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OF THE COMMITTEE ON OPINIONS

ESTATE OF CLAUDIA L. COHEN, by its Executor, RONALD O. PERELMAN, and SAMANTHA PERELMAN, Plaintiffs, v. ROBERT COHEN and JAMES S. COHEN, Defendants.	**SUPERIOR COURT OF NEW JERSEY** **CHANCERY DIVISION** **BERGEN COUNTY** DOCKET NO. C-134-08 CIVIL ACTION OPINION

Decided: August 20, 2010.

Justin P. Walder, Esq., Roger Plawker, Esq., Shalom D. Stone, Esq., (Walder, Hayden & Brogan, P.A.), Roberta A. Kaplan, Esq., (Paul, Weiss, Rifkind, Wharton & Garrison LLP), counsel for Plaintiffs/Counterclaim Defendants, Executor, Ronald O. Perelman and Samantha Perelman.

Christopher L. Weiss, Esq., Russell T. Brown, Esq., (Ferro Labella & Zucker L.L.C.), Robert Gold, Esq., Mitchell Epner, Esq., (Wilson, Sonsini, Goodrich & Rosati, Professional Corporation), counsel for Defendant/Counterclaim Plaintiff Robert Cohen.

Benjamin Clarke, Esq., Russell J. Passamano, Esq., (Decotiis, FitzPatrick & Cole, LLP), counsel for Defendant James Cohen.

Robert A. Atkins, Esq., counsel for Paul, Weiss, Rifkind, Wharton & Garrison, LLP (pro se).

Laurence B. Orloff, Esq., counsel for Lowenstein Sandler, PC (Orloff, Lowenbach, Stifelman & Siegel, P.A.).

Koblitz, P.J. Ch.

This court has previously determined to sanction plaintiffs' counsel for engaging in frivolous litigation by filing and prosecuting an amended complaint with the frivolous allegation that Robert Cohen made an enforceable promise before 1978 to leave his daughter Claudia (and her children should she pre-decease her father) as much as Robert's only living child, James. Defendants have applied for reasonable counsel fees and costs incurred in defending against the frivolous allegation in the amended complaint pursuant to Rule 1:4-8. As a deterrent to discourage plaintiffs' counsel from repeating the objectionable litigation strategy, $1,960,981 in reasonable counsel fees and costs incurred in defending the frivolous promise allegation in the amended complaint and obtaining sanctions, is awarded to defendants.

This is the court's eighth opinion in this complex litigation. As noted in earlier opinions of this court, trial in this matter proceeded in segments. In the initial proceeding, plaintiffs raised the issue of Robert Cohen's (Robert) current capacity to conduct the trial, alleging he was incompetent and needed a guardian ad litem (GAL). After a seven week trial, during which numerous expert and lay witnesses testified, the court determined in an oral opinion, placed on the record June 1, 2009, and hereby incorporated into this opinion, that Robert was functionally competent and did not need a GAL. Subsequently, the court heard evidence with regard to Robert's purported promise and determined in an oral opinion, placed on the record on June 15, 2009, and hereby incorporated into this opinion, that no pre-1978 enforceable promise to bequeath his daughter Claudia Cohen (Claudia) a certain share of his estate was clearly and convincingly demonstrated by plaintiffs. Thus, Count I was dismissed with prejudice.

On April 22, 2009, plaintiffs also filed an incapacitation complaint against Robert with the Surrogate's court. This court dismissed that complaint in an oral opinion, placed on the record June

26, 2009, finding that Robert did not lack capacity. That June 26, 2009, opinion is hereby incorporated into this opinion. In an August 19, 2009 written opinion, the remaining counts of the complaint were dismissed. The August opinion is also incorporated into this opinion.

The fifth segment of this case centered on defendant Robert Cohen's counterclaim filed against the Estate of Claudia L. Cohen by its Executor, Ronald O. Perelman and Samantha Perelman (the Estate), through which he sought the repayment (with interest) from the Estate of a ten million dollar loan made to Claudia. The Estate disputed the nature of the interfamily transfer, alleging it was a gift rather than a loan. In a written opinion issued on April 8, 2010, this court held that the transfer was properly viewed as a loan, and ordered the Estate to repay Robert Cohen the ten million dollars, along with interest and reasonable costs of collection. On August 9, 2010 this court calculated the interest and cost of collection in an oral opinion. The April 8, and August 9, 2010, opinions are hereby incorporated into this decision.

On June 9, 2010, the parties appeared before the court for oral argument as to the defendants' requests for approximately $3 million in counsel fees incurred in collecting under the note, as well as more than $11 million in frivolous litigation fees[1] for defending a lawsuit in which the Estate of Claudia Cohen and Claudia's daughter Samantha Perelman (Samantha) alleged that Claudia's brother James Cohen (James) exerted undue influence on Robert (Claudia's father) to persuade him to transfer hundreds of millions of dollars of his assets to James. Plaintiffs also claimed that before September 1, 1978, Robert promised Claudia that she (and her heirs) would inherit an equal portion of the estate as her then-living siblings. This court has found that Robert

[1] Rule 1:4-8(b)(2) states that a "motion for sanctions shall be filed with the court no later than 20 days following the entry of final judgment." In the present case, the motion was filed prior to the entry of final judgment. In the context of this lengthy and complicated litigation, it was reasonable for the defendants to wait until a decision had been rendered as to the counterclaim before filing a frivolous litigation motion. The court finds the timing of the application reasonable and appropriate.

has capacity and thus does not require a GAL for this litigation and also that his capacity renders premature any claim that he made *inter vivos* gifts to his only living child based on undue influence rather than estate planning. Plaintiffs' probate complaint alleging Robert's incapacity was dismissed on the strength of the extensive evidence relating to Robert's capacity already considered in the equity matter. On June 9, 2010, this court held that as of the March 20, 2009, filing of the amended complaint, all litigation relating to the plaintiffs' promissory estoppel claim was frivolous under Rule 1:4-8. The entire opinion rendered from the bench on June 9, 2010, is incorporated herein, and a portion of the oral opinion is repeated in writing in this opinion.

The back-drop of this litigation is important to set the stage for the inquiry into frivolous litigation counsel fees. Claudia Cohen died of cancer on June 15, 2007. Three years before she died, Claudia, a journalist, wrote out her own will in her own words. She expressed her "everlasting love" to her parents, "who made everything possible" and described her brother James and his wife as "the best brother and sister-in-law anyone could ever have." She also wrote,

> I request that my ex-husband Ronald allow Samantha to have liberal visitation time with my parents, and with my brother James and sister-in-law Lisa and their children. These relationships are EXTREMELY important to me to preserve and I hope Ronald will understand and facilitate this.
> …
> Samantha, please cherish your family.

Claudia knew that her father, Robert, was dying of a particularly insidious form of Parkinson's disease. Her mother had Alzheimer's disease. Claudia wanted her daughter, Samantha, to maintain a close and loving relationship with her maternal family, including her uncle James, Robert's only living child. With this back-drop, Ronald Perelman (Perelman), initially both as executor of Claudia's estate (of approximately $60 million) and guardian of Samantha, sued Robert and James using the assets of the estate to fund the litigation When Samantha turned eighteen she

continued the litigation without the need for a guardian. The amended complaint filed on March 20, 2009, was filed in Samantha's own name as one plaintiff as well as in her father's name as executor of her mother's estate. Samantha is the primary beneficiary of her mother's estate.

