findings of fact justifying a higher rate of interest." (Db56-57.) Rule 4:42-11 imposes no such requirements. Rather, Rule 4:42-11 provides that judgments generally bear "simple interest" "[e]xcept as otherwise ordered by the court or provided by law." R. 4:42-11(a) (emphasis added); see also R. 4:42-11(b) (applying Rule 4:42-11(a)'s calculations for prejudgment interest to tort actions). In other words, Rule 4:42-11 sets a flexible guidepost for prejudgment interest awards, and trial courts have discretion to decide to deviate from that guidepost by order or law as they deem fit.

The heightened standard of review this Court applies to a trial court's prejudgment interest award further supports this interpretation. That standard recognizes that "[a] trial court has the discretion to grant or deny prejudgment interest according to the equities," and thus, the Appellate Division "will defer 'to [the trial court's] action unless it represents a manifest denial of justice.'" Bussell v. DeWalt Prod. Corp., 259 N.J. Super. 499, 521 (App. Div. 1992) (citation omitted); see also Musto v. Vidas, 333 N.J. Super. 52, 74 (App. Div. 2000) (explaining that trial courts have "broad discretion" to award prejudgment

interest "in accordance with principles of equity"). New Jersey courts have consistently exercised this broad discretion to award compound rather than simple interest. See, e.g., Musto, 333 N.J. at 75 (finding "no abuse of discretion in the trial judge's decision to award compound rather than simple interest"); Gleason v. Northwest Mortg., Inc., No. 96-4242, 2008 WL 2945989, at *4 (D.N.J. July 30, 2008) (exercising discretion to comply compound annual interest on equity grounds, so as to strike a balance between "hasten[ing] the accumulation of debt" and wrongfully punishing plaintiff by awarding "interest at a rock-bottom level"); Buck v. Consultants, Inc. v. Glenpointe Assocs., No. 03-454, 2010 WL 2104982, at *3 (D.N.J. May 25, 2010) (exercising discretion to apply compound interest in part because "it is reasonable to assume that a sophisticated business entity, such as [the prevailing party], would have deposited the withheld funds in a financial vehicle that earned compound interest").

Neither Township of West Windsor v. Nierenberg, 345 N.J. Super. 472 (App. Div. 2001) nor AGS Computers, Inc. v. Bear, Stearns & Co., 244 N.J. Super. 1, 5 (App. Div. 1990), relied on by the Wilfs, requires a different analysis. Nierenberg involved a condemnation action that implicated the interest standards of the Eminent Domain Act, N.J.S.A. 20:3-32, which are inapplicable here. 345 N.J. Super. at 478. Nonetheless, the panel found no abuse of

discretion in the trial court's decision to award prejudgment interest at the prime rate compounded annually and deferred to the trial court's factual findings. Id. at 478-49. The appellate panel in AGS Computers, Inc., similarly acknowledged that "prejudgment interest is discretionary," and in remanding the issue back to the trial court, did not "foreclose the judge from considering the appropriate rate of interest to award and the date or dates from which interest is to run." 244 N.J. Super. at 4-5. These courts thus endorsed the discretionary standard applied to prejudgment interest awards, and did not, as the Wilfs suggest, impose any heightened standard on trial courts to deviate from Rule 4:42-11.

Against this backdrop, the trial court on remand did not abuse its discretion in applying compound interest to Jarwick's prejudgment interest award. The paramount consideration in determining whether and how to award prejudgment interest is that "the defendant has had the use, and the plaintiff has not, of the amount in question; and the interest factor simply covers the value of the sum awarded for the prejudgment period during which the defendant had the benefit of monies to which the plaintiff is found to have been earlier entitled." Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 506 (1974). The trial court relied on this equitable purpose to determine the appropriate amount of interest that would compensate Jarwick "for the loss of [the] monies" Jarwick "would presumably have earned if payment was not delayed."

(Da40003.) The trial court concluded that compound interest at two different interest rates would best serve to indemnify Jarwick for its losses: 8.875% from the date of the December 20, 2013 final judgment through and including July 9, 2014 -- the date the Rachel Gardens property at issue was sold; and the average prime interest rate of 3.935% from the date of that sale through and including November 16, 2022. (40079a-40080a.)

Contrary to the Wilfs' assertion, the trial court's decision to award compound interest was not "harsh and oppressive" or "punitive." (Db59-60.) If anything in this case is "harsh and oppressive" or "punitive" it is the Wilfs' withholding, and having the exclusive benefit of, Jarwick's monies for nearly thirty years while persisting in taking every opportunity to further delay this matter's resolution. The Wilfs are "extremely wealthy," as the trial court observed, sophisticated business professionals who have been enriched all this time by the monies to which Jarwick is entitled and have had free reign to invest and reap the benefits of interest (and perhaps compound interest) of those monies at Jarwick's expense. The Wilfs' conduct prevented Jarwick from the use of these monies for decades, which to date, remain under the Wilfs' control. If these circumstances do not warrant the application of compound interest under principles of equity, it is difficult to imagine what circumstances would.

