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JAMES D. KILEY
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New York Supreme Court

Appellate Division—First Department

Appellate Case No.: 2022-05227

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.

BRIEF FOR DEFENDANTS-RESPONDENTS DONALD J. TRUMP, IN HIS PERSONAL CAPACITY AND SHAWN HUGHES, THE EXECUTOR OF THE ESTATE OF ROBERT S. TRUMP

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PRELIMINARY STATEMENT

The Decision and Order of the lower Court granting Defendants/Respondents' motion to dismiss pursuant to C.P.L.R. § 3211(a)(5) should be affirmed. The lower Court correctly ruled that Plaintiff/Appellant released Defendants/Respondents from the claims she now asserts when she entered into a global settlement with them over 20 years ago. In 2001, after 18 months of protracted litigation and negotiation, Plaintiff/Appellant executed general releases and a settlement agreement under which she withdrew objections to the probate of her grandfather's will, consented to the probate of her grandmother's will, settled a lawsuit regarding her health insurance, cashed out the principal in her 1976 trust and sold all of her interests in family-owned companies.

Reading the releases and the settlement agreement together, the lower Court correctly concluded that Plaintiff/Appellant clearly and unambiguously released Defendants/Respondents from unknown claims, including unknown fraud claims. The lower Court correctly concluded that all of Plaintiff/Appellant's claims for fraudulent misrepresentation, fraudulent concealment, fraudulent inducement, negligent misrepresentation, civil conspiracy, breach of fiduciary duty and aiding and abetting a breach of fiduciary duty fell within the broad scope of the releases.

Contrary to counsel's characterization, "young" Mary Trump was not so young when she settled her claims with the family and executed the general releases and settlement agreement. In 2001, Mary Trump was 36 years old. She was represented by very experienced and sophisticated counsel. Her assertions that her counsel had "conflicting loyalties" are conclusory and unsupported by any specific allegations, and as such should be discounted. The releases executed by the parties were fairly and knowingly made. There were no overreaching or unfair circumstances.

Plaintiff/Appellant argues the lower Court made three principal errors requiring reversal of its Decision. With regard to the first, counsel argues that the lower Court did not apply the "fairly and knowingly made" standard for application of general releases to unknown claims which may prohibit enforcement where there is overreaching or unfair circumstances. This is false. In its Decision, the lower Court specifically stated that Plaintiff/Appellant failed to sufficiently allege the existence of overreaching or unfair circumstances and cited to the line of Court of Appeals cases which propound the distinction between known and unknown claims and the requirement that an agreement be fairly and knowingly made with no overreaching or unfair circumstances in the latter situation. Secondly and relatedly, Plaintiff/Appellant argues that the lower Court simply ignored the allegations of overreaching and unfair circumstances made in the Complaint. These allegations do

not constitute overreaching and unfair circumstances as a matter of law. Thirdly, Plaintiff/Appellant argues that the lower Court erred in concluding that the releases were not limited to those claims raised in the formal litigation in the Queens County Surrogate's Court and Nassau County Supreme Court. Clearly the releases were not so limited, and when read in conjunction with the settlement agreement, show that the parties entered into a global settlement that went way beyond the subject matter of the litigations and memorialized a settlement of a "family divorce", with Plaintiff/Appellant selling all of her family related interests to Defendants/Respondents.

As the lower Court did not address the other grounds for dismissal made by Defendants/Respondents in their motion to dismiss, Plaintiff/Appellant requests that this Court consider them now pursuant to C.P.L.R. § 5501(c). Upon consideration, it is respectfully argued that the Court should find, as a matter of law, that Plaintiff/Appellant's claims for fraud are time barred and should also be dismissed on this basis pursuant to C.P.L.R.§ 3211(a)(5). Seeking to invoke the fraud discovery rule, Plaintiff/Appellant alleges that she was only made aware of the alleged fraud when *The New York Times* published an investigative report on the Trump family in October 2018. R-107-145. However, it is undisputable that Plaintiff/Appellant was made aware of the facts she claims purport to this fraud more than twenty years ago during the previous litigation with Defendants/Respondents. In fact, any conclusions

drawn by *The New York Times* in October 2018, which were relevant to Plaintiff/Appellant's theory of fraud, were based solely on 19 boxes of documents from her 2001 litigation file that she, herself, gave to *The New York Times* in 2017. R-346.

Plaintiff/Appellant's Breach of Fiduciary Duty claims are barred by C.P.L.R. § 214(4)'s three-year statute of limitations, because she seeks money damages only, and because her allegations of fraud are not essential for those claims. Assuming arguendo that C.P.L.R. § 213(8) applies, the Breach of Fiduciary duty claims would be time barred for the same reasons her fraud claims are time barred. Regardless, based on Plaintiff/Appellant's allegations, these claims are derivative claims which she has no standing to assert and as such the claims should be dismissed pursuant to C.P.L.R. §3211(a)(7). Similarly, Plaintiff/Appellant's pre-settlement claims for fraud, fraudulent concealment and negligent misrepresentation must be dismissed because she has not pleaded that she justifiably relied on the alleged misrepresentations and concealment. Lastly, Plaintiff/Appellant's claims of civil conspiracy to commit fraudulent misrepresentation and fraudulent concealment and civil conspiracy to commit fraudulent inducement must be dismissed because New York does not recognize and independent cause of action in tort for conspiracy.

STATEMENT OF THE FACTS

Plaintiff/Appellant alleges that, starting almost forty years ago, Defendants/Respondents engaged in three fraudulent schemes to defraud her. First, that Defendants/Respondents, through the formation and use of a purchasing and contracting company called All County Building Supply & Maintenance Corp. ("All County") and a management company called Apartment Management Associates, Inc., ("AMA"), fraudulently siphoned value from Trump family entities in which she had a minority interest to entities Defendants/Respondents owned and controlled, while disguising those transfers as legitimate business transactions (the so called "Grift"). R-46-¶ 48 – R-48-¶ 77. Second, that Defendants/Respondents fraudulently depressed the value of her interests and the net income they generated through fraudulent appraisals and financial statements (the so called "Devaluing"). R-48-¶-78-R-56-¶108. Third, that Defendants/Respondents forced Plaintiff/Appellant to the negotiating table to settle her lawsuit against her will by threatening her. With dramatic flair, Plaintiff/Appellant alleges that when she got to the negotiating table, she was presented with a stack of fraudulent valuations and financial statements and forced to sign a written agreement against her interests (the so called "Squeeze Out"). R-56-¶ 109 – R-57-¶ 112.

To get a second bite at the apple and toll the statute of limitations for fraud, Plaintiff/Appellant claims that she was kept in the dark about the alleged fraud until

The New York Times published its aforementioned report on October 2, 2018, despite the fact that the very documents used by *The Times* to write the article were given to it by Plaintiff/Appellant a year earlier. R-346. Indeed, all of the information Plaintiff/Appellant now claims forms the basis of fraud (which Defendants/Respondents vehemently deny) was made known to her twenty years ago after she filed objections to the probate of her grandfather's will in 2000. At that time, Plaintiff/Appellant, represented by sophisticated counsel, engaged in protracted litigation with two separate lawsuits in two courts, which involved significant discovery, including the exchange of tax returns, financial statements, banking statements, appraisals and other financial information regarding the testamentary and non-testamentary assets of her grandfather as well as other Trump family assets in which she shared a minority ownership interest with her aunts and uncles. Her attorney took SCPA § 1404 examinations of the attorney draftsman and witnesses to the will as well of Defendants/Executors. Eighteen months into the litigation, Plaintiff/Appellant made an informed decision to settle her claims and cash out her family related business interests for a significant sum of money. She wasn't dragged to a negotiating table and at the last minute presented with a stack of fraudulent valuations and financial statements. On the advice of her very competent and experienced attorney, she ultimately signed releases and a 20-page settlement agreement, that had gone through several modifications and revisions between her

attorney and Defendants/Respondent's attorneys and memorialized and finalized global settlement negotiations that had taken place over months, which included a termination of her trust and a buy-out of her interests in the family businesses.

A. The Parties and their Previous Business Interests

Plaintiff/Appellant is the daughter of Fred C. Trump, Jr. ("Fred, Jr"), the brother of Defendants/Respondents, who died in 1981. Plaintiff/Appellant is the granddaughter of Fred C. Trump, ("Fred") a real estate developer who built and acquired dozens of apartment buildings and other commercial properties in New York. R-41. Following in their father's footsteps, Fred's five children formed partnerships and other business entities and acquired interests in several apartment buildings and commercial properties in New York. R-44. When her father died, Plaintiff/Appellant inherited his share of the business entities in trust until they were transferred out right to her when she turned 30 years old in 1995. R-333. At the time of Plaintiff/Appellant's original litigation against Defendants/Respondents in 2000, the parties owned dozens of apartment units, wrap mortgages and sponsor financed loans from individual apartment sales. They owned a ground lease to a McDonald's restaurant and an approximate 1.5% interest in Starrett City, a housing development in East New York. In the Trump family these legal entities have been collectively referred to as "Midland Associates Group" and their ownership interests as the 'Midland Interests". R-43-45.

Plaintiff/Appellant also inherited from her father, minority interests in companies that owned land leases. Since she was a minor at the time, her inherited interests continued to be held in trust until she turned 30 in 1995 at which time, they were deeded outright from the trust to her. R-176-383. Plaintiff/Appellant inherited further interests in ground leases through a testamentary trust that had been established under the will of her great grandmother in 1967 and managed by Chase Manhattan Bank as Trustee. Chase provided an accounting for the period 1968-2000 to Plaintiff/Appellant who executed a Receipt and Release in 2000 when she assumed title these land interests personally. R-385-392.

In 1976, prior to her father's death, Plaintiff/Appellant's grandfather established a trust for her which was managed by Defendants/Respondent and Irwin Durben, Esq as trustees (the "1976 Trust"). A similar trust had been established for Plaintiff/Appellant's father and, when he died in 1981, she inherited half the corpus of that trust. Combined, these assets continued in the 1976 trust until it was terminated when Plaintiff/Appellant settled with Defendants/Respondents in 2001. R-335. [1]

[1] The claims of fraud and breach of fiduciary duty with regard to the 1976 trust are unfounded as the corpus of the trust was only comprised of cash and mortgage receivables (R-192-236) unaffected by any theory of grift alleged.

B. Background of Prior Litigation

After Fred's death on June 25, 1999, a probate petition was filed in the Queens County Surrogate's Court by Defendants/Respondent's Donald J. Trump, Maryanne Trump Barry and the decedent Defendant Robert S. Trump, who were the executors named in their father's Will dated September 18, 1991. R-405-432. On October 21, 1999, Plaintiff/Appellant appeared in the Queens County Surrogate's Court through her retained counsel, John Barnosky of the law firm Farrell Fritz, and entered into a Stipulation to conduct S.C.P.A. § 1404 examinations of the attorney draftsman, witnesses to the will as well as the nominated executors. Plaintiff/Appellant served a Notice for Discovery & Inspection on October 25, 1999 making sixty-one separate demands for all previous wills and codicils, state and federal income tax returns, gift tax returns, personal correspondence, calendars, deeds, mortgages, life insurance policies, banking records, financial records, medical records and more. R-443-446. Defendants/Respondent replied with a Partial Response to First Notice of Discovery & Inspection on November 21, 1999, which exchanged documents and also set a date of December 8, 1999 for Plaintiff/Appellant to inspect and make copies of all relevant records at the Trump corporate offices in Brooklyn. R-446-452. Among the voluminous records exchanged included yearly financial statements for the 1976 trust dating back to 1990 (R-192-236), the management agreement between AMA

and Fred C. Trump (R-453) and a detailed report on the sale of almost forty sponsor and non-sponsor owned apartments in 1999 and 2000. R-468-498.

As a witness to the execution of Fred C. Trump's will, attorney Vincent J. Tosti testified at a § 1404 hearing on January 5, 2000. R 499-509. The decedent Defendant/Respondent Robert S. Trump testified at a §1404 hearing on February 24, 2000. R-512-531. Defendants/Respondent's cousin, John Walter, a part owner of All County, testified at a §1404 hearing on March 7, 2000. R-532-540.

In April 2000, Plaintiff/Appellant commenced a second lawsuit in Nassau County Supreme Court against Defendants/Respondents seeking a permanent injunction to prevent them from discontinuing health insurance coverage to herself, her nephew William and other family members through the Trump Management health plan, despite the fact that no one in her immediate family was an employee of the company. This action would run parallel to the Surrogate's Court proceeding throughout 2000 and into 2001. R-541-552.

On or about March 22, 2000, Plaintiff/Appellant and her brother filed objections to the probate of Fred's will wherein they alleged, inter alia*,* that he did not have testamentary capacity to make the will and that the will was procured by the fraud and the undue influence of Defendants/Respondents. R-553-556.

By letter dated October 2, 2000, Defendants/Respondent's counsel provided Plaintiff/Appellant's counsel detailed records regarding the Midland Interests, including detailed reports on the co-op apartments still owned and detailed records of the sales of approximately forty apartments that had closed in 1999 and 2000 to that point. A second letter to Plaintiff/Appellant's counsel dated November 1, 2000 contained further records regarding the Midland Interests. R-557-560. The parties entered into a further Stipulation in Surrogate's Court on January 8, 2001 in which Plaintiff/Appellant was scheduled for a deposition on February 21, 2001. R-561. Plaintiff/Appellant served a Verified Bill of Particulars on January 12, 2001 wherein she amplified her claims of fraud against Defendants/Respondents. R-562-564.

Defendants/Respondents provided copies of appraisals for the estate assets as well as GRATS that had been created four years previously by Fred and his wife for the benefit of Defendants/Respondents. These included appraisals from Grubb & Ellis, one of the nation's leading commercial real estate service firms (R-565-574) and Management Planning Inc. ("MPI"). R-575-576.

In the latter part of 2000, the parties engaged in significant settlement discussions that would ultimately not only settle the claims made against the estate of Fred C. Trump but would also: (1) also for the probate of his wife Mary A. Trump's estate without objections; (2) provide the terms for the liquidation and buy-out of all of Plaintiff/Appellant's interests in all family partnerships and businesses,

including the Midland Interests and the Land Interests and (3) provide for the termination and distribution of all existing trusts for Plaintiff/Appellant's benefit. Toward those ends, detailed correspondence was exchanged between the parties' attorneys from November 2000 through February 21, 2001 as they inched their way toward a global settlement. R-577-594.

On April 9, 2001, Plaintiff/Appellant executed general releases specifically releasing Defendants/Respondents Donald J. Trump, Maryanne Trump Barry and Robert S. Trump individually and as co-executors of the Estates of Fred C. Trump and Mary A. Trump. R-595-598. That same day Defendants/Respondents resigned as Trustees of Plaintiff/Appellant's 1976 trust and Plaintiff/Appellant executed a Receipt and Release to dispense with a formal accounting. R-599-606. On April 10, 2001, the parties entered into a confidential, comprehensive settlement agreement which: (i) settled the pending cases in the Queens Surrogate's Court and Nassau County Supreme Court; (ii) allowed for the probate of Mary A. Trump's estate without objection through the execution of waivers and consents; (iii) liquidated Plaintiff/Appellant's equitable interests in all family-owned businesses and assets; and (iv) terminated Plaintiff/Appellant's 1976 trust. The settlement agreement itemized the specific value and consideration given for each. R-607-632. Checks were issued and delivered to Plaintiff/Appellant for the consideration stated in the settlement agreement. R-633-636. On April 9, 2001, Plaintiff/Appellant relinquished

her land interests and deeded them to Midland Associates, LLC. R-637-644. On April 10, 2001, she assigned her ten percent (10%) membership interests in Midland Associates, LLC and Park Briar Associates, LLC back to both LLCs and signed stock powers to transfer her shares back to Highlander Hall, Inc. and Coronet Hall, Inc. R-645-654.

ARGUMENT

POINT 1

THE LOWER COURT CORRECTLY FOUND THAT PLAINTIFF/APPELLANT'S CLAIMS ARE BARRED BY THE RELEASES

A. The Lower Court Properly Found that the Releases were Fairly and Knowingly Made

A release, "may encompass unknown claims, including unknown fraud claims, if the parties so intend and the agreement is 'fairly and knowingly made.'" Centro Empresarial Cempresa S.A. v Am Movil, S.A.B. de C.V., 17 N.Y.3d 269, 276, 929 N.Y.S. 2d 3, 8 (2011) quoting Mangini v. McLurg, 24 N.Y. 2d 556, 567, 301 N.Y.S. 2d 508, 517 (1969). The "fairly and knowingly made" requirement may prohibit 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." Id.

Plaintiff/Appellant argues that the lower Court only considered whether she had alleged a separate fraud from the subject of the release or shown duress and that the lower Court ignored the "fairly and knowingly made" standard required to invalidate a release for unknown claims. She alleges that Defendants/Respondents threatened to bankrupt her and cut off her nephew's health insurance, all of which constituted overreaching and unfair circumstances such that the releases should not be considered to have been "fairly and knowingly made". She alleges that, in its Decision, the lower Court only addressed the alleged threats in the context of determining whether such threats precluded the exercise of her free will, which inquiry, she argues, only applies to an argument about duress. R-20, 21. However these alleged threats also do not constitute overreaching or unfair circumstances as a matter of law.

As Plaintiff/Appellant did allege that Defendants/Respondents fraudulently understated and undervalued her assets and that this induced her to enter into the settlement agreement (and releases) (R-63-¶140-142; R-72-¶186,191), (Count 3 of the Complaint) the lower Court rightfully addressed the fact that she had failed to allege a separate fraud from the subject of the releases and without that fraud, she could not challenge the releases on the basis that she was fraudulently induced into entering them. R-19. However, the Court also cited the line of Court of Appeals cases that address the "fairly and knowingly made" standard (R-14-15) and

concluded that Plaintiff/Appellant did not sufficiently allege the existence of overreaching or unfair circumstances to render enforcement of the releases inequitable. R-17. The lower Court noted that Plaintiff/Appellant was represented by counsel and that she acknowledged in the settlement agreement that it was being completed on a voluntary basis; that she was under no compulsion to execute the agreement; that she had had been fully advised throughout the negotiations to resolve their differences as to all negotiations and representations made to each other as well as to the Court and that she had sufficient opportunity to review the agreement with her attorney and executed it after due consideration and of her own volition. R-20 (citing to the Settlement Agreement and Stipulation R-254) In view of this, the lower Court rightfully noted that the release was not the product of overreaching and unfair circumstances where Plaintiff/Appellant had little time for deliberation and consideration. R-20 citing to Bloss v. Va'ad Harabonim of Riverdale, 203 A.D. 2d 36, 40, 610 N.Y.S. 2d 197, 201 (1st Dep't 1994) (where the Court raised questions as to whether a release was knowingly made in view of an affidavit from the plaintiff's attorney wherein he averred, inter alia, that he was not allowed to attend a meeting and act as his client's advocate in a dispute involving a Kosher butcher business and the organization of rabbis who gave it kosher certification, where his client was given an ultimatum and a weekend to make her decision and where he wasn't allowed to insert language into the release memorializing defendants'

promise that they would not object to the plaintiff obtaining certification elsewhere, the key consideration and promise plaintiff relied on).

