APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1059

PHILLIP ALIG; SARA J. ALIG; ROXANNE SHEA; DANIEL V. SHEA, Individually and on behalf of a class of persons,

Plaintiffs - Appellees,

v.

QUICKEN LOANS INC.; AMROCK INC., f/k/a Title Source, Inc., d/b/a Title Source Inc. of West Virginia, Incorporated,

Defendants - Appellants,

and

DEWEY V. GUIDA; APPRAISALS UNLIMITED, INC.; RICHARD HYETT,

Defendants.

Appeal from the United States District Court for the Northern District of West Virginia, at Wheeling. John Preston Bailey, District Judge. (5:12-cv-00114-JPB-JPM, 5:12-cv-00115- JPB)

Argued: October 27, 2020
Decided: March 10, 2021

Before NIEMEYER, WYNN, and FLOYD, Circuit Judges.

Affirmed in part and vacated and remanded in part by published opinion. Judge Wynn wrote the majority opinion, in which Judge Floyd joined. Judge Niemeyer wrote a dissenting opinion.

WYNN, Circuit Judge:

Plaintiffs are a class of "[a]ll West Virginia citizens who refinanced" a total of 2,769 mortgages with Defendant Quicken Loans Inc. from 2004 to 2009, "for whom Quicken [Loans] obtained appraisals" from Defendant Amrock Inc., an appraisal management company formerly known as Title Source, Inc. ("TSI").[1] J.A. 627.[2]

Plaintiffs allege that pressure tactics used by Quicken Loans and TSI to influence home appraisers to raise appraisal values to obtain higher loan values on their homes constituted a breach of contract and unconscionable inducement under the West Virginia Consumer Credit and Protection Act. The district

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[1] For ease of reference, we continue to refer to this entity as TSI throughout this opinion.

[2] Citations to "J.A. __" and "S.J.A. __" refer, respectively, to the Joint Appendix and Sealed Joint Appendix filed by the parties in this appeal.

court agreed and granted summary judgment to Plaintiffs.

We agree with the district court that class certification is appropriate and that Plaintiffs are entitled to summary judgment on their statutory claim. However, we conclude that the district court erred in its analysis of the breach-of-contract claim. Accordingly, we affirm in part and vacate and remand in part.

I.

Viewing the evidence in the light most favorable to Defendants, the record shows the following.[3]

In refinancing mortgages for thousands of West Virginia homes during the class period, Quicken Loans asked potential borrowers to complete an application; sign a uniform deposit agreement authorizing Quicken Loans to "advance out-of-pocket expenses on [the borrower's] behalf" for an appraisal, a credit report, or both; and provide a deposit averaging $350. J.A. 381. Quicken Loans also

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[3] We consider only the evidence presented at the summary judgment stage. *See Rohrbough v. Wyeth Laboratories, Inc.*, 916 F.2d 970, 973 n.8 (4th Cir. 1990) (declining to consider "several documents that were not before the district court when it considered [the] motion for summary judgment"); *see also Kaiser Aluminum & Chem. Corp. v. Westinghouse Elec. Corp.*, 981 F.2d 136, 140 (4th Cir. 1992) ("It is well established that affidavits and exhibits not before the court in making its decision are not to be considered on appeal."); *cf. Bogart v. Chapell*, 396 F.3d 548, 558 (4th Cir. 2005) ("Generally, we will not examine evidence … that was inexcusably proffered to the district court only after the court had entered its final judgment.").

collected information from potential borrowers, including an estimated value of their homes.

Quicken Loans relayed the borrower's estimates of value to TSI, which passed those estimates on to contracted appraisers via appraisal engagement letters. If an appraisal came back lower than the estimated value, appraisers received phone calls from TSI drawing their attention to the estimated value and asking them to take another look. There is no evidence to suggest that borrowers were aware of these practices.

