SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

Plaintiffs,

-against-

HOULIHAN/LAWRENCE INC.,

Defendant.

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MEMORANDUM OF LAW

Index No. 60767/2018

Hon. Linda S. Jamieson

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

PRELIMINARY STATEMENT

The unambiguous documents from each Plaintiff's transaction show they each consented to Houlihan Lawrence's dual agency with designated sales agents, contrary to Plaintiffs' breach of fiduciary duty claim. According to the New York legislature, a customer's advance written consent to a broker's dual agency with designated sales agents affirmatively establishes that consent.[1] Here, all four named Plaintiffs executed and returned the statutory disclosure form, consenting to Houlihan Lawrence's dual agency with designated sales agents – i.e., they consented to Houlihan Lawrence agents representing both the seller and the buyer in their ultimate real estate transactions – thus precluding their breach of fiduciary duty claims based on the absence of such consent as a matter of law, just as the New York legislature contemplated.

Plaintiffs' second cause of action – alleging violation of Section 443 – should be dismissed for the additional, independent reason that Section 443 does not provide a private right of action for its enforcement and because, in relation to the Berks, the cause of action is time-barred.

Plaintiffs' third cause of action fails because Plaintiffs have not pleaded a "deceptive act" that injured them and because the real estate transactions described in their Complaint are not "consumer-oriented." It is also time-barred as to the Berks.

Plaintiffs' unjust enrichment claim, the fourth cause of action of their Complaint, should also be dismissed. The buyer Plaintiffs did not pay the commission they seek to recoup and thus they did not confer a benefit on Houlihan Lawrence. Rather, they seek a windfall – to recover

[1] Advance written consent is sufficient proof of the customer's consent, but it is not the only potential proof. That consent could have been communicated orally. Or, the customer may not have communicated anything but knew all relevant facts and consented to a dual agency transaction. The fact of customer consent is case and individual specific. That is one reason why Plaintiffs' breach of fiduciary claim cannot be maintained on a class basis. Common proof of consent is impossible and requires individual inquiries and individual trials.

commissions *others* paid to Houlihan Lawrence. That fact is fatal to their claim. The seller Plaintiffs signed a contract covering the same subject matter as their unjust enrichment claim, which bars their cause of action as a matter of law.

In addition to the foregoing arguments, which apply to each of the named Plaintiffs, the Berks' claims separately fail under CPLR § 3211(a)(3) because they do not have standing to bring suit in their individual capacity.

For each reason, Plaintiffs' Complaint should be dismissed with prejudice.

ALLEGED FACTS[2]

I. Buyer Plaintiff #1: Pamela Goldstein.

On March 23, 2017, a home located at 6 Wellington Terrace, White Plains, New York ("6 Wellington Terrace") went on the market. *See* Philip Halpern Aff., Ex. A, Compl. ¶ 239. Gino Bello, with Houlihan Lawrence, was the listing agent. *Id.* ¶ 241.

On March 25, Goldstein called Bello and left a message expressing interest in the 6 Wellington Terrace property. *Id.* Later that morning, Daniel Cezimbra, a different Houlihan Lawrence agent from Bello's office, called Goldstein in response to her voice message. *Id.* ¶ 242. Cezimbra told Goldstein that he worked with Bello, the listing agent. *Id.* Goldstein reiterated her interest in 6 Wellington Terrace and asked Cezimbra if she could "see it as soon as possible." *Id.* ¶ 243.

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[2] Houlihan Lawrence recites the facts alleged in the Complaint as if true for purposes of this Motion only and reserves all rights to contest the Complaint's allegations. Because this Motion is directed at the allegations in Plaintiffs' Complaint, it does not address certification issues, including that absent putative class members signed arbitration agreements that preclude their participation in the alleged class. Houlihan Lawrence is separately negotiating a stipulation on that issue with Plaintiffs' counsel. Houlihan Lawrence reserves all rights to raise arguments concerning arbitration, class certification and the purported claims of the putative class, which are not yet properly before the Court, at a later time.

On March 26, Goldstein viewed 6 Wellington Terrace with Cezimbra. *Id.* ¶ 244. That evening, around 8 p.m., Goldstein advised Cezimbra that "she was prepared to make an offer to purchase 6 Wellington Terrace." *Id.* ¶ 245. The following day, Cezimbra forwarded Goldstein an e-mail from Bello explaining that the seller had received "multiple offers" to purchase 6 Wellington Terrace and "would be going to highest and best Wednesday, March 29th no later than 5PM." *Id.* ¶ 246. Cezimbra's email to Goldstein identified Cezimbra as from Houlihan Lawrence. *Id.*, Ex. 106. The forwarded email from Bello identified Bello as from Houlihan Lawrence and the listing agent. *Id.*

At 4:20 p.m. on March 29, Goldstein emailed Cezimbra her decision to offer to purchase 6 Wellington Terrace for $635,000, with a 25% down payment, "contingent on an inspection and financing." *Id.* at 247. Cezimbra acknowledged receipt and confirmed he would present her offer to the seller. *Id.* Cezimbra's email again identified him as an agent with Houlihan Lawrence. *Id.*, Ex. 107.

