ALBERT DILL, as Executor of the Estate of Claude V. Offray, Jr., and as Co-Trustee of the Revocable Trust, Credit Shelter Trust, Exempt Marital Trust, and Non-Exempt Marital Trust under the Revocable Trust Agreement, and Bank of America, N.A., as Co-Trustee of the Revocable Trust, Credit Shelter Trust, Exempt Marital Trust, and Non-Exempt Marital Trust under the Revocable Trust Agreement, Plaintiffs/Respondents, v. CLAUDE V. OFFRAY, III, as beneficiary of the Claude V. Offray, Jr. Trusts u/a/d March 3, 2011, as Amended and Restated on June 4, 2013, and as amended on February 26, 2014, Defendant/Appellant.	ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY UNION COUNTY—LAW DIVISION DOCKET NO.: UNN-L-000958-24 CIVIL ACTION SAT BELOW: HON. JOHN G. HUDAK, J.S.C. APPELLATE DIVISION DOCKET NO. A-001498-24 T4

AMENDED BRIEF ON BEHALF OF DEFENDANT/APPELLANT CLUADE V.OFFRAY, III

HEROLD LAW, P.A.
Craig S. Provorny, Esq.
Attorney Id. No. 021601986
25 Independence Boulevard
Warren, New Jersey 07059-6747
(908) 647-1022 (Tel)
(908) 647-7721 (Fax)
E-mail: cprovorny@heroldlaw.com
Attorneys for Defendant/Counterclaimant
Claude V. Offray, III

On the Brief:
Craig S. Provorny, Esq.

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PRELIMINARY STATEMENT

This appeal challenges the trial court's dismissal of Defendant/Appellant Claude V. Offray III's (hereinafter "Defendant") Counterclaim on a Motion to Dismiss for Failure to State a Claim that is wrong on the law in every instance. In fact, the trial court went so far as to rely on an inapplicable provision of the first Restatement on Trusts that was not raised by any of the parties, even though the first Restatement has since been twice updated and no longer relevant.

This dispute arises out of the failure of Co-Trustees/Respondents Bank of America, N.A. and Albert Dill (collectively referred to herein as the "Co-Trustees") as Co-Trustees of four (4) trusts to obtain anything close to a reasonable rate of return on investments for multi-million dollar trusts over a period of ten (10) years commencing in 2014. The breadth of the mishandling of the four (4) trusts was not known until the Co-Trustees were ordered by the trial court, upon the request of Defendant, to prepare informal accountings for the ten (10) year period of existence of the trusts, which were provided on June 5, 2024. (Da233).

Before Defendant could depose the Co-Trustees about the accountings and well before Defendant's expert could write a report and opine on the failure of the Co-Trustees to obtain anything close to a reasonable rate of return, the Co-Trustees filed a Motion to Dismiss the Amended Counterclaim for Failure to State a Claim based upon claims: (1) Defendant did not have standing to challenge any actions of

the Co-Trustees from 2014 to 2021 prior to the death of Defendant's mother while Defendant was a remainder beneficiary; (2) an action under the Prudent Investor Act ("PIA") for damages against a trustee is limited to a depreciation of principal and a cause of action is not permitted under the PIA for failure to obtain a reasonable rate of return of income; and (3) Defendant failed to join as necessary parties the children of Defendant who had powers of attorney for Defendant and are remainder beneficiaries.

In response to the Motion Defendant provided the trial court with the language of the PIA and published Appellate Division decisions that explicitly provide for a cause of action under the PIA against a trustee for failure to obtain a reasonable rate of income on its investments and that explicitly states a remainder beneficiary has standing to object to an accounting, even if previously approved by the trial court. In granting the Motion to Dismiss, inexplicably, the trial court acknowledged the PIA requires a trustee to obtain a reasonable income for the remainder beneficiaries, yet dismissed the claim, relying on an ERISA case unrelated to trusts.

And, despite an Appellate Division decision holding remainder beneficiaries do in fact have standing to object to an accounting, the trial court did not even mention the decision in its opinion, finding as a blanket rule Defendant had no right as a remainder beneficiary to challenge the actions of the Co-Trustees as a remainder

beneficiary, even though the Co-Trustees never provided an accounting at any time until the underlying litigation.

It should be without dispute in this instance the trial court committed numerous errors of law in its decision dismissing the counterclaim on its face. As set forth herein Defendant respectfully requests the Court reverse the decision of the trial court and remand for further proceedings before a different Judge, because as set forth below, the decision was wholly unsupported, contrary to all applicable law, and was result oriented.

COMBINED PROCEDURAL HISTORY AND STATEMENT OF FACTS

This case involves four (4) trusts created by Defendant's father Claude V. Offray, Jr. Claude died testate on May 31, 2014 (Da188), having executed the Amended and Restated Claude V. Offray, Jr. Revocable Trust Agreement dated June 4, 2013, which amended and restated the Claude V. Offray, Jr. Revocable Trust Agreement dated March 3, 2011, and further executed the First Amendment to the Amended and Restated Claude V. Offray, Jr. Revocable Living Trust on February 26, 2014 (collectively, the "Trusts Agreement" or "RTA"). (Da49-78) Plaintiff Albert Dill is the executor of Claude's Estate (Da192), and Dill and Bank of America, N.A. are the Co-Trustees of the four (4) trusts that were established by the RTA. (Da67)

The RTA created an inter vivos trust, which, upon Claude's death, became irrevocable, the principal of which was to then be used to fund three (3) other separate trusts, the Non-Exempt Marital Trust, and the Credit Shelter Trust. During Gloria's lifetime Defendant and his sister Denise Offray, who is not participating in this appeal, were remainder beneficiaries of the Trusts. (Da50-60)

Upon Gloria's death on March 24, 2021, the Trustees were required by the RTA to "distribute all accumulated, accrued and undistributed income of the Marital Trusts to Grantor's Spouse's estate." (Da50-60) Of note is that at no time prior to Gloria's death did the Co-Trustees submit either a formal or informal accounting of

any of the Trusts. The first and only accountings submitted by the Co-Trustees were pursuant to Court Order in the underlying litigation and consisted of informal accountings for each of the Trusts. (Da240) Thus, prior to this litigation the Co-Trustees never accounted for any of their actions and investments.

The Co-Trustees filed an Order to Show Cause (Da164-168) and Verified Complaint on April 20, 2023 (Da169-201), seeking declarations from the Court and seeking instructions regarding the funding and distribution of the four (4) Trusts and their decision to postpone funding of the Generation Skipping Transfer ("GST") and Non-Generation Skipping Transfer ("Non-GST") Trusts. The claims regarding the four (4) Trusts were resolved by the parties and the Court's September 7, 2023 Consent Order (Da262-265), following which the case was transferred from the Chancery Division to the Law Division. (Da266)

Prior to the transfer on June 15, 2023, prior to receipt of any accountings, and relying solely on the Co-Trustee's Verified Complaint, Defendant filed an Answer and Counterclaim (Da202-219), with the Counterclaim being amended on September 4, 2024 (Da239-293), following receipt of the accountings, but prior to an expert offering an opinion on the investments by the Co-Trustees.

Under his "Failure to Properly Manage Estate Assets" claim, Victor alleged the Co-Trustees breached their fiduciary duty and specifically alleged the Trustees breached their fiduciary duty and the Prudent Investor Act by "failing to adjust the

Trusts' and Estate's investments of securities and equities in a manner generating a reasonable rate of return on the principal" from "May 31, 2014 through February 29, 2024." (Da244-252)

Prior to depositions of the Co-Trustees and any expert reports, on September 24, 2024, the Co-Trustees filed a Motion to Dismiss the Amended Counterclaim in its entirety for failure to state a claim due to the alleged failure to join indispensable parties, that Defendant does not have standing to challenge the actions of the Co-Trustees prior to the death of Gloria Offray, and that the only cause of action existing under the Prudent Investor Act against the Co-Trustees is if the principal of the Trusts depreciated in value and that a cause of action does not exist for failure to obtain a reasonable rate of return on investments. (Da42-44) Additionally, the Co-Trustees sought dismissal of Count One of the Amended Counterclaim regarding funding of the GST and Non-GST Trusts, which was not opposed by Defendant. Defendant, however, opposed the remainder of the Motion to Dismiss.

On December 13, 2024, the trial court granted the Co-Trustees' Motion to Dismiss (Da20-21), finding as follows: (1) Defendant failed to join his children as indispensable parties based upon their holding Powers of Attorney for Defendant and that they were remainder beneficiaries. This dismissal was without prejudice; (2) Count I of the Counterclaim for breach of fiduciary duty for failure to fund the Generation Skipping Trusts was dismissed with prejudice; and (3) Count II for a

breach of the Prudent Investor Act (a) for claims prior to the death of Gloria Offray were dismissed with prejudice, the trial court finding that during the time Defendant was a remainder beneficiary Defendant did not have standing to challenge the actions of the Co-Trustee's during the lifetime of his mother, despite the fact no accountings had ever been submitted; and (b) claims following the death of Gloria Offray were dismissed without prejudice on the basis the Court found a cause of action does not lie under the Prudent Investor Act for the Co-Trustees' failure to obtain a reasonable income, instead holding the only cause of action that exists under the Prudent Investor Act and common law is if the trust's principal decreases in value. (Da22-41)

Given the trial court found a cause of action does not exist under the Prudent Investor Act and common law for failure to obtain a reasonable income Defendant had no reason to amend its Amended Counterclaim. To do so would have been futile based on the trial court limiting the cause of action to only when there is a decrease in value of the principal, a claim that is not being pursued. As a result of the trial court's glaring errors of law this appeal followed.[1]

[1] The procedural history and statement of facts were combined because they are intertwined due to the fact the below proceeding was a Motion to Dismiss the Complaint for Failure to State a Claim.

ARGUMENT

POINT I

THE COURT'S REVIEW OF THE UNDERLYING DECISION IS DE NOVO AND OWES NO DEFERENCE TO THE TRIAL COURT'S INTERPRETATION OF THE LAW AND FACTS

Given the Counterclaim was dismissed as a matter of law for failure to state a claim the standard of review for this Court is de novo. An appellate court's review of rulings of law and issues regarding the applicability, validity (including constitutionality) or interpretation of laws, statutes, or rules is de novo. See In re Ridgefield Park Bd. of Educ., 244 N.J. 1, 17 (2020) (agency's interpretation of a statute); State v. Courtney, 243 N.J. 77, 85 (2020) (interpretation of sentencing provisions in the Criminal Code); Kocanowski v. Twp. of Bridgewater, 237 N.J. 3, 9 (2019) (statutory interpretation). As explained by Judge Pressler, "the appellate court owes no deference to the trial court's `interpretation of the law and the legal consequences that flow from established facts...' and, hence, that its review of legal issues is de novo. Manalapan Realty v. Township Committee, 140 N.J. 366, 378 (1995). Thus, in this instance, the Court is not bound by the trial court's application of law to the facts nor its evaluation of the legal implications of facts where credibility is not in issue.

POINT II

THE TRIAL COURT COMMITTED ERRORS OF LAW AND IGNORED AN APPELLATE DIVISION DECISION IN FINDING DEFENDANT LACKED STANDING TO CHALLENGE THE ACTIONS OF THE CO-TRUSTEES DURING THE LIFETIME OF HIS MOTHER EVEN THOUGH NO ACCOUNTINGS HAD PREVIOUSLY BEEN SUBMITTED (Da39)

The trial court committed errors of law and entirely ignored Appellate Division caselaw in holding that Defendant lacked standing to challenge the actions of the Co-Trustees during the lifetime of his mother Gloria Offray. The decision of the trial court in so holding is even more egregious considering the fact the Co-Trustees never submitted any accountings for the Trusts during the lifetime of Gloria Offray, and the fact the language of the Trust document gives Defendant standing to challenge.

In their brief below the Co-Trustees asserted the Amended Counterclaim concerning investments during decedent Gloria Offray's lifetime must be dismissed because Defendant lacked standing as a remainder beneficiary and the Trustee owed no duty to Defendant to generate income or grow the principal of the four (4) Trusts during Gloria Offray's life. In making this assertion the Co-Trustees did not cite to a single case that stands for the proposition a remainder beneficiary has no standing to sue for actions of a trustee during the beneficiary's lifetime.

And, importantly, as the Court will see, the trial court also did not cite to a single case in holding Defendant lacked standing as a remainder beneficiary to

challenge the actions of the Co-Trustees while Gloria Offray was alive. In fact, as set forth below, the Co-Trustees and the trial court blatantly ignored a published Appellate Division decision that unquestionably provides Defendant with standing.

In ignoring the Appellate Division decision, the only source the trial court cited to was the Restatement (Third) of Trusts §94, stating: "In general, a suit against a trustee of a private trust to enjoin the trustee may only be maintained by a "beneficiary or by a co-trustee, successor trustee, or other person acting on behalf of one or more beneficiaries." Restatement (Third) of Trusts § 94 (2012)." (Da39).

First, the Restatement (Third) of Trusts is not precedential. Rather, it is only guidance.

Second, the provision cited by the trial court says nothing about the standing of a remainder beneficiary. As such, it is neither helpful nor not helpful.

And, importantly, particularly in this instance, Defendant, as a remainder beneficiary, does in fact have standing due to the fact the Co-Trustees never submitted any accountings, formal or informal, for any of the Trusts during Gloria Offray's lifetime. The applicable provision of the Trust document with regard to accountings states as follows, again which the trial court ignored in its entirety:

> 8.1 During Grantor's lifetime, Trustees shall account to Grantor at least quarterly as to all principal and income receipts and disbursements and all changes of investment. These accounts may be copies of Trustees' income and principal transaction statements for the period covered. Grantor's approval of the accounts shall be binding, as to all matters disclosed, on Grantor and all persons, whether adults or minors, who

> are or may become interested in the trust estate. Grantor shall be deemed to have approved any account unless Grantor raises specific written objections to it within sixty (60) days after the account was mailed to him at his last known address.
>
> 8.2 Trustees may also at any time judicially settle its accounts. Alternatively, Trustees may at any time settle their accounts by agreement with the legally competent income beneficiaries of each trust under this Agreement and with the legally competent persons who would be entitled to a share of principal if the trust were then to terminate. **An accounting by agreement shall bind all persons, whether or not then in being, then or thereafter entitled to any portion of the trust, and release Trustees for the acts accounted for.**

[emphasis added] [Da60].

Thus, as the Court can see, the only person for whom an actual accounting was not required in order for the Co-Trustees to settle their accounts was with the deceased Grantor, being Claude V. Offray, Jr. With respect to decedent Gloria Offray and the remainder beneficiaries, which includes Defendant, however, in order to bind remainder beneficiaries to the actions of the Co-Trustees during the lifetime of Gloria Offray, the Co-Trustees would have had to submit either a formal or informal accounting, which would then have bound all beneficiaries, regardless of whether they were then in being or thereafter entitled to any portion of the Trusts. Therefore, if the Co-Trustees had provided a formal or informal accounting during the lifetime of Gloria Offray, the Defendant, as a remainder beneficiary, would have been bound.

