IN THE UNITED STATES DISTRICT COURT
FOR THE 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,	)	Case No: 1:19-cv-01610
v.	)	Judge Andrea Wood
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.,	)	**ORAL ARGUMENT REQUESTED**
Defendants.	)	

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

INTRODUCTION

Seeking to avoid their obligation to produce relevant discovery within their control, defendants HomeServices of America, Inc., BHH Affiliates, LLC, HSF Affiliates, LLC, and the Long & Foster Companies, Inc. ("HSA" or the "HSA Defendants") bring a premature and fruitless motion to strike certain class allegations. HSA argues that some (though not all, or even most) unnamed class members who contracted with non-party HSA affiliates may be required to arbitrate their claims, and that the named plaintiffs lack "standing" to oppose a hypothetical and as-yet-unfiled motion to compel arbitration. HSA's arguments are meritless.

Motions to strike class allegations on the pleadings are disfavored, and HSA provides no basis for making an exception here. Setting that aside, HSA's argument rests on a string of faulty logic. The motion assumes that the arbitration clauses in question can be invoked by non-signatory HSA Defendants. But that proposition is contrary to law, and was recently rejected by the *Sitzer* Court—a fact HSA neglects to mention. *See Sitzer v. NAR*, No. 4:19-cv-00332, 2020 WL 2787725 (W.D. Mo. Apr. 10, 2020). It is also inconsistent with authority from around the country rejecting non-signatories' attempts to use equitable estoppel to enforce arbitration agreements under similar circumstances. *See, e.g.*, *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1127 (9th Cir. 2013). HSA nonetheless makes the puzzling argument that plaintiffs are constitutionally barred from objecting to its position that some class members' claims are subject to arbitration—regardless of how frivolous that position may be. This argument is not supported by Seventh Circuit authority. For good reason—how could it be that, merely by invoking the word "arbitration," HSA is entitled to deprive absent class members of their right to representation in this action without affording the named plaintiffs an opportunity to dispute HSA's arguments? The few decisions HSA does cite

are particularly inapplicable here, where the named plaintiffs plainly have a cognizable interest in seeking full discovery on the class's behalf, including from HSA and its subsidiaries.

But the Court need not reach these issues, because even if some limited number of class members were ultimately compelled to arbitrate their antitrust claims *against HSA* (one of five Defendant groups), the class's composition would remain unchanged—as would the discovery HSA is obliged to provide. The antitrust laws make co-conspirators jointly and severally liable. As a result, class members who purchased services from HSA affiliates may pursue in litigation claims against the remaining defendants. And the substantial majority of class members who purchased services from defendants aside from HSA may pursue in litigation claims against HSA even with respect to those affiliates that had arbitration agreements with their customers. Accordingly, even if some future arbitration motion by HSA were successful, *no* sellers would be wholly excluded from the class, nor would HSA's or its subsidiaries' role in the overall conspiracy change. It would therefore be inappropriate to require modifying the class definition or to limit discovery.

BACKGROUND

Plaintiffs filed their Consolidated Amended Complaint ("CAC") on June 14, 2019. Dkt. 84. The CAC alleges that HSA, the other Corporate Defendants, and NAR conspired in violation of the federal antitrust laws, and that the Corporate Defendants have played an active role in the conspiracy, including by requiring their franchisees and subsidiaries to join and implement the anticompetitive agreement. CAC ¶ 6. On October 2, 2020, the Court denied defendants' motions to dismiss. Dkt. 184. In doing so, the Court observed that "[p]erhaps most importantly, Plaintiffs point to the allegation that each of the Corporate Defendants requires its franchisees, affiliates, and realtors to comply with the NAR's allegedly anticompetitive restraints to secure the benefits of

their brands, infrastructure and resources." *Id.* at 9; *see also id.* at 14 ("Plaintiffs have sufficiently alleged that the Corporate Defendants have control over their franchisees and realtors insofar as the Corporate Defendants require them to join the NAR and local realtor associations, the entities responsible for implementing and enforcing the alleged anticompetitive restraints here."). Discovery into HSA's relationships with its subsidiaries and franchisees, and discovery from the subsidiaries themselves, is therefore an important part of plaintiffs' case.