Shortly thereafter, on March 29, Nicole Corrado from Bello's team provided Goldstein with, among other things, the disclosure form required by Section 443. *Id.*, Ex. 108. The cover page to the provided disclosure documents identified Corrado as "Executive Assistant to The Gino Bello Homes Sales Team" and included a logo for "Gino Bello Homes." *Id.*

The statutory disclosure form that Goldstein received identified Cezimbra as affiliated with Houlihan Lawrence and indicated that he was representing Goldstein as "Buyer's agent." *Id.* The disclosure form also requested Goldstein's advance informed consent to Houlihan Lawrence's dual agency with designated sales agents. *Id.*

Goldstein executed and faxed the Section 443 disclosure form back to Bello's office on March 29, which included her consent to Houlihan Lawrence's dual agency with designated

sales agents. *Id.*, Ex. 112. Corrado filled in Bello's and Cezimbra's names on the executed form to reflect their designations as buyer and seller representatives, respectively. *Id.* ¶ 250.

Due to competition for 6 Wellington Terrace, Goldstein "authorized Cezimbra to make an improved offer on her behalf[.]" *Id.* ¶ 253. On March 30, 2017, Cezimbra informed Goldstein by email that "[t]he sellers on 6 Wellington Terrace have accepted our offer of $637,000 with 30% down!" *Id.*, Ex. 107. That email again identified Cezimbra as from Houlihan Lawrence. *Id.*

On May 22, 2017, Goldstein closed on her purchase of 6 Wellington Terrace. *Id.* ¶ 258.[3] The Purchase Agreement Goldstein executed identified both Bello and Cezimbra as affiliated with Houlihan Lawrence. *See* Nicole Corrado Aff. ¶ 5, Ex. 2. The sellers, not Goldstein, paid Houlihan Lawrence's commission. *See id.* ¶ 6, Ex. 3 ¶ 3.

Goldstein contends that Cezimbra did not inform her that Houlihan Lawrence agents represented both her and the seller and did not obtain her consent to that fact or explain to her the rights, limitations, obligations or consequences of Houlihan Lawrence agents representing both the seller and the buyer in her transaction. Halpern Aff., Ex. A, Compl. ¶¶ 275–76.

II. Seller Plaintiffs: Tony and Ellyn Berk.

Tony and Ellyn Berk's parents owned 190 Davis Avenue in the Highlands area of White Plains. *Id.* ¶ 283. In September 2013, the Berks' mother passed away. *Id.* The property at 190 Davis Avenue became part of her estate. *Id.* ¶ 285. Tony and Ellyn (collectively, the "Berks"), in their role as administrators of Winifred's estate, listed the property with Gino Bello at Houlihan Lawrence. *Id.*

[3] Plaintiffs did not include Goldstein's executed Purchase Agreement in the Complaint's 143 exhibits, despite its centrality to Goldstein's claims.

The estate's undated listing agreement provided for a $469,900 sale price and that Bello was to submit the listing "to the Hudson Gateway Multiple Listing Service, Inc. ('HGMLS'), for dissemination to its Participants." *Id.* ¶ 285, Ex. 116. The estate was to pay a 5% commission with 2% offered to the buyer's agent. *Id.* In the two-page listing agreement, the estate consented in advance to Houlihan Lawrence's dual agency. *Id.* In addition to the Exclusive Right to Sell agreement, the Berks signed the New York statutory disclosure form, evidencing their advance consent to Houlihan Lawrence's dual agency and dual agency with designated sales agents. *Id.* ¶ 302; Geoff Berry Aff., ¶ 5, Ex. C.

Bello allegedly marketed the property only through his personal network. Halpern Aff., Ex. A, Compl. ¶ 287. Through that marketing, he secured two buyers for the property. *Id.* ¶¶ 288–89. The first buyer was "unable to obtain financing." *Id.* ¶ 288. Bello then found a second buyer at $479,000 – $10,000 more than the listing price. *Id.* Ellyn claims to have "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." *Id.* Bello purportedly said that it would be "in the Berks' best interests to sell without testing the market." *Id.*

On June 30, 2014, the estate sold the property to a buyer represented by David Calabrese, another Houlihan Lawrence agent. *Id.* ¶ 289. The Berks executed a second New York statutory disclosure form reflecting the fact that the transaction involved dual agency with designated sales agents, with Gino Bello appointed to represent the sellers and David Calabrese appointed to represent the buyers. Berry Aff., ¶ 6, Ex. D.

The Complaint alleges that Bello priced the listing well below other three bedroom homes he had recently sold in the same area, and that Zillow now (over four years later)

estimates the market value at $614,341.[4] Houlihan Lawrence earned a 5% sales commission for 190 Davis Avenue, as stated in the listing contract, which the Berks paid. Halpern Aff., Ex. A, Compl. ¶ 307.

III. Buyer Plaintiff #2: Paul Benjamin.

In March 2016, Paul Benjamin alleges that he was looking for a home in or around Bedford, New York. *Id.* ¶ 310. He contacted Brian Murray, who he alleges was then manager of Houlihan Lawrence's Chappaqua office, to assist him in his transaction. *Id.* Benjamin became interested in the property at 16 Old Logging Road in Bedford. *Id.* ¶ 311.