The converse, however, is that if the Co-Trustees did not judicially or informally settle their accounts with Gloria Offray, Defendant, as a remainder beneficiary, is not bound, and certainly does not lack standing to challenge the actions of the Co-Trustees during the lifetime of Gloria Offray. In this instance, there is no dispute, and certainly nothing in the record on the Motion to Dismiss for Failure to State a Claim, the Co-Trustees neither judicially settled their accounts nor informally settled their accounts with Gloria Offray. As such, according to the language of the Trust any and all of the actions of the Co-Trustees during Gloria Offray's lifetime are still subject to a challenge by Defendant as a remainder beneficiary.

With respect to binding published caselaw the trial court inexplicably ignored, such caselaw unequivocally supports the proposition of standing for Defendant in this instance. In Matter of Will of Maxwell, 306 N.J. Super. 563 (App. Div. 1997) the Appellate Division was faced with claims by remainder beneficiaries against the trustees of a trust where the trustees had actually submitted accountings to be settled by the trial court and had been approved by the trial court, thereby supposedly binding all beneficiaries, including those who had been remainder beneficiaries at the time of the approval of the accountings. The trustees argued the accountings were therefore binding on the remainder beneficiaries, and, as such, the remainder

beneficiaries could not contest the actions of the trustees during the lifetime of the deceased beneficiary.

The Appellate Division, however, held otherwise, finding the remainder beneficiaries had not been properly represented in some instances, as they had been minors with no guardian ad litem appointed, and, as a result, were not bound by the trial court's approval of the prior accountings. Rather, the Appellate Division explicitly found the trustees had a duty to the remainder beneficiaries to act not only in the interest of the current beneficiary, but to act in the interest of the remainder beneficiaries as well. In so holding the Appellate Division stated as follows:

> Additionally, a trustee representing beneficiaries in succession is under a duty to the successive beneficiaries to act with due regard to their respective interests and to preserve the trust property for the remainderpersons, and not just make it productive of a reasonable income for the benefit of the life beneficiaries. *See Pennsylvania Co. v. Gillmore*, 137 N.J. Eq. 51, 43 A.2d 667 (Ch.Div. 1945); *see also Bliss v. Bliss, supra*, 126 N.J. Eq. at 310, 8 A.2d 705; *Restatement (Third) of Trusts* §§ 183, 232; 7 *New Jersey Practice, supra*, at § 970.

[Matter of Will of Maxwell, supra at 585-86].

> We first consider the contention advanced by the remainderpersons that the order approving the fourth intermediate accounting in 1975 does not bar them from asserting their claims against the trustees because they did not have "due notice" of the proceedings and were not adequately represented by David Freeman, who was appointed as their "virtual representative" on August 28, 1975.
>
> A judgment allowing an account "after due notice [is] res judicata" as to all parties and "as to all exceptions which could or might have been taken to the account." N.J.S.A. 3B:17-8. Such judgment acts to "exonerate and discharge the fiduciary from all claims of all interested

parties and of those in privity with or represented by interested parties except..[a]s relief may be had from a judgment in any civil action." Ibid.; see R. 4:50-1, -2. This concept of finality applies to judgments approving intermediate accountings as well as final accountings. In re Estate of Yablick, 218 N.J.Super. 91, 100, 526 A.2d 1134 (App.Div.1987).

Actions to settle an accounting by a testamentary trustee are governed by R. 4:87-1 to -9 and R. 4:88-1 to -3. With respect to notice of a proceeding for approval of accountings involving minors, R. 4:87-4(a) provides that

[i]f any person is a minor or incompetent and except as otherwise provided by R. 4:26-3 (virtual representation), service [of process] shall be made on the person or persons upon whom a summons would have to be served pursuant to R. 4:4-4(a)(2) and (3) unless a guardian ad litem is required under R. 4:26-2. 10

Rule 4:26-3 sets forth the procedure for appointing a virtual representative, and R. 4:26-2 involves the appointment of a guardian ad litem for minors and incompetent persons to act in such proceedings. Inasmuch as David Freeman was appointed under R. 4:26-3(a), we first consider whether that rule was properly employed in this case.

Rule 4:26-3(a) allows a person who is a presumptive taker of estate property to represent the entire class of potential takers in an accounting proceeding so long as the class of potential takers has the same future interest as the presumptive taker and no demonstrable conflict of interest exists between them. In re Estate of Lange, supra, 75 N.J. at 485, 383 A.2d 1130. The assumption underlying this rule "is the existence of a relationship between the presumptive taker[ ] and the class of potential takers [that is] sufficiently close to guarantee an identity of interest between the representative[ ] and the class and thus to assure that the representation will be adequate." Ibid.

For the most part, R. 4:26-3(a) is utilized to permit a predecessor in interest to represent a successor to that interest. Stated another way, the "virtual representation" rule ordinarily applies vertically, not horizontally. See Pressler, Current N.J. Court Rules, comment on R. 4:26-3 (1997). Although the rule frequently involves issues relating

to representation of unascertainable successors in interest, "[r]esort to the doctrine in other appropriate contexts . where it is essential, in the interests of justice, to adjudicate rights of living persons is encouraged." In re Estate of Lange, supra, 75 N.J. at 486 n. 12, 383 A.2d 1130 (citation omitted).

We have carefully considered the virtual representation rule, its rationale and purposes, and are satisfied that neither the express provisions of the rule nor the "in the interest of justice" catchall in Lange applies here. Accordingly, the Probate Division judge in 1975 erred when he relied on R. 4:26-3(a) to appoint David Freeman as the "virtual representative" of the minor remainderpersons. As a result, the Chancery Division judge's reliance on the finality of the probate order appointing David to "virtually represent" the other minor remainderpersons was misplaced.

Each of the remainderpersons were themselves presumptive takers, and, as such, each was entitled to have been joined as virtual representative of his or her own living or unborn issue. (They, of course, had no living issue.) See In re Estate of Lange, supra, 75 N.J. at 486, 383 A.2d 1130 (recognizing that each of the three presumptive takers in that case represented his or her own class, and when all three acted as the virtual representative of his or her respective class, all successors to those interests were bound)...

Nor could Virginia Freeman or Katherine Holt represent the minor children's [12] interests in the proceedings, despite their receipt on behalf of the children of notice of the proceedings to approve the accounting.[13] This is because a clear conflict of interest existed between them as the life beneficiaries and their children as the ultimate remainderpersons. See Bliss v. Bliss, 126 N.J.Eq. 308, 310, 8 A.2d 705 (Ch.1939) (discussing conflict between life beneficiary's interest and remainderpersons' interests), aff'd o.b., 127 N.J. Eq. 20, 11 A.2d 13 (E. & A.1940); see also In re Estate of Cooper, 81 Wash.App. 79, 913 P.2d 393 (determining that trustee breached duty by maintaining investment policy that maximized income to detriment of trust corpus growth), review denied, 130 Wash.2d 1011, 928 P.2d 414 (1996); Restatement (Third) of Trusts § 232 (Westlaw 1997) (discussing trustee's duty to successive beneficiaries to assure fair balance between increasing the value of the corpus of the trust and increasing the income

> generated by the trust); 7 New Jersey Practice, Wills and Administration § 994.5 (Alfred C. Clapp & Dorothy G. Black) (rev.3d ed.1984) (same principle). As life beneficiaries entitled only to the income earned by the trust assets, it reasonably could be inferred that the primary interest of Virginia Freeman and Katherine Holt was to maximize that income, rather than to preserve the trust corpus for their children. Midlantic's predecessor trustees understood this conflict as reflected by their insistence, at least in the first three intermediate accountings, that the minor children be represented by an independent guardian ad litem...
>
> In view of the obvious conflict between the life beneficiaries and the minor remainderpersons in this case, the trustee had a duty to assure that an independent guardian ad litem was appointed. Accordingly, to the extent that the minor remainderpersons were not adequately represented during the proceedings to approve the fourth intermediate accounting, Donald Freeman, Gregory Holt and Lauren Holt Rupp cannot be bound by the order approving that accounting. Therefore, the Chancery Division judge should not have dismissed their exceptions to the fourth intermediate accounting on that basis, and we are constrained to reverse that aspect of the court's June 13, 1996 order and direct that the minor remainderpersons' pleadings with regard to the fourth intermediate accounting be reinstated. We also direct the judge to reinstate the exceptions as to David Freeman as well, despite the fact that he was not a minor in 1975, in light of his claim of lack of knowledge of the proceeding to approve the fourth intermediate accounting. However, Midlantic may avail itself of the opportunity to conduct discovery concerning this claim, even though the trustee did not present contradictory evidence in opposition to the remainderpersons' exceptions. In view of the summary nature of the proceedings before the Chancery Division, and our decision to remand the entire matter, it is only fair that both sides have an opportunity for discovery.

[Matter of Will of Maxwell, supra at 585-86].

The Appellate Division's decision in Matter of Will of Maxwell could not have been more instructive for the trial court in this matter with respect to whether

or not Defendant did in fact have standing to challenge the actions of the Co-Trustees during the lifetime of Gloria Offray. Despite it being unambiguously clear Defendant did in fact have standing, the trial court ignored the Appellate Division decision in its entirety.

Why Matter of Will of Maxwell is so instructive with regard to this litigation is that even when the trustees had prepared accountings and they were approved by the trial court, because the remainder beneficiaries were not properly represented, including a remainder beneficiary who was not a minor at the time of the approval, the Appellate Division found the remainder beneficiaries had standing to challenge the actions of the trustees during the lives of the prior beneficiaries.

In this instance, the case for standing and the right of Defendant to challenge the actions of the Co-Trustees during the lifetime of Gloria Offray is even stronger than in Matter of Will of Maxwell, where the trustees actually submitted accountings to the Court for approval. Here, not only did the Co-Trustees not submit either a formal accounting, they did not even submit an informal accounting to settle their accounts with Gloria Offray. As such, based on Matter of Will of Maxwell, Defendant certainly has standing to challenge the actions of the Co-Trustees during the lifetime of Gloria Offray until her death in 2021.

To find otherwise would be anathema to the purpose of an accounting, which allows beneficiaries to review and challenge the actions of a trustee. For example,

to follow the reasoning of the trial court and the Co-Trustees, the Co-Trustees could have stolen the entire corpus of the trusts during the lifetime of Gloria Offray, or with respect to their investments, only gained one (1) dollar on their investments of the multimillion dollar trusts, and even though they never submitted an accounting, formal or informal, because Defendant was only a remainder beneficiary during that time, the Co-Trustees' theft of the corpus or failure to obtain anything resembling a reasonable income on their investments, could not be challenged after the death of the beneficiary. This certainly makes no sense, because unless the remainder beneficiary is permitted to challenge the actions of the trustee there would be no one left to contest the malfeasance of the Co-Trustees. It is beyond dispute BOA and Dill as the Co-Trustees, and Dill as the Executor of Gloria Offray's Estate, will definitely not be litigating their own breach of fiduciary duty.

Moreover, the issue of whether or not the Co-Trustees could have distributed all of the income and principal from any of the Trusts during Gloria Offray's lifetime, thereby vitiating any right of Defendant as a remainder beneficiary to challenge their breach of fiduciary duty, is a red herring.

First, the dismissal based on lack of standing was on a Motion to Dismiss for Failure to State a Claim. Thus, while the Co-Trustees could have distributed all of the income and principal of two (2) of the Trusts, not all four (4), there was no evidence whatsoever in the record before the trial court to prove the Co-Trustees did

in fact distribute all of the income and principal during the lifetime of Gloria Offray. And, upon information and belief, it is believed the Co-Trustees did not in fact distribute all of the income and principal of all four (4) of the Trusts during her lifetime. Therefore, given this is an issue of fact, it was improper for the trial court to base dismissal on an issue that is subject to discovery.

Furthermore, the trial court based its finding of lack of standing for all four (4) Trusts on the provision in only two (2) of the Trusts, being the provision regarding distribution of all of the income and principal during the lifetime of Gloria Offray. Given that such provision was contained in only two (2) of the Trusts, being the Marital Trusts (Da53-60), the trial court had no basis whatsoever in finding Defendant lacked standing to challenge the actions of the Co-Trustees predicated on that provision when there is no dispute the other two (2) Trusts contained no such provision. Accordingly, at a minimum, Defendant has standing to challenge the actions of the Co-Trustees in their handling of the two (2) non-Marital Trusts during the lifetime of Gloria Offray.

Nevertheless, based on the foregoing, Defendant has standing to challenge the actions of the Co-Trustees for all four (4) of the Trusts during the lifetime of Gloria Offray. As a result, Defendant requests the Court reverse the decision of the trial court and find Defendant has standing to challenge the actions of the Co-Trustees

for all of the Trusts during Gloria Offray's lifetime and remand the matter to the trial court and to a different Judge.

POINT III

THE TRIAL COURT COMMITTED AN ERROR OF LAW AND AGAIN IGNORED APPELLATE DIVISION CASELAW IN FINDING A CAUSE OF ACTION UNDER THE PRUDENT INVESTOR ACT DOES NOT EXIST FOR FAILURE OF THE TRUSTEES TO OBTAIN A REASONABLE INCOME FROM THEIR INVESTMENT OF THE ASSETS OF THE TRUSTS (Da35-41)

The second egregious error made by the trial court is a finding the only viable cause of action existing under the Prudent Investor Act, N.J.S.A. 3B:20-11.1 et seq. ("PIA") and common law for breach of fiduciary duty by a trustee is for a depreciation in value of the principal of the trust, and that a cause of action does not exist for failure of the trustee to obtain a reasonable rate of return. (Da37-41) Respectfully, it is inexplicable how the trial court came to this conclusion, when in its opinion the trial court quoted a number of sources, including an Appellate Division decision, stating one of the duties of a trustee as a prudent investor is to obtain a reasonable rate of return for the beneficiary. And, then, without any explanation whatsoever, the trial court found otherwise.

As set forth below, a cause of action does in fact exist under the PIA and common law for the failure of a trustee to obtain a reasonable income, not only for the lifetime beneficiary, but for the remainder beneficiary as well. This is the standard not only in New Jersey, but in a number of cases across the United States.

