

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PAMELA GOLDSTEIN,
ELLYN & TONY BERK as Administrators
of the Estate of Winifred 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

**THIRD AMENDED
CLASS ACTION COMPLAINT**

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

INTRODUCTION

1. Homebuyers and sellers have the right to be represented by a real estate agent who is loyal to them and only them when buying or selling a home.

2. Houlihan Lawrence, the leading real estate brokerage firm in New York City's northern suburbs, has deprived thousands of New Yorkers of this important right by representing both the homebuyer and seller in the same transaction in undisclosed, non-consensual dual agency.

THE PARTIES

3. Plaintiff Pamela Goldstein, at all relevant times, is and was a citizen and resident of Westchester County, New York. On May 22, 2017, Goldstein

purchased the property located at 6 Wellington Terrace, White Plains, New York 10607. Houlihan Lawrence represented both Goldstein and the seller in the transaction.

4. Plaintiff Dr. Ellyn Berk, at all relevant times, is and was a citizen and resident of New York County, New York. Plaintiff Tony Berk, at all relevant times, is and was a citizen and resident of the State of North Carolina. On June 30, 2014, the Berks, as Administrators of the estate of their deceased mother, Winifred Berk, sold the property located at 190 Davis Avenue, White Plains, New York 10605. Houlihan Lawrence represented both the Berks and the buyer in the transaction. Ellyn and Tony Berk bring this action in their capacity as Administrators of the Estate of Winifred Berk, at the request and with the approval of the estate's beneficiaries. Ellyn and Tony Berk are the sole beneficiaries of the Estate.

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

6. Defendant Houlihan/Lawrence Inc. ("Houlihan Lawrence") is a New York corporation with its principal place of business at 800 Westchester Avenue, Rye Brook, New York 10573. Houlihan Lawrence is a full-service real estate brokerage firm that represents buyers and sellers in real estate transactions.

Houlihan Lawrence owns and operates 30 offices, with over 1,300 agents, across the Westchester, Putnam, and Dutchess tri-county area. In January 2017, Houlihan Lawrence was bought by HomeServices of America, Inc., a Berkshire Hathaway affiliate.

JURISDICTION AND VENUE

7. This Court has jurisdiction over Houlihan Lawrence pursuant to CPLR 301.
8. There is no federal diversity jurisdiction over the matter.
9. Venue is proper in Westchester County pursuant to CPLR 503.

GENERAL FACTUAL ALLEGATIONS

10. A real estate agent owes its clients fiduciary duties of undivided and undiluted loyalty, obedience, confidentiality, full disclosure, and reasonable care.

11. A real estate broker who acts for the buyer and seller in the same transaction is known as a dual agent.

12. A dual agent collects a double commission on a single transaction—known as “double-dipping” or “double-ending” a transaction—rather than splitting it with a rival brokerage firm.

13. A dual agent cannot provide the full range of fiduciary duties to either of its clients.

14. Dual agency arises whenever a single brokerage firm represents both the seller and the buyer, even if two different salespeople within that one firm are separately representing the seller and buyer.

15. A real estate agent may act as a dual agent only after the agent fully and frankly explains to each client the risks, downsides, and options of its dual agency, including that a dual agent cannot provide undivided and undiluted loyalty to either of its clients.

16. A real estate agent must obtain each client's informed written consent before acting as a dual agent.

17. Pursuant to Real Property Law Section 443, a real estate agent must also provide consumers with the New York State Disclosure Form for Buyer and Seller (the "Statutory Disclosure Form" or "Form") before entering into an agency-client relationship.

18. The Statutory Disclosure Form does not provide consumers with all the information they would need in order to provide informed consent to dual agency.

19. A real estate agent must still make full and frank disclosure above and beyond the information in the Statutory Disclosure Form.

20. A real estate agent who acts as a dual agent without both parties' informed written consent forfeits any sales commission collected on the undisclosed, non-consensual dual-agent transaction.

