

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHRISTOPHER MOEHRL, MICHAEL)
COLE, STEVE DARNELL, VALERIE)
NAGER, JACK RAMEY, DANIEL UMPA,)
And JANE RUH, on behalf of themselves and)
all others similarly situated)

Plaintiffs,)

v.)

THE NATIONAL ASSOCIATION OF)
REALTORS, REALOGY HOLDINGS)
CORP., HOMESERVICES OF AMERICA,)
INC., BHH AFFILIATES, LLC, HSF)
AFFILIATES, LLC, THE LONG & FOSTER)
COMPANIES, INC., RE/MAX LLC,)
and KELLER WILLIAMS REALTY,)
INC.)

Defendants.)

Case No. 1:19-cv-01610

Judge Andrea R. Wood

ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN SUPPORT
OF THE HOMESERVICES DEFENDANTS'
MOTION TO STRIKE CERTAIN CLASS ALLEGATIONS

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INTRODUCTION

Plaintiffs’ putative class includes tens of thousands of individuals who executed a listing agreement containing a binding arbitration provision with a HomeServices of America subsidiary (“Arbitrating Class Members”). Plaintiffs’ Complaint makes no attempt to exclude these individuals from the putative class. The Arbitrating Class Members have no advocate to assure protection of their interests. The named plaintiffs are not typical of the proposed class they propose to represent or adequate to protect the interests of the putative class.

The Court should take action now to excise the Arbitrating Class Members from the putative class so that the discovery to be directed to the HomeServices Defendants¹ can be limited to an appropriate scope and be made proportional to the claims to be litigated against them. For example, certain HomeServices subsidiaries utilized binding arbitration agreements in Pennsylvania, Minnesota, Arizona, and North Carolina for virtually all of their customers for the entire class period—as such, these subsidiaries as a practical matter have no customers in those states who could litigate claims or recover damages in this action. As demonstrated below, the Court should strike the class allegations now and require them to be amended to exclude those class members who agreed to arbitrate this type of dispute with a HomeServices subsidiary.

FACTUAL BACKGROUND

A. The Class Definition.

Plaintiffs’ class begins on March 6, 2015. Doc. 84 ¶¶ 18, 142. It encompasses “home sellers who paid a broker commission . . . in connection with the sale of residential real estate” listed on a “Covered MLS.” *Id.* ¶ 18. Plaintiffs define a Covered MLS as the Bright MLS and My Florida Regional MLS, as well as the MLSs covering the metropolitan areas of Cleveland,

¹ The “HomeServices Defendants” are HomeServices of America, Inc., BHH Affiliates, LLC, HSF Affiliates, LLC, and the Long & Foster Companies, Inc.

Ohio; Columbus, Ohio; Detroit, Michigan; Milwaukee, Wisconsin; Minneapolis, Minnesota; Austin, Texas; Dallas, Texas; Houston, Texas; Las Vegas, Nevada; Phoenix, Arizona; San Antonio, Texas; Colorado Springs, Colorado; Denver, Colorado; Salt Lake City, Utah; Fort Myers, Florida; Miami, Florida; Charlotte, North Carolina; or Raleigh, North Carolina. *Id.*

Plaintiffs exclude from the class only “Defendants and their officers and directors, the judicial officers presiding over this action and the members of their immediate families and judicial staff, and Plaintiffs’ counsel and employees of their law firms.” *Id.* ¶ 143.

B. The HomeServices Defendants and Their Relevant Subsidiaries.

Plaintiffs’ Complaint, Doc. 84 (the “Complaint”), attempts to state an antitrust class action claim against four “Corporate Defendants” and the National Association of Realtors, a trade association. One of these Corporate Defendants is what Plaintiffs call “HomeServices”—really a combination of HomeServices of America, Inc., three of its subsidiaries (HSF Affiliates, LLC, BHH Affiliates, LLC, and The Long & Foster Companies, Inc.), and “their wholly-owned or controlled subsidiaries or affiliates.” Doc. 84 ¶ 34. Movants here will refer to themselves in the collective, as the “HomeServices Defendants.”