B. The Court Properly Addressed the Allegations in the Complaint

Plaintiff/Appellant argues that the allegations the lower Court cited in concluding that the releases were "fairly and knowingly made" were inadequate to support such a finding and that the lower Court ignored other allegations which demonstrated they were not "fairly and knowingly made." First, citing to Jonathan S. v. Benjamin, 193 A.D. 3d 1003, 1004-05, 142 N.Y.S. 3d 429, 430 (2nd Dep't 2021), she argues that the language in the settlement agreement the Court referred to was just "boilerplate", which language cannot be dispositive of the issue. However, the language the Court referenced in the settlement agreement was hardly boilerplate. This was not a Blumberg form. This was a uniquely and carefully drafted document that was reviewed and revised by counsels for both parties. R 591. It addressed the specific acknowledgements the parties conditionally required to effectuate the global settlement. In stark contrast, Jonathan S. v. involved a pro forma general release in a medical malpractice case and a dispute over the

applicability of the boilerplate, ritualistic language "employees, servants and agents". [2]

Second, Plaintiff/Appellant argues that, since she only received $10 in consideration for each of the two releases she signed (R 595-598), and is claiming millions of dollars in her lawsuit, the "disparity between the consideration received and the fair value of (her) 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, 96 N.Y.S. 3d 181, 181 (1st Dep't 2019) see also Johnson v. Lebanese Am.Univ., 84 A.D. 3d 427, 431, 922 N.Y.S. 2d 57, 61 (1st Dep't 2011). Surely this is a disingenuous argument. The releases are to be construed together with the settlement agreement. Indeed, the releases themselves contain specific language indicating that they are being "executed in accordance with the terms and conditions set forth in detail within the Agreement and Stipulation signed by the parties pertaining to the 'global settlement' of all their differences." R-595-598. Under the terms of the settlement agreement, Plaintiff/Appellant received over $3.5 Million. Moreover, it is not uncommon for

[2] Plaintiff settled with St. Vincent's and only those individual defendant doctors it insured. The general release was drafted with specific language stating it applied to claims or possible tortfeasors who are insured through… St. Vincent's. A separately insured defendant claimed she was an employee of St. Vincent's and sought to invoke the release which also contained boilerplate language extending it to "all employees, servants and agents of each named releasee". Looking to the special circumstances of the case, the Court found that the benefit of the release was never intended to extend to the movant. Johnson v. At 104

nominal amounts to be stated on a document where the lawyers are simply looking to establish the basic elements of a contract (offer, acceptance and consideration), especially when a document is to be understood in the context of other documents to a transaction. Moreover, the cases cited by Plaintiff/Appellant are also distinguishable. In Paulino v., the Court also looked at the "nature of the relationship between the parties" (the plaintiff was unrepresented by counsel) and argued that, taken together with the disparity in value, such factors could demonstrate overreaching and unfair circumstances. Paulino v. Braun, 170 A.D. 3d at 506. Unlike Plaintiff/Appellant, Paulino plaintiff had no lawyer when he signed off on the release. Not being represented, he presumably had no understanding of the value of his injury. Had he had a lawyer, the Court undoubtedly would have respected the release because the disparity in the value would have been presumed to have been weighed against other factors like the strength of the case on liability. In Johnson v., the plaintiff employee, unrepresented by counsel, executed a release for $4,651.94, for back pay owed to him, which released claims "related to my services of whatsoever nature" with the defendant. Johnson v. Lebanese Am.Univ., 84 A.D. 3d at 428. While the Court did note that the small amount of consideration, it also found that the release of discrimination claims may not have been 'fairly and knowingly made" since the plaintiff believed the release was simply an acknowledgement of the $4,651.94 owed to him. Id at 430. The Court also found overreaching where the

defendant refused to pay him unless he signed the release and found the release narrow scope since it only referenced the "services" plaintiff provided. Id at 431.

Third, Plaintiff/Appellant argues that the fact she was represented by counsel is not dispositive of the issue of whether the release was fairly and knowingly made. Mangini, 24 N.Y. 2d at 568-560. ("The fact that plaintiff's former lawyer prepared the releases, while a highly significant circumstance is not controlling.) However, Mangini involved a personal injury case, and in those cases, courts have applied special rules to unknown injuries, treating them as matters not in contemplation at the time of settlement, despite the generality of standardize language in releases. Id at 564. Thus, the issue in Mangini involved one of mutual mistake where it was concluded that all parties, including plaintiff's lawyer, could not have known about the serious latent injury that the plaintiff only developed after signing the release. Plaintiff/Appellant also argues the lower Court disregarded key allegations she made that her attorney was conflicted. (R-35-¶ 20; R 57-¶ 114) and that these allegations are more than enough to preclude reliance on the presence of counsel to conclude that the releases were "fairly and knowingly made." However, these allegations are merely conclusory and unsupported by specific facts. The Court should not credit, "mere conclusory statements" or "threadbare recitals of the elements of a cause of action." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed 2d. 288 (2009) "Legal conclusions masquerading as factual conclusions will not suffice."

Achtman v. Kirby, McInerney & Squire, LLP, 464 F. 3d 328, 337 (2d Cir. 2006). The only basis Plaintiff/Appellant argues that her attorney was conflicted was the fact that he was recommended to her by her Trustee, Irwin Durben, whom she alleges conspired with Defendants/Respondents (also a conclusory, threadbare allegation with no factual support). Plaintiff/Appellant argues this recommendation constitutes a "questionable tie" between her attorney and Durben which this Court should construe as a conflict of interest, as the court did in Bergrin v. Eerie World Ent., LLC No. 03 CIV. 4501 (SAS), 2003 WL 22861948 at *2 (S.D.N.Y. Dec, 2, 2003) However, this case is inapposite to the case at bar as it involved a Chapter 11 Bankruptcy proceeding where the questionable ties included cash payments from a principal to the attorney for the debtor in violation of the Bankruptcy Code and ethical rules. Plaintiff/Appellant makes no allegations that payments were made from Durbin to her attorney. Indeed, no specific allegations are made as to any relationship they may have had whatsoever.

In addition, Plaintiff/Appellant argues that the lower Court ignored other key allegations in the Complaint concerning the fairness of the releases, specifically her allegations that Defendants/Respondents made threats against her and withdrew health insurance for her nephew. Plaintiff/Appellant alleged that in a series of meetings between July and October 1999, Robert Trump tried to force Plaintiff/Appellant to consent to her grandfather's probate proceeding. In one

meeting she alleges the Robert threatened that Defendants/Respondents would "bankrupt Midland if (she) fid not comply with their demands", stating that Defendants would "leave you paying taxes on money you don't have for the rest of your lives." R-35-¶ 19; R-56- ¶111, 112. Plaintiff/Appellant alleges that after her grandfather died in 1999, Defendants/Respondents "terminated the health insurance that was keeping her nephew – an infant with cerebral palsy-alive." R-29-¶ 3 She alleges that after she and her nephew spent months in neonatal intensive care suffering seizures and that after he left intensive care he required round the clock nursing care with crushing expenses. R-57- ¶115, 116. She alleges that, like every member of the Trump family, her nephew had health insurance from birth through Trump Management but when she and her brother filed objections to probate, Defendants/Respondents "ripped that health insurance away and put the child's life at risk." R-57- ¶117. Plaintiff/Appellant alleges that she was devastated by "this act of retaliation against a newborn" and became "increasing desperate". R-58- ¶118. She and her brother commenced another action against Defendant/Respondents seeking to reinstate the health insurance. R-58- ¶119. Plaintiff now argues that "these allegations are sufficient to support a possible finding that the release… was obtained under circumstances which indicate unfairness, overreaching and unconscionability…" Gibli v. Kadosh, 279 A.D. 2d 35, 41, 717 N.Y.S. 2d 553, 559 (1st Dep't 2000).

Plaintiff/Appellant can cite to no authority to suggest that the alleged threats from Robert constituted unfairness, overreaching or unconscionability. The alleged threats were clearly not credible and obviously did not dissuade Plaintiff/Appellant from hiring experienced counsel and litigating with Defendants/Respondents for the ensuing 18 months. Further, no allegations are made that such threats persisted in the litigation. It is not surprising that Plaintiff/Appellant's nasty allegations of fraud caused resentment and rebuke and caused a "family divorce". If the courts found threats of this nature between parties to a divorce amounted to unfairness or overreaching, no divorce case could ever be settled with finality.

With respect to the health insurance, it should be first noted that Plaintiff/Appellant makes only conclusory allegations that the withdrawal of it put her nephew's life at risk. She makes no specific allegation that vital, life-saving health care was actually going to be denied to her nephew by any of his medical providers if he lost his existing health insurance, or that other insurance could not be obtained for her nephew, or that her nephew could not be covered under a new policy obtained by his parents because of his pre-existing condition, or that he could not be covered under Medicaid. Indeed, the only conclusion that can be drawn from the allegations is that the financial burden of paying for health insurance would be shifted from Defendants/Respondent's to Plaintiff/Appellant's brother. As her nephew was not her dependent, she would incur no such financial consequences.

The facts in Gibli are vastly distinguishable. The plaintiff, a recent immigrant, sought treatment from the defendant dentist for pain in his mouth. The defendant recommended and performed a tooth extraction that took far more time and was far more difficult than initially advised and caused the plaintiff great pain and swelling. Despite defendant's assurances that the pain and swelling was normal and would subside, the plaintiff's pain continued for weeks until he found an oral surgeon who diagnosed him with axonotmesis, a nerve injury. Because of the time that had passed, the surgeon recommended that he undergo immediate surgical exploration with the intent to repair the nerve. The plaintiff was informed that the cost of the surgery would be $10,000. Believing the defendant responsible for the condition, the plaintiff contacted the defendant, who agreed to pay for the surgery in exchange for a general release. When the plaintiff had the surgery, it was discovered that the lingual nerve could not be repaired as it had been completely severed during the tooth extraction and the oral surgeon changed the diagnosis from axonotmesis to neurotmesis, a permanent nerve injury. Plaintiff then sued the defendant, who sought dismissal of the action based on the release. Like Mangini, the Court primarily found that the issue was one of mutual mistake as to the parties' knowledge of the injuries since the injury was of a different nature than that which both parties agreed and knew at the time of the release. Mangini, 24 N.Y. 2d at 568-560. Beyond this initial analysis of mutual mistake, the Court also found circumstances of overreaching and

unfair circumstances because the defendant compelled him to execute the release by: (1) representing incorrectly that his was numbness was a very common temporary side effect of an extraction and (2) exploiting the plaintiff's belief that he was already at the end of the limited window period in which corrective surgery was possible. The court reasoned that the defendant overreached and acted unfairly by giving plaintiff an unreasonable "choice" to continue to suffer indefinitely the pain directly caused by defendant's tooth extraction or to accept the defendant's offer to immediately pay for the surgery that they both believed would repair the damage and end the pain. Gibli v. Kadosh, 279 A.D. 2d. By comparison, it is clear that Plaintiff/Appellant faced no such similar overreaching or unfair "choice", for if she did, then she would have made the restoration of health insurance, or at least a sum of money to cover the cost of future insurance, a prerequisite to any settlement with Defendants/Respondents. She did not. Rather, the settlement agreement specifically states that the settlement included a discontinuance of the Supreme Court Nassau County Action seeking to permanently enjoin the Defendant/Respondents from discontinuing medical benefits (R-616-¶8) with no consideration for the value of the Nassau Supreme Court Action. R-622 -¶16. Clearly the insurance coverage was gratuitous. Having bitten the hand that fed her, and faced with the choice of putting a value on the coverage, Plaintiff/Appellant elected instead to settle out her claim against the estate for $962,500.00.

Plaintiff/Appellant's argument regarding the threats and health insurance also fail because she ratified the releases by accepting her payments under the settlement agreement and failed to object on the grounds of unfairness, overreaching and unconscionability for nearly 20 years. As the First Department has held, "Assuming arguendo that issues of fact exist as to duress and overreaching, plaintiffs are nevertheless barred from challenging the releases on those ground because they ratified the releases. Ratification occurs when a party accepts the benefits of a contract and fails to acts promptly to repudiate it. Thus, a plaintiff cannot claim that he or she was compelled to execute an agreement under duress while simultaneously accepting the benefits of the agreement." Allen v Riese Organization, Inc., 106 A.D. 3d 514, 517, 965 N.Y.S. 2d 437,440 (1'st Dep't 2013) Plaintiff/Appellant also expressly agreed that the "execution of the [Settlement Agreement] is being completed on a voluntary basis and each party represents that they were under no compulsion to execute this agreement" R-11-¶24.

While Plaintiff/Appellant cites to Storman v. Storman, 90 A.D. 3d 895, 898,935 N.Y.S. 2d 63,67 (2d Dep't 2011), where the Court found allegations of fraud in the Complaint were more than "sufficient to support a possible finding that the release was signed by the plaintiff under circumstances which indicate unfairness", the specific allegations construed as unfair were not recited in the decision. In Pacheco v 32-42 55th St Realty, LLC, 139 A.D. 3d 833, 834, 33 N.Y.S.

3d 301, 302 (2d Dep't 2016), a Labor Law 240(1) personal injury case, the Court found an issue of fact as to whether the release was fairly and knowingly made, when the parties gave different accounts of how the release came to be signed. A controversy undoubtedly common in the setting of a personal injure case, but inapposite to the case at bar. In Paulino v. Braun supra as argued above, the personal injury plaintiff was unrepresented by counsel.

C. The Lower Court Applied the Correct "Clear and Unambiguous" Standard

Plaintiff/Appellant argues that the lower Court misapplied the requirement that the releases clearly and unambiguously reached the previously unknown claims when it noted in its Decision that "there is no indication that the parties intended to limit the releases to known claims". R-16. Plaintiff/Appellant argues that the lower Court only concluded the releases applied to unknown claims by reasoning that that they didn't say otherwise. This is not the case. Indeed, the lower Court looked at the exact language of the releases, noting that they included "all actions" and "causes of action" which plaintiff "ever had, now[has] or hereafter can, shall or may, have for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of this Release, except for any obligations under a certain [settlement agreement] signed simultaneously herewith". The lower Court reasoned that by using the language "all actions" and "causes of action" plaintiff "can", "shall"

or "may" have against defendants, Plaintiff/Appellant released Defendants/Respondents from unknown claims citing Centro 17 N.Y.3d at 277.

The lower Court also read the releases together with the settlement agreement and cited the language of the settlement agreement which indicated that the parties "wished to avoid the uncertainty, further expense and delay incident to protracted litigation and believe that the controversies raised by those proceedings be compromised and settled on a 'global basis' in order to resolve all their differences pertaining to the two probate proceedings, the insurance case; partnership and corporate interests…." R-16. The lower Court also noted that the settlement agreement referred to the releases stating "Separate and apart from the exchange of General Release in the two (2) aforementioned Probate Proceedings… Plaintiffs and Defendants will exchange General Releases as individuals as well as in their representative capacities, such as but not limited to… Co-Executors and officers and directors of Apartment Management Associates, Inc, and Trump Management, Inc. and as partners, officers and directors in the Midland Associate Group". R-16.

The facts in the cases cited by Plaintiff/Appellant in support of her arguments about the unambiguity of a release are readily distinguishable: C & A Seneca Constrs. LLC v. G Builders LLC 67 Misc 3d 1241(A), (Court found Final Waiver of Lien executed for $3,184.71 did not bar action to recover a $165,000.00 balance due under a construction contract in view of the small amount of the final payment

as compared to the balance owed and the lack of any specific language in the document which memorialized the defendant's contention that the balance owed was waived to resolve its claims that the work was substandard); Desiderio v. Geico Gen In. Co. 107 A.D. 3d 662, 663, 967 N.Y.S. 2d 392, 393 (2nd Dep't 2013) (Court found injured plaintiff's claim of bad faith against defendant insurer was not barred where the release did not contain broad, all-encompassing language but, in fact, contained language limiting its reach to the compensation the plaintiff received under the SUM Endorsement); Giuffre v. Andrew, 579 Supp 3d 429,433 (S.D.N.Y. 2022) (Court denied a motion to dismiss by Prince Andrew based on the scope of a prior release noting that it could "not… now decide, as a matter of fact, just what the parties to the release…. actually meant"). Unlike Defendants/Respondents in this action, Prince Andrew was: (a) not a party to the underlying action on which the release and settlement agreement was negotiated, (b) was not named a person to be released and (c) was not a party to the settlement agreement. Further, the release itself contained a non-disclosure provision calling into question Prince Andrew's ability not only to use it, but to even receive a copy.

Plaintiff/Appellant argues, "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, 31 N.Y.S. 3d 504, 505 (1st Dep't 2016)

(quoting Cahill v. Regan 5 N.Y. 2d 292, 299, 148 N.Y.S. 2d 348, 355 (1959)) and that a "release may not be read to cover matters which the parties did not desire of intend to dispose of." Id. (The court disregarded the "agents servants, employees" boilerplate language in the medical malpractice release where facts clearly showed the plaintiff only intended to settle with one tortfeasor and not the other) In that vein, Plaintiff/Appellant argues that the releases should be interpreted only in the context of the probate and Supreme Court health insurance litigations as the plain intent of the releases was to settle those disputes and, while the settlement agreement also included a transfer of her interests in the family businesses, it was limited to controversies "raised by these proceedings" (R-611) and nothing suggests the releases were intended to resolve all unknown claims related to that sale.

