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

MEMORANDUM OF LAW OF DEFENDANT MARYANNE TRUMP BARRY IN SUPPORT OF MOTION TO DISMISS

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PRELIMINARY STATEMENT

Defendant Maryanne Trump Barry ("Judge Barry") submits this memorandum of law in support of her motion, pursuant to CPLR 3211(a)(5), to dismiss Plaintiff's Complaint because (a) each claim is time-barred, and (b) Plaintiff released Judge Barry from the claims asserted. To the extent 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, Judge Barry seeks dismissal because Plaintiff lacks standing and has failed to state a cause of action. Plaintiff's claims of "civil conspiracy to commit fraudulent misrepresentation and fraudulent concealment [and] … fraudulent inducement," also fail because New York does not recognize a cause of action for "civil conspiracy" independent of Plaintiff's fraud allegations.

On April 10, 2001, Plaintiff and Defendants entered into a comprehensive settlement agreement under which Plaintiff (represented by extremely competent counsel) withdrew her objections to the probate of the will of her grandfather, Fred C. Trump ("Fred"), sold all of her interests in Fred's real estate empire, and took distribution of the principal of a 1976 trust which Fred had established for her benefit. As her Complaint (Exhibit 1) (NYSCEF Doc. No. 2) repeatedly acknowledges, Defendants provided her with financial statements and related documents concerning all of her interests, as well as appraisals prepared by Robert Von Ancken of Fred's interests as reported on his federal estate tax return. She also signed general releases in favor of Defendants, releasing each Defendant from any claims she "ever had, now ha[s] 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 [the] Release" (Exhibit 2).

Now, almost twenty years after signing the settlement agreement and releases, Plaintiff seeks to undo their deal, claiming that virtually every document furnished to her and her

counsel was fraudulent. Plaintiff seeks damages for Defendants' alleged fraudulent understatement of the value of her interests, as well as alleged "grift" and devaluing of her interests for the twenty-years *before* she entered into the settlement agreement. These claims are time-barred under any theory. They also must be dismissed because the law and public policy binds Plaintiff to the releases she knowingly signed.

Plaintiff offers nothing more than conclusory allegations that Defendants concealed the alleged fraud, and her own public statements contradict any claim that she could not have discovered the alleged fraud years earlier. In an interview with George Stephanopoulos, Chief Anchor of ABC News, on July 14, 2020,[1] Plaintiff admitted that she had received 19 boxes of tax returns and financial records concerning the operations of Fred's real estate empire from Judge Barry and the other defendants at or before the time of the April 2001 settlement – the very records which she now claims were fraudulent.[2] These records were stored at the offices of her attorneys, Farrell Fritz P.C., which represented her in the settlement. Having had those records in her possession for nearly 20 years, she cannot now claim that she did not have the means to discover the alleged fraud.

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[1] See excerpt from the Stephanopoulos interview annexed as Exhibit 3. The entire transcript can be found at https://abcnews.go.com/Politics/transcript-mary-trumps-interview-abc-news-george-stephanopoulos/story?id=71803869 The Court may consider this information on a motion to dismiss. See Gomez-Jimenez v. N.Y. Law Sch., 103 A.D.3d 13, 16 (1st Dep't 2012) (court may dismiss where documentary evidence tendered by defendant "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (citation and internal quotation marks omitted)); Biondi v. Beekman Hill House Apt. Corp., 257 A.D.2d 76, 81 (1st Dep't 1999) (when court considers documentary evidence, "the allegations are not deemed true," and "[t]he motion should be granted where the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted" (citation and internal quotation marks omitted)), aff'd, 94 N.Y.2d 659 (2000).

[2] Plaintiff made the same admission in her recently published book concerning President Trump (see Exhibit 6, infra).

Indeed, the central allegations of Plaintiff's Complaint – that Defendants siphoned profits from Trump entities in which she held interests through the formation and operation of All County Building Supply & Maintenance Corp. ("All County"), and by charging those entities management fees, consulting fees and salaries through Apartment Management Associates Inc. ("Apartment Management") – were drawn directly from a New York Times investigative report[3] which was based on the same 19 boxes of records, which she personally delivered to the Times in 2017 (see Exhibit 3). If the New York Times was able to divine this claimed "fraud" in less than a year, surely Plaintiff could have done so within the applicable limitations period.

