MAURICE CHEDID, and MARLENE CHEDID, Plaintiffs, vs. THE ESTATE OF ZAKI HELEWA, GEORGE HELEWA, EXECUTOR OF THE ESTATE OF ZAKI HELEWA, GEORGE HELEWA, individually, KAMAL HELEWA, and MICHAEL HELEWA, Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION BERGEN COUNTY DOCKET NO: C-25-12 Civil Action **Hearing Date: January 11, 2013** **Trial Date: February 25, 2013**

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BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL PENDENTE LITE SALE OF REAL ESTATE, AND FOR OTHER ALTERNATIVE RELIEF

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PRELIMINARY STATEMENT

Plaintiffs Maurice Chedid ("Maurice") and Marlene Chedid ("Marlene")[1] seek the entry of an order to compel the *pendente lite* sale of the Defendants' one-half interest in residential property located at 124 Pasadena Avenue, Hasbrouck Heights (the "Property") where Plaintiffs and their teenage daughters currently reside. In addition to this Brief, Plaintiffs rely upon the Certification of Marlene Chedid ("Chedid Cert.") and Certification of Glenn R. Reiser ("Reiser Cert.").

The Court-appointed real estate appraiser values the Property at $460,000, which the parties agreed to be bound to.[2] Defendants have never resided at the Property, and for approximately 2 ½ years have refused to contribute a single dime toward the Property's mortgage debt, maintenance and repairs. Both prior to and during the course of this litigation, Plaintiffs have made good faith attempts to purchase the Estate's one-half ownership interest in the Property, all to no avail. Defendants' bullheadedness and irrational behavior is borne out of nothing but spite against their sister Marlene.

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[1] Maurice Chedid and Marlene Chedid are collectively referred to as the "Chedids."

[2] The Defendants never even paid their share of the Court-appointed appraiser's fee. Plaintiffs' counsel continues to receive unpaid invoices from the appraiser due to the Defendants' non-payment of their proportionate share of his fees. See Exhibit 3 to Reiser Cert.

As set forth in the accompanying Chedid Cert., Plaintiffs value the Defendants' one-half interest in the Property at $67,468.37, exclusive of their unpaid contribution costs calculated by Plaintiffs to be $4,882.70. Deducting these unpaid contribution costs leaves the Estate's one-half equity interest valued at $62,585.67. As a condition of the sale, Plaintiffs are ready, willing and able to post $67,468.37 in escrow - which gives Defendants the benefit of the doubt during this preliminary stage. If the Court approves this sale, the remainder of the case would be limited to resolving any monetary disputes between the parties.[3]

Alternatively, if the Court is disinclined to compel a *pendente lite* sale, then at a minimum the Court should compel Defendants to immediately start contributing their respective share of the Property's carrying costs and maintenance, including mortgage payments.

In 1997 the Chedids purchased the Property with Marlene's parents Zaki Helewa ("Zaki") and Siham Helewa ("Siham"),[4] taking ownership as tenants in common. The Property consists of a ground level or basement, first floor, and a separate rental apartment

[3] The proposed form of Order submitted by Plaintiffs confirms that Defendants would remain solely responsible for the payment of the realty transfer fees to the Bergen County Clerk upon a sale to Plaintiffs.

[4] Zaki Helewa and Sihan Helewa are collectively referred to as the "Helewas."

on the second floor. During their lifetime Marlene's parents occupied the first floor, and the Chedids occupied, and continue to occupy, the ground/basement level with their two teenage daughters.

Defendants George Helewa ("George'), Kamal Helewa ("Kamal") and Michael Helewa ("Michael") are Marlene's brothers. Upon Zaki's death, the Helewas' share of the Property passed to the brothers with George being named as Executor of Zaki's estate ("Estate").[5] Since their father's death in June 2010, Defendants have refused to contribute any monies towards the operating and maintenance costs of the Property. During this period, the Chedids have paid all expenses for the Property, including mortgage payments, taxes, insurance, utilities, repairs and maintenance.

