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 Motion Sequence 3 Return Date: Dec. 7, 2018

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Dated: November 20, 2018

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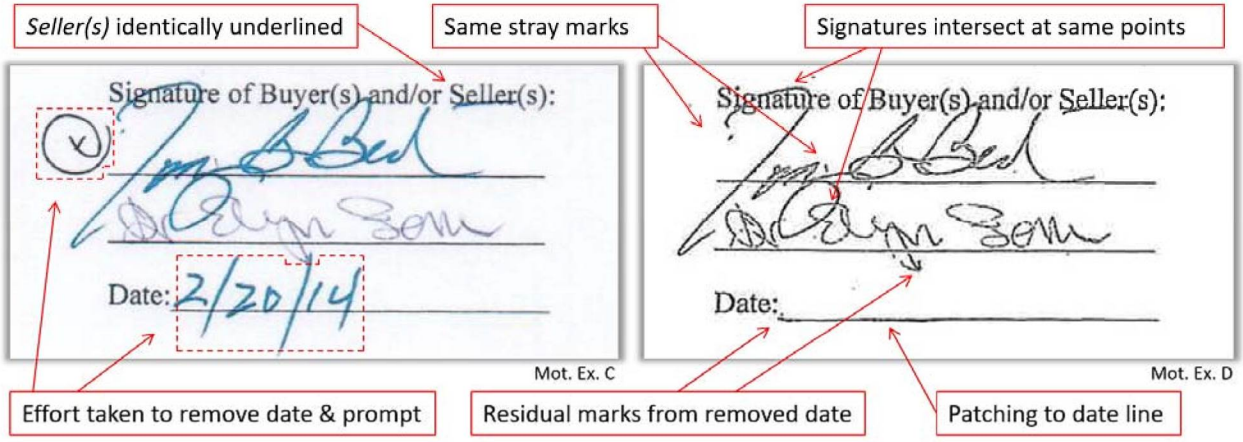
PRELIMINARY STATEMENT

Rarely does a defendant's motion to dismiss bolster the *plaintiffs'* case. But Houlihan Lawrence's motion does just that. Its proffered documentary evidence has revealed a new element of Houlihan Lawrence's dual-agency scheme: fabricating sham statutory disclosure forms. The motion features (at 12) an undated statutory disclosure form which Houlihan Lawrence claims Plaintiffs Tony and Ellyn Berk signed. But inspection of the document shows that the signatures on that form were copied and pasted from a prior, differently marked form—all without the Berks' knowledge or consent:



These documents show that Houlihan Lawrence has created a fraudulent form, has proffered it to this Court as a document the Berks "executed" and provided consent "by signing" (Mot. 5, 12), and has touted it as "essentially unassailable" (Mot. 7) proof of the Berks' informed consent to dual agency. These acts re-confirm Houlihan Lawrence's culture of dual agency and disregard for clients' right to informed consent.

Houlihan Lawrence's legal position also bolsters Plaintiffs' claims. Plaintiffs allege that Houlihan Lawrence engages in rampant disloyal dual agency, including by extracting uninformed, invalid "consent" from clients. In response, Houlihan Lawrence contends those same bogus "consent" forms defeat Plaintiffs' claims as a matter of law. But the Department of State and other industry authorities have made clear that the forms, standing alone, are *insufficient* to fulfill a broker's disclosure and consent obligations.

Houlihan Lawrence's argument reveals that it wrongfully treats signed forms as a free pass to engage in dual agency—even as it also systematically pays secret dual-agency kickbacks to its agents; impermissibly pre-marks the forms; fails to fully disclose the risks, downsides, and options of dual agency; fails to disclose familial and other entrenched relationships among its dual agents; provides disclosure forms too late to be effective; misleads clients by downplaying the forms' significance; and engages in myriad other deceptive and unfair business practices to dupe clients into dual agency.

Apparently recognizing that it cannot succeed in dismissing Plaintiffs' claims, Houlihan Lawrence uses its motion as an occasion to preview its argument for a later stage in the case, that Plaintiffs' claims "cannot be maintained on a class basis" (Mot. 1 n.1). Its class certification arguments ignore the fact that this case is based on Houlihan Lawrence's firm-wide scheme to steer clients into undisclosed, non-consensual dual agent transactions, including through secret dual-agency kickbacks to its agents and a long list of other deceptive and unfair practices.

Houlihan Lawrence has engaged in a common course of conduct affecting all class members and involving common questions of fact and law that compel class-wide adjudication of Plaintiffs' claims.

ARGUMENT

On a motion to dismiss, "the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Sarva v. Self Help Cmty. Servs.*, 73 A.D.3d 1155, 1155-56 (2d Dep't 2010). When a defendant submits evidentiary material in support of a motion to dismiss, "'unless it has been shown that a material fact'" alleged by plaintiffs is "'not a fact at all,'" and "'unless it can be said that no significant dispute exists regarding it,'" then "'dismissal should not eventuate.'" *Weill v. E. Sunset Park Realty, LLC*, 101 A.D.3d 859, 859 (2d Dep't 2012).

1. Breach of Fiduciary Duty: Houlihan Lawrence Fails to Prove Its Defense of Disclosure and Informed Consent as a Matter of Law

Plaintiffs allege that Houlihan Lawrence breached its fiduciary duty by luring thousands of homebuyers and sellers into uninformed, non-consensual dual-agent transactions as part of a firm-wide dual-agency scheme, including by paying secret kickbacks to its agents for dual-agent transactions. In response, Houlihan Lawrence effectively asks this Court to make a conclusive presumption that simply because Plaintiffs executed statutory disclosure forms, they must be deemed to have provided informed consent to Houlihan Lawrence's dual agency. That is not New

York law. *Other* states have adopted statutes establishing a "conclusive presumption" of "informed consent to a dual agency relationship" if the client executes a statutory form. Conn. Gen. Stat. § 20-325g. New York, by contrast, does *not* create such a conclusive presumption, and the execution of a statutory disclosure form does *not* "limit or alter the application of the common law of agency." N.Y. Real Prop. Law § 443(6). Indeed, consumer advocates hailed Section 443 as "the most progressive, consumer-oriented agency disclosure law of any state," because it follows New York common law in recognizing that informed consent requires *more* than a pro forma signature on a form. Am. Compl. ¶ 99 (Dkt. 155) [hereinafter "AC"].