While the dispute between the parties may have only begun with the filing of objections to the probate of Fred Trump's will in Surrogate's Court, in view of the nasty allegations were made by Plaintiff/Appellant that Defendants/Respondents committed fraud and unduly influenced their father (R-554-¶4; 562-¶1-3), the bad feelings understandably escalated the litigation into a full-fledged "family divorce" and the releases and settlement agreement are clear and unambiguous as to the parties desire to completely part ways from each other and resolve all claims now and future not only to the litigations but Plaintiff/Appellant's interest in the family businesses.

Plaintiff/Appellant argues that the releases expressly carved out "claims" related to the sale of her family interests when it provided that its scope is "except for any obligations under" the settlement agreement. R 595-98. This is false. As the lower Court correctly noted, the releases only carved out "obligations" to be performed under the settlement agreement. R-17. A careful reading of the settlement agreement reveals that the only obligations therein were those memorialized in relation to the settlement of the Supreme Court action where Defendants/Respondents remained obligated to pay all insurance claims up to the date of the agreement. R-617 -¶11. Contrary to Plaintiff/Appellant's argument, the settlement agreement simply referenced various information and documents that had been previously provided to her in the course of the parties' negotiation of the buy-out of her family business and financial interests. It did not render any further future obligation on the part of Defendants/Respondents. R-618, 619.

Plaintiff/Appellant misrepresents the case law when she argues that the Court in Centro did not construe that the members release relinquished fraud claims based solely on its broad language. Plaintiff/Appellant argues that the Court only drew the conclusion that the member's release included future fraud claims by reading it together with the master release, which expressly carved out future fraud claims, and concluding 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. On

the contrary, the Court in Centro opined, "As a preliminary matter, the parties here debate whether the members release encompasses unknown fraud claims. We find that it does. The broad language of the release reaches 'all manner of actions… whatsoever… whether past, present or future, actual or contingent, arising under or in connection with the Agreement among members and/or arising out of…. the ownership of membership interests." Id. The Court found the phrase "all manner of actions" in conjunction with the reference of "future" and "contingent" actions indicates an intent to release defendants from fraud claims, like this one, unknown at the time of contract. Id. Citing Ingram Corp v. J. Ray McDermott & Co, Inc 696 F2d 1295, 1312 (5th Cir 1983) and Consorcio Prodipe, A.A. de C.V. v Vinci, S.A., 544 F Supp 2d 178, 192 (S.D.N.Y. 2008). The Centro Court only discussed the fraud exception in the master release in response to the defendants' argument that the fraud exception in the master release should be read into the members release. In response to that argument, the Court stated that it saw no reason to import the master release's express statement into the member release especially since "courts should be extremely reluctant to interpret and agreement impliedly stating something which the parties had neglected to specifically include" Id Citing Rowe v Great Atl & Pac Tea Co., 46 N.Y. 2d 62, 72, 412 N.Y.S. 2d 827, 837 (1978) It was only in the context of refuting the defendants' argument that the fraud exception in the master release should be read into the member Release that the Court opined, "If anything" the

explicit exclusion of fraud claims from the master release suggests that the members release is not so limited. Id.

Lastly the fact that the parties executed a separate Receipt and Release and Waiver of Citation in connection with the 1976 trust also does not limit the scope of the general releases. It is customary, particularly where a trustee provides an informal accounting, to obtain a receipt and release agreement in connection with the accounting, particularly where, as here, Plaintiff/Appellant's trust was being terminated and its principal distributed to her. Additionally, the 1976 trust Receipt and Release and Waiver of Citation released Irwin Durben, who was a trustee, but not a party to the releases and settlement agreement. R-599-606.

POINT 2

PLAINTIFF/APPELLANT'S CLAIMS ARE BARRED BY THE STATATUTE OF LIMITATIONS

A. The Plaintiff/Appellant's Fraud Claims are Untimely

Under C.P.L.R. §213(8), the time within which an action alleging fraud must be commenced "shall be 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." A fraud claim accrues upon the

"commission of the fraud." Armstrong v. Peat, Marwick, Mitchell & Co., 150 A.D.2d 189, 191, 540 N.Y.S.2d 799, 802 (1st Dep't 1989). ("[A]n action based upon fraud must be commenced within six years from the commission of the fraud or two years from its actual or imputed discovery"); Lefkowitz v. Appelbaum, 258 A.D.2d 563, 685 N.Y.S.2d 460, 461 (2d Dep't 1999) (a "cause of action based upon actual fraud must be commenced within six years of the commission of the fraud, or two years from the date the fraud could reasonably have been discovered, whichever is later"). Where, as here, a claim is made that a person was fraudulently induced to enter into a contract, the time of the "commission of the fraud" is the time the person entered into the agreement. Carbon Capital Management, LLC v. American Express Co., 88 A.D.3d 933, 939, 932 N.Y.S.2d 488, 495 (2d Dep't 2011) (fraud claim accrued at time plaintiff entered into contract with investment company in reliance on defendant's alleged misrepresentations); Squitieri v. Trapani, 2012 WL 8677707 (Sup. Ct. Westchester Co. 2012), aff'd, 107 A.D.3d 688, 966 N.Y.S.2d 204 (2d Dep't 2013) (claim that plaintiff was fraudulently induced to enter into agreement to swap interests in properties with defendant accrued on date of agreement); Goldberg v. Manufacturers Life Ins. Co., 242 A.D.2d 175, 672 N.Y.S.2d 39 (1st Dep't 1998) (claim that insurer misrepresented premium payment terms of insurance policy accrued on date plaintiffs purchased policy).

The fraud is also held to have been committed when the plaintiff, or his decedent, is alleged to have parted with his or her property as a result of the defendant's misrepresentations. See D. Penguin Brothers Ltd. v. City National Bank, 158 A.D.3d 432, 70 N.Y.S.3d 192 (1st Dep't 2018) (fraud cause of action accrued when plaintiff was induced to provide $1.5 million investment based on defendants' misrepresentations); Matter of Weinroth, 1993 WL 13715515 (Sur. Ct. New York Co. 1993) (claims for return of decedent's real property, funds in Keogh plan and proceeds of sale of professional cooperative apartment, alleged to have been procured by surviving spouse by fraud, coercion and undue influence, accrued at time of transfer to surviving spouse).

On a motion to dismiss a fraud claim based on the two-year discovery rule, a defendant must make a prima facie case that a plaintiff was on inquiry notice of its fraud claims more than two years before it commenced the action. The burden then shifts to the plaintiff to establish that even it had exercised reasonable diligence, it could not have discovered the basis for its claims before that date. Epiphany Community Nursery Sch.v Levey, 171 A.D. 3d 1,7, 94 N.Y.S. 1, 3 (1st Dep't 2019) The "inquiry as to whether a plaintiff could, with reasonable diligence, have discovered the fraud turns on whether the plaintiff was 'possessed of knowledge of facts from which [the fraud] could be reasonably inferred'". Sargiss v. Magarelli, 12 N.Y.3d 527, 532, 881 N.Y.S.2d 651, 654 (2009). If a plaintiff had "knowledge

of the operative facts underlying [its] fraud claim" more than two years before the commencement of its action, "at which time, with due diligence, [it] could have discovered the alleged fraud," her claim is time-barred. Brock v. Brock, 229 A.D.2d 457, 458, 645 N.Y.S.2d 536, 537 (2d Dep't 1996).

i. Defendants/Respondents Established a Prima Facie Case that Plaintiff/Appellant was on Inquiry Notice of her Claims Prior to October 2018.

Here, Plaintiff/Appellant's claim accrued, at the latest on April 10, 2001, the date on which she entered into the settlement agreement. To the extent that she is attempting to assert fraud claims based on the Defendant/Respondent's actions during the twenty-year period preceding her entry into the settlement agreement, those claims are time-barred because they accrued earlier than April 10, 2001. Plaintiff/Appellant cannot meet her burden of establishing that she was unaware of the alleged fraud and could not, with reasonable diligence, have discovered it within two years of commencing this action, which she filed on September 24, 2020. R-28.

On February 24, 2000, nearly a year before entering into the settlement agreement, Plaintiff/Appellant's counsel questioned Robert Trump extensively concerning All County's operations at his § 1404 hearing. Robert testified that All County was a central purchasing company set up by him, his siblings and his cousin in 1992, to acquire goods and services and combine the bulk purchasing power of

the Company and to buy wholesale from vendors and suppliers and then to sell those products and services to the Company, which would also effectively take control away from the supers by removing them from the purchasing process. Robert freely admitted that All County was a "for profit" venture that made money by marking up prices for the valuable business purposes it served. R-518-519. Robert testified that All County was formed in consultation with the Company's lawyers and outside auditors. R-520. Plaintiff/Appellant's counsel marked for identification financial statements for Beach Haven Management for January 1993 and September 1993 and questioned Robert regarding payments made to All County. R-525,526. He was advised that purchasing for all of Fred Trump's entities, not just Beach Haven, was made through All County. R- 528. He also demanded production of "the documents on All County Management, its shareholders' agreement, and any contractual arrangements between entities in which [Fred] had an interest" during the period from September 1988 through September 1993. R-529,530. Similarly, John W. Walter, testified at his §1404 hearing that All County was formed in 1992 as a central purchasing agent for Fred's companies (R-534) and that it made a profit through a mark-up, which Plaintiff/Appellant's counsel observed had the ancillary benefit of sending money "downstream" from Fred's estate and not subject to estate taxes..." R-539.

Robert Trump also testified concerning AMA, stating that "it's in the business

of managing the individual developments". R-522-523. Plaintiff/Appellant's counsel acknowledged that he had seen "lots of checks going out to Trump Management from the various [Trump family] entities (R-515-516) and that he had "records of all these entities for the three years [prior to Fred's September 18, 1991 will]" R-516. When specifically asked by Plaintiff/Appellant's counsel what AMA did, Robert replied. "What Trump Management, Inc. had really done we shifted the focus over to Apartment Management Associates." Counsel reasoned, and Robert agreed, that in creating AMA, Defendants/Respondents took the money that was being paid from the entities to Trump Management, which was owned by Fred and directed it towards AMA. R-522-523.

As a witness to the execution of Fred C. Trump's Will, attorney Vincent J. Tosti testified at a § 1404 hearing on January 5, 2000. R 499-509. In addition to the facts and circumstances surrounding the execution of the will, Mr. Tosti, as an attorney of the Defendants/Respondents familiar with their businesses, was asked questions with regard to Midland Associates and was specifically questioned about Promissory Notes given by Midland Associates to Fred C. Trump on August 25, 1992 and October 25, 1992. R-510-511.

Such testimony and production of records put Plaintiff/Appellant on inquiry notice of the alleged fraud she now claims. <u>Lucas-Plaza Housing Development Corp. v. Corey</u>, 23 A.D.3d 217, 805 N.Y.S.2d 9 (1st Dep't 2005) (suit alleging fraud in

connection with reissuance and defeasance of long-term tax- exempt bonds untimely where plaintiff's counsel had questioned defendants concerning the bonds' defeasance over ten years before bringing suit). Indeed, all of the records received by Plaintiff/Appellant in the litigation put her on inquiry notice of her alleged fraud claims.

Plaintiff/Appellant admits that, since signing the settlement agreement, she was in possession of or had control over the 19 boxes containing these records from her file on which the New York Times based its investigation. R-346. Those documents, which Plaintiff/Appellant sat on for twenty years, included the transcripts of Robert Trump and John Walter's deposition testimonies which disclosed the existence of All County and AMA, their ownership structure and their legitimate business purposes as well as the financial and tax records for all of Fred Trump's entities, (including the Beach Haven Apartments which *The New York Times* referred to in its report. R-129 infra), as well as the Midland entities and the Land Interests. Defendants/Respondent's did not fraudulently conceal any of this information. To the contrary, they admitted openly to it. They didn't hide All County or AMA. They didn't conceal loans on the books. Plaintiff/Appellant was perfectly free to examine those records, or to ask counsel to do so. Under similar circumstances, the courts have consistently held that the discovery exception to the six-year fraud statute is unavailable. See, e.g., Siegel v. Dakota, Inc., 173 A.D.3d

515, 104 N.Y.S.3d 604 (1st Dep't 2019) (no basis to apply two-year discovery provision to plaintiff's fraud claim against former co-op board members where "plaintiff admits he discovered this alleged new evidence by reviewing board minutes from more than a decade ago that were available to him at that time"); Spinale v. Tag's Pride Produce Corp., 44 A.D.3d 570, 844 N.Y.S.2d 255 (1st Dep't 2007) (summary judgment properly granted dismissing complaint alleging fraudulent inducement of sale of stock where "any documents that might have been necessary for plaintiff to discover the fraud alleged … were in his possession"); Leider v. Amalgamated Dwellings, Inc., 2009 WL 2984839 (Sup. Ct. New York Co. Sept. 9, 2009) ("it has been generally held that when the documents necessary for a claimant to discover the alleged fraud were in his possession, the discovery exception does not apply"); Rite Aid Corp. v. Grass, 48 A.D.3d 363, 364, 854 N.Y.S.2d 1,1 (1st Dep't 2008) (corporation "had notice of operative facts that should have prompted further inquiry as to the … transaction, where the 'key proof – financial records and internal company correspondence – had been in plaintiff's possession' since before the expiration of the two-year discovery period.')

ii. Plaintiff/Appellant Could Have Discovered the Basis for her Claims with Reasonable Diligence

To feign a lack of knowledge of all of the information gleaned from the litigation, Plaintiff /Appellant makes the conclusory allegation that her attorney left

her in the dark due to "conflicting loyalties". R-35-¶ 20; R 57-¶114. Similarly, she alleges that her now deceased and silenced trustee, Irwin Durben conspired to commit fraud without any substantive facts to support the allegation. R-2-¶6; R-45-¶65; R-48-¶78; R-75 ¶206. She makes conclusory allegations that, Robert Von Ancken, a licensed appraiser who worked for Grubb & Ellis, one of the nation's leading commercial real estate service firms, conspired with Defendants/Respondents to produce fraudulent appraisals to devalue her interests. R-48-¶79,81,83; R-52-¶91; R-75-¶206. Von Ancken's company performed valuations for the two GRATs that Fred C. Trump and his wife funded in 1995 as well as valuations of Fred's Estate as of 1999. All of Von Ancken's work was certified by his Managing Director, Ghassan Kachoual. R-565-574. In addition, a second valuation company, Management Planning Inc., ("MPI") had been retained by Defendants/Respondents to value the Estate and GRAT assets and those reports were generated and certified by two valuation experts. R-575-576. To the extent that Plaintiff/Appellant alleges a conspiracy to obtain fraudulent appraisals, the conspiracy must have included these three other people, which is absurd. Plaintiff/Appellant's allegations that she could not have discovered the fraud of the alleged lowball appraisals because they were based on fraudulent data (the alleged "Grift") is patently debunked since Plaintiff/Appellant was made aware of the business model of All County and AMA and any loans on the books through the

deposition testimonies and discovery produced by Defendants/Respondents in the litigation.

Plaintiff/Appellant alleges that Defendants/Respondents ducked sales of Co-op apartments, selling only three sponsored owned apartments in 1998 and 1999 which prevented evidence of sales price information from being generated which, in turn, precluded her from adequately valuing her interests. R-55-¶104 - R-56-¶108. This is patently false and refutable through documentary evidence. Defendants/Respondents provided Plaintiff/Appellant detailed information on the sales of almost forty sponsor and non-sponsor owned apartments in the buildings in 1999 and 2000. R-492-498. Moreover, Plaintiff/Appellant was free to conduct her own appraisals of the apartments.

With respect to her Land Interests, Plaintiff/Appellant claims they were misrepresented to her simply as rights to cash streams from land leases and that she wasn't informed that, in addition, she had a reversion interest in the buildings themselves not just the land leases. R-60-¶130. She claims they were undervalued because they were "based on the present value stream of payments" and didn't consider her reversion interest. Of course, her sophisticated estate counsel would have been aware of any reversionary value of a land lease. Plaintiff/Appellant alleges that the land leases in question were created in 1948 and were for a duration of 99 years and that she would have an ownership interest in the buildings when they

reverted back to the lease owners in 2047. R-42-¶50. This is demonstrably false. First the ground leases commenced in 1950 and were for an initial term of 99 years but they gave the building owners an automatic right of renewal for an additional 99 years. R-392-404. So in fact, Plaintiff/Appellant could only claim a minority ownership interest in the buildings in the year 2148, when she will be 183 years old. Moreover, the reversion interest in a ground lease is an obvious fact. If Plaintiff/Appellant was misinformed or misadvised with regard to it, she would have a grievance with regard to the quality of her legal representation, not a claim of fraudulent misrepresentation against Defendants/Respondents.

Plaintiff/Appellant claims that her Land Interests were undervalued by Von Ancken, R-61-¶132,133,134, but she and her counsel were free to perform their own valuations. Plaintiff/Appellant alleges that she was misinformed with regard to Midland's interest in Starrett City (through Park Briar Associates, LLC) claiming that, while Defendants/Respondents reported the value to her attorney as "nominal" R-59-¶123, it sold for $900 Million seventeen years later in 2018. R-59-¶125. Plaintiff/Appellant's interest would have been 1/10th of 1.4583% of the "net sale amount" after the mortgage was paid off, discounted to present value back in 2001. Of course, Defendants/Respondents were not clairvoyant in 2001, and could not have predicted that a buyer would come along nearly two decades later to overcome the regulatory hurdles and community and political resistance that accompanied any

attempt to sell the property.[3] Plaintiff/Appellant's grievances now don't constitute fraud, they constitute 'seller's remorse".

