COURT OF CHANCERY
OF THE
STATE OF DELAWARE

LEO E. STRINE, JR.
VICE CHANCELLOR

New Castle County Courthouse
Wilmington, Delaware 19801

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RE: In Re: 14 Realty Corp.
C.A. No. 20129-VCS

Dear Counsel:

This letter addresses Jude Wiener's request for a review of the trustee's determinations in the above-captioned matter.

I. Introduction

The trustee was appointed to oversee the dissolution and winding up of a corporation and two affiliated limited partnerships. These dissolution proceedings are part of a larger dispute between two estranged siblings, Jude Wiener and Daniel Wiener, who have spent over half of the last decade litigating over the division and distribution of various jointly owned assets in their family's extensive commercial real estate portfolio, which was largely accumulated by Jude and Daniel's father, Louis Wiener.

The corporation being dissolved is 14 Realty Corp. ("14 Realty"), a Delaware corporation owned in equal parts by Jude and Daniel. 14 Realty is the general partner of two limited partnerships that owned approximately twenty properties, principally shopping centers, located in various states across the South and Midwest. In September 2003, at the request of the parties, this court appointed former Delaware Supreme Court Justice Joseph T. Walsh (the "Trustee") to oversee the dissolution and winding up of 14 Realty and the two limited partnerships (collectively, the "Dissolving Entities"). After devoting several years to managing and disposing of the Dissolving Entities' properties, reconciling their books, and investigating and resolving a myriad of claims and objections raised by Jude in this process, the Trustee has nearly completed his responsibilities. In April 2009, the Trustee submitted a report containing recommendations for the final distribution of the assets of the Dissolving Entities. Jude objects to three of these recommendations and asks this court to review them in accordance with the terms of the order appointing the Trustee (the "Appointment Order").

In this opinion, I affirm each of the three Trustee determinations that Jude appeals from. First, I affirm the Trustee's determination that the Dissolving Entities owe approximately $1.1 million to 32 East 31st Street Corp. ("32 East"), another Wiener-family entity owned solely by Daniel. At one point, the Dissolving Entities held a mortgage secured by 32 East's real property. That mortgage was cancelled when, as part of a refinancing transaction executed by 32 East with a third-party bank, the third-party

bank remitted $1.1 million to the Dissolving Entities. Jude argues that, based on the existence of this mortgage, the $1.1 million must be treated as satisfaction of a preexisting debt, rather than as a loan made from 32 East to the Dissolving Entities. The evidence in the record, however, indicates that the Dissolving Entities never paid value for the mortgage, but instead had been assigned the mortgage from the bank that originally held it when a number of Wiener-owned entities helped 32 East to pay off the mortgage. Although the assigning of the mortgage to the Dissolving Entities is indicative of the Wieners' flexible approach to intercompany transfers, it does not provide evidence that 32 East had a preexisting debt to the Dissolving Entities when the $1.1 million payment was made. Nor does the record indicate that any party relied on the existence of that mortgage to her detriment. As a result, there is no equitable reason to treat the $1.1 million payment as a satisfaction of the mortgage instead of as a loan from 32 East to the Dissolving Entities, consistent with the Dissolving Entities' internal balance sheets.

Next, I affirm the Trustee's determination that Jude is only entitled to $26,000 in attorneys' fees in connection with her success in cancelling $800,000 worth of the approximately $7.2 million debt that Louis claimed the Dissolving Entities owed him. Jude argues that this award is too low and that she is reasonably entitled to $220,000. But, in making this argument, Jude attempts to take credit for also avoiding payment of $1.3 million in interest claimed by Louis. Louis' decision to drop his claim for interest, however, was the result of a global settlement in which another entity owned by Jude and Daniel also paid money to Louis as part of an agreement to resolve all litigation involving

Jude and Louis, including actions in New York and Florida. Given this settlement, it is unclear whether Jude actually avoided the interest payment, which would have provided a benefit to Daniel, or merely shifted which entity Daniel was required to pay Louis' debt from, without necessarily providing any net benefit to him. In addition, Jude's argument that the award understates the benefit she provided ignores the substantial costs Daniel has already borne as a result of Jude's unfocused and far-ranging approach to challenging Louis' creditor claim and other matters in the dissolution, which caused the Dissolving Entities to incur substantial administrative costs in the form of document production and Trustee fees, and which also caused Daniel to incur substantial attorneys' fees. Thus, I find that $26,000 represents a reasonable fee award given the size of the benefit Jude actually conferred and the many costs her aggressive litigation style imposed on her brother.

Finally, I affirm the Trustee's determination that Jude is responsible for the $336,386 of debt charged in the Dissolving Entities' ledgers to Sylas, the brother of Jude and Daniel, whose interest in the Dissolving Entities Jude bought during these proceedings. When Jude purchased Sylas' interest, she agreed to hold Sylas harmless for the debt that he owed the Entities. Jude now argues that she is only secondarily liable, and that her liability is only triggered if Sylas unsuccessfully challenges the debt, which he has not done. I reject this argument because I find that, as a result of specifically acknowledging that Sylas owed a debt of $336,386 to the Dissolving Entities in the agreement governing Jude's purchase of Sylas' ownership interest, and through other

conduct that led the Trustee and Daniel to reasonably believe that the amount of the debt was not in dispute, Jude is estopped from challenging that the debt is due. Jude agreed to be responsible for Sylas' debt, and the Trustee relied on this agreement in making substantial distributions to Sylas and Jude from the Dissolving Entities. If Jude, who aligned with Sylas during most of the dissolution proceedings, wishes to sue Sylas, she is free to do so. But, Jude may not escape her duty to cover the debt she agreed Sylas owed the Dissolving Entities.