Houlihan Lawrence does not and cannot contend that it fully disclosed the risks, downsides, and options of dual agency, as it was duty-bound to do.

A. Houlihan Lawrence Acted as a Dual Agent and Must Prove It Did So Only After Full Disclosure and Informed Written Consent

A real estate broker "is a fiduciary with a duty of loyalty and an obligation to act in the best interests of the principal." *Dubbs v. Stribling Assocs.*, 96 N.Y.2d 337, 340 (2001). The broker "has the affirmative duty not to act for a party whose interests are adverse to those of the principal." *Goldstein v. Dep't of State*, 144 A.D.2d 463, 464 (2d Dep't 1998); *see also* Restatement (Third) of Agency § 8.03.

In the context of a dual-agent transaction, plaintiffs meet their prima facie burden to establish a breach of fiduciary duty by showing that the broker acted as dual agent, on behalf of both a homebuyer and seller. *Dep't of State v. Winograd*, 86 DOS 93 at 4 (Opp'n Ex. P-3). Once the "fact of the double agency" is established,

the broker then bears "the burden of establishing" that it made "full disclosure" of the risks, downsides, and options of dual agency and obtained the clients' informed consent. *Id.*; *see also* Restatement (Third) of Agency § 8.06 & cmt. b (the "agent bears the burden of establishing that the requirements" for acting as a dual agent "have been fulfilled"); *Dep't of State v. Robin*, 80 DOS 97 at 9 (Opp'n Ex. P-4) (broker failed to meet "burden of establishing the affirmative defense of full disclosure on the issue of dual representation"). "To establish the requisite consent for dual agency," the broker must "demonstrate 'that both principals are fully informed of every fact material to their interests and that they consent freely in the presence of such knowledge.'" *Sotheby's Int'l Realty, Inc. v. Black*, No. 06 CIV. 1725 (GEL), 2007 WL 4438145 at *2 (S.D.N.Y. Dec. 17, 2007).

A broker's disclosure of dual agency "must lay bare the truth, without ambiguity or reservation, in all its stark significance." *Wendt v. Fischer*, 243 N.Y. 439, 443 (1926) (Cardozo, J). Its proof of informed consent "must be exacting." *Schwartz v. O'Grady*, No. 86 CIV. 4243 (JMC), 1990 WL 156274, at *5 (S.D.N.Y. Oct. 12, 1990).

B. The Statutory Disclosure Forms Do Not Establish Disclosure and Informed Consent

Houlihan Lawrence does not dispute that it owed Plaintiffs a fiduciary duty and that it acted as a dual agent in Plaintiffs' transactions. Instead, it argues (at 8) that "because each Plaintiff executed the statutory disclosure form," Plaintiffs' claims fail "as a matter of law." Houlihan Lawrence is wrong. Viewed in the light of Houlihan Lawrence's firm-wide scheme to profit from dual-agent transactions,

Plaintiffs' statutory disclosure forms do not represent informed consent *at all*—much less as a matter of law.

The relevant inquiry "is not merely whether the dual agency was disclosed, but whether the disclosure was sufficient to permit informed consent." *Schneider v. Wien & Malkin LLP*, 5 Misc. 3d 1011(A), 2004 WL 2495843 at *15 (Sup. Ct. N.Y. Cty. Nov. 1, 2004). Houlihan Lawrence must show that it made "nothing less than full and complete disclosure." *TPL Assocs. v. Helmsley-Spear, Inc.*, 146 A.D.2d 468, 470 (1st Dep't 1989). It must show that Plaintiffs were "fully informed of every fact material to their interests" and consented "freely in the presence of such knowledge." *Hasbrouck v. Rymkevitch*, 25 A.D.2d 187, 189 (3d Dep't 1966). Among other things, an "agent acting as a dual agent must explain carefully to both buyer and seller that the agent is acting for the other party as well," and "also explain the possible effects of dual representation, including that by consenting to the dual agency the buyer and seller are giving up their right to undivided loyalty." N.Y. Real Prop. Law § 443(a). A mountain of common evidence relevant to all class members will show that Houlihan Lawrence's culture of dual-agency and its unfair practices and policies guarantee that clients do not receive these required disclosures.

Houlihan Lawrence's motion does not even confront the disclosure-and-informed-consent standard, much less meet it. Houlihan Lawrence's statutory disclosure forms, the only evidence on which it relies, do not demonstrate "full and

complete disclosure" or that Plaintiffs were "fully informed of every fact material to their interest"—far from it.

The statutory disclosure form states "very briefly and *not in an informed manner*, what a dual agent is." NYSAR, *Agency – Dual & Designated Agents*, July 21, 2015, at 13:10, available at https://www.nysar.com/legal/nysar-radio (emphasis added). The Department of State and the state's major trade association, NYSAR (New York State Association of Realtors), have recognized that "merely presenting the form to a prospective purchaser or seller *is insufficient*" to fulfill a broker's disclosure and informed consent duties. AC ¶ 112 (emphasis added). When recommending approval of Section 443, the Department of State explained that the form "does not and was not intended to relieve" brokers of their "common law duty" to "obtain informed consent through full disclosure of the implications of the proposed dual agency relationship"—rather, the form is "the *beginning* of full disclosure," and is *not* a "substitution for the rigorous duties of full disclosure in the common law." Opp'n Ex. P-5 at 2-3, Memo from Executive Deputy Secretary of State to Counsel for the Governor, July 12, 1991 (emphasis added). NYSAR's counsel has repeated that guidance time and again, advising New York brokers that the "form in and of itself is not sufficient to provide informed consent"; brokers must disclose "more than what is on the form"; and brokers "have to do more than give [clients] the form and have them sign it." AC ¶ 113.

