SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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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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NOTICE OF APPEAL

Index No.: 60767/2018

PLEASE TAKE NOTICE, that the Defendant, HOULIHAN/LAWRENCE INC., appeals to the Appellate Division, Second Department from an order of the Supreme Court, Westchester County (Jamieson, J.), dated January 21, 2022 and entered with the Clerk of the Court on January 25, 2022 and that this appeal is from each and every part thereof by which Defendant is aggrieved.

Dated: Uniondale, New York
February 23, 2022

Yours, etc.,

RIVKIN RADLER LLP
Appellate Counsel for Defendant-Appellant
HOULIHAN/LAWRENCE INC.

By: *Evan H. Krinick*

Evan H. Krinick, Esq.
Michelle A. Bholan, Esq.
J'Naia L. Boyd, Esq.
926 RXR Plaza
Uniondale, New York 11556-0926
(516) 357-3000
File No.: 012078.00001

Alfred E. Donnellan, Esq.
Nelida Lara, Esq.
DELBELLO DONNELLAN WEINGARTEN
WISE & WIEDERKEHR LLP
Trial Attorneys for Defendant-Appellant
HOULIHAN/LAWRENCE INC.
One North Lexington Avenue
White Plains, New York 10601

Robert D. MacGill, Esq. (admitted *pro hac vice*)
Matthew Ciulla, Esq. (admitted *pro hac vice*)
MACGILL PC
Trial Attorneys for Defendant-Appellant
HOULIHAN/LAWRENCE INC.
156 E. Market Street
Suite 1200
Indianapolis, IN 46204

TO: Jeremy Vest, Esq.
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
Attorneys for Plaintiffs-Respondents
Chrysler Center
666 Third Avenue
New York, NY 10017

William S. Ohlemeyer, Esq.
BOIES SCHILLER FLEXNER LLP
Attorneys for Plaintiffs-Respondents
333 Main Street
Armonk, NY 10504

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a])

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.

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,

- against -

HOULIHAN/LAWRENCE INC.

For Court of Original Instance

Date Notice of Appeal Filed

For Appellate Division

Case Type

- ■ Civil Action
- ☐ CPLR article 75 Arbitration
- ☐ CPLR article 78 Proceeding
- ☐ Special Proceeding Other
- ☐ Habeas Corpus Proceeding

Filing Type

- ■ Appeal
- ☐ Original Proceedings
  - ☐ CPLR article 78
  - ☐ Eminent Domain
  - ☐ Labor Law § 220 or § 220-b
  - ☐ Public Officers Law § 36
  - ☐ Real Property Tax Law § 1278
- ☐ Transferred Proceeding
  - ☐ CPLR article 78
  - ☐ Executive Law § 298
- ☐ CPLR 5704 Review

Nature of Suit: Check up to three of the following categories which best reflect the nature of the case.

☐ Administrative Review	☐ Business Relationships	■ Commercial	☐ Contracts
☐ Declaratory Judgment	☐ Domestic Relations	☐ Election Law	☐ Estate Matters
☐ Family Court	☐ Mortgage Foreclosure	☐ Miscellaneous	☐ Prisoner Discipline & Parole
☐ Real Property (other than foreclosure)	☐ Statutory	☐ Taxation	☐ Torts

Appeal

Paper Appealed From (Check one only):	If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.

☐ Amended Decree	☐ Determination	■ Order	☐ Resettled Order
☐ Amended Judgement	☐ Finding	☐ Order & Judgment	☐ Ruling
☐ Amended Order	☐ Interlocutory Decree	☐ Partial Decree	☐ Other (specify):
☐ Decision	☐ Interlocutory Judgment	☐ Resettled Decree	
☐ Decree	☐ Judgment	☐ Resettled Judgment	

Court:	SUPREME COURT	County:	WESTCHESTER COUNTY
Dated:	JANUARY 21, 2022	Entered:	JANUARY 25, 2022
Judge (name in full):	LINDA S. JAMIESON	Index No.:	60767/2018
Stage: ■ Interlocutory ☐ Final ☐ Post-Final		Trial: ☐ Yes ☒ No	If Yes: ☐ Jury ☐ Non-Jury

Prior Unperfected Appeal and Related Action or Proceeding Information

Are any appeals arising in the same action or proceeding currently pending in the court? ☐ Yes ☑ No
If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.

Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:

Original Proceeding

Commenced by: ☐ Order to Show Cause ☐ Notice of Petition ☐ Writ of Habeas Corpus	Date Filed:
Statute authorizing commencement of proceeding in the Appellate Division:	

Proceeding Transferred Pursuant to CPLR 7804(g)

Court:	County:
Judge (name in full):	Order of Transfer Date:

CPLR 5704 Review of Ex Parte Order:

Court:	County:
Judge (name in full):	Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

This is an appeal from an order which denied Defendant's cross motion to strike the Thomas Cusack Affidavit and which granted Plaintiffs' motion to certify this action as a class action and appointing Plaintiffs to represent the class.

Issues: Specify the issue(s) proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal or modification to be advanced and the specific relief sought on appeal.

1. Whether the court erred in denying Defendant's cross motion to strike the Thomas Cusack Affidavit and to preclude Thomas Cusack from testifying as an expert at trial?

2. Whether the court erred in granting Plaintiffs' motion to certify the class action and finding that all the CPLR Sections 901 and 902 factors to certify a class have been met?

3. Any and all other issues which may arise upon further review of the Record on Appeal.

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this for is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court. Examples of party's original status include: plaintiff, defendant, petitioner, respondent, claimant, defendant third-party plaintiff, third-party defendant, and intervenor. Examples of a party's Appellate Division status include: appellant, respondent, appellant-respondent, respondent-appellant, petitioner, and intervenor.

No.	Party Name	Original Status	Appellate Division Status
1	PAMELA GOLDSTEIN	PLAINTIFF	RESPONDENT
2	ELLYN BERK & TONY BERK, as Administrators of the Estate of Winifred Berk	PLAINTIFF	RESPONDENT
3	PAUL BENJAMIN	PLAINTIFF	RESPONDENT
4	HOULIHAN/LAWRENCE INC.	DEFENDANT	APPELLANT
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Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name:	Evan H. Krinick, Esq.; Michelle A. Bholan, Esq.; J'Naia L. Boyd, Esq./RIVKIN RADLER LLP		
Address:	926 RXR Plaza		
City: Uniondale	State: NY	Zip: 11556-0926	Telephone No: 516-357-3000
E-mail Address:	evan.krinick@rivkin.com; michelle.bholan@rivkin.com; j'naia.boyd@rivkin.com		
Attorney Type:	☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice		
Party or Parties Represented (set forth party number(s) from table above:	4		
Attorney/Firm Name:	Jeremy C. Vest, Esq./MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.		
Address:	Chrysler Center 666 Third Avenue		
City: New York	State: NY	Zip: 10017	Telephone No: (212) 935-3000
E-mail Address:	JVest@mintz.com		
Attorney Type:	☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice		
Party or Parties Represented (set forth party number(s) from table above:	1-3		
Attorney/Firm Name:	William S. Ohlemeyer, Esq./BOIES SCHILLER FLEXNER LLP		
Address:	333 Main Street		
City: Armonk	State: NY	Zip: 10504	Telephone No: 914 749 8200
E-mail Address:	wohlemeyer@bsfllp.com		
Attorney Type:	☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice		
Party or Parties Represented (set forth party number(s) from table above:	1-3		
Attorney/Firm Name:	Alfred E. Donnellan, Esq.; Nelida Lara, Esq. DELBELLO DONNELLAN WEINGARTEN WISE & WIEDERKEHR LLP		
Address:	One North Lexington Avenue		
City: White Plains	State: NY	Zip: 10601	Telephone No: (914) 681-0200
E-mail Address:	aed@ddw-law.com; shochberg@ddw-law.com; NLG@ddw-law.com		
Attorney Type:	☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice		
Party or Parties Represented (set forth party number(s) from table above:	4		
Attorney/Firm Name:	Robert D. MacGill, Esq. (pro hac vice to be filed);Matthew Ciulla, Esq. (pro hac vice to be filed)/MACGILL PC		
Address:	156 E. Market Street, Suite 1200		
City: Indianapolis	State: IN	Zip: 46204	Telephone No: 317-721-1253
E-mail Address:	robert.macgill@macgilllaw.com; matthew.ciulla@macgilllaw.com		
Attorney Type:	☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☒ Pro Hac Vice		
Party or Parties Represented (set forth party number(s) from table above:	4		
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type:	☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice		
Party or Parties Represented (set forth party number(s) from table above:			

To commence the statutory time period for appeals as of right (CPLR § 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Disp ____ Dec __x__ Seq. #s 5, 6 Type Class Cert, Strike

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,

Index No. 60767/2018

DECISION AND ORDER

Plaintiffs,

-against-

HOULIHAN LAWRENCE INC.,

Defendant.