In addition, in a February 24, 2000 deposition which Plaintiff's then counsel took of deceased Defendant, Robert Trump, in her proceeding to contest Fred's Will, Mr. Trump testified in detail concerning the formation and operation of All County, including the mark-up that All County took on supplies and equipment which it purchased for Trump entities. Plaintiff was obviously on notice of the facts of which she complains over twenty years ago, and her failure to timely act precludes assertion of those claims in this action.[4]

Indeed, in her recent book concerning President Trump she admitted that, when she entered into the April 10, 2001 settlement, she had reason to investigate further, but made a

[3] *See* Trump Engaged in Suspect Tax Schemes as He Reaped Riches From His Father, David Barstow, Susanne Craig and Russ Buettner, New York Times, October 2, 2018 (Exhibit 4). See https://www.nytimes.com/interactive/2018/10/02/us/politics/donald-trump-tax-schemes-fred-trump.html.

[4] Plaintiff also could not have missed the *New York Post's* public announcement in 2003 of Defendants' impending sale of the Fred Trump properties for $600 million. *See* Trumps Lighten Up – Family Sells Outer-Borough Buildings for $600M, New York Post, Dec. 18, 2003 (Exhibit 5) https://nypost.com/2003/12/18/trumps-lighten-up-family-sells-outer-borough-buildings-for-600m/

conscious decision to do nothing. Describing her conversation with Jack Barnosky, Esq., her counsel at Farrell Fritz, when she went to retrieve the 19 boxes of documents, Plaintiff stated:

> When he turned to leave, I called after him, "Jack, wait a second. Can you remind me why we decided to settle the lawsuit?"
>
> "Well, you were getting concerned about the costs, and, as you know, we don't take cases on contingency. Although we knew they were lying to us, it was 'He said, she said." Besides, your grandfather's estate was only worth thirty million dollars." It was almost word for word what he told me when I had last seen him almost twenty years earlier.[5] (Emphasis added).

THE COMPLAINT

Plaintiff alleges that through the Wills of her great-grandmother, Elizabeth Trump, her grandfather, Fred, and an inheritance from her father, Fred Trump, Jr., she had minority interests in certain land underlying Fred's developments known as Beach Haven and Shore Haven (the "Land Interests") (Exhibit 1, ¶¶ 38-39, 44, 45-53), a 10% interest in certain corporations and limited liability companies comprising the Midland Associates Group (the "Midland Interests") (Id. ¶¶ 42, 44, 54-59), and her interest as beneficiary under a 1976 Trust created by Fred for her benefit.[6] (Id. ¶ 60) Her brother, Fred Trump III, who declined to join in this lawsuit, had the identical interests (Id., ¶¶ 46, 60).[7]

[5] Mary L. Trump, PH.D., TOO MUCH AND NEVER ENOUGH, HOW MY FAMILY CREATED THE WORLD'S MOST DANGEROUS MAN, Simon & Schuster (July 2020), at p. 187. A copy of pages 185-188 is annexed as Exhibit 6.

[6] Plaintiff and her brother, Fred Trump III (Fred III), were excluded under Fred's 1991 Will (Exhibit 7), except for a pecuniary bequest equal to the amount of Fred's generation skipping transfer tax exemption bequeathed to each of his other grandchildren (Will, Article FIFTH (B)).

[7] Plaintiff's 1976 Trust was funded with $400,000 and its assets consisted of cash and cash equivalents and mortgage receivables on certain of Fred's properties (see Trust Agreement and financial statements for Plaintiff's 1976 Trust annexed as Exhibits 8 and 9).

The Complaint contains no particulars concerning the role of any of the Defendants in the alleged fraudulent scheme or breach of fiduciary duty Plaintiff alleges. Instead, she broadly asserts that "the Defendants" conspired to deprive her of the value of her interests by (a) interposing All County between Trump entities operating the cooperative apartment buildings that were the subject of her interests and suppliers of appliances and other items for those apartments, which marked up the price of the products to the operating entities (Exhibit 1, ¶¶ 12, 69-72), (b) by charging "exorbitant management fees, consulting fees and salaries" through Trump Management, Inc. ("Trump Management") and its successor, Apartment Management, corporations in which she alleges Defendants were interested (Id. ¶¶ 13, 73-75), and (c) by causing the companies in which Plaintiff had an interest to make loans to other companies Defendants owned and controlled, which allegedly contained no terms of repayment, and failed to impose an obligation to pay interest and/or charged preferential rates not available through an arm's length transaction (Id. ¶¶ 14, 76).

