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IN THE MATTER OF THE ESTATE OF TODD HARRIS APPLEBAUM	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION **DOCKET No. A-003948-18** Sat Below: Judge Arthur Bergman, JSC, Superior Court of New Jersey, Chancery Division, Probate Part, Middlesex County Docket No: 238799 APRIL 30, 2019 ORDER CLOSING THE ESTATE, DENYING PLAINTIFF/APPELLANT RELIEF, APPROVING FINAL ACCOUNTING, AND PERMITTING IN-CASH DISTRIBUTION ET AL.

PLAINTIFF/APPELLANT'S BRIEF

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[1] This "Exhibit A" brief is dispositive as regards plaintiff's "particular" objections raised during the final accounting hearings. As the plaintiff/appellant's September 30, 2019 brief shows, this "Exhibit A" interlocutory-appeal brief was certified by plaintiff/appellant at *page 1* of her certification as containing factual assertions she would rely upon at the final accounting hearing - factual assertions which unequivocally weren't *in support of* the final accounting, *ergo* they were clear, detailed objections to the final account. As such, this "brief" is essentially a certification, submitted to the Court below as "<u>Exhibit A,</u>"

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1/3/2019 Exhibit E, 7/20/2017 Hearing P. 29-35..........**6T:29-35**
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1/3/2019 Exhibit M, 8/30/2017 Motion Compel................A2030
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1/30/2019 Def. Opposition Motion Recusal..............A2033-A2034
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1/30/2019 Exhibit 2, Letter From Hon. Rivas, AJSC...........A2042
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1/30/2019 Exhibit 5, Crisis Meeting Pages 37-38.............A0091
1/30/2019 Exhibit 6, Defendant Federal Brief..........A2167-A2181[4]
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5/15/2019 App. Div. Disp. Emrgt Stay (Denied)..............A2093
5/17/2019 Supreme Court Disp. Emrgt Stay (Denied)..........A2094

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[2] This brief was attached as a bona fide exhibit to the recusal motion of Judge Bergman, as it depicts that the executor and/or his counsel *did not* have a factual or *legal* basis for their "death penalty" pleadings to disinherit on the day of the final account hearing - they created a new reason for this drastic remedy *ex post facto* (the "Hope" briefs). The Judge's rather conspicuous support for the "nuclear option" of disinheritance at said final account hearing, wherein *inter alia* he uttered "sure there is" a grounds for disinheritance, was therefore erroneous, in bad faith, and depicted clear bias. See pages 48-50 and 62-63, 9/30/2019 brief, for an overview of the "Hope" second-bite-at-the-apple incident, wherein the Judge gave the executor a second chance to rebrief one single case in furtherance of the "nuclear" option.

[3] This brief was submitted by the executor's counsel to the trial court - and he is likely to submit same in his own appendix - in support of his opposition to the recusal motion and specifically to buttress his argument that plaintiff/appellant, and her attorneys, are engaging in unlawful collateral litigation in order to advance her illicit goals. The brief is thus essential on appeal as it presumably constitutes "proof" that plaintiff/appellant is litigious for no objectively acceptable reason, and that her recusal motion therefore lacks merit - regardless of her proofs.

[4] See footnote 3.

Preliminary Statement

Plaintiff/appellant is a widowed schoolteacher with impeccable character who has never sought redress from any Court until her late husband, and the father of her three children, passed away "testate" on November 4, 2012. Within hours of his passing, defendant/respondents began a $602,200.00 payroll scheme, they were then sued in June of 2013 by a Sun National Bank for bank fraud in an amount exceeding 400K and, in mid-2013, they brazenly misappropriated plaintiff/appellant's 401K plan funds worth in excess of 100K. Aware of her whistleblower activities which stemmed from these incidents, in late 2013, they inhumanely fired her from decedent's company, the Todd Harris Company ("THC"), and had her escorted from the premises by the police because, as they brazenly admitted, she was "*digging for dirt*". Subsequently, and only two days after plaintiff/appellant filed suit in 2014, they "sold" without court approval a multi-million dollar commercial property for *half* of its appraised value, in the process laundering the proceeds of this "firesale" to the executor by way of two shell companies, *to wit*, *Morey La Rue* and *Toben Investments*.

The executor, William P. Fabian, is a purported former "off the books" business partner of decedent who convened a "crisis meeting" promptly upon being sued by Sun Bank in mid-2013, in which meeting he brazenly admitted to having previously committed bank fraud. Worst yet, in an effort to resolve the Sun Bank crisis,

he also at that meeting conspired to commit further bank fraud, in the process warning all parties that his purported off-the-books holdings are to be concealed from everyone, at all costs.

Prior to being sued by plaintiff in 2014, the executor *repeatedly* admitted as to his involvement in an on-going fraudulent payroll scheme which began within *hours* of the passing of decedent. This scheme encompasses repayment of an unprovable and unorthodox "off the books" 500K debt, which the executor increased to 602K with one stroke of the pen, through fictitious and unauthorized $2,000.00 weekly payments on the payroll of THC. Upon being sued in March of 2014, the executor sought to "disappear" or spoliate *his own* compelling admissions and other proofs of the payroll scheme, by merely affixing his signature on a certification with a demonstratively fraudulent employment agreement attached as "**Exhibit 11**" .

In acts which led to a meritorious recusal motion, the motion Judge characterized plaintiff/appellant's voluminous evidence as "***fake news***", "***nothing***", and as "***useless***", and he essentially posited that the executor's compelling pre-suit admissions of fraud were "taken out of context". In doing so, he summarily accepted the executor's clearly spurious certifications, in which the executor essentially posited *after he was sued* that plaintiff/appellant's vast and compelling proofs of fraud were an elaborate hoax perpetrated by a disgruntled widowed school teacher

seeking "control" over the estate of which she was, in fact, a 55% beneficiary.

The motion Judge on April 30, 2019 wittingly penalized plaintiff/appellant by *permanently* disinheriting her, in that although she was effectively the beneficiary of 55% of THC, as a result of the Judge's draconian ruling she will now own between 15% to 25% of this lucrative multi-million dollar company. This inhumane summary ruling also denied payment of plaintiff/appellant's attorney's fees from the estate, denied her all damages sought, denied her plenary hearings, and left her insolvent, owing potentially 500K in attorneys fees, as she struggles to raise one of decedent's daughters.

PROCEDURAL HISTORY[1]

Plaintiff/appellant on March 31, 2014 filed an eleven-count verified complaint and order to show cause for damages and the removal of the executor for fraud. [**A1 to A206**]. Instead of granting the temporary restraints, the Court telephonically

[1] References to the transcripts are as follows:

1T April 4, 2014 (Emergent Hearing for Removal of Executor)
2T May 22, 2014 (Emergent Hearing for Removal Executor)
3T January 16, 2015 (Hearing Motion Distribute Shares In-Kind)
4T April 28, 2016 (Hearing for Removal Executor, By Motion)
5T June 23, 2017 (Motion Hearing)
6T July 20, 2017 (Case Management Conference)
7T October 13, 2017 (Case Management, Account, and motion Hearing)
8T August 10, 2018 (Hearing for Removal of Executor, By Motion)
9T November 9, 2018 (Hearing for Reconsideration)
10T December 14, 2018 (Final Accounting Hearing)
11T February 8, 2019 (Recusal, Et al, Hearing)

advised the parties to appear at a hearing on April 4, 2014. On that date, the Court applied the "irreparable harm" standard, denied relief pending further pleadings, and scheduled a hearing for May 12, 2014, which was then adjourned to May 22, 2014. **[1T:25, 4-25][1T:27, 1-23]**[**A207-A215**]. Defendant/respondent Fabian filed an answer on May 5, 2014. [**A216-A239]**. At the second hearing on May 22, 2014, the Court once again ruled against plaintiff/appellant on grounds that there would be no "irreparable harm" if the executor were permitted to remain. **[2T61, 1-9]. The Court did not consider or apply on either of these two dates the "clear and definite" proof of fraud standard for removal of a fiduciary.** Ibid.

Faced with financial difficulty, plaintiff/appellant on December 12, 2014 filed a motion to have 40% of the shares of the Todd Harris Company ("THC"), transferred to her. [**A472-A473**]. On January 7, 2015, defendant/respondent opposed that request, on grounds that plaintiff/appellant would literally "***destroy***" THC. [**A501-A510**]. On February 3, 2015, the Court denied the motion [**A553-A554**].

On April 5, 2016, plaintiff/appellant filed a non-emergent motion to remove the executor. [**A555-A558**]. Defendant/respondent opposed the motion on April 20, 2016. [**A702-A728**]. A hearing was held on April 28, 2016, [**4T**], which resulted in an August 3, 2016 ruling denying removal, [**A735-A739**], in which the Judge

essentially posited that any concerns of prospective financial harm could be remedied by compelling the defendant/respondents - who had been reasonably accused of systematic fraud and sued by a bank for same - to issue monthly and quarterly financial statements. [**4T:46, 14-24**]. **The record does not indicate that the Court applied the "clear and definite proof of fraud" standard.** Ibid.

On June 26, 2018, with the benefit of two banker depositions taken in early 2018 which offered a further independent basis to corroborate the fraud, plaintiff/appellant filed a 400-page motion seeking the removal of the executor and company CPA Laurence Gold. [**A742-A1108**]. Defendant/respondent and company accountant Gold opposed the motion on July 30, 2018, on the frivolous grounds that he was not aware of the pivotal Sun Bank fraud lawsuit of 2013. [**A1109-A1115**]. The executor opposed the motion on August 2, 2018, [**A1116-A1117**], and the Court denied removal on August 31, 2018, [**A A1231-A1232**], after a hearing on August 10, 2018. [**8T**]. **In the denying removal, the Court characterized plaintiff's proofs as "*fake news*", [8T:51, 9-10], and her certification as "*useless*", [8T:33, 6-7].**

On August 29, 2018, the plaintiff/appellant filed a reconsideration motion which sought a plenary hearing. [**A1129-A1136**]. On October 31, 2018, the executor opposed the motion, and on November 20, 2018, [**A1677-A1678**], after a hearing on November

9, 2018, [**9T**], the Court denied a plenary hearing as well as reconsideration, reasoning essentially that plaintiff's proofs of fraud were devoid of *any* value. Id. On 11/25/2018, plaintiff sought interlocutory review, and this Court, #AM-0152-18, denied same on 1/16/2019.

The executor's pleadings for the final accounting were filed prior to the November removal hearing, on October 19, 2018, returnable on December 14, 2018. [**A1233-A1235**]. On November 30, 2018 plaintiff/appellant filed comprehensive pleadings including certifications, an answer, and a counterclaim. [**A1679-A1822].** Contemporaneously, she also filed a second motion seeking the deposition of CPA Laurence Gold, which motion had also been filed in August of 2017, [**A1825**], but had not (inexplicably) been ruled on. [**A1742-A1826**]. On December 7, 2018, plaintiff sought an adjournment of the December 14, 2018 hearing, pending the interlocutory appeal. [**A1827-A1828**]. The Court denied same promptly after defendant objected. [**A1829-A1831**].

The executor on December 7, 2018 filed an opposition to plaintiff/appellant's second motion to depose the company CPA, [**A1832-A1835**]. Contemporaneously, the executor filed a reply brief to plaintiff/appellant's 11/30/2018 pleadings, in which he argued *inter alia* that counterclaims can only be filed with leave from the Court. [**Letter Brief Omitted**]. On December 10, 2018, the plaintiff/appellant promptly filed a short notice motion,

returnable on December 14, 2018, which sought leave to file her counterclaim and "objections". [**A1952-A1959**]. The Court on December 12, 2018 declined to entertain said motion, instead scheduling a hearing for January 10, 2019, without adjourning the December 14, 2018 final accounting summary hearing [**A1998**].

After the *Hope* "second bite at the apple" incident, *infra*, on April 30, 2019, the Court issued a ruling which inhumanely gave the executor the discretion to permanently disinherit plaintiff/appellant by selling her THC shares. [**A2081-A2088**]. Since the 500K charging lien issue remained outstanding, [**A740-A741**], the Court on May 15, 2019 certified finality. [**A2089-A2092**]. In that same order, the Court also declined to stay its ruling. Id. On May 15, 2019, the appellate division also declined the stay, [**A2093**], and on May 17, 2019 the Supreme Court conditionally agreed. [**A2094**].

