FILED
2011 Jun-27 PM 03:04
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

THOMAS S. ABNEY and JENNIFER ABNEY	)	
Plaintiffs,	)	**Case No. 2:09-cv-01018-RDP**
v.	)	
AMERICAN HOME SHIELD CORPORATION,	)	
Defendant.	)	

STATEMENT OF APPEARANCE AND OBJECTIONS TO CLASS ACTION SETTLEMENT OF MICHELLE A. SCHULER

Michelle A. Schuler hereby files this Statement of Appearance and Objections to the proposed class action settlement, and in support states the following:

I. STATEMENT OF APPEARANCE

(i) Case number:

2:09-CV-1018-RDP

(ii) Full name:

Michelle A. Schuler

(iii) Current mailing address:

1309 Brook Ridge Avenue, Allen, Texas 75002

(iv) Address of the home involved in the real estate transaction in connection with which an AHS home service contract was purchased:

1309 Brook Ridge Avenue, Allen, Texas 75002

(v) Telephone number:

(214) 383-7171

(vi) Attorney's name and contact information (if applicable):

See signature block below

(vii) A full explanation of all your reasons for objecting to the Settlement:

See objections stated below

(viii) Copies of any papers, materials, or briefs in support of the statement of written objections:

See exhibits hereto; see also additional referenced exhibits already on file in this Court

(ix) Notice of your intent to appear at the Fairness Hearing:

Objector Schuler will appear at the fairness hearing through undersigned counsel

(x) Signature or that of your authorized representative:

See signature block below

Objector, through counsel, gives notice of her intention to appear at the Final Fairness hearing presently scheduled for August 17, 2011. Should the date or time of the hearing be re-set, Ms. Schuler and her counsel ask to be notified.

II. OBJECTION TO SETTLEMENT

(i) Case number:

2:09-CV-1018-RDP

(ii) Full name:

Michelle A. Schuler

(iii) Current mailing address:

1309 Brook Ridge Avenue, Allen, Texas 75002

(iv) Address of the home involved in the real estate transaction in connection with which an AHS home service contract was purchased:

1309 Brook Ridge Avenue, Allen, Texas 75002

(v) Attorney's name and contact information (if applicable):

See signature block below

(vi) A full explanation of all your reasons for objecting to the Settlement:

See objections stated below

(vii) Copies of any papers, materials, or briefs in support of the statement of written objections:

See exhibits hereto; see also additional referenced exhibits already on file in this Court

(viii) Signature or that of your authorized representative:

See signature block below

A. BACKGROUND AND SUMMARY

This class action lawsuit has been brought against Defendant American Home Shield Corporation (hereinafter "AHS") by Plaintiffs Thomas and Jennifer L. Abney (hereinafter "Plaintiffs"). The Court preliminarily certified a class for purposes of settlement on March 4, 2011. (Doc # 38).

Defendant AHS is in the business of selling home warranties. This lawsuit alleges that AHS paid a "kickback" to real estate agents as a reward to the agents for "referring" home warranty business to AHS in violation of Section 8(a) of RESPA. The Plaintiffs seek to represent a class of persons who "purchased" home warranties from AHS. Objector is a class member who purchased a home warranty from AHS when she bought a home in Texas. (*See* Doc # 41, at pp. 3-4, and Exhibits C, D, E, and F thereto; Doc #45 at pp. 4-6 and Exhibits thereto).

The Court's order granting preliminary approval of the Proposed Settlement also scheduled a final fairness hearing for August 17, 2011. The Court further ordered that written objections to the Proposed Settlement be filed through June 27, 2011. (Doc # 38).

Objector[1] now files this objection and notice of intent to appear at the fairness hearing because:

[1] Objector Schuler has previously filed a Motion to Intervene herein (and supporting Brief) which has not yet been ruled on by the Court. (Doc # 40 and # 41). Ms. Schuler respectfully requests that the Court grant the intervention.

(1) The Plaintiffs are not adequate class representatives for claims against real estate agents because they never attempted to pursue such claims and, yet, are releasing those claims in exchange for no contribution from real estate agents;

(2) The Plaintiffs lack standing to pursue claims against Ebby Halliday Realtors and are not typical or adequate class representatives for claims against Ebby Halliday;

(3) The settlement is not fair, reasonable or adequate as to non-party real estate agents because they are contributing nothing to the settlement in exchange for the release of such claims and because there is no record before the court to evaluate such claims;

(4) The settlement notice failed to inform absent class members that claims against real estate agents were also being released in addition to the claims against AHS which were the only claims described in the notice;

(5) The settlement notice to absent class members was not reasonably calculated to reach home sellers even though home sellers constitute the "vast majority" of the class; the notice was instead designed to reach buyers, and thus mislead buyers into submitting claim forms and agreeing to be bound by a settlement which provides them no relief; and

(6) The settlement is not fair, reasonable or adequate because a substantial portion of those persons with valid RESPA claims against AHS—both

sellers who reimbursed buyers as well as buyers who were reimbursed by sellers for the cost of a home warranty selected by the buyer—will not be entitled to any benefits under the Proposed Settlement; a "Catch-22" in the settlement's approach to "Qualifying Claims" ensures that virtually no one will receive compensation.

