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

MARY L. TRUMP, *Plaintiff*, v. 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*.	Index No. 654698/2020 Justice O. Peter Sherwood Part 49 Motion Sequences 001, 002 **ORAL ARGUMENT REQUESTED**

PLAINTIFF MARY L. TRUMP'S OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Court Rules

PRELIMINARY STATEMENT

Plaintiff Mary Trump was only 16 years old when her father died, leaving her with a collection of valuable interests in the family real estate business. Her uncles and aunt, Defendants Donald J. Trump, Maryanne Trump Barry, and Robert Trump, took control of those interests and committed to watch over them as Mary's fiduciaries. They lied. The Complaint details the complex fraudulent schemes that Defendants carried out over the course of many years to plunder Mary's interests, cover their tracks, and dupe her into holding onto those interests based on the false belief that nothing was wrong. When their own father (Mary's grandfather) died many years later, Defendants maneuvered to push Mary out of the family business altogether, and swindled her out of her interests for a fraction of what they were actually worth. Many years after that, due to the extraordinary investigative work of a team of reporters at *The New York Times*, Defendants' schemes finally began to unravel, and Mary began to learn the truth about what had really happened.

In their motions to dismiss, Defendants do not contest that the Complaint properly alleges that they engaged in unlawful conduct. They do not contest that the Complaint properly pleads years of false and misleading statements, or that those statements were material. They do not contest that the Complaint properly alleges that Defendants knew their statements were false, that they intended to induce Mary's reliance, or that their fraud caused her tremendous harm.

Rather, their position seems to be that, because Defendants were so successful in covering up their fraud for so many years, they should not have to answer for it now. In other words, the offensiveness of Defendants' past conduct—stealing tens of millions of dollars from their own niece—is perhaps surpassed only by the chutzpah of their current arguments for dismissal. Defendants' arguments fail as a matter of law. It is now time for them to be held accountable for their fraud.

First, it is well-established that claims sounding in fraud are timely if they are brought within two years of notice or discovery. Here, Defendants' fraud only began to come to light with the publication of *The New York Times* investigative report in October 2018. In trying to argue that Mary was on notice of their fraud earlier than that, Defendants point back to their own deposition testimony and to documents exchanged in discovery in litigation about Mary's grandfather's testamentary capacity in connection with his will twenty years ago. But in those materials, Defendants reinforced and concealed—rather than revealed—their fraud. And, because Defendants had cooked the books so thoroughly, further investigation by Mary would only have deepened her misimpressions. Ultimately, the truth only began to come out through 18 months of Pulitzer Prize-winning investigative journalism, by reporters with access not only to the fraudulent documents Defendants provided to Mary, but also to numerous other sources, experts, and Trump insiders who finally revealed the truth.

Second, Defendants seek to shield themselves with a release they obtained when they settled the dispute over Mary's grandfather's will and a breach-of-contract case relating to health insurance for Mary's nephew that Defendants had revoked. The plain intent of the release was to settle those two pending litigations, not to release entirely unknown fraud claims relating to interests Mary had inherited from her father many years earlier having nothing to do with issues of testamentary capacity or breach of contract. The text of the release reflects that limited purpose. Indeed, the parties simultaneously executed a narrow release relating to certain interests Mary held in a 1976 trust, directly undercutting Defendants' newly-minted suggestion that the release was broad enough to cover everything under the sun. And even if the release could somehow be stretched to reach the claims at issue here, the Complaint specifically alleges that Defendants procured that release by putting the life of Mary's infant nephew at risk—thus, the release was not fairly and knowingly made and cannot be enforced under the circumstances.

Third, although Defendants make a smattering of arguments that certain aspects of certain elements of certain claims are not properly pleaded, all of these arguments fail as well. Defendants contend that Mary cannot assert fiduciary duty claims for certain fraudulent conduct because those claims belong to the entities in which she held interests rather than to Mary herself. But Mary's claims arise from the breach of duties that Defendants owed to her directly, and Defendants' compounding frauds ultimately led Mary into a direct transaction with Defendants themselves. While Defendants similarly argue that the Complaint does not allege justifiable reliance prior to the sale transaction, the Complaint alleges in detail how Mary relied on Defendants to steward and protect her interests, and continued to hold onto those interests for years based on the false belief that nothing was wrong. And although Defendants likewise argue that Mary has not properly pleaded civil conspiracy because that is not an independent cause of action, the Complaint does not allege civil conspiracy as a standalone offense.

In the end, Defendants cannot avoid accountability for their fraud simply because they thought that they had gotten away with it years ago. And Defendants' scattershot challenges to the edges of various claims fail as a matter of law. The motions to dismiss should be denied. Indeed, now that Donald Trump is no longer President, the parties should begin to engage in discovery as soon as possible so that the grave injustice Defendants did to their own niece can finally be remedied.

FACTUAL BACKGROUND[1]

A. Mary Inherits Various Interests in the Trump Family Business

Plaintiff Mary Trump ("Mary") is the granddaughter of Fred C. Trump ("Fred Sr."), a developer and landlord who presided over a vast real-estate empire in New York City. (¶31, 40.) Fred Sr. had five children, including Mary's father Fred C. Trump Jr. ("Fred Jr."), as well as Defendants Donald J. Trump, Maryanne Trump Barry, and Robert S. Trump. (¶41.)[2] Mary's father, Fred Jr., died in 1981, when Mary was only sixteen. (¶2.)

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

B. Defendants Seize Control of the Family Business

In the 1980s and 1990s, as the aging Fred Sr. descended into dementia, Defendants maneuvered to take control over his empire, including every entity in which Mary had an interest. Defendants became majority co-owners of the Land Interests. (¶64.) They were majority partners, members, and owners of Midland. (*Id.*). They dominated and controlled various "management"

[1] Citations to "(¶_)" are to paragraphs in the Complaint, NYSCEF 2. Unless otherwise defined, capitalized terms have the same meaning as in the Complaint.

[2] Mary's claims against the late Robert S. Trump are asserted against Shawn Hughes, the executor of his estate.

companies and purchasing agents that transacted with Midland. (¶66.) And they were co-trustees of Fred Sr.'s 1976 Trust. (¶61.) They also procured from Fred Sr. a revised will that named them co-executors of his estate (the "1991 Will") (¶¶7-8), and a sweeping power of attorney authorizing Robert to act in Fred Sr.'s "name, place and stead" over all aspects of his business (¶9).

Having taken the reins of the family business, Defendants not only had total control, they also had near-exclusive access to information. (¶5.) From that dominant position, Defendants perpetrated three distinct yet related frauds at issue in this lawsuit.

