SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

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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,

-against-

HOULIHAN/LAWRENCE INC.

Defendant.

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Index No. 60767/2018

DECISION AND ORDER

The following papers numbered 1 to 7 were read on the motion (seq. no. 8) by class action plaintiffs pursuant to CPLR § 904 for an Order appointing JND Legal Administration ("JND") as the notice plan administrator for this class action lawsuit, and approving the proposed methods and forms of notice to be used to provide notice of pendency of this action to the members of the certified class:

Papers	Numbered
Notice of Motion, Declaration and Exhibits	1
Affidavit and Exhibit	2
Memorandum of Law	3
Affirmation in Opposition and Exhibits	4
Memorandum of Law in Opposition	5

Reply Declaration and Exhibits	6
Reply Memorandum of Law	7

BACKGROUND

This class action lawsuit arises out of allegations that defendant Houlihan/Lawrence Inc. ("defendant") acted as an undisclosed, non-consensual dual agent in representing both buyers and sellers in approximately 10,000 residential real estate sales transactions throughout the Hudson Valley.

As relevant hereto, by Decision and Order dated January 21, 2022 (the "Class Certification Order"), the Court granted plaintiffs' motion for class certification. Specifically, the Class Certification Order provided that: (1) this action may be maintained as a class action on behalf of all home buyers and sellers of residential real estate in Westchester, Putnam, and Dutchess counties from January 1, 2011 to July 14, 2018 in which defendant represented both buyer and seller in the same transaction; (2) plaintiffs are appointed to represent the class; and (3) the Mintz, Levin and Boies Schiller law firms are appointed as co-counsel of record for the class.

Subsequently, by Decision and Order dated June 6, 2022, the Court denied defendant's motion pursuant to CPLR § 902 for an Order amending the definition of the certified class as had been set forth in the Class Certification Order. Thereafter, by

Decision and Order dated July 18, 2022, the Court, *inter alia*, granted defendant's unopposed motion pursuant to 9 U.S.C. §§ 1-14 and CPLR § 7503 for an Order compelling arbitration of claims against any purported class members who executed an arbitration agreement or clause with defendant, and dismissing them from this action. As such, after extensive motion practice, the certified class has been defined, and any potential class members who executed an arbitration agreement or clause with defendant have been compelled to arbitration and dismissed from this action.

Class action plaintiffs now move pursuant to CPLR § 904 for an Order: (a) appointing JND as the notice plan administrator; and (b) approving the proposed methods and forms of notice to be used to provide notice of pendency of this action to the members of the certified class. Defendant opposes the motion in part as set forth below.

THE PARTIES' CONTENTIONS

In support of their motion, class action plaintiffs contend that JND, which has been appointed notice plan administrator by New York courts and other courts in class action lawsuits throughout the country, has the requisite experience and qualifications to handle all class notice tasks. *See* Vest Dec. at ¶ 3. Class action plaintiffs furnish an affidavit from JND's

Vice President, Gina Intrepido-Bowden, who avers as to JND's experiences and qualifications, and sets forth JND's detailed proposed notice plan for this class action lawsuit, which, *inter alia*, includes: (a) a short-form notice to be furnished to class members by email and, as necessary, by first-class mail; (b) a long-form notice that will be made available to class members on a case-specific website for this class action lawsuit; and (c) publication of this lawsuit both in print form in various local newspapers and in digital form by way of placing digital banner advertisements on defendant's website and social media pages, including Instagram and Facebook, and on the Google Display Network. *See* Intrepido-Bowden Aff. at ¶¶ 1-22, Ex. A; Vest Dec. at Exs. 1-3.

Class action plaintiffs argue that this Court should approve JND's proposed notice program and proposed forms of notice, which satisfy the requirements of CPLR § 904 by providing the class members with the best notice practicable under the circumstances of this case. They contend that the short-form individual notices that are communicated primarily through email are cost-effective and expeditious, and compliant with CPLR § 904 and due process, and that these notices will be sent via first-class mail to class members without a valid, deliverable email address. Class action plaintiffs assert that

the short-form notices provide all information required by CPLR § 904 and due process in straightforward and readily understandable terms, and the notices include links to the case-specific website containing the proposed long-form class notice, which includes greater detail and further specifics about this lawsuit. Class action plaintiffs further contend that this individual notice plan will be supplemented with the aforementioned print and digital publication plan, and that by posting digital banner advertisements on defendant's corporate website and social media pages, and other highly trafficked websites, JND estimates that they will reach 85 percent of the class, which is well above the 70 percent threshold deemed to be "reasonable" by the Federal Judicial Center. Accordingly, class action plaintiffs conclude that the Court should grant their motion in its entirety by appointing JND as the notice plan administrator and by approving JND's proposed notice program and proposed forms of notice as detailed in class action plaintiffs' submissions.

