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

CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES AND COSTS

Dated: February 21, 2025

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
919 Third Avenue
New York, NY 10022

Ohlemeyer Law PLLC
75 South Broadway
White Plains, New York 10601

Boies Schiller Flexner LLP
55 Hudson Yards
20th Floor
New York, New York 10001

Attorneys for Plaintiffs and the Class

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PRELIMINARY STATEMENT

After nearly *seven* years of hard-fought litigation, Houlihan Lawrence agreed on the precipice of trial to pay $9 million and to eliminate its In-House Bonus program (the "Settlement"). Class Counsel negotiated the cash component under the Court's direct supervision and agreed to it only after concluding that $9 million disgorges a substantial portion of the profit that it is forecasted to generate during the Settlement's five-year payout period. By effectively imposing the maximum monetary penalty on Houlihan Lawrence, the Settlement promotes deterrence by providing a forceful reminder to Houlihan Lawrence and the real estate brokerage industry that "[u]ndisclosed dual agency cannot be permitted without dire consequences."[1] And the injunctive relief, the elimination of Houlihan Lawrence's In-House Bonus program, removes the central pillar of Houlihan Lawrence's alleged in-house sales scheme and sets a precedent for consumers in New York and elsewhere to challenge other schemes that incentivize real estate agents to steer consumers into in-house transactions. For these and the other reasons set forth below and in Plaintiffs' motion for preliminary approval of the settlement agreement, the Settlement is a highly favorable result for the Class and the public.

But the Settlement is merely the capstone achievement of this socially beneficial litigation, which developed overwhelming evidence that undisclosed

[1] Edward I. Sumber, *Mutually Dependent Transactions and the Creation of Dual Agency*, Real Estate In-Depth, Mar. 2009 (Dkt. 227)

dual agency remains a matter of "paramount concern" in New York. *Rivkin v. Century 21 Teran*, 10 N.Y.3d 344, 353 (2008). The common law has long forbidden brokers from representing the buyer and seller in the same transaction without their timely written informed consent. For more than a century, the rule in this regard has been clear and strict: "If dual interests are to be served, the disclosure to be effective must lay bare the truth, without ambiguity or reservation, in all its stark significance." *Wendt v. Fischer*, 243 N.Y. 439, 443 (1926). Three decades ago, the Legislature enacted Real Property Law § 443 to address real estate brokers' well-documented disregard of this bedrock principle of fiduciary duty law, *Rivkin*, 10 N.Y.3d at 353, codifying and elaborating on brokers' obligation to carefully explain to consumers the consequences of dual agency, including that by consenting to dual agency they are giving up their right to undivided loyalty. Since then, the New York Department of State ("DOS") has consistently maintained that this common and statutory law combines to require brokers to warn consumers to "*Be Wary of Dual Agency*."[2] The Class therefore performed an important public service by getting Houlihan Lawrence's "expert" witness to admit that still today, not a single real estate agent gives this warning,[3] instead presenting dual agency to consumers "as an unobjectionable and routine form of

[2] LI12, "*Be Wary of Dual Agency,*" New York Department of State (Dkt. 788)

[3] Expert Report of J. Rand, October 30, 2023 (Dkt. 1760) at 22; *see also* Opp. to Mot. for Summary Judgment, Apr. 22, 2024 (Dkt. 1872) (asserting that Rand's admission cemented class status and may have even entitled the Class to summary judgment)

agency,"[4] which is the kind of "silver-tongued, self-serving gloss-over" on dual agency that New York law aims to prevent.[5]

Such public admissions will hopefully help galvanize renewed legislative and regulatory efforts to protect consumers from undisclosed dual agency. Regardless, by obtaining class action status for this first-of-its-kind case challenging systemic dual agency abuses and sustaining it through summary judgment despite the barrage of challenges mounted by one of New York's most powerful brokers, the Class has already created a new model for enforcement of New York's existing dual agency disclosure and consent requirements that can be emulated by other classes of private citizens. *See Rodonich v. Senyshyn*, 52 F.3d 28 (2d. Cir. 1995) (recognizing in the civil-rights litigation context that substantive benefits supporting an attorneys' fee award may accrue to the public through court decisions that open the courts to other meritorious claims). And the Court's (un-appealed) ruling that a signed state-mandated agency disclosure form does not alone warrant dismissal of a breach of fiduciary duty action alleging inadequate dual agency disclosure,[6] clears the way for homebuyers and sellers to sue individually for disgorgement of sales commissions paid to any broker who puts

[4] *Id*. at 7

[5] H. Jane Lehman, "*N.Y. Officials Challenge Role of Realty Agents*," Wash. Post, June 27, 1992 (Dkt. 859) (quoting former Secretary of State Gail Schaffer)

[6] *See* Order and Decision, Hon. L. Jamieson, Apr. 17, 2019 (Dkt. 370) at 10 ("By these very words highlighted above, it appears that the mere signing of the form is insufficient, and the legislature required more.")

together an in-house deal without first carefully explaining to the parties the adverse consequences of dual agency. *Id.*