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The following papers numbered 1 to 11 were read on these motions:

Paper	Number
Notice of Motion, Affidavits and Exhibits	1
Memorandum of Law	2
Affidavit and Exhibits in Opposition	3
Memorandum of Law in Opposition	4
Affidavit and Exhibits in Reply	5
Memorandum of Law in Reply	6
Notice of Cross-Motion, Affidavit and Exhibits	7
Memorandum of Law	8
Affirmation and Exhibits in Opposition	9
Memorandum of Law in Opposition	10
Memorandum of Law in Reply	11

FILED: WESTCHESTER COUNTY CLERK 01/25/2022 08:43 AM INDEX NO. 60767/2018
NYSCEF DOC. NO. 1073 RECEIVED NYSCEF: 01/24/2022

There are two motions before the Court in this putative class action lawsuit arising out of allegations that defendant Houlihan Lawrence Inc. acted as an undisclosed, non-consensual dual agent in representing both buyers and sellers in approximately 10,000 residential real estate sales transactions. The first motion, filed by plaintiffs Pamela Goldstein ("Goldstein"), Ellyn Berk ("Ellyn") and Tony Berk ("Tony"), as administrators of the Estate of Winifred Berk, and by plaintiff Paul Benjamin ("Benjamin") (collectively, "plaintiffs"), seeks an order pursuant to CPLR §§ 901 and 902: (1) certifying a class of home buyers and sellers of residential real estate in Westchester, Putnam, and Dutchess counties from January 1, 2011 to July 14, 2018 wherein defendant represented both buyer and seller in the same transaction; (2) appointing plaintiffs as class representatives; and (3) appointing Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. ("Mintz") and Boies Schiller Flexner LLP ("BSF") as co-counsel for the class. The second motion, filed by defendant, is a cross-motion seeking to strike the affidavit of Thomas Cusack ("Cusack") sworn to November 1, 2021 (the "Cusack Affidavit") submitted by plaintiffs in support of their motion for class certification, and to preclude Cusack's anticipated expert testimony.

As an initial matter, with respect to defendant's cross-motion to strike the Cusack Affidavit and to preclude Cusack's

expert testimony, the propriety of expert testimony, including the "admissibility and scope" thereof, "is a determination within the discretion of the trial court." *Goudreau v Corvi*, 197 AD3d 463, 465 (2d Dept 2021); *Robins v City of Long Beach*, 192 AD3d 709, 710 (2d Dept 2021). Similarly, it is well settled that the Court may exercise its discretion in determining whether to strike a non-party and/or expert affidavit furnished by parties to a litigation. *See East Ramapo Cent. Sch. Dist. v New York Schs. Ins. Reciprocal*, 2021 NY App. Div. LEXIS 6400, **10-11 (2d Dept Nov. 17, 2021); *Wells Fargo Bank N.A. v Ho-Shing*, 168 AD3d 126, 135 (1st Dept 2019).

Having reviewed all of the parties' submissions, the Court denies defendant's cross-motion to strike the Cusack Affidavit and to preclude Cusack's expert testimony at a future trial of this action. With respect to the Cusack Affidavit, the Court does not credit defendant's arguments that it should be stricken as "unreliable and untenable" and that it purportedly "offers impermissible legal conclusions and narratives of record evidence" (*see* Def. Br.). Regardless of whether Cusack specifically, or another individual generally, is ultimately qualified as an expert witness to testify at trial, the record presents no valid basis for striking Cusack's affidavit, which avers to, *inter alia*, whether the training and direction that defendant gave its agents conformed to what is normally expected

of a real estate broker. *See Alvarez v First Nat'l Supermarkets, Inc.*, 11 AD3d 572, 573 (2d Dept 2004). Indeed, the 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 Cerrone v N. Shore-Long Is. Jewish Health Sys.*, 197 AD3d 449, 452 (2d Dept 2021); *Mehtvin v Ravi*, 180 AD3d 661, 663-664 (2d Dept 2020).

