IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

PATRICK W. CANTLIN, *et al.*	)	**CASE NO. CV 12 790865**
	)	
Plaintiffs,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	**JOURNAL ENTRY GRANTING**
	)	**THE PLAINTIFFS' MOTION**
SMYTHE CRAMER CO.,	)	**FOR CLASS CERTIFICATION,**
	)	**CERTIFYING THE CLASS, AND**
	)	**CERTIFYING CLASS COUNSEL**
Defendant.	)	

***John P. O'Donnell, J.*:**

Plaintiffs Patrick Cantlin, Elizabeth Hong, Rita Noall and Cindy Miller filed a class action complaint against Smythe Cramer Company, d/b/a Howard Hanna Smythe Cramer, alleging fraud, unjust enrichment and fraudulent inducement. The plaintiffs filed a motion for class certification, followed by the defendant's brief in opposition, the plaintiffs' reply, the defendant's surreply, the plaintiffs' response to the surreply, and each side's submission of supplemental authority.

This entry follows.

STATEMENT OF FACTS

The defendant provided real estate broker services to each of the named plaintiffs. Plaintiffs Cantlin and Hong were buyers who purchased a home jointly. They signed a purchase agreement providing that they "shall pay . . . a fee of $225.00 to [the defendant] for brokerage services rendered to the [plaintiffs]." The $225 charge is listed on line 704 of plaintiffs Cantlin and Hong's HUD-1 statement as an "administrative fee."

Plaintiff Noall was also a buyer. She too signed a purchase agreement obligating her to pay Smythe Cramer a $225 administrative fee. Line 705 of plaintiff Noall's HUD-1 lists the $225 charge as an "admin fee."

Plaintiff Miller was a seller. She signed an exclusive right to sell agreement with the defendant. Under the agreement, Miller agreed to pay Smythe Cramer "a commission of seven percent (7%) of the 1st $100K and 5% on balance" plus an administrative fee of $225. The obligation to pay the administrative fee is also included in the contract to sell Miller's house. The $225 charge is listed on line 705 of plaintiff Miller's HUD-1 as a "broker service fee."

Each of the plaintiffs call the $225 a "sham fee" because they contend that no services are provided in exchange for the fee. They argue that the defendant is compensated by a percentage commission charge in exchange for the brokerage services it provides, and that no additional services are provided to the plaintiffs or to any other putative plaintiff in exchange for the fixed fee. The plaintiffs allege that "the [d]efendant's purpose in implementing the administrative fee was to avoid the public perception that it was increasing its commission rates, while at the same time pocketing additional funds from consumers for services already charged."[1] They argue that the fees already paid must be disgorged and returned to the putative class members.

LAW AND ANALYSIS

Rule 23 of the Ohio Rules of Civil Procedure provides seven requirements for maintaining a class action: (1) an identifiable class must exist and the definition of the class must be unambiguous; (2) the named representatives must be members of the class; (3) the class must be so numerous that joinder of all members is impracticable (numerosity); (4) there must be questions of law or fact common to the class (commonality); (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class (typicality); (6) the

[1] Complaint, ¶ 21.

representative parties must fairly and adequately protect the interests of the class (adequacy of representation); and (7) one of the three Civil Rule 23(B) requirements must be met. *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, ¶ 12. The plaintiffs must prove each of the requirements by a preponderance of the evidence. *Id.*, ¶ 15.

Identifiable Class

In order to satisfy this requirement, the plaintiffs must show that an identifiable class exists and that the definition of the class is unambiguous. *Felix v. Ganley Chevrolet, Inc.*, 8th Dist. No. 98985, 2013-Ohio-3523, ¶ 17. The identifiable class requirement "will not be deemed satisfied unless the description of [the class] is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member. Thus, the class definition must be precise enough to permit identification within a reasonable effort." *Id.*, citing *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67 (1998).

The plaintiffs seek to certify the following class:

> All individuals: 1) in the state of Ohio; 2) from September 18, 2005 to the present; 3) who paid to Defendant a fee entitled "administrative fee" "broker service fee" "brokerage fee" or other similar title, which fee is usually listed on line 704 or 705 of the HUD-1. [*sic*]

The defendant argues the class is not identifiable because each transaction would require an individualized inquiry into each putative class member's documentation to identify whether that individual is a class member. It argues that the individualized inquiry is necessary because: the class is defined so imprecisely, using phrases like "usually listed on line 704 or 705 of the HUD-1" and "other similar title;" whether a putative class member actually paid the fee cannot be easily ascertained from a review of lines 704 and 705 of the HUD-1 settlement statement; and the fee is negotiable, so thousands of records would need to be examined to determine if the fee

was negotiated and whether and to what extent those individualized negotiations affect class membership.