Plaintiff/Appellant alleges that Robert Trump falsely testified that All County had a legitimate purpose and made a legitimate profit and this is proof that Defendants/Respondents concealed the fraud and that Plaintiff/Appellant could not have discovered it upon reasonable diligence. Plaintiff/Appellant mischaracterizes Robert's testimony when she claims that he testified that "savings from Defendants' operation of All County 'offset the markups'". In fact, he specifically testified that the purchasing power of buying in bulk "in many cases" offset the markups. R 526. Defendants/Respondents still maintain their business practices were legitimate and deny any accusations of fraud. But the fact that they didn't acknowledge a fraud, or the fact that Plaintiff/Appellant only concluded All County was a "sham" decades later is irrelevant, because it is knowledge of the alleged fraudulent "acts" which gives a plaintiff notice of alleged fraud not the legal conclusion drawn from the acts. See Erb v. Lincoln Rochester Trust Co. 3 N.Y.2d 321, 326, 165 N.Y.S. 2d 107 (1957) With regard to All County, the fraudulent act is claimed to be its formation and insertion between the Trump companies and its vendors, and its marking up of invoices on the purchase of goods and services, thereby increasing the costs to the

[3] See Oksana Miranova. *The Lesson of Starrett City* Feb 6, 2014 Discussing how a buyer's market only developed in the Mid 2000's R-354

companies. All of these facts were made known to Plaintiff/Appellant twenty years ago. Moreover, Defendants/Respondents did not conceal any facts. They did not fraudulently change entries in books from All County to another entity. Plaintiff/Appellant's own allegations confirm this. R-52- ¶92-94 (wherein she alleges rather that the maintenance expenses payments to All County were simply padded) Defendants/Respondents took no steps to conceal payments to All County on the books. They formed the company on the advice and consent of their lawyers and accountants and testified openly to its existence and business model.

Plaintiff/Appellant argues that the extensive discovery conducted in the litigation concealed rather than revealed the fraud. This is false. By example, Plaintiff/Appellant alleges that Defendants/Respondents issued loans from Coronet Hall, Inc. (one of the Midland assets) to themselves with either no interest rates or below-market interest rates and without appropriate repayment terms (R-¶76) which was evidence that they concealed their fraud. Plaintiff/Appellant doesn't dispute that the loans were categorized as loans on the books. She simply argues that their terms were inadequate, but those terms could have been read by her at any time. While Defendants/Respondent's attorney did properly limit questions about Midland, a non-estate asset, at the §1404 hearings in January 2000, any and all questions could have been posed in further depositions after objections were filed upon a showing of special circumstances to the Surrogate (See Uniform Surrogate's Court Rules at Rule

207.27) Moreover, Plaintiff/Appellant could have pursued direct claims for fraud unrelated to the estate when she filed the second action against Defendants/Respondents in Supreme Court and pursued further discovery in that action. Regardless, when the parties entered protracted settlement discussions a year later, those discussions became global and included a sale of Plaintiff/Appellant's Midland Interests, at which time Plaintiff/Respondent received detailed financial statements and tax returns for the Midland entities. R-559, 560. Plaintiff/Appellant was under no constraint to request any information related to Midland or any other assets while negotiating a sale price, including information on the loans. If a party omits an inquiry when it would have developed the truth, and shuts her eyes to the facts which call for an investigation, knowledge of the fraud will be imputed to her. CSAM Capital, Inc. v. Lauder 67 A.D. 3d 149, 156, N.Y.S. 2d 473, 478(1st Dep't 2009). Also, as the parties became adversaries, and since Plaintiff/Appellant was represented by qualified counsel, a heightened duty to inquire was required of her. Arfa v. Zamir, 76 A.D. 3d 56, 60, 905 N.Y.S. 2d 77 (1st Dep't 2010). Certainly Plaintiff/Appellant can't say that if she looked at the books and saw what was obvious to be seen, entries marked as loans, a casual reading of the loan documents themselves wouldn't have revealed the facts she now claims. Moreover, Plaintiff/Appellant as a member of Midland, had already been receiving yearly financial statements for the Midland assets. R-48-¶6. Plaintiff/Appellant's

allegations that her Trustee, Irwin Durben, conspired with Defendants/Respondents (R-30-¶6, ¶78- ¶91) are conclusory and should be discounted when the Court is determining whether Plaintiff/Appellant has met her burden to show that the alleged fraud could not have been discovered with reasonable diligence. See Davidson v Perls, 42 Misc 3d 1205(A), 983 N.Y.S. 2d 202 (holding that bare assertions are insufficient to invoke the fraud discovery rule) see also Lentini v. Lentini, 280 A.D.2d 330, 330, 720 N.Y.S. 2d 464, 464 (1st Dep't 2001) (holding that the plaintiffs' conclusory, unsubstantiated allegation that defendant's wrong doing could not have been discovered failed as a matter of law where corporate account statements and tax returns could have alerted plaintiffs to the alleged wrongdoing and which were available to them at all times and that these and other corporate books and records should have been examined for the sort of claims plaintiffs make herein.) Moreover, while these documents initially flowed through Plaintiff/Appellant's Trustee, her assets came out of Trust in 1995, six years before she settled out with Defendants. R-645-654.

Plaintiff/Appellant argues that the disclosure of the existence of All County and AMA's ownership structure by Robert Trump would not suggest to a person of ordinary intelligence the probability that she had been defrauded. However, Defendants/Respondents disclosed much more than the identity of the owners. Robert not only testified that Defendants/Respondents formed All County as a

central purchasing agent for the Trump companies, he testified that it acted as a middle man that marked up goods and services for profit and acknowledged that this transferred money from his father's estate to Defendants/Respondents. R-519-520. In addition, Defendants/Respondents provided Plaintiff/Appellant with all the financial documents she needed to deduce, (as *The New York Times* did infra), that maintenance and other expenses for the Trump companies increased significantly after All County was formed. Plaintiff/Appellant alleges that All County was a "sham" company, meaning its "raison d'etre" was to commit fraud. To make that allegation is to allege that there was no need for a middle man between the aging Fred Trump and Midland Associates and their vendors so logically, when Plaintiff/Appellant became aware of the formation of a middle man owned by Defendants/Respondents which marked up invoices, she became aware of the acts she purports support a claim of fraud. Similarly, Robert testified that AMA was formed by Defendants/Respondents in 1994 to replace their father's company, Trump Management, Inc. He testified that the company charged management fees (See Management Agreement R 453-467) which Plaintiff/Appellant's counsel rightly deduced in the deposition, had the effect of reducing his father's income and estate.

The rulings in Epiphany serve to undermine Plaintiff/Appellant's arguments. In Epiphany, the plaintiff brought two separate allegations of fraud against its

executive director's husband (its investment banker): the first, for fraudulently inducing plaintiff to sell its extracurricular program to him at an unreasonably low price; the second, for making unauthorized transfers of millions of dollars from plaintiff's bank accounts to himself years later. With similar facts to the one at bar, the Court found the first claim was time barred since the plaintiff could have discovered the alleged fraud at the time of sale if it had conducted its own appraisals or questioned the disproportionately high rent, which was the basis for the undervaluation of the asset. With facts distinguishable to the one at bar, the Court found the second claim was timely since the plaintiff could not have discovered the fraud where the defendant had falsely recorded the transfers of money as loans, then subsequently changed the designation of the loans on the books to "other receivables" only to further offset them by other fake changes to further conceal them on the books. The defendant also diverted the bank statements to his firm to further conceal the fraud. Epiphany v. 171 A.D. 3d at 7. In the case at bar, Defendant/Respondents did not disguise the loans on the books or fraudulently wipe them out. They left them on the books and Plaintiff/Appellant, with reasonable diligence, could have inspected the notes and read their terms.

Plaintiff/Appellant contends that she only sued in Surrogate's Court alleging her grandfather's lack of testamentary capacity. However, she filed formal Objections and a Bill of Particulars making several specific allegations of fraud

against Defendants/Respondents. R-554-¶4;R-562-¶1,2,3. While Plaintiff/Appellant admits in her book that she "knew" that Defendants/Respondents were lying to her about the value of her grandfather's estate (R-148-152), she contends that such admission was really just a "suspicion" and is not evidence of notice. Plaintiff/Appellant argues the facts are similar to that in Erb v. Lincoln Rochester Trust Co. supra (where plaintiff's suspicions as to defendant bank's good faith in a prior Surrogate's Court proceeding was deemed not necessarily knowledge of facts from which the alleged fraudulent conspiracy might be reasonably inferred.) Unlike the case at bar, the plaintiff and defendant bank were co-executors of an estate, not adversaries in a proceeding plaintiff initiated making multiple allegations of fraud. Further, the plaintiff had only general suspicions of the bank's conduct, not strong convictions that she knew the very fraud (misrepresenting the value of assets) currently alleged. Erbe v. 3 N.Y. 2d at 326. It would also seem logical also that Plaintiff/Appellant's convictions would have been strengthened when the newspapers reported in 2004 that her grandfather's portfolio of real estate sold for about $600,000,00. (R 146-147).

Plaintiff/Appellant relies heavily on Norddeutsche Landesbank Girozentrale v. Tilton, 149 A.D. 3d 152, 48 N.Y.S. 3d 98 (1st Dep't 2017) where the Court found that the plaintiffs were only put on inquiry notice of their complex claims of fraud relating to investments in a collateralized debt obligation (CDO) fund sponsored and

managed by the defendants, when the SEC filed a proceeding against the defendants. The Court found that previously distributed investor disclosures, marketing materials, investor calls and other publicly available information gave insufficient facts to plaintiffs to plead their causes of action because the alleged fraud (that the CDO's were actually private equity funds and the defendants were siphoning value through excessive management fees) was not disclosed in these materials and communications. This case is clearly distinguishable from the case at bar where All County's markup and AMA's Management fees were directly disclosed to Plaintiff/Appellant.

Plaintiff/Appellant argues that reliance on family members and fiduciaries is consistent with reasonable diligence for the purposes of the discovery rule. Trepuk v. Frank, 44 N.Y. 2d 732, 724 405 N.Y.S. 2d 452 (1978) (where plaintiff sued her brother, executor of their step father's estate, claiming he had misrepresented to her the value of the estate). Unlike the case at bar, the plaintiff and defendant in Trepuk were not on opposite sides of a lawsuit with allegations of fraud at the time the alleged misrepresentation was made. In an adversarial context, a "heightened degree of diligence [was] required of [Plaintiff] and [she cannot] reasonably rely on [Defendants'] representations without making additional inquiry to determine their accuracy." Arfa v., 76 A.D. 3d at 60 (quoting Global Mins & Metals Corp v. Holme, 35 A.D. 3d 93, 100, 824 N.Y.S. 2d 210 (1st Dep't 2006). Here, the parties' separation

twenty years ago was akin to a family divorce. Much like a husband and wife in a marital divorce, each no longer had an expectation of reliance on the other. See Nazzaro v. Nazzaro, 2011 WL 1464122 (Sup. Ct. Suffolk Co. 2011) (plaintiff found to be on inquiry notice of the alleged fraud where documents, which had been executed ten years earlier, were sent to her attorney during the parties' divorce action and the Court disregarded the plaintiff's argument that she did not understand the significance of the transfer documents until she engaged experts to review them).

iii. The Relevant Portion of the New York Times October 2, 2018 Report was Based on the Documents it Received from Plaintiff/Appellant

To excuse the two-decade delay in commencing this action, Plaintiff/Appellant alleges that she only became aware of the purported fraud after *The New York Times* published its investigative report in October 2, 2018. R-30-¶ 4; R-64- ¶145. Faced with the uncomfortable truth that the *Times* based much of its report on the 19 boxes of files that Plaintiff/Appellant, herself, gave to them, Plaintiff/Appellant argued before the lower Court that she was not the only source for the report. Indeed, counsel argues that the report was based on thousands of pages of other confidential records and interviews from Fred Trump's former employees, advisers and vendors and that Plaintiff/Appellant couldn't possibly have discovered the alleged fraud with any reasonable diligence were it not for the investigation conducted by the *Times'* Pulitzer Prize winning journalists. R-681. A simple reading

of the *Times* article, however, proves this is to be a hollow argument since the vast majority of it has nothing to do with any claim of fraud Plaintiff/Appellant now posits. That portion of the report which does speak to the facts and circumstances Plaintiff/Appellant alleges support claims of fraud against her was completely derived from the documents she, herself, provided.

The *Times* alleged that All County was formed by Defendants/Respondents in 1992 as a middle man which marked up invoices between the Trump companies and their vendors, effectively channeling money away from Fred Trump to his surviving children. While directly quoting from Robert Trump's deposition testimony from the parties' litigation, the *Times* further illustrated the point by comparing the records of Beach Haven Apartments ("Beach Haven") in 1991 and 1992 with those in 1993 and concluded that Beach Haven's costs for maintenance and repairs increased often over 100%. R-129. The *Times* saw similar increases in all of the other Trump buildings. Id. However the records the *Times* referenced were the very same records provided to Plaintiff/Appellant in the litigation, some of which her attorney marked at Robert's deposition when he questioned him regarding payments Beach Haven made to All County. R-525, 527. If Plaintiff/Appellant had just done what the *Times* did, and compared the financials in her possession for the years before and after All County was formed, she would have seen the impact All County's business model had on the Trump companies' bottom line.

The *Times* reported that Defendants/Respondents formed AMA in 1994 as a management company to replace their father's company, Trump Management Inc. (R-131 & 132), which information Plaintiff/Appellant already gathered from Robert's testimony and discovery in the litigation. (R-522-523) The *Times* described the legal estate planning techniques the Trump family employed when Fred Trump and his wife used Grantor Retained Annuity Trusts (GRAT's) to gift much of their property to their surviving children. R-132-134. However, these GRATS, the tax returns, and the financial records supporting them, were previously exchanged in the litigation. The *Times* suggested that Robert Von Ancken, one of the appraisers that was used to value the GRATS and the estate was known as a "friendly" appraiser in the industry (R-134), which, if true, would have been known by Plaintiff/Appellant's experienced attorney. The *Times* concluded that the valuations given to Fred's properties were two to four times less than their actual value. Plaintiff/Appellant argues that this conclusion could not have been reached through any reasonable diligence on her part yet all the *Times* did was compare the prices for comparable apartment buildings that sold within a year of Von Ancken's appraisals, something she could have easily done. R-134. The *Times* article contained no new information and the deductions made by its authors were made from information that had been provided to Plaintiff/Appellant in the litigation. Anyone with reasonable diligence could have compared the financial reports for the Trump companies before and after

the formation of All County and seen the increase in expenses and decrease in profits. Anyone with the use of reasonable diligence could have taken the appraisals and compared the value of the properties with the value of other similar properties. Thus, it is clear that Plaintiff/Appellant's attempt to use the date of publication of the *Times* report to toll the statute of limitations until that day under the discovery rule is a pretext and should be rejected.

In sum, all of the information that Plaintiff/Appellant claims was unknown to her until 2018, and which forms the basis of her alleged fraud claims, was plainly made known to her and her attorney twenty years ago. Plaintiff/Appellant simply feigns ignorance of all the information that put her on notice for the alleged fraud, claiming she wasn't made aware of any of this information. R-35-¶20. However, knowledge acquired by an agent acting within the scope of his agency is imputed to his principal and the latter is bound by such knowledge even if she claims the information was never communicated to her. Farr v. Newman, 14 N.Y.2d 183,187, 250 N.Y.S. 2d 272 (1964). There can be an exception to the rule where an agent is engaged in a scheme to defraud his principal and the agent has totally abandoned his principal's interests but it cannot be invoked merely because he has a conflict of interest or because he is not acting primarily for his principal. Id at 190, 191. In any event, Plaintiff/Appellant makes only conclusory allegations that her attorney was

conflicted (R-57-¶114), which allegations should be disregarded by the Court. Lentini v. 280 A.D.2d at 330 and Davidson v. 42 Misc 3d at 1205.

B. Plaintiff/Appellant's Remaining Claims Are Untimely

Plaintiff/Appellant's claim of negligent misrepresentation is governed either by C.P.L.R. § 214(4) (three years) Colon v. Banco Popular North America, 59.A.D. 3d 300 (1st Dep't 2009) or C.P.L.R. § 213(1) (six years with no discovery rule) Fandy Corp v. Lung-Fong Chen, 262 A.D. 2d 352 (2d Dep't 199) or the fraud Statute of limitations. In all scenarios, the claim is untimely. Plaintiff/Appellant's claims of breach of fiduciary duty and aiding and abetting breach of fiduciary duty are barred by CPLR 214(4)'s three-year Statute of Limitations, because she seeks money damages only, and because the allegations of fraud are not essential for those claims. IDT Corp. v. Morgan Stanley Dean Witter & Co., 12 N.Y.3d 132, 139, 879 N.Y.S.2d 355, 359 (2009). Assuming 213(8)'s six-year Statute of Limitations were applicable, the breach of fiduciary duty claims are time barred for the same the reasons her fraud claims are time barred.

POINT 3

PLAINTIFF/APPELLANT LACKS STANDING TO BRING BREACH OF FIDUCIARY DUTY CLAIMS

Plaintiff/Appellant claims that, for years prior to relinquishing her Midland Interests in the April 10, 2001 settlement, Defendants/Respondents used All County and AMA as a grift to siphon profits from the entities in which she had an interest and to issue loans with preferential rates from those entities to other Trump entities they controlled. R-43-¶6; R46-¶18-R-48-¶77. Claims of mismanagement or diversion of assets are derivative claims which plead a wrong to the corporation and do not accrue to a shareholder individually. See Abrams v. Donati, 66 N.Y.2d 951, 953 (1985), even where this caused a "diminution in the value of a [shareholder's] stock holdings." O'Neill v. Warburg, Pincus & Co., 39 A.D.3d 281, 281-282 (1st Dep't 2007). The same rules apply to claims for self-dealing and diminution in value brought by members of a limited liability company. See, e.g., Jacobs v. Cartalemi, 156 A.D.3d 605, 608, (2d Dep't 2007).

The cases cited by Plaintiff/Appellant are distinguishable. See Serino v. Lipper, 123 A.D.2d 34 (1st Dep't 2014), (Court held that a claim for damages based on the lost value of in holdings of hedge fund against the accountants who had audited the funds' financial statements was derivative.) See Gjuraj v. Uplift Elevator Corp., 110 A.D.3d 540 (1st Dep't 2013), (Court found minority shareholder's claim for the defendants' freezing him out of the corporation, and failing to pay him his share of the corporation's profits harmed him individually.) In PF2 Securities Evaluations, Inc. v. Fillebeen, 171 A.3d 55 1(1st Dep't 2019), a shareholder alleged

that he was fraudulently induced to part with his shares in a corporation at less than their fair value, not that the defendants caused his shares to decrease in value prior to their sale, the derivative claim which Plaintiff/Appellant attempts to allege here. In Fraternity Fund Ltd. v. Beacon Hill Asset Management LLC, 376 F.Supp.2d 385 (S.D.N.Y. 2005), the Court found "the principal wrong here appears to have been a valuation fraud that injured plaintiffs, not the Funds [in which they had invested]". Id. at 409.

