SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

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PAMELA GOLDSTEIN, ELLYN & TONY BERK, as Administrators of the Estate of Winifred Berk, and PAUL BENJAMIN, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

HOULIHAN/LAWRENCE INC.

Defendant.

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Index No. 60767/2018

DECISION AND ORDER

The following papers numbered 1 to 8 were read on the motion (seq. no. 25) by defendant Houlihan/Lawrence Inc. ("defendant") pursuant to CPLR § 3212 for an Order awarding defendant summary judgment dismissing this class action lawsuit as a matter of law:

Papers	Numbered
Notice of Motion, Affirmation and Exhibits	1
Defendant's Statement of Material Facts	2
Memorandum of Law in Support	3
Declaration and Exhibits in Opposition	4
Class Action Plaintiffs' Statement of Material Facts	5
Memorandum of Law in Opposition	6
Reply Affirmation and Exhibit	7

Memorandum of Law in Reply	8

The following papers numbered 1 to 5 were read on the motion (seq. no. 26) by defendant for an Order striking the expert testimony of Thomas Cusack ("Cusack"):

Papers	Numbered
Notice of Motion, Affirmation and Exhibits	1
Memorandum of Law in Support	2
Declaration and Exhibits in Opposition	3
Memorandum of Law in Opposition	4
Memorandum of Law in Reply	5

The following papers numbered 1 to 6 were read on the motion (seq. no. 27) by defendant for an Order excluding at trial the expert testimony of Robert Lashway ("Lashway") and Gregory Dalzell ("Dalzell"):

Papers	Numbered
Notice of Motion, Affirmation and Exhibits	1
Memorandum of Law in Support	2
Declaration and Exhibits in Opposition	3
Memorandum of Law in Opposition	4
Reply Affirmation and Exhibit	5
Memorandum of Law in Reply	6

RELEVANT BACKGROUND

This class action lawsuit was filed in July 2018 by named plaintiffs Pamela Goldstein, Paul Benjamin, and Ellyn Berk and Tony Berk as administrators of the Estate of Winifred Berk (collectively, "plaintiffs" and together with the other members of the certified class as defined below, the "Class"). *See* NYSCEF Doc. Nos. 1-120.

It arises out of allegations that defendant acted as an undisclosed, non-consensual dual agent in representing both buyers and sellers in thousands of residential real estate sales transactions in the lower Hudson Valley. Specifically, the operative pleading is the Third Amended Class Action Complaint dated June 10, 2019 (the "Third Amended Complaint"), which explains that dual agency arises whenever a single brokerage firm represents both the seller and the buyer, even if two different salespeople within that one firm are separately representing the seller and buyer. *See* NYSCEF Doc. No. 557. Notably, the Third Amended Complaint's central premise is not that dual agency is fundamentally actionable. Rather, it alleges that pursuant to Section 443(4)(a) of the Real Property Law, a real estate agent may act as a dual agent only after the agent has fully and frankly explained to each client the risks, downsides, and options of its dual agency, including that a dual

agent cannot provide undivided and undiluted loyalty to either of its clients, and that a real estate agent must obtain each client's informed written consent before acting as a dual agent. *See* NYSCEF Doc. No. 557; *see also* NY Real Prop. Law § 443(4)(a).[1]

Based upon the Court's Decision and Order issued on April 17, 2019 in which it, *inter alia*, granted in part defendant's CPLR § 3211 motion and dismissed two of plaintiffs' four claims (*see* NYSCEF Doc. No. 370), the Third Amended Complaint asserts plaintiffs' two remaining claims. *See* NYSCEF Doc. No. 557. Specifically, in their first cause of action for breach of fiduciary duty, plaintiffs allege that defendant owed each member of the Class the utmost fiduciary duties of reasonable care, undivided and undiluted loyalty, confidentiality, full disclosure, obedience, and duty to account. *Id.* at ¶¶ 97-103. They allege that defendant was bound by its fiduciary duties to the Class members to employ all measures necessary to provide

