

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PAMELA GOLDSTEIN,
ELLYN & TONY BERK,
and PAUL BENJAMIN, on behalf of
themselves and all others similarly
situated,

Plaintiffs,

v.

HOULIHAN/LAWRENCE INC.,

Defendant.

Index No. 60767/2018

Hon. Linda S. Jamieson

**FIRST AMENDED
CLASS ACTION COMPLAINT**

Plaintiffs Pamela Goldstein, Dr. Ellyn and Tony Berk, and Paul Benjamin, on behalf of themselves and all others similarly situated, based on personal knowledge as to themselves, and upon information and belief as to all other matters, allege as follows:

INTRODUCTION

*“Buying a home is the biggest deal that most people make in their lives. . . . They really want a helping hand It’s a very personal transaction. It’s a scary transaction sometimes to people. A lot of paperwork involved and all that. They really want somebody they trust.”*¹

– Warren Buffett,
Berkshire Hathaway Chairman & CEO

1. Buying or selling a home is often the biggest, most complex, and most stressful transaction a person will ever experience. Homebuyers and sellers have the right to be represented by a real estate agent who is loyal to them and only

¹ *Buffett: Homebuyers want a helping hand*, CNBC (Feb. 26, 2018, 7:10 AM), <https://www.cnbc.com/video/2018/02/26/buffett-homebuyers-want-a-helping-hand.html>.

them when making this critically important decision. Houlihan Lawrence, the leading real estate brokerage firm in New York City's northern suburbs, has stripped thousands of New Yorkers of this important right by representing both the homebuyer and seller in the same transaction—a practice known as “dual agency.”

2. A real estate agent owes its clients fiduciary duties of undivided and undiluted loyalty, obedience, confidentiality, full disclosure, and reasonable care. A real estate agent who acts for the homebuyer and seller in the same transaction is incapable of faithful performance of these duties because the agent must necessarily be unfaithful to one client or the other. A real estate agent can't help its seller-client negotiate a higher price without hurting its buyer-client in the process, and can't help its buyer-client negotiate a lower price without hurting its seller-client at the same time.

3. New York law doesn't outright ban dual representation of homebuyers and sellers in the same transaction. It gives homebuyers and sellers the discretion, in specific limited circumstances, to retain a single real estate agent to act as an intermediary mediating between their conflicting interests. But a real estate agent may act as an intermediary between clients with adverse interests only after the agent fully and frankly discloses to each client the implications of its dual agency—including that both clients are forfeiting their fundamental right to the agent's duty of undivided and undiluted loyalty—and obtains each client's informed written consent.

4. To ensure that this exception doesn't swallow the rule, New York law mandates such specific, comprehensive, and effective disclosures that real estate agents cannot routinely engage in dual agency. As the New York Department of State has recognized: "if dual agency is disclosed properly, there isn't anyone in their right mind who would agree to it."² Real estate agents are held strictly liable if they cannot show they made proper disclosure, irrespective of their good or bad faith and without regard for whether or not their clients were injured. This rigorous compliance-and-enforcement regime is intended to ensure that dual-agent transactions occur "infrequently at best"³ and that scrupulous and unscrupulous brokers alike resist the siren call of a dual-agent transaction's double commission.

5. Since at least January 1, 2011, Houlihan Lawrence has operated a bait-and-switch scheme to lure thousands of homebuyers and sellers into dual-agent transactions: Houlihan Lawrence holds itself out to potential clients as a trustworthy guide that is "here to help" and will be there for its clients "every step of the way," only to dishonor those promises—and breach its fiduciary duties—by acting as the agent for the parties on both sides of the negotiating table without making adequate disclosures about its dual agency to either one of them.

6. To induce its 1,300 agents to participate in the scheme, Houlihan Lawrence pays secret kickbacks to the sales agents who secure double commissions

² Ex. 1 Lew Sichelman, *A New Era for Realty Agents*, Chicago Trib., Aug. 29, 1992, available at http://articles.chicagotribune.com/1992-08-29/news/9203180799_1_traditional-agents-home-buyers-single-agency-realty-association/2.

³ Ex. 2 Penny Singer, *Buying a Home: Who Works for Whom?*, N.Y. Times, Jan. 26, 1992, available at <http://www.nytimes.com/1992/01/26/nyregion/buying-a-home-who-works-for-whom.html>.

through dual-agent transactions. These kickbacks encourage Houlihan Lawrence agents to put their personal interest in a bigger commission check ahead of the interests of their clients by incentivizing them to steer clients into dual-agent transactions. The conflict of interest inherent in Houlihan Lawrence's undisclosed incentive compensation scheme makes it impossible for Houlihan Lawrence sales agents to represent homebuyers and sellers with undivided and undiluted loyalty. The scheme is incompatible with Houlihan Lawrence's fiduciary duties. At the very least, it is a material fact that must be disclosed to each and every one of Houlihan Lawrence's clients.

7. Houlihan Lawrence's kickback scheme is now being exposed. Since the filing of the original complaint in this action, two anonymous sources have stepped forward to report in writing that Houlihan Lawrence has a longstanding practice and policy through which it pays its agents for dual-agent transactions and that the kickback scheme induces Houlihan Lawrence salespeople to act disloyally toward Houlihan Lawrence's clients.

8. On July 19, 2018, Plaintiffs' counsel received a first letter exposing Houlihan Lawrence's illegal kickback scheme, stating that Houlihan Lawrence's program "paid a bonus of 10% of the transactional commission due an agent if the transaction was 'in-house', that is, with another Houlihan Lawrence agent." This source explained that the bonus scheme made it "highly advantageous" for agents "to only show Houlihan Lawrence listings to clients, who probably thought they were getting to see all of the listings meeting their requirements in the area, no

matter which agency represents the seller.” The letter concluded: “None of this was in the buyer’s interest. Under certain circumstances, it was not in the seller’s interest as well, since the selling agent might be willing to accept a lower offer, because the commission difference would be made up by the 10% bonus.”⁴

9. On July 20, 2018, Plaintiffs’ counsel received a second anonymous letter, from “a former Houlihan Lawrence agent” revealing that Houlihan Lawrence pays its agents “a 5 percent bonus for a dual agency deal.” This source explained that Houlihan Lawrence agents are “driven by the extra commission bump,” including as evidenced by numerous inter-office e-mails “encouraging fellow agents to sell their listing, keep it ‘in-house’ to get the added bonus!” The source added that “it can be very very tough” for a non–Houlihan Lawrence–represented buyer to win a bidding war on a Houlihan Lawrence–listed property “if other HL agents are bidding”—meaning that even where a seller might get a better deal from another bidder, Houlihan Lawrence steers its seller-clients to Houlihan Lawrence bidders.⁵

10. No homebuyer or seller represented by Houlihan Lawrence since it began operating this kickback scheme has received representation from Houlihan Lawrence and its agents free from the taint of Houlihan Lawrence’s undisclosed, corrupt bonus system. Houlihan Lawrence breached the fiduciary duty it owed its clients by concealing its divided and diluted loyalty.

⁴ Ex. 2A Letter from Source No. 1 to W. Ohlemeyer, received July 19, 2018.

⁵ Ex. 2B Letter from Source No. 2 to W. Ohlemeyer, received July 20, 2018.

11. Houlihan Lawrence's kickback scheme isn't the only way it disregards and violates its duties to its clients. Houlihan Lawrence's deceptive and unfair business practices also include:

- a. Duping consumers into signing Forms that subject them to dual agency by default.
- b. Misleading consumers by hyping "in-house" sales as if they were good for clients.
- c. Systematically avoiding reference to the risks of dual agency.
- d. Adopting a hands-off, "only if asked" strategy to discussing the downsides, risks, and options of dual agency.
- e. Using misleading and uninformative listing agreements.
- f. Failing to notify clients when dual-agent situations arise.
- g. Failing to disclose to buyer clients the full compensation it will receive for a dual-agent deal.
- h. Training agents to rely on a broken system of misinformation and phony advance consent.
- i. Having in-house sales teams unlawfully market themselves as if those teams were standalone brokerage firms.
- j. Practicing designated dual agency with different members of the same in-house sales team.
- k. Adopting a too-little, too-late "closing protocol" to check for disclosure of dual agency well after consumers have been deceived and have already committed to a transaction with Houlihan Lawrence.
- l. Failing to perform appropriate supervisory training and education of its agents to comply with the law.

12. Houlihan Lawrence has reaped huge profits using these and other tricks to lure homebuyers and sellers into dual-agent transactions—pocketing hundreds of millions of dollars in unearned sales commissions while starving its rival brokerage firms of commission income and preventing them from making contacts that could lead to future business.

13. For every transaction where Houlihan Lawrence acted as an undisclosed, non-consensual dual agent, it has acted as a faithless servant, betraying its clients and compromising the public trust in the integrity of the real estate market and the dignity of the real estate profession. It did not earn the sales commissions it collected on those transactions. It should pay them back.

14. Houlihan Lawrence has created a vicious cycle that leaves homebuyers and sellers increasingly vulnerable to its predatory behavior. Dual-agent transactions beget more dual-agent transactions. As Houlihan Lawrence grows larger, its competitors grow smaller, causing homebuyers and sellers to see Houlihan Lawrence as their only option and all but ensuring that they encounter Houlihan Lawrence on the opposite side of the negotiating table.

15. Houlihan Lawrence's faithless and duplicitous conduct constitutes not only a breach of its fiduciary duties but also deceptive trade practices under New York law, and it has resulted in the unjust enrichment of Houlihan Lawrence at Plaintiffs' and the other Class members' expense.

16. New York law has recognized for over a century that real estate agents owe the highest standard of care, and if they act adversely to their clients, or fail to

disclose any interest which would naturally influence their conduct, it “amounts to such a fraud” upon the client, as to “forfeit any right to compensation for services.” *Murray v. Beard*, 102 N.Y. 505, 508 (1986). By seeking repayment of the commissions Houlihan Lawrence has collected from its faithless and duplicitous conduct, Plaintiffs and the other Class members seek to remedy the harm they suffered as a result of Houlihan Lawrence’s disloyalty, and also to deter Houlihan Lawrence and others from ever again putting their interests ahead of their clients’.

17. Plaintiffs and the other Class members seek to restore for all homebuyers and sellers in the Westchester, Putnam, and Dutchess tri-county area the right to buy or sell their home with a real estate agent who is acting solely in their best interest, and to ensure that any homebuyers and sellers who may choose to give up their agent’s undivided and undiluted loyalty do so only upon full and frank disclosure of all material information necessary to make that decision.

THE PARTIES

18. Plaintiff Pamela Goldstein, at all times relevant to this Complaint, is and was a citizen and resident of Westchester County, New York. On May 22, 2017, Ms. Goldstein purchased the property located at 6 Wellington Terrace, White Plains, New York 10607. Houlihan Lawrence represented both Ms. Goldstein and the seller in the transaction.

19. Plaintiff Dr. Ellyn Berk, at all times relevant to this Complaint, is and was a citizen and resident of New York County, New York. Plaintiff Tony Berk, at all times relevant to this Complaint, is and was a citizen and resident of the State of

North Carolina. On June 30, 2014, the Berks, on behalf of the estate of their deceased mother, sold the property located at 190 Davis Avenue, White Plains, New York 10605. Houlihan Lawrence represented both the Berks and the buyer in the transaction.

20. On July 13, 2016, Plaintiff Paul Benjamin purchased the property located at 16 Old Logging Road, Bedford, New York 10506. Houlihan Lawrence represented both Mr. Benjamin and the seller in the transaction. Prior to his purchase of 16 Old Logging Road, Mr. Benjamin was a citizen and resident of Kings County, New York. Since the purchase, Mr. Benjamin has been a citizen and resident of Westchester County, New York.

21. Defendant Houlihan/Lawrence Inc. (“Houlihan Lawrence”) is a New York corporation with its principal place of business at 800 Westchester Avenue, Rye Brook, New York 10573. Houlihan Lawrence is a full-service real estate brokerage firm that represents buyers and sellers in real estate transactions. Houlihan Lawrence owns and operates 30 offices, with over 1,300 agents, across the Westchester, Putnam, and Dutchess tri-county area. In January 2017, Houlihan Lawrence was bought by HomeServices of America, Inc. (“HomeServices of America” or “HomeServices”), a Berkshire Hathaway affiliate and the nation’s second-largest residential real estate brokerage company.⁶ Prior to its acquisition

⁶ Ex. 3 Warren Buffett “Sage of Omaha” Acquires Houlihan Lawrence, Houlihan Lawrence, Jan. 17, 2017, available at <http://www.houlihanlawrence.com/emails/previewInBrowser/88985d948a0e217eb1a51d7540f3b530832762d8>.

by HomeServices, Houlihan Lawrence ranked 13th of all brokerages nationally as measured by total annual sales volume.⁷

JURISDICTION AND VENUE

22. This Court has jurisdiction over Houlihan Lawrence pursuant to CPLR 301 because Houlihan Lawrence is incorporated in New York, maintains its principal place of business in Westchester County, New York, and was doing business in this State.

23. There is no federal diversity jurisdiction over the matter because the local controversy and home-state controversy exceptions to the Class Action Fairness Act of 2005 apply.⁸ Houlihan Lawrence and greater than two thirds of the members of the Class are citizens of New York; the injuries and conduct complained of took place in New York; and no other class action has been filed in the last three years asserting the same or similar factual allegations against Houlihan Lawrence.

24. Alternatively, there is no federal diversity jurisdiction because more than one third of the members of the Class are citizens of New York; the claims asserted do not involve matters of national or interstate interest; the claims asserted are governed by New York law; this forum has a direct nexus to the Class members, Houlihan Lawrence, and the conduct and harm alleged herein; and the

⁷ *Id.*

⁸ *See* 28 U.S.C. §§ 1332(d), 1453, 1711-15 (2012).

Class includes substantially more New York citizens than citizens of any other state.⁹

25. Venue is proper in Westchester County pursuant to CPLR 503 because Houlihan Lawrence and many of the Plaintiffs are residents of Westchester County, and a substantial part of the events or omissions giving rise to the claims occurred in Westchester County.

GENERAL FACTUAL ALLEGATIONS

1. Houlihan Lawrence grows from a family business to a regional powerhouse

*“we still believe in owning the Westchester market.”*¹⁰

– Chris Meyers, Houlihan Lawrence President

26. Houlihan Lawrence’s roots go back to 1888, when William Lawrence, the founder of Sarah Lawrence College, established Lawrence Investments, eventually renamed Houlihan Lawrence in 1984 after a merger with A.T. Houlihan. The firm remained in the Lawrence family for over a century, until it was acquired by Peter and Nancy Seaman in 1990.

27. In 1994, Nancy became chairman and ran the company along with her two brothers, Chris and Stephen Meyers, until she sold it in January 2017 for an undisclosed sum to HomeServices of America, a Berkshire Hathaway affiliate and the nation’s second-largest residential real estate brokerage company. Ms. Seaman

⁹ See 28 U.S.C. § 1332(d)(3) (2012).

¹⁰ Ex. 4 C.J. Hughes, *Mapping Top Brokerages in Westchester County*, The Real Deal, Jan. 1, 2017, available at https://therealdeal.com/issues_articles/mapping-top-brokerages-in-westchester-county/.

stepped down as chairman when HomeServices acquired Houlihan Lawrence, but her brothers continue to run the firm's day-to-day operations.

28. When the Seamans acquired Houlihan Lawrence in 1990, the firm “had 15 offices and 300 agents with 13% market share in Westchester and Putnam counties.”¹¹ By 2010, the firm's sales had shot up to \$3.5 billion.¹² But they have nearly doubled in just the last few years, skyrocketing to \$6.7 billion, and the firm has grown to 30 offices and 1,300 agents spread across Westchester, Putnam, and Dutchess counties.¹³

29. Houlihan Lawrence now towers above its competition—as of 2011, it commanded 39% of the Westchester real estate market.¹⁴ Between November 2015 and October 2016, it completed 3,625 transactions for nearly \$3.7 billion in sales involving single-family homes in Westchester alone, taking in about three times as much as the next-closest competitor, and about as much as the total sales of its six closest competitors combined.¹⁵

¹¹ Ex. 5 *Houlihan Lawrence Looks Forward*, Houlihan Lawrence: Herd, <http://www.houlihanlawrence.com/blog/houlihan-lawrence-looks-forward.html> (last accessed July 13, 2018).

¹² Ex. 5A Amy Tennery, *Westchester's Winners*, *The Real Deal*, Mar. 31, 2011, available at https://therealdeal.com/issues_articles/westchester-s-winners/.

¹³ Ex. 6 *Houlihan Lawrence Chairman Ends 27 Year Tenure*, Houlihan Lawrence: Herd, <http://www.houlihanlawrence.com/blog/chairman-steps-down.html> (last accessed July 13, 2018);

¹⁴ Ex. 7 Alyssa Abkowitz, *The New Real Estate King Pins*, *MarketWatch* (Jan. 18, 2011) <https://www.marketwatch.com/story/real-estate-brokers-are-some-too-strong-1295042673706>.

¹⁵ Hughes, *supra* note 10.

30. Houlihan Lawrence has the top market share at every price point,¹⁶ and is especially dominant in the luxury market for homes sold over \$1 million. Houlihan Lawrence reported “close to \$4 billion in Westchester sales” in 2017, “topping market shares across every price point.”¹⁷ In 2013, Houlihan Lawrence reported a 54% luxury market share in Westchester.¹⁸ Today, Houlihan Lawrence represents parties “on one side or the other”—and frequently on both sides—“of 70 percent of all homes sold over \$1 million.”¹⁹ Accordingly, Houlihan Lawrence is particularly dominant in parts of Westchester that are rich with luxury real estate. For example, in recent years Houlihan Lawrence has claimed upwards of 75% of the Bronxville market,²⁰ 53% of the Larchmont market,²¹ and 47% of the Scarsdale-Edgemont market. In 2016, Houlihan Lawrence “stood head and shoulders above its rivals, with about triple the sales total of Julia B. Fee Sotheby’s International Realty,” its nearest Westchester County competitor:²²

¹⁶ Ex. 8 *About Houlihan Lawrence*, Realtor.com, https://www.realtor.com/realestateagency/Houlihan-Lawrence_White-Plains_NY_39023_618934943 (last accessed July 13, 2018).

¹⁷ Ex. 8A Dave Zucker, *Class-Action Lawsuit Filed Against Local Real Estate Giant Houlihan Lawrence*, Westchester Magazine, July 18, 2018, available at <http://www.westchestermagazine.com/Class-Action-Lawsuit-Real-Estate-Houlihan-Lawrence/>.

¹⁸ Ex. 9 Olivia Just, *Westchester’s Houlihan Lawrence Comes to Greenwich*, Greenwich Time, Aug. 30, 2013, available at <http://www.greenwichtime.com/news/article/Westchester-s-HoulihanLawrence-comes-to-Greenwich-4776690.php>.

¹⁹ Ex. 10 *2011 State-of-the-Market Report*, available at <https://nikkimcmannrealestate.files.wordpress.com/2011/02/2011stateofthemarket.pdf>.

²⁰ Ex. 10A Sheila M. Stoltz, *The Stoltz Report: Bronxville Area Real Estate 2016 Annual Summary 11* (2017), available at https://issuu.com/houlihanlawrence/docs/the_stoltz_report_-_2016_annual.

²¹ Ex. 11 Pollena Forsman, *Market Insights – Leading the Way*, available at <http://myemail.constantcontact.com/How-Did-We-End-Up-This-Quarter--Q3-2017-Real-Estate-Market-Insights.html?soid=1128273768214&aid=c65RkD2bBwE>.

²² Hughes, *supra* note 10.

Top Westchester County Residential Brokerages By Sales			
RANK	BROKERAGE	SALES VOLUME	NUMBER OF TRANSACTIONS
1	Houlihan Lawrence	\$ 3,655,705,998	3,625
2	Julia B. Fee Sotheby's International Realty	\$ 1,223,174,235	946
3	Coldwell Banker Residential Brokerage	\$ 877,883,066	1,287
4	William Raveis Real Estate New York	\$ 438,634,739	538
5	Douglas Elliman	\$ 378,440,444	423
6	Better Homes and Gardens Rand Realty	\$ 339,265,034	614
7	Keller Williams NY Realty	\$ 259,000,000	581
8	Ginnel Real Estate	\$ 189,796,269	133
9	William Raveis Legends Realty	\$ 162,960,397	194
10	Berkshire Hathaway HomeServices New England Properties	\$ 159,644,554	199

31. Houlihan Lawrence is poised to continue to dominate Westchester again this year, having already sold more than 3,000 of its own listings in the first nine months of 2018, including over 600 listings priced at \$1 million or more. Houlihan Lawrence targets “about 10 to 15 percent growth per year”²³—a target that, if met in 2018, would push its annual sales volume in Westchester past \$4 billion and its total sales volume well past \$7 billion.

32. Since Peter and Nancy Seaman acquired it in 1990, Houlihan Lawrence has increased its annual sales volume by over 1,600%. Even adjusting for inflation to 2016 dollars, Houlihan Lawrence’s \$6.7 billion in 2016 sales represents a staggering increase of more than 850%.

²³ Ex. 12 Vivian Marino, *Christopher A. Meyers: The 30-Minute Interview*, N.Y. Times, Oct. 1, 2014, available at https://www.nytimes.com/2014/10/01/realestate/commercial/christopher-a-meyers.html?_r=0&mtrref=www.houlihanlawrence.com&gwh=6DF617041221F6A972C8D7CCFC0E005D&gwt=pay.

33. Houlihan Lawrence's growth might seem too good to be true—and it is. A huge proportion of Houlihan Lawrence's growing sales have come through ill-gotten gains on undisclosed, non-consensual dual-agent deals, where, as a result of a systematic strategy and policy, the firm abandoned its duty of undivided and undiluted loyalty to its clients to grab double-commissions and choke out its competitors.

2. Houlihan Lawrence holds itself out to customers as a faithful agent

*"From consultation to closing, you can count on Julie to treat you like family, protect your best interests, and to always go the extra mile."*²⁴

– Julie Fedele-Forgione, Houlihan Lawrence Realtor

34. Homebuyers and sellers place great trust in real estate agents—and they are eager to do so. A 2017 nationwide survey found that 7 out of 10 homebuyers and sellers entrusted their home transaction to the first real estate agent they met.²⁵

35. Houlihan Lawrence recognizes that consumer trust is the heart of the real estate agent–client relationship. It lures homebuyers and sellers by swearing oaths of allegiance and devotion to clients.

²⁴ Ex. 13 *Julie Fedele-Forgione*, Houlihan Lawrence, http://juliefedele-forgione.houlihanlawrence.com/agents_offices/ (last accessed July 13, 2018).

²⁵ Ex. 14 Highlights from the Profile of Home Buyers and Sellers, Nat'l Ass'n of Realtors, <https://www.nar.realtor/research-and-statistics/research-reports/highlights-from-the-profile-of-home-buyers-and-sellers> (last accessed July 13, 2018).

36. For example, on the “For Buyers” page of its website, Houlihan Lawrence promises:²⁶

SOUND ADVICE. EVERY STEP OF THE WAY.

Whether you’re shopping for a one-bedroom condo or a sprawling estate, buying a home can be a daunting process. We’re here to help.

Our 1,300 agents across New York City’s northern suburbs harness local expertise, personalized service, and a host of interactive resources to guide you through each step.

37. On its “For Sellers” page, Houlihan Lawrence promises:²⁷

SELLING A HOME. MADE SIMPLE.

No one sells more homes in the region than Houlihan Lawrence. Let our seasoned team of agents guide you through every step of the process.

38. The firm promises that it and its agents will—

- put clients’ “needs and best interests first every step of the way.”²⁸
- “always serve your interests.”²⁹

²⁶ Ex. 15 *For Buyers*, Houlihan Lawrence, http://www.houlihanlawrence.com/for_buyers/ (last accessed July 13, 2018).

²⁷ Ex. 16 *For Sellers*, Houlihan Lawrence, http://www.houlihanlawrence.com/for_sellers/ (last accessed July 13, 2018).

²⁸ Ex. 17 *Pollena Forsman*, Houlihan Lawrence, http://pollenaforsman.houlihanlawrence.com/resources/home_page/ (last accessed July 13, 2018).

²⁹ Ex. 18 *Lynn Conway*, Houlihan Lawrence, http://lynnconway.houlihanlawrence.com/agents_offices/ (last accessed July 13, 2018).

- “fiercely guard their interests.”³⁰
- “devote all of” their “attention to securing the best alternatives in keeping with your best interests.”³¹
- earn “the trust and confidence” of clients through a “commitment to them” and “always” advocate “in their best interests.”³²
- “treat you like family, protect your best interests, and to always go the extra mile” from “consultation to closing.”³³

39. These pledges bait homebuyers and sellers into trusting Houlihan Lawrence and its salespeople to always protect and advance their best interests. The pledges don’t mention the near-certain prospect that a dual-agent situation will arise and Houlihan Lawrence will abandon its undivided and undiluted loyalty to the client. Instead, Houlihan Lawrence and its salespeople say point-blank that they will “fiercely guard” their clients’ best interests “every step of the way”—from “consultation to closing.”

3. Houlihan Lawrence can’t give its clients undivided and undiluted loyalty when it is a dual agent

“It is like a boxing match where we would move from being the coach in the corner giving explicit guidance, direction

³⁰ Ex. 19 *Miriam Lipton*, Houlihan Lawrence, http://miriamlipton.houlihanlawrence.com/agents_offices/ (last accessed July 13, 2018).

³¹ Ex. 20 *Amy C Ensign*, Houlihan Lawrence, http://amyensign.houlihanlawrence.com/agents_offices/ (last accessed July 13, 2018).

³² Ex. 21 *Christine Ryan*, Houlihan Lawrence, http://christineryan.houlihanlawrence.com/agents_offices/ (last accessed July 13, 2018).

³³ *E.g.*, Ex. 21A *Julie E. Schneider*, Houlihan Lawrence, http://julieschneider.houlihanlawrence.com/agents_offices/ (last accessed July 13, 2018); *Fedele-Forgione*, *supra* note 24.

and coaching to our boxing client to then become the referee where we have to remain impartial. I don't think real estate consumers fully understand this aspect of real estate.”³⁴

– John Murphy, realtor

40. Loyal advice from someone with industry knowledge and experience is exactly what homebuyers and sellers need and look for in a real estate agent.

Buyers can ask their agent, for example: *Do you think the sellers would be willing to take less than their current price? What's their motivation for selling? Job loss? Divorce? Leaving town? Have they already found another place?* On the other side of the deal, sellers can ask their agent: *Are these buyers willing and able to go higher than their current bid? How much more? What's their motivation? How motivated are they? What risks do they pose? Could there be a stronger bidder out there?*

41. But when a broker acts as a dual agent for both sides of a real estate deal, it can't have undivided and undiluted loyalty to either side—which means in practical terms that it can't answer any of these questions.

