

ATTORNEY GENERAL OF THE STATE OF NEW YORK  
HOUSING PROTECTION UNIT

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In the Matter of

Assurance No. 22-012

Investigation by LETITIA JAMES,  
Attorney General of the State of New York, of

Kucker, Marino, Winiarsky & Bittens LLP

Respondent.

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**ASSURANCE OF DISCONTINUANCE**

The Office of the Attorney General of the State of New York (“OAG”) commenced an investigation pursuant to Executive Law § 63(12) into Respondent’s issuance of a letter to unrepresented tenants and its filings with the New York State Division of Housing and Community Renewal (“DHCR”). This Assurance of Discontinuance (“Assurance”) contains the findings of the OAG’s investigation and the relief agreed to by the OAG and Respondent Kucker, Marino, Winiarsky & Bittens LLP whether acting through its respective directors, officers, employees, representatives, agents, affiliates, or subsidiaries (collectively, the “Parties”).

**OAG’s FINDINGS**

1. Kucker, Marino, Winiarsky & Bittens LLP (“Kucker”), a law firm located at 747 3<sup>rd</sup> Avenue, New York, NY, has a focus on real estate, including representing landlords in eviction proceedings in New York City Housing Court.

2. On or about June 9, 2020, Kucker, on behalf of its client, submitted an application to DHCR seeking to have its client's buildings determined to be exempt from rent stabilization regulation based on the substantial rehabilitation of the properties.

3. As part of the submission, Kucker attached documents evidencing the substantial rehabilitation that was carried out by the previous owner using city subsidies, including those authorized by the New York State Private Housing Finance Law Article XV.

4. While the attachments submitted to DHCR did include reference to the Article XV loan, Kucker's submission to DHCR did not address the fact that projects funded with Article XV loans are subject to rent stabilization after completion. Once this issue was pointed out by the OAG, Kucker did submit supplemental papers to DHCR arguing why Article XV did not apply to their application.

5. On April 9, 2021, Kucker's client sent a letter to the approximately 263 tenants in the buildings that were the subject of the DHCR application. The letter explained that the client had submitted an application to DHCR seeking to have a determination that the building was exempt from rent stabilization regulation. The letter also provided legal advice to tenants by explaining the effect of the application on the tenant's rent stabilized status and how that will affect their tenancy.

6. When asked by the OAG, Kucker admitted that it wrote the letter for its client and was aware that it was going to be sent to tenants, who were unrepresented.

7. At the time the letter was sent, organizers from Community Action for Safe Apartments ("CASA"), a project for New Settlement Apartments were attempting to organize tenants around conditions in the buildings. The letter significantly hampered CASA's organizing

efforts causing them to expend many more staffing hours discussing the letter with tenants and being unable to have tenants work together towards obtaining safe housing.

8. The New York State Rules of Professional Conduct, codified at 22 N.Y.C.R.R. Part 1200, lays out rules that lawyers admitted to practice law in the State of New York are required to follow.

9. Rule 3.2 states that a lawyer shall not knowingly “fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.”

10. Rule 4.3 prohibits an attorney from providing legal advice to unrepresented parties. An attorney cannot circumvent this rule by having a non-attorney make the communication.

11. Rule 5.1 requires law firms and their partners to adequately supervise subordinates and ensure that the Rules of Professional Conduct are followed.

12. OAG finds that Respondent’s submission to DHCR and the issuance of the letter to its client’s tenants are in violation of Executive Law § 63(12).

13. Respondent admits the OAG’s Findings, paragraphs 1 - 12 above.

14. The OAG finds the relief and agreements contained in this Assurance appropriate and in the public interest. THEREFORE, the OAG is willing to accept this Assurance pursuant to Executive Law § 63(15), in lieu of commencing a statutory proceeding for violations of Executive Law § 63(12) based on the conduct described above from June 9, 2020 through April 9, 2021.

IT IS HEREBY UNDERSTOOD AND AGREED, by and between the Parties:

**RELIEF**

15. General Injunction: Respondent shall not engage, or attempt to engage, in conduct in violation of any applicable laws, including but not limited to the New York State Rules of Professional Conduct, and expressly agrees and acknowledges that any such conduct is a violation of the Assurance, and that the OAG thereafter may commence the civil action or proceeding contemplated in paragraph 12, *supra*, in addition to any other appropriate investigation, action, or proceeding. Respondent shall not be in violation of this paragraph if an attorney or paralegal of Respondent violates the New York State Rules of Professional Conduct without its knowledge and where the firm has complied with the oversight protocols contained in paragraph 16(d) of this Assurance.