To accomplish this on behalf of the Class and the public, Class Counsel worked for nearly seven years, investing over 16,000 hours of labor between the filing of the Complaint and the Settlement and expending more than $1,250,000 of their own money toward the litigation, all without any guarantee of payment.[7] The Settlement is the result of more than 50 motions, including dispositive motions to dismiss and for summary judgment, procedural motions for certification and decertification of the Class, jurisdictional motions to compel arbitration, expert and other evidentiary motions, and motions concerning "virtually every conceivable discovery issue."[8] The case also involved nearly two dozen fact and expert depositions, six expert reports, and full preparation for the scheduled four-week trial.[9] Class Counsel performed this massive amount of legal work against an entrenched, highly experienced, and well-financed opponent with no roadmap of previous cases or settlements, and no assistance from governmental entities or regulators through parallel litigation, to guarantee a recovery.[10]

[7] Affirmation of J. Vest, February 21, 2025 ("Vest Aff.") at ¶¶ 15-18

[8] *Id.* at 16; *see also* Decision and Order, Hon. L. Jamieson, July 9, 2024 (Dkt. 1959) at 8 (discussing the "numerous complex discovery issues and myriad discovery motions that" necessitated "no fewer than 22 Reports and Recommendations")

[9] *Id.* at ¶ 28

[10] *Id.*

In short, at great financial risk and in the face of long odds and stiff opposition, Class Counsel served important public policy goals by holding Houlihan Lawrence accountable for its dual agency abuses to the fullest extent reasonably possible under the circumstances, breathing new life into the common and statutory dual agency disclosure and consent requirements on which New York relies to protect consumers while making one of the most important financial decisions of their lives – buying or selling their home. Under CPLR § 909 and well-established precedent, Class Counsel is therefore entitled to an award of attorneys' fees and costs. In recognition of the extraordinary effort expended and results achieved on behalf of the Class due to Class Counsel's initiative, perseverance, and thorough and skilled representation, Class Counsel seeks an award of attorneys' fees of $7,735,877.22 and reimbursement of $1,264,122.78 in out-of-pocket litigation costs and expenses incurred in connection with the litigation. The requested fee award represents less than 59% the attorneys' fees actually incurred by Class Counsel on behalf of the Class, whereas courts routinely award similarly successful class counsel a multiplier of 4 to 6 times their lodestar, meaning that two top law firms successfully represented the Class for nearly seven years at highly discounted rates. That Class Counsel's requested attorneys' fees and costs were reasonable and necessary in light of the scope, complexity, intensity, magnitude, and unprecedented nature of this action is self-evident from the Court's personal and careful supervision of this case for nearly seven years; is shown by Class

Counsel's detailed contemporaneous billing records; and is confirmed by the fact that, prior to the Settlement, Houlihan Lawrence had already nearly or fully exhausted its reported $10 million in insurance coverage for defense costs.[11]

The fact that the Settlement will not result in a monetary distribution to the Class if the Court awards Class Counsel's requested fees and costs, does not negate the substantial benefit obtained on behalf of the Class. Numerous courts have approved multi-million-dollar attorneys' fee awards in class action settlements that provided for substantial business reforms and other benefits to the class but no monetary payment. *Berry v. Schulman*, 807 F.3d 600, 617 (4th Cir. 2015) (awarding $5.3 million in fees for obtaining an injunctive-relief-only settlement); *Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1126-27 (9th Cir. 2020) (rejecting argument that $3.89 million fee award was excessive when settlement provided only injunctive relief); *McDonough v. Horizon Healthcare Servs.*, 2014 U.S. Dist. LEXIS 93559, at *33-34 (D.N.J. July 9, 2014) (collecting cases and awarding $2.5 million attorneys' fees in a case in which business reforms but no monetary relief obtained for the class); Ex. 1, Final Approval Order, Hon. W. McCleod, *Boskie, et al. v. Backgroundchecks.com, LLC*, No. 2019CP3200824, Oct. 31, 2019 (awarding $2.378 million in attorneys' fees for obtaining an injunctive-relief-only settlement). Similarly, "courts consistently have approved attorneys' fees and expenses in shareholder actions where the plaintiffs' efforts resulted in significant corporate governance reforms but no monetary relief." *In re Rambus*

[11] Vest Aff. at ¶¶ 15-18

Inc. Derivative Litig., 2009 U.S. Dist. LEXIS 131845, at *11 (N.D. Cal. Jan. 20, 2009) (awarding $2 million in attorneys' fees because corporate governance reforms were of significant value); *see also Unite Nat'l Ret. Fund v. Watts*, 2005 U.S. Dist. LEXIS 26246, at *5 (D.N.J. Jan. 14, 2008) (granting attorneys' fees of $9.5 million because of substantially beneficial corporate governance reforms).