42. Dual agency arises whenever a single brokerage firm represents both the seller and the buyer, even if two different salespeople within that one firm are separately representing the seller and buyer. That's because the agency and fiduciary relationships are between the client and the broker, not the client and the individual salesperson. Individual salespeople may act as if they only represent

³⁴ Ex. 22 Donna Fuscaldo, *Working with a Dual Agency: What You Need to Know*, Fox Business, June 12, 2013, <http://www.foxbusiness.com/features/working-with-a-dual-agency-what-you-need-to-know>.

their personal clients—but the “real estate broker and his salespeople are ‘one and the same’ entity when analyzing whether dual agency exists.”³⁵ So when the broker is on the opposing sides of the deal, so are all of its salespeople—and none of them can provide the full range of fiduciary duties to the buyer or seller.

43. A home sale has two main players: the seller and the buyer. Both of them want to do the deal, but their interests are in direct conflict—the seller wants the sale price to be as high as possible, and the buyer wants the sale price to be as low as possible. As a result, a single real estate agent can’t provide undivided and undiluted loyalty to the players on both sides of a deal. The dual agent necessarily breaches its fiduciary duties to one client whenever it advances the interests of the other client.

³⁵ Ex. 51 Dep’t of State Legal Memorandum LI12, available at <https://www.dos.ny.gov/cnsl/dualagency.html>.

44. A simple graphic illustrates this important point:³⁶



45. The New York Department of State's former general counsel called dual agency "an oxymoron": "It is not agency at all, it's just another term for disloyal fiduciary. It's pure self-interest."³⁷

46. Houlihan Lawrence's loyalty is further divided because dual agency incentivizes the firm to prioritize its interest in getting the deal done—and collecting a double commission—over the interests of its clients.

47. So every time Houlihan Lawrence acts as a dual agent, its loyalty is divided among its own interests and the conflicting interests of its clients. Its clients have lost their right to an agent with undivided and undiluted loyalty serving their best interests to the exclusion of all others every step of the way.

³⁶ Ex. 23 *Dual Agency in Georgia*, The Hank Miller Team: Harry Norman Realtors, <https://hankmillerteam.com/education/dual-agency-in-georgia/> (last accessed July 13, 2018).

³⁷ Sichelman, *supra* note 2.

4. Houlihan Lawrence routinely acts as a dual agent

*“dual agency should be incredibly rare.”*³⁸

– J. Philip Faranda, Former Director, NYSAR

48. The giant national real estate trade association National Association of Realtors (NAR) has called dual agency “a totally inappropriate agency relationship for real estate brokers to create as a matter of general business practice.”³⁹ Yet Houlihan Lawrence does exactly that. Astoundingly, dual-agency deals are a huge portion of Houlihan Lawrence’s business.

49. In 2017, Houlihan Lawrence acted as a dual agent in 9 out of 10 of its biggest home sales in Westchester. The combined sale price on those 9 deals was over \$47 million. Assuming a 6% commission, Houlihan Lawrence pocketed commissions of nearly \$3 million on those 9 dual-agent deals alone.

50. Houlihan Lawrence acted as a dual agent in its largest transaction so far this year, a \$33 million sale of a Rockefeller mansion in Sleepy Hollow, New York. Assuming a 6% commission, Houlihan Lawrence pocketed a commission of nearly \$2 million on that single blockbuster dual-agent deal.

51. In the past year (ending Feb. 15, 2018) in Bronxville, where Houlihan Lawrence was founded, the firm kept far more of its listings in-house than it sold to outside buyers:

³⁸ Ex. 24 J. Philip Faranda, *There Is a Big Difference Between Selling Your Own Listing and Dual Agency*, Westchester Real Estate Blog (Feb. 24, 2010), <http://westchesterrealestateblog.net/there-is-a-big-difference-between-selling-your-own-listing-and-dual-agency/>.

³⁹ Ex. 25 Nat’l Ass’n of Realtors, *Who Is My Client? A Realtors Guide to Compliance with the Law of Agency* 10 (1986), available at http://www.caare.org/wp-content/uploads/2017/10/who_is_my_client-1_0.pdf.

- 64% overall were dual-agent deals [48 out of 75]
- 69% of homes sold for \$1 million or more were dual-agent deals [31 out of 45]
- 80% of homes sold for \$2 million or more were dual-agent deals [20 out of 25]

52. Looking at the past 3 years (ending Oct. 21, 2017), Houlihan Lawrence was a dual agent in over 50% of its listed Westchester home sales for \$2 million or more. That's more than 175 dual-agent deals. Assuming a 6% commission and a median sale price of \$2.5 million, Houlihan Lawrence pocketed more than \$26 million in sales commissions on just those dual-agent deals.

53. The widespread dual agency at Houlihan Lawrence includes top agents who have been named to "The Thousand," a prestigious annual ranking by REAL Trends and the *Wall Street Journal* of the top-producing real estate sales professionals in the United States. For example, sales data available on Houlihan Lawrence's website shows:

- Mary Gail Barry (Larchmont office) closed over \$43 million in home sales and Houlihan Lawrence acted as a dual agent in 61% [22 of 36] of those sales in 2017, including at least 8 sales in which Barry personally (not just Houlihan Lawrence) represented both the buyer and the seller.
- Joan O'Meara (Rye office) closed over \$44 million in home sales and Houlihan Lawrence acted as a dual agent in 61% [16 of 26] of those sales in 2017.
- Pollena Forsman (Larchmont office) closed over \$80 million in home sales and Houlihan Lawrence acted as a dual agent in 58% [29 of 50] of those sales in 2017.

5. Houlihan Lawrence fosters a culture of dual agency to fuel its growth

*“The firm’s agents analyze internal data and share inventory with colleagues to help boost ‘in-house’ sales, says Chief Operating Officer Chris Myers [sic]; the firm can collect both sides of the commission on such a sale.”*⁴⁰

– Alyssa Abkowitz, *MarketWatch*

*“He who has the inventory controls the market.”*⁴¹

– Gino Bello Homes,
a Houlihan Lawrence team of agents

54. Dual-agency deals are like steroids for a real estate firm’s bottom line: They enable a firm to double its commissions, grow its market share, and choke out competitors.

55. So Houlihan Lawrence’s rampant dual-agency practice is no accident—a firm that boosts its dual-agency business can grow like a weed and take over its market, just as Houlihan Lawrence has done in the Westchester, Putnam, and Dutchess tri-county area.

56. In its online marketing to consumers, Houlihan Lawrence attributes its success to its “125-year family tradition,”⁴² a reputation built on “exceeding

⁴⁰ Abkowitz, *supra* note 14.

⁴¹ Ex. 26B Gino Bello Homes, *4 Listing appointments today*, Instagram, <https://www.instagram.com/p/BINz-5kFQce/?hl=en&taken-by=ginobellohomes> (last accessed July 14, 2018).

⁴² *Warren Buffett*, *supra* note 6.

expectations in every aspect of the real estate process,” and a commitment to “first-class, personalized service delivered with the greatest integrity and refinement.”⁴³

57. But in its statements to industry insiders and financial analysts, Houlihan Lawrence gives a more candid explanation. Houlihan Lawrence’s President Chris Meyers (then COO) explained to *MarketWatch* what allows Houlihan Lawrence to “stay huge”:

The firm’s agents analyze internal data and share inventory with colleagues to help boost “in-house” sales, says Chief Operating Officer Chris Myers [sic]; the firm can collect both sides of the commission on such a sale.⁴⁴

Meyers also commented: “There’s no substitute for the flow of information in an office.”⁴⁵

58. As Meyers says, “in-house” sales—which is just a watered-down name for dual-agent deals—are hugely profitable. In an “in-house” sale, Houlihan Lawrence pockets a double commission on a single transaction—known as “double-dipping” or “double-ending” a transaction—rather than splitting it with a rival brokerage firm. “In-house” sales give Houlihan Lawrence two distinct competitive edges—as Houlihan Lawrence feasts on a double commission, it simultaneously starves and weakens its competitors.

59. But the double commission collected at the expense of a competitor is only part of the value of “in-house” sales. New listings “are the lifeblood of real

⁴³ Ex. 26 *Our Story*, Houlihan Lawrence, https://www.houlihanlawrence.com/our_story/ (last accessed July 13, 2018).

⁴⁴ Abkowitz, *supra* note 14.

⁴⁵ *Id.*

estate brokerage firms.”⁴⁶ When a broker sells its listing to a competitor’s buyer, the competitor has an inside track to the future listing when that buyer later decides to sell. Houlihan Lawrence can keep many of those future listings away from competitors by selling the current listing “in-house” to one of its buyer clients: when the buyer client decides to put the home back on the market, now Houlihan Lawrence has the inside track to the future listing. In that way, “in-house” sales have a compounding anti-competitive effect that can drive the exponential market share growth Houlihan Lawrence has enjoyed.

60. Houlihan Lawrence’s “Gino Bello Homes” team of agents has boasted in connection with the firm’s market dominance: “He who has the inventory controls the market.”⁴⁷ As Houlihan Lawrence builds increasing control of the real estate “inventory” in the tri-county area, it gains increased ability to “control the market” by steering buyers to its listings through undisclosed, non-consensual dual-agent transactions. Its ever-growing market control and its systematic breach of disclosure and informed-consent obligations feed each other.

61. Chris Meyers’s admission that Houlihan Lawrence actively works to “boost” its “in-house,” dual-agent sales is troubling, because dual agency confuses and harms consumers. While Houlihan Lawrence is “boosting” its dual-agent deals, many other firms are rejecting them as risky and unethical:

⁴⁶ Ex. 26A Penny Singer, *Extra Services Give Realtors an Edge*, N.Y. Times, July 2, 1995, available at <https://www.nytimes.com/1995/07/02/nyregion/extra-services-give-realtors-an-edge.html>.

⁴⁷ *4 Listing appointments*, *supra* note 41.

- Mark Seiden, a broker-owner in Briarcliff Manor, is “opposed to dual agency under any circumstances.”⁴⁸
- Gary Herbst, principal broker of Buyer’s Edge Realty in Tarrytown, says that dual agents are really “double agents” and that “sellers’ and buyers’ agencies should be separate business entities to eliminate any opportunity for collusion within a brokerage.”⁴⁹
- Inman News, a popular online real estate industry news source, in an article titled, “Dual Agency and ‘Double-Dipping’ Still Risky Business,” reported brokers’ shrinking “appetite for ‘double-dipping.’”⁵⁰
- NAR found that the percentage of Realtors nationwide practicing disclosed dual agency was just 33% in 2017, down from 38% in 2016—meaning that a two-thirds majority of realtors will only represent clients in single-agent relationships and will not do “double-end,” dual-agent deals.⁵¹

62. Chris Meyers is one of Houlihan Lawrence’s two most senior corporate decision-makers. He has authority over all 1,300 of its New York agents. His public celebration of dual agency sends a clear message to the firm’s agents that the firm’s policy is to vigorously pursue dual-agency deals.

⁴⁸ Ex. 28 Elsa Brenner, *When Agents Play Two Roles*, N.Y. Times, Aug. 11, 2011, available at <http://www.nytimes.com/2011/08/14/realestate/when-agents-play-two-roles-in-the-regionwestchester.html>.

⁴⁹ *Id.*

⁵⁰ Ex. 29 Matt Carter, *Dual Agency and ‘Double-Dipping’ Still Risky Business*, Inman, Nov. 1, 2011, available at <https://www.inman.com/2011/11/01/dual-agency-and-double-dipping-still-risky-business/>.

⁵¹ Ex. 30 Nat’l Ass’n of Realtors, 2017 Member Profile: The New York State Association of Realtors Report 38, available at <http://www.nysar.com/docs/default-source/members-pdfs/2017-nar-ny-member-profile-report.pdf?sfvrsn=0>.

6. Houlihan Lawrence's rampant dual agency fuels its affiliated title and mortgage companies

63. "In-house" sales are even more lucrative to Houlihan Lawrence than other firms because they allow Houlihan Lawrence to direct more business to its affiliated title and mortgage financing companies.⁵² By steering "in house" buyer clients to its mortgage and title companies, Houlihan Lawrence takes lucrative mortgage business, title insurance premiums, and other settlement-related fees above and beyond its double-commission.

64. Houlihan Lawrence created Thoroughbred Title Services, LLC in 2009.⁵³ Houlihan Lawrence and Thoroughbred Title Services remain "part of a family of companies" and are now both owned by HomeServices of America. HomeServices acquired Thoroughbred Title Services in February 2017, shortly after it acquired Houlihan Lawrence.⁵⁴

65. Mortgage lenders require borrowers to buy title insurance policies covering the borrower and the lender. Title insurance protects against claims on the mortgaged property—for example, due to an outstanding lien, misfiled deed, or illegitimate title. Before title insurance is issued, a title agent searches property

⁵² Ex. 27 *Affiliated Business Disclosure*, Thoroughbred Title Services: An Affiliate of Houlihan Lawrence, <https://www.thoroughbredtitleservices.com/affiliated-business-disclosure/> (last accessed July 13, 2018).

⁵³ Ex. 27A *About Us*, Thoroughbred Title Services, <https://www.thoroughbredtitleservices.com/Why-Thoroughbred/> (last accessed Sept. 12, 2018).

⁵⁴ Ex. 27B John Golden, *HomeServices of America Adds Houlihan Lawrence's Title Agency*, Westfair Communications, Feb. 6, 2017, available at <https://westfaironline.com/85707/homeservices-of-america-adds-houlihan-lawrences-title-agency/>.

records for title defects. The title agent receives a “hefty split of the insurance premium” and usually picks the title insurer on behalf of the buyer.⁵⁵

66. It’s “rare” that homebuyers shop around for title insurance.⁵⁶ Most buyers “rely on real estate agents or attorneys to decide which title insurance to buy” and “seldom scrutinize” the title insurance rates in the “stressful rush to complete a closing.”⁵⁷ As a result, title insurance buyers are “sitting ducks for abuse,” and many “are overcharged for title insurance.”⁵⁸

67. In 2017, the median residential sale price in Westchester County was \$616,250. Using Thoroughbred Title Services’ title insurance calculator, title insurance premiums on a home at that price are about \$3,000.⁵⁹ The national average commission paid to the title agent is 80% of the title insurance premium.⁶⁰ That split gives Thoroughbred Title Services \$2,400 of the title insurance premium on a home sale at the median Westchester County price.

68. Thoroughbred Title Services has acted as title agent on behalf of over 10,000 homebuyers in less than a decade of operation, quickly becoming the leading title agent in Westchester County. Data showing how much Thoroughbred Title

⁵⁵ Ex. 27C Lisa Prevost, *Saving on Title Insurance*, N.Y. Times, Mar. 14, 2013, available at <https://www.nytimes.com/2013/03/17/realestate/saving-money-on-title-insurance.html>.

⁵⁶ Ex. 27D The Editorial Board, *The Title Insurance Scam*, N.Y. Times, May 12, 2015, available at <https://www.nytimes.com/2015/05/12/opinion/the-title-insurance-scam.html>.

⁵⁷ Ex. 27E Shane Goldmacher, *New York’s Hidden Home Buyer Closing Costs: Luxury Boxes and Mint Mojitos*, Jan. 29, 2018, available at <https://www.nytimes.com/2018/01/29/nyregion/title-insurance-new-york.html>.

⁵⁸ *The Title Insurance Scam*, *supra* note 56.

⁵⁹ Ex. 27F *NY Title Insurance Cost Comparison & Fee Calculator*, Thoroughbred Title Services, <https://www.thoroughbredtitleservices.com/RateCalculator/default.aspx> (last accessed Sept. 12, 2018). Assumes a 20% down payment.

⁶⁰ Prevost, *supra* note 55.

Services has made on those transactions is not publicly available. But assuming an industry-average commission split and using Thoroughbred Title Services' title insurance calculation on the 2017 median Westchester County home price, Thoroughbred Title Services pocketed an estimated \$24 million in title agent fees—and likely much more given Houlihan Lawrence's dominance in the luxury market segment.

69. Thoroughbred Title Services gets much of its business from buyers who are working with Houlihan Lawrence. Houlihan Lawrence sales agents steer buyers to Thoroughbred Title Services directly or by referring them to “approved” or “recommended” real estate attorneys who also happen to be Thoroughbred Title Services agents. Real estate attorneys “are supposed to be on the side of the buyer,” but “they can also use their influence to steer their client toward title insurers and others they favor.”⁶¹

70. Houlihan Lawrence President Chris Meyers has acknowledged that the firm maintains a list of “approved” or “recommended” attorneys, and it refers its clients to those preferred attorneys.⁶² Being on Houlihan Lawrence's “approved” or “recommended” attorney-referral list is an enormous benefit for those attorneys. Not only can they collect attorneys' fees for representing Houlihan Lawrence's

⁶¹ Ex. 27G Ed Leefeldt, *One Regulator's Push to Rein in Title Insurance Costs*, CBS News, July 24, 2018, available at <https://www.cbsnews.com/news/one-regulators-push-to-rein-in-title-insurance-costs/>.

⁶² Ex. 27H Catherine Curan, *State Says No to Quid Pro Quo*, The Real Deal, July 28, 2011, available at https://therealdeal.com/issues_articles/state-says-no-to-quid-pro-quo/.

clients, but they can also collect a share of Thoroughbred Title Services' title agent fees.

71. Thoroughbred Title Services operates on an "attorney agent model."⁶³ It maintains a "network of attorney agents" who perform title services on its behalf.⁶⁴ An attorney on Houlihan Lawrence's "approved" or "recommended" attorney-referral list and in Thoroughbred Title Services' "network of attorney agents" can collect both attorneys' fees and title service fees.

72. In turn, attorneys who benefit from being on Houlihan Lawrence's lists have a strong incentive to reciprocate by steering their buyer clients to Thoroughbred Title Services, even if those clients were represented by a different brokerage firm.

73. Houlihan Lawrence avoids making full and frank disclosure of the downsides, risks, and options of dual agency to avoid losing clients to rival brokerage firms. Losing a buyer client means losing not only a buy-side commission, but also the power to steer that buyer to Houlihan Lawrence's affiliated mortgage and title companies.

⁶³ Ex. 27I *Consumer Reform in Title Insurance - Despite The Fight We're Not Giving Up*, Houlihan Lawrence: Herd, <http://www.houlihanlawrence.com/blog/consumer-reform-in-title-insurance-despite-the-fight-were-not-giving-up.html> (last accessed Sept. 12, 2018).

⁶⁴ *Consumer Reform in Title Insurance*, *supra* note 63.

7. Houlihan Lawrence pays agents to steer clients into dual-agent deals

*“Agents at [H]oulihan get a 5 percent bonus for a dual agency deal. It is nuts! . . . You CANNOT believe how many agents are driven by the extra commission bump.”*⁶⁵

– Former Houlihan Lawrence Agent

*“agents are more likely to promote internal listings when they are financially rewarded.”*⁶⁶

– Lu Han, University of Toronto &
Seung-Hyun Hong, University of Illinois

74. Houlihan Lawrence’s culture of dual agency goes beyond just words of encouragement—the firm engages in a kickback scheme that gives agents a direct financial incentive to steer clients into in-house sales. Houlihan Lawrence has created a system of incentives that enable agents to share in the spoils of dual-agent deals and dissuade them from making the full and frank disclosure to homebuyers and sellers of the risks and practical downsides of dual agency.

75. Anonymous sources, including a former Houlihan Lawrence agent, sent letters to Plaintiffs’ counsel after this action was first filed, exposing that Houlihan Lawrence has a longstanding policy through which it directly rewards its agents for steering clients into dual-agent transactions by enhancing agents’ commissions on dual-agent deals. As the sources explain, Houlihan Lawrence

⁶⁵ Letter from Source No. 2, *supra* note 5.

⁶⁶ Ex. 31 Lu Han & Seung-Hyun Hong, *Understanding In-House Transactions in the Real Estate Brokerage Industry* 1, available at http://faculty.las.illinois.edu/hyunhong/rea_inhouse.pdf (last accessed July 13, 2018).

salespeople are paid an extra 5%–10% commission by Houlihan Lawrence on dual-agent deals.

76. Houlihan Lawrence’s dual-agency bonus can be worth thousands of dollars to a sales agent. Agents are paid a percentage of the commission the firm receives from a sale. Many agents receive 50% of the commission. Top agents receive more. On the sale of a \$2 million home, an agent with a 50–50 commission split collects \$30,000 when Houlihan Lawrence receives the typical 6% sales commission (\$120,000, with half attributed to the seller’s side and half to the buyer’s). A bonus of 5% or 10% of the transactional commission increases the agent’s commission to \$33,000 or \$36,000, respectively.

77. According to the former Houlihan Lawrence agent, it “can be very very tough to win” a bidding war on a Houlihan Lawrence–listed property “if other HL agents are bidding.”⁶⁷ It’s easy to see why. A listing agent who receives an extra 5% commission bonus on a dual-agent transaction would have to sell the same property for 10% more than in the dual-agent transaction to make the same amount of money on a non-dual-agent sale. With an extra 10% commission bonus, the listing agent would have to sell the property for 20% more to do as well in a non-dual-agent deal. Buyers who aren’t represented by Houlihan Lawrence are at a 10%–20% price disadvantage. And sellers’ agents will be more interested selling to a Houlihan Lawrence–represented buyer than in selling to the highest bidder.

⁶⁷ Letter from Source No. 2, *supra* note 5.

78. The New York Department of State has long recognized that “business arrangements which can be expected to result in an agent placing his or her interest in a commission ahead of the interest of his or her principal are not to be tolerated.”⁶⁸ New York law not only bars “blatant self-dealing,” but also requires “avoidance of situations in which a fiduciary’s personal interest possibly conflicts with the interest of those owed a fiduciary duty.”⁶⁹

79. Agents are “more likely to promote internal listings when they are financially rewarded.”⁷⁰ By incentivizing its agents to promote dual-agent transactions, Houlihan Lawrence encourages its agents to steer clients into dual-agent transactions rather than the best transaction for the client, and improves its chances of securing a dual agent’s double commission.

80. Houlihan Lawrence’s kickback scheme encourages its salespeople, when representing buyers, “to only show Houlihan Lawrence listings to clients,”⁷¹ or to favor those listings. When representing sellers, Houlihan Lawrence salespeople are incentivized to favor offers made by Houlihan Lawrence buyer clients—even if that means accepting a lower offer—“because the commission difference is made up by” the dual-agency bonus.⁷²

⁶⁸ Ex. 31A *DOS v. Christiana, Manor Homes Blake Realty, Inc.*, 164 DOS 92 at 5.

⁶⁹ *Birnbaum v. Birnbaum*, 73 N.Y.2d 461, 466 (1989).

⁷⁰ Ex. 31 Lu Han & Seung-Hyun Hong, *Understanding In-House Transactions in the Real Estate Brokerage Industry* 1, available at http://faculty.las.illinois.edu/hyunhong/rea_inhouse.pdf (last accessed July 13, 2018).

⁷¹ Letter from Source No. 1, *supra* note 4.

⁷² Letter from Source No. 1, *supra* note 4.

81. The fact that Houlihan Lawrence salespeople receive a kickback for dual-agent deals is material information a consumer would need to make an informed decision about dual agency. Consumers have the right to know that the fiduciary they're relying on to guide them as they make one of the most important decisions of their life has a financial incentive to steer them in a particular direction. "Where a broker's interests or loyalties are divided due to a personal stake in the transaction," New York law requires that "the broker must disclose to the principal the nature and extent of the broker's interest in the transaction."⁷³

82. Agents' ability to steer consumers into dual-agent transactions is "weaker when consumers are more aware of agents' incentives."⁷⁴ But Houlihan Lawrence conceals its dual-agency kickback scheme from consumers.

83. Houlihan Lawrence's practice of paying its agents extra to secure dual-agent transactions serves no legitimate purpose. Houlihan Lawrence and its agents have a fiduciary obligation to act at all times solely in their clients' best interests to the exclusion of all other interests—including Houlihan Lawrence's and its agents' own interests. Houlihan Lawrence breaches its fiduciary duty to its clients by incentivizing its agents to prioritize their own interests over their clients' interests and by concealing this material information from clients.

⁷³ *Dubbs v. Stribling & Assoc.*, 96 N.Y.2d 337, 340 (2001).

⁷⁴ Ex. 31 Lu Han & Seung-Hyun Hong, *Understanding In-House Transactions in the Real Estate Brokerage Industry 1*, available at http://faculty.las.illinois.edu/hyunhong/rea_inhouse.pdf (last accessed July 13, 2018).

8. Dual agency confuses and harms consumers

“serving two masters’ was enjoined by the Bible for very good reasons which modern real estate practice and consumer needs have not changed.”⁷⁵

– William D. North, Former CEO & General Counsel,
NAR

84. Most homebuyers and sellers pay big sales commissions for a real estate agent to guide them through the process. NAR’s 2014 survey found that over 80% of homebuyers and sellers used an agent or broker for their home transactions.⁷⁶ NAR’s 2017 survey found that 7 of 10 consumers hired the first agent they met to represent them⁷⁷ in what is “one of the largest financial transactions they will ever make.”⁷⁸

85. Because dual agency creates immediate conflicts of interest and deprives homebuyers and sellers of the services they often most need from their real estate broker, it is counter-intuitive and dangerous. Even the former CEO and general counsel for the giant real estate trade association NAR has said that dual agency “is bad for the public and the Realtor and the profession.” He added that dual agency should “be ‘prohibited’ by the real estate license laws or regulators” because it is a concept that consumers “have no hope of comprehending.”⁷⁹

⁷⁵ Ex. 32 Letter from William D. North (Oct. 15, 1993), available at http://www.caare.org/wp-content/uploads/2017/10/nar_exec_counsels_against_dual_agency-north_speaks_0.pdf.

⁷⁶ Ex. 33 Ciara Hassenpflug, *Study Sheds Light on New York State’s Homebuyers and Sellers*, N.Y. State Realtor 12, 12 (March/April 2015), available at https://www.nysar.com/docs/default-source/members-pdfs/nyrs_nyrs0215.pdf?sfvrsn=0.

⁷⁷ Nat’l Ass’n of Realtors, *supra* note 25.

⁷⁸ Hassenpflug, *supra* note 76 at 12.

⁷⁹ North, *supra* note 75.

86. Dual agency doesn't just taint transactions when the ultimate buyer and seller are both represented by the same brokerage—it also taints transactions where a dual-agency situation arose at any point in the transaction process. Houlihan Lawrence's divided loyalty at any point calls into question whether the transaction could have closed on better terms for its clients if Houlihan Lawrence had acted with undivided and undiluted loyalty through every step of the process.

87. Dual agency is not totally prohibited in New York, but it is strictly and narrowly limited. It is only allowed when both the seller and buyer give written informed consent after receiving full, frank, and detailed disclosure of the risks and practical downsides of dual agency, and a full explanation of all their options and alternatives to avoid those downsides.

