SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of	
REAL ESTATE BOARD OF NEW YORK, INC., NEW YORK STATE ASSOCIATION OF REALTORS, INC., BOHEMIA REALTY GROUP, BOND NEW YORK REAL ESTATE CORP., THE CORCORAN GROUP, DOUGLAS ELLIMAN REAL ESTATE, HALSTEAD REAL ESTATE, BROWN HARRIS STEVENS RESIDENTIAL SALES LLC, SOTHEBY'S INTERNATIONAL REALTY, INC., R NEW YORK, KIAN REALTY NYC LLC, REGINA WIERBOWSKI REAL ESTATE, LLC, LEVEL GROUP INC., and CITY CONNECTIONS REALTY, INC.,	Index No.
Petitioners,	
For a Judgment pursuant to Article 78 of the CPLR	**VERIFIED PETITION**
-against-	
NEW YORK STATE DEPARTMENT OF STATE, and ROSSANA ROSADO, as New York State Secretary of State,	
Respondents.	

Petitioners Real Estate Board of New York, Inc. ("REBNY"), New York State Association of Realtors, Inc. ("NYSAR"), Bohemia Realty Group, Bond New York Real Estate Corp., The Corcoran Group, Douglas Elliman Real Estate, Halstead Real Estate, Brown Harris Stevens Residential Sales LLC, Sotheby's International Realty, Inc., R New York, Kian Realty NYC LLC, Regina Wierbowski Real Estate, LLC, Level Group Inc., and City Connections Realty, Inc. (collectively, "Petitioners"), by their attorneys Stroock & Stroock & Lavan LLP, hereby allege, as and for their Verified Petition (the "Petition"), as follows:

1. This is a special proceeding brought against Respondents New York State Department of State (the "DOS") and the Secretary of State, Rossana Rosado, in her official capacity, pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR") to invalidate purported "guidance," entitled "Guidance for Real Estate Professionals Concerning the Statewide Housing Security & Tenant Protection Act of 2019 and the Housing Stability and Tenant Protection Act of 2019" (the "DOS Memo") and issued by the DOS in or around February 4, 2020. Specifically, this Petition seeks to invalidate the portion of the DOS Memo—Question 5 and its response ("Question 5") —that pronounced that a landlord's agent cannot collect a broker's fee from a prospective tenant. See DOS Memo, a copy of which is annexed hereto as Exhibit A, at 4.

2. In the New York rental market, it is commonplace for landlords to enter into listing agreements appointing real estate brokers to market, advertise, and show an apartment or other residential units. Pursuant to these listing agreements, if the broker successfully procures a tenant for the vacant unit, the broker is entitled to receive a commission. The overwhelming majority of these agreements set forth that the tenant shall pay the commission to the broker. Affidavit of Hal Gavzie, sworn to February 7, 2020 ("Gavzie Aff.") ¶¶ 4-8. The rental markets in New York are efficient and have worked this way effectively for both tenants and landlords for decades.

3. Despite this, in or around February 4, 2020, the DOS, for the first time and without any notice or warning, issued the DOS Memo, which in its response to Question 5, pronounced that "a landlord's agent cannot be compensated by the prospective tenant for bringing about the meeting of the minds" and that "a landlord's agent that collects a fee for

bringing about the meeting of the minds between the landlord and tenant (i.e., the broker fee) from the tenant can be subject to discipline." See DOS Memo, Exhibit A, at 4.

4. The impact of Question 5 on the New York real estate brokerage community was immediate and devastating. Prospective tenants started backing out of their agreements to pay the procuring brokers their commissions, tenants who had already paid broker fees began demanding the return of already paid commissions, and brokers feared they would be the subject of complaint and discipline from the DOS unless they stopped accepting commissions, despite having procured the transaction and duly earning the commissions.

5. Additional confusion and havoc have been compounded by newspaper articles throughout New York publicizing—incorrectly—that essentially all brokerage fees on rentals were illegal. See, e.g., Will Parker, Ban on Broker Fees Sends New York City Apartment Rental Firms Reeling, Wall Street J., Feb. 8, 2020 ("WSJ Article"), a copy of which is annexed hereto as Exhibit G, at 1 ("A new state rule preventing real-estate firms from charging broker fees on apartment rentals is causing chaos and sudden panic in the industry.").

6. Question 5 of the DOS Memo purports to provide the DOS's interpretation of the Statewide Housing Security and Tenant Protection Act of 2019 (the "Act"), which was signed into law on June 14, 2019, more than seven months earlier. But Question 5 is contrary to the Act—which is bereft of any mention of real estate brokers and/or agents of a landlord—and should be declared void ab initio by this Court.

7. Question 5 is also so divorced from the language of the Act that it cannot be understood as a mere interpretation of the Act. Instead, it is clear that here, the DOS usurped the role of the Legislature and that its actions constitute an illegal exercise of legislative power.

8. Worse, the DOS has been well aware of the market convention that tenants are responsible for paying a commission, even when a broker has entered into a listing agreement with a landlord. Indeed, after enactment of the Act, the DOS still believed that it was lawful for real estate agents to be paid a commission by a tenant, despite representing a landlord. In direct contravention of Question 5, DOS Legal Memorandum LI05, issued by the DOS's General Counsel, recognizes this standard business practice and does not state that it is unlawful:

> Real estate brokers are licensed and regulated by the Department of State. Brokers are trained professionals who can offer potential tenants invaluable advice and guidance in locating and negotiating an apartment rental. They are paid by commission, which is usually calculated as either a percentage of the first year's rent for the apartment or the equivalent of one month's rent.
>
> If the specific apartment sought is subject to a listing agreement between the landlord and a broker, the broker with whom you will be dealing likely represents the interests of the landlord. ***It is important to understand that, even if the broker is representing the landlord, in most transactions the tenant is responsible for paying the broker's commission.*** The tenant is free, however, to negotiate with the broker as to when and how the commission is earned and should insist on a written commission agreement with the broker.