Plaintiffs anticipate that Defendants will argue that any contributions due from the Estate as a whole should be deducted from the Estate's ownership share only if the Property is sold to a third party, as opposed to being sold to Plaintiffs. However, it is immaterial who compensates the Estate for its ownership interest in the Property so long as the Estate receives the fair value to which it is entitled. To the contrary, Plaintiffs will be irreparably harmed and prejudiced if forced to leave their home. Plaintiffs are ready, willing and able to immediately pay

[5] Plaintiffs believe that the Property is the Estate's only asset.

the Estate the fair value of its one-half ownership interest in the Property. In fact, a sale to Plaintiffs would be more beneficial because the parties will avoid incurring real estate brokerage commissions.[6]

But if the Defendants' strategy is to continue down the path of holding the Property hostage without contributing a single dime to its operating and maintenance costs, as they've succeeded in doing for more than 2 ½ years thus far, then Plaintiffs respectfully submit that the Court should enter an order compelling them to start paying the Estate's proportionate share of expenses. Plaintiffs will be prejudiced if the Defendants are allowed to continue avoiding the Estate's co-ownership payment obligations. In fact, Defendants' wrongful actions are jeopardizing Plaintiffs' interest in the Property as illustrated by Bank of America issuing a notice of intent to foreclose on June 11, 2012 based on a default of the second mortgage.

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[6] Based on a $460,000 fair market valuation, the industry standard 6% broker's fee amounts to $27,600. Thus, if the Property was hypothetically sold to a third party for $460,000 then the Estate's equity interest would be reduced by an additional $13,800 - representing one-half of the broker's fee.

PROCEDURAL HISTORY

Plaintiffs commenced this action on January 24, 2012 seeking, among other remedies, to purchase the Estate's one-half interest in the Property, or in the alternative to compel Defendants to contribute their pro rata share of operating and maintenance costs. See Plaintiffs' Complaint attached as **Exhibit 1** to Reiser Cert.

Defendants filed an Answer on February 29, 2012, which consists of a general denial but no counterclaim. See Defendants' Answer attached as **Exhibit 2** to Reiser Cert. Pursuant to an Order entered on May 8, 2012, the parties agreed to the Court appointing a licensed real estate appraiser to fix the value of the Property and to be bound by the appraiser's valuation. The Court appointed Mason Helmstetter Associates, LLC as the designated appraiser. In an appraisal dated August 9, 2012, Mr. Helmstetter valued the Property at $460,000.

During the course of pretrial discovery the Defendants were served with Requests for Admission which they failed to answer. See **Exhibit 3** to Reiser Cert. Accordingly, these Requests are deemed admitted pursuant to R. 4:22-1. A trial date is scheduled for February 25, 2013.

STATEMENT OF FACTS

On August 29, 1997, the Chedids and the Helewas purchased the Property as tenants in common for $350,000. See Chedid Cert. ¶5. Marlene is Zaki's and Siham's daughter. The Deed dated August 29, 1997 confirms the parties took title as tenants in common. Id. at ¶5 and **Exhibit 1** attached thereto. The Helewas and Chedids split the initial $91,000 deposit (and closing costs), and funded the remaining balance with a purchase money mortgage. Id.

The Property consists of a two family home, which the couples purchased with the intention that they would share occupancy of the basement and first floor and rent the second floor to assist with the mortgage payments. The layout of the Property is such that both families were able to live in separate quarters; the Helewas occupied the first floor while the Chedids occupied the ground level/basement floor. Id. at ¶6.

From the parties' initial ownership to Zaki's death, they (with the exception of the second and third mortgages detailed below) split all ownership costs for the Property. Id. at ¶7. Further, at the time of purchase the Helewas and Chedids intended that all income received from the second floor rental unit would be applied to offset the first mortgage. Id. at ¶6.

The Property is currently subject to three separate liens held by Bank of America, as follows: (1) a first mortgage of $259,000, which was modified to $270,000 through a loan

modification agreement executed in February 2012 [Id. at ¶24 and **Exhibit 8** thereto]; (2) a second mortgage in the principal amount of $50,000 [Id. at ¶9 and **Exhibit 2** thereto]; and (3) a third mortgage in the principal amount of $67,000. [Id. at ¶11 and **Exhibit 3** attached thereto]. The parties agreed to take the $50,000 second mortgage in 2007 solely for Kamal's benefit, and the entire proceeds were disbursed to Kamal; the parties agreed to take the third mortgage to enable the Chedids to make improvements to the Property to increase its value. Id. at ¶¶ 10-11.