As alleged in the Amended Complaint, by seeking repayment of commissions collected by Houlihan Lawrence on its dual-agent deals, the Class sought both to "remedy the harm they suffered as a result of Houlihan Lawrence's disloyalty, and also to deter Houlihan Lawrence and others from ever again putting their interests ahead of their clients."[12] Although the Settlement did not recover the commissions paid by the Class, the vast majority of which discovery showed Houlihan Lawrence did not retain for its own benefit but instead paid out to its non-party sales agents, putting them beyond the reach of the Class, it served the overriding purpose of this lawsuit — protection of the public by exposure of the flagrant illicit promotion of in-house sales by New York's leading real estate broker.[13] After all, as former United States Supreme

[12] Amended Complaint, Oct. 1, 2018 (Dkt. 155) at ¶ 16

[13] *See* Email from Landis to Yonkers Agents, Feb. 26, 2016 (Dkt. 1912) (Manager: "We do have a meeting on Tuesday! Let's discuss how to do more in-house deals!"); Email from Landis to White, Feb. 11, 2011 (Dkt. 1913) (Manager: ("[O]ur sales force will be more motivated if it's listed with us because we love to sell our own listings."); Resp. to Stat. of Facts, Apr. 22, 2024 (Dkt. 1950) at ¶¶ 65-66

Court Justice Louis Brandeis recognized, sunlight is the best disinfectant for corruption.[14]

FACTUAL BACKGROUND

The background of the litigation and Settlement is well-known to the Court and is set forth in Plaintiffs' opposition to Houlihan Lawrence's motion for summary judgment or decertification of the Class[15] and in Plaintiffs' motion for preliminary approval of the settlement agreement filed contemporaneously herewith.

Plaintiffs alleged that, among other things, Houlihan Lawrence breached its fiduciary duties and engaged in deceptive trade practices in violation of General Business Law § 349 by operating a scheme to lure homebuyers and sellers into dual-agent transactions, including by offering undisclosed in-house bonuses to its sales agents to incentivize and reward them for brokering deals within Houlihan Lawrence. Houlihan Lawrence, who was represented by national litigation counsel for its corporate, HomeServices of America, a Berkshire Hathaway company, vigorously contested virtually every aspect of this case — including by repeatedly opposing class certification and through motions to dismiss, to compel arbitration,

[14] *Compare* Aff. of T. Cusack, Nov. 1, 2021 (Dkt. 1682) at ¶ 71 (Houlihan Lawrence's "conduct betrays a shocking disregard of its fiduciary duties and the vital consumer protections afforded by New York's agency disclosure and informed-written-consent requirements); Decision and Order, Hon. L. Jamieson, Jan. 24, 2022 (Dkt. 1072) at 4 ("Cusack is intimately familiar with the relevant industry standards and practices")

[15] Opp. to Mot. for Summary Judgment or Decertification, Apr. 22, 2024 (Dkt. 1872)

for summary judgment, to decertify the Class, and to exclude expert testimony and other important evidence.[16] Houlihan Lawrence litigated this case to the precipice of trial, agreeing to the Settlement only after jury selection.

Class Counsel assumed significant risk in undertaking to represent the Class. There was no roadmap of previous cases or settlements, no assistance from governmental entities or regulators through parallel litigation, and a dearth of on-point authority providing clear and unambiguous guidance on key issues. Despite the odds and fierce opposition, Class Counsel succeeded on behalf of the Class, bringing national attention to the "thorny issue of dual agency;"[17] prevailing on virtually every one of the litany of discovery issues litigated by the parties;[18] obtaining favorable rulings on the central disputes relating to class certification, summary judgment, and the admissibility of expert testimony; and ultimately negotiating a settlement that disgorged Houlihan Lawrence's ill-gotten gains to the fullest extent possible under the circumstances and that dismantled its In-House Bonus program.[19]

Class Counsel achieved these results only after years of exhaustive motion practice, analysis of over 1 million pages of documents, retention of three testifying

[16] *Id*. at ¶ 29

[17] *See* Ex. 2, J. Barbanel, "*Lawsuit Accuses Westchester Real Estate Firm of Conflict of Interest*," Wall Street Journal, July 15, 2018; Ex. 3, A. Brambila, "*Brokerage Accused of Paying Agents Bonuses for Double-Ended Deals*," Inman, Oct. 3, 2018

[18] *See* W. Harrington Hr'g Tr., January 31, 2023 (Dkt. 1536) at 32:9-11 (Houlihan Lawrence Counsel: "We have lost virtually everything on discovery")

[19] *Id*. at ¶¶ 11-14

experts, nearly two dozen fact and expert depositions, and complete preparation for a month-long trial.[20] The more than 2,000 entries on the Court's docket attest to Class Counsel's extraordinary efforts.

Despite the massive amount of work required and risk of an unsuccessful outcome, Class Counsel did not waver in their investment of time and money on behalf of the Class. Class Counsel matched Houlihan Lawrence's $10 million investment of attorneys' fees and costs and pushed Houlihan Lawrence to brink of trial to obtain the best possible settlement for the Class.[21] Indeed, at the time of the Settlement, Class Counsel had completed all pretrial work and seated a jury.