[1] This statute provides in relevant part: "A real estate broker may represent both the buyer and the seller if both the buyer and seller give their informed consent in writing. In such a dual agency situation, the agent will not be able to provide the full range of fiduciary duties to the buyer and seller. The obligations of an agent are also subject to any specific provisions set forth in an agreement between the agent, and the buyer and seller. An agent acting as a dual agent must explain carefully to both the buyer and seller that the agent is acting for the other party as well. The agent should also explain the possible effects of dual representation, including that by consenting to the dual agency relationship the buyer and seller are giving up their right to undivided loyalty. A buyer or seller should carefully consider the possible consequences of a dual agency relationship before agreeing to such representation. A seller or buyer may provide advance informed consent to dual agency by indicating the same on this form." *See* NY Real Prop. Law § 443(4)(a) (emphasis added).

the Class with all material information necessary for the Class members to decide whether or not to consent to dual agency in connection with their real estate transactions. *Id.* Plaintiffs further allege that defendant has breached its fiduciary duties in connection with each Class member's real estate transaction by failing to disclose all material information necessary for the Class members to decide whether or not to consent to dual agency, including the downsides, risks, and options of dual agency. *Id.* They allege that defendant has breached its fiduciary duties to the Class members by acting as a dual agent without obtaining the informed written consent of both parties to the transaction. *Id.* Plaintiffs further allege that defendant has breached its fiduciary duties to the Class members by financially incentivizing agents to steer buyers and sellers into dual agent transactions, and by failing to disclose that financial incentive to Class members. *Id.* They also allege that defendant intentionally misled Class members and concealed and suppressed material facts concerning dual agency to induce buyers and sellers to enter into agency relationships and unwittingly acquiesce to dual agency; and that defendant's conduct defrauded plaintiffs and the other Class members through intentional misrepresentations, omissions, suppression, and concealments of material fact. *Id.* Plaintiffs allege that

defendant forfeited its right to a commission in connection with any transaction in which it breached its fiduciary duty, and is subject to punitive damages. *Id.*

Plaintiffs' other remaining claim is their third cause of action for breach of New York General Business Law Section 349. *Id.* at ¶¶ 111-115. Plaintiffs allege in that claim that this statute prohibits deceptive or unfair sales practices by stating that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful." *Id.* Plaintiffs allege that in violation of this statute, defendant deceived plaintiffs and the other Class members by failing to disclose all material information necessary for Class members to decide whether or not to consent to dual agency; acting as a dual agent without the informed written consent of both parties to the transaction; and intentionally misleading Class members and concealing and suppressing material facts concerning dual agency to induce buyers and sellers to enter into agency relationships and unwittingly acquiesce to dual agency. *Id.* They further allege that defendant's deceptive acts and practices are consumer-oriented conduct that adversely affected the public interest of New York, and caused injury to the Class members, including because such Class members paid commissions to

defendant to which the firm, as a faithless fiduciary, was not entitled. *Id.* Plaintiffs allege that defendant is therefore liable for damages as mandated under General Business Law Section 349. *Id.*

In its Answer dated July 1, 2019, defendant, *inter alia*, denied the material allegations of the Third Amended Complaint and asserted 15 affirmative defenses in response thereto. *See* NYSCEF Doc. No. 559.

Subsequently, by Decision and Order dated January 21, 2022, the Court, in relevant part, granted plaintiffs' motion pursuant to CPLR §§ 901 and 902 to certify this lawsuit as a class action and to appoint plaintiffs as representatives of the Class. *See* NYSCEF Doc. No. 1072. In particular, the Court defined the Class by stating that "[t]his action may be maintained as a class action on behalf of all home buyers and sellers of residential real estate in Westchester, Putnam, and Dutchess counties from January 1, 2011 to July 14, 2018 in which defendant represented both buyer and seller in the same transaction." *Id.* at pp. 19-20.[2]

Following the completion of class discovery in this nearly six-year-old litigation, during which the Court appointed a

[2] In a subsequent Decision and Order dated June 7, 2022, the Court denied defendant's motion to amend the definition of the Class as had been set forth in the January 21, 2022 Decision and Order. *See* NYSCEF Doc. No. 1355.

Discovery Referee to oversee the numerous complex discovery issues and myriad discovery motions that arose herein, and which Discovery Referee issued no fewer than 22 Reports and Recommendations, plaintiffs on January 24, 2024 filed a Note of Issue and Certificate of Readiness for Trial. *See* NYSCEF Doc. No. 1663; *see also* NYSCEF Doc. Nos. 1424, 1425, 1426, 1459, 1460, 1461, 1497, 1498, 1499, 1570, 1571, 1572, 1573.