Only rarely may a litigant be charged with payment of frivolous litigation fees under N.J.S.A. 2A:15-59.1. See Ferolito v. Park Hill Association et al., 408 N.J. Super. 401, 408 (App. Div. 2009) (When a litigant alleged to have engaged in frivolous litigation is represented by counsel, the moving party bears the extraordinary burden of proving bad faith on the part of the adversarial litigant); see also McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546 (1993) (Without a showing of bad faith on the part of the litigant, the failings of counsel in not recognizing the frivolous nature of litigation should not be imputed on the litigant.); Id. at 557 ("Although the client determines the objectives of an attorney's representation, the attorney determines the means for pursuing those objectives.").

The standard for assessing fees against counsel focuses on counsel's presumed knowledge of the legal weight of the proofs. Rule 1:4-8 provides for an award of attorneys' fees and litigation costs to a prevailing party as a sanction against a non-prevailing party's attorney, as follows (in relevant part):

> (a) Effect of Signing, Filing or Advocating a Paper. The signature of an attorney . . . constitutes a certificate that the signatory has read the pleading, written motion or other paper. By signing, filing or advocating a pleading, written motion, or other paper, an attorney . . . certifies that to the best of his or her knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
> (1) the paper is not being presented for any improper purpose, such as to harass, or to cause unnecessary delay or needless increase in the cost of litigation;
> (2) the claims . . . and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> (3) the factual allegations have evidentiary support or, as to specifically identified allegations, they are either likely to have evidentiary support or

> they will be withdrawn or corrected if reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support . . .
>
> . . .
>
> (d) Order for Sanctions. A sanction imposed for violation of paragraph (a) of this rule shall be limited to a sum sufficient to deter repetition of such conduct. The sanction may consist of (1) an order to pay a penalty into court, or (2) an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation, or both. Among the factors to be considered by the court in imposing a sanction under (2) is the timeliness of the movant's filing of the motion therefor. In the order imposing sanctions, the court shall describe the conduct determined to be a violation of this rule and explain the basis for the sanction imposed.

Counsel for the Estate engaged in hard-fought litigation that at times crossed the boundary of appropriate litigation tactics. Most notably, plaintiffs' counsel's examination of Robert Cohen was harsh and painful. The examination took place in Robert's large conference room at his office. The room was filled with lawyers, the court reporter, Robert's nurse, his speech facilitator/interpreter, Ms. Malmrose, the videographer, and the Judge. Eighty-four-year-old Robert was dressed immaculately, seated in his chair, frozen and unable to move, with his mouth partially open, periodically coughing, appearing to be on the verge of choking due to his difficulty in swallowing. He could not speak more than one or two syllables, frequently repeating the same syllable numerous times due to his disability. When asked to read, the document was magnified and set on an easel in front of his face. Frequent breaks were necessary. From the beginning, plaintiffs' lead counsel asked complex questions. He confronted Robert with a 1976 quit claim deed not produced in discovery. All apparently calculated primarily to reveal Robert's functional deficiencies, rather than gather evidence. Indeed, plaintiffs' counsel complained three times that the court's rulings, intended to assist in gathering useful information, were making it "impossible to determine cognitive impairment." As an example, with no introductory explanation, plaintiffs' counsel asked if Robert remembered going to see Dr. Green in New York, which Robert did not.

Robert had been to countless doctors, for this litigation and for treatment, primarily in New York. When the court asked Robert if he remembered the doctor in New York with a pony tail, then Robert did, indeed, remember Dr. Green. His eyes lit up and he clearly did recall this odd-looking physician. In spite of the extreme difficulty in obtaining useful evidence from Robert, and the obvious discomfort and frustration caused to Robert, plaintiffs' counsel insisted on asking difficult questions and asking him to review documents which Robert had great difficulty seeing properly. Robert's capacity could not be determined by this painful process, nor was the process particularly helpful in any other way. Only through the testimony of the numerous expert doctors who examined Robert, and the review of the videotapes of those examinations, did the extent to which Robert actually maintained his ability to think become clearly apparent. The doctors asked questions intended to illuminate the extent of Robert's cognitive abilities. Plaintiffs' counsel's questioning was intended to emphasize Robert's deficiencies, disregarding the suffering the questioning caused.

Additionally, plaintiffs' counsel during trial brought up on the record a prior criminal allegation against Robert in which their law firm had represented him some thirty years ago. The lawyers had previously agreed that the prior involvement was completely irrelevant to this matter and would not be mentioned, as maintaining its relevance would put plaintiffs' attorneys in a clear conflict of interest position. RPC 1.9

Plaintiffs' attorneys' lack of independent involvement with Samantha was also worrisome. At her deposition, Samantha testified that the only lawyer with whom she had any meaningful contact before and during the litigation was an attorney employed by MacAndrews and Forbes (her father's company). After this court expressed concern on the record, plaintiffs' counsel sent a letter to the court on May 26, 2009, describing eighteen-year-old Samantha, who had recently lost her

mother and whose father was suing her grandfather and uncle, as "a mature, articulate and intelligent young adult who is knowledgeable and aware of the facts and allegations set forth in both the Complaint and the amended complaint; she has been and remains a willing, active and voluntary participant in this litigation." The letter does not allay the fears of this court that this lawsuit was not in Samantha's best interest and that Samantha did not have independent advice from an attorney who did not work primarily for her father. Understandably, her father may have attempted to shield Samantha from this litigation. For his private counsel to be the go-between between Samantha and trial counsel is particularly troublesome, however, given that only the Estate's assets, essentially Samantha's assets, were used to pay the lawyers. Also, contrary to her mother's expressed wishes, the litigation was extremely destructive to Samantha's relationship with her maternal relatives including her terminally ill grandfather.

These three examples do not arise exclusively in areas which deal with the promise portion of the case, but they help to illuminate the overly aggressive spirit with which this matter was pursued by plaintiffs' counsel.

Judge Doyne's June 20, 2008 decision, narrowed the focus of the promise litigation in that he held, "that plaintiffs' claim for promissory estoppel premised on an oral promise by Robert to Claudia is subject to N.J.S.A. 3B:1-4." N.J.S.A. 3B:1-4 (formerly 3A:2A-19) requires that any contract executed after September 1, 1978,

> to make a will or devise, or not to revoke a will or devise, or to die intestate . . . can be established only by (1) provisions of a will stating material provisions of the contract; (2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

The June 20, 2008 opinion, narrowed the promise issue to whether or not plaintiffs could

prove by clear and convincing evidence that, prior to September 1, 1978, Robert promised to Claudia that she and her heirs would receive half of Robert and Harriet Cohen's estate. Robert denied the promise and Claudia was deceased. Robert had three living children in 1978. It was absolutely clear that the promise cause of action would be extraordinarily difficult to sustain.

At the time plaintiffs' lawyers sought to amend the complaint the court made it clear that they had to add the September 1, 1978 date to the amended complaint and would be expected to meet the burden of proof required. At that March 6, 2009, hearing of plaintiffs' motion to amend the complaint, plaintiffs' counsel responded to the court's reiteration of Judge Doyne's June 20, 2008 opinion by representing on the record that they would be able to prove the existence of a pre-1978 promise. Plaintiffs' counsel said: "If the question is do we have any issue about adding a sentence [to the amended complaint] that says a promise before 1978. Not at all. Obviously, that's the law of the cases, and obviously, we have to prove that to prevail at trial." (Tr. Of 3/6/09 at 4-8). Defendant's counsel referenced Rule 1:4-8 on the record at that time. There was no legal or factual basis for the plaintiffs to proceed with the pre-1978 promise allegation in their amended complaint given the evidence they had and the state of the law in New Jersey, but on March 20, 2009, plaintiffs filed an amended complaint including that allegation.