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

Plaintiff also alleges that Defendants "conspired to drive down the book value and net income of [her] interests" over this twenty-year period by engaging in the foregoing conduct (which she describes as "the grift") (Exhibit 1, ¶ 15) and by engaging the services of Robert Von Ancken (a well known and highly respected appraiser)[8] to provide fraudulent appraisals which "grossly understate the value of [Plaintiff's] interests" (Id. ¶ 16). She alleges that "year after year," Defendants provided her with "false and misleading financial statements", through Irwin Durben, trustee of the Trust which held her Midland Interests,[9] based on Van Ancken's valuations (Id.). She also claims that Defendants refused to sell cooperative apartments held by Midland entities in order to drive down the value of her Midland Interests (Id. ¶¶104-108). Again, the Complaint provides no specifics concerning these alleged "fraudulent" appraisals and "false and misleading financial statements" (other than the Sunnyside financial statements referred to in the preceding paragraph). Plaintiff makes no claim that Defendants provided *any* appraisals or financial statements to her *after* she settled her claims with Defendants in April 2001.

Plaintiff's final set of allegations concerns the 2001 settlement, which she describes as the "the squeeze out" (Exhibit 1, ¶¶ 18-28, 109-142). Plaintiff alleges that a few days after Fred died in June 1999, Defendant Robert Trump "called [her] to convey a simple message on Defendants behalf: It was time for [Plaintiff] to relinquish her interests" (Id. ¶ 110). She claims that "[o]ver the next month or so, [Robert] hectored [Plaintiff] with daily calls reiterating the same message" (Id.). Plaintiff alleges that she and Robert met several times between July and October

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

[9] It appears from Trump records that, at the time of the April 10, 2001 settlement, Plaintiff held her interests in the two corporations and the two limited liability companies which comprised the Midland Associates Group, directly, not through Mr. Durben as Trustee.

1999 when Robert tried to procure Plaintiff's consent to the probate of Fred's will and to relinquish her interests (Id. ¶ 111). She claims that in their final meeting, in October 1999, Robert threatened that "[i]f [Plaintiff] did not comply with their demands, including consenting to probate, Defendants would bankrupt Midland and "'leave you paying taxes on money you don't have for the rest of your lives" (Id. ¶ 112).

Plaintiff alleges that, notwithstanding, she persisted and on March 23, 2000 she and Fred III filed objections to probate, contesting the validity of Fred's 1991 Will ((Exhibit 1, ¶ 113). She acknowledges that, at the recommendation of Trustee Durben, she engaged John J. Barnosky, Esq., a partner of Farrell Fritz, P.C., to represent her in connection with the probate contest and her settlement with Defendants (Id. ¶ 114). She claims that: "[w]hether because of conflicted loyalties or because he was duped by Defendants as well, throughout the litigation and settlement discussions, Barnosky did not keep the Minority Stakeholders [Mary and Fred III] fully informed of material information and pursued a settlement without ensuring that he and his client had complete and accurate information" (Id.). These allegations ring hollow, given Mr. Barnosky's reputation and competence. He is a leading lawyer in the New York Trusts and Estates Litigation Bar, a fellow of the American College of Trusts and Estates Counsel ("ACTEC"), and has consistently been rated as a "Super Lawyer."[10] Moreover, Mr. Barnosky's firm had possession of the very 19 boxes of documents on which The New York Times based its investigation, and on which Plaintiff bases her complaint.

Plaintiff also omits to reveal that on February 24, 2000 Mr. Barnosky took Robert Trump's deposition and questioned him extensively concerning All County (see Point I, infra, at 13-14 and Exhibit 13).

[10] https://www.farrellfritz.com/attorney/john-j-barnosky/#recognition

Plaintiff alleges that, at Judge Barry's suggestion, Defendants terminated Fred III's son William's coverage under Trump Management's health insurance policy in retaliation for her and Fred III's objections (Exhibit 1, ¶¶ 21-22, 117). In response, Plaintiff and Fred III filed a suit in Supreme Court, New York County to reinstate coverage (Id. ¶¶ 22, 119). Plaintiff alleges that "[a]s the pressure mounted, Defendants exploited the opportunity to squeeze [Plaintiff] out of her Interests altogether: they told [her] that they would only settle the litigation if she agreed to be bought out of her Interests altogether…." (Id. ¶ 120, see also ¶ 23).