B. ARGUMENT

1. Plaintiffs are not adequate class representatives for claims against real estate agents because they never attempted to pursue such claims

Rule 23(a) of the Federal Rules of Civil Procedure provides that "one or more members of a class may sue or be sued as representative parties on behalf of all only if … (4) the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a). "The adequacy of representation requirement encompasses two separate inquires: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action." *Busby v. JRHBW, Realty, Inc.*, 513 F.3d 1314, 1323 (11th Cir. 2008).

Because the Plaintiffs have never pursued claims against real estate agents in this case, and yet are willing to release such claims, Plaintiffs have not "adequately represented" the interests of the class with regard to such claims. *See, gen., East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 97 S. Ct. 1891 (1977) (holding that the representative parties in a class action are limited to the

claims they possess in common with other members of the class); *see also Rollins v. Alabama Community College System*, 2010 WL 4269133 (M.D. Ala., October 25, 2010) (plaintiffs who abandoned class claims for damages in order to pursue only injunctive relief failed to establish they were adequate representatives), citing *Cooper v. S. Co*., 390 F.3d 695, 721 (11th Cir. 2004) ("to the extent the named plaintiffs were willing to forego class certification on damages in order to pursue injunctive relief that consisted of an admonition to follow general principles of settled law, it is far from clear that the named plaintiffs would adequately represent the interests of the other putative class members."), overruled on other grounds, *Ash v. Tyson Foods, Inc*., 546 U.S. 454, 457 (2006).

Plaintiffs have shown they are not adequate representatives as to class members' claims against real estate agents and thus the Proposed Settlement, which seeks to release the class members' claims against real estate agents, should be rejected.

2. Plaintiffs lack standing to pursue, much less to release, claims against Ebby Halliday Realtors and are not typical or adequate class representatives for claims against Ebby Halliday Realtors.

The Plaintiffs have sued only AHS, alleged claims against only AHS, and reached a proposed settlement with only AHS. Plaintiffs have not asserted, much less pursued, any claim against their own real estate agent, and have certainly not pursued claims against Objector's real estate agent, Ebby Halliday Realtors. The

Plaintiffs have not made any allegation to show that they have standing to pursue the claim against Ebby Halliday Realtors that the Objector is pursuing or that they even have such a claim to assert. However, according to their proposed settlement agreement, the Plaintiffs are nonetheless apparently all too willing to completely release any and all claims the absent class members may have against any real estate agents (including Ebby Halliday). After setting forth a broad, comprehensive definition of "released parties" in their proposed Settlement Agreement,[2] the parties' proposed release goes, in its own words, "further": "'Released Parties' further includes anyone to whom AHS has paid, directly or indirectly, Broker Compensation during the Class Period." (Proposed Settlement, at ¶ 2.45). The "anyone" means the "Real Estate Professional" involved with the subject transaction and who received a kickback or referral fee. (*See Id*., at ¶ 2.4 and ¶ 2.40).

Plaintiffs indisputably do not possess ANY claim against Ebby Halliday. In connection with the home sale underlying their claims in this lawsuit, the Named

[2] The first sentence of 2.45 of the Settlement provides that "'Released Parties' means the Defendant, its, direct or indirect, subsidiaries, divisions, partners, limited partners, owners, investors, holding companies, parents, affiliates (regardless of the form of the legal entity, e,g., corporation, limited liability company, general or partnership), including its predecessors and successors, and their present and former officers, directors, employees, principals, agents, attorneys, and/or any other Person for which any of these Persons shall have a direct or indirect interest, or for which they may otherwise be responsible, as of any given date."

Plaintiffs "were represented by a real estate agent from Crawford Realty, and the buyer, Thomas B. Morse, was represented by Carol McGiboney, a real estate agent with Realty South Inverness." (Doc # 6 at ¶ 14). The Named Plaintiffs had no dealings whatsoever with Ebby Halliday Realtors (which is hardly surprising given that Ebby Halliday is a Texas realtor), and therefore could possess no claim of any sort against Ebby Halliday.