II. Background

This six-year-old case has, by Court of Chancery standards, been a long-running one, largely because of the complexities of unwinding the multi-entity Wiener real estate empire, as well as the dispute-prone relations among the family members. Because the Trustee has issued several written decisions and because the facts are of little interest to anyone but the litigants, I limit my recitation of the facts to those necessary to place Jude's claims of error in context.

The Dissolving Entities are comprised of three entities: i) 14 Realty; ii) 145 Associates Ltd. ("145 Associates"), which held the majority of the assets of the Dissolving Entities; and iii) 14 Associates Ltd. ("14 Associates"). Both 14 Realty and 14 Associates are owned in equal parts by Jude and Daniel. But, when the dissolution proceedings started, Jude and Daniel shared equal ownership of 145 Associates, the primary asset holder among the three Entities, with their brother, Sylas. Several years into these proceedings, Jude bought out Sylas' one-third interest in 145 Associates. As a

result, Jude now owns two-thirds of 145 Associates while Daniel owns one-third, and Jude and Daniel are the only individuals who have an ownership interest in any of the Dissolving Entities.

The Dissolving Entities are part of a larger group of commercial real estate holdings amassed by Jude, Daniel, and Sylas' father, Louis Wiener. In the mid-1980s, Louis began transferring certain properties to his children through ownership interests in the various entities that owned them. Jude, who is an attorney, joined the family business in 1986 and took part in the management of various entities, as did Daniel.

The origins of this litigation date back to the late 1990s or early 2000s, when Jude and Daniel's working relationship turned sour amid increasingly acrimonious disputes over the management of the aging commercial properties they owned through various Wiener-family entities. By 2003, the siblings were deadlocked, and accordingly sought an order of dissolution under 8 *Del. C.* § 273 and appointment of a trustee to wind up the affairs of the Dissolving Entities. This court granted that request in its September 9, 2003 Appointment Order, which set forth the powers and duties of the Trustee in winding up the affairs of the Dissolving Entities.[1]

[1] *See* B1 ("Appointment Order"). Following the convention established by the parties, I cite to the appendices submitted by Jude and Daniel, which are untabbed, simply by page number: A[page number] or B[page number], as applicable.

The Appointment Order charged the Trustee with two primary tasks: i) marketing and selling the properties owned by the Dissolving Entities;[2] and ii) reconciling each of the Dissolving Entities' balance sheets and collecting debts owed to them or paying debts owed by them. In April 2009, the Trustee submitted a report (the "Trustee Report") indicating that he had nearly completed these tasks, and essentially all that remains before the calculation of the final distributions of the Dissolving Entities' remaining assets is for this court to review certain disputed determinations made by the Trustee.

All of the requests for review have been made by Jude, and all relate to the Trustee's attempts to determine what debts were owed by or to the Dissolving Entities. The Trustee was assisted in this task by Weiser, LLP, a forensic accounting firm hired by the Trustee that submitted a report in early 2004 detailing the results of its inquiry into the Dissolving Entities' balance sheets (the "Weiser Report"). Even with Weiser's help, reconciling the Dissolving Entities' accounts has been an involved process, both because the Wieners historically took a lax approach to accounting for intercompany transfers among the Dissolving Entities and other Wiener-owned enterprises, and because the contentious relationship between Jude and Daniel has spilled over into these proceedings, with the parties raising a variety of disputes that required the Trustee to order and oversee discovery, hear arguments, and issue written determinations.

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[2] As of the date of the Trustee Report, the Trustee had sold all but one of the properties owned by the Dissolving Entities, yielding proceeds of approximately $26 million, of which approximately $18 million has already been distributed to the Wiener siblings under the Trustee's power to make interim distributions. A506.

Jude now seeks reversal of the Trustee's determination in three of these disputes. Specifically, Jude argues that the Trustee should have found that: 1) the approximately $1.1 million payment made by 32 East to 145 Associates in 1998 was a satisfaction for the mortgage held by 145 Associates rather than a loan, and therefore does not represent a debt owed by 145 Associates to 32 East; 2) Jude was entitled to reasonable attorneys' fees of $220,000 for her partial success in challenging Louis' creditor claims, not $26,000; and 3) Jude is not responsible for the $333,386 that, according to 145 Associates' ledgers, Sylas owed 145 Associates when Jude purchased Sylas' interest and agreed to hold him harmless for his debts.

Daniel opposes Jude's request for review, but, importantly, Daniel has not cross-appealed any of the Trustee's determinations. Rather, Daniel simply asserts that the Trustee's determinations should be upheld.

III. Analysis

In accordance with the Appointment Order, I review the Trustee's determinations de novo.[3]

[3] *See* Appointment Order ¶ 20. This was a regrettable choice of review standard and not one I will sanction in my future orders. As this case amply demonstrates, de novo review of the determinations of a skilled and experienced trustee is duplicative and wasteful of judicial resources and parties' time and money. Were the standard of review closer to a business judgment standard — as it should have been — this motion could have been decided far more expeditiously and efficiently on the basis of the Trustee's well-reasoned determinations. Arguably, the Trustee's determinations about the $1.1 million payment and Jude's attorneys' fees were made under ¶ 5 of the Order, which gives the Trustee discretion. To that extent, it is clear the Trustee was well within his discretion. But, because both parties have argued that the review standard is de novo as these determinations are part of the Trustee's Plan, as defined in

A. The $1.1 Million Payment

Jude's first claim of error involves the Trustee's determination that 145 Associates owes $1,126,092.01 (for simplicity, the "the $1.1 Million Payment") to 32 East, a corporation solely owned by Daniel that holds title to the property located at 32-34 East 31st in New York City (the "32 East Property"). Jude's objection raises a factual issue of whether, at the time that 32 East made the $1.1 Million Payment to 145 Associates, 32 East owed 145 Associates that amount in connection with a mortgage that had been assigned to 145 Associates by a third-party bank.