C. Fraud #1: The Grift

Defendants used their positions of dominance and control in the family business to siphon millions of dollars from Mary's interests through sham entities and concealed self-dealing, which they deliberately misrepresented and concealed in financial documents. (¶12, 68.) This constituted fraud and breach of fiduciary duty, and it induced Mary to hold her interests on the false belief that Defendants were stewarding those interests faithfully and providing her with accurate information about their true value. (¶¶10, 11, 158, 176-77.)

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

In addition, Defendants used "management" companies that they owned and controlled, such as Trump Management and Apartment Management Associates ("AMA"), to make secret cash distributions to themselves under the guise of "management," "consulting," and "maintenance" fees and related "salaries." (¶¶74-75.) Defendants also made disguised cash distributions to themselves by issuing what they falsely represented to be "loans" to other entities they controlled. (¶76.)

Defendants repeatedly offered Mary sham financial documents that concealed this self-dealing, including through their co-conspirator Irwin Durben, Mary's so-called "trustee." (¶¶68, 78.) The documents were designed to give Mary the false impression that Defendants were protecting her interests, while Defendants were doing the opposite. (*Id.*)

In reliance on the false appearances of legitimacy and value created by Defendants' fraud, Mary held onto her interests believing everything was okay. (*E.g.*, ¶158.) She had no reason to believe otherwise. She was a minority stakeholder, outsider, and teenager when this fraud began—with barely a cursory understanding of the real estate business. Defendants were her aunts and uncles, her fiduciaries, and the stewards of the family business. (¶¶63-66.) And even if Mary had made inquiries—even if she had scrutinized each page of the financial records Defendants prepared—she could not have uncovered their Grift, because Defendants had so thoroughly concealed it. (¶165.)

D. Fraud #2: The Devaluing

From their position of dominance and control, Defendants perpetrated a second fraud. Together with a lackey appraiser named Robert Von Ancken, Defendants used phony appraisals and other valuation tricks to dramatically understate the value of Mary's interests in financial statements year after year. (¶¶83, 127-28, 160-63.) This too constituted fraud and breach of fiduciary duty, and it induced Mary to hold those interests, misled by Defendants as to their true value. (¶158.) And even if Mary had asked questions, Defendants had cooked the books so thoroughly that further inquiry would only have led Mary into a cul-de-sac of fraud that Defendants had constructed. (¶174.)

This was part of a broader pattern for Defendants, who inflated and deflated the value of various interests and companies according to their audience—higher when they needed collateral for a loan, lower when it was time to pay taxes. (¶¶81-82, 85.) It has been widely reported that government authorities, including the Manhattan District Attorney, are currently investigating these practices. (*See, e.g.*, Px-A.[3])

The Devaluing and the Grift were distinct, but mutually reinforcing, frauds. Through the Devaluing, Defendants created a consistent false impression that Mary's interests were worth far less than they actually were. Through the Grift, they created the false impression that Mary's interests were being managed appropriately, even as Defendants looted them. The two schemes worked together to keep Mary in the dark both with respect to the true value of what she owned and what Defendants were doing with it.

E. Fraud #3: The Squeeze-Out

Defendants' third fraud commenced upon the death of Fred Sr. in 1999, when Defendants saw an opportunity to push Mary out of the business altogether and lock in their illicit gains. (¶3.)

After Fred Sr. died, Defendants filed a probate petition in Queens County Surrogate's Court. (¶109; *see* KDx-Q.)[4] Although she was still uninvolved in the family business and unaware of Defendants' fraudulent Grift and Devaluing, Mary did have entirely separate concerns about whether her grandfather was of sound mind when he executed the 1991 Will (which effectively disinherited her from her grandfather's estate (MTB 4 n.6)).[5] (¶¶23, 109.) Accordingly, Mary

[3] Citations to "Px-_" refer to exhibits to the Affirmation of Alexander J. Rodney filed herewith.

[4] Citations to "KDx-_" and "FDx-_" refer to exhibits to the affirmations of James D. Kiley and Gary B. Freidman, respectively. NYSCEF 19, 36.

[5] "MTB" and "DJT" refer to the opening briefs filed by Defendant Maryanne Trump Barry and Defendants Donald J. Trump and Shawn Hughes, as executor of Robert S. Trump's estate, respectively. NYSCEF 33, 37.

contested the probate petition on that ground (the "Probate Litigation"). (¶¶18, 109.) At Durben's recommendation, Mary, who still trusted him and was unaware of his collusion with Defendants, retained an attorney named John Barnosky to represent her. (¶20.) Whether because he had divided loyalties or because he was duped by Defendants' fraud as well, Barnosky did not keep Mary appropriately informed. (¶114.)

In retaliation for the Probate Litigation, Defendants terminated the health insurance that Trump Management had always provided for Mary, her brother Fred III, and William, Fred III's infant son. (¶117.) William had spent months in neonatal intensive care, with seizures and severe illness, resulting from what was ultimately diagnosed as cerebral palsy. (¶¶21, 116.) It is no exaggeration to say that he needed the health insurance provided by Trump Management in order to survive. (¶¶115-16.) When Defendants terminated young William's health insurance, Mary became desperate. (¶118.) She and her brother, still represented by Barnosky, sued Defendants for breach of contract in Nassau County Supreme Court, seeking an injunction to restore their health insurance (the "Health-Insurance Litigation"). (¶119; *see* KDx-P.)

Discovery was sharply limited in the Probate Litigation. The "3-2" rule in Surrogate's Court limited discovery to the three years before and two years after the execution of the contested will (*i.e.*, from 1988 to 1993). *See* N.Y. Ct. R. § 207.27. Moreover, Mary's Midland and Land Interests were not at issue. (¶120.) In fact, Defense counsel objected to questions about them, arguing that they were not relevant to the core issue of Fred Sr.'s testamentary capacity. (*See, e.g.*, KDx-N at 140 ("Excuse me, we're going back again to something that does not belong in the estate. . . . This is a probate proceeding, not an accounting proceeding. . . .").) Ultimately, Defense counsel at Robert's deposition shut down questions about Mary's interests in the family business: "You keep diverting back to Midland and he's not going to answer any questions about Midland."

(*Id.* at 140.) As a result, although Defendant Robert acknowledged the existence of All County as a profit-making venture that took a "markup" for its work, and confirmed the existence of AMA as a "managing" company, for example, he gave no testimony about their role in perpetrating fraud against Mary. (*See id.* at 139-40, 143.) Thus, neither the Grift nor the Devaluing were disclosed, and both continued unbeknownst to Mary.

As the pressure from the Probate Litigation and Health-Insurance Litigation mounted, Defendants exploited the opportunity to squeeze Mary out of her interests entirely: they told Mary that they would only settle if she also agreed to be bought out of her Midland and Land Interests, even though those interests (according to Defendants' own counsel) were not relevant to either litigation at all. (¶120.)