After August 19, 1997 and until the time of their deaths Zaki and Siham lived at the Property and regularly contributed to the mortgage payments, taxes, insurance, and maintenance. Id. at ¶7. Siham passed away in 2006, thereby vesting Zaki with her ownership interest. Id. Zaki continued to reside at the Property until his death in June 2010. Id. at ¶8. The last mortgage payment made by Zaki was on April 2010, which represented his pro rata share of the mortgage. Id. at ¶12.

Prior to his death, Zaki executed a durable power of attorney giving Kamal power to manage his financial affairs. Id. at ¶12 and **Exhibit 4** thereto. In his Will, Zaki named his son George as the Executor of his Estate, and Kamal, Michael and George as heirs to his one-half ownership interest in the Property. Id. at ¶15 and **Exhibit 5** thereto.

Initially, Marlene's brothers expressed an interest in allowing the Chedids to purchase the Estate's interest in the Property. Id. at ¶18 and **Exhibit 6** attached thereto. But soon thereafter, they reversed their position and demanded the Property be sold on the open market. Id. The brothers all reside in New Jersey but none of them ever occupied the Property, nor have they ever requested to occupy it. Id. at. ¶17. Since their father's death in June 2010, Marlene's brothers have failed to make a single payment towards the first or second mortgages, the real estate taxes owed to the Borough of Hasbrouck Heights, or contribute for any other maintenance and repair costs associated with the Property. Id. at ¶16.

After Zaki's death the Defendants made the upkeep of the Property near impossible by refusing to let the Chedids lease the 2nd floor apartment thereby depriving Plaintiffs with rental income to fund the mortgage payments. Id. at ¶19. At the same time, Maurice experienced financial difficulty and had to file bankruptcy. Id. at ¶20. Marlene's brothers stubbornly continued to prevent the re-rental of the apartment, forcing Maurice's bankruptcy counsel to seek the bankruptcy court's intervention. Id. at ¶21 and **Exhibit 7** attached thereto. Although Defendants eventually capitulated, for approximately ten months the apartment remained vacant and produced no rental income. Id.

By the time Plaintiffs secured a new tenant and started to receive rental income the first mortgage was already in default,

and Bank of America refused to accept further payments. Id. at ¶22. This necessitated Marlene applying for a loan modification agreement with Bank of America, which she negotiated from August to November 2011. Id. at ¶25 and **Exhibit 8** attached thereto. After substantial efforts by Marlene, Bank of America offered Plaintiffs a trial period loan modification and eventually a permanent modification. Plaintiffs have made the loan modification payments to Bank of America since November 2011. Id. at ¶24.

Moreover, after Zaki's death Kamal immediately defaulted on the second mortgage taken solely for his benefit. Id. at ¶13. Plaintiffs have received a notice of intent to foreclose from Bank of America with regard to this second mortgage and are currently attempting to negotiate another loan modification. Id. at ¶30 and **Exhibit 10** attached thereto. As the Court can appreciate, dealing with Bank of America and their various serving agents/loan workout departments in the circuitous loan modification process is both painstaking and time consuming.

The Court-appointed real estate appraiser values the Property at $460,000. Id. at ¶29 and **Exhibit 9** attached thereto. The payoff on the first mortgage is $269,216.86 [Id. at ¶34 and **Exhibit 11** attached thereto], and for the second mortgage is $27,923.20 [Id. at ¶34 and Exhibit 10]. Based on the appraised value of the Property and the mortgage payoffs, the Estate's equity in the Property is $67,468.37 calculated as follows:

$460,000.00	Fair market appraisal as per Court-appointed expert
-$269,216.86	Payoff on first mortgage
$190,783.14	
Divided by two	
$95,391.57	
-$27,923.20	Payoff on second mortgage (sole responsibility of Kamal)
=$67,468.37	**Estate's net equity (excluding unpaid contribution costs)**

Since May 2010, the Chedids have paid 100% of the property taxes, mortgage payments, repairs for the Property. For purposes of this motion, these payments are limited to:

- $37,865.98 in monthly mortgage payments on the first mortgage with Bank of America, including tax and insurance escrow; and
- $12,049.41 in major repair costs.