Plaintiffs' and Defendants' experts agreed that, during the class period, providing the borrower's estimate of value to the appraiser was common in the industry. Additionally, although the 2008–2009 Uniform Standards of Professional Appraisal Practice ("Uniform Appraisal Standards") indicated that appraisers could not ethically accept an appraisal assignment with a specific value listed as a *condition*, the chairman of the organization that issues the Uniform Appraisal Standards testified that an appraiser did not violate those standards merely by accepting an assignment that included an owner's estimate of value. The record includes significant testimony from appraisers that borrowers' estimates of value did not influence them. Finally, the record includes testimony that the estimated value served the legitimate purposes of helping appraisers determine whether to accept an assignment and, upon acceptance, assess an appropriate fee.

Nevertheless, authorities warned lenders before and during the class period that providing estimated values to appraisers was improper. For instance, a 1996 letter from the U.S. Department of Housing and Urban Development to mortgagees instructed that appraisers were required to certify "that the appraisal [was] not based on a requested minimum valuation, [or] a specific valuation or range of values." S.J.A. 857. A 1999 letter from the Office of the Comptroller of the Currency to the Appraisal Standards Board voiced some concern with the practice of providing the owner's estimate of value and warned "employees of financial institutions" against "pressuring appraisers to raise their value conclusions to target values." S.J.A. 861. And in 2005, the Office of the Comptroller of the Currency noted that "the information provided by the regulated institution should not unduly influence the appraiser or *in any way suggest the property's value*." Off. of the Comptroller of the Currency et al., *Frequently Asked Questions on the Appraisal Regulations and the Interagency Statement on Independent Appraisal and Evaluation Functions*, Fed. Deposit Ins. Corp. (Mar. 22, 2005), https://www.fdic.gov/news/news/financial/2005/fil2005a.html (emphasis added) (saved as ECF opinion attachment). While the 2005 guidance was not binding on Defendants, it is relevant to understanding regulators' thoughts on the issue at the time.

Furthermore, during the class period, Defendants stopped providing appraisers with estimated home values in other states—such as neighboring Ohio—where lenders faced mounting legal pressure against the practice. And they ceased the practice altogether in 2009, "right around the time that the [Home] Valuation Code of Conduct was agreed to and defined for the marketplace." J.A. 235. That Code of Conduct prohibits lenders or appraisal management companies from providing an estimated value to an appraiser in a refinancing transaction.[4] By 2011, Quicken Loans itself recognized that "influenc[ing] the appraiser to set [the] home at any certain value … is illegal and unethical." J.A. 107.

The record thus indicates that the acceptability of this practice shifted dramatically during the class period. What started out as a common (though questionable) practice became one that, in short order, was explicitly forbidden—and viewed as unethical by Quicken Loans itself.

Yet the record reveals no such qualms on the part of Defendants during the class period. In one internal email from 2007, which had the subject line "Asking for the max increase available," an Operations Director for Quicken Loans wrote that TSI was "getting a lot of calls from appraisers stating that they can't reach *our requested value* and asking what

[4] "No employee, director, officer, or agent of the lender, or any other third party acting as … appraisal management … on behalf of the lender, shall influence or attempt to influence the development, reporting, result, or review of an appraisal through coercion, extortion, collusion, compensation, inducement, intimidation, bribery, or in any other manner including but not limited to … providing to an appraiser an anticipated, estimated, encouraged, or desired value for a subject property or a proposed or target amount to be loaned to the borrower, except that a copy of the sales contract for purchase transactions may be provided[.]" *Home Valuation Code of Conduct*, Freddie Mac 1 (Dec. 23, 2008), http://www.freddiemac.com/singlefamily/pdf/122308_valuationcodeofconduct.pdf (saved as ECF opinion attachment).

should they do." District Ct. Docket No. 206-2 at 39 (emphasis added). He instructed employees to include in value-appeal requests "something along the lines of 'any additional value would be appreciated.'" *Id.* A second email from a different Quicken Loans employee a few weeks later suggests that Quicken Loans' usual process at the time involved ordering value appeals and second appraisals, as well as "arguing over value appeal orders and debating values with bankers and appraisers."[5] S.J.A. 711. The email continued:

> [Fannie Mae] is being dragged into a law suit [sic] in the state of New York over lender pressure on appraisals. I don't think the media or any other mortgage company … would like *the fact we have a team who is responsible to push back on appraisers questioning their appraised values*…. Ohio is very specific in regards to asking for appeals and they say it is illegal. Other[] states I am sure will jump on board.

