SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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MARY L. TRUMP, Index # 654698/2020

Plaintiff,

Hon O. Peter Sherwood

-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

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MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANTS DONALD J. TRUMP AND SHAWN HUGHES, as Executor of the ESTATE OF ROBERT S. TRUMP'S MOTION TO DISMISS PURSUANT TO CPLR §3211(a) (5) & (7)

KILEY, KILEY & KILEY, PLLC
Attorney for Defendants
DONALD J. TRUMP and SHAWN HUIGHES, as Executor of THE ESTATE OF ROBERT S. TRUMP
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TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page

PRELIMINARY STATEMENT

Plaintiff, brings the instant action against her uncle, the President of the United States, Donald J. Trump in his personal capacity; her aunt, the Honorable Maryanne Trump Barry, a retired federal judge who served sixteen years on the District Court and twenty years on the 3rd Circuit Court of Appeals, and the estate of her uncle, Robert S. Trump. Plaintiff filed a Summons and Complaint on or about September 24, 2020 (**Exhibit "A"**), alleging eight separate causes of action for fraud, conspiracy and breach of fiduciary duty based on alleged conduct dating back 40 years. Plaintiff's Complaint should be dismissed in its entirety pursuant to CPLR § 3211(a)(5) as: (a) Plaintiff's claims are time barred under the statute of limitations; and (b) Plaintiff previously litigated and settled claims with Defendants in 2001, executing General Releases which released Defendants from the claims she now asserts. To the extent that Plaintiff is attempting to assert claims for breach of fiduciary duty and fraud, fraudulent concealment and negligent misrepresentation prior to the sale of her Trump interests, Defendants seek dismissal pursuant to CPLR § 3211(a) (7) because Plaintiff lacks standing and she has failed to state a cause of action for each of her claims of fraud and negligent misrepresentation. Plaintiff's claims of civil conspiracy to commit fraudulent misrepresentation and concealment and civil conspiracy to commit fraudulent inducement should be dismissed because there is no cause of action for "civil conspiracy" independent of the underlying fraud allegations.

Plaintiff makes outlandish and incredulous accusations in her Complaint, which is laden with conspiracy theories more befitting a Hollywood screenplay than a pleading in a legal action. Plaintiff even uses the thematic structure of a play to contrive a decades-long sinister plot in which she claims her aunt and uncles conspired with reputable lawyers, appraisers and other

professionals to defraud her. According to Plaintiff, the evil plan unfolded in three acts or parts she dubs the "Grift", the "Devaluing" and the "Squeeze Out". Neatly packaging the conspiracy as such, Plaintiff casts herself as the unknowing and unsophisticated victim. Quite the contrary, from her very public appearances this past year, it is apparent that Plaintiff has orchestrated a sophisticated plan to exact retribution for decades old, previously litigated family grievances to further her own political agenda and cash in on her family name. To borrow Plaintiff's own thematic structure, her "First Act" commenced in December 2017 when, in blatant and willful violation of the confidentiality and non-disclosure agreement she had entered into with Defendants in 2001, she gave the *New York Times* nineteen boxes of her file from a protracted lawsuit she brought against Defendants for fraud when she filed Objections in the Queens County Surrogate's Court to the probate of her grandfather, Fred C. Trump's Will in 2000. [1] Plaintiff's "Second Act" followed when she contracted with Simon & Schuster to publish her tell all book in July this year. [2] A month later, in an act of astonishing duplicity, she released to the press secretly recorded, private conversations she had with her aunt, Defendant Maryanne Trump Barry.[3] Now for her "Third Act", Plaintiff has commenced this lawsuit with the aid of a law firm that has all but admitted on its web site the true purpose and goal of this litigation- to weaken the President's political influence during his post- presidency by preoccupying him with the defense of innumerable lawsuits. [4]

Plaintiff herself articulates no direct or specific evidence to substantiate her claims of fraud and conspiracy. Instead, she simply refers to a *New York Times* story published on October