In opposition, defendant does not object to this Court appointing JND as the notice plan administrator, and does not object to the substantive language set forth in class action plaintiffs' proposed short-form and long-form class notices. However, defendant asserts that class action plaintiffs'

proposed notice plan, as detailed by JND, should be modified in three principal ways. First, class notice should not begin until resolution of defendant's motion to compel arbitration[1] and until counsel have completed their review of 2,000 legacy transaction files so as to finalize the class roster. Second, class notice should be effectuated by first-class mail and not by email; but defendant asserts that if email is utilized, then the short-form and long-form class notices should be modified to provide a mechanism for class members to opt out via email. Third, publication in print form and in digital form, including the proposed digital banner advertisements on defendant's websites, is not necessary herein and will only serve to prejudice defendant.[2] Accordingly, defendant concludes that the Court should grant class action plaintiffs' motion to the extent of appointing JND as the notice plan administrator, and should otherwise only grant the motion subject to the modifications described above.

[1] As noted above, this unopposed motion was granted by Decision and Order dated July 18, 2022.

[2] Defendant does not object to class action plaintiffs' creation of a case-specific website with a link thereto included in the short-form notices, but asks that defendant be permitted to suggest revisions to the proposed language to be set forth on the website, and that Discovery Referee William P. Harrington, Esq. (the "Discovery Referee") be appointed to adjudicate any disputes regarding the website. *See* Def. Mem. at fn. 3.

ANALYSIS

CPLR § 904 Standards

CPLR § 904 provides in relevant part that "reasonable notice of the commencement of a class action shall be given to the class in such manner as the court directs." *See* CPLR § 904(b). It further states:

> The content of the notice shall be subject to court approval. In determining the method by which notice is to be given, the court shall consider:
>
> I. the cost of giving notice by each method considered;
>
> II. the resources of the parties; and
>
> III. the stake of each represented member of the class, and the likelihood that significant numbers of represented members would desire to exclude themselves from the class or to appear individually, which may be determined, in the court's discretion, by sending notice to a random sample of the class. *See* CPLR § 904(c).

Thus, although "[i]ndividual notice of class proceedings is not meant to guarantee that every member entitled to individual notice receives such notice," the method of notice should be "reasonably calculated to reach the plaintiffs." *Williams v Marvin Windows & Doors*, 15 AD3d 393, 396 (2d Dept 2005), *citing Reppert v Marvin Lbr. & Cedar Co.*, 359 F3d 53, 56-57 (1st Cir. 2004). As such, it is well-settled that "[t]he law requires

that the parties provide the best notice practicable under the circumstances to class members." *Drizin v Sprint Corp.*, 2005 N.Y. Misc. LEXIS 868, *3 (Sup. Ct. N.Y. Cty. Feb. 25, 2005), *citing Eisen v Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). In making that determination, CPLR § 904(c) "requires the court to consider the cost of giving notice by each method considered, the resources of the parties, and the stake of each represented member of the class, and the likelihood that significant numbers of represented members would desire to be excluded from the class." *Drizin*, 2005 N.Y. Misc. LEXIS 868 at *3; *accord Hess v EDR Assets LLC*, 2021 N.Y. Misc. LEXIS 1028, *8 (Sup. Ct. N.Y. Cty. Mar. 10, 2021).

Notice Plan Administrator

As an initial matter, the Court credits class action plaintiffs' unopposed assertion that JND has the requisite experience and qualifications to handle all class notice tasks in this lawsuit; and as such JND is hereby appointed notice plan administrator. *See generally In re Packaged Seafood Prods. Antitrust Litig.*, 2022 U.S. Dist. LEXIS 16471, *62 (S.D. Cal. Jan. 26, 2022) (describing JND as "an experienced notice and claims administrator"); *In re Equifax Customer Data Sec. Breach Litig.*, 2020 U.S. Dist. LEXIS 118209, *226 (N.D. Ga. Mar. 17, 2020) (acknowledging that JND is "an expert in providing class

action notice"); *see also* Intrepido-Bowden Aff. at ¶¶ 1-22, Ex. A.

Timing of Notice

With respect to the timing of notification of the class, such notification should begin promptly, and the Court does not credit defendant's arguments in favor of delaying same. First, the issue of excluding class members who have executed binding arbitration agreements covering this dispute has been mooted, as by Decision and Order dated July 18, 2022, the Court, *inter alia*, granted defendant's unopposed motion pursuant to 9 U.S.C. §§ 1-14 and CPLR § 7503 for an Order compelling arbitration of claims against any purported class members who executed an arbitration agreement or clause with defendant, and dismissing them from this action.