Moreover, when a shareholder or member of a limited liability company disposes of her shares or membership interest, she no longer has standing to sue derivatively. See Ciullo v. Orange and Rockland Util. Inc., 271 A.D.2d 369 (1st Dep't).

POINT 4

PLAINTIFF/APPELLANT'S PRE-SETTLEMENT CLAIMS FOR FRAUD, FRAUDULENT CONCEALMENT AND NEGLIGENT MISREPRESENTATION MUST BE DISMISSED FOR LACK OF JUSTIFIBLE RELIANCE

To plead claims for fraud and fraudulent concealment, Plaintiff/Appellant must plead justifiable reliance. Bannister v. Agard, 125 A.D.3d 797, 798 (2d Dep't 2015). Similarly, she must plead reasonable reliance to sustain her claim for negligent misrepresentation. High Tides, LLC v. DeMichele, 88 A.D.3d 954, 959 (2d Dep't 2011). While Plaintiff/Appellant alleges Defendants/Respondents

misrepresented and concealed that they were allegedly siphoning money from the entities in which she was interested and depressing the value of her interests for years prior to the April 2001 settlement, she does not plead that she took any action in reliance on such alleged misrepresentations and concealment before she tendered her shares in connection with the Settlement Agreement. Plaintiff/Appellant only makes conclusory allegations that she reasonably and justifiably relied on Defendants/Respondents alleged misstatements and omissions in Count 5 of the Complaint (R-76-¶211) However, it's clear those allegations only relate to the sale of the Midland Interests and Land Interests. (Id ¶212). Plaintiff/Appellant makes no allegation that she retained her Midland Interests and Land Interests in reliance on Defendants/Respondent's fraudulent conduct, only that she relied on said allegations when she relinquished her shares in the settlement. In Brawer v. Lepor, 188 A.D. 3d 482 (1st Dep't 2020) the Court dismissed a similar claim for fraudulent concealment where the plaintiff failed to allege how he relied to his detriment on company officers' self-dealing when he didn't allege that the concealment of the self-dealing caused him to retain his membership interest of to take any other action in reliance on such concealment to his damage.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Order appealed from should be affirmed.

Dated: Lake Success, New York
January 27, 2023

Respectfully submitted,

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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

MARY L. TRUMP,

Plaintiff-Appellant,

CASE NO. 2022-05227

—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.

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PRELIMINARY STATEMENT

Defendant-Respondent Maryanne Trump Barry ("Judge Barry") submits this brief in opposition to the appeal by Plaintiff-Appellant Mary L. Trump ("Plaintiff") from the Decision and Order of the Supreme Court, New York County (Reed, J.), dated November 14, 2022 (R. 4), granting Judge Barry's motion to dismiss Plaintiff's Complaint on the grounds that her claims are barred by general releases which she signed in settlement of prior litigation and disputes between the parties. The Decision and Order should be affirmed because the releases clearly and unambiguously expressed the parties' intent to bar the claims for fraud, fraudulent inducement, fraudulent concealment, negligent misrepresentation, breach of fiduciary duty and civil conspiracy that Plaintiff has asserted in this action. Plaintiff's allegations fail to raise any issue of fact concerning her claim that the releases were the product of overreaching or unfair circumstances.

Represented by highly skilled counsel, Plaintiff expressly agreed that the releases were being executed in furtherance of the parties' "global settlement" (R. 96-99, 241, 252) of "all of their differences," including those "pertaining to [Plaintiff's] partnership and corporate interests" (R. 241, 248-250, 253) - the Midland Associates Group and Trump ground lease interests which Plaintiff claims she was fraudulently induced to part with in this action. Plaintiff further agreed that "[t]he execution of this [settlement agreement] is being completed on a voluntary

basis and [she] represents that [she was] under no compulsion to execute this agreement" (R. 254), and that she "had sufficient opportunity to review [it] with [her] attorney and … execute[d] [it] after due consideration and of … her own volition" (Id.). Plaintiff received $1,800,000 for releasing her present claims (R. 253). The facts here bear no relationship to the personal injury cases she relies on where the injured parties were pressured to sign releases without the benefit of counsel and for minimal compensation.

The Decision and Order should also be affirmed because Plaintiff's claims are barred by the Statute of Limitations.[1] Plaintiff was on inquiry notice of her present claims when she settled with Defendants, because her now-deceased uncle, Robert S. Trump ("Robert"), had testified in the parties' litigation to the very transactions on which Plaintiff bases her present claims. Plaintiff has also publicly

[1] Judge Barry may rely on this alternative ground for affirmance under Town of Massena v. Niagara Mohawk Power Corp., 45 N.Y.2d 482, 488 (1978).

acknowledged[2] that, since the 2001 settlement, her counsel has been in possession of 19 boxes of documents, which she now claims contain evidence of the fraud she alleges (R. 101-103). She has also admitted, in her recent "tell-all" book concerning Defendant-Respondent, former President, Donald J. Trump, that when she entered into the April 10, 2001 settlement, she had reason to investigate further, but made a conscious decision to do nothing. Describing her late 2017 conversation with her counsel at Farrell Fritz, Jack Barnosky, Esq. ("Mr. Barnosky"), when she went to retrieve the 19 boxes of documents, Plaintiff stated:

> When he turned to leave, I called after him, "Jack, wait a second. Can you remind me why we decided to settle the lawsuit?"
>
> "Well, you were getting concerned about the costs, and, as you know, we don't take cases on contingency. Although we knew they were lying to us, it was 'He said, she said." Besides, your grandfather's estate was only worth thirty million dollars." It was almost word for word what he told

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[2] See Plaintiff's interview with George Stephanopoulos, Chief Anchor of ABC News, on July 14, 2020 (R. 101-103), the entire transcript of which can be found at https://abcnews.go.com/Politics/transcript-mary-trumps-interview-abc-news-george-stephanopoulos/story?id=71803869. The Court may consider this information on a motion to dismiss. See Biondi v. Beekman Hill House Apt. Corp., 257 A.D.2d 76, 81 (1st Dep't 1999) (when court considers documentary evidence, "the allegations are not deemed true," and "[t]he motion should be granted where the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted" (citation and internal quotation marks omitted)), aff'd, 94 N.Y.2d 659 (2000); Kaplan v. Conway & Conway, 173 A.D.3d 452 (1st Dep't 2019) (trial court properly dismissed claim for malpractice where emails submitted by defendants refuted plaintiff's allegations).

me when I had last seen him almost twenty years earlier (R. 151).[3] (Emphasis added).[4]

Plaintiff's recent attempt to distance herself from this candid admission, made *ante litem motam*, cannot save her from its devastating effect, rendering her present claims untimely.

Plaintiff's pre-settlement claims of breach of fiduciary duty, and fraud, fraudulent concealment and negligent misrepresentation, must also be dismissed, because they are likewise untimely, and Plaintiff lacks standing to assert a derivative claim for breach of fiduciary duty or the aiding and abetting thereof, and fails to allege that she acted in reliance on Defendants' alleged misrepresentations and omissions to disclose. Her claims for civil conspiracy must also be dismissed because New York does not recognize an independent cause of action in tort for conspiracy.

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[3] Mary L. Trump, PH.D., TOO MUCH AND NEVER ENOUGH, HOW MY FAMILY CREATED THE WORLD'S MOST DANGEROUS MAN, Simon & Schuster (July 2020), at p. 187 (R. 151).

[4] Plaintiff also could not have missed the *New York Post's* public announcement in 2003 of Defendants' impending sale of the Fred Trump properties for $600 million. See Trumps Lighten Up – Family Sells Outer-Borough Buildings for $600M, New York Post, Dec. 18, 2003 (R. 146-147). https://nypost.com/2003/12/18/trumps-lighten-up-family-sells-outer-borough-buildings-for-600m/

STATEMENT OF THE QUESTIONS PRESENTED

1. Are all of Plaintiff's claims barred by the general releases which she executed in connection with the parties' April 10, 2001 global settlement?

The Trial Court answered in the affirmative.

2. Are all of Plaintiff's claims time-barred?

The Trial Court did not reach this issue.

3. Does Plaintiff lack standing to assert her claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty based on events occurring prior to the parties' April 10, 2001 settlement because her claims are derivative and she is no longer a shareholder or member of the Midland Associates entities in which she formerly held interests?

The Trial Court did not reach this issue.

4. Should Plaintiff's pre-settlement claims for fraud, fraudulent concealment and negligent misrepresentation be dismissed because she has failed to plead justifiable reliance?

The Trial Court did not reach this issue.

5. Should Plaintiff's civil conspiracy claims be dismissed because New York does not recognize an independent cause of action for civil conspiracy?

The Trial Court did not reach this issue.

STATEMENT OF THE FACTS

Plaintiff's Allegations in the Complaint

This is an action for damages alleging that over a period of some twenty years Defendants engaged in various fraudulent schemes to devalue Plaintiff's 10% interest in certain corporations and limited liability companies comprising the Midland Associates Group (the "Midland Interests") (R. 34-35, ¶ 17(b), R. 41, ¶¶ 42, 44, R. 43-45, ¶¶ 54-59) and her minority interests in certain land underlying developments of her grandfather, Fred C. Trump ("Fred") known as Beach Haven and Shore Haven (the "Land Interests") (R. 34, ¶ 17(a), R. 41, ¶¶ 38-39, 44, R. 42-43, ¶¶ 45-53), and, ultimately, to induce her to sell those interests to Defendants (R. 64, ¶ 149, R. 69, ¶ 160, R. 72, ¶¶180, 186).

The Complaint alleges that Defendants diminished the value of Plaintiff's interests by (a) forming All County Building Supply & Maintenance Corp. ("All County") as a middleman between Trump entities operating the cooperative apartment buildings that were the subject of Plaintiff's interests and suppliers of appliances and other items for those apartments, which marked up the price of the products to the operating entities (R. 32, ¶¶ 11-12, R. 46-47, ¶¶ 69-72), (b) charging "exorbitant management fees, consulting fees and salaries" through Trump Management, Inc. ("Trump Management") and its successor, Apartment Management Associates Inc. ("Apartment Management"), in which Defendants held

interests (R. 33 ¶ 13, R. 47-48, ¶¶ 73-75), and (c) causing the companies in which Plaintiff had an interest to make loans to other companies Defendants owned and controlled, which allegedly contained no terms of repayment, and failed to impose an obligation to pay interest and/or charged preferential rates not available through an arm's length transaction (R. 33, ¶ 14, R. 48, ¶ 76) (collectively, referred to in the Complaint as the "Grift"). The Complaint alleges that the Grift was baked into the financial statements, tax returns and other documents which Defendants provided to Plaintiff at the time she sold her interests to Defendants (R. 37, ¶ 28, R. 59-60, ¶¶ 126-128, R. 65, ¶ 155).

No particulars are provided concerning the timing within the twenty-year period (1981-2001) in which this "misconduct" is alleged to have occurred, except that Plaintiff acknowledges that All County was formed in 1992 (R. 46, ¶ 69), and cites the 1992, 1993, 1997 and 1998 financial statements of Sunnyside Towers, a division of one of the Midland entities (R. 52, ¶¶ 92-93), and 1993 cash disbursement schedules for Highlander Hall (another Midland entity) (R. 53, ¶ 96), as purportedly misrepresenting expenses for repairs and maintenance because of All County's markup. The Complaint also alleges that "in 1990, 1993, 1997, and 1998, Coronet Hall Property, a division of Coronet Hall, Inc. (one of the Midland entities) was owed a total of $1,723,640 in non-interest-bearing advances without definite terms as to repayment" (R. 48, ¶ 76).

Contrary to Plaintiff's claimed ignorance of this alleged fraud,[5] her counsel Mr. Barnosky questioned Robert at length concerning the operations of All County and Apartment Management in a proceeding to probate Fred's will commenced by Defendants as Fred's executors following Fred's death on June 25, 1999. Robert testified at length concerning the "mark up" which All County charged:

- All County is "a purchasing company set up to acquire goods, services, sort of combining the purchasing power of the whole company. Rather than the system of having each individual building order individually its particular building needs, we started buying on a wholesale basis, and then – from vendors, from suppliers, and then selling that off to the entities" (R. 282-283);

- All County was owned by "my two sisters, my brother, myself, and my cousin John Walter" (R. 283);

- One of All County's purposes was to "mark up and generate a profit on its own" (R. 283-284);

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[5] Plaintiff argues that she did not discover the facts concerning her fraud allegations until The New York Times published an investigative report on Donald Trump's rise to power in the real estate industry (Brief at 38-39, R. 64, ¶¶145-146). See Trump Engaged in Suspect Tax Schemes as He Reaped Riches From His Father, David Barstow, Susanne Craig and Russ Buettner, New York Times, October 2, 2018 (R. 107-145), https://www.nytimes.com/interactive/2018/10/02/us/politics/donald-trump-tax-schemes-fred-trump.html. As detailed herein, Plaintiff was fully apprised of those facts in the deposition testimony of her uncle, Robert, and the documents she received prior to executing the parties' settlement agreement and the releases.

- To the extent that the markup was created at a level outside of [Fred's] entity, it could "possibly" have the effect of decreasing [Fred's] estate (R. 284);

- Robert "probably" initiated the idea of All County, "in consultation with our lawyers [and] with our outside auditors" and John Walter and Fred Trump were involved as well (R. 285, 293-295);

- By forming All County we "decided to take advantage of" the "large combined purchasing power" of all of the individual buildings (R. 286-287, 295); and

- "I'm not sure [that even with All County's markup] the Trump entities wound up paying more. The purchasing power, as I said, more than offset in many cases, if not all cases, certainly many of the cases, offset the markups that All County was receiving" (R. 291).

Robert also testified concerning Apartment Management, testifying that "it's in the business of managing the individual developments" (R. 287), and indicating that it had taken over what Trump Management had done (Id.). Mr. Barnosky stated that he had seen "lots of checks going out to Trump Management from the various [Trump family] entities" (R. 280), and that he had "records of all these entities for the three years [prior to Fred's September 18, 1991 Will]" (R. 281), and that "I can assure you there are checks during the two-year period [September 1991 – September 1993] to All County Building Supply" (R. 282). Mr. Barnosky demanded production of "the documents on All County Management [sic], its shareholders' agreement, and any contractual arrangements between entities in

which [Fred] had an interest" during the period from September 1988 through September 1993 (R. 297-298).

The Complaint also alleges that Defendants devalued Plaintiff's Midland Interests and Land Interests by engaging the services of Robert Von Ancken (a well known and highly respected appraiser)[6] to provide fraudulent appraisals which "grossly understate the value of [Plaintiff's] interests" (R. 34, ¶16) (referred to in the Complaint as the "Devaluing") (R. 33, ¶ 15, R. 34, ¶ 16). The Complaint alleges that Defendants obtained such appraisals to devalue her interests over the years and also to induce her to sell them her interests at an undervalued price (R. 34, ¶¶ 16-17, R. 48-49, ¶¶ 79-80, 83-84, R. 61, ¶¶ 132-133). Plaintiff, of course, was free to obtain her own appraisals of the properties held by the relevant entities, but never did so.

Plaintiff's sale of her Midland Interests and Land Interests to Defendants was part of a global settlement entered into by the parties on April 10, 2001 (the "Settlement") (R. 237-262), whereby, in return for the payment to Plaintiff of $3,540,754 (R. 252-253), she also (a) withdrew her objections to the admission of Fred's Will to probate (R. 245), (b) discontinued a Supreme Court action which she and her brother Fred C. Trump III ("Fred III") had brought to enjoin the

---

[6] See https://en.wikipedia.org/wiki/Robert_Von_Ancken.

Defendants from discontinuing medical benefits for Plaintiff and Fred III, and Fred III's son, William (R. 246), and (c) received outright the principal and accrued income of an inter-vivos trust which Fred had established for her benefit (R. 251-252).

The parties made clear in their settlement agreement (the "Settlement Agreement") (R. 237-262) that the settlement was intended to be on a "global basis in order to resolve all of their differences pertaining to the two (2) probate proceedings[7]; the insurance case; partnership and corporate interests [Plaintiff's and Fred III's Midland Interests and Land Interests]; as well as their interests in two (2) inter-vivos trusts established by [Fred] as the Settlor" (R. 241).[8] Similarly, the releases which Plaintiff signed in favor of Judge Barry and the other Defendants pursuant to the Settlement Agreement (the "Releases") expressly provide that:

> This RELEASE is being executed in accordance with the terms and conditions set forth in detail within the Agreement and Stipulation signed by the parties pertaining to the "global settlement" of all their differences (R. 96-99).

[7] Fred's wife, Mary Anne Trump's Last Will and Testament was also offered for probate.

[8] The second inter-vivos trust was for the benefit of Fred III.

The Releases extend to every claim, known or unknown, which Plaintiff "ever had, now [has] or hereafter can, shall or may, have for, upon, or by reason of any matter, cause or thing whatsoever" (Id.).

Plaintiff also expressly represented in the Settlement Agreement that "[t]he execution of this [Settlement Agreement] is being completed on a voluntary basis and [she] represents that [she was] under no compulsion to execute this agreement" (R. 254), and that she "had sufficient opportunity to review this [Settlement Agreement] with her attorney and … execute[d] [it] after due consideration and of … her own volition" (Id.).

Proceedings to Date

Plaintiff filed her Complaint on September 24, 2020, nearly twenty years after she signed the Releases and the Settlement Agreement (R. 29). Both Judge Barry and former President Trump and Robert's executors moved to dismiss on the grounds that all of the claims asserted in the Complaint were time-barred and barred by the Releases (R. 315, 320, 321, 355, 360, 361). Defendants also moved to dismiss Plaintiff's claim for breach of fiduciary duty to the extent Plaintiff predicated her claim on the alleged actions of Defendants prior to the Settlement, on the ground that Plaintiff lacks standing to assert such derivative claims because she was no longer a shareholder or member of the entities allegedly damaged by Defendants' actions (R. 323, 363). Defendants further argued that Plaintiff's pre-settlement

claims for fraud, fraudulent concealment and negligent misrepresentation must be dismissed because the Complaint failed to allege that Plaintiff justifiably relied on Defendants' alleged misrepresentations and concealment (R. 325, 365). Defendants also sought dismissal of Plaintiff's claims purporting to allege a civil conspiracy (R. 326, 366).