As they set the table for negotiations, Defendants once again provided Mary with false and misleading documents reflecting years of fraud concerning the value of her interests. (¶155.) Based on those fraudulent documents, under the desperate circumstances created by the termination of William's health insurance, with a trustee who was conspiring against her, and without appropriate legal representation, Mary signed a set of documents that purported to deprive her of her interests at a fraction of their true value. (¶¶128, 137, 142.)

The specific documents that Mary signed included a "Settlement Agreement," which resolved the Probate Litigation and Health-Insurance Litigation and also transferred Mary's unrelated business interests to Defendants. (*See* KDx-Z.) In connection with that transfer, the Settlement Agreement provided that Mary's interests "necessitated that [she] be furnished [certain] information," including "but not limited to" countless financial and tax documents related to her interests. (KDx-Z at 12-13.) Those documents were riddled with fraud. (¶155.)

Contemporaneously with the Settlement Agreement, Defendants induced Mary to sign two releases. Both were narrow in scope. The first Release pertained to claims in connection with the Probate Litigation and Health-Insurance Litigation. (*See* KDx-X.)[6] It included no reference to fraud or fiduciary duty claims in connection with Mary's interests in the family business, nor to unknown claims generally. (*Id.*) And it explicitly carved out obligations and conditions under the Settlement Agreement. (*Id.*) The second release related to Mary's interests in the 1976 Trust. (*See* KDx-Y.)

F. *The New York Times* Investigative Report Begins to Reveal Defendants' Frauds Years Later

Defendants' frauds at issue here only began to surface with the publication of an investigative report by *The New York Times* in October 2018. (¶145; FDx-4.) That report was the product of 18 months' work by three investigative journalists (David Barstow, Susanne Craig, and Russ Buettner) with access and information that Mary did not and never could have had. (Px-B.) While Defendants contend that Mary was one source, she was far from the only source. To the contrary, that investigative reporting team reviewed "tens of thousands of pages of confidential records" and invoices, conducted extensive "interviews with Fred Trump's former employees and advisers" and vendors, and examined Donald's secret "strategy sessions" with Defendants' co-conspirator Von Ancken. (FDx-4.) The *Times* itself called the investigation "unprecedented in scope and precision." (*Id.*) And the authors won a Pulitzer Prize in Explanatory Reporting for their "exhaustive" investigation and "mastery" of "complex" material. (Px-B.)

[6] Mary signed four substantially identical releases in connection with the Probate Litigation and Health-Insurance Litigation, one for each Defendant and another naming all of the Defendants together, which are referred to collectively as the "Release." (*See* KDx-X.)

Mary filed her Complaint on September 24, 2020, within two years after *The New York Times* published its investigative report. NYSCEF 2.

STANDARD OF REVIEW

Defendants seek dismissal pursuant to CPLR 3211(a)(5) and CPLR 3211(a)(7). Under either provision, it is well settled that the Court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable theory." *Faison v. Lewis*, 25 N.Y.3d 220, 224 (2015) (CPLR 3211(a)(5)); *accord D.K. Prop., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 168 A.D.3d 505, 506 (1st Dep't 2019) (CPLR 3211(a)(7)).

ARGUMENT

I. DEFENDANTS DO NOT ESTABLISH UNTIMELINESS.

Defendants first ask the Court to dismiss this action in its entirety pursuant to CPLR 3211(a)(5) based on the statute of limitations. Because all of the claims at issue sound in fraud, the applicable statute of limitations is "the greater of six years from the date the cause of action accrued or two years from the time the plaintiff . . . discovered the fraud, or could with reasonable diligence have discovered it." CPLR 213(8); *see* CPLR 203(g)(1).[7] Here, the Complaint alleges in detail that Mary did not discover and could not have discovered any of Defendants' fraudulent schemes until the publication of *The New York Times*' investigative report in October 2018. (¶¶145-46, 172-77.) Those allegations must be accepted as true for purposes of this motion. *Mullin v. WL Ross & Co.*, 173 A.D.3d 520, 522 (1st Dep't 2019). Yet Defendants ask the Court to simply disregard those allegations and instead find that Mary was somehow on inquiry notice

[7] Mary's negligent misrepresentation claim, because it sounds in fraud, is likewise subject to the two-year discovery rule under CPLR 213(8). *See Demian v. Calmenson*, 156 A.D.3d 422, 423 (1st Dep't 2017).

of all of her claims earlier based on a smattering of cherry-picked documents and excerpts of testimony from unrelated actions, none of which actually revealed the fraud at issue here. (MTB 11-16; DJT 12-18.)

As an initial matter, Defendants misstate the applicable law. Their contention that Mary bears the burden to show that her claims are timely at this stage relies on inapposite, decades-old authority from outside the Appellate Division, First Department. (*See* MTB 12 (citing *Hillman v. City of N.Y.*, 263 A.D.2d 529 (2d Dep't 1999), and *Lefkowitz v. Appelbaum*, 258 A.D.2d 563 (2d Dep't 1999)); DJT 14 (same).) To the contrary, as the First Department recently explained, it is Defendants who bear the burden to first "make a prima facie case that [Mary] was on inquiry notice of [her] fraud claims more than two years before [she] commenced the action." *Epiphany Cmty. Nursery Sch. v. Levey*, 171 A.D.3d 1, 7 (1st Dep't 2019). To make that showing, Defendants must establish that Mary "had knowledge of facts from which the alleged fraud might reasonably be inferred." *Id.*

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

Ultimately and significantly, where, as here, "it does not conclusively appear that a plaintiff had knowledge of facts from which the alleged fraud might reasonably be inferred, the cause of action should not be disposed of summarily on statute of limitations grounds. Instead, the question is one for the trier-of-fact." *Epiphany*, 171 A.D.3d at 7.

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

Defendants' inquiry notice argument rests almost entirely on deposition testimony during the Probate Litigation and on vague references to documents produced at that time. (*See* MTB 13-14; DJT 14-15.) Defendants' argument fails as a matter of law because those materials concealed, rather than revealed, the fraud. *Epiphany*, 171 A.D.3d at 8. Defendants fall back on vague suspicions that they suggest Mary had concerning Defendants' "good faith" in the Probate Litigation, which also do not constitute inquiry notice as a matter of law. *See Erbe v. Lincoln Rochester Tr. Co.*, 3 N.Y.2d 321, 326 (1957); *CSAM Capital, Inc. v. Lauder*, 67 A.D.3d 149, 156, 157-58 (1st Dep't 2009).