It is well-settled in the Eleventh Circuit that prior to the certification of a class, and before undertaking any of the analysis under Rule 23, the district court must determine that at least one named class representative has Article III standing to raise each class claim. *Wolf Prado-Steiman v. Bush*, 221 F.3d at 1279 (11th Cir. 2000); *see also Griffin v. Dugger*, 823 F.2d at 1482 (11th Cir.1987). Indeed, "[o]nly after the court determines the issues for which the named plaintiffs have standing should it address the question whether the named plaintiffs have representative capacity, as defined by Rule 23(a), to assert the rights of others." *Griffin*, 823 F.2d at 1482. "That a suit may be a class action ... adds nothing to the question of standing." *Simon v. Eastern Ky. Welfare Rights Org*., 426 U.S. 26, 40 n. 20, 96 S. Ct. 1917, 1925 n. 20 (1976); *see also Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 370, 98 S. Ct. 2396 (1978) ("it is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction"); *accord Dash v. FirstPlus Home Loan Owner Trust* 1996-2, 248 F.Supp.2d 489,

503 (M.D.N.C.2003) (“Plaintiffs' characterization of their suit as a putative class action in no way cures this [lack of standing as to some of the defendants] … Otherwise, any plaintiff could sue a defendant against whom the plaintiff has no claim in a putative class action, on the theory that some member of the hypothetical class, if a class were certified, might have a claim.”).

Under the principles of standing, "a plaintiff must allege and show that he personally suffered injury." *Id.* (*see Payne v. Travenol Lab., Inc.*, 565 F.2d 895, 898 (5th Cir.) ("To meet the requirement for standing under Article III, a plaintiff must establish either that the asserted injury was in fact the consequence of the defendant's action or that the prospective relief will remove the harm.") (citation omitted), cert. denied, 439 U.S. 835, 99 S. Ct. 118, 58 L. Ed. 2d 131 (1978)). Thus, to satisfy this requirement, the Court must determine that the class representative is "part of the class and possess[es] the same interest and suffer[ed] the same injury as the class members." *Prado-Steiman*, 221 F.3d at 1279 (citing *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982)).

"**[E]ach claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim**." *Prado-Steiman*, 221 F.3d at 1280(emphasis supplied), citing *Griffin*, 823 F.2d at 1483). Therefore, “[i]n a multi-defendant action or class action, the named plaintiffs must establish that they

have been harmed by each of the defendants." *Dash*, 248 F. Supp. 2d at 504; *accord Christiansen v. Beneficial Nat. Bank*, 972 F. Supp. 681 (S.D. Ga. 1997) (named plaintiff lacked standing to include banks in a class action that plaintiff had not obtained loans from); *see also Perez v. Asurion Corp*., 501 F.Supp.2d 1360, 1366 (S.D. Fla. 2007) (noting that "the Court required Plaintiffs to demonstrate in the amended pleadings that **each proposed class representative had standing with respect to each Defendant**-by showing that they not only paid premiums, but also that they received a replacement phone that was either defective or of a lower value than their deductible") (emphasis supplied); *Henry v. Circus Circus Casinos, Inc.*, 223 F.R.D. 541, 544 (D. Nev. 2004) ("what is required is that for every named defendant there be at least one named plaintiff who can assert a claim directly against that defendant"); *accord In re FEMA Trailer Formaldehyde Products Liability Litigation*, 570 F. Supp. 2d 851 (E.D. La. 2008); *Newport v. Dell, Inc*., 2008 WL 4347017 (D. Ariz. August 21, 2008); *Herlihy v. Ply-Gem Indus., Inc*., 752 F. Supp. 1282, 1291 (D. Md. 1990).[3]

[3] *See, gen., Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp*, 632 F.3d 762, 770 (1st Cir. 2011) (holding that named plaintiff investors lacked standing to assert claims involving sales of certificates in six trusts from which no named plaintiff made purchases); *Audler v. CBC Innovis, Inc*., 519 F.3d 239 (5th Cir. 2008) (holding that named plaintiff "lacks standing to bring claims against any Defendant other than [the defendant with which he dealt]."); *Jackson v. Resolution GGF Oy*, 136 F.3d 1130 (7th Cir.1998) (plaintiff lacked standing in class action as to defendant which "held none of the notes signed by any of the plaintiffs."); *Barry v. St. Paul Fire & Marine Insurance Co*., 555 F.2d 3

Here, Plaintiffs have had no dealings whatsoever with Ebby Halliday Realtors and have no standing to pursue any claims against Ebby Halliday. In fact, Plaintiffs never asserted any such claims; they never discovered such claims; they never negotiated or obtained compensation for the release of such claims. However, Plaintiffs are nonetheless attempting through this proposed settlement to represent Objector with regard to her claims against Ebby Halliday by including and releasing such claims in the proposed settlement.

> It should be obvious that there cannot be adequate typicality between a class and a named representative unless the named representative has individual standing to raise the legal claims of the class. As noted above, typicality measures whether a sufficient nexus exists between the claims of the named representatives and those of the class at large. **Without individual standing to raise a legal claim, a named representative does not have the requisite typicality to raise the same claim on behalf of a class.**

Prado-Steiman, 221 F.3d at 1279 (emphasis supplied).