Id. at ¶¶ 35, 37, and **Exhibits 12** and **14** attached thereto. The $12,049.41 in repair costs is itemized as follows:

Month	**Repairs, expenses and maintenance for Property paid in full by Plaintiffs**
December 2010	$285.26 - costs for new washer $419.86 - plumbing costs for rental units
March 2011	$525.00 - home inspection report $234.33 - dishwasher
May 2011	$739.49 - plumbing repairs necessary to unit $257.00 - repairs / inspection of air conditioning units $630.00 - installation of new locks
July 2011	$850.65 - repairs to shower unit for second floor rental unit $162.64 - material costs associated with repairs

September 2011	$722.25 - replacement for the air conditioning unit
January 2012	$600.00 - install outside trim to address animal issue
May 2012	$250.00 - electric issues for 2nd floor apartment
July 2012	$2,000.00 - plumbing issue - 2nd floor apartment
August 2012	$1,500.00 - paint for 2nd floor rental unit $572.93 -- carpet cleaning costs
November 2012	$2,300.00- new furnace necessary due to storm damage
Totals	**$12,049.41**[7]

Id. at ¶37 and Exhibit 14 thereto.

Since Zaki's death, Plaintiffs have received $40,150 in rental income from the second floor apartment. Id. at ¶36 and **Exhibit 13** attached thereto. The Chedids have used this rental income to partially fund the mortgage payments due to Bank of America on the first mortgage and make necessary repairs to the Property. Id. After reconciling the amounts, it is clear that the Estate's equity should be reduced by $4,882.70, representing the difference between the funds advanced by the Chedids for the Property (i.e., mortgage payments and major repair costs) less a credit for all rental income they received since Zaki's death. To wit:

$37,865.98	Total mortgage payments made by Plaintiffs following Zaki's death	
Divided by two $18,932.99	Each co-tenant's pro rata share of mortgage payments	$18,932.99

[7] Rounded off, each co-tenant's pro rata obligation for repairs and maintenance is $6,042.71 ($12,049.41 ÷ 2 = $6,042.71)

$12,049.41 Divided by two $6,024.71	Plaintiff's total expenditures for repairs/maintenance Each co-tenant's pro rata share of repairs/maintenance	 $6,024.71
$40,150.00 Divided by two $20,075.00	Total rental income received since Zaki's death Each co-tenant's pro rata share of rental income	 $20,075.00
	Pro rata obligation for mortgage payments Each co-tenant's pro rata share of repairs/maintenance Estate's pro rata share of rental income (credit) Total reduction of Estate's equity based on failure to contribute to mortgage, repairs/maintenance	$18,932.99 + $6,024.71 $24,957.70 - $20,075.00 **$4,882.70**

Id. at ¶39.

If the Court agrees that the Estate's unpaid contribution is $4,882.70 then this reduces Estate's net equity in the Property to $62,585.67. Id. Notwithstanding, Plaintiffs are prepared to deposit $67,468.37 in escrow to avoid any disputes with Defendants and streamline the issues for trial, if necessary.

LEGAL ARGUMENT

POINT I

THE COURT SHOULD COMPEL THE PENDENTE LITE SALE OF DEFENDANTS' CO-OWNERSHIP INTEREST IN THE PROPERTY TO PLAINTIFFS

As recounted in the Chedid Cert., Plaintiffs currently reside at the Property with their 2 teenage daughters who attend public school. It has been their home for the past fifteen years and they desire to stay at the Property. For reasons unknown, the Defendants, who are Marlene's brothers, have been unwilling to sell the Estate's co-ownership share in the Property to Marlene. Instead, Defendants insisted the Property be listed on the open market at inflated sales prices that drew no interest from prospective purchasers.

At the same time, Defendants have refused to contribute to the Property's carrying costs - a habit which they've continued during the litigation as illustrated by their failure to pay their portion of the Court-appointed appraiser's fee. Plaintiffs' goal is reasonable and simple: To obtain full title of the Property and pay the Defendants their fair share of the Estate's equity interest.