21. Real estate broker commissions are paid by both the seller and buyer out of the purchase price.

22. Houlihan Lawrence's "company training guru" Annette "Toni" Chrystal has taught: "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.”¹

23. HGTV has explained: “You may have heard that the seller pays the buyer’s agent commission (commonly 2.25 percent to 3.5 percent), but the fact is that the commission is often wrapped into the house price. In other words, sellers factor in the cost of commission when they price their homes.”²

24. *Forbes* has advised that “the commission fees gets baked into the home price, which means that buyers end up paying the fees.”³

25. Houlihan Lawrence routinely acts as an undisclosed, non-consensual dual agent pursuant to a corporate strategy to grow its market share.

26. Since at least January 1, 2011, Houlihan Lawrence has operated a scheme to lure thousands of homebuyers and sellers into undisclosed, non-consensual dual-agent transactions.

27. Houlihan Lawrence has executed its scheme by, among other things, (i) cultivating a firm culture of undisclosed, non-consensual dual agency; (ii) engaging in deceptive and misleading advertising; (iii) following firm-wide

¹ *Who Pays the Commission?*, Turn to the “Twin Team” Toni and Terri @ Houlihan Lawrence | Real Estate Blog, available at <http://toniandterri.com/?p=319>.

² Tammy Stoner, *Learn the Pros and Cons of a Buyer’s Agent*, HGTV, <https://www.hgtv.com/design/real-estate/learn-the-pros-and-cons-of-a-buyers-agent> (last accessed Sept. 19, 2018); see also Susan Stellan, *The Buddy System, or the Buyer’s Broker*, N.Y. Times, Sept. 15, 2011, available at <https://www.nytimes.com/2011/09/18/realestate/the-buyers-broker-getting-started.html?smid=nytcore-ios-share> (“Although the seller typically pays the agents’ commission, that fee comes from the purchase price of the home—in other words, out of the buyer’s pocket—so buyers who think they have no financial obligation to an agent are deluding themselves.”).

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

policies and practices that promote undisclosed, non-consensual dual agency;

(iv) failing to properly train, direct, and supervise its Sales Agents; and (v) failing to put in place necessary and appropriate compliance systems.

28. Houlihan Lawrence has made dual-agent transactions a routine business practice.

29. Houlihan Lawrence has cultivated a firm culture of undisclosed, non-consensual dual agency, including:

- a. Financially incentivizing Sales Agents to steer clients into dual-agent transactions.
- b. Not requiring Sales Agents to disclose that they receive a financial incentive to steer clients into dual-agent transactions (which is material information a consumer would need to make an informed decision about dual agency).
- c. Bombarding Sales Agents with e-mails encouraging them to steer clients into dual-agent transactions.
- d. Permitting and encouraging Sales Agents to market Houlihan Lawrence property listings internally, including on its internal messaging application "InCrowd," before posting the property listing on the multiple listing service.
- e. Permitting Sales Agents to negotiate secret referral fees and other financial arrangements between and among themselves when acting as opposing designated sales agents.
- f. Permitting and encouraging Sales Agents to put clients into dual-agent transactions without listing the client's property on the multiple listing service.

30. Houlihan Lawrence has engaged in deceptive and misleading advertising, including:

- a. Publicly hyping “in-house” sales as if they were good for clients, including by boasting that “Buyers want to go where the inventory is and sellers want to go where the buyer are. We have both.”
- b. Disseminating on its website and elsewhere “comprehensive guides” covering “every fact of the home buyer experience” and “everything you need to know” to buy or sell your home that make no mention of dual agency.
- c. Permitting and encouraging Sales Agents to represent to the public that they will represent clients’ interests throughout a transaction without mentioning dual agency.
- d. Systematically avoiding reference to the risks of dual agency on its website and in other advertising.
- e. Not publishing sales data showing the number of dual-agent transactions.
- f. Not identifying on its website when displaying sold listings that Houlihan Lawrence acted as a dual agent in connection with such transactions.

