To Be Argued By:
ROBERTA A. KAPLAN
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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

MARY L. TRUMP,

Plaintiff-Appellant,

—against—

DONALD J. TRUMP, in his personal capacity, MARYANNE TRUMP BARRY, and SHAWN HUGHES, the executor of the ESTATE OF ROBERT S. TRUMP, in his capacity as executor,

Defendants-Respondents.

CASE NO. 2022-05227

BRIEF FOR PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

The trial court (Reed, J.) erred in concluding that Defendants-Respondents Former President Donald J. Trump, his sister Maryanne Trump Barry, and his brother, the late Robert S. Trump (collectively, the "Defendants-Respondents" or the "Trump siblings") do not have to answer for the fraud they perpetrated against their own niece because they managed to obtain from young Mary Trump—who was unaware of their fraudulent schemes—a general release of claims against them (the "Release"). That conclusion cannot be squared with either precedent or the well-pleaded allegations in Mary Trump's Complaint.

The Court of Appeals has long counseled caution where a general release is invoked, as Defendants-Respondents do here, to bar claims that were unknown at the time that the release was signed. That general release must have been "fairly and knowingly made," and it must "clearly and unambiguously" reach the unknown claims at issue. But the trial court failed to exercise the requisite caution here. Although the trial court acknowledged the governing precedent in its Decision, when it came time to evaluate the Release signed by the parties, the trial court jettisoned that precedent and invented its own rules, conflating and confusing the relevant standards and cherry picking the facts it would consider. In so doing, the trial court ignored, among other things, allegations that Defendants-Respondents placed young Mary in profoundly unfair circumstances, not only by threatening to bankrupt her

and "leave [her] paying taxes on money [she did not] have for the rest of [her] li[fe]," but also by terminating the health insurance that was literally keeping her newborn nephew alive in an intensive care unit. If a release obtained in those circumstances is deemed "fairly and knowingly made," especially at the pleading stage, without the benefit of discovery, then the standard is meaningless. That is not New York law.

The trial court committed three principal errors, each independently requiring reversal of the Decision below.

First, the trial court replaced the "fairly and knowingly made" standard for application of general releases to unknown claims with a much higher standard requiring a showing of duress. Specifically, the trial court concluded that because Mary had failed to show that Defendants-Respondents' threats alleged in the Complaint "precluded the exercise of [her] free will," R-20-21, Mary had failed to demonstrate that the Release was unenforceable. But that is not the test. To be sure, a showing of duress is sufficient to render a release unenforceable (as would be the case with any written agreement). That would be true even as to claims that were known, or even called out explicitly, in the release. But there is an *additional* requirement that must be satisfied before a release can later be invoked to bar unknown claims—that the agreement have been "fairly and knowingly made." The Court of Appeals has been clear that this is a *distinct* requirement that must be met when a release is applied to claims unknown at the time the release was entered.

And under that *additional*, *distinct* test, all that Mary must plausibly allege is that the release was the result of "overreaching or unfair circumstances." The trial court replaced that applicable, unfairness inquiry with a test requiring duress, and as such, its Decision is incorrect as a matter of law. *See infra* Argument, Section A.

Second, and relatedly, in its analysis, the trial court simply ignored the well-pleaded allegations in the Complaint that demonstrate that the Release here was indeed the result of "overreaching and unfair circumstances." In rejecting the claim that the Release was unfairly obtained, the trial court simply quoted boilerplate recitations in the Settlement Agreement and noted that Mary was represented by counsel and paid some amount under the agreement. It ignored the well-pleaded allegations about the Trump siblings' threats, and their cruel termination of Mary's newborn nephew's health insurance. The trial court further ignored the allegations that Mary did not receive adequate legal representation at the time she signed the Release, in part because her legal counsel had been arranged for by a trustee who was conspiring with the Trumps to defraud Mary. The trial court was not free to simply ignore these well-pleaded allegations in the Complaint. And based on those allegations, there can be no doubt that dismissal was inappropriate here. *See infra* Argument, Section B.

Third, in construing the scope of the Release, the trial court also flipped the requirement that a general release "clearly and unambiguously" reach unknown

claims on its head by presuming that the Release covers everything for all time absent a showing that the parties intended to *exclude* unknown claims. But again, that is not the test. The trial court was required to scrutinize the text of the agreement, which combined with the context and circumstances at the time of execution, shows that the Release concerned only those claims raised in the Probate and Health Insurance Litigations that the parties were at the table to settle, *not* unknown fraud claims concerning the transfer of Mary's other interests in the Trump family business that she had inherited from her father. At the very least, applying the proper standard, the allegations in the Complaint are sufficient to raise a question as to whether the Release young Mary signed back in 2001 could reach the claims for the fraud, relating to the business interests, that she discovered decades later once *The New York Times* published its bombshell investigative piece in October 2018 on Defendants-Respondents' schemes. *See infra* Argument, Section C.

Further, because the trial court relied solely on the Release to dismiss the Complaint, it did not address the other grounds for dismissal raised by Defendants-Respondents in their motions to dismiss. The Appellate Division has the jurisdiction and authority to decide those issues now, CPLR 5501(c), and given the delay that has already plagued these proceedings, filed over two years before the Decision below, efficiency considerations and conservation of judicial resources weigh strongly in favor of the Court exercising that authority here. And in addressing those

issues, the Court should conclude that because Mary brought her lawsuit within two years of October 2018, when *The New York Times* published its bombshell investigative report revealing the Trump siblings' fraudulent schemes, straightforward application of the fraud discovery rule compels the conclusion that her claims were timely asserted. The Court should also conclude that Mary had standing to assert the fiduciary duty claims, that her Complaint plausibly alleges justifiable reliance, and that the Complaint plausibly alleges a civil conspiracy. *See infra* Argument, Section D.

Finally, on remand, this Court should order that the case be reassigned to a new Justice. Despite her best efforts, Plaintiff-Appellant was unable to ensure that her claims were heard by the trial court in a timely manner, even though the trial court knew about the significant possibility of dilatory tactics by Donald Trump, *see* R-753-55, R-775-803 (Letters to Trial Court), including that he subsequently filed a competing lawsuit against Mary (and *The New York Times*) in the absence of progress in this case. Four different requests for a conference with the trial court went unanswered.[1] This delay also allowed Defendants-Respondents to evade their discovery obligations, even though the law is clear that the filing of a dispositive

[1] And when the trial court finally addressed the motions to dismiss, it noted in its Decision that it had considered Defendants-Respondents' opposition to requests or supplemental authority that Plaintiff-Appellant had filed, while failing to note that he had considered her original submissions. R-4 (failing to list R-753-58, R-805-50, but listing R-773-74, R-853).

motion does not automatically stay discovery in the Commercial Division and the trial judge never took the time to consider or rule on whether a stay was appropriate. This sort of persistent delay is highly prejudicial to Mary because the relevant events took place long ago, and the Trumps were so successful in hiding their fraudulent schemes from Mary (not to mention the IRS). Not surprisingly, not only have witnesses passed away, but so has one of the three Defendants-Respondents. And of the remaining two, one is 86 years old, and the other has now announced that he is running for President in the 2024 election, which will pick up in earnest by early next year. Thus, the Court should remand to a new Justice to avoid any further prejudicial delay in this case. *See infra* Argument, Section E.

QUESTIONS PRESENTED

1. Did the trial court correctly apply controlling precedent with respect to application of a general release to unknown fraud claims?

2. Did the trial court properly consider the allegations in the Complaint in enforcing the 2001 Release?

3. Did Mary Trump plausibly allege that her claims are timely under the fraud discovery rule?

4. Should the Court reassign the case to a different Justice on remand?

STATEMENT OF THE CASE

As set forth more fully below, this case is about a young girl who was callously defrauded by her own family members after she lost her father at the age of 16. Mary inherited valuable minority interests in the family business after her father died, and her uncles and aunt, Donald J. Trump, Maryanne Trump Barry, and the late Robert S. Trump, committed to watching over those interests for her as fiduciaries. R-29-¶2. They lied. *Id.* Instead of watching over Mary's interests, the Trump siblings designed and executed an intricate scheme to siphon money away from her interests, hide the grift, and deceive her about the true value of what she had actually inherited. *Id.* Eventually, they moved to squeeze Mary out of her interests altogether. R-29-30-¶3. They threatened to bankrupt Mary and terminated the health insurance that was keeping her infant nephew (who had cerebral palsy) alive, *id.*, all to get Mary to "cash in her chips." R-56-¶110. She told the press at the time that "William … desperately needs extra care." R-58-¶118. Defendants-Respondents then presented Mary with a so-called Settlement Agreement, and, in those desperate and unfair circumstances, they forced her to sign. All told, they fleeced her out of tens of millions of dollars or more. R-29-30-¶3.

It was not until October 2018, after the publication of an investigative report by *The New York Times*, drawing on dozens of sources and insider and expert interviews, that Mary finally learned the truth about her family's fraudulent schemes.

For a full recitation of the allegations, Plaintiff-Appellant refers to the Complaint, R-29-80. The key allegations are summarized below.

A. At 16 Years Old, Mary Inherited Various Interests in the Trump Family Business

Plaintiff-Appellant Mary Trump is the granddaughter of Fred C. Trump ("Fred Sr."), a landlord and developer who presided over a vast real estate empire in New York City. R-39-¶31, R-41-¶40. Fred Sr. had five children, including Mary's father Fred C. Trump, Jr., as well as Defendants-Respondents Donald J. Trump, Maryanne Trump Barry, and Robert S. Trump. R-41-¶41.