1. Defendants' Materials Concealed Rather Than Revealed the Fraud.

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

First, Defendants distort deposition testimony having nothing at all to do with the claims Mary asserts here. For example, Defendants' argument that Mary was somehow on inquiry notice of the disguised cash distributions that Defendants made to themselves in the guise of "loans" is, according to Defendants, based on the fact that Mary was "aware that Midland Associates had loans on the books." (DJT 12.) But Defendants point to deposition testimony about a loan that Fred Sr. made *to* Midland (*see* DJT 9; KDx-L, M), which obviously has nothing to do with the fraudulent loans that *Defendants* made *from* Midland to themselves at issue here. (¶76.)

Second, Defendants rely on a series of benign statements from Robert's testimony that disclosed All County and AMA's "existence" and "ownership structure." (DJT 15; *see* MTB 13-14.) For example, Robert testified that he owned All County along with his sisters, brother, and cousin, and that he had "probably" come up with the idea for that company "in consultation with" lawyers and auditors. (MTB 13-14 (citing FDx-13); DJT 14-16 (citing KDx-N); *see also* DJT 8-9 (citing KDx-O).) Plainly, the mere existence or ownership structure of these companies does not amount to "circumstances [that] suggest to a person of ordinary intelligence the probability that [she] has been defrauded." *Aozora Bank, Ltd. v. Credit Suisse Grp.*, 144 A.D.3d 437, 438 (1st Dep't 2016).

Third, Defendants point to false testimony that only serves to confirm their cover-up. More specifically, Robert testified that All County's "markup" constituted legitimate "profit," and that savings from Defendants' operation of All County "offset the markups." (MTB 13-14; *see* DJT 7, 14-15.) By Defendants' own telling, therefore, Robert was claiming that All County had "legitimate business purposes" (DJT 15-16; *see* MTB 13-14), as opposed to being "a sham corporation that . . . existed for the purpose of secretly extracting funds," while "concealing those transfers as legitimate business transactions," as alleged in the Complaint (¶¶68-69). This is the *opposite* of providing notice of fraud—it certainly did not suggest to Mary the "probability that [she] ha[d] been defrauded." *Aozora Bank*, 144 A.D.3d at 438. To the extent that Defendants are contesting Mary's allegations about whether there was any fraud at all, that, of course, is not appropriate at the motion to dismiss stage. *See Faison*, 25 N.Y.3d at 224.

Beyond these few false answers that reinforced the cover-up, Defendants shut down further questioning about Mary's business interests during the Probate Litigation. Asked, for example, whether All County acted as the purchasing agent for Midland, Robert's counsel objected: "Excuse me, we're going back again to something that does not belong in the estate. . . . This is a probate proceeding, not an accounting proceeding. . . . [Y]ou keep diverting back to Midland and he's not going to answer any questions about Midland." (KDx-N at 140.) Defendants cannot pretend they provided notice when they dodged some questions and lied in response to others.

Nor can Defendants establish inquiry notice based on vague references to documents exchanged in discovery in the Probate Litigation. (MTB 14; DJT 9, 15). Notably, Defendants fail to actually identify any document that supposedly put Mary on notice of the fraud she now alleges. That is no surprise—as the Complaint details, the documents Defendants provided to Mary over the years reinforced and concealed their fraud rather than revealing it. (*E.g.*, ¶¶68-77, 84, 91-108.) Indeed, the fraudulent documents themselves would not "suggest to a person of ordinary intelligence the probability that [she] has been defrauded." *Aozora Bank*, 144 A.D.3d at 438. They were deliberately crafted to do exactly the opposite.

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

Defendants muster no authority suggesting otherwise. The cases they cite (MTB 14-15; DJT 15-16) all stand for the unremarkable proposition that documents in a plaintiff's possession *may* put a plaintiff on notice. But that only raises the question of what the materials Defendants submit here *actually show*. Because the documents Defendants point to in their moving briefs served only to reinforce, rather than to disclose, Defendants' fraud, they cannot support a dismissal on statute of limitations grounds. *Epiphany*, 171 A.D.3d at 8.

2. Defendants' Suggestion that Mary Must Have Had Suspicions Is Insufficient to Establish Notice as a Matter of Law.

Unable to point to documents from the time that "utterly refute" Mary's well-pleaded allegations, Defendants fall back on a series of vague arguments that Mary suspected Defendants of dishonesty because she filed a lawsuit relating to Fred Sr.'s testamentary capacity, that she and her lawyer doubted Defendants' good faith with respect to certain aspects of that Probate Litigation, and that her lawyer asked some exploratory questions at a deposition about entities relating to Mary's business interests. (*See* MTB 14-16; DJT 15-17.) All of this falls far short of inquiry notice as a matter of law.

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

First, the fact that Mary initiated litigation about Fred Sr.'s testamentary capacity is obviously insufficient to show notice of the fraud alleged here. It is axiomatic that notice of one kind of misconduct (like whether Defendants took advantage of their father's dementia as alleged in the Probate Litigation) does not constitute notice of an "entirely separate fraudulent act" (like the fraud here). *CSAM Capital*, 67 A.D.3d at 158.

Second, Defendants point to a line from Mary's book in which she quotes Barnosky as saying, "we knew [Defendants] were lying to us" about the value of the estate. (FDx-6; MTB 15-16; *see* DJT 6.) But even if Mary "had reason to question" Defendants' honesty about the value of Fred Sr.'s estate (MTB 15), that does not mean she was aware of the "probability" that she had been defrauded in connection with separate business interests that she had inherited from her father years earlier. *See Aozora Bank*, 144 A.D.3d at 438. In fact, the Court of Appeals has rejected that exact argument in strikingly similar circumstances, concluding that "[k]nowledge of the facts which aroused plaintiffs' suspicions as to the defendant bank's good faith in the prior Surrogate's proceedings was not necessarily knowledge of facts from which the alleged fraudulent conspiracy might be reasonably inferred." *Erbe*, 3 N.Y.2d at 326; *see also Berman v. Holland & Knight, LLP*, 156 A.D.3d 429, 430 (1st Dep't 2017) (prior proceedings did not give rise to inquiry notice).

Third, the fact that Barnosky asked exploratory questions about All County and AMA during depositions in the Probate Litigation does not provide a basis for finding inquiry notice either. The Complaint alleges facts that make it improper to blindly impute whatever Barnosky was thinking to Mary, given his compromised position. (¶114.) *See Center v. Hampton Affiliates, Inc.*, 66 N.Y.2d 782, 784-85 (1985) (declining to impute knowledge as a matter of law in light of factual issues about whether agent is acting "entirely for his own or another's purposes"). But more fundamentally, lawyers ask exploratory questions all the time, especially at depositions—

and here, a handful of questions were answered in a way that further concealed the fraud, and the rest were shut down by Defense counsel as outside the scope of the proceeding. (*See* KDx-N at 140-41.)