Benjamin called Murray to discuss submitting an offer. *Id.* ¶ 313. Murray allegedly informed Benjamin that the seller was prepared to accept an existing offer. *Id.* ¶ 314. The seller, however, accepted Benjamin's $1.6 million cash offer. *Id.* ¶¶ 314–15.

On April 20, 2016, Murray sent Benjamin a copy of the New York statutory disclosure form. *Id.* ¶ 318. Benjamin signed and returned the form, which indicated Benjamin's consent to dual agency with designated sales agents, with Angela Kessel representing the seller and Murray representing Benjamin. *See id.*, Ex. 143.

IV. Plaintiffs' Asserted Causes of Action.

Plaintiffs assert four causes of action against Houlihan Lawrence: (1) breach of fiduciary duty; (2) breach of Real Property Law Section 443; (3) breach of General Business Law Section

[4] While not the subject of this Motion, it is worth noting that Zillow estimates are markedly unreliable in estimating home values. Zillow's own website cautions that its estimates for homes in Westchester County are only "Fair" (i.e., not "Good" or "Best"), with a significant margin of error. *See* https://www.zillow.com/howto/DataCoverageZestimateAccuracyNY.htm, last visited October 30, 2018. Moreover, even assuming the property records on Zillow are correct, the Complaint fails to note that each of the three listings it identifies have more bathrooms and greater square footage than 190 Davis Avenue. Indeed, the property that sold closest in time to 190 Davis Avenue, 111 Grandview Avenue, actually sold for $30/square foot less than 190 Davis Avenue based on Zillow records despite having an additional bathroom.

349; and (4) unjust enrichment. Plaintiffs' breach of fiduciary duty claim, alleging that Plaintiffs did not consent to Houlihan Lawrence's dual agency, as well as Plaintiffs' other claims, fail as a matter of law.

ARGUMENT

I

THE BURDEN OF PROOF

In considering a motion to dismiss based upon the pleadings, "the sole criterion is whether . . . from [the pleading's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 372 N.E.2d 17, 20 (1977). Although the court presumes that pleaded facts are true, it affords no such deference to "bare legal conclusions." *Mayer v. Sanders*, 264 A.D.2d 827, 828, 695 N.Y.S.2d 593, 595 (2d Dep't 1999). Nor does it afford such deference to "factual claims flatly contradicted by the record," *id.*, or by "documentary evidence, *1455 Washington Ave. Assocs. v. Rose & Kiernan Inc.*, 260 A.D.2d 770, 771, 687 N.Y.S.2d 791, 793 (3d Dep't 1999); *WFB Telecomms., Inc. v. NYNEX Corp.*, 188 A.D.2d 257, 258–59, 590 N.Y.S.2d 460, 462 (1st Dep't 1992).

To be considered in connection with a motion to dismiss, documentary evidence outside the pleadings must be unambiguous, of undisputed authenticity, and essentially unassailable. *Rabos v. R & R Bagels & Bakery, Inc.*, 100 A.D.3d 849, 851, 955 N.Y.S.2d 109, 112 (2d Dep't 2012). "Judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, *contracts, and any other papers, the contents of which are essentially undeniable*, would qualify as documentary evidence in the proper case." *Cives Corp. v. George A. Fuller Co., Inc.*, 97 A.D.3d 713, 714, 948 N.Y.S.2d 658, 659–60 (2d Dep't 2012) (emphasis added).

On a motion to dismiss, "[w]hen the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleading has a cause of action [in light of the documentary evidence], not whether she has *stated* one." *Meyer v. Guinta*, 262 A.D.2d 463, 464, 692 N.Y.S.2d 159, 161 (2d Dep't 1999) (emphasis added); *see also Steiner v. Lazzaro & Gregory, P.C.*, 271 A.D.2d 596, 597, 706 N.Y.S.2d 157, 158 (2d Dep't 2000).

The disclosure forms each Plaintiff signed, consenting to Houlihan Lawrence's dual agency, are undeniable documents, dispositive of Plaintiffs' breach of fiduciary duty claim based on the alleged absence of such consent.

II

A. Plaintiffs' Breach of Fiduciary Duty Claim Should Be Dismissed Because Plaintiffs Consented to Houlihan Lawrence's Dual Agency with Designated Sales Agents.

Plaintiffs' first cause of action, breach of fiduciary duty, is based on their allegations that they did not consent to Houlihan Lawrence agents' representing both the buyer and the seller in their respective transactions. Each Plaintiff's claim fails as a matter of law because each Plaintiff executed the statutory disclosure form, demonstrating consent to Houlihan Lawrence's dual agency. Plaintiff Goldstein's claim also fails because she had actual knowledge before making an offer on the property that Bello represented the seller in her transaction and that Cezimbra, her agent, worked with Bello at Houlihan Lawrence.

1. Goldstein's Advance Consent Reflected Her Consent to Dual Agency with Designated Sales Agents, and Goldstein Had Actual Knowledge that Houlihan Lawrence Agents Represented Both the Buyer and the Seller.