Presently before the Court are three post-Note of Issue motions by defendant. First, defendant moves (seq. no. 25) pursuant to CPLR § 3212 for an Order awarding defendant summary judgment dismissing the Third Amended Complaint's two remaining causes of action as a matter of law. *See* NYSCEF Doc. Nos. 1672-1753. Second, defendant moves (seq. no. 26) for an Order striking the expert testimony of Cusack.[3] *See* NYSCEF Doc. Nos. 1754-1824. Third, defendant moves (seq. no. 27) for an Order excluding at trial the expert testimony of Lashway and Dalzell. *See* NYSCEF Doc. Nos. 1825-1833. Plaintiffs oppose all three motions. *See* NYSCEF Doc. Nos. 1836-1853; 1854-1871; 1872-1950.

[3] Defendant previously sought similar relief in cross-moving (seq. no. 6) to strike an affidavit from Cusack and to preclude Cusack's expert testimony at trial, which cross-motion was denied in the Court's aforementioned Decision and Order dated January 21, 2022 that also addressed plaintiffs' motion (seq. no. 5) for class certification. *See* NYSCEF Doc. No. 1072.

THE SUMMARY JUDGMENT STANDARD

"Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party's meeting of this [*prima facie*] burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action." *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012), *quoting Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Vega*, 18 NY3d at 503. Accordingly, "summary judgment is appropriate where only one conclusion may be drawn from the established facts" (*see Jones v Saint Rita's R.C. Church*, 187 AD3d 727, 792 [2d Dept 2020]), or where a cause of action and/or the type of damages sought "fails as a matter of law." *See Ramos v Howard Indus., Inc.*, 10 NY3d 218, 224 (2008); *BBCN Bank v 12th Ave. Rest. Group Inc.*, 150 AD3d 623, 624 (1st Dept 2017).

MOTION FOR SUMMARY JUDGMENT

Having reviewed the parties' submissions, which include sworn testimony collectively set forth in numerous affidavits and deposition transcripts as well as a voluminous record of documentary evidence, the Court determines that triable issues

of fact preclude an award of summary judgment in defendant's favor in connection with both of plaintiffs' remaining causes of action, *i.e.*, the first cause of action for breach of fiduciary duty and the third cause of action for breach of New York General Business Law Section 349. *See* NYSCEF Doc. Nos. 1672-1753; 1872-1950.

As noted above, the Court emphasizes that plaintiffs' two remaining claims are not premised upon the notion that dual agency is inherently actionable. Instead, plaintiffs allege that defendant failed to fully and frankly explain to each client the risks, downsides, and options of its dual agency, and failed to obtain each Class member's informed written consent before acting as a dual agent, in breach of defendant's fiduciary duties and in violation of New York General Business Law Section 349. *See* NYSCEF Doc. No. 557 at ¶¶ 1-96; 97-103; 111-115.

Regarding the first cause of action for breach of fiduciary duty, it is well-established that "[t]he elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct." *Matter of Caton*, 206 AD3d 993, 994 (2d Dept 2022),

quoting Celauro v 4C Foods Corp., 187 AD3d 836, 837 (2d Dept 2020).

Here, the Record on this motion presents triable issues of fact concerning whether defendant breached its fiduciary duties to the Class members and caused them damages. *See* NYSCEF Doc. Nos. 1872-1950; *see also generally People v Grasso*, 50 AD3d 535, 548 (1st Dept 2008) (affirming the denial of summary judgment and stating that "[t]his record exemplifies the general rule that comparison of a party's conduct with the fiduciary standard of care is a question of fact") (internal quotation omitted). Specifically, the documentary evidence, including e-mail and other written correspondence, defendant's employee manuals, defendant's various training materials and related documentation, as well as the excerpts of deposition testimony furnished by plaintiffs, collectively reflects the existence of triable issues of fact regarding whether defendant breached its fiduciary duties to Class members and directly caused such Class members to suffer damages by, *inter alia*, (1) failing to disclose all material information necessary for Class members to decide whether or not to consent to dual agency, including the drawbacks and risks of dual agency; (2) acting as a dual agent without obtaining the informed written consent of both parties to the transaction, including by, *inter alia*, allegedly forging

certain Class members' signatures on relevant documentation; (3) using in-house bonuses to incentivize agents to steer buyers and sellers into dual agent transactions, and by failing to disclose that financial incentive to Class members; and (4) intentionally misleading Class members by concealing and/or suppressing material facts regarding dual agency to induce Class members to agree to dual agency without informed consent. *See* NYSCEF Doc. Nos. 1872-1950.