When Mary was 16 years old, her father died. R-29-¶2. At that time, Mary inherited various interests in the Trump family real estate business. R-30-¶5. Those Byzantine interests were complex, involving an array of nested entities, scattered assets, and inscrutable rights. R-42-45-¶¶45-59. At a high level, they included rights in over 70 acres of land in Brooklyn, improved by more than 50 buildings and a shopping center ("Land Interests"), as well as interests in a collection of entities known as the Midland Associates Group ("Midland"), which held hundreds of New York City apartments, various other assets, and a portion of a 153-acre development in Brooklyn ("Midland Interests"). R-42-44-¶¶48-58. Mary was also separately the beneficiary of a trust that her grandfather had established in 1976 ("1976 Trust"). R-45-¶60.

B. The Trump Siblings Seized Control of the Family Business

In the years that followed, as Fred Sr. descended into dementia, Defendants-Respondents maneuvered to take control of his empire—including every entity in which Mary had an interest. R-45-¶64. They ultimately became majority co-owners of the Land Interests. *Id.* They were majority partners, members, and owners of Midland. *Id.* They dominated and controlled various "management" companies and purchasing agents that transacted with Midland. R-45-46-¶66. They also became co-trustees of the 1976 Trust. R-45-¶61. They procured from Fred Sr. a revised will that named them co-executors of his estate ("1991 Will"), R-31-¶¶7-8, and a sweeping power of attorney authorizing Robert to act in Fred Sr.'s "name, place and stead" over all aspects of his business. R-31-¶9. Having taken the reins of the family business, Defendants-Respondents not only had total control, but they also had near-exclusive access to information. R-30-¶5. From that influential position, they perpetrated three distinct, yet related, frauds.

C. Fraud #1: The Grift

Defendants-Respondents used their dominant positions to control the family business and siphon millions of dollars away from Mary's interests through sham entities and concealed self-dealing, which they deliberately misrepresented and concealed in financial documents. R-32-33-¶12, R-46-¶68. This constituted fraud and breach of fiduciary duty, and it induced Mary to hold her interests on the false

and mistaken belief that Defendants-Respondents were stewarding those interests faithfully and providing her with accurate information about their true value. R-32-¶¶ 10-11, R-68-¶158, R-71-¶¶176-77.

As an example, in 1992, the Trump siblings set up a company called All County Building Supply & Maintenance ("All County"), which they falsely portrayed as a legitimate middleman between the vendors that provided maintenance and supplies for Trump properties and the operating companies that paid those vendors. R-46-47-¶¶69-70. But it was a sham that Defendants-Respondents used to siphon cash to themselves through padded invoices. *Id.* They concealed this Grift in books and records under seemingly innocuous descriptions, such as "repairs," "maintenance," and "expenses." R-52-¶94.

Defendants-Respondents also used "management" companies that they owned and controlled, such as Trump Management and Apartment Management Associates ("AMA"), to make secret cash distributions to themselves under the guise of "management," "consulting," and "maintenance" fees and related "salaries." R-47-48-¶¶74-75. The Trump siblings also made disguised cash distributions to themselves by issuing what they falsely represented to be "loans" to other entities they controlled. R-48-¶94.

Defendants-Respondents repeatedly gave Mary sham financial documents that concealed this self-dealing, including through their co-conspirator Irwin

Durben, Mary's so-called "trustee." R-46-48-¶¶68-78. Durben was an old hand in Trump World, having been Fred Sr.'s attorney since the 1950s, a fiduciary to various Trump family trusts, a senior executive at various corporate entities associated with the Trump property empire (which were managed and controlled by the Trump siblings), and Donald's personal attorney. R-30-31-¶6. In short, he was irredeemably conflicted. *Id.* The documents that Defendants-Respondents and Durbin provided to Mary were designed to give her the false and misleading impression that Defendants-Respondents were protecting her interests, when in fact, they were doing the opposite. R-46-48-¶¶68-78.

And so, Mary held onto her interests believing everything was in order, in reliance on the false appearances of legitimacy and value created by the Trump siblings' fraud. *See, e.g.*, R-68-¶158. Mary had no reason to believe otherwise. She was a minority stakeholder, outsider, and teenager when this fraud began—with barely a cursory understanding of the real estate business. Defendants-Respondents were her aunt and uncles, fiduciaries, and stewards of the family business. R-45-46-¶¶63-66. Even if Mary had made inquiries, even if she had scrutinized each page of the financial records that Defendants-Respondents prepared and gave to her, she could not have uncovered their Grift, because Defendants-Respondents had so thoroughly concealed it. R-69-¶165.

D. Fraud #2: The Devaluing

From their dominant and controlling positions, Defendants-Respondents also perpetrated a second fraud. Year after year, together with a lackey—and now infamous—appraiser named Robert Von Ancken, the Trump siblings used phony appraisals and other valuation tricks to dramatically understate the value of Mary's interests in financial statements. R-49-¶83, R-59-60-¶¶127-28, R-69-¶¶160-63. This too constituted fraud and breach of fiduciary duty, and it also induced Mary to hold onto those interests. R-68-¶158. And again, even if Mary had asked questions, Defendants-Respondents had so thoroughly cooked the books, that further inquiry would only have led Mary into a dead end. R-71-¶174.

This was part of a broader pattern for Defendants-Respondents, who inflated and deflated the value of various interests and companies according to their audience—higher when they needed collateral for a loan, and lower when it came time to pay taxes. R-49-¶¶81-82, R-49-50-¶85. It has been widely reported that government authorities have been investigating these practices. *See, e.g.*, R-699-702. In fact, the New York Attorney General recently sued Defendant-Respondent Donald Trump and others for engaging in years of financial fraud to obtain a host of economic benefits. *See, e.g.*, *Attorney General James Sues Donald Trump for Years of Financial Fraud*, NY Att'y General (Sep. 21, 2022), https://ag.ny.gov/press-release/2022/attorney-general-james-sues-donald-trump-years-financial-fraud.

E. Fraud #3: The Squeeze Out

Defendants-Respondents' third fraud began in 1999, when Fred Sr. died, and they saw an opportunity to push Mary out of the business altogether and lock in their illicit gains. R-29-30-¶3. A few days after Fred Sr. died, Mary received a call from Robert. R-56-¶110. He had called to convey a clear message on behalf of all Defendants-Respondents: it was time for Mary to relinquish her interests. *Id.* Over the next month or so, he harassed Mary with daily calls reiterating the same message: "cash in your chips, honeybunch." *Id.*

Although Mary was still uninvolved in the family business and unaware of Defendants-Respondents' fraudulent Grift and Devaluing, Mary did have entirely separate concerns about whether her grandfather was of sound mind when he executed the 1991 Will, which effectively disinherited her from his estate. R-308-n.6 (Maryanne Brief); R-35-¶18, R-36-¶23, R-56-¶109. Accordingly, notwithstanding Defendants-Respondents' threats, at first, Mary contested the probate petition on that ground ("Probate Litigation"). R-35-¶18, R-56-¶109, R-56-57-¶¶111-12; R-553-556. Durben recommended that Mary hire an attorney named John Barnosky to represent her, and Mary, who still trusted Durben and was unaware of his collusion with Defendants-Respondents, retained Barnosky as Durben had advised. R-35-¶20. Whether it was because he too had divided loyalties, or because he was duped by Defendants-Respondents' fraud, Barnosky did not keep Mary

appropriately informed and pursued a settlement without ensuring they had complete and accurate information. R-57-¶114.

In a series of meetings between July and October 1999, Robert tried to force Mary to consent to probate of Fred Sr.'s will. R-35-¶19. For example, at one meeting in October 1999, at the Drake Hotel at 56th Street and Park Avenue in New York City, Robert threatened that Defendants-Respondents would bankrupt Midland if Mary did not comply with their demands, stating that Defendants-Respondents would "leave [her] paying taxes on money [she did not] have for the rest of your lives." *Id.*

But that was not all. In retaliation for the Probate Litigation, Defendants-Respondents terminated the health insurance that Trump Management had always provided for Mary, her brother Fred III, and his infant son William. R-57-58-¶117. At just two days old, William—born just hours after Fred Sr.'s funeral—turned blue and had the first of many devastating seizures. Ultimately diagnosed with cerebral palsy, he spent months in neonatal intensive care, and after that required round-the-clock nursing care. R-36-¶21, R-57-¶¶115-16. More than once, a seizure put him in a state of cardiac arrest so severe that he would not have survived without CPR. R-36-¶21. Fred III depended on this insurance to pay for his newborn son's crushing

medical expenses. R-36-¶22. It is surely no exaggeration to say that William needed the health insurance provided by Trump Management to survive. R-57-¶¶115-16.[2]

When Defendants-Respondents terminated young William's health insurance, Mary became desperate. R-58-¶118. She told the press at the time that "William is my father's grandson. He is as much a part of that family as anybody else. He desperately needs extra care." *Id.* She and her brother, still represented by Barnosky, sued Defendants-Respondents for breach of contract in Nassau County Supreme Court, seeking an injunction to restore their health insurance ("Health Insurance Litigation"). R-58-¶119; R-541-552.

As the pressure mounted, Defendants-Respondents told Mary that they would only settle if she also agreed to be bought out of all of her Midland and Land Interests, even though those interests (according to Defendants-Respondents' own counsel) were not relevant to either the Probate Litigation or Health Insurance Litigation. R-36-¶23, R-58-¶120. And notably, despite making them a condition to settling the Probate and Health Insurance Litigations, Defendants-Respondents objected to discovery concerning the Midland and Land Interests. R-58-¶120. When

[2] In December 2000, Donald Trump himself admitted that the Trump siblings had terminated William's medical coverage to retaliate against Mary and her brother, telling the *New York Daily News*: "[w]hen [Fred III and Mary] sued us, we said: '[w]hy should we give him medical coverage?'" When asked whether he thought cutting their coverage could appear cold hearted considering the baby's medical condition, Donald dismissed the idea, remarking "I can't help that." R-57-58-¶117.

asked about whether All County also acted as the purchasing agent for Midland, Robert Trump's attorney objected, saying "that does not belong in the estate.… This is a probate proceeding, not an accounting proceeding." R-523. In fact, counsel for Robert Trump noted during his deposition that Robert was "not going to answer any questions about Midland." *Id.* Defendants-Respondents again provided Mary with false and misleading documents reflecting years of fraud concerning the value of her interests. R-65-¶155.