For all these reasons, the trial court did not abuse its discretion in awarding prejudgment interest at a compound interest rate to Jarwick and affirming that decision would not "represent[t] a manifest denial of justice." Bussell, 259 N.J. Super. at 521 (internal quotation marks and citation omitted). The prejudgment interest award therefore should not be disturbed. [4]

## CONCLUSION

As the foregoing demonstrates, and as made clear throughout this litigation, the Wilfs engaged in an egregious and unjustifiable scheme to fabricate transactions to enrich themselves at the expense of their partners. The trial court properly followed the Appellate Division's remand instructions and conducted a comprehensive analysis to enter judgment for Jarwick. The trial court's judgment should be affirmed for all the reasons stated herein.

Dated: August 23, 2023

Respectfully submitted,

**LOWENSTEIN SANDLER LLP**
Attorneys for Jarwick

By: /s/ Michael B. Himmel
Michael B. Himmel

[4] Even though the Wilfs made no objections to Judge Wilson's application of compounded interest in 2013, they now request that this Court review the complete prejudgment interest award to Jarwick, including the $19,435,326 that the prior panel affirmed in 2018. (Db58 n.9.) The Wilfs acknowledge that the 2018 panel affirmed this award. That affirmance was binding on remand and is not subject to this appeal.

# Superior Court of New Jersey

**APPELLATE DIVISION**

**DOCKET NO. A-001749-22**

JARWICK DEVELOPMENTS, INC., ADA REICHMANN and RACHEL HALPERN, AS EXECUTRIX OF THE ESTATE OF JOSEF HALPERN,

*Plaintiffs-Respondents,*

—against—

JOSEPH WILF and THE ESTATE OF HARRY WILF, deceased, individually and as partners in the partnership known as J.H.W. ASSOCIATES; LEONARD A. WILF; ZYGMUNT WILF; MARK WILF; SIDNEY WILF; RACHEL AFFORDABLE HOUSING CO.; HALWIL ASSOCIATES, a partnership and PERNWIL ASSOCIATES, a partnership,

*Defendants-Appellants,*

—and—

MARVIN COHEN and MIRONOV, SLOAN & PARZIALE, LLC (f/k/a Beck, Weiss & Company, P.A.),

*Defendants.*

CIVIL ACTION

ON APPEAL FROM FINAL JUDGMENTS AND ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, MORRIS COUNTY

DOCKET NO. MRS-C-184-92

SAT BELOW: HON. FRANK J. DEANGELIS, P.J.CH.

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2. Final Judgment, dated January 4, 2023, with respect to Josef Halpern. (40005a).

3. Order dated November 16, 2022 regarding the remand from the Appellate Division. (39964a).

4. Order dated October 13, 2021 denying Defendants' motion to recuse Special Master Orlofsky. (39015a).

5. In accordance with *Synnex Corp. v. ADT Sec. Servs., Inc.*, 394 N.J. Super. 577, 587-88 (N.J. App. Div. 2007), all interlocutory orders upon which the judgments are based are appealed, including but not limited to, the October 13, 2021 Order denying Defendants' motion to recuse Special Master Orlofsky, and the November 16, 2022 Order regarding the remand from the Appellate Division listed above.

**6.** Additionally, for purposes of preserving the record for potential further appeals, all interlocutory orders and judgments that preceded the 2018 Appellate Division decision in this matter, *Jarwick Devs., Inc. v. Wilf*, 2018 WL 2449133, Docket No. A-2053-13T3 (N.J. App. Div. June 1, 2018) are also appealed.

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## PRELIMINARY STATEMENT

Jarwick and Halpern devote most of their opposition briefs to glossing over the Appellate Division's prior holdings and instructions, misconstruing this Court's remand mandate as a complete affirmance of the Trial Court's 2013 determinations. Plaintiffs' analysis is dead wrong. As the Wilf Defendants described in detail in their Opening Brief, the 2018 Appellate Division decision required the Trial Court to find specific facts within specific time periods to award compensation to Jarwick and Halpern. The Trial Court failed to do so, and this Court must now rectify the Trial Court's legal errors.

This case is more than three decades old, but justice has not yet been served. Noted in the Wilf Defendants' initial brief, the longevity and complexity of the issues yet to be resolved are due entirely to the unprecedented, unlawful, and vast expansion of the case following the limited remand embodied in this Court's first decision almost seventeen years ago in 2006. The Wilf Defendants, treated with disdain and demonstrable bias by the trial judge after the 2006 remand (Hon. Deanne M. Wilson, J.S.C.), are at least entitled to adherence to this Court's directives on the later remand. Simply put, the parties deserve decisions grounded in valid legal principles.

# ARGUMENT

## I. The Special Master was Required to Recuse

### A. The Special Master's appearance of impartiality is reasonably questioned in this case (39680a).

Judges must recuse themselves whenever "their impartiality or the appearance of their impartiality might reasonably be questioned." *Code of Judicial Conduct Rule 3.17(B).* That standard includes "any . . . reason" that might reasonably lead "**the parties"** to believe that they would not get "a fair and unbiased hearing and judgment" before the court. R. 1:12-1(g)(emphasis added).

Here, as one example of perceived bias and unfairness, Special Master Orlofsky awarded thousands of dollars in attorneys' fees for the time that Plaintiffs' attorneys expended on 100% *unsuccessful* cross-appeals to this Court and *unsuccessful* petitions for certification to the Supreme Court. In doing so, he ignored this Court's remand mandate and affirmed his own prior recommendations that previously had been vacated by this Court. The Wilf Defendants not only witnessed that unfairness, but also know that the Special Master had a relationship both with the Lowenstein law firm - whose fees he approved - and the lead lawyer in this case at that law firm, Michael Himmel. Certainly, the Wilf Defendants reasonably believe that Special Master Orlofsky did not give them an unbiased hearing and the Trial Court, as a result, did not enter a fair judgment. The Trial Court went further, concluding that Special Master Orlofsky, who is an extension of the Trial Court, is

**not** subject to the same standard that would apply to the judge if the court itself had undertaken the identical task assigned to the Special Master.

