To be Argued by:
JACQUES CATAFAGO
(*Time Requested: 15 Minutes*)

Supreme Court of the State of New York
Appellate Division – First Department

Case Nos.:
2023-02618
2023-02621
2023-06798
2024-00643

MALI FUKS, individually and on behalf of
R&L REALTY ASSOCIATES, a New York partnership,

Plaintiff-Respondent,

- against -

RAKIA ASSOCIATES and 2701 BROADWAY ASSOCIATES,

Defendants-Appellants,

- and -

LANCASTER STUDIO ASSOCIATES, UPWEST COMPANY, 27 EAST 21 STREET COMPANY and 504 WEST 111 OWNERS CORP.,

Defendants,

(See inside cover for continuation of caption)

BRIEF FOR PLAINTIFF-RESPONDENT

CATAFAGO FINI, LLP
Attorneys for Plaintiff-Respondent
60 East 42nd Street, 47th Floor
New York, New York 10165
(212) 239-9669
jacques@catafagofini.com

New York County Clerk's Index Nos.: 122768/1996 & 102882/2002

APPELLATE INNOVATIONS
(914) 948-2240

- and -

RUTH SHOMRON,

Defendant-Appellant,

- and -

ALFRED SZALA and
GOLDSTICK WEINBERGER, FELDMAN & GROSSMAN, P.C.,

Defendants,

- and -

ESTATE OF HOWARD SIMON and LARRY GOLDSTEIN,

Defendants-Appellants,

- and -

LINDA GOLDSTEIN,

Defendant.

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PRELIMINARY STATEMENT

Nearly 30 years ago, Mali Fuks ("Fuks") discovered that her partner in R&L Realty Associates ("R&L"), Appellant Ruth Shomron ("Shomron"), amongst other misdeeds, had breached her fiduciary duty to Fuks. For the past quarter of a century, Fuks doggedly pursued this litigation to uphold her rights and seek compensation for the damages Shomron inflicted upon her and R&L. Fuks was opposed at every step by Shomron, who used her great financial resources to delay this and related cases, forcing a move to arbitration, then abandoning that and moving back to the courts. This journey through the courts has caused Fuks immense financial harm, driving her close to bankruptcy and personal emotional devastation from the suicide of her husband Yoram Fuks. This Court should not allow any further delay in granting justice to Fuks.

Nearly 15 years ago, the issues in Fuks' Complaint and her objections to the accounting of Shomron of the income, expenses, assets and liabilities of R&L were referred to Referee Lancelot Hewitt to hear and report. Referee Hewitt presided over more than 100 days of hearings spanning eight years, generating thousands of pages of transcripts, hearing 16 witnesses including four experts, admitting over 1,000 documents containing over 10,000 pages into evidence, and after three years of consideration issuing an 85-page report (the "Report").

Following the Referee's issuance of the 85-page Report, Appellants moved to confirm, reject, and modify the Report. However, Appellants failed to provide the lower court with the extensive hearing record and did not object to the Referee's failure to file the same until *after* the Report had been confirmed. It was only because Appellants were displeased with the lower court's decision that they belatedly complained about this issue on appeal. (Notably, Appellants specifically did not appeal from the parts of the lower court's decision that granted the relief Appellants sought.)

Upon remand from this Court to consider the record in front of the Referee, the lower court obtained the hearing record and issued several Decisions and Orders determining the remaining issues in this matter. Despite the extensive record and numerous findings of two fact finders following a seven-year inquest in front of the Referee and the extensive motion practice and hearings in front of the lower court, Appellants again appeal the lower court's Orders and Judgment, complaining that there is insufficient evidence to support the lower court's findings. Appellants' brief is not only unsupported by the record, but it is also extremely disrespectful and rife with inaccuracies. Remarkably, Appellants even went so far as to surreptitiously and unilaterally change the caption to include the Estate of Howard Simon as a party, despite Appellants' counsel never having moved to represent the estate. Enough is

enough. This Court must put an end to this never ceasing saga that has drained the court of far too much of its time and resources.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the court below properly confirmed the Referee's finding that Shomron had breached her fiduciary duties to Fuks and that Fuks be awarded $375,000.00 in damages.

2. Whether the court below properly deferred to the Referee's credibility determinations in confirming the part of the Report that found that entries in Shomron's Certified Accounting were "inaccurate," "incorrect," or "incomplete."

3. Whether the court below properly dismissed Shomron's Eighth Counterclaim seeking the repayment of loans that had allegedly been made to R&L.

4. Whether the court below properly dismissed the Eleventh and Twelfth Counterclaims asserted by Goldstein and Simon, respectively.

5. Whether the court below properly reduced the award of legal fees to Shomron to $176,445.10.

6. Whether the court below properly confirmed the part of the Referee's Report finding that Appellants' Thirteenth Counterclaim for Abuse of Process was without merit.

COUNTERSTATEMENT OF THE CASE

This appeal concerns several decisions of the lower court in connection with the parties' motions to confirm, reject, and/or modify the report dated May 21, 2021 (the "Report") issued by Special Referee Lance Hewitt (the "Referee") after a years-long hearing on the issues remaining in *Fuks v. Rakia Associates, et. al.* (Sup. Ct. N.Y. Co.) (Index No. 122768/1996) ("Action No. 1") and *Shomron v. Fuks, et. al.* (Sup. Ct. N.Y. Co.) (Index No. 102882/2002) ("Action No. 2"). A2-7; A8-13; A14-19; A20-24. These issues were referenced to the Referee to hear and report. A69.1-69.51. Specifically, this appeal is from:

> (1) The Decision and Order dated April 10, 2023 and entered April 11, 2023 (the "April 11, 2023 Order") which: (a) modified the Referee's Report to increase the amount of the constructive trust in favor of R&L to $1,596,154.25, comprised of $662,628.85 net profit plus $933,525.40 in statutory interest; (b) declared that the loans from Salon, 2701 Broadway, Zilber, Rakia, Kaplan, Khan, and Ms. Shomron are valid and enforceable, and Shomron can pay back Harry Sloan the sum of $13,444.62 with interest at the rate of 10% per annum and Ordered that the parties are to appear in person for an inquest to determine the remaining amounts, if any, on the Eighth counterclaim loans, on May 10, 2023 at 10:00 am; (c) denied Shomron's request to modify the report to impose attorneys' fees without prejudice to making a motion for same within 30 days of the e-filed date of the decision and order; (d) dismissed Shomron's Ninth, Tenth, Eleventh, and Twelfth Counterclaims; and (e) confirmed the determinations in the Referee's Report that: (i) Shomron's accounting was "substantially and significantly" inaccurate and incomplete; (ii) Fuks was entitled to an award of $375,000 for Shomron's breach of fiduciary duty; (iii) Shomron's Fourth Affirmative Defense based on the statute of limitations should be dismissed; (iv) Shomron's Seventh Counterclaim

should be dismissed for failure of proof; and (v) Shomron's Counterclaim for abuse of process was without merit (A24-24.12);

(2) The Decision and Order dated May 10, 2023 and entered May 11, 2023 (the "May 11, 2023 Order") that dismissed Shomron's Eighth Counterclaim for failure to prove damages (A24.13-24.15)

(3) The Amended Judgment dated May 26, 2023 and entered July 5, 2023 (the "Amended Judgment") that, in part, entered a money judgment against Shomron in favor of Fuks on the breach of fiduciary duty claim in the amount of $375,000 plus interest (A24.16-24.18); and

(4) The Decision and Order dated October 3, 2023 and entered October 4, 2023 (the "October 4, 2023 Order") which granted Shomron's motion for attorneys' fees to the extent of directing R&L to reimburse her in the amount of $176,445.10 and denying Fuks' cross-motion for sanctions (A24.19-24.23).

A. The Referee's Decision Denying Shomron's Motion for a Directed Verdict

Causes of Action 1 to 6 in Action No. 1 sought an accounting from Shomron. A203-210. Indeed, this case at its core is about those numbers. At the end of Fuks' direct case, Shomron made a motion pursuant to CPLR 4401. A115, fn. 4. The Referee's decision largely rejected Shomron's CPLR 4401 motion finding:

> Moreover, the extensive testimonial and voluminous documentary evidence adduced at the hearing sufficiently demonstrates that subsequent to when Ms. Fuks obtained a partnership interest in R&L in 1989, Ms. Shomron, on behalf of R&L, engaged in a multitude of business transactions that were consummated without the knowledge and/or consent of Ms. Fuks. Such evidence also demonstrates that many of those transactions involved entities in which Ms. Shomron had an interest or affiliation. A77-78.

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> The extensive testimonial evidence given by Ms. Guttman [sic] [Fuks' expert] at the hearing, as well as the content of her report [Plaintiff's Exhibit 149], sufficiently establishes that the "accounting" submitted by Ms. Shomron in the instant matter is to an extent inaccurate or incomplete…. A75.
>
> **********
>
> Additionally, the documentary evidence submitted by Ms. Fuks, as set forth in Farren's reports [Plaintiff's Ex. 255A and 255B], sufficiently contradict the evidence set forth in the accounting with respect to R&L's capital accounts to support Ms. Fuks' allegations regarding the "false allocation" of ["]monies" and "negative capital accounts." A81.

B. The Referee's Report

The roadmap to the Referee's Report is the Certified Accounting, a 20-schedule 133-page accounting made up of various schedules provided by Shomron, admitted as Plaintiff's Exhibit 3B. *See* A113-196; A8960-9073; A1357. In presenting his final analysis in the Report, the Referee used the schedules representing the sales of apartments, the loans payable, and the loans to partners, comprising 439 entries. *Id*.

Of these 439 entries, at least 245 entries (more than 55%) totaling over $1,759,000 (exclusive of alleged third-party loans) were rejected as incorrect. A161-184, ¶¶ 1-88. An additional 22 entries (over 5%) totaling over $330,000 were deemed to have "insufficient evidence" (A.183, ¶ 85) and, as stated in the Report, "consequently, upon review of the documentary evidence taken together, I find that [the] Certified Accounting submitted by Ms. Shomron to Ms. Fuks in the instant

matter is substantially and significantly inaccurate and incomplete" (A184, ¶ 88). In total 267 entries, or 61%, were either incorrect, inaccurate or there was insufficient evidence to corroborate them. A113-196. In other words, three out of every five entries made by Shomron in these three Schedules alone, were found to be incorrect.