The plaintiffs' proposed class is both identifiable and unambiguous. Putative class members can easily determine whether they belong in the class by looking at lines 704 and 705 of their HUD-1 settlement statements to see if the fee was charged. And despite the fact that the same fee may go by different names or appear in different places on a HUD-1 settlement statement, it does not take much more than a glance at a putative plaintiff's HUD-1 settlement statement to see whether that person would fall within the class definition. Additionally, the disputed fees are readily ascertained because they are the only fees listed on the named plaintiffs' HUD-1s as payable to "Howard Hanna" or "Howard Hanna Smythe Cramer."

Nor is the class any less identifiable because of the possibility that some people were assessed the fee but did not pay it. If the class the plaintiffs seek to certify – those who "paid the fee" – is not coextensive with the class of people who were assessed the fee, the defendant is surely in possession of the evidence needed to winnow the class from those who were assessed to those who actually paid. The same goes for plaintiffs who may have negotiated the fee; presumably those people can be identified by an amount other than $225 on their HUD-1s, or through a lower commission rate. Finally, exhibit 13 to the plaintiffs' reply in support of their motion is a document prepared by Smythe Cramer showing the total closing fees for buyers and sellers each month from January 2006 until March 2013. It also lists annual totals for the years 2000 through 2005. All of this suggests that the determination of whether a putative class member paid the fee and how much he or she paid may be made "within a reasonable effort." *Felix,* supra.

The defendant cites to *Maestle v. Best Buy*, 197 Ohio App.3d 248, 2011-Ohio-5833 (8th Dist.) for the proposition that the mere existence of a defendant's account records does not mean that each class member is readily identifiable. The plaintiff in *Maestle* sought to certify the following class:

> All persons who at any time after September 12, 1985 were Best Buy customers, each with a Best Buy credit card, who were: assessed interest or finance charges; a minimum monthly finance charge of 50 cents (or any other amount); finance charges on any promotional purchases earlier than the first day after expiration of the promotional period; or assessed interest or finance charges upon payments demanded prior to the expiration of 90 days.

Maestle is distinguishable from the current case because the class definition included everyone who was charged any interest or finance charges, even if those charges were justifiably assessed due to the customer's failure to make a payment. The definition was thus overly broad and ambiguous. The appellate court observed that "the overly broad nature of appellant's current class would require the lower court to conduct an individualized inquiry with respect to each individual's account in order to determine whether that individual was in fact injured and, therefore, a proper member of the class." *Id.*, ¶ 26. Here, the plaintiffs' cause of action, if meritorious, depends on the *payment* of the administrative fee being actionable, and the easiest way to identify those who paid the fee is to first identify those who were *assessed* the fee. Once the class of people who were assessed the fee is identified then, with reasonable effort, those who did not actually pay it can be identified and excluded from the class. In *Maestle* the plaintiff would have lumped into the class even those who never paid a charge, i.e. people who were not damaged by the defendant's conduct.

Class Representatives

The named representatives must be members of the class. *Cullen*, supra, at ¶ 12. Each of the named plaintiffs falls within the class definition, and so this requirement is satisfied.

Numerosity

The class must be so numerous that joinder of all members is impracticable. *Id.* Here, the plaintiffs contend that the class will be over 10,000 people, which easily meets the numerosity requirement.

Commonality

A plaintiff must show that there are questions of law and fact common to the class. *Musial Offices, Ltd. v. County of Cuyahoga*, 8th Dist. No. 99781, 2014-Ohio-602, ¶ 31. Thus, commonality requires that the class members' claims depend upon a common contention such that determination of its truth or falsity will resolve an issue that is central to the validity of each claim in one stroke. *Id.*

This requirement is satisfied. The plaintiffs' contention is that the defendant charged a fee for rendering services when those services had already been paid for by the percentage commission negotiated with the seller. The issue is whether the fee charged by the defendant is "a scam double charging of commission"[2] and thus a "sham fee" that must be disgorged and returned to all putative class members. Answering this question once will answer the question for the whole class. Thus, the plaintiffs have proved commonality.

Typicality

The Ohio Supreme Court has summarized Civil Rule 23(A)(3)'s typicality requirement as follows:

> [A] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims.
> *Baughman v. State Farm Mut. Auto Ins. Co.*, 88 Ohio St.3d 480, 727 N.E.2d 1265 (2000).

[2] The plaintiffs' motion for class certification, page 5.