Three circumstances, together, compel the conclusion that Special Master Orlofsky's appearance of impartiality is reasonably questioned. First, the Special Master was considering a fee application requiring him to evaluate the reasonableness of Lowenstein's work and fees. Second, simultaneously, Lowenstein offered the Special Master a paid opportunity to serve as a mediator, and the Special Master accepted. Third, the offer and acceptance took place during the pendency of the fee application in this case. Highly significant, the Special Master failed even to *disclose* these circumstances to *either* the Trial Court *or* the Wilf Defendants. The Special Master was required to recuse himself, or at least, to disclose Lowenstein's paid-mediator offer so that the parties and the Trial Court could reevaluate whether he should continue to serve in this case. Hence, it is reasonable to question the Special Master's appearance of impartiality.

Plaintiffs ignore these facts. Halpern makes no substantial argument on recusal. Jarwick erects a series of straw men. The Wilf Defendants seek to apply, not to displace, the New Jersey Supreme Court's governing objective standard that asks whether the Special Master's "appearance of impartiality" *may* be reasonably questioned. (*See* Jarwick_Pb 19; Wilf_Db 30-31). The Wilf Defendants do not seek a rule that "private attorneys may not serve as special masters or mediators in

alternative dispute resolution matters involving the same law firm at the same time." (Jarwick_Pb 19). Jarwick is confused. It collapses the distinctions between: (i) a Special Master with quasi-judicial authority of the court, and (ii) a mediator with no such decision-making authority. Also, it collapses the distinction between: (i) a matter that simply *involves* a law firm as representative of a party, and (ii) a matter specifically involving an attorneys' fees request and award that turns on the reasonableness of that law firm's work and fees. "Motions for recusal ordinarily require a case-by-case analysis of the particular facts presented." *State v. McCabe*, 201 N.J. 34, 46 (2010). Jarwick conflates factually dissimilar circumstances.

The case law cited by Jarwick — all unpublished or from other jurisdictions — also does not support its position. *Jenkins v. Sterlacci*, 849 F.2d 627 (D.C. Cir. 1988), supports the Wilf Defendants. That case involved a Special Master who was opposing counsel in a separate matter to a law firm representing a party before him, and the court concluded that this conflict required disclosure because "his impartiality might otherwise have reasonably been questioned." *Id.* at 633. The court simply held that the party seeking recusal had waived its objection. *Id*. at 634. The Wilf Defendants did not waive their objections to the Special Master in this case

and instead sought his removal. The other cases Jarwick cites are factually far afield.[1]

Jarwick's other arguments are similarly unavailing. Jarwick erroneously focuses on whether the attorneys' fee award directly impacts how much Lowenstein is paid (s*ee* Jarwick_Pb 22), ignoring the Wilf Defendants' argument that the attorneys' fees issue required considering the reasonableness of Lowenstein's work and Lowenstein's fees — matters directly implicating Lowenstein lawyers, including Mr. Himmel, not just the firm's client. (Wilf_Db 32-33). Jarwick formalistically argues that there is no reasonable basis for doubting the appearance of impartiality where a law firm delivers a financial benefit to a Special Master considering a fee award application prepared by that same law firm ***based on that***

[1] Every case cited by Jarwick on this issue is readily distinguishable from this case. *See In re Joint E. & S. Dist. Asbestos Litig.*, 737 F. Supp. 735 (E.D.N.Y. 1990) (denying motion to disqualify mediator brought by an asbestos manufacturer objecting to confidential information allegedly acquired during mediator's years-old representation of a coalition and committee sponsored by asbestos manufacturers); *Nuckel v. Borough of Little Ferry*, No. A-4940-11T1, 2013 WL 4104100, at *6–8 (N.J. Super. Ct. App. Div. Aug. 15, 2013) (denying motion to disqualify Special Master where Special Master had represented, without pay, a distinct party not before the court); *Fuhrmann v. Wolf*, No. A-6031-07T3, 2009 WL 4255529, at *5–7 (N.J. Super. Ct. App. Div. Nov. 19, 2009) (denying motion to disqualify discovery master where master's law firm inadvertently retained defendant's counsel's law firm without the knowledge or involvement of master or defendant's counsel); *Cirba, Inc. v. VMware, Inc.*, No. CV 19-742-LPS, 2022 WL 606655 (D. Del. Jan. 7, 2022) (denying motion to disqualify special discovery master where master's law firm partner concurrently served as co-counsel to defendant's counsel in representation of an unrelated party).

***law firm's work***, as long as the financial benefit is not paid by the law firm itself and the fee award is not directly paid to the law firm. But the whole point of the broad catch-all language in Rule 3.17, requiring disqualification "in proceedings in which [judges'] impartiality or the appearance of their impartiality might reasonably be questioned," not just when required by one of the specific provisions of the rule, is to recognize that recusal is required in "scenarios that cannot be neatly catalogued." *In re Advisory Letter No. 7-11 of the Supreme Court Advisory Comm.*, 213 N.J. 63, 73 (2013).