Because obtaining informed consent requires brokers to do "more than give [clients] the form and have them sign it," NYSAR "drafted a document to assist"

brokers to disclose to consumers "exactly what dual agency is and how it works." NYSAR, *Part 3 of Agency – Dual & Designated Agents*, Sept. 11, 2012, at 11:08, available at https://www.nysar.com/legal/nysar-radio; *see also* AC ¶¶ 117-22. Those NYSAR forms provide key disclosures about dual agency that are lacking in the statutory disclosure forms and thus lacking in Houlihan Lawrence's proffered documentary evidence. *See id.*

C. Houlihan Lawrence Failed to Disclose Material Facts, Including Its Dual-Agency Kickback Scheme

Houlihan Lawrence doesn't dispute that it never told Plaintiffs that it financially incentivizes its agents to steer clients into dual-agent transactions. Those secret dual-agency kickbacks are "material information a consumer would need to make an informed decision about dual agency." AC ¶ 81. Clients "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." *Id.*; *see also id.* ¶¶ 74-83. Since this suit was filed, anonymous sources have come forward to emphasize the dangers of these secret kickbacks—and to state that there are "thousands upon thousands of inter-office emails" that will prove it. *See* AC Exs. 2A, 2B (Dkt. 158, 159).

Houlihan Lawrence is duty-bound to avoid "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"—such conflicts of interest "are not to be tolerated." *Dep't of State v. Christiana*, 164 DOS 92 at 5 (Opp'n Ex. P-6); *see also Dubbs*, 96 N.Y.2d at 340 (broker must disclose "the material facts illuminating the

broker's divided loyalties"). Yet it systematically pays a secret kickback that puts every one of its agents in "situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty." *Birnbaum v. Birnbaum*, 73 N.Y.2d 461, 466 (1989).

Similarly, while Houlihan Lawrence claims Ms. Goldstein had "knowledge" that both her agent and the seller's agent were "affiliated with Houlihan Lawrence" (Mot. 11), such knowledge doesn't establish the level of required disclosure as a matter of law. "Not only must the dual agency be revealed but the facts relevant to enable the principal to make an informed decision must also be disclosed." *Schwartz*, 1990 WL 156274, at *5). Houlihan Lawrence doesn't dispute that, unbeknownst to Ms. Goldstein, the two Houlihan Lawrence agents on opposite sides of her deal were brothers-in-law who have teamed up on clients in "at least a dozen deals in just the last two years or so." AC ¶¶ 265-67. NYSAR's counsel advises that within-family dual agency represents a conflict that *cannot be waived even if disclosed*: "Even though the buyer and seller may have said it's okay, I don't think they understand the full implications. I don't think the full fiduciary range of duties can be given in the event that there is a familial relation . . . . I think a familial conflict is impossible to waive." NYSAR, *Agency – Dual & Designated Agents*, Nov. 11, 2014, at 51:30, available at https://www.nysar.com/legal/nysar-radio. Houlihan Lawrence, however, never even disclosed its familial conflict.

In addition to the familial conflict in Ms. Goldstein's transaction, Plaintiffs' transactions all involved entrenched and problematic relationships between the

agents on opposite sides of the deal. Ms. Goldstein's agent was a financially dependent, subordinate team member of the seller's agent. AC ¶¶ 261-67. The Berks' agent had a longstanding "close personal" relationship with the buyer's agent. AC ¶ 291. Mr. Benjamin's agent is the office manager for Houlihan Lawrence's Chappaqua office. AC ¶ 310. Again, NYSAR's counsel has disapproved of dual agency in such contexts: "team leaders or office managers [should] not be designated agents" because "there is a presumption of impropriety by members of the public." NYSAR, *Agency – Buyer's Agents*, Apr. 21, 2015, at 12:30, available at https://www.nysar.com/legal/nysar-radio. Houlihan Lawrence doesn't claim to have disclosed those entrenched relationships.

D. The Documentary Evidence Shows Houlihan Lawrence Failed Its Disclosure-and-Informed-Consent Obligations

Far from providing the required "undeniable" (Mot. 7) evidence of informed consent, the forms show that Plaintiffs did *not* provide informed consent to Houlihan Lawrence's dual agency.

First, all of Houlihan Lawrence's proffered forms are pre-marked. Houlihan Lawrence's pre-marking of clients' forms impermissibly converts the Legislature's *opt-in* system to an *opt-out* system. AC ¶¶ 146-68. Yet Houlihan Lawrence's motion ignores Plaintiffs' allegations that such pre-marking is impermissible, and it can't raise the issue for the first time in its reply brief. *Pinkston v. Weiss*, 238 A.D.2d 393 (2d Dep't 1997). Houlihan Lawrence even admits that it unilaterally *altered* Ms. Goldstein's form *after* she signed it. Corrado Aff. ¶ 4.

Second, Houlihan Lawrence gave Ms. Goldstein and Mr. Benjamin the statutory disclosure form too late. A broker must obtain written informed consent to dual agency "prior to undertaking to act either as a dual agent or for an adverse interest." *Winograd*, 86 DOS 93 at 3 (Opp'n Ex. P-3); *see also Dep't of State v. Werner*, 160 DOS 96 at 7-8, 11 (Opp'n Ex. P-7) (listing agreements "tainted from their inception" by broker's failure to timely provide form, "a clear and unambiguous demonstration of incompetency"). A broker must fully disclose the risks, downsides, and options of dual agency "at the onset of discussions concerning agency." Opp'n Ex. P-8, Anthony Gatto, Amended Agency Disclosure Takes Effect January 1, 2011, NYSAR Legal Lines; *see also* N.Y. Real Prop. Law §§ 443(3)(a), (3)(c); Opp'n Ex. P-9, *Questions I Thought I Had Already Answered*, LIBOR, July 4, 2014 (dual agency risks must be discussed "as soon as you start talking about real estate and the party's desire to sell or buy"). One of Houlihan Lawrence's office managers admits: "Both parties must agree to dual agency in writing, in advance." AC Ex. 55 (Dkt. 230).