Here, according to the plaintiffs, the alleged wrong to each plaintiff is Smythe Cramer's extraction of a fee for nothing. Each class member's claim is based on the same legal theory and the wrong done to each class member was done in the same way. The named plaintiffs, as representatives of the class, are situated just like every other member of the class, and the plaintiffs have satisfied the typicality requirement.

Adequacy of Representation

The representative parties must fairly and adequately protect the interests of the class. Civil Rule 23(A)(4). In making this determination, courts must consider two questions: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class? *Musial Offices, Ltd.*, supra, at ¶¶ 27-28. A class representative is adequate, provided that his interest is not antagonistic to that of the prospective class members. *Id.* The representatives' counsel is adequate if the lawyers are qualified, experienced and generally able to conduct the proposed litigation. *Id.*

This prerequisite to maintaining a class action is not seriously debated by the defendant, perhaps because, like me, Smythe Cramer has little doubt that the named plaintiffs and their counsel will fairly and adequately protect the interests of the class.

Civil Rule 23(B)(3): predominance

Besides satisfying all the prerequisites of Civil Rule 23(A), a plaintiff must also satisfy at least one of the three Civil Rule 23(B) requirements. *Cullen*, supra, at ¶ 12. In this case, the plaintiffs claim to have met the predominance requirement of Civil Rule 23(B)(3) because "questions of law or fact common to the members of the class predominate over any questions

affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

For common questions of law or fact to predominate, it is not sufficient that such questions merely exist; rather, they must present a significant aspect of the case. *Cullen*, supra, at ¶30. Furthermore, they must be capable of resolution for all members in a single adjudication. *Id*. To meet the predominance requirement, a plaintiff must establish that issues subject to generalized proof and applicable to the class as a whole predominate over those issues that are subject to only individualized proof. *Id.*

In determining a motion for class certification, a court has to consider what the plaintiffs will have to prove at trial and whether those matters can be presented by common proof. *Id*., ¶17. The plaintiffs have alleged causes of action for fraud, unjust enrichment and fraudulent inducement. If the plaintiffs can prove their claims by common proof without the need for individualized proof, then the predominance requirement will be satisfied.

1. Fraud and Fraudulent Inducement

The elements of fraud are: (1) a representation (or concealment of a fact when there is a duty to disclose), (2) that is material to the transaction at hand, (3) made falsely, with knowledge of its falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, and (4) with intent to mislead another into relying upon it, (5) justifiable reliance, and (6) resulting injury proximately caused by the reliance. *Volbers-Klarich v. Middletown Mgmt.*, 125 Ohio St. 3d 494, 501, 2010-Ohio-2057, ¶ 27.

The defendant argues that the plaintiffs cannot show a common misrepresentation because none of the documents make a representation about the fee, and if the defendant's agents

did make oral representations to putative plaintiffs about the fee then they would have to be examined on an individualized basis.

But the plaintiffs' contention is that the fee itself is a misrepresentation because by virtue of it being charged, it is implying that the plaintiffs are receiving a service when in fact they are not receiving anything in addition to what the percentage commission paid by the seller already covers. They argue that "[b]y creating a separate fee for which no additional services are provided, [the defendant] deceived class members into believing that the fee was an additional separate charge that [the defendant] incurred. Instead, the fee was simply a way to lie about and hide an increase in the sales commission."[3]

Whether the plaintiffs' position has merit need not be decided now. Instead the focus is whether its merit can be established by common proof. The plaintiffs have as much as admitted that neither they nor any other class members were lied to orally or, other than the form contracts, in writing. Because the plaintiffs claim that the fraud was committed simply by collecting the money without performing services beyond those already provided in exchange for the separately agreed commission, the fraud claims do not require individual inquiries and can be demonstrated by common proof. Of course, Smythe Cramer is free to use individual inquiries for some cases to defeat the claims in all cases.

As to the next elements of fraud, it is not necessary to establish inducement and reliance upon material omissions by direct evidence. *Cope v. Metropolitan Life Ins. Co.*, 82 Ohio St.3d 426, 436, (1998). When there is nondisclosure of a material fact, courts permit inferences or presumptions of inducement and reliance. *Id.* Thus, cases involving common omissions across the entire class are generally certified as class actions, notwithstanding the need for each class member to prove these elements. *Id.*

[3] The plaintiffs' reply in support of motion for class certification, pp. 6-7.

The alleged nondisclosure here is the fact that the fee is a duplicative fee which pays for nothing. That alleged omission is made across the entire class, so the elements of the defendant's intent to induce reliance and justifiable reliance can be supported by common proof.

Smythe Cramer also argues that the plaintiffs have failed to establish that damages are capable of measurement on a class-wide basis. Yet Smythe Cramer has already produced exhibit 13, discussed above, that details the total amount of fees it has collected. Dividing that total by the number of class members – or multiplying the number of class members by $225 – should produce a reliable, if not exact, gauge of damages, obviating the need for individual damage calculations.

