

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI  
KANSAS CITY

BRENT M. KRAUSE, et ux.	)	
	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 0516-CV30246
	)	Division 15
CHICAGO TITLE INSURANCE	)	
COMPANY, et al	)	
	)	
Defendants.	)	

FINDINGS OF FACT, OPINION, AND JUDGMENT

This case came before the Court on March 2 and 3, 2010 for a trial on Plaintiffs' claim for an equitable accounting. Having reviewed the evidence and considered the arguments of counsel, the Court concludes that Plaintiffs are entitled to an accounting. Pursuant to Mo. R. Civ. P. 73.01(c), the Court renders the following findings and opinion containing a statement of the grounds for its decision. As used herein, the term "Class Member" includes each person who is a member of a class certified in this case.

FINDINGS OF FACT

1. Defendant, Chicago Title Insurance Company ("CTI"), performs escrow settlement services in 18 states, including Missouri. CTI refers to the person who is responsible for preparing the Settlement Statement, and for the receipt and the disbursement of funds in a real estate closing, as escrow officer, closer, or settlement agent.
2. CTI is an escrow agent in the real estate closings in which the Class Members were parties.
3. CTI collected through escrow from each Class Member money for the sole

purpose of paying recording fees in that Class Member's transaction. CTI then deposited those recording fees into an escrow account.

4. Each Class Member entrusted a specified amount of their money to CTI for which CTI agreed the sole and specific purpose was paying recording fees.

5. Each Class Member is a party to an escrow agreement with CTI under which CTI agreed to use the money it collected for payment of recording fees solely for the purpose of paying the recording fees actually charged by the municipality or governmental entity. The Court finds that CTI's agreement with each Class Member concerning recording fees defined part of CTI's responsibility as an escrow agent.

6. In addition, CTI agreed with each class member to act as a settlement agent for each class member and to receive and disburse money, including recording fees, in closing a real estate transaction only as directed by each class member on that Class Member's settlement statement.

7. CTI handled and possessed money collected from each Class Member for recording fees that was property belonging to each Class Member. CTI kept no specific records on each Class Members' transaction to show what it did with each Class Members' money that was entrusted to CTI for payment of recording fees.

8. The Class Members do not have records or documents from which they can determine how much CTI over collected in recording fees. The Class Members cannot determine, from reviewing the public records alone, if CTI paid to record documents for their transactions.

9. CTI had no policy throughout the class period of reconciling recording

fees collected with recording fees actually paid by CTI, and the Court finds that no reconciliation occurred during that period. CTI did not keep contemporaneous records on a transaction-by-transaction basis of how much it was over collecting from each Class Member.

10. Unlike the Class Members, CTI has the special expertise, industry knowledge, and knowledge of its own records and procedures such that it can determine how much it paid in recording fees on each Class Members' transaction.

11. In addition, CTI is able to take records it receives in recording documents to determine how much it paid to record those documents related to particular file numbers and CTI has records from which it can on a file number and party basis determine how much it collected for recording fees. CTI could have done that throughout the class period. CTI has records which show whether it paid to record a document and the Class Members do not have those records. The Class Members do not have the specialized knowledge that CTI has in order to determine whether CTI recorded documents in a particular transaction or what documents it did record, if any.

12. The Class Members have a need to discover from CTI how much in recording fees has been over collected from them.

13. If there is an over collection of recording fees, the over-collected amount belongs to the person from whom the recording fees were collected.

14. CTI's settlement agents have throughout the class period known that the amount shown on the settlement statement for recording fees is an estimate and that amount may or may not reflect the actual recording fees. CTI has never implemented a reconciliation policy to reconcile if a recording fee collected was greater than, less than, or equal to the amount

actually charged to record documents. If the settlement agent wanted to determine the amount of recording fee that was actually charged by the recorder of deeds for recording a document in a transaction, she or he would ask for the recorded record returned to the production office.

15. CTI acknowledges that it is its responsibility to send the money back to the person from whom there was an over collection, but only if CTI knows there has been an over collection. Throughout the Class Period, CTI made money on recording fees being over collected. The Court finds that CTI consciously elected to not implement any procedure or practice during the class period to determine if there was an over collection of recording fees. Such a procedure could have been easily implemented.