As the Referee correctly explained, once a party objecting to an account has produced evidence to demonstrate that an account is incomplete and inaccurate, the accounting party has the burden of establishing the completeness and accuracy of the accounting by a fair preponderance of evidence. *See* A159, ¶ 5. Here, Shomron declined to have a CPA prepare the accounting and schedules, instead opting to prepare and submit her own schedules which she self-certified to the Court. A9073. During the hearing, no independent, dependable expert or fact witness gave credible testimony in support of Shomron's schedules or any of the counterclaims. Indeed, Shomron did not call any accountant to independently review her accounting schedules, not even R&L's own accountants. Shomron also failed to call upon any of the former co-defendants in Action No. 1 to testify and bolster her own case. A26.

The Referee rejected Shomron's evidence as follows:

> <u>Errors in Shomron's Accounting of Sale of Apartments</u>
>
> Total Entries (per Certified Accounting, A8960-9073): 53 entries
>
> Entries Incorrect (per Referee's Report, A113-196): 31 entries (58% incorrect)

Errors in Shomron's Accounting of Loans Payable (non-Partner)

Total Entries (per Certified Accounting, A8960-9073): 193 entries

Entries Incorrect (per Referee's Report, A113-196): 150 entries (77% incorrect)

Errors in Shomron's Accounting of Loans from Partners

Shomron

Entries for Shomron's alleged loans (per Certified Accounting, A8960-9073): 133 total entries

Entries Incorrect (Referee's Report, A113-196): 34 (26% incorrect)

Goldstein

Entries for Goldstein's alleged loans (per Certified Accounting, A8960-9073): 13 total entries

Entries Incorrect (Referee's Report): 8 entries (62% incorrect)

Simon

Entries for Simon's alleged loans (per Certified Accounting, A8960-9073): 20 entries

Entries Incorrect (Referee's Report, A113-196): 13 (65% incorrect)

Fuks

Entries for Fuks loans (per Certified Accounting, A8960-9073): 27 entries

Entries Incorrect (per Referee's Report, A113-196): 19 (70% incorrect)

Accordingly, the Referee found that Fuks' evidence established that Shomron's accounting contained hundreds of entries that were incorrect, unsupported, or outright fabrication, concluding:

> Upon consideration of all the testimony presented, the considered credibility to be afforded the witnesses, and review of all documents admitted into evidence, I find as to Action No. 1 that the certified accounting submitted by Ms. Shomron to Ms. Fuks is substantially and significantly inaccurate and incomplete[.] A195.
>
> I find…that this document fails to precisely reflect how the amounts received by R&L from the sale of apartments in the subject premises were disbursed. I further find that the document also fails to reflect precisely how the monies received by R&L in the form of loans were disbursed or repaid. A184, ¶ 87.
>
> Consequently, upon review of the documentary evidence taken together, I find that [the] Certified Accounting submitted by Ms. Shomron to Ms. Fuks in the instant matter is substantially and significantly inaccurate and incomplete. A184, ¶ 88.

Notably, the Referee also made numerous findings about the egregious misconduct of Shomron's business partner, Hamid Khan ("Khan"). *See* A125, ¶ 27 n. 10; *see, e.g.*, A126-128, ¶¶ 30-34; A186, ¶ 95.

C. The Gutman Report

Zvia Gutman ("Gutman") testified as an expert and was admitted as such by the Referee over objection of Shomron. A3244, lines 17-23. She testified concerning omissions and inaccuracies in Shomron's accounting schedules, Shomron's mismanagement of R&L's Property, and Shomron's deceptive mishandling of R & L's books and records. Gutman produced a lengthy, well-

documented report which was admitted into evidence. A9818-9832 (admitted at A3317); A9833-10013 (admitted at A3389). The Gutman Report sets forth the actual details and summary of R&L's finances and refutes Shomron's accounting schedules. *Id*. As noted, Gutman reviewed thousands of records and spent approximately 2,000 hours recreating the finances of R&L. A3297, lines 5-6; A3364. Gutman identified numerous transgressions by Shomron, including, but not limited to those specified below.

Shomron used phantom checks, mostly certified, that were used for a whole host of ploys, in some cases being allegedly made payable to tenants for relocation. A9822. Gutman found that IRS form 1099s were never issued by Shomron for any of these alleged relocation transactions despite the legal requirement to do so for any amount over $600. A9827-9828. Testimony showed that the alleged tenants did not receive the specified amounts, if any. *See, e.g.*, A127, fn. 35 (discussing Plaintiff's Exhibit 10B).

Gutman found that Shomron and/or Khan had written many R&L checks to cash and/or were cashed by Khan or deposited into Khan controlled accounts. A9823-9825; A9836; A9946-9947. Gutman found that the escrow IOLA Attorneys account held by Goldstick, Weinberger, Feldman & Grossman ("GWFG") was illegally invaded by and drawn upon by Shomron and other entities under her control. A9823; A9827-9828; A9836; A9952-9955. Gutman found that R&L

checks were written from one account and deposited into another or the same R&L account but were booked as if they were rent (also described as circular checks). *See, e.g.,* A9827-9828; A9832; A9834; A.9843; *see also* A8960-9073.

Shomron illegally and knowingly signed checks far above the amount of available funds (R&L bank records show over 230 checks), which were returned due to insufficient funds. A9822. Shomron failed to provide any evidence that any of the entities to which she sent bad checks took any action or attempted in any way to make good on those funds or to collect the money due to them if any. The logical conclusion is that for some or many of these checks, no payment was actually due. R&L suffered and paid bank charges for this systematic activity. A9822.

Gutman reviewed all of R&L's financial records that Shomron made available. However, during the course of the hearing, it became apparent that Shomron failed to produce all of R&L's records that she had in her possession. Gutman reviewed thousands of checks, bank records, J-51 documents, tax returns and boxes and boxes of other records. A3246, line 26 – A3248, line 7. Gutman put in over 2,000 hours of work into her Report. A3297, lines 2-11. Using her experience as a property manager for comparable properties (A3086, lines 18-19; A3098, lines 3-9), Gutman's report reconstructed an accounting for the rent received and diverted, the improvements claimed and the reasonable costs of such improvements, the unaccounted-for cash and certified checks and circular checks,

the lost rent due to failure to obtain major capital improvement rent increases, the lost tax savings from failure to obtain J-51 benefits and other monies diverted from R&L. *See* A164-168, ¶¶ 13-26; A9818-9832; A9833-10013. Gutman concluded that Shomron had personally benefited by self-dealing, embezzlement and mismanagement at the expense of R&L. A9818-9832; A9833-10013.

In contrast to Shomron's self-created schedules, Gutman is an expert who examined the totality of available records and documented every conclusion in her report. Moreover, Gutman testified and was cross-examined for 25 days. Shomron's counsel, despite unusual latitude and time, was unable to punch substantial holes in Gutman's Report or testimony. As an example of this ineffectual cross-examination, Gutman identified hundreds of returned checks from available bank records (Shomron omitted mention of these checks in her schedules); yet, on cross-examination, Shomron's attorney only asked Gutman about 31 of the "returned" checks. Gutman's amended report takes into consideration those 31 checks, and sets forth the correct amount owed by Shomron to R&L.

D. The Lower Court's First Decision Confirming the Report

In its initial Decision and Order dated July 29, 2021 and entered on August 16, 2021 (the "August 16, 2021 Order") confirming the Referee's Report, the lower court recognized that "Shomron's motions [to confirm, reject, and modify the Report] largely seek a redo of the hearing before the special referee" and explained

that the "court will not engage in second guessing a hearing officer who made credibility findings after listening to testimony directly during a 7-year inquest." A26. There, the court awarded a judgement of $375,000 with statutory interest in favor of Mali Fuks and against Ruth Shomron; declared that the loans from Salon, 2701 Broadway, Helfman, Zilber, Rakia, Kaplan, Khan and Ms. Shomron, bearing interest rates of 10% per annum are valid and enforceable; and imposed a constructive trust in the amount $1,158,316.66, representing the total sum of "rents and profits" earned by the constructive trust. A25-27.

E. The Appellants' Prior Appeal

Appellants appealed the August 16, 2021 Order and perfected their appeal on May 13, 2022. The appeal was fully briefed as of September 7, 2022 and oral argument was held on November 15, 2022.

On appeal, Appellants argued that the lower court had failed to obtain and consider the record before the Referee. Apps. Br. at 3.[1] As a result, this Court did not address that appeal on the merits and instead issued an Order on December 8, 2022 remitting the matter to the motion court for a new decision that takes into consideration the transcripts and other evidence before the Referee. A24.24-24.26.

[1] "Apps. Br." refers to the Brief for Appellants-Defendants filed on February 13, 2024 (NYSCEF Doc. No. 32).

F. The Lower Court's Decisions on Appeal

The April 11, 2023 Order

On remand, Appellants provided the lower court with much – but notably not all – of the record in front of the Referee. Indeed, Appellants failed to include more than 200 of the exhibits admitted during the hearings, some of which contain hundreds of pages of evidence such as checks, deposit slips, bank statements, etc. With respect to the hearing transcripts, it appears that Appellants cherry picked the testimony that was most beneficial to them, failing to include nearly 60 of the more than 150 transcripts. For example, Appellants did not provide the lower court or this Court with Plaintiff's Exhibits 8C, 9B, 10A, 10B, 48-A, 48-B, & 48-C.

Following consideration of record provided to it, the court issued its April 11, 2023 Order confirming in part and modifying in part the Referee's Report. In its Order, the lower court emphasized that this action has been pending for nearly 30-years and "rivals the long running dispute in Charles Dickens' novel, *Bleak House*[.]" A24. The court made particular note of Shomron's repeated antics in litigating this case:

> The court also notes that Shomron has gone out of her way to conflate issues and confuse the court. The brief on this motion is a rambling 34 pages that lack a table of contents and table of authorities. This brief pales in comparison to the 45-page post-trial brief that also lacks a table of contents and table of authorities. One wonders if this was done on purpose to obfuscate as it is in total violation of the rules of the Commercial Division, this Part, and common sense. This was in addition to purposeful omissions and misrepresentation of the record

> that could only have been designed to take advantage of a judge who is new to a case that has been pending for almost 30 years.