The preference in New Jersey is that parties bear the responsibility of their own litigation expenses—a preference commonly referred to as the American Rule—"even when there is litigation of 'marginal merit.'" Belfer v. Merling, 322 N.J. Super. 124, 144 (App. Div. 1999); see also Venner v. Allstate, 306 N.J. Super. 106, 113 (App. Div. 1997). Costs and fees awarded as a frivolous litigation sanction represent a rare exception to this rule due to a shared concern between the legislature and the judiciary over the "cost that baseless litigation imposes on litigants, the courts, and the public." McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 562 (1993). Courts have held that the frivolous litigation statute is to be interpreted restrictively so as to

remain "'consistent with the premise that in a democratic society citizens should have ready access to all branches of government including the judiciary.'" Savona v. Di Giorgio Corp., 360 N.J. Super. 55, 60 (App. Div. 2003) (citing McKeown-Brand, 132 N.J. at 561–62).

The pre-1978 understanding that Robert always intended his children to divide his estate; his statement to Perelman after they met in 1984 that Claudia would be a wealthy woman; Robert's insistence on a pre-nuptial agreement when she married Perelman—none of that amounted to clear and convincing evidence of an enforceable promise which extended to Samantha when Claudia predeceased Robert. Perelman testified at trial that Claudia "reiterated the commitment that her father made that the children would share equally in his estate. . . . . From the time that the children were youngsters, Claudia had been older than the rest, she was probably a teenager, but there was always the concept that the kids were going to share equally in his estate." (6/2 a.m. Tr.50:20-51:7). In September 1978 Claudia was 27 years old, unmarried and childless. She did not meet Perelman until 1983. The testimony of Perelman did not support the promise claim. No other evidence was introduced to support the promise.

The changing nature of the purported promise advanced by plaintiffs is an additional indication of the frivolous nature of the promise claim. Plaintiffs' claim of the content of the promise varied over the course of the litigation as set forth in Appendix 1 of Robert's April 6, 2010 brief, as follows:

Document	**Date**	**Quantum of Alleged Obligation**	**Date of purported promise**
Demand Letter of Theodore Wells, Esq.	2/22/08	"monies in an amount equal to the current value of a ***one-third interest in the Hudson Group***."	None; no purported oral promise asserted

Original Complaint	4/7/08	"Defendant Robert Cohen promised to Claudia Cohen that she would receive ***50% of her parents' estates***, which defendant Robert Cohen had estimated at the time to be worth approximately $100 million."	None
First Interrogatory Answer	8/28/08	"Robert Cohen made promises to Claudia Cohen prior to the year 1984 that she would receive ***a substantial portion of his estate***, although Plaintiff has not yet determined the exact dates, times and locations where such promises were made."	None
Proposed amended complaint	2/18/09	"Robert Cohen made clear and definite promises to Claudia Cohen that upon his death she would receive ***an equal share to that of her brother James Cohen of his future estate.***"	None
amended complaint	3/20/09	"Robert Cohen made clear and definite promises to Claudia Cohen that upon his death she would receive ***an equal share to that of her brother James Cohen of his future estate***. The promises that Robert Cohen made to Claudia Cohen as described in his amended complaint were first made prior to September 1, 1978"	Unspecified date before September 1, 1978
Testimony of Samantha O. Perelman (Ex. W)	3/30/09	Of her grandfather's estate, "***[her] mother was promised the cash while [her] uncle was promised the business***."	None
Supplemental Interrogatory Answers	4/2/09	"Robert Cohen made promises to Claudia Cohen prior to the year 1984 that she would receive ***a share of his estate equal to the share to be received by her brother James Cohen.***"	Unspecified date before September 1, 1978
Flumenbaum Representation I	4/15/09	Plaintiffs had "never wanted the business" but "want[ed] the cash." "The promise basically was that Robert Cohen's estate would be split . . . [a]mong his kids" and "that Claudia would get an ***equivalent*** amount in cash, and if not Claudia, then her heir Samantha."	None
Flumenbaum Representation II	6/1/09	Plaintiffs' counsel stated "the promise was that [Claudia] would ***inherit roughly the same as her brother***."	None
Testimony of Ronald O. Perelman	6/2/09	"[Claudia Cohen] reiterated the commitment that her father made that the children ***would share equally in his estate***," and "From the time that the children were youngsters, Claudia had been older than the rest, she was probably a teenager, but there was always the concept that the kids ***were going to share equally in the estate***."	Unspecified date before September 1, 1978

Defendants gave the required notice to plaintiffs of the frivolous nature of the promise allegation in the amended complaint. In order for a prevailing party to proceed with the filing of a

motion under Rule 1:4-8, the party must include with its motion a "certification that the applicant served written notice . . . to the attorney . . . who signed or filed the paper objected to." R. 1:4-8(b)(1). Such notice must "(i) state that the paper is believed to violate the provisions of this rule, (ii) set forth the basis for that belief with specificity, (iii) include a demand that the paper be withdrawn, and (iv) give notice . . . that an application for sanctions will be made within a reasonable time thereafter if the offending paper is not withdrawn within 28 days of service of the written demand." Id. James first notified plaintiffs of the frivolous nature of the claim on November 10, 2008. In what would be his first of three notice letters, counsel for James indicated with specificity that they believed plaintiffs' complaint could not "be supported by 'existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.'" Defendant's counsel further articulated that "the lack of any factual basis for the Plaintiffs' complaint is clearly shown, in among other things, the Plaintiffs' responses to the Defendant's Interrogatories and Demand for Production of Documents." James' first 1:4-8 letter was provided to counsel prior to the point at which the litigation became frivolous. Further notice was also provided subsequent to the frivolous amended complaint. Counsel for James sent a second letter on May 1, 2009, stating the same basis for dismissal under the rule and statute, following receipt of the plaintiffs' amended complaint. A third letter was sent by James to plaintiffs' counsel on June 12, 2009, for the same purpose, again citing an absence of viable claims as the basis for dismissal. On May 20, 2009, counsel for Robert also sent a notice letter to plaintiffs' counsel. Robert's counsel cited the lack of evidentiary support and the unlikelihood that evidentiary support would be adduced as the basis for dismissal, as demonstrated by the factual and expert discovery and trial testimony.

Plaintiffs' counsel were also given other warnings that their litigation was frivolous prior to

filing their amended complaint. Judge Doyne's June 20, 2008 decision put plaintiffs on notice that they would be required to prove by clear and convincing evidence that a pre-1978 promise was made. On March 6, 2009, this court reminded counsel of this evidentiary requirement and plaintiffs' counsel represented that it would be met. Plaintiffs' counsel did not heed these many warnings. As more than the required notice was provided, it is only proper to make counsel fees recoverable back to the point at which the litigation clearly became frivolous, when the amended complaint was filed on March 20, 2009.