By Decision and Order entered November 14, 2022 (R. 4), the Hon. Robert R. Reed dismissed the Complaint in its entirety, holding that the Releases barred Plaintiff's claims in this action. Following the Court of Appeals' controlling decision in Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V., 17 N.Y.3d 269 (2011), Justice Reed properly held that the Releases' sweeping language – releasing Judge Barry and the other Defendants from "all actions" and "causes of action" which Plaintiff "ever had, now [has] or hereafter can, shall or may, have for, upon, or by reason of any matter, cause or thing whatsoever" (R. 96-99) − clearly demonstrated the parties' intent that Plaintiff was releasing the Defendants from all unknown as well as known claims (R. 15-17, see Point I.A., infra).

Justice Reed also properly rejected Plaintiff's claim that Defendants' termination of health coverage for her nephew constituted "overreaching or unfair circumstances" (R. 20-21). Plaintiff made no showing that Defendants were required to continue that coverage and Plaintiff, who is not the infant's parent, lacks

standing to make that claim. Moreover, Plaintiff's receipt of over $3 million in consideration for executing the Releases, her representation by experienced counsel, and her express representations that she entered into the Settlement of her own volition, without any compulsion, and that she had sufficient time to review the Settlement Agreement with her counsel and that she executed it after due consideration, preclude any claim of overreaching or unfairness (Point I.B., infra).

Having dismissed the Complaint based on the Releases, the Court did not reach the issue of its timeliness, but as shown in Point II, infra, dismissal on that ground is also warranted because the Statute of Limitations bars Plaintiff's claims. Although not necessary because of these dual grounds for affirmance, Judge Trump also addresses Plaintiff's arguments concerning Defendants' actions insofar as they predate the Settlement (Points III and IV) and purport to allege a claim for civil conspiracy (Point V).

ARGUMENT

POINT I

PLAINTIFF'S CLAIMS ARE BARRED BY THE RELEASES

A. The Clear and Unambiguous Language in the Releases Bars Plaintiff's Claims

It "is well established that a valid release constitutes a complete bar to an action on a claim which is the subject of the release." Global Minerals and Metals Corp. v. Holme, 35 A.D.3d 93, 98 (1st Dep't 2006), lv. denied, 8 N.Y.3d 804 (2007);

accord, Matter of Cheng Ching Wang, 114 A.D.3d 939, 940 (2d Dep't 2014). If "the language of a release is clear and unambiguous, the signing of a release is a 'jural act' binding on the parties," Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V., 17 N.Y.3d 269, 276 (2011) (quoting Booth v. 3669 Delaware, 92 N.Y.2d 934, 935 (1998)), which "will be enforced as a private agreement." Appel v. Ford Motor Co., 111 A.D.2d 731, 732 (2d Dep't 1985).

In Centro Empresarial Cempresa S.A., the plaintiffs, as here, alleged that the defendants had fraudulently induced them to sell their minority investment in a telecom company (which they owned through a limited liability company). The plaintiffs executed a release in connection with the sale releasing the defendants from:

> all manner of actions … whatsoever … whether past, present or future, actual or contingent, arising under or in connection with the Agreement Among Members and/or arising out of … the ownership of membership interests in [TWE]….

17 N.Y.3d at 274. The Court of Appeals held that "the phrase 'all manner of actions' in conjunction with the reference to 'future' and 'contingent' actions, indicates an intent to release defendants from fraud claims, like this one, unknown at the time of contract." Id. at 277.[9]

[9] Contrary to Plaintiff's erroneous contention (Brief at 33-34), the Court of Appeals reached this conclusion independent of the existence of a second release executed by the parties, which was inapplicable to the plaintiff's claims. 17 N.Y.3d at 277.

The Releases Plaintiff signed are even broader, releasing Defendants from:

> all actions … whatsoever, in law, admiralty or equity, which against the RELEASEE … the RELEASOR ever had, now have or hereafter can, shall or may, have for, upon, or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the day of the date of this RELEASE (R. 96-99).

As in Centro Empresarial Cempresa S.A., the words "hereafter can, shall or may, have" contemplate future actions and unknown fraud claims. Courts repeatedly have held general releases containing similarly broad language to bar claims for fraudulent inducement, whether or not the release specifically referred to "unknown" claims. See, e.g., Engel v. Deutsche Bank National Trust Co., 116 A.D.3d 915 (2d Dep't 2014); Silverstein v. Imperium Partners Group, LLC, 126 A.D.3d 593 (1st Dep't 2015).

Plaintiff's argument that the Releases were intended to resolve only her probate contest and her Supreme Court action (Brief at 30-32) is baseless. The Settlement Agreement specifically outlined the matters that were being settled, including separate sections for Plaintiff and her brother's Midland Interests and their Land Interests, and states the consideration each was receiving for their interests (R.

In rejecting the plaintiff's claim that the second release, which excluded fraud claims, should be read into the applicable Members Release, the court merely pointed out that "[i]f anything, the explicit exclusion of fraud claims from the [second release] suggests that the Members Release is not so limited." Id.

245-253, ¶¶4-16). Indeed, under the section headed "Consideration," Paragraph 16 specifically states that "The 'Proponents' agree to pay the 'Objectants/Respondents' the following in consideration of a 'global settlement' of all of their differences" (R. 252) (emphasis added), and the Releases state that they are being executed in furtherance of that "global settlement" (R. 96-99). That Defendants were released in their capacities as "partners, officers and directors in the Midland Associates Group" (R. 96) – in which Plaintiff held her Midland Interests, as well as "officers and directors" of Apartment Management and Trump Management (Id.), also demonstrates Plaintiff's intention to release Defendants from all of her present claims.

Equally meritless is Plaintiff's argument (Brief at 35-36) that because the parties carved out from the Releases their respective obligations under the Settlement Agreement, that somehow narrows the scope of the Releases. Every release that is executed in connection with a settlement agreement, if properly drafted, excludes the parties' obligations under that agreement. See Kafa Investments, LLC v. 2170-2178 Broadway, LLC, 39 Misc.3d 385, 389-90 (Sup. Ct. New York Co. 2013), aff'd, 114 A.D.3d 433 (1st Dep't), lv. denied, 24 N.Y.3d 902 (2014).

The fact that Plaintiff signed a separate release in connection with her 1976 Trust (Brief at 36-37) also does not limit the broad scope of the Releases. It is

customary, particularly where a trustee provides an informal accounting, to obtain a receipt and release agreement in connection with the accounting, particularly where, as here, Plaintiff's trust was being terminated and its principal distributed to her.

Plaintiff's cases are not to the contrary. In Desiderio v. Geico General Ins. Co., 107 A.D.3d 662, 663 (2d Dep't 2013), the release "did not contain [the] broad, all encompassing language" that the Releases contain here, and in Linn v. New York Downtown Hospital, 139 A.D.3d 574, 575 (1st Dep't 2016), the release was "unambiguously limited to causes of action that plaintiffs had against [defendant] Cabrini," not other unnamed tortfeasors Similarly, in Giuffre v. Prince Andrew, 579 F.Supp. 3d 429 (S.D.N.Y. 2022), the defendant, who claimed to benefit from a prior settlement agreement between the plaintiff and the infamous Jeffrey Epstein, was not named as a releasee in that agreement. In C & A Seneca Construction LLC v. G Builders LLC, 67 Misc.3d 1241(A) (Sup. Ct. New York Co. 2020), it was obvious, based on the language of two lien waivers previously signed by the plaintiff and the parties' past practice, that a "final lien waiver," which had similar language, was intended only as a waiver to the extent that the plaintiff received a payment at the time of its execution, and not a waiver of its right to further payment under the parties' construction agreement.

That Defendants are alleged to have been co-shareholders or co-members with Plaintiff in Midland or are otherwise alleged to have been acting as

fiduciaries when entering into the Settlement Agreement, does not affect the enforceability of the Releases. It is well-settled that where, as here, "the fiduciary relationship is no longer one of unquestioning trust," Centro Empresarial Cempresa S.A., supra, 17 N.Y.3d at 278, a sophisticated principal or one represented by sophisticated counsel, is able to release her fiduciary from all claims. Id.; accord Arfa v. Zamir, 17 N.Y.3d 737, 738 (2011); Pappas v. Tzolis, 20 N.Y.3d 228, 233 (2012). When Plaintiff agreed to relinquish her Midland Interests and her Land Interests, the parties were already in an adversarial relationship – she had filed her objections contesting Fred's Will and had brought her action against Defendants to require them to reinstate insurance coverage for Fred III's son, William, which she alleges was discontinued out of spite by the Defendants. In addition, her Complaint alleges that Robert attempted to force her to sell her interests, by threatening that Defendants would put Midland into bankruptcy and put her in a position where she would pay income taxes for the rest of her life (R. 56-57, ¶ 112), without receiving any further income. This Court in Arfa v. Zamir, 76 A.D.3d 56, 60 (1st Dep't 2010), aff'd, 17 N.Y.3d 737 (2011), found that a similar threat to damage a co-shareholder's interest evidenced such an adversarial relationship.

Moreover, in the adversarial context, a "heightened degree of diligence [was] required of [Plaintiff] and [she cannot] reasonably rely on [Defendants'] representations without making additional inquiry to determine their accuracy" Arfa,

76 A.D.2d at 60 (quoting Global Minerals and Metals Corp. v. Holme, supra, 35 A.D.3d at 100). Plaintiff did not exercise such diligence, notwithstanding that she was plainly on notice, through her counsel's questioning of Robert concerning the "fraud" of which she now complains. "There is no prerequisite to the settlement of a fraud case that the (fiduciary) defendant must come forward and confess to all his wrongful acts in connection with the subject matter." Centro Empresarial Cempresa S.A., supra, 17 N.Y.3d at 278.

The Releases are also enforceable under the well-settled rule that "a party that releases a fraud claim may later challenge the release as fraudulently induced only if it can identify a separate fraud from the subject of the release." Centro Empresarial Cempresa S.A., supra, 17 N.Y.3d at 276. Plaintiff concedes that she cannot make such a showing, as she disclaims any reliance on her allegations of fraud as a basis for voiding the Releases (Brief at 22-23).

B. Plaintiff Failed to Raise a Triable Issue that the Releases Were Not "Fairly and Knowingly Made"

Justice Reed properly rejected Plaintiff's attempt to avoid dismissal under those cases which have required a factual determination whether a release was "fairly and knowingly made" (R. 20-21). This line of cases, including the Court of Appeals' oft-cited decision in Mangini v. McClurg, 24 N.Y.2d 556 (1969), has no application here. The vast majority involve personal injury cases where an insurance adjuster or other agent of the defendant pressures the injured plaintiff to sign a

release before he or she has even had a chance to recover, and for a paltry consideration. See, e.g., Paulino v. Braun, 170 A.D.3d 506 (1st Dep't 2019); Gibli v. Kadosh, 279 A.D.2d 35, 40-41 (1st Dep't 2000); Haynes v. Garez, 304 A.D.2d 714 (2d Dep't 2003); Powell v. Adler, 128 A.D.3d 1039 (2d Dep't 2015).

In most cases, the release is procured without the opportunity for the plaintiff to confer with counsel. See, e.g., Paulino v. Braun, supra; Curry v. Episcopal Health Services, 248 A.D.2d 662 (2d Dep't 1998); Fleming v. Brooklyn Heights R.R. Co., 95 App. Div. 110 (2d Dep't 1904) The inequity of the release's procurement is magnified by the fact that the plaintiff has suffered an injury which is unknown at the time of the plaintiff's execution of the release and which is orders of magnitude greater that the injury known to the parties at the time of the release. Mangini, supra.

By contrast, where the injured party has had time to consult with counsel, assess the extent of his or her injuries, has read and considered the terms of the release, and has received a substantial consideration in return for its execution, the release will be enforced in accordance with its terms, notwithstanding that the plaintiff's later claimed injuries were unknown at the time of the release's execution. Viskovich v. Walsh-Fuller-Slattery, 16 A.D.2d 67 (1st Dep't 1962), aff'd, 13 N.Y.2d 1100 (1963); Yehle v. New York Cent. R.R. Co., 267 App. Div. 301 (4th Dep't 1943), aff'd, 295 N.Y. 874 (1946). The releasor's retention of an attorney to negotiate the

release is "a highly significant circumstance." Mangini, supra, 24 N.Y.2d at 568. As stated by this Court in Viskovich, supra:

> Where the terms of a release are agreed upon after negotiation and deliberate bargaining, and the injured party is not disadvantaged by dealing directly with the alleged tort-feasor, but on the contrary is represented by competent counsel who explains the meaning and effect of the general release, and the claimant is not inhibited by such mental deficiency as to be incapable of an intelligent comprehension and understanding of the meaning of his act in executing the instrument, it will be held that he freely assented to and voluntarily entered such agreement.

16 A.D.2d at 70.

Here, the terms of the Settlement Agreement and Releases were negotiated extensively by counsel for the Defendants and Plaintiff's counsel, Mr. Barnosky, who is one of New York's premier trusts and estates litigators.[10] Plaintiff expressly disclaimed any overreaching or unfairness in the Settlement Agreement, where she stated that "[t]he execution of this [agreement] is being completed on a voluntary basis and [she] represents that [she was] under no compulsion to execute this agreement" (R. 254). She also agreed that she "had sufficient opportunity to review [the Settlement Agreement] with her attorney and … executed [it] after due

[10] Mr. Barnosky is a leading lawyer in the New York Trusts and Estates litigation bar, a fellow of the American College of Trusts and Estates Counsel ("ACTEC"), and has consistently been rated as a "Super Lawyer."
https://www.farrellfritz.com/attorney/john-j-barnosky/#recognition

consideration and of … her own volition" (Id.). Having acknowledged that she was not under any compulsion to execute the Settlement Agreement and Releases, she cannot now claim their enforcement should be precluded by overreaching or unfairness. Kazimierski v. Weiss, 252 A.D.2d 481, 481 (2d Dep't 1998) ("The appellant's claim that he signed the agreement while under duress is further rebutted by his acknowledgments to the contrary in the agreement itself"); Weinstein v. Weinstein, 109 A.D.2d 881 (2d Dep't 1985) ("Plaintiff's allegations that she was unaware of her rights and that she signed the agreement under duress are rebutted by the agreement's direct acknowledgments to the contrary").

The present case is also distinguishable because the consideration Plaintiff received for her execution of the Releases was substantial – not the $10 per Release that Plaintiff speciously claims (Brief at 25-26). She was paid $1,700,000 as consideration for her Midland Interest (R. 253), and $100,000 for her Land Interest (Id.).[11] She was also paid $962,500 as consideration for her withdrawal of her objections in Fred's probate proceeding (R. 252), and received the full principal amount and accrued income of her 1976 trust ($778,254) (R. 253), which was otherwise distributable to her solely at the trustees' discretion (R. 180).

[11] Given that the leases for Plaintiff's Land Interests were 99 year leases commencing in 1950 and that the tenants had the automatic right to renew the leases for another 99 years (to 2148) (R. 275-276), it is absurd for Plaintiff to claim (R. 60 ¶130, R. 62, ¶135) that her reversionary interests had any substantial value.

Plaintiff's wholly conclusory allegation that Mr. Barnosky's representation of her was inadequate (R. 57, ¶ 114, Brief at 26-27) is insufficient to raise any triable fact issue as to the fairness of her execution of the Releases, particularly given his status as an outstanding litigator.[12] Putnam v. Kibler, 210 A.D.3d 1458, 1462-1463 (4th Dep't 2022) (bare legal conclusion that attorney representing plaintiff had conflict of interest is insufficient to raise issue of fact as to validity of release as not "fairly and knowingly made").

Moreover, Plaintiff herself is very sophisticated. She holds graduate degrees in clinical psychology, has taught graduate courses in psychology and served as the CEO of The Trump Coaching Group, a New York-based life coaching company she founded. She is also a successful author.[13] On top of that, she was at all times represented by sophisticated and esteemed counsel. Indeed, in Estate of Mautner v. Alvin H. Glick Irrevocable Grantor Trust, 2019 WL 6311520 (S.D.N.Y. 2019), the Court applied the principles enunciated in Centro to bar a real estate

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[12] Plaintiff's attempt to discredit Mr. Barnosky is specious. She alleges no facts supporting her allegation that he "did not keep [Plaintiff] fully informed of material information and pursued a settlement without ensuring that he and his client had complete and accurate information" (R. 57, ¶114, see also R. 35, ¶20). In Bergrin v. Eerie World Entertainment, LLC, 2003 WL 22861948 (S.D.N.Y. 2003) (Plaintiff's Brief at 27), by contrast, abundant evidence was submitted that a bankruptcy debtor's counsel's interests conflicted with those of the debtor.

[13] https://www.forbes.com/sites/jemimamcevoy/2020/06/15/whos-mary-trump-heres-everything-we-know-about-the-presidents-niece/?sh=78ec564f474e

investor from claiming fraudulent inducement where he was represented in the negotiations for the sale of his interest by a real estate attorney "who ha[d] extensive experience both in NY and NJ." Id. at *5. See also Board of Managers of NV 101 N 5th Street Condominium v. Morton, 39 Misc.3d 1212(A), at *13 (Sup. Ct. Kings Co. 2013) (condominium board members were not unsophisticated where they managed a luxury building containing 40 units and had access to legal counsel).

Plaintiff's claim that Defendants placed her "in profoundly unfair circumstances" by terminating Fred III's son, William's health insurance (Brief at 1), rings hollow given Plaintiff's agreement to its termination in the Settlement Agreement and the fact that she did not even demand any separate consideration for acceding to such termination (R. 246-247, 252). Moreover, William was not Plaintiff's son, and Fred III has not joined in this litigation.