[1] *Mary Trump Reveals How She Became a Top Source for The New York Times,* CNN July 7, 2020, https://www.cnn.com/2020/07/07/media/mary-trump-book-new-york-times/index.html
[2] Mary L. Trump, Ph.D., *Too Much and Never Enough: How My Family Created the World's Most Dangerous Man*, New York, Simon & Schuster 2020 https://users.monash.edu.au/~kallan/papers/mtrump.pdf
[3] *Mary Trump's Secret Recordings of Aunt Knocking POTUS Slammed a "Rotten", "Disgusting"*, Fox News August 24, 2020 https://www.foxnews.com/media/mary-trump-blasted-for-secretly-recording-aunt-knocking-potus
[4] See https://www.kaplanhecker.com/newsroom/post-presidency-con-man

2, 2018 which purported to demonstrate that Defendant, Donald J. Trump, inherited wealth from his parents and was not totally self-made, a narrative the authors and, no doubt, the *New York Times* itself were eager to push. [5] The *Times* article suggested that the estate planning techniques employed by the Trumps were "suspect", notwithstanding the fact that the planning was performed under the advice, guidance and execution of experienced attorneys, accountants and other professionals in the field and notwithstanding the fact that the estate and trust tax returns survived an intense audit by the IRS. On its mission to prove that the President was not self-made, the *Times* took full advantage of the libel protections afforded it to make unsubstantiated claims that Defendants formed "sham" companies and engaged in fraud and a conspiracy to transfer vast sums of monies to themselves from their father's companies. Seizing the opportunity to re-litigate her case and piggy back on a wave of political bias against Defendants, Plaintiff now runs with this unsubstantiated narrative, albeit with an added self-serving twist- that it was all done to defraud her. Unlike newspapers stories, claims made in lawsuits must be substantiated by admissible evidence, not speculation and conjecture about double hearsay statements from anonymous sources. Plaintiff proffers no direct evidence to support her claims of fraud or conspiracy. She paints in broad strokes and just repeatedly characterizes alleged conduct and transactions as fraudulent and conspiratorial, hoping the mantra will have a transformative effect.

Plaintiff alleges that, starting almost forty years ago, Defendants engaged in three fraudulent schemes to defraud her. First, that Defendants, through the formation and use of a purchasing and contracting company called All County Building Supply & Maintenance Corp.

[5] See David Barstow, Susan Craig & Russ Buettner, *Trump Engaged in Suspect Tax Schemes as He Heaped Riches From His Father N.Y.Times, Oct 2, 2018, https://www.nytimes.com/interactive/2018/10/02/us/poltics/donald-trump-tax-schemes-fred-trump.html.*

("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 owned and controlled, while disguising those transfers as legitimate business transactions (the so called "Grift"); second, that Defendants fraudulently depressed the value of her interests and the net income they generated through fraudulent appraisals and financial statements (the so called "Devaluing"); and third, that Defendants forced Plaintiff to the negotiating table to settle her lawsuit against her will by threatening her. With dramatic flair, Plaintiff 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").

To get a second bite at the apple and toll the statute of limitations for fraud, Plaintiff claims that she was kept "in the dark" about the alleged fraud until *The New York Times* published its aforementioned article 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 a year earlier. Indeed, all of the information Plaintiff now claims forms the basis of fraud (which Defendants 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, she retained an experienced and highly regarded trusts and estate litigator named John Barnoski, Esq., a partner of the law firm, Farrel Fritz. Plaintiff 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 made an informed decision to settle her claims for a significant sum of money. Plaintiff admitted in her own book that she should have investigated further when she settled in 2001 but made a conscious decision to do nothing.[6] 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 a carefully worded twenty page settlement agreement, that had gone through several modifications and revisions between her attorney and attorneys for the estate and memorialized and finalized global settlement negotiations that had taken place over months, which included a termination of her Trust and a buyout of her interests in the family businesses. At no time was Plaintiff forced to relinquish her interests in the family businesses during this litigation. At any time, she could have simply withdrawn her Objections to the probate of her grandfather's Will and maintained the status quo.