88. The history of New York's regulation of dual agency, discussed below, shows how important these strict disclosure requirements are.

A. Dual agency traces back to the abuses of the earlier “sub-agency” system

*“it was completely like the wild, wild West out there when it came to real estate. There was a lot of confusion about roles and allegiances . . . I could tell you horror stories.”*⁸⁰

– Mark Nadler, Broker

89. To understand the harms of dual agency, it's useful to understand an earlier real estate agency regime, called “sub-agency.”

⁸⁰ Brenner, *supra* note 48.

90. Traditionally, real estate brokers represented only sellers. Brokers who found a buyer became a “sub-agent” of the seller’s agent, and owed their undivided loyalty and other fiduciary duties solely to the seller. From the buyer’s point of view, this “sub-agent” of the seller would seem to be working on the buyer’s behalf, but the buyer was actually unrepresented. This system was known as “sub-agency.”⁸¹

91. In the sub-agency system, buyers often had no idea that the “sub-agent” was working solely in the seller’s best interest. And buyers didn’t realize that everything they said to this “sub-agent”—no matter how confidential or harmful to their interests—would be passed on to the seller and used against the buyer in negotiations.

92. The *New York Times* has described this sub-agency era:

Time was, if you went looking for a house, you went to a broker, who consulted listings and showed you what he or she thought you’d be most likely to buy. You probably didn’t know, and almost certainly would never be told, that that broker didn’t represent you in any way—that he or she was legally and contractually obligated to represent solely the interest of the seller in any transaction that might occur.⁸²

⁸¹ See, e.g., Ex. 34 Mary Szto, *Dual Real Estate Agents and the Double Duty of Loyalty*, 41 Real Est. L.J. 22, 38 (2012) (“Until the 1990’s listing agents, who were fiduciaries for the seller, required selling agents who worked with buyers, to be subagents, and therefore also fiduciaries of the seller.”).

⁸² Ex. 35 Mervyn Rothstein, *When the Broker Works for the Buyer*, N.Y. Times, Sept. 19, 1993, available at <http://www.nytimes.com/1993/09/19/realestate/when-the-broker-works-for-the-buyer.html?pagewanted=all>.

93. Sub-agency favored real estate brokers' interests over consumers' interests.⁸³ It allowed sub-agents to work with buyers without actually representing those buyers or owing them a fiduciary duty, and then to turn around and collect a share of the sales commission. When unwary buyers would eventually come to realize that a sub-agent had harmed their interests, the sub-agents would be effectively immune to those aggrieved buyers' lawsuits or complaints to state real estate licensing boards.

B. The abuses of sub-agency led to a push for reforms—and pushback from real estate trade associations

*“The industry has gotten away from these laws {of agency} to such a degree now that they don't even understand what is legal and illegal anymore....”*⁸⁴

– Gail Shaffer, Secretary,
N.Y. Dep't of State (1983-1995)

94. The confusion and harm of sub-agency was exposed in 1983, when a landmark nationwide survey by the Federal Trade Commission revealed that more than 70% of homebuyers and sellers mistakenly believed that the real estate agent in their transactions represented the buyer, even though the agent actually only represented the seller.⁸⁵

⁸³ Ex. 36 Matt Carter, *From Subagency to Non-Agency: A History*, Inman, Feb. 17, 2012, available at <https://www.inman.com/2012/02/17/from-subagency-non-agency-a-history/>.

⁸⁴ Ex. 37 Elizabeth Lesly, *Realtors Fighting New Rules*, Wash. Post, May 26, 1990, available at https://www.washingtonpost.com/archive/real-estate/1990/05/26/realtors-fighting-new-rules/40a67226-2f52-4045-aa95-dc6938da3aed/?utm_term=.4d933ac0e63f (braces and ellipsis in original).

⁸⁵ Ex. 38 1 Federal Trade Commission Staff Reports, Los Angeles Regional, The Residential Real Estate Brokerage Industry 69 (Dec. 1983).

95. The revelation of widespread consumer confusion and harm fueled a nationwide push for real estate industry reform. In New York, the Department of State regulates the real estate industry, and its Secretary, Gail Shaffer, was one of the leaders of the push for reform.

96. Secretary Shaffer sought to create a real estate “consumer’s bill of rights”—a set of real estate regulations to codify and build on existing New York agency law. She explained that brokers’ violations of agency law were “widespread” and that they “do not understand in many cases what a fiduciary’s responsibility is.”⁸⁶ Secretary Shaffer’s proposed reforms would have banned sub-agency, required that buyers get written disclosure of an agent’s fiduciary responsibility to the seller, and declared dual agency—which she considered “a capital offense” under the law of agency—illegal.⁸⁷

97. The major New York trade association, NYSAR, resisted Secretary Shaffer’s reforms—even though it admitted “the confusion that could be created when an individual purchases a home and doesn’t know who represents whom.”⁸⁸ NYSAR pushed for more lenient legislation that would permit sub-agency as long as sub-agents’ fiduciary duties to the seller were disclosed to the buyer, and would permit dual agency as long as both sides gave informed consent.

⁸⁶ Lesly, *supra* note 84.

⁸⁷ Ex. 39 Judith Evans, *N.Y. Brokers May Have to Tell Whom They Represent*, Democrat And Chronicle, June 23, 1990, available at <https://www.newspapers.com/image/137358415/>.

⁸⁸ *Id.*

98. Secretary Shaffer warned—correctly, as Houlihan Lawrence’s conduct bears out—that NYSAR’s proposed disclosure-and-consent system could be dishonored, making real estate consumers “fair game for unscrupulous real estate brokers and salespeople”⁸⁹ and allowing “megabrokers to do business as usual and protect their profits.”⁹⁰ Even NAR’s former CEO and general counsel saw that a disclosure-and-consent system would be risky for consumers: “Dual agency presents problems which could be overcome only by constant, sophisticated, and individualized legal oversight coupled with rigorous supervision of a highly trained and legally sensitive salesforce. Even then, the risks would remain significant.”⁹¹

C. New York enacted strict disclosure requirements for any dual agency

*“if dual agency is disclosed properly, there isn’t anyone in their right mind who would agree to it.”*⁹²

– Maureen Glasheen, then–General Counsel,
N.Y. Dep’t of State

99. In the push-and-pull between the New York Department of State’s call to ban dual agency on one hand and NYSAR’s request for a permissive disclosure-and-consent system on the other, the New York Legislature in 1991 enacted Real Property Law Section 443, a law that did not outright ban dual agency, but set forth

⁸⁹ *Id.*

⁹⁰ Ex. 40 Lew Sichelman, *Buyers Need to Be Sure the Realtor Isn’t a ‘Double Agent’*, Chicago Trib., Feb. 6, 1993, available at http://articles.chicagotribune.com/1993-02-06/news/9303176245_1_dual-agency-buyer-s-agent-real-estate.

⁹¹ Ex. 32 William D. North, *Agency, Facilitation and the Realtor 7* (1993), available at http://www.caare.org/wp-content/uploads/2017/10/nar_exec_counsels_against_dual_agency-north_speaks_0.pdf.

⁹² Sichelman, *supra* note 2.

a rigorous requirement of full and frank disclosure before a broker could act as a dual agent. Consumer activists hailed it as “the most progressive, consumer-oriented agency disclosure law of any state” in the U.S.⁹³

100. Before a New York real estate broker can even enter an agent-client relationship, Real Property Law 443 requires any such broker, including Houlihan Lawrence, to provide consumers with a standard two-page agency disclosure form. It’s formally called the “New York State Disclosure Form for Buyer and Seller” and referred to in this Complaint as the “Statutory Disclosure Form” or the “Form.”



101. The Statutory Disclosure Form is a two-page document that gives consumers a brief, single-paragraph introduction to each of the different types of real estate agency relationship: Seller’s Agent, Buyer’s Agent, Broker’s Agent, Dual Agent, and Dual Agent with Designated Sales Agents. But the Form is *only* an

⁹³ *Id.*; Ex. 41 H. Jane Lehman, *N.Y. Officials Challenge Role of Realty Agents*, Wash. Post, June 27, 1992, available at https://www.washingtonpost.com/archive/realestate/1992/06/27/ny-officials-challenge-role-of-realty-agents/45af1209-3f7b-449c-ba0c-c50d986c1c76/?utm_term=.52fe80d72fe0.

introduction—it does *not* provide consumers with all the information they would need in order to provide informed consent to dual agency.

102. Section 443 effectively codifies certain New York common law principles of agency. It provides that the statute does not “limit or alter the application of the common law of agency with respect to residential real estate transactions,” and affirms that a “real estate broker may represent both the buyer and seller” only “if both the buyer and seller give their informed consent in writing.”⁹⁴ Real estate agents must still make full and frank disclosure above and beyond the introductory information in the Statutory Disclosure Form.⁹⁵

103. Section 443’s requirement that agents fully and frankly disclose the downsides, risks, and options of dual agency was expected to function as a near-total ban on dual-agent deals, because, as the Department of State’s chief counsel explained, “if dual agency is disclosed properly, there isn’t anyone in their right mind who would agree to it.”⁹⁶

104. Consumer Advocates in American Real Estate (“CAARE”), a non-profit organization dedicated to promoting fair real estate practices in the U.S., explains the effects of dual agency in plain terms: it “strips buyers and sellers of service to a

⁹⁴ Real Prop. Law §§ 443(6), 443(4)(a).

⁹⁵ *Rallis v. Brannigan*, No. 03-16738, 2008 WL 227009, 2008 LEXIS 7676 at *29-30 (Sup. Ct. Nassau Cty. Jan. 11, 2008) (“it is not the disclosure form set forth in § 443 of the Real Property Law which determines whether disclosure has been made . . . and fiduciary obligations fulfilled but common law principles of agency law”); *compare* Conn. Gen. Stat. § 20-325g (establishing, unlike Section 443, “a conclusive presumption that a person has given informed consent to a dual agency relationship with a real estate broker if that person executes a written consent” as specified under the terms of the statute).

⁹⁶ Sichelman, *supra* note 2.

level that can best be described as abandonment.”⁹⁷ The Consumer Federation of America, an association of nearly 300 non-profit consumer organizations, calls dual agency a “nonsensical concept since there is no way a broker can represent the financial interests of both seller and buyer.”⁹⁸

105. The executive vice president of the Westchester County Board of Realtors confirmed shortly after Section 443 was enacted that the “dual-agency situation occurs infrequently at best”—and only in quirky situations where, for example, a relative of the seller’s agent wants to buy a house, or “perhaps a buyer and seller are friends but they don’t want to negotiate the deal themselves, so instead they hire an agent to help.”⁹⁹

106. Section 443 has had two noteworthy amendments since its enactment:

- As of January 1, 2007, Section 443 recognized a new agency relationship, first called “Dual Agency with Designated Sales Associates,” and then renamed a year later as “Dual Agent with Designated Sales Agents.”
- As of January 1, 2011, Section 443 permitted brokers to obtain consumers’ informed consent to dual agency in advance, with follow-up notification to clients when a dual-agency situation actually arises.

⁹⁷ Ex. 42 *Never Agree to Dual Agency*, CAARE, <http://www.caare.org/DualAgency> (last accessed July 13, 2018).

⁹⁸ Ex. 43 Stephen Brobeck & Patrick Woodall, *How the Real Estate Cartel Harms Consumers and How Consumers Can Protect Themselves* 13 (June 2006), available at https://consumerfed.org/pdfs/Real_Estate_Cartel_Study061906.pdf.

⁹⁹ Singer, *supra* note 3.

107. Both amendments increased the risk of consumer confusion about dual agency, so they made it even more critical that real estate agents fully and candidly disclose all the downsides, risks, and options of dual agency.

108. The first amendment to Section 443, in 2007, made dual agency riskier because the new relationship it created—“Dual Agent with Designated Sales Agents”—still “cannot provide undivided loyalty” and “cannot provide the full range of fiduciary duties” to a client, but assigns the buyer and seller each a “designated sales agent” who is supposed to be “representing the interests of and advocating on behalf of” one side or the other.¹⁰⁰ This designated agency makes dual agents seem more like client advocates, but even NYSAR recognizes that designated agency “poses the same general challenges as a typical dual agency arrangement.”¹⁰¹ NYSAR’s legal counsel makes clear: “Designated agency is a type of dual agency and is not the same as being a seller or buyer agent.”¹⁰² But designated sales agents can provide clients just enough services to create a feeling of trust that masks the conflicted loyalties and diminished duties of the designated sales agents and their affiliated broker. In this way, designated agency amplified the threat that unless brokers made detailed disclosure of consumers’ downsides, risks, and options, brokers could, in the words of Secretary Shaffer of the Department of State, “lull consumers into a sense of security” and “create the illusion of trust without

¹⁰⁰ Real Prop. Law § 443(4)(a), (b).

¹⁰¹ Ex. 44 Brad J. Boyd, *Avoid Dual Agency Pitfalls*, Realtor Mag, Apr. 2007, available at <http://realtormag.realtor.org/law-and-ethics/law/article/2007/04/avoid-dual-agency-pitfalls>.

¹⁰² Ex. 45 S. Anthony Gatto, *Requesting Additional Commission Not Permitted for Designated Agency or Any In-House Transaction*, N.Y. State Realtor 13, 13, Nov./Dec. 2015, available at http://www.nysar.com/docs/default-source/members-pdfs/nyrs_nyrs0615.pdf?sfvrsn=0.

accountability.”¹⁰³ For these reasons, consumer advocates warn that designated agency “is worse than dual agency.”¹⁰⁴

109. The second amendment to Section 443, in 2011, made dual agency riskier because it permitted brokers to obtain buyers’ and sellers’ informed consent to dual agency *before* any dual-agent situation actually arose. Dual agency arises only when a broker’s buyer client expresses an interest in a property listed by that same broker on behalf of a seller client. So consenting to dual agency before that situation arises is potentially confusing for consumers, who are being asked to consider the issue in the abstract. NYSAR promoted the advance-consent amendment as a modest change to “streamline” the process of showing property, but the Department of State worried that an advance-consent system would increase the number of disciplinary complaints against agents and create a “less informed public” because when “an agency relationship changes from the broker representing one party, to representing both, the consumers may not know who the broker is actually representing.”¹⁰⁵ Yet the Department of State ultimately did not oppose the 2011 amendment, because it was “clear that advance consent to dual agency must be ‘informed,’” meaning that in addition to disclosing all the downsides, risks, and options of dual agency itself, real estate agents also had to “disclose the benefits and detriments of providing advance consent prior to the form being executed and to

¹⁰³ *Double Agent*, *supra* note 90.

¹⁰⁴ Ex. 46 *Designated Agency – Is It Fraud?*, CAARE, <http://www.caare.org/designatedagency/> (last accessed July 13, 2018).

¹⁰⁵ Ex. 47 Letter from Matthew W. Tebo, Legislative Counsel, N.Y. Dep’t of State, to Peter J. Kiernan, Counsel to the Governor (July 15, 2010).

provide later disclosure when the dual agency relationship has actually been consummated.” Failure to provide the required follow-up disclosure “would be a violation of the broker’s fiduciary duties of full disclosure and reasonable care to the consumer.”¹⁰⁶

110. In sum, Section 443 reinforced that real estate brokers are saddled with a heavy burden to disclose to consumers all the disadvantages, risks, and options of dual agency before it could act as a dual agent—and the later amendments to Section 443 put even greater weight on those disclosure burdens.

D. Trade associations work to help brokers meet their heavy disclosure obligations

“It is not sufficient for a broker to simply hand the form to consumers and ask them to read it and sign it.”¹⁰⁷

– Edward I. Sumber, NYSAR Broker Reference Manual

111. Section 443 requires real estate brokers to give their clients the Statutory Disclosure Form, but that’s just one small piece of brokers’ extensive disclosure obligations before they can act as dual agents.

112. Longtime legal counsel for HGAR has explained: “merely presenting the form to a prospective purchaser or seller is insufficient.”¹⁰⁸

¹⁰⁶ *Id.* See also Sam Irlander, *Modern Real Estate Practice New York for Salespersons*, Dearborn Real Estate Education, 12th Ed. 2016 (“Failure to provide this follow-up disclosure would be treated as a violation of the broker’s fiduciary duties of full disclosure and providing reasonable care to the consumer.”).

¹⁰⁷ Ex. 48 *Annual Compliance Review for Brokers*, NYSAR, <http://www.nysar.com/legal/brokers-reference-manual/annual-compliance-review-for-brokers> (last accessed July 13, 2018).

¹⁰⁸ Ex. 48A Edward I. Sumber, *Annual Compliance Review for Real Estate Salespersons*, NYSAR, <https://www.nysar.com/legal/brokers-reference-manual/annual-compliance-review-for-real-estate-salespersons> (last accessed Sept. 27, 2018); see also *Rallis*, *supra* note 95 (“it is not the disclosure

113. The point was hammered home time and again on NYSAR radio, an internet-based live call-in show where the trade association's members asked NYSAR's general counsel real estate-related legal questions. NYSAR's general counsel explained:

- “Informed consent means you have to do more than give them the form and have them sign it. . . . You should never be putting the form in front of a customer and having them sign it without explaining to them how it works, what they should expect from you, what are your duties.”¹⁰⁹
- “That form in and of itself is not sufficient to provide informed consent.”¹¹⁰
- “The form is not informed consent. You have to tell them more than what is on the form.”¹¹¹

114. Shortly after the enactment of Section 443, Jo Levine, former president of NYSAR, said that “it will take brokers and customers about 20 to 30 minutes to fill out the form and discuss the options.”¹¹²

115. A broker acting as a dual agent must show that its clients have been “fully informed of every fact material to their interests” and have “freely” consented

form set forth in § 443 of the Real Property Law which determines whether disclosure has been made . . . and fiduciary obligations fulfilled but common law principles of agency law”).

¹⁰⁹ *Part 3 of Agency – Dual and Designated Agents*, NYSAR (Sept. 11, 2012), available at <https://www.nysar.com/legal/nysar-radio>.

¹¹⁰ *Agency Issues – Dual & Designated Agents*, NYSAR (Nov. 12, 2013), available at <https://www.nysar.com/legal/nysar-radio>.

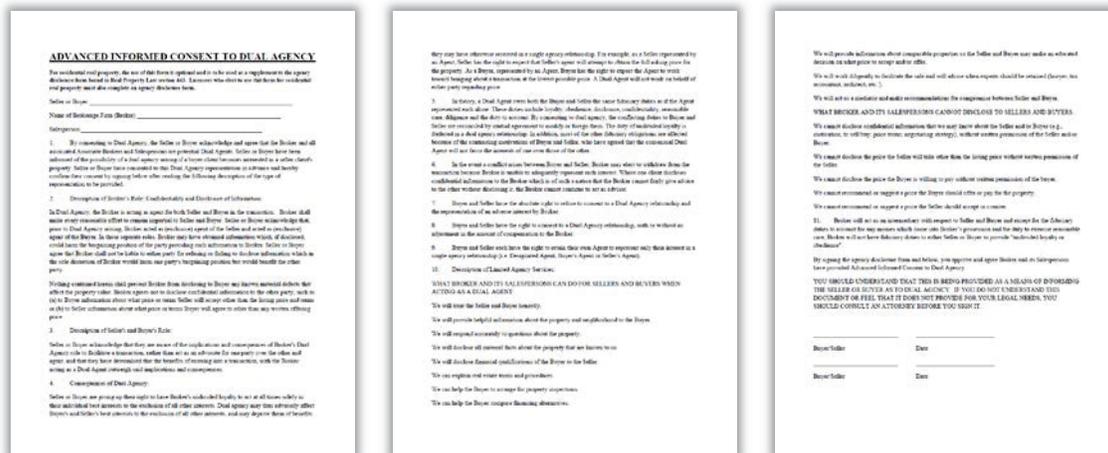
¹¹¹ *Agency-Dual and Designated Agents*, NYSAR (Nov. 21, 2017), available at <https://www.nysar.com/legal/nysar-radio>.

¹¹² Ex. 49 David Johnston, *Dealing in Your Interests*, Gannet Suburban Newspapers, Dec. 22, 1991, at J1.

to the broker's dual agency even after being fully informed.¹¹³ The broker's disclosure "must lay bare the truth, without ambiguity or reservation, in all its stark significance."¹¹⁴

116. What's more, a dual-agent broker bears the burden of showing its clients' informed consent with "exacting" proof.¹¹⁵

117. Recognizing brokers' extensive disclosure obligations and heavy burden to show informed consent, NYSAR created a three-page form¹¹⁶ for its members to use in addition to the Statutory Disclosure Form when seeking advance informed consent to dual agency:



118. NYSAR created a similar form for its members to use when seeking advance informed consent to dual agency with "designated sales agents."

¹¹³ *Hasbrouck v. Rymkevitch*, 25 A.D.2d 187, 189 (3d Dep't 1966).

¹¹⁴ *Wendt v. Fischer*, 243 N.Y. 439, 443 (1926) (Cardozo, J.).

¹¹⁵ *Sotheby's Int'l Realty, Inc. v. Black*, 2007 WL 4438145 at *4-5, 2007 U.S. Dist. LEXIS 92168, at *12-13 (S.D.N.Y. Dec. 13, 2007) (quoting *Schwartz v. O'Grady*, No. 86 Civ. 4243, 1990 WL 156274, at *5 (S.D.N.Y. Oct. 12, 1990)).

¹¹⁶ Ex. 50 NYSAR, "Advanced Informed Consent to Dual Agency," available at https://www.nysar.com/docs/members-pdfs/advanced_informed_consent_to_dual_agency.pdf?sfvrsn=4.

119. NYSAR's general counsel has explained to the group's members that these NYSAR forms "were put together by a number of individuals" and "reviewed by an equal number of attorneys" to give clients information they need in order to give informed consent: "if you are entering into dual or designated, the Department of State requires that the consumers have informed consent, that they are informed as to what each provides. We believe that this form provides that informed consent for you."¹¹⁷

120. The NYSAR dual-agency form provides much more information about dual agency than the abbreviated description of a "Dual Agent" in the Statutory Disclosure Form. For example, the NYSAR form advises consumers:

- *When dual agency may arise.* "Seller and Buyer have been informed of the possibility of a dual agency arising if a buyer client becomes interested in a seller client's property."
- *Who the dual agent is.* "By consenting to dual agency, the Seller or Buyer acknowledge and agree that the Broker and all associated Associate Brokers and Salespersons are potential Dual Agents."
- *What the broker will do as a dual agent.* The broker "shall make every reasonable effort to remain impartial to Seller and Buyer." The broker's role is "to facilitate a transaction, rather than act as an advocate for one party over the other and agent." The broker "will act as a mediator and make recommendations for compromise between Seller and Buyer."

¹¹⁷ *Agency – Dual and Designated Agents* (NYSAR radio broadcast Nov. 11, 2014), available at <https://www.nysar.com/legal/nysar-radio>.

- *What the dual agent will not do.* The dual agent “will not work on behalf of either party regarding price” and “will not favor the interests of one” client “over those of the other.” The dual agent “cannot recommend or suggest a price the Buyer should offer or pay for the property” and “cannot recommend or suggest a price the Seller should accept or counter.”
- *What the buyer and seller are giving up.* “Seller or Buyer are giving up their right to have Broker’s undivided loyalty to act at all times solely in their individual best interests to the exclusion of all other interests.” The agent’s “duty of undivided loyalty is forfeited in a dual agency relationship” and “most of the other fiduciary obligations are affected because of the contrasting motivations of Buyer and Seller.”
- *What rights the clients have.* Clients have an “absolute right to refuse to consent to a Dual Agency relationship and the representation of an adverse interest by Broker.” Clients have the right to condition their consent to dual agency on “an adjustment in the amount of compensation to the Broker.” Clients “have the right to retain their own Agent to represent only their interest in a single agency relationship.” Clients have the right to “consult an attorney” before agreeing to dual agency.

121. NYSAR’s designated-agency form¹¹⁸ also goes well beyond the Statutory Disclosure Form, by—

- explaining “Dual Agency with Designated Sales Agents”;
- describing the role of “Designated Sales Agents”;

¹¹⁸ Ex. 50A NYSAR, “Advanced Informed Consent to Dual Agency with Designated Sales Agents,” available at <https://www.nysar.com/docs/members-pdfs/advanced-informed-consent-to-dual-agency-designated.pdf?sfvrsn=0>.

- describing the broker's role as to confidentiality and disclosure of information;
- describing the seller's and buyer's role;
- explaining the consequences of "Dual Agency with Designated Sales Agents";
- advising buyers and sellers of their right to refuse consent, to condition consent on an adjustment of the broker's compensation, the right to retain a broker to act solely in their interests, and the right to retain an attorney before giving consent;
- describing the "Limited Agency Services" that "Designated Sales Agents" and brokers may provide sellers and buyers; and
- describing the information the broker and "Designated Sales Agents" may not disclose to either the buyer or seller.

122. These NYSAR forms are available to members, including Houlihan Lawrence, through NYSAR's website.

E. The New York Department of State continues to warn consumers about dual agency

*"BE WARY OF DUAL AGENCY"*¹¹⁹

– New York Department of State

123. As the regulators of New York's real estate industry, the Department of State has continued to underscore the risks of dual agency. At a real estate symposium soon after Section 443 was enacted, Secretary Shaffer "lambasted real estate brokers for failing to fulfill their legal accountability as fiduciaries to buyers

¹¹⁹ Legal Memorandum LI12, *supra* note 35.

and sellers,” saying that the “widespread traditional practices” in the industry “have really troubling, troubling impacts for consumers and for ethics in general.”¹²⁰

124. Secretary Shaffer left office in 1995, but the Department of State continues to warn consumers of dual agency to this day. The Department maintains on its website a legal memorandum from its Office of General Counsel, warning consumers: “BE WARY OF DUAL AGENCY.”¹²¹

125. Longtime legal counsel to the tri-county trade association HGAR¹²² has explained that the Department of State Memo “discourages consumers from dual agency because of the loss of the undivided loyalty of the agent first hired by the consumer,” and “reflects the longstanding disdain of the New York State Department of State to dual agency.”¹²³

126. The Department of State Memo explains to consumers: “Significantly, by consenting to dual agency, you are giving up your right to have your agent be loyal to you, since your agent is now also representing your adversary.” And it assures consumers that they never need to consent to dual agency: “As a principal in a real estate transaction, you should always know that you have the right to be

¹²⁰ Lehman, *supra* note 93.

¹²¹ Legal Memorandum LI12, *supra* note 35.

¹²² HGAR (Hudson Gateway Association of Realtors) is the trade association for real estate professionals in Westchester, Putnam, Dutchess and Rockland counties, and boasts 10,000 members. HGAR owns and operates the Hudson Gateway Multiple Listing Service (HGMLS), which allows member-brokers to share property-listing information exclusively with one another. Member-brokers who list properties with HGMLS agree to pay cooperating brokers who produce an acceptable purchase offer—most listing brokers offer to split their commission 50-50 with the buyer’s broker.