Given the intensity and complexity of the litigation, Class Counsel's work necessarily hampered their ability to take on other work. That was time and money spent and invested on behalf of the Class that could have been spent on less risky cases, where liability or damages were more certain, or where the claims had been advanced by previous litigation, government prosecutions, or public admissions.[22]

ARGUMENT

1. The requested attorneys' fees are reasonable

CPLR § 909 authorizes a court to grant attorneys' fees to class counsel who obtain a judgment on behalf of a class:

[20] *Id*. at ¶¶ 15-19
[21] *Id*. at ¶ 29
[22] *Id*. at ¶ 30

> If a judgment in an action maintained as a class action is rendered in favor of the class, the court in its discretion may award attorneys' fees to the representatives of the class and/or to any other person that the court finds has acted to benefit the class based on the reasonable value of legal services rendered and if justice requires, allow recovery of the amount awarded from the opponent of the class.

"No single method of determining reasonable attorney's fees in a class action is mandated." *Vizcaino v. Ritz Carlton Hotel Co., LLC*, 2020 N.Y. Misc. LEXIS 2319, at *3 (N.Y. Sup. Ct. Suffolk Cnty. May 8, 2020). State and federal courts use two methods to determine the proper amount of attorneys' fees to award in a class action case: the lodestar method and the percentage of recovery method. *See, e.g., Lopez v. Dinex Group, LLC*, 2015 N.Y. Misc. LEXIS 3657, at *13-14 (Sup. Ct. N.Y. Cnty. Oct. 6, 2015) ("A court may calculate reasonable attorneys' fees by either the lodestar method (multiplying the hours reasonably billed by a reasonable hourly rate, then applying a multiplier based on more subjective factors) or based on a percentage of the recovery.").

"The lodestar method," in particular, "has frequently been used by New York state courts to determine fees in class actions." *Vizcaino*, 2020 N.Y. Misc. LEXIS 2319 at *3; *see also Nager v. Teachers' Retirement Sys. of the City of New York*, 57 A.D.3d 389, 390 (1st Dep't 2008) ("Supreme Court properly used the lodestar method in determining the reasonable value of plaintiffs' attorneys' services in instituting and settling this class action, rather than applying a percentage of the value of the settlement."); *Matakov v. Kel-Tech Constr. Inc.*, 84

A.D.3d 677, 678 (1st Dep't 2011) ("The court properly applied the lodestar method to calculate plaintiffs' class counsel's fee rather than the percentage method.").

"Under the lodestar method, the determination of what constitutes a reasonable fee involves 'extensive consideration of the nature and value of the services rendered by the plaintiffs' attorneys." *Vizcaino*, 2020 N.Y. Misc. LEXIS 2319 at *3. "The lodestar fee is initially calculated by multiplying the number of hours reasonably expended on the litigation by the reasonable hourly rate." *Id.* "A strong presumption exists that the lodestar calculation represents the 'reasonable' fee, even when that calculation is disproportionate to the amount of damages awarded to the successful plaintiff." *Arnutovskaya v. Alteration Group of NY, LLC*, 2020 N.Y. Misc. LEXIS 2933, at *21 (Sup. Ct. N.Y. Cnty. June 23, 2020).

The lodestar method is especially appropriate where, as here, the injunctive relief and other non-monetary benefits obtained on behalf of the class and the public are not easily monetized, *S.S. Body Armor I, Inc. v. Carter Ledyward & Milburn, LLP*, 927 F.3d 763, 774 (3d Cir. 2019) (explaining that the lodestar method is typically applied where "the nature of the settlement evades the precise evaluation needed for the percentage-of-recovery method"). Moreover, the lodestar method ensures adequate compensation for class counsel undertaking socially beneficial litigation where, as here, there are significant limitations on the defendant's ability to pay to resolve their alleged liability. *See Marroquin Alas v. Champlain Valley Specialty of N.Y., Inc.*, 2016 U.S. Dist. LEXIS 79043, at *26 (S.D.N.Y. June 17, 2016) ("When evaluating the reasonableness of a fee award,

courts weigh the public benefit of the litigation and the need to encourage experienced and able counsel to undertake such litigation.") (internal quotations omitted); *Gokare v. Fed. Express Corp.*, 2013 U.S. Dist. LEXIS 203546, at *7 (W.D. Tenn. Nov. 22, 2013 ("The law recognizes that society has an interest in encouraging attorneys to pursue contingent fee class actions on behalf of consumers.").

The "determination as to the proper amount of an award of attorney's fees lies largely within the discretion of the court." *Rahmey v. Blum*, 95 A.D.2d 294, 299-300 (2d Dep't 1983). "Where the fee applications are voluminous, it is widely recognized that it is unrealistic to expect the trial judgment to evaluate and rule on every entry in an application.' The court, instead, will look at the big picture to see if the total time expended for each portion of the case was reasonable." *Ousmane v. City of New York*, 22 Misc.3d 1136(A) (Sup. Ct. N.Y. Cnty. Mar. 17, 2009) (internal quotations omitted). "The court may award fees that exceed the amount of the recovery on the underlying claim," as long as the fees awarded "bear a reasonable relationship to the scale of the litigation and results achieved." *W. 58th St. Props. LLC v. Kulbersh*, 2003 N.Y.L.J. LEXIS 1747, at *4-5 (Civ. Ct. N.Y. Cnty. Oct. 8, 2003).