16. Programmatic Relief:

- a. Kucker will conduct a mandatory training at its offices for every attorney and paralegal at its firm that will cover their obligations under the New York Rules of Professional Responsibility, including communications with unrepresented individuals and ethical obligations for submissions to courts and administrative adjudicative bodies. The training shall occur within 60 days from the effective date of this Assurance.
- b. Kucker has sent the OAG the proposed course that provides adequate training on the Rules of Professional Conduct, including communications with unrepresented individuals and ethical obligations for submissions to courts and administrative adjudicative bodies.

- c. Within 10 days of Kucker and its employees completing the training referenced in paragraph 16(a), Kucker will provide proof to the OAG that every Kucker employee has completed the training, which may include a letter from the instructor, certificates of completion or other documentation evidencing completion of the course.
- d. Kucker has sent the OAG protocols for oversight of attorneys at the firm so that violations contained in this Assurance will not occur in the future that are attached as Exhibit A. Kucker will immediately implement the protocols and agree to follow the protocols into the future.
- e. Within 20 days from the effective date of this Assurance, Kucker will send by certified mail, return receipt and by regular mail a written notice to each tenant who received the management letter referenced in paragraph 5 above, utilizing the form letter attached as Exhibit B. Respondents shall provide proof of mailing of the notice to each tenant to the OAG within thirty (30) days of effecting mailing.
- f. Acceptance of this Assurance by the OAG is not an approval or endorsement by OAG of any of Respondent's policies practices or procedures, and the Respondent shall make no representation to the contrary.
- g. The Parties agree that it would be difficult to value the damages caused by default in the performance of any obligation under this paragraph, and therefore agree that Respondent shall pay to the State of New York a stipulated penalty of \$5,000.00 for each and every such default in the performance of any obligation under this paragraph occurring after the effective date of the Assurance.

h. In the event that Respondent reasonably believes that the performance of its obligations under any provision of this Assurance would conflict with any federal or state law or regulation that may be enacted or adopted after the effective date of this Assurance such that compliance with both this Assurance and such provision of law or regulation is not possible, Respondent shall notify the OAG promptly and the Parties shall meet and confer at their earliest convenience to attempt to resolve such alleged conflict.

17. Monetary Relief

- a. Respondent shall pay to the State of New York \$50,000.00 in restitution. Payment of the Monetary Relief Amount shall be made in full upon execution of this Assurance. The OAG shall send the restitution to CASA as restitution for the diversion of its resources.
- b. Payments shall be made by attorney check, corporate or certified check, or bank draft, which shall be made payable to the “State of New York”, and shall reference Assurance No. 22-012; payments shall be addressed to the attention of Brent Meltzer, State of New York, Office of the Attorney General, Housing Protection Unit, 28 Liberty Street, New York, NY 10005.
- c. Payments in excess of \$50,000 shall be made by wire transfer.

## MISCELLANEOUS

### Subsequent Proceedings.

18. Respondent expressly agrees and acknowledges that the OAG may initiate a subsequent investigation, civil action, or proceeding to enforce this Assurance, for violations of the Assurance, or if the Assurance is voided pursuant to paragraph 24, and agrees and acknowledges that in such event:

- a. any statute of limitations or other time-related defenses are tolled from and after the effective date of this Assurance;
- b. the OAG may use statements, documents or other materials produced or provided by the Respondent prior to or after the effective date of this Assurance;
- c. any civil action or proceeding must be adjudicated by the courts of the State of New York, and that Respondent irrevocably and unconditionally waives any objection based upon personal jurisdiction, inconvenient forum, or venue,
- d. evidence of a violation of this Assurance shall constitute prima facie proof of a violation of the applicable law pursuant to Executive Law § 63(15).

19. If a court of competent jurisdiction determines that the Respondent has violated the Assurance, the Respondent shall pay to the OAG the reasonable cost, if any, of obtaining such determination and of enforcing this Assurance, including without limitation legal fees, expenses, and court costs.

Effects of Assurance:

20. All terms and conditions of this Assurance shall continue in full force and effect on any successor, assignee, or transferee of the Respondent. Respondent shall include any such successor, assignment or transfer agreement a provision that binds the successor, assignee or transferee to the terms of the Assurance. No party may assign, delegate, or otherwise transfer any of its rights or obligations under this Assurance without the prior written consent of the OAG.

