

No. 23-394

In The
Supreme Court of the United States

THURAYYAH Z. RICHARDSON,

Petitioner;
—against—

THE PROCTOR AND GAMBLE COMPANY,
ABRAMS ARTISTS AGENCY and COTY INC. –
CLAIROL BEAUTY BRAND,

Respondents.

**On Petition For A Writ Of Certiorari
To The New York State Court Of Appeals**

**REPLY TO
BRIEF IN OPPOSITION OF PETITIONER'S
PETITION FOR WRIT OF CERTIORARI**

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LIST OF PROCEEDINGS

THURAYYAH Z. RICHARDSON v. THE PROCTER & GAMBLE COMPANY, ABRAMS ARTISTS AGENCY, and COTY INC. – CLAIROL BEAUTY BRAND, Index No. 650734/2019, Supreme Court of the State of New York, County of New York. Judgment entered August 23, 2021.

THURAYYAH Z. RICHARDSON v. THE PROCTER & GAMBLE COMPANY, ABRAMS ARTISTS AGENCY and COTY INC. – CLAIROL BEAUTY BRAND, Appellate Case No. 2022-00620, Appellate Division, First Judicial Department, Supreme Court of the State of New York. Judgment entered October 6, 2022.

THURAYYAH Z. RICHARDSON v. THE PROCTER & GAMBLE COMPANY, ABRAMS ARTISTS AGENCY and COTY INC. – CLAIROL BEAUTY BRAND, Appellate Case No. 2022-00620, Appellate Division, First Judicial Department, Supreme Court of the State of New York. Judgment entered December 22, 2022.

THURAYYAH Z. RICHARDSON v. THE PROCTER & GAMBLE COMPANY, ABRAMS ARTISTS AGENCY and COTY INC. – CLAIROL BEAUTY BRAND, Mo. No. 2023-103, State of New York Court of Appeals. Judgment entered May 18, 2023.

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Petitioner-Appellant Thurayyah Z. Richardson (“Petitioner” or “Richardson”) respectfully submits this Reply Brief in further support of her petition to the United States Supreme Court for a writ of certiorari.

PRELIMINARY STATEMENT

In this rare instance, for the reasons set forth below, Respondents actually make Petitioner’s case. If the only way to defend against this appeal is to misstate the facts of record demonstrably, it speaks volumes as to the strength of the appeal at bar, which will have wide ranging impact in the coming world of deep-faked images and unscrupulous commercial actors. The issues below do show that there was a denial of due process of law in violation of the Petitioner’s Fifth and Fourteenth Amendment’s rights of the United States Constitution. The use of deceptive obfuscation tactics by the Respondents throughout these proceedings and legal documents has undermined the fundamental principles of fairness, justice, and democratic governance. The fraud upon the court by the Respondents caused the abuse of discretion and these deceptive practices hinder the Petitioner’s ability to exercise her Fifth and Fourteenth Amendment’s rights of the United States Constitution.

ARGUMENT
POINT I
REVIEW SHOULD BE GRANTED
BECAUSE THE OPPOSITION 100% RELIES
ON MISSTATEMENTS OF “FACT”

It is truly a clear injustice that Respondents state unproven and untrue claims as if they were facts, even when the record is clearly to the contrary as established below and the Record on Appeal below. The resulting examination actually proves that due process was denied to the Petitioner by presuming that these issues of fact and law were correct which resulted in the court ruling in favor of Respondents in deciding summary judgment below.

First, Respondents like to tout a paper they call the “2003 Modeling Contract”, the only problem is that the paper is a fiction. (See Respondent’s Brief at p.3). The document Respondents refer to is the Clairol Model/Agency Partnership Agreement at record page R.111 in the Second Circuit. This is a document that does not have Petitioner’s first or last name on it. The “Model” name designating whom the agreement would govern is blank in the body of the document. It does not have the “Agency” line filled in either. The signature line appears to say “Zu-Baydah by Genie Esposit” who apparently may work for the Abrams Artists Agency, and is dated March 24, 2003. It is not a valid modeling contract, and certainly not a modeling contract that governs, or is binding upon Petitioner. If it were binding, which it is not, one would also notice that several

usages are crossed out, including “video, print, its territories Canada and Mexico, media, and all print or “internet advertising”, and promotions”. The so-called Agreement doesn’t even contain payment terms of any kind and is lacking the 6 elements that are required for a contract to be legally enforceable.