Plaintiffs' hold title to the Property with the Estate as tenants in common, as confirmed in the Deed to which they took title. A tenancy in common is the holding of an estate by different persons, with a unity of possession and the right of each to occupy the whole in common with the cotenant(s).

Burbach v. Sussex Co. Mun. Utilities Authority, 318 N.J. Super. 228 (App. Div. 1999). The interest of a tenant in common may be transferred without the consent of the remaining cotenant(s). Ibid.

Although it is recognized that partition among tenants in common may normally be had as of course, see Newman v. Chase, 70 N.J. 254, (1976), courts have held that the remedy of partition is not necessarily available as a matter of right in all cases:

> It is an established principle that a court of equity, in decreeing partition does not act ministerially and in obedience to the call of those who have a right to partition, but founds itself on its general jurisdiction as a court of equity and administers its relief *ex aequo et bono* according to its own notions of general justice and equity between the parties.

Baker v. Drabik, 224 N.J. Super. 603, 609 (App. Div. 1988), citing Newman v. Chase, supra, 70 N.J. at 263 (quoting Woolston v. Pullen, 88 N.J. Eq. 35, 40 (Ch. 1917)).

Courts addressing similar situations, wherein one co-owner desires to stay in the property, have denied partition based upon equitable principles and required the co-owner in possession to compensate the other with an owelty. In Leonard v. Leonard, 124 N.J. Super. 439, 442 (App. Div. 1973), the court explained that an owelty is an amount of money that a cotenant will owe to the other cotenant, and which will equalize the partition, if one cotenant "receives property with a value greater than his proportionate share." Ibid. In fact, several

New Jersey courts have liberally applied this concept to allow one co-tenant to purchase the property, with the other co-tenant receiving a credit for this proportionate share. See Baker v. Drabik, supra, 224 N.J. Super. 603(co-tenant allowed to remain as sole occupant of the premises, but required to pay non-occupying cotenant an appropriate amount in compensation for share as cotenant, with credit for her share of principal reduction portion of mortgage payments and capital improvements); see also Asante v. Abban, 237 N.J. Super. 495, 502 (Law Div. 1989)(co-tenant determined to have share of ownership in proportion to financial contribution to purchase price, and entitled to receive proportionate percentage of appraised value of property); and Reitmeier v. Kalinoski, 631 F. Supp. 565 (D.N.J. 1986)(single family property partitioned such that residing plaintiff retained entire property while reimbursing co-tenant with monetary compensation). In each of these cases, the courts allowed the co-owner desiring to remain in possession to purchase the co-tenant's interest.

Baker v. Drabik, supra, 224 N.J. Super. 603, is directly on point with the case at bar. There, the court entered a judgment of partition where the parties were tenants in common involved in a joint venture. The Appellate Division reversed the trial court's ruling that the defendant could remain as sole occupant in the property without payment to plaintiff of any owelty, instead permitting defendant, in lieu of a court-ordered sale,

to purchase the plaintiff's interest at the current fair market value less credits for payments already made by plaintiff. Like this Court did in the instant case, in Baker the court ordered the appointment of an appraiser to determine the property's market value if the parties could not agree on a fair price. And like the Chedids, the defendant in Baker had primarily occupied the property for approximately ten years and paid the majority of the mortgage and other maintenance expenses.

Applying the rationale and ruling of Baker v. Drabik and the other similar rulings cited above, the Chedids should be allowed to purchase the Defendants' co-ownership interest in the Property based on a calculation of the parties' respective share of the equity. There is no compelling reason why Plaintiffs should not be permitted to purchase the Defendants' co-tenancy interest. To the contrary, the equities support this relief. Plaintiffs have made the Property their home for the past fifteen years and have teenage children attending the public school system, whereas the Defendants have never lived there. Further, Plaintiffs have expended their own time and money to preserve the Property for everyone's benefit, including: (1) advancing the Estate's contributions for the mortgage; (2) acting as a landlord and generating rental income to reduce the Estate's mortgage contribution; (3) preventing foreclosure by negotiating a loan modification with Bank of America; (4) making mortgage payments to Bank of America without receiving any

contribution from the Estate; and (5) advancing all costs for necessary repairs and maintenance for the Property without receiving a single dime from Defendants.

