UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

CHRISTOPHER MOEHRL, MICHAEL COLE, STEVE DARNELL, VALERIE NAGER, JACK RAMEY, SAWBILL STRATEGIC, INC., DANIEL UMPA, and JANE RUH, on behalf of themselves and all others similarly situated,))) Civil Action No.: 1:19-cv-01610) Judge Andrea R. Wood
Plaintiffs,) Magistrate Judge M. David Weisman
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.	DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL APPOINTMENT OF CLASS COUNSEL
Defendants.)))
)

<u>DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL</u>



TABLE OF CONTENTS

		Page	
TABLE OF A	AUTHORITIES	iv	
INTRODUC	ΓΙΟΝ	1	
STATEMEN	T OF FACTS	5	
I.	Residential Real Estate in the United States.	5	
II.	II. The National Association of REALTORS® and the Challenged Rules.		
	A. MLS Policy Statement 7.23	8	
	B. Standards of Practice ("SOPs") 16-16 and 3-2	8	
	C. "One Sided Commission Transparency" and Steering	10	
	D. The "Free" Rule	11	
III.	Plaintiffs' Experts' Theories of Harm	11	
IV.	The Natural Experiments of Northwest MLS, West Penn MLS, and REBNY.	15	
V.	Home Services of America	16	
VI.	Keller Williams	18	
VII.	Realogy	19	
VIII.	RE/MAX, LLC	21	
ARGUMENT	Γ	23	
I.	Plaintiffs Have Failed To Meet Their Burden to Prove That Common Issues Predominate Over Purely Individual Issues	23	
	A. Plaintiffs Have Proposed No Valid Method of Proving Class-Wide Impact Using Common Proof	25	
	1. Plaintiffs Have No Class-Wide Evidence to Show They Are "Forced" to Offer Cooperative Compensation By the Challenged Rules	26	



	a)	Plaintiffs' "Steering" Theory Cannot Serve As Class-wide Proof Of Impact	28
	b)	The Evidence Contradicts Plaintiffs' Claims of Class-wide Impact.	30
2.	Buyers that Se	ffs Have No Class-Wide Evidence that s Would No Longer Use Buyer Brokers or ellers Would No Longer Be Incentivized to or Them	32
	a)	Buyers Would Still Use Buyer Brokers.	32
	b)	Because Sellers Would Be Incentivized To Offer Cooperative Compensation Even Without the Rule, Individual Issues Predominate.	37
3.	Class- Exist,	ffs Have Not Met Their Burden in Providing Wide Evidence That Uninjured Sellers Don't But Instead, Only Offer the Unreliable Say- Their Experts.	39
	a)	The Elhauge and Economides Reports Cannot Be Considered Because They Are Inadmissible under <i>Daubert</i>	39
	b)	Even If Considered, The Elhauge and Economides Reports Do Not Support Class Certification.	41
4.	Class I	ffs Have No Common, Class-wide Proof that Members Would be Better Off in the But-For	52
5.		ffs' Mode of Class-wide Impact Fails to nt for Real-world Variation in Commission	57
Consp	iracy Ig	imed Common Class-wide Evidence of nores Predominant Individualized Issues ense.	58
		ws in Plaintiffs' Class-Wide Damages Model s Certification	61
1.		ffs' Liability and Damages Theories Fail Comcast	62



B.

C.

		2.	Plaintiffs' Damages Model Fails To Consider the Impact of Eliminating the Offer of Cooperative	(2)
		3.	Compensation Plaintiffs' Damages Model Fails to Account for Individualized Factors That Explain Class Members' Commission Rates	
	D.		iffs Cannot Show that a Class Action is a Superior of Adjudication.	
	E.		Iffs Incorrectly Argue that <i>Per Se</i> Analysis is priate Here.	65
II.	Plainti	iffs Hav	re Failed To Satisfy The Rule 23(a) Factors	66
	A.	Plainti	ffs Have Failed to Satisfy Commonality	66
	B.	Plainti	ffs Have Failed to Satisfy Typicality	66
III.			ould Not Certify The Proposed Rule 23(b)(2) lief Class.	68
IV.	Plaintiffs' Proposed Class Definition is Overbroad, Because It Fails to Exclude Sellers Who Have Agreed to Arbitrate This and Related Disputes.			70
V.	The Western District of Missouri's Decision in <i>Burnett v. NAR</i> is Not Persuasive.			73
	AT.			7.4



TABLE OF AUTHORITIES

Cases	

Advanced Aerofoil Techs., Inc. v. Todaro, No. 11-cv-7866, 2011 U.S. Dist. LEXIS 137230 (N.D. Ill. Nov. 30, 2011)	72
AD/SAT, Div. of Skylight, Inc. v. Associated Press, 181 F.3d 216 (2d Cir. 1999)	58
Affymax, Inc. v. Johnson & Johnson, 420 F. Supp. 2d 876 (N.D. Ill. 2006)	72
Am. Honda Motor Co. v. Allen, 600 F.3d 813 (7th Cir. 2010)	39, 73, 74
Avilez v. Pinkerton Gov. Servs., Inc., 596 F. App'x 579 (9th Cir. 2015)	71
Barber v. United Airlines, Inc., 17 F. App'x 433 (7th Cir. 2001)	52
Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294 (5th Cir. 2003)	25
Berni v. Barilla S.p.A., 964 F.3d 141 (2d Cir. 2020)	69
Blades v. Monsanto, 400 F.3d 562 (8th Cir. 2005)	30, 36, 37, 39
Blanton v. Domino's Pizza Franchising LLC, 962 F.3d 842 (6th Cir. 2020)	71
Butler v. Sears, Roebuck & Co., 727 F.3d 796 (7th Cir. 2013)	63
Cates v. Whirlpool Corp., 2017 WL 1862640 (N.D. Ill. May 9, 2017)	48, 52
Chen v. Yellen, 2021 WL 4192078 (N.D. Ill. Sept. 15, 2021)	52
Chicago Teachers Union, Local No. 1 v. Board of Educ., 797 F.3d 426 (7th Cir. 2015)	70
Clark v. Bumbo Int'l Trust, No. 15-C-2725, 2017 WL 370825 (N.D. Ill. Aug. 28, 2017)	68
Colby v. J.C. Penney Co., 811 F.2d 1119 (7th Cir. 1987)	73



DOCKET

Explore Litigation Insights



Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time** alerts and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.