As Plaintiffs do not possess any claim against Ebby Halliday, their absence of such a claim is obviously not "typical" of Objector's claim against Ebby

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(1st Cir. 1977) (plaintiffs asserting class action lacked standing to assert claims against those insurance companies from which no named plaintiff had not bought any of the policies in question) aff'd, 438 U.S. 531, 98 S. Ct. 2923, 57 L. Ed. 2d 932 (1978); *Central Wesleyan College v. W.R. Grace & Co*., 6 F.3d 177, 188 (4th Cir. 1993) (stating that it is "essential that named class representatives demonstrate standing through a 'requisite case or controversy between themselves personally and [defendants],' not merely allege that 'injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.' ") quoting *Blum v. Yaretsky*, 457 U.S. 991, 1001 n. 13, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982).

Halliday. *See, gen., Benefield v. International Paper Co*., 270 F.R.D. 640 (M.D. Ala. 2010) ("In summary, because Johnson's claims are factually the same as only some of the putative class, he is pursuing some damages not sought by the entire class, and he apparently seeks to recover on theories not asserted on behalf of the class, his claims are not typical, and he is not an adequate class representative.").

Plaintiffs have also failed to present any other basis for having standing to pursue claims against Ebby Halliday.

Plaintiffs have never even pursued claims against Ebby Halliday, and yet are willing to release such claims (despite no contribution being made to the settlement from Ebby Halliday). Plaintiffs have not "adequately represented" Objectors and others with claims against Ebby Halliday. The Proposed Settlement, which would release all claims of class members against Ebby Halliday, should be rejected.

3. The settlement is not fair, reasonable or adequate as to non-party real estate agents because they are contributing nothing to the settlement and, furthermore, there is no record before the court to evaluate such claims.

As noted, Plaintiffs have sued only AHS, alleged claims against only AHS, and reached a proposed settlement with only AHS. As such, ***only AHS is contributing to the Proposed Settlement.*** Plaintiffs have not asserted, much less pursued, any claim against any real estate agent, including their own agent. Plaintiffs have certainly not pursued claims against Ebby Halliday Realtors. However, according to the Proposed Settlement agreement, class members must

completely release any and all claims the absent class members may have against any real estate agents. Nothing has changed since the Eight Circuit noted that "We have found no cases in which a release protected noncontributing third parties like Dean Witter; in addition to being apparently unprecedented in federal case law, such a free ride for bad actors is counter-intuitive." *In re Y & A Group Securities Litigation*, 38 F.3d 380, 384 (8th 1994).[4] As noted above, the Plaintiffs here lack standing to even assert claims against Ebby Halliday. No federal court has ever approved, over objection, a class action release of non-contributing third-parties in these circumstances.

After setting forth a broad, comprehensive definition of "released parties" in their proposed Settlement Agreement,[5] the parties' proposed release goes, in its own words, "further": "'Released Parties' further includes anyone to whom AHS

[4] In *Y&A Group*, the settlement being construed did include such a "surprising" and "counter-intuitive" release. *Id.* However, the question raised on appeal was simply one of the intent of the settling parties, not to determine in the first instance whether such a release was fair, reasonable or adequate. *See id.*

[5] The first sentence of 2.45 of the Settlement provides that "'Released Parties' means the Defendant, its, direct or indirect, subsidiaries, divisions, partners, limited partners, owners, investors, holding companies, parents, affiliates (regardless of the form of the legal entity, e,g., corporation, limited liability company, general or partnership), including its predecessors and successors, and their present and former officers, directors, employees, principals, agents, attorneys, and/or any other Person for which any of these Persons shall have a direct or indirect interest, or for which they may otherwise be responsible, as of any given date."

has paid, directly or indirectly, Broker Compensation during the Class Period." *See* Proposed Settlement, at 2.45. "Broker Compensation" is elsewhere defined to refer to the kickback payments to "Real Estate Professionals." *Id*. at 2.4 and 2.40. In other words, although no claims have been asserted against a single "Real Estate Professional" in this lawsuit and even though these non-parties are contributing nothing whatsoever to the settlement, the class members would be required to completely release claims against real estate professionals throughout the country (whether Plaintiffs even possessed claims against those realtors or not).

The "Real Estate Professionals" in question are not minor, tag-along players in this drama. Indeed, they are nothing like, for example, Defendant AHS's "former officers" or "subsidiaries" that would also be released by the proposed settlement. Rather, these realtors who were paid "Broker Compensation" each owed a fiduciary duty to the class member they were supposed to representing. AHS owed no such duty and the Plaintiffs have not alleged it did. Unlike claims against AHS, a claim of breach of fiduciary duty against one's own real estate agent for misrepresenting the actual "commission" being made by the agent on a sale would not turn upon any unresolved niceties of RESPA interpretation. In other words, claims against real estate professionals are potentially more valuable *and stronger* than the asserted RESPA claims against AHS. In any event, it

certainly makes no sense to simply give away any and all claims against "Real Estate Professionals" without even bothering to allege or purse them first.