¹²³ Ex. 52 Edward I. Sumber, *Mutually Dependent Transactions and the Creation of Dual Agency*, Real Estate In-Depth, Mar. 2009, available at <http://www.dolgettalaw.com/2009-03-mutually-dependent.php>.

represented by an agent who is loyal to you throughout the entire transaction. Your agent's fiduciary duties to you need never be compromised."¹²⁴

F. Consumers are in no position to understand dual agency without frank and candid help

*"The natural assumption is that the agent is working for you, but the situation may not be that simple. There are seller's agents, buyer's agents, broker's agents, dual agents and even dual agents with designated sales agents—which all sounds more like the cast of characters in a spy film than people involved in a real estate transaction."*¹²⁵

– Elsa Brenner, *The New York Times*

*"There are agents, and then there are agents. Yes, it sounds confusing."*¹²⁶

– National Association of Realtors (NAR)

127. Homebuyers and sellers trust and depend on their real estate agents to give them the information they need to make informed decisions.

128. About half of homebuyers are first-time buyers.¹²⁷ As a Houlihan Lawrence office manager explains, first-time homebuyers “aren’t typically versed in the intricacies of agency disclosure, nor do they understand the concepts of a buyer’s agent and seller’s agent. They only know that the person they meet at an open

¹²⁴ Legal Memorandum LI12, *supra* note 35.

¹²⁵ Brenner, *supra* note 48.

¹²⁶ Ex. 53 Nat'l Ass'n of Realtors, *Descriptions of Agency*, Homebuying Resources, available at <http://rebac.net/home-buying/getting-started/descriptions-agency>.

¹²⁷ Ex. 54 Nat'l Ass'n of Realtors, *Meet the Typical New York State Homebuyer & Seller*, Feb. 2015, available at <http://www.nysar.com/docs/members-pdfs/5-typbuyers-sellers.pdf?sfvrsn=0>.

house or e-mail about a listing is an ‘agent.’”¹²⁸ The general counsel and managing partner at a Houlihan Lawrence competitor explains that buyers in their 20s and 30s “are going to need a LOT of education, because most of them have never bought a home, and they don’t understand and often fear the process.”¹²⁹

129. Sellers similarly need education on dual agency. According to a Houlihan Lawrence associate broker, the typical seller in Westchester County is a baby boomer looking to downsize.¹³⁰ Baby boomers looking to sell a house they bought decades ago likely last participated in the real estate market under a sub-agency regime defined by widespread consumer confusion. So sellers are at high risk of entering their home sale confused, mistaken, or misled about their real estate agents’ role and allegiance.

130. All the different terms used to refer to various real estate professionals are another source of confusion. A real estate agent is anyone who has a real estate license. Real estate agents are also frequently called real estate salespersons or licensees. Real estate agents work for real estate brokers, who have passed a certification exam and satisfied the industry experience and education requirements to obtain a broker’s license. An associate real estate broker is a real

¹²⁸ Ex. 55 Brendon DeSimone, *Should You Use the Listing Agent When Purchasing a Home?*, Zillow, Apr. 4, 2016, available at <https://www.zillow.com/blog/should-you-use-listing-agent-195192/>.

¹²⁹ Ex. 56 Joseph W. Rand, *Special Report: How the Market Is Changing, How Those Changes Will Impact Our Business, and What Can We Do to Adapt and Thrive*, March 2013, available at https://webcache.googleusercontent.com/search?q=cache:x_ee8zetSeMJ:https://rand.zendesk.com/hc/en-us/article_attachments/217521628/TheMarketIsChangingBooklet_fromTrainingPktWhitePpr.pdf+&cd=15&hl=en&ct=clnk&gl=us.

¹³⁰ Ex. 57 Dave Donelson, *Downsizing Heats Up Housing: Millennials, Boomers, And Other Persistent Market Forces Drive Westchester Home Sales in 2017*, Westchester Mag., Feb. 28, 2017, available at <http://www.westchestermagazine.com/Westchester-Magazine/March-2017/Downsizing-Heats-Up-Housing/>.

estate agent who has obtained a broker's license but elects to work under the supervision of a broker. A realtor is a real estate agent or broker who is a member of NAR (the National Association of Realtors) and has agreed to abide by NAR's code of ethics.

131. Making things even more complicated, the term "agent" is used in the real estate industry in two very different ways. NAR explains:

There are agents, and then there are agents. Yes, it sounds confusing. That's because the term "agent" is often used in a casual manner, referring to any real estate practitioner.

But agent also refers to someone with whom you've established a formal agency relationship—someone who represents your best interests in a real estate transaction and owes you fiduciary responsibilities.¹³¹

132. This distinction between two senses of the term "agent" is often lost on consumers—they don't understand that when they hire their real estate agent, they're really hiring their agent's brokerage firm, and that their agent and *all* the other agents in the firm represent all the firm's clients. As a result, they don't appreciate the significance of having the same broker on both sides of the deal. When their individual agent isn't on the other side of the deal, consumers are particularly likely to mistakenly believe that they still have their agent's undivided and undiluted loyalty, even though the agent on the other side of the deal is with the same firm.

¹³¹ *Descriptions of Agency*, *supra* note 126.

133. Legal counsel to REBNY (the Real Estate Board of New York, a trade association of more than 17,000 real estate professionals in New York City), has recently confirmed: “Nationwide one of the biggest complaints that consumers have about the real estate broker and the relationship is that they don’t fully understand how the real estate broker is acting on that consumer’s behalf.”¹³²

134. “Especially because the paperwork can be hard to decipher,” the New York Department of State “emphasizes that it’s the broker’s responsibility to ensure the client understands they’re ‘giving up their right to the agent’s undivided loyalty.’” Agents “shouldn’t assume consumers know what they’re getting themselves into.”¹³³

135. For these reasons, consumers need a full and frank education on the downsides, risks, and options of dual agency before they can possibly be in a position to make an informed decision about whether to give up their agent’s undivided and undiluted loyalty.

¹³² REBNY video, *REBNY How to Series: Agency Disclosure & Client Representation Episode 2*, YouTube (June 7, 2016), available at https://www.youtube.com/watch?list=PLlG8jg6jqklnWnNIS4btAKjNDGgLh5IWL&time_continue=143&v=17VYanL3vaY.

¹³³ Ex. 57A Meenal Vamburkar & Kevin Sun, *Dual Agency Dispute Serves as a Warning Sign for Brokers*, The Real Deal, Aug. 22, 2018, available at <https://therealdeal.com/2018/08/22/dual-agency-dispute-serves-as-a-warning-sign-for-brokers/>.

G. Brokers must forfeit any commissions they get by acting as an undisclosed, non-consensual dual agent

*“Undisclosed dual agency cannot be permitted without dire consequences.”*¹³⁴

– Edward I. Sumber, Longtime counsel to HGAR

136. Given the dangers of undisclosed, non-consensual dual agency, brokers who act as a dual agent without both parties’ informed consent are strictly liable for their ill-gotten commissions from the tainted deal.

137. Brokers have a fiduciary duty to act in their clients’ best interests,¹³⁵ and can’t serve as a dual agent without both sides’ informed consent after “full and complete disclosure to all parties.”¹³⁶ The giant trade association NAR has recognized: “Undisclosed dual agency is a clear breach of the broker’s fiduciary duty to each of his principals and is generally viewed to be an act of fraud.”¹³⁷

138. New York courts enforce real estate brokers’ fiduciary duties with “uncompromising rigidity.”¹³⁸ It’s no excuse for a broker who acted as an undisclosed, non-consensual dual agent to say that it acted in good faith or that its clients were not harmed.¹³⁹ “The law does not stop to inquire whether the contract or transaction was fair or unfair.”¹⁴⁰ Where a broker acts as an undisclosed, non-

¹³⁴ Sumber, *supra* note 123.

¹³⁵ *Dubbs v. Stribling & Assocs.*, 96 N.Y.2d 337, 340 (2001).

¹³⁶ *Dep’t of State, Div. of Licensing Servs. v. Tucci*, 228 DOS 03 (2003).

¹³⁷ *Who Is My Client?*, *supra* note 39 at 10.

¹³⁸ *Wendt v. Fischer*, 243 N.Y. 439, 443 (1926).

¹³⁹ *Sotheby’s*, *supra* note 115; *Tucci*, 228 DOS 03; *see* 2A N.Y. Jur. 2d Agency § 227 (2007).

¹⁴⁰ *Wendt*, 243 N.Y. at 443.

consensual dual agent, it forfeits “any right of compensation.”¹⁴¹ That means the dual-agent broker must forfeit its commission:

It makes no sense to permit the broker to collect a commission when the broker cannot prove compliance with a disclosure statute designed to protect the public.¹⁴²

139. The New York real estate industry knows the strict sanctions for undisclosed, non-consensual dual agents. Longtime legal counsel to HGAR has explained that undisclosed dual agency “cannot be permitted without dire consequences”—including that “the commission is deemed to be forfeitable.”¹⁴³ NYSAR’s general counsel also warns that “forfeiture of all commissions” is among the penalties “for undisclosed dual agency.”¹⁴⁴

140. Real estate broker commissions are paid by both the seller and buyer out of the purchase price. As Houlihan Lawrence’s “company training guru”¹⁴⁵ Annette “Toni” Chrystal teaches, “the seller accepted an offer that incorporates the

¹⁴¹ *Sotheby’s*, U.S. Dist. LEXIS 92168, at *12-13 (S.D.N.Y. Dec. 13, 2007) (collecting cases); *P. Zaccaro, Co., Inc. v. DHA Capital, LLC*, 2018 N.Y. Slip Op. 00458 (1st Dep’t Jan. 25, 2018) (“Where, as here, the duty of undivided loyalty is breached, plaintiff broker forfeits its right to a commission, regardless of whether damages were incurred.”).

¹⁴² *Talk of the Millennium Realty Inc. v. Sierra*, 819 N.Y.S.2d 213, 213 (Civ. Ct. Richmond Cty. Jan. 3, 2006).

¹⁴³ *Mutually Dependent Transactions*, *supra* note 123.

¹⁴⁴ *Dual, Designated and Buyer’s Agency* (NYSAR radio broadcast Oct. 18, 2016), available at <https://www.nysar.com/legal/nysar-radio>.

¹⁴⁵ *Ex. 57B Welcome These New Local Leaders for 2018*, Houlihan Lawrence: Herd, <http://www.houlihanlawrence.com/blog/new-manager-appointments.html> (last accessed Sept. 12, 2018).

commission, and the buyer is paying the commission as it is incorporated within the price they agree to pay for the house.”¹⁴⁶

141. Others in the real estate industry agree. For instance, HGTV explains: “You may have heard that the seller pays the buyer’s agent commission (commonly 2.25 percent to 3.5 percent), but the fact is that the commission is often wrapped into the house price. In other words, sellers factor in the cost of commission when they price their homes.”¹⁴⁷ *Forbes* similarly advises that “the commission fees gets baked into the home price, which means that buyers end up paying the fees.”¹⁴⁸

9. Houlihan Lawrence systematically fails its duty to disclose to its clients the downsides, risks, and options of dual agency

*“The disclosures and consents necessary to make a dual agency lawful are so comprehensive and specific that a typical real estate broker cannot undertake them as a matter of routine.”*¹⁴⁹

– National Association of Realtors (NAR)

142. Despite the promises in its marketing materials to act as a faithful agent to its clients, Houlihan Lawrence has adopted a practice and policy by which

¹⁴⁶ Ex. 57C *Who Pays the Commission?*, Turn to the “Twin Team” Toni and Terri @ Houlihan Lawrence | Real Estate Blog, <http://toniandterri.com/?p=319> (last accessed Jun. 28, 2018).

¹⁴⁷ Ex. 57D Tammy Stoner, *Learn the Pros and Cons of a Buyer’s Agent*, HGTV, <https://www.hgtv.com/design/real-estate/learn-the-pros-and-cons-of-a-buyers-agent> (last accessed Sept. 19, 2018); see also Ex. 57E Susan Stellin, *The Buddy System, or the Buyer’s Broker*, N.Y. Times, Sept. 15, 2011, available at <https://www.nytimes.com/2011/09/18/realestate/the-buyers-broker-getting-started.html?smid=nytcore-ios-share> (“Although the seller typically pays the agents’ commission, that fee comes from the purchase price of the home—in other words, out of the buyer’s pocket—so buyers who think they have no financial obligation to an agent are deluding themselves.”).

¹⁴⁸ Ex. 57F Kevin Miller, *First-Timer FAQ: How Do Real Estate Commissions Work?*, *Forbes*, Jun. 6, 2018, available at <https://www.forbes.com/sites/forbesrealestatecouncil/2018/06/06/first-timer-faq-how-do-real-estate-commissions-work/#3fb286213894>.

¹⁴⁹ *Who Is My Client?*, *supra* note 39 at 10.

it routinely acts as a dual agent—even in the face of industry guidance that dual agency should be incredibly rare. Acting as dual agent prevents Houlihan Lawrence from giving its clients undivided and undiluted loyalty, and the only way it can do that is if those clients give informed consent to dual agency. The only way those clients can give informed consent to dual agency is if Houlihan Lawrence provides them with full and frank disclosure of all the downsides, risks, and options of dual agency.

143. That heavy disclosure burden is a problem for Houlihan Lawrence—and not just because it creates a lot of hard work in making all the necessary disclosures, but also because once dual agency is disclosed fully, “there isn’t any one in their right mind who would agree to it.”¹⁵⁰

144. To fully disclose the downsides, risks, and options of dual agency, Houlihan Lawrence must candidly explain to consumers at least all the information found in the NSYAR forms (see paragraphs 117 to 122 above).

145. Instead of providing those candid disclosures, Houlihan Lawrence has adopted a set of company-wide policies and practices that *prevent* its clients from understanding the downsides, risks, and options of dual agency—all while creating a paper trail to give the illusion that clients have consented to Houlihan Lawrence acting as a dual agent.

¹⁵⁰ Sichelman, *supra* note 2.

A. Houlihan Lawrence dupes consumers into signing a Statutory Disclosure Form that subjects them to dual agency by default

*“Buying a house means navigating through a maze of confusing paperwork and important decisions. There’s so much to keep track of, and so many costs that appear out of nowhere. You can feel like you’re being taken advantage of—if not worse.”*¹⁵¹

– Thoroughbred Title Services

*“defaults make a difference.”*¹⁵²

– Eric J. Johnson & Daniel Goldstein,
Columbia University

146. The most basic, square-one disclosure obligation Houlihan Lawrence faces is that it must provide consumers with the Statutory Disclosure Form for review, completion, and signature before it enters an agency relationship with them.¹⁵³

¹⁵¹ Ex. 57G *For Home Buyers in NY*, Thoroughbred Title Services, <https://www.thoroughbredtitleservices.com/Buyers/> (last accessed Sept. 12, 2018).

¹⁵² Ex. 58 Eric J. Johnson & Daniel Goldstein, *Do Defaults Save Lives?* Science, vol. 302 pp.1339 (2003), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1324774.

¹⁵³ See Real Prop. Law §§ 443(3)(a), (c).

147. The Form provides a space to identify the real estate salesperson and brokerage firm providing the Form to the consumer, and to identify that broker’s role (e.g., seller’s agent, buyer’s agent, dual agent):

This form was provided to me by _____ of _____
(Print Name of Licensee) (Print Name of Company, Firm or Brokerage)

a licensed real estate broker acting in the interest of the:

<input type="checkbox"/> Seller as a <i>(check relationship below)</i>	<input type="checkbox"/> Buyer as a <i>(check relationship below)</i>
<input type="checkbox"/> Seller’s Agent	<input type="checkbox"/> Buyer’s Agent
<input type="checkbox"/> Broker’s Agent	<input type="checkbox"/> Broker’s Agent
<input type="checkbox"/> Dual Agent	
<input type="checkbox"/> Dual Agent with Designated Sales Agent	

148. Where a brokerage is acting as a dual agent with designated sales agents, the Form provides a space to specifically identify each of the designated sales agents:

If dual agent with designated sales agents is indicated above: _____ is appointed to represent the buyer; and _____ is appointed to represent the seller in this transaction.

149. Since 2011, when the possibility of advance informed consent to dual agency was introduced, the Form has included a space where a “seller or buyer may provide advance informed consent to dual agency by indicating” that consent on the Form:¹⁵⁴

For advance informed consent to either dual agency or dual agency with designated sales agents complete section below:

<input type="checkbox"/> Advance Informed Consent Dual Agency
<input type="checkbox"/> Advance Informed Consent to Dual Agency with Designated Sales Agents

¹⁵⁴ Real Prop. Law § 443(4)(a); see also Section 443(3)(f).

150. Houlihan Lawrence doesn't provide the Form to clients prior to agreeing to act as their agent as required under Section 443. Houlihan Lawrence waits until clients have committed—mentally, emotionally, or even legally—to buy a particular home before presenting the Form for signature. Houlihan Lawrence knows that clients are unlikely to pay attention to the Form or to derail the transaction and raise an objection to dual agency once they are caught up in the momentum of sealing the deal.

151. The Form's purpose is defeated if it's provided after an agency relationship is formed—and even more so if it's a dual-agency relationship. The conflict of interest created by dual agency taints a transaction, and that taint can't be cured by disclosing the dangers only after the fact. Consumers' "right to be represented by an agent who is loyal" to them "throughout the entire transaction"¹⁵⁵ is irrevocably breached as soon as Houlihan Lawrence begins to act as an undisclosed, non-consensual dual agent.

152. But even when it eventually provides the Form to clients, Houlihan Lawrence does all the wrong things. Its salespeople don't sufficiently explain to clients the various agency relationships, how and why those relationships can change during the home transaction process, the likelihood that a dual-agent situation will arise, or the implications and consequences of each type of relationship. And its salespeople don't sufficiently explain the downsides, risks, and options of dual agency. Contrary to NYSAR's guidance, Houlihan Lawrence ensures

¹⁵⁵ Legal Memorandum LI12, *supra* note 35.

that its agents don't use the forms that NYSAR created to explain dual agency to clients.

153. Instead, Houlihan Lawrence has its agents use a pre-filled Statutory Disclosure Form that dupes consumers into signing on to a bogus advance consent to dual agency.

156. For good reason, New York set up a system where it is the “seller or buyer”—not the agent—who “may provide advance informed consent to dual agency by indicating” that consent on the Form.¹⁵⁶

157. When consumers are asked to tick a box indicating their “Advance informed consent to dual agency,” it will naturally prompt them to pause and ask the questions they need to answer before they can make an informed decision—for example: *What exactly is dual agency? How does it work? What am I giving up if I agree to dual agency? How does acting as a dual agent change my agent’s duties and incentives? What does it mean, in practical terms, when I lose my agent’s undivided and undiluted loyalty? Do I have to consent? Are there ways we can work around a potential dual-agent situation so that I don’t have to sacrifice my agent’s loyalty? What will I be losing if I don’t want to consent? Why should I give advance consent instead of crossing that bridge if we come to it?*

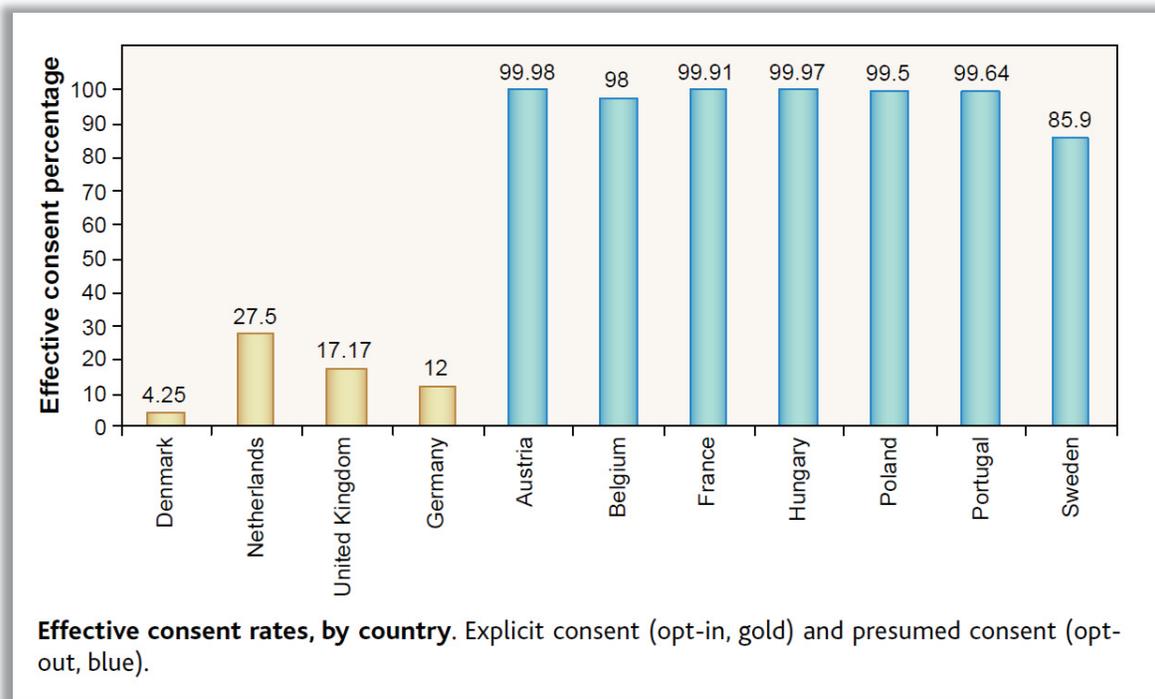
158. Using pre-ticked boxes short-circuits that questioning process.

159. It changes the system so that instead of requiring clients to *opt in* to a dual-agent representation, Houlihan Lawrence shifts the burden to the client to *opt out* of a dual-agent relationship that Houlihan Lawrence has selected for them as the default.

160. It’s well-understood that *opt-out* systems like the one Houlihan Lawrence has created will yield vastly different results from *opt-in* systems like the one required by New York law. For instance, researchers at Columbia University’s

¹⁵⁶ Real Prop. Law § 443(4)(a) (defining “dual agent”); *see also* Real Prop. Law § 443(3)(i).

Center for Decision Sciences found huge differences in enrollment in organ-donor programs across different countries in Europe depending on whether they used an *opt-in* (explicit consent) system or an *opt-out* (presumed consent) system. In Germany, using an opt-in program, only 12% of Germans gave consent to be organ donors, whereas next-door in Austria, using an opt-out program, more than 99% of Austrians gave consent.¹⁵⁷ The stark effect of setting the default option was unmistakable across all the reported countries:¹⁵⁸



161. As the Columbia researchers explained, “making a decision often involves effort, whereas accepting the default is effortless.”¹⁵⁹

¹⁵⁷ Ex. 59 Kate Anderson, *How to Nudge Us to Do the Right Thing More Often*, Forbes, Aug. 10, 2013, available at <https://www.forbes.com/sites/kareanderson/2013/08/10/how-to-nudge-us-to-do-the-right-thing-more-often/#71f316a92019>; Johnson, *supra* note 152 at 1338.

¹⁵⁸ Johnson, *supra* note 152 at 1338.

¹⁵⁹ *Id.*

162. *Scientific American* reported similar results in an experiment geared toward persuading consumers to purchase “green energy” contracts. Researchers found that “a simple change in the decision architecture” made a huge difference: “Using the opt-in rule, merely 7% of households purchased a green energy contract. Using the ‘opt-out’ rule, however, increased participation tenfold to roughly 70%.”¹⁶⁰

163. Houlihan Lawrence has manufactured its own “change in the decision architecture” of the Statutory Disclosure Form to create the illusion that its clients’ signatures on those Forms reflect the legally required advance informed consent to dual agency. They do not, including because Houlihan Lawrence has duped consumers into skipping the necessary step of ticking the box that indicates their consent.

164. To make matters worse, when clients look to the signature line of the pre-filled Form, they see that it merely asks the client to “acknowledge receipt” of the Form—not to give advance consent or waive any rights:

(I)(We) acknowledge receipt of a copy of this disclosure form:

Signature of Buyer(s) and/or Seller(s):

✘ _____

✘ _____

Date: _____

¹⁶⁰ Ex. 60 Sebastian Berger, *The Power of the Nudge to Change Our Energy Future*, *Scientific American*, Dec. 29, 2015, available at <https://www.scientificamerican.com/article/the-power-of-the-nudge-to-change-our-energy-future/>.

165. Consistent with this language on the Form, Houlihan Lawrence tells clients in its “Handbook for Homebuyer” and “Seller’s Guide” that their *receipt* of the Form is “acknowledged by signing and dating the appropriate form.” The guides don’t tell clients that signing the Form will give advance consent or waive any rights. Instead, Houlihan Lawrence implies that the Form is just paperwork to be received and “acknowledged” as a matter of course—even though Houlihan Lawrence actually intends to treat the client’s signature as a license to act as a dual agent.

166. Plus, the Form assures consumers up-front that it is “NOT A CONTRACT”:



167. So the only part of the Form that signals to consumers that they could be giving advance consent to dual agency is the empty box they must tick to indicate that consent. By pre-ticking those boxes, Houlihan Lawrence buries that lone signal and sucks consumers into uninformed, non-consensual dual-agency deals premised on bogus Statutory Disclosure Forms.

168. Making matters worse, Houlihan Lawrence agents complete Statutory Disclosure Forms incorrectly, including by indicating on the Form that Houlihan Lawrence is acting solely in the interests of the seller or buyer when a dual-agent situation has already arisen; that Houlihan Lawrence is simultaneously acting in the interests of the buyer or seller and as a dual agent; that Houlihan Lawrence is simultaneously acting as a Dual Agent and Dual Agent with Designated Sales Agents; and that the buyer or seller is providing *advance* consent to dual agency even though a dual-agent situation has already arisen. These errors further confuse and mislead Houlihan Lawrence's clients.

B. Houlihan Lawrence misleads consumers by hyping “in-house” sales as if they were good for clients

*“Buyers want to go where the inventory is and sellers want to go where the buyers are. We have both.”*¹⁶¹

– Stephen Meyers, Houlihan Lawrence CEO

169. Houlihan Lawrence doesn't use the term “dual agency” in its marketing materials. The very name “dual agent” calls to mind a “double agent” and suggests a conflict of interest. Houlihan Lawrence instead tries to re-brand its rampant dual-agency practice and spin it as a benefit to clients.

170. Houlihan Lawrence's CEO Stephen Meyers has boasted: “Buyers want to go where the inventory is and sellers want to go where the buyers are. We have both.”¹⁶² According to Meyers, the prospect of dual agency is not a reason to be

¹⁶¹ *Market Report*, *supra* note 19.

¹⁶² *Id.*

wary of Houlihan Lawrence, but just the opposite: it is the reason why consumers should hire them in the first place.