Second, the Court perceives no reason to further delay the commencement of notification of the class members while counsel for the respective parties review and address 2,000 legacy transaction files so as to finalize the class roster. Although counsel are strongly urged to expeditiously finalize the list of class members and should continue to seek adjudication of any specific disputes from the Discovery Referee, the record reflects that defendant has identified approximately 10,000 transactions falling within the class definition. While the

Court understands that defendant subsequently disputed whether roughly 2,000 of those transactions should be omitted from the list – which the parties are addressing with the Discovery Referee – class notice should not be delayed and should be sent to a potentially over-inclusive list where, as here, the list "indisputably contain[s] the universe of class members." *See T.K. v Bytedance Tech. Co., Ltd.*, 2022 U.S. Dist. LEXIS 65322, *62 (N.D. Ill. Mar. 25, 2022).

Accordingly, notification of the class members identified in defendant's list of roughly 10,000 transactions should begin promptly, and the class roster can of course be narrowed subject to the parties' continued review and adjudication of any disputes with the Discovery Referee. *See Victorino v FCA US LLC*, 2020 U.S. Dist. LEXIS 155991, **5-6 (S.D. Cal. Aug. 27, 2020) (stating that "[n]otice to a broader group than the class definition is acceptable as long as there is some link or connection between the method of class notice and the class definition"); *Bowerman v Field Asset Servs., Inc.*, 2015 U.S. Dist. LEXIS 126058, **10-11 (N.D. Cal. Sept. 21, 2015) (holding that "[h]ere, as occasionally occurs, the best notice practicable under the circumstances was notice to a group that was broader than the class definition but included the complete universe of class members. This was an acceptable and

unremarkable method of delivering notice to the class"); *Macarz v Transworld Sys. Inc.*, 2001 U.S. Dist. LEXIS 7675, *61 (D. Conn. Jan. 8, 2001) (requiring notice to each person on defendant's list which "indisputably contains the universe of class members (albeit a twenty-five percent over-inclusive list)," and stating that "approximately three-quarters of the notices sent to the names on the proposed list would result in notice to all class members").

Form of Notice

Regarding the form of notice, defendant does not substantively object to the proposed language included in the short-form notice and the long-form notice furnished by class action plaintiffs, both of which notices the Court adopts and approves herein, subject to the email opt-out provision as set forth below. *See* Vest Dec. at Exs. 1-2.

With respect to the transmission of the short-form notices, the Court adopts class action plaintiffs' proposal that these notices are to be sent by email, and then by first-class mail to those class members who cannot be contacted electronically. As noted by class action plaintiffs, email is widely recognized as an efficient and cost-effective means of giving individual notice of a 21st century class action lawsuit. *See Gedeon v Valucare, Inc.*, 2021 U.S. Dist. LEXIS 67026, *34 (E.D.N.Y. Mar.

31, 2021) (noting that "[c]ourts in the Second Circuit routinely approve email distribution of notice"); *In re Deloitte & Touche, LLP*, 2012 U.S. Dist. LEXIS 12641, **6-7 (S.D.N.Y. Jan. 17, 2012) (approving email notice in a class action and stating that "[i]in the present age . . . communication through email is the norm").

As such, the Court does not credit defendant's assertion that the short-form notices should be sent via first-class mail instead of by email. Rather, email will be used in the first instance, and the notices will be sent via first-class mail only to those class members without a valid, deliverable email address. It is the Court's determination that, in accordance with CPLR § 904, such method of notice is "reasonably calculated to reach the plaintiffs," and constitutes "the best notice practicable under the circumstances to class members." *See Williams*, 15 AD3d at 396; *Drizin*, 2005 N.Y. Misc. LEXIS 868 at *3.

Relatedly, however, the Court credits defendant's argument that if email is utilized, then both the short-form and long-form class notices should be modified to provide a mechanism for class members to opt out via email as well as by first-class mail. *See Lyngaas v Curaden AG*, 2019 U.S. Dist. LEXIS 111217, **4-5 (E.D. Mich. July 3, 2019) (stating that "[t]he Court

agrees that it would be more convenient for a class member to fax or email Plaintiff's counsel in order to opt out of the class. These methods will ensure that there is written documentation of a class member's request. Accordingly, Plaintiff shall revise the notice form in order to provide an email address and a fax number to which a class member can direct an opt-out request. The notice should also provide that a class member may opt out by mailing a request to Plaintiff's counsel"); *Ellis v Costco Wholesale Corp.*, 2012 U.S. Dist. LEXIS 169894, *5 (N.D. Cal. Nov. 29, 2012) (noting that "the approved class notice allows class members to indicate their desire to opt out of the class via email").