Respondents also claim that Petitioner admitted that she accepted payment “under the terms contained in the 2003 Model Agreement” (Respondent’s Brief at p.12), but they conveniently have no citation to the Record, and a review of the record shows no such admission – Respondents again try to feed this Court inaccurate apparent sworn false statements to bolster their empty claims. The perpetual mendacious acts of the Respondents are deceitful, reckless, damning, perjurious, and criminal.

It is a miscarriage of justice that the Petitioner is being held to a statement in an unverified complaint that she never made that seeks to bind her to a contract that is invalid, legally unenforceable, and illegible. The Petitioner was a freelance talent/model working with Respondent Abrams Artists Agency and never signed the invalid contract or a voucher that gave authorization to Abrams Artists Agency to sign the invalid contract on her behalf. Liability of an “Agent” Who Has No Authority to Sign – A person who has no authority to sign an instrument cannot really be an “Agent” because by definition an agent is a person or entity authorized to act on behalf of and under the control of another in dealing with third parties. The General Rule – An unauthorized signature is not binding; it is

– as the UCC puts it – ineffective except as the signature of the unauthorized signer. Uniform Commercial Code, Section 3-403. UNAUTHORIZED SIGNATURE. It is very questionable as to why Abrams Artists Agency has never signed any other contract or model release on behalf of the Petitioner except for the ones referenced in this lawsuit. Sheppard, Mullin, Richter, & Hampton are a prestigious law firm and experts on contract law so they should know what are the elements of a valid contract and that if a person signs a contract without the other party's consent, the signature does not bind the document or contract. This is because the intent of both parties has not been established. Both parties must sign a document or contract to make it legally binding. *See* New York General Business Law Article 11 Section 181 Contracts, Statements of terms & Conditions, and receipts *see* #2 and Section 189 Enforcement of Provisions of this Article, Arts and Cultural Affairs Law Article 37, Sections 37.01 Definitions, 37.03 Theatrical Employment; Contracts, and 37.05 Theatrical Employment; Financial Investigations and Security.

Contracts serve as a crucial legal agreement between a model-talent and her agent establishing the terms & conditions that govern their working relationship; no such contract or agreement between Petitioner and Abrams Artists Agency ever existed.

Respondents falsely claim under oath that Petitioner accepted payment and was paid for all of the usages of her image, but this is far from factual. The Petitioner was sent an email from the Respondent

Procter & Gamble offering her more compensation for the additional usages of her image that she discovered. On August 28, 2015 at 1:17pm Emi Moreno of Procter & Gamble wrote to Linda Mysel of Talent Partners “it does appear that at some point she was offered an additional \$12M to cover any other additional usage (internet, POS, etc.) from 4-10 which did not meet her expectations”. The incontrovertible email evidence is on the record and was given to the court during discovery. The email evidence proves that the Petitioner was not paid for all of the usages of her image on the Clairol Texture & Tones 1b silkening hair box. Why would Respondent P&G offer the Petitioner more compensation for additional usages if they weren’t owed to Petitioner? The email evidence offering more compensation to the Petitioner for the additional usages of her image was constantly ignored by the courts. The email evidence is so irrefutable that the Respondents should have been sanctioned and face disciplinary actions for making apparently sworn false statements in the first degree and committing Perjury. The Petitioner should have been awarded summary judgment and compensated immediately for the continuous additional usages of her image.

Respondents also refer to a 2003 “Voucher” yet no document in the record has the title of a voucher, let alone one signed by the Petitioner. Respondent’s egregious examples of misrepresentation are clearly evident. If they are referring to the “Model Release” at page R.112, it too is a document that does not have Petitioner’s first or last name on it. The “Model” name

is blank in the body of the document where one must write in the name of the model to be governed by the terms therein. It does not have the “Agency” line filled in either – that is blank. The signature line here also appears to say “Zu-Baydah by Genie Esposit” (it is largely illegible) who may be of the Abrams Artists Agency, and it is dated March 24, 2003 with no duration or payment terms. It is not a modeling “release” or a “voucher” that is binding upon Petitioner or relevant to this action. The model release also lacks the 6 elements that are required for a contract to be legally enforceable. Model contracts are legal documents that lay out the payment terms, usage durations and particular types of usages and conditions of work as a model. Model releases grant permission for the use of model’s likeness in particular ways. Model contracts are in place for models to control their images, protect their privacy, and recover fair compensation for their continuous work.