First, there is nothing in the PIA nor the common law that should lead anyone to conclude a cause of action under the PIA and common law is limited to

depreciation of the value of a trust. In fact, the PIA and common law refer to the need of the fiduciary to take into consideration "the expected total return from income and the appreciation of capital." And, as the Court will see, there is nothing in either the PIA nor common law that limits the fiduciary as a prudent investor to the single goal of ensuring there is not a depreciation of the principal. Rather, the duties of the fiduciary as a prudent investor are quite broad. The PIA states in part as follows:

> a. A fiduciary shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the fiduciary shall exercise reasonable care, skill, and caution.
>
> b. A fiduciary's investment and management decisions respecting individual assets shall not be evaluated in isolation, but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.
>
> c. Subject to the standards established in this act, a fiduciary may invest in any kind of property or type of investment. No specific investment or course of action is inherently imprudent.
>
> d. Among the circumstances that the fiduciary shall consider in investing and managing trust assets are those of the following as are relevant to the trust and its beneficiaries:(1) general economic conditions;(2) the possible effect of inflation or deflation;(3) the expected tax consequences of investment decisions or strategies;(4) the role that each investment or course of action plays within the overall trust portfolio;(5) **the expected total return from income and the appreciation of capital**;(6) other resources of the beneficiaries;(7**) the need for liquidity, for regularity of income, and for preservation or appreciation of capital**; and(8) an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of

> the beneficiaries as, for example, an interest in a closely-held enterprise, tangible and intangible personalty, or real estate.
>
> e. The fiduciary shall take reasonable steps to verify facts relevant to the investment and management of trust assets and may rely and be fully protected in relying upon statistical, financial, corporate or other information as to a particular investment, and upon ratings or other opinion as to the financial or other status thereof, contained in or offered by any financial, statistical, investment, rating or other publication or service published for the use of and accepted as reliable by investors in like investments or upon a copy of the prospectus prepared and filed with the Securities and Exchange Commission in connection with a new issue.
>
> f. A fiduciary who has special skills or expertise, or is named fiduciary in reliance upon representations of special skills or expertise, has a duty to use those special skills or expertise

[emphasis added] [N.J.S.A. 3B:20-11.3]. Thus, based upon the clear language of the PIA, a fiduciary, such as the Co-Trustees, has a duty as a prudent investor to take into account in its investments "the expected total return from income and the appreciation of capital... [and] the need for liquidity, for regularity of income, and for preservation or appreciation of capital." These two provisions of the PIA establish a duty of a trustee to obtain a reasonable rate of return on its investments, and, if they do not, establish why it was not a breach of their fiduciary duty under the PIA to do so.

The obligation of the trustee to obtain a reasonable rate of return on its investments under the PIA is supported by two (2) cases from this Court, being In re Gloria T. Mann Revocable Tr., 468 N.J. Super. 160 (App. Div. 2021) and Matter of

Will of Maxwell, supra. In fact, the trial court cited to In re Gloria T. Mann Revocable Tr., and quoted from it, stating:

> In addition, Plaintiffs have not plead a violation of the PIA. The PIA, as well as the common law of trusts, obligates trustees to make investment as a prudent person would make of his own property in order to (1) preserve the estate and (2) the amount of income to be derived. Therefore, a trustee's investment strategies are concerned with preserving the principal and providing for a regular return. See Matter of Gloria T. Mann Revocable Trust, 468 N.J. 160, 173 (App. Div. 2021). [Da39-40].

So, what did the trial court find in the above-quoted case is required of a trustee under the PIA as a prudent investor—to make investments for "the amount of income to be derived" and to "provid[e] for a regular return." (Da40) Based on this language in the trial court's opinion it is baffling how the trial court could then conclude a cause of action does not exist under the PIA and common law for the failure of the Co-Trustees to obtain a reasonable income from their investments.

Moreover, even though cited to in its decision, the trial court completely ignored Matter of Will of Maxwell in finding an action under the PIA and common law is limited to a depreciation of the principal of a trust, where the Appellate Division stated:

> Applying these principles here, we hold that the pleadings presented by the remainderpersons were sufficient as a matter of law. **Their challenge to the minimal performance of the trust corpus when viewed against the allegations of conflict of interest, lack of diversity, and imbalance in the investment portfolio justifies permitting discovery concerning whether the trustees exercised**

> **their "special skills or expertise" to prudently and impartially manage the trust assets for the ultimate remainderpersons**.")

[emphasis added] [Matter of Will of Maxwell, 306 N.J. Super. at 586].

Why the trial court ignored this decision in its conclusion is beyond explanation, other than the trial court was result oriented. Without question, in Matter of Will of Maxwell, this Court held a remainder beneficiary has a cause of action for the minimal performance of the trust corpus, which is exactly what Defendant pleaded in both its Counterclaim and Amended Counterclaim.

With respect to the one (1) case the trial court relied on for finding a cause of action under the PIA is limited to the depreciation of the principal, In re Unisys Sav. Plan Litigation, 74 F.3d 420 (3rd Cir. 1996) (Da40), the trial court's reliance on this case is both misplaced and a complete misunderstanding of what the Third Circuit said.

First, In re Unisys Sav. Plan Litigation has nothing whatsoever to do with the PIA. Rather, it was a litigation under the Employee Retirement Income Security Act of 1974, ("ERISA"), 29 U.S.C. § 1001 et seq. (1985 & Supp.1995), that has its own set of standards for investments. And, nowhere will this Court find a single mention of the PIA in the Third Circuit's decision.

Second, there is not a single word in the Third Circuit's opinion limiting causes of action to a depreciation of the principal. And, the reason for this is because the litigation was about the fiduciary of the ERISA plan's failure to diversify its

investments, leading to a huge depreciation of the principal. So, there was not even a reason for the Third Circuit to make any finding on a limitation of a cause of action for failure to obtain a reasonable rate of return on the investments.

Third, Defendant cannot fathom why the trial court even cited to In re Unisys Sav. Plan Litigation, 74 F.3d at 434 for the proposition "[w]ithout a depreciation in value of the estate, there can be no liability." First, the Third Circuit said no such thing. Rather, what the Third Circuit actually said at page 434 is: "Under the common law of trusts, a trustee is duty-bound "to make such investments and only such investments as a prudent [person] would make of his own property having in view the preservation of the estate **and the amount and regularity of the income to be derived**. . . ." (emphasis added) Restatement (Second) of Trusts § 227 (1959)." How the trial court could take this statement of the Third Circuit as a holding "[w]ithout a depreciation in value of the estate, there can be no liability," when the Third Circuit actually said a trustee is duty-bound to make investments as a prudent person would make of his own investments taking into account "the amount and regularity of the income to be derived" is again inexplicable.

With respect to the actual duty of a trustee under the PIA as a prudent investor to provide beneficiaries with a "reasonable income," this Court recently found as follows:

> "The most fundamental duty owed by the trustee to the beneficiaries of the trust is the duty of loyalty," which prevents the trustee from administering the trust in a way that militates toward the trustee's benefit and the beneficiaries' detriment. *In re Est. of Koretzky*, 8 N.J. 506, 528-29, 86 A.2d 238 (1951) (collecting cases); *see also In re Gloria T. Mann Revocable Tr.*, 468 N.J. Super. 160, 172, 256 A.3d 407 (App. Div. 2021) (providing trustees must "invest and manage the trust assets solely in the interest of the beneficiaries" (quoting N.J.S.A. 3B:20-11.5)). A trustee bears similar duties to a trust's remaindermen, if any, and must not use the trust property to benefit only "the life beneficiaries." *In re Will of Maxwell*, 306 N.J. Super. 563, 585-86, 704 A.2d 49 (App. Div. 1997) (collecting authorities).
>
> Trustees are further subject to the requirements set forth in the [*19] Act, which "expresses a standard of conduct, not outcome," for a trust's fiduciaries, and compliance "is determined in light of the facts and circumstances existing at the time of the fiduciary's decision or action." *Gloria T. Mann Revocable Tr.*, 468 N.J. Super. at 173 (quoting N.J.S.A. 3B:20-11.9). Under the Act, fiduciaries must "invest and manage trust assets as a prudent investor would," including by exercising "reasonable care, skill, and caution" in handling those assets according to "the purposes, terms, distribution requirements, and other circumstances of the trust." *Id.* at 172 (quoting N.J.S.A. 3B:20-11.3(a)). To that end, the Act enumerates "circumstances that the fiduciary shall consider in investing and managing trust assets." N.J.S.A. 3B:20-11.3(d)(1)-(8).
>
> **With these circumstances in mind, trustees are duty bound "to preserve the trust property" and "make it productive so" the beneficiaries receive "a reasonable income."** *Gloria T. Mann Revocable Tr.*, 468 N.J. Super. at 172 (quoting *Pa. Co. for Ins. on Lives v. Gillmore*, 137 N.J. Eq. 51, 58, 43 A.2d 667 (Ch. 1945)).

[emphasis added] [In re Estate of Nigito, 2024 N.J. Super. Unpub. LEXIS 3136, *18-19] [Da267-284].[2]

[2] Pursuant to R. 1:36-3 a copy of the unpublished opinion is made a part of the Appendix as Da267. Defendant is unaware of any contrary opinions.

Furthermore, New Jersey courts are not alone in finding a cause of action exists under the PIA and common law for failure of the trustee to obtain a reasonable income for the benefit of both the beneficiary and remainder beneficiary. See e.g., Goodwine v. Goodwine, 819 N.E.2d 824, 828 (Ind. Ct. App. 2004) ("Moreover, the trustee must preserve the trust property and make it productive for both income and remainder beneficiaries."); The Woodward School of Girls, 469 Mass. 151, 164 (2014) (A trustees' duty is primarily to invest in such a manner as to produce an income for income beneficiaries and secondarily to preserve the principal); Christensen v. Superior Court, 193 Cal. App. 3d 139, 143 (Cal. 1987) ("A trustee has a 'general duty to maximize the trust assets consistent with safety and other relevant considerations'."); In re Estate of Cooper, 81 Wn. App. 79, 89 (Wash. Ct. App. 1996) (Washington's prudent investor rule requires the trustee as a prudent investor to consider income as well as the safety of the capital and the requirements of the beneficiaries).

Based on the foregoing, there is, without question, a duty for a trustee, such as the Co-Trustees, as a prudent investor to at a minimum invest so as to obtain a reasonable income from investment of the assets of a trust. Nowhere in any case known to Defendant will this Court find a cause of action against a trustee under the PIA and common law is limited to depreciation of the value of the principal of the trust. And, in this instance, not only did the trial court not cite to any authority for

this proposition, not only did the trial court err in its reliance on and misstate the holding in In re Unisys Sav. Plan Litigation, not only did the trial court ignore Matter of Will of Maxwell, where this Court found a cause of action exists for the minimal performance of the trust, the trial court actually quoted caselaw for the proposition a trustee has a duty as a prudent investor to provide for a regular return of income to beneficiary, citing to Matter of Gloria T. Mann Revocable Trust.

What the trial court did, moreover, was only paraphrase Matter of Gloria T. Mann Revocable Trust. The actual quote from the case, which could not be more contrary to the holding of the trial court is "**'the trustee is under a duty . . . 'not merely to preserve the trust property but to make it productive so that a reasonable income will be available for the'" beneficiaries**," citing Pa. Co. for Ins. on Lives v. Gillmore, 137 N.J. Eq. 51, 58 (Ch. 1945). (emphasis added). In light of the above-quoted language, Defendant is hard pressed to understand how the trial court could have ignored the Appellate Division and find that under both the PIA and common law a cause of action does not exist for a beneficiary to challenge the trustee's failure to obtain a reasonable income from investment of a trust's assets.

And, in this instance, not only was the income obtained by the Co-Trustees not reasonable, the income was woefully unreasonable. For the reasons stated herein Defendant respectfully requests the Court reverse the decision of the trial court and find a cause of action exists under both the PIA and common law for breach of

fiduciary duty by a trustee due to its failure to invest trust assets to obtain a reasonable income. Moreover, Defendant respectfully requests that on remand the matter be assigned to a different Judge due to the fact the trial court ignored and misstated precedent that not only was incorrect, but appeared to be result oriented.

POINT IV

THE TRIAL COURT COMMITTED ERROR IN FINDING DEFENDANT'S ADULT CHILDREN WERE INDISPENSABLE PARTIES TO THE LITIGATION BECAUSE THEY HELD POWERS OF ATTORNEY FOR THE DEFENDANT AND THEY ARE REMAINDER BENEFICIARIES (Da31-34)

The trial court committed error in finding that Defendant's adult children should have been named as indispensable parties due to Defendant having given each of his children a Power of Attorney, citing to R. 4:28-1(a). (Da105-128) And, the trial court committed further error in finding the children are indispensable parties because their interests will be affected by the outcome of the litigation as remainder beneficiaries to the Trusts. (Da33-34)

With respect to the children being indispensable parties due to the Powers of Attorney, the Court will note the trial court did not cite to any case law for the proposition anyone holding a power of attorney is an indispensable party, regardless of how limited or how broad is the power of attorney. The reason for the lack of cases is, because at best, someone who holds a power of attorney is no more than a witness, as the party in interest herein is Defendant.

And, this is particularly more so, when there is no claim the grantor of the power of attorney is incompetent. In this instance there is no claim Defendant is incompetent, only that Defendant has authorized his children through powers of attorney to litigate and handle matters concerning his Estate and Trusts on his behalf.

Moreover, there is nothing in either Power of Attorney that divests Defendant from the ability or authority to act on his own behalf.

With respect to the children being indispensable parties due to the fact they are remainder beneficiaries, again the trial court misunderstands the rules with respect to Probate. And, this Court must recognize the Motion to Dismiss for Failure to State a Claim was decided by a Judge sitting in the Law Division, not probate. So, that may account for the misunderstanding.

Regarding remainder beneficiaries, all that is required is the remainder beneficiary, if an adult, have notice of litigation that affects his/her interests, not that he/she is an indispensable party to the litigation. And, upon notice, the adult beneficiary can voluntarily decide whether or not to join the litigation. While not part of the record, which is very relevant upon a Motion to Dismiss for Failure to State a Claim and which should have been very relevant to the trial court's determination, counsel for Defendant can assure the Court the children are very much aware of the litigation.

While not determinative with regard to being a necessary party to the litigation, the trial court's finding with respect to the children being necessary parties as remainder beneficiaries is in fact relevant to whether or not Defendant has standing to challenge the actions of the Co-Trustees during the lifetime of Gloria Offray. As the Court can see, the trial court found that as remainder beneficiaries

the adult children are necessary parties to the litigation. This finding is in clear conflict with the trial court's determination that as a remainder beneficiary Defendant does not have standing to challenge the actions of the Co-Trustees during the lifetime of Gloria Offray. To be blunt, the trial court cannot have it both ways. Either a remainder beneficiary does not have standing during the lifetime of the beneficiary to challenge the actions of the trustee or the remainder beneficiary does in fact have standing.

What caselaw holds, as found in Matter of Will of Maxwell, supra, a remainder beneficiary does in fact have standing to challenge the actions of the trustee, as long as they are given proper notice. In this case, the trial court, before concluding the adult children are necessary parties simply because they are remainder beneficiaries, should have on a Motion to Dismiss for Failure to State a Claim determined whether or not the adult children were on notice of the litigation. The trial court, without dispute, did not do so. Instead, the trial court found as a matter of law, without any factual basis to do so, the adult children as remainder beneficiaries were indispensable necessary parties and the litigation could not proceed without them being joined. This finding by the trial court was incorrect as a matter of law. See Matter of Will of Maxwell, supra.