Furthermore, defendant's assertion that the Cusack Affidavit sets forth "impermissible legal conclusions and narratives of record evidence" is also without merit, as Cusack properly cites

to exhibits that summarize and/or support his conclusions, in accordance with Rule 13(c) of the Rules of the Commercial Division of the Supreme Court (*see* 22 NYCRR § 202.70(g)(13[c])).

The Court also denies defendant's cross-motion as premature to the extent that it requests that Cusack be "precluded from testifying in the future" at the trial of this action (*see* Def. Br.). Defendant does not cite any New York authority requiring or even suggesting that a court should issue a determination regarding expert disclosure at trial where, as here, class certification has not yet occurred. Furthermore, no Order issued by this Court, from the Court's Proposed Preliminary Conference Order that was filed on July 31, 2018 to its Class Certification Discovery Schedule Order dated June 16, 2021, has contemplated that expert disclosure would occur at this stage of the litigation, or that the Court would make rulings at this juncture regarding the preclusion of possible and/or anticipated expert witnesses at trial. Accordingly, with respect to Cusack's anticipated expert testimony at a future trial of this action, "[t]he decision regarding the admissibility of evidence should await the trial, when the determination may be made in context." *See Grant v Richard*, 222 AD2d 1014, 1014 (4th Dept 1995); *see also Speed v Avis Rent-A-Car*, 172 AD2d 267, 268 (1st Dept 1991) (holding that the trial court was "premature" in ruling upon the admissibility of evidence at a future trial, which determination

is "more properly made at trial when its relevance, or lack of relevance, may be determined in context.").

With respect to plaintiffs' motion for class certification, "[t]he determination of whether a lawsuit qualifies as a class action under the statutory criteria ordinarily rests within the sound discretion of the trial court." *City of New York v Maul*, 14 NY3d 499, 509 (2010); *see Lewis v Hallen Constr. Co., Inc.*, 193 AD3d 511, 512 (1st Dept 2021). First, pursuant to CPLR § 901(a),[1] "a party seeking class certification has the burden to satisfy the requirements of numerosity, commonality, typicality, adequacy of representation, and superiority." *Matter of Long Is. Power Auth. Hurricane Sandy Litig. v Long Is. Power Auth.*, 2021 NY App. Div. LEXIS 7437, *2 (2d Dept Dec. 29, 2021). "These requirements are to be liberally construed in keeping with the goals of CPLR article 9." *Matter of Long Is. Power Auth. Hurricane Sandy Litig.*, 2021 NY App. Div. LEXIS 7437 at *2,

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[1] CPLR § 901(a) provides: "One or more members of a class may sue or be sued as representative parties on behalf of all if:

1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;

3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;

4. the representative parties will fairly and adequately protect the interests of the class; and

5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

citing *Andryeyeva v New York Health Care, Inc.*, 33 NY3d 152, 183 (2019).

Moreover, "if the court finds that the prerequisites under section 901 have been satisfied," it should then consider five factors as set forth in CPLR § 902[2] in determining whether to grant class certification. *See Kurovskaya v Project O.H.R.*, 194 AD3d 612, 613 (1st Dept 2021) (affirming class certification where, after reviewing the CPLR § 901(a) factors, the trial court then properly determined that "the CPLR 902 factors weigh in favor of class certification"); *accord Lavrenyuk v Life Care Servs., Inc.*, 198 AD3d 569, 569 (1st Dept 2021) (holding that the trial court "did not improvidently exercise its discretion in determining that plaintiff met her burden of demonstrating the prerequisites for class action certification under CPLR 901 and 902").

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[2] CPLR § 902 provides in relevant part: "The action may be maintained as a class action only if the court finds that the prerequisites under section 901 have been satisfied. Among the matters which the court shall consider in determining whether the action may proceed as a class action are:

1. the interest of members of the class in individually controlling the prosecution or defense of separate actions;

2. the impracticability or inefficiency of prosecuting or defending separate actions;

3. the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

4. the desirability or undesirability of concentrating the litigation of the claim in the particular forum;

5. the difficulties likely to be encountered in the management of a class action."