As such, in light of the presence of these triable issues of fact, the branch of defendant's motion for summary judgment dismissing the first cause of action for breach of fiduciary duty is denied. *See* NYSCEF Doc. Nos. 1872-1950; *see also Functional Life Achievement, Inc. v Aspiring Munchkins LLC*, 225 AD3d 422, 422 (1st Dept 2024) (affirming the denial of summary judgment regarding a breach of fiduciary duty claim and stating that "[t]he motion court properly held that issues of fact preclude partial summary judgment"); *Sands Bros. Venture Capital II, LLC v Metropolitan Paper Recycling, Inc.*, 201 AD3d 421, 422-423 (1st Dept 2022) (holding that "[w]e affirm denial of summary judgment as to the . . . breach of fiduciary duty claim as well. As the motion court recognized, the claim arises from allegations that Zizza facilitated the 2010 Transactions, and this Court has previously determined that triable issues of fact

surround those transactions"); *Toobian v Golzad*, 193 AD3d 778, 780 (2d Dept 2021) (noting that the Supreme Court correctly "found triable issues of fact regarding whether there was a breach of fiduciary duty," and holding that defendant's motion for summary judgment dismissing the breach of fiduciary duty claim was therefore properly denied); *Bowery 263 Condominium Inc. v D.N.P. 336 Covenant Ave. LLC*, 169 AD3d 541, 542 (1st Dept 2019) (reversing the Supreme Court's granting of summary judgment dismissing a breach of fiduciary duty claim where "issues of fact exist regarding whether Cohen's actions or inactions constitute a breach of fiduciary duty").

As noted above, the third cause of action seeks damages under General Business Law § 349, which provides in relevant part that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." *See* NY Gen. Bus. Law § 349(a). The Court of Appeals has explained that this statute is directed at wrongs against the consuming public:

> [A]s a threshold matter, plaintiffs claiming the benefit of section 349 . . . must charge conduct of the defendant that is consumer-oriented, by having a broader impact on consumers at large. Private contract disputes, unique to the parties, for example, would not fall within the ambit of the statute.

Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A., 85 NY 2d 20, 24-25 (1995).

> "Consumer-oriented conduct does not require a repetition or pattern of deceptive behavior. The statute itself does not require recurring conduct . . . instead [Plaintiff] must demonstrate that the acts or practices have a broader impact on consumers at large. Private contract disputes, unique to the parties, for an example would not fall within the ambit of the statute." *Id.* at 25.

The third cause of action is grounded in the allegation that defendant violated this statute in deceiving Class members by failing to disclose all material information necessary for them to decide whether or not to consent to dual agency, by acting as a dual agent without the Class members' informed written consent, and by intentionally misleading Class members and concealing and suppressing material facts concerning dual agency to induce buyers and sellers to enter into agency relationships and unwittingly acquiesce to dual agency. *See* NYSCEF Doc. No. 557 at ¶¶ 111-115. Plaintiffs in this claim further allege that defendant's deceptive acts and practices are consumer-oriented conduct that adversely affected the public interest of New York, and caused injury to Class members,

including because Class members paid commissions to defendant to which the firm, as a faithless fiduciary, was not entitled. *Id.*[4]

The Record on this motion presents triable issues of fact concerning whether defendant's conduct violated General Business Law § 349. *See* NYSCEF Doc. Nos. 1872-1950. In particular, the documentary evidence and sworn deposition testimony furnished by plaintiffs collectively reflect the existence of triable issues of fact regarding whether defendant committed "[d]eceptive acts or practices" as contemplated by General Business Law § 349 and caused damages to the Class members by, *inter alia*, (1) failing to disclose all material information necessary for Class members to make an informed decision regarding whether or not to consent to dual agency; (2) acting as a dual agent without the informed written consent of both parties to the transaction including by, *inter alia*, allegedly forging certain Class members' signatures on relevant documentation; and (3) intentionally misleading Class members and concealing and suppressing material facts regarding dual agency to induce Class members to agree to dual agency without informed consent. *See* NYSCEF Doc. Nos. 1872-1950; *see also* NY Gen. Bus. Law § 349(a).