No competent attorney could have missed the frivolous nature of this promise claim, once the unhelpful testamentary documents were received in February of 2009. By that time, plaintiffs' counsel knew—or at the very least should have known—that they not only lacked any applicable legal authority to proceed with their claim that an enforceable promise was made, but also any evidentiary support for their position. Plaintiffs' counsel by this time had received Robert's testamentary documents which produced no evidence of a promise and evidenced Robert's continuing desire to keep up with the changes in his estate including eliminating heirs when they died. He modified the terms of his will to roughly equalize the inheritance to his living children. He removed his son Michael from his will after his death in 1997, although Michael left a son, and removed Claudia after her death, although she was survived by her daughter, Samantha. Robert was consistent in removing his children from his will when they died, even if they left a living child. Thus these testamentary documents did not refer to any pre-1978 promise nor support an immutable promise as of 1978 to leave his estate equally to his three children and their heirs after death. Any hope of the plaintiffs' counsel that the testamentary documents would form a basis for the promise claim evaporated upon their review, and yet plaintiffs' counsel frivolously included the promissory estoppel claim in their amended complaint.

To serve the deterrent purpose of this Rule this court held that an appropriate sanction in the form of a reimbursement of a portion or all of defendants' reasonable counsel fees and costs would be calculated and imposed against plaintiffs' lawyers, who would share in liability in much the same way as lawyers working in the same law firm. Rule 1:4-8(b)(3). In its opinion of June 9, 2010, the court noted that pursuant to Rule 1:4-8(d), plaintiffs' counsel may also be directed to pay a penalty into court should reimbursement of defendants' fees and costs not be sufficient to deter counsel from repeating the offensive conduct. To assist the court in determining sanctions, Special Discovery Master Joseph P. Castiglia, Esq., (Castiglia) was directed to prepare a report of the actual reasonable fees[2] and costs incurred by both defendants as a result of the promise litigation from March 20, 2009, forward. Parties were then given an opportunity to submit responses to Castiglia's report, as well as appear before the court for oral argument on August 9, 2010. After argument, the court decided all pending issues in the promissory note fee dispute and reserved decision on the issue of the appropriate amount of the frivolous litigation sanction. This court now determines an appropriate sanction amount "limited to a sum sufficient to deter repetition of such conduct." Rule 1:4-8.

First the court will examine the objections to the Castiglia report to determine the quantity of reasonable counsel fees incurred by defendants in litigating the promise-related issues in the amended complaint, as well as those incurred in pursuing Rule 1:4-8 sanctions. Then, the court will explain why monetary sanctions are necessary to deter plaintiffs' counsel. The court will then consider the lack of any mitigating factors presented to reduce the award of all reasonable fees incurred in defending the frivolous portion of the amended complaint. Then the court will consider

[2] The issue of whether the actual rate charged by out-of-state counsel should be used in calculating the fees and costs incurred was resolved by the June 9, 2010, oral opinion in which the court held that reasonable forum rates should apply.

the lack of aggravating circumstances to support a penalty in addition to reasonable counsel fees. Finally, the court will explain that the amount of the reasonable counsel fee is an appropriate sanction amount for deterrent purposes.

Quantity of Reasonable Counsel Fees

Defendants' submissions to the court request reimbursement in the amount of $1,424,927.82 (for James Cohen) and $3,100,415.93 (for Robert Cohen),[3] for fees and costs associated with defending against the portion of the litigation the court found to have been frivolous. Castiglia's report reduces the amount compensable to $484,066.65 for James Cohen and $1,223,100.32 for Robert Cohen. Castiglia was unable to verify certain costs which he deemed compensable, and thus granted counsel leave to supplement their submissions prior to the August 9th hearing. Counsel for James and Robert did so, bringing the recommended reimbursable fees and costs amounts up to $521,384.09 for James Cohen and $1,312,286.05 for Robert Cohen.[4] After reviewing the

[3] Of the $3,100,415.93 requested by counsel for Robert Cohen, $183,286.72 was for the work of Ferro Labella and $2,917,129.21 for the work of Wilson Sonsini.

[4] Castiglia's initial report recommended an award of $1,223,100.32 for Robert Cohen and $484,066.65 for James. Castiglia, however, gave counsel for defendants leave to submit supplemental information as to the amount spent on certain costs found to be compensable by the report. Epner did so in Third Reply Certification filed with the court on August 4, 2010. As did Huttle in his Certification filed on August 4, 2010. These were met with objection from Paul Weiss in a letter to the court from Atkins dated August 9, 2010.

Counsel for James requested an additional $37,317.44 in costs. Counsel for Robert initially requested an additional $99,742.12 in costs, but upon receipt of Atkins' letter, counsel modified the amount (in a letter dated August 13, 2010) to $89,185.73, to account for inadvertent error—the result of which was that $10,556.39 in costs were counted twice.

The balance of the Atkins letter takes issue with the following items: (1) Robert's request for $16,131.20 in transcript costs for June 2, 3, and 15, 2009; (2) transcript costs associated with the afternoon session of the June 15, 2009, hearing; (3) transcript costs of a discussion with the Special Master regarding the deposition of James Cohen. As such, Atkins requests a $25,756.30 reduction be made to the costs claimed by Robert, which would result in an overall upward adjustment of $73,985.82 for Robert, rather than $89,185.73. Atkins argues that the additional costs claimed by James should be reduced from $37,317.44 to $35,715.39, to account for a deduction of $1,525.76 and allegedly inaccurately claimed costs, as well as an additional $76.29 to reflect a 5% surcharge for copying costs.

Paul Weiss takes objection to the fact that both defendants request reimbursement for obtaining transcripts. Both parties needed their own transcript. The objection to reimbursement for the transcript of the discussion which followed the deposition of James Cohen is equally unfounded, because the conversation with Castiglia dealt with whether the Fry deposition should go forward. The court adopts Castiglia's observation that the Fry deposition

Footnote continued on next page.

supplemental information, as well as the objections to it, the court accepts the additional costs and incorporates them into Castiglia's recommended totals.

Paul Weiss and counsel for Lowenstein Sandler commend Castiglia for reducing the recoverable amount, but argue that further reductions are required so as not to unjustly enrich the defendants or go beyond the deterrent purpose of the rule. Paul Weiss places the compensable fees and costs at approximately $700,000 in total. Lowenstein did not endeavor to pinpoint a specific amount of recoverable fees, but merely insists that the amount recommended by Castiglia be reduced by the court, and that a monetary sanction is unnecessary. Upon careful review of the submissions of counsel and Castiglia, as outlined below, this court finds that the appropriate reimbursement amount is $1,406,215 for Robert Cohen and $554,766 for James.

The Approach Taken in Determining Which Fees and Costs were Reasonably Incurred in Defending Against the Frivolous Aspect of the Case

Castiglia, having served as discovery master in this litigation since October 2008, has a thorough understanding of this case and thus was able to distinguish—when given sufficient documentation—efforts undertaken primarily to defend against the promise claim (efforts which are compensable pursuant to the court's June 9, 2010, finding) from efforts in connection with other aspects of the case, or in which defense to the promise claim was merely collateral to some other aspect of the case (efforts which are thus not compensable). Defendants have submitted what they believe to be billings attributable to compensable work, but in some cases they are unable to do so with precision. Castiglia did not automatically exclude a billing entry for lack of specificity. Nor did Castiglia accept estimates substantiated only in broad, general terms. Rather, Castiglia considered counsels' presentations against the backdrop of his reconstruction of the case based on

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should not have gone forward in light of the June 15, 2010, dismissal, and thus transcript costs objected to by Paul Weiss in this instance are deemed compensable.

personal knowledge, and made recommendations to the court based on what he believed to be reasonable in that context.

