IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

TIMOTHY WILLIAMS, Plaintiff, v. UNION CAPITAL MORTGAGE CORP., et al. Defendants	) CASE NO. CV 11- 765720)) JUDGE PAMELA BARKER))) **Journal Entry:**) Decision and Order on) Motion for Class Certification)))	CV11765720 83853415

This matter is before the Court on Plaintiff Timothy Williams' Motion for Class Certification filed September 13, 2013 (hereinafter "Plaintiff's Motion"). On October 15, 2013, Defendants Union Capital Mortgage Corporation, Ronald M. Szuch, and Union Capital Escrow Corporation (hereinafter "Defendants") filed a Brief in Opposition to Plaintiff's Motion. On October 31, 2013, Plaintiff filed his Reply brief. On November 26, 2013, the Court granted Defendants' Motion For Leave To File A Surreply Instanter to Plaintiff's Motion. Upon consideration of the arguments raised and the evidence presented by the parties, the Court finds as follows.

1) RIGOROUS ANALYSIS BY COURT

Plaintiff Williams, as the proposed representative of the putative class, must demonstrate that each requirement for certification of a class action set forth under Civil Rule 23 has been satisfied. In deciding Plaintiff's Motion, the Court must conduct its own analysis under Civ.R. 23. Indeed, "[w]hen determining whether to

certify a class, a trial court must conduct a rigorous analysis, and it may grant certification only after resolving all relevant factual disputes and finding that sufficient evidence proves that all requirements of Civil Rule 23 have been satisfied."[1] This rigorous analysis "may include probing the underlying merits of the plaintiff's claim, but only for the purpose of determining whether the plaintiff has satisfied the prerequisites of Civ. R. 23."[2] In this matter, a rigorous analysis was conducted as demonstrated by the briefing submitted by the parties and reviewed by the Court, the pre-trials and telephone conferences conducted by and between the Court and counsel, and the March 12, 2013 hearing conducted by the Court on Plaintiff's Motion.

2) STANDARD OF REVIEW FOR THE COURT

In determining whether a class action may be maintained, the Court has broad discretion "and that determination will not be disturbed absent a showing of an abuse of discretion."[3] A trial court abuses its discretion when "the trial court's decision [is] unreasonable, arbitrary, or unconscionable."[4]

3) STANDARD FOR CLASS CERTIFICATION: SEVEN REQUIREMENTS

The requirements for maintaining a class action are set forth in Civil Rule 23. The factors that the Court is required to analyze in evaluating Plaintiff's Motion are: "(1) an identifiable class must exist and the definition of the class must be unambiguous; (2) the named representatives must be members of the class; (3) the

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[1] *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St. 3d 373, 374 (Ohio 2013).
[2] *Stammco, LLC v. United Tel. Co. of Ohio*, 136 Ohio St.3d 231, 2013-Ohio-3019, 994 N.E.2d 408, syllabus, *Reconsideration denied by Stammco v. United Tel. Co.*, 136 Ohio St.3d 1496, 2013-Ohio-4140, 994 N.E.2d 465, citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-52, 180 L.Ed.2d 465 (2011).
[3] *Marks v. C.P. Chemical Co.*, 31 Ohio St. 3d 200, 201 (Ohio 1987).
[4] *Wilson v. Brush Wellman, Inc.*, 103 Ohio St. 3d 538, 545 (Ohio 2004).

class must be so numerous that joinder of all members is impracticable; (4) there must be questions of law or fact common to the class; (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; (6) the representative parties must fairly and adequately protect the interests of the class; and (7) one of the three Civ.R. 23(B) requirements must be met." *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 125 Ohio St.3d 91, 93, 2010-Ohio-1042, 926 N.E.2d 292, at ¶ 6, quoting *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 71, 1998-Ohio-365, 694 N.E.2d 442 (1998), citing Civ.R. 23(A) and (B) and *Warner v. Waste Mgt.*, 36 Ohio St. 3d 91, 521 N.E.2d 1091 (1988).[5]

4) SUMMARY OF PLAINTIFF'S MOTION FOR CLASS CERTIFICATION:

This case involves the Plaintiff's purchase of his Bay Village home in May of 2008. For this real estate purchase, Plaintiff used Defendants' services, and Defendants provided a HUD-1 form which included numerous fees, including an Appraisal Fee of $300.00 and a Credit Report fee of $50.00. Plaintiff argues that these fees for third party services were greater than the actual costs incurred or paid by Defendants for these services.

In Plaintiff's Motion, Plaintiff moved to identify the putative class as "all individuals or entities who: 1) from 15 years prior to the filing of the complaint to the date of the order issuing notice; 2) were customers of the Defendants; and 3) were charged by Defendants any listed fee on their HUD-1 in an amount more than Defendants paid to any third party". However, it must be noted that during the hearing of March 12, 2014, Plaintiff narrowed his identification of the putative class

[5] *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St. 3d 373, 377 (Ohio 2013).

to those customers specifically charged a $350.00 fee on the HUD-1 form for an appraisal and credit report and abandoned any arguments raised as to additional fees.[6]

As modified at the hearing, the central issue or question raised by Plaintiff's Motion is whether it is lawful for Defendants to "up-charge" the putative class members on the HUD-1 form for third party services for credit reports and appraisals in conjunction with real estate purchases. Since a small amount of money is in question individually and since Plaintiff argues this practice of "up-charging" is widespread, Plaintiff maintains that this case is appropriate for class action certification.