Houlihan Lawrence didn't give the form to Ms. Goldstein or Mr. Benjamin until *after* they had shared their confidential information and Houlihan Lawrence had acted as a dual agent. Houlihan Lawrence showed Ms. Goldstein the property on multiple occasions, advised her on price negotiations, and submitted two offers on her behalf before providing the form. AC ¶¶ 237-48. Mr. Benjamin had viewed the property on several occasions, made multiple offers, conducted price

negotiations informed by his agent's advice, and reached a deal to purchase the property before he received the form. AC ¶¶ 309-25.

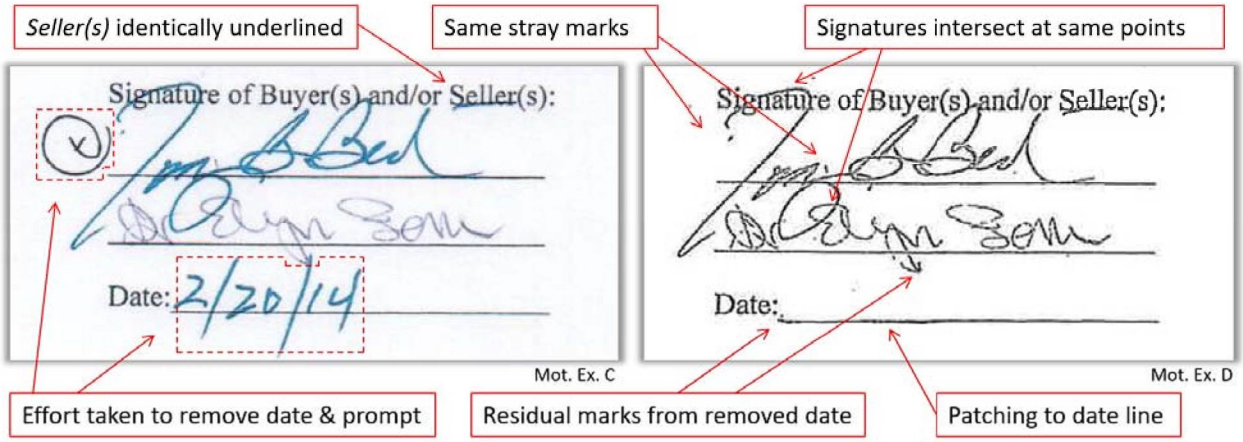
Late disclosure is insufficient, including because Houlihan Lawrence's systematically untimely disclosures discourage clients from raising questions until they have already "committed—mentally, emotionally, or even legally—to buy a particular home." AC ¶ 150; *see also id.* ¶ 151, 230-31. Yet Houlihan Lawrence wrongly attempts (at 13) to excuse its non-compliance by blaming Plaintiffs for not knowing enough to question Houlihan Lawrence's duplicitous practice.
Mr. Benjamin and the other Plaintiffs were under no burden to ferret out Houlihan Lawrence's misconduct and object to it—Houlihan Lawrence was the fiduciary with the burden of making timely and full disclosure.

Third, documentary evidence shows that Houlihan Lawrence minimized the significance of the statutory disclosure forms when it presented them to Plaintiffs. For example, Mr. Benjamin received his form as an attachment to an e-mail that downplayed the document as a mere "Office form." AC Ex. 139 (Dkt. 324). Such "deliberate effort at a 'blow-by'" and "casual" reference to crucial disclosures is impermissible. *Sotheby's v. Black*, 2007 WL 4438145 at *3.

E. Houlihan Lawrence Created a Sham Statutory Disclosure Form and Proffered It as "Unassailable" Proof

Houlihan Lawrence proffers fraudulent documentary evidence. It features (at 12) a "second statutory disclosure form" and represents (at 5, 12) that two of the Plaintiffs "executed" the form. But the signatures on that undated "second" form are plainly copied and pasted from the prior, differently marked statutory

disclosure form. *Compare* Mot. Ex. C (Dkt. 339) *with* Mot. Ex. D (Dkt. 340). The "second" document is undated, but contains stray marks reflecting where the date on the original was incompletely removed (original on the left):



The Berks did not sign the "second" form or authorize Houlihan Lawrence to sign it on their behalf. Tony Berk Aff. ¶ 5; Ellyn Berk Aff. ¶ 4.

Houlihan Lawrence's apparent practice of creating sham statutory disclosure forms—and its endorsement of such forms as "unassailable" (Mot. 7) evidence of informed consent to dual agency—is a newly revealed element of its scheme to manufacture phony consent. It confirms Houlihan Lawrence's culture of disregard for client consent. And it is yet another reason why statutory disclosure forms, standing alone, cannot establish disclosure and informed consent as a matter of law.

In addition, the sham form exposes the falsity of Houlihan Lawrence's position (at 9) that advance consent to dual agency eliminates "the need for a separate disclosure and consent when the dual agency actually arose." The New York Department of State and industry authorities have rejected that position, explaining that failure "to provide later disclosure when the dual agency

relationship has actually been consummated" would be "a violation of the broker's fiduciary duties of full disclosure and reasonable care to the consumer." AC Ex. 47 (Dkt. 220); *see also* Opp'n Ex. P-10, Sam Irlander, *Modern Real Estate Practice in New York for Salespersons*, Dearborn Real Estate Education, 12th Ed. 2016, at 65 ("in addition to the advance consent to a dual agency," broker is "obligated to provide a later disclosure when the dual agency relationship has been actually created" and failure to do so is "a violation of the broker's fiduciary duties").

Requiring disclosure when dual agency actually arises does not mean the "advance informed consent" option has "no purpose" (Mot. 10). As the Sponsor's Memorandum quoted by Houlihan Lawrence (Mot. 9) indicates, allowing advance consent to dual agency was intended to "streamline" the property-showing process. Brokers can obtain advance consent to act as a dual agent when showing properties—but that does not convert advance consent into a sweeping license for brokers to engage in protracted dual-agent representation without any further disclosure to clients.

Accordingly, NYSAR explains that where the original form does not reflect the broker's dual-agent status, "a new Section 443 notice must be executed" once dual agency actually arises. AC Ex. 48. That Houlihan Lawrence felt compelled to fabricate such a document and submit it in support of its motion shows that it, too, recognized the need for timely follow-up disclosure of actual dual agency.