The $1.1 Million Payment was made in 1998 and appears in a general ledger maintained by 145 Associates to record intercompany balances. Weiser, the forensic accountant, determined after extensive investigation that "the intercompany general ledger balances present a reasonably fair representation of the cash and non-cash transactions (except for various items explained below), which occurred from 1998 to 2002."[4] The $1.1 Million Payment was not one of the items that Weiser flagged for concern.

Jude, however, objected to Weiser's analysis, contending that the Payment was a satisfaction for a mortgage 145 Associates held on the 32 East Property (the "Mortgage"), meaning the Payment cancelled, rather than created, a debt. In support of her contention, Jude submitted documents relating to a refinancing of the 32 East Property that took

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the Appointment Order, and are therefore subject to ¶ 20 of the Order, I conduct a wasteful and duplicative review.

[4] B59.

place in 1998. The documents indicate that the bank providing the refinancing, SunAmerica Life Insurance Company, paid $1,126,092.01 to 145 Associates "in order to have the existing mortgage, held by 145 Associates, Ltd. satisfied."[5] Jude then requested and was granted the opportunity to conduct discovery regarding the Payment.[6] In this process, 145 Associates made its records available, and Weiser accountants who worked on the Weiser Report sat for deposition.

After reviewing the record and arguments submitted by the parties, the Trustee determined that the factual record supports Weiser's finding that the $1.1 Million Payment represented a loan because various documents indicate that 32 East had already satisfied the Mortgage when SunAmerica remitted the Payment to 145 Associates. That is, the Trustee found that the $1.1 Million Payment was not a satisfaction because 32 East did not owe 145 Associates anything when the Payment was made.

In reaching this determination, the Trustee concluded that the following events led to the $1.1 Million Payment.[7] In 1994, Louis, the original owner of the 32 East Property, transferred the Property to 32 East subject to the Mortgage, which at the time was held by a third-party bank, City & Suburban Federal Savings Bank. In late 1997, as the Mortgage was coming due, Daniel was forced to decide whether to refinance the Mortgage or pay it off. According to Daniel, he had wanted to refinance the Mortgage, but could not find a

[5] A21.
[6] A42.
[7] I draw this description from the Trustee's Determination and Supplemental Determination Re Dispute Over Credits Due Dan Wiener, A523; A531, as well as the relevant underlying documents in the record.

lender offering acceptable terms before the Mortgage came due.[8] As a result, Daniel decided to satisfy the Mortgage, which at the time had a balance of $1,115,733.63, using cash from Wiener-owned enterprises while waiting for an attractive refinancing offer.

As was common practice when a Wiener-owned entity needed to make a large cash payment, the payment for the City & Suburban mortgage was pooled from a number of Wiener-owned entities. Daniel apparently expected that this pooling would take place in 145 Associates' bank account because 145 Associates typically acted as a form of bank to the other Wiener-owned entities. But, for reasons Daniel attributes to miscommunication with the bookkeepers, the funds for paying off the Mortgage were pooled in 32 East's bank account at North Fork Bank, and North Fork's records indicate that at the end of December 1997, 32 East wired the Mortgage payoff amount to City & Suburban.[9] 32 East's cash receipt ledger shows that 32 East had collected $900,000 from various sources in late December 1997. 145 Associates' ledger indicates that it contributed $243,000, which was "recorded as an advance or loan to [32 East]."[10] After receiving the payoff amount from 32 East, City & Suburban did not cancel the Mortgage. Instead, at the direction of Daniel, City & Suburban assigned the Mortgage to 145 Associates, a decision Daniel never explained to the full satisfaction of the Trustee.

Approximately three months later, on April 1, 1998, Daniel closed a refinancing transaction with SunAmerica, securing a $2,250,000 loan with the 32 East Property. At

[8] A269.
[9] A64.
[10] A528.

the closing, Daniel signed several documents on behalf of 145 Associates and 32 East attesting that 145 Associates was the owner of the Mortgage, the Mortgage secured a bona fide obligation, and assigning the Mortgage to SunAmerica.[11] The closing statement from the refinancing indicates that SunAmerica remitted the $1.1 Million Payment to 145 Associates "for payoff of its loan."[12] This payment was marked as a credit in favor of 32 East on 145 Associates' ledger.