[4] In the Court's Decision and Order issued on April 17, 2019 in which it denied defendant's CPLR § 3211 motion to dismiss this claim, the Court addressed – and rejected – defendant's various arguments that General Business Law § 349 does not apply to real estate transactions and is inapplicable to the conduct alleged in this lawsuit. *See* NYSCEF Doc. No. 370 at pp. 12-17.

Therefore, in light of the presence of the aforementioned triable issues of fact in the Record, the branch of defendant's motion for summary judgment dismissing the third cause of action is denied. *See* NYSCEF Doc. Nos. 1872-1950; *see also Hobish v AXA Equit. Life Ins. Co.*, 225 AD3d 487, 488 (1st Dept 2024) (citing the presence of "issues of fact" in holding that "[t]he court also correctly denied defendant summary judgment dismissing plaintiff's General Business Law § 349(h) cause of action"); *M.V.B. Collision, Inc. v Allstate Ins. Co.*, 187 AD3d 881, 883 (2d Dept 2020) (stating that "we agree with the Supreme Court's determination to deny that branch of the defendant's motion which was for summary judgment dismissing the cause of action alleging a violation of General Business Law § 349"); *Krobath v South Nassau Communities Hosp.*, 178 AD3d 807, 809 (2d Dept 2019) (holding that "we agree with the Supreme Court's determination that the hospital was not entitled to summary judgment dismissing the General Business Law § 349 cause of action insofar as asserted against it" where, *inter alia*, "there is a triable issue of fact as to whether the plaintiff suffered an injury under General Business Law § 349"); *David v #1 Mktg. Serv., Inc.*, 113 AD3d 810, 811 (2d Dept 2014) (reversing the CPLR § 3212 dismissal of a General Business Law § 349 claim and stating that "[t]he Supreme Court should have denied that branch

of the respondents' motion which was for summary judgment dismissing the first cause of action insofar as asserted against them").

Without opining as to whether plaintiffs may ultimately prevail on the merits of their two remaining claims, the Court does not credit any of defendant's various legal arguments in support of granting summary judgment on the Record presently before the Court, which is replete with the above-referenced triable issues of fact. In particular, the Court does not agree with defendant's numerous assertions aimed at re-litigating the certification of the Class. Indeed, although defendant's Notice of Motion makes clear that defendant seeks an award of summary judgment pursuant to CPLR § 3212 (*see* NYSCEF Doc. No. 1672), its moving brief rehashes several arguments regarding class certification, including contentions previously considered and rejected by this Court in prior Decisions and Orders, and states that defendant alternatively seeks de-certification of the Class. *See* NYSCEF Doc. No. 1753.

As referenced above, the Court's Decision and Order dated January 21, 2022 (the "Class Certification Order") set forth a highly detailed 20-page analysis of, *inter alia*, plaintiffs' motion pursuant to CPLR §§ 901 and 902 for class certification. *See* NYSCEF Doc. No. 1072. Without timely moving for leave to

renew or reargue the Class Certification Order, defendant subsequently moved pursuant to CPLR § 902 to amend the definition of the Class, which motion was denied by Decision and Order dated June 7, 2022. *See* NYSCEF Doc. No. 1355. While the Court acknowledges that defendant has appealed from the Class Certification Order (*see* NYSCEF Doc. No. 1076), which appeal apparently remains pending (*see* NYSCEF Doc. No. 1872 at p. 6), nothing in the Record before the Court on this motion convinces the Court that de-certification of the Class is warranted. *See* NYSCEF Doc. Nos. 1672-1753; 1872-1950; *see also generally Jacobs v Macy's East, Inc.*, 17 AD3d 318, 319-320 (2d Dept 2005) (affirming the Supreme Court's denial of defendants' motion for reargument of class certification and for class de-certification and stating that defendants' contentions were "without merit"); *Colbert v Rank Am., Inc.*, 295 AD2d 302, 302 (2d Dept 2002) (affirming the denial of class de-certification where, *inter alia*, "the record developed on the [summary judgment] motion" did not "warrant decertification of the class").