By an Agreement and Stipulation, dated April 10, 2001 (the "Settlement Agreement") (Exhibit 10), Plaintiff and Defendants, in their individual capacities and as Executors of the Estates of Fred and Defendants' mother, Mary Anne Trump, as Trustees of Mary 's 1976 Trust, as shareholders and officers and directors of Trump Management and Apartment Management, and as partners, officers and directors in the Midland Associates group and co-owners of the ground leases in which Plaintiff held interests, settled all of their disputes, including the probate contest, Plaintiff and Fred III's Supreme Court Action and Defendants' buyout of Plaintiff's Land Interests and her Midland Interests, and her interests under the 1976 Trust and Fred's 1991 Will. The Settlement Agreement specifically listed certain documents which were furnished to Plaintiff in connection with the settlement, although the parties acknowledged that the list was not exclusive (Id. ¶ 13).

In consideration of Plaintiff and her brother, Fred III's discontinuance of the will contest, the Settlement Agreement provided that each was to be paid $962,500. Each was also paid $1,700,000 for their interests in the Midland Associates Group and each received $100,000 for their respective Land Interests. Mary's 1976 Trust was terminated and total trust assets of $778,254 were distributed to her. Fred, who had an identical trust, was granted the right to

designate a successor trustee and the trust principal of $824,934 was transferred to the new trustee. Both discontinued their action to reinstate William's insurance coverage, and Defendants discontinued their counterclaims in that action (Exhibit 10, ¶¶ 4-18). Plaintiff gave all of the Defendants general releases (Exhibit 2) and executed a receipt and release agreement (Exhibit 11), for the distribution of her trust assets.

Plaintiff's claim that she was defrauded concerning her Midland Interests under the Settlement Agreement rests on her contention that the financial statements, tax returns, cash disbursement schedules and other financial documents that she and her counsel were given in connection with the settlement understated the value of her interests for the same reasons that the financial documents Defendants had previously provided to her had understated those interests – *viz.*, because of the alleged All County "grift" and Defendants' charging of "exorbitant" management and consulting fees and salaries, and the procurement from Mr. Von Ancken of undervalued appraisals (Exhibit 1, ¶¶ 126-128).

Plaintiff also claims that on December 8, 2000, counsel for Defendants misrepresented the value of Starrett City Associates, LP (in which Midland had a 1.4583% interest) (Exhibit 1, ¶ 58(c)), based on "information obtained from management" *(i.e.*, the Defendants) (Id. ¶¶ 123-124).

Incredibly, Plaintiff also claims that the valuations which Defendants provided to her of her Land Interests were misleading because they did not include the value of her reversion interests under the long-term leases with which her Land Interests were burdened (Exhibit 1, ¶ 130). Given that the leases were 99 year leases commencing in 1950 and that the tenants had the automatic right to renew the leases for another 99 years (to 2148) (see Exhibit 12), it is absurd for Plaintiff to claim that the reversionary interest had any substantial value. She claims that the estate

and gift tax returns for Fred's estate that she was given in connection with the settlement fraudulently understated the value of the land interests which Fred held in the same properties for the same reason (Id. ¶ 135). She also claims (again without any factual particulars) that the ground leases "were excessively preferential to Defendants' entities as lessees and far below market," and "[t]hese extremely low lease payments increased the flow of value to Defendants as lessees to the detriment of Mary and the other stakeholders as lessor" (Id. ¶ 136). Of course, the claimed detrimental effect was equally applicable to Defendants who also held interests in the underlying land. Similarly, she alleges that Defendants provided her with "numerous financial statements, general ledgers, and tax returns for 1989, 1990, 1991, 1992, and 1993 for Beach Haven, Shore Haven, and various associated entities and divisions of those entities" which allegedly contained fraudulent undervaluations of the value of her Land Interests (Id. ¶ 132), as well as allegedly fraudulent appraisals prepared by Mr. Von Ancken (Id. ¶ 133). The Complaint offers no details to substantiate these bald claims.