1.1. A fee less than 59% of Class Counsel's lodestar is reasonable

As noted above, Class Counsel spent over 16,000 hours between the filing of the Complaint and through October 4, 2024, when the parties reached the Settlement. These hours result in an overall lodestar during that period of

$13,066,733.00. That lodestar significantly understates Class Counsel's total investment of time and labor on behalf of the Class because it does not account for (1) attorneys' fees incurred in connection with Class Counsel's preparation of the complaint and extensive pre-filing factual investigation; (2) post-Settlement attorneys' fees that Class Counsel has and will continue to incur on behalf of the Class, including preparation of Plaintiffs' motion for preliminary approval of the settlement agreement, attendance at the final fairness hearing, and direction of the class notice process; (3) attorneys' fees that co-counsel William S. Ohlemeyer incurred on behalf of the Class following his departure from Boies Schiller Flexner LLP;[23] and (4) attorneys' fees that Class Counsel incurred but did not bill the Class.[24]

Because Class Counsel's requested fee award of $7,735,877.22 represents only 59% of their lodestar between July 14, 2018, and October 4, 2024,[25] and an even smaller fraction of their total lodestar, it is not only facially reasonable but significantly below the norm in courts in New York. *See In re Telik Litig.*, 576 F.Supp.2d 570, 590 (S.D.N.Y. 2008) ("lodestar multiples of over 4 are routinely awarded by courts."); *Garcia v. Pancho Villa's of Huntington Vill., Inc.*, 2012 U.S.

[23] *Id.* at ¶¶ 19-23 ("Mr. Ohlemeyer continued to activity represent the Class through the Settlement, including by regularly conferring with co-lead class counsel and editing the Class's filings, preparing for and attending hearings before the Discovery Referee and the Court, leading settlement negotiations on behalf of the Class, and preparing to examine witnesses and to otherwise participate at trial.")

[24] *Id.*

[25] *Id.*

Dist. LEXIS 144446, at *8 (E.D.N.Y. Oct. 4, 2012) ("Courts regularly award lodestar multipliers from two to six times lodestar); *Michels v. Phoenix Home Life Mut. Ins.*, 1997 N.Y. Misc. LEXIS 171 (Sup. Ct. N.Y. Cnty. Jan. 7, 1997) (collecting cases awarding multipliers from 6 to 12 times lodestar).

1.1.1. Hours reasonably expended

"The first step to be taken in arriving at a fair and appropriate award of attorneys' fees under the lodestar method is to determine whether the number of hours claimed were reasonably 'expended from contemporaneous time sheets." *Ousmane*, 22 Misc.3d 1136(A) (quoting *Becker v. Empire of America Federal Savings Bank*, 177 A.D.2d 958 (4th Dep't 1991)). Courts consider the following factors in assessing the reasonableness of the hours worked: "the extent to which the hours reflect inefficiency or duplicative work; legal work versus non-legal work, investigations, and other work performed by non-lawyers; time spent in court differentiated from out-of-court efforts; and the court's own knowledge, experience and expertise as to the time required to complete a similar task." *Id.* "Where, as is the case here, the billing records are voluminous, it is less important that judges attain exactitude, than that they use their experience with the case, as well as their experience with the practice of law, to assess the reasonableness of the hours spent." *Schutter v., Tarena Int'l, Inc.*, 2024 U.S. Dist. LEXIS 161838, at *45 (E.D.N.Y. Sept. 9, 2024).

Class Counsel's contemporaneous billing records substantiate the requested fee award.[26] On their face, the total hours worked on the case are reasonable in light of both the scope, complexity, intensity, stakes, and unprecedented nature of the case as well as the favorable results achieved for the Class and the public. Class Counsel's records reflect that the attorneys' fees incurred on behalf of the Class almost exclusively related to motion practice, depositions, expert reports, analysis of the voluminous evidentiary record, trial preparation, and other essential litigation activity.[27]

It is unnecessary for the Court to delve into each hour of work that was performed by Class Counsel to scrutinize whether each and every hour expended was reasonable given that, as noted above, Class Counsel seeks significantly less than 59% of their lodestar. *See Clark v. Castor & Pollux Ltd.*, 2019 N.Y. Misc. LEXIS 48101, at *54 (Sup. Ct. N.Y. Cnty. Sept. 18, 2019 ("The fact that Quinn Emmanuel has requested only a fraction of the time incurred prosecuting this action weighs heavily against a reduction of the award sought."); *Widjaja v. Kong Yue USA Corp.*, 2016 U.S. Dist. LEXIS 34038, at *2 (E.D.N.Y. Mar. 16, 2016) (declining to reduce requested fee where "hours expended by all attorneys at the firm were voluntarily reduced by a significant margin") (internal quotation marks omitted).