Nor does the Court credit defendant's contention that plaintiffs' remaining causes of action are subject to a three-year limitations period and are therefore time-barred to the extent they are based on transactions prior to July 14, 2015. Defendants' terse argument entirely fails to acknowledge – and

is fatally undercut by – the fact that plaintiffs have expressly pled equitable tolling as to all causes of action, including the two remaining claims in the Third Amended Complaint. *See generally Doe v Holy See* (*State of Vatican City*), 17 AD3d 793, 794-795 (3d Dept 2005) (stating that "[e]quitable estoppel may be invoked to defeat a statute of limitations defense when the plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action . . . concealment without actual misrepresentation may form the basis for invocation of the doctrine if there was a fiduciary relationship which gave the defendant an obligation to inform the plaintiff of facts underlying the claim").

Indeed, the Third Amended Complaint includes a section expressly captioned "TOLLING OF THE STATUTE OF LIMITATIONS," and alleges, *inter alia*, that defendant "was under a continuous duty to inform Plaintiffs and the other Class members that it acted as a dual agent in connection with the transactions at issue; to inform them of all the risks, downsides, and options of dual agency; and to inform them of its in-house bonus kickback scheme," and that because defendant "knowingly and fraudulently concealed the true character of its agency relationship with Plaintiffs and the other Class members, and concealed its scheme to evade its fiduciary duties and flout its disclosure and

informed-consent obligations . . . [defendant] is estopped from relying on any statutes of limitations in defense of this action." *See* NYSCEF Doc. No. 557 at ¶¶ 89-92. In addition to this unambiguous language in the body of the Third Amended Complaint, both the first and third causes of action plainly allege that defendant concealed its alleged wrongdoing, *i.e.*, defendant "concealed and suppressed material facts concerning dual agency," "fail[ed] to disclose all material information necessary" for informed consent regarding dual agency, and "intentionally misled[] Class members and conceal[ed] and suppress[ed] material facts concerning dual agency." *See* NYSCEF Doc. No. 557 at ¶¶ 97-103; 111-115.

Accordingly, in light of these allegations and the Record on this motion that reflects the aforementioned triable issues of fact regarding whether defendant concealed and suppressed material facts regarding dual agency to induce Class members to agree to such dual agency without informed consent (*see* NYSCEF Doc. Nos. 1872-1950), the application of the statute of limitations for the first and third causes of action is a question of fact for the jury. As such, the Court on this Record will not grant defendant partial summary judgment dismissing as time-barred all claims based on transactions prior to July 14, 2015. *See, e.g., Vigliotti v North Shore Univ.*

Hosp., 24 AD3d 752, 755 (2d Dept 2005) (stating that "[w]hether or not an estoppel should be found is a question of fact . . . As such, the defendants are not entitled to dismissal of the action at this juncture on statute of limitations grounds"); *Doe*, 17 AD3d at 794-795 (noting that "[e]quitable estoppel may be invoked to defeat a statute of limitations defense when the plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action . . . concealment without actual misrepresentation may form the basis for invocation of the doctrine if there was a fiduciary relationship which gave the defendant an obligation to inform the plaintiff of facts underlying the claim"); *see also Statharos v Statharos*, 219 AD3d 651, 653 (2d Dept 2023) (stating that "[t]he discovery accrual rule also applies to fraud-based breach of fiduciary duty claims" such that the limitations period does not begin to run until the plaintiff "could, with reasonable diligence, have discovered the fraud").[5]

[5] Although defendant's argument for a three-year statute of limitations is undercut by equitable estoppel, the Court notes in any event that the first cause of action is grounded in the allegation that defendant "defrauded Plaintiffs and other members of the Class through intentional misrepresentations, omissions, suppression, and concealments of material fact." *See* NYSCEF Doc. No. 557 at ¶¶ 97-103. As such, this claim is "based upon fraud" in accordance with CPLR § 213(8), and therefore "the time within which the action 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 or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it." *See* CPLR § 213(8).