A meritorious motion for the recusal of the Judge was filed on January 3, 2019. [**A1999-A2029**]. Said motion also sought, for the third time, an order compelling the deposition of CPA Laurence Gold, which had been sought by motion since August 2017. [Id.][**A1825-A1825**]. On January 30, 2019, the executor opposed the motion, [**A2033-A2034**], and the Court on February 8, 2019 held a hearing on all outstanding issues. [**11T**]. On February 27, 2019, without memorandum opinion, the Court denied recusal, denied the long-sought Gold deposition, and refused to permit the filing of

plaintiff/appellant's counterclaim and additional "objections". [**A2077-A2080**].

I. INTRODUCTORY FACTS

"We Are Not Reporting Anything To Anyone At The End Of The Day..so I have to keep everything from me off the books."

The executor of the estate of the late Todd Harris Applebaum, defendant/respondent William P. Fabian, a *former* purported "off the books" business partner of decedent, upon being sued for fraud by Sun National Bank on June 25, 2013, [**A109-A130**], promptly convened a "crisis" meeting, on June 27, 2013, [**A82-A108**], and brazenly uttered as follows:

> *We're not reporting anything to anybody at the end of the day. I don't know why I let you record this, but you better erase that part…….. You know how Todd owes me all this money, right? If I put that on the corporate books, then Sun Bank [in 2010] would never have loaned us a dime or Wells Fargo. If I put that on the books now (in 2013), Wells Fargo won't make the (commercial) loan. So I have to keep everything from me off the books, but if I drop dead, I expect my family to be paid.* [**A091**].[2]

At a subsequent meeting in August of 2013, transcribed real-time by a court reporter, the executor then set forth the details of a $602,200.00 payroll scheme. [**A141-A192**]. Specifically, he asserted without proofs that he and decedent had "agreed"[3] that he would be repaid certain "off the books" debts through payroll

[2] Defendant/respondents Laurence W. Gold, CPA, and Frank Rajs, among others, were present at this "crisis" meeting.

[3] The repeated use by defendant/respondents of a 2010 "employment agreement" [**A303-A310**], to justify the 2012 payroll fraud is a hoax and a fraud upon the Court. Statement of Facts, §VII(ii).

payments on the payroll of the Todd Harris Company ("THC"), [**A153**], which would continue until the full amount "of approximately $500,000.00" was paid off. Id. One month later, he would *sua sponte* increase this amount to $602,200.00 by personally affixing that number on a sheet of paper, without proofs. [**A433-A436**]. The executor further admitted at the August meeting that defendants Gold and Rajs approved the payroll scheme, [**A153**], and that the unprovable[4] 500K or 602K debt [**A433-A436**], was not on the books.[5] [**A153**].

Upon being sued in 2014, Mr. Fabian and his counsel essentially posited that the foregoing proofs - including Mr. Fabian's own admissions - were effectively an elaborate hoax by plaintiff in an attempt to enrich her coffers by criminally fabricating false evidence. The trial Judge agreed, *infra*.

II.
BACKGROUND FACTS

This matter stems from the passing of Todd Harris Applebaum on November 4, 2012 ("decedent")[**A002**]. Decedent allegedly died testate, and in his purported last will and testament appointed his former "off the books" business partner, William P. Fabian, as

[4] The only "proof" of this debt consists of an unsigned two-page handwritten document authored by Mr. Fabian himself. [**A433-A436**].

[5] This payroll scheme is also evidenced by the minutes of a THC meeting of December 9, 2012, [**A194-A196**], a September 2013 notepad handwritten missive authored by Mr. Fabian, [**A434**], and prior recorded admissions made by Mr. Fabian and his counsel.

executor. [**A002, A41-A46**]. Decedent was the owner of numerous profitable assets including, but not limited to, a profitable multi-million dollar swimming-pool services company called the Todd Harris Company ("THC"), which grosses over ten million dollars annually. [**A002**]. He was also *51% owner* of a company called "Toben Investments," whose sole asset was a profitable commercial property appraised at 1.5 million dollars, [**A626-A701**], which was sold for *half* of that amount *two days* after the filing of plaintiff's lawsuit. [**A559-A560**].

In his purported will [**A74-A79**], decedent bequeathed 60% of the THC shares to a testamentary trust, of which plaintiff/appellant and her three children were beneficiaries.[6] Id. In addition, he bequeathed the residuary of his estate to plaintiff/appellant [**A76**]. **This was understood to mean that she *would in fact* inherit 40% of THC, which she was *repeatedly* promised prior to filing suit.** [**A1751-A1754**],[7] [**10T:44, 14-20**], [**A404**], [**A80-A81**], [**A0145**]. *Ergo*, plaintiff/appellant was the non-controlling owner of 15% of THC through the testamentary trust, and a 40% direct owner, and as such she was and has been entitled

[6] To date, the testamentary trust has not been funded.

[7] The scrivener of decedent's will, attorney Paul Cavise, at his deposition testified that decedent specifically engineered a 40%/60% testamentary scheme which would allow THC to subsist without interference by the minority shareholder. [**A1751-A1754**] **Cavise did not, however, testify that decedent *upon signing the will* intended to completely divest his wife of her 40% shares.** Id.

to 55% of THC profits since November of 2012. However, she has received nothing to date, and on April 30, 2019 the trial Judge in a draconian ruling denied her any and all relief, refused to permit the payment of her attorneys fees from the estate, and divested this widow of her 40% shares, for fear that she could, literally, "***destroy***" or "***kill***" the company.[8] This ruling left the widow insolvent, with (potentially) 500K in outstanding attorneys fees, as she struggles to raise decedent's daughter.

III.
MISAPPROPRIATION OF 401(K) VALUED AT $100,000.00

Defendant/respondents, within months of the passing of decedent, fraudulently misappropriated plaintiff/appellant's 401K funds worth $100,000.00 [**A41, A177, A256, A495**] . This theft consisted of the transfer or "rolling over" of the 401K account into another account with a different financial institution, and then withdrawing the $100,000.00, without notifying the new financial institution that the funds were the property of plaintiff as decedent's surviving spouse. [**A495**].

IV.
THE SUN BANK FRAUD LAWSUIT of JUNE 25, 2013 AND THE CRISIS MEETING OF JUNE 27, 2013: CONSPIRACY TO COMMIT BANK FRAUD AND OTHER ADMISSIONS

[8]As stated *infra*, the Judge explicitly denounced plaintiff's lawsuits, and stated he would have divested her of her shares for that reason, notwithstanding the litigation privilege. [**A2081-A2088**]. However, he then adopted a pretextual reason, *to wit*, that the admittedly solvent estate could sell the shares to satisfy its expenses. See Point VI, §ii(2)(B).

The Sun Bank fraud lawsuit was filed on June 25, 2013, and consisted of allegations of bank fraud, and forgery, exceeding $400,000.00. **[A109-A130].** The relevance of this fraud lawsuit against the estate and other defendants is three-fold: (**i**) it serves as a compelling factual basis for a **plenary hearing** to ascertain the executor's estate-related fraud, (**ii**) it served as a bona-fide catalyst for plaintiff's comprehensive whistleblower activities, and (**iii**) a Wells Fargo banker at his deposition in 2018 testified that the knowing concealment of this lawsuit by accountant Mr. Gold, acting as agent of the executor per the Sun Bank "crisis" meeting [**A82-A108**], was a glaring material omission, i.e., that it "*absolutely*" would have made a difference if it had not been concealed. [**A753, A755, A1105**].

As a result of this Sun Bank fraud lawsuit, the executor convened the Sun Bank "crisis meeting" on June 27, 2013. [**A82-A108**]. In attendance were defendant/respondents Fabian, Rajs, and Gold, among others. Id. This meeting was characterized by brazen admissions of fraud, made in the heat of the moment, as defendant/respondents dramatically exclaimed that the liquidation of THC was imminent[9], and that criminal charges were possible. [**A96**]. The executor at this meeting thus quipped, ***"we are not***

[9] ***"If we don't do something today, by the end of the next week the Todd Harris Company will cease to exist…it's sink or swim time."*** [**A810, A83**, T. 6.27.13 P. 7 L. 15-19].

reporting anything to anyone at the end of the day" and ***"I have to keep everything from me off the books"*** [**A091**]. He also admitted that "they" committed bank fraud in 2010, by concealing from a lender his "off the books" financials, Id, and he also brazenly planned a conspiracy to commit bank fraud with the assistance of CPA Laurence Gold. Id. Plaintiff/appellant refused to participate in the conspiracy, by refusing to sign a personal guarantee under false pretenses. [**A821, A729-730**].[10]

V.
$602,200.00 PAYROLL FRAUD AND SALARY RAISES BEGAN WITHIN HOURS OF DECEDENT'S PASSING

The THC payroll fraud consists of a scheme to pay an unorthodox debt to the executor in the amount of 500K, [**A153**], or 602K, [**A433-A436**], via fictitious 2K weekly "salary" payments on the payroll of THC, which began within *hours* of the passing of decedent. [**A12**], [**10T:18, 20-25**]. The trial Judge at a hearing below repeatedly *sua sponte* characterized this debt as time-barred. [**8T:12, 1-5**], [**8T:13, 1-2**]. After he was sued by plaintiff/appellant, the executor produced a poorly-drafted employment agreement ("EA"), [**A303-A310**], dating to 2010, and claimed that he was "earning" the payroll payments under this 2010 EA, starting promptly upon the passing of decedent in late 2012.

[10] Defendants then used plaintiff's refusal to commit fraud to disparage and disinherit her, by falsely claiming that her reluctance to participate in the bank fraud could "harm" the company.[**A507, A719**].

He made these false representations notwithstanding compelling pre-suit proofs that he was not working, notwithstanding compelling indicia of fraud within the EA itself, [**A847-A851**], notwithstanding that the purported author of the EA all but called it a fraud, [**A849**], See Statement of Facts, §VII(ii), *and* notwithstanding that the EA says nothing regarding such a payroll scheme. **The repeated use of this EA by the executor is, in fact, a hoax upon this honorable Court.**

Plaintiff/appellant's payroll scheme proofs include the December 9, 2012 THC board meeting minutes which *explicitly* ratified the scheme, [**A194-A196**], the April 2013 THC board meeting wherein the executor claimed he conspired with defendant Rajs, [**A318, A836**], the August 2013 meeting wherein the executor set forth the scheme in detail - and implicated defendants Rajs[11] and Gold,[**A153**], the September 2013 missive in which he asserted that the 602K debt would be reduced by his THC and Toben payroll payments from November 2012 to date, [**A434**], the two page handwritten, unsigned document wherein the executor essentially without proof asserted conclusively that he was owed 602K, and not 500K, as he had claimed in August of 2013, [**A435-A436**], and a

[11] In addition to participating in the payroll scheme per the admissions at the April 2013 and August 2013 meetings, defendant Rajs also gave himself a 50K raise within hours of the passing of decedent - with the executor's approval. [**A6**].

certification dated 5/15/2014, in which he partially admitted the scheme.[12]

VI. FRAUDULENT "FIRESALE" OF PROFITABLE ONE-AND-A-HALF MILLION DOLLAR "TOBEN" COMMERCIAL PROPERTY FOR 800K TWO DAYS AFTER THE FILING OF PLAINTIFF/APPELLANT'S COMPLAINT

The *Toben* commercial property was owned 51% by the estate, and 49% by decedent's son, by virtue of their respective ownership in **shell company** "*Toben Investments,Inc*". [**A3, A765**]. It had recently been appraised at 1.5 million dollars, [**A626-A701**], and its annual income was circa 300K. Ibid. As the sole beneficiary of the residuary, [**A74-A79**], plaintiff/appellant stood to inherit 51% of *Toben*, and hence the commercial property and its profits. However, merely two days after plaintiff filed suit and sought to stop the sale, [**A1-A40**], defendants disposed of the property via a firesale, at half of the appraised value, [**A717**], to the commercial tenants and former business partners of the executor. [**A717, A559-A560**]. **The primary beneficiary of this "firesale" was the executor**. [**A717**].