The statutory disclosure form, on its face, states that the customer's execution of it constitutes advance consent to dual agency with designated sales agents. After explaining that

"dual agency with designated sales agents" exists when two agents from the same brokerage firm represent the seller and buyer separately, it provides:

> A seller or buyer may provide advance informed consent to dual agency with designated sales agents *by indicating the same on this form*.

Real Prop. Law § 443 (emphasis added). Thus, the disclosure form's unambiguous language states that its execution evidences the consumer's advance, informed consent to a broker's dual agency with designated sales agents.

Advance consent means that execution of the form evidences the consumer's consent, even though the designated sales agents have not yet been identified. Indeed, the entire purpose for adding the advance consent language to the statutory form was to speed and simplify real estate transactions by allowing *advance* informed consent to dual agency with designated sales agents and thus eliminating the need for a separate disclosure and consent when the dual agency actually arose. The Sponsor's Memorandum to the 2011 amendments to Section 443, which added the above-quoted advance consent language, makes that intent manifest:

> A statutorily required agency disclosure form is used to provide consumers with information regarding their representation in a real estate transaction. "Dual Agent" is currently recognized in real estate license law as a valid form of agency relationship in which the buyer and seller are represented by the same real estate brokerage company.
>
> This bill [adding advance consent language to the statutory disclosure form] **will allow consumers to select and allow a "dual agency" relationship in advance of it actually occurring**. In many cases, buyers' agents will bring their clients to multiple properties in their search for an appropriate property for the buyer. They will often run into situations where the seller is represented by the same brokerage company for whom the buyers' agent works. Currently, the property could not be shown until a new agency disclosure form was signed by the seller and buyer. This delays these activities and sometimes prohibits the property from being shown. The revised agency disclosure form would streamline this process by allowing consumers to provide advanced consent to this "dual agency" relationship. **The selection by the buyer or seller of "dual agency" in advance of it occurring is completely optional**.

(New York State Assembly Memorandum in Support of Legislation, Bill No. A10443B, An Act to amend real estate property law, in relation to disclosure regarding real estate agency relationship, 2011) (emphasis added).

The Sponsor's Memorandum clarifies that *by executing* the statutorily prescribed agency disclosure form, a consumer demonstrates her *advance* consent to dual agency with designated sales agents. If that were not the case, and separate consent were later needed, the 2011 amendment to Section 443, by the author's own expression, would have no purpose.

This Court must apply statutes as written. *People v. Kupprat*, 6 N.Y.2d 88, 90, 160 N.E.2d 38, 40 (1959) ("[w]e must read statutes as they are written and, if the consequence seems unwise, unreasonable or undesirable, the argument for change is to be addressed to the Legislature, not to the courts."). The New York legislature determined both the content of the Section 443 disclosure and that its execution is at least one manner of demonstrating consumer consent to dual agency with designated sales agents. The Court must give that unambiguous language effect.

Here, Goldstein received and executed the statutorily required agency disclosure form, which included a request that she consent to Houlihan Lawrence's dual agency with designated sales agents. *See* Corrado Aff. ¶ 4, Ex. 1. According to Section 443's unambiguous language and its unambiguous legislative intent, by executing that disclosure form, Goldstein consented to Houlihan Lawrence's dual agency with designated sales agents.

Separately, Goldstein's own allegations and documents show, contrary to her recent claims, that she *knew* that Bello represented the seller and that both Bello and Cezimbra were affiliated with Houlihan Lawrence. The Complaint shows:

- She called Gino Bello as the listing agent to request information about the subject property, Halpern Aff., Ex. A, Compl. ¶ 241;
- Cezimbra returned Goldstein's call to Bello, identifying himself as from Houlihan Lawrence and as working with Bello, *id.* ¶ 242;
- Each of Cezimbra's emails to Goldstein and attached as Exhibits to Goldstein's Complaint identify Cezimbra as affiliated with Houlihan Lawrence and, in some instances, with the Gino Bello team, *see, e.g.*, *id.*, Exs. 106–07;
- Cezimbra forwarded Goldstein documents about the property which identified Bello as affiliated with Houlihan Lawrence and as the listing agent, *id.*, Ex. 106;
- The email forwarding the statutory disclosure forms to Goldstein came from Bello's Houlihan Lawrence office, *id.*, Ex. 108;
- The statutory disclosure form Goldstein received and executed identified Cezimbra as affiliated with Houlilhan Lawrence, Corrado Aff., ¶ 4, Ex. 1; and
- The Purchase Agreement Goldstein executed identified Cezimbra and Bello as both from Houlihan Lawrence, *id.* ¶ 5, Ex. 2.

Goldstein thus admits knowing at all relevant times that Bello and Cezimbra were both affiliated with Houlihan Lawrence, finalizing her transaction with such knowledge, and thereby consenting to Houlihan Lawrence's dual agency with designated sales agents.

Goldstein's consent to Houlihan Lawrence's dual agency with designated sales agents eliminates her claim for breach of fiduciary duty, which should be dismissed with prejudice.

2. The Berks Executed Both an Advance Consent and a Subsequent Form Consenting to Dual Agency with Designated Sales Agents.