Notwithstanding the foregoing general denial of summary judgment, the Court finds that, as conceded by plaintiffs, partial summary judgment is awarded to defendant to the extent of excluding from the Class approximately 1,700 individuals for whom defendant did not act as a dual agent. *See* NYSCEF Doc. No. 1872 at pp. 30-31. The Court's understanding from the Record on this motion is that the Class includes a sub-group comprised of individuals included in a list of over 2,300 transactions in which only a single agent of defendant was involved, and that the Class retained Lashway, a certified public accountant, who reviewed these files and identified 627 transactions among these 2,300 transactions that involved dual agency. Accordingly, the approximately 1,700 individuals in this sub-group of 2,300 transactions for whom dual agency was not confirmed are excluded from the Class. Defendant's motion for summary judgment is therefore granted to the extent of excluding these individuals from the Class, and is otherwise denied as set forth above.

MOTION TO STRIKE CUSACK'S EXPERT TESTIMONY

With respect to defendant's motion to strike Cusack's expert testimony, it is well-settled that "the admissibility and limits of expert testimony lie primarily in the sound discretion of the trial court." *People v Lee*, 96 NY2d 157, 162 (2001); *accord Goudreau v Corvi*, 197 AD3d 463, 465 (2d Dept 2021)

(noting that "[t]he admissibility and scope of expert testimony is a determination within the discretion of the trial court").

"It is for the trial court in the first instance to determine when jurors are able to draw conclusions from the evidence based on their day-to-day experience, their common observation and their knowledge, and when they would be benefited by the specialized knowledge of an expert witness." *People v Lee*, 96 NY2d at 162, *quoting People v Cronin*, 60 NY2d 430, 433 (1983). In doing so, the trial court assesses whether the proffered expert testimony "would aid a lay jury in reaching a verdict." *People v Taylor*, 75 NY2d 277, 288 (1990). "In rendering this determination, courts should be wary not to exclude such testimony merely because, to some degree, it invades the jury's province." *People v Lee*, 96 NY2d at 162.

The Court in its discretion determines that Cusack's expert testimony, which concerns real estate industry standards and practices regarding the standard of care governing the disclosure and practice of dual agency in New York, is relevant to the central issues being tried in this action, and that his testimony would aid the jury in reaching a verdict. *See People v Taylor*, 75 NY2d at 288. In reviewing the parties' submissions, the Court notes that glaringly omitted from defendant's motion is any reference to the fact that this is the

second instance in which defendant has sought to preclude Cusack's expert testimony at trial. *See* NYSCEF Doc. Nos. 1754-1824. Indeed, as briefly referenced above, in response to plaintiffs' motion for class certification, defendant cross-moved to strike an affidavit from Cusack and to preclude Cusack's expert testimony at trial, which cross-motion was denied in the Class Certification Order. *See* NYSCEF Doc. No. 1072. In relevant part, the Court stated as follows:

> [T]he Cusack Affidavit makes clear that based upon his decades-long experience in representing clients as a licensed real estate agent and in supervising real estate agents for brokerage firms, Cusack is intimately familiar with the relevant industry standards and practices that relate to the dual agency issue that is central to this putative class action lawsuit; and defendant's submissions do not credibly dispute same (*see* Cusack Aff. at ¶¶ 1, 3-5 and Curriculum Vitae). Accordingly, although the Court declines to determine, at this premature stage, whether Cusack ultimately will be admitted as an expert witness at trial to testify concerning the issue of dual agency or other related subject matter, the Cusack Affidavit reflects that he is "qualified to render an opinion as to the appropriate standard of care by virtue of his experience and expertise," and defendant's characterization thereof as "unreliable and untenable" is unsubstantiated and does not warrant the striking of the Cusack Affidavit on this record. *See* NYSCEF Doc. No. 1072 at p. 4.

Although the Court in adjudicating this motion is not beholden to its prior determination, nothing in the Record

herein convinces the Court that it should strike Cusack's expert testimony. *See* NYSCEF Doc. Nos. 1754-1824; 1836-1853. Rather, the Record reflects that Cusack is an expert on industry standards and practices concerning the standard of care governing the disclosure and practice of dual agency in New York, such that his testimony is relevant to the central issues being litigated herein and would aid the jury in reaching a verdict. *See* NYSCEF Doc. Nos. 1836-1853; *see also People v Taylor*, 75 NY2d at 288; *Goudreau*, 197 AD3d at 465 (holding that "the record demonstrates that the challenged testimony clarified issues calling for professional knowledge and that the expert possessed the relevant knowledge").[6]