Based on this series of transactions, the Trustee concluded that 145 Associates had not advanced value for the assignment of the Mortgage, and therefore the payoff of the Mortgage by SunAmerica represented a loan from 32 East to 145 Associates.[13]

Having independently examined the record, I am in agreement with Weiser and the Trustee that the documentary evidence does not sustain Jude's assertion that the payment was in satisfaction of a debt already owed to 145 Associates.[14] The basis of

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[11] A133, A138.
[12] A23.
[13] A533-34.
[14] In evaluating the record, I reject Jude's argument that any gaps or unclear documents must be construed against Daniel who, as a fiduciary, had a duty to keep accurate records. In some cases, such a presumption might be equitable. *See, e.g.*, *Williams v. Spanagel*, 2000 WL 1336728, at *6 (Del. Ch. Sept. 14, 2000) ("[A]s fiduciaries, the Spanagels have the duty to account for their disposition of the Property and any income generated therefrom while they exercised exclusive control over it."), *aff'd*, 787 A.2d 101 (Del. 2001); *Sadler v. Smith*, 1987 WL 10524, at *2 (Del. Ch. Apr. 30, 1987) ("A trustee is bound to keep regular and accurate records respecting trust property and render a full account of the property and his conduct at the time of settlement." (citing 4 POMEROY'S EQUITY JURISPRUDENCE § 1063 (5th ed. 1941))). But not here, where Jude stands in the same position as Daniel regarding the records of 145 Associates. At the time of the City & Suburban and SunAmerica transactions, Jude had equal ownership of and involvement in 145 Associates as Daniel, and, as an attorney, Jude should have been well aware of the many shortcomings in the Wiener-owned entities' recordkeeping. Having failed to take any action to improve the records then, Jude cannot now claim that their lack of clarity must be construed

Jude's objection is essentially a "gotcha" argument: Jude argues that because Daniel authorized the $1.1 Million Payment at the SunAmerica refinancing, and in the process signed statements acknowledging the Mortgage was a bona fide obligation, he cannot now deny that the Payment represented a satisfaction.

But, Jude fails to offer any evidence that 145 Associates paid value for the assignment of the Mortgage, other than the $243,000, which the parties concede has been accounted for in other transfers. Instead, reliable evidence of record, including bank statements maintained by third-party banks and ledgers of the entities involved that were scrutinized in detail by a forensic accountant, indicates that the majority of the money used to pay City & Suburban came from other sources, and that these intercompany loans were accurately accounted for in the ledgers of the entities involved. Jude's conclusory and unsupported arguments to the contrary, suggesting that Daniel made undocumented reimbursements from 145 Associates to the entities that contributed to the City & Suburban payoff, do not alter this reality.

Nor am I convinced by Jude's argument that Daniel's statement to SunAmerica to the effect that the Mortgage represented a bona fide obligation from 32 East to 145 Associates should be taken as persuasive evidence that the Wiener-owned entities that contributed to the City & Suburban payoff somehow all charged their contributions to

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solely in her favor, especially when her father's loose business style resulted in Jude having received millions of dollars in wealth. The informality came along with the cash, as a total package. And, in any event, Daniel has met, in my view, this burden, if he bears it, to show that the $1.1 Million Payment represents a debt owed by 145 Associates to 32 East.

145 Associates, resulting in 145 Associates ultimately being responsible for the payoff amount. Rather, Daniel's statements during the SunAmerica closing can reasonably be taken as a simplification of the situation. A bona fide debt obligation for essentially the amount of the $1.1 Million Payment did exist between 32 East and other Wiener-owned entities because those entities had loaned 32 East money to pay City & Suburban. But, this debt obligation was spread across those entities, rather than held solely by 145 Associates. This distinction, however, was probably not material to SunAmerica, the primary concern of which would have been the cancellation of an outstanding encumbrance on the 32 East Property, not which among a group of entities owned primarily by the same three, closely related people would ultimately receive the Payment.

In this regard, Jude's argument that Daniel is estopped from denying that the Mortgage represented a debt owed by 32 East to 145 Associates based on his statements in the SunAmerica closing documents is not well taken. The core of an estoppel claim is that there has been detrimental reliance.[15] Here, Jude has not pointed to any party who detrimentally relied on the existence of the Mortgage during the brief period it was held by 145 Associates.

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[15] *See Hammelburger v. Foursome Inn Corp.*, 431 N.E.2d 278, 282 (N.Y. 1981) ("Estoppel does not render the mortgage valid but prevents one who has represented it to be valid from asserting that it is void, to the injury of those who have acted in reliance upon the representation." (quotation omitted)). The parties have argued the question of the Mortgage's validity under New York law. And, in any event, Delaware also requires detrimental reliance as an element of estoppel. *See Burge v. Fid. Bond & Mortgage Co.*, 648 A.2d 414, 420 (Del. 1994).

In short, Jude has provided no *equitable* reason why the $1.1 Million Payment should be treated as satisfaction of debt between 32 East and 145 Associates. Jude has offered no reliable evidence that 145 Associates paid value for the assignment of the Mortgage, or that any party, let alone Jude herself, detrimentally relied on the characterization of the $1.1 Million Payment in the SunAmerica closing papers as a bona fide debt obligation held by 145 Associates. Accordingly, I affirm the Trustee's finding that 145 Associates must pay 32 East $1,126,092.01.

B. <u>Jude's Attorneys' Fees</u>

Jude is requesting an award of $220,000 for attorneys' fees from the assets of the Dissolving Entities on the basis that her efforts to reduce a creditor claim brought by Louis against the Entities conferred a benefit on the Entities. The Trustee determined that Jude's efforts led to Louis reducing his claim for $7.59 million by $800,000, and that Jude was entitled to some compensation for her partial success on this front. Accordingly, and based on his calculation of the conferred benefit, the Trustee recommended that Jude be awarded $26,000 in fees. Jude asserts that the Trustee greatly undercalculated the benefit she conferred on the Dissolving Entities and asks this court to review the Trustee's determination.

