To be Argued by:
WILLIAM T. O'CONNELL
(Time Requested: 30 Minutes)

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Appellate Division—First Department Case No. 2023-03239

Court of Appeals

of the

State of New York

JAMES KNIGHT, as Administrator of The Estate of PAMELA J. KNIGHT,

Plaintiff-Respondent,

-against-

AMSTERDAM NURSING HOME CORP. and THE NEW YORK AND PRESBYTERIAN HOSPITAL,

Defendants,

-and-

DEWITT REHABILITATION AND NURSING CENTER, INC. d/b/a Upper East Side Rehabilitation and Nursing Center,

Defendant-Appellant.

REPLY BRIEF FOR DEFENDANT-APPELLANT

GOLDBERG SEGALLA, LLP
Attorneys for Defendant-Appellant
50 Main Street, Suite 425
White Plains, New York 10606
Tel.: (914) 798-5400
Fax: (914) 798-5401
woconnell@goldbergsegalla.com

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PRELIMINARY STATEMENT

Under New York law, where a party to a lawsuit asserts that venue must be changed pursuant a mandatory forum selection clause agreed to by the parties, and the party seeking the change of venue makes an initial showing that the forum selection clause is applicable to the dispute and enforceable against those parties, the burden shifts to the party opposing a change of venue to demonstrate that the forum selection clause is unenforceable for some reason.

In this case, the Appellate Division majority ("majority") improperly reversed that burden of proof by requiring Dewitt, the party seeking to enforce the forum clause and who produced two signed Admission Agreements, to affirmatively demonstrate as a matter of law that the Decedent's signatures on the agreement were not forgeries. Although Plaintiff and the majority have located some appellate authority from the Second Department supporting this erroneous application of the burden of proof, New York statutory and case law from the First Department have consistently held that the burden of proof on a CPLR 501 motion to change venue lies with the Plaintiff. Dewitt respectfully submits that this Court reverse and apply that established burden of proof in this case.

Although Plaintiff asserts that Dewitt has raised an unpreserved argument regarding circumstantial evidence in support of its claim that the Decedent's signature was sufficiently authenticated, it was Plaintiff himself who introduced this

authentication method during his Appellate Division briefing, and it was appropriate for Dewitt to respond.

The Appellate Division majority erred in failing to recognize the conflict between the First and Second Department decisions regarding who bears the burden of proof on a CPLR 501 motion to change venue. *Compare Caio v. Throgs Neck Rehab & Nursing Ctr.*, 197 A.D.3d 1030 (1st Dept't 2021) *with Andreyeva v. Hayon Solomon Home for the Aged, LLC,* 190 A.D.3d 801 (2d Dep't 2021). Because both of these cases included unresolved factual issues regarding whether the signing of the Admission Agreements was authorized, they were materially indistinguishable. Yet, *Caio* held that it was the Plaintiff's burden to show that the Agreements were unenforceable, while the *Andreyeva* Court placed that burden on the defendant. This Court should re-affirm that once the defendant makes an initial showing of applicability and enforceability, the burden lies with the Plaintiff.

Finally, although Plaintiff contends that the Decedent's electronic signature by the digital signature recorder, Docusign, is not entitled to a presumption of genuineness because such electronic signature was never itself authenticated, such argument fails because Plaintiff's underlying authentication arguments lack merit, and even more so, because it was Plaintiff, not Dewitt, that bore the burden of proof in the first instance. If the burden of proof is properly applied on this motion to change venue, this Court should conclude that Plaintiff failed to show that the

signature on the Agreements were forgeries. Accordingly, the trial court properly granted Dewitt's motion to change venue to Nassau County pursuant to the mandatory forum selection clause in the Admission Agreements, and this Court should reverse the majority's order holding otherwise.