[26] *Id.* at ¶ 15-19

[27] *Id.*

Moreover, Houlihan Lawrence's own attorneys' fees and costs provide further confirmation of the reasonableness of the attorneys' fees incurred by Class Counsel on behalf of the Class. During discovery, Houlihan Lawrence produced insurance policies showing that it had $10 million in applicable insurance coverage for defense costs. By October 4, 2024, when the parties reached the Settlement, Houlihan Lawrence had exhausted most or all of that coverage through payment of legal fees and other costs associated with defending this lawsuit. The Settlement could not have been achieved if Class Counsel had not matched Houlihan Lawrence's own substantial investment of attorneys' fees and costs in this case.[28]

1.1.2. Reasonable hourly rate

"The reasonable hourly rate should generally be based on the customary fee charged for similar services by lawyers in the community with like experience and comparable reputation to those by whom the prevailing party was represented." *Vizcaino*, 2020 N.Y. Misc. LEXIS 2319 at *17 (internal quotation omitted); *see also Mazurek v. Presto*, 2024 U.S. Dist. LEXIS 197942, at *4 (D. Conn. Oct. 31, 2024) ("In calculating the reasonable hourly rate, the Court applies a presumption in favor of calculating fees based on the prevailing rates in the forum in which the litigation was brought.").

Class Counsel's billing rates were $575-625 for junior associates, $795-$870 for senior associates, and between $900-$1,410 for partners. These rates fall well within the reasonable range of rates approved by courts in other class actions. *See*,

[28] *Id*. at ¶ 27

e.g., *Torres v. Colvin*, 2015 U.S. Dist. LEXIS 29239 (S.D.N.Y. Mar. 6, 2014) ("[A] substantial body of caselaw has awarded rates that approach, if they do not exceed, $1,000.00. Moreover, many of those decisions were issued some years ago, and their awards, if adjusted for increases in the cost of living, would equal or exceed the amount requested here."); *Schiebel v. Colvin*, 2016 U.S. Dist. LEXIS 174833, at *2 (N.D.N.Y. Dec, 19, 2016) (collecting cases where courts approved hourly rates over $1,000); *Morrison v. Saul*, 2019 U.S. Dist. LEXIS 220068, at *3 (S.D.N.Y. Dec. 19, 2019) (approving fees based on effective hourly rate of $935.52). Indeed, Class Counsel's rates are below those recently approved by the federal court in *Burnett v. The Nat'l Ass'n of Realtors, et al.*, No. 19-CV-0332-SRB, another real estate class action litigated by Houlihan Lawrence's counsel contemporaneously with this case.[29]

When adjusting for the fact that Class Counsel seeks not more than 59% of their lodestar, Class Counsel's adjusted blended billing rate across all billers is only $483. That is comparable to the rate charged by Mr. Harrington for his service as the Court-appointed Discovery Referee. But, when accounting for the time value of money, even that figure overstates Class Counsel's billing rate given

[29] *Compare* Ex. 4, *Burnett* at ¶¶ 171-185 (granting final approval of settlement and fee award) and Ex. 5, Declaration of Eric L. Dirks, Sept. 13, 2024 *Burnett v. Nat'l Ass'n of Realtors, et al.*, No. 19-CV-00332-SRB (reporting billing rates for partners of $1,250).

that Class Counsel will receive these attorneys' fees only at the end of seven years of work.[30]

1.2. Percentage of Recovery Method

"Another acceptable method for determining attorneys' fees in a class action is the percentage method." *Vizcaino*, 2020 N.Y. Misc. LEXIS 2319 at *12. "Under the percentage method, the court awards attorneys' fees as a 'percentage of the total award received by the plaintiffs. To calculate the percentage, the court considers the effort expended and risks undertaken by plaintiffs' counsel and the results of those efforts, including the value of the benefits obtained for the class." *Id.* (quoting *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 188 (W.D.N.Y. 2005). Although the Court need not evaluate Class Counsel's proposed fee award using the percentage-of-recovery method, performing such a cross-check confirms that the requested fee is reasonable.

During the Class Period, Houlihan Lawrence collected more than $200 million in sales commissions in connection with in-house sales in which it paid an In-House Bonus to one or more of the sales agents involved in those transactions.[31] As the Class argued throughout the litigation, Houlihan Lawrence's In-House Bonus program was central to its alleged in-house sales scheme and an independent breach of its fiduciary duty that entitled the Class to disgorge those

[30] Vest Aff. at ¶ 24

[31] Ex. 6, Expert Report of R. Lashway, Aug. 15, 2023 ("Lashway Report") at Table 8

tainted commissions in their entirety.[32] From that perspective, and reasonably assuming that going forward Houlihan Lawrence would have made an equivalent number of In-House Bonus payments but for this litigation, the socially beneficial value of the Class's elimination of Houlihan Lawrence's In-House Bonus program is equal to the more than $200 million in forfeitable sales commissions.