The Berks evidenced their consent to Houlihan Lawrence's dual agency on three, separate occasions. They consented in an initial disclosure, executed at the outset of their transaction, and a second time, in the estate's listing agreement. Halpern Aff., Ex. A, Compl., Ex. 116. The Berks consented a third time to Houlihan Lawrence's role as dual agent with designated sales agents by signing a second statutory disclosure form, which identified David Calabrese and Gino Bello as the agents appointed to represent the buyer and seller, respectively:

This form was provided to me by Biagio Bello (print name of licensee) of Houlihan Lawrence (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

( ) Buyer as a (check relationship below)
( ) Buyer's agent
( ) Broker's agent

( ) Dual agent
(✓) 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:

David Calabrese is appointed to represent the buyer; and

Biagio Gino "Bello is appointed to represent the seller in this transaction.

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

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

Date:

Date:

Berry Aff., ¶ 5, Ex. D.

Like with Goldstein, the documentary evidence proves that the Berks were aware of and consented to Houlihan's dual agency role in this transaction and precludes their claim for breach of fiduciary duty.

3. Paul Benjamin Consented to Houlihan Lawrence's Role in the Transaction by Executing the Statutory Disclosure Form.

Paul Benjamin admits that he received and executed the statutory disclosure form, consenting to Houlihan Lawrence's role as dual agent with designated sales agents. The form Benjamin signed identified Angela Kessel as the agent appointed to represent the sellers and Brian Murray as the agent appointed to represent the buyers:

( ) Dual agent
(✓) 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:

Brian S. Murray **is appointed to represent the buyer; and**

Angela Kessel **is appointed to represent the seller in this transaction.**

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

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

Date: 4/20/16 **Date:**

Brian Murray Aff., ¶ 4, Ex. E.

Benjamin's complaint appears to be that the form came too late. But he never objected to Houlihan Lawrence's role in the transaction or raised any question about the form when he received it. He signed it without equivocation in connection with the purchase of a $1.6 million

property. Now, more than two years later, he seeks to escape the effect of his signature and recover commissions that, as explained below, he did not pay. He received and acknowledged receipt of the disclosure explaining Houlihan Lawrence's role.

Benjamin's consent to Houlihan Lawrence's dual agency with designated sales agents, like the other named plaintiffs, eliminates his claim for breach of fiduciary duty.

B. Plaintiffs' Second Cause of Action, Alleging Violation of Section 443, Should Be Dismissed Because Section 443 Cannot Be Enforced Through Private Rights of Action.

Plaintiffs' second cause of action alleges violations of Section 443. As noted above, that claim fails because Plaintiffs consented to Houlihan Lawrence's dual agency with designated sales agents. Plaintiffs' second cause of action, however, additionally fails because Section 443 does not provide a private right of action.

Section 443 is part of Article 12-A of the Real Property Law. Section 442-e identifies the consequences for violating that Article. The only private right of action specified is in RPL Section 442-e(3), which is limited to suits against brokers and agents who are not properly licensed under Article 12-A. *2 Park Ave. Assocs. v. Cross & Brown Co.,* 36 N.Y.2d 286, 289 (1975) ("[S]ubdivision 3 of section 442-e does not apply to licensed real estate brokers and salesmen."). It does not permit a private right of action against licensed brokers and agents who violate Section 443. *Id.*

Rather, Section 443 leaves its enforcement to the attorney general, which as a matter of settled law, precludes a private right of action in the absence of contrary legislative language not present here. *See, e.g.*, *Hammer v. Am. Kennel Club*, 1 N.Y.3d 294, 300, 771 N.Y.S.2d 493, 496 (2003) ("The statute does not, either expressly or impliedly, incorporate a method for private citizens to obtain civil relief. In light of the comprehensive statutory enforcement scheme,

recognition of a private civil right of action is incompatible with the mechanisms chosen by the Legislature."); *Goldman v. Simon Prop. Grp. Inc.*, 58 A.D.3d 208, 217, 869 N.Y.S.2d 125, 132 (2d Dep't 2008) ("The fact that this section does not provide a private right of action, but authorizes only the Attorney General to commence an action for a violation of its provisions, while other sections of the General Business Law expressly provide for a private right of action … suggests that recognition of an implied private right of action would be inconsistent with the legislative scheme."). There is no statutory language in Section 443 permitting a private right of action. It therefore does not exist as a matter of law.

The New York Supreme Court has reached that conclusion in the context of Section 443 causes of action in particular. In *Sambrotto v. Bond New York Props. Brokerage, LLC*, No. 109889/2011, 2013 WL 685223 (N.Y. Sup. Ct. 2013), the court dismissed a claim under Section 443 because the statute "does not contain any provision allowing a private right of action against licensed real estate brokers." *Id.* at *1. Similarly, in *Rallis v. Brannigan* (cited by Plaintiffs' Complaint) the court recognized that "Section 443 of the Real Property Law is disciplinary in nature and enforced by the Attorney General." No. 6738-03, 2008 WL 227009 (N.Y. Sup. Ct. 2008); *see* Halpern Aff., Ex. A, Compl. n.95. And *2 Park Ave.* makes clear that the remedies provided under the article are limited to regulatory sanctions by the Attorney General, not damages for private litigants. 36 N.Y.2d at 289–91.