It is undisputed that Defendants have not expressed a desire to reside at the Property, do not currently reside at there, or made any payments towards its carrying costs and upkeep since their father's death. Apparently, their only desire is for a payday. It should make no difference to Defendants what the source of the funding is to buy out the Estate's interest in the Property, so long as the Estate receives the fair value of its co-tenancy. In fact, Plaintiffs concede that Defendants are entitled to receive payment for the Estate's equity interest in the Property, and are willing to deposit $67,468.37 in escrow in order to take title solely in their names. Plaintiffs respectfully submit that $67,468.37 is the most that Defendants could possibly claim as constituting the Estate's one-half equity interest in the Property. As previously mentioned, a sale to Plaintiffs would benefit all parties because it would avoid payment of a real estate commission.

POINT II

DEFENDANTS ARE CO-TENANTS WITH A LEGAL OBLIGATION TO CONTRIBUTE TO THE OPERATING EXPENSES AND MAINTENANCE COSTS NECESSARY TO SUSTAIN THE PROPERTY

As set forth in Point I, supra, Plaintiffs do not dispute that they share title to the Property with Defendants as tenants in common. If the Court allows Plaintiffs to acquire full title

to the Property Plaintiffs readily concede their obligation to account to Defendants and reimburse them for their fair share of the Estate's equity in the Property. However, Plaintiffs maintain that any calculation of the Estate's respective equity in the Property must be offset by the mortgage payments, repair and maintenance costs which they advanced on Defendants' behalf - with the Estate receiving the appropriate credit for rental income received by Plaintiffs following Zaki's death.

Generally, New Jersey courts view tenants in common as having entered a fiduciary relationship, wherein each party has a legal obligation to sustain and protect the common title, and both a right to share in the benefits of ownership and an obligation to share in the costs. Colquon's Estate v Colquon's Estate, 55 N.J. 558, 563 (1982). When one co-tenant's actions benefit the other co-tenant, he should be reimbursed for the proportionate share of the amount paid. Roll v. Everett, 73 N.J. Eq. 697, 701 (E. & A. 1908); Egan v. Egan, 98 N.J. Eq. 487, 490 (Ch. 1925).

Similarly, our federal and state courts have cited to the concepts of equity and fairness in determining that contribution is appropriate if the plaintiff has "'removed a common burden from the shoulders of himself and the defendant, and ... they are benefitted by it.'" Reitmeier v. Kalinoski, 631 F.Supp. at 582, citing Baird v. Moore, 50 N.J. Super. 156, 163 (App. Div. 1958)(other internal citation omitted). See also Colquon's

Estate, 55 N.J. at 581 (internal citations omitted). Such costs include mortgage payments, taxes, necessary repairs, maintenance, carrying charges, and insurance. Id. (citations omitted). Further, the fact that the party advancing the costs has possession of the property does not preclude reimbursement or contributions, when the advances made benefited the common estate. Baird v. Moore, 50 N.J. Super. at 165-166.

In Esteves v. Esteves, 341 N.J. Super. 197 (App. Div. 2001), the Appellate Division provided guidelines for resolving disputes between co-owners over contribution and reimbursement. First, there must be an accounting between the co-tenants such that the an owner who has paid less than his pro rata share of operating and maintenance expenses must account to the co-owner who has contributed more than his pro rata share. Id. at 201-202, citing Baird v. Moore, 50 N.J. Super. at 172. This principle applies "even if the former [owner] had been out of possession and the latter [co-owner] in possession of the property." Id. Second, the co-tenant who chooses not to occupy the property "does not give him the right to impose an 'occupancy' charge on the other." Id. Third, equity and fairness dictate the co-tenant in sole possession of the property who demands contribution from the other should allow a corresponding credit for the value of his sole occupancy. Id.

However, other courts have held that allowing or disallowing an accounting for the use and occupation must be

viewed on equitable grounds on a case by case basis. In Baird v. Moore, supra, the court determined that since there was no ouster of the co-tenant, and plaintiff had paid all maintenance and repair costs, including insurance, mortgage, and tax payments, defendant was not entitled to an accounting for the sole use and occupancy by the plaintiff. See also Brown v. Havens, 17 N.J. Super. 235 (Ch. Div. 1952)(co-tenant estate not entitled to accounting for rent when executor never sought co-possession of property or demand that rent be paid).