ARGUMENT

I. NEW YORK LAW DEMONSTRATES THAT THE BURDEN OF PROOF ON A CPLR 501 AND 510 MOTION TO CHANGE VENUE BASED ON A MANDATORY FORUM SELECTION CLAUSE LIES WITH THE PLAINTIFF

A. Forum Selection Clauses Are Prima Facie Valid And Enforceable

The general rules on the enforceability of forum selection clauses and which party bears the burden of proof on motions to change venue under CPLR 501 and 510 are well-established. "A contractual forum selection clause is *prima facie valid and enforceable* unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would for all practical purposes be deprived of its day in court (emphasis added)." *Puleo v. Shore View Ctr. For Rehabilitation & Health Care,* 132 A.D.3d 651, 652 (2d Dep't 2015).

Although the case law recognizes that the party asserting the forum selection clause must make an initial showing that the forum clause is applicable to the dispute and enforceable against the parties, *see Caio v. Throgs Neck Rehab. & Nursing Ctr.,* 192 A.D.3d at 1030), plaintiff incorrectly interprets this initial showing as a threshold requirement that the party asserting the clause must establish, as a matter of law, that the alleged signatory actually signed the document. However, neither

CPLR 501 or CPLR 510, impose such a requirement. Unlike a CPLR 3212 motion for summary judgment motion, which requires evidentiary proof in admissible form and requires "affidavits" from personal knowledge, *see* CPLR 3212(b), CPLR Article 5 includes no such requirements. Plaintiff's assumption that evidentiary rules for dispositive motions apply to Article 5 motions to change venue is unsupported by any statute or controlling case law.

Once Dewitt made its strong initial showing in this case that the forum selection clause was applicable and enforceable, the burden shifted to the Plaintiff to show that the clause was unreasonable, unjust, against public policy, invalid due to fraud or overreaching, was unenforceable due to a lack of mutual assent or signature -- or, was otherwise unenforceable for any reason. In this case, Dewitt met its initial burden, and upon the burden shifting to Plaintiff as required by the case law, Plaintiff failed to demonstrate that the Agreements were not signed by the Decedent or were otherwise unenforceable.

Plaintiff misapprehends the "signature" requirement in the context of a CPLR 501 and 510 motion to change venue, and the Second Department likewise has rendered erroneously rulings on this point. *See e.g. Andreyeva v. Haym Solomon Home for the Aged, LLC,* 190 A.D.3d 801 (2d Dep't 2021); *Sherrod v. Mt. Sinai St. Luke's,* 204 A.D.3d 1053 (2d Dep't 2022). Applying a "summary judgment" procedural analysis, Plaintiff and the Second Department would require a threshold

prima facie showing that the signatures on the admission agreements were genuine before shifting the burden to the plaintiff to demonstrate unenforceability. There is no basis to treat the signature requirement any differently than the other grounds of unenforceability, by requiring it to be proven by the defendant asserting the forum clause, and requiring the defendant to do so before the burden shifts to the Plaintiff.

Put another way, why would a defendant asserting a mandatory forum selection clause have to make an initial threshold showing, as a matter of law, of a genuine signature -- when it undeniably is the Plaintiff's burden under CPLR 501 and 510 to show that the Agreements are unenforceable for other reasons -- such as unreasonableness, unfairness, fraud, overreaching or being contrary to public policy. Dewitt contends that it made a sufficient showing of genuineness, but even if it did not, it was Plaintiff's established burden to make to the contrary showing of two forged Agreements to enter Dewitt -- which Plaintiff herein clearly failed to make.

B. Dewitt's Direct and Circumstantial Evidence Was Sufficient To Make An Initial Showing That The Decedent Signed Both Admission Agreements, Which Shifted The Burden Onto The Plaintiff To Show That The Forum Clause Was Unenforceable

As indicated in our opening brief, Dewitt submitted substantial direct and circumstantial evidence demonstrating that the Decedent, Pamela Knight, signed the two Admission Agreements upon her admissions to Dewitt in February and March 2019. (R.61-84; 90-117; 120-121). Although Plaintiff argues that Dewitt's

circumstantial evidence argument is unpreserved for review, it was Plaintiff himself who introduced the purely legal issue of the permissible methods of authenticating a writing in his Appellant's Brief at the Appellate Division (NYSCEF, Appeal No. 2022-03239, Doc. No. 6, p.15, Fn. 8), and accordingly, Dewitt was permitted to respond to such legal argument. *See Palau v. Pagan,* 194 A.D.3d 425, 425-426 (1st Dep't 2021) (although argument was unpreserved, it was considered because it was a purely legal argument that was apparent from the face of the record).