To the extent that Plaintiff relies on Robert's alleged threat that Defendants "would bankrupt Midland[14] and 'leave you paying taxes on money you don't have for the rest of your lives'" (R. 57), she is attempting to aver duress as a basis for voiding the Release (although she now disclaims that she is doing so – Brief at 23). Her claim is barred because she ratified the Release by accepting her

[14] Contrary to Plaintiff's repeated misleading statements (Brief at 1-2 7, 21), there is no allegation in her Complaint that Defendants threatened to bankrupt Plaintiff personally.

payments under the Settlement Agreement and failed to object on grounds of duress for nearly twenty years. As this Court held in Allen v. Riese Organization, Inc., 106 A.D.3d 514, 517 (1st Dep't 2013):

> Assuming arguendo that issues of fact exist as to duress and overreaching, plaintiffs are nevertheless barred from challenging the releases on those grounds because they ratified the releases. Ratification occurs when a party accepts the benefits of a contract and fails to act promptly to repudiate it. Thus, a plaintiff cannot claim that he or she was compelled to execute an agreement under duress while simultaneously accepting the benefits of the agreement [citations omitted].

She cannot avoid a failed defense of duress by recharacterizing it as "unfairness" and "overreaching."[15]

Moreover, as discussed in Point II, this is clearly not a case of unknown injury comparable to the unknown personal injuries in Mangini and other cases. Plaintiff was fully aware of the alleged All County and Apartment Management "Grift" which lies at the heart of her claims before entering into the Settlement Agreement and executing the Releases. She agreed with her counsel that the Defendants were "lying to us" and nevertheless executed the Settlement Agreement and Releases without further pursuing the matter.

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[15] Plaintiff obviously did not view this alleged "threat" as a serious threat to her financial well-being. She alleges that the threat was made in October 1999 (R. 35, ¶19), and she did not settle with Defendants until eighteen months later in April 2001 (R. 237-262).

The Releases also should be enforced because "strong policy considerations favor the enforcement of settlement agreements." Rocanova v. Equitable Life Assurance Society, 83 N.Y.2d 603, 616 (1994). Such interests "are advanced only if settlements are routinely enforced rather than becoming gateways to litigation." Rebell v. Trask, 220 A.D.2d 594, 597 (2d Dep't 1995). As the Court of Appeals held in Centro Empresarial Cempresa S.A., supra:

> A release "should never be converted into a starting point for … litigation except under circumstances and under rules which would render any other result a grave injustice."

17 N.Y.3d at 276 (quoting Mangini, 24 N.Y.2d at 563). Plaintiff did not make such a showing here.

Plaintiff's cases are not to the contrary. In Johnson v. Lebanese American University, 84 A.D.3d 427 (1st Dep't 2001), the defendant employer claimed that an employee's release of "all actions or rights that [he] may ever have against the [defendant] in respect of my abovementioned service," barred the employee's allegedly unknown claim for employment discrimination. The court declined to grant the employer summary judgment because the employee was not represented by counsel, and there was obvious unfairness, given that the modest consideration he was paid for the release was nothing more than the amount he was owed in employee benefits and compensation. The employer never challenged the

employee's averment that he understood that he was only releasing his right to challenge the amount of that compensation and those benefits.

In Bloss v. Va'ad Harabonim, 203 A.D.2d 36 (1st Dep't 1994), the defendants deceived the plaintiff, the owner of a retail kosher butcher business, into releasing all claims against them arising from their removal of her kosher certification, by falsely promising that they would assist her in obtaining alternative certification. Far from assisting her, they opposed her efforts to be certified by another rabbinical organization and pressured other supervisory organizations to deny her certification. The plaintiff was summoned to sign the release minutes before the onset of the Sabbath and was presented with only two choices which were economically devastating to her, she could either lose her certification or sell her store within a matter of weeks, and was given only a weekend to make her decision. The present case is plainly distinguishable, because Plaintiff acknowledged that she had plenty of time for deliberation, she was paid handsomely in exchange for the Releases, and she disclaims that she was fraudulently induced into signing the Releases (Brief at 21, 22-23).

Jonathan S. v. Benjamin, 193 A.D.3d 1003 (2d Dep't 2021) and Storman v. Storman, 90 A.D.3d 895 (2d Dep't 2011), are also inapposite. Jonathan S. involved only the construction of a release, which by its terms was intended to cover only such persons who were insured through the defendant hospital. No issue

was raised as to the fairness of the release. Likewise, in Storman, the issue before the Court was whether the parties intended plaintiff's claims of fraudulent inducement to be covered by the release. Although the court found that plaintiff's allegations were sufficient to support a possible finding that the release was signed under circumstances which indicate unfairness, the court's finding was based on the plaintiff's allegations of fraud, which Plaintiff has expressly disavowed as a basis for a finding of unfairness here (Brief at 22-23).

This case is also plainly distinguishable from Paulino v. Braun, supra, where the plaintiff was repeatedly pressured by an insurer's claim specialist to execute a release while he was still recovering from surgery and unable to work, and the consideration he received was far less than the fair value of his claims. Here, Plaintiff was represented by skilled counsel in the parties' negotiations concerning the Settlement, she had ample time to consider whether she should enter into the Settlement Agreement and Releases, and received a substantial consideration which was expressly spelled out in the Settlement Agreement. She averred no facts which justify the conclusion that her execution of the Releases was the product of overreaching or unfairness.

POINT II

PLAINTIFF'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

A. Plaintiff's Knowledge of the Existence and Operation of All County and Apartment Management Placed Her on Inquiry Notice of Her Fraud Claims

Under CPLR § 213(8), the time within which an action alleging fraud must be commenced "shall be 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." A fraud claim accrues upon the "commission of the fraud." See, e.g., Lefkowitz v. Appelbaum, 258 A.D.2d 563 (2d Dep't 1999) (a "cause of action based upon actual fraud must be commenced within six years of the commission of the fraud, or two years from the date the fraud could reasonably have been discovered, whichever is later").

Where, as here, a claim is made that a person was fraudulently induced to enter into a contract, the time of the "commission of the fraud" is the time the person entered into the agreement. Carbon Capital Management, LLC v. American Express Co., 88 A.D.3d 933, 939 (2d Dep't 2011) (fraud claim accrued at time plaintiff entered into contract with investment company in reliance on defendant's alleged misrepresentations); Squitieri v. Trapani, 2012 WL 8677707 (Sup. Ct. Westchester Co. 2012), aff'd, 107 A.D.3d 688 (2d Dep't), lv. denied, 22 N.Y.3d 852 (2013) (claim that plaintiff was fraudulently induced to enter into agreement to swap

interests in properties with defendant accrued on date of agreement); Goldberg v. Manufacturers Life Ins. Co., 242 A.D.2d 175 (1st Dep't), lv. dismissed in part and denied in part, 92 N.Y.2d 1000 (1998) (claim that insurer misrepresented premium payment terms of insurance policy accrued on date plaintiffs purchased policy).

The fraud is also held to have been committed when the plaintiff is alleged to have parted with his or her property as a result of the defendant's misrepresentations. See, e.g., D. Penguin Brothers Ltd. v. City National Bank, 158 A.D.3d 432 (1st Dep't 2018) (fraud cause of action accrued when plaintiff was induced to provide $1.5 million investment based on defendants' misrepresentations).

Here, Plaintiff's fraud claims accrued, at the latest on April 10, 2001, the date on which she entered into the Settlement Agreement. To the extent that she is attempting to assert fraud claims based on the Defendants' actions during the twenty-year period before she signed the Settlement Agreement, those claims are time-barred because they accrued even earlier than April 10, 2001.

On a motion to dismiss a fraud claim based on CPLR 213(8)'s two-year discovery rule, "a defendant must make a prima facie case that a plaintiff was on inquiry notice of its fraud claims more than two years before it commenced the action." Epiphany Community Nursery School v. Levey, 171 A.D.3d 1, 7 (1st Dep't 2019). The "burden then shifts to the plaintiff to establish that even if it had

exercised reasonable diligence, it could not have discovered the basis for its claims before that date." Id.

Plaintiff does not -- and cannot -- dispute that her fraud claims are time-barred if she "had knowledge of facts from which the alleged fraud might reasonably be inferred," more than two years before she commenced this action (Brief at 40, citing Epiphany, 171 A.D.3d at 7). Accord Sargiss v. Magarelli, 12 N.Y.3d 527, 532 (2009); Brock v. Brock, 229 A.D.2d 457, 458 (2d Dep't 1996). Her "positive knowledge of [the alleged] fraud [was] not required." Watts v. Exxon Corp., 188 A.D.2d 74, 76 (3d Dep't 1993). She "need only [have been] aware of enough operative facts so that, with reasonable diligence, [she] could have discovered the fraud." Lucas-Plaza Housing Development Corp. v. Corey, 23 A.D.3d 217, 218 (1st Dep't 2005); accord Nazzaro v. Nazzaro, 2011 WL 1464122 (Sup. Ct. Suffolk Co.); Kelly v. Legacy Benefits Corp., 34 Misc.3d 1242(A), at *6 (Sup. Ct. New York Co. 2012). The "'legal rights that stem from certain facts or circumstances need not be known, only the facts or circumstances themselves.'" Id. (quoting Stone v. Williams, 970 F.2d 1043, 1049 (2d Cir. 1992)).

In applying these principles, courts repeatedly find claimants to be on inquiry notice where they have knowledge of the transactions later claimed to be fraudulent, and consistently reject arguments that only experts (or, as argued by Plaintiff here, journalists) could have pieced together the information. In Nazzaro

v. Nazzaro, supra, the plaintiff claimed that her husband fraudulently induced her to transfer assets into a limited partnership and family trust, thereby removing them from the marital estate. The court held that she was on inquiry notice of the alleged fraud, where the documents effecting the transactions, which had been executed ten years earlier, were sent to her attorney during the parties' divorce action. Plaintiff's claim that she did not understand the significance of the transfer documents until she engaged experts to review them, did not preclude a finding of inquiry notice.

Similarly, in Kelly v. Legacy Benefits Corp., the plaintiff alleged he was fraudulently induced into purchasing an interest in two life insurance policies due to life expectancy reports misrepresenting the mortality of the insureds. The court held that the plaintiff possessed sufficient facts to discover the alleged fraud when he received the life expectancy reports, because those reports were the subject of his fraud claim. "That he did not draw the precise inferences or connections is irrelevant because he possessed all the necessary facts upon which he now relies." 34 Misc.3d 1242(A), at *7; see also Avalon LLC v. Coronet Properties Co., 306 A.D.2d 62 (1st Dep't), lv. denied, 100 N.Y.2d 513 (2003) (fraud claims dismissed where plaintiff provided with copy of fraudulent assignment agreement and knew of payments made pursuant to the assignment, more than two years before commencing action); Gutkin v. Siegel, 85 A.D.3d 687 (1st Dep't 2011) (plaintiff investor in oil and gas drilling partnerships who claimed that defendants failed to disclose that the

partnerships would receive only a small percentage of the generated revenue, was on inquiry notice when he received quarterly drilling reports showing the exact percentage of net drilling revenue each partnership received).

Here, before signing the Settlement Agreement in 2001, Plaintiff had all of the documents and information she has today that form the basis of her allegations.[16] Robert testified at length in Fred's probate proceeding concerning the operations of All County, and the markup it charged to the Trump entities (see pp. 8-9, supra). Robert also confirmed in his testimony that Apartment Management charged management fees to the Trump entities (R. 287), an allegation which is at the heart of Plaintiff's claims. Her counsel's questioning of Robert put Plaintiff on notice of the alleged fraud she now claims. Lucas-Plaza Housing Development Corp. v. Corey, 23 A.D.3d 217 (1st Dep't 2005) (suit alleging fraud in connection with reissuance and defeasance of long-term tax-exempt bonds untimely where plaintiff's counsel had questioned defendants concerning the bonds' defeasance over ten years before bringing suit).

The Complaint acknowledges Plaintiff's receipt of numerous financial statements, at or before the settlement, which show charges made by All County to

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[16] Plaintiff's attempt to apply the standards applicable to a CPLR 3211(a)(1) dismissal based on documentary evidence (Plaintiff's Brief at 42) is erroneous. These standards do not govern the determination whether Plaintiff was on inquiry notice.

the buildings comprising her Midland Interests for "repairs and maintenance expenses," "painting apartments," "painting supplies," "janitorial supplies", "repair materials" and "plumbing supplies and repairs" (R. 52-53, ¶¶ 92-97). Whether Plaintiff understood or pieced together all of the information at the time is beside the point. Plaintiff plainly was on inquiry notice that All County charged the Midland and Land entities for expenses she now claims to be fraudulent. In the Settlement Agreement, she confirmed her receipt of the very same financial records she now claims are false and misleading (R. 248, ¶ 13; *see also* R. 59-60, ¶ 127).[17]

In addition, Plaintiff admits that, since signing the Settlement Agreement, she was in possession of or had control over the 19 boxes of records on which The New York Times based its investigation (R. 101-103, 148-152). She was perfectly free to examine those records, or to ask counsel to do so. Under similar circumstances, the courts have consistently held that the discovery exception to the six-year fraud statute is unavailable. See, e.g., Siegel v. Dakota, Inc., 173 A.D.3d 515 (1st Dep't 2019), lv. denied, 35 N.Y.3d 902 (2020) (no basis to apply two-year discovery provision to plaintiff's fraud claim against former co-op board members where "plaintiff admits he discovered this alleged new evidence by reviewing board

[17] To the extent Plaintiff claims she was defrauded by loans Defendants allegedly procured from her Midland entities (R. 33, ¶ 14, R. 48, ¶ 76), those loans were disclosed on the records she was provided (see R. 59-60, ¶¶ 126-127).

minutes from more than a decade ago that were available to him at that time"); Spinale v. Tag's Pride Produce Corp., 44 A.D.3d 570 (1st Dep't 2007) (summary judgment properly granted dismissing complaint alleging fraudulent inducement of sale of stock where "any documents that might have been necessary for plaintiff to discover the fraud alleged … were in his possession"); Leider v. Amalgamated Dwellings, Inc., 2009 WL 2984839 (Sup. Ct. New York Co.) ("it has been generally held that when the documents necessary for a claimant to discover the alleged fraud were in his possession, the discovery exception does not apply"); Rite Aid Corp. v. Grass, 48 A.D.3d 363, 364 (1st Dep't 2008) (corporation "had notice of operative facts that should have prompted further inquiry as to the … transaction, where the "key proof – financial records and internal company correspondence – had been in plaintiff's possession" since before the expiration of the two-year discovery period).

Plaintiff's admission that "we knew they were lying to us" (R. 151),[18] further supports the conclusion that she was on inquiry notice of her alleged fraud claims. Erbe v. Lincoln Rochester Trust Co., 3 N.Y. 2d 321 (1957), is inapposite because, in Erbe, the plaintiffs had only their suspicions that the estate's executors

[18] Plaintiff's argument that Mr. Barnosky was only referring to "the value of [Fred Trump's] estate" in the quoted passage (Brief at 48) is disingenuous. In the next sentence, Mr. Barnosky stated, "Besides, your grandfather's estate was only worth thirty million dollars" (R. 151). Obviously, the matters about which Plaintiff and her counsel thought Defendants were lying extended beyond the value of Fred's estate.

had fraudulently conspired with the defendant trust company to sell the estate's major stockholding at less than its actual value. Here, Plaintiff was specifically informed of the transactions that she now alleges were fraudulent.

The December 2003 New York Post's article reporting on Defendants' impending sale of Fred's properties for $600 million (R. 146-147), also establishes that Plaintiff was on inquiry notice of her fraud allegations. Given her allegation that she was told his estate was valued at "no more than thirty million dollars" (R. 68, ¶157(c)), this certainly was a red flag. See, e.g., Kislev Partners, LLP v. Sidley LLP, 2019 WL 2712898 (Sup. Ct. New York Co.), at *4 ("court may find that plaintiffs were on inquiry notice where there is information concerning the fraudulent acts available to the plaintiffs in the public domain").

Epiphany Community Nursery School v. Levey, supra, on which Plaintiff relies, is not to the contrary. Indeed, it supports a finding that Plaintiff was on inquiry notice. There were two allegations of fraud in Epiphany – first, that a nursery school owner's husband defrauded the school into selling its extracurricular programs to an entity he controlled at an unreasonably low price, and second, that he fraudulently transferred $5.9 million of the school's cash to him and his affiliates by manipulating the school's books. As here, the school argued that the purchase price for the extracurricular programs was based on a fraudulent valuation commissioned by the husband, which was "substantially inaccurate." The Court

held this claim to be time-barred because the wife, as the school's director, could have obtained her own appraisal at the time of sale. 171 A.D.3d at 7-8. Here, too, Plaintiff could have obtained her own appraisal of the value of her Midland and Land Interests before signing the Settlement Agreement, and her failure to do so renders her claims time-barred.

For the school's second fraud claim, which the Court did not dismiss on statute of limitations grounds, the nursery school alleged that the husband fraudulently concealed the transfers by designating them on the school's books as "loans," and "other receivables," and then offsetting the "loans" by falsely claiming that the school owed his affiliates monies for consulting services. Here, the facts are markedly different. The means by which Plaintiff claims she was defrauded were explicitly made known during Robert's deposition and in the documents she received. The alleged "fraud" was not concealed in any way.

In Norddeutsche Landesbank Girozentrale v. Tilton, 149 A.D.3d 152 (1st Dep't 2017), also relied on by Plaintiff, plaintiffs purchased notes issued by entities claiming to be collateralized debt obligation ("CDO") funds, when they were actually private equity funds. The Court merely held that certain representations made in the indentures governing the funds and their marketing materials, and in an investor conference call, were insufficient to put the plaintiffs on notice that the funds were not CDO funds. The gist of the alleged fraud, that the defendants were

using the funds to purchase controlling equity stakes in the companies to which the loans were made, was not disclosed in these materials and communications, much less any indication that the defendants were siphoning the value of these companies by taking excessive management fees. Thus, the holding in the case is both unremarkable and inapposite. Here, Defendants disclosed All County's markup and that the Defendants were charging the Trump entities management fees through Apartment Management – the crux of Plaintiff's claims.

That Defendants' counsel foreclosed Mr. Barnosky from more extensively questioning Robert concerning Plaintiff's Midland Interests during the deposition (Brief at 15-16, 45), does not vitiate inquiry notice. On the contrary, it should have signaled a need for further investigation. If a party "shuts [her] eyes to the facts which call for investigation, knowledge of the fraud will be imputed to [her]." Norddeutsche, supra, 149 A.D.3d at 159. Indeed, Mr. Barnosky elicited testimony from Robert that "once you established All County as the purchasing agent, … the purchases for all the [Trump] entities would have been through All County just as we're now seeing happened with Beach Haven" (R. 293). Armed with that knowledge, Plaintiff could have petitioned for an expansion of discovery in the probate proceeding or in a separate New York Supreme Court action, yet chose not to and then settled all her claims and potential claims.