Separately, in *Sitzer*, the court denied HSA's motion to compel arbitration, strike class allegations, and stay proceedings with respect to the HSA Defendants. The *Sitzer* Court rejected HSA's argument that incorporation of the AAA Rules was clear and unmistakable evidence of intent to delegate arbitrability disputes with a non-party to the relevant contract, and held that HSA as a non-signatory to the listing agreements could not enforce other entities' arbitration clauses. *Sitzer*, 2020 WL 2787725, at *4-7.

HSA now moves to strike class allegations relating to certain unnamed class members who may have signed listing agreements with one of eleven HomeServices subsidiaries that contain an arbitration clause. No HSA Defendant is a signatory to the listing agreements that HSA attaches to its motion. In addition, the arbitration clauses at issue are limited by their language to signatories—for example, they apply only to "claims, disputes or controversies between Seller and Broker/Licensee" or "[a]ny controversy or claim between the parties to this Exclusive Right to Sell Listing Contract." Fox & Roach Decl., Ex. A, at 4-5; Edina Realty Decl., Ex. A, at 4 (emphasis added). Nor does HSA provide evidence as to how many class members are subject to such provisions, though it acknowledges that many sellers who contracted with its subsidiaries are not. HSA claims that only two subsidiaries have used arbitration agreements for the entire class period, and that most subsidiaries did not include arbitration provisions until 2018 or 2019. Nevertheless,

HSA argues that the Court should strike class allegations and assent to HSA's refusal to provide discovery from six subsidiaries (plus two subsidiaries' Pennsylvania and Minnesota operations) based on these arbitration agreements. *See* Ex. A, at 1-3.

No other defendant joined in HSA's motion or otherwise moved to strike class allegations.

ARGUMENT

I. HSA's Motion is Premature

HSA styles its motion as one to "strike class allegations," arguing that an unspecified amendment to the class definition is required to exclude an unspecified number—at one point, "tens of thousands," at another point, just "thousands"—of potential class members. HSA Br. 1, 6. The motion, which rests on the purported inadequacy of the named plaintiffs, is premature.[1]

Courts in this District (and around the country) routinely reject motions to strike unnamed class members filed before class certification.[2] This is true even when a defendant challenges inclusion of putative class members who may have signed arbitration agreements or litigation waivers. *See Delgado*, 2017 WL 9939630, at *1 (declining to strike class allegations based on arbitration agreements because of "[t]he numerous legal and factual issues that would need to be resolved before enforcing any arbitration agreement" to which defendant was not a signatory);

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[1] While HSA's motion to strike is premature, HSA is dilatory to the extent it seeks to delay discovery. HSA waited more than 19 months following the filing of plaintiffs' original complaint to file this motion, including during substantial briefing on the motions to dismiss. HSA provides no explanation for its delay or its failure to raise this issue with the Court in advance of or during the November 2020 scheduling conference that set the discovery deadlines HSA now tries to avoid.

[2] *See, e.g.*, *Delgado v. I.C. Systems, Inc.*, 17-cv-1366, 2017 WL 9939630, at *1 (N.D. Ill. May 18, 2017); *Dietrich v. C.H. Robinson Worldwide, Inc.*, 18-cv-4871, 2018 WL 6399199, at *1 (N.D. Ill. Dec. 6, 2018); *Buonomo v. Optimum Outcomes, Inc.*, 301 F.R.D. 292, 299 (N.D. Ill. 2014); *Figueroa v. Kronos Inc.*, 454 F. Supp. 3d 772, 790-91 (N.D. Ill. 2020); *Boatwright v. Walgreen Co.*, 10-cv-3902, 2011 WL 843898, at *2-3 (N.D. Ill. Mar. 4, 2011); *Murdock-Alexander v. Tempsnow Emp.*, 16-cv-5182, 2016 WL 6833961, at *3-4 (N.D. Ill. Nov. 21, 2016); *E&G, Inc. v. Am. Hotel Register Co.*, 17-cv-1011, 2018 WL 1334934, at *2 (N.D. Ill. Mar. 15, 2018); *Mauer v. Am. Intercontinental Univ.*, 16-cv-1473, 2016 WL 4698665, at *4 (N.D. Ill. Sept. 8, 2016).

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