Jarwick also claims that the Wilf Defendants cannot meet the abuse-of-discretion standard for review of a recusal decision. (Jarwick_Pb 16-17). That is not the applicable test. The case Jarwick cites explains that there is "review de novo" of "whether the proper legal standard was applied," and reversed the denial of the recusal motion at issue because "the municipal court judge mistakenly focused on whether [the moving party] had suffered any prejudice," which need not be present for recusal to be required. *State v. McCabe*, 201 N.J. 34, 45 (2010). As the Wilf Defendants explained in their Opening Brief, both the Special Master and the Trial Court made similar errors. *See* Wilf_Db 32 (Trial Court erroneously discounted the mediation because of its brevity); *id*., 32-33 (Special Master erroneously focused on the absence of a "direct financial link" between Lowenstein and the Special Master).

### B. The Code of Judicial Conduct's standard for recusal should be applied here (39680a).

Jarwick argues that this Court "need not address" the issue of whether the *Code of Judicial Conduct* applies to Special Masters because "the trial court agreed to accept the Wilfs' premise that the *Code* applied in deciding the Wilfs' recusal motions." (Jarwick_Pb 16). The Wilf Defendants agree that this Court could reverse by concluding that the Trial Court misapplied the *Code*. However, since the Trial Court held the *Code's* application to be "*in dubitante*" (in doubt) and concluded that "it is much more reasonable to apply the Rules of Professional Conduct" to the work of Special Masters, this Court should clarify that the *Code of Judicial Conduct* does, in fact, apply to Special Masters, at least in relevant part.

It is true that New Jersey courts have not yet uniformly applied the *Code of Judicial Conduct* to Special Masters outside the *Mount Laurel* context, but they certainly have not foreclosed it either.[2] That other jurisdictions have expressly included Special Masters in their judicial codes does not mean that New Jersey has made a deliberate decision to apply a lesser recusal standard to Special Masters. If it were otherwise, *Mount Laurel* Special Masters also would be exempt from the

[2] Neither *Snyder v. Snyder*, No. A-4116-13T2, 2016 WL 4473254 (N.J. Super. Ct. App. Div. Aug. 25, 2016), nor *Fuhrmann v. Wolf*, No. A-6031-07T3, 2009 WL 4255529, at *7 (N.J. Super. Ct. App. Div. Nov. 19, 2009), unpublished decisions cited by Jarwick, are to the contrary. *Snyder* concluded that the judicial appointee at issue in that case was *not* akin to a Special Master. 2016 WL 4473254 at *4. *Fuhrmann* in fact *applied* the *Code of Judicial Conduct*. 2009 WL 4255529 at *7.

judicial recusal rules. Rule 1.12(c) of the *Rules of Professional Conduct*, which applies to a range of "third-party neutral[s]" who are *not* (like Special Masters) arms of the court, addresses only the limited scenario of negotiating for employment with a party or party's attorney and lacks the robustness of the *Code's* recusal standard. The Court should hold that the *Code of Judicial Conduct's* standard for recusal applies to Special Masters, at least in relevant part, and that the Special Master in this case was required to recuse here.

## II. The Trial Court's Attorneys' Fees Award Was Erroneous (39989a-40001a; 40005a-40010a).

As the Wilf Defendants explained in their Opening Brief, in the previous appeal, this Court expressly held that the Trial Court "erred by finding that all of Jarwick's and Halpern's claims rested on a common core of operative facts." *Jarwick Devs., Inc. v. Wilf*, No. A-2053-13T3, 2018 WL 2449133, at *29 (N.J. Super. Ct. App. Div. June 1, 2018). This Court noted the general rule "that when a plaintiff presents claims for which fees can be awarded along with claims for which such fees cannot be awarded, attorneys' fees for all of the time devoted by counsel to the case can be awarded if the work on the unrelated claims can be deemed to be part of the pursuit of the ultimate result achieved." *Id*. at *28 (internal quotation marks omitted). Here, however, the work done in pursuit of Plaintiffs' non-attorneys' fees claims were not part of the ultimate result achieved. This Court said so when it stated that their claims lacked a "common core of operative facts." *Id.* at

*29. As such, the Court required that the award be limited to only "the fees and costs ***reasonably devoted*** to plaintiffs' pursuit of their respective ***RICO claims***." *Id*. (emphasis added).

Plaintiffs run away from this Court's mandate, which cannot be reconciled with what the Special Master or the Trial Court did on remand. In the face of the decision's express language, both Jarwick and Halpern surprisingly argue that this Court did not actually hold that there was no common core of operative facts. (Jarwick_Pb 26-27; Halpern_Pb 70-71). The Court's directive for remand shows otherwise. Plaintiffs argue that, rather than perform a claim-by-claim analysis, "the court must focus on the 'significance of the ***overall*** relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.'" *Silva v. Autos of Amboy, Inc.*, 267 N.J. Super. 546, 556 (App. Div. 1993) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983)) (emphasis added). But application of the lodestar method as exemplified by *Silva* presupposes that all of "the plaintiff's claims for relief 'involve a common core of facts or will be based on related legal theories . . .'" *Id.*

This Court did not direct (or permit) the broad "results obtained" approach on remand because Plaintiffs' various claims were instead "a series of discrete claims." *Id.* Thus, the task on remand was whether and which of Plaintiffs' "fees and costs" were "reasonably devoted to plaintiffs' pursuit of their respective ***RICO*** claims," not

whether Plaintiffs' result on the RICO claims warrants the payment of fees and costs incurred in pursuit of their other claims as well. *Jarwick*, 2018 WL 2449133, at *29.