A24.1-24.2.

The lower court also highlighted that, despite the nearly seven years long inquest, Shomron has never been able to sufficiently prove her alleged damages:

> The Report of the Special Referee is over 80 pages long. In Action No. 1, the Special Referee rejected Shomron's accounting, holding that it was "inaccurate and incomplete" (Report pg. 85). The Special Referee reviewed several schedules in Shomron's "accounting" and specifically found hundreds of incorrect or incomplete entries about income, loans, and expenses. Even after all the time this case has been pending, Shomron is unable or unwilling to account for hundreds of thousands of dollars. This does not reflect well on Shomron's credibility. The Special Referee also found that Shomron breached her fiduciary duties to Fuks by engaging in active misconduct, as delineated on pages 74-76 of the Report. This also does not reflect well on Shomron's credibility.

A24.2.

In its April 11, 2023 Order, the lower court modified the Report to increase the amount of the constructive trust in favor of R&L to the amount of $1,596,154.25, plus statutory interest on $662,628.85 from 1/1/2018. A24.3-24.4; A24.11.

The court confirmed the part of the Report that found the loans in Shomron's Eighth Counterclaim to be valid and declared that Shomron could pay back Harry Sloan the sum of $13,444.62 with interest, but scheduled a hearing to determine the amounts due on the balance of the remaining loans. A24.4-24.5; A24.11. The court reminded Shomron "that she has the burden of proof on the amount of these loans"

and noted that "[g]iven the inaccurate and incomplete accounting she has produced, it may be impossible to carry that burden." A24.5.

Next, the lower court confirmed the Referee's determination that Shomron's accounting was "substantially and significantly inaccurate and incomplete." A24.5. As the lower court explained:

> The Referee heard from witnesses and reviewed several schedules. He found hundreds of incorrect or incomplete entries about the income, expense assets, and liabilities of R&L. Indeed, after litigating since 1996, Shomron is unable to account for hundreds of thousands of dollars. Shomron has kept terrible records and is now suffering the consequences.
>
> The Referee also found, after considering the testimony, that Shomron had superior involvement with R&L to Fuks and therefore more responsibility for keeping records (Report, pg. 75). The court will not disturb these findings made after consideration of witness testimony and weighing of evidence (*see Bank of Am. N.A., v Greenfield*, 203 AD3d 1003 [2d Dept 2022]).

A24.5.

The court also confirmed the Referee's award of $375,000 to Fuks for Shomron's breach of fiduciary duty, finding that "the Referee's calculation is well-supported in the record" and that it "actually could have been higher." A24.5-24.6.

The lower court then confirmed the Referee's dismissal of Shomron's Fourth Affirmative Defense based on the statute of limitations and Shomron's Seventh Counterclaim for breach of fiduciary duty. A24.6-24.8. With respect to the Fourth Affirmative Defense, the court found that the limitations period was six years – not

three years as Shomron insists – and that, in any event, she waived this issue by failing to raise it in her post-trial brief to the Referee. A24.7. The lower court confirmed the Referee's dismissal of Shomron's Seventh Counterclaim for failure of proof. A24.7-24.8.

The court also dismissed Shomron's Eleventh and Twelfth Counterclaims for failure meet her burden as to the amounts owed to Larry Goldstein and the Estate of Howard Simon. A24.8-24.10. As the lower court emphasizes:

> Only Shomron testified about the amounts allegedly owed. Given that the Referee specifically found that the amounts Shomron recorded for these loans/capital contributions were inaccurate, that the overall accounting was "substantially and significantly inaccurate and incomplete," that Fuks had long accused Shomron of using sham accounting to pocket money from R&L, and that Fuks prevailed on her breach of fiduciary duty claim which incorporated these accusations, the record supports disregarding Shomron's testimony about these capital contributions/loans under the doctrine *in falsus unum, in falsus omnibus*. Therefore, the failure of Goldstein or anyone from Simon's estate to testify is fatal. Shomron has thus failed to carry her burden as to amounts owed to Goldstein and Simon.

A24.9-24.10.

Next, the lower court confirmed the Referee's finding that Shomron's Counterclaim for abuse of process with respect to the arbitration proceeding was without merit. In so doing, the court highlights the hypocrisy of Shomron's request:

> This is the height of hypocrisy. Both parties have abused the court process for decades to a degree this court has never seen. Neither seem to care about the court's time or that their endless vendetta against each other has used up resources that could have been spent on other litigations. It confounds the court that Shomron first moved to

> disapprove the Report of the Referee without providing the record to the judge, who was new to the case. Then, after losing the motion, appealing the decision and somehow managing to supply that missing record to the Appellate Division. Further, movants here misrepresented by omission what Judge Stackhouse ordered and failed to include the Referee's fulsome decision on Fuks' CPLR 4401 motion to make it look like the Referee had no reason to dismiss Shomron's seventh counterclaim. And even further, the court finds it disingenuous how Shomron, defendant in in Action No. 1, continues changing the nature of an alleged debt as it suits the needs of the case at that moment. While we are on the subject, the court warns that continuing to omit inconvenient facts, procedural or otherwise, to this court, will result in sanctions. This conduct is all the more egregious because Shomron has had the same attorney in this dispute from the first day (*see* Reply Aff., pg. 5).

A24.10.

Finally, the lower court denied Shomron's request for an award of attorneys' fees for the successful prosecution of Action No. 2 on the basis that it was not part of the reference to the Referee and therefore the Referee had no jurisdiction to decide it. A24.11. However, the court's denial was without prejudice to a separate motion for reasonable attorneys' fees incurred in the prosecution of the constructive trust claim. *Id*.

The May 11, 2023 Order

Following an inquest on Shomron's Eighth Counterclaim the lower court issued its May 11, 2023 Order declaring that the loans in the Eighth Counterclaim were valid and enforceable but that the Eighth Counterclaim was dismissed for failure to prove damages. A24.13-24.15. As the court explained:

> Given that the parties have been litigating since 1996 and the inquest took them seven years to complete, the court stressed in its decision on motion 28 (EDOC 115) there was to be no new evidence at the inquest other than what was submitted at the original 7-year hearing before the Special Referee. The court also admonished Shomron's counsel for obfuscating the issues in this case and warned that further attempts to mislead the court might result in sanctions.

A24.13. Despite this clear warning, "[t]he inquest became a circus." Highlighting how unprepared Shomron's counsel was, the lower court determined that Shomron was unable to prove damages:

> Shomron's counsel was unprepared. He did not come in with documents for anyone but himself. He expected the court and opposing counsel to have had the foresight to bring all the evidence from the 7-year hearing before the Special Referee, despite the narrow nature of the inquest. Fortunately, the court had retained the flash drive containing the exhibits from the hearing and proceeded with electronic documents.
>
> Once the inquest was underway, incredibly, and despite the prior admonishment not to mislead the court any further, Shomron's counsel lead off with an attempt to relitigate an amount the Special Referee had already found to be inaccurate: Shomron's alleged loan from July 11, 1990 (see Report at ¶ 81, pg 71).
>
> After being asked to move on from loan amounts the Special Referee had already ruled were inaccurate, counsel basically admitted he could point to no proof other than a compilation he created after the hearing before the Special Referee had closed. However, items counsel prepares are not evidence. Despite repeated requests from the court to point to actual evidence, counsel was unable to do so. Instead, he claimed that, given the voluminous nature of the documents, to do so would be "impossible." He did not even try to give the court a sampling. Aside from his client, he did not show up to court with any witnesses (such as one of the accountants from the inquest which might have been helpful). He did not even ask to put his client on the stand.

> This was unfortunate for it is Shomron/Rakia who has the burden of proof on the counterclaim.
>
> **********
>
> Shomron has had 27 years to prove her counterclaim. She has not done so. Having failed utterly to maintain proper business records, she is now suffering the consequences. Therefore, although the court declares that the loans in the eighth counterclaim are valid and enforceable as the Special Referee found, the court dismisses the eighth counterclaim for failure to prove damages.

A24.14 (emphasis in original).

The Amended Judgment

Following the April 11, 2023 and May 11, 2023 Orders, the lower court issued an Amended Judgment dated May 26, 2023 and entered on July 5, 2023. This Amended Judgment: (i) confirmed the Referee's Report as modified by the April 11, 2023 Order; (ii) awarded Fuks a judgment on her Twelfth Cause of Action against Shomron the amount of $375,000 plus interest at 9% per annum from December 30, 1996 in the sum of $895,345.89; (iii) declared that the loans specified in Shomron's Eighth Counterclaim are valid and enforceable but that the Eighth Counterclaim is dismissed for failure of proof as to amounts; (iv) declared that Shomron, on behalf of R&L is authorized to pay back the loan made by Harry Salon to R&L in the amount of $40,000 plus interest of 10% per annum from February 1, 1994 to the date of the Amended Judgment in the sum of $117,764.38; (v) adjudged that Plaintiff's objections to the accounting of Shomron are upheld as the accounting is substantially

and significantly inaccurate and incomplete; and (vi) dismissed with prejudice the Fuks' Complaint and the Counterclaims asserted by the defendants. A24.16-24.18

The October 4, 2023 Order

Pursuant to the lower court's April 11, 2023 Order, Shomron moved for attorneys' fees, seeking $352,890.20 for attorneys' fees and costs incurred in her successful prosecution of Action No. 2. Fuks also cross-moved for sanctions against Shomron and her counsel. *See* A24.19. In its October 4, 2023 Order, the lower court denied Fuks' cross-motion and granted Shomron's motion to the extent of awarding her $176,445.10 in attorneys' fees and costs. A24.19-24.23. As the lower court explained, its decision to reduce Shomron's fees was based on several issues with the invoices and timesheets submitted by her counsel:

- The April 11, 2023 Order limited Shomron's fees to those incurred while prosecuting the constructive trust claim, but "the time records submitted in support of [Shomron's] attorneys' fee request do not differentiate between those fees generally incurred in prosecuting this case, versus those fees that were specifically incurred in prosecuting the constructive trust claim, as specified in the Order." A24.21.