While all counsel acknowledge the tremendous efforts of Castiglia, each expressed disagreement with specific recommendations, as well as the overall approach taken. Of particular importance were concerns over the evidentiary standard necessary to substantiate defendants' claims that certain hours and efforts were expended on compensable litigation. Counsel for plaintiffs, citing Rendine v. Pantzer, 141 N.J. 292, 337 (1995), take the position that all ambiguous or non-identifiable entries should be rejected, as the defendants' presentation of hours must set forth with specificity the number of hours and the manner in which they were spent. Plaintiffs' counsel oppose any estimations on the part of Castiglia, despite his unique expertise and intimate knowledge of this case. Defendants claim that their submissions to the court and special discovery master met the necessary specificity to justify Castiglia's recommendations and the court's award.

The court finds that the approach implemented by Castiglia in reaching his conclusion was reasonable and appropriate under the circumstances. Having reviewed the billing submissions of counsel, the court finds that they meet the requisite level of specificity under the circumstances. Defense counsel cannot be expected to have prepared billing records with the knowledge that only work connected with one issue would be compensated. Castiglia's conservative approach minimized the risk of including fees unconnected to the post-amended complaint promise portion of the case.

In addition to taking issue with the overall approach taken by Castiglia, counsel for Lowenstein and Paul Weiss also argue that the reasonable fee calculations should have been adjusted further to reduce or eliminate duplicative efforts and "overkill for the tasks involved." To the contrary, the court finds that defense counsel did an admirable job of preparing a joint defense

where the tasks were allocated among all counsel and only a *de minimus* amount of duplication occurred. Thus the court endorses Castiglia's decision not to further reduce the recommendation based on plaintiffs' counsel's unfounded claim of work duplication, especially in light of the fact that plaintiffs' counsel never alleged having billed fewer hours on any task than did defense counsel.

In the pages that follow, the court addresses counsels' specific challenges to the report submitted by Castiglia, and, where appropriate, makes adjustments to the recommended counsel fee amount.

Rate Adjustments for Out-of-State Counsel

The court's ruling of June 9th mandated that Castiglia reduce the hourly rates charged by out-of-state counsel to conform with forum rates of similarly experienced counsel. The court believed it would be possible to do this by looking to the rates charged by similarly situated and experienced counsel from New Jersey involved in this very case in most instances. Castiglia went even further in his diligent efforts. He sought information on billing rates from a wide array of well-regarded law firms in Bergen and Essex counties, so that he could recommend rates with an informed view of the forum rates. The court has accepted, without exception, the rates recommended in Castiglia's report as they are reasonable rates charged in this part of New Jersey. Plaintiffs' counsel did not object to the majority of the rates recommended by Castiglia, but did take exception to the rates applied to Messrs. Gold and Epner. For the reasons stated on the record, on both June 9th and August 9th, the court applies the hourly rate charged by plaintiffs' New Jersey counsel Justin Walder to New York counsel Robert Gold's time, and the rate charged by New Jersey attorney Christopher Weiss to New York counsel Mitchell Epner's time.

Time Expended and Costs Incurred on the Application for Sanctions

Rule 1:4-8(b)(2) permits the court to award litigants who prevail in a frivolous litigation application reasonable fees and expenses incurred in presenting the motion. Castiglia recommends that defendants be reimbursed for only 50% of the costs and fees incurred in bringing the sanctions motion. The report adopts the position of plaintiffs' counsel that the defendants were only partially successful in bringing the sanctions application and thus should only recover a portion of the expense associated with it. Defendants argue that under Ferolito,[5] they were required to pursue sanctions against both plaintiffs and their counsel. While strategically defendants may have been well-advised to bring the two applications together, that does not necessitate an award of 100% of the resulting costs and fees. The court acknowledges that the two bodies of law supporting the different applications are closely intermingled, and that the factual basis for bringing these applications overlapped almost entirely, but a sizeable portion of the work done in connection with these applications was attributable to the unsuccessful application against the litigants brought pursuant to N.J.S.A. 2a:15-59.1. The court accepts Castiglia's recommendation that 50% of the fees and costs associated with the sanctions applications be compensable.

Interlocutory Appeal Costs

Defendant James Cohen argues that 50% of the fees related to the two orders to show cause filed in April 2009, and subsequent related motion for leave to appeal, should be recoverable. James alleges that these applications by plaintiffs were related to the promise allegations insofar as they were brought to delay the promise trial and prolong the frivolous action through the summer of 2009. Counsel for Robert concede that Robert is not entitled to recovery of fees associated with the order to show cause for a determination of his mental capacity, but rather join James only in seeking reimbursement for the order to show cause that sought a sixty-day stay of the trial on the promise

[5] 408 N.J. Super. at 411.

allegations. Counsel for James claim that these costs, at a minimum, amount to an additional $6,000, and counsel for Robert request an additional $12,000. Castiglia's report indicates that he did not include fees incurred as a result of the interlocutory appeal. The court accepts Castiglia's recommendation, as the link between defending against the orders to show cause (and interlocutory appeal that followed) and the promise claim is too attenuated to justify a finding that the work was compensable.

Depositions

Paul Weiss seeks a $55,000 reduction in the sanction amount endorsed by Castiglia's report for his inclusion of fees associated with the depositions of Elizabeth Fry on June 16, 2009; David Moscow on June 18, 2009; and Catherine Oberg on June 19, 2009. All three of these depositions were taken after the court's June 15, 2009, dismissal of the promise claim. As such, the focus of these depositions should have been restricted to matters other than the previously dismissed promise claim. Plaintiffs continued with these depositions, which were almost entirely tied to the promise claim (or wholly irrelevant) even after the court's June 15 dismissal of the promise claim and defendants should therefore receive reasonable compensation for them. The recommendation made by Castiglia is undisturbed by the court.

Paul Weiss also takes issue with reimbursement for fees and costs associated with what they characterize as "capacity-only" and "full merits" depositions.[6] Paul Weiss and Lowenstein deem the deposition of Samantha Perelman to be a "capacity only" deposition, and thus non-compensable, and this court agrees. According to the March 9, 2009, letter

[6] Lowenstein takes an even more generalized approach, claiming that nothing should be awarded for work that was not done *exclusively* on the promise claim. Lowenstein argues that anything that would have occurred regardless of the promise claim should be non-compensable.

from Castiglia, the deposition of Samantha Perelman was expressly "*limited* to the issue of Robert Cohen's present mental capacity." (emphasis in original). Any questions posed by defense counsel relating to the promise were thus in violation of Castiglia's directive and cannot now be recoverable. This is true even though Samantha's answer to one of those impermissible questions, relating to her understanding of what her mother would inherit, was repeated frequently in defendants' promise defense. Castiglia's report indicates that a portion of the $23,498.50 recommended[7] for the April 14, 2009 bill, was for services related to "part of the work performed in preparing for Samantha Perelman's deposition . . . and some time in connection with attending Samantha Perelman's deposition." (Castiglia's Report at p. 9). Castiglia's report does not precisely quantify the amount related to Samantha's deposition. Castiglia updated the court on the recommended amount attributed to Samantha's deposition which he allowed at 50%. For the reasons already discussed, the court rejects this recommendation, and the court will not allow any compensation for Samantha's deposition. The initial recommendations made by Castiglia included $9,313.75 in fees and costs to Robert and $773 in fees and costs to James for work related to Samantha's deposition which will be subtracted from the total.