This Court previously directed the parties to provide additional briefing regarding the broad scope of the proposed release. (Doc # 33). In response, the parties blew a cloud of smoke. Plaintiffs provided no supporting law (Doc # 36), and Defendants cited to a very tiny group of very unusual and very different cases. (Doc # 35 at p. 15).

Defendant cited to *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2nd Cir. 2005). The circumstances before the court in *Wal-Mart* could hardly be more different from the present case. First, the settling defendants were "national bank card associations" Visa and Master Card, and the "non-parties" released were the defendants' "member" banks. *Id*. The claims against the member banks were identical in all respects to the claims against the association. *Id.* at 109. Even more important, the member banks actually contributed to the settlement. *Id*., at 109. In fact, "the banks not only contributed to the Settlement[ ], but **virtually all of the relief comes from them**." *Id*. (emphasis supplied). The *Wal-Mart* court also found that the class members had been adequately represented as to the claims against the released banks. *Id.*, at 109-110. As shown above, class members in the present case have clearly not been adequately represented as to claims against the real estate agents.

Defendant also cites to the extremely unusual and very distinguishable case of *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 143, 160-65 (E.D.N.Y. 2000). Although the district court did approve a settlement that released non-parties in the unusual circumstances that were before it, the court nonetheless also repeatedly emphasized that the non-parties were also contributing in various ways to the settlement and must comply with the terms of the settlement in order to benefit from the release. *See, e.g., id.* at 158 (noting released parties will not be able to enforce release if they "withhold from class members the information necessary in order to claim benefits to which they are entitled."); *id.* at 161 (noting that if released parties "refuse to provide information that they have in their possession that is needed for the fair administration of the Refugee Class" the court "will consider an application for modification of the enforceability of releases with respect to those entities"); *id.*, at 162-63 ("The failure of Swiss entities seeking releases from Slave Labor Class II claims to identify themselves will result in the denial of a release and permit those who have claims against those entities to pursue such claims independently of this lawsuit."). In fact, when the parties first proposed to release non-party insurers, the court found that objections to such a broad release of non-parties were "well taken." *Id.* at 160. The court approved a release of "participating released insurers" only after the settlement agreement was amended to obligate the released insurers to contribute to the settlement by

agreeing to a specified insurance claims process as to the claims of the class members. *Id.* The opinion in *In re Holocaust Victim Assets* provides no support for, and in fact undermines, the proposed release of real estate agents in the present case.

Defendant also cited to the unreported *In re Lloyd's American Trust Fund Litigation*, 2002 WL 31663577 (S.D.N.Y. 2002). However, that case merely follows the above cases in finding that "it is appropriate for a class action settlement to include a limited release of a non-party, such as Lloyd's, where that ***non-party has contributed substantially*** to making the settlement possible." (emphasis supplied).

In any event, "[p]roponents of class action settlements bear the burden of developing a record demonstrating that the settlement distribution is fair, reasonable and adequate," *Holmes*, 706 F.2d at 1147. Here, the record before the Court is clearly inadequate for the Court to analyze the adequacy of the settlement with regard to real estate agents.

The parties have failed to provide any precedent whatsoever in support of the proposed release of non-contributing, non-party real estate agents. The Proposed Settlement should be rejected.

4. The settlement notice failed to inform absent class members that claims against real estate agents were also being released in addition to the claims against AHS which were the only claims described in the notice.

Rule 23(e) requires that the district court "direct notice in a reasonable manner to all class members who would be bound by a proposed settlement." FED. R. CIV. P. 23(e)(1)(B). The notice must apprise class members of the terms of the settlement agreement in a manner that allows class members to make their own determination regarding whether the settlement serves their interests. *See In re Katrina Canal Breaches Litigation*, 628 F.3d 185, 197-199 (5th Cir. 2010) (rejecting class action settlement notice as failing to "provide interested parties with knowledge critical to an informed decision as to whether to object to class certification and settlement."); *Int'l Union, United Auto., Aerospace, and Agric. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 630 (6th Cir. 2007) (explaining that notice must "fairly apprise the prospective members of the class of the terms of the proposed settlement so that class members may come to their own conclusions about whether the settlement serves their interests.") (internal quotation marks omitted).

"In addition to the requirements of Rule 23, the Constitution's Due Process Clause also guarantees unnamed class members the right to notice of ... settlement." *DeJulius v. New England Health Care Employees Pension Fund*, 429 F.3d 935, 943-44 (10th Cir. 2005); *accord Adams v. Southern Farm Bureau Life Ins. Co.*, 493 F.3d 1276, 1285 (11th Cir. 2007) ("Class actions, as other cases, are subject to the requirements of due process.") (internal quotation marks omitted).

In the context of notice for class certification and class member opt-out, the Eleventh Circuit has stated that "it is not only necessary that the notice reach the parties affected but that it convey the required information." *Adams,* 493 F.3d at 1285-86 (internal quotation marks omitted).

Here, the written notice to absent class members fails to even attempt to actually explain that the settlement extends beyond Defendant AHS and includes real estate agents who are not parties to the lawsuit being described and settled. The only "notice" provided to absent class members as to whether or not claims against non-party real estate agents are also being released is the following: "Released Parties (as defined in the Agreement)." (*See* Class Notice, attached hereto as Exhibit 2, at p. 7). The reference may be adequate as to AHS (and individuals and entities related to AHS) because the fact that the suit has been brought against AHS is of course actually discussed in the notice. However, such a vague reference is wholly inadequate notice that real estate agents are also being released.

> ... Surely the best notice practicable under the circumstances cannot stop with ... generalities. It must also contain an adequate description of the proceedings written in objective, neutral terms, that, insofar as possible, may be understood by the average absentee class member....
>
> Absentee class members will generally have had no knowledge of the suit until they receive the initial class notice. This will be their primary, if not exclusive, source of information for deciding how to exercise their rights under [R]ule 23.... **Not only must the substantive claims be adequately described but the notice must**

> **also contain information reasonably necessary to make a decision to remain a class member and be bound by the final judgment or opt out of the action**.

Twigg v. Sears, Roebuck & Co., 153 F.3d 1222, 1227-28 (11th Cir. 1998) (emphasis supplied), quoting *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1103-05 (5th Cir.1977) (quotations and citations omitted). Here, the class notice makes no effort to describe claims against real estate agents. The notice (like the lawsuit filed and pursued by Plaintiffs) is only concerned with claims against AHS.

"[I]n determining whether notice of the [class action settlement] was sufficient to afford the process due, ***we look solely to the language of the notices and the manner of their distribution.***" *Twigg*, 153 F.3d at 1227 (emphasis supplied). In other words, "the actual terms of the settlement agreement on file … are not relevant to the due process analysis." *Id*., at 1228, n. 7. The notice in this case completely fails to inform class members with claims against real estate agents that such claims "were being litigated or that they had been settled." *Id*., at 1228. The notice fails to satisfy Rule 23 and fails to provide Due Process to absent members, and the Proposed Settlement should be rejected.

5. The settlement notice to absent class members was not reasonably calculated to reach sellers even though sellers constitute the "vast majority" of the class, and was instead designed to reach buyers; but buyers will be mislead into submitting claim forms and agreeing to be bound by a settlement which provides them no relief.

"[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 314-15 (1950). In the present case, the parties have dubiously engineered a notice program designed to reach only home buyers even though the parties contend that the "vast majority" of the class are instead home sellers. This is clearly not a means one reasonably would adopt to accomplish notice to the class.

The parties' motion for preliminary settlement approval wrongly implied that notice would be sent to all buyers and sellers. In fact, the parties agreed that notice would be sent to such persons only when a "last known address … has been retained by AHS in the ordinary course of business." (Proposed Settlement at ¶ 7.4). However, AHS only has records of homeowners (the home ***buyers***) who were covered by AHS home warranties. (Deposition of Christian Morgan, attached hereto as Exhibit 3, at pp. 23–28). In short, no attempt has been made to provide direct notice to the home sellers. This is particularly unacceptable given Plaintiffs' own admission that sellers will constitute the "vast majority" of the class. (Doc # 43 at p. 5).

"Upon commencing a class action, the class representatives must be prepared to accept the concomitant responsibility of identifying absentee class

members as well as paying the costs of their individual notice." *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1102 (5th Cir. 1977), citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. at 176-79. Here, Plaintiffs have apparently done little to indentify the class members beyond briefly questioning a single AHS witness about its records -- and that deposition revealed that AHS does not track the identity of the sellers. Absent class members are entitled to more. The comically meager $2,500 or so in costs that Plaintiffs' counsel have incurred "pursuing" this case further illustrates how little has been done.

Even assuming *arguendo* that Plaintiffs adequately fulfilled their obligation to identify class members, the substituted notice (internet) employed here is inadequate. Mere publication on the internet is particularly lacking with regard to home sellers in the present case. *See, e.g.*, *Mullane*, 339 U.S. at 315 ("It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts."); *see also id.* ("The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract…."). Even assuming a seller came across the internet notice by "chance," they are at least as likely as not to conclude the notice does not concern them. *See, Mullane*, at 315 (noting that "[c]hance alone brings to the attention" of a class member a published notice).

First, sellers never entered into any sort of relationship with AHS, were never themselves covered by an AHS warranty and most likely would simply not consider themselves as having "purchased" an AHS warranty. Second, the notice references only transactions in which AHS paid "Broker Compensation," but one of the points of the present lawsuit is that class members almost universally do not know that such broker compensation was paid. A seller could thus chance upon the website notice, review the HUD form for his transaction, and then reasonably conclude that "Broker Compensation" was not paid and the notice thus does not concern him.