Accordingly, both the short-form and long-form notices should be revised to provide class members with a mechanism by which they can opt-out of the class by email, while also allowing class members to opt out via first-class mail if they so desire. Subject to that important revision, the short-form and long-form notices proposed by class action plaintiffs are adopted and approved herein.

Case-Specific Website

With regard to the proposed case-specific website for this class action lawsuit on which, *inter alia*, the long-form notice will be set forth as revised in accordance herewith, the Court

approves class action plaintiffs' proposal to use www.HoulihanLawrenceLitigation.com as the website to be established and maintained by JND. *See* Intrepido-Bowden Aff. at ¶ 20. However, as requested by defendant, the Court directs class action plaintiffs' counsel to share with defendant's counsel drafts of all substantive language to be posted therein, so that counsel may discuss any suggested revisions thereto prior to publication on the website. Furthermore, as also requested by defendant, the Discovery Referee is hereby appointed to adjudicate any disputes relating to the content of the case-specific website.

Publication

Finally, with respect to the issue of publication – both in print and digital format – the Court credits defendant's argument that publication is not necessary herein and may only serve to prejudice defendant. Indeed, as noted above, defendant has identified a universe of approximately 10,000 transactions that encompass the definition of the class herein, i.e., all home buyers and sellers of residential real estate in Westchester, Putnam, and Dutchess counties from January 1, 2011 to July 14, 2018 in which defendant represented both buyer and seller in the same transaction. Notwithstanding that defendant is adjudicating before the Discovery Referee whether up to 2,000

of those transactions should ultimately be excluded from the class, the Court in this Decision and Order has authorized class action plaintiffs to begin sending notice of this lawsuit to all potential class members identified in the original roughly 10,000 transactions. As detailed above, the underlying reasoning is that notice of this lawsuit should not be delayed and should be sent to a potentially over-inclusive list where, as here, the list "indisputably contain[s] the universe of class members." *See T.K.*, 2022 U.S. Dist. LEXIS 65322 at *62.

To that end, however, the Court perceives no valid basis for allowing class action plaintiffs to further publicize this lawsuit with the type of "targeted, robust digital and print publication notice campaign" described in class action plaintiffs' motion papers. *See* Intrepido-Bowen Aff. at ¶¶ 14-19. Indeed, the Court credits defendant's contention that it would be prejudicial – and unnecessary – to permit class action plaintiffs to publish the short-form notice in local newspapers where, as here, class membership is not expanding with new purchases, and all class members for the relevant 2011 to 2018 transactions can already be ascertained from the (potentially over-inclusive) list of transactions furnished by defendant.

Moreover, the Court does not credit class action plaintiffs' assertion that they should be permitted to publish

digital banners advertising this lawsuit on defendant's website or on its social media pages or any related websites. Such digital publication is wholly unnecessary given the circumstances presented herein, and would serve no apparent purpose other than to prejudice defendant and to potentially damage its business and reputation. *See Hong v Haiku Asian Bistro White Plains*, 2022 U.S. Dist. LEXIS 16047, **35-36 (S.D.N.Y. Jan. 28, 2022) (holding that "the Court will not authorize Plaintiff's counsel to post a short form of the notice on public social media groups. Posting on social media and websites would be overbroad and not likely to materially improve the chances of notice. The potential plaintiffs here are likely to be reached and identified by other means, and any plaintiffs who cannot be reached will not have their legal rights altered by their inaction, whereas posting on social media groups and websites has the potential to prejudice Defendants") (internal citations omitted); *Lin v DJ's Int'l Buffet*, 2019 U.S. Dist. LEXIS 193947, **16-17 (E.D.N.Y. Nov. 7, 2019) (denying request for digital publication of class action notice because "posting on social media and websites has the potential to prejudice Defendants"); *Mark v Gawker Media LLC*, 2014 U.S. Dist. LEXIS 155424, **8-9 (S.D.N.Y. Nov. 3, 2014) (denying request to publish class action notice on defendants' websites and blogs

because this "extracts a cost from Defendants, and has the potential to appear punitive, while the incremental chance that potential plaintiffs who do not otherwise receive notice would see it and become aware of their rights is small").

Accordingly, class action plaintiffs' request to publish information about this lawsuit, both in print and in digital format, is denied.

CONCLUSION

Therefore, for all of the reasons stated above, class action plaintiffs' motion is granted in part and denied in part as set forth in detail above.[3]

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
July 25, 2022

HON. LINDA S. JAMIESON
Justice of the Supreme Court

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[3] All other arguments raised on this motion and all materials submitted by the parties in connection therewith have been considered by this Court, notwithstanding the specific absence of reference thereto.

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