The Toben property was encumbered by a private mortgage owned

[12] The executor's certification falsely states that "***consistent with my agreement with Todd, I will only receive payment until my loans and accrued consulting fees are paid in full.***" [**A233-A239**]. This is a hoax upon this Honorable Court. The only agreement he produced, [**A303-A310**], does not in any way provide for this "arrangement".

by the previous owner of the property, "*Morey La Rue Inc*", **[A234, A717**], which itself was a ***shell company*** *de facto* owned by Mr. Fabian.[13] When the Toben property was sold, this mortgage was accelerated and paid in full - for the benefit of the executor. [**A717**]. In addition, shell company *Toben* "loaned" *The Todd Harris Company*, "THC", a portion of the proceeds of the sale, and THC then used this loan to accelerate and pay the "bailout" promissory note, [**A132-A137**], owed the executor in the amount of $350K. [**A717**]. **The executor thus profited from the timed Toben firesale in at least two ways, and potentially more.**

The *Toben* company was also used as a shell company, as depicted inter alia by the no show salaries to the executor, as well as to defendant Raj's spouse. **[A882-A887].**

VII.
LITIGATION FRAUD AND BREACH OF FIDUCIARY DUTY BY THE EXECUTOR

The rampant litigation fraud in the case *sub judice*, which also constitutes a breach of fiduciary duty, consists of: (**i**) the frivolous use of outdated THC employee affidavits to disinherit plaintiff by requesting *in-cash* distribution of her 40% THC shares

[13] E.g, per the appraisal company, conveyance of the property to shell company *Toben* by shell company *Morey La Rue* was a "***transfer of convenience***". [**A647**]. See also **[A882-A887]**, RICO complaint, for an overview of the *Morey La Rue* mortgage scheme. Mr. Fabian, however, claimed to be president of *Morey La Rue*, not owner, [**A234**], despite compelling undisputed proofs that he, with the help of co-defendants Rajs and Gold, had been receiving the monthly *Morey La Rue* mortgage payments.[**A887**].

for, literally, fear that she can "***destroy***" or "***kill***" the company, [**A511-A548**], (**ii**) the creation by the executor of *ex-post-facto* affidavits, prepared after he was sued, to *knowingly* conceal his own *pre-suit* admissions of the payroll fraud, [**A233, A501, A702-A728**], and (**iii**) the brazen attempt by counsel for the executor, as well as Mr. Gold (CPA), to "disappear" the pivotal Sun Bank lawsuit. In the executor's case, his counsel in an "exclusive" certification asserted, three times, that the Sun Bank lawsuit against the estate "was never filed" [**A1663-A1664**]. Mr. Gold similarly filed a certification, [**A1109-A1115**], claiming that he was unaware of this lawsuit despite compelling contrary evidence, *infra*.

i.
Litigation Fraud and Breach of Fiduciary Duty in the Context of Frivolous Pleadings for In-Cash Distribution: The Hoax of the Complete "Destruction" of a Multi-Million Dollar Company by A Disinherited Widow With Scant Financial Means

The executor on January 7, 2015, and then again in August of 2017 and October of 2018, in an effort to disinherit plaintiff, filed certifications signed in May of 2014, in which several THC employees in a *faux pas* claimed *inter alia* that plaintiff "stared" at one employee, that she was "*digging for dirt*", and that she changed the truck gas receipts policy in an effort to combat fraud. [**A511-A548**]. They thus essentially asserted that she was not welcomed, that *no one "liked"* her as one attorney once prominently

quipped, because of her whistleblower activities[14], and that if she were to physically remain on the premises *as a THC employee*, they would leave the company. Id. In September of 2017, the executor all but admitted that these outdated affidavits were no longer useful - as the "affiant employees" as of recent had no objections to her presence at the company. [**A1730**]. Further, as plaintiff had been fired by police escort in December of 2013, she had no physical presence at the company, [**A38**, **A68**, **A263**, **A388**, **A908**]. Nonetheless, and despite defendant's repeated pre-suit promises to plaintiff that she *would* inherit her 40% shares,

[14]Plaintiff's pre-litigation whistleblower activity is *extensive.* Specifically, *hours* after decedent died, and one month prior to probating decedent's last will and testament, the executor began his payroll fraud, and in addition increased defendant Rajs' salary by $50,000.00. [**A6**]. As a result, plaintiff began her whistleblower activity by *inter alia* consensually recording all meetings, starting in or about April of 2013. [**A311-A336**]. Sun National Bank on June 25, 2013 then filed a 400K fraud lawsuit against the estate and other defendants. [**A109-A130**]. The Sun Bank "crisis" meeting was held two days later, and was likewise recorded by plaintiff with the executor's consent. [**A82-A108**]. Then, in August of 2013 plaintiff confronted the executor with her attorney and a court reporter, and demanded details regarding his payroll fraud, which he readily admitted adding that he sought to pay himself "approximately" 500K. [**A141-A192**]. On September 4, 2013, he "increased" this amount to $602,200.00 dollars, and his "evidence" consisted of two unsigned handwritten sheets of paper. [**A433-A436**]. Shortly thereafter, in December of 2013, plaintiff was discharged from her husband's company, and was escorted by the police. [**A38**]. Plaintiff then filed suit in late March 2014, and in or about May 2014 the THC employee-affiants executed *faux pas* affidavits in which they *inter alia* admitted whistleblower animus, e.g., that plaintiff was "*digging for dirt*", [**A511**].

[**10T:44, 14-20**], [**A404**], [**A80-A81**], [**A0145**], defendants brazenly filed the affidavits in late 2018 to "support" their far-fetched proposition that plaintiff could "***destroy***" or "***kill***" THC with her 40% non-controlling minority stake, and that she should therefore be divested of her minority interest in her late husband's company. [**A710**], [**10T:46, 15-25**]. [**10T:47, 13-28**]. The motion Judge, who called plaintiff's proofs "***useless***" and "***fake news***", adopted this far-fetched *Orwellian* novel[15], and *summarily* divested her of her shares. [**A2081-A2088**]. In doing so, he ignored plaintiff's valuation of the shares, [**A1757-A1822**], which was five times the valuation of the executor's valuation. [**A1259-A1285**]. See *Balsamides v. Protameen Chemicals, Inc.*, 160 *N.J.* 352, (1999).

ii.
Creation of *Ex Post Facto* Evidence
To Knowingly Conceal the Payroll Fraud

The executor throughout this litigation has knowingly sought to conceal his fraudulent payroll scheme by filing a series of *ex post facto* affidavits in which he essentially claimed that plaintiff's *pre-suit* proofs of fraud were an elaborate hoax by an insolvent widowed schoolteacher. He was aided in this illicit quest by "**Exhibit 11**", a purported employment agreement ("EA") which allegedly took effect in early 2010 and which lacks any modicum of business judgment. [**A303-A310**]. Moreover, its

[15] Which also included claims by the executor that plaintiff had a *propensity* to file lawsuits generally. [**A914, ⁋70**]

purported author all but called this instrument fictitious, [**A849**], and it contains compelling *indicia* of fraud within its four corners. Id.[16] In his certifications, the executor brazenly claimed that this 2010 agreement, [**A286-A292]**, permitted him to work for a salary, starting promptly upon decedent's death in 2012. [**A694**]. This instrument, however, contains no such clause. **The repeated use of this EA is a hoax upon the Honorable Courts of New Jersey.**

The compelling pre-suit proofs of the payroll scheme which the executor and his counsel knowingly sought to conceal with *one stroke of the pen* are set forth at Statement of Facts, §V.

Other proofs of the payroll scheme include the executor's *faux pas* interrogatory answers, in which the executor mistakenly admitted that he did not engage in the payroll fraud in 2011 because of an IRS audit. [**A1152-A1155**].[17]

iii.
Knowing Concealment of Sun Bank Lawsuit

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[16] Its purported author/scrivener - Paul Cavise, Esq. - did not remember drafting same, [**A849**], the signatures appear forged, [**A851**], and it contains clauses which no reasonable businessman would agree to (e.g. golden parachutes which would bankrupt THC). [**A22, A847**]. Moreover, the notary who notarized same has no records of the notarization, [**A844**].

[17] Moreover, defendant's attempt to deny the payroll scheme at his deposition backfired, as he admitted that he "changed his mind" regarding the scheme - although he was unable to say *when* he "changed" his mind. This constitutes a clear admission. [**A842**].

The executor's counsel in fact attempted to knowingly "disappear" the pivotal Sun Bank lawsuit of 2013, [**A109-A130**], by filing one single certification personally signed *by him* in late 2018, which had only one purpose - to knowingly place on the record, three times, the false statement that the Sun Bank fraud lawsuit against the estate was "*never filed*." [**A1663-A1664**]. This newly created and demonstratively false "fact" was used to undermine and oppose plaintiff's motion for the removal of the executor for fraud. [**A1129-A1136**]. Defendant/respondent CPA Gold likewise attempted to deny the Sun Bank lawsuit - in his case he knowingly filed a certification opposing his and the executor's removal for fraud, [**A1109-A1115**], in which he falsely asserted that he was unaware of the Sun Bank lawsuit, in a clear attempt to undermine the deposition testimony of a Wells Fargo executive, who characterized the omission of the Sun Bank lawsuit from a loan application as material, by unequivocally testifying that it "absolutely" would have made a difference if the Sun Bank lawsuit had been disclosed in connection with a commercial loan application in late 2013. [**A753, A755, A1105**]. This certification permitted Mr. Gold, and the executor[18], to argue that neither of them should be removed for fraud, as plaintiff had sought.

[18] The executor was the mastermind of this conspiracy to defraud Wells Fargo, per the June 27, 2013 Sun Bank "crisis" meeting, **A82-A108**, *supra*.

The executor's counsel's *scienter* is depicted *inter alia* by counsel's dramatization at the May 22, 2014 hearing that the Sun Bank lawsuit was catastrophic and nearly caused the liquidation of THC. **[2T:38, 1-5].** Counsel was also aware, having attended the deposition (per his own certified billing records, (**[A1446-A1447]**), that a Wells Fargo executive in early 2018 in fact literally testified that it "absolutely" would have made a difference if Mr. Gold (acting as agent of the executor) would not have knowingly concealed the Sun Bank lawsuit from Wells Fargo in 2013. [**A753, A755, A1105**]. Moreover, counsel's certified billing records, [**A1432**], also depict his receipt and review of a "Sun Bank Counsel" subpoena and correspondence from Sun Bank's attorneys, [**A1673-A1676**], which prominently cited the docket number for the Sun Bank fraud lawsuit against the estate. Lastly, prior to plaintiff's unsuccessful interlocutory appeal of late 2018, the executor's counsel was also in receipt of a certification by plaintiff/appellant, in which she stated that a call placed to the Somerset Court in late 2018 confirmed that the Sun Bank lawsuit was "filed". [**A1669-A1671**].[19]

The evidence depicting Mr. Gold's *scienter* is equally compelling, and includes Sun Bank bailout promissory note which he

[19] This did not stop counsel from *knowingly* relying on his spurious "never filed" certification in his opposition to the 2018 interlocutory appeal motion, which was denied.

signed, **A132-A137**, his presence at the Sun Bank "crisis" meeting, **A82-A108**, and his own invoice, **A1156**.

POINT I

The Trial Judge Erred When He Refused To Enter Temporary Restraints On The Day Of The Filing Of The Order To Show Cause On March 31, 2014, Thus Resulting In The "Firesale," Two Days Later, Of A Profitable Estate Asset At Half Of Its Appraised Value. **[1T:25, 9-20]**

In the seminal case of *In re Estate of Hazeltine*, 119 N.J. Eq. 308, 314 (1936 Prerog. Ct.), the Court set forth the standard for removal of a personal representative on the basis of fraud, *to wit*, "courts are reluctant to remove an executor or trustee without clear and definite proof of fraud." Id. at 315. (emphasis supplied). Regarding injunctive relief, the seminal case of *Crowe v. DeGioia*, 90 N.J. 126 (1982) set forth the well-known standard, *to wit*, "a preliminary injunction should not issue except when necessary to prevent irreparable harm." Id.

As stated *supra*, the Court below did not enter temporary restraints on date of the filing of the complaint, March 31, 2014. The restraints *inter alia* sought to stop the sale of the profitable "Toben" commercial property, which was sold at nearly half of its appraised value to the tenants of the property, only two days after plaintiff's suit was filed. Statement of Facts, §VI.