Based on the foregoing it was improper for the trial court to dismiss the litigation as a matter of law for failure to join the adult children of Defendant as indispensable parties to the litigation pursuant to R. 4:28-1(a).[3]

[3] While Defendant does not agree with the trial court's dismissal of Count I of the Amended Counterclaim Defendant is not appealing that portion of the trial court's decision, as it is based on the discretion of the Co-Trustees with respect to a related litigation. That decision with respect to the related litigation is currently subject to a Motion for Reconsideration. If the Motion is unsuccessful, and/or if it is unsuccessful on appeal, Defendant reserves its right to appeal the trial court's dismissal.

CONCLUSION

For the foregoing reasons Defendant Claude V. Offray, III respectfully requests this Court reverse the decision of the trial court and remand Count II of the Amended Counterclaim to the trial court and upon remand to a different Judge, as the trial court committed numerous and blatant errors of law and that appeared to be result oriented.

Respectfully submitted,

HEROLD LAW, P.A.
Attorneys for Defendant/Appellant
Claude V. Offray, III

By:/s/ Craig S. Provorny
Craig S. Provorny, Esq.

DATED: May 21, 2025

ALBERT DILL, as Executor of the Estate of Claude V. Offray, Jr., and as Co-Trustee of the Revocable Trust, Credit Shelter Trust, Exempt Marital Trust, and Non-Exempt Marital Trust under the Revocable Trust Agreement, and BANK OF AMERICA, N.A., as Co-Trustee of the Revocable Trust, Credit Shelter Trust, Exempt Marital Trust, and Non-Exempt Marital Trust under the Revocable Trust Agreement,

Plaintiffs/Respondents,

v.

CLAUDE V. OFFRAY, III, as beneficiary of the Claude V. Offray, Jr. Trusts u/a/d March 3, 2011, as Amended and Restated on June 4, 2013, and as amended on February 26, 2014,

Defendant/Appellant.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-001498-24

ON APPEAL FROM:
SUPERIOR COURT
LAW DIVISION, UNION COUNTY
Docket No. UNN-L-958-24

Honorable John G. Hudak, J.S.C.

CIVIL ACTION

BRIEF ON BEHALF OF RESPONDENTS BANK OF AMERICA, N.A. AND ALBERT DILL IN THEIR REPRESENTATIVE CAPACITIES

Of Counsel and On the Brief:

MORGAN, LEWIS & BOCKIUS LLP
Brian W. Shaffer, Esq. (NJ ID 025651996)
2222 Market Street
Philadelphia, PA 19103
(215) 963-5000
brian.shaffer@morganlewis.com

DONNELLY MINTER & KELLY, LLC
Patrick B. Minter (NJ Bar No.: 031661994)
163 Madison Ave, Suite 320
Morristown, New Jersey 07960
(973) 200-6400
pminter@dmklawgroup.com

Date: July 21, 2025

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PRELIMINARY STATEMENT

Appellant Claude V. Offray III ("Victor")'s opening brief challenging the trial court's dismissal of his claims is heavy on rhetoric and accusations, but light on law and logic. The trial court was correct to dismiss Victor's Amended Counterclaim against Respondents Bank of America, N.A. ("BANA") and Albert Dill, Co-Trustees of four Trusts relevant to this case. The only dismissed Count that Victor appeals alleged that the Trusts achieved an unreasonably low rate of return. The Counterclaim included no specificity about what rate the Trusts achieved or should have achieved, what investments should have been different, or any other alleged facts that could possibly support the claim.

The trial court properly dismissed this claim in its entirety for three independent reasons. Victor failed to (i) allege any facts with specificity to support it, (ii) allege a depreciation of Trust assets, and (iii) include indispensable parties in this case. The trial court also correctly dismissed the bulk of the claim (for all time before March 24, 2021) for a fourth reason—(iv) Victor's mother Gloria was the only beneficiary entitled to income before her death, and thus Victor lacked standing.

On appeal, Victor inexplicably fails to challenge one of the independent grounds for dismissal: that he failed to allege any facts with specificity to

support his claim. Despite the Trustees pressing this argument below and the trial court accepting it, Victor ignores it on appeal. That waiver is enough for this Court to affirm the entire dismissal because the only appealed Count cannot succeed without the requisite fact-pleading. And even if Victor challenged this holding, his argument would fail. Indeed, he alleges no actions or inactions that supposedly violated the Trustees' fiduciary or statutory duties. He concedes that the Prudent Investor Act requires trustees to balance a host of considerations, many of which have nothing to do with rate of return, and yet he fails to allege a single consideration the Trustees ignored—or anything they could or should have done differently in managing the Trusts.

A separate reason to affirm is that Victor alleges no depreciation of Trust value—never disputing the value of the Trusts increased by over a million dollars in two years. Victor's naked insistence that the Trusts should have increased in value by even more simply does not state a claim for relief under the terms of the Trusts and governing law, which requires Trustees (among other things) to exercise caution to avoid losses, preserve the trust principal, and provide for regular (not risky) income. And the few cases that Victor block-quotes throughout his brief do not support his claim, as they contemplate liability only for decreased principal—which is not alleged here.

Relatedly, this claim was rightly dismissed for the bulk of the time period at issue—when Gloria was alive. During that time, Victor was simply a contingent remainderman beneficiary. The Trustees' only common law duty as to him was to preserve the Trust principal—which they indisputably did.

Finally, the entire claim was properly dismissed for Victor's failure to join indispensable parties. Through discovery, the Trustees learned that Victor had no knowledge of this case and was relying entirely on his Attorneys-in-Fact (two of his children) to pursue his claims. The relevant Powers of Attorney gave his Attorneys-in-Fact near complete control over this case and confirmed that they are necessary to resolve it and have an interest in its outcome. Given the unique facts here, his children were properly deemed indispensable parties.

The trial court had ample justification to dismiss Victor's Counterclaim. The Court should disregard Victor's over-heated rhetoric and affirm dismissal for any of these straightforward, independent reasons.

PROCEDURAL HISTORY

In April 2023, Plaintiffs/Respondents BANA (as Co-Trustee of the Revocable Trust, Credit Shelter Trust, Exempt Marital Trust, and Non-Exempt Marital Trust under the Revocable Trust Agreement (collectively, the "Four Trusts")), and Albert Dill (as Executor of the Estate of Claude V. Offray, Jr. and

as Co-Trustee of the Four Trusts) filed a Verified Complaint seeking declarations and instructions regarding the funding and distribution of the Four Trusts created by Appellant's father, Claude V. Offray, Jr. ("Claude"). Da23. These claims were resolved by the parties and the trial court's September 7, 2023 Consent Order. Da262–65.

That was not the end of the case, however, because Appellant Claude V. Offray III ("Victor") filed counterclaims on June 15, 2023, which were amended on September 4, 2024. Da202–15; Da239–53. He asserted (1) a breach of fiduciary duty claim for failure to fund the Exempt Generation Skipping Transfer Tax Trust ("GST Trust") and the Non-Exempt Generation Skipping Transfer Tax Trust ("Non-GST Trust") as required by the trust instrument ("Counterclaim Count I") and (2) a breach of fiduciary duty claim and a statutory claim under the Prudent Investor Act (the "PIA") for failure to secure a "reasonable rate of return" on the principal of the Four Trusts and Claude's Estate ("Counterclaim Count II"[1]). Da244–50.

On December 13, 2024, the trial court dismissed Victor's counterclaims. The court dismissed Counterclaim Count I for the Co-Trustees' alleged failure

[1] His second claim, however, was titled "Failure to Properly Manage Estate Assets."

to fund the GST and Non-GST Trusts because Victor failed to state a claim; dismissed Counterclaim Count II for alleged violations of the Prudent Investor Act and breach of fiduciary duty for failure to state a claim and for lack of standing; and found that both counts should also be dismissed because Victor failed to join his Powers of Attorney and contingent beneficiaries as indispensable parties. Counterclaim Count I was dismissed without prejudice, and Counterclaim Count II was dismissed with prejudice for events prior to March 24, 2021 and without prejudice for events after that date. Da20–21. Victor chose not to amend his pleading within the thirty days contemplated by the dismissal order. Da21. The order dismissing Count II is the subject of Victor's appeal.

STATEMENT OF FACTS

I. The Four Trusts and Revocable Trust Agreement

This case involves Four Trusts created by Victor's father Claude. Claude died testate on May 31, 2014, having executed the Amended and Restated Claude V. Offray, Jr. Revocable Trust Agreement dated June 4, 2013, which amended and restated the Claude V. Offray, Jr. Revocable Trust Agreement dated March 3, 2011, and further executed the First Amendment to the Amended and Restated Claude V. Offray, Jr. Revocable Living Trust on February 26, 2014

(collectively, the "Revocable Trust Agreement" or "RTA"). Da49–78. Dill is the executor of Claude's Estate, and Dill and BANA are the Co-Trustees of the Four Trusts that were established by the RTA.

The RTA created an inter vivos trust, which, upon Claude's death, became irrevocable, see Da51 at § 3.4, the principal of which was then to be used to fund three other separate trusts for the benefit of Claude's surviving spouse, Gloria Offray ("Gloria"): the Exempt Marital Trust, the Non-Exempt Marital Trust, and the Credit Shelter Trust. See Da53–57 at §§ 5.1–2. The RTA required the Trustees to distribute the entire amount of income generated from the two Marital Trusts to Gloria during her lifetime. See Da54 at § 5.1(b) ("Trustees shall pay the entire net income of each of the Marital Trusts to or for the benefit of Grantor's Spouse . . . ."). Upon Gloria's death on March 24, 2021, the Trustees were required by the RTA to "distribute all accumulated, accrued and undistributed income of the Marital Trusts to Grantor's Spouse's estate." See Da55 at § 5.1(i).

The RTA also permitted the Trustees, in their sole discretion, to exhaust trust principal for Gloria's benefit during her lifetime. Gloria had the absolute right to receive 10% of the value of the Non-Exempt Marital Trust principal while she was alive. See Da54 at § 5.1(d). Additionally, the Trustees had the

absolute discretion to "pay to or apply for the benefit of Grantor's Spouse as much or all of the principal of the Marital Trusts as may be necessary from time to time, in the sole discretion of Trustees, for Grantor's Spouse's health, education, maintenance and support." See id. at § 5.1(c) (emphasis added). Finally, during Gloria's lifetime, the Trustees could "in their sole discretion, . . . pay to or apply for the benefit of Grantor's Spouse so much, any or all of the net income and principal" of the Credit Shelter Trust "as may be necessary or advisable in the Trustees' discretion, from time to time, for Grantor's Spouse's maintenance, support, health and education" if they consider the other financial resources available to meet these needs. See Da56 at § 5.2(a) (emphasis added). Victor had no right to receive any distributions of income or principal from the Revocable Trust itself. See Da50–53 at §§ 3, 4.

II. Victor's Counterclaim

BANA and Dill filed a Verified Complaint on April 20, 2023, seeking declarations from the Court and seeking instructions regarding the funding and distribution of the Four Trusts and their decision to postpone funding of the GST and Non-GST Trusts. Da23. These claims were resolved by the parties and the Court's September 7, 2023 Consent Order. Da262–65.

On June 15, 2023, Victor filed his Answer and Counterclaim. Da202–15. In the first Count of his Counterclaim, Victor alleged that the Trustees breached their fiduciary duty by failing to fund the GST and non-GST Trusts with all the net income of the Four Trusts. Da208–12.

In his second Count ("Failure to Properly Manage Estate Assets"),[2] Victor originally alleged that the Trustees breached their fiduciary duty and specifically alleged that "[i]ncome at a rate of approximately 2.5% per year" during the two years following Gloria's death was not a reasonable rate of return on the principal of the Four Trusts and Estate. See Da213 at ¶¶ 33–34. On September 4, 2024, Victor amended this Count, alleging that the Trustees breached some unspecified fiduciary duty and the Prudent Investor Act by "failing to adjust the Trusts' and Estate's investments of securities and equities in a manner to generate a reasonable rate of return on the principal" from "May 31, 2014 through February 29, 2024." Da250 at ¶¶ 34, 36–38. In doing so, Victor removed the allegation that the rate of return on the Four Trusts was approximately 2.5% per year and failed to substitute it with any alleged rate of

[2] This Count was incorrectly numbered as "Count Three" in the original Answer and Counterclaim.

return, despite generally citing the accountings for the Four Trusts, which provide detailed information on the investments of the Four Trusts' assets and the income generated by the Four Trusts. Compare Da212–13 with Da249–50. Victor's Amended Counterclaim identified no provision of the RTA, which governs the funding and administration of the Four Trusts, that was allegedly breached. See Da249–50.

Victor sought several forms of relief, including (i) removal of BANA and Dill as Co-Trustees of the Four Trusts and Dill as the Executor of the Estate; (ii) appointment of successor Executor and Co-Trustees; (iii) entry of an order directing the Trustees to distribute principal from the Four Trusts; (iv) entry of an order directing the Trustees to fund the GST and non-GST Trusts; and (v) monetary damages including interest. Da250–52.

III. Victor's Attorneys-in-Fact

On June 27, 2024, Counsel for BANA and Dill deposed Victor on his Counterclaim and related filings certified by Appellant, including his Supplemental Responses to Plaintiffs' Interrogatories, which he served on the Trustees around two days before his deposition. See Da80–90. During this deposition, BANA and Dill learned—for the first time—that Appellant was

entirely relying on his Attorney(s)-in-Fact to "handle" his Counterclaims,[3] and any factual basis purportedly underlying each of the counts therein.[4] Appellant repeatedly testified that he himself had no knowledge of the facts underlying his Counterclaims, although he had certified that he had knowledge of "all of the facts stated in the Counterclaim" in his Supplemental Responses to Plaintiffs'

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[3] See, e.g., Da84–85 at 98:25–99:7 ("Q. And if I understand it correctly, your counterclaims that are asserted against Mr. Dill and Bank of America in the New Jersey proceeding, is it fair to say that you have essentially turned those counterclaims over to your powers of attorney, and they are handling them? A. Yes."); Da81–82 at 61:24–62:7 ("Q. So when you say this was all being handled by your daughter, Sharon, what do you mean it was being handled by her? A. She's my power of attorney. Q. So is it your understanding that she was providing the information to Mr. Provorny's office, that he needed to prepare and file this counterclaim? A. Yes.").