The depositions of Ronald Kochman, Cyril Hermele, Laura Reidel, Dean Vegosen, Howard Joroff, and Jeffrey Margel, have been characterized as "full merits" depositions by Paul Weiss as they were not confined to the promise claim, but rather covered all eight of the plaintiffs' claims. Paul Weiss argues that only 50% of the costs and fees associated with these depositions would be appropriate. Castiglia's recommendation is that 100% be recouped by the defendants. The court endorses Castiglia's recommendation with regard to

[7] Defense counsel claimed that $77,919.50 in fees and costs recorded in the April 14, 2009 bill, were related to the promise claim. Castiglia then reduced the amount claimed to $23,498.50.

the expense of these depositions. These witnesses were deposed as a result of their close relationships with Robert Cohen, and their familiarity with his great love for his daughter. Many of these witnesses had knowledge of the father/daughter relationship that pre-dated the transfers of wealth and assets to James alleged to have resulted from undue influence. It was evident to the court, as it was to Castiglia, that the primary purpose of these depositions was to glean knowledge and evidence of a pre-1978 promise.

While Paul Weiss sought to disallow reimbursement for the depositions discussed *supra,* Paul Weiss does not dispute that all of the fees and costs associated with the depositions of Perelman on May 28, 2009 and James Cohen on June 1, 2009, were related to the promise claim and thus full recovery is consistent with the court's June 9th Opinion.

Robert Cohen's Testimony

Castiglia's report included $72,000, or 100% of the fees and costs incurred in connection with Robert Cohen's trial testimony. Paul Weiss argues that Robert's testimony was part of the capacity phase of the litigation and unrelated to the promise claim. Prior to Robert's testimony, the court ruled that—given Robert's health condition and the challenges it posed to testifying—it would permit his testimony to cover all topics, not merely capacity issues. Thus Robert's counsel—and in fact all counsel—had a professional obligation to be prepared for all issues including the promise when Robert testified. Castiglia was correct in recommending that Robert be reimbursed for the time his attorneys spent in attending his trial testimony. Counsel for Robert point to a slight calculation error in the report—the improper exclusion of 13.5 hours of Zirogiannis' time and 4.5 hours of Chia's time. The amount recommended for Robert Cohen will be increased by $5,040 to account for this error.

Trial Preparation During the Capacity Portion of the Trial

In his report, Castiglia includes approximately half of the hours that Gold, and all of the hours Zirogiannis, requested for work done in April and May of 2009 during the course of the capacity trial as preparation for the promissory estoppel claim. The inclusion of this time by Castiglia amounts to $140,500 in recoverable fees. Paul Weiss argues that because the time is recorded as trial preparation in what they characterize as a rather generic way, there was no way for Castiglia to discern whether this was preparation for the capacity or promise portions of the litigation. Castiglia's inclusion of half of the hours sought by Gold during this period of the litigation is conservative. Gold certified to spending at least half of his non-trial hours preparing for the promise litigation. Gold also certified that all of Zirogiannis' trial preparation time was dedicated to the promise claim.

Counsel for Robert opposes the reduction by Castiglia.. Defendants argue that Gold's unrebutted certification justifies inclusion of the full amount requested. Castiglia supports his reduction noting it was done "in recognition of the obvious and inevitable overlap between compensable promise related time and non-compensable time relating to other claims. . ." The court is satisfied by Castiglia's reasoning. Gold was intimately involved with every aspect of Robert's defense. It is thus not at all surprising that much of what he characterized as "promise related" in his certification overlapped with other issues so much so that Castiglia could not justify deeming the claimed time fully compensable.

The court had directed counsel to be ready to litigate the promise claim immediately following the conclusion of the capacity trial. Counsel thus had no choice but to prepare for the promise litigation and try the capacity case simultaneously. The promissory estoppel claim being the more substantive legal matter, as well as the claim with the greatest

financial stake, it was only reasonable for counsel to allocate at least 25% of Gold's time and 100% of Zirogainnis' time to the claim during that time frame. The full amount set by Castiglia is thus left undisturbed by the court.

Defendants' 10% Allocation of Promise-Related Litigation During the Capacity Trial

Defendants sought reimbursement of 10% of the costs and fees incurred in litigating the capacity phase of the litigation. Defendants claim that based on a good faith estimate, at least 10% of the capacity phase, including time in court, was spent on promise-related issues. An insignificant portion of the capacity trial ventured into issues connected to the promise. This court has previously made clear that the capacity phase of the litigation did not meet the necessary legal requirements to be considered frivolous, and thus the reimbursement sought is not compensable.

James' E-Discovery

This court previously ruled that James is not entitled to recovery of e-discovery costs on grounds of discovery abuse. Castiglia's report includes in its calculation of James' costs incurred in connection with the promise claim, a credit of $33,750 for e-discovery. Paul Weiss objects to the inclusion of the $33,750 because they claim the consultants' invoices were too vague to justify Castiglia's recommendation that 25% of the amount claimed for e-discovery be considered by the court in calculating the sanction. The position taken by Paul Weiss fails to take into consideration the fact that Castiglia oversaw the e-discovery in this case, and has first-hand knowledge of the purpose behind the discovery. He did not recommend that James be reimbursed the full amount, but rather made an informed calculation that only 25% of the amount claimed was actually attributable to the promise

claim.[8] Castiglia's recommendation is undisturbed.[9]

James' Costs

James argues that the report by Special Discovery Master Castiglia improperly excludes the majority of the costs incurred by James in defending the promise claim. Out of a total costs incurred after March 20, 2009, of $346,384.61, James sought reimbursement of roughly $187,000. The amount recommended by Castiglia only included about $70,000 in costs. James claims that there was no rational explanation provided. However, as indicated in footnotes 7 and 9 of his report, Castiglia indicates that the exclusions were based on an inability to determine which costs were attributable to the promise claim, and counsel were given leave to submit a certified statement of all approved expenses prior to the August 9th hearing.[10] The Huttle Certification[11] filed with the court on August 4, 2010, sets out $37,317.44 in permissibly reimbursable costs, all of which have already been awarded by the court in this opinion. Any additional costs reimbursements sought are denied, and Castiglia's recommendations undisturbed. Castiglia reviewed each charge on each bill separately, and except where noted, recommended a percentage acceptable to the court.

Other Billing Challenges Specific to James

Counsel for James sought $51,496.65 for fees and costs associated with the promise

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[8] Lowenstein argues that fees and costs associated with discovery disputes should be excluded, as R. 1:4-8(e) states, it "does not apply to disclosure and discovery requests, responses, objections, and discovery motions that are subject to provisions of R. 4:23." Counsel does not identify which discovery disputes are objectionable, and it appears to the court that the rationale behind his position is misapplied in the instant case as none of the discovery disputes for which the defendants are being reimbursed were in connection with a R. 4:23 motion to compel.

[9] This finding is not inconsistent with the court's earlier ruling as the standards for awarding e-discovery costs pursuant to the holding in Zubulake v. UBS Warburg, LLC, and that applied in compensating victims of frivolous litigation pursuant to Rule 1:4-8 are completely different.

[10] See supra p. 15 at note 3.

[11] Supra at p. 15 note 3.

litigation in July of 2009. In his report Castiglia recommends inclusion of $4,955 in connection with the services detailed in this invoice. Counsel claim that more than 90% of the fees sought in this invoice are denied without explanation, and yet Castiglia, at page 11 of his report, provides an explanation acceptable to the court. Castiglia only included those billing entries which he was able to verify as either exclusively or primarily related to the promise aspect in the post-promise dismissal period of the case. Castiglia further stated that he rejected the plaintiffs' position that no time accruing after June 15, 2009, may be included in connection with the promise aspect. The promise aspect of the case figured into the defendants' post June 15th work. Castiglia's explanation is sufficient and the amount recommended is undisturbed.