16. CTI was aware prior to the class period that the over collection of recording fees was a problem in at least one state. CTI did nothing to determine if that problem existed in Missouri and, if so, to take steps to address it.

17. CTI conducted a random sample of transactions it closed for files opened in 2003 through 2005. Of the twenty-five files randomly selected, CTI determined that in twenty-four of them recording fees had been over collected. The average per file over collection in those twenty-four files is \$32.37. Even then, CTI did not implement any procedure to reconcile recording fees.

18. CTI stated in its discovery responses, "Chicago Title does not keep the amount paid to government entities on a transaction basis."

19. Plaintiffs undertook extensive discovery efforts to obtain from CTI how much it paid governmental entities in recording fees on a transaction-by-transaction basis, to no avail. CTI did not provide that information.

20. The Court finds that CTI intentionally did not keep records of over collected recording fees on a transaction basis in order to elevate its financial interest over the financial interest of the Class Members. The net amount of recording fees over collected by CTI grew during the class period until a point in time at which CTI made a concerted effort to ensure that it did not collect on an aggregate basis more for recording fees than it paid. From this evidence, the Court finds that CTI intentionally over collected recording fees on a net basis and that if CTI had kept records on a transaction basis to reconcile recording fees it would not have obtained the large amount of over collected recording fees it did during the class period.

21. Prior to and throughout the class period CTI decided to not keep readily available records of over collected recording fees on a transaction basis. Based on CTI's view that if it does not know that there has been an over collection of recording fees it has no responsibility to refund any over collected amounts and it does not issue any refund, the Court finds that CTI believed it could avoid having to refund over collected recording fees simply by poor record keeping and having no reconciliation procedure.

22. As a result of CTI's failure to keep records and its failure to implement any reconciliation procedure despite the knowledge that it was over collecting recording fees, determining the amount of money over collected from each Class Member based on a review of each Class Member's transaction file is unnecessarily difficult. Thus, the escrow accounts with respect to each Class Member are sufficiently complex in this case to require an accounting performed by CTI so that CTI can inform each Class Member of that amount over collected from that Class Member. The Court finds that only someone with CTI's specialized knowledge and expertise of its own internal procedures and records can determine definitively how much money

has been over collected from each Class Members. The Court finds that documents recorded with the recorder of deeds show only what was charged to record a particular document and would not inform each Class Member who paid the recording fees. The Court finds that CTI has exhibited an expertise and access to records in determining over collected recording fees that is superior to other parties to real estate transactions.

23. CTI recognizes it owes fiduciary duties as a settlement agent. CTI recognizes that one of the fiduciary duties owed when acting as a settlement agent is "a duty to conserve the monies involved in the transaction and pay it only to those persons entitled to receive it pursuant to the parties instructions and company policy." "Monies" means all monies deposited in escrow and disbursed through escrow, including recording fees.

24. CTI recognizes that, "It is universally understood that the settlement agent is the neutral third party charged with carrying out the mutual instructions provided by the parties. The responsibilities of a settlement agent also include their fiduciary duties." CTI recognizes that among its fiduciary duties is to, "Act with a high degree of care to conserve the money and pay it only to those persons entitled to receive it as disclosed on your settlement statement." The money to be "conserved" and "paid only to those entitled to receive it" includes all money deposited in escrow and disbursed through escrow, and that includes recording fees.

25. CTI has taken the position that if each Class Member undertook the task of performing the accounting CTI is obligated to perform, CTI could challenge the accuracy of that accounting. In addition, CTI has taken the position that it is not required to accept the search results and calculation by the Class Representatives of the amount of each Class Member's over-collection, but instead could challenge their accuracy of the amount CTI paid in recording fees on

a file-by-file basis. CTI has taken the position that the Class Representatives, even with the assistance of counsel and an expert witness, could not accurately determine the amount of their own over-collection and that the calculations for many other Class Members would be erroneous if attempted by Plaintiffs.