The direct and circumstantial evidence included two 28-page Admission Agreements (with attachments) that each included: (a) ten (10) instances where name "PAMELA KNIGHT" was typed into the form; (b) eight (8) instances where the Decedent allegedly entered her Docusign electronic signature (the writing is partially legible), (c) four instances where Dewitt employee Eleizer Morales allegedly co-signed each Agreement by Docusign, (d) forty-four instances where the initials "PK" appears on the bottom of each page of the Agreement, and (e) an acknowledgment by "PK" of using Docusign to sign the Agreements and submitting them to Dewitt. (R.61-84; 90-117).[1]

[1] No evidence was introduced during motion practice as to why Morales was unable to submit an affidavit concerning the Decedent's signing of the Agreements. However, his status as a Dewitt employee or former employee would not have disqualified him from doing so under New York's Dead Man's Statute (CPLR 4519), as he was not an "interested" person within the meaning of the statute. *See Matter of American Comm. For the Weizmann Instit. of Science v. Dunn,* 10 N.Y.3d 82, 97, n.12 (2008)("[C]orporations are almost immune from the Dead Man's Statute because corporate employees are not 'disqualified from testifying for their employer'"); *see also*

The Admission Agreements also included an acknowledgement by the signing Resident and/or Designated Representative stating that such residence or representative "hereby understand[s] agree[s] that Admission to the Facility is *conditioned* upon the review and execution of this Agreement and related documents… (emphasis added)." (R.61,90). These acknowledgements in each of the two Agreements are initialed by "PK" via Docusign at the bottom of each page. (R.61; 90). The simple fact that the Decedent was actually admitted to Dewitt at the same time the Agreements were executed (as Plaintiff admits in his opposition below) (R.133-134), and the fact that the signor of these Agreements acknowledged that the signing and execution of the Agreements was a "condition" of "admission to the Facility," provide significant corroborating evidence that the Decedent signed both Agreements in February and March 2018 *as a condition* of her admission to Dewitt. (R.61; 90). Plaintiff is wholly silent in his Brief regarding this circumstantial corroboration.

Perhaps silence may have been the better tactical decision, because Plaintiff's attempts to distinguish Dewitt's circumstantial evidence cases also fall entirely flat. Contrary to Plaintiff's woeful attempts to distinguish these cases, they collectively stand for the relevant proposition that where a party cannot prove by direct evidence

Butler v. Cayuga Med. Ctr., 158 A.D.3d 868, 873-874 (3d Dep't 2018); *Smith v. Kuhn*, 221 A.D.2d 620, 621 (2d Dep't 1995).

that a signature on a document is genuine, it may rely on compelling circumstantial evidence to authenticate the document and its signature.

For example, in *People v. Dunbar* (215 N.Y. 416, 422-423 ([1915]), this Court found that circumstantial proof that the defendant Dunn had called and written a letter to State-Superintendent Lynch requesting the assignment of State employee Fogarty (a friend and former employee of Dunn) as Labor Supervisor on a job that Dunn's company had just won from the State, was admissible to show that the assignment was for nefarious and fraudulent purposes, despite Dunn's denial that he was the caller or letter writer. Based on the compelling circumstances involving the multiple telephone conversations and meetings between the Superintendent Lynch and defendant Dunn, and the corresponding letter, the Court properly exercised its discretion in finding Dunn's call and letter admissible as sufficiently authenticated. *Id.*

Similar circumstantial evidence was offered here, including the Decedent's printed name and multiple instances of Docusign signatures and initials; the Decedent's actual admission to Dewitt at or around the dates that the two Admission Agreements were executed; the acknowledgment by the signor (likely the Decedent) that her execution of the Agreements was a "condition" of her admission; and the Trimarchi Affidavit outlining the protocol for resident admissions paperwork. (R. 11-121).