James also takes issue with the disallowances calculated in consideration of the October 28, 2009 bill. In that invoice, James sought reimbursement of $55,877.49. Castiglia recommended that $9,630.25 be reimbursable, stating that he was only able to verify two of the billing entries as relating to the promise claim. Those two billing entries totaled $900. For the reasons stated *supra* in connection with James' July invoice, that portion of Castiglia's recommended amount remains undisturbed. The remaining $8,730.25 of the recommended amount was based on Castiglia's determination that defendants are entitled to 50% of the costs associated with making the sanctions application. The court endorses Castiglia's recommendation.[12]

Special Discovery Master Fees

Counsel for Robert seeks an additional $40,184.37 for work conducted by Castiglia after March 20, 2009. In his report, Castiglia recommends that only 50% of the $40,184.37

[12] See discussion relating to sanctions *supra* at p. 18–19.

should be reimbursed to Robert as not all of the work done after the March 20th filing related precisely to the promise claim. Paul Weiss takes issue with this being an equitable remedy rather than a recommendation for an award justified by R. 1:4-8, as Castiglia has not established that the 50% to be credited is proportionate to the amount of his time spent on promise-related work. Castiglia's estimation is acceptable to the court and his recommendation is undisturbed.

Castiglia has also submitted a preliminary bill for the preparation of the report, and a subsequent bill to counsel following the August 9, 2010, appearance. Castiglia billed $47,413.50[13] for his work in connection with the report and the final proceeding. Paul Weiss argues that plaintiffs' counsel should not be required to reimburse Robert for fees related to the preparation of special discovery master's report when they were successful in proving that some of the claims sought by defendants should be disallowed. The work of the special discovery master in writing this report was necessitated solely by this court's finding that the amended complaint promissory estoppel claim was frivolous. Had frivolous litigation not been found, the report would not have been necessary. This court has previously ordered that the Special Master's payment arrangements continue as established at the outset—50% to be paid by the Estate and 50% to be paid by Robert. Final judgment in this matter will continue to reflect that arrangement, however the sanction awarded to Robert is adjusted upward in the amount of $23,707 to include reimbursement by plaintiffs' counsel of the amount paid by Robert.

[13] This total reflects the $40,771.50 attributable to fees incurred between June 30, 2010, and July 28, 2010, plus the $6,642.00 requested in Castiglia's supplemental bill for fees and costs incurred between August 2, 2010, and August 9, 2010.

Work Conducted by Defendants After June 9, 2010

Defendants seek upward adjustments for work conducted after June 9, 2010, the date when the court rendered its opinion finding frivolous litigation. Defendants claim that after this date all of the work done by defendants' counsel focused on identifying the portion of Robert's legal fees that were incurred in defending against the promissory estoppel aspect of the amended complaint after March 20, 2009. In his report, Castiglia rewarded only 50% of the fees and expenses incurred after June 9, 2010. Castiglia supported his decision with two reasons: (1) the difference in the amount is relatively small and (2) the reduction is an equitable device meant to "compensate the obligated law firms for any possible duplication of effort after June 9th." While Castiglia's reasoning is understandable, the court is satisfied with the defendants' representation that 100% of their post June 9th efforts were focused on the promise. The court cannot conceive of, nor have the plaintiffs' counsel suggested, any other alternative project defendants could have been working on in connection with this litigation following its conclusion on the merits.

Robert seeks, and is awarded, an upward adjustment of $15,572 to account for the difference in what was billed (converted into forum rates) and what was already included in Castiglia's calculation.

Counsel for James submitted four bills for work done after June 9th. The first two bills include work done prior to June 9th. The first bill of June 29, 2010, covers the period of May 7th through June 14th. James claimed $20,613.39, and Castiglia initially recommended an amount of $8,762.33, which would compensate James for only 50% of the time spent in connection with the sanctions application. The court leaves undisturbed the recommended 50% inclusion for pre June 9th sanctions work, but makes an upward

adjustment of $2,697.50 in order to reimburse James for 100% of the post June 9th work. The second bill of June 29, 2010, covers the period between May 12 and June 15, 2010. James claimed $39,188.06, and Castiglia again recommended reasonable fees encompassing 50% of the sanctions-related work, amounting to a recommended fee of $11,365.84. An upward adjustment of $6,311 is made to this bill to account for 100% compensation of post June 9th sanctions work. Bills submitted on June 30th and July 22nd both cover only post June 9th work. James had claimed a total of $23,856.03 in these two bills, and Castiglia had recommended a reimbursable amount of $8,710.10. James will receive an upward adjustment of $15,145.93, which represents the difference between the amount claimed for work done after June 9th and the amount previously recommended by Castiglia. The total amount for James' upward adjustment in this instance is $24,154.43.

Mathematical Miscalculations Not Addressed Elsewhere

At page 25 of his report, Castiglia recommends that 66.1 hours of time by paralegal Drucker be considered compensable by the court. Due to a misplaced decimal point, only $991.50 of the $9,915 that should have been considered was included. Thus, reasonable fees for Robert is adjusted upward to include the mistakenly excluded $8,923.50.

Supplemental Submissions of Counsel

Following the August 9, 2010, proceedings, counsel for defendants have submitted certification requesting upward adjustments for fees incurred in connection with the August 9th appearance. Counsel for James requests an additional $51,061 in fees and costs. Counsel for Robert recommend an upward adjustment of $149,111.21 for fees (at forum rates) and costs associated with the August 9th proceeding.[14] Paul Weiss raises some valid issues regarding the

[14] Counsel for Robert initially requested an upward adjustment of $152,290.71. Following receipt of plaintiffs'

Footnote continued on next page.

additional fees requested.

The court finds that counsel for defendants billed an unreasonable amount of time for conferences between the law firms representing the defendants and time reviewing one anothers' work. Additionally, significant portions of the briefs reargued issues such as entitlement to non-forum rates and full compensation rather than compensation for only the portion of the litigation found to have been frivolous—both issues already decided by the court.

The court therefore cuts the requested amounts and includes $50,000 (of $149,111.21 requested) for Robert and $10,000 (of the $51,061 requested) for James. These additional requests involve work done in the past few weeks, and thus the briefs and argument is fresh in the mind of the court.

Thus the total amount of reasonable counsel fees for Robert is $1,406,215 and the total for James is $554,766 for a total of $1,960,981 in reasonable counsel fees and costs attributable to defending the frivolous post-amended-complaint promise allegations and seeking sanctions.

Why Monetary Sanctions are Necessary

Having determined the amount of reasonable counsel fees and costs incurred in defending the frivolous aspect of the amended complaint and litigating counsel fees, the court will consider why a monetary sanction is appropriate.

Rule 1:4-8, like the Frivolous Litigation Statute, was intended to serve the dual purpose of specifically deterring the offending party from ever repeating the misconduct and compensating the victims of frivolous litigation:

> Since its enactment [the Frivolous Litigation] statute has been recognized as serving a dual purpose. On the one hand, the statute serves a punitive purpose, seeking to deter frivolous litigation. On the other hand, the statute

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counsel's August 19, 2010, objections, counsel for Robert submitted a letter (also dated August 19, 2010) conceding an inadvertent double billing error and amending the previously requested amount accordingly.