Under the desperate circumstances created by the threats and the termination of William's health insurance, with a trustee who was conspiring against her, and without appropriate legal representation, Mary signed a set of documents that purported to deprive her of her interests at a fraction of their true value. R-60-¶128, R-62-¶137, R-63-¶142.

The specific documents that Mary signed included a "Settlement Agreement," which resolved the Probate and Health Insurance Litigations and also transferred Mary's unrelated business interests to Defendants-Respondents. R-607-632. In connection with that transfer, although the Settlement Agreement provided that Mary's interests "necessitated that [she] be furnished [certain] information," including, "but not limited to," financial and tax documents related to her interests, R-618-19, those documents were riddled with fraud. R-65-¶155.

Contemporaneously with the Settlement Agreement, the Trump siblings induced Mary to sign two releases, both of which were narrow in scope. The first release pertained to claims in connection with the Probate Litigation and Health Insurance Litigation. R-595-598.[3] It included no reference to fraud or fiduciary duty claims in connection with Mary's interests in the family business, nor to unknown claims generally. *Id.* And it expressly carved out obligations and conditions under the Settlement Agreement. *Id.* The second release related to Mary's interests in the 1976 Trust. R-599-606.

F. Years Later, *The New York Times*' Investigative Report Began to Reveal Defendants-Respondents' Frauds

Defendants-Respondents' frauds at issue here only began to come to light with the publication of an investigative report by *The New York Times* in October 2018. R-64-¶145; R-107-145. That report was the product of 18 months of work by three investigative journalists (David Barstow, Susanne Craig, and Russ Buettner), *id.*, with access and information that Mary did not have, and never could have had. R-703-708. Plaintiff-Appellant does not dispute that Mary was one source. But she was far from the only source. To the contrary, the investigative reporting team reviewed "tens of thousands of pages of confidential records" and invoices,

[3] Mary signed four substantially identical releases in connection with the Probate and Health Insurance Litigations, one for each Trump sibling and another naming all of the Trump siblings together, which are referred to collectively as the "Release." *See* R-595-598.

conducted extensive "interviews with Fred Trump's former employees and advisers" and vendors, and examined Donald's secret "strategy sessions" with the Trump siblings' co-conspirator Von Ancken. R-109-110, R128. *The New York Times* itself called the investigation "unprecedented in scope and precision." *Id.* The authors ultimately won a Pulitzer Prize in Explanatory Reporting for their "exhaustive" investigation and "mastery" of "complex" material. R-703-708.

PROCEDURAL HISTORY

Plaintiff-Appellant filed the Complaint on September 24, 2020, within two years after *The New York Times* published its investigative report. R-28-80. After two stipulations extending their time to answer, *see, e.g.*, R-751, Defendants-Respondents moved to dismiss the Complaint on December 23, 2020. R-299-328; R-340-368. On February 26, 2021, Plaintiff-Appellant opposed the motions to dismiss and requested oral argument. R-655-695. Defendants-Respondents filed their respective replies on March 25 and 26, 2021. R-713-730; R-731-750. Following Justice Sherwood's retirement, the case was reassigned, and Defendants-Respondents' motions to dismiss were marked fully submitted on May 12, 2021. The trial court heard argument eight months later, on January 11, 2022. R-854-924. It would be ten more months before it issued a decision. R-4-22.

Beginning in June 2021, about six weeks after full submission, Plaintiff-Appellant wrote to the trial court requesting a preliminary conference on four

separate occasions. R-751-52, R-753-58, R-775-803, R-925-26. The trial court never responded or scheduled such a conference, even after Plaintiff-Appellant pointed out that Defendants-Respondents already were attempting to use to their advantage the fact that the relevant fraud took place "almost twenty years" ago. *See, e.g.*, R-305 (Maryanne Brief). The trial court also knew about potential issues of dilatory tactics by Defendants-Respondents, *see* R-753-58, R-775-803, including that Donald Trump subsequently filed a competing lawsuit against Mary and *The New York Times*. In her series of letters, Plaintiff-Appellant also noted that one Defendant-Respondent (Robert) had died, two remaining Defendants-Respondents were 75 and 84 years old, and Donald Trump had all but announced that he was running for President in the upcoming 2024 election. R-776; R-925. Plaintiff-Appellant also proposed that counsel attend the preliminary conference by video or telephone if COVID-19 was still a concern. R-755. Defendants-Respondents either ignored or opposed each request, though they never sought or obtained a discovery stay. The trial court took no action whatsoever on any of the requests.

On November 14, 2022, Donald Trump announced that he is running for President of the United States in the 2024 presidential election. *See, e.g.*, Gabby Orr et al., *Former President Donald Trump Announces a White House Bid for 2024*, CNN (Nov. 15, 2022) https://www.cnn.com/2022/11/15/politics/trump-2024-presidential-bid. The same day, the trial court issued its Decision, denying the

motions to dismiss, limited solely to the ground that the 2001 Release barred Mary's claims. R-4-22.

STANDARD OF REVIEW

This Court reviews de novo all questions of law and fact from an order on a motion to dismiss. *See* CPLR 5501(c); *Consol. Rest. Operations, Inc. v. Westport Ins. Corp.*, 205 A.D.3d 76, 81 (1st Dep't 2022); *Moezinia v. Damaghi*, 152 A.D.2d 453, 456-57 (1st Dep't 1989). For motions to dismiss under CPLR 3211(a)(5) and (a)(7), this Court, like the trial court, must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable theory." *See Faison v. Lewis*, 25 N.Y.3d 220, 224 (2015) (cleaned up); *D.K. Prop., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 168 A.D.3d 505, 506 (1st Dep't 2019).

ARGUMENT

A. The Trial Court Erred Because It Did Not Apply the Applicable Legal Standard Requiring that a General Release Have Been "Fairly and Knowingly Made" Before Barring Unknown Fraud Claims

The Court of Appeals, most recently in *Centro Empresarial Cempresa S.A. v. Am. Movil, S.A.B. de C.V.*, 17 N.Y.3d 269 (2011), has been clear that there are two distinct ways in which a plaintiff can challenge the enforcement of an otherwise clear release. First, a general release, like any other written agreement, can be "invalidated … for any of the traditional bases for setting aside written agreements, namely,

duress, illegality, fraud, or mutual mistake." *Id.* at 276 (cleaned up). Mary Trump did not argue any of these "traditional bases" here, which would have invalidated the Settlement Agreement in its entirety. *See, e.g.*, R-686-88. There is, however, a second, *additional* common law standard, applicable here, that governs only when a release is invoked to bar claims that were *unknown* at the time that the release was signed. Namely, and critical here, "a release may encompass unknown claims, including unknown fraud claims, if the parties so intend and the agreement is 'fairly and knowingly made.'" *Id.* (quoting *Mangini v McClurg*, 24 N.Y.2d 556, 566-67 (1969)). The "fairly and knowingly made" requirement thus prohibits enforcement in "situations where because … of the existence of overreaching or unfair circumstances, it was deemed inequitable to allow the release to serve as a bar to the [previously unknown] claim of the injured party." *Mangini*, 24 N.Y.2d at 567.

This is where Mary focused her arguments below in opposing Defendants-Respondents' motions to dismiss. Specifically, she argued that the Release at issue here (even if it could be read to cover these claims, which it cannot, *see infra* Argument, Section C), was nevertheless unenforceable because it was the result of overreaching and unfair circumstances. *See, e.g.*, R-686-88. She cited, among other things, the threats to bankrupt her and the withdrawal of desperately-needed health insurance from her gravely ill nephew as evidence of that overreaching and unfairness. *Id.*

But rather than focusing on the unfairness inquiry, the trial court instead addressed an argument Mary Trump was not making—whether Mary Trump had alleged a separate fraud from the subject of the Release, or shown duress, sufficient to invalidate the Release. It spent over two pages of its 19-page Decision addressing whether Mary had alleged that she was induced to sign the Release through "a *separate* fraud from the subject of the releases." R-18. The trial court also made a passing reference to the "alleged threats" made by the Trump siblings, concluding that Mary had not shown that such threats "precluded the exercise of [her] free will." *Id.* at 18. But this "free will" inquiry goes to an argument about duress. In fact, the case the trial court cited in support, *Art Stone Theater Corp. v. Technical Programming & Sys. Support of Long. Is.*, 157 A.D.2d 689, 691 (2d Dep't 1990), explicitly deals with a claim of economic duress to void a release. R-21.[4]

But Mary never argued that a *separate* fraud induced her into signing the Release; the "squeeze out" scheme that the trial court discussed in its Decision is *the*

[4] The trial court also summarily concluded that this is not a case in which Mary "had little time for deliberation and consideration" before signing the Release. R-20. But here, again, the trial court was focused on an argument Mary Trump never made—her argument concerned the threats her family made to bankrupt her and the withdrawal of health insurance, not the amount of time she had to consider the agreement before signing. *See infra* Argument, Section B. Notably, the trial court cited to *Bloss v. Va'ad Harabonim of Riverdale*, 203 A.D.2d 36, 38 (1st Dep't 1994), but that case actually rejected summary judgment in a case alleging facts concerning whether a release was "fairly and knowingly made," noting that the allegations were sufficient to take the matter to a factfinder. It therefore *supports* Plaintiff-Appellant here.

fraud that she challenges on the merits in her Complaint—not a basis for not enforcing the Release.[5] Nor did Mary argue that she was under duress when she signed the Settlement Agreement, such that the Release should now be voided even as to the probate and other claims at which it was aimed. Simply put, Mary Trump did not invoke any of these "traditional bases" for invalidating a written agreement in opposing application of the Release. She instead focused on the second, *additional* requirement that New York law imposes on a release that is sought to be applied to bar *unknown* claims: that the release be "fairly and knowingly made."