Jarwick focuses on the Court's holding that the Trial Court's finding of a common core of operative facts "ignores the time-limitations that apply to the non-RICO and RICO claims" and argues that this Court simply remanded for a redetermination of whether the claims involving a longer limitations period than the RICO claims had a common core of operative facts with the RICO claims. (Jarwick_Pb 27). But that is not what this Court said. Instead, this Court found that the Trial Court's finding of a common core of operative facts was erroneous. This mandated that, on remand, any award be limited to work "reasonably devoted" to the RICO claims. *Jarwick*, 2018 WL 2449133, at *29. This Court did not conclude that the only basis for reconsideration was the incorrect statute of limitations; in fact, it stated that the awards "must be reconsidered for several reasons." *Id*. But even if it had relied solely on the statute of limitations issue, this Court still found that the non-RICO claims lacked a "common core of operative facts." *Id*.

As the Wilf Defendants explained in detail in their Opening Brief, the Special Master and the Trial Court failed to comply with this Court's ruling. (*See* Wilf_Db 37-44). Plaintiffs' contrary arguments all fail.

### A. The Special Master and the Trial Court improperly awarded fees for work performed before RICO claims were added to the case (39067a-39068a).

The Special Master awarded Jarwick fees for work performed by its counsel in 2007, 2008, and 2009, notwithstanding that the record below shows that RICO claims were not either contemplated by Jarwick or added to the case until October 2009. Those claims were added only after Halpern intervened in August 2009 and sought to add RICO claims that Jarwick's attorneys had never even considered. (*See* Wilf_Db 34-35). There is simply no evidence in the record that *any* of Jarwick's pre-September 2009 work was "reasonably devoted" to RICO claims that had not yet been filed and not even considered, given Jarwick's communications to the Trial Court in late July and August 2009. (*Id*). This award was improper and should be reversed.

Jarwick responds by attacking an argument the Wilf Defendants did not make and ignoring the one they actually made. The Wilf Defendants did not argue that there is any "bright-line rule" (Jarwick_Pb 29) barring recovery of attorneys' fees on a RICO claim before such a claim is filed. The Wilf Defendants do not dispute that a RICO plaintiff can recover investigation costs incurred before filing, assuming that the fee applicant can show from its contemporaneous billing records that it actually did such work. Rather, as explained in the Wilf Defendants' Opening Brief, the Special Master's error was the award of attorneys' fees for a period where RICO

claims were not even *contemplated*. (Wilf_Db 34-37). There is no evidence in the record that any work performed on Jarwick's behalf before September 2009 was "reasonably devoted" to investigation of RICO claims or was otherwise performed in contemplation of RICO claims. To the contrary, in July 2009, Jarwick sought to move to trial in September 2009 on both the accounting and valuation of its 25% interest in the partnership, with no RICO claims at issue. (2427a-2437a). Jarwick also opposed adding Halpern as a party to avoid delaying that trial. (2427a-2437a; Wilf_Db 35). Furthermore, Halpern's counsel boldly proclaimed to the Special Master "I brought the RICO claim to this action. I did. And I don't mean to criticize anybody on Jarwick's side. I did." 256T at 87:2-4. And Halpern did not join the case until after July 2009. Jarwick points to nothing in the record suggesting otherwise.

### B. The Special Master and the Trial Court erroneously awarded fees for work not "reasonably devoted" to or "reasonably required" for the RICO claims (39089a-39090a; 40005a-40010a).

This Court's mandate as to attorneys' fees was clear: on remand, "[t]he court must ***limit*** its award to the fees and costs reasonably devoted to plaintiffs' pursuit of their respective RICO claims." *Jarwick*, 2018 WL 2449133, at *29. Similarly, as to "counsel fees and costs for time spent establishing wrongful acts on the part of defendants that pre-dated the time for which the RICO claims could be asserted," this Court held that, to award such fees, "the court must find that the time devoted

to *presenting* that evidence was ***reasonably required*** to establish the RICO claims." *Id*. Complying with this mandate requires evaluating whether, and the extent to which, the fees for specific tasks were in fact "reasonably devoted to plaintiffs' pursuit" of the RICO claims.

Instead of complying with this Court's mandate, the Special Master and the Trial Court focused on the presence of factual overlap at a high level. Similar to its previous ruling that was vacated and reversed by this Court, the Trial Court found again that "***[m]any*** facts that pertain to plaintiffs non-RICO claims were essential in establishing defendants' violation of RICO," and that "[i]t would be illogical to state the facts discovered from 1992 to 2009, which gave rise to and informed plaintiffs' understanding that defendants had violated the RICO statute, had ***nothing*** to do with plaintiffs' prosecution of their RICO claims." (39996a) (emphasis added).