Department of State Office of General Counsel Legal Memorandum LI05 ("Legal Memorandum LI05"), https://www.dos.ny.gov/cnsl/apthunt.html (last visited February 9, 2020), a copy of which is annexed hereto as Exhibit B, at 1 (emphasis added). The DOS's Legal Memorandum LI05 remains available on the DOS's website up to the time of filing this Petition, and Question 5 does not say that brokers can no longer rely on Legal Memorandum LI05. Nor did the DOS state that Question 5 supersedes Legal Memorandum LI05.

9. In sum, this Court should find that the determination in Question 5 of the DOS Memo is contrary to established law, devoid of logic, arbitrary and capricious, an abuse of discretion, and constitutes improper rulemaking by the DOS in violation of the State

Administrative Procedure Act ("SAPA"). Therefore, this Petition seeks nullification of Question 5, and the Court should order that DOS is enjoined from disciplining any broker or salesperson for failing to comply with the "rule" set forth in Question 5 and that even if brokers are representing landlords, they are still entitled to continue to receive commissions from tenants.

PARTIES

10. Petitioner REBNY is a New York not-for-profit trade association founded in 1896. REBNY represents commercial, residential, and institutional property owners, builders, managers, investors, brokers, and salespeople; banks, financial service companies, utilities, attorneys, architects, and contractors; corporations, co-partnerships, and individuals professionally interested in New York City real estate. In particular, REBNY represents the interests of close to 14,000 real estate brokerage professional members in the five boroughs of New York City, and provides business and other services related to the operation of real estate brokerage firms and individual real estate licensees throughout New York City. REBNY brings this action on behalf of itself, and its almost 14,000 members directly impacted by the harm created by Question 5 of the DOS Memo. REBNY's members will suffer an injury in fact as the result of the DOS Memo and REBNY's members are within the zone of interests of the regulations governing this dispute.

11. Petitioner NYSAR is a New York not-for-profit trade association established in 1905. It represents the interests of approximately 60,000 real estate brokerage professional members throughout New York. NYSAR provides business services related to the operation of real estate brokerage firms and real estate licensees. NYSAR and its 27 local boards/associations of REALTORS® and their individual real estate licensee members are affiliated with the National Association of REALTORS®, Inc. NYSAR brings this action on

behalf of itself and its approximately 60,000 members directly impacted by the harm created by Question 5 of the DOS Memo. NYSAR's members will suffer an injury in fact as the result of the DOS Memo and NYSAR's members are within the zone of interests of the regulations governing this dispute.

12. Petitioner Bond New York Real Estate Corp. ("Bond") is a real estate brokerage firm incorporated in the State of New York and founded in 2000. Bond maintains its corporate headquarters at 810 Seventh Avenue, New York, New York 10019. Over 500 real estate licensees are currently affiliated with Bond. Bond, and each of its licensees, are members of REBNY. Bond's brokers and salespersons commonly engage in rental transactions in New York and are often compensated by tenants in transactions involving listing agreements where they are appointed by a landlord to serve as the landlord's agent.

13. Petitioner Brown Harris Stevens Residential Sales LLC ("Brown Harris Stevens") is a real estate brokerage firm incorporated in the State of New York and founded in 1873. It maintains its corporate office at 770 Lexington Avenue, New York, New York 10065. Over 700 real estate licensees are currently affiliated with Brown Harris Stevens (over 400 in New York). The Brown Harris Stevens agents engaging in real estate brokerage in New York City are members of REBNY. Brown Harris Stevens's brokers and salespersons commonly engage in rental transactions in New York and are often compensated by tenants in transactions involving listing agreements where they are appointed by a landlord to serve as the landlord's agent.

14. Petitioner Halstead Real Estate ("Halstead") is a real estate brokerage firm incorporated in the State of New York and founded in 1984. It maintains its corporate office at 770 Lexington Avenue, New York, New York 10065. Halstead operates various offices through

Halstead Manhattan LLC, Halstead Brooklyn LLC, Halstead Queens LLC, Halstead Riverdale LLC, Halstead Hudson LLC, and Halstead Hamptons LLC. Approximately 950 real estate licensees are currently affiliated with Halstead. The Halstead agents engaging in real estate brokerage in New York City are members of REBNY, and the agents engaging in real estate brokerage with Halstead Riverdale LLC and Halstead Hudson LLC are members of NYSAR. Halstead's brokers and salespersons commonly engage in rental transactions all over the State of New York and are often compensated by tenants in transactions involving listing agreements where they are appointed by a landlord to serve as the landlord's agent.

15. Petitioner Sotheby's International Realty, Inc. ("Sotheby's") is a real estate brokerage firm incorporated in the State of Michigan and founded in 1976. It maintains multiple offices in New York County. Over 2,000 real estate licensees are currently affiliated with Sotheby's (over 400 in New York). Sotheby's agents engaging in real estate brokerage in New York City are members of REBNY. Sotheby's brokers and salespersons commonly engage in rental transactions in New York and are often compensated by tenants in transactions involving listing agreements where they are appointed by a landlord to serve as the landlord's agent.