The trial court, however, conflated these two distinct standards and ultimately failed to apply the correct one. The Decision quoted to *Centro*, cited the "fairly and knowingly made" standard, and even recognized it as a requirement under New York law when a release is invoked to bar claims unknown at the time of the agreement. R-14-15. But then at the key moment in its analysis, the Decision simply replaced that standard with one requiring either fraud or duress, i.e., the "traditional bases" under the first inquiry. R-14-15, R-18-21. In other words, the trial court paid mere lip service to the "fairly and knowingly made" standard, ultimately requiring Mary to show one of the "traditional bases" for invalidation of the Release instead. That

[5] Because Mary is not alleging here that she was induced to sign the Release by a separate fraud, the cases the trial court invoked in this discussion—*Arfa v. Zamir*, 17 N.Y.3d 737 (2011); *Sodhi v. IAC/InterActive Corp.*, 201 A.D.3d 451 (1st Dep't 2022); and *Kafa Invs., LLC v. 2170-2178 Broadway LLC*, 114 A.D.3d 433 (1st Dep't 2014)—are all inapposite.

conflation and replacement of the "fairly and knowingly made" standard is legal error; the Court of Appeals has been clear that these are distinct inquiries. *Centro*, 17 N.Y.3d at 276. Because the use of a general release to bar claims that were unknown at the time of the agreement is different, extra requirements apply in those circumstances. The trial court failed to properly apply the law concerning that extra requirement, and accordingly, reversal of the Decision below is necessary.

B. The Trial Court Erred Because It Failed to Address the Key Allegations in the Complaint Surrounding the Release

Not only did the trial court fail to apply the correct "fairly and knowingly made" standard, but it also compounded that error by failing to consider in its analysis the key allegations in the Complaint concerning the unfairness of the Release. Instead, the trial court cherry picked three allegations, none of which demonstrates that the Release here was "fairly and knowingly made," in any event. At the same time, the trial court ignored other key allegations establishing—especially at the pleading stage—that it was not.

First, the trial court relied mostly on boilerplate language from the Settlement Agreement to support its conclusion that this is not a case where Defendants-Respondents' alleged threats precluded the exercise of Mary Trump's "free will." R-20-21. Specifically, the trial court noted that the agreement sets out that "'[t]he execution of this [settlement agreement] is being completed on a voluntary basis and each party represents that they were under no compulsion to execute this agreement

and that they have been fully advised throughout the negotiations to resolve their differences between the parties as to all negotiations and representations made to each other as well as to the Court[.]'" R-20 (cleaned up). The trial court also quoted the statement in the agreement that Mary "'had sufficient opportunity to review this [settlement agreement] with [her] attorney and … executes this instrument after due consideration and of … her own volition[.]'" *Id.* But such boilerplate recitations in the Settlement Agreement cannot be dispositive. If they could, the "fairly and knowingly made" requirement would be rendered a nullity. The Court of Appeals has been clear that the test requires consideration of equitable factors, including whether there is overreaching or unfair circumstances. *Mangini*, 24 N.Y.2d at 567. Those factors are unlikely to be reflected in boilerplate language in the agreement. As such, almost exclusive reliance on such boilerplate language, as the trial court did here, constitutes error. *See id.*; *see also Jonathan S. v. Benjamin*, 193 A.D.3d 1003, 1004-05 (2d Dep't 2021) (finding that despite "[s]tandardized, even ritualistic, language" claiming to release all employees from liability, the "specific circumstances of [the] case" indicated that the release was more limited).

Second, the trial court noted that Mary received consideration in exchange for entering into the Settlement Agreement. Specifically, the trial court noted that Mary "received $1,700,000 as consideration for her Midland Interests, $100,000 for her Land Interests, and $962,500 to withdraw her objections in the probate proceeding."

R-20. But the trial court ignored the fact—repeatedly pointed out in the briefing, *see, e.g.*, R-684—that Mary actually received only $10 in consideration for each of the two releases she signed. *See* R-595-598. And it is the Release, which the Trump siblings contend released unknown claims, that is at issue here. *Id.*[6] So what the Court must consider is that Mary received $10 for signing a Release that Defendants-Respondents claim relinquished then-unknown claims worth at least tens of millions of dollars. Here, "the disparity between the consideration received and the fair value of plaintiff's claim" weighs in favor of concluding that the Release was the result of overreaching or unfair circumstances such that it was not "fairly and knowingly made." *Paulino v. Braun*, 170 A.D.3d 506, 506 (1st Dep't 2019) (cleaned up); *see also Johnson v. Lebanese Am. Univ.*, 84 A.D.3d 427, 431 (1st Dep't 2011) (noting that "it is appropriate to consider whether a relatively small amount of consideration paid to a releasor in exchange for signing a release suggests that the scope of the release is narrower").

Third, the trial court made passing reference to the fact that Mary was represented by counsel at the time that she signed the Settlement Agreement. R-20. But involvement of counsel is not dispositive. *Mangini*, 24 N.Y.2d at 568-569 ("The fact that plaintiffs' former lawyer prepared the releases, while a highly significant

[6] Indeed, to the extent there was any question about this issue, the trial court should have ordered the parties to engage in discovery rather than reach a conclusion contrary to what the document actually says. *Compare* R-20 *with* R-595-598.

circumstance, is not controlling."). Even worse, the trial court ignored key allegations that it was at the recommendation of Durben that Mary Trump and her brother engaged Barnosky as their counsel in the first place. R-35-¶20, R-57-¶114. At the time, Mary trusted Durben and had no idea that he was colluding with Defendants-Respondents in their campaign to defraud her and squeeze her out of the family business. *Id.* These allegations are more than enough to preclude reliance on the presence of counsel to conclude that the Release was "fairly and knowingly made." *See, e.g.*, *Bergrin v. Eerie World Ent., LLC*, No. 03 CIV. 4501 (SAS), 2003 WL 22861948, at *2 (S.D.N.Y. Dec. 2, 2003) (in bankruptcy context, "[c]ourts have found that a conflict of interest arises … when debtor's counsel has questionable ties with a principal"). It goes without saying that particularly at the motion to dismiss stage, the trial court cannot simply cite to the presence of counsel in support of its conclusion, while at the same time ignoring the allegations concerning the ineffectiveness and potential conflicts of such counsel.

Relying on these cherry-picked facts—the boilerplate language in the agreement, the receipt of consideration (though not really for the Release), and the presence of counsel (albeit a conflicted one)—the trial court concluded summarily that there were no overreaching or unfair circumstances as a matter of law. But not only were these cherry-picked facts inapposite, insufficient, or themselves contracted by the well-pleaded allegations in the Complaint, *see supra* at 24-27, but

the trial court also failed to consider *other* key allegations in the Complaint concerning the fairness of the Release: especially the threats against Mary and the withdrawal of health insurance from her infant nephew, which put his life at risk. *See supra* at 14. The trial court recited these allegations early in its Decision, in summarizing the allegations in the Complaint, yet they are inexplicably absent from the discussion concerning whether the Release—which the court held bars Mary from pursuing all claims against Defendants-Respondents—was "fairly and knowingly made" as required under New York law.

Considering the entirety of the facts alleged in the Complaint, as the trial court was required to do, these "allegations are sufficient to support a possible finding that the release signed by the plaintiff was obtained under circumstances which indicate unfairness, overreaching and unconscionability, dismissal is inappropriate." *Gibli v. Kadosh*, 279 A.D.2d 35, 41 (1st Dep't 2000) (cleaned up). They are more than "sufficient to support a possible finding that the release was signed by the plaintiff under circumstances which indicate unfairness." *Storman v. Storman*, 90 A.D.3d 895, 898 (2d Dep't 2011). And to the extent there is any doubt, the parties should engage in discovery so that the issue can go to a factfinder. *See, e.g.*, *Johnson*, 84 A.D.3d at 430-33 (reversing grant of summary judgment where plaintiff raised triable issue as to whether release agreement was "fairly and knowingly made"); *Pacheco v. 32-42 55th St. Realty, LLC*, 139 A.D.3d 833, 834 (2d Dep't 2016)

(affirming denial of motion to dismiss where allegations were sufficient "to support a possible finding that the defendants procured the relief by means of fraud and that the release was signed by the plaintiff under circumstances which indicate unfairness") (cleaned up); *see also Paulino*, 170 A.D.3d at 506 ("Both the nature of the relationship between the parties that negotiated the release and the disparity between the consideration received and the fair value of plaintiff's claim weigh in plaintiff's favor" as "evidence of overreaching and unfair circumstances" that "raise an issue of fact as to the validity of the release.") (Cleaned up).

C. The Trial Court Erred by Misapplying and/or Misstating the Applicable "Clear and Unambiguous" Standard

The trial court also erred by flipping on its head the requirement that the Release "clearly and unambiguously" reached the previously unknown claims. To obtain dismissal under CPLR 3211(a)(5), Defendants-Respondents bear the burden of showing that "the language of [the] release is clear and unambiguous." *Centro*, 17 N.Y.3d at 276. More specifically, here, the Trump siblings must show that the Release "clearly and unambiguously released" the unknown fraud claims that are at issue in this case. *See C&A Seneca Constrs. LLC v. G Builders LLC*, 67 Misc.3d 1241(A), at *2-*3 (N.Y. Sup. Ct., July 10, 2020) (denying motion to dismiss when release did not unambiguously cover claim at issue). Only "if the parties so intend[ed]" may the release be so enforced. *Centro*, 17 N.Y.3d at 276 (cleaned up). "Where a court cannot *definitively determine* whether the scope of a release was

intended to cover the allegations in a complaint, a motion pursuant to CPLR 3211(a)(5) to dismiss the complaint must be denied." *Desiderio v. Geico Gen. Ins. Co.*, 107 A.D.3d 662, 663 (2d Dep't 2013) (emphasis added); *see also Giuffre v. Andrew*, 579 F. Supp. 3d 429, 433 (S.D.N.Y. 2022) (denying motion to dismiss based on the scope of a prior release, and noting that "it is not open to the Court now to decide, as a matter of fact, just what the parties to the release … actually meant").

