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

THOMAS S. ABNEY and JENNIFER L. ABNEY, on their own behalf and on behalf of all others similarly situated,	)	
Plaintiffs,	)	**CIVIL ACTION NO. CV-09-P-1018-S**
v.	)	
AMERICAN HOME SHIELD CORPORATION,	)	
Defendant.		

PLAINTIFFS' BRIEF CONTAINING SUPPLEMENTAL AUTHORITY IN SUPPORT OF FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Thomas S. Abney and Jennifer L. Abney (hereinafter collectively referred to as "plaintiffs") submit the following brief containing supplemental authority in support of final approval of class action settlement.

I.

INTRODUCTION

Plaintiffs request this Court to finally approve the class action settlement. The scope of the release in this settlement is reasonable and permissible under the law, and Class Counsel's decision not to sue real estate brokers and professionals for breach of fiduciary duty was based on

careful legal analysis. It is appropriate for a class action settlement to include a release of non-asserted claims and of non-parties. The breadth of the settlement release, moreover, is entirely necessary to ensure finality for defendant American Home Shield. Otherwise, this settlement would not have been obtained.

II.

ARGUMENT

A. Scope Of The Release In This Settlement Is Reasonable And Permissible.

On June 26, 2011, Michelle A. Schuler (hereinafter "Schuler") filed an objection to this settlement, contending that the releases in this settlement should not be permitted to cover real estate brokers and other real estate professionals that were parties to the transactions sued upon in this case. It is plaintiffs' understanding by speaking with defense counsel for American Home Shield that the objection has been resolved by giving additional benefits to the class. Schuler's decision to withdraw her objection is in accordance with the law regarding releases in class action litigation.

The scope of the release in this settlement is reasonable and is not overly broad. "[P]ractically speaking, class action settlements simply will not occur if the parties cannot set definitive limits on defendants' liability." In re WorldCom, Inc. Securities Litig., 2007 U.S. Dist. LEXIS 48155, at *17

(S.D.N.Y. July 6, 2007) (quoting Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96, 106 (2d Cir. 2005)). "The scope of a settlement release, however, is limited by the 'identical factual predicate' and 'adequacy of representation' doctrines." In re WorldCom, 2007 U.S. Dist. LEXIS 48155, at *17 (quoting Wal-Mart, 396 F.3d at 106). Plaintiffs' release in this settlement is restricted to the specific transactions on which Plaintiffs' and the Class Members' claims are based and does not release anything beyond the transactions at issue.

Plaintiffs' release does include claims not presented in this case, which are based on the underlying transactions at issue. It is well settled that such a release is permissible. "Class action releases may include claims not presented in the complaint and even those which could not have been presented so long as the released conduct arises out of the 'identical factual predicate' as the settled conduct." In re Currency Conversion Fee Antitrust Litig., 264 F.R.D. 100, 118-19 (S.D.N.Y. 2010) (quoting Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96, 107 (2d Cir. 2005); TBK Partners, Ltd. v. W. Union Corp., 675 F.2d 456, 460 (2d Cir. 1982)). Courts have recognized "that in order to achieve a comprehensive settlement that would prevent relitigation of settled questions at the core of a class action, a court may permit the release of a claim based on the identical factual predicate as

that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action." TBK Partners, 675 F.2d at 460. This rule of law serves the important policy interest of judicial economy by permitting parties to enter into comprehensive settlements that 'prevent relitigation of settled questions at the core of a class action. In re Currency Conversion, 264 F.R.D. at 119. "As long as the overall settlement is found to be fair and class members were given sufficient notice and opportunity to object to the fairness of the release, [there is] no reason why the judgment upon settlement cannot bar a claim that would have to be based on the identical factual predicate as that underlying the claims in the settled class action." TBK Partners, 675 F.2d at 460. The breadth of the release in this settlement, therefore, is reasonable, and this Court should have no hesitation in approving the settlement.

Class Counsel also adequately represented the class as to the un-asserted but released claims in the settlement agreement. "Adequate representation of a particular claim is established mainly by showing an alignment of interests between class members, not by proving vigorous pursuit of that claim." Wal-Mart, 396 F.3d at 106-07; see also In re WorldCom, Inc. Securities Litig., 2007 U.S. Dist. LEXIS 48155, at *23 ((S.D.N.Y. July 6, 2007) ("If the claimants wished to bring their own separate claims against their broker for

losses in their WorldCom trading, they could have opted out of the class action.). Plaintiffs' and class members' interests were aligned insofar as the interest was recovery for losses from the alleged kickbacks in the real estate transactions at issue in the case.

B. Class Counsel's Decision Not To Sue Real Estate Brokers And Professionals For Breach Of Fiduciary Duty Was Based On Careful Legal Analysis.