HomeServices of America, Inc. is a holding company. Strandmo Decl., attached as Exhibit 1, ¶ 4. It is not a real estate broker, does not sell real estate, does not charge listing commissions, and does not enter into listing agreements with homeowners. *Id.* However, HomeServices of America, Inc. has at least twelve subsidiaries that operate brokerages that list homes on one or more Covered MLS. Of these, eleven subsidiaries provided home seller purported class members with listing agreements containing binding arbitration clauses (“Listing and Arbitration Agreements”) for at least some part of the class period:

Subsidiary	Relevant Time Period of Arbitration Rights	Citation to Arbitration Clauses
Fox & Roach ²	Entire class period in Pennsylvania, and September 2018-present in Delaware. Ex. 2 ¶¶ 6–18.	Ex. 2 ¶¶ 8, 10-13, 17-18 (authentication); Ex. 2 at Fox & Roach Decl. Exs. A p.5 § 33(b); B p.3 § 16(b); C p.3 § 16(b); D p.3 § 16(b); E p.3 § 15; F p.3 § 15; G p.1 (arbitration provisions).
Ebby Halliday ³	October 2018-present. Ex. 3 ¶¶ 6-12.	Ex. 3 ¶¶ 10-12 (authentication); Ex. 3 at Ebby Decl. Exs. A p.6 §§ 16-17; B p.6 §§ 16-17; C p.6 §§ 16-17 (arbitration provisions).
Lovejoy Realty ⁴	April 2019-present. Ex. 4 ¶¶ 6-9.	Ex. 4 ¶ 9 (authentication); Ex. 4 at Lovejoy Realty Decl. Ex. A p.1 (arbitration provisions).
Midwest Preferred ⁵	April 2019-present. Ex. 5 ¶¶ 6-9.	Ex. 5 ¶ 9 (authentication); Ex. 5 at Midwest Preferred Decl. Ex. A p.1 (arbitration provisions).
Edina Realty ⁶	Entire class period in Minnesota, and April 2019-present in Wisconsin. Ex. 6 ¶¶ 5-11.	Ex. 6 ¶¶ 10-11 (authentication); Ex. 6 at Edina Realty Decl. Exs. A p.4:141; B p.8 (arbitration provisions).
Esslinger-Wooten-Maxwell ⁷	August 2018-present. Ex. 7 ¶¶ 5-9.	Ex. 7 ¶ 9 (authentication); Ex. 7 at EWM Decl. Ex. A p.3 § 9 (arbitration provisions).
Florida Realty ⁸	November 2019-present for homes listed on a Covered MLS. Ex. 8 ¶¶ 6-10.	Ex. 8 ¶ 10 (authentication); Ex. 8 at Florida Realty Decl. Ex. A p.3 § 12 (arbitration provisions).

² Fox & Roach is a 99.9% owned subsidiary of Fox & Roach/Trident Limited Partnership, which is a 99.9% owned subsidiary of HomeServices Northeast, LLC. HomeServices Northeast, LLC is a wholly owned subsidiary of HomeServices of America, Inc. Ex. 1 ¶ 5. Fox & Roach lists on at least one Covered MLS. Fox & Roach Decl., attached as Exhibit 2, ¶ 4.

³ Ebby Halliday is a wholly owned subsidiary of HomeServices of Texas, LLC, which is a wholly owned subsidiary of HomeServices of America, Inc. Ex. 1 ¶ 6. Ebby Halliday lists on at least one Covered MLS. Ebby Decl., attached as Exhibit 3, ¶ 4.

⁴ Lovejoy Realty is a wholly owned subsidiary of HomeServices of Minnesota, LLC, which is a wholly owned subsidiary of HomeServices of America, Inc. Ex. 1 ¶ 7. Lovejoy Realty lists on at least one Covered MLS. Lovejoy Realty Decl., attached as Exhibit 4, ¶ 5.

⁵ Midwest Preferred is a wholly owned subsidiary of HomeServices of Minnesota, LLC, which is a wholly owned subsidiary of HomeServices of America, Inc. Ex. 1 ¶ 8. Midwest Preferred lists on at least one Covered MLS. Midwest Preferred Decl., attached as Exhibit 5, ¶ 5.

⁶ Edina Realty is a wholly owned subsidiary of Edina Financial Services, Inc., which is a wholly owned subsidiary of HomeServices of Minnesota, LLC. HomeServices of Minnesota, LLC is a wholly owned subsidiary of HomeServices of America, Inc. Ex. 1 ¶ 9. Edina Realty lists on at least one Covered MLS. Edina Realty Decl., attached as Exhibit 6, ¶ 4.

⁷ Esslinger-Wooten-Maxwell is a wholly owned subsidiary of HomeServices of Florida, Inc., which is a wholly owned subsidiary of HomeServices of America, Inc. Ex. 1 ¶ 10. Esslinger-Wooten-Maxwell lists on at least one Covered MLS. EWM Decl., attached as Exhibit 7, ¶ 4.

