

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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GREAT AMERICAN INSURANCE :
COMPANY, : Civil Action No.:
Plaintiff, : **COMPLAINT FOR DECLARATORY**
-against- : **JUDGMENT**
HOULIHAN LAWRENCE INC., : **JURY DEMANDED**
Defendant. :
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Plaintiff Great American Insurance Company (“GAIC”) by its attorneys, Ropers Majeski Kohn & Bentley, P.C., as and for its Complaint against defendant Houlihan Lawrence Inc. (“Houlihan”) alleges as follows:

NATURE OF THE ACTION

1. GAIC brings this complaint for a declaratory judgment, seeking a declaration that GAIC has no obligation to provide insurance coverage (defense or indemnification) to Houlihan under Real Estate Professional Liability Insurance Policy in connection with an underlying civil action entitled *Goldstein, et. al. v. Houlihan Lawrence, Inc.*, pending in the New York State Supreme Court, Westchester County, Index No. 60767/2018 (hereafter, the “Underlying Action”).

2. In the Underlying Action, the putative class action plaintiffs allege that Houlihan engaged in firm-wide intentionally dishonest and fraudulent activity. According to the operative complaint, the plaintiffs in the Underlying Action explicitly allege that “Houlihan[]’s widespread breaches of its fiduciary duties are not the result of innocent mistakes, technical violations, or a few rogue agents. Houlihan[]’s corporate policies and practices, detailed above, demonstrate conscious disregard for Houlihan[]’s fiduciary duties.”

3. GAIC seeks a declaration that coverage for the Underlying Action is not available to Houlihan as the conduct and acts alleged in the Underlying Action are excluded from coverage under the applicable insurance policy.

4. Consequently, GAIC further seeks a declaration that it has no obligation to defend and/or indemnify Houlihan in connection with the Underlying Action.

PARTIES

5. GAIC is an insurance company organized and existing under the laws of the State of Ohio and having its principal place of business in Cincinnati, OH. GAIC is authorized to and does conduct insurance business in the State of New York.

6. Upon information and belief, Houlihan is a domestic corporation organized and existing under the laws of the State of New York and having its principal place of business in Rye Brook, NY.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332(a) in that there is complete diversity of citizenship between the parties, and the amount in controversy exceeds \$75,000 exclusive of interests and costs.

8. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) in that a substantial part of the events giving rise to the claim occurred in this District, or alternatively, defendant Houlihan is subject to personal jurisdiction in this District.

UNDERLYING ACTION

9. This declaratory judgment action arises out of the Underlying Action, which was originally filed in July 2018.

10. The operative complaint, the First Amended Complaint (“FAC”) was filed in the Underlying Action on October 1, 2018. A copy of the FAC is annexed hereto as Exhibit A.

11. The plaintiffs in the Underlying Action focus their claims and allegations on one aspect of Houlihan’s business: Houlihan’s use of “dual agency” arrangements when representing clients during the purchase and sale of real estate.

12. The plaintiffs in the Underlying Action allege that New York law mandates specific, comprehensive and effective written disclosures from real estate agents before a dual agency is allowed. These plaintiffs contend that real estate agents are held strictly liable if they cannot show that they made proper disclosures, irrespective of the agent’s good or bad faith and without regard to whether or not the agent’s clients were injured.

13. The plaintiffs in the Underlying Action allege that not only do Houlihan and its agents routinely and intentionally fail to provide proper disclosures, but even when they do, the disclosure is incorrect, confusing, or intentionally manipulative so that the buyer or seller must “opt-out” of the dual agency arrangement, instead of affirmatively agreeing to the dual agency.

14. The plaintiffs in the Underlying Action allege that Houlihan’s dual agency scheme is institutionalized in that Houlihan not only encourages, but actively facilitates the scheme by paying “kickbacks” to agents that secure double commissions through dual agent transactions. The plaintiffs allege that these kickbacks encourage Houlihan agents to put their personal interest in a bigger commission check ahead of the interests of their clients by incentivizing Houlihan agents to steer clients into dual agent transactions, even though Houlihan knows that dual agency transactions rarely, if ever, serve a client’s interest. The plaintiffs allege that the conflict of interest inherent in Houlihan’s undisclosed incentive compensation scheme makes it impossible for Houlihan sales agents to represent homebuyers and sellers with

undivided and undiluted loyalty and is incompatible with Houlihan's fiduciary duties under New York law.