The fraud proofs submitted to the Court on March 31, 2014 included: 2013 Sun Bank fraud lawsuit pleadings depicting *inter alia* forgery, [**A109-A130**], the June 27, 2013 Sun Bank "crisis

meeting" transcript,[**A82-A108**], and the transcript for the August 29, 2013 meeting clearly depicting the payroll fraud. [**A141-A192**]. These proofs constitute "clear and definite proof of fraud" because of the numerous utterances and admissions of fraud made at the Sun Bank "crisis" meeting, *to wit*, that they *will* defraud Wells Fargo, that they defrauded Sun Bank in 2010, that they *"are not reporting anything to anyone at the end of the day,"* that *"I [the executor] have to keep everything from me off the books,"* and that *"if [the executor] drops dead..[he] expects [his] family to be paid."* [**A91**]. Further, the executor brazenly admitted the details of the payroll scheme at the August 29, 2013 meeting, [**A153**], and at the SunBank "crisis" meeting he set forth his intention to sell the Toben commercial property "***very soonly, quickly, easily***" **[A84] -** so that his family is paid <u>first</u>.

Based on the foregoing proofs alone, it should have been clear that the proposed Toben sale was for the benefit of the executor only. As such, the Court should have entered the restraints on March 31, 2014, and/or scheduled a plenary hearing, without regard to "irreparable harm".

<u>**POINT II**</u>

The Trial Judge Committed Reversible Error When, On The Return Date Of The OTSC, April 4, 2014, And Then Again on May 22, 2014, He Summarily Applied The "Irreparable Harm" Standard, In Lieu Of The "Clear And Definite Proof Of Fraud" Standard With a Hearing. **(Not Raised Below)[1T:25, 9-20][2T60, 18-25]**

At the May 22, 2014 hearing, the Judge uttered a statement which characterized the first two removal hearings in 2014, *to wit*, *"it's kinda like the Hippocratic Oath. The first thing I want to do is to make sure that I don't do any harm. To what? To a business."* **[2T:59, 2-4].** The Judge's concern, echoed throughout the transcripts of May 22, 2014 and April 4, 2014, was exclusively the financial health of the Todd Harris Company ("THC"). Fraud - or the rights of plaintiff/appellant as a beneficiary[20] - was but a collateral concern. Id. [**1T**], [**2T**]. Moreover, the Court did not consider or apply the "clear and definite" proof of fraud standard for removal of a fiduciary at either of the two hearings in 2014, although it was privy to the following utterances made by the executor:

> *We're not reporting anything to anybody at the end of the day. I don't know why I let you record this, but you better erase that part……..you know how Todd owes me all this money, right? If I put that on the corporate books, then Sun Bank would never have loaned us a dime or Wells Fargo. If I put that on the books now, Wells Fargo won't make the loan. So I have to keep everything from me off the books, but if I drop dead, you know, I expect my family to be paid.* [**A91**]

Thus, as stated, and notwithstanding compelling proofs of fraud, the court at the first hearing placed sole emphasis on the financial health of THC:

[20] The plaintiff/appellant has received nothing from her late husband's estate to date, and was partially if not entirely permanently disinherited by the Judge below on April 30, 2019.

> ***THE COURT:*** *Okay; no, no, no this is -- a metaphor. The sky is falling Judge Cuffani; I've just -- of course it's not under oath, but I've just gotten a representation from the attorney who represents the company that the sky is not falling. The company is not going out of business. The company is -- is doing comparably to what it is was doing before, apparently Mr. Harris passed away, so the sky is not falling...* **[1T:25, 9-20].**

Subsequently, plaintiff/appellant raised the issue of the 602K payroll fraud, and the Judge began to apply the irreparable harm test, by asserting that the executor's potential inability to return monies stolen by way of the payroll fraud was insufficient to remove him for fraud:

> ***THE COURT:*** *There's -- that's the slippery slope ... Every potential judgment creditor would rush to Judge Cuffani and say, Judge Cuffani, if you don't do this, when we finally get to.....the point where we prove that we're right and we're entitled to get this money, they're not going to be able to pay it. That is not irreparable harm, I assure you.* **[1T:25, 4-25]**

In making this statement, the Judge failed to consider altogether whether plaintiff's proofs constituted "clear and definite" proof of fraud. The plaintiff then informed the Court that it was effectively sanctioning prospective fraud, to which the Judge replied that he would not enter "summary judgment" as there was no "irreparable harm":

> ***MR. GUSSIS:*** *Judge, when he admits that he did not take one dime of this money from 2008 to 2011, and obviously he -- he -- and admits that it wasn't on anyone's books or records is like saying, go ahead, embezzle and you can pay it back later if you don't enter the order.*

> ***THE COURT:*** *Okay, so let me just -- if you want me today, on the first day of this lawsuit, to enter summary judgment.*

> ***MR. GUSSIS:*** *No, I asked you for a temporary restraint, Judge. That's what I asked you for on the $2,000.*
>
> ***THE COURT:*** *It's not irreparable; that's my ruling.* **[1T:27, 1-23].**

Subsequently, the Judge once again asserted that the financial health of THC was the litmus test for removal:

> ***THE COURT:*** *Nobody wants the goose to be killed that's laying the golden eggs. So everybody's on the same page there. Want this business to survive, to thrive, to generate money and then we're arguing over money, that's what everybody wants, okay …* **[1T:32, 9-20]**

The court then concluded that the "sky is not falling", formally declined to enter the restraints, **[1T60, 16-25]**, and scheduled a second *summary* hearing. [**A207-A215**].

At the second summary hearing on May 22, 2014, the Court once again ruled against plaintiff/appellant on grounds that there would be no "irreparable harm" if the executor were permitted to remain - presumably since any prospective fraud can be remedied with monetary compensation. **[2T61, 1-9].** The Court also continued to focus on the financial health of THC (at any cost)[21], scheduled no plenary hearings, and once again failed to review the fraud proofs through the lenses of the "clear and definite proof of

[21] ***"It's kinda like the Hippocratic Oath. The first thing I want to do is to make sure that I don't do any harm. To what? To a business."*** **[2T59, 2-4].** *"So my point is I'm very reluctant in any case to do something that may result in it be harmful to the business."* **[2T64, 1-3].**

fraud" standard. The Court did, however, apply the *status quo* component of the "irreparable harm" test:

> COURT: *"It's a very high burden and it's a very artful way of saying, well, the status quo is really what it was a year and a half ago. That's not what status quo injunction is. A status quo injunction is let's keep in place what's currently there. For me to enter relief that you want I'm going to have to undo a number of things that have occurred. So that is ultimate relief. That's not interim relief."* **[2T60, 18-25]**
>
> *So by clear and convincing evidence all the Crowe DiGioia have to be met, including the irreparable harm element, including is it clear that you're going to prevail on the merits.* ***There's a lot of disputed facts.*** *So the type of injunctive relief that's being sought today you have not satisfied that burden. It's not for want of trying. It's not for lack of advocacy. It may because at present you don't have enough information.* **[2T61, 1-9].**

Notably, the Court acknowledged that there are disputed facts, but did not order a plenary hearing. Moreover, in finding that the status quo would be preserved, the Court failed to recognize that the fraud was **prospective and on-going.**[22]

It is respectfully submitted that the Court thus erred in: (**i**) failing to properly apply the "irreparable harm standard", (**ii**) not applying the "clear and definite proof" standard, (**iii**) in failing to enter the temporary restraints (**iv**) and/or in not ordering plenary hearing(s).

[22] Further, plaintiff as part of her restraints was not asking that the payroll payments made from 2012 to present be returned (the "ultimate relief"). She was asking the Court to stop the payroll payments going *forward*. As such, the Court erred in finding that granting *that* relief constituted the "ultimate relief".

POINT III

The Trial Judge Erred On February 3, 2015 In Denying The Distribution Of Plaintiff/Appellant's 40% Stake In The Todd Harris Company.**[3T:9, 24-25]**

The plaintiff/appellant, who has received nothing to date from the estate of her late husband, [**3T9:24-25**], first sought in-kind distribution of her 40% shares on December 12, 2014. **[A472-A473].** A summary hearing was held on January 16, 2015. [**3T**]. In her certifications, plaintiff contended that she was briefly employed at THC in 2013 but was discharged with police escort after she became a whistleblower, and she further highlighted how the Sun Bank fraud lawsuit against the estate and the ensuing Sun Bank "crisis" meeting of June 27, 2013 impacted her decision to become a whistleblower. [**A474-A479**]. She also described how 401K plan funds of which she was a beneficiary, valued at approximately 100K, were misappropriated by defendants, **Id.**, [**A488-A497**], and she emphasized her losses stemming from the timed firesale of the lucrative Toben commercial property. **Id.**, [**A488-A497**]. She also submitted proofs regarding the payroll fraud, which was depleting the estate of which she was 55% beneficiary. [**A498-A500**].

Although the executor's response *marginally* alluded to a pretextual estate tax issue as prohibiting distribution in-kind, [**3T36:24-25**], [**A507**][23], his proffered *primary* reason to oppose

[23] In or about May of 2015, the purported tax issue was resolved - with a refund to the Estate, *infra*.

same, repeated *ad nauseam*, consisted of his far-fetched assertion that plaintiff could literally "**destroy**" the company, thus jeopardizing his illicit payroll payments, if she were permitted a non-controlling interest in the company:

> *...I have come to believe that if she is allowed to acquire a substantial role in the operations of the business (which would be the case if she were to receive 40% of the stock) she would* ***quickly destroy*** *the business by alienating many of the key employees, by interfering in day to day operations of which she had no knowledge, and by refusing to cooperate in major business decisions, such as obtaining off season financing, as discussed below....* **[A502]**.

> *I know of Edita's detrimental effects based upon my personal observation, as well as the reports about her conduct, and* ***particularly about her unrelenting criticisms of the Company's operations and management,*** *that I received from Frank Rajs on an almost daily basis.* **[A503]** (emphasis supplied).

The court then essentially agreed that the *pre-textual* tax issue was paramount, and entered an order prohibiting the transfer of shares to plaintiff. [**A553-A554**].

It is respectfully submitted that the Court erred in that it was rather clear from plaintiff's submissions that the executor was merely seeking to silence the widow's whistleblower activities, which included her 2014 lawsuit, in an effort to preserve his prospective payroll fraud scheme. [24]

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[24] See *LoBiondo v. Schwartz*, 199 N.J. 62 (2009), (access to the courts is a constitutional right.) and *Hawkins v. Harris,* 141 N.J. 207, (1995) (**litigation privilege** protects such lawsuits).

POINT IV

It Was Error For The Judge To Summarily Deny Removal Of The Executor For Fraud in 2016 and 2018, and to Refuse to Appoint a Special Master. [**4T:8, 1-3**], **[8T:51, 9-10], [9T:14,3-4]**

There were four attempts total to remove the executor for fraud. The first by way of emergent pleadings in 2014, *supra*, the second by motion in 2016, [**A555-A558**], and two attempts by motion in 2018. [**A742-A745**], [**A1129-A1136**]. The 2016 hearing was characterized by the Judge's failure to apply the "clear and definite proof" standard, instead seeking a compromise which allowed the executor to continue administering the estate by regularly reporting the financial health of THC, while engaging the payroll fraud. [**4T**]. The third and fourth attempts to remove the executor in 2018 were based primarily on the testimony of Deborah Heins, a Sun Bank executive, [**A938-A1003**], and Kevin Harvey, a Wells Fargo executive, [**A1004-A1108**], who both testified under oath in early 2018 regarding bank fraud by defendant/respondent Gold, the company accountant, acting pursuant to the executor's instructions at the Sun Bank "crisis meeting", [**A82-A108**], in connection with obtaining a 250K commercial loan. Specifically, the bank executives testified that they would have called the FBI, [**A756, A1001**] and that it "absolutely" would have made a difference if Mr. Gold had not knowingly concealed the Sun Bank lawsuit from Wells Fargo. [**A753, A755, A1105**]. The motion

Judge at the first 2018 hearing literally characterized these proofs as "**fake news**" and as "**useless**". [**8T:51, 10-11**], [**8T:33, 6-7**].

2016 Removal Motion

Plaintiff's strategy at the 2016 removal hearing consisted of highlighting her fraud causes of action as set forth in her 2014 complaint, [**A1-A40**], in the context of her comprehensive removal motion, [**A555-A701**], as well as in the context of her objections to the executor's interim accounting[25]. [**4T:8, 1-3**]. Plaintiff thus asserted that the testamentary trust had not been funded, and that a purported pre-textual tax issue which served as a basis to deny plaintiff her 40% THC shares had been resolved with the estate getting a lofty refund. [**4T:8, 10-12**]. Plaintiff also referenced the timed firesale of the Toben commercial property, which primarily benefited the executor by virtue his "*Morey La Rue*" mortgage. Id. [**4T:13, 7-8**]. In doing so, she also discussed the fraud of alleged environmental damage, which was relied upon by the executor to justify the timed firesale of the Toben property.