FACTS MADE KNOWN TO PLAINTIFF IN THE PRIOR LITIGATION

The decedent Defendant Robert S. Trump testified at his §1404 hearing (*See* **Exhibit "N"**) that he began working with his father in the fall of 1991, while his father (then in his mid-eighties) was convalescing from hip replacement surgery. In view of the age of the buildings in the portfolio, Robert helped begin a campaign to perform major capital improvements which included the installation of new roofs, new boilers, elevator equipment, windows, sidewalks et cetera. (Page 44:11-24) Robert also observed that his father had an

[6] Mary L. Trump, Ph.D., *Too Much and Never Enough: How My Family Created the World's Most Dangerous Man*, New York, Simon & Schuster 2020 https://users.monash.edu.au/~kallan/papers/mtrump.pdf at page 187

antiquated and inefficient system (ripe for theft) where the building superintendents controlled the purchase of supplies and equipment. Therefore, in 1992, Robert, along with his three siblings and a cousin, on the advice and blessing of their lawyers and outside accountants, formed All County to become the central purchasing agent and contractor for the Trump properties. (Page 135:10-17; Page 137:6-11) Robert testified that All County was 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." (Page 135: 2-9) Robert freely admitted that All County was a "for profit" venture. Plaintiff's attorney had the following exchange with Robert:

> Q. And so was one of the purposes of--- All County Building Supply in addition to having the business purpose of centralized purchasing power, if you will, could mark up and generate a profit on its own. ?
> A. That's correct.
> Q. And that was one of the other purposes?
> A. It was a purpose also, yes.
> (Page 135:24-Page 136:8)

Robert testified that, in many cases, the mark-up charged by All County was offset by the savings wholesale bulk purchasing afforded. (Page 143:5-13) Plaintiff's attorney also observed that the markup had the effect of decreasing Fred C. Trump's estate, which Robert acknowledged, while clarifying that the performance of major capital improvements allowed for the lawful increase in rents under New York City law which ultimately increased the profitability of his father's companies. (Page 136:9-Page 137:7) Plaintiff's attorney probed deeper into All County, marking and identifying cash disbursements to All County for Beach Haven Management in January and September, 1993 and entering the following exchange:

> Q. "Would it be fair to say that once you established All County as the purchasing agent, that the purchases or all of the entities would have been

through All County….? And I am going to find the same kind of entries in all of those other entities to the extent they had purchasing requirements?
A. "I believe so"

Q. And I'm going to find the same kind of entries in all of those other entities to the extent that had purchasing requirements?
A. Right
(Page 145: 3-12)

Plaintiff requested and, upon information and belief, received records from Defendants regarding All County, including its consulting contract with Fred Trump's entity, Trump Management, Inc., and letters from Fred Trump with regard to purchase orders. (Page 165: 19-166:2) Robert further testified that in 1994, he and his siblings replaced their father's company, Trump Management Inc, with their own management company, AMA. The company had a management agreement with Fred C. Trump and charged a management fee. (*See* **Exhibit "J"**) This was made clear and obvious to plaintiff's attorney, when he had the following exchange with Robert:

Q. What did that (Apartment Management Associates) do?
A. It created, I believe, later, but it's in the business of managing the individual developments. What Trump Management, Inc. had really done we shifted the focus over to Apartment Management Associates.

Q. So, in effect, you took the money that was being paid from the entities to Trump Management, which was owned by your father, and that money went to a company controlled by people other than your father?
A. That's correct.
(Page 139:17- 140:5)

Not only was Plaintiff's attorney made keenly aware of All County and AMA and their business purposes, he conceded that they made for "good estate planning" by getting money out of Fred Trump's estate. (Page 141: 2-8)

Defendant's cousin, John W. Walter testified at his §1404 hearing (*See* **Exhibit "O"**) that All County was formed in 1992 to have a central purchasing agent. Prior to All

County, there was an inefficient system where no one in the central office was responsible for purchasing and where the supers would order supplies for the individual buildings. (Page 257: 2-20) In questioning Mr. Walter, Plaintiff's attorney again was advised that All County made a profit through a mark-up, which he observed had the ancillary benefit of sending money "downstream" and not subject to estate taxes..." (Page 262:18-21)

Plaintiff was provided voluminous financial records, which she admits in her Complaint included years that pre-dated and postdated All County and AMA. (Complaint ¶ 92, 93) Plaintiff was given discovery with regard to loans taken by Midland Associates and elicited deposition testimony from Mr. Tosti with regard to the loans. (See **Exhibit "L"**) In fact, plaintiff had legal access to all of Midland's financial records prior to settling her claim. Plaintiff was provided the appraisals used for the Estate and Gift tax returns and was certainly free to obtain her own valuations.