31. Houlihan Lawrence has promoted undisclosed, non-consensual dual agency through firm-wide policies and practices including:

- a. Cutting and pasting client signatures on the Statutory Disclosure Form.
- b. Altering signed Statutory Disclosure Forms without clients’ knowledge or consent.
- c. Treating a client’s signature on the Statutory Disclosure Form as conclusive proof of the client’s informed consent to dual agency.
- d. Adopting a hands-off, “only if asked” strategy of shifting its obligation to discuss the downsides, risks, and options of dual agency over to clients, requiring clients to figure out what questions, if any, they need to ask in order to understand dual agency.

- e. Inducing clients to sign the Statutory Disclosure Form after Houlihan Lawrence began acting as a dual agent.
- f. Using misleading and uninformative listing agreements that fail to inform sellers of all the risks, downsides, and options of dual agency and that improperly suggest that sellers will lose out on potential purchasers unless they agree to dual agency.
- g. Failing to provide the Statutory Disclosure Form to clients prior to agreeing to act as their agent.
- h. Failing to timely notify clients when dual-agent situations arise.
- i. Failing to disclose to buyer clients the full compensation it will receive for a dual-agent deal.
- j. Conferring financial and other benefits on its clients' attorneys.
- k. Permitting a single agent to represent the buyer and seller in the same transaction.
- l. Having in-house sales teams unlawfully market themselves as if those teams were standalone real estate brokerage firms.
- m. Practicing "within-team" designated dual agency with different members of the same Houlihan Lawrence in-house sales team.
- n. Practicing "within-team" designated dual agency with the team leader acting as a designated sales agent on behalf of one of the parties.
- o. Permitting "intra-office" designated dual agency with the office manager acting as a designated sales agent on behalf of one of the parties.
- p. Permitting Sales Agents who are family members to act as opposing designated sales agents in dual-agent transactions.

32. Houlihan Lawrence has failed to properly train, direct, and supervise its Sales Agents, including:

- a. Training Sales Agents to adhere to a defective standardized agency disclosure protocol, including to say no more about dual agency than is in standard form documents that fail to make sufficient disclosure.
- b. Training Sales Agents to pre-fill the Statutory Disclosure Form to indicate clients' advance informed consent to dual agency.
- c. Providing its Sales Agents systematically incorrect training on agency disclosures.
- d. Providing its Sales Agents systematically incorrect scripted agency disclosures.
- e. Disregarding real estate industry guidance to equip Sales Agents with written dual-agency disclosure and consent forms.
- f. Having Sales Agents (i) downplay the importance of the Statutory Disclosure Form by referring to it as mere "paperwork," (ii) give the Form to clients as part of a group of "paperwork" documents for signature, and (iii) present the Form for signature by e-mail rather than in person.
- g. Failing to adequately train Sales Agents to properly complete and timely provide the Statutory Disclosure Form.
- h. Not requiring Sales Agents to use the Statutory Disclosure Form to make the required follow-up disclosure once a dual-agent situation has arisen and to confirm the client's knowledge of and informed written consent to the dual agency.
- i. Permitting and encouraging Sales Agents to share confidential information about new listings at office and sales team meetings and later act as dual agents.
- j. Permitting and encouraging Sales Agents to refer to themselves and one another as "buyer's agent" or "seller's agent" when facilitating negotiations between parties to dual-agent transactions.

33. Houlihan Lawrence has failed to put in place necessary and appropriate compliance systems, including:

- a. Adopting a too-little, too-late “closing protocol” to check only for a Statutory Disclosure Form bearing a signature, and only well after consumers have been deceived and have already committed to a transaction with Houlihan Lawrence.
- b. Disregarding industry guidance to conduct annual compliance reviews of its Sales Agents and offices.
- c. Failing to discipline Sales Agents for violations of dual agency disclosure and informed-consent obligations.
- d. Financially incentivizing its office managers to overlook Sales Agents’ violations of dual agency disclosure and informed-consent obligations.