When these dissolution proceedings began, Louis intervened and claimed that the Dissolving Entities owed him approximately $9.15 million for cash advances or property transfers he had made to the Entities over time. Weiser investigated this claim and concluded that the ledgers of the Dissolving Entities only showed a debt of $7.59 million

to Louis. After Weiser issued its Report, Louis moved for summary judgment, arguing that the Dissolving Entities' ledgers were conclusive evidence that he was owed $7.59 million. Jude then mounted a vigorous and wide-ranging opposition to Louis' motion that proceeded in three stages. Notably, Daniel joined sides with his father on this issue and opposed Jude's challenge. Daniel's reasons for doing so included a desire to narrow the scope of the dissolution proceedings, which were delaying the marketing of the Dissolving Entities' properties at a time when real estate markets were softening; Daniel also appears to have been motivated by a desire to defray some of the emotional toll this litigation was taking on Louis.[16]

In the first stage of her opposition to Louis' claim, Jude argued that the transactions that Louis claimed were loans were actually gifts to his children that were never meant to be repaid. Jude did not succeed on this argument, and the Trustee found that the transfers Louis made to his children to get them established in the business were meant to ultimately be repaid. But, based on the conflicted nature of many of the transactions involved — Louis was involved in the management of the Dissolving Entities when the transfers were made — the Trustee determined that Louis was not entitled to a presumption that the ledgers of the Dissolving Entities were accurate, and declined to award Louis summary judgment. Instead, the Trustee directed the parties to proceed with discovery relevant to Jude's challenges to Louis' claim other than the contention that the assets were gifts.

[16] Daniel Wiener Ans. Br. at 36 & n.22; B24-26.

This kicked off a lengthy inquiry in which Jude sought discovery into the multitude of transactions that had occurred between Louis and the Dissolving Entities in the past generation. This discovery included the propounding by Jude of document requests and interrogatories not only on Louis, but also on 145 Associates and Daniel, as well as day-long depositions with Louis and his accounting personnel. Jude pursued a variety of theories through discovery that she ultimately discarded, as noted in the Trustee Report: "diversion of rental income, the misallocation of insurance premiums and the alleged misappropriation of the proceeds of securities[] were explored through discovery but later abandoned by Jude."[17] This discovery culminated in a day-long evidentiary hearing before the Trustee.

In her briefing after the evidentiary hearing and at oral argument before the Trustee, Jude had somewhat narrowed her challenge to $3 million worth of the credits claimed by Louis resulting from transactions occurring between 1987 and 1997. Of the items that Jude challenged, the Trustee determined that only one, an $800,000 charge made in 1993, should be disallowed because it lacked documentation. Accordingly, the Trustee offset $800,000 of the credits claimed by Louis and found that the Dissolving Entities owed Louis $6.39 million.[18]

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[17] A538.

[18] The parties had conceded earlier that another credit claimed in the $7.59 million total Louis sought summary judgment on had already been offset in the ledgers of the Dissolving Entities, reducing Louis' claim to $7.19 million before the $800,000 offset. A340.

This determination was followed by a dispute over whether Louis was owed interest on his claims. Jude unsuccessfully challenged Louis' right to interest in the third round of briefing related to Louis' creditor claim, and the Trustee awarded Louis interest at a 6% simple rate from the time he filed his claim in 2003.

After the Trustee issued his determinations, Jude persisted in challenging her father's claims, and sought an interim appeal in this court of the Trustee's findings that the Dissolving Entities owed Louis $6.39 million plus interest, which at the time amounted to approximately $1.13 million. On the eve of the hearing scheduled in this court, and after briefing on the appeal had been completed, Jude and Louis reached a settlement resolving all of the claims between them, both in this action and in related litigation occurring in Florida and New York (the "Jude-Louis Settlement").[19] The Settlement called for the Dissolving Entities to pay Louis $6.4 million, and for another entity, 41 Associates, a Florida limited partnership owned equally by Jude and Daniel, to pay $2.6 million, for a total settlement payment to Louis of $9 million.

After executing the Jude-Louis Settlement, Jude applied to the Trustee for an allocation of $220,000 in attorneys' fees related to her challenge to Louis' claim under the corporate benefit and common fund doctrines. Daniel opposed this application, but the Trustee concluded that Jude was entitled to some compensation because Jude's

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[19] The Settlement was between Louis, Jude, Jude's husband, and Sylas. Daniel was not a party, but did consent to the disbursements contemplated by the Settlement.

challenge "did result in a benefit to the 145 Associates to the extent it served to reduce debt appearing on the books of that entity when the Trustee was appointed."[20]

Using the percentage of the benefit approach to calculating attorneys' fees,[21] the Trustee calculated Jude's award as follows: First, the Trustee determined that Jude had conferred a benefit of $800,000 on the Dissolving Entities based on the one item credited to Louis in the Dissolving Entities' ledgers that the Trustee offset. The Trustee declined to include the $1.13 million in interest that was owed to Louis at the time of the Jude-Louis Settlement because the Trustee could not conclude that Louis' waiver of the interest was the result of Jude's efforts on behalf of the Dissolving Entities rather than her agreement to pay $2.6 million from the assets of 41 Associates. Next, the Trustee adjusted the $800,000 benefit downward to take into account that Jude realized part of the benefit directly through her two-thirds interest in 145 Associates, the entity to which the $800,000 claim was charged. As a result, the Trustee determined that Jude should only be compensated for the benefit she conferred on Daniel's one-third interest in 145 Associates, or $264,000. Having calculated the benefit in this manner, the Trustee then set attorneys' fees at 10%,[22] for an award of $26,000.