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[25] Which the executor at the 12/14/2018 final accounting hearing claimed was **identical** to the final accounting. [**10T:17, 1-5**]. It should be noted, however, that the Toben transaction was not reflected in the final accounting, [**A1298-A1372**], and neither was the payroll fraud, per the executor's own admission, *infra*. Further, as stated *infra*, legally sufficient objections may be found in certifications, pleadings, et al, *In Re Maxwell's Will*, 306 N.J. Super. 563 (1997), and plaintiff at the 2016 hearing did nothing more than re-hash said causes of actions, which were decided at the final account hearing of December 14, 2018.

[**4T:12, 12-25**].

Plaintiff also discussed the Toben "no show" salaries, [**4T:21, 4-10**], and she highlighted the 350K attorneys fees paid to the executor's counsel - indicating that it represented 26% of the value of the estate, [**4T:21, 21-22**].

The executor's counsel in contrast argued, without corroborating evidence, that decedent approved the Toben "no show" salaries, [**4T:25, 2-5**], and he further falsely claimed that a 2010 employment agreement ("EA"),[**A303-A310**], permitted the executor to claim a "salary" starting promptly upon decedent's passing <u>in late 2012</u>. [**4T:25, 6-11**] [**4T:25, 6-11**].

The executor's counsel further posited, again without evidence, that plaintiff/appellant wanted "control", and that she was upset that she was not executrix. [**4T:29, 6-19**].

Having heard argument, the Judge essentially found no need for a special master - or removal of the executor for that matter - since he saw no need for the additional expense of such a special master, [**4T:35, 24-25**], [**4T:36, 1-5**].

In lieu of removal, the Judge executed a case management order, [**4T:46, 14-24**], [**A735-A739**], which essentially *inter alia* mandated that defendants provide regular monthly and quarterly statements and documents to plaintiff.

After the 2016 hearings, in or about February of 2018, plaintiff deposed two bank executives from Wells Fargo and Sun

National bank, [**A938-A1003**], [**A1004-A1108**], who independently corroborated the scheme to conceal the executor's $602K payroll scheme as set forth prominently at the Sun Bank "crisis" meeting. [**A82-A108**]. This independent and compelling evidence gave rise to a renewed 400-page motion to remove the executor in mid 2018, followed by a reconsideration motion in late 2018, *infra*, which motions would also be decided by a new Judge who had been in the case since mid-2017.

FIRST 2018 REMOVAL MOTION

The first 2018 motion to remove the executor, [**A742-A745**], was primarily based on the banker depositions of 2018, [**A938-A1003**], [**A1004-A1108**]. However, additional proofs were also submitted regarding the entirety of plaintiff's fraud causes of action, in the form of a 200-page verified RICO complaint with embedded exhibits, which was submitted as "Exhibit A" and certified by plaintiff as "true". [**A760-A937, A748**]. The said RICO complaint prominently set forth the entirety of the utterances by the executor, made at the June 27, 2013 Sun Bank "crisis" meeting, including that "***we're not reporting anything to anybody at the end of the day,***" and that "***I have to keep everything from me off the books.***" [**A771**]. These utterances, and the RICO complaint, essentially set forth the payroll scheme in its entirety - payment of the executor's "off the books" debts regardless of their

validity, and concealment.[26]

The executor's frivolous "defense" to removal in 2018 consisted essentially of his 2016 certification in which he, with one stroke of the pen, sought to eviscerate from the record plaintiff's compelling pre-suit proofs of the payroll fraud, *supra*. [**A702-A728**].

The motion hearing for the first 2018 removal motion was in fact characterized by circumlocutory vituperation and aggressive cross examination of plaintiff's counsel, by the motion Judge, with defense counsel a mere spectator. [**8T**]. The Judge thus characterized plaintiff's proofs as "***fake news***", [**8T:51, 9-10**], and stated that plaintiff's certification was literally "***useless***", [**8T:33, 6-7**]. In contrast, he *sua sponte* referenced the executor's 2016 certification and the 2010 employment agreement as "proof" that the executor was not engaging in the payroll scheme, essentially, because he denied it after being sued. [**8T:13, 21-22**]. [**8T:15, 5-6**]. The Judge further *sua sponte* invoked the statute of limitations to argue that the executor's 602K debt was time-barred, and therefore did not have to be disclosed to the banks,[**8T:12, 1-5**], [**8T:13, 1-2**], yet he refused to acknowledge

[26] Contrary to the motion Judge's "finding" below, made without reference to an alternative context, the **context** of these utterances is crystal clear, they were made by the executor on the heels of a Sun Bank lawsuit against the estate which they believed would result in liquidation of THC, and hence would jeopardize repayment of the executor's illicit $602,200.00 debt.

that if the debt was time barred then it should not have been paid on the payroll of the Todd Harris Company. [**8T:21, 6-7**].

The Judge then continued to relentlessly undermine plaintiff's proofs by *inter alia* suggesting that some of the exhibits referenced or quoted in plaintiff's *verified* RICO complaint should have been provided as separate exhibits in the removal motion, and he further posited that the removal motion *must* be limited to the banker depositions only - although the banker depositions in this complex case of necessity were intertwined with the other proofs. [**8T:9, 7-10**]. The Judge then questioned the entirety of plaintiff's proofs, merely because plaintiff briefly hypothesized at one point that the executor *may* have been an equity owner of the THC company. [**8T:18, 8-9**] Moreover, the Judge seemed unwilling to accept that payment of debts on the payroll of *any* company, whether or not time-barred or otherwise illicit, was inherently fraudulent. [8T:41, 20-24]. [8T:42, 1-4].

Unsurprisingly, with virtually no argument by defense counsel, the Judge ruled against plaintiff, "finding" *inter alia* that the "***heart of the case is that there is no case***", [**8T:17, 5-6**], and that there weren't "any facts", [**8T:44, 1-9**], or, more crudely, that "***you don't have any facts all.***" [**8T:72, 24-25**]. The foregoing prompted a subsequent reconsideration motion, *infra*.

SECOND REMOVAL HEARING OF 2018

Shortly after the August 2018 summary removal hearing, plaintiff filed a motion for reconsideration which **also sought a plenary hearing.** [**A1129-A1136**]. The second 2018 removal hearing was not unlike the first, as it was characterized by the Judge's focus on *sua sponte* undermining plaintiff's every fact and argument, *literally* at one time refusing to let the executor's counsel participate, [**9T:14, 3-4**], and engaging in poignant and aggressive cross examination of the widow's counsel, to a degree wholly uncharacteristic of sound judicial temperament or fairness in the administration of justice.

Per the Judge's concerns regarding lack of exhibits as expressed at the first 2018 motion for removal of the executor, as part of her reconsideration motion plaintiff submitted additional exhibits. [**A1137-A1230**].[27]

At the reconsideration hearing the Judge denied removal and a plenary hearing as he determined, without evidence, that the following utterance made by the executor at the Sun Bank crisis meeting of 2013 was taken out of context: "***we're not reporting anything to anybody at the end of the day.***" [**A91**]. [**9T:10, 21-22**].

[27] These exhibits included the Sun Bank "crisis" meeting, [**A82-A108**], which contained the incriminating utterances as well as the conspiracy to defraud banks and other admissions, as well as the partial transcript for the August 2013 meeting, which set forth the payroll scheme in detail. [**A141-A192**].

[**9T:15, 24-25**]. This ruling led to a meritorious recusal motion and an interlocutory appeal, which was denied by this Court.

Upon remand, it is respectfully requested that this Court vacate/reverse the rulings denying removal, as well as the Judge's April 30, 2019 order approving the final accounting, as the said final accounting is void *ab initio* until the removal issue is resolved. See, e.g., *Three Keys Ltd. v. SR Utility Holding Co.*, 540 F. 3d 220, (3rd Cir 2008) (the Probate Court in the underlying state litigation removed the executor based on an "interested" transaction involving the unlawful transfer or sale of shares of decedent's company.)

POINT V

It Was Error for the Judge on December 12, 2018, and on February 27, 2019, to Deny Plaintiff/Appellant's Motion to File A Verified Counterclaim and/or To Amend The Exceptions to the Final Accounting. [11T:7, 14-15]

The motion Judge on or about December 12, 2018, and then again on February 8, 2019, denied plaintiff's motion seeking to file a counterclaim with additional exceptions, which included her payment of her attorney's fees from the estate. [**A1998**] [**A2077-A2078**]. Specifically, plaintiff *inter alia* sought *breach of fiduciary duty* damages as a result of the executor's frivolous pleadings for in-cash distribution [**A1952-A1959**].[28] Her pleadings

[28] See Statement of Facts, §VII, Litigation Fraud. See also *In the Matter of the Estate of Kathryn Parker Blair*, 2017 N.J. Super. Unpub. LEXIS 426, No. A-0100-15T1 (App. Div., Feb. 22, 2017), cert. denied, 230 N.J. 475 (May 30, 2017) (***"A willfully false***

also sought additional "objections" to the accounting, including payment of her formidable attorneys fees from the estate, and contained clear objections to the fees paid to counsel for the executor.[29]

The "short notice" motion requesting leave to file these pleadings, [**A1952-A1959]**, was filed before the final accounting summary hearing - and was meant to be entertained at the said hearing. However, instead of allowing plaintiff to argue the merits of those objections at the final accounting hearing of December 14, 2018, or adjourning the said hearing altogether pending a ruling on the short notice motion, the Judge scheduled a motion hearing which was to take place in 2019, well after the final accounting hearing of December 14, 2018. [**A1998**].

The motion was eventually heard on Feb. 8, 2019, along with the Judge's recusal motion and the third motion seeking the deposition of CPA Laurence Gold. [**A1742-A1745**]. On that date, the Judge found that the executor's pleadings for in-cash distribution were not frivolous, [**11T:7, 14-15**], and he then

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certification in lieu of oath will support a criminal prosecution").

[29]The executor's counsel disclosed on December 14, 2018, the final accounting summary hearing, that numerous redactions in the final accounting were for payment of estate-related expenses, which includes and is likely largely comprised of attorneys fees. As the long-sought Gold deposition was never granted, despite three motions, it is unknown how these transfers from THC to the estate were effected.

determined that the plaintiff's counterclaim was essentially a series of objections, [**11T:9, 10-16**], which he rejected. [**11T:30, 2-12**]. Paradoxically, he also determined that this was an issue for the appellate division to resolve [**11T:6, 22-25**], since a "counterclaim is not an exception." [**11T:6, 11-12**].

It is respectfully submitted that the Judge in his rulings, erred *inter alia* as follows: his denial of the long-sought Gold deposition, his failure to permit the breach of fiduciary counterclaim against the executor for his frivolous pleadings for in-cash distribution, and the denial of additional exceptions/objections.

POINT VI

It was Error for the Trial Judge on April 30, 2019 to Summarily Approve the Executor's Final Accounting, to Deny Plaintiff/Appellant Monetary Relief, To Refuse to Order the Long-Sought Company Accountant (Gold) Deposition, to Grant the Executor's Pleading for In-Cash Distribution, To Deny Plaintiff Payment of Attorneys Fees from the Estate, and to Fail to Acknowledge Plaintiff's objections to the Final Accounting. [**10T:24, 14-16**]

i. Introduction - "Specificity" Of The Objectant's "Exceptions" Must Of Necessity Be Defined In The Context Of The Executor's Systematic Fraud

"*If fraud is used to avoid or circumvent the provisions.. of this [probate code], any person injured thereby may obtain appropriate relief.*" N.J.S.A. 3B:1-9 (emphasis supplied.) The executor's purported final "accounting" was in fact premised on systematic fraud, *infra*. *Ergo*, the "specificity" of an objectant's "exceptions" must of necessity be viewed in the context of such

pernicious fraud. R. 1:1-2(a)("*The rules.. shall be construed to secure a just determination, [and] fairness*".) (emphasis supplied). Restated, R. 4:87-8, which governs "particular" exceptions, is to be read *in pari materia* with N.J.S.A. 3B:1-9 and R. 1:1-2(a), to afford an objectant the necessary latitude in "objecting" to sophisticated white collar accounting[30] fraud which is not reflected in the final "accounting", per the executor's own admission, infra. *Matter of Estate of Horowitz*, 220 N.J. Super. 300 (1987) (probate code to be read *in pari materia* with other sections of the code). Any other reading of the probate code effectively sanctions white collar fraud, including the use of shell companies.[31]

Plaintiff's objections to the "objections" in this fraud-laden case are thus self-evident. Neither the 602K payroll fraud,

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[30]Fiduciary reporting is subject to national accounting standards, *to wit, "preparation of an accounting in conformity with the Uniform Principles and Model Account Formats promulgated by the National Fiduciary Accounting Project shall be considered as an appropriate manner of presenting a fiduciary account. See English and Whitman, Fiduciary Accounting and Trust Administration Guide (ALI-ABA 2d ed. 2008)."* Comment to to UPC §3-705, Duties of Personal Representatives.