34. Houlihan Lawrence’s widespread breaches of its fiduciary duties and consumer-oriented misconduct are not innocent mistakes, technical violations, or acts of a few rogue agents.

35. Houlihan Lawrence’s President (then COO) explained to MarketWatch in January 2011 that the firm’s agents work to “boost ‘in-house’ sales,” recognizing the value of being able to “collect both sides of the commission on such a sale.”

36. Houlihan Lawrence’s dual-agency practice not only enables it to collect double-commissions at the expense of its competitors, but also gives it an inside track to future listings (creating a compounding anti-competitive effect) and enables it to direct more business to its affiliated title and mortgage financing companies (including through reciprocal relationships with its list of “approved” or “recommended” real estate attorneys).

37. Houlihan Lawrence's conduct in furtherance of its scheme to promote and practice widespread undisclosed, non-consensual dual agency demonstrates conscious disregard for its fiduciary duties.

38. Houlihan Lawrence exercises control over its Sales Agents by, among other things, requiring Sales Agents to comply with Houlihan Lawrence's policies and procedures, to use company-approved contracts, and to attend comprehensive training provided by Houlihan Lawrence. In these and other ways, Houlihan Lawrence ensures that its Sales Agents at all times act in accordance with Houlihan Lawrence's firm-wide scheme and strategy to promote undisclosed, non-consensual dual-agent transactions.

39. Houlihan Lawrence's institutional culture, strategy, and practice of non-disclosure and misinformation about dual agency creates a systemic disclosure void that individual Sales Agents cannot possibly fill on an ad hoc basis.

40. Houlihan Lawrence would have identified widespread violations of its disclosure and informed-consent obligations if it acted in accordance with a proper compliance plan.

41. All class members' claims arise as a result of Houlihan Lawrence's unlawful course of conduct.

42. Houlihan Lawrence has reaped hundreds of millions of dollars in ill-gotten dual-agent sales commissions from the undisclosed, non-consensual dual-agent transactions.

PLAINTIFFS' ALLEGATIONS

1. Plaintiff Pamela Goldstein

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

44. On May 22, 2017, Plaintiff Pamela Goldstein purchased the property located at 6 Wellington Terrace, White Plains, New York 10607 for \$637,000, \$38,000 above the list price.

45. Houlihan Lawrence acted as a dual agent on behalf of Goldstein and the seller in connection with Goldstein's purchase of 6 Wellington Terrace without making full and frank disclosure to Goldstein of the risks, downsides, and options of dual agency and without obtaining her informed written consent.

46. Houlihan Lawrence did not provide Goldstein with full and frank disclosure of the material information necessary for her to decide whether or not to consent to dual agency, including the nature and consequences of the dual agency relationship as well as the attendant rights and obligations.

47. Houlihan Lawrence gave Goldstein a Statutory Disclosure Form only after it began acting as a dual agent in connection with her transaction.

48. Houlihan Lawrence did not give Goldstein a Statutory Disclosure Form prior to showing her 6 Wellington Terrace, receiving her confidential information, advising her in preparing an offer to purchase the property, and otherwise acting as a dual agent in connection with her transaction.

49. The Statutory Disclosure Form Houlihan Lawrence gave to Goldstein was pre-filled by Houlihan Lawrence to falsely represent that Houlihan Lawrence

was acting in Goldstein's interests and representing her as a Buyer's Agent. The Form was also pre-filled by Houlihan Lawrence to check the box for "Advance informed consent to dual agency with designated sales agents," with the space for identifying "designated sales agents" left blank.

50. Houlihan Lawrence did not disclose the benefits and detriments of providing advance consent to a dual-agency relationship before Goldstein signed and returned the Form.