> serves a compensatory purpose, seeking to reimburse the party that has been victimized by the party bringing the frivolous litigation.

Toll Brothers, Inc. v. Township of West Windsor, 190 N.J. 61, 67 (2007) (internal citations omitted). See also Alpert, Goldberg, Butler, Norton & Weiss P.C. v. Quinn, 410 N.J. Super. 510, 545 (App. Div. 2009) ("While it is clear that Rule 1:4-8 has a punitive purpose in seeking to deter frivolous litigation, it also seeks to compensate a party that has been victimized by another party bringing frivolous litigation").

Paul Weiss and Lowenstein Sandler argue that since they are both such important, well-regarded law firms, the mere finding that they engaged in frivolous litigation is deterrence enough. They argue that this court's finding of frivolous litigation has been widely publicized and besmirches their reputation, which will cost them untold, unspecified damages.

A monetary sanction, however, is clearly appropriate here. This lawsuit from the beginning has been a dispute between individuals over hundreds of millions of dollars. The law firms chose to represent the parties as a sound business decision. Paul Weiss is reported to be one of the top-ranked national firms in terms of income, while Lowenstein Sandler is number two in New Jersey in revenue. According to published reports not disputed by plaintiffs' counsel, in 2009 Paul Weiss received $650 million in revenue and Lowenstein Sandler reported $183 million in revenue.[15] This litigation has generated close to $15,000,000 in fees for defense counsel, who estimate that plaintiffs' counsel fees must be considerably higher, given that they utilized the services of approximately twice as many lawyers and a higher percentage of New York (higher billing) counsel. A monetary sanction will discourage a repetition of frivolous litigation, especially in light

[15] New Jersey Law Journal, The New Jersey Top 40, July 30, 2010. See also, Memorandum of Law in Support of Defendant/Counterclaim Plaintiff Robert Cohen's Motion for Costs and Attorneys Fees Pursuant to N.J.S.A. 2A:15-59.1 and Rule 1:4-8, at n. 122 ("Lowenstein Sandler reported more than $187 million in revenue for the year 2008.").

of the lack of acknowledgement of wrongdoing.

Plaintiffs' lawyers plan to appeal this finding of frivolous litigation, so they no doubt believe that it would be unwise to express remorse. Without remorse, or any acknowledgment of wrongdoing, how can they reassure the court that this behavior will not reoccur? How will they recognize frivolous litigation and avoid it next time? Lownstein Sandler now has an internal method to address the issue. Lownstein Sandler set up a new system in their firm in the fall of 2009 which they hope will safeguard against the pursuit of frivolous litigation in the future. A firm committee, including at least one attorney not involved in the litigation and inside general counsel, will review any 1:4-8 letter received. This process, which began before the frivolous litigation finding in this case, appears salutary.

Paul Weiss offers no demonstrable reason why they might not engage in this type of offensive litigation again. They claim never to have been found to have engaged in frivolous litigation in the one hundred year history of the firm. They argue that it will not happen again because it did not happen before. Of course firms change lawyers and practices. Without recognizing and addressing a problem, it is hard to be sure that it will not resurface. A sufficient monetary sanction is necessary to impress upon counsel the need to make greater efforts to avoid frivolous litigation in the future.

Lack of Mitigating Factors

Plaintiffs' counsel do not present any mitigation. They can not and do not plead poverty. Nor, for obvious reasons, does either firm suggest that they did not have sufficient expertise or experience to handle this matter. If demonstrated, certainly the court should take into account the limited financial means of counsel, and perhaps limited experience or skill level of counsel, as mitigation in assessing a frivolous litigation sanction. If this litigation involved a contingent rather

than hourly fee, or controversial issues of public import which made obtaining counsel difficult, a monetary sanction might not be appropriate. A court should not generally impose a large monetary sanction if such a sanction would discourage lawyers in the future from advancing unpopular or unprofitable causes. This case, however, was clearly lucrative for all counsel. No mitigation has been demonstrated by plaintiffs' counsel.

Lack of Aggravating Factors

No aggravating circumstances have been demonstrated either. No history of prior instances of frivolous litigation on the part of either firm has been brought to the court's attention. Certainly repeated acts of frivolous litigation might well justify the imposition of a penalty beyond reasonable counsel fees. Rule 1:4-8(d).

Reasonable Counsel Fees Represent an Appropriate Sanction

Defendants persuasively argue that the law firms should not profit in litigation in which they have exceeded the bounds of appropriate advocacy. At the very, very least the law firms should not profit in that portion of the litigation which is frivolous. No court in good conscience could approve a lawyer making money from frivolous litigation. Frivolous litigation not only burdens the other parties in the case, but the court is forced to waste its resources (the taxpayers' resources) when so many legitimate disputes involving important issues are waiting to be resolved.

Although defendants argue forcefully that the law firms should not profit, defendants accept the law firms' right to withhold completely all information regarding their billing.[16] Plaintiffs'

[16] Transcript of August 9, 2010, Proceedings at 68:4–12. Gold stated:

> The reason you [the court] have no basis whatsoever to draw any comparison between what we did in winning the case and what they did in losing the case is because they exercised their rights to keep that evidence from you. They clung to the privileges on the liability issue. And they produced no evidence before you so you could make any comparison, so you could draw any conclusions with respect to which [sic] how profitable this case was for them.

counsel have chosen not to reveal the fees they have received (or that portion which constitutes profit) for this litigation. Nor have counsel even provided information about the fees generated by the frivolous post-amended complaint, promise-related work. Given that defendants do not contest the firms' right to keep their billings private, the court is unable to ensure that a profit will not be made by plaintiffs' firms in this litigation. Given the extraordinary legal efforts put into this case, and consequent extraordinary billing, as well as the deep pockets of the parties, this court strongly suspects that plaintiffs' firms will indeed profit, at least in the overall litigation, if not the frivolous portion, even after paying the $1,960,981.00 here imposed pursuant to Rule 1:4-8.

Conclusion

Pursuant to the court's findings discussed *supra*, the reasonable counsel fees and costs incurred by James and Robert as recommended by Castiglia are adjusted in the following ways:

Amount Recommended by Castiglia for James Cohen: $484,066.65		
Basis of the Fees / Costs	**Upward Adjustment**	**Downward Adjustment**
Supplemental Costs	$37,317.44	
Samantha's Depositions		$773
Fees and Costs Incurred Post 6/9/10	$24,154.43	
Fees and Costs Incurred in Connection with 8/9/10	$10,000	
Total Amount Recoverable by James Cohen: $554,766[17]		

[17] The exact amount is $554,765.52. The Court has rounded to the nearest dollar.

Amount Recommended by Castiglia for Robert Cohen: $1,223,100.32		
Basis of the Fees / Costs	**Upward Adjustment**	**Downward Adjustment**
Supplemental Costs	$89,185.73	
Samantha's Depositions		$9,313.75
Erroneous Exclusion of fees associated with Robert's Trial Testimony	$5,040	
Reimbursement for fees paid by Robert to Castiglia in connection with the Report	$23,707.00	
Fees and Costs Incurred Post 6/9/10	$15,572.00	
Mathematical Error	$8,923.50	
Fees and Costs Incurred in Connection with 8/9/10	$50,000	
Total Amount Recoverable by Robert Cohen: $1,406,215[18]		

[18] The exact amount is $1,406,214.80. The Court has rounded to the nearest dollar.