[4] See, e.g., Da86 at 114:18–21 ("Q. Do you know what is meant by paragraph 20 in this counterclaim? A. I'll have to ask my power of attorney."); Da87 at 115:18–22 ("Q. Where did the information come from that you allege in paragraph 22 of the counterclaim? A. Again, you'll have to ask my power of attorney."); Da88 at 126:19–22 ("Q. Do you know where that number comes from? A. Again, I don't know, at this time. You'll have to ask my power of attorney."); Da90 at 130:2–8 ("Q. Well, what do you claim the Bank of America and Al Dill did wrong with regard to managing estate assets, as it does in your counterclaim? A. That -- again, it's for my power of attorney. They will be able to give you a -- I'm not a -- you know, I'm not the expert here."); Da89 at 128:11–25 ("Q. Whoever [the Attorney-in-Fact] was, that's the person that you would rely on for any information about the contents of these counterclaims. A. Yes. Q. And that's true with respect to the count 1 that we looked at earlier, with regard to the funding and distribution from certain trusts, and it's also true with respect to this count, about managing assets. Correct? A. Yes. Q. And it would be the same person -- A. You would -- Q. -- whoever it was, it would be the same person. A. The power of attorney, yes.").

Interrogatories mere days prior to his deposition. Da83 at 79:4–18 ("Q. All right. Well, the first sentence says Claude V. Offray III has knowledge of all facts stated in the counterclaim. So what facts stated in the counterclaim do you have knowledge of? A. I'm not the expert. I don't recall . . . . Q. So what – I'm just asking you, what – can you tell me, in the counterclaim, and we can bring it back up, which facts you have knowledge of? A. I don't recall.") (discussing Da93, Appellant's Suppl. Resp. to Pls.' Interrog. No. 2). Victor testified that two of his children, Sharon Offray ("Sharon") and Claude V. Offray IV ("Claude IV"), were his Attorneys-in-Fact. Da83 at 79:22–25 ("A. This is being handled by my power of attorney. Q. And who is that? A. This has been Sharon and Claude.").

Following this deposition, BANA and Dill jointly requested that Victor provide copies of all Powers of Attorney in favor of Sharon and Claude IV. See Da102–03. The provided Powers of Attorney authorized Sharon (from May 1, 2023 to August 17, 2023) and Claude IV (from August 17, 2023 forward) to take broad actions related to claims, litigation, and Trusts and Estates from which Appellant was entitled to a share or payment. Da106–28. With respect to litigation and claims, Sharon and Claude IV are authorized to not only "[a]ssert and maintain" counterclaims to "recover damages . . . or seek an injunction,

specific performance, or other relief", but also "participate in litigation", make admission of facts, consent to examination, and bind Appellant in litigation. Da107, 115, 123. Victor's Attorneys-in-Fact are also able to "appear for the Principal . . . , execute and file or deliver stipulations on the Principal's behalf, verify pleadings, seek appellate review . . . , receive, execute, and file or deliver a consent, waiver, release, confession of judgment, satisfaction of judgment, notice, agreement, or other instrument in connection with the prosecution, settlement, or defense of a claim or litigation." Id.

The Powers of Attorney also authorize Victor's Attorneys-in-Fact with "general authority with respect to estates [and] trusts" from which he is entitled to a payment. Da108, 116, 124. The Attorneys-in-Fact may "[d]emand or obtain money or another thing of value to which the Principal is, may become, or claims to be, entitled by reason of the fund, by litigation or otherwise," "[e]xercise . . . a presently exercisable general power of appointment held by the Principal", and "[i]nitiate [and] participate in . . . litigation to remove, substitute, or surcharge a fiduciary." Id.

IV. The Trustees' Motion to Dismiss

On September 24, 2024, the Trustees filed a Motion to Dismiss the Amended Counterclaim for failure to state a claim and failure to join

indispensable parties. The Trustees argued that (a) Victor failed to adequately plead any specific act of breach or a duty owed to him by the Trustees when he alleged the investments yielded an inadequate rate of return; (b) Victor lacked standing to bring his specific claims related to the Four Trusts' rate of return during the period of May 31, 2014 through March 24, 2021 (the period between Claude's death and Gloria's death), when Victor was only a contingent remainder beneficiary; and (c) Victor failed to join his Attorneys-in-Fact who were indispensable parties to the action. Da24–26. Victor opposed the Motion to Dismiss, and the trial court granted the motion on December 13, 2024. Da20–21.

V. Order on Appeal

The trial court dismissed Victor's Counterclaim in its entirety. See Da20–41. After summarizing the parties' positions, the trial court began its analysis by addressing whether Victor had the ability to bring the Counterclaims given the Powers of Attorney delegated to his two children. The court held that under R. 4:28-1(a), Victor's children had to be included in this case. That is because Victor's Attorneys-in-Fact were subject to service of process, were handling the case on his behalf (Victor testified that he had little knowledge of the case), were

necessary to accord complete relief because the counterclaim would fail without them, and were just as much contingent beneficiaries as Victor. Da31–34.

Second, the trial court explained that Victor's first Count in his Counterclaim (for breach of fiduciary duty for failure to fund the GST and Non-GST trust) should be dismissed based on the parties' prior resolution of the issue in the Chancery Court. See Da34–36. Because the trust documents establish discretionary powers to withhold funding for these trusts, and because the Consent Order did not order otherwise, the court dismissed this count without prejudice. Id. (Victor does not challenge this dismissal on appeal. Db34 n.3.[5])

Third, the trial court addressed Count II, involving an alleged "unreasonable rate of return." See Da37–41. The Court dismissed this claim for three reasons. It held first that Victor did not have standing to challenge the Trustees' management of the Trusts while Gloria was still alive because all income had to be paid to Gloria while she was alive, and the Trusts gave the

[5] Despite concededly "not appealing that portion of the trial court's decision," Victor attempts to "reserve[] [his] right to appeal the trial court's dismissal" of Count I at some later time. Db34 n.3. That is not possible. See State v. Rochat, 470 N.J. Super. 392, 456 (App. Div. 2022) ("An issue not briefed on appeal is deemed waived.") (internal quotation marks omitted) (quoting Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011)); Bacon v. N.J. State Dept. of Educ., 443 N.J. Super. 24, 38 (2015) ("By failing to raise their original jurisdiction argument in their initial brief, plaintiffs have waived this contention.").

Trustees "sole and absolute discretion" to pay all principal to Gloria "as may be necessary." Da39. Victor would only be entitled to any principal or income if any was left over after Gloria died, and under the plain terms of the Trust, none needed to be. Id.

The trial court also held that Victor did not "plead a violation of the [Prudent Investor Act]," even if he had standing to bring the claim. Da39. While the Prudent Investor Act requires fiduciaries to invest and manage funds as a prudent investor would—exercising reasonable care, skill and caution to preserve the trust property and make it productive—it does not create liability absent a depreciation in the value of the trust principal. Da37–40. Here, the Trusts' balance increased by over a million dollars in the two years after Gloria's death, defeating any Prudent Investor Act claim. Da40.

Finally, the trial court rightly observed that Victor not only failed to allege any loss to the Trusts, he also failed "to allege what conduct [the Trustees] either engaged in or failed to engage in that led to an [allegedly] inadequate return." Id. Victor generally invoked the "accountings" provided by the Trustees in May and June 2024 for this claim, but he did "not allege what exactly the accountings showed concerning" the Trustees' actions, inactions, or investing approach that was allegedly improper. See id.

These holdings independently required dismissal of Count II. The trial court dismissed the claim for violation of the Prudent Investor Act prior to March 24, 2021 (i.e., the time of Gloria's death) with prejudice for lack of standing, but dismissed this claim after that date without prejudice for failure to state a claim. Victor was given thirty days to amend his pleadings and to add his Powers of Attorney, Da21, but he failed to do so—instead, accepting the dismissal and choosing to appeal.

LEGAL ARGUMENT

I. Legal Standard

On appeal of a motion to dismiss for failure to state a claim, this Court applies "a plenary standard of review." Rezem Family Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 114 (App. Div. 2011). It thus applies the same standard the trial court did.

As relevant here, the standard for evaluating a motion to dismiss a counterclaim for failure to state a claim upon which relief can be granted is the same as moving to dismiss a complaint under Rule 4:6-2(e). Malik v. Ruttenberg, 398 N.J. Super. 489, 493–94 (App. Div. 2008). The court accepts as true the well-pleaded factual assertions and accords the non-moving party reasonable inferences from those facts. Id. at 494. The essential facts supporting the causes

of action must be presented, and conclusory allegations are disregarded. Scheidt v. DRS Techns., Inc., 424 N.J. Super. 188, 193 (App. Div. 2012) (citing Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 768 (1989)).

Additionally, a claim for breach of fiduciary duty must be supported by facts identifying with specificity both the specific acts of breach and the asserted duty allegedly owed to the claimant. Berger v. Frazier, No. A-1852-15T1, 2018 WL 3402115, at *4–5 (N.J. Super. Ct. App. Div. July 13, 2018) (affirming dismissal of breach of fiduciary duty claim because claimant failed to identify specific inadequacies, standards, or factual allegations); see also R. 4:5-8 (requiring that for breach of trust claims, the "particulars of the wrong, with dates and items if necessary, shall be stated insofar as practicable"). A motion to dismiss "may not be denied based on the possibility that discovery may establish the requisite claim; rather, the legal requisites for plaintiffs' claim must be apparent from the complaint itself." Edwards v. Prudential Prop. & Cas. Co., 357 N.J. Super. 196, 202 (App. Div. 2003).

In evaluating a motion to dismiss for failure to join a party without whom the action cannot proceed, the court must determine whether a party is indispensable under Rule 4:28-1. See R. 4:6-2(f). An indispensable party is one whose absence precludes "complete relief . . . among those already parties." R.

4:28-1(a)(1). Such parties generally must have "an interest inevitably involved in the subject matter before the court and a judgment cannot justly be made between the litigants without either adjudging or necessarily affecting the absentee's interests." Int'l Bhd. of Elec. Workers Loc. 400 v. Borough of Tinton Falls, 468 N.J. Super. 214, 225 (App. Div. 2021) (internal quotation marks omitted) (quoting Toll Bros., Inc. v. Twp. of W. Windsor, 334 N.J. Super. 77, 90–91 (App. Div. 2000)).

II. Victor Failed to State a Claim for Failure to Generate a Reasonable Rate of Return (Da34–41).

As the trial court correctly held, Victor's allegation of failure to generate a reasonable rate of return fails in its entirety for two independent reasons. First, Victor failed to allege facts necessary to support a specific breach of duty and, second, the Trustees owed no duty to Victor to grow the principal of the Four Trusts. The trial court dismissed this claim in its entirety on both independent grounds, and this Court can affirm for either reason. In addition, even if the Court does not affirm the dismissal of the entire Count on one of these grounds (it should), the claim is not viable for any actions taken while Victor's mother Gloria was alive, so dismissal of any claim before March 24, 2021 should be affirmed in any event.

A. The Operative Counterclaim Alleges No Facts Supporting a Specific Act of Breach as Required under New Jersey Law (Da39–41).

As noted above, the Trustees argued, and the trial court held, that Victor's entire claim alleging a fiduciary breach based on an unreasonable rate of return failed because Victor did not allege "what conduct [the Trustees] either engaged in or failed to engage in that led to an [allegedly] inadequate return." Da40. His general invocation of the "accountings" provided by the Trustees in May and June 2024 did "not allege what exactly the accountings showed concerning," the Trustees' actions, inactions, or investing approach that was allegedly improper, or how such allegations showed any breach. See Da40–41 ("It is difficult to measure conduct when none is alleged."); see also Da24–25 (summarizing Trustees' motion arguing that Victor's claim must be dismissed for failure to allege any facts supporting a specific breach as required under New Jersey law); Da28 at (summarizing Trustees' reply arguing same).

Yet, Victor presents no argument—legal or otherwise—to dispute the trial court's dismissal on this ground. See generally Db9–34 (arguing for reversal only of the trial court's other holdings). That constitutes waiver on appeal and is reason alone to affirm.

Indeed, arguments not raised in an appellant's initial brief are considered waived. See State v. Rochat, 470 N.J. Super. 392, 456 (App. Div. 2022) ("An issue not briefed on appeal is deemed waived.") (internal quotation marks omitted) (quoting Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011)). And this Court has explained that it "generally decline[s] to consider arguments" not raised in an opening brief, even if later made "in a reply brief." Bacon v. New Jersey State Dept. of Educ., 443 N.J. Super. 24, 38 (2015) ("By failing to raise their original jurisdiction argument in their initial brief, plaintiffs have waived this contention.") (citations omitted).

This waiver is inexplicable, and it dooms Victor's entire appeal. It is beyond dispute that the essential facts supporting a plaintiff's causes of action must be alleged in the complaint, and conclusory allegations without factual support must be disregarded. See Scheidt, 424 N.J. Super. at 193 (citing Printing Mart-Morristown, 116 N.J. at 768). Unless a breach of fiduciary duty claim is supported by factual allegations, then, it must be dismissed. Berger, 2018 WL 3402115, at *4–5 (affirming dismissal of breach of fiduciary claim because claimant failed to identify specific inadequacies, standards, or factual allegations). As the trial court held, Count II of the Amended Counterclaim contains no factual allegations that could give rise to liability for breach of

fiduciary duty or any claim under the Prudent Investor Act. Instead, the Count is bare bones and rife with broad conclusory statements that must be disregarded.

Victor's choice not to dispute any of this, and not to present any argument against the trial court's holding that the Count omitted requisite factual allegations, constitutes waiver and, as stated above, it is reason alone for this Court to affirm. Because dismissal of Count II is all that Victor challenges on appeal, the appeal can and should end here.

Even without waiver, however, the trial court's decision to dismiss Count II on this ground is plainly correct. Victor did not allege any facts sufficient to support a breach of any duty in managing the Trusts. He merely claimed in conclusory fashion that the Trustees failed "to adjust the Trusts' and Estate's investments of securities and equities in a manner to generate a reasonable rate of return on the principal." Da250 at ¶¶ 36–38. Victor failed to specify the appropriate standard, the investments that should have or could have been adjusted, or any reference as to what would have been considered a "reasonable" rate of return. Indeed, the Amended Counterclaim did not even allege what rate of return was achieved for any time between May 31, 2014 and February 29, 2024—let alone any reason to think it was "unreasonable." See Da249–50 at ¶¶

30–32.[6] Victor did not identify a single investment by the Trustees that was supposedly inadequate.

This is all despite Rule 4:5-8 plainly requiring that for "breach of trust" claims, the "particulars of the wrong, with dates and items if necessary, shall be stated insofar as practicable." And all claims for relief must "contain a statement of the facts on which the claim is based, showing that the pleader is entitled to relief." Rule 4:5-2. Victor at least had to allege facts that show the Trustees somehow violated a fiduciary duty and the Prudent Investor Act, including under the factors identified as relevant by N.J.S.A. 3B:20-11.3 (which Victor agrees apply, see Db22–23). The Amended Counterclaim mentioned none of these, and thus fell far short of his burden.