51. Houlihan Lawrence gave Goldstein the Form without any explanation of dual agency or the Form's significance.

52. After Goldstein signed and returned the Form, Houlihan Lawrence altered it without her knowledge or consent, to identify Houlihan Lawrence Sales Agents Gino Bello and Daniel Cezimbra as "designated sales agents" in connection with the transaction.

53. Houlihan Lawrence did not give Goldstein a copy of the altered Statutory Disclosure Form.

54. Bello and Cezimbra were brothers-in-law and members of the Houlihan Lawrence in-house sales team known as "Gino Bello Homes."

55. Bello was the founder and team leader of the "Gino Bello Homes" Houlihan Lawrence in-house sales team, and in that capacity exercised Bello power and authority over Cezimbra.

56. Houlihan Lawrence did not disclose to Goldstein the nature and extent of Bello and Cezimbra's familial and professional relationships.

57. Houlihan Lawrence did not disclose that Cezimbra had agreed to pay Bello 30% a referral fee in connection with Goldstein's purchase of 6 Wellington Terrace.

58. Houlihan Lawrence did not disclose to Goldstein that Houlihan Lawrence has a policy and practice of paying Sales Agents a bonus for dual-agent transactions.

59. Houlihan Lawrence did not disclose to Goldstein the total compensation Houlihan Lawrence would receive on her purchase of 6 Wellington Terrace.

60. Houlihan Lawrence pressured and coerced Goldstein to make an offer of more than \$35,000 above the listing price, and to further raise her offer, improve its financing terms, and pay to have the house inspected. Houlihan Lawrence rushed her through the inspection process and pressured her to accept the property "as-is" even after the inspection revealed numerous issues with the property.

61. Houlihan Lawrence collected a 5% commission on Goldstein's purchase of 6 Wellington Terrace. Houlihan Lawrence's sales commission was paid out of the proceeds of the sale of the property. Goldstein paid at least a portion of the commission collected by Houlihan Lawrence on the transaction, including because it was "incorporated within the price" she "agreed to pay for the house and the owner agreed to accept."⁴

⁴ *Who Pays the Commission?*, *supra* note 1; see also ¶¶ 21-24 above.

2. Plaintiffs Dr. Ellyn and Tony Berk

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

63. On or about June 30, 2014, Plaintiffs Dr. Ellyn and Tony Berk, in their capacity as Administrators of the Estate of Winifred Berk, duly appointed by order of the New York State Surrogate's Court, Westchester County, sold the property located at 190 Davis Avenue for \$479,000, well below the sale price of comparable properties.

64. Houlihan Lawrence acted as a dual agent on behalf of the Berks and the buyer in connection with the Berks' sale of 190 Davis Avenue without making full and frank disclosure to the Berks of the risks, downsides, and options of dual agency and without obtaining their informed written consent.

65. Houlihan Lawrence did not provide the Berks with full and frank disclosure of the material information necessary for them to decide whether or not to consent to dual agency, including the nature and consequences of the dual agency relationship as well as the attendant rights and obligations.

66. The Statutory Disclosure Form Houlihan Lawrence gave the Berks was pre-filled by Houlihan Lawrence to indicate that Houlihan Lawrence was acting on behalf of the Berks as a Seller's Agent. The Form was also pre-filled by Houlihan Lawrence to check the box for "Advance informed consent to dual agency with designated sales agents."

67. Houlihan Lawrence did not disclose the benefits and detriments of providing advance consent to a dual-agency relationship before the Berks signed and returned the Form.

68. Without the Berks' knowledge or consent, Houlihan Lawrence later copied and pasted the Berks' signatures onto a different Statutory Disclosure Form marked to indicate that Houlihan Lawrence was acting in a dual-agent capacity.

69. Houlihan Lawrence did not give the Berks a copy of the Statutory Disclosure Form with their copied and pasted signatures.