Respondents then try to confuse the Court by delving into *non-sequiturs*. This action is not regarding a television commercial (a separate event for which Petitioner was paid) nor extensions of the use of a particular picture for which Petitioner was paid. Those claims are red herrings.

In this case, Defendant Coty, who admits they own Clairol (Respondent’s Brief at p.7), was using Petitioner’s Photograph on Clairol’s own Clairol.com websites, to advertise and sell the texture and tones 1b black silkening hair box with the Petitioner’s image on it including through the date of oral argument October

6, 2022 in the Appellate Division below.¹ It is printed out – it is real – it is undeniable. Any claim that this was only used on “third parties” websites is purely, wholly and demonstrably false. They say “Coty never advertised, marketed, sold or used Petitioner’s Image” (Respondent’s Brief at p.7), **which is 100% an apparently sworn false statement, and is the basis of Respondent’s argument.**

If the Court judges where justice should prevail, perhaps a party so desperate as to make such apparently sworn false statements in the United States Supreme Court is a worthy focus of such justice, and perhaps their victim is worthy of being saved and vindicated. Just because the lower court was fooled does not mean that the injustice and failure of due process should be replicated by this Honorable Court.

POINT II

REVIEW SHOULD BE GRANTED BECAUSE THE ALLEGED STATUTE OF FRAUDS ISSUE IS IRRELEVANT

Respondents then make a meritless claim that the violations of due process are moot because they assert that the Petitioner’s oral contract claim could be barred by a violation of the statute of frauds at New

¹ Amazingly, Respondents claim that Petitioner did not timely discover and turn over Respondent’s websites, which ignores that it was Respondents who had an obligation to produce images of the Clairol.com website. Any failure to produce those was Respondents’ failure.

York General Obligations Law § 5-701(a)(1). However, the trial court decision below was at R.8 – there is no statute of frauds finding at all – that is not a part of the decisions of record. The Appellate Division and the New York Court of Appeals did not make any finding regarding the New York Statute of Frauds – it is yet another red herring to mislead this Honorable Court. In any case, had the Statute of Frauds been material below, New York law would permit the court to hold that there is sufficient evidence of the oral agreement in other writings, had it gone that path, and decline to dismiss on that basis. *See, Parlux Fragrances, LLC v. S. Carter Enters. LLC*, 204 A.D.3d 72, 89 (1st Dep’t 2022); *Crabtree v. Elizabeth Arden Sales Corp.*, 305 N.Y. 48, 54-55 (N.Y. 1953).

POINT III

IN THE ALTERNATIVE THE WRIT OF CERTIORARI SHOULD BE GRANTED TO PREVENT MISAPPREHENSIONS OF LAW FROM BECOMING PRECEDENT

Respondents do not dispute that only a *verified* complaint should be binding as an admission. *See*, Respondent’s Brief at p.11-13. *See Aronitz v. PricewaterhouseCoopers LLP*, 27 A.D.3d 393, 394 (1st Dep’t 2006). Nor can Respondents dispute that the Courts below violated that principle, expressly holding that the unverified Complaint in this action was binding upon the Petitioner.

Respondents argue that this is not a split in the law, however such a ruling is clearly both a split in the law regarding when a pleading becomes a judicial admission, and a denial of due process.

Respondents instead argue that the failure of the lower court is not material (*See* Respondent's Brief at p.11) right after they cite that this misconception of law was the first and foremost reason for the decision below. (*See* Respondent's Brief at p.8).