At a minimum, the monetary value of the injunctive relief obtained by the Class is equal to not less than approximately $11 million, the amount of In-House Bonus payments that Houlihan Lawrence made during the Class Period and that it is reasonable to assume that Houlihan Lawrence would have made going but for this litigation.[33] *Compare Fleisher v. Phoenix Life Ins. Co.*, 2015 U.S. Dist. LEXIS 121574, at *51-52 (S.D.N.Y. Sept. 9, 2015) ("In calculating the overall settlement value for purposes of the 'percentage of the recovery' approach, courts include the value of both the monetary and non-monetary benefits."). Even under that *minimum* valuation standard and without accounting for any other non-monetary benefits of the litigation, the requested fee award of $7,735,877.22 represents only 39% of the total value of the Settlement, which is consistent with awards made in other class actions. *See*

[32] Mot. for Class Cert., Mar. 23, 2022 (Dkt. 1289) at 2 ("Bonus was a pillar of HL's in-house sales strategy"); Opp. to Mot. for Summary Judgment, Apr. 22, 2024 (Dkt. 1872) at § 3 ("Bonus remains independent grounds for certification and liability")

[33] *See* Ex. 6, Lashway Report at Table 5. Accordingly, without consideration of any other non-monetary benefit resulting from the litigation, the minimum combined value of the injunctive relief and cash consideration is approximately $20 million.

Velez v. Novartis Pharms. Corp., 2010 U.S. Dist. LEXIS 125945, at *58 (S.D.N.Y. Nov. 30, 2010) ("The federal courts have established that a standard fee in complex class action cases like this one, where plaintiffs counsel have achieved a good recovery for the class, ranges from 20 to 50 percent of the gross settlement benefit."); *see Alvarez v. Farmers Ins., Exch.*, 2017 U.S. Dist. LEXIS 119128, at *3 (N.D. Cal. Jan. 18, 2017) ("Fee award percentages generally are higher in cases where the common fund is below $10 million.").

1.3. Miscellaneous factors

Finally, "[i]n addition to the factors identified above with regard to the lodestar method and the percentage method, New York courts have examined the following, largely overlapping, factors in determining whether to confirm an award of attorneys' fees in a class action, as in any other case:

> The time and labor required; the difficulty of the questions involved; the skill required to handle the issues presented; the experience, ability and reputation of counsel; the proposed amount of fees; the benefit resulting to the putative class from the services; the customary fee charged for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved.

Vizcaino, 2020 N.Y. Misc. LEXIS 2319, at *13 (quoting *Gordon v. Verizon Commc'ns, Inc.* 148 A.D.3d 146, 165 (1st Dep't 2017)).

Here, as discussed above, Class Counsel's time and labor invested was substantial and necessarily precluded other work.[34] Litigating this case to the

[34] Vest Aff. at ¶¶ 15-19, 30

precipice of trial required over $13,000,000 in lodestar from the filing of the complaint through the Settlement. In addition to the substantial number of hours it took to reach the Settlement, Class Counsel were also required to advance the Class $1,264,122.78 of their own money to pay for out-of-pocket litigation costs, not including more than $150,000 in legal research expense. That extraordinary expenditure of time and resources was undertaken without any guarantee of payment.[35] *See Yarrington v. Solvay Pharm., Inc.*, 697 F.Supp.2d 1057, 1062 (D. Minn. 2010) ("Courts have recognized that the risk of receiving little or no recovery is a major factor in awarding attorney fees."); *Tussey v. ABB, Inc.,* 20.19 U.S. Dist. LEXIS 138880, at * (W.D. Mo. Aug. 16, 2019) ("Unless that risk is compensated with a commensurate award, no firm, no matter how large or well-financed, will have the incentive to consider pursuing a case such as this.").

Moreover, the litigation faced low odds of early settlement given that it attacked business practices that were central both to Houlihan Lawrence and the real estate brokerage industry generally.[36] *See* Ex. 4, Order, Hon. S. Bough, *Burnett v. Nat'l Ass'n of Realtors, et al.*, Case 4:19-cv-00332-SRB, Nov. 27, 2024

[35] *Id*. at ¶¶ 15-19

[36] *See*, *e.g.*, Ex. 8, Hon. L. Jamieson Hr'g Tr., Apr. 11, 2023 at 15:3-10 ("The industry custom and practice is uniform across the industry…. There are internal compensation arrangements made in each of these brokerage that are consistent with what Houlihan Lawrence does, number one. Number two, with respect to in-house, not just internal compensation, but dual agent is handled the same way.").

("Burnett") at ¶ 175 (recognizing that "low odds of early settlement[]" is a significant factor in awarding attorneys' fees). Indeed, Houlihan Lawrence categorically denied the allegations in the Class's complaint, asserted that it had at all times "dutifully" represented its clients with "integrity," and expressed confidence in its business practices even after the Class exposed its In-House Bonus program.[37]

While prosecuting the case for nearly seven years, Class Counsel had neither a roadmap of previous cases or settlements nor government assistance, and because the Class's claims concerned point-of-sale oral communications involving more than 1,300 sales agents, operating out of more than 20 Houlihan Lawrence offices, across three counties, over a seven-year period, Class Counsel necessarily had to seek broad-based discovery.[38] Class Counsel was thus exposed to significant risk not only due to the prospect of no recovery but also due to the extraordinary amount of time and money that they were required to expend to obtain the evidence necessary to prove class-wide misconduct.