Further, both *Young v. Crescent Coffee, Inc.* (222 A.D.3d 704, 705 [2d Dep't 2023] and *Choudhry v. Starbucks Corp.* (213 A.D.3d 521, 522 (2d Dep't 2023]) involved the issue of whether certain leases were adequately authenticated in the absence of testimony from the signors' of said documents. In both cases, the Second Department held that the leases were properly considered on the parties' summary judgment motions based on the deposition testimony of witnesses who were sufficiently familiar with the documents and the signatures on them. *See Choudhry v. Starbucks Corp.,* 213 A.D.3d at 522 ("Starbucks' witness … had sufficient personal knowledge of the lease agreement to authenticate it, even though he did not sign or negotiate the lease"); *Young v. Crescent Coffee, Inc.,* 222 A.D.3d at 705 ("Here, the deposition testimony of Goodrow's property manager adequately authenticated the signatures on the lease agreement," citing *Choudhry)*.

Here, given the undeniable facts that the Decedent was admitted to the facility on or around the dates of the Admission Agreements (R.61; 90; 133-134); that execution of the Agreements was a condition of admission (R.61; 90); and the detailed Trimarchi Affidavit statements explaining the admission paperwork protocol (R.119-121); there was sufficient authentication of the Decedent's signatures in this case.

Also on the issue of authentication, Dewitt respectfully submits that the Appellate Division majority erred in holding that the Trimarchi Affidavit failed to

satisfy the foundation requirements for admissibility of the Admission Agreements as business records. (R.119-121). *See* CPLR 4518. While the majority held that the Trimarchi Affidavit stated that the Admission Agreements were "kept," but not "created" in the regular course of business, the Affidavit itself showed otherwise. (R.119-121; 165).

Trimarchi states in her affidavit that "[i]t is the custom and practice of [a] Facility Representative processing admissions to meet with *each resident* to review the admission paperwork; the Representative speaks with the incoming resident ("resident") to determine if they or a family member typically sign their paperwork; if the resident is responsive and conversing appropriately, the Representative will proceed to a discussion of the admission paperwork, and if not, the Representative will discuss with a family member; the Representative "will review every page of the Admission Agreement with the resident," and then "personally witness the resident execute all signature pages, which is done either by hand or Docsign"; and during this process the Representative "explains the nature of the Admission Agreement," and if the person signing "appears confused or reluctant to sign," they are advised that they can have additional time or refuse to sign. (R.119-121).

Based on her sworn statement that the above protocols applied to "each resident," it is clear that Trimarchi as Director of Admissions laid sufficient foundation for the admissibility of the Decedent's Admission Agreements as

business records that were created, kept and maintained in the regular course of Dewitt's business as a rehabilitation facility. (R.119-121). *See DeLeon v. Port Authority,* 306 A.D.2d 146, 146 (1st Dep't 2003). ("It is well settled that a business entity may admit a business record through a person without personal knowledge of the document, its history or its specific contents where that person is sufficiently familiar with the corporate records to aver that the record is what it purports to be and that it came out of the entity's files"); *cf. JP Morgan Chase Bank, N.A. v. Clancy,* 117 A.D.3d 472, 472-473 (1st Dep't 2014) (hearsay exhibits to an employee's affidavit were inadmissible because the affidavit failed to state in words or substance that it was the regular business of the plaintiff to create such records).

People v. Kennedy (66 N.Y.2d 569, 579 [1986]), cited by Plaintiff, is easily distinguished since unlike here, where Trimarchi laid out the protocol for reviewing and signing admission paper work with "each" resident, the testimony concerning loan sharking records lacked the regularity and uniformity of the Trimarchi Affidavit.

C. Dewitt's Custom And Practice Evidence Was Admissible Under Plaintiff's Own Authorities Because Such Evidence Was Not Offered On Issue Of Negligence, But Rather On The Issue Of The Decedent's Signature

Dewitt submitted the Trimarchi Affidavit, in which Dewitt's Director of Admissions provided the protocol for review and execution by new residents of the Admission Agreements, with a Dewitt's staff member's co-signature. (R.119-121).