Plaintiff argues that he has met each and every one of the required Civ. R. 23 factors. Plaintiff asserts that this case involves an identifiable class with an unambiguous definition so that it can be readily assessed if a person fits the class, i.e., those charged $350.00 for an appraisal and credit report on the HUD-1 form. Plaintiff argues that he fits the class as a person who was charged this fee. Plaintiff further argues that the class in question is so numerous, possibly around 6,000 customers, so that only a class action is practical. Plaintiff indicates that the common issue that unites the class is the "up-charging". Plaintiff Williams indicates he is typical of the class as he, too, was charged this fee.[7] Further Plaintiff Williams

[6] Plaintiff referred to the $350 fee as an "up-charge" for the credit report and appraisal, meaning that the costs paid by Defendants to third-parties for the credit report and appraisal totaled less than $350. Defendant referred to the $350 fee as an "application fee" that includes costs for the credit report, appraisal, and processing services associated therewith.

[7] On the HUD-1 form relative to Plaintiff's real estate transaction which via Affidavit Defendant Szuck testified was not a form provided by Union Capital Mortgage Corporation, the $300 Appraisal Fee and the $50 Credit Report fee are separate line items because that specific form did not permit the originator to

claims that he is a representative typical of the class and that his interests are not antagonistic to the class and he will vigorously prosecute the claim. Finally, Plaintiff Williams argues that he satisfies the Civ.R. 23(b) requirement that the common question of who was "up-charged" this fee predominates over questions affecting individual members and that a class action is superior to other available methods as the individual amount in controversy is so small.

5) SUMMARY OF DEFENDANTS' OPPOSITION TO CLASS CERTIFICATION:

Defendants' main argument is that Plaintiff cannot prove his claim on a class-wide basis and that Plaintiff has failed to satisfy the rigorous analysis detailed above and required under Civ.R. 23. According to Defendants, whether or not the putative class members qualify to participate in the class action depends on the analysis of individual transactions - which thus creates a lack of uniformity. Defendants argue that they are allowed to charge an application fee and that this fee is appropriately used to cover the costs for credit reports and appraisals. Importantly, Defendants argue that the amount of fees involved for the services in question varies per customer and may even exceed the amount charged ($350). This amount is actually a "flat fee" charged for services, and in many cases the amounts for these services vary, which would trigger an individual analysis of each and every transaction to determine if it would qualify as an "upcharge". As such, the Defendants argue that a common question does not predominate the class, as an individual inquiry is required as to all 6000 prospective members.

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indicate that an Application Fee was collected; whereas on HUD-1 forms generated and typically used by Union Capital Mortgage Corporation, there is one line item designated as an "Application Fee" of $350.00.

Further, Defendants argue that the HUD-1 form used by Plaintiff Williams is not the same form used by most of its customers.[8] As such, Plaintiff Williams is not typical of other members of the class and would not serve as an appropriate representative.

6) INDIVIDUAL ANALYSIS AS A BAR TO CLASS CERTIFICATION: PERME v. UNION ESCROW CO. et al.

In their briefs and during the March 12, 2013 hearing, Plaintiff and Defendants cited to, and relied upon the holding from the *Perme* case[9] to support their respective positions. The Court agrees, however, with the Defendants' analysis that the *Perme d*ecision would preclude class certification in a case like this because an individual analysis is required, i.e., the alleged "up-charge" at issue in this case would require individual assessments as not all customers were overcharged. Defendants note that due to the varying amounts of fees in question, the Defendants adopted a flat fee to cover the costs generally associated with the processing of applications. The result of these variations would be an individual analysis of each case, which would result in a lack of predominance in this class and a failure of the Plaintiff to fulfil his Civ. R. 23 requirements. When the Court asked Plaintiff's Counsel about this very issue at the March 12, 2014 hearing, Plaintiff's Counsel

[8] Williams' form indicated a separate appraisal fee and credit report fee, and Defendants argue that on most forms this fee is listed as simply an "application fee" for $350.00.

[9] *John Perme, et al. v. Union Escrow Co. et al.* (August 2, 2012), 2012-Ohio-3448. (It is important to note that this decision vacated the previous decision of the Eighth District Court of Appeals from May 31, 2012).

conceded that varying costs may be involved, but dismissed this issue as a question of only the appropriateness of charging a flat fee.[10]

The Court however, views the varying charges by customer as grounds to deny class certification. *Perme* directly addresses the largest obstacle facing Plaintiff in certifying this matter: "Because individualized inquiries were required for each class member to determine the effect of the purchase agreement, we concluded that the matter could not be certified."[11] In *Perme* the Court did go on to find that some of the claims included in the Complaint were permissible for certification, as they did not require individual scrutiny and constituted statutory claims.[12] This distinction, however, is not present in the instant matter, as the Second Amended Complaint of the Plaintiff, filed January, 11, 2013, does not include any statutory claims that do not rest upon individual analysis of the prospective class members. Again, under *Perme* the "predominance requirement cannot be met where individualized inquiry into each transaction is necessary". [13]

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[10] Plaintiff argued that the appropriateness of the "flat fee" would then be a question for the jury, and not a bar to certification.

[11] *John Perme, et al. v. Union Escrow Co. et al.* (August 2, 2012), 2012-Ohio-3448 (Vol 757, Page 491, Paragraph 11).

[12] *John Perme, et al. v. Union Escrow Co. et al. (*August 2, 2012), 2012-Ohio-3448 (Vol 757, Page 491, Paragraph 11).

[13] *John Perme, et al. v. Union Escrow Co. et al.* (August 2, 2012), 2012-Ohio-3448 (Vol 757, Page 494, Paragraph 17).

7) **HOLDING OF THE COURT**

Given the facts of this case and given the clear guidance offered by the Eighth District in the *Perme* decision, the Court finds that Plaintiff's proposed class certification lacks predominance and Plaintiff's Motion for Class Certification must be and is DENIED.

DATED THIS 15th day of April, 2014.

Pamela A. Barker
JUDGE PAMELA A. BARKER