Here, the trial court concluded that the Release covered the unknown fraud claims because "[t]here is no indication that the parties *intended to limit the releases to known claims* at the time they executed the releases and settlement agreement." R-16 (emphasis added). In other words, the trial court required that the Release be "clear and unambiguous" in *excluding* unknown claims. But that is not the test. Under controlling law, the parties must "clearly and unambiguously" show that they intended to *include*—not exclude—such unknown claims from the Release. The trial court here did exactly the opposite.

Properly applying the standard, it is clear that the Release that young Mary Trump signed in 2001 did not "clearly and unambiguously" cover the unknown claims for the fraud that she discovered years later in 2018. As an initial matter, the Release was obtained as part of the Settlement Agreement for the Probate and Health Insurance Litigations. "The meaning and extent of coverage of a release 'necessarily depend, as in the case of contracts generally, upon the controversy being settled and

upon the purpose for which the release was actually given.'" *Linn v. N.Y. Downtown Hosp.*, 139 A.D.3d 574, 575 (1st Dep't 2016) (quoting *Cahill v. Regan*, 5 N.Y.2d 292, 299 (1959)). Here, "the controversy being settled" was the Probate and Health Insurance Litigations, and the plain intent of the Release was to settle *those disputes*—i.e., the disputes concerning the testamentary capacity of Fred Sr. and the breach of contract for terminating health insurance for Mary, Fred III, and William, which were the only disputes the parties were aware of at the time. Indeed, the Release, *see* R-595-98, points to the Settlement Agreement, which includes case captions from the Probate and Health Insurance Litigations, and recites that the parties "wish[ed] to avoid the uncertainty, further expense and delay incident to protracted litigation and believe it is in the best interest of all concerned that the controversies *raised by these proceedings* be compromised and settled, on a 'global basis.'" R-611 (emphasis added). It is true that the Settlement Agreement also included a transfer of Mary's interest in the family business. But nothing about that suggests that the Release was intended to resolve all unknown claims related to that sale, and "a release may not be read to cover matters which the parties did not desire or intend to dispose of." *Linn*, 139 A.D.3d at 575. And to the contrary, the Release here expressly carved out claims related to that sale—when it provided that its scope is "except for any obligations under" the Settlement Agreement, R-595-98, as discussed *infra*.

The specific context in which the Release was obtained is key to the analysis. Indeed, the Court of Appeals has recognized that releases "are given in circumstances where the parties are sometimes looking no further than the precise matter in dispute that is being settled." *Mangini*, 24 N.Y.2d at 562. That is true even when "releases contain standardized, even ritualistic language." *Id.* As a result, "the cases are many in which the release has been avoided with respect to uncontemplated transactions despite the generality of the language in the release form." *Id.*; *see also, e.g.*, *Cahill*, 5 N.Y.2d at 299 (1959) (holding that "release covered and barred only those matters about which there had been some dispute").

Particularly when viewed in that context, the terms do not "clearly and unambiguously" release the unknown claims at issue. *C&A Seneca*, 67 Misc.3d 1241(a), at *2. In fact, the Release does not refer to "unknown claims" at all, R-595-98, even though that is a common provision in many releases. *See, e.g.*, *Arfa v. Zamir*, 76 A.D.3d 56, 57 (1st Dep't 2010) (releasing "known or unknown" claims). And while the Release contains some broad boilerplate language, "New York law does not construe a general release to bar claims for injuries unknown at the time the release was executed, even when the release contains broad language." *Maddaloni Jewelers, Inc. v. Rolex Watch U.S.A., Inc.*, 354 F. Supp. 2d 293, 299 (S.D.N.Y. 2004); *see also Johnson v. Lebanese Am. Univ.*, 84 A.D.3d 427, 431 (1st Dep't 2011) (claims not released when release could be reasonably construed as limited to

different subject matter); *Storman*, 90 A.D.3d at 898 ("defendant submitted a broad, general release … purporting to release the defendant from all claims," but "it cannot be definitively determined at this point that the scope of the release was intended to cover the allegations in the complaint").

The trial court Decision, like Defendants-Respondents below, relies heavily on *Centro*, 17 N.Y.3d 269. But that case supports, rather than hurts, Plaintiff-Appellant. In *Centro*, plaintiffs alleged that the defendants, their co-fiduciaries, induced them to sell their interest in a telecommunications company by misrepresenting the value of the enterprise. *See id.* at 272. The Court of Appeals addressed the enforcement of two releases executed in connection with corporate purchase agreements: the Members Release, applicable to claims arising out of the Agreement Among Members, and the Master Release, applicable to claims arising out of the Master Agreement. The Members Release relinquished "all manner of actions … whether past, present or future, actual or contingent" arising out of "the ownership of membership interests in [TWE] or having taken or failed to take any action in any capacity on behalf of [TWE] or in connection with the business of [TWE]." *Id.* at 274. By contrast, the Master Release had the same language, but added a proviso that "the foregoing release shall not release any claims involving fraud." *Id*.

Contrary to what the trial court suggested in its analysis, *see* R-17, the *Centro* holding that the Members Release relinquished fraud claims did not rest solely on its broad language releasing "all manner of actions" including "future" and "contingent" claims. Instead, *reading the two releases together*, the Court of Appeals concluded that "the explicit exclusion of fraud claims from the Master Release suggests that the Members Release is not so limited." *Centro*, 17 N.Y.3d at 277. The fact that the parties explicitly addressed potential fraud claims was key. By contrast, here, there is not an explicit exclusion of fraud claims in one release such that the other can be read to include such claims. Nor does the Release here mention "future" or "contingent" claims. There is simply no indication that the parties contemplated future fraud claims *at all* with regard to the Release or the Settlement Agreement—whereas in *Centro*, the express exclusion of fraud claims from one release, but not the other, executed "at the same time," *id.*, clearly demonstrated exactly such a purposeful decision. As the Court of Appeals has long recognized, "courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include." *Id.* (cleaned up); *see also Rowe v. Great Atl. & Pac. Tea Co.*, 46 N.Y.2d 62, 72 (1978).[7]

[7] The other cases on which the trial court relied—*Consorcio Prodipe, S.A. de C.V. v. Vinci, S.A.*, 544 F. Supp. 2d 178 (S.D.N.Y. 2008), and *Miller v. Brunner*, 164

What's more, the release in *Centro* was also expressly aimed at a sale transaction, and was intended to resolve all claims relating to that sale. *See* 17 N.Y.3d at 274, 277. Here, in contrast, the Release explicitly carved out claims relating to the transfer of Mary's interests in the family business to Defendants-Respondents: the Release provides that its scope is "except for any obligations under" the Settlement Agreement and that it is "executed in accordance with the terms and conditions set forth" in that agreement. And the Settlement Agreement states that Mary's "request" and her position "necessitated that [she] be furnished" with certain "information" about her interests in connection with the sale. R-618-631. The information that Defendants-Respondents provided did not satisfy that obligation and instead only compounded and effectuated their fraud. The trial court disregarded these carve-outs, instead faulting Mary for failing to recognize that her uncles and aunts were no longer acting as fiduciaries and failing to explicitly require the Trump siblings to provide *truthful* information as part of the agreement. R-19. But New York law is clear that "every contract contains an implied covenant of good

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A.D.3d 1228 (2d Dep't 2018)—are inapposite. The release at issue in *Consorcio* expressly contemplated "any and all actions … *whether known or unknown* …." 544 F. Supp 2d at 184 (emphasis added). This release contains much broader language than the Release that Mary Trump signed in connection with her settlement of the Probate and Health Insurance Litigations. And although the release in *Miller* contains similar language to the Release here, *see* 164 A.D.3d at 1230; *see supra*, that case does not involve the allegations of threats, pressure, and inadequate legal representation at issue here, *id.*

faith and fair dealing." *Carvel Corp. v. Diversified Mgmt. Grp., Inc.*, 930 F.2d 228, 230 (2d Cir. 1991); *see also In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 158 (E.D.N.Y. 2000) (discussing the concept of good faith in the context of parties entering releases to extinguish claims); *Restatement (Second) of Contracts* § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement"). And because a general release is a contract and subject to the same rules of construction, *Davis v. Rochdale Vil.*, 109 A.D.3d 867, 867 (2d Dep't 2013) (cleaned up), that means that the Release that Mary Trump signed was subject to that covenant of good faith and fair dealing. Defendants-Respondents, therefore, had a duty to come to the negotiating table in good faith, whether fiduciaries or not. Instead, they used the negotiation to further their fraudulent schemes. And in any event, the key point is that the mere existence of the carve-outs demonstrates that the Release was narrow in scope and reach, and it excluded claims concerning the transfer of Mary's other interests—at the very least, the allegation concerning those carve-outs is sufficient to put in doubt whether the Release "clearly and unambiguously" reached the previously unknown fraud claims.

Finally, the trial court summarily concluded, without analysis, that the 1976 Trust release does not limit the scope of the general Release. R-17. But the signing of a separate release relating to the 1976 Trust as part of the Settlement Agreement

is highly relevant to a determination of the scope of the Release now being invoked by Defendants-Respondents, particularly at the pleading stage where Plaintiff-Appellant is entitled to every favorable inference. R-599-606. The fact that all parties found it necessary to obtain a separate release concerning claims arising from Mary's interests in the 1976 Trust confirms that the parties intended the Release to be read narrowly. Had the parties intended the Release to sweep broadly enough to encompass *all* of Mary's potential claims, the separate 1976 Trust release would not have been necessary. Reading the releases together helps "discern the intentions of the parties" that the Release was intended to resolve the pending litigation and was not intended to reach the entirely separate and unknown fraud claims at issue here. *NAB Constr. Corp. v. City of N.Y.*, 276 A.D.2d 388, 389 (1st Dep't 2000).