The already considerable difficulty of that task was compounded by Houlihan Lawrence's zealous defense. *See* Ex. 4, *Burnett* at ¶ 178 ("Courts often

[37] *See* Ex. 3, A. Brambila, "*Houlihan Lawrence Accused of Deceptive Dual-Agency Practice in Lawsuit*," Inman News, July 19, 2018; Ex. 2, J. Barbanel, "*Lawsuit Accuses Westchester Real Estate Firm of Conflict of Interest*," Wall Street Journal, July 15, 2018; Ex. 9, A. Brambilla, "*Brokerage Accused of Paying Agents Bonuses for Double-Ended Deals*," Inman, Oct. 3, 2018 ("[W]e continue to deny the allegations")

[38] Vest Aff. at ¶ 28

judge class counsel's skill against the 'quality and vigor of opposing counsel….'") (quoting *In re Charter Commc'ns, Inc.*, 2005 U.S. Dist. LEXIS 14772, at *53 (E.D. Mo. June 30, 2005). Houlihan Lawrence litigated "virtually every conceivable discovery issue," necessitating an unprecedented 26 Reports and Recommendations by the Court-appointed Discovery Referee, thereby causing "substantial delay and expense."[39] Yet, due to Class Counsel's skill, experience, and perseverance, the Class prevailed on those disputes nearly without fail, eventually obtaining the discovery necessary to secure and sustain class certification through summary judgment.[40]

In the end, the Class succeeded in holding Houlihan Lawrence financially accountable to the maximum extent possible short of putting it into insolvency. Based on an analysis of Houlihan Lawrence's financial records conducted on behalf of the Class by a certified public accountant, Class Counsel concluded that the $9 million that Houlihan Lawrence agreed to pay represents a substantial portion of all profits that it is reasonably forecasted to earn during the next five years. That level of disgorgement represents a significant monetary penalty that should deter Houlihan Lawrence and other real estate brokers from further engaging in undisclosed dual agency.

[39] Twentieth R&R, William S. Harrington, Nov. 9, 2022 (Dkt. 1468) at 10.

[40] *See* W. Harrington Hr'g Tr., Jan. 31, 2023 (Dkt. 1536) at 32:9-11 (Houlihan Lawrence Counsel: "We have lost virtually everything on discovery.").

Houlihan Lawrence's elimination of its In-House Bonus program, after defending that program throughout the litigation,[41] is a major consumer protection victory that benefits the Class by resolving the allegedly unfair business practice at the center of the Class's complaint, constrains Houlihan Lawrence's ability to further operate its alleged in-house sales scheme,[42] and sets a precedent that can be used by legislators, regulators, and other private citizens to challenge other in-house sales incentives.

2. The requested expenses are reasonable

"It is well-settled that attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were incidental and necessary to the representation of those clients." *In re Bear Stearns Cos., Inc. Sec., Derivative, & Erisa Litig.*, 909 F.Supp.2d 259, 272 (S.D.N.Y. 2012); *see also Ryan*, 2013 N.Y. Misc. LEXIS 932, at *15 (awarding class counsel reimbursement of the litigation expenses); *In re Indep. Energy Holdings PLC Sec. Litig.*, 302 F.Supp.2d 180, 183 n. 3 (S.D.N.Y. 2003) ("Courts typically allow counsel to recover their reasonable out-of-pocket expenses.").

The total costs and expenses associated with the litigation through October 4, 2024, is $1,264,122.78, not including more than $150,000 in legal research expense. The costs and expenses through October 4, 2024, were reasonable and

[41] *See* Mot. for Summary Judgment, Mar. 11, 2024 (Dkt. 1753) at 10-13

[42] *See* Aff. of T. Cusack, Nov. 1, 2023 (Dkt. 1682) at ¶¶ 48-54 (discussing the "strategic importance" of the In-House Bonus); Expert Report of T. Cusack, Aug. 15, 2023 (Dkt. 1727) at 45 ("The In-House Bonus creates a conflict of interest for sales agents by giving them a financial interest in the consumer's decision")

necessary in order to reach the Settlement.[43] The largest components of these costs are for experts, depositions, class notice and administration, and fees paid to the Court-appointed Discovery Referee and Mediator. Attorneys routinely bill clients for such expenses, all were reasonable and necessary expenses in such a large, complex, and hard-fought litigation, and it is therefore appropriate to allow Class Counsel to recover these costs from the Settlement Fund.

CONCLUSION

Class Counsel respectfully request that the Court approve the requested fee of $7,735,877.22 and reimbursement of current litigation costs and expenses in the amount of $1,264,122.78.

Dated: February 21, 2025
New York, New York

By: */s/ Jeremy Vest*

Jeremy Vest, Esq.
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
919 Third Avenue
New York, NY 10022

Ohlemeyer Law PLLC
75 South Broadway
White Plains, New York 10601

Boies Schiller Flexner LLP
55 Hudson Yards
20th Floor
New York, New York 10001

Attorneys for Plaintiffs and the Class

[43] Vest Aff. at ¶¶ 25-27

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 6,386 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 6,386.

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New York, New York

By: */s/ Jeremy Vest*

Jeremy Vest, Esq.
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
919 Third Avenue
New York, NY 10022

Ohlemeyer Law PLLC
75 South Broadway
White Plains, New York 10601

Boies Schiller Flexner LLP
55 Hudson Yards
20th Floor
New York, New York 10001

Attorneys for Plaintiffs and the Class