Turning first to an analysis of the five CPLR § 901(a) factors, the first such factor is numerosity, *i.e.*, whether "the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable." *See* CPLR § 901(a)(1). Where, as here, the record reflects that defendant brokered approximately 10,000 dual-agent residential real estate transactions during the relevant time frame of January 1, 2011 to July 14, 2018, such that up to 20,000 buyers and sellers were parties to such transactions, plaintiffs have established that the numerosity requirement readily has been met. *See* Vest Aff., Ex. 90; *see also Chernett v Spruce 1209, LLC*, 2021 NY App. Div. LEXIS 7386, *5 (1st Dept Dec. 28, 2021) (holding that the numerosity requirement was satisfied in a putative class action involving 127 potential class members); *Agolli v Zoria Hous., LLC*, 188 AD3d 514, 514 (1st Dept 2020) (stating that "40 was the presumed threshold of numerosity for class certification.").

The second CPLR § 901(a) factor is commonality, *i.e.*, whether "there are questions of law or fact common to the class which predominate over any questions affecting only individual members." *See* CPLR § 901(a)(2). The Court of Appeals of New York has explained that "commonality cannot be determined by any mechanical test and that the fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action." *City of New York v Maul*, 14 NY3d

at 514. "Rather, it is predominance, not identity or unanimity, that is the linchpin of commonality." *City of New York v Maul*, 14 NY3d at 514 (emphasis added). *See also Matter of Long Is. Power Auth. Hurricane Sandy Litig.*, 2021 NY App. Div. LEXIS 7437 at *3; *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 97 (2d Dept 1980) (stating that "the decision as to whether there are common predominating questions of fact or law so as to support a class action should not be determined by any mechanical test, but rather, whether the use of a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated.").

Here, although the Court credits defendant's argument that there is not absolute unanimity among the proposed class (for example, certain proposed class members will invariably be purchasers of real estate, while others will be sellers thereof, and that there will certainly be differences among the class members as to damages sustained), plaintiffs have established that there is predominance such that "there are questions of law or fact common to the class which predominate over any questions affecting only individual members." *See* CPLR § 901(a)(2); *see also Burdick v Tonoga, Inc.*, 179 AD3d 53, 58 (3d Dept 2019) (holding that "Defendant's argument that individual class members will have different damages, though likely true, does not alter this conclusion. Even if, after determining the answers to these

common questions, it becomes clear that questions peculiar to each individual may remain or that there are varied damages suffered among class members, class certification is still permissible."); *Ferrari v National Football League*, 153 AD3d 1589, 1591 (4th Dept 2017) (stating that "where the same types of subterfuge were allegedly employed [by defendant] to pay [class action plaintiffs] lower wages, commonality of the claims will be found to predominate, even though the putative class members have different levels of damages.").

Accordingly, the Court finds that defendant's uniform training, script and practices, alleged to have been part of an orchestrated "strategy" to increase in-house sales by representing both buyers and sellers in thousands of real estate transactions – including by offering undisclosed in-house bonuses to defendant's real estate brokers so as to incentivize dual-agency sales – meets the commonality requirement. *See Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 791 (2012) (holding that where the defendant pursued a specific "strategy" affecting the plaintiffs, the commonality requirement had been met because "it would be reasonable to infer that the case will be dominated by class-wide issues - whether [defendant's] practice is lawful, and if not what the remedy should be"); *City of New York v Maul*, 14 NY3d at 514 (stating that "although this litigation may be close to the outer boundary of the concept of commonality," because

"each of the plaintiffs and proposed class members possesses his or her own unique factual circumstances and special needs," holding that the commonality requirement had nonetheless been met "given the liberal construction intended by the Legislature" and because of the existence of "common allegations that transcend and predominate over any individual matters").

Further with respect to commonality, the Court does not credit defendant's strained argument that "[t]he fact that the proposed class would contain the buyer and seller of the same house in the same transaction creates irreconcilable intra-class conflicts." (*see* Def. Br.). Its citation to *Cooper v Sleepy's, LLC*, 120 AD3d 742, 743-744 (2d Dept 2014) for this contention is inapposite, as that case involved a proposed class representative who sought recovery of a commission directly from another proposed class member. In that case, the Court denied class certification because there were several such conflicts among the proposed class members. *See Cooper*, 120 AD3d at 744. By contrast, in this action, the evidence submitted by the parties does not demonstrate any notable conflict between or among proposed class members, and defendant's reference to hypothetical "irreconcilable intra-class conflicts" is purely speculative. It does not warrant the denial of class certification.