- "Additionally, the invoices and time entries are also unclear on whether such work was being performed for one action, the other action, or both, and ultimately fail to differentiate what work is being done for which case." A24.21.

- "The time records and invoices counsel submitted also clearly highlight the duplicative and unnecessary work that was performed throughout the past three decades that this case has been pending. The records and invoices are clear evidence of overlitigation and underscore the numerous instances of unnecessary legal work that counsel performed." A24.21-24.22.

- "The invoices and time entries are also rife with instances of block billing, making it nearly impossible for the court to discern how much time was spent on each specific task and ultimately prevents the court from determining the reasonableness of the fee request." A24.22.

Accordingly, the lower court reduced the amount of attorneys' fees it awarded Shomron to $176,445.10. A24.23.

ARGUMENT

I. THE COURT BELOW PROPERLY CONFIRMED THE REFEREE'S REPORT

"It is well settled that the report of a Special Referee shall be confirmed whenever the findings contained therein are supported by the record and the Special Referee has clearly defined the issues and resolved matters of credibility, since the Special Referee is considered to be in the best position to determine the issues presented." *Nager v. Panadis*, 238 A.D.2d 135, 135-36 (1st Dep't 1997) (holding that "the IAS court erred when it declined to confirm the report as a review of the report reveals that Special Referee Liebman cogently and concisely analyzed the issues presented, and evaluated and credited the defendants' testimony"); *see Abe v. New York Univ.*, 190 A.D.3d 543, 543 (1st Dep't 2021) ("The Special Referee clearly defined the issues and was in the best position to weigh the evidence and make credibility determinations, and we perceive no basis to disturb them."); *Safka Holdings, LLC v. 220 W. 57th St. Ltd. P'ship*, 142 A.D.3d 865, 866 (1st Dep't 2016) ("The Referee's findings were supported by the record, and the Referee clearly

defined the issues and resolved matters of credibility."); *Hopper v. Premier Coach, Inc.*, 111 A.D.3d 508, 509 (1st Dep't 2013) ("The report of a JHO should be confirmed whenever the findings contained therein are supported by the record and the [JHO] has clearly defined the issues and resolved matters of credibility."); *Baker v. Kohler*, 28 A.D.3d 375, 375-76 (1st Dep't 2006) ("The report of a referee should be confirmed if its findings are supported by the record.").

This Court has repeatedly emphasized that, because a referee is in the best position to determine the credibility of the witnesses before him, the referee's credibility determinations are entitled to deference. *See Winopa Int'l, Ltd. v. Woori Am. Bank*, 59 A.D.3d 203, 204 (1st Dep't 2009) ("[T]he court, in confirming the report, properly deferred to the findings of the Special Referee, who was in the best position to weigh the evidence and make credibility determinations."); *Application of Corcoran*, 176 A.D.2d 508, 508 (1st Dep't 1991) ("The JHO was in the best position to determine the credibility of the witnesses before him."); *Credit Car Leasing Corp. v. Litwer*, 168 A.D.2d 319, 320 (1st Dep't 1990) ("Credibility questions are for the referee, and we find no reason to disturb the credibility determinations of the Referee, who was in a better position than this Court to determine credibility."); *see also Galasso, Langione & Botter, LLP v. Galasso*, 89 A.D.3d 897, 898 (2d Dep't 2011) ("The credibility determination of a referee's report are entitled to deference on appeal, since the referee had the opportunity to see and hear the witnesses.");

Anonymous v. Anonymous, 289 A.D.2d 106, 107 (1st Dep't 2001) ("The special referee had the advantage of hearing the witnesses and observing their demeanor, and his evaluation of their credibility is entitled to deference on appeal.").

Here, the lower court's confirmation of the Referee's Report was proper. *Abe*, 190 A.D.3d at 543 (affirming lower court's confirmation of the Referee's report). The Report summarizes the relevant trial testimony, analyzes the evidence in light of controlling law, and makes specific findings of credibility where the testimony was conflicting. The record supports the Referee's findings of fact, and his conclusions of law are consistent with controlling precedent. Moreover, the lower court's deference to the Referee's findings and credibility determinations was appropriate, especially given the vast amount of conflicting testimony. *See Winopa Int'l, Ltd.*, 59 A.D.3d at 203 (holding that trial court's deferral to Referee's findings was appropriate).

II. THE ORDERS ON APPEAL ARE SUPPORTED BY THE RECORD AND SUFFICIENTLY STATE THE FACTS ESSENTIAL TO THEIR DECISIONS

As they did on their prior appeal, Appellants cite CPLR 4213(b) and CPLR 4319, falsely assert that "neither the Referee nor the lower court stated a single fact from the hearing record they deemed essential on *any* of the issues in this appeal[.]" Apps. Br. at 36 (emphasis in original).

Appellants specifically point to two determinations made by the lower court: (1) "that Fuks sustained $375,000.00 in damages because of Shomron's alleged breach of fiduciary duties"; and (2) that "Shomron's 'accounting' was 'substantially and significantly inaccurate and incomplete." Apps. Br. at 36. While not clearly articulated, Appellants appear to be arguing that, with respect to these findings, both the Referee's Report and the lower court's Orders did not comply with CPLR 4319 and 4213 and, therefore, must be reversed. *See id*. at 33-37. However, this argument fails for the reasons set forth herein and below.

Despite Appellants' assertion, the prevailing view is that CPLR 4319 applies only to a referee to hear and determine, not one to report and recommend, and therefore would not apply directly to the Report at issue here. *See* CPLR 4319, Practice Commentaries ("CPLR 4319, like CPLR 4318 preceding it, while not stating in terms that it applies to only a reference to determine, makes clear by its content that that's what it intends. Its title 'decision' by itself makes that clear, because the referee who renders a 'decision' is a referee to determine."); *John Hancock Mut. Life Ins. Co. v. 491-499 Seventh Ave. Assocs.*, 169 Misc. 2d 493, 498 (N.Y. Sup. N.Y. Co. 1996) ("[A] review of the legislative history makes it clear that CPLR 4317-4319 are a series of sections that all relate to referees to determine not referees to report.…The text of the section also makes it clear that it applies only to

referees to determine. The statute refers to 'the decision.' Only a referee to determine may issue a 'decision' while a referee to report issues a 'report.'").[2]

Because, here, the reference was made "to report and recommend" pursuant to CPLR 4201, CPLR 4320 applies instead. *See* CPLR 4319, Practice Commentaries ("A referee to report makes only a recommendation to the court (that's what the 'report' is), and that's governed by CPLR 4320(b)."); *see, e.g., NYCTL 2012 A-Tr. v. 1698 Lex Corp.*, 169 A.D.3d 577, 578 (1st Dep't 2019) ("The report, which referred to an intermediate order considering intervenor-defendants' motion for a directed verdict, adequately complies with the requirements of CPLR 4320.").

However, even under the requirements of CPLR 4319 and CPLR 4213(b) to the court's decision below, the findings of fact and conclusions of law set forth are more than sufficient. Here, the Referee's Report spans 85-pages with very detailed findings and conclusions. A112-196. It begins by laying out all evidence the Referee found relevant to his findings, and includes extensive citation to evidence admitted during the hearings. A113-158, ¶¶ 1-118. The Report then contains a section describing the appropriate legal standards and principles that the Referee applied in making his recommendations. A158-161, ¶¶ 1-13. Finally, the Report

[2] *See c.f. Kucherovsky v. Excel Med. & Diagnostic, P.C.*, 93 A.D.3d 531, 531 (1st Dep't 2012) ("The reference in this action was clearly one to hear and determine (*see* CPLR 4301) rather than to hear and report (*see* CPLR 4201). Consequently, the referee possessed 'all the powers of a court in performing a like function' (CPLR 4301), and his decision 'shall stand as the decision of a court' (CPLR 4319).").

contains a thorough analysis of the issues referred to the Referee to hear and report, including the Referee's findings and recommendations. A161-162, ¶¶ 1-4; A162-191, ¶¶ 5-111 (discussing Action No. 1); A191-195, ¶¶ 1-13 (discussing Action No. 2).

After considering the extensive record presented during the seven-year inquest, the lower court issued its April 11, 2023 Order granting in part and denying in part Shomron's motion to set aside certain portions of the Referee's Report. A24.1 ("The court now renders a decision having taken into consideration the hearing transcripts and other evidence before the Referee, including all prior decisions, exhibits, memoranda of law, affidavits, charts, calculations, and emails."); *see* A24-24.12. As discussed in detail below, the April 11, 2023 Order sets forth in sufficient detail its findings of fact and conclusions of law. *See id*.

Even relatively short trial court decisions are routinely affirmed as sufficient under CPLR 4213(b). *See, e.g.*, *Marks v. Macchiarola*, 250 A.D.2d 499, 499 (1st Dep't 1998) ("Brief though the trial court's decision is, it sets forth sufficient findings of fact and conclusions of law to satisfy the requirements of CPLR 4213(b)…."); *see c.f. Kermanshah Oriental Rugs, Inc. v. Latefi*, 51 A.D.3d 562, 563 (1st Dep't 2008) ("We also find unavailing plaintiff's claim that a new trial is warranted on the ground that the decision and judgment failed to state the essential facts on which they are based for, although brief, the trial court's decisions set forth

sufficient findings of fact and conclusions of law to satisfy the requirements of CPLR 4213(b).”). In comparison, the Orders appealed from, together with the Referee’s Report, contain more than 100-pages of thorough discussion of the evidence, findings, and issues (A24-24.23; A112-196), and clearly meet CPLR 4213(b)’s requirement that the decision of the court “state the facts [the court] deems essential.” CPLR 4213(b).