171. But as a sales pitch, Meyers's hype doesn't add up. There should be no advantage to a buyer to retaining an agent with "inventory" and no advantage to a seller to retaining an agent "where the buyers are." A key purpose of a multiple listing service like the HGMLS is to ensure that new listings are circulated to the *entire* market at the same time.¹⁶³ Houlihan Lawrence's listing agreements expressly require it to submit its listings "immediately" to HGMLS "for dissemination to its participants."¹⁶⁴ Through multiple listing services, buyers and sellers should have the same access to one another no matter who represents them. NYSAR's General Counsel agrees that all brokers "must be given" the "same access" to new listings.¹⁶⁵

172. It could only make any difference to a buyer that its agent has "inventory" or to a seller that its agent is "where the buyers are" when the agent is intentionally steering its clients away from deals with outside agents, and instead pressing its clients into dual-agent, "in house" deals—but that's one of the critical ways that dual agency can *hurt* clients, not help them. Dual agents would rather

¹⁶³ See Ex. 61 HGMLS, Rules and Regulations 2, available at <http://www.hgar.com/wp-content/uploads/2016/09/HGMLS-Rules-and-Regulations-2014-003.pdf> (HGMLS "endeavors to make real estate more readily marketable by establishing a centralized source of market data" and is intended "to facilitate the orderly dissemination of listing and related information and to insure effective cooperation among Participants").

¹⁶⁴ Houlihan Lawrence Listing Agreement ("Both Owner(s) and Agent agree that the Agent immediately is to submit this listing agreement to the Hudson Gateway Multiple Listing Services, Inc. (HGMLS) for dissemination to its Participants.").

¹⁶⁵ Ex. 61A S. Anthony Gatto, *The Seller Steers the Ship*, Blueprint for Success, TriplePlay Realtor Convention & Trade Expo, available at <https://www.nysar.com/docs/default-source/members-pdfs/the-seller-steers-the-ship-triple-play-2017.pdf?sfvrsn=0>.

see their clients do a deal with each other—fetching a double commission for Houlihan Lawrence and an “in-house” kickback bonus for the agents—than to see their clients do a deal with some party represented by an outside agent and have to split the commission. That means dual agents have a motive to steer their clients toward “in-house” buyers or sellers even where those buyers or sellers aren’t the client’s best option.

173. In other words, Meyers’s hype that “Buyers want to go where the inventory is and sellers want to go where the buyers are” is dead wrong. And it turns the New York legal requirement to warn consumers of the risks of dual agency on its head, encouraging consumers to ignore the Department of State’s warning to “**BE WARY OF DUAL AGENCY**” and instead be *thankful* for dual agency.

174. But Houlihan Lawrence salespeople are following their CEO’s lead. For instance, brokers in the firm’s Scarsdale office display Meyers’s quote on the front page of their group’s website.¹⁶⁶ In the “For Sellers” section of their site, they even tout Houlihan Lawrence’s “proprietary” buyer-clients as a reason sellers should choose to list with Houlihan Lawrence—describing how they will steer their buyers into their seller-clients’ properties:

We are proud to be a part of Houlihan Lawrence, the market leader in lower Westchester county, representing 60% of home sales and over four times the dollar volume of its nearest competitor. Collectively, we and our colleagues have developed an unrivaled proprietary client

¹⁶⁶ Ex. 62 The Glasser Lipton Team, www.glasserlipton.com (last accessed July 13, 2018).

base of buyers. Daily, each of us is on high alert to receive information on new listings to share with our respective clients. The Glasser Lipton Group subscribes to this unique approach, utilizing this platform to promote our listings throughout this powerful broker network.¹⁶⁷

175. A broker in the firm's Rye office likewise quotes Meyers's hype, using her newsletter to clients, "Realty Check," to pitch Houlihan Lawrence's dominant market share as "a tremendous benefit to Sellers and Buyers":

It's a question that Joan O'Meara, associate broker for Houlihan Lawrence in Rye & Harrison, is asked frequently: "I see the statistics. I read the articles. But does Houlihan Lawrence having a greater percentage of market share in our communities really matter to me?" According to Stephen Meyers, CEO of Houlihan Lawrence, the answer in a nutshell is this: "Buyers want to go where the inventory is. And sellers want to go where the buyers are and we have both." In other words, this is a tremendous benefit to Sellers and Buyers.¹⁶⁸

176. Brokers in the firm's Scarsdale office boast that their "office has been compared to a trading floor with information being shared and brokers working as a 'team' to get deals done; a business model benefitting both our sellers and buyers."¹⁶⁹ Following Meyers's lead, they are inviting consumers to believe they

¹⁶⁷ Ex. 63 *For Sellers*, The Glasser Lipton Team, <http://www.glasserlipton.com/for-sellers/> (last accessed July 13, 2018).

¹⁶⁸ Ex. 64 Joan O'Meara, *Does Market Share Really Matter to the Home Buyer or Seller*, 7 Realty Check 2H, available at https://joanomeara.files.wordpress.com/2011/05/hl_news_harrison.pdf (emphasis added).

¹⁶⁹ Ex. 65 Elise Jan Flagg & Laura Sheppe Miller, *Our January Picks*, Jan. 2015, available at <http://myemail.constantcontact.com/Our-January-Picks.html?soid=1115882323948&aid=VsbhVG2Ym5Q>.

have nothing to fear and everything to gain from Houlihan Lawrence pairing up its buyer-clients and seller-clients to engineer an “in-house,” dual-agent sale.

177. Meyers has even suggested that consumers need not be wary even when the same individual Houlihan Lawrence salesperson represents both parties in a single transaction, a situation “rife with the potential for conflicting loyalties.”¹⁷⁰ Meyers argued that even this single-agent dual-agency scenario helps rather than harms consumers: “There’s one less intermediary involved and they can offer a buyer a more direct pipeline to the seller during negotiations.”¹⁷¹

178. Meyers’s hype of the made-up benefits of dual agency reflects a firm-wide, top-down strategy to mislead clients by brazenly touting dual agency as a benefit rather than a harm.

C. Houlihan Lawrence systematically avoids alerting consumers to the risks of dual agency

*“agents worry that having to discuss these kinds of possibilities when first meeting clients could frighten them off.”*¹⁷²

– Vivian S. Toy, *New York Times*

179. In addition to hyping phony benefits of dual agency, Houlihan Lawrence systematically avoids alerting customers to the real downsides of dual agency.

¹⁷⁰ Brenner, *supra* note 48.

¹⁷¹ *Id.*

¹⁷² Ex. 66 Vivian S. Toy, *A New Broker Disclosure Law in New York*, N.Y. Times, Dec. 30, 2010, available at <http://www.nytimes.com/2011/01/02/realestate/02post.html?mcubz=1>.

180. If Houlihan Lawrence wanted to make the downsides, risks, and options of dual agency clear to its customers, one simple step it could take would be to give customers the forms NYSAR has already prepared for its member-brokers for just that purpose. NYSAR prepared succinct, plainspoken forms that advise consumers about when dual agency may arise, who the dual agent is, what a dual agent will and will not do, what consumers are giving up by consenting to dual agency, and what rights consumers have. (See paragraphs 117 to 122.) NYSAR prepared those forms with the help of attorneys and for the benefit of brokers like Houlihan Lawrence. NYSAR makes the forms available to Houlihan Lawrence and other brokers on its website. There's no real obstacle for Houlihan Lawrence to using the NYSAR forms—except that the NYSAR forms may prompt clients to object to dual agency.

181. But even though it would be easy to do, Houlihan Lawrence doesn't give its customers the NYSAR forms.

182. In addition, the firm ensures that its website and other consumer outreach materials are nearly silent about dual agency. Sometimes Houlihan Lawrence agents reference dual agency on *other* websites, but not on their Houlihan Lawrence pages. One Houlihan Lawrence agent's profile on the popular home-design website Houzz says, "Whether he represents you as a seller's agent, buyer's agent, or as a dual agent, you will be looking forward to working with him again."¹⁷³ Three paragraphs of the agent's four-paragraph Houzz profile appear word-for-word

¹⁷³ Ex. 67 Houzz, <https://www.houzz.com/pro/mnogueras41/houlihan-lawrence> (last accessed July 13, 2018).

on Houlihan Lawrence's website, but the paragraph with the reference to working as a "dual agent," is omitted.¹⁷⁴

183. Another Houlihan Lawrence agent provides frank advice about dual agency on his personal blog—which does not reference his affiliation with Houlihan Lawrence—but that advice is conspicuously absent from his Houlihan Lawrence agent profile. The advice from the agent's personal blog makes clear why truly informed clients would *not* consent to dual agency:

Are Dual Agents a good idea, or a bad one? Unless you're an experienced real estate investor, it's best to stick with a buyer's agent. There's no cost. And a good buyer's agent will provide an invaluable amount of advice and support in what can end up being a very stressful period.¹⁷⁵

184. Out of the firm's 1,300 New York agents, references to dual agency have slipped out in only two agents' Houlihan Lawrence online profiles, both from Dutchess County. One agent makes a passing reference to "Dual Agent" being one of her "Specialties."¹⁷⁶ The other agent offers a uniquely open discussion of the issue, which is not visible on the webpage at first, but appears after clicking "MORE" under the heading "ABOUT ME":

In my view it is very difficult to represent both buyer and seller in the same deal. Dual agency is often counter to

¹⁷⁴ Ex. 68 *Marco Nogueras*, Houlihan Lawrence, http://marconogueras.houlihanlawrence.com/agents_offices/ (last accessed July 13, 2018).

¹⁷⁵ Ex. 69 *Brendon DeSimone, Buyer's Agent vs. Listing Agent; What You Need to Know*, Brendon DeSimone, available at <http://brendondesimone.com/2016/04/06/buyers-agent-vs-listing-agent/> (last accessed July 13, 2018).

¹⁷⁶ Ex. 70 *Katherine (Kaye) Saglibene*, Houlihan Lawrence, https://kayesaglibene.houlihanlawrence.com/agents_offices/ (last accessed July 13, 2018).

true client representation, and it is typically better for a real estate agent to represent either the buyer or seller to the best of their ability, creating the ideal conditions for the true execution of fiduciary duty to the clients.¹⁷⁷

185. The firm's near-total silence is out of step with industry practice.

Unlike Houlihan Lawrence, leading competitors' websites address dual agency head-on. For example:

- *William Raveis*, a top real estate company in the Northeast, includes a page on its website devoted to "Understanding Agency" including dual agency,¹⁷⁸ and addresses "What is dual agency?" under both its "Buying FAQs" and its "Selling FAQs."¹⁷⁹ Among other things, William Raveis advises that consumers should "request a copy of your agent's company's policy regarding agency so you will know where you stand on these important matters."¹⁸⁰
- *Redfin*, a national real estate brokerage operating in Westchester, Putnam, and Dutchess counties, includes a "Definition of Dual Agency" in its "Real Estate Glossary," explaining among other things that a dual agent will "get double the commission" and that "buyers and sellers should be sure to understand all potential conflicts of interest before entering into a dual agency relationship."¹⁸¹

¹⁷⁷ Ex. 71 *Joseph Briggs*, Houlihan Lawrence, https://www.houlihanlawrence.com/agents_offices/info/JosephBriggs/ (last accessed July 13, 2018).

¹⁷⁸ Ex. 72 *Understanding Agency*, William Raveis, <http://ask.raveis.com/UnderstandingAgency> (last accessed July 13, 2018).

¹⁷⁹ Ex. 73 *Your Real Estate team FAQs*, William Raveis, <http://ask.raveis.com/YourRealEstateTeamFAQs#2465> (last accessed July 13, 2018).

¹⁸⁰ Ex. 73 *Id.*

¹⁸¹ Ex. 74 *Real Estate Glossary: What is Dual Agency?* Redfin, <https://www.redfin.com/definition/dual-agency> (last accessed July 13, 2018).

- *Coldwell Banker*, a residential real estate franchise with about 3,000 offices, advises homebuyers and sellers when “Choosing an Agent” to be mindful of dual agency.¹⁸²
- *Sterling Park Realty* provides dual-agency-related discussions from its president and principal broker (who was also the 2016 president of HGMLS), on its “Common Forms in a Real Estate Transaction” page¹⁸³ and its “Understanding NYS Agency Law” page, including to explain that “the potential for conflicts of interest in a dual-agency relationship” make it “vital that all parties give their informed consent.”¹⁸⁴
- *Platinum Drive Realty*, a real estate firm covering Westchester, Manhattan, and Connecticut, provides an online “Homebuyers Handbook” that addresses dual agency and makes clear that both parties will be required to acknowledge the dual agency in writing when it arises.¹⁸⁵ Platinum Drive Realty warns consumers to “be wary” of dual agency and advises buyers of new construction: “your best bet is to go into the situation with your own representative” rather than accepting dual agency.¹⁸⁶
- *Douglas Elliman*, the largest brokerage in the New York Metropolitan area and fourth-largest residential

¹⁸² Ex. 75 *Choosing an Agent*, Coldwell Banker,

<https://www.coldwellbankerhomes.com/advice/choosing-an-agent/> (last accessed July 13, 2018).

¹⁸³ Ex. 76 Leah Caro, *Common Forms in a Real Estate Transaction*, Park Sterling Realty (Feb. 6 2015), <https://www.parksterlingrealty.com/Common-Forms-In-A-Real-Estate-Transaction/Real-Estate-forms-transaction/Article-2836>.

¹⁸⁴ Ex. 77 Leah Caro, *Understanding N.Y.’s Agency Law*, Park Sterling Realty (Feb. 6, 2015) <https://www.parksterlingrealty.com/Understanding-Nys-Agency-Law/Sellers-buyers/Article-2831>.

¹⁸⁵ Ex. 78 Jennifer Y. Ross, *Platinum Drive Realty’s Homebuyers Handbook*, Westchester Living (Jan. 12 2017), <http://westchesterliving.house/real-estate-blog/platinum-drive-realtys-homebuyers-handbook/>.

¹⁸⁶ Ex. 79 *3 Things to Know About Buying New Construction*, Westchester Living, <http://westchesterliving.house/real-estate-blog/3-things-to-know-about-buying-new-construction/> (last accessed July 13, 2018).

real estate company in the country, includes the Statutory Disclosure Form in its “Terms of Service.”¹⁸⁷

186. Even smaller full-service brokerage firms, where the risk of dual agency is lower, address dual agency on their websites. For example—

- *Nutshell Realty* warns consumers that “the best way to protect your interests throughout the selling process is to understand agency” and explains the types of dual agency.¹⁸⁸
- *Rossi Living LLC* directs consumers to the Department of State’s “BE WARY OF DUAL AGENCY” memo.¹⁸⁹
- *Silversons Realty* in Scarsdale advises consumers: “Before you enter into a discussion with a real estate agent regarding a real estate transaction, you should understand what type of relationship you wish to have with that agent,” and explains the types of dual agency.¹⁹⁰
- *Dorothy Jensen Realty Inc.* in White Plains addresses dual agency on the firm’s “Buying Your Home – Working With a Real Estate Agent” page, including some of the practical impact of dual agency: “the law states that a dual agent shall not disclose to the buyer that the seller will accept less than the list price, or

¹⁸⁷ Ex. 80 *Terms of Service*, Douglas Elliman Real Estate, <https://www.elliman.com/terms-of-service> (last accessed July 13, 2018).

¹⁸⁸ Ex. 81 *Seller Representation*, Nutshell realty, <http://www.nutshellrealty.com/seller-representation.aspx> (last accessed July 13, 2018).

¹⁸⁹ Ex. 82 *Agency Disclosure*, Rossi Living LLC, <http://rossiliving.com/agency-disclosure/> (last accessed July 13, 2018).

¹⁹⁰ Ex. 83 *Seller’s Guide*, Silversons Realty LLC, <http://www.silversons.com/resources/sellers-guide/> (last accessed July 13, 2018).

disclose to the seller that the buyer will pay more than the offer price, without express written permission.”¹⁹¹

187. It’s not as if Houlihan Lawrence’s website is simply out of date. The firm actively maintains a website that it touts as having “a consumer focus that is a radical departure from the brokerage norm” and was “built to meet the needs” of consumers.¹⁹²

188. Houlihan Lawrence exercises “firm control” over its and its agents’ advertising to “create a consistency of experience across the brand.”¹⁹³ The absence of references to dual agency in Houlihan Lawrence’s online materials reflects a company-wide corporate policy.

D. Houlihan Lawrence expressly adopts a hands-off, “only if asked” strategy to discussing the downsides, risks, and options of dual agency

*“Your Houlihan Lawrence agent will present you with the required New York State Agency Disclosure document and answer any questions that you might have.”*¹⁹⁴

– Houlihan Lawrence Handbook for Homebuyers

189. Houlihan Lawrence uses a strategy of shifting its own disclosure burdens over to clients, by adopting a policy of merely handing clients pre-filled Statutory Disclosure Forms and requiring clients to try to figure out what

¹⁹¹ Ex. 84 *Buying Your Home: Working with Agents*, Dorothy Jensen Realty Inc., <http://www.dorothyjensenrealty.com/Pages/WorkingWithAgents.aspx> (last accessed July 13, 2018).

¹⁹² Ex. 85 *Houlihan Lawrence Launches New Consumer-Focused Web Site*, Business Wire (Jan. 25, 2010, 10:01 AM), <https://www.businesswire.com/news/home/20100125006109/en/Houlihan-Lawrence-Launches-New-Consumer-Focused-Web-Site>.

¹⁹³ Hughes, *supra* note 10.

¹⁹⁴ Ex. 86 *Buyer’s Guide*, Houlihan Lawrence, available at http://houlihan.media.active-clients.com/files/company/36/5305/Handbook_for_Homebuyers__2016/ (last accessed July 13, 2018).

questions, if any, they need to ask in order to understand dual agency. Houlihan Lawrence's burden-shifting strategy fails to meet its disclosure obligations.

190. Houlihan Lawrence sets out its "only if asked" strategy in its "Handbook for Homebuyers" and "Seller's Guide," which are presented as "comprehensive guides" to cover "every facet of the home buying experience" and include "everything you need to know" to buy or sell your home. Neither of these 20-plus-page spreads includes "dual agent" or any other agency-related term in its extensive "Glossary of Terms." They contain only a single paragraph on "Agency Disclosure Law"—with no mention of dual agency. Rather, they say just this:

AGENCY DISCLOSURE LAW

As a [homebuyer or homeseller], you have choices regarding the service and representation you receive when working with [an agent or a realtor]. Your Houlihan Lawrence agent will present you with the required New York State Agency Disclosure document and answer any questions that you might have. Receipt of this information is acknowledged by signing and dating the appropriate form.¹⁹⁵

191. So in its "comprehensive guides," the only thing Houlihan Lawrence says to homebuyers and sellers about agency is that it will provide the Statutory Disclosure Form and answer questions, if asked.

¹⁹⁵ Ex. 87, *Buyer's Guide*, Houlihan Lawrence, available at https://media.houlihanlawrence.com/files/company/36/17553/2018__NY_Buyer_Guide/ (last accessed July 13, 2018); Ex. 88, *Seller's Guide*, Houlihan Lawrence, available at https://media.houlihanlawrence.com/files/company/36/17543/2018__NY_Sellers_Guide/ (last accessed July 13, 2018) [slight differences in wording between the Handbook for Homebuyer and the Seller's Guide are provided above with both versions in brackets].

192. Houlihan Lawrence’s client guides also reflect the firm’s strategy of hiding the truth about dual agency in other ways. For example, the “comprehensive guides” direct homebuyers and sellers to other resources as to certain other issues—including the New York Attorney General’s website for more information on “Megan’s Law” and to FEMA’s website to learn more about flood zones—but Houlihan Lawrence pointedly avoids directing clients to the New York Department of State’s website or to the Department of State’s legal memo warning consumers to “BE WARY OF DUAL AGENCY.”¹⁹⁶

E. Houlihan Lawrence uses misleading and uninformative listing agreements

*“Your agent’s fiduciary duties to you need never be compromised.”*¹⁹⁷

– New York Department of State

193. With its seller clients, Houlihan Lawrence generally enters a listing agreement, formally called an “Exclusive Right to Sell Agreement.” The listing agreements contain an “In-House Sales” section purportedly advising sellers of their options if a dual-agent situation arises. The listing agreements don’t just fail to inform sellers of all the risks, downsides, and options of dual agency—they also confuse and mislead sellers, including by suggesting that sellers will lose out on potential purchasers unless they agree to dual agency.

¹⁹⁶ *Id.*

¹⁹⁷ Legal Memorandum LI12, *supra* note 35.

194. The listing agreements purport to lay out the options if a dual-agent situation arises, but the agreements mislead sellers, including by failing to explain that they have the “absolute right to refuse to consent” to dual agency; creating the misimpression that consent to dual agency should be the general rule rather than the exception to the rule; and by making it sound like sellers will lose out on deals unless they agree to dual agency, including by suggesting that unless sellers are willing to consent to dual agency, their homes shouldn’t be shown to Houlihan Lawrence buyer clients, and sellers will miss out on all those potential buyers.

195. The listing agreements’ suggestion that sellers will lose out on possible deals unless they consent to dual agency is wrong—and it’s exactly the opposite of what brokers are supposed to tell consumers. As the Department of State explains in its legal memo to consumers:

As a principal in a real estate transaction, you should *always* know that you have the right to be represented by an agent who is loyal only to you throughout the entire transaction. Your agent’s fiduciary duties to you *need never be compromised*.¹⁹⁸

196. Houlihan Lawrence’s listing agreements fail to disclose the downsides, risks, and options of dual agency in a variety of other ways as well. For example:

- They don’t explain that an agent’s fiduciary duty of loyalty—which is lost in dual agency—“prohibits your

¹⁹⁸ Legal Memorandum LI12, *supra* note 35 (emphasis added).

agent from advancing any interests adverse to yours or conducting business to benefit the agent or others.”¹⁹⁹

- They don’t explain that dual agents cannot “recommend or suggest a price the Buyer should offer or pay for the property,” or “recommend or suggest a price the Seller should accept or counter.”²⁰⁰
- They don’t explain that Houlihan Lawrence will pocket a double commission on “in-house,” dual-agent deals, giving the firm a financial incentive to do a deal that may not be in the clients’ best interest.
- They don’t explain that clients can require the broker to reduce its commission as a condition to consenting to dual agency.²⁰¹
- They describe dual agency solely as a potential future concern, don’t explain that Houlihan Lawrence may seek advance consent to dual agency, and they don’t explain the pros and cons of advance consent.
- They use confusing, unclear, outdated, and inconsistent terms that fail New York’s “Plain English Law.”²⁰²

197. In sum, Houlihan Lawrence’s listing agreements fit perfectly into its broader scheme to dupe clients into dual-agent deals and underscore that even in its corporate legal documents discussing dual agency, Houlihan Lawrence doesn’t tell clients what they need to know, and instead misleads them into believing that

¹⁹⁹ *Id.*; see also Ex. 89 *Agency Disclosure*, NYSAR, available at <http://www.nysar.com/legal/key-legal-issues/agency-disclosure> (clients “need to be fully informed as to the fiduciary obligations they will be losing by agreeing to dual agency”) (last accessed July 13, 2018).

²⁰⁰ Ex. 50 NYSAR Dual Agent Form ¶ 10.

²⁰¹ Compare with Ex. 50 NYSAR Dual Agent Form ¶ 8; Ex. 50A NYSAR Designated Agent Form ¶ 7.

²⁰² See Gen. Oblig. Law § 5-702.

they'll be losing out unless they submit to dual agency and give up their agents' undivided and undiluted loyalty.

F. Houlihan Lawrence fails in its duty to follow up with clients once a dual-agent situation actually arises

*“if a potential purchaser begins negotiations of any type, it is required that the licensee contact the seller and inform them that there is a dual agency situation where the buyer is showing interest in the property. . . . In order to minimize the potential for liability, all notices should be in writing and made at the time of negotiations or immediately thereafter.”*²⁰³

– NYSAR

198. Even in cases where a broker has obtained valid advance informed consent to dual agency, the broker has a continuing obligation to notify the client whenever an actual dual-agency situation arises. But Houlihan Lawrence fails to provide the required follow-up disclosure before acting as a dual agent. Worse, Houlihan Lawrence salespeople will continue to refer to themselves as “buyer’s agent” and “seller’s agent” when facilitating negotiations between parties to dual-agent transactions. As a result, Houlihan Lawrence allows buyers and sellers to negotiate under the mistaken belief that they have their agents’ undivided and undiluted loyalty.

199. Houlihan Lawrence also fails to explain, once a dual-agent situation arises, whether it is acting as a “dual agent” or a “dual agent with designated sales agents,” which are two similar but different species of dual agency. Buyers and

²⁰³ Ex. 89 *Agency Disclosure*, *supra* note 199.

sellers have a right to know whether their Houlihan Lawrence salespeople are acting as mediators (dual agent) or quasi-advocates (dual agency with designated sales agents), and they cannot know unless Houlihan Lawrence tells them.

200. Houlihan Lawrence can and should make the required follow-up disclosures using the Statutory Disclosure Form. The Form itself anticipates such follow-up, advising consumers: “Throughout the transaction you may receive more than one disclosure form.”²⁰⁴ At the outset of the relationship, Houlihan Lawrence is often a “seller’s agent” or a “buyer’s agent,” and marks the Form accordingly. Once a dual-agent situation arises, Houlihan Lawrence should provide a new Form indicating that it’s now acting as a “dual agent” or “dual agent with designated sales agents.”

201. By failing to timely notify both parties when a dual-agent situation arises and failing to make clear when it is acting in a dual-agent capacity, Houlihan Lawrence strips its clients of their right to undivided and undiluted loyalty without their knowledge, breaching its fiduciary duty.

G. Houlihan Lawrence fails to disclose to buyers all compensation paid to the firm in a dual-agent transaction

“Where a broker’s interests or loyalties are divided due to a personal stake in the transaction or representation of multiple parties, the broker must disclose to the principal

²⁰⁴ See also *Annual Compliance Review for Brokers*, *supra* note 107 (indicating that real estate brokers have a statutory or common-law obligation to provide their clients with a new Statutory Disclosure Form when the agency relationship changes from single to dual: “If dual agency or designated becomes the methodology for you to complete an in-house transaction, you must a) obtain the informed consent of the buyer and seller to the dual agency role; and b) if your Agency Disclosure Form does not reflect your capacity as a dual agent or designated agent, a new Section 443 notice must be executed.”).

*the nature and extent of the broker's interest in the transaction or the material facts illuminating the broker's divided loyalties.”*²⁰⁵

– New York Court of Appeals

202. Sellers are aware of the full commission that Houlihan Lawrence receives on the sale of their property. The full commission paid to Houlihan Lawrence is specified in the listing agreement between Houlihan Lawrence and the seller.