Plaintiff also alleges that Defendants misrepresented the values of several properties "associated with the Fred Sr. Estate" and properties related to Fred and his wife, Mary Anne's grantor retained annuity trusts ("GRATs") (Exhibit 1, ¶¶ 139-140). These allegations are irrelevant, as they do not involve Plaintiff's interests -- Plaintiff's only bequest under Fred's Will was a pecuniary bequest unrelated to the subject properties.

Plaintiff concedes that after she sold her interests in the Fred Trump properties in the April 10, 2001 settlement, "she no longer received financial statements or other information (through her representatives or anyone else) pertaining to the Trump empire and the Interests she had relinquished (Exhibit 1, ¶ 143).

Based on the foregoing allegations, Plaintiff alleges eight causes of action: (1) fraudulent misrepresentation, fraudulent concealment and fraudulent inducement (Counts 1, 2 and 3) (Exhibit 1, ¶¶ 147-169, 170-184, 183-194), based on her allegations of "grift" and undervaluation, which culminated in her relinquishing her Midland Interests and Land Interests for "dramatically less than they were actually worth," and (2) for negligent misrepresentation (Count 4) (Id. ¶¶ 195-204) , breach of fiduciary duty (Count 7) (Id. ¶¶ 221-230), and Defendants' alleged conspiracy to defraud her, and to aid and abet each other's alleged breach of fiduciary duty (Counts 5 and 6, and 8) (Id. ¶¶ 205-213, 214-220, 231-236).

ARGUMENT

POINT I

PLAINTIFF'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

A. Plaintiff's Fraud and Negligent Misrepresentation 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., Lefkowitz v. Appelbaum, 258 A.D.2d 563 (2d Dep't 1999) (a "cause of action based upon actual fraud must be commenced within six years of the commission of the fraud, or two years from the date the fraud could reasonably have been discovered, whichever is later").

Where, as here, a claim is made that a person was fraudulently induced to enter into a contract, the time of the "commission of the fraud" is the time the person entered into the agreement. Carbon Capital Management, LLC v. American Express Co., 88 A.D.3d 933, 939 (2d Dep't 2011) (fraud claim accrued at time plaintiff entered into contract with investment company

in reliance on defendant's alleged misrepresentations); Squitieri v. Trapani, 2012 WL 8677707 (Sup. Ct. Westchester Co. 2012), aff'd, 107 A.D.3d 688 (2d Dep't), lv. denied, 22 N.Y.3d 852 (2013) (claim that plaintiff was fraudulently induced to enter into agreement to swap interests in properties with defendant accrued on date of agreement); Goldberg v. Manufacturers Life Ins. Co., 242 A.D.2d 175 (1st Dep't), lv. dismissed in part and denied in part, 92 N.Y.2d 1000 (1998) (claim that insurer misrepresented premium payment terms of insurance policy accrued on date plaintiffs purchased policy).

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

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 (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, [she] could have discovered the alleged fraud," her claim is time-barred. Brock v. Brock, 229 A.D.2d 457, 458 (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 (2d Dep't 1999), lv. denied, 94 N.Y.2d 759 (2000); Lefkowitz v. Appelbaum, supra, 258 A.D.2d at 563.

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 even 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 Robert Trump extensively concerning All County's operations. Mr. Trump testified that:

- All County is "a purchasing company set up to acquire goods, services, sort of combining the purchasing power of the whole company. Rather than the system of having each individual building order individually its particular building needs, we started buying on a wholesale basis, and then – from vendors, from suppliers, and then selling that off to the entities" (Exhibit13, Tr. 134-135, 147);

- All County was owned by "my two sisters, my brother, myself, and my cousin John Walter" (Id. Tr. 135);

- One of All County's purposes was to "mark up and generate a profit on its own" (Id. Tr. 135-136);

- To the extent that the markup was created at a level outside of Fred's entity, it could "possibly" have the effect of reducing Fred's estate (Id. Tr. 136, 147);

- Robert "probably" initiated the idea of All County, "in consultation with our lawyers [and] with our outside auditors" and John Walter and Fred Trump were involved as well (Id. Tr. 137, 145 -147);

- By forming All County we "decided to take advantage of" the "large combined purchasing power" of all of the individual buildings (Id. Tr, 138-139, 147); and

- "I'm not sure [that even with All County's markup] the Trump entities wound up paying more. The purchasing power, as I said, more than offset in many cases, if not all cases, certainly many of the cases, offset the markups that All County was receiving" (Id. Tr. 143).