15. The plaintiffs in the Underlying Action also allege that Houlihan intentionally engages in dishonest, fraudulent, deceptive and unfair business practices by:

- (a) duping consumers into signing forms that subject them to dual agency by default;
- (b) systematically avoiding reference to the risks of dual agency;
- (c) adopting a hands-off, "only if asked" strategy to discussing the downsides, risks, and options of dual agency;
- (d) using misleading and uninformative listing agreements;
- (e) failing to notify clients when dual agent situations arise;
- (f) failing to disclose to buyer clients the full compensation Houlihan will receive for a dual agent deal;
- (g) training agents to rely on a broken system of misinformation and phony advance consent;
- (h) having in-house sales teams unlawfully market themselves as if those teams were standalone brokerage firms;
- (i) practicing designated dual agency with different members of the same in-house sales team; and
- (j) 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.

16. The plaintiffs in the Underlying Action seek to certify 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.”

17. The plaintiffs in the Underlying Action seek the return of sales commissions Houlihan collected on real estate transactions in which Houlihan acted as an undisclosed, non-consensual dual agent, with interest from the time such commissions were paid.

CLAIM AND POLICY

The Policy

18. GAIC issued a Real Estate Professional Liability Insurance Policy to Houlihan for the July 26, 2016 to July 26, 2017 policy period, bearing policy number RAB3084795-16 (the “Policy”). A copy of the Policy is annexed hereto as **Exhibit B**.

19. The Policy has a limit of liability of \$5 million per Claim, which is subject to a \$50,000 per Claim retention.

20. The Policy was cancelled effective January 9, 2017 pursuant to a Cancellation Endorsement.¹ Pursuant to the Extended Reporting Period Endorsement purchased at the time of cancellation, the Extended Reporting Period is January 9, 2017 to January 9, 2020.

21. The Insuring Agreement of the Policy provides as follows:

Section I. Insuring Agreement

The **Company** will pay on behalf of an **Insured** all sums in excess of the deductible that the Insured becomes legally obligated to pay as **Damages** and **Claim Expenses** as a result of a **Claim** first made against the **Insured** during the **Policy Period** or any applicable **Extended Reporting Period** by reason of an act or omission,

¹ Upon information and belief, as of January 9, 2017, Houlihan was acquired by HomeServices of America.

including **Personal Injury**, in the performance of **Real Estate Professional Services** by the **Insured**, including any **Lock-box Claims** or **Open House Claims**, provided that:

- A. no such act or omission, or **Related Act or Omission**, was committed prior to the **Retroactive Date**;
- B. prior to the inception date of the first policy issued by the **Company**, and continuously renewed, no **Insured** had a basis to believe that any such act or omission, or **Related Act or Omission**, might reasonably be expected to be the basis of a **Claim**; and
- C. the **Claim** must be reported in accordance with Section IX. Notice of Claims and Potential **Claims**.

The **Company** has the right and duty to defend any **Claim** against an **Insured** even if any of the allegations of the **Claim** are groundless, false or fraudulent. Defense counsel may be designated by the **Company** or, at the **Company's** option, by the **Insured** with the **Company's** written consent and subject to the **Company's** guidelines.

22. Section II of the Policy contains the following relevant definitions:

B. “Claim” means:

- (1) a written demand for money or services received by an Insured; or
- (2) a civil proceeding in a court of law, or arbitration proceeding, against an Insured, commenced by the service of summons or receipt of an arbitration demand;

arising out of an act or omission in the performance of **Real Estate Professional Services**.

C. “Claim Expenses” means:

- (1) fees and costs charged by attorneys designated by the **Company** or designated by an Insured with the **Company's** prior written consent;
- (2) all other reasonable and necessary fees, costs and expenses resulting from the investigation, adjustment, negotiation, arbitration, mediation,

defense or appeal of a **Claim**, if incurred by the **Company** or by an Insured with the **Company's** prior written consent; and

- (3) premiums on appeal bonds, attachment bonds or similar bonds; provided, however, the **Company** is not obligated to apply for or furnish any such bond.

Claim Expenses do not include fees, costs or expenses of employees or officers of the **Company**, or salaries, loss of earnings or other remuneration by or to an **Insured**.

D. “**Company**” means the insurance company identified in the Declarations.

F. “**Damages**” means any monetary judgment or award which an Insured is legally obligated to pay. **Damages** also means a monetary settlement to which the **Company** agrees on an **Insured's** behalf; provided, however, **Damages** do not include:

- (1) the return, restitution, reduction, compromise or refund of fees, commissions, expenses or costs for **Real Estate Professional Services** performed or to be performed by an **Insured** and injuries that are a consequence of any fees, commissions, expenses or costs charged by an **Insured**;
- (2) fines, penalties, forfeitures or sanctions;
- (3) the multiplied portion of any multiplied awards;
- (4) the cost of compliance with any order for, grant of, or agreement to provide non-monetary relief, including services or injunctive relief; or
- (5) punitive or exemplary amounts;
- (6) any amounts uninsurable as a matter of law or public policy.