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

B. Reasonable Diligence Would Not Have Uncovered the Fraud.

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

To begin with, the New York Court of Appeals has held that reliance on family members and fiduciaries is itself consistent with "reasonable diligence" for purposes of the discovery rule. *See Trepuk v. Frank*, 44 N.Y.2d 723, 724 (1978). In *Trepuk*, the Court of Appeals found that a fifty-year delay in the plaintiff's discovery of fraud to be timely because "reliance upon one's mother and fiduciary brother was understandable and the extraordinary delay in discovery [of the fraud was] therefore equally understandable." *Id.* at 724. Any remaining questions about reasonable diligence, the Court held, "should be left to the trier of the facts." *Id.* at 725. *Trepuk* controls here. Defendants are not only Mary's close family members, but they were actually her fiduciaries. In addition, they had "superior knowledge of essential facts" concerning the value of

Mary's interests. *Sports Tech. Applications, Inc. v. MLB Advanced Media*, L.P., 188 A.D.3d 619, 620 (1st Dep't 2020). Mary's reliance on them is therefore "understandable" and entirely consistent with reasonable diligence. *Trepuk*, 44 N.Y.2d at 724.[9]

Even if Mary had gone beyond what *Trepuk* requires and investigated further, she could not have discovered Defendants' fraud through the "exercise of reasonable diligence," *Epiphany*, 171 A.D.3d at 7; *see Sargiss*, 12 N.Y.3d at 532. In other words, assuming that Mary had "obtain[ed] her own valuations" (DJT 9), they would have led her nowhere because the underlying data and information was "false and misleading." (¶84.) And while Defendants harp on the availability of discovery in the Probate Litigation (MTB 15; DJT 17), the rules in that proceeding precluded inquiry relating to events outside the five-year window surrounding the execution of the 1991 Will, which excluded years critical to Defendants' fraud. *See* N.Y. Ct. R. § 207.27. And again, Defendants themselves shut down questioning about Mary's business interests. (*See* KDx-N at 140-41.)

In other words, because Defendants cooked the books so thoroughly, further inquiry would only have led Mary deeper into their web of deceit. At *best*, she would have been left with a pile of contradictory evidence that could be "interpreted in a myriad of ways." *Norddeutsche*, 149 A.D.3d at 161-62 ("the [timeliness] defense must await a fully developed factual record"). In *Norddeutsche*, again, in strikingly similar circumstances, the First Department held that the plaintiffs could not have discovered the fraud with reasonable diligence where defendants had "purposely siphoned off the value" of various companies, "including by taking excessive management fees for themselves," all of which was "unbeknown[] to [plaintiffs] because of [the

[9] The same is true of Von Ancken, who was, as Defendants themselves point out, a licensed and purportedly independent appraiser whose work was certified by others. (*See* DJT 9.)

defendants'] deliberate concealment." *Id*. at 155. As a result, it was not "unambiguous" that defendants were "using [the entities they controlled] for the unexpected and deliberate purpose" of impropriety. *Id*. at 161. The same, of course, is true here.

Ultimately, the facts that would have allowed Mary to infer Defendants' complex fraud only came to light through an exhaustive, unprecedented, 18-month investigation for which three *New York Times* investigative reporters won the Pulitzer Prize. (¶4; Px-B.) While Defendants contend that Mary was a source for the *Times* report, the investigative team also had access to extensive information Mary did not have (and could not have reasonably obtained): they reviewed "tens of thousands of pages of confidential records," took "interviews with Fred Trump's former employees and advisers," and examined Donald's secret "strategy sessions" with Defendants' co-conspirator Von Ancken. (*See* FDx-4.) This investigation by award-winning investigators, tax experts, and a former chief of investigations for the Manhattan district attorney's office (*see id.* at 5) far exceed the applicable standard of "reasonable diligence" by a "person of ordinary intelligence." *CSAM Capital*, 67 A.D.3d at 155-56.

C. Mary's Breach of Fiduciary Duty Claims Are Likewise Timely Under the Discovery Rule.

Defendants argue that the two-year discovery rule does not apply to Mary's breach of fiduciary duty claims "because Plaintiff seeks money damages only, and because Plaintiff's allegations of fraud are not essential for those claims" (MTB 16; DJT 17.) But the discovery rule clearly applies to fiduciary duty claims sounding in fraud regardless of the remedy sought. *See, e.g.*, *Kaufman v. Cohen*, 307 A.D.2d 113, 119 (1st Dep't 2003). And, as the Complaint alleges in detail, fraud is essential to Mary's breach of fiduciary duty claims because Defendants breached their duties to Mary *through fraudulent conduct*—by "self-dealing, siphoning her Interests, devaluing them, misrepresenting their value, and attempting to fraudulently squeeze her out of them." (¶226.) *See Kaufman*, 307 A.D.2d at 119; *Yatter v. William Morris Agency, Inc.*, 268 A.D.2d 335, 336 (1st Dep't 2000) (applying discovery rule where "same facts are involved for both the causes of action for fraud and breach of fiduciary duty, and the question of plaintiff's knowledge remains unresolved"). Unsurprisingly, the only case that Defendants cite to support their argument that Mary's fiduciary-duty claims are untimely is inapposite because, unlike the facts alleged here, it did not sound in fraud. (*See* MTB 16; DJT 17-18 (citing *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 140 (2009) (plaintiff did "*not* claim that it was actually duped" (emphasis added))).)

II. DEFENDANTS DO NOT ESTABLISH THAT MARY'S CLAIMS WERE RELEASED.

Defendants next seek dismissal pursuant to CPLR 3211(a)(5) based on the Release they compelled Mary to sign in order to settle the Probate Litigation and Health-Insurance Litigation. As with their limitations argument, Defendants "bear[] the initial burden." *Estate of Mautner v. Alvin H. Glick Irrevocable Grantor Tr.*, No. 19 Civ. 2742, 2019 WL 6311520, at *4 (S.D.N.Y. Nov. 25, 2019).

To meet this burden, Defendants must show that "the language of [the] release is clear and unambiguous." *Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V.*, 17 N.Y.3d 269, 276 (2011). More specifically, Defendants must show that the Release "clearly and unambiguously released" the claims now at issue. *See C&A Seneca Constructions LLC v. G Builders LLC*, 67 Misc.3d 1241(A), at *2 (Sup. Ct., N.Y. Cty. July 10, 2020) (denying motion to dismiss where release did not unambiguously cover claim at issue). "Where a court cannot definitively determine whether the scope of a release was intended to cover the allegations in a complaint, a motion pursuant to CPLR 3211(a)(5) to dismiss the complaint must be denied." *Desiderio v. Geico Gen. Ins. Co.*, 107 A.D.3d 662, 663 (2d Dep't 2013).