Below, Victor vaguely referred to the accountings produced by Plaintiffs as supposed support for his allegations that the plaintiffs mismanaged the Trusts' assets by failing to adjust investments to generate a better return on principal.

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[6] Oddly, Victor's original Counterclaim alleged income "at the rate of approximately 2.5%" from the Trusts and just asserted (without any support) that that rate was "not a reasonable rate of return," Da213 at ¶ 34, but in his Amended Counterclaim, which is operative here, Victor removed that specificity and just stated that the Trustees should have adjusted the "investments of securities and equities in a manner to generate a reasonable rate of return on the principal." Da250 at ¶¶ 37–38. The Amended Counterclaim neither alleges the actual rate of return, what return would be reasonable, nor what the Trustees could or should have done differently to guarantee such a rate.

Da40. But Victor's sole conclusory allegation that "Plaintiffs failed to adjust the Trusts' . . . investments of securities and equities in a manner to generate a reasonable rate of return on the principal" lacks the particularity required by Rule 4:6-2(e). Da250 at ¶¶ 36–39.

Victor also argued below that the Amended Counterclaim puts the Trustees "on notice" of Victor's claims. Da27. Victor failed to articulate the legal standard of "notice" in his Amended Counterclaim and Opposition, however. Instead, he simply restated conclusory allegations from the Amended Counterclaim, which must be disregarded. See Scheidt, 424 N.J. Super. at 193 (App. Div. 2012); see also Berger, 2018 WL 3402115, at *5 (rejecting conclusory allegations and dismissing claim that "did not identify any inadequacies" in defendant's process to support breach of fiduciary duty claim).

Further, below, Victor argued that this case requires experts to analyze whether the rate of return on the principal was reasonable. Da27.[7] But a plaintiff cannot plead legal conclusions and then avoid dismissal by asserting that an expert will later fill in the gaps. See Berger, 2018 WL 3402115, at *3

[7] Victor alludes to this point on appeal by stating that the motion to dismiss was filed "well before [his] expert could write a report and opine on" this issue. Db1, 5. But he does not make any legal argument based on this point, instead consciously (given his arguments below that were omitted on appeal) waiving the opportunity to respond. That dooms his appeal. See supra at pp. 19–21.

("Conclusory allegations do not provide an adequate basis to deny a motion to dismiss[.]"). Indeed, a motion to dismiss "may not be denied based on the possibility that discovery may establish the requisite claim; rather, the legal requisites for [a plaintiff's] claim must be apparent from the complaint itself." Edwards, 357 N.J. Super. at 202. Any reliance on hypothetical future expert opinions to identify the specific acts of breach is plainly insufficient, and Victor's Amended Counterclaim was rightly dismissed for failure to state a claim.

Because Count II is the only claim on appeal, and because Victor declined the trial court's offer to replead part of this claim with more specificity, this Court need not go further to affirm the trial court's entire judgment of dismissal.

B. New Jersey Law Imposes No Duty on Trustees to Grow Principal at a Particular Rate, Especially Not in the Vague Terms Alleged Here (Da37–40).

An independent reason to affirm the trial court's dismissal is that Victor identified no legal duty to grow the Trusts' principal more than it concededly grew. See Da37–40. Victor does not dispute that the Trusts grew by over a million dollars in the relevant timeframe. Da38–39. The Trust principal certainly did not decline. Yet, Victor cites no case supporting a claim for breach of the Prudent Investor Act in such circumstances—where the only allegation is that the rate of return should have been higher (by some unspecified amount).

As the trial court explained, the Prudent Investor Act requires fiduciaries to invest and manage trust assets as a prudent investor would, "considering the purposes, terms, distribution requirements, and other circumstances of the trust," exercising "reasonable care, skill, and caution." Da37 (citing N.J.S.A. 3B:20-11.2–3). The Act also requires Trustees to diversify investments, manage assets solely in the interest of the beneficiaries, remain impartial among beneficiaries, and to engage in other duties. See N.J.S.A. 3B:20-11.4–7. Nowhere does it require a particular rate of return on investments, instead giving the fiduciary discretion to manage "risk and return objectives" in a reasonable manner, with a host of factors being relevant to the trustee's decisions. N.J.S.A. 3B:20-11.3.

Victor block quotes this provision of the Prudent Investor Act (Db22–23), but it does not help him. It states that a fiduciary's investment decisions should "not be evaluated in isolation" but in the context of the entire portfolio, a fiduciary "may invest in any kind of property or type of investment," and the fiduciary should consider eight different circumstances and prudently balance them. N.J.S.A. 3B:20-11.3. Just one of the eight circumstances to "consider" is "the expected total return from income and appreciation of capital." Id. (emphasis added). Victor emphasizes this consideration with bold font—and another that requires balancing liquidity, income, and preservation—but does

not (and cannot) argue that it necessarily trumps the other required considerations. See Db22–23. Even that consideration itself references "expected total return," not actual return—and Victor, again, alleges nothing about the expected return (or any other consideration) when the Trustees made the relevant investment decisions. No law requires a specific rate of return. The Prudent Investor Act, in contrast, requires Trustees to consider many factors having nothing to do with that rate.

Indeed, the statute makes clear that the "prudent investor rule expresses a standard of conduct, not outcome." Matter of Gloria T. Mann Revocable Tr., 468 N.J. Super. 160, 173 (App. Div. 2021) (emphasis added) (quoting N.J.S.A. 3B:20-11.9). "Compliance with the rule is determined in light of the facts and circumstances existing at the time of the fiduciary's decision or action"—not the eventual result of the investment decisions. Id. (quoting same). And Victor alleged essentially nothing about those relevant facts and circumstances.

Under New Jersey law, claims for breaches of fiduciary duty and under the Prudent Investor Act make the most sense when the trust principal has depreciated. See Matter of Tr. of Post, No. A-0929-16T1, 2018 WL 3862756, at *3, 8 (N.J. Super. Ct. App. Div. Aug. 15, 2018) (affirming trial court's holding that trustees violated the Prudent Investor Act when investments led to

depreciation of the trust assets); see also In re Martha Heyman Tr., No. A-5903-06T3, 2008 WL 2885272, at *3–5 (N.J. Super. Ct. App. Div. July 29, 2008) (affirming trial court's holding that trustee breached his financial duties and the Prudent Investor Act when his investment of trust assets in a high-risk hedge fund resulted in a loss of the trust principal). Of course, here, Victor does not allege that the principal of the Four Trusts depreciated in any way—nor could he. It is undisputed that the Trustees generated a return on the principal of the trusts.

At the very least, a fiduciary breach or Prudent Investor Act claim would have to show the Trustee failed some duty under the Act—like failing to invest at all, see N.J.S.A. 3B:20-11.3; Gloria T. Mann, 468 N.J. Super. at 172, or failing to diversify assets where warranted, N.J.S.A. 3B:20-11.3; Com. Tr. Co. of N. J. v. Barnard, 27 N.J. 332, 343 (1958), or showing partiality among beneficiaries, N.J.S.A. 3B:20-11.6; In re Will of Maxwell, 306 N.J. Super. 563, 585 (App. Div. 1997). Victor's "unreasonable rate of return" claim alleges none of these things.

Matter of Anna Grumme Tr. is a particularly informative case on this point. No. A-0196-18T2, 2020 WL 4760300 (N.J. Super. Ct. App. Div. Aug. 18, 2020). The appellate court affirmed the rejection of a claim that the trustee could have earned an additional $515,103 if the trust assets had been invested

differently. Id. at *2. It rejected this claim because the trustee "had the authority to exercise his discretion with respect to diversifying the Trust's assets" to effectuate its duty to preserve the trust assets. Id. at *5. Indeed, this case makes clear that a "reasonable amount of income" means that trustees should invest conservatively—i.e., trustees "must be . . . cautious"—not seeking a high income but seeking to "preserve the trust estate" and "minimize the risk of large losses." Id. (citations and internal quotation marks omitted). This cautious approach requires diversification and eschews risky, high-income investments.

On this point, it is noteworthy that Victor block-quotes (Db27) three paragraphs from a recent appellate decision, Matter of Estate of Nigito, but omits the next two sentences, which state: "The law does not expect a trustee 'to take risks for the purpose of increasing the principal or income.' Rather, the trustee is expected only to preserve the trust property and provide beneficiaries with 'a regular income.'" No. A-2013-22, 2024 WL 5233136, at *7 (N.J. Super. Ct. App. Div. Dec. 27, 2024) (emphasis added) (quoting Com. Tr., 27 N.J. at 343; Gloria T. Mann, 468 N.J. Super at 172–73). Indeed, Nigito expressly rejected an argument that the trustees should have focused on increasing or maximizing the payout rather than preserving the trust and providing a regular income. Id. at *7–8.

Like the plaintiffs in Nigito and Anna Grumme, Victor here just asserted the Trust should have made more money. In doing so, Victor makes the same mistake as those plaintiffs: he ignores the Trustees' duty to diversify, preserve assets, avoid large losses, and achieve a regular (i.e., steady, non-risky, and constant) income. He alleges nothing that the Trustees could have or should have done differently (again, the Trusts' principal alone increased by over a million dollars in two years), so his claim must fail.[8]

Victor cites two other cases that he asserts (at Db23–25) support his claim. But neither one shows that any liability is possible based simply on the rate of return.

First, Victor quotes in bold a sentence from Gloria T. Mann, stating a trustee has a duty "not merely to preserve the trust property but to make it

[8] See also In re Unisys Sav. Plan Litig., 74 F.3d 420, 434 (3d Cir. 1996) (holding, under common law of trusts, trustee must "use caution, with a view to the safety of the principal and the securing of a reasonable and regular income," and whether trustee acted appropriately "depends upon the circumstances at the time when the investment is made and not upon subsequent events"). Victor blasts the trial court's citation to Unisys even though it undermines his claim. Db25–26. He notes it was an ERISA case, but ignores that ERISA incorporates the common law of trusts, and the relevant portion cited the Restatement (Second) of Trusts § 227, not ERISA law. And, he ignores that the Court notes the "preservation of the estate," with a "regular" (but not maximal) income is key. In re Unisys Sav. Plan Litig., 74 F.3d at 434. Nor does Victor ever mention the key duty of caution all trustees must exercise.

productive" on the beneficiaries' behalf. 468 N.J. Super. at 172. Of course, the investments here were productive, to the tune of over a million dollars in two years. This case is nothing like Gloria T. Mann, where the plaintiff alleged that the trustee violated the Prudent Investor Act and the trust instrument when she did not invest the trust assets at all (as required by the statute and the trust itself) and rather placed the funds in savings accounts. 468 N.J. Super. at 171. Even with this allegation that is lacking here, however, the court held that the trustee had a duty to exercise "a degree of caution," and therefore held that keeping a portion of the trust in a bank account was not a fiduciary breach. Id. at 172–73. The plaintiff in that case did not allege (as Victor does) that the trustee's investments simply yielded a lower rate of return than he preferred.[9]

Victor also argues that Maxwell supports his claim. But the plaintiffs there did not allege an unreasonable rate of return. Rather, they alleged a

[9] In both his Amended Counterclaim and his briefing in both courts, Victor is also unclear about what exactly should have been higher: the income from the investments, or the increase to the principal. Those things often conflict, and trustees must balance them, not maximize one or the other. See Pa. Co. for Ins. on Lives & Granting Annuities v. Gillmore, 137 N.J. Eq. 51, 56 (Ch. 1945) ("the trustee is not under a duty to the beneficiary entitled to the income to endanger the safety of the principal in order to produce a large income, [but] he is under a duty to him not to sacrifice income for the purpose of increasing the value of the principal") (internal quotation marks omitted). This is another reason to affirm dismissal of Victor's unclear allegations.

"decline in the value of the trust assets even though there had never been an invasion of the principal of the trust during the entire period covered by the accountings." 306 N.J. Super. at 570; id. at n.6 (noting plaintiffs argued that "given inflation, in actuality there has been a substantial decline in the real value or purchasing power of the trust assets"). Victor conveniently ignores the contingent remaindermen's actual claims in Maxwell because it makes the case wholly irrelevant. Here, Victor does not allege any decline in the value of the Trust principal during Gloria's lifetime. Nor could he. If anything, Maxwell only confirms that such a loss is necessary for someone like him to have a claim. See id. at 585 (noting fiduciary duty "to minimize the risk of large losses").

And, making the case even more inapposite, the Maxwell plaintiffs' allegations did not focus solely on the amount of loss or the rate of (non)return. They alleged that the trustees mismanaged the trust in at least four ways, none of which Victor alleges—by (i) failing to properly diversify the trust assets in a manner minimizing the risk of loss, (ii) improperly favoring the lifetime beneficiaries over the contingent beneficiaries, (iii) investing in a portfolio with an imbalance between income-producing assets and "assets with growth potential," and (iv) overseeing the depreciation of the value of the trust principal.

Id. at 569–70, 575–76. Nowhere does this (or any other) case state that the mere allegation of an unreasonable rate of return is sufficient to bring a claim.

Count II was properly dismissed in its entirety for this reason, too.

C. Victor Has No Standing to Bring this Claim for Actions Taken During Gloria's Lifetime (Da39).

Even if the Court does not affirm dismissal of Victor's entire Count II (it should), the claim must be dismissed for all the time before March 24, 2021.

A party has standing to bring a claim only if he has a "sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and there must be a substantial likelihood that the plaintiff will suffer harm in the event of an unfavorable decision." Matter of J.R., 478 N.J. Super. 1, 8 (App. Div. 2024); see also In re Project Authorization Under N.J. Reg. of Historic Places Act, 408 N.J. Super. 540, 555–56 (App. Div. 2009). Here, Victor had no stake in the rate of return from the Four Trusts during Gloria's lifetime.

As an initial matter, Victor does not appeal the Court's decision dismissing his claims as to the Estate (see generally Db), and Victor does not dispute that he has no interest in the income generated from the two Marital Trusts because all income was to be distributed to Gloria during her lifetime, and upon her death, the undistributed income would go to her estate. See Da54–55 at §§ 5.1(b), 5.1(i). Moreover, he also has no interest in the income generated

by the Credit Shelter Trust, since the Trustees could have distributed some or all of the income to Gloria during her lifetime, with no distributions required to be made to Victor under the RTA. See Da56 at §§ 5.2(a).

On appeal, Victor argues that he did have standing to sue as a contingent beneficiary related to income generation of the Trusts during Gloria's lifetime. Db9–20. Victor is wrong; while he may have had standing to bring some types of claims during Gloria's lifetime, he did not have standing to bring these claims related to income generation and returns on investment. The RTA makes clear that during her lifetime, Gloria was the sole beneficiary of the Four Trusts, and Victor was a contingent remainder beneficiary not entitled to any distribution of either income or principal during Gloria's lifetime. See Da53–58 at § 5. As the trial court made clear, the RTA expressly states that Victor had no interest in the income generated by the Trusts during Gloria's lifetime, and Victor had no interest in the principal of the Trusts because the RTA states that the trustees could exhaust the principal for Gloria's benefit. See Da39.