70. Houlihan Lawrence promised the Berks that it would give 190 Davis Avenue "maximum exposure," including by listing the property on the multiple listing service and promoting it on at least 30 major real estate portals and over 500 other national websites, in Houlihan Lawrence's "exclusive Gallery of Homes Magazine," and through a "Postcard Marketing Campaign" of 500 "Just Listed" cards.

71. Houlihan Lawrence never listed 190 Davis Avenue on the multiple listing service or otherwise promoted it outside of Houlihan Lawrence.

72. Houlihan Lawrence marketed 190 Davis Avenue exclusively to its Sales Agents, including posting the property on its internal messaging application "InCrowd."

73. Dr. Ellyn Berk twice suggested that Houlihan Lawrence list the property on the multiple listing service. Houlihan Lawrence advised that it was not

in the Berks' best interests to do so and instead arranged a dual-agent transaction between the Berks and the buyer.

74. The Houlihan Lawrence Sales Agents involved in the Berks' sale of 190 Davis Avenue, Gino Bello and David Calabrese, were longtime close personal friends. Houlihan Lawrence did not disclose to the Berks the nature and extent of Bello and Calabrese's personal and professional relationships.

75. Houlihan Lawrence did not disclose to the Berks that Houlihan Lawrence has a policy and practice of paying Sales Agents a bonus for dual-agent transactions.

76. Houlihan Lawrence advised the Berks to offer a substandard commission of only 2% to any buyer's agent. Houlihan Lawrence did not disclose to the Berks that substandard commission rates artificially increase the frequency of dual-agent transactions by making the property listing less attractive to outside brokerage firms.

77. Houlihan Lawrence collected a 5% commission on the Berks' sale of 190 Davis Avenue. Houlihan Lawrence's sales commission was paid out of the proceeds of the sale of the property. The Estate paid at least a portion of the commission collected by Houlihan Lawrence on the transaction.

3. Plaintiff Paul Benjamin

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

79. On July 13, 2016, Paul Benjamin purchased the property located at 16 Old Logging Road, Bedford, New York 10506 for \$1,600,00, \$125,000 above the list price.

80. Houlihan Lawrence acted as a dual agent on behalf of Benjamin and the seller in connection with Benjamin's purchase of 16 Old Logging Road without making full and frank disclosure to Benjamin of the risks, downsides, and options of dual agency and without obtaining his informed written consent.

81. Houlihan Lawrence did not provide Benjamin with full and frank disclosure of the material information necessary for him to decide whether or not to consent to dual agency, including the nature and consequences of the dual agency relationship as well as the attendant rights and obligations.

82. Houlihan Lawrence gave Benjamin a Statutory Disclosure Form only after it began acting as a dual agent in connection with his transaction.

83. Houlihan Lawrence did not give Benjamin a Statutory Disclosure Form prior to showing him 16 Old Logging Road, receiving his confidential information, advising him in preparing to offer to purchase the property, and otherwise acting as a dual agent in connection with his transaction.

84. Houlihan Lawrence gave Benjamin the Form without any explanation of dual agency or the Form's significance.

85. Houlihan Lawrence did not disclose to Benjamin that Houlihan Lawrence has a policy and practice of paying Sales Agents a bonus for dual-agent transactions.

86. Houlihan Lawrence did not disclose to Benjamin the total compensation Houlihan Lawrence would receive on his purchase of 16 Old Logging Road.

87. Houlihan Lawrence pressured Benjamin into using its recommended attorney and to improve initial his above-asking-price, all-cash, contingency-free offer.