16. Petitioner R New York ("R New York") is a real estate brokerage firm incorporated in the State of New York and founded in 2007. It maintains an office at 641 Lexington Ave., New York, New York 10022. Over 774 real estate licensees are currently affiliated with R New York. R New York, and each of its licensees, are members of REBNY. R New York's brokers and salespersons commonly engage in rental transactions in New York and are often compensated by tenants in transactions involving listing agreements where they are appointed by a landlord to serve as the landlord's agent.

17. Petitioner Douglas Elliman Real Estate ("Douglas Elliman") is a real estate brokerage firm originally formed in the State of New York and founded in 1911. It maintains multiple offices in New York State. Over 4,000 real estate licensees are currently affiliated with Douglas Elliman. Douglas Elliman, and many of its licensees, are members of REBNY and NYSAR. Douglas Elliman's brokers and salespersons commonly engage in rental transactions in the City of New York and the Counties of Nassau, Suffolk, and Westchester, and are often compensated by tenants in transactions involving listing agreements where they are appointed by a landlord to serve as the landlord's agent.

18. Petitioner Kian Realty NYC LLC ("Kian Realty") is a real estate brokerage firm incorporated in the State of New York and founded in 2011. It maintains an office at 450 Seventh Avenue, Suite 1501, New York, New York 10123. Over 100 real estate licensees are currently affiliated with Kian Realty. Kian Realty, and each of its licensees, are members of REBNY. Kian Realty's brokers and salespersons commonly engage in rental transactions in New York and are often compensated by tenants in transactions involving listing agreements where they are appointed by a landlord to serve as the landlord's agent.

19. Petitioner Regina Wierbowski Real Estate, LLC ("Regina Wierbowski") is a real estate brokerage firm incorporated in the State of New York. It maintains an office at 261 Broadway, New York, New York 10007. Regina Wierbowski is a member of REBNY, and she commonly engages in rental transactions in New York and is often compensated by tenants in transactions involving listing agreements where her firm is appointed by a landlord to serve as the landlord's agent.

20. Petitioner Level Group Inc. ("Level Group") is a real estate brokerage firm incorporated in the State of New York. It maintains an office at 211 East 43rd Street, New York,

New York 10017. Level Group, and each of its licensees, are members of REBNY. Level Group's brokers and salespersons commonly engage in rental transactions in New York and are often compensated by tenants in transactions involving listing agreements where they are appointed by a landlord to serve as the landlord's agent.

21. Petitioner Bohemia Realty Group ("Bohemia") is a real estate brokerage firm incorporated in the State of New York and founded approximately 10 years ago. It maintains offices at 2101 Frederick Douglass Boulevard, New York, New York, 10026 and 3880 Broadway, New York, New York 10032. Approximately 140 real estate licensees are currently affiliated with Bohemia. Bohemia, and each of its licensees, are members of REBNY. Bohemia's brokers and salespersons commonly engage in rental transactions in New York and are often compensated by tenants in transactions involving listing agreements where they are appointed by a landlord to serve as the landlord's agent.

22. Petitioner The Corcoran Group ("Corcoran") is a real estate brokerage firm incorporated in the State of Delaware. It maintains various offices throughout New York State. Approximately 2,400 real estate licensees are currently affiliated with Corcoran. Corcoran, and many of its licensees, are members of REBNY. Corcoran's brokers and salespersons commonly engage in rental transactions in New York and are often compensated by tenants in transactions involving listing agreements where they are appointed by a landlord to serve as the landlord's agent.

23. Petitioner City Connections Realty, Inc. ("City Connections") is a real estate brokerage firm incorporated in the State of New York. It maintains an office at 71 West 23rd Street, New York, New York 10010. City Connections, and each of its licensees, are members of REBNY. City Connections' brokers and salespersons commonly engage in rental

transactions in New York and are often compensated by tenants in transactions involving listing agreements where they are appointed by a landlord to serve as the landlord's agent.

24. Respondent New York State Department of State maintains offices at One Commerce Plaza, 99 Washington Ave, Albany, New York 12231-0001 and 123 William Street, New York, New York 10038-3804. The DOS, inter alia, oversees the licensure, registration, and regulation of real estate brokers in the State of New York.

25. Respondent Rossana Rosada was appointed New York State Secretary of State on February 3, 2016 and unanimously confirmed by the New York State Senate on June 15, 2016. Pursuant to New York Executive Law § 90, the New York State Secretary of State serves as the head of the DOS.

JURISDICTION

26. The jurisdiction of this Court to hear this proceeding is based upon Article 78 of the CPLR.

27. Venue is proper in Albany County since, *inter alia*, Respondents are located and events material to this Petition took place there.

BACKGROUND

A. Tenant-Paid Broker Fees Is a Longstanding Business Practice in the New York Rental Market

28. Landlords in the State of New York commonly elect to have real estate brokers represent them in connection with the rental of their apartment, home, or other units. See Affidavit of Gary Malin, sworn to February 8, 2020 ("Malin Aff.") ¶¶ 3-9; Affidavit of Douglas Wagner, sworn to February 7, 2020 ("Wagner Aff.") ¶¶ 3-9; Affidavit of Sarah Saltzberg, sworn to February 9, 2020 ("Saltzberg Aff.") ¶¶ 3-7; Gavzie Aff. ¶¶ 4-8. Such landlords will enter into listing agreements with the real estate broker, among other things, to

market, advertise, and show their units. Id. Landlords, many of whom are individuals or small business owners, will utilize the services of a broker because they are not equipped to handle certain administrative tasks associated with rental transactions, such as the processing and compiling of rental applications, running credit applications, and tracking of related regulatory requirements. Brokers also assist both the tenant and the landlord in the negotiation of the monthly rent. Id.