In sum, the trial court flipped the "clear and unambiguous" test on its head and ignored the fact questions stemming from ambiguity as to the scope and reach of the Release. There were several transactions taking place at the same time, and context shows that the Settlement Agreement applied only to the specific pending disputes among the parties. Moreover, the Release here did not specifically reference unknown fraud claims, and there is no indication that the parties considered future fraud claims at all at that time.

D. This Court Should Decide the Other Grounds on which Defendants-Respondents Sought Dismissal

The trial court also misstepped in failing to decide—notwithstanding full briefing and argument, and the passage of an extraordinary amount of time—the other grounds on which Defendants-Respondents sought dismissal, including with respect to the statute of limitations and the application of the fraud discovery rule. This Court should do so now. *See* CPLR 5501(c); *cf. Horowitz v. Foster*, 180 A.D.3d 783, 784 (2d Dep't 2020) (addressing matters unaddressed by Supreme Court below that were briefed by the parties). And this Court should exercise that authority here given the age of the Defendants (and witnesses), and the dilatory and prejudicial tactics they already have engaged in while the trial court effectively put the case on hold for more than a year and a half. *See supra* 19. Practically speaking, it would be egregiously unfair to require Plaintiff-Appellant to wait another two years or more for the trial court to decide whether the other grounds for dismissal are valid, whether her claims can proceed, and whether she is entitled to discovery in this case.[8]

i. The Court Should Conclude that Defendants-Respondents Have Not Established Untimeliness

It is well-established that claims sounding in fraud are timely if they are brought within two years of notice or discovery. Defendants-Respondents' fraud

[8] It is somewhat curious that the trial court did not address these grounds since most of the oral argument on January 11, 2022 concerned these issues. *See generally* R-854-924.

only began to come to light after the publication of *The New York Times*' investigative report in October 2018. In trying to argue that Mary was on notice of their fraud earlier than that, Defendants-Respondents pointed back to their own deposition testimony and to documents exchanged in discovery in the Probate Litigation. But in those materials, Defendants-Respondents concealed and reinforced—rather than revealed—their fraud. And, because they had cooked the books so thoroughly, further investigation by Mary would only have deepened her misimpressions. Ultimately, the truth only began to come out through 18 months of Pulitzer Prize-winning investigative journalism, by reporters with access not only to the fraudulent documents that Defendants-Respondents provided to Mary, but also to numerous other sources, experts, and Trump insiders who finally revealed the truth.

Because Plaintiff-Appellant's claims at issue sound in fraud, the applicable statute of limitations is "the greater of six years from the date the cause of action accrued or two years from the time the plaintiff … discovered the fraud, or could with reasonable diligence have discovered it." CPLR 213(8); CPLR 203(g)(1). The Complaint alleges in detail that Mary did not discover, and could not have discovered, any of Defendants-Respondents' fraudulent schemes until the publication of *The New York Times*' investigative report in October 2018. R-64-¶¶ 145-46, R-70-71-¶¶172-77. Those allegations must be accepted as true for purposes

of the motions to dismiss. *Mullin v. WL Ross & Co. LLC*, 173 A.D.3d 520, 522 (1st Dep't 2019). Yet Defendants-Respondents asked the trial court to simply disregard those allegations and instead find that Mary was somehow on inquiry notice of all of her claims earlier, based on a smattering of cherry-picked documents and excerpts of testimony from unrelated actions, none of which actually revealed the fraud at issue here. R-315-320; R-355-361.

To start, Defendants-Respondents have misstated the applicable law. Their contention that Mary bears the burden to show that her claims are timely at the motion to dismiss stage relies on inapposite, decades-old authority from outside the Appellate Division, First Department. R-316 (citing *Hillman v. City of N.Y.*, 263 A.D.2d 529 (2d Dep't 1999) and *Lefkowitz v. Appelbaum*, 258 A.D.2d 563 (2d Dep't 1999)); R-357 (same). To the contrary, this Court recently explained that it is Defendants-Respondents who bear the burden to first "make a prima facie case that [Mary] was on inquiry notice of [her] fraud claims more than two years before [she] commenced this action." *Epiphany Cmty. Nursey Sch. V. Levey*, 171 A.D.3d 1, 7 (1st Dep't 2019). To meet that burden, Defendants-Respondents must establish that Mary "had knowledge of facts from which the alleged fraud might reasonably be inferred." *Id.*

If—and only if—Defendants-Respondents are able to make a *prima facie* showing of "inquiry notice," then the burden shifts to Mary to establish that, "even

if [she] had exercised reasonable diligence, [she] could not have discovered the basis for [her] claims before that date." *Id.* Determining when a plaintiff acting with "reasonable diligence" could have discovered an alleged fraud "involves a mixed question of law and fact," *id.* at 3 (citing *Sargiss v. Magarelli*, 12 N.Y.3d 527, 532 (2009)), and a plaintiff carries her burden by "aver[ring] evidentiary facts … raising an issue of fact" with respect to the limitations period, *6D Farm Corp. v. Carr*, 63 A.D.3d 903, 906 (2d Dep't 2009).

Importantly, when, as here, "it does not conclusively appear that a plaintiff had knowledge of facts from which the alleged fraud might reasonably be inferred, the cause of action should not be disposed of summarily on statute of limitations grounds. Instead, the question is one for the trier-of-fact." *Epiphany*, 171 A.D.3d at 7. At the oral argument on the motions to dismiss, Defendants-Respondents argued that the standard for invoking the discovery rule becomes "a motion for summary judgment" or "a mini summary judgment." R-871-72, R-880. But that is not true under *Epiphany*—the allegations must be taken as true on the motions to dismiss. *Id.* at 4. This Court recently reiterated that principle in *Sabourin v. Chodos*, 194 A.D.3d 660, 661 (1st Dep't 2021). There, this Court affirmed the denial of a motion for summary judgment on the grounds that "alleged inconsistencies between … deposition testimon[ies] and … affidavit[s] … may be fodder for

cross[]examination, but they do not support a finding, as a matter of law, that plaintiff[] [was] on inquiry notice." *Id.*

ii. Defendants-Respondents Do Not Make a *Prima Facie* Case That Mary Was on Inquiry Notice of Her Claims Prior to October 2018

Defendants-Respondents' inquiry notice argument rests almost entirely on deposition testimony during the Probate Litigation and on vague references to documents produced at the time. R-317-19; R-357-58. Defendants-Respondents' argument fails because on their face those materials concealed, rather than revealed, the fraud. *Epiphany*, 171 A.D.3d at 8. Defendants-Respondents fall back on vague suspicions that they suggest Mary had concerning Defendants-Respondents' "good faith" in the Probate Litigation, which also do not constitute inquiry notice as a matter of law. *See Erbe v. Lincoln Rochester Tr. Co.*, 3 N.Y.2d 321, 326 (1957); *CSAM Capital, Inc. v. Lauder*, 67 A.D.3d 149, 155-58 (1st Dep't 2009).

(a) Defendants-Respondents' Materials Concealed Rather Than Revealed the Fraud

Dismissal on the basis of documentary evidence under CPLR 3211(a)(1) "is warranted only if the documentary evidence submitted 'utterly refutes plaintiff's allegations' and 'conclusively establishes a defense to the asserted claims as a matter of law.'" *Amsterdam Hospitality Group v. Marshall-Alan Assoc.*, 120 A.D.3d 431, 433 (1st Dep't 2014); *see also Flowers v. 73rd Townhouse LLC*, 99 A.D.3d 431 (1st Dep't 2012) (applying same standard on limitations motion). The materials that

Defendants-Respondents put before the trial court came nowhere close to meeting that very high bar.

First, Defendants-Respondents distort deposition testimony having nothing at all to do with the claims Mary asserts here. For example, Defendants-Respondents' argument that Mary was somehow on inquiry notice of the disguised cash distributions that Defendants-Respondents made to themselves under the guise of "loans" is, according to Defendants-Respondents, based on the fact that Mary was "aware that Midland Associates had loans on the books." R-355. But Defendants-Respondents point to deposition testimony about a loan that Fred Sr. made *to* Midland, R-352; R-499-509; R-510-11, which obviously has nothing to do with fraudulent loans that Defendants-Respondents made *from* Midland to themselves at issue here. R-48-¶76. In all events, notice of loans does not suggest notice of improper distributions disguised as loans.

Second, Defendants-Respondents rely on a series of benign statements from Robert's testimony that disclosed All County and AMA's "existence" and "ownership structure." R-358; R-317-18. For example, Robert testified that he owned All County along with his sisters, brother, and cousin, and that he had "probably" come up with the idea for that company "in consultation with" lawyers and auditors. R-317-18 (citing R-278-98); R-357-59 (R-512-31); R351-52 (citing R-532). Plainly, the mere existence or ownership structure of these companies does

not amount to "circumstances … [that] suggest to a person of ordinary intelligence the probability that [she] has been defrauded." *Aozora Bank, Ltd. V. Credit Suisse Grp.*, 144 A.D. 3d 437, 438 (1st Dep't 2016).