First, the above-described RTA sections make clear that Victor had no "sufficient stake in the outcome" of whether the funds were properly invested during Gloria's lifetime—because he had no right to the returns or payments in the first place. Matter of J.R., 478 N.J. Super. at 8. Under well-settled and

recently affirmed law, contingent remaindermen beneficiaries may not challenge payments that do not change their legal rights or entitlements. See, e.g., Matter of Leslie Karen Ross Tr., No. A-0915-23, 2025 WL 1276218, at *2 (N.J. Super. Ct. App. Div. May 2, 2025) (affirming trial court's holding of no standing for "a contingent remainder beneficiary" who had no "entitlement to" trust income); In re Walsh's Estate, 32 N.J. Super. 528, 534 (App. Div. 1954) ("only those entitled to the trust income have been damnified [sic] by the reduction of that income" and thus have standing to challenge it).

Because it cannot "be said with certainty that [the contingent remainderman] would be adversely affected by the payments of income" while the true beneficiary is alive, id. (emphasis added), and the same is true under the RTA here, Victor has no standing to sue for the trustees' generation of income during Gloria's lifetime.[10] Thus, "because [Victor] was not 'entitled to' a 'distribution'" during Gloria's lifetime, he could neither compel full accountings or object to those accountings and/or the management decisions they would have

[10] See also Leslie Karen Ross Tr., 2025 WL 1276218, at *2 (citing In re Oathout's Estate, 25 N.J. Misc. 186 (Orphans' Ct. 1947); In re Bessemer Trust Co., 147 N.J. Super. 331, 346 (Ch. Div. 1976); and Walsh's Estate, 32 N.J. Super. at 534, for the proposition "that contingent remaindermen under a testamentary trust . . . who are unaffected by allowances out of income . . . . cannot file exceptions to such items in an accounting").

revealed. Leslie Karen Ross, 2025 WL 1276218, at *4 (quoting In re Estate of Herrmann, 127 N.J. Eq. 65, 67 (Prerog. Ct. 1939)); see also Wiedenmayer v. Johnson, 106 N.J. Super. 161, 165 (App. Div.), aff'd sub nom. Wiedenmayer v. Villanueva, 55 N.J. 81, 259 A.2d 465 (1969) (rejecting contingent remaindermen's challenge to decisions by trustee that supposedly caused them to suffer a "loss [to] their contingent remainder interest," since the trustee had discretion to distribute "the Corpus of the trust [] to the son absolutely").

Second, Victor also lacked standing to sue for a breach of fiduciary duty during Gloria's lifetime because Victor cannot establish that the Trustees owe him any duty to generate income under the Prudent Investor Act during that time. The Prudent Investor Act states that a trustee has a "duty to 'invest and manage the trust assets solely in the interest of the beneficiaries.'" Gloria T. Mann, 468 N.J. Super. at 172 (quoting N.J.S.A. 3B:20-11.5). During Gloria's lifetime, the Trustees owed no duty to Victor to generate a reasonable rate of income on assets of the Four Trusts. That duty was owed solely to Gloria. Indeed, the RTA made clear that Victor had no entitlement to any of the trust principal, either. See supra; see also N.J.S.A. 3B:20-11.2 (making clear that the "prudent investor rule is a default rule that may be expanded, restricted, eliminated, or otherwise altered by express provisions of the trust instrument").

In any event, even if the RTA did not make clear that Victor was not entitled to Trust principal during Gloria's lifetime, under well-settled New Jersey law, a trustee's sole duty to a contingent remainder beneficiary like Victor is to preserve the principal of the trust. See Pa. Co. for Ins. on Lives & Granting Annuities v. Gillmore, 137 N.J. Eq. 51, 58–59 (Ch. 1945) (noting that a trustee's duty to a contingent beneficiary who is to receive only principal is to preserve the principal of the trust); Ditmars v. Camden Trust Co., 10 N.J. Super. 306, 337–38 (Ch. Div. 1950), modified, 10 N.J. 471 (1952) (noting that remaindermen had no interest in income until testator's wife died under trust agreement that provided that testator's wife was to receive income from trust for life). The sole duty the Trustees possibly could have owed to Victor as a contingent remainder beneficiary during this period was to preserve the principal of the Four Trusts. Yet, this case does not involve an alleged failure to preserve principal.

The Trustees did not owe Victor a duty to generate income or to grow the principal of the Four Trusts during Gloria's lifetime. Thus, the Trustees could not have breached any duty to Victor to increase income at a certain rate before March 24, 2021 (the date of Gloria's death) as a matter of law.

Victor launches two arguments on appeal, both of which fail. First, Victor claims that the Trustees never submitted any accountings for the Trusts during Gloria's lifetime, and then asserts that means he could not be "bound" by the Trustees' actions. See Db10–12. As an initial matter, Victor never attached a certification to his opposition brief below averring as such. Even taking his unalleged assertion that the accounts were not settled as true, however, it does not change the simple fact that he brought no claim (nor could he) for failure to preserve principal.

Nor does Victor cite any support for the idea that failing to provide an "actual accounting" somehow allows contingent remaindermen beneficiaries to sue. Db11. Even if that were a breach of some duty, again, it would have been for Gloria (or her estate) to enforce. As the above-cited cases make clear, contingent remaindermen "cannot file exceptions" to an accounting because they "are unaffected by allowances out of income[.]" Leslie Karen Ross, 2025 WL 1276218, at *2 (emphasis added) (citations omitted). Put differently, accountings are irrelevant to contingent remaindermen because they cannot affect them.

The text of the RTA that Victor cites does not say otherwise. It simply notes that an account "shall bind all persons . . . and release Trustees for the acts

accounted for." Db11 (quoting Da60). Nowhere does it say the inverse: that the lack of an accounting means anyone can sue. Case law says the opposite.

Second, Victor relies near-exclusively on the 1997 Matter of Will of Maxwell case. Indeed, he simply block quotes from that case for nearly four single-spaced pages of his brief. Db13–16. Despite Victor's apparent belief, Maxwell does not help him on this question. As noted above, the contingent remaindermen in Maxwell were not suing for a supposed unreasonable rate of return or income; rather, they argued that the trust principal suffered a "serious decline in real value." 306 N.J. Super. at 568; see id. at 570 & n.6 (noting remainderpersons' argument "that, given inflation, in actuality there has been a substantial decline in the real value or purchasing power of the trust assets").[11]

Maxwell is also irrelevant because the trust at issue in that case entitled the initial beneficiaries only to "income" until their death, and then the "principal would be distributed to their descendants." Id. at 568. Indeed, language that Victor quotes makes this point clear: "As life beneficiaries entitled only to the income earned by the trust assets," those beneficiaries had every

[11] For the same reason, Victor's fanciful hypothetical where a trustee has "stolen the entire corpus of the trusts" is obviously irrelevant. Db18. First, Gloria herself (or her estate) could have and would have sued if that happened. Second, that would be a loss of principal, not alleged in this case.

incentive to "maximize that income, rather than to preserve the trust corpus for their children." Db16 (quoting Maxwell, 306 N.J. Super. at 581) (emphasis added). Given that arrangement, there was a conflict of interest in Maxwell between the initial beneficiaries (who only had an interest in income) and the remaindermen (who were entitled to all left over principal), which the remaindermen should have had an opportunity to vindicate before being bound by a court-approved accounting.[12] Here, by contrast, Victor did not have the same interest in the Trusts during Gloria's lifetime, as she was entitled to the income and potentially all principal in the discretion of the Trustees. Da53–57 at §§ 5.1–2. The terms of the RTA here are unlike the trust agreement in Maxwell, and those terms control. Victor has not cited any case (nor could he) standing for the proposition that a general fiduciary duty to preserve principal trumps the specific terms of the Trust Agreement. The opposite is true. See In re Estate of Bonardi, 376 N.J. Super. 508, 515 (App. Div. 2005) ("It is well-

[12] Maxwell is also irrelevant because it simply answered whether the remaindermen could be bound under res judicata principles by an accounting where they were not adequately represented. Here, the Trustees do not base their argument on res judicata or claim that Victor is bound by an accounting—rather, they are arguing that Victor has no standing to make this claim, and Victor has cited no case where a contingent remainderman did have standing to bring a failure-to-generate-enough-income claim like his.

settled that a court's primary function is to enforce the testator's expressed intent with respect to a testamentary trust.").

Thus, even if the Court does not affirm dismissal of Victor's Count regarding a reasonable rate of return in its entirety (it should), the claim must be dismissed as it relates to any actions or inaction before May 24, 2021.

III. The Amended Counterclaim Was Properly Dismissed for Failure to Join Indispensable Parties (Da31–34).

In addition to all the above reasons to affirm the dismissal, the trial court also was right to hold that Victor's Attorneys-in-Fact were indispensable parties and the failure to join them required dismissal. Da31–34. As a result, the Counterclaim was properly dismissed in its entirety under Rule 4:6-2(f) (authorizing dismissal for "failure to join a party without whom the action cannot proceed").

Whether a person is an indispensable party whose absence precludes "complete relief . . . among those already parties" is a "fact sensitive" inquiry. Int'l Bhd. of Elec. Workers Loc. 400, 468 N.J. Super. at 225. If the absence of a person precludes "complete relief" among the current parties, the person must be joined. R. 4:28-1(a)(1).

Based on the unique facts of this case, the Attorneys-in-Fact were indispensable parties. Typically, an Attorney-in-Fact has the power to handle

legal affairs by "retaining and communicating with a lawyer, and authorizing such lawyer to take legal action," although they cannot "sign pleadings, affidavits or certifications, or otherwise testify in writing or verbally." Marsico v. Marsico, 436 N.J. Super. 483, 488, 495 (Ch. Div. 2013). The Powers of Attorney that Victor executed, however, give far broader powers to his Attorneys-in-Fact, including the ability to control the litigation and reach a resolution of these claims. These extensive powers make them indispensable parties.

As an initial matter, Victor authorized his Attorneys-in-Fact to exercise complete control of this litigation.[13] The Powers of Attorney give Victor's Attorneys-in-Fact the authority to seek and enforce the resolution of cases by (i) appointing, removing, substituting, or surcharging fiduciaries of any trusts and estates in which Victor has an interest, (ii) demanding monetary damages and specific performance, and (iii) initiating, proposing, and agreeing to a settlement

[13] Da84–85 at 98:25–99:7 ("Q. And if I understand it correctly, your counterclaims that are asserted against Mr. Dill and Bank of America in the New Jersey proceeding, is it fair to say that you have essentially turned those counterclaims over to your powers of attorney, and they are handling them? A. Yes."); Da81–82 at 61:24–62:7 ("Q. So when you say this was all being handled by your daughter, Sharon, what do you mean it was being handled by her? A. She's my power of attorney. Q. So is it your understanding that she was providing the information to Mr. Provorny's office, that he needed to prepare and file this counterclaim? A. Yes.").

of trust-related litigation. Da107–08; Da115–16; Da123–24; see also Da31–32 (quoting Powers of Attorney).[14]

Victor also testified that he had no knowledge of the facts underlying this matter. See Da83 at 79:4–18 (no recollection of any facts stated in the counterclaim that Victor knew). Despite Victor previously certifying otherwise, Da92–93; Da100, it was his Attorneys-in-Fact alone who purportedly had knowledge of all of the facts related to Victor's Amended Counterclaims. Da89 at 128:11–20 (Victor would "rely on [his Attorney-in-Fact] for any information about the contents of these counterclaims"); Da93. In light of Victor's inability to testify as to the underlying facts of his claims, his Attorneys-in-Fact are the only parties who can provide the factual bases of his Amended Counterclaim, which is vital to completely resolving the issues present before the Court.

Additionally, Victor's Attorneys-in-Fact will purportedly control the resolution of the Counterclaim at issue. Victor's Amended Counterclaim seeks

[14] Reference to matters and documents outside the pleadings (including Victor's testimony and the Powers of Attorney) was appropriate for the motion to dismiss for lack of joinder of indispensable parties. Compare R. 4:6-2 (noting "If, on a motion to dismiss based on defense (e), matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment[.]") (emphasis added) with Nikirk v. ConducTV Brands, No. A-1217-19T3, 2021 WL 391621, at *2 (N.J. Super. Ct. App. Div. Feb. 4, 2021) (affirming dismissal for failure to join indispensable parties for which defendant cited to plaintiff's interrogatory responses).

(i) removal of Plaintiffs as Co-Trustees of the Four Trusts and as Executor of the Estate and (ii) the appointment of a successor Executor and Co-Trustees. Da251. But it is Victor's Attorneys-in-Fact who have the authority to appoint, remove, substitute, or surcharge fiduciaries of any trusts and estates in which Victor has an interest. Da108, 116, 124. Indeed, Victor had "essentially turned th[e] counterclaims over" to his Attorneys-in-Fact. Da83 at 79:4–18; Da84–85 at 98:25–99:7. They have also been authorized to demand monetary damages and specific performance—such as the distribution of principal from the Four Trusts and funding of the GST and non-GST trusts. Da107, 115, 123.

Because the Attorneys-in-Fact are the only persons who can provide the factual bases underlying the Amended Counterclaim, have been controlling the litigation, and have the authority to seek and enforce the resolution of this case (and thus have effectively been given an interest in the matter), they are indispensable parties without whom complete relief cannot be afforded. And the case was properly dismissed without them.

In arguing otherwise, Victor attacks a strawman, misstating the trial court's holding, claiming that it held "anyone holding a power of attorney is an indispensable party, regardless of how limited or how broad is the power of attorney." Db31. The trial court held no such thing. Instead, it focused on the

text of the Powers of Attorney at issue here and held that these extremely broad powers—as well as Victor's own testimony that he had no knowledge about the case and all questions should be referred to his Attorneys-in-Fact—showed they were indispensable parties in this case. Da31–33.

Victor also pretends that the trial court held the Attorneys-in-Fact were indispensable parties solely because they were remainder beneficiaries and have an interest in the case. Db32–33. Victor ignores that that fact was just one of several reasons the court held they were indispensable. Da33. Their undeniable interest in the case as contingent beneficiaries only supports their indispensable status when paired with all the other unique facts.

Finally, Victor states (without support) that Attorneys-in-Fact like his children are "no more than a witness." Db31. However, the terms of the Powers of Attorney and Victor's own deposition testimony indicate that Victor's Attorneys-in-Fact are the ultimate decision-makers and have an interest in the litigation. Victor cites no authority, and the Trustees are aware of none, stating that such parties are mere witnesses.