Indeed, Appellants again cite the same cases (*see* Apps. Br. at 35-36) that only highlight the sufficiency of the lower court’s decision. Not only are the cases highly distinguishable – including because *none* involve the confirmation of a Referee’s report – but to the extent relevant, they show just how bare bones a decision must be in order to be deemed insufficient under CPLR 4213(b).

For example, in *Weckstein v. Breitbart*, 111 A.D.2d 6 (1st Dep’t 1985), the trial court dismissed all plaintiff’s claims after a bench trial “without making any findings of fact or conclusions of law…saying only that plaintiff wholly failed to prove his case.” *Id.* at 7. “Without benefit of any findings of fact by the court below,” the First Department was then “asked to rule on a myriad of issues.” *Id*. Nevertheless, the First Department still affirmed the lower court’s dismissal of four of the plaintiff’s causes of action (*id*.), putting a lie to Appellants’ assertion that the “requirement that the lower court state the facts it deems essential for its decision” is “mandatory” (Apps. Br. at 35).

Likewise, the decision of the trial court in *People Theatres of N.Y. Inc. v. City of New York*, 84 A.D.3d 48 (1st Dep't 2011) was similarly lacking. In an action challenging constitutionality of amendments to the city's zoning regulations, the lower court had been asked to answer a question posed on remitter from the Court of Appeals regarding whether 60/40 establishments were similar in nature to certain other adult establishments that had been shown to cause negative "secondary effects." *Id*. at 59. Unlike here, where the lower court's decision includes dozens of pages of analysis explaining how the Referee arrived at his findings and recommendations, the trial court's decision in *People Theatres of N.Y.* was described as "extremely terse" and "simply detailed the City's evidence and arrived at legal conclusions." *Id*. Notably, it did not set forth any findings of fact and, thus, "did not provide any direction for the parties or [the First Department] to adequately review, analyze, or understand the ruling." *Id*. at 59-60.

Power v. Falk, 15 A.D.2d 216 (1st Dep't 1961), decided prior enactment of CPLR 4213, concerned an appeal from a post-trial dismissal. There, the Special Term had merely recited the controversy, leaving the parties and the appellate court "no way of knowing what ultimate facts the court found to support the conclusion that plaintiffs failed to make out a case" or even "whether, if such a case was made out, it is barred by limitations." *Id*. at 218.

Finally, *Cobb v. Collins*, 123 A.D.3d 520 (1st Dep't 2014) involved an appeal from a judgment following a damages inquest. Notably, CPLR 4213(b) expressly requires the itemization of personal injury, injury to property or wrongful death damages. *Id*. ("In any action brought to recover damages for personal injury, injury to property or wrongful death, other than a medical, dental or podiatric malpractice action commenced on or after July twenty-sixth, two thousand three, the court's decision as to future damages shall be itemized in accordance with subdivision (e) of rule forty-one hundred eleven of this chapter."). In *Cobb*, the First Department's reversal was based on the lower court's failure to itemize the damages as required. *Cobb*, 123 A.D.3d at 520.

As with their prior appeal and in their motions in court below, Appellants' brief on appeal is rampant with slights of hand, mis-quotes, quotes with no sources and other deceptive writing. Appellants seek to have the Court accept an alternative history of facts based upon Shomron and her counsel's biased view rather than the record of testimony and documents relied upon by the Referee and the court below.

Both below and now, Appellants rely heavily on the Affirmations of counsel, which are inadmissible hearsay. *See JMD Holding Corp. v. Congress Fin. Corp.*, 4 N.Y.3d 373 (2005); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *Palo v Principio*, 303 A.D.2d 478 (2d Dep't 2003). Moreover, as discussed above, Appellants' subjective disagreements with the Referee's credibility determinations

must be rejected. *See, e.g., Winopa Int'l, Ltd. v. Woori Am. Bank*, 59 A.D.3d 203, 204 (1st Dep't 2009).

At bottom, Appellants are upset that after decades of litigation they have failed to get the outcome that they desired and, instead of accepting that reality, have decided to further prolong this endless dispute. This Court should tell them enough is enough and affirm the lower court's well-reasoned Orders.

III. THE COURT BELOW PROPERLY CONFIRMED THE AWARD IN FAVOR OF FUKS BASED ON SHOMRON'S BREACHES OF FIDUCIARY DUTIES

The court below properly confirmed the Referee's finding that "Ms. Shomron breached a fiduciary duty owed to [Fuks] as a partner in R&L, by engaging in activities that constitute 'misconduct'" and recommendation that "as a result of the breach of fiduciary duty owed by Ms. Shomron to Ms. Fuks, the evidence supports an award in damages in the amount of $375,000.00." A161, ¶ 1; *see* A185-187, ¶¶ 93-96; A24.5-24.6. Specifically, the lower court held that:

> The court confirms the award of $375,00[0] for breach of fiduciary duty. In this case, the Referee found that Ms. Shomron's accounting was "substantially and significantly inaccurate and incomplete" (Report, pg. 73). He also found that Ms. Shomron engaged in certain activities as Fuks' partner that constituted direct misconduct towards her. This included not telling Fuks that she (Shomron) was using one of R&L's sub-accounts for petty cash, purposefully entering certain expenses that R&L actually paid as income, using R&L funds to pay her personal expenses without telling Fuks and failing to file tax returns. As mentioned earlier, the court also found that Shomron had more involvement with R&L and a greater responsibility for record

keeping. Therefore, the Referee properly determined that Shomron breached her fiduciary duties to Fuks.

A24.5-24.6 (emphasis in original).

The Referee found that Shomron's misconduct included:

(i) Ms. Shomron's failure to advise Ms. Fuks that she had authorized Khan to utilize the 2701 Broadway petty cash account for R&L business purposes, which resulted in misleading and inaccurate information being entered into the R&L monthly management reports, as well as her failure to advise Ms. Fuks that certain entries made by Khan incorrectly and inaccurately identified certain expenses paid by R&L as rental income received by R&L, and that Ms. Shomron failed to advise Ms. Fuks that she had authorized Khan to pay certain of her personal expenses with R&L funds;

(ii) Ms. Shomron's failure to file timely tax returns with the IRS and local tax authorities for the years 1994 through 1999, thus requiring Ms. Fuks to file such delinquent tax returns for the tax years 1995, 1996, 1997, 1998 and 1999, at the direction of an arbitrator who conducted an arbitration proceeding involving the parties, and thereafter also filing returns for the years 2000 and 2001. I find that given Ms. Shomron's years of experience as a partner in R&L, she was in a superior position to Ms. Fuks with respect to the manner and timing in which such tax returns were prepared and filed and;

(iii) Ms. Shomron's failure to advise Ms. Fuks about the execution of an "Exclusive Listing Agreement" dated May 4, 1991, between herself and Harry Salon of Salon Realty, an agreement that granted Salon Realty the exclusive right to sell cooperative apartments in the subject premises. I find that even though R&L was not a party to this one-year agreement, the agreement effected Ms. Fuks' rights as a partner in R&L.

A186-187, ¶ 95. The Referee goes on to find that "the totality of the evidence demonstrates that Ms. Fuks sustained damages as a direct result of Ms. Shomron's misconduct towards her and that the damages sustained by Ms. Fuks is in the amount

of $375,000.00." A187, ¶ 96. Thus, there were two finders of fact that determined that Shomron had breached her fiduciary duty to Fuks and that Fuks was entitled to $375,000 in damages.

On appeal, Appellants again do not dispute the lower court's determination that Shomron owed a fiduciary duty to Fuks or that she engaged in the incidents of misconduct described in the Report (Apps. Br. at 38-42), and have therefore conceded those issues.[3] Instead, Appellants repeat their baseless argument, as they did on their prior appeal and below, that there is no evidentiary support for the Referee's or the lower court's findings regarding the damages suffered by Fuks as a result of Shomron's breaches of fiduciary duty. Apps. Br. at 38-42.

"It is well established that the decision of the fact-finding court should not be disturbed unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence." *Frame v. Maynard*, 83 A.D.3d 599, 601-02 (1st Dep't 2011); *see AGCO Corp. v. Northrop Grumman Space & Mission Sys. Corp.*, 61 A.D.3d 562, 563-64 (1st Dep't 2009) ("Turning to the later decision after hearing, we note that a fact-finding court's decision should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence." (internal citations omitted)).

[3] Appellants also conceded this point on their cross-motion to reargue in the court below. *See* A1031.

This is especially so where, as here, the hearing court's determination turns largely on the credibility of the witnesses. *Arrufat v. Bhikhi*, 101 A.D.3d 441, 442, 954 N.Y.S.2d 538, 538 (1st Dep't 2012) ("The hearing court's determination turned largely on credibility, the resolution of which is entitled to deference on appeal."); *Watts v. State*, 25 A.D.3d 324, 324 (1st Dep't 2006) ("In a nonjury trial, the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses." (internal citations omitted)); *Mosley v. State*, 150 A.D.3d 1659, 1660 (4th Dep't 2017) ("We must give due deference…to the [lower] court's evaluation of the credibility of the witnesses and quality of the proof, and review the record in the light most favorable to sustain the judgment.").

After reviewing all of the evidence and making credibility determinations, both the lower court and the Referee determined that the record supported awarding Fuks $375,000 in damages for Shomron's breach of fiduciary duty, and that determination should not be disturbed on appeal.

Appellants falsely assert that the "[t]he Referee's only statement on the issue of damages for breach of fiduciary duties was the conclusory statement that, 'the totality of the evidence demonstrates that Ms. Fuks sustained damages as a direct result of Ms. Shomron's misconduct towards her and the damages sustained by Ms.