Houlihan Lawrence also wrongly contends (at 12) that the Berks consented to dual agency by executing the listing agreement. But that pre-filled agreement

merely sought consent for the property to be "shown to Buyer Clients of Houlihan Lawrence," noting only a "*potential* for Dual Agency" and a possibility that "certain differences or conflicts *may* arise," at which point the Berks would "confirm in writing" whether or not they consented. AC Ex. 116 ¶ 15 (Dkt. 301, emphasis added). The listing agreement does not establish informed consent—if Houlihan Lawrence thought it did, it wouldn't have fabricated the "second" statutory disclosure form.

* * *

In sum, Houlihan Lawrence's documentary evidence does not represent informed consent at all—much less as a matter of law. Houlihan Lawrence has engaged in a many-faceted dual-agency scheme. AC ¶¶ 5-11, 54-83, 142-236. That scheme involves manufacturing "the *appearance* of clients' advance informed consent to dual agency" (*id.* ¶ 332(2)k(ii), emphasis added), while in fact adopting "a broken system of misinformation and *phony* advance consent" (*id.* ¶ 11.h, emphasis added). Houlihan Lawrence now attempts to use that phony advance consent as an absolute insurance policy against its rampant breaches of fiduciary duty. New York law does not permit that—even if, unlike here, the proffered documents were genuine.

2. Section 443 Implies a Private Right of Action to Enable Consumers to Protect Themselves from Unscrupulous Brokers

Houlihan Lawrence does not dispute that Plaintiffs have alleged violations of Real Property Law Section 443. Instead, it incorrectly argues (at 14-16) that Section 443 does not provide a private right of action.

A private right of action may be "fairly implied" under Section 443. The factors for determining whether a statutory implied private right of action exists are (1) whether plaintiffs are within "the class for whose particular benefit the statute was enacted"; (2) whether "recognition of a private right of action would promote the legislative purpose" of the statute; and (3) whether "such a right would be consistent with the legislative scheme." *Maraia v. Orange Reg'l Med. Ctr.*, 63 A.D.3d 1113, 1116 (2d Dep't 2009).

Section 443 was enacted for the benefit of homebuyers and sellers like Plaintiffs. AC ¶¶ 84-110; *see also Rivkin v. Century 21 Teran Realty LLC*, 10 N.Y.3d 344, 353 (2008). Indeed, Section 443's mandated disclosure form is called the "New York State Disclosure Form *for Buyer and Seller*." AC ¶ 100 (emphasis added).

A private right of action promotes Section 443's legislative purpose of ensuring that homebuyers and sellers receive the disclosures necessary to make an informed decision about dual agency. Section 443 "does not provide any penalty for the failure of the broker to complete the disclosure form in the manner required by the legislation"—and "in order for the law to make any sense and for it to serve its purpose, there must be some consequence attendant to the failure of the broker to comply." *Talk of the Millennium Realty Inc. v. Sierra*, 12 Misc. 3d 1153(A), 2006 WL 1341014, at *4 (Civ. Ct. Richmond Cty. Jan. 3, 2006). The "logical penalty would be to create a presumption that the failure to comply with the disclosure law

would serve as a basis to deny a broker a commission when there is a non-compliance with the statute." *Id.*

A private right of action under Section 443 is consistent with the legislative scheme. Houlihan Lawrence emphasizes (at 14-15) the attorney general's criminal enforcement powers, but such criminal penalties apply only to "unlicensed activity," not to Houlihan Lawrence's misconduct. *2 Park Ave. Assocs. v. Cross & Brown Co.*, 36 N.Y.2d 286, 290 (1975). More fundamentally, it is wrong that a statutory grant of criminal or administrative enforcement power "precludes a private right of action" (Mot. 14). A "private right of action, in addition to administrative enforcement," can be "fully consistent with the legislative scheme." *Maimonides Med. Ctr. v. First United Am. Life Ins. Co.*, 116 A.D.3d 207, 211 (2d Dep't 2014).

Here, an implied private right of action is appropriate because Section 443 is "not simply remedial in nature," but affords homebuyers and sellers "various rights" and imposes "an affirmative duty" on brokers to "provide specified services" and disclosures. *Henry v. Isaac*, 214 A.D.2d 188, 193 (2d Dep't 1995) (finding private right of action despite "broad and comprehensive" administrative "supervisory and enforcement powers"). It is "directed toward protecting" the rights "of a particular class of individuals," and violations of Section 443 "directly and adversely affect" those individuals. *Id.* A private right of action under Section 443 "'would augment the existing enforcement devices and enhance a legislative scheme which, in part, imposes affirmative duties for the protection of those very individuals.'" *Maimonides*, 116 A.D.3d at 215.

Houlihan Lawrence points (at 14) to the court-imposed limits on Real Property Law Article 12-A's statutory *penalty* provision, Section 442-e(3). That provision authorizes a party to seek a penalty of up to "four times the sum" of any "commission, compensation or profit" received as a result of a statutory violation. The Court of Appeals long ago applied a "narrow construction" limiting that stiff statutory penalty to unlicensed brokers—even though Section 442-e(3) does not expressly state such a limitation. *2 Park Ave.*, 36 N.Y.2d at 290-91 (1975). But the Court did not consider, much less rule, that its "narrow construction" of the *penalty* rights under Section 442-e(3) should extend to foreclose an implied *private rights of action* under Section 443. The quadruple-damages penalty that motivated the Court to narrowly construe Section 442-e(3) would not apply to an implied private right of action under Section 443. Indeed, Section 443 was not yet enacted and thus not before the Court when it decided *2 Park Avenue*.

Houlihan Lawrence cites (at 15) a case that relies on *2 Park Avenue* to conclude that Section 443 does not provide a private right of action against licensed brokers. *Sambrotto v Bond N.Y. Props. Brokerage, LLC*, No. 109889/2011, 2013 WL 685223 (Sup. Ct. N.Y. Cty. Feb. 20, 2013). But, as discussed, *2 Park Avenue* could not and did not address the availability of a private right of action under Section 443. Houlihan Lawrence's reliance on *Rallis v. Brannigan*, No. 6738-03, 2008 N.Y. Misc. LEXIS 7676 (N.Y. Sup. Ct. Nassau Cty. 2008), is equally misplaced: that case did not consider whether a private right of action may be "fairly implied" or assess the relevant factors.