Nor does the Court credit defendant's argument that class certification is unwarranted because this Court in its Decision

and Order dated April 8, 2019 (the "2019 Decision") stated that "[w]hile the alleged commonality between these plaintiffs may be alleged non-disclosure, the ultimate resolution of the claims can only be determined by individual analysis of each transaction." (*see* NYSCEF Doc. No. 370 at p. 13). Notably, the 2019 Decision was issued years ago in the context of a CPLR § 3211 motion to dismiss the pleadings for failure to state a cause of action. The Court's analysis was strictly limited to the four corners of the parties' pleadings. At that very early stage of the litigation, the Court did not have the benefit of having reviewed the voluminous record that is presently before the Court or the parties' legal arguments concerning class certification. The Court does not credit defendant's assertion that class certification must now be denied because of a passing statement in the 2019 Decision. *See Borawski v Abulafia*, 140 AD3d 817, 818 (2d Dept 2016) (stating that a court's determination on a CPLR 3211 motion does not bind it by the law of the case doctrine in connection with its determination of subsequent motions).

The third CPLR § 901(a) factor, typicality, is met where "the claims or defenses of the representative parties are typical of the claims or defenses of the class." *See* CPLR § 901(a)(3). "The commonality and typicality requirements tend to merge into one another." *Onadia v City of New York*, 56 Misc. 3d 309, 320 (Sup. Ct. Bronx Cty. 2017). "Typical claims are those that arise

from the same facts and circumstances as the claims of the class members." *Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 143 (2d Dept 2008); *see Ackerman v Price Waterhouse*, 252 AD2d 179, 201 (1st Dept 1998) (holding that the typicality requirement had been met where the plaintiff's claims "arose out of the same course of conduct and are based on the same theories as the other class members, [thus] they are plainly typical of the entire class.").

Plaintiffs have established that they have met the typicality requirement such that the claims of the representative parties are typical of the claims of the putative class. A review of the affidavits furnished by Goldstein, Ellyn, Tony, and Benjamin unambiguously demonstrates that such representatives each state that they purchased or sold residential real estate in Westchester, Putnam, and Dutchess counties between January 1, 2011 and July 14, 2018, and that defendant represented both the buyer and the seller in every such transaction. *See* Goldstein Aff. at ¶¶ 6-10; Ellyn Aff. at ¶¶ 12-18; Tony Aff. at ¶¶ 8-14; Benjamin Aff. at ¶¶ 6-10. The affidavits further reflect that each of the representatives avers that they did not give timely and/or valid informed written consent to defendant's dual agency, and that they did not receive adequate disclosure concerning defendant's representation of both buyer and seller, or of the in-house bonus incentive that was being offered and paid for dual

agency transactions. *See* Goldstein Aff. at ¶¶ 7-10; Ellyn Aff. at ¶¶ 15-18; Tony Aff. at ¶¶ 11-14; Benjamin Aff. at ¶¶ 7-10. Accordingly, inasmuch as the named plaintiffs' claims "derive from the same course of conduct that gives rise to the claims of the other class members and is based upon the same legal theory," the typicality requirement of CPLR § 901(a)(3) has been met. *See Hurrell-Harring v State of New York*, 81 AD3d 69, 73 (3d Dept 2011); *see also Roberts v Ocean Prime, LLC*, 148 AD3d 525, 526 (1st Dept 2017) (holding that the "claims of the putative class representatives are typical of the class's claims since . . . their injuries, if any, derive from the same course of conduct by defendants.").

Plaintiffs have also established the fourth CPLR § 901(a) factor, in demonstrating that "the representative parties will fairly and adequately protect the interests of the class." *See* CPLR § 901(a)(4). In considering this factor, "a court should consider any potential conflicts of interest, the parties' familiarity with the lawsuit and financial resources, and the quality of class counsel." *Ferrari*, 153 AD3d at 1592, citing *Cooper*, 120 AD3d at 743-744. Here, plaintiffs have each asserted in their affidavits that they understand their responsibilities as prospective class representatives, have no conflicts of interest with any of the putative class members and are committed to prosecuting the case in the best interest of the proposed