The Trial Court used this confusing logic to reject the claim-specific analysis mandated by this Court, and instead focused on Plaintiffs' counsel "achiev[ing] an excellent result for their clients, prevailing on both non-RICO claims, and convincing the trial court punitive damages were appropriate." (40072a-73a; 40076a). The mandate from this Court was to "limit [the] award to the fees and costs reasonably devoted to plaintiffs' pursuit of their respective RICO claims" — not to decide (contrary to this Court's holding) that there was a common core of facts and, therefore, apply the *Silva* rule focusing on the "overall relief obtained." *Silva*, 267

N.J. Super. at 556. Similarly, the Special Master noted that certain broad categories of facts were *potentially* relevant to both RICO and non-RICO claims, but did not engage in any granular analysis of what Plaintiffs' counsel *actually did* prior to September 2009 (for Jarwick) or afterwards (for both Plaintiffs) so as to determine whether such work was in fact "reasonably devoted" or "reasonably necessary" to the RICO claims. (39146a-50a). Again, as Halpern's counsel announced to the Special Master, "I brought the RICO claim to this action." 256T at 87:2-4.

Jarwick argues that the Wilf Defendants' position improperly requires an analysis of time entries or specific projects. But applying the remand directive of this Court requires evaluating whether specific work was, in fact, "reasonably devoted" to those claims. Attorneys' fee awards routinely involve analysis at that level of specificity, *see*, *e.g.*, *Hansen v. Rite Aid Corp.*, 253 N.J. 191, 221 (2023).[3] And *Hansen*, decided while this appeal was pending, should at least require a remand to assure complete compliance with the Supreme Court's latest instructions about evaluation of fee applications.

Jarwick further argues that certain arguments made by the Wilf Defendants were previously made on the prior appeal. (Jarwick_Pb 34-35). That much is true

[3] If the Court finds that a further remand is impracticable, an alternative would be to apply an overall percentage reduction in attorneys' fees to account for the non-RICO work. *See In re Pall Corp.*, No. CV 07-3359 (JS) (GRB), 2013 U.S. Dist. LEXIS 55592, at *8 (E.D.N.Y. Apr. 8, 2013) ("[T]he use of a percentage cut is a widely used, efficient means of resolving attorneys' fees applications").

— and this Court vacated the fee awards, which, it held, "must be reconsidered for several reasons." *Jarwick*, 2018 WL 2449133, at *29. This Court did not affirm, expressly or by implication, the prior findings by the Trial Court or the Special Master about which fees were compensable. It vacated the entirety of the attorneys' fee award. Hence, it required the Trial Court to reconsider the fees by applying a different standard from the one the Trial Court previously had used. *Id.* The Trial Court failed to comply with that directive, necessitating this appeal.

As to Halpern's arguments, with one exception, his references are either to the Special Master's original 2013 report, which applied a different standard and which fee award was vacated by this Court, or to the Special Master's supplemental 2022 report on fees for the appeal. (*See* 39135a, 39149a-50a, 39171a-72a). Halpern's citations purporting to illustrate the Special Master's granular analysis include exactly **one** citation to the Special Master's first 2022 report reconsidering the fee award that this Court vacated, and that citation is to the Special Master's summary of his prior report. (39036a-37a). In short, Halpern makes the Wilf Defendants' point, that the Special Master's 2022 report essentially affirmed his prior recommendations, vacated by this Court, and did not include the kind of analysis this Court mandated.[4]

[4] Halpern also makes much of the fact that in the Special Master's 2013 fee recommendation, the Special Master reduced Halpern's fee award by $100,000 in

Both Jarwick and Halpern take issue with this Court's prior ruling, arguing that it is inappropriate to limit the fee award to the fees devoted to the RICO claims – the only fee shifting claims in the case. Halpern, inexplicably, goes so far as to deny that this Court even held that "compensable work must be limited to that which was 'reasonably devoted to [Halpern's] pursuit of [his] … RICO claims.'" (Halpern_Pb 68 n.24 (alterations in original)). Jarwick seeks application of the *Silva* rule that would inquire into "the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended in the litigation" (Jarwick_Pb 32), a different standard from (as the prior remand required) focusing specifically on the "fees and costs reasonably devoted to plaintiffs' pursuit of their respective RICO claims." But these arguments are flatly inconsistent with this Court's prior holding. Plaintiffs' attempt to reject this Court's ruling *sub silentio* should be rejected.

### C. Plaintiffs are not entitled to an award for their unsuccessful cross-appeals (39173a-39177a; 40005a-40010a).

Plaintiffs failed across-the-board in their cross-appeals and petitions for certification, but the Special Master still awarded them fees for this work. (Wilf_Db 44-45). Jarwick relies on the same statutory language as the Special Master

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light of Halpern's counsel's representation that this amount represented work on claims "wholly unrelated" to RICO. (Halpern_Pb 50-51; 14549a). This reduction, amounting to about 2% of the fee award, hardly represents an effort to "limit [the] award to the fees and costs reasonably devoted to plaintiffs' pursuit of their respective RICO claims."

(Jarwick_Pb 37), ignoring that the statute requires a "***reasonable*** attorney's fee," s*ee N.J.S.A.* 2C:41-4(c) (emphasis added), and reasonableness includes the level of success. *See Silva*, 267 N.J. Super. at 559; (Wilf_Db 44-45). Halpern cites cases involving the distinct context of a plaintiff that has some successful and some unsuccessful claims that share a common core of facts. (Halpern_Pb 72-73). That context has no applicability to Plaintiffs' cross-appeals, which involved *no* successful appellate claims. This Court should reject the award of fees for Plaintiffs' cross-appeals and petitions for certification.