[31] See, *Graziano v. Grant*, 326 N.J. Super. 328, 342 (App. Div. 1999), *("[A] court of equity should not permit a rigid principle of law to smother the factual realities to which it is sought to be applied...Applying principles of fairness and justice, a judge ..has a broad range of discretion to fashion the appropriate remedy in order to vindicate a wrong consistent with principles of fairness, justice, and the law..")*

nor the timed Toben 800K firesale along with the disreputable *Morey La Rue* shell company used to syphon Toben's profits for the benefit of the executor *only*, "appeared" in the purported final "accounting", as the executor's counsel in fact admitted. [**10T:24, 14-16**]. This was consonant with the executor's utterance in 2013 that "*we are not reporting anything to anyone at the end of the day.*" [**A91**]. Notwithstanding, compelling objections *were* made, which the Judge below ignored.

To be sure, the motion Judge since 2017 has *sua sponte* scrutinized the plaintiff's *every* move, with the precision of an interested chess master, while seemingly espousing a pernicious endgame. Thus, when plaintiff at the final accounting summary hearing pointed out that the *sole* case relied upon by the executor in his pleadings to disinherit, *to wit,* "*In re Hope*", [**10T:32, 23-25**], did not support in-cash distribution, in lieu of *effortlessly* ruling on behalf of the widow as he had done repeatedly in favor of the executor in the removal proceedings, he instead gave the executor a "second bite at the apple", by allowing him to re-brief "*In re Estate of Howard Hope*". Id.

Having given the executor a second opportunity to disinherit the widow, the Judge then issued a draconian ruling on April 30, 2019, [**A2081-A2088**], approving the fraud-laden final "accounting", denying the long-sought Gold CPA deposition, denying all of plaintiff's claims and objections, and denying plaintiff payment

of her attorney's fees from the estate. Id. This draconian "**death penalty**" ruling against a widow, which effectively rewarded the defendants for their sophistication in using shell companies to conceal their fraud from the final "accounting", left plaintiff and her special needs daughter insolvent, with outstanding attorney's fees of nearly 500K[32], and scant assets to satisfy same.

The April 30, 2019 "death-penalty" summary ruling was partially premised on the purported lack of "specific" or "particular" objections. However, the objections were compelling, as per the following: **First**, plaintiff's breach of fiduciary duty claims, decided contemporaneously with the objections to the final accounting, constitute sufficiently "specific" objections. **Second**, numerous specific objections were in fact made at the final accounting hearing. **Third**, THC and *shell company* Toben corporate accounting "merged" with estate accounting, thus obfuscating the demarcation between estate and corporate accounting. **Fourth**, the record is replete with compelling objections and claims made by the plaintiff since 2014.

ii. Plaintiff's Specific Objections

The summary hearing to approve the executor's purported final "accounting" took place on December 14, 2018, notwithstanding

[32] It should be noted that there could be no "specificity" regarding this 500K attorney fee at the final account hearing, since the Judge in 2017 stayed all proceedings regarding the "reasonableness", e.g. "specificity," of this fee. [**A740-A741]**

plaintiff's prior requests for an adjournment pending an interlocutory appeal. [**A1827-A1828**]. At the hearing, the Judge targeted the issue of "specific" objections with near-mathematical precision, effectively reducing the **entirety** of the widow's rights into a seeming contest between unlicensed forensic accountants, and in the process showing scant concern for the demonstratively conspicuous *indicia* of fraud within the four corners of the purported final "accounting" itself, such as the redactions for potentially unlawful "advances" made by the Todd Harris Company ("THC") to the estate to pay defense counsel's attorneys fees. [**10T:16, 16-17**], [**10T:17, 7-11**]. [**A1338**].[33] To be sure, however, plaintiff's objections were crystal clear, *infra*.

1. Breach of Fiduciary Claims Pending Before the Court on December 14, 2018, the date of the Summary Final Accounting Hearing, Constituted Legally Sufficient Exceptions/Objections

In *In Re Maxwell's Will*, 306 N.J. Super. 563 (1997), the plaintiffs argued that "*their amended exceptions, along with their brief, exhibits, answer and counterclaim, are legally sufficient pleadings to entitle them to at least conduct discovery*." Id. at 584. This Court agreed, stating "*we hold that the pleadings ...*

[33] It is *plausible* that these advances were unlawful. However, as the long-sought deposition of company accountant Mr. Gold was denied by the Court, although it had been the subject of three timely motions to compel for over one year, **[10T:19, 16-17]**, this topic could not be properly explored during discovery.

were sufficient as a matter of law….... [and] that the...amended exceptions set forth claims ... with sufficient particularity .. to entitle them to at least pursue discovery." Id. at 586.

In the case *sub judice*, plaintiff's initial breach of fiduciary claims where pending before the Court on the date of the final accounting summary hearing. [**A1-A40**].[34] She also attempted to file new claims in December of 2018, which the Judge at a hearing in 2019 in fact characterized as "objections". **[11T:9, 10-16]**.[35]

More *specifically*, **the Toben property** claim[36], decided at the final account hearing of 2018, was referenced at Count V of her 2014 complaint, at Count VII, which requested an order finding that the executor, *"by his vote to sell [the Toben commercial property] has breached his fiduciary duty for the above stated reasons,"* and at Count XI. In addition, attached as an exhibit

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[34] See UPC §3-808(d): "*Issues of liability as between the estate and the personal representative individually may be determined in a proceeding for accounting, surcharge or indemnification or other appropriate proceeding*."

[35] Further, it is undisputed that she expressly sought payment of her attorneys fees from the estate, [**A1740, A1993**], and that proceedings regarding the *specificity* of a nearly 500K fee claim by her prior counsel were expressly stayed by the Court on December 12, 2017. [**A740-A741**].

[36] This claim entailed the loss of estate funds because of no show salaries, as well as the loss of nearly $300,000.00 per annum rental income and the $800,000.00 capital loss resulting from the timed firesale of the "Linden" property owned by Toben.

to plaintiff's 2014 complaint, pending and decided on the day of the final account hearing, were the Sun Bank "crisis" meeting minutes wherein plaintiff clearly stated that she, "*objected to [the sale of the Toben property], arguing that she wants to preserve this asset for her children.*" [**A199**].

The $602,200.00 payroll fraud in turn was referenced at Count III - which sought damages for the executor's "*$2,000 a week repayment of alleged loans/consulting fees disguised as salary*", and at Counts IV, V, VI, and I of her 2014 complaint, [**A1-A40**]. The theft of plaintiff's 401K funds valued at $100,000.00, was similarly referenced in a March 13, 2014 certification at pages 1 [**A41**] and 29 [**A69**], at Schedule R of the complaint [**A177**], and in a certification of December 12, 2014. [**A495**]. These March 2014 pleadings, pending before the Court on December 14, 2018, thus constituted legally sufficient objections. *In Re Maxwell's Will*, 306 N.J. Super. 563 (1997).

2. Further Specific Exceptions Made at Final Accounting Hearing as To Valuation, Payroll, and In-Cash Distribution

A. Specific $602,200.00 Payroll Scheme Objection on December 14, 2018

Plaintiff in her November 30, 2018 answer to the final accounting pleadings objected to the payroll fraud: "*[plaintiff] denies the executor is entitled to commissions [because of] the payment to himself of an undisclosed 602K debt disguised as a THC*

salary…" [**A1701**]. The payroll scheme was also *specifically* referenced at the December 14, 2018 summary hearing, wherein plaintiff unequivocally stated: "***Judge, this $2,000 weekly payroll payment has been the subject of -- of our concern for over four years…***"[**10T:18, 20-25**], and "***the exception is Judge, that the executor paid himself $602,200, he admitted he did so, it's unlawful, he put himself on the payroll.***"[37] [**10T:22, 2-5**].

B. Specific In-Cash Distribution Objection and "Second Bite at the Apple" at December 14, 2018 Hearing

The second half of the December 14, 2018 hearing was dominated by the executor's nefarious pleadings for in-cash distribution of plaintiff's shares, for fear that she would literally "***destroy***" or "***kill***" the Todd Harris Company[38], a multi-million dollar company, *supra* Statement of Facts §VII(i). These evidently spurious pleadings were filed by the executor, *twice*, notwithstanding his own *specific* September 2017 deposition testimony that THC personnel *no longer* objected to plaintiff's presence at the

[37] The executor's "defenses" to the payroll fraud where as set forth in the statement of facts *supra, to wit,* that an employment agreement("EA") which took effect in 2010, and which its purported author all but called a fraud, permitted the payroll payments which began within hours of the passing of decedent in late 2012. [**10T:25, 17-19**].

[38] In addition to the Fabian certification repeatedly referencing "destroy", *supra* statement of facts, the fiduciary's counsel flagrantly quipped at the hearing that "***she's going to kill it. It's going to go under.***" [**10T:46, 15-25**]. [**10T:47, 13-28**].

company, [**A1730**], notwithstanding that plaintiff had not set foot at THC for over five years, [**10T:38, 11-20**], notwithstanding that she had been fired and then escorted by the police - and therefore had no physical presence at the company, [**10T:44, 22-25**], notwithstanding that prior to her whistleblower activity she had been promised the shares and was routinely treated as a shareholder, [**10T:44, 14-20**], [**A404**], [**A80-A81**], [**A0145**], and notwithstanding that a 40% share ownership is insufficient to "control"[39] or "***destroy***," *any* company.[40]

In fact, plaintiff in her November 30, 2018 answer to the final accounting pleadings objected to the in-cash distribution of her shares: "*Mrs. Applebaum denies the executor is entitled to commissions [because of] his attempted retaliatory sale of my 40% stake in the company..*" [**A1701**]. Further, plaintiff's comprehensive 21-page certification was a *compelling objection* to in-cash distribution [**A1720-A1741**].

During the colloquy regarding in-cash distribution, the

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[39] Per the testimony of the scrivener, footnote 7, *supra*, decedent engineered a *specific* testamentary scheme which allowed the company to operate without interference from the minority shareholder. There is no factual support for the proposition that decedent *intended* any *other* scheme when he signed the will.

[40] *Balsamides v. Protameen Chemicals, Inc.*, 160 N.J. 352, (1999)("*Because a fifty percent shareholder cannot direct outcomes as a fifty-one percent shareholder can, he does not have 'control' of the corporation*".)

Judge's predisposition for permanent disinheritance was markedly clear.[41] Plaintiff/appellant, however, asserted that the facts did not support *in-cash* distribution per the executor's own interpretation of *In Re the Estate of Howard C. Hope*, 390 N.J. Super. 533 (App. Div. 2007) since, *inter alia,* there were no objecting co-beneficiaries of the *residuary* of the estate, which included the 40% THC shares, and the executor's and/or the trustee's objections to in-kind distribution were insufficient as a matter of law. [**10T:39, 20-24**]. Faced with a clear dearth of facts and law(s) which permitted in-cash distribution, the Judge inhumanely gave the executor a "second bite at the apple", and had him re-brief "*Hope*", in order to identify *any* facts and/or *any* law which permitted disinheritance.[42] [**10T:52, 24-25**].

As pointed out in plaintiff's reply "Hope" brief, [**A2131-A2149**], the executor in his "supplemental" brief sought, for *the first time,* an extension or modification of law - since the case he previously relied upon clearly did not advance his spurious arguments. Specifically, the executor in a remarkable reversal *ex post facto* relied upon N.J.S.A. 3b:23-1 ("**Subsection 1**"), to argue

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[41] The Judge stated that "***sure there is,***" a legal and factual basis to permanently disinherit the widow.[**10T:49, 18-21**].