Plaintiffs cannot maintain a cause of action for an alleged violation of Section 443. That right/power is reserved for the Attorney General. For this additional reason, Plaintiffs' second cause of action should be dismissed.

The Section 443 claim should be dismissed as to the Berks for another, independent reason: the Berks filed it beyond the three-year statute of limitations in CPLR § 214(2). That

statute provides in relevant part that plaintiffs must "commence[] within three years" any "action to recover upon a liability, penalty, or forfeiture created or imposed by statute." Granted, no liability is "created or imposed" by Section 443 because, again, it provides no private right of action. But even if it did, the Berks filed their action outside the three-year period. Although the estate sold the home on June 30, 2014, the Berks did not commence this lawsuit until October 2018 – over four years later. The Berks' claim is thus also time-barred.

C. Plaintiffs' Third Cause of Action Fails Because They Have Not Alleged Deceptive Acts That Caused Them Injury.

Plaintiffs' cause of action under Section 349 of the General Business Law fails because they have not alleged a deceptive act by Houlihan Lawrence that injured them.

To state a claim under Section 349, a plaintiff must allege that (1) defendant engaged in a consumer-oriented act or practice (2) that was "deceptive or misleading in a material way" and (3) "plaintiff has been injured by reason thereof." *See, e.g.*, *Abdale v. N. Shore Long Island Jewish Health Sys., Inc.*, 49 Misc. 3d 1027, 1038–39, 19 N.Y.S.3d 850, 859–60 (N.Y. Sup. Ct. 2015) (internal quotation marks omitted) (quoting *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 324 (2002)). Plaintiffs have not done so.

Paragraphs 237–325 of the Complaint contain the allegations specific to the Plaintiffs' transactions. Duplicative of their breach of fiduciary claim, Plaintiffs contend their respective Houlihan Lawrence agents "deceived" them by failing to obtain informed consent to dual agency with designated sales agents. As explained above, Plaintiffs each consented, in writing, to Houlihan Lawrence's dual agency with designated sales agents. Nothing was hidden and Plaintiffs were not deceived.

Separately, though, Plaintiffs cannot show that "the acts or practices [complained of] have a broader impact on consumers at large," as Section 349 requires. *Silverman v. Household*

Fin. Realty Corp. of New York, 979 F. Supp. 2d 313, 317–18 (E.D.N.Y. 2013) (quoting *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25, 647 N.E.2d 741, 745 (1995)). They allege only a "[p]rivate contract dispute[], unique to the parties," which does "not fall within the ambit of the statute." *Id.*; *see also Yellow Book Sales and Distribution Co., Inc. v. Hillside Van Lines, Inc.*, 98 A.D.3d 663, 664–65, 950 N.Y.S.2d 151 (2d Dep't 2012).

New York courts have routinely rejected Section 349's application to real estate transactions where, like here, the facts are unique to the plaintiff. For example, in *Canario v. Gunn*, 300 A.D.2d 332, 333–34, 751 N.Y.S.2d 310 (2d Dep't 2002), the court concluded that a misrepresentation in connection with a real estate transaction "had the potential to affect only a single real estate transaction involving a single unique piece of property" and was thus not consumer oriented under Section 349. *Id.* at 333–34; *see also Sheehy v. New Century Mortg. Corp.*, 690 F. Supp. 2d 51, 74–75 (E.D.N.Y. 2010) (holding Section 349 inapplicable to individual real estate transaction). Likewise, in *Silverman*, the court rejected a Section 349 claim based on allegedly deceptive conduct in connection with a home loan. *Silverman*, 979 F. Supp. 2d at 318. The court observed that plaintiffs' claims "derive from the particular circumstances of this loan, namely, whether their unique debt to income ratio was appropriate, and whether the nature of any advice allegedly given them regarding how to proceed during the loan modification application process was misleading." *Id.*

Additionally, courts have refused to apply Section 349 to real estate transactions given the statutory purpose to cover much more modest consumer-oriented transactions. *See Teller v. Bill Hayes, Ltd.*, 213 A.D.2d 141, 146–47, 630 N.Y.S.2d 769 (2d Dep't 1995) (Section 349 "was primarily intended to apply to more modest transactions."). *Teller* held that the "home remodeling contract for hundreds of thousands of dollars" fell outside the ambit of the statute.

Id. at 146–48; *see also Waverly Props., LLC v. KMG Waverly, LLC*, 824 F. Supp. 2d 547 (S.D.N.Y. 2011) (holding that a complaint about construction defects was not "consumer-oriented," based in part on the fact that it involved a large transaction, whereas the statute was focused on more modest consumer transactions). *Id.* at 566–67.