To feign ignorance and attempt to create an issue of fact, Plaintiff conjures up conspiracy theories starting with her own attorney, John Barnosky, Esq. whom she alleges may have left her in the dark due to "conflicting loyalties". (Complaint ¶ Id) Plaintiff alleges that her now deceased and silenced Trustee, Irwin Durben conspired to commit fraud with no substantive facts to support the allegation. (Complaint ¶ 78, 91) Plaintiff also alleges 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 to produce fraudulent appraisals to devalue her interests. (Complaint ¶ 80-84) 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. Von Ancken's work was certified by two other appraisers. (*See* **Exhibit "U"**) In addition, a second valuation company, Management Planning Inc., ("MPI") had been retained

by Defendants to value the Estate and GRAT assets. The reports generated were also certified by two valuation experts. (*See* **Exhibit "V"**) To the extent that Plaintiff alleges a conspiracy to obtain fraudulent appraisals, the conspiracy must include these three other people, which is absurd.

Plaintiff alleges that Defendants ducked sales of Co-op apartments, selling only three sponsor 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. This is patently false. Defendants provided Plaintiff detailed information on the sales of almost forty sponsor *and* non-sponsor owned apartments in the buildings in 1999 and 2000. (*See* **Exhibit "K"**)

With respect to her Land Interests, Plaintiff claims they were misrepresented to her simply as rights to cash streams from ground leases and that she wasn't informed that, in addition, she had a reversion interest in the buildings themselves not just the ground leases. (Complaint ¶ 51-52) Plaintiff claims that the alleged fraudulent appraisals and alleged fraudulent maintenance and management fees lowered the net income of the buildings that stood on the land, which in turn devalued her reversion interest. Plaintiff claims that the ground 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. (Complaint ¶ 50) This is demonstrably false. First the ground leases commenced in 1950. (See **Exhibit "E"**) 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*. So in fact, plaintiff can 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 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.

Plaintiff alleges that she was misinformed with regard to Midland's interest in Starrett City (through Park Briar Associates, LLC) claiming that, while Defendants reported the value to her attorney as "nominal" (Complaint ¶ 123,124), it sold for $900 Million seventeen years later in 2018. (Complaint ¶ 123,124) Plaintiff'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 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. [7] Plaintiff's complaints now don't constitute fraud, they constitute 'buyer's remorse". Moreover, Plaintiff had a duty to make further inquiry in 2001 (see Point II, infra).

In April 2000, Plaintiff commenced a second lawsuit in Nassau Supreme Court, suing Defendants to compel them to continue to pay her and her family's health insurance premiums. (*See* **Exhibit "P"**) While plaintiff was litigating the second action against Defendants in Supreme Court, she had been made aware of the following facts: that Defendants, along with their cousin, formed All County and used it as the exclusive purchasing agent and general contractor for the Trump buildings as a means to take purchasing control away from the supers and to use the power of bulk purchasing; that All County was a "for profit" venture that marked up the goods and services it purchased in consideration for the legitimate business purposes it served; that All County performed extensive major capital improvements for the Trump

[7] See Oksana Miranova. *The Lesson of Starrett City* Feb 6, 2014 https://www.bklynr.com/the-lesson-of-starrett-city/ Discussing how a buyer's market only developed in the Mid 2000's

buildings throughout the 1990's; that AMA was formed by Defendants as the managing agent for the portfolio of real estate properties in 1994 and that it received a management fee which amount was disclosed to Plaintiff. She was aware that Midland Associates had loans on the books. She was aware of the GRATs that were created in 1995 as well as the values assigned to them. She was aware of the appraised value of the estate. If all of this smelled of fraud to Plaintiff, she could have added causes of action to her Supreme Court lawsuit in 2000.

ARGUMENT

POINT I

PLAINTIFF'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

A. Plaintiff's Fraud Claims are Untimely

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., 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), lv. denied, 22 N.Y.3d 852, 975 N.Y.S.2d 385 (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), lv. dismissed in part and denied in part, 92 N.Y.2d 1000, 684 N.Y.S.2d 186 (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).

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). The "burden of establishing that the fraud could not have been discovered before the two-year period before the commencement of the action rests on the plaintiff, who seeks the benefit of the exception." Hillman v. City of New York, 263 A.D.2d 529, 693 N.Y.S.2d 224, 225 (2d Dep't 1999), lv. denied, 94 N.Y.2d 759, 706 N.Y.S.2d 80 (2000); Lefkowitz v. Appelbaum, supra, 258 A.D.2d at 563, 685 N.Y.S.2d at 461.