Mr. Trump also testified concerning Apartment Management, testifying that "it's in the business of managing the individual developments" (Exhibit 13, Tr. 139), and indicating that it had taken over what Trump Management had done (Id.). Mr. Barnosky stated that he had seen "lots of checks going out to Trump Management from the various [Trump family] entities (Exhibit 13, Tr. 132), and that he had "records of all these entities for the three years [prior to Fred's September 18, 1991 Will]" (Id. Tr. 133), and that "I can assure you there are checks during the two-year period [September 1991 – September 1993] to All County Building Supply" (Id. Tr. 134). Mr. Barnosky also demanded production of "the documents on All County Management [sic], its shareholders' agreement, and any contractual arrangements between entities in which [Fred] had an interest" during the period from September 1988 through September 1993 (Id. Tr. 165-166). 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 (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).

In addition, Plaintiff admits that, since signing the Settlement Agreement, she was in possession of or had control over the 19 boxes of records on which the New York Times based its investigation. She was perfectly free to examine those records, or to ask counsel to do so. Under similar circumstances, the courts have consistently held that the discovery exception to the six-year fraud statute is unavailable. See, e.g., Siegel v. Dakota, Inc., 173 A.D.3d 515 (1st Dep't 2019), lv. denied, 35 N.Y.3d 902 (2020) (no basis to apply two-year discovery provision to

plaintiff's fraud claim against former co-op board members where "plaintiff admits he discovered this alleged new evidence by reviewing board minutes from more than a decade ago that were available to him at that time"); Spinale v. Tag's Pride Produce Corp., 44 A.D.3d 570 (1st Dep't 2007) (summary judgment properly granted dismissing complaint alleging fraudulent inducement of sale of stock where "any documents that might have been necessary for plaintiff to discover the fraud alleged … were in his possession"); Leider v. Amalgamated Dwellings, Inc., 2009 WL 2984839 (Sup. Ct. New York Co. 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 (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).

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, which Plaintiff now claims were fraudulent.

Moreover, as Plaintiff concedes in her book, at the time she signed the Settlement Agreement, both she and her lawyer believed they had reason to question the valuations Defendants were providing to them ("we knew they were lying to us" -Exhibit 6), but made a

conscious decision not to proceed further. The time when Plaintiff should have discovered the "fraud" she alleges expired long ago, and all of her fraud claims are time-barred.[11]

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 (2009). Plaintiff's allegations supporting her claim for breach of fiduciary duty are premised on Defendants' alleged siphoning and devaluing of her interests (see Exhibit 1, ¶226), which as we demonstrate in Point III, infra, are derivative claims[12] 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 viewing Plaintiff's allegations in the most favorable light, her breach of fiduciary duty claims accrued no later than April 10, 2001, when she entered into the Settlement Agreement. The three-year statute expired over sixteen years ago.

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

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

[12] 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.

POINT II

PLAINTIFF'S CLAIMS ARE BARRED BY THE GENERAL RELEASES SHE SIGNED 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 (1st Dep't 2006), lv. denied, 8 N.Y.3d 804 (2007); accord, Matter of Cheng Ching Wang, 114 A.D.3d 939, 940 (2d Dep't 2014). If "the language of a release is clear and unambiguous, the signing of a release is a 'jural act' binding on the parties," Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V., 17 N.Y.3d 269, 276 (2011) (quoting Booth v. 3669 Delaware, 92 N.Y.2d 934, 935 (1998)), which "will be enforced as a private agreement." Appel v. Ford Motor Co., 111 A.D.2d 731, 732 (2d Dep't 1985).

That Defendants are alleged to have been co-shareholders or co-members with Plaintiff in Midland or are otherwise alleged to have been acting as fiduciaries when entering into the Settlement Agreement, does not affect the enforceability of the releases. It is well-settled that where, as here, "the fiduciary relationship is no longer one of unquestioning trust," Centro Empresarial Cempresa S.A., supra, 17 N.Y.3d at 278, a sophisticated principal or one represented by sophisticated counsel, is able to release her fiduciary from all claims. Id.; accord Arfa v. Zamir, 17 N.Y.3d 737, 738 (2011); Pappas v. Tzolis, 20 N.Y.3d 228, 233 (2012). When Plaintiff agreed to relinquish her 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 56, 60 (1st Dep't 2010).