H. “**Extended Reporting Period**” means the period of time after the end of the **Policy Period** for reporting **Claims** to the **Company** that are made against an **Insured** during the applicable **Extended Reporting Period** by reason of an act or omission, which was committed prior to the end of the **Policy Period** and on, or subsequent to, the **Retroactive Date** and is otherwise covered by this Policy.

J. **"Insured"** means:

- (1) the **Named Insured**;

S. **"Real Estate Professional Services"** means services performed for others in an Insured's capacity as a(n):

- (1) real estate agent or broker;
- (2) leasing agent or **Property Manager**;
- (3) appraiser or auctioneer of real property;
- (4) expert witness, real estate consultant or counselor, provided such services are limited to the areas specified in items (1) through (3) above;
- (5) **Short Term Escrow Agent, Referral Agent** or notary public; or
- (6) member of a real estate accreditation, standards review or similar real estate board or committee;

provided that all necessary licenses or certifications are held by the **Insured** at the time of the act or omission giving rise to the Claim.

Real Estate Professional Services shall also include the above services performed for others by an **Insured** on or via the **Insured's** internet, e-mail, telecommunications or similar system.

23. Section III of the Policy entitled Exclusions provides in part:

This Policy does not apply to any **Claim**:

A. based on or arising out of any dishonest, intentionally wrongful, fraudulent, criminal or malicious act or omission by an **Insured**;

E. based on or arising out of:

- (1) any disputes involving an **Insured's** fees, commissions or charges;
- (2) the conversion, misappropriation, commingling or defalcation of funds or other property;

- (3) the gaining of any personal profit or advantage to which an **Insured** is not legally entitled; or

The Claim

24. By letter dated July 27, 2018, Houlihan, via its personal counsel, provided first notice to GAIC of the Underlying Action. A copy of the July 27, 2018 letter is attached hereto as **Exhibit C.**

25. At no time prior to this first notification did Houlihan request consent from GAIC to retain defense counsel on its behalf in connection with the Underlying Action.

26. GAIC issued its first Reservation of Rights letter on July 31, 2018 to Houlihan. In the July 31, 2018 Reservation of Rights letter, GAIC specifically noted the potential applicability of various terms, conditions and provisions of the Policy including, but not limited to, Exclusion A, and reserved all rights with respect thereto. A copy of the July 31, 2018 Reservation of Rights letter is attached hereto as **Exhibit D.**

27. After additional investigation, GAIC issued a supplemental Reservation of Rights letter on December 5, 2018. In the December 5, 2018 Reservation of Rights letter, GAIC specifically noted the potential applicability of various terms, conditions and provisions of the Policy including, but not limited to, Exclusions A and E, and reserved all rights with respect thereto. A copy of the December 5, 2018 Reservation of Rights letter is attached hereto as **Exhibit E.**

28. By letter dated February 4, 2019, GAIC informed Houlihan that after further analysis and investigation of the allegations and the conduct at issue in the Underlying Action, GAIC had determined that no coverage obligations exist under the Policy with respect to the Underlying Action as a result of the application of Exclusion A – dishonest, intentionally wrongful and fraudulent conduct committed by the Insured. The letter further provides that

GAIC will seek a judicial determination that no indemnification obligations exist under the Policy for the Underlying Action including with respect to any Claim Expenses and pending that determination, GAIC would provide a defense subject to a complete reservation of rights including the right to recoup all Claim Expenses incurred. A copy of the February 4, 2019 letter is attached hereto as **Exhibit F**.

29. Within the same February 4, 2019 letter, GAIC also informed Houlihan that after further analysis and investigation of the allegations and the conduct at issue in the Underlying Action, GAIC had determined that no coverage obligations exist under the Policy with respect to the Underlying Action as a result of the application of Exclusions E – any dispute involving an Insured's fees, commissions or charges.

30. Within the same February 4, 2019 letter, GAIC informed Houlihan that after further analysis and investigation of the allegations and the conduct at issue in the Underlying Action, GAIC has determined that no indemnification obligations exist under the Policy with respect to the Underlying Action on the basis that the plaintiffs in the Underlying Action do not seek "Damages" from Houlihan as that term is defined in Section II(F) of the Policy.