3. Houlihan Lawrence's Firm-Wide Dual-Agency Scheme Is Deceptive, Consumer-Oriented Conduct that Violates Section 349

Plaintiffs allege that Houlihan Lawrence has lured thousands of New York homebuyers and sellers into dual-agent transactions by failing to timely disclose the risks, downsides, and options of dual agency; by failing to obtain clients' informed written consent; and by paying its agent secret kickbacks for dual-agent transactions. Houlihan Lawrence contends that this conduct is somehow neither "deceptive" nor "consumer-oriented" to state a violation of New York's consumer protection statute, Section 349. Houlihan Lawrence is wrong.

First, Houlihan Lawrence wrongly contends (at 16) that each of the Plaintiffs "consented, in writing, to Houlihan Lawrence's dual agency" and therefore "Plaintiffs were not deceived." As discussed in Part 1 above, Houlihan Lawrence's documents do not establish lack of deception—indeed, Houlihan Lawrence's inauthentic, untimely, defective forms affirmatively establish deception, as do its secret kickbacks and the other elements of its dual-agency scheme. Houlihan Lawrence's disclosure failures "undermine a consumer's ability to evaluate his or her market options to make a free and intelligent choice," and "inherently hurt the public." *N. State Autobahn, Inc. v. Progressive Ins. Grp.*, 102 A.D.3d 5, 13 (2d Dep't 2012).

Second, Houlihan Lawrence wrongly argues (at 16-19) that its deception was not a "consumer-oriented act or practice" because certain facts of each Plaintiff's claims are purportedly "unique" or "idiosyncratic." Houlihan Lawrence's argument fails because the gravamen of each Plaintiff's claim is the same: As part of a firm-

wide scheme to dupe clients into dual-agent transactions, Houlihan Lawrence fails to timely disclose the risks, downsides, and options of dual agency and obtain informed written consent. It achieves that scheme through a common system of "deceptive and unfair business practices" including undisclosed kickbacks, pre-marked forms, hype for dual-agency deals as if they were good for clients, and a long list of other improper practices. AC ¶ 11; *see also id.* ¶¶ 54-83, 142-236.

Deceptive acts are consumer-oriented when they are "part of an institutionalized program" and have a broad "impact on consumers at large," *N. State Autobahn, Inc.*, 102 A.D.3d at 13, or when "they potentially affect similarly situated consumers." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 26-27 (1995). Plaintiffs allege that Houlihan Lawrence has an "institutional culture and strategy of non-disclosure and misinformation" about dual agency (AC ¶ 205), including its deceptive use of the statutory disclosure form, its payment of secret kickbacks to sales agents (AC ¶¶ 6-10, 74-83), and a host of other improper practices (e.g., AC ¶¶ 48-62, 111-22, 233-36). "Consumer-oriented conduct does not require a repetition or pattern of deceptive behavior," *Oswego*, 85 N.Y.2d at 25, but Plaintiffs allege just that, far surpassing the standard for "consumer-oriented" under Section 349.

The positions Houlihan Lawrence takes in its motion further confirm that it embraces deceptive and unfair practices: it contends (at 8-14) that mere execution of a statutory disclosure form establishes informed consent, effectively disclaiming any duty to tell clients more than what is on the form; it asserts (at 11) that

Ms. Goldstein's mere knowledge that the buyer's and seller's agents "were both affiliated with Houlihan Lawrence" suffices as knowledge of the risks, downsides, and options of dual agency; it disclaims (at 10) any duty to provide follow-up disclosures once dual agency actually arises; it contends (at 13) that untimely disclosure is permissible so long as the client "never objected" to it; and it propounds (at 12) sham documents as "unassailable" evidence of consent.

Houlihan Lawrence's cited cases involve "one-off" transactions that are readily distinguishable from its institutional scheme to disregard its disclosure-and-informed-consent obligations to consumers.

Third, Houlihan Lawrence wrongly argues (at 17-18) that Section 349 claims may only be directed to "much more modest" transactions, and not to real estate transactions. But it is "well settled that Section 349 covers real estate transactions." *Banks v. Consumer Home Mortg., Inc.*, No. 01-CV-8508 (ILG), 2003 WL 21251584, at *7 (E.D.N.Y. Mar. 28, 2003). Section 349 provides broad "prohibition" of deceptive acts "in the conduct of *any business*" or "*any service*" and thus the Appellate Division has "not surprisingly" interpreted Section 349 "to cover real estate transactions." *Polonetsky v. Better Homes Depot, Inc.*, 97 N.Y.2d 46, 53 & n.1 (2001) (citing cases). "Although the courts have observed that the consumer protection statutes are primarily intended to apply to more modest transactions, they have not been reluctant to apply the statutes to real estate transactions where they have, as here, involved defective practices affecting the public at large."

Polonetsky v. Better Homes Depot, Inc., 185 Misc. 2d 282, 291 (Sup. Ct. N.Y. Cty. 2000) (citations omitted).