[42] In doing so, the motion Judge essentially adjourned a hearing which plaintiff had previously unsuccessfully sought to adjourn, [**A1975-A1976**], in order to give the personal representative a second opportunity to severely penalize an insolvent widow.

that a "prefatory" exception allowed the Court to bypass and ignore N.J.S.A. 3b:23-3 ("**Subsection 3**") - which he had previously argued was the proper statutory scheme for in-cash distribution.[43]

However, on April 30, 2019 the motion Judge permitted in-cash distribution pursuant to a clearly *pretextual* reason, *to wit*, that distribution in-cash was warranted in order to allow the (admittedly solvent) estate to meet its expenses. [**A2081-A2088**].[44] This draconian and inhumane ruling, which was also premised on the executor's purported discretion to distribute in-cash, runs afoul of *In Re the Estate of Howard C. Hope*, 390 N.J. Super. 533 (App. Div. 2007), in that *Hope* does not permit the Court to bypass the statutory scheme for distribution if the executor is afforded such discretion. Id. In fact, in "*Hope,*" the **last will and testament *also* permitted in-cash distribution**, yet the Court held that the statutory scheme nonetheless applied. Id.[45]

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[43] This mind-boggling re-shuffling of the law, in order to invoke the "death penalty", was probative in that the executor's motives have never been benign - he has never had a factual or legal basis to seek disinheritance, and clearly sought to do so only as a means to retaliate against plaintiff.

[44] Although this "death penalty" *summary* ruling based on pretext did not form a basis for the recusal motion, *infra*, it is respectfully submitted that it is compelling evidence that the Judge below should be *permanently* removed from this case.

[45] *Ergo,* one of the co-beneficiaries of the *same* asset, in this case the residuary of the estate, *must* object to *in-kind* distribution. In the case at bar, there is *only one* beneficiary of the residuary, plaintiff/appellant. See also comment to UPC §3-906, ("***This section establishes a preference for distribution***

A prominent *constitutional* reason also disfavors disinheritance. Specifically, defendant/respondents have made no effort to conceal that they sought to sell plaintiff's shares as a means to penalize her for her lawsuits[46] and whistleblower activity, and they've made it crystal clear throughout this case that they were also attempting to stop plaintiff from filing *hypothetical* minority shareholder lawsuits[47]. These poorly conceived reasons to support in-cash distribution run afoul of ***LoBiondo v. Schwartz***, 199 N.J. 62 (2009), which sets forth that access to our honorable courts is a constitutional right, [**10T:41, 2-7**], and ***Hawkins v. Harris,*** 141 N.J. 207, (1995) (setting forth the litigation privilege, which essentially forbids defendants herein from punishing plaintiff for her lawsuits).

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in kind.") and N.J.S.A. 3B:23-4 **(**"..*the personal representative may mail .. a proposal for distribution to* ***all persons who have a right to object.***"). (emphasis supplied).

[46] The executors's counsel at the hearing thus quipped "*everything..the Federal Court lawsuit where she has seen fit to sue every single member of senior management of the company, all of that demonstrates that if she has any connection whatsoever with this company,* ***she's going to kill it.***" [**10T:46, 15-25**].

[47] As stated in the statement of facts, the executor's certifications prominently depicted their concern for plaintiff's lawsuits, and her purported propensity to file minority shareholder lawsuits. Moreover, the affiant affidavits disclosed whistleblower animus (e.g. "she was digging for dirt"), [**A511-A548**], and the executor's own counsel in a missive stated that it "doesn't take much imagination" to *predict* that if plaintiff were permitted her shares she *would* file lawsuits against the company [**A921**].

For the foregoing reasons, the Court erred in ordering in-cash distribution.

C. Plaintiff's "Exhibit A", Specific Objections as to the Valuation of THC, Toben, Payroll, and 401K At the December 14, 2018 Hearing,

Plaintiff as part of her final accounting filings of November 30, 2018 submitted a *comprehensive* valuation report, [**A1757-A1822**], which valued the THC shares at nearly five times the amount claimed by defendant, and in her certification, ⁋50, she *specifically* stated, "***I respectfully submit .. that the Gramkow violation [sic] relied upon by the executor be stricken and/or ignored altogether***." [**A1737**]. This certification, along with the *detailed* valuation report, was in fact a comprehensive *objection* to in-cash distribution and to the valuation of The Todd Harris Company. As plaintiff's valuation also *specifically* refuted Mr. Fabian's employment agreement ("EA"), in the context of the phantom stock issue, it was also a specific objection to the payroll fraud, which subsisted on said EA. [**A1762**].

A rather detailed objection as to the firesale of the Toben property was also referenced in plaintiff's final account submissions, *to wit*, that "*the Estate no longer has as an asset the profitable 'Toben' property, valued at 1.5 million, and which yielded nearly 300K per annum in gross receipts, and over 130K per annum in net income per an appraisal dated October 15, 2013. Said property was sold at half of the appraised value primarily to*

benefit the executor only." [**A1758**]. Plaintiff in her submissions also levied a *second* Toben objection, as well as an objection to the executor's misappropriation of the 401(k) funds, *to wit*, "*Mrs. Applebaum denies the executor is entitled to commissions [because of] the firesale of the lucrative 'Toben' commercial property, [and] his misappropriation of plaintiff's 401(k)*." [**A1701**].

More importantly, plaintiff as part of her final account filings submitted as "**Exhibit A**" a *comprehensive* interlocutory appeal brief, [**A2095-A2130**], which set forth claims and "objections" as to all matters, with the highest degree of "particularity" possible. At page 1, ¶1 of her certification, plaintiff certified this "Exhibit A" brief, *to wit*, "*I am attaching as Exhibit A the brief filed in my Interlocutory Appeal of November 25, 2018, and I certify as to the truth of the factual assertions therein*.". [**A1720**]. See *In Re Maxwell's Will*, 306 N.J. Super. 563 (1997) (finding that "***brief, exhibits, answer and counterclaim***", in the context of a final accounting, are "***legally sufficient***").

The crystal clear objections cited in the "certified" interlocutory "Exhibit A" brief included the following:

> Six years ex post facto,.. the testamentary trust has not been formed [sic, funded], the defendant/respondents have distributed nothing to plaintiff/appellant or her special needs daughter…they misappropriated plaintiff/appellant's one hundred thousand dollar 401K plan proceeds.. they sold the lucrative "Toben" commercial property appraised at 1.5 million dollars for half of the appraised value **primarily to suit the Executor's financial interests**, and the executor handily admitted and nonchalantly paid himself a disputed

> undisclosed debt in the amount of $602,200.00 by placing himself on the payroll of THC…. The 602K debt is evidenced by nothing more than self-serving handwritten annotations on three sheets of paper, unsigned by anyone, and written by the executor himself. [**A2103-A2104**] (emphasis supplied).

The certified "Exhibit A" brief also specifically referenced plaintiff's 2014 complaint, which was decided on the day of the final account hearing and was therefore an obvious "objection", to wit, "*plaintiff/appellant in or about March 23, 2014 filed a comprehensive eleven-count verified complaint for inter alia damages and the removal of the executor for fraud.*" [**A2099**]. In another section of the "Exhibit A" brief, plaintiff *once again* referenced her 2014 complaints, and provided yet more "specificity" regarding the sale of the Toben property:

> Shortly thereafter, in late March of 2014, plaintiff/appellant filed a lawsuit which defendant/respondents had been expecting...Nearly simultaneously with the filing of this lawsuit, and in order to prevent plaintiff/appellant from filing pleadings to prevent the sale, defendant/respondents sold the lucrative "Toben" property, appraised at 1.5 million dollars, for half of said value, in a transaction which **benefited primarily the Executor**. [**A2105**] (emphasis supplied).

Further, at page 12 of her "Exhibit A" brief, the plaintiff *again* clearly objected to the payroll fraud and the 401K misappropriation, *to wit*, "for purposes of the within appeal, the primary reasons sought to remove ..William P. Fabian as Executor, are .. (**i**) his admitted scheme to pay himself a 602K debt he has scant proofs for - by placing himself on the payroll of THC ... (**ii**) his misappropriation of plaintiff/appellant's 401K plan

proceeds." [**A2107**]. Lastly, three full pages of the "Exhibit A" brief, to wit pages 25-27, contained detailed, comprehensive, and compelling details, e.g. specificity, regarding the payroll scheme. [**A2120-A2122**].[48]

3. *"Specificity" in the Context of Fraudulent Transactions Not Disclosed in the Final Accounting*: Toben Investments Inc. And THC Inc. as Shell Companies To Conceal Fraudulent Transactions

It is axiomatic that an "objectant" is not tasked with "specifically" objecting to complex fraud which was deliberately concealed by the "accountant".[49] In fact, at one point during the final accounting hearing, counsel for the executor effectively conceded that the Todd Harris Company payroll fraud, **involving a direct admitted payment to the executor (e.g. self-dealing)**, was not disclosed in the final accounting[50]. *A fortiori*, plaintiff could not "specifically" object, with the "particularity" or precision of a forensic accountant, to the 602K THC payroll fraud or, for that matter, to the timed firesale of the Toben property,

[48] Because of the 65-page limitation to the within brief, that objection will not be included here.

[49] See NJSA 3B:1-9 and UPC §1-106, ("**if fraud is used to avoid or circumvent the provisions.. of this [code], any person injured thereby may obtain appropriate relief**..") (emphasis supplied).

[50] See [**10T:24, 14-16**]("..*Todd Harris Company expenses are not included in the accounting because this is the estate's accounting. The company is separate.*").

thus underscoring the need for the long-sought deposition of company accountant Gold.[51]

4. Specific Objections Elsewhere in the Record Below

The Judge's draconian ruling *inter alia* finding that there were no "specific" objections is further eclipsed by the overwhelming number of specific references to the executor's estate-related fraud in the entire record below, *to wit*, the **401K fraud** was specifically referenced in a RICO complaint which was certified or verified by plaintiff, and submitted to the Court on June 26, 2018. [**A760-A937**]. It was also specifically referenced at a hearing in 2016, [**4T:18, 24-25**], and was also expressly referenced at a hearing in 2015, [**3T:14, 10-12**], and at two hearings in 2014, [**2T:19, 11-21**], [**2T:23, 15-16**].

The fraudulent **timed Toben firesale** was also *repeatedly* referenced at hearings in 2014[52], 2015[53], and 2016[54].

Moreover, the RICO complaint which was certified or verified by plaintiff, and submitted to the Court on June 26, 2018,

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[51] Notwithstanding, the degree of "specificity" of plaintiff's *de facto* objections is compelling, and legally sufficient.

[52] *To wit*, at [2T:5, 10-11],[2T:12, 2], [2T:12, 5] , [2T:16, 19], [2T:20, 4] , [2T:23, 16], [2T:27, 1] , [2T:28, 24] , [2T:29, 1, 17, 18] , [2T:32, 5], [2T:32, 12] , [2T:46, 16], [2T:47, 3] , [2T:56, 23] , [2T:64, 18] , [2T:67, 18], [2T:71, 24] , [2T:12, 4] , [2T:46, 23].

[53] [3T:7, 1-25],[3T:12,9-10].

[54] [4T:8-16],[4T:42, 15-18].

contained clear (albeit inherently complex) claims and objections as to the **payroll fraud**, the **401K theft**, the **Toben sale**, **in-cash distribution**, and **attorneys fees**. [**A760-A937**]. This RICO suit was pending on the day of the final accounting, and thus *ipso facto* constituted a "continuing" objection.

The **$602,200.00 payroll fraud** was also referenced at hearings in 2014[55], 2015[56], 2016[57], and 2018[58], and the Court was therefore

[55] [**1T:27, 18-20**] (injunction to stop payroll fraud), [**1T:59, 24-25**] (executor draws 2K weekly check disguised as a salary), [**2T:10, 6-14**] (Rajs 50K salary increase), [**2T:6-11**], [**2T:26, 17-25**] ("*[executor] said, his $2,000 would be paid until his consulting fees and loans, which he hasn't proven, were paid in full.*")

[56] [**3T:10, 1-5**] ("*Meanwhile, before this purported will was -- was probated Mr. Fabian... started taking $2,000 a week, as he said he was owed a half a million dollars*").