Remarkably, Victor's argument section challenging the indispensable parties holding cites no case law discussing powers of attorney or indispensable parties whatsoever. It also entirely ignores the text of the Powers of Attorney

here, which the trial court relied upon. Even if these failures do not waive his challenge, it shows this Court should affirm dismissal on this independent ground, as well.[15]

CONCLUSION

For these reasons, the dismissal of Victor's Amended Counterclaim should be affirmed.

[15] Victor also asks this Court (without any legal citation) to remand this case to a different judge. See Db3, 20, 30. His only support for this request is his assertion that the trial court's holdings were "result oriented." Id. at 3, 25, 35. Victor offers no support for that accusation and there is none. Nor do his claims come close to satisfying the standard governing such requests. See Graziano v. Grant, 326 N.J. Super. 328, 350 (App. Div. 1999). This Court should disregard that request and Victor's other overheated rhetoric.

Respectfully submitted,

Date: July 21, 2025

MORGAN, LEWIS & BOCKIUS LLP

Attorneys for Respondent Bank of America, N.A., In Its Representative Capacity as Co-Trustee of the of the Revocable Trust, Credit Shelter Trust, Exempt Marital Trust, and Non-Exempt Marital Trust Under the Revocable Trust Agreement

By: */s/ Brian W. Shaffer*
Brian W. Shaffer, Esq.

DONNELLY MINTER & KELLY LLC

Attorneys for Respondent Albert Dill, in His Representative Capacity as Executor of the Estate of Claude V. Offray, Jr. and as Co-Trustee of the Revocable Trust, Credit Shelter Trust, Exempt Marital Trust, and Non-Exempt Marital Trust Under the Revocable Trust Agreement

By: */s/ Patrick B. Minter*
Patrick B. Minter, Esq.

ALBERT DILL, as Executor of the Estate of Claude V. Offray, Jr., and as Co-Trustee of the Revocable Trust, Credit Shelter Trust, Exempt Marital Trust, and Non-Exempt Marital Trust under the Revocable Trust Agreement, and Bank of America, N.A., as Co-Trustee of the Revocable Trust, Credit Shelter Trust, Exempt Marital Trust, and Non-Exempt Marital Trust under the Revocable Trust Agreement, Plaintiffs/Respondents, v. CLAUDE V. OFFRAY, III, as beneficiary of the Claude V. Offray, Jr. Trusts u/a/d March 3, 2011, as Amended and Restated on June 4, 2013, and as amended on February 26, 2014, Defendant/Appellant.	ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY UNION COUNTY—LAW DIVISION DOCKET NO.: UNN-L-000958-24 CIVIL ACTION SAT BELOW: HON. JOHN G. HUDAK, J.S.C. APPELLATE DIVISION DOCKET NO. A-001498-24 T4

AMENDED REPLY BRIEF ON BEHALF OF DEFENDANT/APPELLANT CLUADE V. OFFRAY, III

HEROLD LAW, P.A.
Craig S. Provorny, Esq.
Attorney Id. No. 021601986
25 Independence Boulevard
Warren, New Jersey 07059-6747
(908) 647-1022 (Tel)
(908) 647-7721 (Fax)
E-mail: cprovorny@heroldlaw.com
Attorneys for Defendant/Counterclaimant
Claude V. Offray, III

On the Brief:
Craig S. Provorny, Esq.

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POINT I

ANY FAILURE TO ASSERT FACTS WITH SPECIFICITY IN THE AMENDED COUNTERCLAIM WAS SOLELY AS A RESULT OF THE FAILURE OF PLAINTIFFS/RESPONDENTS TO SUBMIT ACCOUNTINGS UNTIL ORDERED TO DO SO BY THE TRIAL COURT

By failing to provide accountings for any of the Trusts from inception in 2014 until June 2024 Plaintiffs/Respondents Bank of America, N.A. and Albert Dill have created a Catch-22. In the trial court's opinion and in Plaintiffs/Respondents' response the proverbial cart was put before the horse when they assert the Amended Counterclaim was properly dismissed for failure to allege facts with specificity. The reason for the inability of Defendant/Appellant to plead facts with specificity is entirely as a result of Plaintiffs/Respondents' failure to ever submit an accounting, formal or informal, until forced to do so as a result of Defendant/Appellant's Counterclaim demanding accountings for all four (4) of the Trusts. And the initial Counterclaim, filed in June 2023, was submitted almost one (1) year prior to receipt of the accountings in June 2024. So, all that was available at the time the Counterclaim was filed were bank statements, that lacked the detail of approximately eight hundred (800) pages of the accountings covering transactions over a ten (10) year period, but which showed an unreasonable rate of return on the investments.

And, the purpose of the Amended Counterclaim as provided for in the Motion for Leave to Amend, filed on July 31, 2024, was to extend the time period of the

Counterclaim back to 2014, not for any other substantive purpose. (Da285). Thus, given the accountings were not provided until June 2024, at the time the Amended Counterclaim was filed all Defendant/Appellant could plead was lack of a reasonable rate of return on the investments in the Trusts, but certainly did not have enough time for an expert to opine on the exact facts underpinning why the rate of return was well below the rate of return a prudent investor would seek to obtain.

Had the Plaintiffs/Respondents submitted accountings prior to being ordered to do so by the Court, Defendant/Appellant would have had enough time in the ordinary course to have their expert review the accountings to provide the specific facts underlying the breach of fiduciary duty and the Prudent Investor Act. Thus, Plaintiffs/Respondents are using their failure to provide timely accountings as a shield and a sword when claiming the Amended Counterclaim lacks specificity.

With respect to Plaintiffs/Respondents' claim the appeal is deficient because the issue of lack of specificity was not raised in the initial brief and is therefore waived, citing to State v. Rochat, 470 N. J. Super. 392, 456 (App. Div. 2022) and Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011), neither case says any such thing. Rather, these cases state that if not raised in the appeal the issues are waived, not if not raised in the initial brief.

Further, the trial court's discussion about the Amended Counterclaim failing to identify specific facts concerning the Trustee's actions or inactions or investing

approach that was allegedly improper or showed a breach was buried in a paragraph where the trial court was discussing the trial court's determination the only cause of action under the PIA was for a decrease in the principal of the Trusts (Da40-41), which was fully addressed in Defendant/Appellant's initial brief. Thus, if the issue was not fully addressed it was inadvertent due to the framing of that portion of the trial court's Opinion focusing on the lack of a cause of action for failure to obtain a reasonable rate of return.

Accordingly, based on the procedural history of the litigation where Plaintiffs/Respondents did not provide accountings until ordered to so by the Court, thereby depriving Defendant/Appellant the opportunity to set forth the underlying facts for the unreasonable rate of return, it should not be Defendant/Appellant who should be punished for its opportunity to challenge the breach of fiduciary duty by Plaintiffs/Respondents. Under no circumstances should Plaintiffs/Respondents be rewarded for their failure to submit a single accounting over a ten (10) year period. Accordingly, on this basis alone the dismissal of Count II the Amended Counterclaim should be reversed.

POINT II

CONTRARY TO THE CLAIMS OF PLAINTIFFS/RESPONDENTS DEFENDANT/APPELLANT IDENTIFIED THE LEGAL DUTY OF THE CO-TRUSTEES AS SET FORTH IN BOTH THE PRUDENT INVESTOR ACT AND CASELAW

In Point II.B of their opposition Plaintiffs/Respondents assert "[a]n independent reason to affirm the trial court's dismissal is that Victor identified no legal duty to grow the Trust's principal more than it concededly grew." While there is no dispute how much the principal grew, which was well below the market, Defendant/Appellant did in fact identify the legal duty stated in both the Prudent Investor Act and in the caselaw, all cited in Defendant/Appellant's initial brief.

First, based upon the clear language of the PIA, a fiduciary, such as the Co-Trustees, has a duty as a prudent investor to take into account in its investments "the expected total return from income and the appreciation of capital... [and] the need for liquidity, for regularity of income, and for preservation or appreciation of capital." These two provisions of the PIA establish a duty of a trustee to obtain a reasonable rate of return on its investments, and, if they do not, establish why it was not a breach of their fiduciary duty under the PIA to do so. (Pb23).

Second, in its initial brief Defendant/Appellant identified the legal standard as set forth by this Court in In re Gloria T. Mann Revocable Tr., 468 N.J. Super. 160 (App. Div. 2021) and In Matter of Will of Maxwell, 306 N.J. Super. 563, 585-586 (App. Div. 1997), in which this Court held a trustee has a duty to not only make the

trust productive of a reasonable income for the benefit of the life beneficiaries, but also act with due regard to the respective interests of the remainder beneficiaries. (Pb26-28). Based on these standards identified by Defendant/Appellant it is difficult to understand how Plaintiffs/Respondents can state Defendant/Appellant failed to identify a legal duty to grow the trust.

As for the remainder of Plaintiffs/Respondents' arguments in Point II.B, apparently they forget the Motion before the trial court was a Motion to Dismiss for Failure to State a Claim, not a Motion for Summary Judgment. The issues of whether or not the rate of return was reasonable, which it was not, or whether or not Plaintiffs/Respondents properly diversified the investments, are all issues for the trier of fact, and are entirely irrelevant to a Motion to Dismiss for Failure to State a Claim and to this appeal.

Accordingly, given that Defendant/Appellant did identify the legal duty imposed on Plaintiffs/Respondents under both the PIA and caselaw, and the remainder of Plaintiffs/Respondents' arguments improperly require findings of fact, the dismissal of Count II of the Amended Counterclaim should be reversed.

POINT III

DEFENDANT/RESPONDENT HAS STANDING TO ALLEGE A BREACH OF FIDUCIARY DUTY AND THE PRUDENT INVESTOR ACT PRIOR TO THE DEATH OF GLORIA OFFRAY AS DEFENDANT/RESPONDENT WAS NOT SEEKING TO ENJOIN THE ACTIONS OF THE CO-TRUSTEES NOR TO FILE EXCEPTIONS TO THE ACCOUNTINGS

In Point II.C of their opposition Plaintiffs/Respondents assert the Amended Counterclaim must be dismissed for the period prior to March 24, 2021, the date of death of Gloria Offray, because Defendant/Appellant does not have standing to make any claims related to the actions of the Co-Trustees prior to the death of Gloria Offray. This assertion is incorrect, as Plaintiffs/Respondents misunderstand the caselaw and what is being sought by Defendant/Appellant, which is a claim for breach of fiduciary duty and the PIA.

As the Court will see in their response what Plaintiffs/Respondents focus on are cases that hold a remainder beneficiary does not have standing to seek to enjoin the actions of a trustee during the life of the lifetime beneficiary nor to file exceptions to an accounting submitted while the lifetime beneficiary is alive. Those, however, are not the claims asserted in the Amended Counterclaim.

Rather, the claims that are being pursued are for breach of fiduciary duty under both common law and the Prudent Investor Act, involving neither an action for injunctive relief nor exceptions to an accounting. And, contrary to Plaintiffs/Respondents' claim they owed no duty to Defendant/Appellant during the

life of Gloria Offray, In Matter of Will of Maxwell, 306 N.J. Super. 563 (App. Div. 1997) unambiguously holds otherwise. It could not be more clear co-trustees, in this case Plaintiffs/Respondents, during the life of Gloria Offray had not only a fiduciary obligation to Gloria Offray, but had a fiduciary obligation to Defendant/Appellant as a remainder beneficiary.

With respect to Plaintiffs/Respondents overreaching claim there was no fiduciary obligation given the Trust obligated the Plaintiffs/Respondents to distribute all of the net income to Gloria Offray during her life, this is both a misrepresentation of the four (4) Trusts, but improperly requires a factual finding on a Motion to Dismiss for Failure to State a Claim that Plaintiffs/Respondents did in fact make such distributions. Moreover, this position ignores the fiduciary obligation to grow the principal of the Trusts, as well as to provide for a reasonable income.

As for the four (4) Trusts the reason this is a misrepresentation is that only two (2) out of the four (4) Trusts required distribution of all the net income, with the other two (2) only providing distribution of all of the net income based upon the discretion of the Co-Trustees, being Plaintiffs/Respondents.

Second, given that below what was before the trial court was a Motion to Dismiss for Failure to State a Claim it was improper for the trial court to dismiss the Count II of the Amended Counterclaim based upon the language of the Marital Trusts when there were no facts elicited pre-discovery Plaintiffs/Respondents did in

fact distribute all of the net income while Gloria Offray was alive. As such, this basis for the dismissal of Count II of the Amended Counterclaim on a Motion to Dismiss was improper.

Based on the foregoing the decision of the trial court dismissing Count II of the Amended Counterclaim was improper and should be reversed.

POINT IV

GIVEN NEITHER SHARON OFFRAY NOR CLAUDE OFFRAY, IV WILL DIRECTLY BENEFIT FROM A JUDGMENT OTHER THAN AS REMAINDER BENEFICIARIES THEY ARE NOT INDISPENSABLE PARTIES TO THE LITIGATION

In Point III of their opposition Plaintiffs/Respondents submit the Amended Counterclaim was properly dismissed for failure to join indispensable parties, in this case Sharon Offray and Claude V. Offray, IV, due to their Powers of Attorney.

First, with respect to this claim Plaintiffs/Respondents do not offer any caselaw in support of their positon someone with a Power of Attorney who will not directly benefit from the litigation must be joined as a party if they are aware of the litigation and choose not to be joined as a party. In this instance there is no dispute Sharon Offray and Claude Offray, IV, who hold and held the Powers of Attorney, are very much aware of the litigation and did not choose to join as parties.

Second, the only person who at this moment is affected and has a right to litigate Plaintiffs/Respondents breach of the PIA and fiduciary duty is

Defendant/Appellant.[1] And, if a judgment is granted in favor of Defendant/Appellant it will be Defendant/Appellant who benefits at this time, not Sharon Offray and Claude Offray, IV. There is no dispute the Powers of Attorney did not give them the right to any proceeds of the litigation, other than as remainder beneficiaries.

As for the merits of the claim in opposition to the dismissal of the Amended Counterclaim for failure to join indispensable parties Defendant/Appellant relies upon the arguments as set forth in his initial brief.

[1] Defendant/Appellant acknowledges Defendant Denise Offray had an opportunity to participate in opposition to the Motion to Dismiss for Failure to State a Claim, and potentially in this appeal, but chose not to do so, and was dismissed from this appeal.

CONCLUSION

For the foregoing reasons and for the reasons set forth in his initial brief Defendant/Appellant Claude V. Offray, III respectfully requests this Court reverse the decision of the trial court and remand Count II of the Amended Counterclaim to the trial court and upon remand to a different Judge, as the trial court committed numerous and blatant errors of law and that appeared to be result oriented.

Respectfully submitted,

HEROLD LAW, P.A.
Attorneys for Defendant/Appellant
Claude V. Offray, III

By:/s/ Craig S. Provorny
Craig S. Provorny, Esq.

DATED: August 1, 2025