Plaintiffs' allegations do not allege modest, consumer-oriented transactions. Each relates to real estate worth between $450,000 and $1.6 million. And, each named Plaintiff's factual allegations are unique to his or her transaction. For example, Goldstein claims:

- She became interested in an online listing, reached out to a listing agent, and received a call from a different agent, Cezimbra, Halpern Aff., Ex. A, Compl. ¶¶ 241–42;
- Cezimbra showed her the Property, *id.* ¶ 244;
- Goldstein and Cezimbra worked to formulate a bid strategy, *id.* ¶ 245;
- There was a competitive bid process, and the house received multiple offers, resulting in a request for "highest and best" offers, *id.* ¶ 246;
- Goldstein and Cezimbra worked to formulate a "highest and best" offer, *id.* ¶ 247;
- Cezimbra provided Goldstein disclosure forms through an assistant, *id.* ¶¶ 248–49; and
- Cezimbra asked Goldstein to further improve her offer given the competitive bids the seller had received, which she agreed to do, *id.* ¶¶ 252–53.

The Berks' claim is, if anything, even more idiosyncratic. They have the unusual circumstance of a non-MLS transaction and allege various individualized issues, such as an initial transaction that fell through, a subsequent above-asking offer before the property was on the market, and the sale of a property by an estate administered by two out-of-town children. Finally, Benjamin's transaction involved substantially more money than the other two – $1.6 million – and a competitive bid situation where the seller already had an acceptable offer.

Much like the transactions in *Silverman* and *Teller*, each Plaintiff's home purchase involves individual facts concerning the sale process for his or her specific property (including multiple bid situations in a hot housing market), the disclosures made to Plaintiffs, the individual communications between Plaintiffs and their agents and each Plaintiffs' subjective awareness of the relevant facts. Plaintiffs cannot convert their individual transactions, which are not consumer-oriented under Section 349, into covered transactions by adding sweeping, class action allegations of conduct that did not impact them.

For the above reasons, Plaintiffs' Section 349 claim should be dismissed as to all Plaintiffs. But like the Section 443 claim, the Berks' claim, in particular, should be dismissed for another, distinct reason: the three-year statute of limitations in CPLR § 214(2). Again, that statute requires that an "action to recover upon a liability, penalty, or forfeiture created or imposed by statute" must be "commenced within three years." *Id.*; *see Gaidon v. Guardian Life Ins. Co. of Am.*, 96 N.Y.2d 201, 208, 750 N.E.2d 1078 (2001). And again, the Berks joined this action well beyond that period. The estate sold the home in the summer of 2014, but the Berks did not file this action until over four years later in October 2018. Their claim is thus time-barred.

D. Plaintiffs' Fourth Cause of Action – Unjust Enrichment – Fails Because (1) the Buyer Plaintiffs Did Not Confer Any Benefit On Houlihan Lawrence and, (2) the Seller Plaintiffs Executed Contracts Concerning the Same Subject.

As with Plaintiffs' other causes of action, Plaintiffs' written consent to Houlihan Lawrence's dual agency with designated sales agents precludes their unjust enrichment claim. Because Plaintiffs consented to Houlihan Lawrence's disclosed dual agency with designated sales agents, nothing unjust occurred in connection with Plaintiffs' transactions.

The buyer Plaintiffs' claim separately fails because they did not confer any benefit on Houlihan Lawrence. The seller Plaintiffs' claim separately fails because they entered a written agreement with Houlihan Lawrence on the same subject.

1. The Buyer Plaintiffs' Unjust Enrichment Claims Fail Because They Did Not Confer a Benefit on Houlihan Lawrence.

To state a cause of action for unjust enrichment, a plaintiff must allege that "(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." *Philips Int'l Invs., LLC v. Pektor*, 117 A.D.3d 1, 7, 982 N.Y.S.2d 98 (1st Dep't 2014) (internal quotation marks omitted); *see also Mazzaro de Abreu v. Bank of Am. Corp.*, 525 F. Supp. 2d 381, 397–98 (S.D.N.Y. 2007). Goldstein and Benjamin have not satisfied and cannot satisfy the second element of this cause of action because they, as the purchasers of the property at issue, did not pay any commission in connection with the transaction. *See, e.g.,* Corrado Aff. ¶ 6, Ex. 3 ¶ 3 (reflecting the seller's agreement to pay the commission). Because Houlihan Lawrence did not benefit at Goldstein's or Benjamin's expense, and because no breach of fiduciary duty exists, equity and good conscience do not require restitution.

The second element of an unjust enrichment claim requires allegations "that the defendant benefited *at the expense of* the plaintiff." *Mazzaro*, 525 F. Supp. 2d at 397–98 (emphasis added). A plaintiff must therefore offer a credible, non-speculative link between an expense she incurred and a benefit to the defendant.

Norcast S.ar.l. v. Castle Harlan, Inc., 147 A.D.3d 666, 48 N.Y.S.3d 95 (1st Dep't 2017) is instructive on this issue. In *Norcast*, plaintiffs sold their business to a special purpose vehicle part-owned by the defendant. Plaintiffs alleged that they sold the business for a deflated price because defendant had concealed the true identity of the buyer, a competitor. The plaintiffs also

asserted a claim for unjust enrichment, alleging that defendant was unjustly enriched by a $25 million fee it received from the competitor to facilitate the purchase. The Appellate Division held that the Supreme Court had properly dismissed the unjust enrichment claim. Even though the sellers were parties to the transaction, their relationship to the fee defendant received was "too speculative to support their allegation that defendant was enriched 'at [plaintiffs'] expense.'" *Id.* at 668 (citation omitted); *see also Mazarro*, 525 F. Supp. 2d at 397–98 (holding that, although defendant had clearly received fees in connection with transfers of funds plaintiff claimed were fraudulent, plaintiff could not satisfy the second or third elements to state a claim for unjust enrichment); *Lebovits v. Bassman*, 120 A.D.3d 1198, 1199–200, 992 N.Y.S.2d 316, 318 (2d Dep't 2014) (dismissing unjust enrichment claim because link between lessee and mortgagee was "too attenuated").