Here, Plaintiff'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 Defendants' 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 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.

On February 24, 2000, nearly a year before entering into the Settlement Agreement, Plaintiff's counsel, Mr. Barnosky, questioned Defendant-Decedent, Robert Trump extensively concerning All County's operations. 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. (*See* "**Exhibit N"** Page 134:20- 135:17) 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. (Page 135:24-136:6) Robert testified that All County was formed in consultation with the Company's lawyers and outside auditors. (Page 145:21- 146:12)

Robert Trump also testified concerning AMA, testifying that "it's in the business of managing the individual developments" and indicating that it had taken over what Trump Management had done (Page 139:15-22). Mr. Barnosky stated that he had seen "lots of checks going out to Trump Management from the various [Trump family] entities (Page 132:22--133:2), and that he had "records of all these entities for the three years [prior to Fred's September 18, 1991 Will] (Page 133:16-20), and that "I can assure you there are checks during the two-year period [September 1991 – September 1993] to All County Building Supply" (Page:134:20-23). Mr. Barnosky 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. Such questioning put Plaintiff on notice of the alleged fraud she now claims. Lucas-Plaza Housing Development Corp. v. Corey, 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).

Plaintiff 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. Those documents, which Plaintiff 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. Defendants did not fraudulently conceal any of this information. To the contrary, they admitted openly to it. Plaintiff 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), lv. Denied 35 N.Y. 3d 902, 124 N.Y.S. 3d 309 (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 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 (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 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 and that her very qualified and experienced attorney was possibly duped. (Complaint ¶ 20) Plaintiff's claim that

she was misinformed by counsel might form the basis for a legal malpractice claim but it doesn't toll the statute of limitations for fraud.

It is thus obvious that 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 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, or any loans to or from Midland which Plaintiff now claims were fraudulent. Furthermore, to the extent that any discovery was limited in the probate proceeding, Plaintiff could have pursued direct claims for fraud unrelated to the Estate when she filed the second action against Defendants in Supreme Court.

B. 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 Dean Witter & Co., 12 N.Y.3d 132, 139, 879 N.Y.S.2d 355, 359 (2009). A review of Plaintiff's allegations supporting her claim for breach of fiduciary duty shows that they are premised on Defendants' alleged siphoning and devaluing of her interests (Complaint, ¶226), which as is argued in Point III, infra, are derivative claims[8]

[8] If Plaintiff could assert these claims, they would be governed by CPLR 213(7), 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.

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 II, infra).

Even if 213(8)'s six-year Statute of Limitations were applicable, Plaintiff's breach of fiduciary duty claim is time barred for the same the reasons her fraud claims are time barred.

POINT II

PLAINTIFF'S CLAIMS ARE BARRED BY THE GENERAL RELEASES SHE EXECUTED IN CONNECTION WITH THE SETTLEMENT AGREEMENT

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, 824 N.Y.S.2d 210, 214 (1st Dep't 2006), lv. denied, 8 N.Y.3d 804, 831 N.Y.S.2d 106 (2007); accord, Matter of Cheng Ching Wang, 114 A.D.3d 939, 940, 981 N.Y.S.2d 439, 441 (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., 17 N.Y.3d 269, 276, 929 N.Y.S.2d 3, 8 (2011) (quoting Booth v. 3669 Delaware, 92 N.Y.2d 934, 935, 680 N.Y.S.2d 899 (1998)), which "will be enforced as a private agreement." Appel v. Ford Motor Co., 111 A.D.2d 731, 732, 490 N.Y.S.2d 228, 229 (2d Dep't 1985).

That Defendants are alleged to have been co-partners 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 release. 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, 929 N.Y.S.2d at 9, 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, 929 N.Y.S.2d 11, 12 (2011); Pappas v. Tzolis, 20 N.Y.3d 228, 233, 958 N.Y.S.2d 656, 659 (2012). When Plaintiff agreed to relinquish her interest in Midland 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, without receiving any further income. The First Department in Arfa v. Zamir, supra, found that a similar threat to damage a co-shareholder's interest evidenced such an adversarial relationship. 76 A.D.3d at 60, 905 N.Y.S.2d at 80.