203. When Houlihan Lawrence represents both the buyer and seller, it receives the entire commission, and the full amount of the compensation it receives must be disclosed to the buyer. The buyer is entitled to know the amount of all compensation paid to Houlihan Lawrence as a dual agent, just as the buyer is entitled to know any other information that may affect the agent's advice. Indeed, a real estate broker “shall not receive compensation from more than one party except with the full knowledge and consent of the broker's client.”²⁰⁶

204. Houlihan Lawrence breaches its fiduciary duty to buyers in dual-agent transactions by not disclosing the amount it will be paid by the seller. Buyers cannot learn this commission information from any other source but Houlihan Lawrence, because the “listing office commission is not visible on the MLS sheets, only what the owner is offering for the sale of their property to the selling agent.”²⁰⁷

²⁰⁵ *Dubbs v. Stribling & Assoc.*, 96 N.Y.2d 337, 340 (2001).

²⁰⁶ 19 NYCRR 175.7.

²⁰⁷ *Who Pays the Commission?*, *supra* note 146.

H. Houlihan Lawrence's individual agents are trained to rely on the firm's broken system of misinformation and phony advance consent

*"agents report that many of the agents they deal with do not understand dual agency, are unable to explain it to their client and fail to make required disclosures."*²⁰⁸

– Edward I. Sumber, Longtime counsel to HGAR

205. Houlihan Lawrence's institutional culture and strategy of non-disclosure and misinformation about dual agency creates a systemic disclosure void that the firm's individual agents could not possibly fill on an ad hoc basis.

206. Even if Houlihan Lawrence clients weren't being duped by pre-filled Statutory Disclosure Forms, misled by marketing hype about phony benefits of dual agency, and deprived of plainspoken written disclosures like those found in the NYSAR forms that Houlihan Lawrence doesn't use, Houlihan Lawrence knows that real estate agents require training and education to make the many detailed disclosures needed to enable homebuyers and sellers to make an informed decision about dual agency.

207. Agents' struggles with their agency-related disclosure duties are well-recognized from every corner of the industry:

- The Department of State recognized the problem that "real estate brokers and salespersons themselves, seldom realize the inherent problems of a real estate agent acting as a dual agent."²⁰⁹

²⁰⁸ Ex. 90 Edward I. Sumber, *Buyer Agency, Dual Agency, Property Condition Disclosure and Short Sales are Focus of Legal Scan*, Real Estate In-Depth, Sept. 2011, available at <http://www.dolgettalaw.com/pdf/2011-09-buyer-agency.pdf>.

²⁰⁹ Legal Memorandum LI12, *supra* note 35.

- The *New York Times* reported that real estate agents “do not fully understand the complexities of broker allegiance.”²¹⁰
- HGAR’s longtime counsel recognized that many agents “are unaware of their obligations under Section 443 of the Agency Relationship Disclosure Law,” and that undisclosed, non-consensual dual agency “remains a particularly difficult problem in New York State” that has “resulted in numerous complaints against licensees.”²¹¹
- NAR survey data has found that many agents “do not understand dual agency, are unable to explain it to their client and fail to make required disclosures.”²¹²
- In its operation of a Legal Hotline for members, NYSAR reported that agents “often misunderstand or were wrongfully informed as to the requirements of agency disclosure.”²¹³
- In May 2016, NYSAR informed the New York State Legislature that agents “are often confused by the agency relationships created during the real estate transaction.”²¹⁴

208. The mass confusion makes it essential for an eminent mega-brokerage firm like Houlihan Lawrence which purports to act with the “greatest integrity”²¹⁵

²¹⁰ Brenner, *supra* note 48.

²¹¹ *Mutually Dependent Transactions*, *supra* note 123.

²¹² *Buyer Agency*, *supra* note 208 (discussing 2011 NAR Member Profile, a bi-annual survey of NAR’s member real estate boards that seeks to determine the most pressing issues facing its membership).

²¹³ Ex. 91 S. Anthony Gatto, *NYSAR Legal Hotline: 2010 in Review*, N.Y. State Realtor 10, 13, available at http://www.nysar.com/docs/default-source/members-pdfs/naylor_nyrs0211.pdf?sfvrsn=0 (last accessed July 13, 2018).

²¹⁴ Ex. 92 Helene Weinstein & John Bonacic, *Memorandum in Support: A.9474 by Assemblymember Helene Weinstein, S. 7248 by Senator John Bonacic*, NYSAR, May 2016, available at <http://www.nysar.com/docs/default-source/members-pdfs/a-9474-s-7248---ce-agency-memo.pdf?sfvrsn=2>.

²¹⁵ Ex. 26 *Our Story*, Houlihan Lawrence, https://www.houlihanlawrence.com/our_story/ (last accessed July 13, 2018).

to establish policies and procedures to ensure that its agents make the legally mandated disclosures and obtain informed consent before acting as dual agents.

209. Instead, Houlihan Lawrence has implemented the very opposite policies and procedures and trained its salespeople, including at its own “HL University,” to adhere to a standardized protocol—including to say no more about dual agency than is in the Statutory Disclosure Form and Houlihan Lawrence’s evasively worded form agreements—and to follow a check-the-box approach that falsely equates consumers’ signatures on pre-filled Statutory Disclosure Forms with full and frank disclosure and informed consent.

210. Rather than establishing policies and procedures that properly address disclosure of agency relationships—for example, by requiring its salespeople to use the NYSAR Forms or some other separate lawyer-written disclosure and acknowledgement form—Houlihan Lawrence has instead adopted policies and procedures to further its bait-and-switch scheme.

I. Houlihan Lawrence has its in-house sales teams unlawfully market themselves in a way that falsely suggests they are standalone real estate brokerage firms

*“The Nancy Kennedy Team is a dedicated real estate agency serving New York’s Westchester County, Putnam County & Hudson Valley.”*²¹⁶

– Houlihan Lawrence’s “The Nancy Kennedy Team”

211. New York law permits real estate licensees associated with the same real estate brokerage firm to join together for the sole and limited purpose of advertising themselves to the public as a “team.”

212. Real estate “teams” are recognized in New York law only in the real estate advertising regulations, where they are defined as two or more persons, “one of whom must be an associate real estate broker or real estate salesperson, associated with the same real estate brokerage who hold themselves out or operate as a team.”²¹⁷

213. A team is not a separate, licensed entity. It exists only within a licensed real estate brokerage firm and operates with the approval and under the supervision of the brokerage. New York real estate advertising regulations prohibit use of team names that suggest that the team is a standalone brokerage. Team names that violate this prohibition sow consumer confusion by obscuring the

²¹⁶ Ex. 93 *Nancy Kennedy Team*, Facebook, https://www.facebook.com/pg/thenancykennedyteam/about/?ref=page_internal (last accessed July 13, 2018).

²¹⁷ See 19 NYCRR 175.25(a)(2).

relationship between the team and its brokerage.²¹⁸ When dealing with an unlawfully named team, consumers may not understand that their relationship is, in fact, with Houlihan Lawrence and that a dual-agent situation arises whenever the misleadingly named team and another Houlihan Lawrence agent or team is on the other side of a transaction. NAR has recognized “the confusion that teams can cause over who is the broker” given that “a team can appear to operate as a separate brokerage firm to consumers.”²¹⁹

214. A team name must consist of the word “team” and the full licensed name of the licensed team members or else be followed by the name of the brokerage with which the team members are affiliated.²²⁰ Using “any other terms besides ‘team’”—for instance, “associate,” “realty,” “real estate,” or “group”—is prohibited because such terms falsely suggest that the team is a standalone brokerage.²²¹

215. Yet Houlihan Lawrence has its teams use names that violate New York’s laws and regulations.²²² For instance:

- Miriam Lipton and Debby Glasser of Houlihan Lawrence’s Scarsdale office operate “The Glasser Lipton Group.”²²³

²¹⁸ They also run afoul of Real Prop. Law § 441-c(1)(A), which prohibits “dishonest or misleading advertising.”

²¹⁹ Ex. 94 *Legal Issues for Teams*, Nat’l Ass’n of Realtors (Sept. 11, 2007), available at <https://www.nar.realtor/being-a-realtor/partnerships-teams/legal-issues-for-teams>.

²²⁰ 19 NYCRR 175.25(e)(1).

²²¹ *Id.*

²²² See Real Prop. Law § 441-c(1)(A); 19 NYCRR 175.25(e)(1).

- Debra, Douglas, and Cheryl Tricarico of Houlihan Lawrence's Irvington office operate the "Tricarico Realty Team."²²⁴
- Filomena Rosemary Stern, Steven Geiger, and Amy Via of Houlihan Lawrence's White Plains office operate "The Geiger, Stern & Via Real Estate Team."²²⁵
- Donna and Scott McElwee of Houlihan Lawrence's Rye office operate "Donna & Scott McElwee Real Estate."²²⁶

216. The Nancy Kennedy Team operating out of Houlihan Lawrence's Croton-on-Hudson office holds itself out to the public not just as a team, but as "a dedicated real estate agency serving New York's Westchester County, Putnam County & Hudson Valley."²²⁷

217. Houlihan Lawrence's "Gino Bello Homes" omits the required term "team" altogether—from the team name, logo, web address, and marketing materials.²²⁸ Massive "Gino Bello Homes" posters displayed in high-traffic Westchester County locations illustrate Houlihan Lawrence's aggressive promotion of its teams as standalone brokerages:

²²³ Ex. 95 *The Glasser Lipton Group at Houlihan Lawrence*, Facebook, https://www.facebook.com/pg/The-Glasser-Lipton-Group-at-Houlihan-Lawrence-38966160777324/about/?ref=page_internal (last accessed July 13, 2018).

²²⁴ Ex. 96 *Tricarico Realty Team*, Facebook, <https://www.facebook.com/TricaricoEnterprises> (last accessed July 13, 2018).

²²⁵ See, e.g., Ex. 97 *The Geiger, Stern, and Via Real Estate Team*, <http://thegeigersternviarealestateteam.com/> (last accessed July 13, 2018).

²²⁶ Ex. 98 *Donna and Scott McElwee Real Estate*, <https://www.donnaandscottmcelweerealestate.com/list-my-home/> (last accessed July 13, 2018).

²²⁷ Ex. 93 *The Nancy Kennedy Team*, Facebook, https://www.facebook.com/pg/thenancykennedyteam/about/?ref=page_internal (last accessed July 13, 2018).

²²⁸ Ex. 99 *Gino Bello Homes*, <https://www.ginobellohomes.com/> (last accessed July 13, 2018).



218. Houlihan Lawrence's Gino Bello Homes team also violates the rule that there should be "No fancy titles within teams."²²⁹ The team leader Biagio (Gino) Bello has declared himself the "President" of "Gino Bello Homes" while giving Gerardo (Gerry) Magnarelli the impressive-sounding title "Managing Director."²³⁰ Such titles serve to further confuse consumers into believing Gino Bello Homes is a separate entity from Houlihan Lawrence.

219. The Gino Bello Homes Instagram page is chock full of advertisements that violate the prohibition on use of team-specific logos in advertisements that do not also include the Houlihan Lawrence name or logo:

²²⁹ S. Anthony Gatto, *NYSAR 2016 Business Meetings Legal Update Session*, February 2016, video available at <https://ensemble.annese.com/hapi/v1/contents/permalinks/realestateteams/view> (Team members "can't have a corporate title. You can't be president for an entity that doesn't exist.... No fancy titles within teams.").

²³⁰ Ex. 100 *Our Agents*, Gino Bello Homes, <https://www.ginobellohomes.com/our-agents/> (last accessed July 13, 2018).





220. Houlihan Lawrence teams also fail to comply with the real estate advertising regulatory requirement that the homepage of the team's website include a link to Houlihan Lawrence's website.²³¹

221. By facilitating and permitting its sales teams to advertise in a manner that confuses consumers, Houlihan Lawrence further impairs consumers' ability to make informed choices about their agency relationships.

²³¹ See Ex. 101 *The Nancy Kennedy Team*, <http://www.thenancykennedyteam.com/> (last accessed July 13, 2018).

J. Houlihan Lawrence’s in-house sales teams practice impermissible “within-team” designated sales agency

*“Consumers think you are working solely for them. That’s what they believe. And that’s how we have to act.”*²³²

– S. Anthony Gatto, NYSAR General Counsel

222. A key motivator for real estate agents to form teams and advertise as teams is to sell consumers on the benefits of having a whole team of agents on their side rather than just one agent. For instance, Houlihan Lawrence’s “The Nancy Kennedy Team” pitches to clients: “You don’t get one broker—you get five.”²³³

223. Because teams lead consumers to believe that every member of the team is acting in the clients’ best interests, members of the same team may not serve as designated sales agents for both the buyer and seller in a Dual Agent with Designated Sales Agents situation.

224. NYSAR’s General Counsel, Anthony Gatto, has counseled NYSAR members that “designated agency should not be practiced within a team.”²³⁴ In a 2016 presentation, Gatto illustrated why it would be absurd to allow real estate agents to promote themselves as a team and then act as dual agents, by imagining the truth-in-advertising disclaimer necessary to reveal the reality of the situation:

²³² Ex. 102 Edward I. Sumber, *Broker Compliance and Supervision (Starting Over)*, Real Estate In-Depth, Oct. 2013, available at <http://dolgettalaw.com/pdf/2013-10-broker-compliance-and-supervision.pdf>.

²³³ See, e.g., *Nancy Kennedy Team*, *supra* note 231.

²³⁴ See, e.g., Gatto, *supra* note 229.



Team Agency Issues

- Remember consumers believe the entire team is acting in their best interest..why else would you form and promote a team?
- The Anthony Gatto Team consists of 20 licensees and we will work to sell your home*

*The Anthony Gatto Team does not work in your best interest if we have another client that wants to buy your property so not all of the team members will be working in your best interest even though you thought they were.

225. It is even more outrageous for a team to practice designated sales agency within the team and allow the team *leader* to act as a designated sales agent on behalf of one of the parties, in part because, as NYSAR's General Counsel explains, "consumers believe that the team leader has this supervisory duty" over the other members of the team.²³⁵ Moreover, the team leader is the team's "rainmaker," primarily responsible for bringing in new business and on whom the other team members depend for sales commissions and client referrals. Team leaders also have the power to bring in and expel team members. An irreconcilable conflict of interest exists whenever a team leader acts as a designated sales agent

²³⁵ *Id.*

opposite a subordinate member of the same team. That's why NYSAR's General Counsel advises that a "Team 'leader' should never be a designated agent."²³⁶

226. Designated sales agency within a team is also unworkable because teams are "designed to share information and clients," so "multiple team members may have confidential information about a client,"²³⁷ making it impracticable for team members to fairly give advice in dual- and designated-agency situations without disclosing the clients' confidential information.

227. Houlihan Lawrence teams practice "within-team" designated sales agency—where members of the same team represent both the buyer and the seller. Even worse, Houlihan Lawrence team *leaders* negotiate against their subordinate, and hopelessly conflicted, team members. Houlihan Lawrence teams engage in this misconduct without disclosing to clients that the practice of designated sales agency within the same team presents additional conflicts of interest for the real estate agents and poses added dangers to the client. Houlihan Lawrence does not have its teams disclose information to clients about referral fees, commission splits, and other financial arrangements among team members that are material to the client's decision whether or not to consent to "within-team" designated agency.

²³⁶ Ex. 103 S. Anthony Gatto, *Legal Update Winter 2016*, available at <https://www.grar.org/wp-content/uploads/2017/07/GRAR-Legal-Update-Winter-2016.pdf>; *see also* Gatto, *supra* note 229 ("If the team does something illegal, the broker will be held liable for making that same mistake so to speak.... Team structure does not nullify or otherwise negate the obligations of a broker to comply with all applicable laws, rules, regulations.").

²³⁷ *Legal Issues for Teams*, *supra* note 219.

228. Houlihan Lawrence is responsible for the misconduct of its sales teams. NYSAR's General Counsel has warned its broker members: "If the team or a member of team did it... so did the broker."²³⁸

229. Yet Houlihan Lawrence permits and encourages its teams to engage in illegal forms of dual agency. Designated sales agency within a team—particularly when a team leader acts as one of the designated sales agents—constitutes a per se breach of the fiduciary duties owed by Houlihan Lawrence to both the buyer and seller. Houlihan Lawrence's inherently illegal practice of designated sales agency within the same Houlihan Lawrence team further demonstrates its institutionalized commitment to dual agency no matter how pernicious.

K. Houlihan Lawrence waits until it is too late to check if adequate disclosures have been made—and even then only looks to see if the Form has been signed

*The Statutory Disclosure Form "must be presented to a consumer at 'first substantive contact'."*²³⁹

– NYSAR

230. Houlihan Lawrence purports to follow a "rigorous closing protocol" to ensure that its agents receive sales commissions only after they have documented compliance with Houlihan Lawrence's disclosure obligations. No matter how "rigorous," a "protocol" implemented at closing is too little, too late. Houlihan Lawrence cannot remove the stain of undisclosed, non-consensual dual agency by

²³⁸ See, e.g., *Legal Update Winter 2016*, supra note 236; see also Gatto, supra note 229 ("If the team does something illegal, the broker will be held liable for making that same mistake so to speak.... Team structure does not nullify or otherwise negate the obligations of a broker to comply with all applicable laws, rules, regulations.").

²³⁹ *Agency Disclosure*, supra note 199.

revealing its divided loyalties at closing, *after* the parties have committed to the transaction and *well after* disclosure is required by law.

231. Houlihan Lawrence administers its “closing protocol” with the same check-the-box approach that characterizes its overall approach to its disclosure obligations. Houlihan Lawrence merely checks that its clients have received and executed a Statutory Disclosure Form—it does not investigate whether its agents have provided clients all the information they need to give informed consent to dual agency. Houlihan Lawrence doesn’t even confirm that the Statutory Disclosure Form is correct—it allows clients to close even when the Form incorrectly states that Houlihan Lawrence acted solely in the clients’ interests when, in fact, Houlihan Lawrence acted as a dual agent with divided loyalties.

L. Houlihan Lawrence’s supervisory duties require it to take appropriate steps so that its agents understood and followed the law

*“It is . . . critical that every person in a supervisory role in a brokerage firm first reeducate themselves and then ascertain whether the salespersons affiliated with the firm have clear knowledge of current law, rules and regulations.”*²⁴⁰

– Edward I. Sumber, Longtime counsel to HGAR

232. A real estate broker has a duty to provide affiliated salespersons “regular, frequent and consistent personal guidance, instruction, oversight and superintendence.”²⁴¹ Consistent with that supervisory obligation, NYSAR’s “Broker Reference Manual” recommends that real estate brokers conduct an annual

²⁴⁰ *Broker Compliance*, *supra* note 232.

²⁴¹ 19 NYCRR 175.21.

compliance review to ensure compliance with Section 443.²⁴² Houlihan Lawrence would have identified widespread violations of its disclosure-and-informed consent obligations if it acted in accordance with a responsible compliance plan.

10. Houlihan Lawrence has acted in conscious disregard of its fiduciary duties

*“We try to create a consistency across the brand.”*²⁴³

– Chris Meyers, Houlihan Lawrence President

233. Since at least January 1, 2011, Houlihan Lawrence has systematically breached its fiduciary duties to its clients in thousands of home sales and reaped hundreds of millions of dollars in ill-gotten dual-agent sales commissions. Houlihan Lawrence’s abandonment of its clients and disregard for fiduciary duties can only have been intentional.

234. Houlihan Lawrence stripped all members of the Class of their right to Houlihan Lawrence’s undivided and undiluted loyalty as part of a centralized scheme to increase the firm’s profitability; to expand its share of the market for real estate brokerage services in the Westchester, Putnam, and Dutchess tri-county area; to fund its recent expansion into Connecticut; and to make it a more attractive and expensive acquisition target.

235. Houlihan Lawrence advanced its scheme by cultivating a firm culture and imposing firm-wide policies and practices that caused Houlihan Lawrence to

²⁴² *Annual Compliance Review for Brokers*, *supra* note 107.

²⁴³ Hughes, *supra* note 10.

act as a Dual Agent with ever-increasing frequency. Houlihan Lawrence made dual-agent transactions a routine business practice by, among other things:

- a. Not disclosing downsides, rights, or options of dual agency in its marketing materials.
- b. Publicly hyping the purported benefits of dual agency to consumers.
- c. Permitting and encouraging agents to represent to the public that they will represent clients' interests throughout a transaction without mentioning the possibility of dual agency.
- d. Not directing its agents to use the NYSAR Forms to obtain informed written consent to dual agency.
- e. Financially incentivizing its agents to steer clients into dual-agent transactions.
- f. Not requiring its agents to disclose that they receive a financial incentive to steer clients into dual-agent transactions.
- g. Having its agents pre-fill the Statutory Disclosure Form to indicate clients' advance informed consent to Dual Agent and Dual Agent with Designated Sales Agents relationships.
- h. Providing its agents systematically incorrect training in agency disclosures at "HL University."²⁴⁴
- i. Training agents to discuss agency issues with clients only if asked.
- j. Having its agents downplay the importance of the Statutory Disclosure Form by referring to it as mere "paperwork," giving the Form to clients as part of a group of "paperwork" documents for signature, and presenting it for signature by e-mail rather than in person.

²⁴⁴ Ex. 104 *Checklist for New Agents*, Houlihan Lawrence, http://www.hlagents.com/dfHHL/app/pdf/checklist_for_new_agents.pdf (last accessed July 13, 2018).

- k. Not tasking a designated, specially trained employee to give clients the agency disclosures, but instead leaving the task to agents whose livelihood depends on closing more deals.
- l. Permitting agents who are family members to act as opposing Designated Sales Agents in Dual Agent with Designated Sales Agent transactions.
- m. Permitting and encouraging members of the same sales team to act as opposing Designated Sales Agents in Dual Agent with Designated Sales Agents transactions.
- n. Permitting and encouraging sales team leaders to act as Designated Sales Agents in within-team Dual Agent with Designated Sales Agent transactions.
- o. Permitting sales teams to violate applicable advertising regulations.
- p. Requiring its agents to use Houlihan Lawrence's misleading "Exclusive Right to Sell Agreement" when acting as a listing agent.
- q. Permitting a single agent to represent the buyer or seller in the same transaction.
- r. Not requiring agents to use the Statutory Disclosure Form to make the required follow-up disclosures once a dual-agent situation has arisen and to confirm the client's knowledge of and informed written consent to the dual agency.
- s. Permitting and encouraging its agents who host an open house to represent a buyer who expresses an interest in the property at the open house.
- t. Permitting and encouraging agents to refer to themselves and one another as Buyer's Agent or Seller's Agent after a dual-agent situation has arisen.
- u. Failing to notify clients who have been given inadequate or incorrect agency disclosures uncovered during its "closing protocol."

- v. Failing to report agents who have failed to make adequate disclosures to the Department of State.
- w. Permitting and encouraging agents to share confidential information about new listings at office and sales team meetings and later act as dual agents.
- x. Permitting and encouraging its agents to share new listings with other Houlihan Lawrence agents before the property appears on the HGMLS and later act as dual agents.
- y. Not publishing sales data showing the number of dual-agent transactions.
- z. Not identifying on its website when displaying sold listings that Houlihan Lawrence acted as a dual agent in connection with each such transaction.

236. Houlihan Lawrence's widespread breaches of its fiduciary duties are not the result of innocent mistakes, technical violations, or a few rogue agents. Houlihan Lawrence's corporate policies and practices, detailed above, demonstrate conscious disregard for Houlihan Lawrence's fiduciary duties. Houlihan Lawrence seeks to "create a consistency across the brand," including by requiring its agents to use company-approved contracts, maintaining "firm control" over all advertising, and putting its agents through "comprehensive" in-house training programs.²⁴⁵ In these and other ways Houlihan Lawrence ensures that its agents at all times act in accordance with Houlihan Lawrence's firm-wide strategy to cultivate dual-agent transactions. All class members' claims arise as a result of Houlihan Lawrence's unlawful course of conduct.

²⁴⁵ Ex. 104A Michele Miller, *Four Houlihan Lawrence Agents in Top .5 Percent on Nationwide Brokers Sales Poll*, Patch, July 19, 2013, https://patch.com/new-york/ossining/four-houlihan-lawrence-agents-in-top-5-percent-on-nationwide-broker-sales-poll_7d262384.

PLAINTIFFS' ALLEGATIONS

1. Plaintiff Pamela Goldstein

*"Break the Rules. Just sometimes. It's ok."*²⁴⁶

– Gino Bello, "The Face of Westchester Real Estate"

237. Plaintiffs repeat and re-allege the allegations above as if fully set forth here.

238. In the spring of 2017, Plaintiff Pamela Goldstein was looking online for a new home for her and her two elementary-age children.

239. On Thursday, March 23, 2017, Houlihan Lawrence listed for sale, for \$599,900, a single-family home (4 bedroom, 2.5 bath Center Hall Colonial) at 6 Wellington Terrace, White Plains, New York 10607.

240. On March 24, Ms. Goldstein viewed the listing for 6 Wellington Terrace on a real estate listing website and was immediately interested.

241. On the early morning of March 25, Ms. Goldstein telephoned the listing agent, Gino Bello, an associate real estate broker resident in Houlihan Lawrence's White Plains office, and left a voicemail expressing her interest in 6 Wellington Terrace.

242. On the morning of March 25, a different Houlihan Lawrence agent, Daniel Cezimbra, called Ms. Goldstein in response to her voicemail. Cezimbra did

²⁴⁶ Ex. 105 Gino Bello Homes, *Break the Rules*, Instagram, <https://www.instagram.com/p/BkPyZlOlRk-/?hl=en&taken-by=ginobellohomes> (last accessed July 13, 2018).

not explain why he rather than Bello was returning her call—he simply introduced himself as someone who “work[s] with Gino.”

243. During the call, Ms. Goldstein told Cezimbra that she was very interested in 6 Wellington Terrace and would like to see it as soon as possible. Cezimbra told Ms. Goldstein that the property was not available to be shown until the next day (March 26), but that he would be happy to show it to her then. Later that day, Cezimbra confirmed Ms. Goldstein’s appointment to see 6 Wellington Terrace and sent her other active property listings.

244. On Sunday, March 26, Ms. Goldstein viewed 6 Wellington Terrace with Cezimbra for the first time. During the viewing, Ms. Goldstein confided in Cezimbra that there was a signed contract on her then-current residence, and she needed to find a new home within the school district very quickly to ensure as smooth a transition as possible for her children. At the end of the viewing, Goldstein told Cezimbra that she intended to make an offer to purchase the property but wanted her parents to view it before making a final decision. Cezimbra showed the property to Goldstein’s parents later that day.

245. At around 8 p.m. Sunday evening, Ms. Goldstein advised Cezimbra that she was prepared to make an offer to purchase 6 Wellington Terrace and asked him to contact her to discuss strategy. Cezimbra advised Ms. Goldstein that multiple offers had already been made on the property and that she would need to come in above the asking price to have any chance. Late that night, on Cezimbra’s advice, Ms. Goldstein made an above-list offer to purchase the property.