31. Within the same February 4, 2019 letter, GAIC also informed Houlihan that GAIC would assume Houlihan's defense in the Underlying Action and appoint defense counsel to defend Houlihan in the Underlying Action pending resolution of this Declaratory Judgment Action. GAIC explicitly reserved all rights with regard to its defense obligations under the Policy including seeking to recover and/or recoup all Claim Expenses incurred on behalf of Houlihan should it be determined that no coverage exists under the Policy.

32. Finally, within the same February 4, 2019 letter, GAIC also informed Houlihan that Houlihan failed to obtain GAIC's consent to retain its current defense counsel – Collier

Halpern & Newberg, LLP in White Plains, NY and Barnes & Thornburg, LLP in Indianapolis, IN. Further, at no time has GAIC consented to or approved the retention of either firm. Consequently, GAIC advised Houlihan that GAIC would not reimburse Houlihan for any defense fees, costs and/or expenses incurred without GAIC's consent since such defense fees, costs and/or expenses are not "Claim Expenses" as defined by the Policy.

33. GAIC continues to provide a defense to Houlihan in the Underlying Action pending the outcome of this Declaratory Judgment Action.

34. An actual case or controversy exists between the parties concerning the rights and obligations of the parties under the Policy with respect to the Underlying Action.

AS AND FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment – Exclusion A)

35. GAIC repeats and realleges each and every allegation set forth in paragraphs 1 through 34 hereof as if set forth at length herein.

36. Section III of the Policy entitled Exclusions provides in part:

This Policy does not apply to any **Claim**:

A. based on or arising out of any dishonest, intentionally wrongful, fraudulent, criminal or malicious act or omission by an **Insured**;

37. As more fully detailed in the February 4, 2019 correspondence, the allegations, claims and causes of action asserted against Houlihan in the Underlying Action are based on or clearly arise out of dishonest, intentionally wrongful, fraudulent, criminal or malicious acts or omissions by Houlihan with respect to the dual agency arrangements and transactions.

38. As a result, Exclusion III(A) of the Policy precludes coverage for the Underlying Action.

39. GAIC is entitled to a declaration that GAIC has no obligation to defend and/or indemnify Houlihan in connection with the Underlying Action and requests that the Court enter a judgment declaring that coverage is unavailable for the Underlying Action under the Policy.

AS AND FOR A SECOND CAUSE OF ACTION
(Declaratory Judgment – Exclusion E)

40. GAIC repeats and realleges each and every allegation set forth in paragraphs 1 through 39 hereof as if set forth at length herein.

41. Section III of the Policy entitled Exclusions provides in part:

This Policy does not apply to any **Claim**:

E. based on or arising out of:

(1) any disputes involving an **Insured's** fees, commissions or charges;

42. As more fully detailed in the February 4, 2019 correspondence, the plaintiffs in the Underlying Action seek the return of commissions charged by Houlihan in the disputed dual agency transactions.

43. As a result, Exclusion III(E) of the Policy precludes coverage for the Underlying Action.

44. GAIC is entitled to a declaration that GAIC has no obligation to defend and/or indemnify Houlihan in connection with the Underlying Action and requests that the Court enter a judgment declaring that coverage is unavailable for the Underlying Action under the Policy.

AS AND FOR A THIRD CAUSE OF ACTION
(Declaratory Judgment – Section II(F)(1) of the Policy)

45. GAIC repeats and realleges each and every allegation set forth in paragraphs 1 through 44 hereof as if set forth at length herein.

46. Section II of the Policy entitled Definitions provides in part:

F. **"Damages"** means any monetary judgment or award which an Insured is legally obligated to pay. **Damages** also means a monetary settlement to which the **Company** agrees on an **Insured's** behalf; provided, however, **Damages** do not include:

- (1) the return, restitution, reduction, compromise or refund of fees, commissions, expenses or costs for **Real Estate Professional Services** performed or to be performed by an **Insured** and injuries that are a consequence of any fees, commissions, expenses or costs charged by an **Insured**;
- (2) fines, penalties, forfeitures or sanctions;
- (3) the multiplied portion of any multiplied awards;
- (4) the cost of compliance with any order for, grant of, or agreement to provide non-monetary relief, including services or injunctive relief; or
- (5) punitive or exemplary amounts;
- (6) any amounts uninsurable as a matter of law or public policy.

47. As more fully detailed in the February 4, 2019 correspondence, the plaintiffs in the Underlying Action seek the return of commissions charged by Houlihan in the disputed dual agency transactions. As such, the monetary amounts sought in the Underlying Action are not Damages as that term is defined in the Policy.