Accordingly, based upon the foregoing, defendant's motion (seq. no. 26) to strike Cusack's expert testimony is denied. *See Shehata v Koruthu*, 201 AD3d 761, 763 (2d Dept 2022) (holding that "[c]ontrary to the plaintiff's contention, the Supreme Court properly denied his motion to strike the testimony of the defendant's expert"); *Zuzze v Butler*, 191 AD3d 1302, 1303 (4th Dept 2021) (stating that "[p]laintiff moved to strike the offending expert testimony and, in our view, the court did not

[6] In arguing that Cusack is not an expert on dual agency because he does not actively hold a real estate license, defendant strains credulity by failing to acknowledge Cusack's sworn testimony reflecting that the Department of State prohibits real estate education school operators such as Cusack from holding active real estate licenses so as to avoid any potential conflicts of interest. *See* NYSCEF Doc. No. 1842.

abuse its discretion in denying that motion"); *Lazier v Strickland Ave. Corp.*, 50 AD3d 641, 642 (2d Dept 2008) (holding that "[t]he Supreme Court correctly denied that branch of the motion of the third-party defendant . . . which was to strike the testimony of Strickland's expert").

MOTION TO EXCLUDE THE TESTIMONY OF LASHWAY AND DALZELL

The Court has reviewed the parties' submissions regarding Lashway's expert testimony concerning his audit of defendant's dual-agent transaction files and Dalzell's expert testimony concerning alleged forgeries by defendant. The Court in its discretion determines that both experts' testimony is relevant to the issues being tried in this action, and that their testimony would aid the jury in reaching a verdict and should not be excluded herein. *See* NYSCEF Doc. Nos. 1825-1833; 1854-1871; *see also People v Taylor*, 75 NY2d at 288; *Goudreau*, 197 AD3d at 465 (holding that "the record demonstrates that the challenged testimony clarified issues calling for professional knowledge and that the expert possessed the relevant knowledge").

Lashway is a certified public accountant, and his audit of, *inter alia*, a statistical sample of more than 300 of defendant's dual-agent transaction files is pertinent to the dual agency issue at the heart of this class action lawsuit. *See* NYSCEF

Doc. Nos. 1854-1871. Dalzell is a handwriting expert, and his testimony is highly relevant to plaintiffs' allegation that defendant forged signatures for certain Class members, such that they never consented to dual agency. *See* NYSCEF Doc. Nos. 1854-1871. The Record on this motion fails to persuade the Court that it should exclude either expert witness from testifying at trial.[7] Therefore, defendant's motion (seq. no. 27) for an Order excluding at trial the expert testimony of Lashway and Dalzell is denied. *See Shehata*, 201 AD3d at 763; *Zuzze*, 191 AD3d at 1303; *Lazier*, 50 AD3d at 642.

CONCLUSION

Accordingly, based upon the foregoing, defendant's summary judgment motion (seq. no. 25) is granted only to the extent of excluding from the Class the aforementioned sub-group of approximately 1,700 individuals for whom dual agency was not confirmed, and is otherwise denied. Defendant's motion (seq. no. 26) to strike Cusack's expert testimony and its motion (seq.

[7] As noted by plaintiffs, the purpose of Dalzell's testimony is not to establish that defendant forged signatures on behalf of all Class members. Rather, the Court at trial may issue a limiting instruction to the effect that the jury may weigh the allegedly forged forms as part of the totality of the evidence concerning the Class members' consent to dual agency, but may not conclude on that basis alone that defendant forged any signatures beyond what is specifically established at trial. The Court may similarly issue a limiting instruction with respect to Lashway's testimony as necessary to minimize any potential for undue prejudice. *See generally People v Frumusa*, 29 NY3d 364, 373 (2017) (noting that "a limiting instruction generally may be used to minimize any potential undue prejudice from the admission of evidence").

no. 27) to exclude at trial the expert testimony of Lashway and Dalzell are both denied in their entirety.

The foregoing constitutes the decision and order of the Court.[8]

Dated: White Plains, New York
July 9, 2024

HON. LINDA S. JAMIESON
Justice of the Supreme Court

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[8] All other arguments raised on these three motions and all materials submitted by the parties in connection therewith have been considered by this Court, notwithstanding the specific absence of reference thereto.