Anyone who has sold a home knows that the seller pays the entire commission. The buyer Plaintiffs' transactions were no different. *See, e.g.,* Corrado Aff. ¶ 6, Ex. 3 ¶ 3. Despite their conclusory allegations to the contrary, the documentary evidence shows that the buyer Plaintiffs did not pay Houlihan Lawrence any commission. The sellers agreed to pay a 5% commission rate and actually paid that amount at or after the closing. The buyer Plaintiffs are not entitled to recover any portion of a commission they did not pay, which is the only relief they seek in their fourth cause of action. Halpern Aff., Ex. A, Compl. ¶ 356.

Plaintiffs also fail to satisfy the third element of unjust enrichment, as equity and good conscience do not require restitution under these circumstances. *See Mazzaro*, 525 F. Supp. 2d at 397 ("As Defendants did not benefit at the expense of Plaintiffs, equity and good conscience cannot require restitution."). Allowing buyers to recover commission payments that they did not

make would result in a windfall and subject Houlihan Lawrence to potential duplicative liability (to both the seller, who actually paid the commission, and the buyer, who did not).

2. The Seller Plaintiffs Cannot Recover in Unjust Enrichment Because They Executed a Contract on the Same Subject.

The Berks concede that the estate signed an Exclusive Right to Sell agreement with Bello, even attaching it as an exhibit to their Complaint. Halpern Aff., Ex. A, Compl., Ex. 116. It is axiomatic that "a cause of action for unjust enrichment is foreclosed by the existence of a valid and enforceable contract." *E.g.*, *Estate of Sonnelitter v. Estate of White*, 115 A.D.3d 1160, 1162, 983 N.Y.S.2d 149, 152 (4th Dep't 2014).

Here, the estate's agreement with Houlihan Lawrence provided for the parties' rights associated with the sale of 190 Davis Avenue, including the payment of Houlihan Lawrence's commission. To the extent the estate claims Houlihan Lawrence did not satisfy its obligations under the parties' agreement, "its remedy is for breach of contract," not unjust enrichment. *JP Morgan Chase Bank v. Orleans,* No. 650006/2004, 2007 WL 6882391 (N.Y. Sup. Ct. 2007).

Plaintiffs' fourth cause of action, like their other claims, fail as a matter of law.

E. The Berks Lack Standing to Assert Claims in Their Individual Capacity.

The estate of Winifred Berk owned and ultimately sold 190 Davis Avenue. The Berks could only, and did only, sign the listing agreement in their capacity as administrators of the estate. Halpern Aff., Ex. A, Compl., Ex. 116. They did not own the property, did not enter any contracts in their individual capacity and did not pay any commission. Accordingly, they have no standing to assert any claims and lack capacity under CPLR § 3211(a)(3).

Individual beneficiaries of an estate, even sole beneficiaries, have no right to bring an independent cause of action to recover estate property. *Stallsworth v. Stallsworth*, 138 A.D.3d 1102, 1103, 30 N.Y.S.3d 661, 663 (2d Dep't 2016) ("The plaintiffs, as individual beneficiaries of

the decedent's estate, had no independent right to maintain an independent cause of action for the recovery of estate property, as such a right belonged to the personal representative of the decedent's estate."). Any action to recover estate property must be on behalf of the estate and must name the administrator as a party *in his representative capacity*. *Hodgins v. Zabel*, 7 Misc.2d 484, 488, 166 N.Y.S.2d 135 (N.Y. Sup. Ct. 1957). "The administrator, in his representative capacity, is in law, a person distinct from the individual." *Id.*

Here, the Berks brought the estate claims in their individual capacities. They have no right to do so. For this additional reason their claims should be dismissed.

CONCLUSION

Based upon all of the foregoing, Defendant respectfully requests that the Court dismiss with prejudice the first through fourth causes of action alleged in the Complaint pursuant to CPLR §§ 3211(a)(1), (a)(3), and (a)(7), together with such other, further and different relief as this Court may deem just and proper in the circumstances and the costs and disbursements of this motion.

Dated: White Plains, New York
October 30, 2018

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Certificate of Counsel
Pursuant to Rule 17 of the Commercial Division Rules

I, Philip M. Halpern, counsel for Defendant who is filing the within document, hereby certify, pursuant to Rule 17 of the Commercial Division Rules, that the word count for the foregoing document, excluding the caption, table of contents, table of authorities, and signature block, is 6,904 words. This document therefore complies with the rule, which limits briefs, memoranda, affirmations, and affidavits to 7,000 words. I certify that the word count Microsoft Word 2010 generated for this document is 6,659 and I further certify that the word count of the images which appear on pages 12-13 is 245 words based upon a manual word count.

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