29. Rental listing agreements entered into between landlords and brokers may be exclusive, whereby the landlord appoints one brokerage firm to serve as the exclusive agent for a building or apartment unit, or the landlord may contract with multiple firms to show and rent an apartment or a building. There are currently thousands of such rental listing agreements in force across New York State. Id.

30. Upon information and belief, the overwhelming majority of these rental listing agreements provide that the broker shall be paid its commission on a successful rental by the tenant. That arrangement incentivizes brokers to work diligently to identify potential tenants, assigns the administration of rental transactions to those who are best equipped to administer them—namely, the brokers—and significantly reduces landlords' operational costs. The principal effect of having the rental market work in this fashion—as it has statewide for decades—is to keep rents affordable and to keep the rental market operating efficiently for both landlords and consumers. Id. If landlords stop utilizing the services of brokers, it will result in the landlord having to pay for advertising the apartment listing and to hire additional personnel to market, advertise, and show their own apartments. Moreover, these additional costs will no doubt be passed on to consumers in the form of increased rents. Such a result will mean that renters will be priced out of many apartments. Those rent increases will be in place for years,

costing consumers a multiple of the amount of commission they would have previously paid up front according to the way the rental market worked before the DOS Memo. The result is that consumers will bear the costs of these added landlord expenses. Gavzie Aff. ¶ 13; Saltzberg Aff. ¶ 12. Unfortunately, both consumers and brokers will be hurt.

B. Enactment of New York Real Property Law Section 238-a

31. On June 14, 2019, Governor Cuomo signed the Act into law, enacting sweeping statewide changes to New York's rent laws.

32. Among other provisions, the Act incorporated new Section 238-a ("Limitation on Fees") into New York Real Property Law ("RPL") Article 7. Importantly, while it mentions landlords explicitly, the new provision fails to contain any mention of real estate brokers or agents of landlords. The new Section 238-a provides as follows, in relevant part:

> Except in instances where statutes or regulations provide for a payment, fee or charge, ***no landlord, lessor, sub-lessor or grantor*** may demand any payment, fee, or charge for the processing, review or acceptance of an application, or demand any other payment, fee or charge before or at the beginning of the tenancy, except background checks and credit checks as provided by paragraph (b) of this subdivision . . . .

See RPL § 238-a(1)(a) (emphasis added).

33. On its face, RPL § 238-a(1)(a) bars an explicitly defined category of actors—"landlord[s], lessor[s], sub-lessor[s] or grantor[s]"—from demanding that tenants pay certain types of payments, fees, and charges before or at the beginning of the tenancy. See RPL § 238-a(1)(a). RPL § 238-a(1)(a), however, does not provide that it applies to any person or entity other than these statutorily enumerated persons. Specifically, RPL § 238-a does not provide, or suggest, that real estate brokers, real estate salespeople, agents, or affiliates of a

landlord, lessor, sub-lessor, or grantor are subject to the statute. Neither RPL § 238-a, nor any other provision of the Act, even mention the words "broker" or "real estate salespeople."

34. On its face, RPL § 238-a also provides that it is inapplicable in any "instances where statutes or regulations provide for a payment, fee or charge . . . ." See RPL § 238-a(1)(a). By its explicit terms, RPL § 238-a therefore preserves the effectiveness of all other statutes and regulations providing for a payment, fee, or charge to a real estate broker or salesperson. See, e.g., RPL §§ 440, 442-a.

C. The New York Rental Market Maintained Its Decades-Long Status Quo After the Enactment of RPL § 238-a

35. The Act did not alter the longstanding business practice of tenants paying brokerage fees to brokers appointed by landlords pursuant to listing agreements between the landlord and broker.

36. Indeed, even after the enactment of the Act, and to this day, the DOS's website sets forth unequivocally that "in most transactions" the tenants will be responsible for paying the brokerage commission—even when the broker is also representing the landlord. DOS General Counsel Legal Memorandum LI05 is currently publicly displayed on the DOS website and makes this point clear to consumers, brokers, and landlords across New York:

> Real estate brokers are licensed and regulated by the Department of State. Brokers are trained professionals who can offer potential tenants invaluable advice and guidance in locating and negotiating an apartment rental. They are paid by commission, which is usually calculated as either a percentage of the first year's rent for the apartment or the equivalent of one month's rent.
>
> ***If the specific apartment sought is subject to a listing agreement between the landlord and a broker, the broker with whom you will be dealing likely represents the interests of the landlord. It is important to understand that, even if the broker is representing the landlord, in most transactions the tenant is responsible for paying the broker's commission. The tenant is free, however, to***

> ***negotiate with the broker as to when and how the commission is earned and should insist on a written commission agreement with the broker.*** Without a written commission agreement, the commission is earned when the broker has obtained oral agreement between the landlord and tenant on the essential terms of the tenancy, even if the tenant never takes occupancy or signs a lease. The tenant may therefore seek a written commission agreement with the broker providing that the commission will not be earned or paid until the tenant takes occupancy or a lease is signed by both landlord and tenant.

Legal Memorandum LI05, Exhibit B, at 1 (emphasis added).

37. Furthermore, on the DOS Website's Frequently Asked Questions for Real Estate Salespersons and Brokers, the DOS affirmatively states that "[t]he commission or compensation of a real estate broker is not regulated by statute or regulation." FAQ – Real Estate Salesperson and Broker ("DOS FAQ"), https://www.dos.ny.gov/licensing /re_salesperson/re_sales_broker_faq.html (last visited February 9, 2020), a copy of which is annexed hereto as Exhibit C, at 3-4.