Even if Defendants were able to meet their initial burden, a release of unknown claims is unenforceable if it was not "fairly and knowingly made." *Centro*, 17 N.Y.3d at 276 (quoting *Mangini v. McClurg*, 24 N.Y.2d 556, 566-67 (1969)). The "fairly and knowingly made" requirement applies in contexts beyond outright fraud and duress, and prohibits enforcement in "situations where because . . . of the existence of overreaching or unfair circumstances, it was deemed inequitable to allow the release to serve as a bar to the claim of the injured party." *Mangini*, 24 N.Y.2d at 567.

A. Defendants Cannot Show That the Release Unambiguously Covers the Claims at Issue Here.

"The meaning and extent of coverage of a release 'necessarily depend, as in the case of contracts generally, upon the controversy being settled and upon the purpose for which the release was actually given.'" *Linn v. N.Y. Downtown Hosp.*, 139 A.D.3d 574, 575 (1st Dep't 2016) (quoting *Cahill v. Regan*, 5 N.Y.2d 292, 299 (1959). Put simply, "a release may not be read to cover matters which the parties did not desire or intend to dispose of." *Id.*

Here, the Release at issue was entered into in order to resolve the then-pending Probate Litigation and Health-Insurance Litigation, the only disputes the parties were aware of at the time. Indeed, the Release (KDx-X) points to the Settlement Agreement, which includes case captions from the Probate Litigation and Health-Insurance Litigation, and recites that the parties "wish[ed] to avoid the uncertainty, further expense and delay incident to protracted litigation and believe it is in the best interest of all concerned that the controversies *raised by these proceedings* be compromised and settled, on a 'global basis.'" (KDx-Z at 5 (emphasis added).)

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

Here, while the Release contains some boilerplate, it does not "clearly and unambiguously" reach the unknown claims at issue. *C&A Seneca*, 67 Misc.3d 1241(A), at *2. Indeed, the release does not refer to "unknown" claims (*see* KDx-X)—a common provision in many releases. *See, e.g.*, *Arfa v. Zamir*, 76 A.D.3d 56, 57 (1st Dep't 2010) (releasing "known or unknown" claims). And in any event, as a general matter, "New York law does not construe a general release to bar claims for injuries unknown at the time the release was executed, even when the release contains broad language." *Maddaloni Jewelers, Inc. v. Rolex Watch U.S.A., Inc.*, 354 F. Supp. 2d 293, 299 (S.D.N.Y. 2004); *see*, *e.g.*, *Johnson v. Lebanese Am. Univ.*, 84 A.D.3d 427, 431 (1st Dep't 2011) (claims not released where release could be reasonably construed as limited to different subject matter); *Storman v. Storman*, 90 A.D.3d 895, 898 (2d Dep't 2011) ("defendant submitted a broad, general release . . . purporting to release the defendant from all claims," but "it cannot be definitively determined at this point that the scope of the release was intended to cover the allegations in the complaint").

What's more, the consideration given to Mary for the Release was a mere $10 in each instance. (*See* KDx-X.) That small sum is particularly incompatible with Defendants' notion that it released them from all claims she might ever have against them, even the then-unknown claims for tens of millions of dollars at issue here. *See Johnson*, 84 A.D.3d at 431 ("[I]t is appropriate to consider whether a relatively small amount of consideration paid to a releasor in exchange for signing a release suggests that the scope of the release is narrower than is urged by the releasee.").

While Defendants seek to rely on *Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V.* ("*Centro*"), 17 N.Y.3d 269, everything about that case works against them. For starters, the release in *Centro* specifically referenced "future" and "contingent" actions, in conjunction with the phrase "all manner of actions," which the Court of Appeals found indicated an intent to release unknown claims. 17 N.Y.3d at 277. Significantly, the Release here does not contain the same language. More fundamentally, the release in *Centro* was explicitly aimed at a sale transaction, and was intended to resolve all claims relating to that sale. *Id.* at 274, 277. Here, as set forth above, the Release was aimed at the pending Probate Litigation and Health-Insurance Litigation. To be sure, the Release here made reference to the Settlement Agreement, and the Settlement Agreement included a transfer of Mary's interests in the family business to Defendants. But that does not suggest that the Release was intended to resolve all unknown claims relating to that sale. To the contrary, the Release here *explicitly carved out* claims relating to that sale: the Release provides that its scope is "except for any obligations under" the Settlement Agreement. (KDx-X.) And the Settlement Agreement, in turn, states that Mary's "request" and her position "necessitated that [she] be furnished" with certain "information" about her interests in connection with the sale. (KDx-Z at 12-13.) The information that Defendants provided did not satisfy that obligation and instead only compounded and effectuated their fraud. *See Standish-Parkin v. Lorillard Tobacco Co.*, 12 A.D.3d 301, 303 (1st Dep't 2004) (duty to disclose not satisfied when defendants "knowingly made false misrepresentations"). Similarly, the Release states that it was being "executed in accordance with the terms and conditions set forth" in the Settlement Agreement. (KDx-X.) But again, Defendants' provision of fraudulent information failed to satisfy those conditions upon which the Release is based. These carve-outs underscore the narrow construction already apparent from the context and plain text of the Release: unlike the release in

Centro, the Release here was not aimed at the separate sale of Mary's business interests. Moreover, even if the Release could somehow be stretched beyond its intent and beyond its actual language to reach unknown claims, a similarly broad construction of the carve-outs in the Release would still preserve the unknown fraud claims at issue here.

Finally, the limited scope of the Release is reinforced by the fact that Mary and Defendants contemporaneously signed a separate release relating to the 1976 Trust as part of the Settlement Agreement. (*See* KDx-Y.) The fact that both parties found it necessary to obtain a separate release concerning claims arising from Mary's interests in the 1976 Trust confirms that the parties intended the Release to be read narrowly. Had the parties intended the Release to sweep broadly enough to encompass all of Mary's potential claims, the separate 1976 Trust release would not have been necessary. Reading these two releases together helps "discern the intentions of the parties" that the Release was intended to resolve the pending litigation and was not intended to reach the entirely separate and unknown fraud claims at issue here. *NAB Constr. Corp. v. City of N.Y.*, 276 A.D.2d 388, 389 (1st Dep't 2000)).

B. The Release Is Unenforceable in Any Event.

The Court of Appeals has made it clear that releases of unknown claims must be "'fairly and knowingly made,'" *Centro*, 17 N.Y.3d at 276, and may not be enforced 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 claim of the injured party," *Mangini*, 24 N.Y.2d at 567. Where the Complaint's "allegations are sufficient to support a possible finding that the release signed by the plaintiff was obtained under circumstances which indicate unfairness, overreaching and unconscionability, dismissal is inappropriate. *Gibli v. Kadosh*, 279 A.D.2d 35, 41 (1st Dep't 2000).