Plaintiff argues that this evidence was inadmissible because it did not qualify as proper "customs and practice" evidence under this Court's decision in *Halloran v. Virginia Chemicals, Inc.* (41 N.Y.2d 386, 390-394 [1977]). Plaintiff contends that the Trimarchi Affidavit is not admissible customs and practice evidence because it did not involve "a deliberative and repetitive practice" by a person "in complete control of the circumstances." *Id.* at 392. Plaintiff correctly cites the rule, but it is inapplicable here.

Plaintiff's suggested flaws in Dewitt's "custom and practice" evidence do not apply here, since Dewitt is not offering such evidence on a summary judgment motion to show presence or absence of negligence. *Id.* at 390-392. A close reading of *Halloran* shows that it has no application in determining whether a signature is genuine, and therefore, authenticated or not.

Halloran explains that "habit" evidence is generally admissible in non-negligence cases to show conformity with prior conduct. *Id.* at 390-391. As *Halloran* states: "While courts of this State have in negligence cases traditionally excluded evidence of carefulness or carelessness as not probative of how one acted on a particular occasion, in other cases evidence of a consistent practice or method followed by a person has routinely been allowed (citations omitted)." *Id*. Thus, evidence of habit -- such as a lawyer executing wills in accordance with statutory requirements, or a notice being mailed on a specified day of the month -- "has, since

the days of common-law reports, generally been admissible to prove conformity on specified occasions." *Id.* at 391.

Halloran explicitly recognizes that the rule is different where negligence is the issue. *Id.* "When negligence is at issue, however, New York courts have long resisted allowing evidence of specific acts of carelessness or carefulness to create an inference that such conduct was repeated when like circumstances were again presented. *Id.* Accordingly, *Halloran* imposes a stricter standard for custom and practice evidence involving negligence issues, where such "habit or regular usage" evidence will be admissible only where it constitutes proof of "a deliberate repetitive practice by one in complete control of the circumstances." *Id.* at 392.

Thus, Plaintiff's citation and discussion of *Halloran* is off-base and irrelevant to the custom and practice evidence found relevant here. Plaintiff's citation to the *Rivera*, *Flores and Martin* decisions are likewise inapposite because they similarly involve "custom and practice" evidence to prove or defeat negligence, and have nothing to do with the authentication of a signature.

D. The First Department Has Consistently Placed The Burden Of Proof On A CPLR 501 Motion To Change Venue On The Plaintiff, And The Appellate Division Majority In This Case Conflicts With Its Prior *Caio* Decision And Should Be Reversed

New York law has traditionally held that mandatory forum selection clauses "are prima facie valid and enforceable unless shown by the resisting party to be

unreasonable." *Brooke Group v. JCH Syndicate 488,* 87 N.Y.2d 530, 534 (1996); *see also Braverman v. Yelp, Inc.,*128 A.D.3d 568, 568 (1st Dep't 2015), *lv. denied* 26 N.Y.3d 902 (2015) (plaintiff's fraudulent inducement claim would have to be brought in a different forum in accordance with the forum selection clause in the parties' agreement [as] plaintiff failed to meet his burden of showing why it should not be enforced); *Wang v. UBS AGI,* 139 A.D. 3d 448, 448 (1st Dep't 2016) (claim must be brought in a different forum pursuant to the forum selection clause in the parties' account agreement, and plaintiff failed to meet his burden of showing unenforceability); *British West Indies Guar. Trust Co. v. Banque Int'l A. Luxembourg,* 172 A.D.2d 234 (forum selection clauses are prima facie valid and in order to set it aside, a party must show it is unreasonable or unjust, or invalid due to fraud or overreaching). This line of cases clearly placed the burden of proof on the Plaintiff to show why the forum selection clause should not be enforced.

However, in January 2021, the Second Department issued its decision in *Andreyeva* (190 A.D.3d at 801-803), which altered the equation by effectively reversing the burden of proof and requiring the defendant moving for a change of venue to establish, as a matter of law, that the nursing home resident, decedent or designated representative, signed the admission agreement that included the mandatory forum selection clause.