class members. *See* Goldstein Aff. at ¶¶ 11-17; Ellyn Aff. at ¶¶ 19-25; Tony Aff. at ¶¶ 15-21; Benjamin Aff. at ¶¶ 11-17. Moreover, plaintiffs have amply established that proposed class counsel has the background and experience that is necessary to provide high quality representation to the class. They have also demonstrated that counsel has the financial resources to prosecute this action and will continue to pay for all costs associated with the litigation. *See* Vest Aff. at ¶¶ 9-15; Ohlemeyer Aff. at ¶¶ 10-15. Accordingly, plaintiffs have demonstrated the fourth factor of adequacy of representation as required by CPLR § 901(a)(4). *See Stecko v RLI Ins. Co.*, 121 AD3d 542, 543 (1st Dept 2014) (holding that "[t]he record supports a finding that plaintiffs and their counsel can adequately represent the class."); *Dabrowski v Abax Inc.*, 84 AD3d 633, 634-635 (1st Dept 2011) (stating that "[p]laintiffs' counsel has demonstrated its expertise and zealous representation of the plaintiffs here, as well as in prior class action cases" such that adequacy of representation has been established).

Fifth and finally, plaintiffs have demonstrated that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy" as required by CPLR § 901(a)(5). Given that plaintiffs have established that defendant brokered approximately 10,000 dual-agent residential real estate transactions during the relevant time frame of

January 1, 2011 to July 14, 2018 (*see* Vest Aff., Ex. 90), for which each transaction invariably includes both a buyer and seller as possible class members, it would be highly impractical, burdensome and costly for up to 20,000 distinct plaintiffs to individually prosecute actions against defendant. Moreover, even if a small percentage of the 20,000 potential class members brought individual lawsuits, it would waste judicial resources and there would be a possibility of inconsistent determinations. *See Roberts*, 148 AD3d at 526 (stating that "[c]lass action treatment will conserve judicial resources, reduce litigation expenses, and avoid inconsistent outcomes"); *Hurrell-Harring*, 81 AD3d at 75 (noting that "denial of class certification gives rise to the possibility of multiple lawsuits involving claims duplicative of those asserted in this action and inconsistent rulings by various courts in this state."). Furthermore, given the possibility (or perhaps even the likelihood) that damages purportedly suffered by an individual class member may be dwarfed by the costs associated with prosecuting a single lawsuit, the "costs of prosecuting individual actions would result in the class members having no realistic day in court." *See Ferrari*, 153 AD3d at 1593, citing *Stecko*, 121 AD3d at 543. Therefore, based upon the record before the Court, it finds that a class action is "superior to other available methods for the fair and efficient adjudication of the controversy." *See* CPLR §

901(a)(5); *see also Williams v Air Serv Corp.*, 121 AD3d 441, 442 (1st Dept 2014); *Freeman v Great Lakes Energy Partners, L.L.C.*, 12 AD3d 1170, 1171 (4th Dept 2004).

Plaintiffs having demonstrated that the prerequisites under CPLR § 901(a) have been satisfied, the Court will now consider five factors as set forth in CPLR § 902 in determining whether to grant class certification. *See Kurovskaya*, 194 AD3d at 613; *Lavrenyuk*, 198 AD3d at 569. As set forth below, the Court finds that the CPLR § 902 factors have been readily met based upon its review of the parties' submissions.

First, regarding "the interest of members of the class in individually controlling the prosecution or defense of separate actions," there is no evidence or testimony in the record, including in the plaintiffs' affidavits, that any plaintiff has expressed interest in individually controlling the prosecution of a separate action. *See* CPLR § 902(1); *see also* Goldstein Aff. at ¶¶ 11-17; Ellyn Aff. at ¶¶ 19-25; Tony Aff. at ¶¶ 15-21; Benjamin Aff. at ¶¶ 11-17. Given that "[t]here is no indication that the members of the class have expressed any interest in controlling the prosecution of their own claims," plaintiffs have satisfied the first CPLR § 902 factor. *See Krebs v Canyon Club, Inc.*, 22 Misc. 3d 1125(A) (Sup. Ct. Westchester Cty. 2009).

Second, "the impracticability or inefficiency of prosecuting or defending separate actions" also strongly favors class

certification, as it is apparent that the prosecution of separate actions by as many as 20,000 potential class members would be highly impractical and extraordinarily inefficient. *See* CPLR § 902(2); *see also* Vest Aff., Ex. 90. Thus, plaintiffs have satisfied the second CPLR § 902 factor. *See Emilio v Robison Oil Corp.*, 63 AD3d 667, 668 (2d Dept 2009) (holding that the CPLR § 902 factors weighed in favor of class certification where, *inter alia*, "[m]embers of the class appear to number in the multiple hundreds").