Third, the Trump siblings point to false testimony that they offered in furtherance of their own cover up. More specifically, Robert testified that All County's "markup" constituted legitimate "profit," and that savings from Defendants-Respondents' operation of All County "offset the markups." R-317-18; R-350, R-357-58. By Defendants-Respondents' own telling, therefore, Robert was claiming that All County had "legitimate business purposes," R-358-59; R-317-18, as opposed to being "a sham corporation that … existed for the purpose of secretly extracting funds," while "concealing those transfers as legitimate business transactions," as alleged in the Complaint. R-46-¶¶68-69. This is the opposite of providing notice of fraud—it certainly did not suggest to Mary Trump the "probability that [she] ha[d] been defrauded." *Aozora Bank*, 144 A.D. 3d at 438. To the extent that Defendants-Respondents are contesting Mary's allegations about whether there was any fraud at all, that, of course, is not appropriate at the motion to dismiss stage. *Faison*, 25 N.Y.3d at 224; NYSCEF 97 at 29-30 ("As the Court recognized and as the *Epiphany* case … makes clear, this is not a motion for arguing facts.").

Beyond these false few answers that reinforced the cover up, Defendants-Respondents shut down further questioning about Mary's business interests during the Probate Litigation. Asked, for example, whether All County acted as the purchasing agent for Midland, Robert's counsel objected: "Excuse me, we're going back again to something that does not belong in the estate.… This is a probate proceeding, not an accounting proceeding.… [Y]ou keep diverting back to Midland and he's not going to answer any questions about Midland." R-523. Defendants-Respondents cannot pretend they provided notice when they dodged some questions and lied in response to others.

Nor could Defendants-Respondents establish inquiry notice based on vague references to document exchanged in discovery in the Probate Litigation. R-318; R-352, R-358. Notably, Defendants-Respondents failed to actually identify any document that supposedly put Mary on notice of the fraud she now alleges. That is no surprise—as the Complaint details, the documents Defendants provided to Mary over the years reinforced and concealed their fraud rather than reveal it. R-46-48-¶¶68-77, R-49-¶84, R-52-56-¶¶91-108. Indeed, the fraudulent documents themselves would not "suggest to a person of ordinary intelligence the probability that [she] has been defrauded. *Aozora Bank*, 144 A.D.3d at 438. They were deliberately crafted to do exactly the opposite.

This Court recently confronted almost the exact same issue on nearly identical facts in *Epiphany* and held that dismissal on limitations grounds was not appropriate. *See* 171 A.D.3d at 8. The complaint there alleged that the defendant had "devised a fraudulent scheme to intentionally falsify the financial statements and books and records of [the plaintiff-company]," and had "fraudulently concealed" certain "alleged illicit and unauthorized transfers … by falsely designating the entries in [the company's] books and records as 'loans,' … and offsetting the loans by falsely claiming monies owed by [the company] for consulting services that were never provided." *Id.* On the basis of those allegations, this Court concluded that, "[s]ince the acts were allegedly concealed from [plaintiff], defendants have not established a prima facie case … [and] it does not conclusively appear that [plaintiff] had knowledge of the facts from which the fraud could reasonably be inferred." *Id.*[9] The same is true here, for the exact same reasons.

Defendants-Respondents set forth zero authority suggesting otherwise. The cases they cite, R-318-19; R-358-59, all stand for the unremarkable proposition that documents in a plaintiff's possession *may* put a plaintiff on notice. But that only raises the question of what the materials Defendants-Respondents submit here

[9] To be sure, the court in *Epiphany* noted that the plaintiff could have obtained her own appraisal in connection with one "branch of the fraud claim[,]" 171 A.D.3d at 7, but even if Mary had done that here, any appraisal would have been based on the same "false and misleading data and other management information that Defendants had provided to Von Ancken for use in his valuations." R-49-¶84.

actually show. Because the documents Defendants-Respondents point to in their moving briefs served only to reinforce, rather than to disclose, Defendants-Respondents' fraud, they cannot support a dismissal on statute of limitations grounds. *Epiphany*, 171 A.D.3d at 8.

iii. Defendants-Respondents' Suggestion that Mary Must Have Had Suspicions is Insufficient to Establish Notice as a Matter of Law

Unable to point to documents from the time that "utterly refute" Mary's well-pleaded allegations, Defendants-Respondents fall back on a series of vague arguments that Mary suspected Defendants-Respondents of dishonesty because she filed a lawsuit relating to Fred Sr.'s testamentary capacity, that she and her lawyer doubted Defendants-Respondents' good faith with respect to certain aspects of that Probate Litigation, and that her lawyer asked some exploratory questions at a deposition about entities relating to Mary's business interests. R-318-19; R-358-60, R-362. All of this falls far short of inquiry notice as a matter of law.

First, the fact that Mary had initiated litigation about Fred Sr.'s testamentary capacity given his dementia, *see, e.g.*, Compl. 7; Philip Weiss, *The Lives They Lived: Fred C. Trump, b. 1905; The Fred*, N.Y. TIMES (Jan. 2, 2000), https://www.nytimes.com/2000/01/02/magazine/the-lives-they-lived-fred-c-trump-b-1905-the-fred.html, is obviously insufficient to show notice of the fraud alleged here. It is axiomatic that notice of one kind of misconduct (like whether Defendants-

Respondents took advantage of their father's dementia as alleged in the Probate Litigation) does not constitute notice of an "entirely separate fraudulent act" (like the fraud here). *CSAM Capital*, 67 A.D.3d at 158. *See also* R-884-85 (discussing at oral argument before Justice Reed that "knowledge of harm" concerning the Fred Sr. estate "isn't sufficient to conclusively establish inquiry notice").

Second, Defendants-Respondents point to a line from Mary's book in which she quotes Barnosky as saying "we knew [Defendants-Respondents] were lying to us" about the value of the estate. R-148-52; R-319-20; R-349. But even if Mary "had reason to question" Defendants-Respondents' honesty about the value of Fred Sr.'s estate, R-319, that does not mean she was aware of the "probability" that she had been defrauded in connection with separate business interests that she had inherited from her father years earlier. *See Aozora Bank*, 144 A.D.3d at 438. In fact, the Court of Appeals has rejected this exact same argument in strikingly similar circumstances, concluding that "[k]nowledge of the facts which aroused plaintiffs' suspicions as to the defendant bank's good faith in the prior Surrogate's proceedings was not necessarily knowledge of facts from which the alleged fraudulent conspiracy might be reasonably inferred." *Erbe*, 3 N.Y.2d at 326; *see also Berman v. Holland & Knight, LLP*, 156 A.D.3d 429, 430 (1st Dep't 2017) (prior proceedings did not give rise to inquiry notice).

Third, the fact that Barnosky asked exploratory questions about All County and AMA during depositions in the Probate Litigation does not provide a basis for finding inquiry notice either. The Complaint alleges facts that make it improper to blindly impute whatever Barnosky was thinking to Mary, given his compromised position. R-57-¶114; *see Center v. Hampton Affiliates, Inc.*, 66 N.Y.2d 782, 783-85 (1985) (noting that knowledge cannot be imputed where there are factual issues about whether agent is acting "entirely for his own or another's purposes"). But more fundamentally, lawyers ask exploratory questions all the time, especially at depositions—and here, a handful of questions were answered in a way that further concealed the fraud, and the rest were shut down by defense counsel as outside of the scope of the proceeding. R-523-24. Besides, there is nothing in the record to conclusively indicate that Barnosky had any knowledge or notice of circumstances suggesting fraud. In fact, as discussed during oral argument before Justice Reed on these motions, it was Robert Trump who first brought up All County, which shows that "nothing in the questioning suggests that Mary or her lawyer had any knowledge of fraud or fraud directed at these separate interests that Mary had inherited from her father many years earlier." R-884. And even if there were evidence of such knowledge, any question about whether any such knowledge would be imputed to Mary is a question of fact for later in the proceedings below.

Even if Defendants-Respondents could point to something to suggest that Mary had reason to suspect the fraud at issue here (and they have not, and cannot), such a suspicion would be insufficient as a matter of law since, as this Court has held, "knowledge of the fraudulent act is required and mere suspicion will not constitute a sufficient substitute." *Norddeutsche Landesbank Girozentrale v. Tilton*, 149 A.D.3d 152, 159 (1st Dep't 2017); *accord CSAM Capital*, 67 A.D.3d at 156 ("Mere suspicion will not suffice as a ground for imputing knowledge of the fraud.") (cleaned up).

iv. Reasonable Diligence Would Not Have Uncovered the Fraud

Even if the Trump siblings had met their *prima facie* burden to show that Mary "had knowledge of facts from which the alleged fraud might be reasonably be inferred," Mary would still easily meet her burden to show that, even with "reasonable diligence," she could not have "discovered the basis for [her] claims" more than two years before filing. *See Epiphany*, 171 A.D.3d at 7 (cleaned up).

To begin with, the Court of Appeals has held that reliance on family members and fiduciaries is itself consistent with "reasonable diligence" for purposes of the discovery rule. *See Trepuk v. Frank*, 44 N.Y.2d 723, 724 (1978). There, the Court of Appeals found that a fifty-year delay in the plaintiff's discovery of fraud was not grounds for dismissing his claim because "[r]eliance upon one's mother and fiduciary brother was understandable and the extraordinary delay in discovery [of

the fraud was] therefore equally understandable." *Id.* at 724. Any remaining questions about reasonable diligence, the Court held, "should be left to the trier of the facts." *Id.* at 725. *Trepuk* controls here. Defendants-Respondents are not only Mary's close family members, but they were actually her fiduciaries. In addition, they had "'superior knowledge of essential facts'" concerning the value of Mary's interests. *Sports Tech. Applications, Inc. v. MLB Advanced Media, L.P.,* 188 A.D.3d 619, 620 (1st Dep't 2020) (quoting *Greenman-Pedersen, Inc. v. Berryman & Henigar, Inc.*, 130 A.D.3d 514, 516 (1st Dep't 2015)). Mary's reliance on them is therefore "understandable" and entirely consistent with reasonable diligence. *Trepuk*, 44 N.Y.2d at 724. The same is true of Von Ancken, who was, as Defendants-Respondents themselves point out, a licensed and purportedly independent appraiser whose work was certified by others. R-352.