Plaintiff's attempt to distance herself from the knowledge and actions of Mr. Barnosky (Brief at 49) is also unavailing. Plaintiff offers nothing more than speculation that Mr. Barnosky's interests conflicted with hers. No facts are pleaded which support Plaintiff's contention. Further, to avoid imputation of an agent's acts to his principal, the agent "must have totally abandoned his principal's interests and be acting entirely for his own or another's purposes," Center v. Hampton Affiliates, Inc., 66 N.Y.2d 782, 784-85 (1985); the "adverse interest" exception to the rule of imputation "cannot be invoked merely because [the agent] has a conflict of interest or because he is not acting primarily for his principal". Id. Plaintiff failed to allege, much less show, that Mr. Barnosky abandoned her interests and that he was acting entirely for his own or another's purposes.

B. Plaintiff Failed to Establish That She Could Not Have Discovered the Alleged Fraud with Reasonable Diligence

Plaintiff fails to meet her "burden of establishing that even with the exercise of reasonable diligence, [she] could not have discovered the basis for [her] claims, prior to [two years before the commencement of this action]." Epiphany Community Nursery School v. Levey, supra, 171 A.D.3d at 7; CIFG Assurance North America, Inc. v. Credit Suisse Securities (USA) LLC, 128 A.D.3d 607, 608 (1st Dep't 2015), lv. denied, 27 N.Y.3d 906 (2016). Having been alerted to the existence and operation of All County and Apartment Management in the Surrogate's Court litigation, Plaintiff could have investigated the impact on her

Midland Interests and Land Interests. Although the Surrogate's Court generally limits discovery in a probate proceeding to three years before the decedent's execution of his will and two years thereafter, an objectant may apply for an expansion of that period where fraud or undue influence are alleged. See In re Application of Radio Drama Network, 2022 WL 4366001, at *3 (Sur. Ct. New York Co.); 22 NYCRR §207.27. Plaintiff also could have pursued litigation in the Supreme Court. At the very least she could have secured her own appraisals of her interests, which could have revealed any alleged "devaluing." The key point is – she could have done more at the time, but did not. Her delay is fatal to her claim.

Plaintiff offers only conclusory allegations to the contrary (R. 69, ¶ 165, R. 71, ¶ 174), which are insufficient as a matter of law to carry her burden. See Lentini v. Lentini, 280 A.D.2d 330 (1st Dep't 2001) ("Plaintiffs' conclusory, unsubstantiated allegation that defendants' wrongdoing could not have been discovered until late 1996 fails as a matter of law in the face of evidence showing otherwise"). Tellingly, these allegations assert that "[Plaintiff] could not have discovered the true value of her Interests through the exercise of ordinary diligence or intelligence because Defendants, in furtherance of their fraud and with near-exclusive access to information, had siphoned value away from and misrepresented the value of her Interests for so long" (R. 69, ¶ 165, R.71, ¶ 174) (emphasis added). Yet, the very companies and mechanisms through which this "siphoning" allegedly

occurred were revealed to her during the probate litigation. Given the information she possessed, she cannot tenably claim that she could not have reasonably discovered the alleged fraud when she chose not to seek appraisals or conduct any further inquiry.

Further, Plaintiff's claim that Robert concealed the alleged All County fraud by testifying that that it generated a profit though its markup (Brief at 44), does not excuse Plaintiff from failing to pursue further investigation once she learned of the existence of the markup. As noted above, her "positive knowledge of [the alleged] fraud [was] not required." Watts v. Exxon Corp., 188 A.D.2d 74, 76 (3d Dep't 1993). She "need only [have been] aware of enough operative facts so that, with reasonable diligence, [she] could have discovered the fraud." Lucas-Plaza Housing Development Corp. v. Corey, 23 A.D.3d 217, 218 (1st Dep't 2005). It is undisputed that Plaintiff was aware of the "operative facts" concerning All County. Mr. Barnosky acknowledged at Robert's deposition that the Defendants' interposition of All County had the effect of decreasing the profits that Fred's entities would otherwise earn, downstreaming them instead to Defendants as the owners of All County (R. 284, 288-289, 295). The effect on the Trump entities in which Plaintiff held interests would obviously be identical.

Moreover, Plaintiff admits that she had access, for nearly twenty years, to the 19 boxes of Trump records she obtained during the probate litigation. Such

access precludes any claim that she could not have discovered the alleged fraud. See Siegel v. Dakota, Inc., 173 A.D.3d 515 (1st Dep't 2019), lv. denied, 35 N.Y.3d 902 (2020), and the other cases cited at pp. 35-36, supra. Plaintiff's argument that even The New York Times ("NYT") could not piece together the information without the need to consult with other sources (Brief at 52-53) is belied by a review of the NYT article (R. 107-145). To the limited extent the NYT focused on All County and Apartment Management (R. 112, 128-132), its reporters relied on the same documents and information Plaintiff possessed at the time of the Settlement Agreement – any interviews they conducted were mere embellishment. Indeed, the NYT quotes Robert's testimony (see section entitled "A Disguised Gift" − R. 128-129, 131). It required no special expertise for Plaintiff to have divined that All County was acting as a middleman between the Trump entities managing the properties in which she held her Midland and Land Interests and their vendors, and was exacting a markup in doing so. Moreover, it was plain to see that Apartment Management was receiving management fees for those properties.

There was also nothing mysterious about the loans that the Complaint alleges Defendants made to other companies they owned and controlled, which allegedly contained no terms of repayment, and failed to impose an obligation to pay interest and/or charged preferential rates not available through an arm's length transaction. These loans were fully recorded on the books of the relevant Trump

entities. Those records are contained in the 19 boxes which remained in control of her counsel for nearly 20 years.

Plaintiff also could have obtained appraisals for the properties which she now claims were devalued. As previously noted, in Epiphany Community Nursery School, this Court found that a nursery school's claim that the school owner's husband had defrauded the school into selling its extracurricular programs to an entity he controlled at an unreasonably low price, was time-barred because the owner failed to obtain her own appraisal of the value of the programs.

Trepuk v. Frank, 44 N.Y.2d 723 (1978), relied on by Plaintiff, is not to the contrary. In Trepuk, there was not a shred of evidence that the plaintiff, the decedent's stepdaughter, was on notice that the defendant executor's statement that the decedent' estate was insolvent, was false. Here, Plaintiff was aware, nearly twenty years before commencing this action, of the very acts of the defendants she now claims to be fraudulent. Moreover, there was nothing in Trepuk to indicate that the plaintiff and the defendant, her brother, were in an adversarial relationship, as Plaintiff alleges here.

All of the information that Plaintiff claims was unknown to her until 2018 and which forms the basis of her alleged fraud claims, was plainly made known to her and her lawyer twenty years ago. Plaintiff's then counsel had all the information she needed to pursue the present claims, or at the very least to pursue

more intensive discovery in Plaintiff's probate contest concerning All County's billing of the Trump operating entities and the management and consulting fees, and salaries, which Plaintiff now claims were fraudulent.

Moreover, as Plaintiff concedes in her book, at the time she signed the Settlement Agreement, both she and her lawyer believed they had reason to question the valuations Defendants were providing to them ("we knew they were lying to us" - R. 151), but made a conscious decision not to proceed further. The time by which Plaintiff should have discovered the "fraud" she alleges expired long ago, and all of her fraud claims are time-barred.[19]

C. Plaintiff's Claims for Breach of Fiduciary Duty and Aiding and Abetting Breach of Fiduciary Duty Are Time-Barred

Plaintiff's claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty are barred by CPLR §214(4)'s three-year Statute of Limitations, because Plaintiff seeks money damages only, and because Plaintiff's allegations of fraud are not essential for those claims. IDT Corp. v. Morgan Stanley

[19] The limitations periods for negligent misrepresentation claims are governed either by CPLR §214(4) (three years), Colon v. Banco Popular North America, 59 A.D.3d 300 (1st Dept 2009); CPLR §213(1) (six years with no discovery rule), Fandy Corp. v. Lung-Fong Chen, 262 A.D.2d 352 (2d Dep't 1999); or the fraud Statute of Limitations (CPLR §213(8)). Plaintiff's claim for negligent misrepresentation is untimely under either of these provisions. Plaintiff's fraud-based conspiracy claims, even if they stated a cause of action (which they do not), would be time-barred under CPLR §213(8).

Dean Witter & Co., 12 N.Y.3d 132, 139 (2009). Plaintiff's allegations supporting her claim for breach of fiduciary duty are premised on Defendants' alleged siphoning and devaluing of her interests (see R. 78, ¶ 226), which as we demonstrate in Point III, infra, are derivative claims[20] which she has no standing to assert. Moreover, by the time the parties entered into the Settlement Agreement, their fiduciary relationship had terminated (see Point I.A., supra). Even viewing Plaintiff's allegations in the most favorable light, her breach of fiduciary duty claims accrued no later than April 10, 2001, when she entered into the Settlement Agreement. The three-year statute expired over sixteen years ago.

Further, if §213(8)'s six-year Statute of Limitations applies, Plaintiff's breach of fiduciary duty claims are time-barred for the same reasons as her fraud claims.

POINT III

PLAINTIFF LACKS STANDING TO ASSERT ANY CLAIMS FOR BREACH OF FIDUCIARY DUTY OR AIDING AND ABETTING BREACH OF FIDUCIARY DUTY PRIOR TO THE APRIL 10, 2001 SETTLEMENT

Plaintiff claims that, for twenty years prior to relinquishing her Midland Interests in the April 10, 2001 settlement, Defendants engaged in various schemes

[20] If Plaintiff could assert these claims, they would be governed by CPLR §213(7)'s six-year time period, which applies to actions on behalf of a corporation against an officer, director or shareholder to recover damages for waste or an injury to property. No discovery period is provided for those claims.

to diminish the value of her investment, by siphoning profits from the two corporations and two limited liability companies in which he held her interests.[21] These include her allegations concerning the markups taken by All County as a middleman, Defendants' alleged charging of "exorbitant management fees, consulting fees and salaries" to these entities through Trump Management and Apartment Management, and by causing these entities to make loans to other Trump entities they controlled, at preferential rates or which did not require repayment.

All of these claims are derivative claims which do not accrue to a shareholder individually. As the Court of Appeals held in the leading case of Abrams v. Donati, 66 N.Y.2d 951, 953 (1985):

> [A]llegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually.

This rule applies to claims that such diversion and self-dealing caused the "diminution of the value of [a shareholder's] stock holdings." O'Neill v. Warburg, Pincus & Co., 39 A.D.3d 281, 281-282 (1st Dep't 2007).

> Because the heart of the alleged injury is the diminution in the value of shares of QoS Networks Limited, a start-up company in which plaintiffs were minority shareholders, the argument that plaintiffs are entitled to bring a direct

[21] Highlander Hall, Inc. and Coronet Hall, Inc., and Midland Associates, LLC and Park Briar Associates, LLC (see R. 43, ¶ 55).

> action against Warburg, the majority shareholder, is unavailing under New York Law.

Id. at 282. Accord Elghanian v. Harvey, 249 A.D.2d 206, 207 (1st Dep't 1998) ("The motion court correctly determined that plaintiff's claim for diminution of the value of his stock holdings in defendant Artra was a derivative cause of action belonging to that corporation and not to plaintiff individually"). The same rules apply to claims for self-dealing and diminution in value brought by members of a limited liability company. See, e.g., Jacobs v. Cartalemi, 156 A.D.3d 605, 608, (2d Dep't 2017); Warner v. Heath, 2020 WL 2095654, at *7 (Sup. Ct. New York Co.). These are precisely the claims that Plaintiff asserted here.

None of Plaintiff's cases are to the contrary. In Serina v. Lipper, 123 A.D.2d 34 (1st Dep't 2014), this Court held that "it is clear that Lipper's claim for damages based on the lost value of his holdings [in certain hedge funds which he had founded, against the accountants who had audited the funds' financial statements], is derivative." 123 A.D.2d at 41. Lipper's only claim that survived summary judgment was his claim arising from his personal retention of the accountants to prepare his tax returns and to provide him with personal financial advice, which allegedly resulted in his incurring a substantial gift tax liability, a claim based on an independent duty which the accountants had assumed to him. (Id.).

Gjuraj v. Uplift Elevator Corp., 110 A.D.3d 540 (1st Dep't 2013), is likewise distinguishable, because it involved a minority shareholder's claim for the defendants' freezing him out of the corporation, and failing to pay him his share of the corporation's profits, which harmed him individually. In PF2 Securities Evaluations, Inc. v. Fillebeen, 171 A.D.3d 551 (1st Dep't 2019), a shareholder alleged that he was fraudulently induced to part with his shares in a corporation at less than their fair market value, not that the defendants caused the plaintiffs' shares to decrease in value prior to their sale, the derivative claim which Plaintiff attempts to allege here. Fraternity Fund Ltd. v. Beacon Hill Asset Management LLC, 376 F.Supp.2d 385 (S.D.N.Y. 2005), is also distinguishable because "the principal wrong here appears to have been a valuation fraud that injured plaintiffs, not the Funds [in which they had invested]". Id. at 409.

It is equally well settled that when a shareholder or member of a limited liability company disposes of her shares or membership interest, she no longer has standing to sue derivatively. See Ciullo v. Orange and Rockland Util. Inc., 271 A.D.2d 369 (1st Dep't), lv. denied, 95 N.Y.2d 760 (2000) ("Plaintiffs lack standing to challenge dismissal of their complaint since they are no longer shareholders in defendant corporation, having tendered their shares for cash in the merger of defendant corporation into another corporation"); Jacobs v. Cartalemi, supra.

Thus, as Plaintiff is not a shareholder or member of any of the Midland entities, she has no standing to prosecute her claims for breach of fiduciary duty or aiding and abetting such breach on behalf of any of those entities.

POINT IV

PLAINTIFF'S PRE-SETTLEMENT CLAIMS FOR FRAUD, FRAUDULENT CONCEALMENT AND NEGLIGENT MISREPRESENTATION MUST BE DISMISSED FOR LACK OF JUSTIFIABLE RELIANCE

It axiomatic that to plead claims for fraud and fraudulent concealment, Plaintiff must plead justifiable reliance. Bannister v. Agard, 125 A.D.3d 797, 798 (2d Dep't 2015). Similarly, Plaintiff must plead reasonable reliance to sustain her claim for negligent misrepresentation. High Tides, LLC v. DeMichele, 88 A.D.3d 954, 959 (2d Dep't 2011).

Although the Complaint alleges that Defendants misrepresented and concealed that they were allegedly siphoning money from the Trump entities in which she was interested and depressing the value of her interests for years prior to the April 2001 settlement, Plaintiff does not plead that she took any action in reliance on such alleged misrepresentations and concealment before she tendered her shares in connection with the Settlement Agreement. None of the paragraphs in the Complaint which Plaintiff cites (R. 32, ¶ 10, R. 41, ¶ 42, R. 42, ¶ 46, R. 45, ¶ 61, 65,

R. 68, ¶ 158, R. 71, ¶ 177, R. 76, ¶211) allege such reliance.[22] Contrary to Plaintiff's repeated misrepresentations (Brief at 9-10, 11, 12), there is no allegation that she retained her Midland Interests and Land Interests in reliance on the Defendants' alleged fraudulent conduct; her only allegations of reliance are that she relied on the Defendants' alleged misrepresentations and omissions in parting with her shares in the Settlement.

This Court affirmed the dismissal of a similar claim for fraudulent concealment in Brawer v. Lepor, 188 A.D.3d 482 (1st Dep't 2020), holding that the complaint failed to allege how plaintiff relied to his detriment on a limited liability company's president and vice president's concealment of the company's 43.5% member's self-dealing and their own self-dealing by causing the company to pay their personal expenses. The plaintiff (the company's other 43.5% member) did not

[22] While Plaintiff conclusorily alleged in paragraph 211 of the Complaint (Count 5) that she "reasonably and justifiably relied on Defendants' and their Co-Conspirators' misstatements and omissions and could not have discovered the truth though ordinary intelligence [sic] ….," paragraph 212 makes clear that this allegation pertained only to her sale of her Midland Interests and her Land Interests. Paragraph 212 provides that:

> As a direct and proximate result of Defendants' collusion and cooperation in misrepresenting and concealing the value of her Interests, Mary relinquished her Interests for far less than their fair market value, and was thereby injured" (R. 76) (emphasis added).

allege that their concealment caused him to retain his membership interest or to take any other action in reliance on such concealment.to his damage.

Here, too, Plaintiff fails to allege that she took any action in reliance over the 20-year period on Defendants' alleged fraud and fraudulent concealment, or their alleged negligent misrepresentations. Accordingly, her claims for fraud, fraudulent concealment and negligent misrepresentation, to the extent that they rely on actions allegedly taken by the Defendants prior to the April 10, 2001 settlement, should be dismissed.

POINT V

NEW YORK DOES NOT RECOGNIZE A CAUSE OF ACTION FOR CONSPIRACY

Plaintiff's claims of "civil conspiracy to commit fraudulent misrepresentation and fraudulent concealment" (Count 5) and "civil conspiracy to commit fraudulent inducement" (Count 6) must also be dismissed, because "New York does not recognize an independent cause of action in tort for conspiracy." EVEMeta LLC v. Siemens Convergence Creators Corp., 173 A.D.3d 551, 553 (1st Dep't 2019); accord Mamoon v. Dot Net Inc., 135 A.D.3d 656, 658 (1st Dep't 2016); Salerno v. Pandick, Inc., 144 A.D.2d 307, 308 (1st Dep't 1988). In any event because the underlying fraud claims are barred by the Releases and are time-barred, any such conspiracy claims are unsustainable.

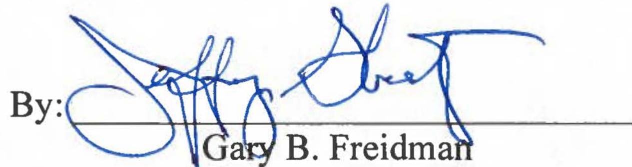
CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Order appealed from should be affirmed.

Dated: New York, New York
January 27, 2023

Respectfully submitted,

GREENFIELD STEIN & SENIOR, LLP

By: 

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