246. On Monday, March 27, Cezimbra forwarded to Ms. Goldstein an e-mail he received from Bello indicating that the seller had received “multiple offers” on 6 Wellington Terrace and would “be going to highest and best Wednesday, March 29th no later than 5PM.”²⁴⁷ Cezimbra explained that “highest and best” meant essentially that there was a bidding war for the property and that Ms. Goldstein would need to significantly improve her offer if she hoped to win. Ms. Goldstein conferred and consulted with Cezimbra throughout much of the evening as she formulated what she expected would be her last offer.

247. Ms. Goldstein saw the property again on March 29 ahead of the 5 p.m. deadline for submission of “highest and best” offers. Shortly after 3 p.m., less than two hours before the deadline, Cezimbra advised Goldstein to make an offer of \$635,000. At 4:20 p.m., after conferring and consulting with Cezimbra throughout the day, Ms. Goldstein e-mailed Cezimbra to offer to purchase the property for \$635,000, with a 25% down payment, “contingent on an inspection and financing.”²⁴⁸ Cezimbra quickly acknowledged receipt and advised that he would present the offer on her behalf.²⁴⁹

248. Shortly after she submitted her “highest and best” offer of \$635,000, Ms. Goldstein received an e-mail from Nicole Corrado, the “Executive Assistant to The Gino Bello Homes Sales Team,” advising:

²⁴⁷ Ex. 106 E-mail from D. Cezimbra to P. Goldstein (Mar. 27, 2017, 5:27 PM).

²⁴⁸ Ex. 107 E-mail from P. Goldstein to D. Cezimbra (Mar. 29, 2017, 4:20 PM).

²⁴⁹ Ex. 107 E-mail from D. Cezimbra to P. Goldstein (Mar. 29, 2017, 4:32 PM).

Good Afternoon Pamela,

Dan asked that I send over the attached buyers documents to be signed. I've highlighted and marked where your signatures are required. At your convenience, please sign where indicted [sic] and e-mail or fax back to me.

Feel free to contact me with any questions.

Thank you in advance.²⁵⁰

249. Among the many highlighted and pre-marked "buyers documents" was a copy of the Statutory Disclosure Form. It was pre-filled to indicate that Houlihan Lawrence was acting in Ms. Goldstein's interests and representing her exclusively as a Buyer's Agent:

This form was provided to me by Daniel Cezimbra (print name of licensee) of Houlihan Lawrence Inc. (print name of company, firm or brokerage), a licensed real estate broker acting in the interest of the:

() Seller as a (check relationship below)

() Seller's agent

() Broker's agent

() Dual agent

() Dual agent with designated sales agents

Buyer as a (check relationship below)

Buyer's agent

Broker's agent

250. The Statutory Disclosure Form was also pre-filled to check the box for "Advance informed consent to dual agency with designated sales agents," with the space for identifying "designated sales agents" left blank:

²⁵⁰ Ex. 108 E-mail from N. Corrado to P. Goldstein (Mar. 29, 2017, 4:42 PM).

For advance informed consent to either dual agency or dual agency with designated sales agents complete section below:

Advance informed consent dual agency

Advance informed consent to dual agency with designated sales agents

If dual agent with designated sales agents is indicated above:

_____ is appointed to represent the buyer; and

_____ is appointed to represent the seller in this transaction.

251. Later that day, March 29, Ms. Goldstein signed the Statutory Disclosure Form acknowledging her receipt of the Form and returned it to Corrado.²⁵¹ Ms. Goldstein did not appoint a designated sales agent to work on her behalf.²⁵² Upon her receipt of Ms. Goldstein's Statutory Disclosure Form, Corrado modified the Statutory Disclosure Form, by identifying Cezimbra as the designated sales agent appointed to represent Ms. Goldstein and identifying Bello as the designated sales agent appointed to represent the seller.²⁵³ Ms. Goldstein never received Corrado's modified Statutory Disclosure Form.

252. A few hours after the 5 p.m. deadline for "highest and best" offers, Cezimbra contacted Ms. Goldstein and began pressuring her to improve her offer for a third time. He told her that the sellers had "more than one" offer for \$650,000 but might accept an improved offer from her.²⁵⁴ During calls that lasted until 11 p.m.,

²⁵¹ Ex. 112 Goldstein Statutory Disclosure Form.

²⁵² *Id.*

²⁵³ Ex. 113 Affidavit of Nicole Corrado in Support of Houlihan Lawrence's Motion to Dismiss ¶ 4, Sept. 7, 2018.

²⁵⁴ In discovery, Houlihan Lawrence has denied that the sellers "received two or more offers to purchase the Property for \$650,000 or more." Ex. 114 Def.'s Resps. to Pl.'s Notice to Admit, Sept. 17, 2018 (Response to Request No. 38).

Cezimbra repeatedly urged Ms. Goldstein to raise her offer from \$635,000 with 25% down to \$637,000 with 30% down.

253. The next morning, at 8 a.m., as Ms. Goldstein rushed to get her children ready for school, Cezimbra picked up where he left off the night before—pushing Ms. Goldstein to improve her offer. Ms. Goldstein caved in to the pressure and authorized Cezimbra to make an improved offer on her behalf on his proposed terms.

254. On Thursday, March 30, at 1:11 p.m., Cezimbra informed Ms. Goldstein: “The sellers on 6 Wellington Terrace have accepted our offer of \$637,000 with 30% down!”²⁵⁵ Cezimbra immediately started pressuring Ms. Goldstein to schedule a property inspection.

255. On March 31, Ms. Goldstein arranged to have the property inspected. Cezimbra warned her: “There’s a big possibility that the sellers may go with another offer” unless the inspection was completed by April 2 (a Sunday).²⁵⁶

256. On April 4, after the inspection had been completed but before the results were available, Cezimbra again threatened Ms. Goldstein that if the contracts were not “back in hands of sellers attorney by Friday at 5PM they will have to go to the next offer.”²⁵⁷

257. On Thursday, April 6, after the inspection turned up numerous problems with the property that Ms. Goldstein sought to have remedied prior to

²⁵⁵ Ex. 107 E-mail from D. Cezimbra to P. Goldstein (Mar. 30, 2017, 1:11 PM).

²⁵⁶ Ex. 109A E-mail from D. Cezimbra to P. Goldstein (Apr. 1, 2017, 9:21 AM).

²⁵⁷ Ex. 109 E-mail from D. Cezimbra to P. Goldstein (Apr. 4, 2017, 12:01 AM).

closing, Cezimbra pressured her with the threat that the sellers would go with another offer unless she purchased the property as-is. Ms. Goldstein again relented, after Cezimbra agreed to reimburse her for the hundreds of dollars wasted on the inspection.

258. On May 22, 2017, Ms. Goldstein purchased 6 Wellington Terrace for \$637,000.

259. Houlihan Lawrence pocketed the entire commission on the sale of 6 Wellington Terrace. It received a commission as the agent for the seller, and a commission as the agent for the buyer, Ms. Goldstein.

260. Ms. Goldstein's experience is disturbing on its face—not only did Houlihan Lawrence fail to disclose the downsides, risks, and options of dual agency to Ms. Goldstein, it affirmatively misled her by representing that Cezimbra was her “Buyer's agent,” and then used Cezimbra to pressure and coerce Ms. Goldstein to make an offer of more than \$35,000 above the listing price, and to further raise her offer and improve its financing terms, pay to have the house inspected and rush her through the inspection process, and ultimately force her to accept the property “as-is” even after the inspection revealed numerous issues with the property.

261. But Ms. Goldstein's experience is even more deeply disturbing in light of the fact that it is just one example of the entrenched and collusive relationships between Houlihan Lawrence team leaders like Bello (the seller's agent) and team subordinates like Cezimbra (Ms. Goldstein's supposed “Buyer's agent”).

262. Gino Bello bills himself as “The Face of Westchester Real Estate” (a term he registered as a trademark in June 2016).²⁵⁸ Bello boasts over \$300 million in career sales, was named “Best Realtor in Westchester” by Westchester Magazine in 2014 and 2015, and was ranked one of America’s Best Real Estate Agents in 2017 by Real Trends.

263. With Houlihan Lawrence’s encouragement and support, Bello founded and leads the “Gino Bello Homes” team within Houlihan Lawrence. Bello is the team’s “rainmaker,” the team member primarily responsible for bringing in new property listings. The advertising and marketing of those listings attracts potential buyers, and Bello in turn refers those buyers to one of his subordinates on the Gino Bello Homes team in exchange for a share (as high as 30%) of any commission the subordinate collects on the buyer representation. The Gino Bello Homes team members depend on Bello’s generation of new client leads and referrals and therefore have a huge financial incentive to advance Bello’s interests—even at the expense of their buyer clients.

264. Gino Bello Homes assures prospective clients: “When you are working with Gino Bello Homes, you are working with a trusted partner.”²⁵⁹ In reality, when a buyer and seller are both represented by Gino Bello Homes, neither party can receive loyal representation.

²⁵⁸ Ex. 110 *The Face of Westchester Real Estate: Trademark Details*, Justia, <https://trademarks.justia.com/867/44/the-face-of-westchester-real-86744921.html> (last accessed July 13, 2018).

²⁵⁹ Biagio “Gino” Bello: *The Face of Westchester Real Estate*, Facebook, <https://business.facebook.com/TopWestchesterRealtor/videos/2001935276515185/> (last accessed July 13, 2018).

265. Cezimbra, Ms. Goldstein’s “Buyer’s agent,” is one of Bello’s subordinate team members—and his brother-in-law. Cezimbra pledges to represent his clients with “extreme” and “unflinching dedication.”²⁶⁰ With Houlihan Lawrence’s encouragement and support, Cezimbra touts himself as “Westchester’s Top Buyer’s Agent” to imply to unsuspecting clients that he only represents buyers—a useful deception when seeking to represent buyer clients interested in a Gino Bello Homes listing. In reality, Cezimbra works alongside Bello on behalf of Gino Bello Homes’ seller clients.

266. According to publicly available sales records, Bello and Cezimbra have teamed up to represent Houlihan Lawrence buyer and seller clients in the same transaction on at least a dozen deals in just the last two years or so. While Cezimbra held himself out as representing the buyer in those transactions, Houlihan Lawrence reported the truth to HGMLS, crediting Bello with having represented both the buyer and seller as a dual agent—as it did with Ms. Goldstein’s transaction.

267. Cezimbra did not inform Ms. Goldstein that he was a member of the Gino Bello Homes team or that he is Bello’s brother-in-law. Cezimbra also did not inform Ms. Goldstein that Bello and Cezimbra had agreed to split any buy-side sales commission paid to Gino Bello Homes or Cezimbra if and when Ms. Goldstein purchased 6 Wellington Terrace.

²⁶⁰ Ex. 111 *Daniel Cezimbra*, Gino Bello Homes, <https://www.ginobellohomes.com/realestate/agent/daniel-cezimbra/> (last accessed July 13, 2018).

268. In withholding this and other material information from Ms. Goldstein, Cezimbra was following Houlihan Lawrence corporate policy, which does not require that its agents disclose to clients and obtain clients' informed written consent to agreements between Houlihan Lawrence team members or agents on referral fees, sales commission splits, and other financial arrangements.

269. In addition to withholding information about his collusive relationship with Bello, Cezimbra falsely represented himself to Ms. Goldstein as her "Buyer's agent" in the required Statutory Disclosure Form (see paragraph 249 above). Houlihan Lawrence and Cezimbra could only have been representing Goldstein as a Dual Agent because Bello and Cezimbra were both members of Houlihan Lawrence's Gino Bello Homes sales team, with Bello as team leader.

270. NYSAR has shown how to complete the Statutory Disclosure Form when both the seller and buyer provide informed consent to Houlihan Lawrence and its salespeople acting as Dual Agent (Figure H) or as Dual Agent with Designated Sales Agents (Figure I):²⁶¹

Figure H

Traditional dual agency (not advanced consent) demonstrates how a licensee should fill out the agency disclosure form when the licensee is a dual agent. Licensees should utilize this method of completing the form when both sides of the transaction are represented by the licensee's brokerage, but not as a seller's or buyer's agent.

- | | |
|--|--|
| <input type="checkbox"/> Seller as a (check relationship below) | <input type="checkbox"/> Buyer as a (check relationship below) |
| <input type="checkbox"/> Seller's agent | <input type="checkbox"/> Buyer's agent |
| <input type="checkbox"/> Broker's agent | <input type="checkbox"/> Broker's agent |
| <input checked="" type="checkbox"/> Dual agent | |
| <input type="checkbox"/> Dual agent with designated sales agents | |

²⁶¹ Ex. 91 *New York Realtors Guide to Agency Disclosure*, N.Y. State Realtor 15, 18, March/April 2011, available at https://www.nysar.com/docs/default-source/members-pdfs/naylor_nyrs0211.pdf?sfvrsn=0.

Figure 1

Traditional designated agency (not advanced consent) demonstrates how a licensee should fill out the agency disclosure form when the licensee is a designated sales agent. Licensees should utilize this method of completing the form when the consumers consent to designated agency and agree to have two different licensees from the same brokerage represent the best interest of each respective party. One licensee will be designated by the broker and seller to represent the seller and one licensee will be designated by the broker and buyer to represent the buyer. It should be noted that the broker remains a dual agent and can never be a designated agent.

- | | |
|---|--|
| <input type="checkbox"/> Seller as a (check relationship below) | <input type="checkbox"/> Buyer as a (check relationship below) |
| <input type="checkbox"/> Seller's agent | <input type="checkbox"/> Buyer's agent |
| <input type="checkbox"/> Broker's agent | <input type="checkbox"/> Broker's agent |
| <input type="checkbox"/> Dual agent | |
| <input checked="" type="checkbox"/> Dual agent with designated sales agents | |

For advance informed consent to either dual agency or dual agency with designated sales agents complete section below:

- Advance informed consent dual agency
 Advance informed consent to dual agency with designated sales agents

If dual agent with designated sales agents is indicated above:

Jennifer Jones is appointed to represent the buyer; and
John Doe is appointed to represent the seller in this transaction.

271. By misidentifying itself as a Buyer's Agent, Houlihan Lawrence falsely represented to Ms. Goldstein that Houlihan Lawrence did not represent the interests of the seller, that Houlihan Lawrence and Cezimbra were able to provide the full range of fiduciary duties to her, and that she continued to enjoy the right to have Houlihan Lawrence's and Cezimbra's undivided and undiluted loyalty to act at all times solely in her individual best interests to the exclusion of all other interests.

272. Moreover, by pre-marking the "Advance informed consent" box (see paragraph 250 above), Houlihan Lawrence implied that a dual-agent situation had not yet arisen; "advance consent" means consent given *in advance* of an event.

273. Houlihan Lawrence reinforced its false representation that it was Ms. Goldstein's loyal "Buyer's agent" by leaving blank the section identifying the names

of agents designated to represent the parties in the event of a “dual agent with designated sales agents” situation (see paragraph 250 above).

274. Cezimbra never corrected the Statutory Disclosure Form that falsely represented that Houlihan Lawrence and Cezimbra were acting in Ms. Goldstein’s interest as a Buyer’s Agent. Cezimbra never advised Ms. Goldstein that Houlihan Lawrence and Cezimbra were representing her in a dual agent capacity. In fact, Ms. Goldstein did not have *any* discussion with Cezimbra about the nature of his and Houlihan Lawrence’s dual agency relationship with her, the rights and obligations created by that relationship, or the consequences and implications of dual agency. Instead, Houlihan Lawrence wrote down the identities of the “designated sales agents” on the Statutory Disclosure Form only after Ms. Goldstein had signed and returned the Form, and without notifying her.

275. Houlihan Lawrence neither asked for nor obtained Ms. Goldstein’s informed written consent to its dual agency.

276. Houlihan Lawrence never disclosed to Ms. Goldstein “the benefits and detriments of providing advance consent prior to the [Statutory Disclosure] form being executed.”²⁶²

277. Houlihan Lawrence did not inform Ms. Goldstein of its practice and policy of financially rewarding its salespeople for dual-agent transactions by giving them an extra share of Houlihan Lawrence’s double commission.

²⁶² Ex. 47 Letter from Matthew W. Tebo, Legislative Counsel, N.Y. Dep’t of State, to Peter J. Kiernan, Counsel to the Governor (July 15, 2010).

278. Houlihan Lawrence never disclosed to Ms. Goldstein the total compensation it would receive on her purchase of 6 Wellington Terrace.

Ms. Goldstein did not know at the time she purchased the property that Houlihan Lawrence was entitled to receive a commission of 5% on the selling price.

279. Houlihan Lawrence collected a 5% sales commission on Ms. Goldstein's purchase of 6 Wellington Terrace. Houlihan Lawrence's sales commission was paid out of the proceeds of the sale of the property. Ms. Goldstein paid at least a portion of the commission collected by Houlihan Lawrence on the transaction, including because it was "incorporated within the price" she "agreed to pay for the house and the owner agreed to accept."²⁶³

280. Houlihan Lawrence's treatment of Ms. Goldstein throughout the transaction reflected that of an agent with conflicted interests and divided loyalties.

281. Houlihan Lawrence's conduct constitutes a breach of the fiduciary duties it owed to Ms. Goldstein irrespective of its good faith or bad faith and whether or not it intended to defraud her.

²⁶³ *Who Pays the Commission?*, *supra* note 146.

2. Plaintiffs Dr. Ellyn and Tony Berk

*“My premium marketing plan helps sellers obtain the maximum price through maximum exposure to the marketplace”*²⁶⁴

– Gino Bello, “The Face of Westchester Real Estate”

282. Plaintiffs repeat and re-allege the allegations above as if fully set forth here.

283. Winifred and Morton Berk lived at 190 Davis Avenue in the Highlands area of White Plains for nearly 60 years. They raised two children in their home, both now adults: Dr. Ellyn Berk, a New York City resident and consultant to philanthropic and cultural institutions, and Tony Berk, a North Carolina resident and former Westchester County assistant district attorney. Morton passed away in 1996, and in September 2013, Winifred passed away at the age of 95.

284. Ellyn and Tony assumed responsibility for selling their parents’ lifelong home. They didn’t quite know where to begin. They hadn’t lived in Westchester County in many years and didn’t have a relationship with an area realtor. They assumed they couldn’t go wrong by putting the sale in the hands of the most prominent real estate brokerage firm and realtor in White Plains: Houlihan Lawrence and Gino Bello.

285. Ellyn and Tony, on behalf of their parents’ estate, signed a “Listing Agreement” granting Houlihan Lawrence the exclusive right to sell 190 Davis

²⁶⁴ Ex. 115 “Premium Marketing Plan For: 190 Davis Avenue White Plains, NY 10605.”

Avenue.²⁶⁵ The Listing Agreement provided that “the Agent *immediately* is to submit this listing agreement to the Hudson Gateway Multiple Listing Services, Inc. (HGMLS), for dissemination to its Participants.”²⁶⁶

286. Ellyn and Tony were persuaded to sign with Houlihan Lawrence in part by Bello’s “Premium Marketing Plan” for their parents’ home. Bello represented that his “premium marketing plan helps sellers obtain the maximum price through maximum exposure to the marketplace.”²⁶⁷ Bello promised to promote the listing, in among other ways, on “the multiple listing service” and “a minimum of at least 30 major real estate portals and over 500 other national websites,” in Houlihan Lawrence’s “exclusive Gallery of Homes Magazine,” and through a “Postcard Marketing Campaign” of “500 Just Listed cards.”²⁶⁸

287. But Bello did not seek the “maximum price” for 190 Davis Avenue by giving it the “maximum exposure” he had promised. Bello did not even advertise the property to the general public through the multiple listing service (“MLS”) or popular online databases like Realtor.com, Trulia, and Zillow that consumers typically search for active property listings. Instead, Bello advised the Berks to “list” 190 Davis Avenue for \$469,900—but only marketed the property to a small pool of buyers through his personal network, rather than publish it on the MLS for

²⁶⁵ Ex. 116 Berk Exclusive Right to Sell Agreement.

²⁶⁶ *Id.* (emphasis added).

²⁶⁷ “Premium Marketing Plan,” *supra* note 264.

²⁶⁸ *Id.*

all buyers to see. Ellyn suggested testing the market by advertising the property openly, but Bello did not do so.

288. Bello's first attempted off-market deal for 190 Davis Avenue fell apart when the buyer, who was represented by one of Bello's Houlihan Lawrence office-mates, was unable to obtain financing. Several months later, Bello advised the Berks that he had found a buyer at \$479,000. Ellyn again asked Bello if they should put the house on the MLS to see what others would be willing to pay, given that Bello had found someone willing to pay at or above the listing price just by asking around. Bello said no, that it was in the Berks' best interests to sell without testing the market.

289. Following Bello's advice, on June 30, 2014, the Berks sold their parents' home for \$479,000, to a buyer represented by another Houlihan Lawrence agent, David Calabrese.

290. Bello never discussed with the Berks the possibility that a dual-agent situation could arise in the sale of their parents' home—nor did he ever explain the downsides, risks, and options the Berks would face if a dual-agency situation arose.

291. Bello also never disclosed to the Berks his longtime close personal friendship with Calabrese, the buyer's agent. Bello and Calabrese both started their real estate careers at Better Homes and Gardens Rand Realty's White Plains office and moved together to Houlihan Lawrence in November 2010 to work as part of the same in-house sales team. Calabrese remains intimate with Bello and the Gino Bello Homes sales team. For example, Calabrese's social media shows that, in

the last few years, he and Bello have enjoyed a shoe shine together at Grand Central Terminal,²⁶⁹ dined together at Westchester's exclusive Blue Hill at Stone Barns²⁷⁰ and Benjamin Steakhouse,²⁷¹ flown to Miami Beach²⁷² and Atlantic City,²⁷³ and celebrated the holidays at Westchester Hills Golf Club,²⁷⁴ Bello's birthday at Nusr-et,²⁷⁵ and the grand opening of a new development listed by Bello in Mamaroneck.²⁷⁶

292. Bello sold 190 Davis Avenue to Calabrese's client as a "pocket listing." A pocket listing is the real estate industry term for a listing that an agent keeps in his pocket and markets to only a small pool of buyers through personal networks rather than openly publishing it on the MLS for all buyers to see. Bello and Calabrese put the deal together in a couple of hours.

²⁶⁹ Ex. 117 *Gerry Magnarelli*, Facebook, <https://www.facebook.com/photo.php?fbid=10204282033510310&set=a.1188836640394.28955.1212672342&type=3&theater> (last accessed Sept. 12, 2018).

²⁷⁰ Ex. 118 *Alicia Albano Squitieri*, Facebook, <https://www.facebook.com/photo.php?fbid=10212455749612600&set=t.671040863&type=3&theater> (last accessed Sept. 12, 2018).

²⁷¹ Ex. 119 *David Calabrese*, Facebook, <https://www.facebook.com/photo.php?fbid=10153851722230864&set=t.671040863&type=3&theater> (last accessed Sept. 12, 2018).

²⁷² Ex. 120 *Gerry Magnarelli*, Facebook, <https://www.facebook.com/photo.php?fbid=10212237687396685&set=t.671040863&type=3&theater> (last accessed Sept. 12, 2018).

²⁷³ Ex. 121 *Gerry Magnarelli*, Facebook, <https://www.facebook.com/photo.php?fbid=10206222026688927&set=t.671040863&type=3&theater> (last accessed Sept. 12, 2018).

²⁷⁴ Ex. 122 *David Calabrese*, Facebook, <https://www.facebook.com/photo.php?fbid=10154977844580864&set=t.671040863&type=3&theater> (last accessed Sept. 12, 2018).

²⁷⁵ Ex. 123 *Gerry Magnarelli*, Facebook, <https://www.facebook.com/photo.php?fbid=10216639074708617&set=t.671040863&type=3&theater> (last accessed Sept. 12, 2018).

²⁷⁶ Ex. 124 *Philips Harbor*, Facebook, <https://www.facebook.com/PhilipsHarbor/photos/t.671040863/174883203200132/?type=3&theater> (last accessed Sept. 12, 2018).

293. A pocket listing is rarely, if ever, in the best interests of the seller client. The National Association of Exclusive Buyer Agents says pocket listings do “a tremendous disservice to home sellers” and “are all about a fast sale and easy commission money, benefiting only the listing agent.”²⁷⁷

294. NAR is critical of pocket listings as well, explaining that withholding a property listing from MLS “significantly diminishes” key “marketing opportunities,” which “may result in reaching fewer potential buyers and a longer time from listing to selling the property, and, perhaps at the core of most sellers’ minds, it *may not yield the highest price for the property.*”²⁷⁸

295. Indeed, “REALTORS® and real estate organizations nationwide agree getting the maximum exposure for your home from an MLS listing is essential to achieving top dollar on your sale.”²⁷⁹

296. Pocket listings are, however, very attractive to real estate brokerage firms like Houlihan Lawrence who have an appetite for dual-agent transactions. As NAR explains, pocket listings “are more likely to result in the agent representing the seller and the buyer, and the outcome would be a higher commission for the agent.” Where an agent suggests a pocket listing because it holds “the prospect of a double commission,” NAR recognizes that such conduct “could violate the Code of

²⁷⁷ Ex. 125 Kirsten Myers, *Why “Pocket-Listings” are a Disadvantage to Home Buyers and Sellers*, available at <https://naeba.org/blog/why-pocket-listings-are-disadvantage-home-buyers-and-sellers/>.

²⁷⁸ Ex. 126 Lesley M. Walker, *Law & Policy: Professionalism and Pocket Listings*, Realtor AE Magazine, Mar. 5, 2014, available at <https://www.nar.realtor/realtor-ae-magazine/law-policy-professionalism-and-pocket-listings> (emphasis added).

²⁷⁹ Ex. 127 Sam DeBord, *3 Concerns About Pocket Listings Every Home Seller Should Consider*, Realtor.com, Jun. 11, 2014, available at <https://www.realtor.com/advice/sell/3-concerns-pocket-listings-every-home-seller-consider/>.

Ethics, MLS rules, and laws in most states.”²⁸⁰ NYSAR’s General Counsel similarly recognizes that agents engage in “self-dealing” in violation of their fiduciary duties when they market a property as a pocket listing “in order to increase their chance of getting ‘both sides’ of the transaction.”²⁸¹

297. At \$469,900, Bello priced the 190 Davis Avenue pocket listing well below other three-bedroom homes he’d recently sold in the same area (\$625,000,²⁸² \$625,000,²⁸³ \$550,000²⁸⁴). Zillow now estimates the market value for 190 Davis Avenue at \$614,341,²⁸⁵ consistent with recent sales of three-bedroom homes in the area (\$725,000,²⁸⁶ \$619,000,²⁸⁷ \$615,000,²⁸⁸ \$580,000²⁸⁹), including by Bello (\$565,000,²⁹⁰ \$525,000²⁹¹). Since 2016, only one home within the three-block area—

²⁸⁰ Walker, *supra* note 278.

²⁸¹ *The Seller Steers the Ship*, *supra* note 165.

²⁸² 185 Longview Avenue in December 2013. Ex. 128 https://www.zillow.com/homedetails/185-Longview-Ave-White-Plains-NY-10605/32977929_zpid/.