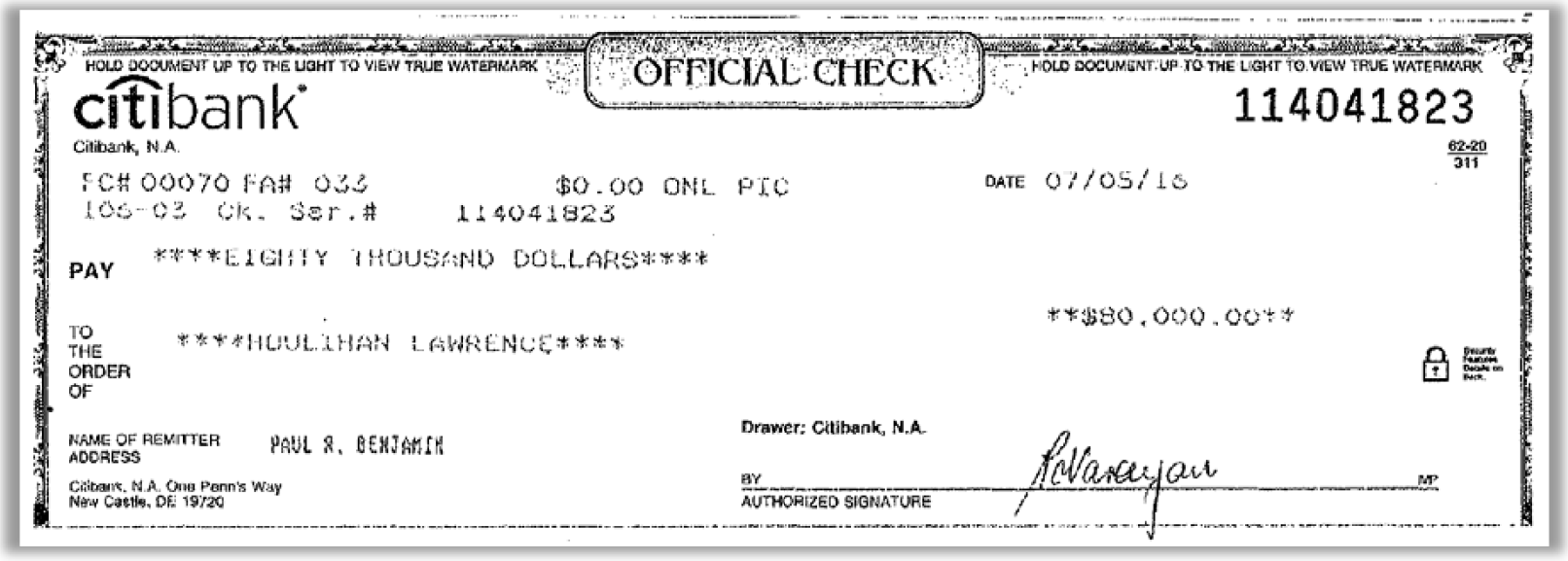
Houlihan Lawrence's conduct involves "defective practices affecting the public at large." While NYSAR's former director has counseled that "dual agency should be incredibly rare," Houlihan Lawrence routinely acts as a dual agent. AC ¶¶ 48-53. It does so pursuant to a firm-wide "bait-and-switch scheme to lure thousands of homebuyers and sellers into dual-agent transactions." AC ¶ 5. It broadly solicits consumers, including through its website, property listings, "comprehensive" buyer and seller guides, and "posters displayed in high-traffic" locations. AC ¶¶ 34-39, 190-92, 217. Every consumer who engages with Houlihan Lawrence about a possible agency relationship is entitled to timely and full disclosure of the risks, downsides, and options of dual agency.

4. Houlihan Lawrence Was Unjustly Enriched by Collecting Commissions on Transactions in Which It Was Disloyal

A. Houlihan Lawrence Cannot Avoid Liability for Its Unjust Enrichment by Denying that Buyers Pay the Commission

Houlihan Lawrence's contention (at 20-22) that buyer-Plaintiffs "did not pay any commission in connection with the transaction" ignores Plaintiffs' allegations to the contrary, including a statement from Houlihan Lawrence's "company training guru": "the seller accepted an offer that incorporates the commission, and the buyer is paying the commission as it is incorporated within the price they agree to pay for the house." AC ¶ 140. The Federal Trade Commission and Department of Justice exercise supervisory authority over the real estate industry and likewise disagree

with Houlihan Lawrence's position: "because the amount home sellers pay their real estate broker is built into the home sales price, both home buyers and sellers bear this expense." Opp'n Ex. P-11, *Competition in the Real Estate Brokerage Industry*, Apr. 2007. Illustrating this well-recognized economic reality, Houlihan Lawrence admits that it collected a sales commission of $80,000 in connection with buyer-Plaintiff Paul Benjamin's transaction—and received a check from him in that amount at closing. *See* Opp'n Ex. P-12, Responses to Requests 139-40.


HOLD DOCUMENT UP TO THE LIGHT TO VIEW TRUE WATERMARK

OFFICIAL CHECK

HOLD DOCUMENT UP TO THE LIGHT TO VIEW TRUE WATERMARK

citibank

Citibank, N.A.

114041823

62-20
311

FC# 00070 FA# 033 $0.00 ONL PIC DATE 07/05/16
105-03 Ck. Ser.# 114041823

PAY ****EIGHTY THOUSAND DOLLARS****

$80,000.00

TO THE ORDER OF ****HOULIHAN LAWRENCE****

NAME OF REMITTER PAUL R. BENJAMIN
ADDRESS

Citibank, N.A. One Penn's Way
New Castle, DE 19720

Drawer: Citibank, N.A.

BY AUTHORIZED SIGNATURE

Moreover, buyer-Plaintiffs do not need to have personally paid the commissions in order to succeed on a claim for unjust enrichment. "While the paradigm case of unjust enrichment is one in which the benefit on one side of the transaction corresponds to an observable loss on the other, the consecrated formula 'at the expense of another' can also mean 'in violation of the other's legally protected rights,' without the need to show that the claimant has suffered a loss." Restatement (Third) of Restitution & Unjust Enrichment § 1, cmt. a (2011); *see Tsutsui v. Barasch*, 67 A.D.3d 896, 899 (2d Dep't 2009) ("equity requires the imposition of a constructive trust over any profits gained from" defendant's

wrongful acts, "to prevent an unjust enrichment" even absent "direct harm" to plaintiff).

Houlihan Lawrence's assertion (at 21) that "equity and good conscience do not require restitution under these circumstances" depends on its faulty premise that buyer-Plaintiffs "did not confer any benefit" to Houlihan Lawrence (Mot. 20). Houlihan Lawrence received more commission money because it represented the buyer-Plaintiffs. Had another broker represented those buyer-Plaintiffs—a broker who was not a dual agent and could therefore faithfully represent the buyer-Plaintiffs—that commission money would have gone to the faithful broker instead of Houlihan Lawrence. *See* AC ¶¶ 58-59 ("double commission collected at the expense of a competitor"). Houlihan Lawrence eagerly represents buyer clients all the time—not out of charity, but for the financial benefit of the commission money it receives for doing so.