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, 905 N.Y.S.2d at 80 (quoting Global Mins. & Metals Corp. v. Holme, supra, 35 A.D.3d at 100, 824 N.Y.S.2d at 216 (1st Dep't 2006), lv denied, 8 N.Y.3d 804, 831 N.Y.S.2d 106 (2007). Plaintiff did not exercise such diligence, notwithstanding that she was plainly on notice, through her counsel's questioning of Robert Trump 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, 929 N.Y.S.2d at 9.

The release is 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, 929 N.Y.S.2d at 8. Plaintiff has not done so here. There can be no dispute that the release executed by Plaintiff encompasses fraud claims, including any fraud claims that were allegedly unknown at the time of the settlement. In Centro Empresarial Cempresa S.A., where, like here, the Plaintiffs 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, 929 N.Y.S.2d at 60. 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 the contact." Id.

The general 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.

All of Plaintiff's current claims are within the terms of the Releases she executed in 2001.

POINT III

PLAINTIFF LACKS STANDING TO ASSERT ANY CLAIM TO RECOVER FOR DEFENDANTS' ALLEGED BREACH OF FIDUCIARY DUTY PRIOR TO THE APRIL 10, 2001 SETTLEMENT

Plaintiff claims that, for some twenty years prior to relinquishing her Midland Interests in the April 10, 2001 settlement, Defendants engaged in various schemes to diminish the value of her investment, by siphoning profits from the two corporations and two limited liability companies in which she held her interests.[9] 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 AMA, 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 classic 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, 498 N.Y.S.2d 782, 783 (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, 833 N.Y.S.2d 461, 462 (1st Dep't 2007).

> Because the heart of the alleged injury is the diminution of 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 action against Warburg, the majority shareholder, is unavailing under New York Law.

[9] Highlander Hall, Inc. and Coronet Hall, Inc., and Midland Associates, LLC and Park Briar Associates, LLC (Complaint ¶¶55).

Id. at 282, 833 N.Y.S.2d at 462. Accord Elghanian v. Harvey, 249 A.D.2d 206, 207, 671 N.Y.S.2d 266 (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, 67 N.Y.S.3d 63, 66-67 (2d Dep't 2007); Warner v. Heath, 2020 WL 2095654, at *13-14 (Sup. Ct. New York Co. 2020).

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, 706 N.Y.S.2d 428 (1st Dep't 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 claim for breach of fiduciary duty on behalf of any of those entities.

POINT IV

PLAINTIFF'S PRE-SETTLEMENT CLAIMS FOR FRAUD, FRAUDULENT CONCEALMENT AND NEGLIGENT MISREPRESENTATION MUST BE DISMISSED BECAUSE SHE HAS NOT PLEADED THAT SHE JUSTIFIABLY RELIED ON DEFENDANTS' ALLEGED MISREPRESENTATIONS AND CONCEALMENT

To plead claims for fraud and fraudulent concealment, Plaintiff must plead the element of justifiable reliance. Similarly, Plaintiff must plead reasonable reliance to sustain her

claim for negligent misrepresentation. High Tides, LLC v. DeMichele, 88 A.D.3d 954, 959, 931 N.Y.S.2d 377, 383 (2d Dep't 2011).

Although Plaintiff claims 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, she does not plead that she took any action in reliance on such alleged misrepresentation and concealment before she tendered her shares in connection with the Settlement Agreement.

The First Department recently affirmed this Court's 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 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

PLAINTIFF'S CONSPIRACY CAUSES OF ACTION MUST BE DISMISSED

Plainitff's claims of "civil conspiracy to commit fraudulent misrepresentation and fraudulent concealment" (Count 5) and "civil conspiracy to commit fraudulent inducement" (Count 6) must 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, 104 N.Y.S.3d 607, 610 (1st Dep't 2019); accord Mamoon v. Dot Net Inc., 135 A.D.3d 656, 658, 25 N.Y.S.3d 85, 88 (1st Dep't 2016); Salerno v. Pandick, Inc., 144 A.D.2d 307, 308, 534 N.Y.S.2d 179, 180 (1st Dep't 1988). In any event because the underlying fraud claims are time-barred, any such conspiracy claims are unsustainable.

CONCLUSION

For all of the foregoing reasons, Plaintiff's complaint should be dismissed as against Defendants Donald J. Trump and Shawn Hughes, as Executor of the Estate of Robert S. Trump pursuant to CPLR§ 3211(a)(5)& (7).

Dated: Lake Success, NY
December 22, 2002

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