IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

JAY REIFERT,

Plaintiff,

MEMORANDUM AND ORDER

v.

04-C-969-S

SOUTH CENTRAL WISCONSIN MLS CORPORATION, REALTORS ASSOCIATION OF SOUTH CENTRAL WISCONSIN, INC., ROBERT L. COURTER, SUSAN MATHEWS, DAVID STARK, ROBERT WEBER, THOMAS BUNBURY, MAURICE W. HILL, PETER SVEUM, MARSHALL ZWYGART and DAVID MCGRATH,

Defendants.

Plaintiff Jay Reifert commenced this anti-trust action alleging that defendant South Central Wisconsin MLS Corp. ("SCW MLS") unlawfully ties the sale of its services to the purchase of services from its corporate parent, defendant Realtors Association of South Central Wisconsin, Inc. ("Realtors"). The matter is presently before the Court on the plaintiff's motion to certify a plaintiff class pursuant to Rule 23, Fed. R. Civ. P. The following are facts relevant to class certification which are undisputed for purposes of this motion.

FACTS

Defendant Realtors is a real estate professionals trade association and the owner of 100% of SCW MLS' stock. It offers

numerous services to its members including education courses, referral programs, conventions, publications, lobbying and social functions. As a contractual condition of membership Realtors requires members to join the Wisconsin Association of Realtors and the National Association of Realtors. Annual fees to join all three associations are approximately $449. Defendant Realtors is a membership organization which fixes its dues to recover the costs of the services it provides to its members.

Defendant SCW MLS maintains a data base of homes for sale known as a multiple listing service. It has a monopoly on the service in south cental Wisconsin. Nearly all broker represented residential property sold in south central Wisconsin is listed in defendant's MLS. There is no effective commercial substitute for a subscription to defendant's MLS. Approximately 100% of active residential real estate agents in south central Wisconsin use defendant's MLS. SCW MLS bylaws explicitly limit MLS access to real estate licensees belonging to the National Association of Realtors.

Plaintiff is a licensed real estate broker who work's exclusively as a buyer's agent. As an exclusive buyer's agent and member of a trade organization which competes with defendant Realtors, the National Association of Exclusive Buyer's Agents (NAEBA), he had no desire to join defendant Realtors. He sought to purchase and was denied MLS services because he was not a member of

the National Association of Realtors. In order to gain access to the MLS, plaintiff was compelled to join defendant Realtors and to pay its membership dues even though he had no interest in being affiliated with it or receiving the services it offered. He has paid dues in excess of $2000 to the defendant Realtors to maintain his membership and thereby obtain MLS access.

During the four years at issue in this action there have been at least approximately 2,079 annual and 5600 total SCW MLS participants.

MEMORANDUM

Determining whether class certification is appropriate requires consideration of the four threshold prerequisites of Rule 23(a): numerosity, commonality, typicality and adequate representation. Implicit in this task is determining whether a class exists and defining it. Simer v. Rios, 661 F.2d 655, 669 (7th Cir. 1981); 7A Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice and Procedure, § 1760 (3d ed. 2005); In re Copper Antitrust Litigation, 196 F.R.D. 348, 353 (W.D. Wis. 2000). The class cannot be so broad that it includes numerous individuals who are unlikely to have the claim being litigated. Wright, supra, § 1760 at n. 12. Adashunas v. Negley 626 F.2d 600 at 604. The class must be manageable in the sense that the court is able to identify and notify the members. Hardy v. City Optical, Inc., 39 F.3d 765, 771 (7th Cir. 1994). A class which is defined

in part by the state of mind of its members is usually not manageable. Simer, 661 F.2d at 669.

Plaintiff initially defined the class as all 5600 individuals who participated in SCW MLS. That class is far too broad. Plaintiff does not contend that defendant Realtors extracted supra-competitive prices for its membership as a result of the tying arrangement. Rather, plaintiff contends only that he and certain other members did not want to join at all and were forced to buy entirely unwanted services. Plaintiff predicts, but has thus far produced no evidence, that 30% of defendant Realtors' members would not have joined absent the tying arrangement. Accordingly, even by plaintiff's own reckoning more than two thirds of the initially identified class has no claim. Apparently conceding the point plaintiff in its reply brief at page 5 redefines the class as including only "those who would not have voluntarily purchased Realtor Association services."

This new more limited class is inherently unmanageable because membership is entirely contingent on each individual member's state of mind. Members who joined involuntarily to gain access to the MLS are unidentifiable from any records or other objective evidence. The possibility that plaintiff may be able to establish a statistical likelihood that a certain percentage of past members would not have joined does nothing to help identify them individually. Such a determination would require member by member

testimony and credibility assessment. It might be possible to limit the class to NAEBA members who could be presumed to oppose membership in defendant Realtor. However, plaintiff testified that there were only two other potential NAEBA members in South Central Wisconsin. Such a class could not satisfy the numerosity requirement.

In fact, even if the class could be defined as all involuntary members of defendant Realtors, plaintiff has failed to provide any evidence of numerosity. There is no affidavit from any other member suggesting that membership was coerced. There is no evidence that anyone has complained about the rule or sought to change it. Although plaintiff suggests in his briefs that he will produce statistical evidence of likely numerosity, at this time there is nothing in the record to support it and it amounts to speculation which cannot sustain a numerosity finding. Marcial v. Coronet Ins. Co., 880 F.2d 954, 957 (7th Cir. 1989).

Plaintiff has been unable to identify a class which is sufficiently numerous or manageable to sustain class certification. Accordingly,

ORDER

IT IS ORDERED that plaintiff's motion to certify a class is DENIED.

Entered this 20th day of May, 2005.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge