UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JEANNE MARCHIG and THE MARCHIG ANIMAL WELFARE TRUST,

Plaintiffs,

10 Civ. 3624 (JGK)

-against-

CHRISTIE'S INC.,

Defendant.

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MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS

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MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS

Plaintiffs' attorneys, Law Offices of Richard A. Altman, submit this memorandum of law in opposition to defendant Christie's motion to dismiss the complaint. Defendant misinterprets the case law, omits binding precedents to which they were parties (and thus which the Court should collaterally estop them from disputing), and provides the thinnest and most superficial analysis of the issues to the Court. Furthermore, many of the issues which they ask this Court to determine as a matter of law are fact-dependent, and cannot be resolved without discovery. Their motion should be denied, and they should be directed to serve an answer to the complaint. In the alternative, plaintiffs should be granted leave to amend the complaint to the extent the Court determines that any essential factual allegations are lacking, and they respectfully request leave to do so.[1]

STANDARDS ON A 12(b)(6) MOTION

Defendant Christie's moves pursuant to F.R.Civ.P. 12(b)(6) to dismiss this action on the grounds of the statute of limitations and for failure to state a claim upon which relief can be granted. But the standards for granting such a motion are demanding. Plaintiffs need plead only "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). A claim will have "facial plausibility when the plaintiff pleads factual

[1] As a preliminary procedural matter, it is noted that the Court may consider the exhibits plaintiffs are submitting in opposition to defendant's motion without converting this motion into one for summary judgment, notwithstanding F.R.Civ.P. 12(d). *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir.2002); *International Audiotext Network v. American Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir.1995). Particularly is this so when the basis for the motion is the affirmative defense of the statute of limitations. Dismissal on the basis of an affirmative defense is appropriate only "if the defense appears on the face of the complaint." *Staehr v. Hartford Fin. Servs. Group*, 547 F.3d 406, 426 (2d Cir.2008)(*citing McKenna v. Wright*, 386 F.3d 432, 436 (2d Cir.2004)), and thus plaintiffs are entitled to demonstrate that the allegations in the complaint are sufficient to overcome the defense, by submitting documents which came from Christie's. The time-barring of the claims is not apparent from the face of the complaint, and therefore plaintiffs are entitled to submit evidence demonstrating that the action is not in fact time-barred.

content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, ___U.S.___, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). The complaint must be construed liberally, all of its factual allegations must be accepted as true, and the Court must draw all reasonable inferences in plaintiffs' favor, *Harris v. Mills*, 572 F.3d 66, 71-72 (2d Cir.2009). "[A] motion to dismiss does not involve consideration of whether a plaintiff will ultimately prevail on the merits, but instead solely whether the claimant is entitled to offer evidence in support of his claims." *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 65 (2d Cir.2010)(citation and quotation marks omitted). Under these standards, the Court should deny this motion and direct the defendant to answer the complaint.

STATEMENT OF THE FACTS

In 1997, plaintiff Jeanne Marchig consigned a pen-and-ink drawing ("the Drawing") to defendant Christie's, one of the leading auction houses in the world, to be sold at auction, along with other works of art belonging to plaintiffs (complaint, ¶¶ 8, 9, 13 and 16 at 2-4). Christie's knew that she intended to donate the proceeds of the sale to plaintiff The Marchig Animal Welfare Trust, an English and Scottish charitable trust of which she is a trustee. The Drawing had belonged to plaintiff Marchig's late husband, an art restorer, when they married in 1955, and she became its sole owner in 1983, after he died (*id.*, ¶¶ 13-15 at 4). Plaintiff Marchig and her late husband had a relation with Christie's going back to 1966, having consigned works of art for sale, and Christie's has said that she is a valued client of the firm (*id.*, ¶ 18 at 4; Altman decl., Exhs. B and G). At the time of the consignment, she informed Christie's of her late husband's belief that the Drawing was by Domenico Ghirlandaio, who was an early Italian Renaissance painter, a teacher of Michelangelo, and had apprenticed at the same time as Leonardo da Vinci, under Andrea del Verrocchio (*id.*, ¶¶ 2-4 at 2 and 20 at 5).

The Drawing was examined by François Borne, at the time the resident expert at Christie's of Old Master Drawings. The complaint alleges that he spent fifteen minutes examining the Drawing, concluded that it was a German drawing dating from the 19th Century, and advised plaintiff Marchig that the Drawing was "superb...an object of great taste," but that he was "tempted to change the frame in order to make it seem an amateur object of the 19th century and not an Italian pastiche." (*id.*, ¶¶ 20-23 at 5). Plaintiff Marchig reluctantly accepted this assessment and attribution, but did not consent to change the frame. However, Christie's changed the frame anyway, and it was sold with a different frame. The original frame has not been returned to her (*id.*, ¶¶ 25-29 at 6).[2]

In late August 1997, plaintiff Marchig and Christie's entered into a consignment agreement regarding the terms of the sale of the Drawing (complaint, Exh. B). The Drawing was listed in the auction catalog as "the property of a lady," and "German, 19th Century." It sold at a public auction in January 1998 for $21,850, and plaintiffs received the proceeds less defendant's commission (*id.*, ¶¶ 31-34 at 6-7). In 2007, the Drawing was sold by the auction purchaser in a private sale for approximately the same sum, $22,000.

From 1998 until 2009, plaintiffs and defendants had many additional dealings as part of a continuing relationship, including the sale of additional works of art (Altman decl., Exhs. C-J), and there were many communications between plaintiffs and Christie's. In particular, she dealt with Mr. Noël Annesley, the Honorary Chairman of Christie's, who resided in London.[3] In one of those letters, dated

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[2] Since commencing this action, plaintiffs have made a formal demand that Christie's return the frame, but Christie's has yet to respond to this demand. In the event it is not returned in the near future, plaintiffs intend to move to amend the complaint to add claims for replevin and conversion to recover the frame, or for damages if it cannot be returned.

[3] Mr. Annesley is a well-known expert on Old Master drawings, *see* Annesley, Attributing Old Master Drawings, *in* Spencer, ed., The Expert versus the Object: Judging Fakes and False Attributions in the Visual Arts (2004) at 79-88.

April 17, 2007, Mr. Annesley says that "I was touched to be reminded of the fact that you and I first met as long ago as 1966, only two years after I joined Christie's. It is very rewarding to have an association that goes back over so many years." *Id.*, Exh. G.

In July 2009, Mrs. Marchig received a telephone call from Mr. Annesley, informing her for the first time that there had been claims made that the Drawing was actually by Leonardo da Vinci. She was "devastated by this news," and then began to investigate the attribution of the Drawing on her own (*id.*, ¶ 40-43 at 7-8). Annesley sent her a series of letters and emails regarding the new attribution, and even came from London to Geneva to meet with her in person to discuss the situation and to determine what to do about it (Altman decl., Exhs. H-J).

In April 2010, a book was published by two experts, Martin Kemp and Pascal Cotte, respectively a Leonardo scholar and an optical scientist, setting out the artistic and scientific evidence to support the attribution to Leonardo. Among the scientific evidence is a fragment of a fingerprint and palm print on the Drawing which match those on a known Leonardo. Among the stylistic evidence is a careful comparison of the pen strokes on the Drawing, which go in the direction that a left-handed artist (Leonardo was left-handed) would draw them. The complaint summarizes some of the evidence in favor of the attribution, including statements by other Leonardo scholars who have examined the Drawing (¶¶ 44-57 at 8-10). The Drawing has been insured for a sum in excess of $100 million (*id.*, ¶ 60 at 10).

Plaintiffs sought to resolve the matter with Christie's, but when Christie's refused to acknowledge any liability, they brought this action on May 3, 2010, seeking unspecified damages under four legal theories: (1) Breach of fiduciary duty; (2) Breach of warranty; (3) Negligence; and (4) Negligent misrepresentation. Defendant Christie's has now moved to dismiss the complaint pursuant to F.R.Civ.P. 12(b)(6), asserting that all of the claims are time-barred, and that none of the four claims

in the complaint is legally sufficient. They further seek to dismiss any claims brought on behalf of the plaintiff Marchig Animal Welfare Trust. It will be shown that all of the claims are legally sufficient and timely, and that there is no basis to dismiss the Trust as a plaintiff.

POINT I

PLAINTIFFS HAVE STATED FOUR LEGALLY SUFFICIENT CLAIMS FOR RELIEF.

All of the claims in the complaint are sufficiently set forth, and the factual allegations, all of which are to be taken as true, make out four claims upon which relief can be granted. Accordingly, the motion to dismiss for failure to state a claim should be denied.

First Claim: Breach of Fiduciary Duty

There can be no doubt that a fiduciary relationship exists between the parties here, and the Court should so hold as a matter of law. "A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 832 NE2d 26, 799 NYS2d 170 (2005)(quotation marks omitted).

It is well-established that auction houses are fiduciaries with respect to their consignors, and have obligations beyond those of the marketplace. The most significant, and controlling, authority supporting this proposition (and unmentioned in Christie's motion) is *Cristallina S. A. v. Christie, Manson & Woods International, Inc.*, 117 A.D.2d 284, 502 N.Y.S.2d 165 (1st Dept.1986). In that case, the plaintiff, a Panamanian corporation engaged solely in the purchase and sale of art works (and therefore having substantial art expertise) had consigned eight Impressionist paintings to Christie's. The auction was a failure, and Cristallina sued Christie's and its former president, David Bathurst, for damages, claiming that they intentionally or negligently misrepresented the sum the paintings would bring at auction,

manipulated the reserve prices, and failed to advise it of the risks inherent in such a sale. The lower court had dismissed the case, but it was reinstated on appeal. The Appellate Division said:

> The auctioneer is the agent of the consignor. As an agent, Christie's had a fiduciary duty to act in the utmost good faith and in the interest of Cristallina, its principal, throughout their relationship. When a breach of that duty occurs, the agent is liable for damages caused to the principal, whether the cause of action is based on contract or on negligence...Moreover, where, as here, an agent is selected because of its special fitness for the performance of the duties to be undertaken, the principal is entitled to rely on the agent's judgment and integrity...[A]n auctioneer...is nonetheless held to a standard of care commensurate with the special skill which is the norm in the locality for that kind of work. Thus, the breach of contract, negligence and breach of fiduciary duty causes of action should not have been dismissed since sufficient has been shown to present a factual question as to whether Christie's and Bathurst acted in a manner commensurate with their skill and expertise...
> 117 A.D.3d at 292-94 (quotation marks and citations omitted).

Thus, Christie's had significant fiduciary obligations to Mrs. Marchig, and those obligations were arguably even greater than those it had toward Cristallina, because, unlike Mrs. Marchig, Cristallina had significant expertise of its own in the art market, and thus less need to rely upon Christie's judgment and advice. Buying and selling art was its sole activity, unlike Mrs. Marchig, who relied totally upon Christie's assessment and evaluation of the Drawing. Furthermore, because Christie's was a party to the very case which determined that auction houses are fiduciaries with respect to their consignors, they should be collaterally estopped from arguing to the contrary, and the Court should so hold, as a matter of law.

Christie's, like every auctioneer, is heavily regulated by statute, common law and New York City Regulations. "The business of an auctioneer, while perfectly legal, has always been affected with a public interest and subject to legislative restriction." *Biddles, Inc. v. Enright*, 239 N.Y. 354, 365 (1925). There are many such restrictions governing auction houses in the City of New York. Under regulations of the New York City Department of Consumer Affairs, auction houses in this City, among other things, must be licensed and must warrant title to works they sell. Their principals must be fingerprinted, and they

are subject to criminal liability for false or fraudulent representations. *See generally* Lerner & Bresler, 1 Art Law: The Guide for Collectors, Dealers and Artists, Appendix 4-6 at 435-449 (3d ed.2005). *See also* N.Y. Arts & Cultural Affairs L. § 13.01, imposing significant warranty obligations upon art merchants (which includes auction houses, § 11.01(2)); N.Y. Gen.Bus.L. § 25; *Levin v. Dalva Bros. Inc.*, 459 F.3d 68, 77 (1st Cir.2006)("[Section 13.01] was a specific legislative enactment designed to regulate express warranty claims brought by lay people after purchasing fine art from art merchants. As such, it supplants the otherwise applicable provisions of the Uniform Commercial Code.").

Parties in a fiduciary relation can modify their contractual obligations, *Mickle v. Christie's, Inc.*, 207 F.Supp.2d 237 (S.D.N.Y 2002); *Greenwood v. Koven*, 880 F.Supp. 186, 194 (S.D.N.Y.1995), but can not completely disclaim the obligations created by the relation, *Blue Chip Emerald LLC v. Allied Partners Inc.*, 299 A.D.2d 278 (1st Dept.2002). "If a contract establishes a relationship of trust and confidence between the parties, such as that between agent and principal, then a fiduciary duty arises from the contract which is independent of the contractual obligation. And a breach of contract which also constitutes a breach of that fiduciary obligation is not merely a broken promise, but, outside of and beyond that, there is trust betrayed and confidence abused; there is constructive fraud." *GLM Corp. v. Klein*, 665 F.Supp. 283, 286 (S.D.N.Y.1986)(quotation marks and citation omitted).

The complaint contains substantial allegations to demonstrate that Christie's breached their obligations. In particular, M. Borne's dismissal of Mrs. Marchig's husband's possible attribution of the Drawing to Ghirlandaio, and his arrogant refusal to take that suggestion seriously (¶¶ 3, 4 and 5 at 2), his insistence that it had to be a German drawing from the 19th century despite its being on vellum (an unusual medium for such a supposedly late work, well after the Renaissance)(¶¶ 5 at 2, 21 and 22 at 5, 24 at 6), the fifteen minutes he allegedly spent analyzing the Drawing (¶ 4 at 2), his insistence upon changing the original frame on the Drawing so it would not look like "an Italian pastiche," over Mrs.

Marchig's objection (¶ 23 at 5, 29 at 6), Christie's failure to return the frame (¶ 30 at 6), Christie's failure to investigate the actual age of the drawing by then-readily available non-destructive carbon dating, let alone their failure to assess its age reasonably accurately by routine and well-established methods of analysis and connoisseurship, and their probable lack of interest in the Drawing, perhaps because they preferred to sell the more valuable Tiepolo drawings which she had consigned to them at the same time (¶ 32 at 6), all support a claim for breach of fiduciary obligations. Had Borne taken Mrs. Marchig's suggested attribution seriously, the Drawing would have at the least probably been identified correctly as an Italian drawing from the 15th Century, obviously worth far more than $22,000, no matter who the artist might have been.[4]

Thus, Christie's defense, amounting to nothing more than "no one could have known...." can not be taken seriously. There was a great deal that could have been known, under then-current standards of technology and connoisseurship, had Christie's properly discharged its fiduciary responsibilities and properly applied its much-vaunted expertise in Old Master drawings to this Drawing. At a minimum, an expert in Old Master drawings should surely be able to date a drawing with a margin of error of less than 400 years, and to tell the difference between a German drawing and an Italian one. During the course of discovery, and at trial, those standards will be the subject of expert testimony, and will show that Christie's utterly failed to protect Mrs. Marchig, refused to investigate her belief as to the age of the drawing, should have been able to attribute the Drawing correctly, and should be liable for their failure to do so.

[4] It must be emphasized that the Drawing has, on information and belief, been insured for a sum in excess of $100 million, which strongly suggests that an insurer has determined to its satisfaction that the Drawing is a genuine Leonardo. Information about the insurance, and the circumstances surrounding it, will certainly be a part of the discovery to be conducted in this action.

The legal standard is similar to that to which attorneys, physicians and other fiduciaries with special expertise are held. In other words, Christie's is "held to a standard of care commensurate with the special skill which is the norm in the locality for that kind of work... [It is] a factual question as to whether Christie's and Bathurst acted in a manner commensurate with their skill and expertise..." *Cristallina, supra*, 117 A.D.3d at 293-94. Thus, once again, there is a factual question whether Christie's acted in such a manner, this time with respect to these plaintiffs. It is no answer that Christie's would surely have preferred to sell the Drawing as a Leonardo because of the enormous commission they would have earned. That is not the issue at all. Rather, the issue is the standard of care imposed on fiduciaries, and their potential personal gain is irrelevant to their performance of those obligations.[5]

It is also significant that the auctioneer in the *Cristallina* case, Christopher J. Burge, is the same individual who is named on the consignment agreement as acting on behalf of Christie's in this case (complaint, Exh. B at 4). According to the case, Christie's had after that auction entered into a consent judgment with the New York City Department of Consumer Affairs, which had taken action against Christie's over the issuance of a false press release about the sale. Christie's was fined $80,000 and Burge's and Bathurst's auction licenses were suspended. The Appellate Division found these facts significant in upholding a claim for punitive damages, which it refused to dismiss. This fine and license suspension would appear to be favorable to plaintiff Marchig's argument that she was either actively misled or that at best, Christie's investigation was inadequate.