38. The fact that the DOS included this information on its website even after the Act was passed, and continues to include it on its website to this day, is a clear indication that at the time of enactment, and until issuance of the DOS Memo, the DOS did not understand the Act to have any impact on a broker's right to collect a commission from a prospective tenant.

39. After the enactment of the Act—and until the publication of the DOS Memo over seven months later—the New York rental market continued to operate as it had operated for decades: landlords and real estate brokers maintained listing agreements and continued to enter into new listing agreements providing that the broker shall be paid a commission by the tenant upon successful execution of a lease agreement. Malin Aff. ¶¶ 4-10. This is not surprising since nothing in the language of the Act, or in any public announcements

or guidance by the DOS,[1] had signaled that RPL § 238-a called for a fundamental change in how real estate brokers should be compensated upon consummation of a rental transaction. Malin Aff. ¶ 10; Wagner Aff. ¶¶ 10-11.

D. The DOS Issued the DOS Memo in Violation of Lawful Procedure

40. On February 4, 2020, without any prior notice to or any consultation with the real estate brokerage community—including Petitioners REBNY or NYSAR—the DOS issued the DOS Memo and published it on its website. See Malin Aff. ¶ 11. Indeed, the real estate brokerage community became aware of the DOS Memo on February 4, and its businesses have been rocked by havoc and confusion since that date.

41. The DOS Memo sets forth that it contains the DOS's "interpretations" of the Act, and purports to "help licensed real estate brokers, salespersons, and other interested parties to understand the new law." DOS Memo, Exhibit A, at 1.

42. Specifically, in Question 5 and its response, which focus on RPL § 238-a(1)(a), the DOS Memo declares that this law (i) prohibits a real estate broker representing a landlord from receiving any form of commission or other fee from a tenant, and (ii) subjects such real estate broker to discipline for violating that prohibition:

> 5. CAN A LANDLORD'S AGENT COLLECT A "BROKER FEE" FROM THE PROSPECTIVE TENANT?
>
> ***No, a landlord's agent cannot be compensated by the prospective tenant for bringing about the meeting of the minds.*** NY RPL § 238-a(1)(a) provides, in part, "no landlord, lessor, sub-lessor or grantor may demand any payment, fee, or charge for the processing, review or acceptance of an application, or demand any other payment, fee or charge before or at the beginning of the tenancy, except background checks and credit checks…." The fee to bring about the meeting of the minds would be a "payment, fee or charge before or at the beginning of the tenancy" other than a

[1] In fact, as noted above, the DOS website appeared to confirm that the Act had no impact on broker fees. See Legal Memorandum LI05, Exhibit B, at 1; see also DOS FAQ, Exhibit C, at 3-4.

> background or credit check as provided in this section. ***Accordingly, a landlord's agent that collects a fee for bringing about the meeting of the minds between the landlord and tenant (i.e., the broker fee) from the tenant can be subject to discipline.***

See id. at 4 (emphasis added).

43. Question 5 is contrary to the Act and established law.

44. Furthermore, while styled as "Guidance," in reality, the DOS Memo establishes a new rule promulgated by the DOS:

- it is an official pronouncement of the DOS's interpretation of RPL § 238-a;
- it declares the scope of persons against whom the DOS will enforce this statute—including persons not referred to explicitly in the statute;
- it declares the scope of payments, fees, and charges that the DOS considers to be covered by the statute—including payments not referred to in the statute; and
- it states that violators of the DOS' rule "can be subject to discipline."

45. On or about February 6, 2020, Erin McCarthy, an official spokesperson for the DOS, reportedly asserted in a statement that the rule set forth in the DOS Memo—providing that landlord's agents who collect a brokerage fee from a tenant are in violation of RPL § 238-a(1)(a) and subject to discipline—does not apply retroactively. See Michael Gold & Luis Ferré-Sadurní, Brokers' Fees Fallout: Renters Are Jubilant, but Agents Are Reeling, N.Y. Times, Feb. 6, 2020 ("N.Y. Times Article"), a copy of which is annexed hereto as Exhibit D, at 2 ("This is not intended to apply retroactively, and future transactions should be entered into with this guidance in mind."). The DOS's assertion that Question 5 does not apply retroactively demonstrates that (1) this new rule is a drastic departure from current market practice, and (2) the language of RPL § 238-a(1)(a) itself failed to put anyone on notice that commissions paid by tenants to brokers appointed by landlords were somehow being abolished. Indeed, that is

because, as set forth herein, the Act does not support this wholesale and drastic departure from industry practice in New York.

46. Additionally, the DOS, in issuing the DOS Memo and subsequently establishing the scope of its retroactivity, further usurped the role of the New York State Legislature and engaged in unlawful rulemaking.

47. SAPA prohibits the DOS from promulgating, or enforcing, new rules except in accordance with prescribed procedures. See SAPA § 202. The DOS has adhered to such procedural requirements in connection with prior rulemaking (e.g., in the course of recently formulating revisions to 19 N.Y.C.R.R. § 175.25).

48. Nevertheless, the DOS issued the DOS Memo without first publishing notice of its proposed rulemaking, providing the public an opportunity to submit comments, duly filing its new rules, or otherwise adhering to the procedural requirements to which it is subject under New York law.