⁸ Florida Realty is a wholly owned subsidiary of HomeServices of Florida, Inc., which is a wholly owned subsidiary of HomeServices of America, Inc. Ex. 1 ¶ 11. Florida Realty lists on at least one Covered MLS. Florida Realty Decl., attached as Exhibit 8, ¶ 4.

Subsidiary	Relevant Time Period of Arbitration Rights	Citation to Arbitration Clauses
Long Realty ⁹	Entire class period for homes listed on a Covered MLS. Ex. 9 ¶¶ 5-12.	Ex. 9 ¶¶ 9-12 (authentication); Ex. 9 at Long Realty Decl. Exs. A p.5 § 6; B p.6 § 6; C p.6 § 6; D p.6 § 6 (arbitration provisions).
Preferred Carolinas ¹⁰	Entire class period. Ex. 10 ¶¶ 5-15.	Ex. 10 ¶¶ 10-15 (authentication); Ex. 10 at Preferred Carolinas Decl. Exs. A p.7 § 14; B p.6 § 14; C p.7 § 14; D p.7 § 14; E1 pp.1-2; E2 pp.1-2; F pp.1-2 (arbitration provisions).
First Weber ¹¹	July 2019 to present, for those who opted in. Ex. 11 ¶¶ 5-13.	Ex. 11 ¶¶ 9-13 (authentication); Ex. 11 at First Weber Decl. Exs. B, C, D, E (arbitration provisions).
Long & Foster ¹²	July 2019 to present. Ex. 12 ¶¶ 7-10.	Ex. 12 ¶ 10 (authentication); Ex. 12 at L&F Decl. Ex. B (arbitration provisions).

These arbitration provisions require arbitration of the instant dispute. *See citations supra*; text accompanying note 15, *infra*. Many of the arbitration provisions also require arbitration of “gateway” arbitrability disputes. *See citations supra*; text accompanying note 14, *infra*.¹³

C. The Complaint’s Allegations.

In March 2019, Plaintiffs filed the instant suit. Doc. 1. Plaintiffs complain about the listing commission they agreed to pay in listing agreements:

A seller broker’s compensation is specified in a listing agreement, a contract between the seller and the seller broker that details the terms of the listing. A listing agreement typically states that the seller broker has the exclusive right to market the seller’s home.

⁹ Long Realty is a wholly owned subsidiary of HomeServices of America, Inc. Ex. 1 ¶ 12. Long Realty may list on a Covered MLS on occasion. Long Realty Decl., attached as Exhibit 9, ¶ 4.

¹⁰ Preferred Carolinas is a wholly owned subsidiary of HomeServices of the Carolinas, Inc., which is a wholly owned subsidiary of HomeServices of America, Inc. Ex. 1 ¶ 13. Preferred Carolinas lists on at least one Covered MLS. Preferred Carolinas Decl., attached as Exhibit 10, ¶ 4.

¹¹ First Weber is a wholly owned subsidiary of HomeServices of Wisconsin, LLC, which is a wholly owned subsidiary of HomeServices of America, Inc. Ex. 1 ¶ 14. First Weber lists on at least one Covered MLS. First Weber Decl., attached as Exhibit 11, ¶ 4.

¹² Long & Foster is a wholly owned subsidiary of Long & Foster Real Estate Ventures, Inc., which is a wholly owned subsidiary of The Long & Foster Companies, Inc., which is a wholly owned subsidiary of HomeServices MidAtlantic, LLC, which is a wholly owned subsidiary of HomeServices of America, Inc. Ex. 1 ¶ 15. Long & Foster lists on at least one Covered MLS. L&F Decl., attached as Exhibit 12, ¶ 6.

¹³ Many of the Listing and Arbitration Agreements also contain class action waivers, which additionally bar this suit. *See, e.g.*, Ex. 2 at Fox & Roach Decl. Ex. A at 5; Ex. 3 at Ebby Decl. Ex. A at 6; Ex. 4 at Lovejoy Decl. Ex. A at 1; Ex. 5 at Midwest Decl. Ex. A at 1; Ex. 6 at Edina Decl. Ex. A at 4; Ex. 9 at Long Decl. Ex. A at 6; Ex. 11 at First Weber Decl. Ex. B at 1; Ex. 12 at L&F Decl. Ex. B at 2.

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