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[5] In a recent case in London, Christie's UK was sued for misattributing a painting which turned out to be by Titian. They sold it at auction in 1993 for £8,000 after assessing it as being "from the school of Titian." Their rival Sotheby's later put it up for sale for $4-$6 million in 2009 after it was identified as a Titian original, although it did not sell. The former owners sued Christie's and settled earlier this year for an undisclosed sum. *See* Christie's sued for misidentifying Titian painting worth millions, *available at* http://www.telegraph.co.uk/culture/art/art-news/7309299/Christies-sued-for-misidentifying-Titian-painting-worth-millions.html (accessed May 23, 2010).

In sum, to state a claim for breach of a fiduciary duty, plaintiff must establish the existence of a fiduciary relationship, misconduct by the defendant, that the misconduct induced plaintiff to engage in the transaction in question, and that the misconduct directly caused plaintiff's loss. *Colello v. Colello*, 9 A.D.3d 855, 859, 780 N.Y.S.2d 450 (2004). All of these elements are present here, and the conclusion is that the complaint alleges sufficient facts to state a claim for breach of fiduciary obligations.[6]

Second Claim: Breach of Warranty

The Second Claim is based upon the consignment agreement between the parties (complaint, Exh. B), and the warranties contained therein. Christie's argues that the agreement contains "a broad disclaimer in Christie's favor" (Memo at 15). This is not correct. The disclaimer provides in pertinent part as follows (Exh. B at 2): "7. Christie's shall not be liable for any errors or omissions in catalogue or other descriptions of the property...Christie's makes no representations or warranties to Seller with respect to the Property, its authenticity, condition or otherwise." But plaintiffs' claim is based upon the failure to attribute the Drawing. The quoted language does not disclaim any warranties with respect to attribution. The claim simply says that Christie's misattribution is a breach of its warranty to attribute consigned works correctly and that plaintiffs have been damaged by that breach.[7]

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[6] The secondary literature on the liability of experts for misattribution is substantial and instructive. *See generally* Singer, "Sotheby's Sold Me a Fake!" Holding Auction Houses Accountable for Authenticating and Attributing Works of Fine Art, 23 Colum-VLA J.L. & Arts 439 (2000); Spencer, The Risk of Legal Liability for Attributions of Visual Art, *in* Spencer, ed., The Expert versus the Object, *supra*, n. 3 at 143-187; Jauregui, Rembrandt Portraits: Economic Negligence in Art Attribution, 44 U.C.L.A. L. Rev. 1947 (1997); Bennett, Fine Art Auctions and the Law: A Reassessment in the Aftermath of Cristallina, 16 Colum.-VLA J.L. & Arts 257 (1992); Levy, Liability of the Art Expert for Professional Malpractice, 1991 Wis. L. Rev. 595 (1991); Karlen, Fakes, Forgeries, and Expert Opinions, 16:3 J. Arts Mgmt. & Law 5 (1986); 1 Lerner & Bresler, Art Law, *supra*, The Auction House and the Consignor, at 333-387.

[7] Christie's for some reason cites *Tony Shafrazi Gallery Inc. v. Christie's Inc.*, Index No. 112192/07 (Sup.N.Y.Co.2008) and annexes a copy to its papers. But that case involved their warranty obligations to a purchaser, not their fiduciary obligations to a consignor. It has nothing to do with our case.

Christie's identical argument was rejected in another case well-known to them, *E.S.T., Inc. v. Christie's Inc.*, 6/28/2001 N.Y.L.J. 20, Index No. 112793/2000 (Sup.N.Y. Co.2001)(Altman decl., Exh. K). In *E.S.T, Inc.*, which is directly on point, the plaintiff had consigned a painting to Christie's for sale. Its in-house expert attributed the painting to Sistro Badolocchio, and it sold at auction for $12,000. It was later discovered that the painting was actually by Annibale Carracci, a far more important 17th century painter, and was worth approximately $300,000. E.S.T. sued over the misattribution, claiming that Christie's was negligent and had breached its fiduciary duty. Christie's moved to dismiss on the basis of the consignment agreement, which contained the following language: "Christie's makes no representation or warranties to Consignor with respect to the property, its authenticity, condition or otherwise....Christie's shall not be liable for any errors or omissions in catalogue or other descriptions of the property." The provisions in the *E.S.T., Inc.* case and the present case are identical in their essential terms.

E.S.T. argued that "attribution" was not the same thing as "authenticity" and was not included within it, that the omission of the word "attribution" from the disclaimer rendered Christie's liable, and that because Christie's had drafted the agreement and could easily have inserted the word, any ambiguity should be construed against them. The Court agreed and refused to dismiss the complaint, saying that it could not determine as a matter of law that misattribution was included in the disclaimed matters, that the provision was ambiguous, and directed Christie's to answer the complaint. Christie's did so and the matter was later settled.[8]

Thus, it must be concluded that the consignment agreement in this case does not insulate Christie's from liability for its misattribution of the Drawing, any more than it did in the *E.S.T, Inc.* case.

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[8] Christie's standard form consignment agreement was subsequently changed to include a disclaimer of any warranty of attribution.

Furthermore, inasmuch as Christie's was a party to that case, it should be collaterally estopped from arguing that the agreement bars plaintiffs' claims here.

But even beyond the holding in *E.S.T, Inc.* there are public policy reasons which preclude Christie's from disclaiming liability for the misattribution. Even an express disclaimer will not be given effect where the facts are peculiarly within the knowledge of the party invoking it. *Danann Realty Corp. v Harris*, 5 N.Y.2d 317, 322 (1958); *Tahini Invs. v Bobrowsky*, 99 A.D.2d 489, 470 N.Y.S.2d 431 (2d Dept.1984).