The parties' attempts to provide notice to sellers—the "vast majority" of the class—is a "mere gesture." *See Mullane*, at 315. The Proposed Settlement should be rejected.

6. The settlement creates a Catch-22 leaving many if not most class members with no chance of any benefit whatsoever.

"Proponents of class action settlements bear the burden of developing a record demonstrating that the settlement distribution is fair, reasonable and adequate." *Holmes v. Continental Can Co.,* 706 F.2d 1144, 1147 (11th Cir.1983). The Proposed Settlement is unfair, unreasonable and inadequate because for many -- *if not most* -- of those within the class definition, the Proposed Settlement's claim process leads to a "no-payment" Catch-22.

In an extremely common scenario, a buyer makes all of the decisions regarding whether to obtain a home warranty, how much to spend on that warranty, what particular coverage options to obtain, and which home warranty provider to use, and then the seller simply reimburses the buyer for the cost of the warranty that the buyer has chosen. The Plaintiffs are clearly aware of how common it is for the seller to reimburse the buyer for the cost of a warranty as the Plaintiffs have stated to this court that "**the vast majority of this class consist[s] of sellers."** (Doc #43, at p. 2). However, as will be shown below, as negotiated by Plaintiffs' counsel neither the buyer nor the seller has any chance of receiving any benefit under the Proposed Settlement, regardless of whether the relevant real estate agents were paid an illegal kickback by AHS.

According to recent filings by the Plaintiffs, a home seller who is merely reimbursing a buyer for the cost of a home warranty could be considered the "purchaser" of the warranty. (*See* Doc #43). In response to Objector's Motion to Intervene, Plaintiffs explained at length that their Proposed Settlement is not intended to benefit a home buyer (like Objector Schuler) who is reimbursed by the home seller for the amount of a home warranty. (*See* Doc #43, at 1-5). Instead, according to Plaintiffs, the home seller who reimburses the home buyer should be considered the "purchaser" of the warranty and thus a member of the present class.

(*Id*.). As a result of this explanation, Plaintiffs assert that home *sellers* comprise the "vast majority" of their class. (*Id.* at 2.).

A problem arises, however, when the Proposed Settlement does not merely require that a claimant "purchase" a warranty in a transaction that involved a kickback payment by AHS to the real estate agents. Rather, a class member must further swear under oath that AHS was "suggested" to him by the real estate agent and that he selected AHS ***because*** of the real estate agent's suggestion. (*See* Proof of Claim form at Question 15; *see also* Proposed Settlement at ¶ 2.38 (defining "Qualifying Claim"). Of course, as discussed above, home sellers do not typically select the home warranty provider. Rather, the home *buyer* does. The seller is most often simply reimbursing the cost of a warranty that was selected by the buyer (up to an agreed-on amount). Thus, even though it would be absurd to ask a seller who did not select AHS why they selected AHS, the claims process for the Proposed Settlement actually depends upon a claimant providing the "correct" answers to precisely just such absurd questions in order to be entitled to recover *any amount under the settlement*.

To be a "Qualifying Claim," a seller must establish that the real estate agent in question "suggested that the [seller] purchase the Home Service Contract" and further establish that the seller "would not have purchased the Home Service Contract absent such suggestion." (*See* Proof of Claim form at Question 15; *see*

also Proposed Settlement at ¶ 2.38 (defining "Qualifying Claim"). Of course, since the decision to go with AHS was actually made by the buyer, the seller will never be able to establish such a "Qualifying Claim." Furthermore, if the buyer who selected AHS is not considered to have "purchased" the home warranty because he was reimbursed by the seller for the cost of the warranty, then the home buyer will also never be able to establish a qualifying claim.

It must be noted that this Catch-22 is entirely a creation of the parties and their Proposed Settlement and has nothing to do with the relevant law. The relevant statute and case law does not define the "purchase" of a home warranty in the manner put forward in recent briefs (not in the definition or settlement itself) by the parties. More obviously (and regardless of how one determines who is charged for or purchased a home warranty), the law simply does not impose any "reliance" or "but for the real estate agent's suggestion" element; the parties here invented and imposed that on the class through their own devices.

To consider the impact of this Catch-22, the Court need only consider the claims of all named plaintiffs that have appeared in this case, as well as the claim of this Objector.