Class Counsel's pre-suit legal research revealed difficult-to-overcome barriers to recovery under a breach of fiduciary duty theory against the un-named real estate brokers and professionals and, thus, Class Counsel chose not to sue these parties. In a class action case, it is not necessary, or even a requirement, for plaintiffs to sue each and every potential defendant in order for a court to approve a settlement releasing all potential parties from liability. "[C]lass action settlements have in the past released claims against non-parties where, as here, the claims against the non-party being released were based on the same underlying factual predicate as the claims asserted against the parties to the action being settled." Wal-Mart, 396 F.3d at 109 (quoting In re Lloyd's Am. Trust Fund Litig., 2002 U.S. Dist. LEXIS 22663, at *11 (S.D.N.Y. Nov. 26, 2002); see e.g., In re Holocaust Victim Assets Litig., 105 F. Supp. 2d 139, 143, 160-65 (E.D.N.Y. 2000) (approving class settlement with broad releases against non-parties, including insurance

carriers, other banks, and Swiss governmental entities); In re Orthopedic Bone Screw Products Liab. Litig., 176 F.R.D. 158, 181 (E.D. Penn. 1997) (approved release of un-asserted claims against unnamed parties "based on the identical factual predicate as that underlying the claims in the settled class action"); Epstein v. Wittig, 2005 U.S. Dist. LEXIS 31078, at *14 (D. Kan. Dec. 2, 2005) (approving settlement that released both the named and unnamed parties "with respect to asserted or unasserted claims arising out of the same underlying facts"). Plaintiffs are releasing only those claims and parties that relate to the transactions at issue in the class action, which is wholly supported by case law.

In addition, it is far from clear that the realtors who disclosed to their principals that they were receiving a financial benefit from the home warranty transaction have, in fact, breached their fiduciary obligations to the principals. One example is Schuler's own situation, in which the arrangement between her agent and AHS was disclosed in the agency agreement between her and the realtor. (Schuler Agency Agreement, Ex. 12 to Ex. A to American Home Shield's Response to Motion to Intervene, ¶ 11.c.). Under Texas law, a real estate agent may act in a double agent capacity, representing both sides of the transaction and receiving a commission from both principals, so long as the arrangement is disclosed to

both principals. Armstrong v. O'Brien, 83 Tex. 635, 19 S.W. 268, 274 (Tex. 1892); Tinsley v. Penniman, 12 Tex. Civ. App. 591, 34 S.W. 365, 367 (Tex. App. Ct. 1896); Keitt v. Gresham, 174 S.W. 884, 886 (Tex. App. Ct. 1915); Baker v. Greer, 208 S.W. 755, 756 (Tex. App. Ct. 1919). It would be quite difficult to argue that it is consistent with fiduciary obligations for an agent to serve two antagonistic masters on opposite sides of a transaction, so long as there is disclosure and consent, and yet inconsistent with fiduciary obligations for the agent to receive an ancillary benefit from a third party, even though that benefit is disclosed to the principal in a signed agency agreement.

Numerous Texas cases have made clear that disgorgement of an entire fee for breach of fiduciary duty is far from automatic. The Texas Supreme Court held, in Burrow v. Arce, 997 S.W.2d 229, 241 (Tex. 1999), that "to require an agent to forfeit all compensation for every breach of fiduciary duty, or even every serious breach, would deprive the remedy of its equitable nature." Texas law states that in a situation where, as here, "an agent who agreed to accept [] profit from the person with whom [the agent] was dealing on behalf of his principal must disgorge *that profit*," not their entire compensation. Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 201 (Tex. 2002)(emphasis supplied) (citing Siegrest v. O'Donnell, 182

S.W.2d 403, 405 (Tex. Civ. App. – San Antonio 1944, writ ref'd); *See also*, Kinzbach Tool Co. v. Corbett-Wallace Corp., 160 S.W.2d at 514 (Tex. 1942). "Recovery [for breach of fiduciary duty] is limited to the profit, benefit, or advantage received by the fiduciary." Marist College v. Nicklin, 1995 Tex. App. LEXIS 871, *14 (Tex. Civ. App. 1995) (citing Anderson); *see also*, Watson v. Limited Partners of WCKT, Ltd., 570 S.W.2d 179, 182 (Tex. Civ. App.--Austin 1978, writ ref'd n.r.e.). Thus, even if Ms. Schuler could prove that her agent breached his fiduciary obligations to her and even if she could prove she was damaged as a result, the most likely measure of damages a Texas court sitting in equity would award is the amount by which the agent profited from the transaction – in other words, the $90 kickback.

Finally, class counsel concluded well before filing this case that a claim for breach of fiduciary duty against a real estate agent would be difficult, if not impossible, to maintain as a class action. Individual liability and damages issues would abound. A central issue that could not be decided on a class basis would be the particular circumstances of any disclosure of the kickback arrangement. In some circumstances, as in Schuler's own case, disclosure is made and consent is given at the time of the formation of the agency relationship. In some circumstances, the agent may have never

informed the principal of the kickback arrangement. In others, the agent's disclosure may have come much later, at a time when any consent given might be held not to suffice to absolve the agent of liability for the conflict of interest. These are matters that would have to be decided on an individual basis, and it is difficult to imagine any federal court holding in such circumstances that common issues predominate over individual ones. Fed. R. Civ. Proc. 23(b)(3).

III.

CONCLUSION

Based on the foregoing supplemental authority and the previously filed material in this case, this Court should finally approve the settlement in this class action.

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CERTIFICATE OF SERVICE

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