Furthermore, disclaimers such as this are barred by the Arts & Cultural Affairs Law. Section § 13.01, entitled Express Warranties, reads in pertinent part as follows:

> Notwithstanding any provision of any other law to the contrary:
> ...
> 4. (a) An express warranty and disclaimers intended to negate or limit such warranty shall be construed wherever reasonable as consistent with each other but...negation or limitation is inoperative to the extent that such construction is unreasonable.
> (b) Such negation or limitation shall be deemed unreasonable if:...(iii) the information provided is proved to be, as of the date of sale or exchange, false, mistaken or erroneous.

Under this statute, any limitations upon the scope of an art merchant's warranty are unreasonable if the information is proved to be "false, mistaken or erroneous" as of the date of the sale. The complaint alleges that the attribution was false, mistaken or erroneous, and therefore the second claim is sufficient to state a claim for breach of warranty.

Third Claim: Negligence

The third claim is one for simple negligence. "Under New York law, the elements of a negligence claim are: (i) a duty owed to the plaintiff by the defendant; (ii) breach of that duty; and (iii) injury substantially caused by that breach [citing cases]." *Lombard v. Booz-Allen & Hamilton, Inc.*, 280 F.3d 209, 215 (2d Cir.2002). It is long established in New York in negligence cases that the scope of the duty owed, and whether that duty was breached, are generally questions of fact for the jury. *Dolan v Delaware*

& Hudson Canal Co., 71 N.Y. 285, 288 (1877); *Derdiarian v Felix Contr. Corp.*, 51 N.Y.2d 308, 315 (1980)("Because questions concerning what is foreseeable and what is normal may be the subject of varying inferences, as is the question of negligence itself, these issues generally are for the fact finder to resolve.").

The third claim alleges that Christie's "had a duty to plaintiffs to act as a reasonably prudent expert auction house," (¶ 91 at 14), that the duty included the obligations "to correctly attribute the Drawing to the artist who created it, and to correctly estimate its age...to use due care which was reasonable under the circumstances [and] to obtain the best possible price," (¶¶ 92, 94, 95 at 14), that they "failed to exercise due care, and to act as reasonably prudent experts" (¶ 96 at 14), that plaintiffs were financially damaged by Christie's negligence and that the negligence was the proximate cause of plaintiffs' damages (¶¶ 98-99 at 15).

Accordingly the claim is sufficiently pleaded. Any questions of the nature and scope of Christie's duty, and whether they breached that duty, are properly ones for the jury, and not the subject of a motion to dismiss. To answer those questions will require expert witness testimony regarding the nature of the relation between auction houses and their consignors, the nature of connoisseurship and the technology of attribution, and a host of other complex factors. The Court cannot say as a matter of law that there is no duty, and particularly in view of the fiduciary relation between the parties, the duty is likely to be a substantial one. Therefore, this third claim should not be dismissed.

Fourth Claim: Negligent Appraisal or Misrepresentation.

> Under New York law, the elements for a negligent misrepresentation claim are that (1) the defendant had a duty, as a result of a special relationship, to give correct information; (2) the defendant made a false representation that he or she should have known was incorrect; (3) the information supplied in the representation was known by the defendant to be desired by the plaintiff for a serious purpose; (4) the plaintiff intended to rely and act upon it; and (5) the plaintiff reasonably relied on it to his or her detriment. However, the alleged misrepresentation must be factual in nature and not promissory or relating to future events that might never come to fruition.

Hydro Investors, Inc. v. Trafalgar Power, Inc., 227 F.3d 8, 20-21 (2d Cir.2000)(citations omitted).

See also Parrott v Coopers & Lybrand, 95 N.Y.2d 479, 484, 741 N.E.2d 506, 718 N.Y.S.2d 709 (2000).

The tort of negligent misrepresentation involves breach of "a duty to speak with care." *Kimmell v. Schaefer*, 89 N.Y.2d 257, 652 N.Y.S.2d 715 (1996). It arises in the context of "[p]rofessionals, such as lawyers or engineers, [who] by virtue of their training and expertise, may have special relationships of confidence and trust with their clients." Such professionals can be subjected to "liability for negligent misrepresentation when they have failed to speak with care." *Id.* at 263-64. The allegation here is that the Drawing was examined for only fifteen minutes before an opinion was rendered, and that plaintiff Marchig's suggested attribution was not even considered, as the letters from M. Borne demonstrate (complaint, Exhs. C & D). This is woefully insufficient under the circumstances.

Thus, "in order to impose tort liability here, there must be some identifiable source of a special duty of care. The existence of such a special relationship may give rise to an exceptional duty regarding commercial speech and justifiable reliance on such speech." *Id.* at 264. Whether such a relationship exists is generally an issue of fact, and *Kimmell* sets out the elements the fact finder should consider:

> whether the person making the representation held or appeared to hold unique or special expertise; whether a special relationship of trust or confidence existed between the parties; and whether the speaker was aware of the use to which the information would be put and supplied it for that purpose. 89 N.Y.2d at 264.

See also American Protein Corp. v. AB Volvo, 844 F.2d 56, 63-64 (2d Cir.1988), *cert. den.*, 488 U.S. 852 (1988)("The law of negligent misrepresentation, as enunciated in New York, recognizes that generally there is no liability for words negligently spoken but that there is an exception when the parties' relationship suggests a closer degree of trust and reliance than that of the ordinary buyer and seller.")(citation and quotation marks omitted); *White v. Guarente*, 43 N.Y.2d 356 (1977); *Coolite Corp. v. American Cyanamid Co.*, 52 A.D.2d 486, 384 N.Y.S.2d 808 (1st Dept.1976).