[57] [**4T:19, 3-6**] ("*..he wanted Bill Fabian, who is his friend, his advisor, who had a consulting agreement, an employment agreement with the Todd Harris Company that was to pay him $2,000 a month. He had that agreement with -- with Todd Harris Company.*")

[58] [**8T:14, 7-9**] ("*And the minutes essentially say that he will pay himself a $2,000 weekly salary in satisfaction of these loans.*")[**8T:16, 4-5**] (Mr. Fabian began paying himself 2K weekly promptly upon decedent's death), [**8T:42, 8-13**] (consequences of the payroll fraud on THC financial statements: "*Because he's on the payroll. There's accounting that has to take place. Mr. Gold will know that. ...The income tax returns, there's one particular entry .. wages and salaries, but she [sic] would have to overstate it by $2,000 in wages and salaries, which is not true.*") [**8T:46, 8-12**] (Plaintiff explaining how the payroll payments are a fraud: "*[Executor] ... representing to ...the accounting world ...I am an employee. I'm working and this is my weekly salary..*"). [**9T:17, 14-20**] ("*There's plenty of fraud. The $602,200 debt … which he admitted .. [on] a sheet of paper, which is unsigned by anyone, it's handwritten, and on that sheet of paper he says, I'm owed $602,200 and he paid himself that debt ...on the payroll of the*

in fact fully aware of these clear objections/claims, which were **pending before the Court on December 14, 2018, and "resolved" contemporaneously with the final accounting approval.**

iii. Long-Sought Laurence Gold (CPA) Deposition Partially Impeded Proper Resolution of the "Final Accounting" Proceeding

The tortuous issue of defendant/respondent Laurence Gold's deposition (company accountant), sought by multiple undecided motion(s) for over one year [**10T:30, 22-23**], [**10T:31, 4-6**], footnote 63 *infra*, inevitably took prominence at the December 14, 2018 hearing, with the Judge seemingly baffled that the deposition of the company accountant was required for purposes of the final accounting. [**10T:6, 7-25**]. He then attempted to constrict plaintiff's discovery rights by asserting that the *long-sought* Gold deposition cannot be compelled since it did not have a nexus to the proposed final accounting. Id. Plaintiff then responded that The Todd Harris Company was the only estate asset, and as such the corporate entity essentially "merged" with the estate[59],

Todd Harris Company. We don't know whether that debt is actually -- has any basis in fact").

[59] See, e.g., [**10T:22, 16-25**](payroll THC accounting "*carries on into the estate accounting*"), See also [**10T:26, 7-9**]("primary estate asset *is the Todd Harris Company*"), and [**10T:28, 21-25**]("*the estate had no funds and it relied completely on the Todd Harris Company and so therefore, the Todd Harris Company accountant is the person we have to ask questions*"). Ibid.

thus obfuscating the line between estate accounting, and the corporate accounting performed by Mr. Gold, thereby warranting his deposition. [**10T:6, 22-24**].[60]

This "merger" argument was also referenced vis-à-vis the Todd Harris Company $602,200.00 payroll fraud, which as stated *supra* was "concealed" in the final accounting, as the fiduciary's counsel prominently admitted at the final accounting hearing. Thus, when pressed by the Judge to pinpoint, with "specificity", the entries in the (partially-redacted) final accounting which reflected the $602,200.00 payroll scheme at the Todd Harris Company[61], plaintiff continued to assert that the long-sought Gold deposition, which plaintiff sought by (undecided) motion(s) for over one year, [**10T:30, 22-23**], [**10T:31, 4-6**], would answer that inquiry, as well as many others. [**10T:10, 3-10**]. Nonetheless, the Judge continued to seek a surgically accurate "*specific*" objection

[60] The potentially unlawful transfers for defense counsel fees from THC to the estate, which were **redacted** in the final accounting [**A1338**], [**10T:16, 16-17**], [**10T:17, 7-11**], also supports the plaintiff's argument that the long-sought Gold deposition is necessary. **To date, it is unknown how those counsel fee transfers were accounted for, e.g., as a THC expense or as distribution from THC shares to the estate.**

[61] Toben Inc., was used as a "shell" company prior to the timed firesale of its commercial property in 2014. <u>Statement of Facts, §VI</u>. This illicit use of the company allowed the defendants to omit the firesale from **the final accounting.** CPA Laurence Gold at a deposition would be able to **clarify the issue of the *valuation* of Toben Inc. given the firesale of its sole asset.**

throughout the first half of the summary hearing, to which plaintiff continued to assert that the partially-redacted "final accounting" would require CPA Gold's long-sought deposition for clarification. [**10T:30, 8-15**]. Plaintiff then, if as a matter of best practices or because of exhaustion, "objected" on the record to the entirety of the final accounting as essentially void *ab initio* because of the systematic fraud, which was concealed. Ibid.[62] The Judge then determined that he would interpret plaintiff's need for the long-sought deposition of the company accountant as *conclusive* proof that there were no "specific" objections. [**10T:21, 1-2**]. He then issued a final ruling on April 30, 2019, *permanently* disinheriting the widow. [**A2081-A2088**].

iv. Conclusion (In Cash Distribution, Objections)

For the foregoing reasons, the Court erred in ordering in-cash distribution, and in approving the purported final "accounting", which "accounting" relied upon the use of sophisticated "shell" companies to disguise fraud and is, therefore, void *ab initio*. It was further error for the Judge to refuse to order the long-sought company accountant (Gold) deposition[63], to refuse to order

[62] However, in doing so, plaintiff did not assert that specific objections had not been made in her filings or elsewhere.

[63] The company accountant deposition was first sought by a motion which was properly filed in August of 2017, but was never decided by the Court. [**A1825-A1825**]. It was referenced at various hearings as being *particularly* significant, [**A1746-A1750**], and on Nov 20, 2018, despite the motion having been properly filed in 2017, the

a plenary hearing for her fraud claims, to deny any monetary relief[64], to reject plaintiff's comprehensive "specific" objections[65], to fail to order plenary hearings, and to deny plaintiff payment of attorneys fees from the estate, while allowing the executor counsel's fees to go unchallenged. Moreover, the Judge's order permitting the shares to be sold and/or to be placed into the testamentary trust is wholly contrary to decedent's specific testamentary scheme and should be reversed.[66]

POINT VII

It Was Error For The Judge To Refuse To Recuse Himself, Without Offering A Statement Of Reasons As Required By Law. **[11T:30, 3-5]**

Judge in an order erroneously claimed it was not properly brought before the court. [**A1677-A1678**]. Plaintiff then re-filed same on 11/30/2018 [**A1742-A1745**], and then again on 1/3/2019, [**A1999-A2003**]. The motions were then denied again, without order, at the December 14, 2018 and February 8, 2019 summary hearings.

[64] See NJSA 3B:1-9 and UPC §1-106, ("Whenever fraud has been perpetrated in connection with any proceeding or in any statement .. or if fraud is used to avoid or circumvent the provisions or purposes of this [code], any person injured thereby may obtain appropriate relief..")

[65] R. 1:1-2(a) ("**The rules.. shall be construed to secure a just determination, [and] fairness**".)

[66] As stated at footnote 7, the scrivener testified that decedent *specifically* engineered a 40%/60% testamentary scheme - he did not testify that decedent intended *any other* testamentary scheme(s), particularly one which would disinherit his wife of 22 years. In Re Theodore M. Payne, 186 N.J. 324, 335 (2006) *("Extrinsic evidence...should be admitted to aid in ascertaining the testator's probable intent under the will.").*

The compelling reasons advanced by plaintiff/appellant for the recusal of Judge Arthur Bergman, JSC, [**A1999-A2032]**, are cited throughout this brief[67], as his draconian acts and omissions against an insolvent widow are potentially unprecedented, and include his *summary* invocation of the "death penalty" remedy.

Specifically, plaintiff/appellant sought recusal because of the Judge's clear bias in granting the executor's every request, while denying everything sought by plaintiff, including bona fide adjournments, i.e. an adjournment of the December 14, 2018 final accounting hearing. [**A1827-A1828**]. Plaintiff further sought recusal since the Judge *ab initio* "exonerated" the executor for fraud, *effortlessly* and repeatedly ruling in his favor, while characterizing plaintiff's proofs in a scandalous manner, *to wit*, "***the heart of [plaintiff's case] is that there is no case***", [**A2014**], "***fake news***", [**A2014**], "[**her certification is**] ***useless, I don't care how much she's seen and what she hasn't seen***", [**A2011, A2014**], and "***you can always be pregnant***", [**A2012**]. Conversely, he *sua sponte* invoked the executor's certification to exonerate him from fraud, "***show me in this record where he said it because [his] certification denies it.***" [**A2015**]. Further, when confronted at the

[67] The recusal motion was entertained on February 8, 2019, and the recusal colloquy begins at page 9 of the "**11T**" transcript. At [**11T:30, 3-5**], the Judge denied recusal without a statement of reasons: "*so I'm going to deny the recusal because I haven't done anything that I think (indiscernible) the recusal.*" Ibid.

final accounting hearing with a dearth of facts and law which would permit the "death penalty" remedy of disinheritance, the Judge had the executor go back to the drawing board to find facts and laws to effect this "nuclear option" against an innocent widow, e.g. the "Hope" second-bite-at-the-apple incident. See Point VI, §ii(2)(B). Particularly concerning is that the Judge had previously denied plaintiff's request to adjourn this very same final accounting hearing - yet he had no problem in permitting an adjournment in order to implement this "death penalty" remedy.

Moreover, the Judge's final draconian ruling, Point VI, §ii(2)(B), as well as his failure to provide a statement of reasons for the denial of the recusal motion, *Magill v. Casel,* 238 N.J.Super. 57 (App.Div.1990), should weigh in favor of this Honorable Court reversing the recusal denial. [**A2079-A2080**]. See, e.g., *US v. Bergrin*, 682 F. 3d 261, (3rd Cir. 2012) (permitting recusal in the context of a RICO proceeding).

CONCLUSIONS AND RELIEF SOUGHT

The "interested" executor in the case *sub judice* has never denied a $602,000.00 debt purportedly owed him by decedent and/or decedent's family-run company. He has in fact sought to pay himself that disputed debt by fraudulently placing himself on the payroll of the company. This indebtedness, which initially arose from an unorthodox $100,000.00 loan *personally* given to decedent decades ago before the Todd Harris Company was a going concern, [**A433-A436**], and

which **as a result of an undocumented yearly interest scheme ballooned to nearly 500K over the span of nearly thirty years**, does not appear in the final accounting. And neither does the payroll scheme for that matter, as admitted by counsel at the final accounting hearing.

Ergo, this matter does not require a "standard" valuation of shell companies whose financial statements are the product of perpetual unabated fraud[68], and neither does it require "particularized" surgically-accurate "objections" to such complex fraud, to be made at a two-hour *summary* proceeding. Plaintiff/appellant's comprehensive million-dollar claims, it is respectfully submitted, should not be reduced to a such a "bulls eye" you win, *everything else* you lose, all-or-nothing *summary* contest. This case is not apt for such a solution seemingly rooted on rudimentary game theory, and the rules and statutes of our honorable courts in fact contemplate as much, *supra*. "**Appropriate relief**" in this complex fraud-based case involving deliberate concealment therefore requires detailed and particularized *causes of action*, such as those properly raised in plaintiff's 2014 pleadings, as well as *reasonable* access to our Honorable Tribunals, by way of comprehensive plenary hearings or otherwise. See N.J.S.A. 3B:1-9.

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[68] See, e.g, plaintiff's comprehensive valuation report for The Todd Harris Company, wherein her valuation expert *inter alia* questions why the defendant's valuation expert relied on the statements of Mr. Fabian *alone* with regards to a $370,000.00 loan which appeared to be "off the books". [**A1764**].

Plaintiff/appellant thus respectfully requests that all orders denying removal of the executor be vacated, that this Court order the Court below to provide plaintiff with plenary hearings for the removal issue and for her breach of fiduciary duty claims, that the April 30, 2019 order approving the final accounting be reversed/vacated in all respects, that plaintiff be permitted to file new "objections" to a *bona-fide* accounting by a new personal representative, that the order(s) denying the long-sought Gold CPA deposition be reversed, with instructions that the deposition date is to be set consonant with new hearings below, and that the order denying recusal be reversed/vacated, with instructions for a new Judge to be assigned to this case.

Plaintiff/appellant further seeks guidance as to the scope of the "clear and definite" proof standard, guidance regarding the propriety of in-cash distribution under "Hope", and guidance regarding "specificity" or "particularity" of objections/exceptions in cases of rampant corporate and estate fraud by a personal representative who relies on illicit shell company "accounting".

Respectfully submitted.

DATED: September 30, 2019 *Santos A. Perez, Esq.*