The first named plaintiff, Rudd, "sold a home" and one of the closing costs was a charge for an AHS home warranty to cover the buyer's new home. (Doc #1, Original Complaint, at 3). There is nothing in the record to suggest that Rudd, as

opposed to the home buyer, chose AHS. Next, plaintiff Heil joined the case, alleging that when she "sold her condominium … one of the items listed among Mrs. Heil's closing costs was a charge for a one-year home warranty purchased from AHS." Again, nothing before the Court even remotely suggests that Heil, the seller, somehow selected AHS as the warranty provider to cover the buyer. And the situation is the same for the Abneys, the current named plaintiffs and proposed class representatives. The Abneys "sold a home" and "among the Abneys' closing costs was a charge for $524 for a one-year home warranty purchased from AHS." (Doc #6, 2nd Amend. Compl. at pp. 4-5). The record is devoid of any evidence to suggest that the Abneys, as opposed to the buyer, decided to buy a home warranty and selected AHS on the basis of a representation made by their real estate agent. But if it *was* the buyer who decided to obtain a home warranty and/or selected AHS as the particular home warranty provider, the Abneys will themselves not be able to establish a "Qualifying Claim."

With regard to Objector's transaction, Plaintiffs and AHS have both filed briefs herein arguing that Objector should not be considered a class member because the HUD form states that the cost of the warranty was paid by the seller. However, Objector was the one that made the decision to obtain a warranty, and the one that selected AHS as the provider. (*See* Doc # 41, at pp. 3-4; *id.* at Exhibits C, D, E, and F; Doc #45 at pp. 4-6 and the Exhibits attached thereto). Thus the

home seller in Objector's transaction did not select AHS, and thus will not be able to establish that he selected AHS because of a "suggestion" to do so by a real estate agent. Thus, under the Proposed Settlement, neither the buyer nor the seller recovers anything even though the "purchaser" (whoever that is) is a "class member" who must release all claims against all "Released Parties."

Of course, Objector's transaction is hardly the only one to involve the buyer choosing to obtain a warranty, selecting a warranty provider, and then being reimbursed for the cost of that warranty at closing. In fact, in Texas, the state-promulgated standard form contract provides that the home buyer selects the home warranty company, and that the home seller pays for it up to the amount specified in the contract. The Texas ***standard form contract*** provides as follows:

> H. RESIDENTIAL SERVICE CONTRACTS: Buyer may purchase a residential service contract from a residential service company licensed by TREC. If Buyer purchases a residential service contract, Seller shall reimburse Buyer at closing for the cost of the residential service contract in an amount not exceeding _____. Buyer should review any residential service contract for the scope of the coverage, exclusions and limitations. ***The purchase of a residential service contract is optional. Similar coverage may be purchased from various companies authorized to do business in Texas.***

See attached Exhibit 1, at p. 4, ¶ 7(H) (Texas Real Estate Commission, Form 20-8, available online at http://www.trec.state.tx.us/pdf/contracts/20-8.pdf) (emphasis in original). By definition, virtually all Texans who fall within the class definition will recover NOTHING under the Proposed Settlement because, in Texas, sellers

did not choose AHS, but according to the parties herein, home buyers did not purchase the warranty if they were reimbursed.

There does appear to be some group (of ***completely unknown*** size) that might benefit from the settlement. For example, it is certainly feasible that some seller decided to purchase a warranty for the benefit of their buyer, and further took it upon themselves to select the particular warranty provider. It is even *possible* the Abneys were such sellers (as far as Objector is aware, the paltry record before the Court lacks even the relevant contract documents for the Abney transaction to be analyzed, and they never sat for a deposition so these matters were never examined). Some buyers also likely selected and paid for AHS home warranties without being reimbursed by their seller. Such buyers and sellers might be able to state a "Qualifying Claim." But the proponents of settlement ought to be required to prove to the Court that they have not concocted a settlement that limits potential recovery to only a handful of the entire class that is ostensibly releasing all of their claims.

Plaintiffs suggest the "vast majority" of the class consists of sellers. In turn, the vast majority of theses sellers likely did not select AHS at all because the buyer made the decision. Therefore, a significant portion and probably the majority of the class will face, and not overcome, the hurdle of satisfying both the parties' recent construction of "purchaser" (which, according to Plaintiffs, means home

sellers in the "vast majority" of cases) and further establish that they selected AHS because of the "suggestion" made by a real estate agent (because in the vast majority of cases, sellers do not make any such selection).

If the Abneys (home sellers) did choose AHS as the warranty provider for the buyer in their transaction, the Abneys are anything but typical. The Proposed Settlement provides no benefit at all to many, if not most (there are no real numbers as the Abneys have done so very little to develop the record) buyers and sellers who have claims against AHS that are supposedly being settled in this case. The settlement is not fair, reasonable or adequate and should not be approved.

III. CONCLUSION AND PRAYER

For all the reasons set forth herein as well as those set forth in the previously filed Motion to Intervene (Doc # 40) and Memorandum in Support (Doc # 41), in particular that Plaintiffs are releasing valuable claims against Real Estate Professionals which they have neither the standing or inclination to litigate for no compensation, the Plaintiffs should not be named as Class Representatives, the proposed Class should not be certified, and the Proposed Settlement should be rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was filed electronically on June 27, 2011. Parties may access this filing through the Court's CM/ECF system. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

Further, notice was faxed to the following as required by the Notice of the settlement:

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