88. Houlihan Lawrence collected a 5% commission on Benjamin's purchase of 16 Old Logging Road. Houlihan Lawrence's sales commission was paid out of the proceeds of the sale of the property. Benjamin paid at least a portion of the commission collected by Houlihan Lawrence on the transaction, including because it was "incorporated within the price" he "agreed to pay for the house and the owner agreed to accept."⁵

TOLLING OF THE STATUTE OF LIMITATIONS

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

90. Houlihan Lawrence was also under a continuous duty to inform Plaintiffs and the other Class members that it engaged in a scheme to evade its fiduciary duties—including the fiduciary duties imposed on it by real estate license

⁵ *Who Pays the Commission?*, *supra* note 1; see also ¶¶ 21-24 above.

law, rules and regulations, contract law, the law of agency, and tort law—and that it deliberately flouted its disclosure and informed-consent obligations.

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

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

CLASS ACTION ALLEGATIONS

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

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

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

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

(1) The Class is so numerous that individual joinder of all Class members is impracticable. Houlihan Lawrence has acted in an undisclosed, non-consensual dual-agent capacity in connection with thousands of home sale transactions in Westchester, Putnam, and Dutchess counties since January 1, 2011.

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

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

provide adequate disclosure of the risks, downsides, and options of dual agency before entering a dual-agent relationship.

- e. Whether Houlihan Lawrence breached its fiduciary and statutory duties because it systematically avoided alerting clients to the risks, downsides, and options of dual agency.
- f. Whether Houlihan Lawrence engaged in a course of conduct to induce Plaintiffs and other Class members to consent to dual agency based on misrepresentations and omissions of material information.
- g. Whether Houlihan Lawrence breached its fiduciary and statutory duties by its express adoption of a hands-off, “only if asked” approach to discussing dual agency.
- h. Whether Houlihan Lawrence breached its fiduciary and statutory duties by failing to timely provide Statutory Disclosure Forms identifying Houlihan Lawrence as a dual agent to the parties in dual-agent transactions.
- i. Whether Houlihan Lawrence systematically failed to obtain both parties’ consent to dual agency once a specific dual-agent situation arose.
- j. Whether the following information is material to consumers’ decision to consent to dual agency:
 - (i) Prior to dual agency arising, Houlihan Lawrence acted as the exclusive agent of the seller or the buyer.
 - (ii) In Houlihan Lawrence’s initial role as exclusive agent for the buyer or seller before a dual-agency situation arose, Houlihan Lawrence may have obtained

information which, if disclosed, could harm the buyer's or seller's bargaining position.

- (iii) Consumers should be wary of dual agency.
- (iv) Dual agency may deprive buyers and sellers of benefits they would have otherwise received in a single-agency relationship.
- (v) Houlihan Lawrence and its salespeople, when acting as a dual agent, must make every reasonable effort to remain impartial to the seller and buyer.
- (vi) Houlihan Lawrence and its salespeople, when acting as a dual agent, may not disclose any confidential information to the other party, including but not limited to the price that either side would be willing to accept.
- (vii) Houlihan Lawrence and its salespeople, when acting as a dual agent, cannot recommend or suggest a price the buyer should offer or pay for the property.
- (viii) Houlihan Lawrence and its salespeople, when acting as a dual agent, cannot recommend or suggest a price the seller should accept or counter.
- (ix) Houlihan Lawrence will collect a larger commission by acting as a dual agent, and that could create a conflict of interest between Houlihan Lawrence on the one hand and its clients on the other hand.
- (x) Consumers have the right to condition their consent to dual agency on an adjustment in Houlihan Lawrence's compensation.

- (xi) Consumers have the right to retain their own agent to represent solely their best interests.
 - (xii) Consumers have the absolute right to refuse to consent to a dual-agency relationship and Houlihan Lawrence's representation of an adverse interest.
- k. Whether Houlihan Lawrence has implemented policies and procedures to, among other things:
- (i) Enter into agency relationships with buyers and sellers before presenting them with the Statutory Disclosure Form.
 - (ii) Pre-tick the boxes on clients' Statutory Disclosure Forms to manufacture the appearance of clients' advance informed consent to dual agency.
 - (iii) Market dual agency as advantageous to buyers and sellers.
 - (iv) Make misleading and insufficient disclosures in its listing agreements.
 - (v) Financially incentivize agents to steer buyers and sellers into dual-agent transactions.