In the present case, the principles of equity and fairness require the Court to adjust the Defendants' share of the equity in the Property to accurately account for the ongoing payments and carrying costs that Plaintiffs have advanced without receiving any contribution from them. In addition, the second mortgage taken for sole benefit of Kamal must also be deducted from Defendants' equity in the Property. Defendants have admitted that Kamal exclusively benefitted from the proceeds of the second mortgage. See Defendants' Answer, and Request for Admissions annexed as **Exhibit 2** and **Exhibit 3** to Reiser Cert. Also, since Defendants were not "ousted" from the Property they are not entitled to claim a credit for Plaintiffs' use and occupancy of the Property. See Baird v. Moore, supra,

As tenants in common the parties have a fiduciary relationship and are legally obligated to protect the common title. Since Zaki's death the Defendants have deliberately

ignored their obligations towards the Property. As a result, the Chedids have been forced to act as sole caretakers of the Property, protecting the parties' ownership interest in order to prevent foreclosure by Bank of America. It is only because of Plaintiffs' efforts and diligence in securing a loan modification with Bank of America and honoring the payment terms that the parties are still co-tenants. Without Plaintiffs' efforts, Bank of America would have foreclosed and neither party would have any interest in the Property; these payments have clearly removed a common burden from the Property and benefitted the Defendants who have yet to spend a single dime.[8]

POINT III

IN THE ABSENCE OF THE COURT ORDERING THE PENDENTE LITE SALE OF THE DEFENDANTS' CO-TENANCY INTEREST, THE COURT SHOULD COMPEL DEFENDANTS TO PAY THEIR FAIRE SHARE OF ALL NECESSARY OPERATING AND MAINTENANCE COSTS

If the Court is not inclined to order the *pendente lite* sale of the Defendants' co-ownership interest, then in the alternative, and at a minimum, the Court should compel Defendants to immediately contribute to all necessary operating and maintenance costs for the Property such as mortgage payments, taxes, insurance, necessary repairs, and maintenance – these are all costs that Plaintiffs exclusively paid both

[8] The threat of foreclosure by Bank of America still looms because of Defendants' failure to pay the second mortgage. This threat will continue even if the Court compels the *pendente lite* sale of the Estate's co-tenancy interest in the Property to Plaintiffs. See Notice of Intent to Foreclose issued by Bank of America on June 11, 2012 annexed as Exhibit 10 to Chedid Cert.

immediately prior to, and subsequent to, Zaki's death. As such, the Defendants should be compelled to contribute to the Property's ongoing expenses. See Colquon's Estate, supra (New Jersey Supreme Court held that co-tenants stand in a fiduciary relationship with each having the obligation to sustain and protect the common title, a right to share in the benefits of ownership, and an obligation to share in the costs).

Each day that passes without Defendants contributing their share of costs and obligations on the Property results in further harm to Plaintiffs. In the meantime, Defendants are able to sit back and enjoy the fruits of real estate ownership without its burdens, and continue to hold Plaintiffs hostage.

CONCLUSION

For the foregoing reasons and authorities cited, and in the interest of justice, the Court should compel the *pendente lite* sale of the Defendants' co-ownership interest in the subject Property. As a condition of the sale, Plaintiffs are ready, willing and able to post in escrow the sum of $67,468.37 which represents the maximum value of the Estate's' net equity interest in the Property - a greater amount than Defendants could claim if the Property were sold outright to a third party because of the payment of a brokerage commission. If the parties are unable to resolve any disputes about credits, the trial can be limited to resolving *de minimis* monetary issues.

Alternatively, if the Court is not inclined to order a *pendente lite* sale of the Defendants' co-ownership interest, then at a minimum the Court should compel them to start contributing toward the Property's carrying costs and maintenance. Otherwise, Defendants will continue to reap the benefits of property ownership without the attendant burdens, all to Plaintiffs' detriment and prejudice.

Respectfully submitted,

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By: _____
Glenn R. Reiser

Dated: December 14, 2012