Fuks is in the amount of $375,000.000.'" Apps. Br. at 39. However, Appellants' unsubstantiated attacks on the evidence and findings of the court below are futile.[4]

Indeed, the lower court directly responded to this attack by Appellants:

> Knowing that this determination is unlikely to be overturned, as it is based on witness credibility and the weighing of the evidence, Shomron resorts to quibbling with the $375,000 amount. Shomron contends that even if the finding of misconduct remains, the damages amount of $375,000 makes no sense. Shomron is wrong. First, Shomron should not be allowed to benefit from her utter failure to keep proper financial records, which make it difficult to ascertain the exact amounts she pilfered from the company (*see Wolf v Rand*, 258 AD2d 401, 402–03, [1st Dept 1999] [court afforded "significant leeway" in awarding damages for breach of fiduciary duty, especially "[w]hen a difficulty faced in calculating damages is attributable to the defendant's misconduct, some uncertainty may be tolerated" [citations omitted]).
>
> Shomron conceded $201,631.00 in damages during the appeal on the first decision and order confirming the Referee's Report (*see* Appeal Reply Brief for Defendant-Appellant dated September 23, 2022, pg. 8 [stating that "the alleged incidents of misconduct purportedly engaged in by Shomron, . . . only add up to $201,631.00," not $375,000]). The difference of less than $125,000 certainly falls under the "significant leeway" to which the Report deserves, especially considering Shomron's utter failure to maintain proper accounting records. Moreover, Shomron forgets the $125,000 that Fuks paid for her partnership share as well as thousands of dollars in periodic payments that Shomron demanded (*see* Decision, pgs. 7-11). Therefore, the

[4] Appellants' assertion that none of the categories of damages identified by Fuks in her post-hearing brief was for any of the alleged incidents that the Referee found to constitute Shomron's breaches of her fiduciary duty (Apps. Br. at 39) is also blatantly false. *See, e.g.*, A1194 ("Khan wrongful payment" – $11,000); *id*. ("Office expense diversions" – $60,580); *id*. ("Bank charges for bounced checks" – $12,536); *id*. ("Misc. other wrongful items" – $117,515).

> Referee's calculation is well-supported in the record. It actually could have been higher.

A24.6.

Appellants also grossly mischaracterize the contents and substance of the Report, blatantly disregarding the nearly 46-pages discussing the evidence (A113-158) and the approximately 35-pages setting forth the Referee's extensive findings of fact (A161-195). Appellants also ignore the overwhelming amount of evidence admitted during the 6 ½ years of hearings that the Referee considered in making his findings and recommendations, including hundreds of exhibits entered into evidence by both sides and thousands of pages of testimony from 16 witnesses including 4 experts. *See* A113 & *id*., n.4. Indeed, even after the hearings were complete, it took the Referee several years to issue his Report. A113; A196. Appellants' disregard of the extensive testimonial and documentary evidence in this case is even more egregious in light of the Referee's clear statement that his finding "that Ms. Fuks sustained damages as a direct result of Ms. Shomron's misconduct towards her and that the damages sustained by Ms. Fuks is in the amount of $375,000.00" is based on "the totality of the evidence." A187, ¶ 96.

Importantly, "[s]ignificant leeway is granted to a court in making a fair approximation of the loss occasioned by a breach of fiduciary duty." *Herman v. Feinsmith*, 39 A.D.3d 327, 328 (1st Dep't 2007); *Oshrin v. Hirsch*, 6 A.D.3d 352, 353–54 (1st Dep't 2004) ("The methodology employed to determine damages was

fair and reasonable and in accordance with the significant leeway granted to a court in making a fair approximation of the loss occasioned by a breach of fiduciary duty."). Moreover, where, as here, a difficulty in calculating damages is attributable to Appellants' misconduct, some uncertainty may be tolerated. *Wolf v. Rand*, 258 A.D.2d. 401, 402-03 (1st Dep't 1999) ("when a difficulty faced in calculating damages is attributable to the defendant's misconduct, some uncertainty may be tolerated").

Appellants falsely claim that the Referee never found that Shomron or any of her witnesses lacked credibility and that there were no findings by the Referee that Shomron failed to keep proper financial records. Apps. Br. at 41-42. To the contrary, the Referee explained that "[u]pon consideration of all the testimony presented, *the considered credibility to be afforded the witnesses*, and review of all documents admitted into evidence, I find as to Action No. 1 that *the certified accounting* submitted by Ms. Shomron to Ms. Fuks is *substantially and significantly inaccurate and incomplete*." A195 (emphasis added); *see* A184, ¶¶ 87-88. The only logical interpretation of this statement is that the Referee did not find Shomron to be credible and that her financial records were, at best, inaccurate and incomplete.

Finally, Appellants argue that Fuks' cause of action for breach of fiduciary duties is barred, at least in part, by a three-year statute of limitations. Apps. Br. at 42. However, the lower court thoroughly rejected Appellants' argument on several

grounds, including because the applicable statute of limitations is six years – not three years – and the Appellants waived this argument by failing to raise it in their post-trial brief to the Referee. As the lower court explained:

> Shomron argues that the three-year statute of limitations applies and that, therefore, any alleged breach of fiduciary duty by Shomron prior to December 30, 1993 is time barred. However, Shomron never discusses when the cause of action accrued. It is axiomatic that a breach of fiduciary duty that sounds in fraud, as is the case here, has a six-year statute of limitations period, or two years from the discovery of the misconduct…. Nor did Shomron argue statute of limitations in her post-trial brief to the Referee, essentially waiving the issue. Finally, the Special Referee found plenty of instances of misconduct post-dating 1993. Thus, the issue of statute of limitations is just another of Shomron's baseless arguments.

A24.7. Appellants fail to even address the lower court's holding.

IV. THE LOWER COURT PROPERLY DISMISSED SHOMRON'S EIGHTH COUNTERCLAIM FOR THE REPAYMENT OF CERTAIN LOANS TO R&L

The court below correctly dismissed Shomron's eighth counterclaim seeking the repayment of certain loans to R&L for failure to prove damages following an inquest on the issue. *See* A24.13-24.15. As the lower court explained:

> Shomron has had 27 years to prove her counterclaim. She has not done so. Having failed utterly to maintain proper business records, she is now suffering the consequences. Therefore, although the court declares that the loans in the eighth counterclaim are valid and enforceable as the Special Referee found, the court dismisses the eighth counterclaim for failure to prove damages.

A24.14.

On appeal, Appellants complain about how the lower court conducted the inquest, insisting that it was a "sham" and accusing the lower court of being "intemperate, impatient, discourteous, and undignified." Apps. Br. at 49-53. Setting aside his extremely offensive discussion of an esteemed member of the Supreme Court, Appellants' counsel was on notice of what was expected of him at the inquest. The April 11, 2023 Order clearly instructed Shomron as to the court's expectations for the inquest, stating that: "This hearing will be before this court, not before a Special Referee. The court reminds Shomron that she has the burden of proof on the amount of these loans. Given the inaccurate and incomplete accounting she has produced, it may be impossible to carry that burden. No new evidence will be allowed at the hearing on these loans whatsoever." A24.5.

Despite the lower court's clear directive, Shomron and her attorney showed up unprepared and unable to meet her burden of proof. *See* A1275.187-1275.229; A24.13-24.15. Indeed, Shomron has consistently struggled to meet her burden of proof throughout this litigation. Like Judge Crane, the Referee also found that "the certified accounting submitted by Ms. Shomron to Ms. Fuks is substantially and significantly inaccurate and incomplete[.]" A195.

Remarkably, on appeal, Shomron falsely claims that "the lower court would not allow Shomron's counsel to call any witness." Apps. Br. at 50. To the contrary, the lower court merely limited the evidence to that which was introduced during the

seven-year inquest in front of the Special Referee. A24.5; A24.13-24.14. As the lower court emphasized, witnesses – including one of the accountants from the inquest – might have been helpful to Shomron's case. A24.14 ("Aside from his client, he did not show up to court with any witnesses (such as one of the accountants from the inquest which might have been helpful). He did not even ask to put his client on the stand.").

It is axiomatic that trial courts have wide latitude and discretion regarding trial procedure. CPLR 4011. As relevant here, a "trial court has broad discretion to control the courtroom, rule on the admission of evidence, elicit and clarify testimony, expedite the proceedings and to admonish counsel and witnesses when necessary." *Messinger v. Mount Sinai Med. Ctr.*, 15 A.D.3d 189, 189 (1st Dep't 2005); *see Grimaldi v. Sangi*, 177 A.D.3d 1208, 1212 (3d Dep't 2019); CPLR 4011.

The record establishes that, although the Supreme Court interjected on numerous occasions during Shomron's testimony, contrary to Shomron's characterization, said interjections demonstrated the Supreme Court's "evenhanded attempt towards focusing the proceedings on the relevant issues and clarifying facts material to the case in order to expedite the trial." *Revell v. Guido*, 124 A.D.3d 1006, 1009 (3d Dep't 2015); *see Kaminester v. Foldes*, 51 A.D.3d 528, 530 (1st Dep't 2008) ("Finally, we reject respondent's contention that the court's hearing was improperly conducted. The record is replete with examples in which the court

appropriately asked her to clarify her vague, indirect responses. Even if the court's questioning regarding her attorney's knowledge of her marriage to the AIP was improper, we conclude that any error was harmless in light of the remaining evidence." (internal citations omitted)); *Lewis v. Port Auth. of New York & New Jersey*, 8 A.D.3d 205, 206 (1st Dep't 2004) ("Defendants were not deprived of a fair trial or of the opportunity to present a defense by the conduct of the trial court. Although the court conducted the trial assertively and frequently interrupted witness examinations, the record discloses that its interventions were properly directed at clarifying the testimony and expediting the proceedings."); *Solomon v. Meyer*, 149 A.D.3d 1320, 1321 (3d Dep't 2017).

Here, the lower court's evidentiary rulings did not deprive Shomron of a fair trial. The trial court is accorded broad discretion in making evidentiary rulings and, absent an abuse of discretion, its rulings should not be disturbed on appeal. *Mazella v. Beals*, 27 N.Y.3d 694, 709 (2016); *see Mike v. 91 Payson Owners Corp.*, 137 A.D.3d 555, 555 (1st Dep't 2016) ("The rulings at issue were within the trial court's broad authority to control the courtroom and rule on the admission of evidence."); *Orser v. Wholesale Fuel Distribs. CT, LLC*, 173 A.D.3d 1519, 1523 (3d Dep't 2019) ("We reject defendant's challenges to Supreme Court's evidentiary rulings. Supreme Court has broad discretion in making evidentiary rulings and, absent an abuse of discretion, such determinations will not be disturbed on appeal.").