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

(4) Plaintiffs will fairly and adequately represent and protect the interests of the Class, are committed to the vigorous prosecution of this action, have retained counsel competent and experienced in class

litigation, and have no interests antagonistic to or in conflict with those of the Class.

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

- a. Common questions of law and fact regarding Houlihan Lawrence's conduct and responsibility predominate over any questions affecting only individual Class members.
- b. The expense and burden of individual litigation would make it difficult or impossible for individual Class members to redress the wrongs done to each of them individually.
- c. Given the size of the sales commissions paid by each individual Class member, most or all Class members would have no rational economic interest in individually controlling the prosecution of specific actions, and the burden imposed on the judicial system by individual litigation by even a fraction of the Class would be burdensome, making class adjudication the superior alternative.
- d. The conduct of this action as a class action presents fewer management difficulties, better conserves judicial resources and the parties' resources, and more effectively protects the rights of each Class member than would piecemeal litigation.
- e. The challenges of managing this action as a class action are far less than the expense, burdens, risks of inconsistency, economic infeasibility, and inefficiencies of individualized litigation.

- f. The benefits of class treatment to the legitimate interests of the parties, the Court, and the public make class adjudication superior to alternatives.
- g. Plaintiffs are not aware of any obstacles to the management of this action that would preclude its maintenance as a class action.
- h. The Court has the authority and flexibility to maximize the efficiencies and benefits of the class mechanism and reduce management challenges.

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

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION (Breach of Fiduciary Duty)

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

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

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

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

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

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

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

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

[The Supreme Court's Decision and Order dated April 8, 2019, granted Houlihan Lawrence's motion to dismiss the Second Cause of Action.]

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

105. New York Real Property Law Section 443(3)(a) requires that a listing agent shall provide the Statutory Disclosure Form to a home seller “prior to entering into a listing agreement with the seller” and “shall obtain a signed acknowledgment from the seller.”

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

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

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

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

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

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

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

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

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

concerning dual agency to induce buyers and sellers to enter into agency relationships and unwittingly acquiesce to dual agency.

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

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

**FOURTH CAUSE OF ACTION
(Unjust Enrichment)**

[The Supreme Court's Decision and Order dated April 8, 2019, granted Houlihan Lawrence's motion to dismiss the Fourth Cause of Action.]

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

117. Houlihan Lawrence acted as a dual agent without making full and complete disclosure of downsides, risks and options of dual agency and without obtaining both parties' informed written consent. As a result, Houlihan Lawrence did not earn the sales commissions it collected on its dual-agent transactions.

118. Houlihan Lawrence enjoyed financial benefits to the detriment of Plaintiffs and other Class members who paid sales commissions for loyalty and services they did not receive. It would be inequitable, unjust, and unconscionable for Houlihan Lawrence to retain those wrongfully obtained sales commissions.

119. Plaintiffs and other Class members therefore seek repayment of all unjust sales commissions, plus interest.

PRAYER FOR RELIEF

120. Plaintiffs, on behalf of themselves and all others similarly situated, request the Court to enter judgment against Houlihan Lawrence, as follows:

(1) Certification of the proposed Class, designating Plaintiffs as the named representatives of the Class, designating the undersigned as Class Counsel, and making such further orders for the protection of Class members as the Court deems appropriate under CPLR Article 9.

(2) Repayment of the sales commissions Houlihan Lawrence collected on home sale transactions in which it acted as an undisclosed, non-consensual dual agent, with interest from the time such commissions were paid.

(3) Punitive damages.

(4) Attorneys' fees and costs, as allowed by law.

(5) Pre-judgment and post-judgment interest, as provided by law.

(6) Such other relief as may be appropriate.

Dated: June 10, 2019
Armonk, New York

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