Of course, given the authority of the *Cristallina* case, and the absence of any argument to the contrary in Christie's motion–which essentially acknowledges that it was a fiduciary–this Court can readily conclude that such a special relationship exists as a matter of law, and it is submitted that it should do so. Thus, the basis of the relation is sufficient to create liability for false negligent statements, so long as there are allegations of falsity, reliance and damages.

The claim for negligent misrepresentation in the complaint is more than sufficiently pleaded. It alleges that :

- Plaintiffs presented the Drawing to Christie's "as a work of the Italian Renaissance, expressed that belief and asked defendant to investigate it" (¶ 3 at 2),

- Their possible attribution was summarily rejected by Christie's resident expert of old master drawings at the time, after only about fifteen minutes of examination (¶ 4),

- The expert "dated it to the 19th century, attributed it to an anonymous German artist, and defendant sold it with that erroneous description for a fraction of its true value" (¶ 5)

- Defendant, its employees and agents made a number of statements to plaintiffs, and to the general public, that the Drawing was "German School, early 19th Century," "a German drawing in the taste of the Italian Renaissance," that it was advisable to "change the frame in order to make it seem an amateur object of the 19th century and not an Italian pastiche," and that it was "a German drawing in the taste of the Renaissance" (¶¶ 23, 24 and 31).

- The statements were false and erroneous when made, and that Christie's should have so known, because of their specialized knowledge and expertise in the attribution of drawings consigned to it for sale, and could have so learned with a reasonable investigation (¶¶ 103-04 at 15);

- Defendant, as a fiduciary, was under a duty of care to provide correct information as to the attribution of the Drawing to plaintiffs (¶ 105 at 16).

- Defendant knew that plaintiffs required accurate information in order to sell the Drawing at the highest possible price, and that they intended to rely and act upon Christie's opinion as to its attribution (¶¶ 107-08 at 16);

- Plaintiffs had the right to rely upon Christie's for correct and truthful information as to the attribution, and did so rely (¶¶ 110-11 at 16);

- Plaintiffs placed complete trust and confidence in Christie's to attribute the Drawing accurately (¶ 112 at 16)

- Christie's willfully failed and refused to evaluate plaintiffs' belief as to the attribution of the Drawing, and summarily rejected it without meaningful investigation (¶ 113 at 16).

- Christie's false statement of attribution damaged plaintiffs, and it is liable for damages in an amount to be determined (¶ 114 at 17).

All of the requirements of the claim, as set out in *Hydro Investors, Inc., supra*, are met. In sum, plaintiffs have alleged that Christie's and they had a special relationship, and a concomitant duty to give correct information, that Christies' made false statements during the course of that relationship and should have known that the statements were false. Plaintiffs have further alleged that Christie's knew that they (plaintiffs) had a serious purpose, that they would rely upon the statements, and did so, and that they have been damaged as a result. Furthermore, all of the statements were factual in nature, and not promissory. Accordingly, this claim is sufficiently pleaded.

In conclusion, all four claims are legally sufficient, and Christie's motion to dismiss for failure to state a claim upon which relief can be granted should be denied.

POINT II

ALL OF THE CLAIMS ACCRUED, AND THE STATUTE OF LIMITATIONS COMMENCED TO RUN, WHEN PLAINTIFFS LEARNED OF THE ATTRIBUTION OF THE DRAWING, AND NOT BEFORE. THUS ALL OF THE CLAIMS ARE TIMELY.

Christie's argues that the statute of limitation has run on all claims, supposedly because the sale of the Drawing took place in 1998. But the claims did not accrue in 1998, and the statute of limitations did not commence to run at that time. Rather, the claims accrued in the summer of 2009, when Christie's informed Mrs. Marchig, through Noël Annesley, its Chairman Emeritus, of the attribution of the Drawing to Leonardo. This information placed her on notice, and she then accumulated sufficient evidence as a result of her own investigation to be able to claim in good faith that Christie's had breached its obligations, and that plaintiffs had been damaged.

Christie's is correct that the applicable statute of limitations for the first claim, the breach of fiduciary duty, is three years. *IDT Corporation v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 879 N.Y.S.2d 355 (2009), *rearg. den.* 12 N.Y.3d 889, 883 N.Y.S.2d 793 (2009). But the claim did not accrue, and the statute of limitations did not begin to run, until plaintiffs learned that the Drawing was by Leonardo, because before then, they could not have truthfully alleged that they had been damaged. The *IDT* Court continued:

> A tort claim accrues as soon as "the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint" (Kronos, Inc. v AVX Corp., 81 NY2d 90, 94, 612 NE2d 289, 595 NYS2d 931 [1993]). As with other torts in which damage is an essential element, *the claim "is not enforceable until damages are sustained"* (*id.* at 94; emphasis added).
>
> In *Kronos, Inc.*, the Court of Appeals said:
>
> [P]laintiff's cause of action is one sounding in tort, and, as a general proposition, a tort cause of action cannot accrue until an injury is sustained. That, rather than the wrongful act of defendant or discovery of the injury by plaintiff, is the relevant date for marking accrual. The Statute of Limitations does not run until there is a legal right to relief. Stated another way, accrual occurs when the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint...In tort, however, there is

> no enforceable right until there is loss. It is the incurring of damage that engenders a legally cognizable right.

In this case, plaintiffs could not have alleged damages until such time as the attribution of the Drawing to Leonardo, for the simple reason that they could not before then allege a loss, or allege that they had incurred damages, and thus would have had nothing to sue on. Since they did so within less than one year of learning of that attribution, the first, third and fourth tort claims are all timely, because all of them require the allegation of damages as an essential element, and until the attribution, plaintiffs could not allege damages. *See also Gross v. Stern*, 276 A.D.2d 591 (2d Dept.2000)("The plaintiff has alleged legally cognizable claims against the appellants for, inter alia, breach of fiduciary duty and an accounting. The claims are not time-barred since the plaintiff commenced this action within two years of her discovery of the alleged breach")(citations omitted); *Guedj v. Dana*, 11 A.D.3d 368 (1st Dept. 2004).