²⁸³ 111 Grandview Avenue on June 25, 2014. Ex. 129 https://www.zillow.com/homedetails/111-Grandview-Ave-White-Plains-NY-10605/32977941_zpid/

²⁸⁴ 132 Davis Avenue in January 2014. Ex. 130 https://www.zillow.com/homedetails/132-Davis-Ave-White-Plains-NY-10605/32977309_zpid/.

²⁸⁵ 190 Davis Avenue in June 2014. Ex. 131 https://www.zillow.com/homedetails/1--Davis-Ave-White-Plains-NY-10605/32977624_zpid/.

²⁸⁶ 161 Longview Avenue in June 2017. Ex. 132 <http://www.houlihanlawrence.com/property/113014403/161-longview-avenue-white-plains-ny-10605>.

²⁸⁷ 176 Longview Avenue in April 2017. Ex. 133 <http://www.houlihanlawrence.com/property/73057623/176-longview-avenue-white-plains-ny-10605>.

²⁸⁸ 177 Longview Avenue in August 2017. Ex. 134 <http://www.houlihanlawrence.com/property/134255353/177-longview-avenue-white-plains-ny-10605>.

²⁸⁹ 161 Longview Avenue in June 2017. Ex. 132 <http://www.houlihanlawrence.com/property/113014403/161-longview-avenue-white-plains-ny-10605>.

²⁹⁰ 192 Davis Avenue in November 2015. Ex. 135 https://www.zillow.com/homedetails/192-Davis-Ave-White-Plains-NY-10605/32977623_zpid/?print=true.

²⁹¹ 189 Davis Avenue in February 2016. Ex. 136 https://www.zillow.com/homedetails/189-Davis-Ave-White-Plains-NY-10605/32977643_zpid/?print=true.

a “Calling all contractors & investors” listing “in need of extensive renovations”—has sold for less than 190 Davis Avenue.²⁹²

298. As with the risks and downsides of dual agency generally, Bello didn’t tell the Berks about the risks and downsides of pocket listings.

299. Instead, Bello pre-filled the Listing Agreement to indicate the Berks’ purported consent to showing 190 Davis Avenue to Houlihan Lawrence’s buyer clients. In the event a Houlihan Lawrence buyer client expressed an interest in the property, the Listing Agreement stated that “differences or conflicts *may* arise,” and the Berks and the buyer would be required to “confirm in writing” their consent to or rejection of dual agency before negotiating a deal. But Houlihan Lawrence never told the Berks that a dual-agent situation had arisen—much less asked them to consent to it.

300. The Listing Agreement provides for a Houlihan Lawrence commission of 5% of the selling price, but Bello pre-filled the Listing Agreement to authorize an offer of a substandard commission of only 2% (rather than the standard 2.5%) to any buyer’s agent. Houlihan Lawrence (including Bello) did not tell the Berks that “substandard commission rates artificially increase the frequency of dual-agent transactions” by making the property listing less attractive to outside brokerage firms.²⁹³

²⁹² 72 Longview Avenue in June 2017. Ex. 137

<http://www.houlihanlawrence.com/property/72757703/72-longview-avenue-white-plains-ny-10605>.

²⁹³ Ex. 138 Lu Han & Seung-Hyun Hong, *Understanding In-House Transactions in the Real Estate Brokerage Industry*, Apr. 8, 2016, available at http://faculty.las.illinois.edu/hyunchong/rea_inhouse.pdf.

301. Houlihan Lawrence also did not tell the Berks that it financially rewards its salespeople for dual-agent transactions by giving them an extra share of Houlihan Lawrence's double commission.

302. At the time the Berks signed the Listing Agreement, they also signed a "Disclosure of Information on Lead-Based and/or Lead-Based Paint Hazards for Sales," an "Affiliated Business Arrangement Disclosure Statement," a "Sellers' Obligations Under Real Property Condition Disclosure Law [Real Property Law § 462(2)]," and a Statutory Disclosure Form. All of the documents were sent to the Berks by e-mail and completed out of Bello's presence.

303. As he had done with the Listing Agreement, Bello pre-filled the Statutory Disclosure Form, indicating that Houlihan Lawrence was acting on behalf of the Berks as a Seller's Agent and pre-checking the box for "Advance informed consent to dual agency with designated sales agents." Bello did not "Disclose the benefits and detriments of providing advance consent prior to the [Statutory Disclosure] form being executed."²⁹⁴ Bello also did not "provide later disclosure when the dual agency relationship [was] actually consummated."²⁹⁵

²⁹⁴ Ex. 47 Letter from Matthew W. Tebo, Legislative Counsel, N.Y. Dep't of State, to Peter J. Kiernan, Counsel to the Governor (July 15, 2010).

²⁹⁵ *Id.*

commission collected by Houlihan Lawrence on the transaction, including because they were the co-executors and sole beneficiaries of their parents' estate.

308. Houlihan Lawrence's conduct constitutes a breach of the fiduciary duties it owed to the Berks. Houlihan Lawrence should be required to return the sales commission it collected on the sale of 190 Davis Avenue.

3. Plaintiff Paul Benjamin

*"This form states that I represent you and Angela represents the seller. Office form..."*²⁹⁶

– Brian Murray, Houlihan Lawrence
Branch Manager, Chappaqua

309. Plaintiffs repeat and re-allege the allegations above as if fully set forth here.

310. In March 2016, Plaintiff Paul Benjamin began looking for a home in or around Bedford, New York. Unfamiliar with the Westchester County real estate market, he contacted Brian Murray of Houlihan Lawrence's Chappaqua office to assist him. As the manager of the Houlihan Lawrence branch serving Armonk, Briarcliff Manor, Chappaqua, Mount Kisco, Pleasantville, Thornwood, and Yorktown, Murray "leads 58 agents through all transactions."²⁹⁷

311. On April 4, 2016, Murray sent Mr. Benjamin a list of nine properties. Included among them was a 4,750-square-foot, front-porch farmhouse located at 16

²⁹⁶ Ex. 139 E-mail from B. Murray to P. Benjamin (April 20, 2016, 10:42 AM).

²⁹⁷ Ex. 140 Brian Murray Manager Houlihan Lawrence Chappaqua, Real Estate In-Depth, Jul. 2016, available at <http://www.realestateindepth.com/people/brian-murray-manager-houlihan-lawrence-chappaqua/>.

Old Logging Road, Bedford, New York 10506 that Houlihan Lawrence put on the market earlier that day for \$1,475,000. Mr. Benjamin was immediately drawn to 16 Old Logging Road and set up an appointment to see it with Murray on April 7, 2016.

312. Murray wasn't available to show Mr. Benjamin 16 Old Logging Road that day. So the listing agent, Angela Kessel, a top-selling real estate salesperson in Houlihan Lawrence's Bedford-Pound Ridge office, showed Mr. Benjamin the home instead. Kessel did not give Mr. Benjamin a Statutory Disclosure Form identifying herself as the seller's agent at the time she showed Mr. Benjamin 16 Old Logging Road.

313. Mr. Benjamin was more interested in 16 Old Logging Road after seeing it in person. Soon after leaving the property, he called Murray to convey his interest in making an offer. Murray told Mr. Benjamin the seller had already received a full-asking-price offer, so Mr. Benjamin made a topping offer of \$1.5 million cash with no contingencies.

314. Murray told Mr. Benjamin he had conveyed the offer to Kessel, but that the seller was prepared to accept the first bidder's offer, even though it was for less money and subject to a mortgage contingency. Mr. Benjamin asked Murray whether he thought the seller would accept an all-cash offer of \$1.6 million. Murray said he believed such an offer would get a deal done, and it did.

315. By April 15, 2016, the seller had accepted Mr. Benjamin's enhanced offer of \$1.6 million cash, agreeing to sell 16 Old Logging Road for \$125,000 over the asking price.

316. Mr. Benjamin intended to retain a New York City real estate attorney with whom he had a relationship to represent him on the transaction. Murray strongly discouraged him, saying the seller was wary of working with an attorney who wasn't from Westchester County.

317. On April 15, 2016, Murray referred Mr. Benjamin to Frank Vieth, an attorney in Katonah, New York.²⁹⁸ At Murray's urging, Mr. Benjamin engaged Mr. Vieth.

318. On April 20, 2016, several days after Mr. Benjamin and the sellers reached agreement on the deal for 16 Old Logging Road, Murray for the first time sent Mr. Benjamin a copy of the Statutory Disclosure Form.

319. Although Murray claims to help "his clients to make informed decisions,"²⁹⁹ he presented the Statutory Disclosure Form to Mr. Benjamin with no explanation of dual agency or the Form's significance.

320. Instead, in his e-mail attaching the Statutory Disclosure Form, Murray downplayed and misrepresented the Form, stating: "This form states that I represent you and Angela represents the seller. Office form...."³⁰⁰ While Murray's

²⁹⁸ Ex. 141 E-mail from B. Murray to P. Benjamin (April 15, 2016, 2:56 PM).

²⁹⁹ Ex. 142 *Brian Murray*, Houlihan Lawrence, http://brianmurray.houlihanlawrence.com/agents_offices/ (last accessed Sept. 19, 2018).

³⁰⁰ Ex. 143 E-mail from B. Murray to P. Benjamin (April 20, 2016, 10:42 AM).

e-mail suggested that Mr. Benjamin and the seller were separately represented, the Statutory Disclosure Form attached to Murray's e-mail was pre-marked to indicate Houlihan Lawrence's dual agency, while Mr. Benjamin's attention was directed to the highlighted signature line. Mr. Benjamin promptly signed the Statutory Disclosure Form and returned it to Murray.³⁰¹

321. Murray did not discuss with Mr. Benjamin the downsides, risks, and options of dual agency, never disclosed that Houlihan Lawrence financially rewards its salespeople for dual-agent transactions, and never disclosed the total commission Houlihan Lawrence would receive on Mr. Benjamin's purchase of 16 Old Logging Road.

322. On April 20, 2016, Mr. Benjamin executed a contract for the purchase of 16 Old Logging Road.

323. Houlihan Lawrence collected a sales commission on Mr. Benjamin's purchase of 16 Old Logging Road. Houlihan Lawrence's sales commission was paid out of the proceeds of the sale of the property. Mr. Benjamin paid at least a portion of the commission collected by Houlihan Lawrence on the transaction, including because it was "incorporated within the price" he "agreed to pay for the house and the owner agreed to accept."³⁰²

324. Murray's conduct in connection with Mr. Benjamin's purchase of 16 Old Logging Road is consistent with that of an agent who put his own interest in

³⁰¹ Ex. 143 E-mail from P. Benjamin to B. Murray (April 20, 2016, 11:25 AM).

³⁰² *Who Pays the Commission?*, *supra* note 146.

a quick sale and a bigger sales commission over the interests of the client he represented.

325. Houlihan Lawrence's conduct constitutes a breach of the fiduciary duties it owed to Mr. Benjamin. Houlihan Lawrence should be required to return the sales commission it collected on the sale of 16 Old Logging Road.

TOLLING OF THE STATUTE OF LIMITATIONS

326. Houlihan Lawrence was under a continuous duty to inform Plaintiffs and the other Class members that it acted as a dual agent in connection with the transactions at issue; to inform them of all the risks, downsides, and options of dual agency; and to inform them of its in-house bonus kickback scheme.

327. Houlihan Lawrence was also under a continuous duty to inform Plaintiffs and the other Class members that it engaged in a scheme to evade its fiduciary duties—including the fiduciary duties imposed on it by real estate license law, rules and regulations, contract law, the law of agency, and tort law—and that it deliberately flouted its disclosure obligations.

328. Houlihan Lawrence knowingly and fraudulently concealed the true character of its agency relationship with Plaintiffs and the other Class members, and concealed its scheme to evade its fiduciary duties and flout its disclosure obligations.

329. Accordingly, Houlihan Lawrence is estopped from relying on any statutes of limitations in defense of this action.

CLASS ACTION ALLEGATIONS

330. Plaintiffs bring this action and seek to certify and maintain it as a class action under CPLR Article 9 on behalf of themselves and a class of consumers in Westchester, Putnam, and Dutchess counties defined as follows:

All buyers and sellers of residential real estate in Westchester, Putnam, and Dutchess counties from January 1, 2011 to the present wherein Houlihan Lawrence represented both the buyer and seller in the same transaction.

331. Excluded from the Class are Houlihan Lawrence and HomeServices of America, Inc. and their employees, officers, directors, legal representatives, heirs, successors, and wholly or partly owned subsidiaries or affiliates; Class Counsel, their employees, and their immediate family members; and the judicial officers and their immediate family members and associated court staff assigned to this case.

332. This class action satisfies the criteria of CPLR 901(a) for at least the following reasons:

(1) The Class is so numerous that individual joinder of all Class members is impracticable. Houlihan Lawrence has acted in a dual-agent capacity in connection with thousands of home sale transactions in Westchester, Putnam, and Dutchess counties since January 1, 2011. On information and belief, the Class consists of all of the homebuyers and sellers in the home sale transactions in which Houlihan Lawrence acted in a dual-agent capacity.

(2) Questions of law and fact common to the Class predominate over questions affecting only individual Class members. These common questions include, among others:

- a. Whether Houlihan Lawrence breached its fiduciary and statutory duties by failing to provide Plaintiffs and other Class members with Statutory Disclosure Forms before entering into an agency relationship.
- b. Whether Houlihan Lawrence failed to obtain valid advance informed consent from Plaintiffs and other Class members by presenting them with pre-filled Statutory Disclosure Forms that transformed New York's *opt-in* structure for advance consent into an impermissible *opt-out* structure.
- c. Whether Houlihan Lawrence breached its fiduciary and statutory duties by failing to provide adequate disclosure of the financial incentives it gives its agents to steer clients into dual-agent transactions.
- d. Whether Houlihan Lawrence breached its fiduciary and statutory duties by failing to provide adequate disclosure of the risks, downsides, and options of dual agency before entering a dual-agent relationship.
- e. Whether Houlihan Lawrence breached its fiduciary and statutory duties because it systematically avoided alerting clients to the risks, downsides, and options of dual agency.
- f. Whether Houlihan Lawrence engaged in a course of conduct to induce Plaintiffs and other Class members to consent to dual agency based

on misrepresentations and omissions of material information.

- g. Whether Houlihan Lawrence breached its fiduciary and statutory duties by its express adoption of a hands-off, “only if asked” approach to discussing dual agency.
- h. Whether Houlihan Lawrence breached its fiduciary and statutory duties by failing to timely provide Statutory Disclosure Forms identifying Houlihan Lawrence as a dual agent to the parties in dual-agent transactions.
- i. Whether Houlihan Lawrence systematically failed to confirm both parties’ consent to dual agency once a specific dual-agent situation arose.
- j. Whether the following information is material to consumers’ decision to consent to dual agency:
 - (i) Prior to dual agency arising, Houlihan Lawrence acted as the exclusive agent of the seller or the buyer.
 - (ii) In Houlihan Lawrence’s initial role as exclusive agent for the buyer or seller before a dual-agency situation arose, Houlihan Lawrence may have obtained information which, if disclosed, could harm the buyer’s or seller’s bargaining position.
 - (iii) Consumers should be wary of dual agency.
 - (iv) Dual agency may deprive buyers and sellers of benefits they would have otherwise received in a single-agency relationship.
 - (v) Houlihan Lawrence and its salespeople, when acting as a dual agent, must make

every reasonable effort to remain impartial to the seller and buyer.

- (vi) Houlihan Lawrence and its salespeople, when acting as a dual agent, may not disclose any confidential information to the other party, including but not limited to the price that either side would be willing to accept.
 - (vii) Houlihan Lawrence and its salespeople, when acting as a dual agent, cannot recommend or suggest a price the buyer should offer or pay for the property.
 - (viii) Houlihan Lawrence and its salespeople, when acting as a dual agent, cannot recommend or suggest a price the seller should accept or counter.
 - (ix) Houlihan Lawrence will collect a larger commission by acting as a dual agent, and that could create a conflict of interest between Houlihan Lawrence on the one hand and its clients on the other hand.
 - (x) Consumers have the right to condition their consent to dual agency on an adjustment in Houlihan Lawrence's compensation.
 - (xi) Consumers have the right to retain their own agent to represent solely their best interests.
 - (xii) Consumers have the absolute right to refuse to consent to a dual-agency relationship and Houlihan Lawrence's representation of an adverse interest.
- k. Whether Houlihan Lawrence has implemented policies and procedures to, among other things:

- (i) Enter into agency relationships with buyers and sellers before presenting them with the Statutory Disclosure Form.
- (ii) Pre-tick the boxes on clients' Statutory Disclosure Forms to manufacture the appearance of clients' advance informed consent to dual agency.
- (iii) Market dual agency as advantageous to buyers and sellers.
- (iv) Make misleading and insufficient disclosures in its listing agreements.
- (v) Financially incentivize agents to steer buyers and sellers into dual-agent transactions.

(3) Plaintiffs' claims are typical of the claims of the Class members, and arise from the same course of conduct by Houlihan Lawrence. The relief Plaintiffs seek is typical of the relief sought for the Class members.

(4) Plaintiffs will fairly and adequately represent and protect the interests of the Class, are committed to the vigorous prosecution of this action, have retained counsel competent and experienced in class litigation, and have no interests antagonistic to or in conflict with those of the Class.

(5) A class action is superior to other available methods for the fair and efficient adjudication of this controversy, including because:

- a. As discussed above (§ 332(2)), common questions of law and fact regarding Houlihan Lawrence's conduct and responsibility

predominate over any questions affecting only individual Class members.

- b. The expense and burden of individual litigation would make it difficult or impossible for individual Class members to redress the wrongs done to each of them individually.
- c. Given the size of the sales commissions paid by each individual Class member, most or all Class members would have no rational economic interest in individually controlling the prosecution of specific actions, and the burden imposed on the judicial system by individual litigation by even a fraction of the Class would be burdensome, making class adjudication the superior alternative.
- d. The conduct of this action as a class action presents fewer management difficulties, better conserves judicial resources and the parties' resources, and more effectively protects the rights of each Class member than would piecemeal litigation.
- e. The challenges of managing this action as a class action are far less than the expense, burdens, risks of inconsistency, economic infeasibility, and inefficiencies of individualized litigation.
- f. The benefits of class treatment to the legitimate interests of the parties, the Court, and the public make class adjudication superior to alternatives.
- g. Plaintiffs are not aware of any obstacles to the management of this action that would preclude its maintenance as a class action.

- h. The Court has the authority and flexibility to maximize the efficiencies and benefits of the class mechanism and reduce management challenges.

333. The Class is ascertainable. Its members can be identified using sales records and other information kept by Houlihan Lawrence or third parties.

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION (Breach of Fiduciary Duty)

334. Plaintiffs repeat and re-allege the allegations above as if fully set forth here.

335. Houlihan Lawrence owed each member of the Class the utmost fiduciary duties of reasonable care, undivided and undiluted loyalty, confidentiality, full disclosure, obedience, and duty to account. Houlihan Lawrence was bound by its fiduciary duties to the Class members to employ all measures necessary to provide the Class with all material information necessary for the Class members to decide whether or not to consent to dual agency in connection with their real estate transactions.

336. Houlihan Lawrence has breached its fiduciary duties in connection with each Class member's real estate transaction by failing to disclose all material information necessary for the Class members to decide whether or not to consent to dual agency, as alleged herein, including the downsides, risks, and options of dual agency.

337. Houlihan Lawrence has breached its fiduciary duties to the Class members by acting as a dual agent without obtaining the informed written consent of both parties to the transaction.

338. Houlihan Lawrence has breached its fiduciary duties to the Class members by financially incentivizing agents to steer buyers and sellers into dual-agent transactions, and by failing to disclose that financial incentive to Class members.

339. Houlihan Lawrence intentionally misled Class members and concealed and suppressed material facts concerning dual agency to induce buyers and sellers to enter into agency relationships and unwittingly acquiesce to dual agency. Houlihan Lawrence's conduct defrauded Plaintiffs and the other members of the Class through intentional misrepresentations, omissions, suppression, and concealments of material fact.

340. Houlihan Lawrence forfeited its right to a commission in connection with any transaction in which it breached its fiduciary duty and is subject to punitive damages.

**SECOND CAUSE OF ACTION
(Breach of Real Property Law Section 443 –
Disclosure Regarding Real Estate Agency Relationship)**

341. Plaintiffs repeat and re-allege the allegations above as if fully set forth here.

342. New York Real Property Law Section 443(3)(a) requires that a listing agent shall provide the Statutory Disclosure Form to a home seller "prior to

entering into a listing agreement with the seller” and “shall obtain a signed acknowledgment from the seller.”

343. New York Real Property Law Section 443(3)(b) requires that a seller’s agent shall provide the Statutory Disclosure Form to a buyer or buyer’s agent “at the time of the first substantive contact with the buyer” and “shall obtain a signed acknowledgment from the buyer.”

344. New York Real Property Law Section 443(3)(c) requires that a buyer’s agent shall provide the Statutory Disclosure Form to the buyer “prior to entering into an agreement to act as the buyer’s agent” and “shall obtain a signed acknowledgement from the buyer.” Section 443(3)(c) further requires that a buyer’s agent shall provide the Statutory Disclosure Form to a seller or seller’s agent “at the time of the first substantive contact with the seller” and “shall obtain a signed acknowledgement from the seller” or the listing agent.

345. If a buyer or seller refuses to sign a Statutory Disclosure Form, the agent “shall set forth under oath or affirmation a written declaration of the facts of the refusal” pursuant to Section 443(3)(e).

346. Houlihan Lawrence breached Section 443 by failing to timely provide clients with Statutory Disclosure Forms and to obtain clients’ timely informed consent.

347. Houlihan Lawrence should be denied commissions for the transactions in which it breached Section 443.

**THIRD CAUSE OF ACTION
(Breach of General Business Law Section 349 –
Deceptive or Unfair Sales Practices)**

348. Plaintiffs repeat and re-allege the allegations above as if fully set forth here.

349. New York General Business Law Section 349 prohibits deceptive or unfair sales practices: “Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful.”

350. In violation of Section 349, Houlihan Lawrence acted to deceive Plaintiffs and the other Class members by, among other things, failing to disclose all material information necessary for Plaintiffs and the other Class members to decide whether or not to consent to dual agency; acting as a dual agent without the informed written consent of both parties to the transaction; and intentionally misleading Class members and concealing and suppressing material facts concerning dual agency to induce buyers and sellers to enter into agency relationships and unwittingly acquiesce to dual agency.

351. Houlihan Lawrence’s deceptive acts and practices, as described herein, are consumer-oriented conduct that adversely affected the public interest of New York, and caused injury to Plaintiffs and the other Class members, including because Plaintiffs and other Class members paid commissions to Houlihan Lawrence to which the firm, as a faithless fiduciary, was not entitled.

352. Houlihan Lawrence is therefore liable for damages as mandated under Section 349.

**FOURTH CAUSE OF ACTION
(Unjust Enrichment)**

353. Plaintiffs repeat and re-allege the allegations above as if fully set forth here.

354. Houlihan Lawrence acted as a dual agent without making full and complete disclosure of downsides, risks and options of dual agency and without obtaining both parties' informed written consent. As a result, Houlihan Lawrence did not earn the sales commissions it collected on its dual-agent transactions.

355. Houlihan Lawrence enjoyed financial benefits to the detriment of Plaintiffs and other Class members who paid sales commissions for loyalty and services they did not receive. It would be inequitable, unjust, and unconscionable for Houlihan Lawrence to retain those wrongfully obtained sales commissions.

356. Plaintiffs and other Class members therefore seek repayment of all unjust sales commissions, plus interest.

PRAYER FOR RELIEF

357. Plaintiffs, on behalf of themselves and all others similarly situated, request the Court to enter judgment against Houlihan Lawrence, as follows:

- (1) An order certifying the proposed Class, designating Plaintiffs as the named representatives of the Class, designating the undersigned as Class Counsel, and making such further orders for the protection of Class members as the Court deems appropriate under CPLR Article 9.

(2) An order enjoining Houlihan Lawrence to desist from acting as an undisclosed, non-consensual dual agent in home sale transactions, and such other injunctive relief as the Court deems just and proper.

(3) A declaration that Houlihan Lawrence's conduct breached its fiduciary duties to Plaintiffs and the other Class members, including:

- a. A declaration that the Statutory Disclosure Form, standing alone, does not provide sufficient information for consumers to understand the risks, downsides, and options of dual agency.
- b. A declaration that Houlihan Lawrence breached its fiduciary duties and violated Section 443 by pre-ticking the advance-consent boxes on the Statutory Disclosure Form and transforming New York's *opt-in* system into an unauthorized *opt-out* system.
- c. A declaration that Houlihan Lawrence's hyping of "in-house," dual-agent deals as beneficial to clients breaches Houlihan Lawrence's fiduciary duties and misleads consumers.
- d. A declaration that Houlihan Lawrence's adoption of a hands-off, "only if asked" policy for discussing dual agency with potential clients breaches Houlihan Lawrence's fiduciary duties.
- e. A declaration that Houlihan Lawrence's failure to timely provide consumers with a Statutory Disclosure Form breaches Houlihan Lawrence's fiduciary duties.
- f. A declaration that Houlihan Lawrence's failure to provide consumers with a correct Statutory Disclosure Form breaches its fiduciary duties.

- g. A declaration that Houlihan Lawrence's failure to provide consumers with a plainspoken, written explanation of the downside, risks, and options of dual agency breaches Houlihan Lawrence's fiduciary duties.
- h. A declaration that Houlihan Lawrence's failure to follow up with clients, including to provide an updated Statutory Disclosure Form accurately reflecting its agency role, breaches Houlihan Lawrence's fiduciary duties.
- i. A declaration that Houlihan Lawrence's use of an undisclosed in-house bonus kickback scheme to financially incentivize its agents to steer buyers and sellers into dual-agent transactions breaches Houlihan Lawrence's fiduciary duties.

(4) A declaration that Houlihan Lawrence must repay Plaintiffs and the other Class members the sales commissions it collected on home sale transactions in which it acted as an undisclosed, non-consensual dual agent, with interest from the time such commissions were paid.

(5) Punitive damages.

(6) An award of attorneys' fees and costs, as allowed by law.

(7) An award of pre-judgment and post-judgment interest, as provided by law.

(8) An award of such other relief as may be appropriate under the circumstances.

Dated: October 1, 2018
Armonk, New York

By: /s/ William Ohlemeyer
William Ohlemeyer, Esq.
Jeremy Vest, Esq.
Amos Friedland, Esq.
Paul Fattaruso, Esq.
BOIES SCHILLER FLEXNER LLP
333 Main Street
Armonk, NY 10504

Melissa Felder Zappala, Esq.
BOIES SCHILLER FLEXNER LLP
1401 New York Ave, NW
Washington, DC 20005

Attorneys for Plaintiffs