Moreover, in the adversarial context, a "heightened degree of diligence [was] required of [Plaintiff] and [she cannot] reasonably rely on [Defendants'] representations without making additional inquiry to determine their accuracy" Arfa, 76 A.D.2d at 60 (quoting Global Minerals and Metals Corp. v. Holme, supra, 35 A.D.3d at 100). Plaintiff did not exercise such diligence, notwithstanding that she was plainly on notice, through her counsel's questioning of Robert 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.

The releases are also enforceable under the well-settled rule that "a party that releases a fraud claim may later challenge the release as fraudulently induced only if it can identify a separate fraud from the subject of the release." Centro Empresarial Cempresa S.A., supra, 17 N.Y.3d at 276. Plaintiff 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. 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.

As the claims which Plaintiff now asserts are all within the terms of the releases she executed in favor of Defendants, her Complaint must be dismissed.

POINT III

TO THE EXTENT PLAINTIFF SEEKS TO RECOVER FOR DEFENDANTS' ALLEGED BREACH OF FIDUCIARY DUTY PRIOR TO THE APRIL 10, 2001 SETTLEMENT, SHE LACKS STANDING TO ASSERT THESE CLAIMS

Plaintiff claims that, for 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 he held her interests.[13] These include her allegations concerning the markups taken by All County as a middleman, Defendants' alleged charging of "exorbitant management fees, consulting fees and salaries" to these entities through Trump Management and Apartment

[13] Highlander Hall, Inc. and Coronet Hall, Inc., and Midland Associates, LLC and Park Briar Associates, LLC (see Exhibit 1, ¶[55).

Management, and by causing these entities to make loans to other Trump entities they controlled, at preferential rates or which did not require repayment.

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

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

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

> Because the heart of the alleged injury is the diminution in the value of shares of QoS Networks Limited, a start-up company in which plaintiffs were minority shareholders, the argument that plaintiffs are entitled to bring a direct action against Warburg, the majority shareholder, is unavailing under New York Law.

Id. at 282. Accord Elghanian v. Harvey, 249 A.D.2d 206, 207 (1st Dep't 1998) ("The motion court correctly determined that plaintiff's claim for diminution of the value of his stock holdings in defendant Artra was a derivative cause of action belonging to that corporation and not to plaintiff individually"). The same rules apply to claims for self-dealing and diminution in value brought by members of a limited liability company. See, e.g., Jacobs v. Cartalemi, 156 A.D.3d 605, 608, (2d Dep't 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 (1st Dep't), lv. denied, 95 N.Y.2d 760 (2000) ("Plaintiffs lack standing to challenge dismissal of their complaint since

they are no longer shareholders in defendant corporation, having tendered their shares for cash in the merger of defendant corporation into another corporation"); Jacobs v. Cartalemi, supra.

Thus, as Plaintiff is not a shareholder or member of any of the Midland entities, she has no standing to prosecute her 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 FOR LACK OF JUSTIFIBLE RELIANCE

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

Although 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 misrepresentations 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

NEW YORK DOES NOT
RECOGNIZE A CAUSE OF ACTION FOR CONSPIRACY

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 (1st Dep't 2019); accord Mamoon v. Dot Net Inc., 135 A.D.3d 656, 658 (1st Dep't 2016); Salerno v. Pandick, Inc., 144 A.D.2d 307, 308 (1st Dep't 1988). In any event because the underlying fraud claims are time-barred, any such conspiracy claims are unsustainable.

CONCLUSION

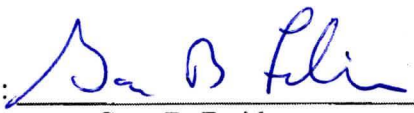
For all of the foregoing reasons, it is respectfully submitted that (a) Plaintiff's Complaint should be dismissed as against Judge Barry in its entirety, with prejudice, (b) Judge

Barry should be awarded her costs, including attorneys' fees, and (c) this Court should grant such other and further relief to Judge Barry as it deems just and proper.

Dated: New York, New York
December 23, 2020

Respectfully submitted,

GREENFIELD STEIN & SENIOR, LLP

By: 

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CERTIFICATION OF COMPLIANCE

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