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[20] A539-40.
[21] *See Franklin Balance Sheet Inv. Fund v. Crowley*, 2007 WL 2495018, at *9-10 (Del. Ch. Aug. 30, 2007) (discussing possible approaches to calculating reasonable attorneys' fees).
[22] In settings the percentage at 10%, the Trustee took into account that Jude had already been reimbursed to some extent by Sylas. At the same time that Sylas assigned his interest in 145 Associates to Jude, he also assigned his one-third interest in another Wiener-owned entity, Albany Tower Associates, L.L.C., for ten dollars "and other good and valuable consideration, including the past and future funding of the litigation in Delaware, Case No.: 20129." A358.

Jude argues that the Trustee made two errors in reaching this amount: 1) the interest payment should have been included; and 2) the award overlooks the fact that the money will come primarily from 145 Associates' assets, so on balance Daniel will only pay one-third of the attorneys' fees attributable to the benefit conferred on him.

After reviewing the record, I find that Jude is not entitled to the $220,000 she requests, or to any additional fees beyond the $26,000 awarded by the Trustee. Jude's argument for why she is entitled to fee-shifting is based on two equitable exceptions to the American Rule that a party to litigation bears her own costs, the common fund doctrine and the corporate benefit doctrine.[23] The common fund doctrine is applicable where a litigant confers a monetary benefit on an ascertainable class, and the corporate benefit doctrine is applicable where the alleged benefit is not a tangible monetary one.[24] Because Jude claims she conferred a monetary benefit on the Dissolving Entities — a reduction in the debt owed to Louis — I review the fee award under the framework of the common fund doctrine.

The common fund doctrine is based "on the equitable principle that those who have profited from litigation should share its costs."[25] The amount of fees awarded under this doctrine rests in the sound discretion of this court, and must be reasonable in relation

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[23] *See Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1164 (Del. 1989) (discussing the equitable exceptions to the American Rule).
[24] *See Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1090 (Del. 2006); *Franklin*, 2007 WL 2495018, at *6; *In re Dunkin' Donuts S'holders Litig.*, 1990 WL 189120, at *3 (Del. Ch. Nov. 27, 1990).
[25] *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1044 (Del. 1996).

to the benefit conferred.[26] In touting her achievement of what was, relative to the sums involved, a modest benefit for Daniel and the Dissolving Entities by cancelling $800,000 of Louis' claimed debts of $7.19 million plus interest, Jude ignores the substantial costs she imposed on Daniel and the Dissolving Entities through, in the well-justified estimation of the Trustee, "far-ranging and acrimonious objections."[27] Jude's splatter-gun approach to discovery and litigation, in which her attorneys alone billed 1054 hours,[28] was highly disproportional to the likely benefit of challenging the entirety of a creditor claim supported by the ledgers of the Dissolving Entities, ledgers which an independent forensic accountant had concluded were "a reasonably fair representation" of the accounts between the Wiener-owned entities.[29]

This is not to say that Jude did not have some colorable arguments that warranted discovery. Rather, the point is that Jude's unfocused approach to prosecuting her challenge created substantial costs unrelated to the benefit she ultimately secured. And, Daniel has already borne a portion of these costs. The expense and delay of locating decades-old records of the Dissolving Entities requested by Jude, responding to interrogatories, and having the parties and the Trustee — whose services are being paid for by the Dissolving Entities — turn their attention toward these issues (and to some

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[26] *Korn v. New Castle County*, 922 A.2d 409, 413 (Del. 2007); *Chrysler Corp. v. Dann*, 223 A.2d 384, 386 (Del. 1966).
[27] A540.
[28] A304.
[29] B59.

extent away from their efforts to rapidly maximize the value of the underlying real estate assets) are all costs Daniel must necessarily share as an owner of the Dissolving Entities.

And, in claiming it was error for the Trustee not to credit her for the $1.13 million in interest the Dissolving Entities avoided paying as part of the Jude-Louis Settlement, Jude seeks to ignore the fact that the $1.13 million saved by the Dissolving Entities was offset by the $2.6 million payment by 41 Associates, a company in which Daniel owned a *greater* share than in the Dissolving Entities. In other words, Jude succeeded in transferring a cost charged to an entity in which Daniel owned an approximately one-third share to an entity in which Daniel owned a half-share. In these circumstances, one is hard-pressed to say that Daniel was benefitted by the Jude-Louis Settlement.

Nor do the circumstances of this case present the typical free-rider problem that the common fund doctrine is meant to address.[30] Daniel did not sit on the sidelines of Louis' creditor claim while Jude alone defended the assets of the Dissolving Entities. Rather, Daniel had to hire his own counsel and incur his own costs in order to address Jude's many claims, placing Jude and Daniel in a position often more akin to adversaries — between whom fees would normally not be shifted[31] — than to a representative shareholder seeking compensation from an absent, free-riding shareholder. That is, the $800,000 reduction in Louis' claim does not entirely represent a windfall to Daniel

[30] *Goodrich*, 681 A.2d at 1044 (discussing that, in the absence of equitable fee shifting, "persons who obtain the benefit of a lawsuit without contributing to its cost [freeriders] are unjustly enriched at the successful litigant's expense" (quoting *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980)) (alteration in original)).
[31] Jude has not argued for fee shifting under the bad faith exception to the American Rule.

because Daniel has offsetting legal costs he incurred in order to protect his interests in this court.