21. Nothing contained herein shall be construed as to deprive any person of any private right under the law.

22. Any failure by the OAG to insist upon the strict performance by Respondent of any of the provisions of this Assurance shall not be deemed a waiver of any of the provisions hereof, and the OAG, notwithstanding that failure, shall have the right thereafter to insist upon the strict performance of any and all of the provisions of this Assurance to be performed by the Respondent.

Communications:

23. All notices, reports, requests, and other communications pursuant to this Assurance must reference Assurance No. 22-012, and shall be in writing and shall, unless expressly provided otherwise herein, be given by hand delivery; express courier; or electronic mail at an address designated in writing by the recipient, followed by postage prepaid mail, and shall be addressed as follows:

If to the Respondent, to: Louis V. Fasulo, Fasulo Braverman & Di Maggio LLP, 225 Broadway, Suite 715, New York, NY 10007, [lfasulo@fbdmllaw.com](mailto:lfasulo@fbdmllaw.com),



If to the OAG, to: Brent Meltzer, Housing Protection Unit, NYS Office of the Attorney General, 28 Liberty Street, New York, NY 10005, [brent.meltzer@ag.ny.gov](mailto:brent.meltzer@ag.ny.gov), or in his/her absence, to the person holding the title of Chief, Housing Protection Unit.

Representations and Warranties:

24. The OAG has agreed to the terms of this Assurance based on, among other things, the representations made to the OAG by the Respondent and their counsel and the OAG's own factual investigation as set forth in Findings, paragraphs 1 - 11 above. The Respondent represents and warrants that neither it nor its counsel has made any material representations to the OAG that are inaccurate or misleading. If any material representations by Respondent or its counsel are later found to be inaccurate or misleading, this Assurance is voidable by the OAG in its sole discretion.

25. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Assurance has been made to or relied upon by the Respondent in agreeing to this Assurance.

26. The Respondent represents and warrants, through the signatures below, that the terms and conditions of this Assurance are duly approved. Respondent further represents and warrants that Kucker Marino Winiarsky & Bittens LLP by Alan D. Kucker, is a duly authorized Member acting at the direction of the Partnership.

General Principles:

27. Unless a term limit for compliance is otherwise specified within this Assurance, the Respondent's obligations under this Assurance are enduring. Nothing in this Agreement shall relieve Respondent of other obligations imposed by any applicable state or federal law or regulation or other applicable law.

28. Nothing contained herein shall be construed to limit the remedies available to the OAG in the event that the Respondent violates the Assurance after its effective date.

29. This Assurance may not be amended except by an instrument in writing signed on behalf of the Parties to this Assurance.

30. In the event that any one or more of the provisions contained in this Assurance shall for any reason be held by a court of competent jurisdiction to be invalid, illegal, or unenforceable in any respect, in the sole discretion of the OAG, such invalidity, illegality, or unenforceability shall not affect any other provision of this Assurance.

31. Respondent acknowledges that they have entered this Assurance freely and voluntarily and upon due deliberation with the advice of counsel.


32. This Assurance shall be governed by the laws of the State of New York without regard to any conflict of laws principles.

33. The Assurance and all its terms shall be construed as if mutually drafted with no presumption of any type against any party that may be found to have been the drafter.


34. This Assurance may be executed in multiple counterparts by the parties hereto. All counterparts so executed shall constitute one agreement binding upon all parties, notwithstanding that all parties are not signatories to the original or the same counterpart. Each counterpart shall be deemed an original to this Assurance, all of which shall constitute one agreement to be valid as of the effective date of this Assurance. For purposes of this Assurance, copies of signatures shall be treated the same as originals. Documents executed, scanned and transmitted electronically and electronic signatures shall be deemed original signatures for purposes of this Assurance and all matters related thereto, with such scanned and electronic signatures having the same legal effect as original signatures.

35. The effective date of this Assurance shall be May 26, 2022.

LETITIA JAMES  
Attorney General of the State of New York  
28 Liberty Street  
New York, NY 10005

By:   
\_\_\_\_\_  
Brent Meltzer  
Chief  
Housing Protection Unit

KUCKER, MARINO, WINIARSKY & BITTENS LLP

By:   
\_\_\_\_\_  
Alan D. Kucker, Esq.  
Member

STATE OF New York )  
  ) ss.:  
COUNTY OF New York )

On the 1<sup>st</sup> day of June in the year 2022 before me personally came Alan D. Kucker to me known, who, being by me duly sworn, did depose and say that he resides in Westchester County, NY; that he is a Member of Kucker Marino Winiarsky Bittens LLP, the entity described in the above instrument, and that he has authority to sign on behalf of the partnership.