B. Houlihan Lawrence Cannot Avoid Liability for Its Unjust Enrichment by Invoking Sellers' Contract

Houlihan Lawrence contends (at 22) that the Berks' unjust enrichment claim is foreclosed "by the existence of a valid and enforceable contract." But an unjust enrichment claim is not foreclosed "where the contract does not cover the dispute in issue," *Hochman v. LaRea*, 14 A.D.3d 653, 654-55 (2d Dep't 2005), and the claim "does not depend on the existence of valid and enforceable written contracts." *Sebastian Holdings, Inc. v. Deutsche Bank AG*, 78 A.D.3d 446, 448 (1st Dep't 2010). The Berks' claim arises out of Houlihan Lawrence's failure to fulfill common-law fiduciary obligations, not "its obligations under the parties' agreement" (Mot. 22).

They do not allege a breach-of-contract claim, and buyer-Plaintiffs assert the same unjust enrichment claim despite their lack of a written contract. *Cf. Sebastian Holdings*, 78 A.D.3d at 448 (permitting unjust enrichment claim because it was not "duplicative" of any breach-of-contract claims). Houlihan Lawrence's cited cases therefore do not apply.

5. The Berks' Statutory Claims Are Timely

Houlihan Lawrence asserts (at 15-16, 19) that the Berks' statutory claims are time-barred. It does not contend that the Berks' breach of fiduciary duty and unjust enrichment claims are time-barred.

Plaintiffs allege tolling based on Houlihan Lawrence's cover-up of its wrongdoing. AC ¶¶ 326-29. Houlihan Lawrence fails to address those allegations. A fiduciary who concealed material facts it was under a duty to disclose is equitably estopped from asserting a statute of limitations defense. *See* Decision & Order at 66, *Fox Paine & Co. v. Hous. Cas. Co.*, No. 52607/2014 (Sup. Ct. Westchester Cty. Apr. 6, 2018) (Opp'n Ex. P-13); *see also Ross v. Cmty. Gen. Hosp. of Sullivan Cty.*, 150 A.D.2d 838, 841 (3d Dep't 1989) (in fiduciary relationship, "intentional concealment of material facts itself may be sufficient to create an estoppel"). The "question of whether a defendant should be equitably estopped is generally a question of fact." *Century Fed. Sav. & Loan Ass'n v. Net Realty Holding Trust*, 87 A.D.2d 858 (2d Dep't 1982). Houlihan Lawrence's concealment of its secret kickback scheme and other self-dealing behavior—including through its fabrication of sham statutory disclosure forms—warrants application of equitable estoppel.

In addition, the Berks' Section 443 claim is subject to a six-year limitations period. The three-year term in CPLR 214(2) "does not automatically apply to all causes of action in which a statutory remedy is sought, but only where liability 'would not exist but for a statute.'" *Gaidon v. Guardian Life Ins. Co. of Am.*, 96 N.Y.2d 201, 208 (2001). It is "insufficient to bring a claim within the ambit of § 214(2) if the statute merely enlarges the common-law scheme of liability." *Liberty Mut. Ins. Co. v. Excel Imaging, P.C.*, 879 F. Supp. 2d 243, 266 (E.D.N.Y. 2012). When Section 443 was enacted, brokers were already required by common law "to make clear" whom they represented. *Rivkin*, 10 N.Y.3d at 353. Indeed, Section 443(6) expressly "preserves 'the common law of agency with respect to residential real estate transactions.'" *Id.* at 354. Thus, Section 443 claims are governed by the same statute of limitations as that of "the common-law cause of action which the statute codified or implemented." *Gaidon*, 96 N.Y.2d at 208. That is the six-year period for a breach of fiduciary duty sounding in fraud. CPLR 213(8); *Kaufman v. Cohen*, 307 A.D.2d 113, 119 (1st Dep't 2003).

6. The Berks Have Standing

Houlihan Lawrence's contention (at 22-23) that the Berks lack "standing" and "capacity" to bring their claims as the sole beneficiaries of their deceased mother's estate has no substantive force. The Berks are the co-administrators of their mother's estate. AC ¶ 307; *see also* Opp'n Ex. P-1 (certificate of appointment) & Ex. P-2 ¶ 13 (the Berks "continue to administer" the estate "in their capacities as Administrators"). As such, they have standing and capacity to assert claims on the

estate's behalf. *See* N.Y. Est. Powers & Trusts Law § 11-3.1. Executors or administrators of an estate may sue in their own name and are not required to describe their representative capacity in the pleading. *Connery v. Sultan*, 129 A.D.3d 455, 455 (1st Dep't 2015); CPLR 1004. Nonetheless, the allegations in the Amended Complaint (e.g., ¶¶ 19, 285, 307) provide ample basis to construe the pleading as asserting claims by the Berks in their capacity as co-administrators. *See* 86 N.Y. Jur. 2d Process & Papers § 31 ("the omission of the word 'as' in the title" of a case "does not conclusively establish" that a plaintiff is "suing in an individual capacity when the complaint plainly discloses a representative or official ground for an action or liability"). In the event the Court construes the Amended Complaint as asserting claims in the Berks' individual capacities, Plaintiffs should be given leave to substitute the Berks in their representative capacity pursuant to CPLR 2001. As co-administrators and sole beneficiaries of their mother's estate, the Berks are without dispute the real parties in interest to this action.

CONCLUSION

For the foregoing reasons, Houlihan Lawrence's motion to dismiss should be denied.

Dated: November 20, 2018
Armonk, New York

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Certificate of Counsel
Pursuant to Commercial Division Rule 17

I, Jeremy Vest, counsel for Plaintiffs, hereby certify, pursuant to Commercial Division Rule 17, that the word count for the foregoing document, excluding the caption, table of contents, table of authorities, and signature block, is 6,892 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 generated for this document is 6,702 and I further certify that the word count of the images which appear on pages 1, 13, and 23 are 190 words based upon a manual word count.

Dated: November 20, 2018
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