## III. The Trial Court's Award of Punitive Damages Must be Vacated (39970a-39989a).

In their briefs, Plaintiffs do not hide their wholesale reliance on the findings of Judge Wilson in defending the award of punitive damages. (*See*, *e.g.*, Halpern_Pb 57-58). But insofar as they purport to underlie the imposition of punitive damages, Judge Wilson's punitive damages award was entirely vacated, and the Trial Court was tasked with reevaluating the award of punitive damages while considering only acts that occurred solely within the statute of limitations ("SOL") period. Within that period (October 1, 2003 – December 31, 2011), the Trial Court did not make appropriate findings from which it could impose punitive damages. Judge Wilson made no such findings and the Trial Court merely relied upon the same non-existent findings. And such findings were required under R. 1:7-4.

Plaintiffs suggest that this Court undertake its own searching review of the trial record to uphold the Trial Court's decision. (Halpern_Pb 57-58; Jarwick_Pb 37-38). But this Court already has rejected that invitation and directed the Trial Court to "make specific findings of fact as to each individual defendant" as to "whether each of these defendants engaged in conduct" during the SOL period "which rises to the level required for the award of punitive damages." 2018 WL 2449133, at *26. The Wilf Defendants extensively cited to the Trial Court how each purported finding of fact by Judge Wilson, cited by Plaintiffs, failed to establish specific conduct by any defendant within the specific time period that met the legal standard justifying a finding of punitive damages. *See, e.g.,* 253T at 32:6-35:3.

In support of their position, Plaintiffs cite a recent, unpublished case from this Court, *Devli v. Tasci*, No. A-2573-20, 2022 WL 17491290 (N.J Sup. Ct. App. Div., Dec. 8, 2022), as supporting an award of punitive damages in this case. But in *Devli*, the trial judge "issued a thorough and detailed written opinion addressing the punitive damage claim under the [Punitive Damages Act (PDA)]" and, in "[a]nalyzing the *N.J.S.A.* 2A:15-5.12(c) factors, she repeated her findings." *Id.* at *4. As described below, that analysis is lacking here.

This Court cannot discern an appropriate basis for punitive damages from the rest of the record, as Plaintiffs suggest. The PDA requires proof of "actual malice" or "wanton and willful disregard" by "clear and convincing evidence," *N.J.S.A.*

2A:15-5.12(a). Even if this Court engaged in the searching review Plaintiffs suggest, it would find only facts "needed to state the bare bones elements of the underlying" violations, not the finding of malice or facts required for a finding of punitive damages. *Sacchi v. ABC Fin. Servs. Inc.*, Civ. No. 14-1196 (FLW), 2014 WL 4095009 at *5 (D.N.J. Aug. 18, 2014).

With respect to all Defendants, the Trial Court improperly imposed punitive damages in a commercial dispute between "sophisticated businesspersons who would often use multiple partnership[s] during the course of one project in order to limit their financial exposure at various stages." (498a).

In reaching its conclusions under *N.J.S.A.* 2A:15-5.12(a), for example, the Trial Court only noted that Zygmunt Wilf improperly transferred funds from one entity to another. (40054a-55a). Again, this Court recognized that these parties understood that business arrangement. (498a). That Zygmunt knew he was transferring money does not transform that conduct between partnerships into a "wanton and willful act[]" under the PDA. (40054a). With respect to *N.J.S.A.* 2A:15-5.12(b), the Trial Court again relied on Zygmunt's transfers, while apparently weighing pre-SOL period conduct. (40055a-56a). Indeed, Plaintiffs additionally point to conduct pre-dating Oct. 1, 2003, and stretching as far back as 1998, contrary to this Court's express instructions in 2018. (Halpern_Pb 59-60).

As to Leonard and Mark Wilf, the specific findings as to their culpability provided even less support for the imposition of punitive damages. The Trial Court adopted the theory, unsupported by any case citation, that knowledge of and "fail[ure] to stop" Zygmunt Wilf's transfer of funds, constituted a wanton and willful omission under the PDA (40138a-45a).

As to the imposition of a 2.5x multiplier on punitive damages, Plaintiffs do not seriously address the substantial amount of compensatory damages and interest already awarded. The punitive damage award runs afoul of equitable principles, New Jersey law, and Due Process. Here, the Trial Court awarded over $16 million of punitive damages, atop more than $50 million in compensatory damages and interest alone. Such an award warrants re-examination.

Plaintiffs also suggest that the punitive damages award somehow would make them whole as "this Court's . . . strict application of the SOL" reduced their compensatory damages. (Halpern_Pb 65 n.22). Such a justification is wholly improper under the PDA.

## IV. The Trial Court's Award of Compounded Interest and at an Excessive Interest Rate was Error (40006a-40007a; 40009a-40010a).

The Trial Court inappropriately awarded Jarwick and Halpern: (1) pre-judgment interest that was compounded, and (2) pre-judgment interest that exceeded the appropriate rate under R. 4:42-11.

### A. The Trial Court made no finding that interest should be compounded after December 20, 2013 (40006a-40007a; 40009a-40010a).