26. CTI has challenged Plaintiffs' expert for allegedly improperly calculating overcharges in connection with his analysis of a sampling of files for the purpose of calculating an aggregate damages estimate for the class. In response to a direct request, CTI's counsel refused to identify the files on which they believe Plaintiffs' expert made a mistake or for which the data on which he relied was erroneous.

27. The Court finds that it is inequitable for CTI to challenge the Class Members' damage calculation when the amount could have been easily proved had CTI simply kept adequate records on a transaction basis of what it did with each Class Members' money and given CTI's expertise and superior knowledge. If CTI had kept such records, then the Class Members would have been able to obtain that information easily from CTI in discovery, and the matter would not have been subject to dispute. The Class Members have no legal remedy for the time and money they would necessarily spend in trying to determine what CTI did with the money entrusted to it for payment of recording fees in order to prove their damages.

28. The Court finds that Plaintiffs' claim for an equitable accounting was plead alternatively and that Plaintiffs' request for the relief of an equitable accounting was one of several forms of relief pleaded for by Plaintiffs and was not dependent upon Plaintiffs' inability to prove actual damages as a legal remedy. Based on the Second Amended Petition and construing it in its entirety and liberally, the Court finds that neither Plaintiffs' claim for an

accounting nor request for accounting relief were contingent on the presence or absence of any other claim or relief. Construed fairly, Plaintiffs' Second Amended Petition seeks to prove damages with an accounting for each class member.

29. The Court finds that Plaintiffs have never made clearly inconsistent statements to the Court or taken clearly inconsistent positions in any pleadings, filings, or arguments to the Court and that the knowledge of Plaintiffs based on information provided by CTI evolved and changed over time. The Court finds that it never accepted any position or statement advanced by Plaintiffs that resulted in an unfair advantage to Plaintiffs or an unfair detriment to CTI.

30. The Court finds that Plaintiffs up to and at the time of the April 2007 class certification hearing consistently made clear that the mechanics of how the over collected amount on each class member's transaction would be determined was an issue that could be resolved in a number of ways at a later time.

31. The Court finds that the time it takes to determine from the records of the recorder of deeds how much was charged by that office depends on the circumstances of each transaction, and the court finds that on average it would take five minutes per transaction. The Court finds that Plaintiffs never represented that they would research the recorder of deeds office to determine how much the recorder of deeds charged to record documents, but only that such an exercise was a possible alternative.

32. The Court has considered Chicago Title's Civil Rule 73.01 Request That The Court Prepare and File an Opinion, Including Legal Grounds for Decision and Finding of Facts, of Its Decision in the Non-Jury Trial Ordered by the Court to Commence on March 2,

2010 which was filed on March 2, 2010. Many of CTI's requests do not concern fact issues, and many concern facts not relevant to any issue currently before the Court. To the extent there are any fact issues upon which findings were requested by CTI and such requests are not otherwise addressed in this Findings Of Fact, Opinion, And Judgment, the Court finds those facts as support and are consistent with the Court's opinion.

#### OPINION

33. Under Missouri law, CTI has a fiduciary relationship with each Class Member and owes fiduciary duty to each Class Member. *Hammack v. Coffelt Land Title, Inc.*, 284 S.W.3d 175, 178 (Mo. Ct. App. 2009); see also *Eastern Atlantic Transp. and Mechanical Eng., Inc. v. Dingman*, 727 S.W.2d 418, 423 (Mo. Ct. App. 1987).

34. Similarly, under Missouri law,

“One is said to act in a ‘fiduciary capacity’ ... when ... the business which he transacts, or the money or property which he handles, is not his own or for his own benefit, but for the benefit of another person, as to whom he stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part.”