Christie's argues, in effect, that plaintiffs should have sued by 2001, long before they knew, or could have known with any degree of diligence, of Christie's breach of their obligations. What would they possibly have claimed in such a suit? They could not at that time have alleged damages, and thus they had no enforceable right and no possible basis for a suit. Moreover, the question of whether a plaintiff knew or should have known of the true facts underlying a claim is generally a question to be determined by the ultimate fact-finder, and not by the Court alone on a motion to dismiss. *Trepuk v. Frank*, 44 N.Y.2d 723 (1978). Accordingly, the claims for breach of fiduciary duty, for negligence and for negligent misrepresentation are all timely.

As for the second claim, for breach of warranty, that is timely as well. A distinction must be drawn between the warranty which Christie's owes to its buyers, and to its consignor-sellers. As to the former, its obligations are created by contract, by the U.C.C., by the Consumer Affairs Department regulations and by the above-cited provision of the Arts & Cultural Affairs Law, § 13.01. But their

warranty obligations to their consignors are different. Because of their fiduciary relation with their consignors, their warranty obligations are not solely contractual, but are also subject to the continuous treatment or continuous representation doctrine, to which we now turn.

POINT III

ALL OF THE CLAIMS ARE TIMELY, BECAUSE OF THE CONTINUOUS TREATMENT OR REPRESENTATION DOCTRINE.

The doctrine of continuous treatment, or continuous representation, also applies to the facts of this case. When there is a relation of trust and confidence, and the relation requires application of specialized professional skills, a claim for breach of the obligations does not arise during the relation, but only when the relation terminates. Until then, the statute of limitations is tolled. The doctrine first arose in a medical malpractice case, *Borgia v. City of New York*, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962), in which the New York Court of Appeals held that "when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint, the 'accrual' comes only at the end of the treatment." 12 N.Y.2d at 156. The doctrine was applied by the Second Circuit in *Ulrich v. Veterans Admin. Hosp.*, 853 F.2d 1078, 1081 (2d Cir.1988)("the rationale is supported by the need for flexibility in determining the cause of a latent injury"). In such cases, the statute of limitations will not begin to run until the representation ends. *See Glamm v. Allen*, 57 N.Y.2d 87, 94, 439 N.E.2d 390, 453 N.Y.S.2d 674 (1982).

The list of professionals subject to the continuous treatment doctrine has expanded significantly beyond physicians since *Borgia*. It includes attorneys, *Greene v. Greene*, 56 N.Y.2d 86, 436 N.E.2d 496, 451 N.Y.S.2d 46 (1982), architects, *Bd. of Ed. of the Hudson City School Dist. v. Thompson Construction Corp.*, 111 A.D.2d 497, 499, 488 N.Y.S.2d 880 (3d Dept.1985)("[*Borgia*] has been expanded to include all claims, irrespective of the applicable Statute of Limitations, where, due to the professional relationship, its use is appropriate"); accountants, *In re Investors Funding Corp.*, 523 F.Supp. 533 (S.D.N.Y.1980),

dentists, *Weble v. Giovanniello*, 137 A.D.2d 680, 524 N.Y.S.2d 772 (2d Dept.1988), and land surveyors, *Tool v. Boutelle*, 91 Misc. 2d 464, 398 N.Y.S.2d 128 (Sup.Albany Co.1977). What all of these professions have in common is that their practitioners possess special skills and expertise by virtue of education and training, and that they are generally in a fiduciary relation to those whose interests they represent.

Given that auction houses possess such skills and expertise, and, moreover, that they were in a fiduciary relation with the plaintiffs as a matter of law, the doctrine is applicable here. Although no case has been found specifically holding that an auction house is among the professionals subject to the doctrine, there is good reason to apply it here, inasmuch as Christie's both holds itself out as having, and indeed does have, significant expertise, which it calls upon to render services to its clients-consignors. Moreover, it is clear that auction houses in general, and Christie's in particular (*Cristallina, supra*), have fiduciary obligations to their consignors. Mr. Annesley acted in accordance with those obligations by bringing the new attribution to plaintiffs' attention in the first place; if he did not believe that he had continuous obligations to plaintiffs, he would not have continued to represent their interests.

There are two policy reasons for the rule. First, "a person seeking professional assistance has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected to question and assess the techniques employed or manner in which the services are rendered." *Shumsky v. Eisenstein*, 96 N.Y.2d 164, 167, 750 N.E.2d 67, 726 N.Y.S.2d 365 (2001)(quotation marks omitted); *Greene v. Greene*, *supra*, 56 N.Y.2d at 94.

Second, "[t]he policy underlying the continuous treatment doctrine seeks to maintain the physician-patient relationship in the belief that the most efficacious medical care will be obtained when the attending physician remains on a case from onset to cure. Implicit in the policy is the recognition that the doctor not only is in a position to identify and correct his or her malpractice, but is best placed to do so." *McDermott v. Torre*, 56 N.Y.2d 399, 408, 437 N.E.2d 1108, 452 N.Y.S.2d 351 (1982)(citation

omitted), and that tolling the statute of limitations under such circumstances encourages such corrective action. However, after the professional relationship ends, these considerations no longer obtain and the rule no longer applies.