In this regard, I note that, in my de novo view of this issue, Jude is not entitled in equity to cherry-pick parts of this proceeding in search of a fee award. Taken as a whole, Jude's litigation efforts were likely far more financially and emotionally injurious to Daniel than they were beneficial. That Jude obtained some modest financial benefit for the Dissolving Entities at an overall very large cost in time, money, and familial harmony is a relevant factor that supports the Trustee's award. Indeed, if this court were starting wholly from scratch, it would likely conclude that equity does not require *any* shifting of fees at all to Jude. But, because Daniel has not cross-appealed the Trustee's determination, and because the $26,000 awarded by the Trustee is a reasonable estimate of the costs Jude incurred to provide Daniel with the benefit of avoiding a $246,000 deduction from his interest in the Dissolving Entities as a debt owed to Louis, I simply affirm the Trustee's determination.[32]

C. <u>Responsibility For Sylas' Debt</u>

Finally, Jude asks this court to review the Trustee's determination that Jude is responsible for the $336,386 of debt charged to Sylas in 145 Associates' ledgers at the

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[32] I am not convinced by Jude's argument that the Trustee's determination should be adjusted to take into account that Jude will be paying part of the attorneys' fees awarded to her through her ownership interest in the Dissolving Entities. The Trustee's approach is reasonable and consistent with the treatment of the litigation costs that Jude caused the Dissolving Entities to incur, which have been shared by Daniel.

time that Jude purchased Sylas' interest in 145 Associates and for which Jude agreed to hold Sylas harmless.

It was common practice for 145 Associates to make cash advances to the Wiener siblings, mostly to defray their individual tax liabilities for partnership income.[33] As of December 31, 2002, 145 Associates' ledgers showed that Sylas owed 145 Associates $337,449.89 as a result of such advances (the "Sylas Debt").[34] In April 2006, the Trustee asked the Wiener siblings to verify the balances shown in the ledgers. In May 2006, Sylas responded that there was no documentation for the Sylas Debt and that, in fact, Sylas' own records indicated that 145 Associates owed him $189,797.66. Sylas's counsel was then given the opportunity to review 145 Associates' records. After conducting this review, Sylas' counsel informed the Trustee in a November 2006 teleconference that he had been unable to find sufficient material to support a defense against the ledger entries, and as a result Sylas was dropping his challenge.

Admittedly, Jude and Daniel's counsel have conflicting recollections of what was stated in this conference,[35] for which there is apparently no transcript. But, I give the greatest weight to the recollection of Sylas' counsel, who told this court in March 2009 that in 2006, after he had examined the records of 145 Associates, he "reported back to the trustee that [he] could not find anything regarding that debt, and [his] best

[33] A509.
[34] A403.
[35] *See* A459; A473.

recollection is that it was then decided that if [they] were not able to find anything to defend against it, it was going to remain on the books."[36]

Several months after Sylas dropped his challenge, in April 2007, Jude and Sylas submitted a settlement agreement to the Trustee for his approval under which Sylas would, in essence, be cashed out of his interest in the family business by Jude so that Sylas could be done with his involvement in the family fight (the "Jude-Sylas Settlement Agreement"). That Agreement states that "Jude shall pay Sylas $1,500,000 in accordance with the terms of this Agreement for Sylas's entire interest in 145 [Associates] . . . and she shall hold Sylas harmless for the $336,386 *he owes* to 145 [Associates]."[37] The Trustee approved the Jude-Sylas Settlement Agreement in May 2007. Shortly afterwards, Sylas' counsel requested that the Trustee make a $3 million distribution out of 145 Associates' funds so that Sylas could be paid from the proceeds "and truly put this matter to bed."[38] With the consent of Daniel and Jude, the Trustee made the distribution, remitting $1.5 million of Jude's two-thirds ($2 million) share of the distribution directly to Sylas.[39] Importantly, as Jude's counsel has indicated to this court, there was no notice to the Trustee when he approved the disbursement that the

[36] 3/30/09 Tr. at 6-7.
[37] A421 (emphasis added). The parties have not explained why Sylas' debt changed from the $337,449.89 indicated in the Weiser Report to the $336,386 stated in the Jude-Sylas Settlement Agreement, but this does not appear to be a point of dispute.
[38] A511.
[39] A429.

amount of the Sylas Debt remained an open issue, and, instead "the parties in fact led him to the contrary."[40]

Over a year after Sylas received his payout, in November 2008, a dispute arose between Jude and Daniel over how to treat the Sylas debt in the final accounting of 145 Associates' balance sheets. The difficulty was that by then Sylas had moved with his job to Israel, had dismissed his U.S. counsel, and refused, despite the requests of the Trustee, to have any further involvement in these proceedings. As a result, the Trustee reasonably concluded that the Sylas Debt should be charged to Jude. The Trustee reasoned that Jude was responsible for the Debt because Sylas and Jude had admitted that Sylas owed it in the Jude-Sylas Settlement Agreement, and because the $1.5 million disbursement to Sylas, without any offset for the Debt, would not have been approved without the Trustee's belief that Jude had taken responsibility for that Debt under the Jude-Sylas Settlement Agreement.

On appeal, Jude argues that under the plain language of the Jude-Sylas Settlement, Jude bears only secondary liability for the Sylas Debt. Jude further argues that Sylas has a defense to the Sylas Debt under the statute of limitations,[41] and therefore Sylas or Jude

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[40] 3/30/09 Tr. at 24.