Because all the elements of fraud can be proved or disproved by common proof, the questions of law and fact on the fraud causes of action which are common to the class members predominate over questions which might affect only individual members.

2. Unjust Enrichment

Unjust enrichment is proved by evidence that: (1) a benefit was conferred by a plaintiff upon a defendant; (2) the defendant has knowledge of the benefit; and (3) retention of the benefit by the defendant under the circumstances would be unjust. *Grey v. Walgreen Co.*, 197 Ohio App. 3d 418, 424, 2011-Ohio-6167 (8th Dist.).

For the unjust enrichment cause of action the operative facts of each transaction are essentially the same: Smythe Cramer charged an agreed percentage commission covering all of its brokerage services but then imposed an "administrative fee" that was really only a disguised increase in the commission because no extra service was provided for the fee which was not already included in the services paid for by the commission. If the named plaintiffs can prove these facts in their own cases there is no reason to think the rest of the class members'

transactions were any different.[4] The legal significance of these common questions of fact is also the same across the class: is it unjust, under the circumstances, for Smythe Cramer to retain the benefit?

Because all the elements of unjust enrichment can be proved or disproved by common proof, the questions of law and fact on that cause of action which are common to the class members predominate over questions which might affect only individual members.

Civil Rule 23(B)(3): superiority

The factors to be considered in determining whether a class action is superior to other available methods for the fair and efficient adjudication of a controversy are: (1) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action. Civil Rule 23(B)(3).

It is tempting to observe that each plaintiff's compensatory damages are no more than 225 dollars, then note that the fee just to file a lawsuit in common pleas court is 250 dollars, and summarily conclude that a class action is a superior method of resolving the plaintiffs' claims. Tempting, but not prudent, because just about every lawsuit seeking class certification involves causes of action where the individual damages alone would not justify the effort and expense of a lawsuit, but that doesn't mean that the superior method of prosecuting every claim for low damages is a class action. I will therefore address Civil Rule 23(B)(3)'s explicit considerations.

First, because each plaintiff's compensatory damages are so low, it is unlikely that there is much individual interest by putative class members in controlling separate actions. For any

[4] But acknowledging the defendant's right to show that they are.

class member who paid or received at least $100,000 for the house bought or sold, compensatory damages total less than one-fourth of one percent of the sale price. I cannot believe that there is more than a handful of outliers who would prefer to control an individual lawsuit for such a sum as opposed to rising or falling with a class. The same goes for the likelihood that potential class members would prefer to individually pursue administrative claims through the Ohio Real Estate Commission.

There is no evidence that other litigation exists concerning this controversy, so that factor weighs in favor of resolving the dispute only once for the class.

The remaining practicalities weigh in favor of a class action as a superior method of resolution. In theory, Smythe Cramer is faced with this single class action lawsuit in Ohio or the possibility of thousands of individual actions in courts across the state. Viewed that way, it is desirable to both sides to concentrate the litigation in one forum. Finally – the slowness of this decision notwithstanding – I do not foresee any special difficulties in managing these claims as a class action. Here again I point to the thousands of hypothetical alternative individual lawsuits to suggest that managing this single case is a superior means to administer justice.

I therefore find that the plaintiffs have satisfied Civil Rule 23(B)(3)'s superiority requirement.

CONCLUSION AND CLASS CERTIFICATION ORDER

Based on all of the foregoing, the plaintiffs' motion for class certification is granted and the following class is certified: all individuals who, from September 18, 2005, through September 6, 2012,[5] and in Ohio, paid to Smythe Cramer Co., dba Howard Hanna Smythe Cramer, a fee entitled "administrative fee," "broker service fee," "brokerage fee," or other similar title, which fee is usually listed on line 704 or 705 of a HUD-1 settlement statement.

[5] The date the lawsuit was filed.

Having considered the factors set forth in Civil Rule 23(F), Patrick J. Perotti, Esq. and the law firm of Dworken & Bernstein Co., LPA, James A. DeRoche, Esq. and the law firm of Garson Johnson, LLC, and Glenn D. Feagan and the law firm of Law Offices of Glenn D. Feagan are appointed as class counsel. Pursuant to Civil Rule 23(F)(1)(e), further orders pertaining to class counsel shall be made as necessary, including any determination of an award of attorney's fees.

IT IS SO ORDERED:

_____ Date: July 9, 2015
Judge John P. O'Donnell

SERVICE

A copy of this journal entry was sent by email on July 9, 2015, to the following:

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