Notably, on appeal Appellants again falsely claim that their figures are based on entries the Referee found to be correct. *See* Apps. Br. at 48. To the contrary, the $2,839,036.35 figure that Appellants claim is owed is based on assertions that the Referee found to be inaccurate. A177-184. Indeed, after considering all the relevant evidence, the Referee found that: "[T]he certified accounting submitted by Ms. Shomron to Ms. Fuks is substantially and significantly inaccurate and incomplete[.]" A195. As discussed above, the findings of the Special Referee are entitled to deference. *See Winopa Int'l, Ltd. v. Woori Am. Bank*, 59 A.D.3d 203, 204 (1st Dep't 2009) ("[T]he court, in confirming the report, properly deferred to the findings of the Special Referee, who was in the best position to weigh the evidence and make credibility determinations."). Remarkably, Appellants fail to even acknowledge these findings.

Furthermore, the appeal from the May 11, 2023 Order must be dismissed to the extent that Appellants are not "aggrieved parties" pursuant to CPLR 5511. It is well-established that "[o]nly an 'aggrieved' party may appeal from an order." *State v. Philip Morris Inc.*, 61 A.D.3d 575, 578 (1st Dep't 2009) ("We agree with respondent-PMs that appellant-NPMs are not 'aggrieved' by the order and we therefore dismiss this appeal."); *see* CPLR 5511.

As this Court has explained, "[a] party is 'aggrieved' by an order where the party has a direct interest in the controversy which is affected by the result and the

adjudication has a binding force against the rights, person or property of the party seeking to appeal." *Philip Morris Inc.*, 61 A.D.3d at 578. However, the fact "that a party may be disappointed or even have been deprived of a financial benefit by the adjudication does not, without more, make the party 'aggrieved'." *Id*. ("That the adjudication may remotely or contingently affect interests which the party represents does not give it a right to appeal.").

Rather, "[i]t must be shown that the party had some legal right or interest in the subject of the determination which was adversely affected thereby." *Id.*; *In re Landis*, 114 A.D.3d 458, 459 (1st Dep't 2014) ("[C]ross-petitioner had no direct interest in whether or not petitioner's court-authorized counsel was paid, or whether such fees would be paid from his mother's substantial estate. Cross-petitioner was not 'aggrieved' (CPLR 5511), as he did not stand to be directly affected by the interim fee award."). Here, Appellants are not "aggrieved parties" with respect to the non-parties' loans and, thus, lack standing to represent those interests.

V. THE LOWER COURT PROPERLY DISMISSED APPELLANTS' ELEVENTH AND TWELFTH COUNTERCLAIMS

The court below properly dismissed Appellants' Eleventh, and Twelfth Counterclaims in Action No. 1, seeking repayment of loans purportedly made to R&L by Goldstein and Simon. A24.8-24.9. As the court explained:

> [T]he Referee rejected the amounts owed to or repaid to Goldstein as inaccurate:
>
> > "deposits and/or payments made to Goldstein during the period of January 1989 through March 9, 1990. I find that such deposits and/or payments are inaccurate as to the following entries: January 9, 1989, April 17, 1989, June 20, 1989, September 6, 1989, September 21, 1989, October 4, 1989, February 5, 1990 and December 22, 1990"
>
> (Referee Report, ¶ 82).
>
> Shomron never identifies what is left after these amounts are subtracted. The Referee also found "inaccurate" most of Shomron's proof with respect to Simon's "capital contributions" (Referee Report, p.72, ¶ 83).
>
> Shomron never explains why the Referee's finding is wrong. She merely claims that Fuks "denies that Goldstein is entitled to receive $165,450.00 . . . and denies knowledge or information sufficient to form a belief as to whether Simon is entitled to receive $280,450.00" (Memorandum of Law in Support, pg. 27). However, it is not Fuks who has the burden of proof on this issue. It is Shomron's burden.
>
> Only Shomron testified about the amounts allegedly owed. Given that the Referee specifically found that the amounts Shomron recorded for these loans/capital contributions were inaccurate, that the overall accounting was "substantially and significantly inaccurate and incomplete," that Fuks had long accused Shomron of using sham accounting to pocket money from R&L, and that Fuks prevailed on her breach of fiduciary duty claim which incorporated these accusations, the record supports disregarding Shomron's testimony about these capital contributions/loans under the doctrine *in falsus unum, in falsus*

> *omnibus*. Therefore, the failure of Goldstein or anyone from Simon's estate to testify is fatal. Shomron has thus failed to carry her burden as to amounts owed to Goldstein and Simon.

A24.9-24.10. On appeal, Appellants do not address any of these issues, instead dismissing them as merely "matters 'outside the four corners' of the amendments [of the partnership agreement]." Apps. Br. at 54.

Moreover, while Appellants assert that "Shomron's undisputed testimony was that neither Goldstein nor Simon have been paid any of the monies specified in their respective amendments" (Apps. Br. at 54), Appellants failed to submit this testimony or the Amendment on the motion to confirm, reject, and modify the report and have therefore waived this argument.

There are also fatal issues with the representation of these parties by Shomron's counsel. First, there is an obvious conflict of interest with Shomron's counsel representing parties whose interests are at odds with those of R&L and Shomron. Notably, Justice Crane raised this issue on the record at the July 22, 2021 hearing:

> THE COURT: I'm a little confused why. It seems that Ms. Shomron's interests were somewhat at odds with some of these people who allegedly made loans, and I'm just curious why they were being represented on the same side.
>
> MR. HALPERIN: I don't know what you mean.
>
> THE COURT: Was there an assignment?
>
> MR. HALPERIN: No.

THE COURT: Why were you representing all these people?

MR. HALPERIN: We're not representing all these people.

THE COURT: Who are you representing?

MR. HALPERIN: It's a good question, your Honor, and I appreciate the opportunity to answer that. The main reason why this-- the main point, from Ms. Shomron's point of view, as to, and why she has been so vigorous in defending herself and pursuing it is because she has said time and time again that she feels that it's an obligation that any individual who gave money to R&L in good faith on a handshake where we have documentary evidence that shows they gave the money, a check, et cetera, that they should be repaid, and she knew that the main thing that Ms. Fuks has sought to do in this case is to not repay her loans, not to repay the loans. That's been the essence of this case.

It's repayment of loans and Ms. Shomron, from the day one, from the time right before even this lawsuit began, and it's in the record said no, these people have to get paid and that is why she has done it. She's asked --

THE COURT: Can I ask a question which is, since your client's rights are at odds with the people who loaned money, why are you purporting to represent all of them?

MR. HALPERIN: There is—they're not at odds.

THE COURT: Of course they are. She owes them money.

MR. HALPERIN: Because that is what people do when they borrow money, they repay it. They aren't represented. They don't have a lawyer.

THE COURT: So, I don't understand. Do you represent them or not? I'm asking you a yes or no question.

MR. HALPERIN: I do not represent anyone who's not named in this case.

****

> THE COURT: How about Larry Goldstein and the estate of Simon, do you represent them?
>
> MR. HALPERIN: Yes, I do. Originally, I did not represent the estate of Simon. They asked me to represent them later on in the case but yes, I do and, again, it's because all we want to do, all Ms. Shomron has been wanting to do is to pay the people who are entitled to be repaid.
>
> THE COURT: I don't understand how you can represent them and Ms. Shomron at the same time.
>
> MR. HALPERIN: Because we --
>
> THE COURT: Their interests are at odds.
>
> **********
>
> THE COURT: How can you sit here and represent them both?
>
> MR. HALPERIN: Because we agree. Ms. Shomron agrees they should be repaid which is-- they're not at odds with the reading of the plain language of the agreement. They are completely in harmony about what is right, what the documents say, and what they're supposed to be paid.
>
> THE COURT: These third parties or they need to be in a separate lawsuit.

A56, line 4 – A59, line 1; *see* A48-59. Appellants have repeatedly failed to address or rectify this conflict of interest.

Second, Appellants' failure to submit any evidence that it is representing the Estate of Simon is fatal to their appeal with respect to Simon's Counterclaim. *See Thomas v. Rubin*, 197 A.D.3d 1061, 1061 (1st Dep't 2021) ("It is well-settled that the death of a party divests a court of jurisdiction to conduct proceedings in an action until a proper substitution has been made pursuant to CPLR 1015[a]…Since the

order was issued after a defendant's death and without proper substitution, the appeal must be dismissed as we do not have jurisdiction to hear and determine the appeal."); *Hemphill v. Rock*, 87 A.D.2d 836, 836 (2d Dep't 1982) ("Upon plaintiff's death his attorneys' authority to act on his behalf terminated. Nor can this court exercise jurisdiction over a dead party."). Indeed, the representation of Simon's estate by Appellants' counsel is further complicated by the conflict of interest issues raised by the lower court at the July 22, 2021 hearing. *See* A56, line 4 – A.59, line 1.

Accordingly, the lower court properly dismissed Appellants' Eleventh and Twelfth Counterclaims.

VI. THE LOWER COURT PROPERLY REDUCED THE AMOUNT OF LEGAL FEES SOUGHT BY SHOMRON

In its October 4, 2023 Order, the lower court awarded Shomron $176,445.10 for the legal fees she incurred in prosecuting her constructive trust claim. A24.19-24.23. The court reduced Shomron's requested award of $352,890.20 by approximately 50% "to account for inefficiencies, overlitigation, excessiveness, duplicative efforts and work, and excessive block-billing." A24.22. On appeal, Appellants argue that the lower court erroneously reduced the amount of legal fees sought by Shomron. Apps. Br. at 55-58.

It is well-settled that, "[t]he determination of a reasonable attorney's fee is generally left to the discretion of the Supreme Court, which is usually in the best position to determine the factors integral to determining reasonable fees." *Utica*

Mut. Ins. Co. v Magwood Enters., Inc., 15 A.D.3d 471, 472 (2d Dep't 2005); *see Peterson v. Schwartz-Peterson*, 223 A.D.3d 825, 826 (2d Dep't 2024) ("The award of reasonable counsel fees is a matter entrusted to the trial court's sound discretion."); *see, e.g., E. Aurora Coop. Mkt., Inc. v. Red Brick Plaza LLC*, 197 A.D.3d 874, 877 (4th Dep't 2021)*; Hernandez v. Kaisman*, 139 A.D.3d 406, 407 (1st Dep't 2016); *Diakrousis v. Maganga*, 61 A.D.3d 469 (1st Dep't 2009).