*Zelch v. Ahlemeyer*, 592 S.W.2d 482, 485 (Mo. Ct. App. 1979), quoting *Black's Law Dictionary*, Fourth Edition. The Court concludes that because CTI conducted business and handled money – recording fees in this case – which was not its own, but which belongs to the Class Members, a fiduciary relationship exists as a matter of law and was defined at least in part by CTI's agreement to use recording fees collected only to pay recording fees actually incurred. In addition, internal CTI documents are some evidence of the existence of CTI's fiduciary relationship and fiduciary duties, regardless of whether those internal documents were shared with Class Members. The Court concludes that CTI's fiduciary duties included its escrow agreement to only use recording

fees collected to actually pay recording fees. The Court concludes that CTI was the agent of each Class Member for purposes of paying recording fees

35. “From this fiduciary relationship spring certain legal consequences. Most important ... is the obligation of the fiduciary to account for his handling of the beneficiary’s business.” *Zelch*, 592 S.W.2d at 485 (emphasis added). Thus, under Missouri law,

It is well settled that when a fiduciary relation is shown to exist, and property or property interests have been intrusted to an agent ..., the burden is thrown back upon such agent intrusted to render an account, and to show that all his trust duties have been fully performed, and the manner in which they have been performed. It is assumed that the agent ... has means of knowing and does know, what the principal ... cannot know, and is bound to reveal the entire truth,

It is the obligation of the fiduciary to keep complete and accurate accounts or records and if he has not done so all doubts and obscurities are resolved against him. Loss or absence of records does not absolve the fiduciary of the obligation to render a full account and he bears the burden of providing what the lost or absent records would show.

*Id.* (internal quotations omitted) (emphasis added). See also *King v. Bullard*, 257 S.W.3d 175, 184 (Mo. Ct. App. 2008) (“[t]he failure to keep proper books and records constitutes a breach of the fiduciary relationship”); *McCreary v. McCreary*, 954 S.W.2d 433, 451 (Mo. Ct. App. 1997) (“As a fiduciary of the funds in question, respondent was obligated to keep complete and accurate records and bore the burden of proving what any cost or absent records would show.”) (internal quotations omitted); *In re Estate of Condren*, 756 S.W.2d 599, 602 (Mo. Ct. App. 1988) (same).

36. As a fiduciary entrusted with another’s funds, CTI “is bound to reveal the entire truth” in response to inquiries from any Class Member about what CTI did with their

money. *Zelch*, 592 S.W.2d at 485.

37. If the records necessary for CTI to fulfill that obligation are absent from CTI's files, then the burden is on CTI, not the Plaintiffs, to establish what those absent records would show. *McCreary*, 954 S.W.2d at 451; *Zelch*, 592 S.W.2d at 485.

38. Therefore, "[a]n equitable accounting is an appropriate remedy where there is a duty to account arising from a fiduciary relationship existing between the parties." *McCreary*, 954 S.W.2d at 451. The Court concludes that CTI had a duty to account to each Class Member as to how money collected for recording fees was used.

39. The Court concludes that based on the facts in this case the Class Members need not satisfy each of the four-part test set forth in *Shaner v. System Integrators, Inc.*, 63 S.W.3d 674 (Mo. Ct. App. 2001), to establish their right to an accounting. The plaintiff in *Shaner* never challenged whether he had to establish all four elements, and the courts in *King*, *Zelch*, *McCreary*, and *Condren* did not analyze the plaintiff's right to an accounting under the four-part test utilized in *Shaner*. In *King*, *Zelch*, *McCreary*, and *Condren*, the courts found that the existence of a fiduciary relationship alone that entailed entrustment of money or property for a specific purpose, and which included a duty to account for the handling of another's money or property, triggered the right to an equitable accounting.

40. Accordingly, the Court concludes based on the existence of the fiduciary relationship between CTI and the Class Members in which each Class Member entrusted CTI with money for the sole and specific purpose of paying recording fees, the Class Members are entitled to an equitable accounting from CTI of how much of the money collected for recording fees was actually paid by CTI to the recorder of deeds for recording documents in each Class

Members' transaction.

41. Although not required to do so in this case, the Court also concludes that the Class Members have established each of the four elements in Shaner.

42. CTI had a substantive fiduciary obligation to keep accurate books and records with respect to the Class Members' money that was entrusted to it for payment of recording fees. *Zelch*, 592 S.W.2d at 485. Under Missouri law, "[l]oss or absence of records does not absolve the fiduciary of the obligation to render a full account and he bears the burden of providing what the lost or absent records would show[.]" *Zelch*, 592 S.W.2d at 485. The Court concludes the Class Members have shown a need for discovery in this case.