Sworn to before me this  
1<sup>st</sup> day of June, 2022

  
\_\_\_\_\_  
NOTARY PUBLIC

ADAM REZNICK  
Notary Public, State of New York  
No. 01RE66680  
Qualified in New York County  
Commission Expires March 20, 2025

## EXHIBIT A

- Create an ethics committee within 30 days off the Effective Date of the Assurance with both partners and associates of Kucker, Marino, Winiarsky & Bittens, LLP or its successor (“the Firm”) for the resolution of ethical issues including compliance with Rules 3.2 and 4.3 of the Rules of Professional Conduct.
- Immediately provide current copies of the Code to every lawyer at the Firm and to any new attorney who commences employment at the Firm.
- Periodically, but no less than quarterly, issue law firm policy statements or opinions to every lawyer at the Firm, to be maintained in a permanent loose-leaf binder or kept in electronic form, on recurring ethical issues like conflict procedures, ethical obligations concerning non-lawyer employees, and conflict clearance procedures for new attorneys.
- Within 30 days of the Effective Date of the Assurance, the Firm shall retain an independent, outside ethics expert who will provide guidance and recommendations on any complex ethical issue or issues in which the ethics committee cannot resolve or needs guidance.
- Circulate recent developments in ethics to all attorneys at the Firm on no less than a quarterly basis with particular emphasis on compliance with Rules 3.2 and 4.3 of the Rules of Professional Conduct.
- Present in-house ethics trainings to attorneys at the Firm on a regular basis, but no less than quarterly, geared to the interests and needs of the Firm with particular emphasis on compliance with Rules 3.2 and 4.3 of the Rules of Professional Conduct.
- The Firm will ensure that there is regular communication and overlapping membership between the management of the Firm and ethics committees of the Firm.
- Within 30 days of the Effective Date of the Assurance, the Firm will hold a training for attorneys at the Firm on how to conduct research ethics issues using the Firm’s legal research software. Trainings shall be held annually and for any new attorneys.
- The Firm continues to follow its pre-established protocols for determining conflicts of interest, accounting for client funds, and assuring that inexperienced lawyers are properly supervised. DR 5-105(e) requires all New York law firms to maintain records of prior engagements as well as a procedure for checking conflicts.

The Firm will follow the following procedures for Conflicts Checks, Escrow and Attorney Supervision:

## **I. Conflicts Check**

The Accounting Department is asked by Partners to run conflict checks: a) on new clients before retainer letters are finalized; and b) on the addresses of buildings that are prospective purchases for new or existing clients. The Accounting Department has access to identifying information for all current and former clients of the firm and identifying information for all matters currently and previously handled by the firm, including tenant/party names, and building addresses where relevant.

The procedure for conflict checking includes a software search in two programs: Juris and Client Profiles. If the result of the check is a conflict, it is brought to the attention of a Senior Partner, who will review.

The Senior Partner will make the final decision as to whether a conflict exists (which may include consultation with ethics counsel), and, if a conflict does exist, will decide if the conflict can be the subject of conflict waiver agreements, or if refraining from the requested representation is required.

If it has been determined that there is no conflict (or if waiver agreements are secured in the event of a discovered conflict), the Accounting Department will assign a client code (for new clients), will assign a case code for the matter, will open the electronic file, and the assigned attorney will commence work.

Conflicts checks are performed using the building owner name, one or more building addresses of the subject of the potential new matter, and any names of Tenants of record/Parties,

### **Step One - Juris**

Juris is our Accounts Receivable software program. It has an "Inquiry Reports" feature and a tab that states "Conflict Inquiry".

The address of the building is input, and the result of the search is a list of all Persons that are associated with that address.

A name search is also performed, which will indicate if that name exists in our records and, if so, in what capacity.

The name and address search are performed in two ways:

Broad search: Manually scroll through the results and review.

Exact phrase search: Type the address and name in quotes.

Obtaining no matching results means no apparent conflict.

### **Step Two – Client Profiles/Total Office**

This is our Document Management system. The Accounting Department utilizes the document search feature, which contains the firm's Word documents, PDF documents and Outlook Emails. The same steps as set forth above for searches in Juris are taken here.

The firm's electronic "rolodex" is then checked using a broad search. This search returns results for any parties that were identified to a specific matter.