E. The DOS's Interpretation of RPL § 238-a is Contrary to Law

49. The DOS interpretation of RPL § 238-a, as memorialized in Question 5 of the DOS Memo, defies the plain language of RPL § 238-a.

50. Neither RPL § 238-a nor its legislative history make any reference to a landlord's agent, a real estate broker, or a real estate broker's fee. See Regular Session of the New York State Senate (June 14, 2019 at 11:29 a.m.), an excerpt of which is annexed hereto as Exhibit H, at 5501:14-18; see also Public Hearing: Rent Regulation and Tenant Protection Legislation, Before the New York State Senate, Standing Committee on Housing, Construction, and Community Development (May 23, 2019), an excerpt of which is annexed hereto as Exhibit I, at 21:17-23. As set forth below, members of both the State Senate and State Assembly never

recalled discussing the application of RPL § 238-a to real estate brokers or salespersons. Yet in Question 5, the DOS declares that RPL § 238-a nevertheless prohibits "a landlord's agent" who "br[ought] about the meeting of the minds between the landlord and tenant" from collecting a "broker fee" from that tenant. See DOS Memo, Exhibit A, at 4. The DOS has, by this erroneous and arbitrary interpretation, improperly and without legislative authorization dictated a new set of rules governing the compensation of real estate brokers and, accordingly, added new substantive requirements to RPL § 238-a.

51. Likewise, RPL § 238-a does not provide that a "landlord's agent" is subject to discipline for anything. Yet the DOS declares in its DOS Memo that, under RPL § 238-a, "a landlord's agent" (such as a broker) "can be subject to discipline" for violating that statute—without specifying what that discipline would be and how it would be administered. This, too, is an erroneous and arbitrary declaration by the DOS that a "landlord's agent" can be disciplined under RPL § 238-a for accepting a "broker's fee" from a tenant.

52. Clearly, if the Legislature had intended RPL § 238-a to apply to agents of the landlord, or even more explicitly real estate brokers, it would have inserted those words into the statute. In fact, multiple other sections of the Act did include landlord's agents on the face of the statute. For example, the section immediately preceding the one that created RPL 238-a(1)(a) states, "[t]he failure of a lessor, ***or any agent of the lessor*** authorized to receive rent, to provide a lessee with a written notice of the non-payment of rent may be used as an affirmative defense by such lessee in an eviction proceeding based on the non-payment of rent." See Act § 9 (amending Section 235-e of the RPL) (emphasis added); see also Act § 2 (amending Section 223-b of the RPL by, inter alia, including a "landlord's agent" within the group of actors

prohibited from retaliating against a tenant). Numerous other provisions of the RPL explicitly refer to a landlord's agent as well. For example:

> Notwithstanding any other provision of law, within a city having a population of one million or more, it shall be unlawful and shall constitute harassment **for any landlord** of a building which at any time was occupied for manufacturing or warehouse purposes, **or other person acting on his behalf**, to engage in any course of conduct, including, but not limited to intentional interruption or discontinuance or willful failure to restore services customarily provided or required by written lease or other rental agreement, which interferes with or disturbs the comfort, repose, peace or quiet of a tenant in the tenant's use or occupancy of rental space if such conduct is intended to cause the tenant (i) to vacate a building or part thereof; or (ii) to surrender or waive any rights of such tenant under the tenant's written lease or other rental agreement.

RPL § 235-d (emphasis added). Accordingly, if the Legislature had intended to have RPL 238-a(1)(a) apply to real estate brokers or agents, it certainly could have included that language in the new provision. The Legislature, however, did not include such language, and the DOS erroneously inserted such language in its response to Question 5.

53. The DOS Memo also erroneously and arbitrarily disregards the clause in RPL § 238-a that "[e]xcept[s]" from its scope "instances where statutes or regulations provide for a payment, fee or charge." RPL § 238-a(1)(a). The DOS, therefore, improperly ignores other provisions of State law that establish the rules that govern compensation for licensed brokers and salespeople—and that do not contain any limitations whatsoever on who can compensate a real estate broker, such as RPL §§ 440 and 442. See also 19 NYCRR 175.7.

54. Furthermore, the DOS Memo completely contradicts the information on the DOS's website. While the DOS Memo states that a broker may not collect a broker fee from a tenant, the DOS General Counsel's Legal Memorandum LI05 discussed above makes clear that "in most transactions the tenant is responsible for paying the broker's commission" and never

states that such an arrangement violates New York law. Legal Memorandum LI05, Exhibit B, at 1. While the DOS Memo asserts that RPL § 238-a(1)(a) applies to broker fees, the DOS's website further states, "[t]he commission or compensation of a real estate broker is not regulated by statute or regulation." DOS FAQ, Exhibit C, at 3-4. These conflicting messages highlight why the DOS Memo is erroneous and arbitrary, and further demonstrate why Question 5 should be nullified and voided.

F. The Impact of the DOS's Unlawful, Erroneous, and Arbitrary Interpretation of RPL § 238-a(1)(a)

55. Question 5 of the DOS Memo stunned the real estate industry. Major media outlets reported that the DOS "blindsided the [real estate] business and even lawmakers." Jennifer Gould Keil, Carol Campanile, Tamar Lapin, NYC Real Estate Industry Reeling After Surprise Broker Fees Ruling, N.Y. Post, Feb. 6, 2020 ("Post Article"), a copy of which is annexed hereto as Exhibit E, at 1. The New York Times wrote, "Renters, brokers and landlords alike were left scrambling to interpret the guidance unexpectedly issued late Tuesday night that, under landmark tenant protection laws passed last summer, brokers could no longer require tenants to pay them fees." N.Y. Times Article, Exhibit D, at 1. A Daily News editorial added, "To the surprise of almost everyone, more than six months after the new rent laws were signed into permanence, state regulators are now also saying that the changes contain a total ban on the ability of landlords to charge prospective tenants a broker's fee." Daily News Editorial Board, Breaking the Brokers: A Rushed Through Rent Regulation Law May Wipe out the Middle-Men Aiding Apartment Seekers, N.Y. Daily News, Feb. 9, 2020, a copy of which is annexed hereto as Exhibit F.