Plaintiffs avoid Judge DeAngelis' statement in the Final Judgment Orders that "the Court **did not disturb Judge Wilson's determination that pre-judgment interest should be compounding**, as affirmed by the Appellate Division." *See* 40007a; 40010a (emphasis added). As noted by the Wilf Defendants in their Opening Brief, this statement is factually incorrect. The manner of determining pre-judgment interest was decided upon agreement between the parties up to the Final Judgment of December 20, 2013 – it was **not** "determined" by Judge Wilson. (*See* Wilf_Db 54-55; 247T at 91:11-18). Judge Wilson made no findings about pre-judgment interest. In fact, Judge Wilson stated that the agreed 8.875% pre-judgment interest rate was "far and above anything that I have ever seen." (247T at 91:11-18). Judge Wilson simply accepted the agreement between the parties for the period ending December 20, 2013. Further, the Appellate Division only affirmed the pre-judgment interest award – it was silent as to the methodology of the calculation. The 8.875% pre-judgment interest rate and compounding interest was limited to the date of Final Judgment of December 20, 2013. Nevertheless, Jarwick and Halpern attempt to unilaterally expand that agreement to extend far beyond the December 20, 2013 entry of the Final Judgment.

Jarwick's and Halpern's attempt failed when they presented it to Judge Wilson in December 2013, at the time of the Final Judgment. Judge Wilson specifically found that the agreement of the 8.875% compounded interest "wasn't agreed to for the purposes of" post-judgment interest beginning December 20, 2013. 251T at 13:25-14:1. Judge Wilson confirmed that "nobody agreed that, forgive me if I missed this in your papers, but I don't think anybody, any defendant or representative of defendant agreed that 8.875% was going to be the post-judgment rate of interest, did they." 251T at 35:20-24. Judge Wilson stated that the agreement "was a very special **and limited** agreement" on the rate of interest – and its compound nature – until December 20, 2013. 251T at 37:1-7 (emphasis added).

Under R. 4:42-11(b), the law is clear: "except as otherwise provided by law, the court **shall**, in tort actions . . . include in the judgment **simple interest**." (emphasis added). RICO damages and non-RICO tort claims are tort damages and must follow R. 4:42-11(b). In exceptional cases, the court can suspend pre-judgment interest. *See id*. But the Rule is otherwise clear as to the interest allowed. Once the agreement between the parties ended on December 20, 2013, it was error to award Jarwick and Halpern compounded interest.

Jarwick asserts that R. 4:42-11 "sets a flexible guidepost for prejudgment interest awards." Jarwick Brief at 46. Halpern argues that the Trial Court has "broad discretion" to determine pre-judgment interest. But even if it were a matter of the

Trial Court's discretion, "compound interest is clearly the exception rather than the rule," and thus is "disfavored." *Johnson v. Johnson*, 390 N.J. Super. 269, 276 (App. Div. 2007)(citing *Henderson v. Camden Cnty. Mun. Util. Auth.*, 176 N.J. 554, 559 (2003)). With such interest clearly "disfavored" and a lack of **any findings** about this case being an exception in which compound interest is appropriate, it was legal error to award compound interest beyond December 20, 2013. More specifically, even if this Court finds that the Trial Court's discussion of the applicable interest rate is appropriate, and it is not, it is abundantly clear that the Trial Court made no such findings with respect to the justification for an award of compound interest, as Judge Wilson similarly did not make any such findings with respect to compound interest. *See* 40007a; 40010a.

### B. The Trial Court awarded an excessive interest rate for the period after December 20, 2013 (40006a-40007a; 40009a-40010a).

Halpern's argument that "prejudgment interest should run through the date of entry of its new 'final' judgment" fails to acknowledge the basis upon which the Trial Court made that award. (Halpern_Pb 75). The date of transition from pre-judgment to post-judgment interest is *not* the controlling factor in this case. Simply, the 8.875% compound interest rate agreed-upon between the parties **ended** on December 20, 2013. From that point on, the Court, having made **no findings** to the

contrary, abused its discretion in deviating from awarding simple interest at the rate embodied in R. 4:42-11.

It was error to award compounded interest to Jarwick and Halpern. Additionally, it was error to provide Jarwick and Halpern with an excessive rate of pre-judgment interest. This Court should correct those errors.

## CONCLUSION

For the aforementioned reasons, as well as those set forth in the Wilf Defendants' Opening Brief, this Court should vacate the award of attorneys' fees and remand for consideration by a different Special Master or by the Trial Court independently of the Special Master's recommendations. This Court also should reverse the award of punitive damages and compounded interest at an excessive rate.[5] A remand can be efficiently conducted with clear instructions from this Court.

[5] The Wilf Defendants incorporate and preserve for possible petition for certification, if needed following this appeal, all arguments and points decided against them by this Court in its opinion of June 1, 2018.

DATED: October 16, 2023 Respectfully Submitted,

By:

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# CERTIFICATION OF SERVICE

PETER C. HARVEY, being of full age, hereby certifies as follows:

1. I am an attorney-at-law in New Jersey and a Partner in the law firm of Patterson Belknap Webb & Tyler LLP, counsel for Defendants-Appellants Joseph Wilf, the Estate of Harry Wilf, Leonard A. Wilf, Zygmunt Wilf, Mark Wilf, Sidney Wilf, Rachel Affordable Housing Co., Halwil Associates and Pernwil Associates (collectively, the "Wilf Defendants").

2. I certify that on the below date, I caused copies of the Wilf Defendants' Reply Appellate Brief to be served upon the following counsel by NJ eCourts and Email:

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I hereby certify that the foregoing statements made by me are true. I understand that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

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