Where an attorney's records reflect block-billing, the grouping of several tasks in single billing entry, a reduction of the amount of billed is generally appropriate; however, there is no set "maximum or minimum that block-billed fees should be reduced to account for unnecessary work." *Community Counseling & Mediation Services v. Chera*, 115 A.D.3d 589, 590 (1st Dept 2014). Furthermore, it is appropriate for a court to discount senior attorney hours where, as here, a disproportionate amount of time is spent on the matter. *Hernandez v. Kaisman*, 139 A.D.3d 406, 407-08 (1st Dep't 2016) ("Contrary to plaintiffs' contentions, the trial court did not set the fee award unreasonably low. Other courts have similarly discounted senior attorney hours where, as here, they made up a 'disproportionate' amount of the time spent on the matter[.]").

Here, the lower court found that the "invoices and timesheets [submitted by Shomron] are deficient for several reasons and ultimately prevent the court from

determining the reasonableness of Shomron's attorneys' fee request." A24.21. The court specifically identified the following issues with Shomron's submission:

- The April 11, 2023 Order limited Shomron's fees to those incurred while prosecuting the constructive trust claim, but "the time records submitted in support of [Shomron's] attorneys' fee request do not differentiate between those fees generally incurred in prosecuting this case, versus those fees that were specifically incurred in prosecuting the constructive trust claim, as specified in the Order." A24.21.

- "Additionally, the invoices and time entries are also unclear on whether such work was being performed for one action, the other action, or both, and ultimately fail to differentiate what work is being done for which case." A24.21.

- "The time records and invoices counsel submitted also clearly highlight the duplicative and unnecessary work that was performed throughout the past three decades that this case has been pending. The records and invoices are clear evidence of overlitigation and underscore the numerous instances of unnecessary legal work that counsel performed." A24.21-24.22.

- "The invoices and time entries are also rife with instances of block billing, making it nearly impossible for the court to discern how much time was spent on each specific task and ultimately prevents the court from determining the reasonableness of the fee request." A24.22.

Appellants first contend that the lower court did not specify what it meant by its limitation to the prosecution of its constructive trust claim. Apps. Br. at 55. However, Shomron's Notice of Motion clearly states that she was seeking "attorneys' fees and costs…incurred on behalf of R&L in connection with her successful prosecution of Shomron v. Fuks, et. al. (Sup. Ct. N.Y. County Index No. 102882/02) [Action No. 2]." A1275.1. As set forth in the Referee's report, "[w]ith regard to Action No. 2, the parties agreed that all causes of action and counterclaims

asserted in the answer had been resolved except for the third cause of action which seeks the imposition of a Constructive Trust with respect to Certain R&L rent and profits…." A114, fn. 5. Indeed, Appellants' attorney also clearly stated on the record that, with respect to Action No. 2, "[t]he only issue…is the amount of rents and profits to impose upon Ms. Fuks, period." A69.38, lines 3-5. Thus, it is unclear why there is any confusion on the part of Appellants as to the lower court's limitation of attorneys' fees to the constructive trust claim.[5]

Next, Appellants' state in conclusory fashion that the lower court "erroneously claims that the invoices and time entries fail to differentiate what work is being done for which case." Apps. Br. at 57. The only "support" Appellants offer for this assertion is a statement made by Appellants' attorney at the January 12, 2018 hearing in front of the Special Referee regarding invoices that he submitted as evidence to the Referee. Notably, those time records do not include the attorneys' fees incurred after February 11, 2017. *See* A1275.14-1275.116; A1275.165-1275.166. In addition, Appellants fail to address the lower court's finding that, even with respect to the invoices submitted to the Special Referee, the invoice entries do not "differentiate between those fees generally incurred in prosecuting this case,

[5] To the extent that Shomron believes she was entitled to attorneys' fees for any other aspect of Action No. 2, she waived any such entitlement.

versus those fees that were specifically incurred in prosecuting the constructive trust claims, as specified in the Order." A24.21.

Appellants also dispute the lower court's finding that its time records are rife with instances of block billing, asserting that "a significant number of entries merely state one activity" and arguing that "Shomron's counsel time records do not make it exceedingly difficult to identify whether the amount of time spent on any particular task was unreasonable." Apps. Br. at 57. While the lower court only provided two specific examples of block billing, a review of the time records reveals countless others. *See generally* A1275.14-1275.116. Indeed, none of the entries break down the time spent on individual tasks on a single day and, thus, the only instances where it can be determined how much time was spent on a single task is where there was only one task done on that day.

Finally, Appellants ignore the lower court's finding that: "The time records and invoices counsel submitted also clearly highlight the duplicative and unnecessary work that was performed throughout the past three decades that this case has been pending. The records and invoices are clear evidence of overlitigation and underscore the numerous instances of unnecessary legal work that counsel performed." A24.21-24.22.

VII. THE LOWER COURT PROPERLY DISMISSED APPELLANTS' COUNTERCLAIM FOR ABUSE OF PROCESS

The court below properly confirmed the Referee's recommendation that Appellants' counterclaim for abuse of process be dismissed. A24.10-24.11; A190-191, ¶¶ 110-111. As the lower court explained:

> Shomron has not carried her burden to prove abuse of process. The gravamen of her claim now is that Fuks abused the process by suing the first arbitrator, William Spiro, serving him with a summons with notice in the middle of the arbitration (Mem. in Support [EDOC 6], Action No. 1, pg. 27). The parties mutually agreed to end the arbitration and return to court.
>
> It is difficult to understand how merely commencing an action against an arbitrator by summons with notice is an abuse of process with respect to Shomron (*see e.g. Place v Ciccotelli*, 121 AD3d 1378, 1380 [3d Dept 2014]). Mr. Spiro did not testify before the Referee, and, although a new arbitrator was appointed, Shomron herself chose not to continue, but instead to return to court. Accordingly, the Referee's decision that the abuse of process claim was without merit was correct.

A24.10-24.11 (emphasis in original). Likewise, the Referee found that:

> Ms. Shomron has failed to submit sufficient evidence that the action commenced by Ms. Fuks against Spiro in this court was ultimately designed to engage in "arbitration shopping" and therefore constitutes an "intent to do harm without excuse or justification," or that Ms. Fuks used "process in a perverted manner to obtain a collateral objective" (*see*, *Ettienne v. Hochman*, 83 AD3d 888 [2nd Dept. 2011]). As such, I find that the thirteenth counterclaim is without merit.

A191, ¶ 111.

As with their prior appeal, Appellants' brief merely restates their arguments to the court below without even referencing the lower court's decision or the Report.

See Apps. Br. at 58-60. Appellants do not even attempt to substantiate any of their inflammatory statements with citations to the record. For example, Appellants insist that: "[b]ased on the facts adduced at the hearing, when Fuks sued Arbitrator Spiro, her clear motive was to coerce him to resign after this Court reinstated him." Apps. Br. at 60. If that were so, however, presumably Appellants would have provided citations to the hearing transcript.

Moreover, in citing this Court's decision reinstating the arbitrator in 2001, Appellants fail to mention that the removal of the arbitrator was due to the Appellants' own conduct. *See Shomron v. Fuks*, 286 A.D.2d 587, 589 (1st Dep't 2001) ("By letter of August 17, 2000, petitioners' attorney wrote to the AAA objecting to Moses & Singer's representation of Fuks, because of the 'strong ties that exist between the Arbitrator's firm, BDO Seidman, and Moses & Singer.'"). Upon reinstatement, Arbitrator Spiro advised the parties that during the period when he thought he would have to step down – a situation caused by Appellants' complaint – he had discarded all of his notes. A8772, lines 7-12. It was only at this point that Fuks, who had already spent hundreds of thousands of dollars on legal and AAA fees, decided to sue.

Appellants then make a series of wholly conclusory, unsubstantiated assertions concerning Fuks' intent and motives. *See* Apps. Br. at 60. Notably,

Appellants wholly ignore the lower court's findings as to their own improper conduct. As the lower court outlined:

> The Referee's Report found the counterclaim for abuse of process with respect to the arbitration proceeding was without merit. Shomron asks the court to reject that aspect of the Report.
>
> This is the height of hypocrisy…. It confounds the court that Shomron first moved to disapprove the Report of the Referee without providing the record to the judge, who was new to the case. Then, after losing the motion, appealing the decision and somehow managing to supply that missing record to the Appellate Division. Further, movants here misrepresented by omission what Judge Stackhouse ordered and failed to include the Referee's fulsome decision on Fuks' CPLR 4401 motion to make it look like the Referee had no reason to dismiss Shomron's seventh counterclaim. And even further, the court finds it disingenuous how Shomron, defendant in in Action No. 1, continues changing the nature of an alleged debt as it suits the needs of the case at that moment. While we are on the subject, the court warns that continuing to omit inconvenient facts, procedural or otherwise, to this court, will result in sanctions. This conduct is all the more egregious because Shomron has had the same attorney in this dispute from the first day (*see* Reply Aff., pg. 5).

A24.10.

Thus, both the lower court and the Referee found that Appellants' abuse of process counterclaim was "lacking in merit" and their utter failure to provide any evidence in support of their allegations is fatal to their claim. *See* A24.10; A162, ¶ 3; A190-191, ¶¶ 108-111; A195-196. Accordingly, the lower court properly dismissed Appellants' counterclaim for abuse of process.

CONCLUSION

For the reasons set forth herein, this Court should affirm the lower court's Amended Judgment and Orders that are currently on appeal.

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CATAFAGO FINI LLP

/s/ Jacques Catafago

Jacques Catafago, Esq.
Sarah M. Dyer, Esq.
One Grand Central Place
60 East 42nd Street, 47th Floor
New York, NY 10165
(212) 239-9669
jacques@catafagofini.com
Attorneys for Respondent

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