"The continuous representation doctrine tolls the statute of limitations...where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim." *McCoy v. Feinman*, 99 N.Y.2d 295, 306, 785 N.E.2d 714, 755 N.Y.S.2d 693 (2002). *See also Zorn v. Gilbert*, 61 N.Y.2d 939, 463 N.E.2d 371, 474 N.Y.S.2d 970 (2007); *Williamson v. PricewaterhouseCoopers LLP*, 9 N.Y.3d 1, 9, 872 N.E.2d 842, 840 N.Y.S.2d 730 (2007).

There is substantial evidence in this case to support a tolling of the statute of limitations under the doctrine of continuous representation, and demonstrating that the parties had a mutual understanding of the need for further advice and representation regarding the attribution of the Drawing. Christie's believed it had continuous fiduciary obligations to plaintiffs, and acted in accordance with that belief on many occasions between 1998 and 2009.

For example, when Mrs. Marchig wrote to Mr. Annesley in August 2009, informing him of her intention to hold Christie's responsible for the misattribution (Altman decl., Exh. A), she received a response the next month from Christie's in-house counsel (*id.*, Exh. B), acknowledging their continued responsibility towards her ("[y]ou are a very valued client at Christie's, as was your husband, and we are honored by the trust you have shown us"). There are many other indications evidencing their continuing fiduciary obligations, copies of which are exhibits to the Altman declaration:

Exh. A – Letter dated 26 August 2009 from Marchig to Annesley, advising him of her intentions to pursue the matter.

Exh. B – Letter dated September 2009 from Sandra Cobden of Christie's to Marchig; "You are a very valued client at Christie's, as was your husband, and we are honored by the trust you have shown us."

Exh. C – Letter dated 23 June 1998 advising Marchig of her artworks in their warehouse.

Exh. D – Letter dated 5 May 2001 from Marchig to Annesley, asking him to arrange sales of her late husband's artworks.

Exh. E – Letter dated 12 July 2001 from Annesley to Marchig, relating sale of artworks.

Exh. F – Letter dated 4 October 2005 from Gower Williams to Marchig, with estimates of value of her late husband's artworks.

Exh. G – Letter dated 17 April 2007 from Annesley to Marchig, regarding his visit to her home, asking that she consign a painting by Piero di Cosimo to Christie's; noting that they first met in 1966; "It is very rewarding to have an association that goes back over so many years."

Exh. H. – Letter dated 29 September 2009 (after Marchig learned of the Leonardo attribution) from Annesley to Marchig, sending her a copy of the 1998 auction sale catalog in which the Drawing was listed; "We do find ourselves in an extraordinary situation, and I really do appreciate your concerns, and also your very friendly and positive approach. I continue to feel that the best way forward is for each of us to alert the other with any developments as they take place."

Exh. I – Letter dated 13 October 2009 from Annesley to Marchig, relating their meeting in London three weeks earlier; "this new attribution raises a whole host of questions."

Exh. J – Email from Annesley to March dated 7 January 2010; "In keeping with our efforts to keep each other fully informed of developments regarding the so-called 'La Bella Milanese,' I wanted to bring to your attention the January issue of Art News."

These are not the actions and words of an ordinary seller of property to a customer after the consummation of a commercial transaction. Nor are they the actions and words of someone preemptively defending himself against a possible claim. Rather, they are the actions of a fiduciary who deemed himself, and the auction house corporation of which he was the Honorary Chairman, to have serious and ongoing obligations to a client after the sale took place, and to keep her informed about the status of what Christie's had done, and intended to do, on her behalf to solve the problem. Less charitably, it might be construed as damage control. Yet, that he voluntarily notified her is proof of the seriousness with which he took Christie's obligations to her, and in any event, it is sufficient to demonstrate the continued existence of fiduciary obligations toward a valued client. It would seem to require discovery, including a deposition of Mr. Annesley, to explore fully the nature and extent of his contacts with her since the sale of the Drawing, and of his intentions behind those contacts.

Given their volunteering the information about the re-attribution of the Drawing, it ill behooves Christie's to invoke the statute of limitations, and they should in any event be estopped from doing so. The continuing existence of the fiduciary relation between the parties is sufficient to bar assertion of the statute of limitations, under the continuous treatment doctrine, and to do so with respect to all of the claims in the complaint.

POINT IV

THE MARCHIG TRUST IS A PROPER PLAINTIFF.

Christie's final point is that plaintiff The Marchig Animal Welfare Trust should be dismissed for lack of standing, *i.e.*, that the Trust is not the real party in interest. But the Trust is not seeking to enforce the contract as a third-party beneficiary, and Christie's analysis is off the point. Rather, the Trust is entitled to be a plaintiff pursuant to F.R.Civ.P. 17(a)(1)(E) and (F), which permit "a trustee of an express trust", or "a party with whom or in whose name a contract has been made for another's

benefit" to sue. Furthermore, pursuant to Rule 17(a)(3), "[t]he court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest."

Mrs. Marchig is a real party in interest, and the Trust is an intended beneficiary of her claims. That is sufficient to permit both she and the Trust of which she is a trustee to be plaintiffs. See the extensive analysis in *Highland Capital Mgmt., L.P. v. Schneider*, 551 F.Supp.2d 173, 196 n. 13 (S.D.N.Y. 2008), *rev'd on other grds.*, 2010 U.S. App. LEXIS 12735 (2d Cir., June 22, 2010)("the modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.")(citation omitted). There are no such concerns here, because the Trust should remain.

Accordingly, both Mrs. Marchig and the Trust are proper plaintiffs. And to the extent it is determined that the Trust is not a real party in interest, the Court should not dismiss the Trust, but should afford time for the appropriate ratification or repleading.

CONCLUSION

Based upon the foregoing, this motion should be denied, and defendant should be directed to serve an answer to the complaint. In the alternative, plaintiffs should be granted leave to replead to the extent that any of the claims in the complaint are held to be deficient in any respect.

Dated: New York, New York
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/S/

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