Respondents say it is also irrelevant because their other (mis)statements of fact should govern, as the Court below decided when it resolved said genuine issues of material fact on summary judgment, counter to the law of New York. "Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue." *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231, 413 N.Y.S.2d 141 (1978). "In deciding a motion for summary judgment, the court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues." *F. Garafolo Elec. Co., Inc. v. N.Y. University*, 300 A.D.2d 186, 188, 754 N.Y.S.2d 227, 229-230 (1st Dep't 2002); *Master Craft Jewelry Co. v. Holmes Protection Co. of N.Y., Inc.*, 277 A.D.2d 56, 717 N.Y.S.2d 4 (1st Dep't 2000).

Here, the trial court did not abide by that standard, that they may not resolve genuine issues of material fact in determining a motion for summary judgment. A "trial court must apply the correct standard, and the appeals court must make sure that has

occurred . . . but the judge's discretion is not limited." *Fox v. Vice*, 563 U.S. 826, 838-839, 131 S.Ct. 2205, 190 L.Ed.2d 45 (2011). A "court by definition abuses its discretion when it makes an error of law." *Id.*; quoting *Koon v. United States*, 518 U.S. 81, 100, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996), By incorrectly determining facts on summary judgment below, when the Court was not permitted to resolve issues of fact and when the record contains no evidence to support its decision, constitutes a clear abuse of discretion. *Kode v. Carlson*, 596 F.3d 608 (9th Cir. 2010).

Finally, the Respondents repeat their misunderstanding of the statute of frauds as a governing principle here which, as cited above, it does not.

If anything, these positions by Respondents prove that Petitioner has fully established by these mutually exclusive positions that she is a victim of a violation of her due process rights under the Fifth and Fourteenth Amendments.

POINT IV

REVIEW SHOULD BE GRANTED BECAUSE THE RESPONDENT'S ARGUMENTS FAIL TO DISCUSS DIFFERENT USES OF AN IMAGE, WHICH RESETS THE SINGLE PUBLICATION RULE

Respondents argue that it is the same use to re-click a link many times or reuse an advertisement, and cite narrow precedent specific to those arguments, but they fail to acknowledge and appreciate that use of an

image on a product box in stores, the use of an image on a product box in internet advertising and sales, and print magazines are vastly different usages that require additional payment terms, authorizations, and duration terms.

This issue is one that will be exploding into prominence before this Court as technology to re-use images has evolved. Can I take a still image and make it move? Can I take a still image and create a deep-fake with artificial intelligence? With deep-fake technology, can I pay an actress for a television commercial and use their likeness to make a feature film without paying them after a year has lapsed?

Here, the question is not hypothetical, as Petitioner agreed to have her image used on a product box for domestic instore usages only, but her image was later used on Respondent's *current* website, Clairol.com, major retailer websites, countless digital hair and beauty stores websites, print advertisements inside of numerous magazines, retail store coupon advertisements, TV commercials, and international territories – advertisements which are vastly extensive and outside the limits of the agreed usages and exposure.

Petitioner's interpretation of the single publication rule is not tortured. Respondent's application of the single publication rule is not applicable in this lawsuit or petition. The single publication rule does not govern model or talent contracts or agreements for the multiple usages of their images on the internet, in mass media, or in print ads in magazines. Television

commercials are governed by the rules and regulations of the Screen Actors Guild (SAG) and the American Federation of Television and Radio Artists (AFTRA).

The first publication rule, as discussed in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), is very different from the Appellate Division's holding in the decision below, as it refers to a single publication, not new applications. *Id.* at n.2; Restatement (Second) of Torts § 577A(4) (1977). Thus any time-bar established should only be applied as to a single use or publication, and not subsequent, different uses or publications of an image. Consent to use an image for one purpose, such as an advertisement should not bar action for all future purposes.

Thus any time-bar established is only as to a single use or publication, and not subsequent, different uses or publications of an image.

Otherwise an evildoer can avoid prosecution by displaying a single recorded commercial use in a market where the victim will not see it and then remaining dormant for one year before misusing the image. There is no indication in the statute that the legislature intended it to act as a safe harbor for evildoers, as Respondents would interpret the statute of limitations – in reality, it seems the statute was intended as a remedy to the victims who would otherwise lose control of their own image forever.

CONCLUSION

For the foregoing reasons, Petitioner Mrs. Richardson respectfully requests that this Court issue a writ of certiorari to review the judgment of the State of New York Court of Appeals.

Dated: New York, New York
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Respectfully submitted,

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