56. Even the State Legislature evidently was surprised by the DOS Memo. Multiple legislators, including State Senator Diane Savino, reportedly said that broker's fees

never even came up as an issue during consideration and enactment of the Act. See Post Article, Exhibit E, at 2.

57. Media reports also capture the existential threat that the DOS Memo poses to New York real estate brokerage firms. The New York Post quoted an anonymous head of a rental brokerage as stating, "[w]hat the [DOS] did was unconscionable . . . They didn't reach out to anyone to say this bombshell of their interpretation of the law would be dropped [and] they didn't give anyone the opportunity to understand it and the nuances." Id. at 1. The Post also quoted Jay Martin, head of the Community Housing Improvement Program (a trade association of approximately 4,000 building owners), as fearing that "[t]his will decimate the brokerage industry." See id. Sarah Saltzberg, head of Petitioner Bohemia, told the New York Times:

> These [rental agents] are hard-working New Yorkers that are quite frankly able to stay in this city because they have this job . . . The agents are out there, pounding the pavement, going up and down stairs, looking at apartments that may not have been treated for bed bugs, doing some really hard work. It's the equivalent of having the rug pulled out from underneath us.

N.Y. Times Article, Exhibit D, at 2. Donna Olshan, founder of Olshan Properties, told The Wall Street Journal, "[t]here's lots of little firms, and I don't know how they're going to do the business . . . A lot of these brokers don't make much more than teachers." Wall Street Journal Article, Exhibit G, at 3.

58. Petitioners' supporting affidavits echo these concerns. Gary Malin, Chief Operating Officer of Petitioner Corcoran, attested:

> The impact of the DOS' erroneous interpretation of RPL § 238-a(1)(a) cannot be overstated. First and foremost, Corcoran is currently working on thousands of current rental transactions in which potential tenants are now threatening not to close the transactions and are refusing to pay commissions to the Corcoran rental agents—despite the fact that they were fully aware of the terms of the rental, and Corcoran is clearly the procuring cause of

> the transaction. Landlords need these transactions, which had been fully agreed to by the tenant, or they will face the prospect of losing another month's rent, at least. Corcoran agents, who worked diligently to consummate the transaction, also will be cheated out of their commission by tenants trying to take advantage of the DOS' erroneous interpretation.

Malin Aff. ¶ 12; see also Saltzberg Aff. ¶ 10. Hal Gavzie, the Executive Manager of Leasing for Douglas Elliman, adds, "[t]he recent memorandum from the New York Department of State . . . threatens to harm Douglas Elliman, as well as the livelihoods of many of our over 4,000 licensed associate brokers and salespersons." Gavzie Aff. ¶ 2.

59. Although the DOS released the DOS Memo only a few days ago, these concerns are already being realized. The DOS's unlawful, erroneous, and arbitrary interpretation of RPL § 238-a(1)(a) has had an immediate and devastating impact on the rental real estate market statewide.

60. First, potential tenants are threatening not to close thousands of pending rental transactions and/or refusing to pay brokerage commissions, even though the terms of the commission were agreed upon by all parties to the transaction, and the nature of the relationships between the brokers and the landlords was fully disclosed to the tenants through the use of agency disclosure forms. See Malin Aff. ¶ 12. The unwinding of these pending transactions, due to the DOS's erroneous and arbitrary interpretation of RPL § 238-a, will harm landlords (who face the prospect of losing substantial rental income they have reasonably expected to receive) and brokers (who earned their commissions by working diligently to procure and consummate the transactions), and most of all consumers, who may not then close on apartments they seek to rent, and have been misled by the DOS's erroneous and arbitrary interpretation and improper rulemaking. See id.; see also Gavzie Aff. ¶ 11.

61. Second, the DOS's erroneous and arbitrary interpretation of RPL § 238-a(1)(a) would potentially render void and illegal key provisions in many agreements that brokers—including REBNY's and NYSAR's member firms—have entered into with landlords that set forth that the tenant shall pay the broker's commission. Upon information and belief, this impacts thousands of previously executed agreements across New York State. See Malin Aff. ¶ 14.

62. Third, because the DOS has declared that "a landlord's agent . . . can be subject to discipline" under RPL § 238-a for accepting an earned commission check from a tenant, real estate brokers and salespeople from across New York State would be subject to discipline from the DOS—perhaps including revocation of their licenses—simply for doing their jobs. See, e.g., Saltzberg Aff. ¶ 11. Question 5 of the DOS's Memo, if permitted to stand, jeopardizes the livelihoods of thousands of brokers and salespeople who rely on their earned commissions as their principal, if not sole, source of income. See Malin Aff. ¶ 1.

63. Fourth, upon information and belief, the DOS's erroneous and arbitrary interpretation of RPL § 238-a would create a massive disincentive for landlords to enter into agreements with brokers and to utilize their services. The likely consequence of this would be to force many real estate agents to leave the industry. This result would also pose an existential threat to the economic viability of hundreds, if not thousands, of small businesses across the State. See Malin Aff. ¶ 17; see also Wagner Aff. ¶ 18.