In *Andreyeva,* the defendant rehabilitation facility moved to change venue from Kings to Nassau County based on a forum selection clause in an admission agreement allegedly signed by the decedent upon her admission to the defendant facility. *Id.* at 801. The defendant attempted to authenticate the decedent's signature with the admission agreements and an affidavit of one of its employees, who lacked personal knowledge of the decedent's signature on the agreement. Despite the case law stating it was the plaintiff's burden to show the unenforceability of the "prima facie valid" forum selection clause, the Second Department held that the defendant facility had "failed to adequately authenticate the alleged agreement containing the forum selection clause…" *Id.* at 802. Because the defendant did not submit any other evidence to show that the Decedent signed the agreement, the Court affirmed the denial of the defendant facility's motion to change venue.

Eight months later, the First Department issued its decision in *Caio v Throgs Neck Rehab. & Nursing Ctr.* (197 A.D.3d at 1030-1031), holding that "[d]efendant established that the nursing home admission agreement signed by the decedent's designated representative on his behalf to secure his admission to its nursing home had a forum selection clause," providing that Westchester County was the exclusive forum for any dispute arising out of the agreements. *Id.*

Although the plaintiff had argued both at the trial court and appellate levels that the nursing home failed to demonstrate that the alleged designated

representative, the decedent's son Marco, had actual or apparent authority to sign the admission agreement on the decedent's behalf, the appellate court never expressly resolved that issue. Although the trial court accepted the plaintiff's arguments and held that Marco's authority to sign was not established and denied the motion to change venue, the First Department never expressly addressed the issue of whether the son Marco's signature was authorized based on actual or apparent authority to sign the agreement. To the contrary, the First Department simply noted that the decedent's alleged designated representative signed the agreement, and held that no affidavit with personal knowledge was required. (*Caio v. Throgs Neck Rehab. And Nursing Center,* NYSCEF, Appellate Case No. 2021-01100, [Doc No. 6, p.5] [Record on Appeal] and [Doc. 12, p. 2] [A.D. Order]).

Despite the lack of definitive proof of Marco's authority to sign the admission agreement on decedent Caio's behalf, the First Department reversed the denial of the nursing home's motion to change venue, and upheld the invocation of the forum selection clause. The Court expressly stated: "That defendants did not proffer an affidavit by a person having personal knowledge of the circumstances under which the admission agreement was executed is not fatal to their motion for a change of venue. Plaintiff, as the party challenging the validity of the agreement's venue selection clause had the burden to show why it should not be enforced." *Id.* at 1031, citing *Braverman v. Yelp, Inc.* 128 A.D.3d at 568.

Andreyeva and *Caio* are inconsistent. In both cases, a factual dispute existed as to whether the signature on the admission agreements containing the forum selection clause were unauthorized. In *Andreyeva*, the factual dispute was whether the decedent signed it at all, and thus, whether the forum clause was enforceable. In *Caio*, the factual dispute was whether the decedent's son Marco's signature was authorized by actual or apparent authority, and thus, whether the forum clause was enforceable. The fact that the potential unenforceability was premised on the identity of the signor -- as opposed to the authority of the signor -- is irrelevant for purposes of this appeal. They were both grounds to hold the agreements containing the forum clauses unenforceable. However, in one case (*Andreyeva*), the appellate court held that an affidavit from someone with personal knowledge of the signing was required, and in the other case (*Caio*), the Court held that the absence of such an affidavit was "not fatal." *Id.*

For the reasons stated in our Appellant's Brief, we believe *Caio* applies the proper analysis. *Caio* makes clear that even where there is some factual dispute concerning the authority to sign an admission agreement, the burden ultimately lies on the plaintiff to show on a CPLR 501 motion to change venue pursuant to a forum selection clause why enforcement of such clause in unreasonable, unjust, against public policy, the product of fraud or overreaching, or -- the lack of a genuine signature. There is no reason to separate the issue of unauthorized signature from

fraud, overreaching or any other reason for unenforceability, and CPLR Article 5 provides no such reason.