[41] Jude's position on this issue is at odds with her own position on the application of the statute of limitations in this case, where the length and complexity of the dissolution proceedings has led to delay in reaching some matters. With regard to the 32 East claim, the Trustee rejected Daniel's argument that Jude's challenge was time barred on the basis that:

> As the trusteeship has progressed over the past four years, the issue of credits due the parties has been accorded secondary status pending the sale of assets and the marshalling of funds. . . . I have recently requested the parties to . . . either accept

must first have the opportunity to present that defense, and the Trustee must reach a determination, before the Sylas Debt can be charged to Jude.

But, Jude's position is unsustainable in light of the language of the Jude-Sylas Settlement Agreement, which explicitly acknowledges the amount of the Sylas Debt, and under considerations of estoppel arising from Jude and Sylas' failure to indicate that there was any dispute regarding the Sylas Debt when Sylas sought approval of the $3 million distribution. "The doctrine of equitable estoppel applies when a party intentionally, or unintentionally, induces another to detrimentally rely on the party's conduct."[42] Here, Jude and Sylas's conduct induced the Trustee, acting on behalf of 145 Associates, and Daniel to forgo an opportunity to collect the Sylas Debt because they reasonably believed that Jude had taken responsibility for it.

Specifically, the Settlement Agreement *plainly* states that Jude "shall hold Sylas harmless for the $336,386 *he owes*."[43] Without any indication of conditionality — for example, if Jude had only agreed to hold Sylas harmless to the extent he owed 145 Associates money — the clear meaning of this provision is that there was no dispute as to

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> the entries on the balance sheet as presently stated or express a contrary position. Jude's questioning of the [32 East] allocation is thus timely and not subject to laches-type objection.

A524 (Trustee's Determination Re Dispute Over Credits Due Dan Wiener). Jude adopted this reasoning when Daniel argued to this court that the 32 East claim was time barred, arguing that "it was only in 2006 that Trustee indicated for the first time that he would consider this matter." Jude Wiener Rep. Br. at 6. The same argument is equally applicable here because the Sylas Debt was also one of the matters that the Trustee did not turn to until 2006.

But, because Jude and Sylas are estopped from raising their statute of limitations argument in the first place, I need not, and therefore do not, dilate further on this matter.

[42] *Burge v. Fidelity Bond & Mortgage Co.*, 648 A.2d 414, 420 (Del. 1994).

[43] A421 (emphasis added).

the amount Sylas owed 145 Associates. Such a reading is consistent with Sylas' decision to drop the challenge he had raised against the Sylas Debt earlier in the proceedings. Sylas was the only person with standing to challenge the Debt, and he had acknowledged it. Jude then plainly promised to bear that liability for him.

Thus, it was reasonable for the Trustee and Daniel to believe there would be no detriment to 145 Associates if Sylas received the full $1.5 million that Jude had promised him under the Jude-Sylas Settlement Agreement before the final accounting was completed because, under the terms of that Agreement, Jude had agreed to pay the Sylas Debt in full. Jude and Sylas did nothing to dispel such a belief, which worked decidedly in Jude and Sylas' favor because approval of the Jude-Sylas Agreement by the Trustee, standing in the shoes of the General Partner, was required under the 145 Associates partnership agreement, and the $3 million disbursement also required the Trustee's approval. That is, Jude and Sylas would not have been able to complete their Settlement Agreement had the Trustee not believed the interests of 145 Associates were protected by its terms. And, indeed, Jude's counsel acknowledged that the parties had led the Trustee to believe the Sylas Debt was no longer an open issue.[44] Moreover, the fact that Jude also consented to the full $1.5 million disbursement when she was on the hook to pay the Sylas Debt if Sylas himself did not would have been a strong indicator to the Trustee and Daniel that Jude's acceptance of the Sylas Debt was part of the deal between Jude and

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[44] 3/30/09 Tr. at 24.

Sylas. The reason the Trustee could safely release the funds was precisely because the $336,386 owed by Sylas would be covered by Jude, at no cost to Daniel.

Jude only asserted that Sylas did not owe the Debt after the Trustee had disbursed Sylas' share of 145 Associates without any offset for the Sylas Debt. This is a totally inequitable and tardy assertion by Jude. The debtor, Sylas, had acknowledged the Debt. To force the Trustee, Daniel, and 145 Associates to pursue Sylas now would be inequitable. If Jude wishes to chase after her brother for this money in Israel, she is, I suppose, free to do so. But, Jude may not stick 145 Associates or Daniel with that cost.[45] She must honor her promise to bear the Sylas Debt.

For these reasons, I affirm the Trustee's determination that Jude is responsible for paying the Sylas Debt.

IV. Conclusion

For the foregoing reasons, the determinations of the Trustee that 1) 145 Associates owes Daniel $1,126,092.01; 2) Jude's reasonable attorneys' fees are $26,000; and 3) Jude

[45] In this regard, the costs Jude has already imposed on Daniel by litigating this flimsy defense to her contractual obligation to cover the Sylas Debt provide further support for the discussion in the previous section of this letter regarding the net loss Jude's aggressive litigation stance in these proceedings has likely caused Daniel.

is responsible for the $333,449.89 in debt charged to Sylas are affirmed. The parties shall file a final order addressing the remaining issues in the case within twenty days or explain why that is not possible. IT IS SO ORDERED.

Very truly yours,

/s/ Leo E. Strine, Jr.

Vice Chancellor

LESJr/eb

cc: Joseph T. Walsh, Esquire