43. The Court concludes that the Class Members have shown that determining the amount over collected on a particular transaction is sufficiently complex and implicates CTI's expertise and familiarity to support requiring CTI to perform an accounting. The Court concludes that any determination which a Class Member would make does not stand on the same footing as an accounting that CTI would make and is not a substitute for an accounting performed by CTI. The Court concludes that an expert opinion on aggregate damages is not a remedy that would compensate for an accounting performed by CTI. The Court concludes that CTI's admission that it failed to keep complete and accurate accounts or records of what it did with the money entrusted to it by each Class Member for payment of recording fees mandates that "all doubts and obscurities" regarding such accounts are resolved against CTI. *Zelch*, 595 S.W.2d at 485. Missouri law mandates that CTI, not Plaintiffs, bear the burden and cost of the accounting which is one of CTI's fiduciary duties. *Id.*; *McCreary*, 954 S.W.2d at 451.

44. This case involves many transactions with the Class Members' money and,

therefore, the complexity of accounts element is satisfied. See *Bath Junkie Branson, L.L.C. v. Bath Junkie, Inc.*, No. 04-3421-CV-SRED, 2006 WL 3825103, \*5 (W.D. Mo. Dec. 21, 2006) (finding right to an accounting where “the accounts holding this money are complicated in that many transactions with this money have taken place”). The Court notes that its conclusion concerning “complexity” applies only in the context of applying the Shaner elements and should not be taken to in any respect question the appropriateness of class certification, an issue that is not currently before the Court.

45. Plaintiffs have no adequate remedy at law because, by CTI’s own admission, Plaintiffs cannot obtain the necessary information from CTI in discovery, CTI failed to keep accurate books and records of how much it paid in actual recording fees from the money collected from each Class Member for recording fees, and the damages measured by over collected recording fees do not compensate the Class for the cost of fulfilling CTI’s fiduciary obligation to keep records and provide an accounting. The Court concludes that under Missouri law an accounting is properly used as evidence of damages in the present case, and therefore the availability of legal damages in the present case cannot defeat the right to an accounting and shows that legal damages do not provide the same remedy as an accounting. The Court concludes that each Class Member is entitled to the process of having CTI render an account of how his or her money was handled. Money damages are not an adequate remedy to compensate for that process. See *Bath Junkie*, 2006 WL 3825103 at \*5 (“[c]ourts at law do not provide a remedy for plaintiffs to obtain the necessary information”).

46. The Court concludes that in addition to the grounds set forth above it also has authority under Mo. R. Civ. P. 52.08(d) to order an accounting as part of the course of

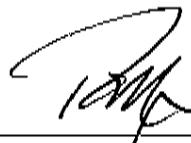
proceedings in this class action.

Accordingly, the Court hereby enters the following JUDGMENT:

1. CTI is ordered to perform an accounting of each Class Members' transaction to determine for each Class Member: a) how much was collected from each Class Member for recording fees; b) how much CTI actually paid to record the documents in connection with each Class Member's transaction; and c) the amount over collected from each Class Member;

2. All parties shall appear at a status conference at 8:30 a.m. on August 17, 2010 at which time CTI is ordered to report on the progress of the accounting and the Court and Class Counsel shall be given an opportunity to ask questions about the accounting. Five (5) days prior to that status conference CTI shall provide Class Counsel with a report on the progress of the accounting.

Date: 7/9/10

  
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Circuit Judge Robert Schieber

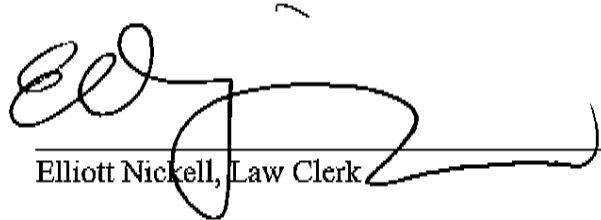
CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing was served via hand-delivery this 12<sup>th</sup> day of January, 2010 upon the following:

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