II. PLAINTIFF FAILED TO MEET HIS BURDEN OF PROOF OF SHOWING THAT THE FORUM SELECTION CLAUSE IN THE ADMISSION AGREEMENTS WERE UNENFORCEABLE

A. Plaintiff's Submissions

In opposition to Dewitt's initial showing of an applicable and enforceable forum selection clause, which this Court has generally described as "prima facie valid and enforceable," the burden logically shifted to the Plaintiff to show otherwise. Plaintiff failed to meet his burden.

This Court has held that "a bald assertion of forgery" is insufficient as a matter of law to raise a disputed issue of fact as to the enforceability of a written agreement between the parties. *See Banco Popular N. Am. V, Victory Taxi Mgt.,* 1 N.Y.3d 381, 384 (2004). Plaintiff's submissions clearly meet this definition. Plaintiff submits a conclusory 2-page affidavit stating he was familiar with his late mother's signature, and the signatures on the Admission Agreements were "not my mother's as I know it." (R.144). He also submits a yellowed-worn piece of paper that allegedly includes his mother's signature, which is very different from that on the Agreements.

Plaintiff's submissions show almost nothing. First, the Decedent's alleged signatures on the Agreements are indicated on such agreement to be via "Docusign," an electronic signature method. (R. 74; 103). Thus, the majority itself recognized,

digital signatures often bear no resemblance to a person's handwritten signature -- and thus, Plaintiff's comparison is worthless.

Second, Plaintiff wholly failed to identify where he obtained his mother's alleged "exemplar" signature from; when it was written; and on what document was it was affixed to. As noted in our moving brief, handwriting comparisons that do not clearly identify and describe comparison exemplars are inadmissible. CPLR 4536.[2] *See Kanterakis v. Minos Realty 1, LLC,* 151 A.D.3d 950, 951 (2d Dep't 2017), *lv. denied* 30 N.Y.3d 913 (2018) (testimony of plaintiff's handwriting expert should not have been considered, where the plaintiff "failed to present evidence authenticating the group of 3 exemplars").

B. Docusign Electronic Signatures

With respect to the Docusign signatures, the bottom line is that forum selection clauses are "*prima facie* valid and enforceable," *Brooke Group v. JCH Syndicate 488*, 87 N.Y.2d at 534. Although Plaintiff argues and the majority held that the Agreements were not *prima facie* enforceable because the signatures were never authenticated, this conclusion was erroneous based on the circumstantial evidence cited and under the business records exception. *See* Prince, Richardson on Evidence § 9-103; CPLR 4518. In short, because the signatures and Agreements are

[2] It should be noted that on the alleged exemplar document the decedent's signature is directly below the signature of an individual identified as "William J. Knight," and the signatures appear to be in the exact same handwriting, demonstrating the exemplar's unreliability.

authenticated, and Plaintiff's evidence constituted no more than a "bald assertion of forgery, the motion for a change of venue should have been granted, and this Court should reverse.

CONCLUSION

In light of the foregoing, it respectfully is requested that this Court reverse the Appellate Division Order, and grant Appellant Dewitt's motion to change venue, and for such other and further relief as to this Court deems just proper and equitable.

Dated: White Plains, New York
May 15, 2024

Respectfully submitted,

William T. O'Connell, Esq.

GOLDBERG SEGALLA, LLP

NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR PART 500.1(j) the foregoing brief was prepared on a computer using 2010 Microsoft Word.

Type. A proportionally spaced typeface was used, as follows:

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STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF NEW YORK)		**EXPRESS NEXT DAY AIR**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On May 16, 2024

deponent served the within*:* **REPLY BRIEF FOR DEFENDANT-APPELLANT**

upon:

Stephen D. Chakwin Jr.
NGUYEN LEFTT, PC
228 East 45th Street, Suite 1110
New York, New York 10017
212-256-1755

Attorneys for Respondent

the address(es) designated by said attorney(s) for that purpose by depositing **3** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on 16th day of May 2024

MARIANNA BUFFOLINO
Notary Public State of New York
No. 01BU6285846
Qualified in Nassau County
Commission Expires July 15, 2025

Job# 329829