Even if Mary had gone beyond what *Trepuk* requires and investigated further, the Complaint makes clear that she could not have discovered Defendants-Respondents' fraud through the "exercise of reasonable diligence." *See Epiphany*, 171 A.D.3d at 7; *see also Sargiss*, 12 N.Y.3d at 532. In other words, even if Mary had "obtain[ed] her own valuations," R-352, they would have led her nowhere because the underlying data and information was "false and misleading." Compl. 84. And although Defendants-Respondents harp on the availability of discovery in the Probate Litigation, R-319; R-360, the rules in that proceeding precluded inquiry

relating to events outside the five-year window surrounding the execution of the 1991 Will, which excluded years critical to Defendants-Respondents' fraud. *See* N.Y. Ct. R. § 207.27. And again, Defendants-Respondents themselves shut down questioning about Mary's business interests. R-523-24.

In short, because Defendants-Respondents cooked the books so thoroughly, further inquiry would only have led Mary deeper into their web of deceit. At best, she would have been left with a pile of contradictory evidence that could have been "interpreted in a myriad of ways." *Norddeutsche*, 149 A.D.3d at 161-62 ("[T]he [timeliness] defense must await a fully developed factual record…."). In *Norddeutsche*, again, in strikingly similar circumstances, this Court held that the plaintiffs could not have discovered the fraud with reasonable diligence where defendants had "purposely siphoned off the value" of various companies, "including by taking excessive management fees for themselves," all of which was "unbeknown[] to [plaintiffs] because of [the defendants'] deliberate concealment." *Id.* at 154-55. As a result, it was not "unambiguous" that defendants were "using [the entities they controlled] for the unexpected and deliberate purpose" of impropriety. *Id.* at 161. The same, of course, is true here.

Ultimately, the facts that would have allowed Mary to infer Defendants' complex fraud only came to light through an exhaustive and unprecedented 18-month investigation for which three *New York Times* investigative reporters won the

Pulitzer Prize. R-30-¶4; R-703-08. Although Defendants-Respondents contend that Mary was a source for the *Times* report, the investigative team also had access to extensive information that Mary did not have (and could not have reasonably obtained). They reviewed "tens of thousands of pages of confidential records," took "interviews with Fred Trump's former employees and advisers," and examined Donald's secret "strategy sessions" with the Trump siblings—some of which involved finding a "friendly" appraisal—leading to the hiring of co-conspirator Von Ancken. P-107-45. This investigation by award-winning investigators, which involved tax experts and a former chief of investigations for the Manhattan district attorney's office, *id.* at 26, far exceed the efforts required under the applicable standard of "reasonable diligence" by a "person of ordinary intelligence." *CSAM Capital*, 67 A.D.3d at 155-56.

v. Mary's Breach of Fiduciary Duty and Negligent Misrepresentation Claims Are Likewise Timely Under the Discovery Rule

Defendants-Respondents argue that the two-year discovery rule does not apply to Mary's breach of fiduciary duty claims "because Plaintiff seeks money damages only, and because Plaintiff's allegations of fraud are not essential for those claims." R-320; R-360. But the discovery rule clearly applies to fiduciary duty claims sounding in fraud regardless of the remedy sought. *See, e.g.*, *Kaufman v. Cohen*, 307 A.D.2d 113, 119 (1st Dep't 2003). And, as the Complaint alleges in

detail, fraud is essential to Mary's breach of fiduciary duty claims because the Trump siblings breached their duties to Mary through fraudulent conduct—by "self-dealing, siphoning her Interests, devaluing them, misrepresenting their value, and attempting to fraudulently squeeze her out of them." R-78-¶226; *see also Kaufman*, 307 A.D.2d at 119; *Yatter v. William Morris Agency, Inc.*, 268 A.D.2d 335, 335 (1st Dep't 2000) (applying discovery rule where "same facts are involved for both the causes of action for fraud and breach of fiduciary duty, and the question of plaintiff's knowledge remains unresolved"). Unsurprisingly, the only case that Defendants-Respondents cite to support their argument that Mary's fiduciary duty claims are untimely is inapposite because, unlike the facts alleged here, it did not sound in fraud. R-320; R-360-61 (citing *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 139, 140 (2009) (plaintiff did "not claim that it was actually duped"); *see also IDT Corp.*, 12 N.Y.3d at 140 (finding no fraud claim and noting that plaintiff did "not claim that it was actually duped"). Mary's negligent misrepresentation claim, because it also sounds in fraud, is likewise subject to the two-year fraud discovery rule under CPLR 213(8). *See Demian v. Calmenson*, 156 A.D.3d 422, 423 (1st Dep't 2017).

vi. Defendants-Respondents' Remaining Claims are Meritless and Have Been Abandoned

Defendants-Respondents made a smattering of arguments below that certain aspects of certain elements of certain claims are not properly pleaded. R-323-26; R-

363-67. To the extent those arguments have not been abandoned, this Court should also address them for the reasons set out above. *See supra* 38.

Plaintiff-Appellant reincorporates her arguments from her opposition to the motions to dismiss. R-688-93. More specifically, the Court should reject Defendants-Respondents' argument that Mary lacked standing to bring claims relating to the Grift and the Devaluing. As Mary explained below, her aunts and uncles breached duties they owed directly to Mary, independent of any duty they owed to any corporate entity, and Mary was personally harmed by their fraudulent misrepresentations and omissions—believing that Defendants-Respondents were protecting her interests, Mary left those interests under their control, believed their valuations suggesting they were worth less than they really were, and ultimately relinquished those interests to them at a gross undervaluation. The Court should also reject the Trump siblings' argument that Mary failed to properly allege justifiable reliance in connection with the fraud. The Complaint unambiguously alleges that Mary made decisions based on information provided to her by her uncles and aunt, even before the ultimate squeeze out. *See* R-32-¶10, R-41-¶42, R-42-¶46, R-45-¶¶61, 65, R-68-¶158, R-71-¶177, R-76-¶211. Finally, the Court should reject Defendants-Respondents' arguments concerning the civil conspiracy allegations. The Complaint does not assert an independent civil conspiracy cause of action; instead, it groups "allegations of civil conspiracy … to connect the actions of

separate defendants with an otherwise actionable tort." *Cohen Bros. Realty Corp. v. Mapes*, 181 A.D.3d 401, 404 (1st Dep't 2020) (cleaned up).

E. Given the Unexplained Delays in this Case, the Court Should Reassign This Case on Remand

Following reversal of the Decision below, and a conclusion that the claims here are timely, this Court should remand for further proceedings and order that the case be reassigned to a different Justice given the extreme and unexplained delay by the trial court, as described above. "It is, of course, axiomatic that, once an appeal is properly before it, a court may fashion complete relief to the appealing party." *Hecht v. City of New York*, 60 N.Y.2d 57, 62 (1983). This Court may direct that the case be assigned to a new justice on remand. *See, e.g.*, *Adams v. Hilton Hotels, Inc.*, 4 A.D.3d 232, 233 (1st Dep't 2004).

At a minimum, this case needs to be remanded to a Commercial Division Justice who will promptly set and enforce an efficient discovery schedule. In addition to the delay discussed above, the ages of the remaining Defendants-Respondents, and the lost key witnesses and evidence in this case, Donald Trump recently announced that he is running for President in the 2024 election.[10] Mary Trump is justifiably concerned that, should the case on remand be delayed too long,

[10] *See* Gabby Orr et al., *Former President Donald Trump Announces a White House Bid for 2024*, CNN (Nov. 16, 2022), https://www.cnn.com/2022/11/15/politics/trump-2024-presidential-bid.

Donald Trump will likely use his campaign commitments as a basis to seek further delay. She expressed these concerns to the trial court on June 1, 2022. R-925-26.

And it is beyond question that Donald Trump has done so before. For example, in *Low v. Trump University, LLC*, No. 10 Civ. 00940 (S.D. Cal.), Donald Trump requested in May 2016 that trial be delayed until after the 2016 election. His lawyer argued that a pre-election trial date would "cause an unwarranted intrusion on the election process" and would be unfair to Mr. Trump, who "must devote all of his full-time efforts and energies to running his campaign and running for office." Conf. Tr. at 10, *Low*, No. 10 Civ. 00940, at 10, ECF 481. Indeed, his lawyer asserted that "it would be a virtually impossible burden" on Donald Trump "to have to defend himself at trial" before the election. *Id.* And a month ago, Donald Trump publicly complained that plaintiffs in three cases against him "refused to move" the case schedules past the midterm elections—even though he was not even on the ballot for the midterms. *See* Donald J. Trump (@realDonaldTrump), Truth Social (Oct. 28, 2022, 10:31 AM), https://truthsocial.com/users/realDonaldTrump/statuses/109246383326528876.

The 2024 presidential election will begin in earnest in early 2024.[11] As discussed above, Robert Trump is already dead, other key witnesses have died, and

[11] For reference, the first GOP primary for the 2020 election was on February 11, 2020. *Primaries & Causes: New Hampshire*, CNN (Feb. 19, 2020),

Maryanne Trump and Donald Trump are 86 and 75 years old. This case must proceed promptly.

Given the unexplained and prejudicial delay thus far, and the special circumstances concerning the need to proceed expeditiously, this case needs to be remanded to someone who will promptly set a discovery schedule. Plaintiff-Appellant therefore respectfully requests that the Court reassign the case on remand to a new Justice.

CONCLUSION

For the above reasons, this Court should reverse the trial court order, dismiss Defendants-Respondents' motions to dismiss in its entirety and otherwise direct the Commercial Division to reassign the case to another Justice.

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https://www.cnn.com/election/2020/primaries-caucuses/state/new-hampshire/overview. It does not appear that the GOP has set its Presidential primary and caucus schedule for 2024.

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New York, New York

Respectfully submitted,

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