Third, with respect to "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class" as set forth in CPLR § 902(3), there is no evidence of any ongoing litigation involving the subject matter of this lawsuit and/or the named plaintiffs or potential class herein, and plaintiffs' counsel has affirmatively represented that they are not aware of any such litigation. *See* Vest Aff. at ¶ 19; Ohlemeyer Aff. at ¶ 19; Pl. Br.

The fourth CPLR § 902 factor, *i.e.*, "the desirability or undesirability of concentrating the litigation of the claim in the particular forum," also favors class certification, as Westchester County Supreme Court is an appropriate and desirable forum for this Commercial Division action. *See* CPLR § 902(4). Indeed, all four plaintiffs purchased and/or sold residential real estate in Westchester County; defendant is headquartered in

Westchester County; and many of the relevant real estate transactions occurred in this county. *See* Goldstein Aff. at ¶¶ 6-10; Ellyn Aff. at ¶¶ 12-18; Tony Aff. at ¶¶ 8-14; Benjamin Aff. at ¶¶ 6-10; Vest Aff., Exs. 1-210. Accordingly, plaintiffs have established that the desirability of concentrating the litigation of this putative class action in Westchester County favors class certification. *See Fleming v Barnwell Nursing Home & Health Facilities, Inc.*, 309 AD2d 1132, 1134 (3d Dept 2003).

Fifth and finally, regarding CPLR § 902(5), "the difficulties likely to be encountered in the management of a class action," such factor does not weigh against class certification, as this Court does not anticipate any extraordinary difficulty to be encountered in the course of class action management. *See Fleming*, 309 AD2d at 1134 (noting that "there are no apparent difficulties in managing this class").

Accordingly, based upon the foregoing, plaintiffs' motion to certify this action as a class action, to appoint plaintiffs to represent the class, and to appoint Mintz and BSF as co-counsel for the class, is granted.[3] This 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

[3] All other arguments raised on this motion and evidence submitted by the parties in connection therewith have been considered by this Court, notwithstanding the specific absence of reference thereto.

represented both buyer and seller in the same transaction. The plaintiffs are hereby appointed to represent the class; and Mintz and BSF are appointed as co-counsel of record for the class.

The Court will conduct a conference on February 3, 2022 at 10 a.m. to discuss, *inter alia*, notice to the class and schedules for the completion of all pre-trial proceedings, including disclosure. There is no need for a hearing on class certification, as previously scheduled.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
January 21, 2022

Linda S. Jamieson

HON. LINDA S. JAMIESON
Justice of the Supreme Court

To: Mintz, Levin et al.
Attorneys for Plaintiffs
666 Third Avenue
New York, N.Y. 10017

Boies Schiller et al.
Attorneys for Plaintiffs
333 Main Street
Armonk, N.Y. 10504

Delbello Donnellan et al.
Attorneys for Defendant
One North Lexington Avenue
White Plains, N.Y. 10601

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2022 the

NOTICE OF APPEAL, INFORMATION SHEET and THE ORDER

was served on:

MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
Attorneys for Plaintiffs-Respondents

BOIES SCHILLER FLEXNER LLP
Attorneys for Plaintiffs-Respondents

via electronic mail through NYSCEF at the following email addresses:

- ALFRED E. DONNELLAN - aed@ddw-law.com
- PAUL FATTARUSO - pfattaruso@cf-llp.com
- AMOS E. FRIEDLAND - afriedland@rochefreedman.com
- WILLIAM P. HARRINGTON - wpharrington@bpslaw.com
- SHARI B. HOCHBERG - shochberg@ddw-law.com
- NELIDA LARA-GARDUNO - NLG@ddw-law.com
- WILLIAM S. OHLEMEYER - wohlemeyer@bsfllp.com
- JEREMY C. VEST - JVest@mintz.com

Dated: Uniondale, New York
February 23, 2022

Yours, etc.,

RIVKIN RADLER LLP
Attorneys for Defendant-Appellant
HOULIHAN/LAWRENCE INC.

By: *Evan H. Krinick*

Evan H. Krinick, Esq.
Michelle A. Bholan, Esq.
J'Naia L. Boyd, Esq.
926 RXR Plaza
Uniondale, New York 11556-0926
(516) 357-3000