64. Upon information and belief, if landlords stop utilizing the services of brokers or are forced to pay broker commissions directly as a result of the DOS's erroneous and arbitrary interpretation of RPL § 238-a, the additional costs such landlords would incur would likely be passed on to consumers. As noted above, many landlords across the State are not

equipped to handle the administrative aspects of rental transactions, including processing applications, processing credit applications, and other administrative duties. Hiring personnel to handle these tasks, as well as hiring individuals to show apartments, will increase costs for landlords significantly. The incurring of these significant costs would, undoubtedly, result in increased rents statewide and in certain renters being priced out of apartments. See Gavzie Aff. ¶ 13; see also Malin Aff. ¶ 16.

FIRST CAUSE OF ACTION

65. Petitioners repeat and re-allege the allegations set forth in paragraphs 1 through 64 above as if fully set forth herein.

66. A rule is a fixed general principle applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers. A rule establishes substantive standards applicable to agency adjudication.

67. On February 4, 2020, Respondents issued a determination stating that a landlord's agent or broker cannot collect a "broker fee" from prospective tenants under RPL § 238-a(1)(a).

68. Respondents' determination sets forth a fixed general principle applied by Respondents without regard to other facts and circumstances relevant to the regulatory scheme of RPL § 238-a(1)(a). The determination also establishes substantive standards that are applicable to Respondents' adjudication, and therefore, the determination is a rule.

69. Every agency rule and regulation must comply with SAPA § 202(1)(a).

70. Respondents released the determination in Question 5 without any notice to the public and without giving the public an opportunity to comment. The determination in

Question 5 was issued suddenly, without warning to the real estate industry, and without providing the industry with an opportunity to be heard.

71. As a result, Respondents released the determination in violation of SAPA § 202(1)(a).

72. Respondents' determination is not mere guidance, as the determination grafts onto RPL § 238-a(1)(a) rigid requirements and the threat of discipline, which are not included in the text of the statute. An agency, by law, may not legislate by adding guidance requirements not expressly authorized by statute.

73. Petitioners therefore seek a judgment nullifying and voiding Respondents' determination in Question 5 of the DOS Memo.

SECOND CAUSE OF ACTION

74. Petitioners repeat and re-allege the allegations set forth in paragraphs 1 through 73 above as if fully set forth herein.

75. RPL § 238-a(1)(a) prohibits *landlords* from demanding certain payments, fees, or charges before or at the beginning of a tenancy. On its face, the statute only applies to landlords, lessors, sub-lessors, and grantors. Moreover, the statute only prohibits certain fees, but expressly permits payments, fees, or charges that are otherwise authorized by statute or regulation.

76. On its face, RPL § 238-a(1)(a) does not apply to a landlord's agent or broker and does not prohibit any and all types of payments, fees, or charges.

77. Respondents' determination in Question 5 of the DOS memo is contrary to law. Question 5 of the DOS Memo: (1) expands RPL § 238-a(1)(a) to apply to a landlord's agent or broker; (2) adds the threat of disciplinary action to real estate brokers under the statute;

(3) disregards the statute's allowance of payments, fees, or charges that are otherwise authorized by statute or regulation; and (4) injects a "meeting of the minds" standard into the statute to prohibit a landlord's agent and/or broker from obtaining broker fees.

78. Respondents' determination in Question 5 was issued more than seven months after RPL § 238-a(1)(a) was passed on June 14, 2019, buried in what was characterized as "guidance."

79. Respondents' determination in Question 5 conflicts with its own published legal opinion and the legislative history of RPL § 238-a(1)(a).

80. Respondents' determination in Question 5 amounts to a drastic overhaul of New York's rental market that will have a devastating impact on thousands of New York real estate professionals without having afforded them notice or consultation.

81. As a result, Respondents' decision to issue the determination in Question 5, prohibiting a landlord's agent or broker from obtaining broker fees from prospective tenants, was contrary to established law, arbitrary and capricious, and/or an abuse of discretion.

82. Petitioners therefore seek an order annulling Respondents' determination in Question 5.

83. No application for the same or similar relief has been made in this or any other proceeding.

WHEREFORE, Petitioners respectfully request that this Court issue an Order:

(1) Permanently enjoining the applicability of Respondents' determination to Question 5 of its "Guidance for Real Estate Professionals Concerning the Statewide Housing Security & Tenant Protection Act of 2019 and the Housing Stability and Tenant Protection Act of 2019," issued in or around February 4, 2020, that a landlord's agent, including a broker, cannot be compensated by a prospective tenant for bringing about a meeting of the minds between the landlord and tenant ("Respondents' Determination");

(2) Permanently enjoining Respondents from pursuing disciplinary action against a landlord's agent, including a broker, who demands or collects a commission, broker's fee or other compensation from a prospective tenant for bringing about a meeting of the minds between the landlord and tenant;

(3) Nullifying and voiding Respondents' Determination;

(4) Awarding Petitioners their legal costs and fees in bringing this proceeding; and

(5) Awarding Petitioners such other and further relief as this Court deems just and appropriate.

Dated: New York, New York
February 9, 2020

STROOCK & STROOCK & LAVAN LLP

By: */s/ Claude G. Szyfer*

Claude G. Szyfer
Daniel N. Bertaccini
Kerry T. Cooperman
Nathaniel H. Benfield
TaLona H. Holbert

180 Maiden Lane
New York, New York 10038
(212) 806-5400
cszyfer@stroock.com

Counsel for Petitioners