48. To the extent any damages sought in the Underlying Action are, or can be, characterized as any of the other enumerated excluded forms of Damages found in the definition of Damages in the Policy, there is also no coverage.

49. For the reasons set forth in the February 4, 2019 correspondence, the Underlying Action is not entitled to coverage pursuant to Section II(F)(1) the Policy.

50. GAIC is entitled to a declaration that GAIC has no obligation to defend and/or indemnify Houlihan in connection with the Underlying Action and requests that the Court enter a judgment declaring that coverage is unavailable for the Underlying Action under the Policy.

AS AND FOR A FOURTH CAUSE OF ACTION
(Declaratory Judgment – Recoupment of Defense Costs)

51. GAIC repeats and realleges each and every allegation set forth in paragraphs 1 through 50 hereof as if set forth at length herein.

52. GAIC only has an obligation to pay Claims Expenses in connection with a Claim that is subject to coverage under the Policy.

53. For the reasons set forth in the February 4, 2019 correspondence, the Underlying Action is not entitled to coverage under the Policy.

54. Subject to an explicit reservation of rights letter, GAIC has assumed Houlihan's defense in the Underlying Action. As such, GAIC has incurred and/or will continue to incur certain Claim Expenses in defending Houlihan in the Underlying Action, a claim which is excluded under the Policy.

55. GAIC is therefore entitled to a declaration that Houlihan is obligated to reimburse GAIC for all Claims Expenses it has paid on Houlihan's behalf in connection with the Underlying Action and requests that the Court enter a judgment ordering Houlihan to reimburse GAIC for all Claim Expenses paid.

AS AND FOR A FIFTH CAUSE OF ACTION
(Declaratory Judgment – Fees and Costs Incurred By Houlihan)

56. GAIC repeats and realleges each and every allegation set forth in paragraphs 1 through 55 hereof as if set forth at length herein.

57. Section II(C) of the Policy defines "Claims Expenses" as follows:

C. “**Claim Expenses**” means:

- (1) fees and costs charged by attorneys designated by the **Company** or designated by an Insured with the **Company’s** prior written consent;
- (2) all other reasonable and necessary fees, costs and expenses resulting from the investigation, adjustment, negotiation, arbitration, mediation, defense or appeal of a **Claim**, if incurred by the **Company** or by an Insured with the **Company’s** prior written consent; and
- (3) premiums on appeal bonds, attachment bonds or similar bonds; provided, however, the **Company** is not obligated to apply for or furnish any such bond.

Claim Expenses do not include fees, costs or expenses of employees or officers of the **Company**, or salaries, loss of earnings or other remuneration by or to an **Insured**.

58. Houlihan has incurred certain fees, costs and/or expenses in connection with the Underlying Action for which it did not seek nor obtain GAIC’s consent. Therefore such fees, costs and/or expenses are not “Claim Expenses” as defined by the Policy.

59. Thus, GAIC has no obligation to reimburse Houlihan for such fees, costs and/or expenses incurred in connection with the Underlying Action.

60. GAIC is therefore entitled to a declaration that GAIC is not obligated to reimburse Houlihan for any fees, costs and/or expenses Houlihan incurred in connection with the Underlying Action that are not “Claim Expenses” as defined by the Policy and requests that the Court enter a judgment declaring that coverage is unavailable for any and all such fees, costs and/or expenses.

WHEREFORE, Plaintiff demands judgment as follows:

- (a) on the First Cause of Action, for a declaration that Plaintiff has no obligation to pay any Damages or Claims Expenses under the Policy to Houlihan in connection with the Underlying Action;
- (b) on the Second Cause of Action, for a declaration that Plaintiff has no obligation to pay any Damages or Claims Expenses under the Policy to Houlihan in connection with the Underlying Action;
- (c) on the Third Cause of Action, for a declaration that Plaintiff has no obligation to pay any Damages or Claims Expenses under the Policy to Houlihan in connection with the Underlying Action;
- (d) on the Fourth Cause of Action, the return of all Claim Expenses incurred in the defense of Houlihan in the Underlying Action;
- (e) on the Fifth Cause of Action, for a declaration that Plaintiff has no obligation to reimburse Houlihan for any fees, costs and/or expenses it incurred in connection with the Underlying Action that are not Claim Expenses as defined in the Policy; and
- (f) for such other and further relief as the Court deems just and proper.

Dated: New York, New York
February 4, 2019

ROPER, MAJESKI, KOHN & BENTLEY



By: _____

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