Here, Defendants created a veritable perfect storm of "overreaching" and "unfair circumstances." *Mangini*, 24 N.Y.2d at 567. The Complaint alleges that Mary signed the Release under the pressure created by Defendants' retaliatory act of withdrawing health insurance from Mary's infant nephew and imperiling the young boy's life. (¶¶3, 21, 118.) This was in addition to Defendants' threats to bankrupt Mary's interests, not to mention Mary herself. (¶112.) And this all took place in a broader context in which Mary, an unsophisticated party, was dependent on the highly sophisticated Defendants, her aunt and uncles, who obviously had a position of dominance, control, and near-exclusive access to information. (¶¶5, 54, 165, 175.)

All of these allegations must be accepted as true in evaluating the unfairness of the Release. *See Sachetti-Virga v. Bonilla*, 158 A.D.3d 783, 784 (2d Dep't 2018). And these allegations are more than "sufficient to support a possible finding that the release was signed by the plaintiff under circumstances which indicate unfairness." *Storman*, 90 A.D.3d at 898. Indeed, New York courts routinely find the sort of pressure that Defendants imposed on Mary to be an "overreaching or unfair circumstance" that renders a release not "fairly and knowingly made." *See, e.g.*, *Johnson*, 84 A.D.3d at 430-31 (finding factual question whether it would be fair to enforce release where plaintiff was given "take-it-or-leave-it proposition"); *Pacheco v. 32-42 55th St. Realty, LLC*, 139 A.D.3d 833, 834 (2d Dep't 2016) (affirming denial of motion to dismiss where allegations were sufficient "to support a possible finding that the defendants procured the relief by means of fraud and that the release was signed by the plaintiff under circumstances which indicate unfairness"); *see also Paulino v. Braun*, 170 A.D.3d 506, 506 (1st Dep't 2019) ("Both the nature of the relationship between the parties that negotiated the release and the disparity between the consideration received and the fair value of plaintiff's claim weigh in plaintiff's favor" as "evidence of overreaching and unfair circumstances" that "raise an issue of fact as to the validity of the release."). Indeed, if there is any doubt on this score, the issue should be left for resolution by a finder of fact. *See, e.g.*, *Johnson*, 84 A.D.3d at 430-33 (finding fact dispute sufficient to reverse grant of summary judgment regarding whether release of claims was "fairly and knowingly made").[10]

III. DEFENDANTS' MISCELLANEOUS ARGUMENTS FOR PARTIAL DISMISSAL FAIL.

Defendants do not dispute that the bulk of the claims asserted in the Complaint are legally cognizable and properly pleaded. Instead, Defendants spend the balance of their briefs making narrow and misguided attacks on fragments of particular claims under CPLR 3211(a)(7). (MTB 19-22; DJT 20-24.) More specifically, Defendants (1) challenge Mary's standing to bring fiduciary duty claims relating to the Grift and the Devaluing; (2) argue that the Complaint does not sufficiently plead justifiable reliance in connection with the fraud and negligent misrepresentation claims based on the same misconduct; and (3) seek dismissal of the civil conspiracy based on the mistaken notion that the Complaint pleads conspiracy as a standalone offense, rather than in connection with specific and meticulously-pleaded wrongdoing. As explained below, each of these arguments fails.

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[10] Defendants cannot escape these unfair circumstances by contending that they were no longer fiduciaries when the Release was signed. (*See* MTB 17-18; DJT 18-19.) Even if that were true, releases of non-fiduciaries must also be "fairly and knowingly made." *See, e.g.*, *Johnson*, 84 A.D.3d at 430. Nor was Mary required to exercise a "'heightened degree of diligence.'" (MTB 18; DJT 19 (quoting *Arfa*, 76 A.D.3d at 60.) Mary is not the sort of "highly sophisticated business person" with "clear notice" of the other side's dishonesty on whom that duty is imposed. *Arfa*, 76 A.D.3d at 60. And the fact that Mary was represented by counsel does not help them either, *see* *Bloss v. Va'ad Harabonim of Riverdale*, 203 A.D.2d 36, 40 (1st Dep't 1994), even assuming (as was not the case) that Barnosky were independent and effective. *But see* (¶114).

A. Mary Has Standing to Assert Fiduciary Duty Claims Based on Conduct Before 2001.

Defendants contend that fiduciary duty claims based on their Grift and Devaluing are derivative claims belonging to Midland as a corporation rather than to Mary as "a shareholder." (MTB 16, 20; DJT 17-18, 21.)[11] Defendants' standing argument fails for the simple reason that it ignores the claims actually asserted in the Complaint: Mary does not assert claims for injury to Midland. On the contrary, she alleges that Defendants breached fiduciary duties owed to her independently through their fraud, which injured her directly.

To be sure, as Defendants point out, "allegations 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." *Abrams v. Donati*, 66 N.Y.2d 951, 953 (1985) (emphasis added). But, as *Abrams* itself makes clear, that rule does not apply "when the wrongdoer has breached a duty owed directly to the shareholder which is independent of any duty owing to the corporation." *Id.*; *accord Serino v. Lipper*, 123 A.D.3d 34, 39-40 (1st Dep't 2014).[12] Specifically, New York courts distinguish between derivative and direct claims by considering "who suffered the alleged harm" and "who would receive the benefit from any recovery." *Serino*, 123 A.D.3d at 40. It is well established that, "[i]f there is any harm caused

[11] To be clear, Defendants do not challenge under their derivative theory Mary's standing to assert fiduciary duty claims based on fraud during the Squeeze-Out. They take issue only with her claims based on the ways Defendants misrepresented and concealed their plundering and devaluing of her interests before that forced sale.

[12] All of the cases Defendants cite are inapplicable here for the same reason—none concerns a duty owed directly to the shareholder. (*See* MTB 20–21; DJT 22 (citing *Ciullo v. Orange & Rockland Utils., Inc.*, 271 A.D.2d 369, 369 (1st Dep't 2000), *Jacobs v. Cartalemi*, 156 A.D.3d 605, 608 (2d Dep't 2017)).)

to the *individual*, as opposed to the *corporation*, then the individual may proceed with a direct action." *Id.* (emphases added).