Obtaining no matching results means no apparent conflicts.

## **II. Escrow Account Procedure**

All escrow checks are given to the firm's Administrator or Bookkeeper. The check is scanned into a pdf copy and saved in the electronic case file (Client Profiles(CP)/Aderant). An "associated" CP email is sent to the attorney working on the case verifying that an escrow check was deposited into the firm's escrow account. Two photocopies of the check are made. One is given to the attorney who is handling the matter for placement in the case file. An escrow file is created by the firm's Administrator and a second copy of the check is put in the file.

Client escrow files are maintained in a locked filing cabinet. Two employees and two partners have access to these files. The files contain:

- photocopies of checks deposited with the deposit slip attached to each copy
- copies of checks cut
- canceled checks drawn on the account and bank statements
- instructions/authorizations to transfer, disburse, or withdraw funds from the account

The depositing of escrow checks is handled by the firm's Bookkeeper. The posting in the accounting system and disbursing funds is completed by the firm's Administrator. Only three partners are authorized to sign checks and each firm check must be presented for signature with a copy of the deposited check that the funds emanated from. Blank checks or checks made payable to cash are never signed. All bank statements or documents received from the bank regarding the account are also kept in the same filing cabinet, in a different drawer.

To protect our clients, we take care not to disburse against uncollected funds. To avoid a situation where a provisionally credited item is dishonored after the funds have been disbursed, we wait at least three business days after depositing a check before disbursing funds. Before a check is drawn, we review the account via the bank's website to ensure that the funds are available. The Administrator prepares the check via Quickbooks and brings the check to a partner for signature along with all supporting documentation (copy of the check and deposit slip which the funds are being drawn on). The memo portion of the check always states the client/matter number. All checks are photocopied and filed into the appropriate client/file after being entered into the electronic case file (CP).

The firm's accounting program automatically emails a weekly report of the record of receipts and disbursements every Wednesday. This report states client number, amount held in escrow and the total running balance of the escrow account.

An accounting is provided to the client upon completion of the disbursement of the client's funds and at such other times as may be reasonably requested by the client. All accountings are written on firm stationery.

The firm's Administrator sends escrow bank statements to an outside CPA for reconciliation every month. Part of the accountant's reconciliation and review is to make sure that the endorsements of the checks match who the check was made payable to. The firm's Administrator and the firm's Bookkeeper are authorized to deposit funds. The firm's Administrator and Bookkeeper are not authorized to withdraw funds and are not signors on the account.

### **III. Supervision of Inexperienced attorneys**

Work product of inexperienced attorneys is reviewed by a Partner prior to its transmittal to a client, submission to a court, administrative agency, or tribunal. Comments and instruction are given by the Partner to the inexperienced attorney as both a learning experience and to address any deficiencies in the work product.

Inexperienced attorneys are encouraged to reach out to Partners with questions or issues that they are unfamiliar with.

Caseloads of inexperienced attorneys are reviewed by a Partner on a periodic basis, at least bi-weekly, via discussions, with efforts to ascertain that work loads are not too heavy, that expectations are being met, that the legal concepts arising in the cases are understood, and that disciplinary rules are being followed.

Billing time entries of inexperienced attorneys are reviewed by a Partner monthly, prior to the invoice being sent to the client, to ensure that the time billed to the client is not more than a reasonable amount charged for the services rendered. Efforts are made to ensure that the time entries clearly describe the work that was performed.

## EXHIBIT B

Dear Tenant of Apartment \_\_\_\_, Building \_\_\_\_:

On or about April 9, 2021, you were sent a letter from Management. The letter was about an application by the owner of your building to the New York State Division of Housing and Community Renewal (Docket #IT610008UC). The letter provided information and advice on the meaning of the owner's application. (A copy of that letter is included here for your reference.).

**The owner's application was later denied by DHCR. However, you may wish to speak with an attorney about the application to understand what this means.**

Here are two organizations that provide free assistance to eligible tenants:

Bronx Legal Services  
349 East 149th St., 10th Floor  
Bronx, NY 10451  
718-928-3700 (main number)  
917-661-4500 (intake number)

Community Action for Safe Apartments (CASA) (tenant organizers)  
35 Marcy Pl,  
Bronx, NY 10452  
718-716-8000

You can also go to [www.lawhelpny.org](http://www.lawhelpny.org) to find other free legal resources.

Very truly yours,

Kucker, Marino, Winiarsky & Bittens LLP