Here, Defendants breached duties they owed directly to Mary independent of any duty they owed to any corporate entity. As the Complaint alleges, Defendants breached various overlapping fiduciary duties they owed to Mary, including as majority owners of a closely held entity, through their fraudulent misrepresentations and omissions. (¶224; *see* ¶¶225-27; *see also supra* Part I.C.) And that fraud caused injury "directly to" Mary: it caused Mary to believe that her interests were being protected and induced her to keep them under Defendants' control, and to believe that her interests were far less valuable than they really were, which induced Mary to hold them until she ultimately relinquished them at a gross undervaluation. *See Serino*, 123 A.D.3d at 39-40. Thus, the "harm suffered and the relief sought belongs to [her] individually." *Id.* at 40; *see also Gjuraj v. Uplift Elevator Corp.*, 110 A.D.3d 540, 540-41 (1st Dep't 2013) (minority shareholder in closely held corporation could bring direct breach of fiduciary duty claim "since defendants' freezing him out of the corporation and failing to pay him his share of the profits harmed him individually, and he would receive the benefit of any recovery").

The First Department recently upheld an individual counterclaim for breach of fiduciary duty in analogous circumstances—where shareholders like Defendants who "controlled the company's finances . . . abused their position by falsely representing the company's financial state in order to induce [counterclaimant] to part with his shares at a price below fair value." *PF2 Secs. Evaluations, Inc. v. Fillebeen*, 171 A.D.3d 551, 553 (1st Dep't 2019); *accord Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt. LLC*, 376 F. Supp. 2d 385, 409 (S.D.N.Y. 2005) (shareholders in investment funds could bring claims for breach of fiduciary duty arising from misstatements of net asset values in reports to investors).

B. The Complaint Properly Alleges Justifiable Reliance in Connection with Fraud in the Same Period.

Defendants next make the limited argument that Mary has not pleaded justifiable reliance on the false and misleading statements that Defendants made to conceal their Grift or effect the Devaluing of her interests. To be clear, Defendants do not suggest that any reliance would have somehow been unjustifiable—nor could they. *See, e.g.*, *Epiphany*, 171 A.D.3d at 9-10 (finding justifiable reliance based on plaintiff's "familial relationship" with the defendant, defendant's "superior knowledge," and that defendant "went to great lengths to conceal" the fraud); *Anderson ex rel. Anderson, Weinroth & Co., L.P. v. Weinroth*, 48 A.D.3d 121, 136 (1st Dep't 2007) (finding plaintiff "reasonably justified in relying on [his fiduciary's] representations concerning . . . capital contributions without having to perform his own independent inquiries"); *Swersky v. Dreyer & Traub*, 219 A.D.2d 321, 327-28 (1st Dep't 1996) (reinstating fraud claim where there were "outstanding issues" of fact about disparity in information between plaintiff and defendant that "places this case within the ambit of the 'special facts' doctrine").

Instead, Defendants contend that Mary did not rely on their misstatements and omissions at all. But unlike the plaintiff in *Brawer v. Lepor*, the case Defendants cite (MTB 21; DJT 23), Mary's Complaint *does* allege that she "made . . . decisions based on information provided" by the Defendants, even before the Squeeze-Out. *See Brawer v. Lepor*, No. 652334/2017, 2019 WL 1901380, at *6 (Sup. Ct., N.Y. Cty. Apr. 29, 2019), *aff'd in relevant part*, 188 A.D.3d 482 (1st Dep't 2020) (appeal cited in MTB 21; DJT 23). Indeed, Mary alleges that she "retain[ed] [her] investments in reliance on misrepresentations" and omissions by Defendants—the paradigm of detrimental reliance. *See Brawer*, 188 A.D.3d at 483 (citing *Robeco-Sage Capital, L.P. v. Citigroup Alternative Invs. LLC*, No. 601030/2008, 2009 WL 2626244, at *14-15 (Sup. Ct., N.Y. Cty. July 28, 2009)).

More specifically, Mary alleges that she "placed" "trust" in the Defendants and their co-conspirator Durben, her fiduciaries, to look out for her interests after her father died. (¶¶10, 42, 46, 61, 65.) "[Y]ear after year Defendants provided [her], through her trustee [and Defendants' co-conspirator] Durben with financial documents that were designed to dupe her into believing that her interests were being protected," despite their siphoning and devaluing. (¶177; *accord* ¶16 ("Defendants fostered the impression that everything was okay, that they were watching over her interests.").) Ultimately, that false belief induced her to keep her interests under Defendants' control as they plundered her inheritance, "because the true value of [her] Interests was an essential consideration for her in deciding whether and the amount for which" to relinquish them. (¶158.) Thus, Mary "reasonably and justifiably relied on Defendants' and their Co-Conspirators' misstatements and omissions." (¶211.) Because all of these allegations must be taken as true and accorded every possible favorable inference, none of Mary's claims can be dismissed on this basis. *See Kaufman*, 307 A.D.2d at 121 (pleading fraud does not require plaintiffs "indicate[] how they came to rely on [defendant's] statements"); *Am. Gen. Home Equity, Inc. v. Gjura*, No. 102365/2009, 2010 WL 2984344, at *12-13 (Sup. Ct., N.Y. Cty. July 16, 2010) (explaining on a motion to dismiss that "strong proof of reliance on a false representation is often not necessary in an action for deceit [because] it can be inferred from the circumstances surrounding the transaction").

C. The Complaint Properly Alleges a Civil Conspiracy.

Finally, Defendants argue that the Complaint asserts causes of action for conspiracy that must be dismissed because New York does not recognize conspiracy as an independent cause of action. (MTB 22; DJT 23-24.) But the Complaint does not assert conspiracy as an independent cause of action. Instead, it groups "allegations of civil conspiracy . . . to connect the actions of separate defendants with an otherwise actionable tort." *Cohen Bros. Realty Corp. v. Mapes*, 181

A.D.3d 401, 404 (1st Dep't 2020). (*See* ¶¶205-20 (alleging "Civil Conspiracy *to Commit Fraudulent Misrepresentation and Fraudulent Concealment*," "Civil Conspiracy *to Commit Fraudulent Inducement*" (emphases added)).) And the Complaint does so properly by alleging "the primary tort [fraudulent misrepresentation, fraudulent concealment, and fraudulent inducement], plus . . . an agreement between two or more parties; an overt act in furtherance of the agreement; the parties' intentional participation in the furtherance of a plan or purpose; and resulting damage or injury." *Compare Cohen Bros.*, 181 A.D.3d at 404, *with* (¶¶ 205-20); *id.* (reversing dismissal where plaintiffs "adequately pleaded civil conspiracy" by "pleading the underlying fraud . . . as well as an agreement").

CONCLUSION

Based on the foregoing, the motions to dismiss should be denied.

Dated: February 26, 2021

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I, Roberta A. Kaplan, hereby certify, in accordance with Commercial Division Rule 17, that this Memorandum contains 9,992 words, as measured by the word count of the word-processing software used to prepare this document. Pursuant to Rule 17, this word count excludes the caption, table of contents, table of authorities, and signature block. This word count is within the 10,000 word limit so-ordered by Justice Sherwood on February 17, 2021. NYSCEF 68.

Dated: February 26, 2021
New York, New York

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