Id. (emphasis added). One recipient of the latter email testified in 2009 that the purpose of providing the estimated value was to "give[] an appraiser an ability to see what they are going to potentially look at the property at [sic]" and to "give[] them a heads up as to what the client thinks the home is worth." S.J.A. 709.

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[5] The practice of "ordering, obtaining, using, or paying for a second or subsequent appraisal … in connection with a mortgage financing transaction" was later forbidden by the Home Valuation Code of Conduct, with certain limited exceptions. *Home Valuation Code of Conduct*, *supra* note 4, at 2.

Dewey Guida, an appraiser routinely contracted by Quicken Loans and TSI, testified during a deposition that prior to 2009, TSI *always* included the borrower's estimate of value, but he could not recall whether other companies did so. He agreed that these estimated values were a "tip-off." S.J.A. 674. He testified that he largely ignored the estimated value "unless the value didn't come in. Then we received some phone calls about it[.]" S.J.A. 669. If the appraisal "wasn't at the estimated value," he clarified, "I would get a call on it" from TSI "with the value." *Id.* These calls were "[v]ery vague," but in essence, Defendants were saying: "We had an estimated value of this amount of money. You appraised at this amount.... [C]ould you relook at it? ... [I]s there a reason why?" *Id.*

Class representatives Phillip and Sara Alig refinanced their mortgage through Quicken Loans in 2007. The Aligs estimated their home to be worth $129,000, and Quicken Loans passed this information along to TSI, who, in turn, passed it on to Guida. Guida appraised the home to be worth $122,500. He then received a request from Defendants to revisit the appraisal and raise it to $125,500 based on a modification to the data points for the closest comparison house. Guida testified that such requests from his clients for "straight value increase[s]" were not common, but he acknowledged that he complied and raised the appraised value to $125,500, though he could not recall doing so. S.J.A. 671. The Aligs obtained a loan from Quicken Loans for about $113,000. Plaintiffs' two experts estimated that the actual 2007 value of the Aligs' home was $99,500 or $105,000, respectively.

Plaintiffs brought actions against Quicken Loans, TSI, and three other defendants in West Virginia state court in 2011 which were removed to federal court in 2012.[6] After a winnowing of the claims and defendants, three claims remain: (1) a civil conspiracy claim against both Quicken Loans and TSI; (2) a claim of unconscionable inducement to contract under the West Virginia Consumer Credit and Protection Act against Quicken Loans; and (3) a breach-of-contract claim against Quicken Loans.[7]

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[6] In addition to Quicken Loans and TSI, Plaintiffs' complaint named as defendants two appraisers, Guida and Richard Hyett, as well as Appraisals Unlimited, Inc., where Guida served as president. Moreover, the complaint proposed a defendant class, represented by Guida, Hyett, and Appraisals Unlimited, of appraisers "who receive appraisal assignments from Quicken [Loans] that improperly include the targeted appraisal figure Quicken [Loans] needs to issue the loans." J.A. 61.

[7] The complaint brought ten claims: (1) civil conspiracy, against all defendants; (2) unfair or deceptive acts or practices in violation of W. Va. Code § 46A-6-104, against all defendants; (3) excessive fees in violation of W. Va. Code § 31-17-8(c), (g), and (m)(1), against Quicken Loans; (4) unconscionable inducement to contract, against Quicken Loans; (5) accepting assignments listing target value numbers on appraisal request forms and accepting fees contingent upon the reporting of a predetermined appraisal value, in violation of W. Va. Code § 30-38-12(3) and -17, against Guida, Hyett, Appraisals Unlimited, and the proposed appraiser class; (6) charging illegal fees in violation of W. Va. Code § 46A-2-128(d), against Quicken Loans; (7) breach of contract, against Quicken Loans; (8) negligence and negligence per se, against all defendants; (9) fraudulent or intentional misrepresentation, against all defendants by the named plaintiffs only; and (10) making illegal loans in excess of the fair market value of the property in violation of W. Va. Code § 31-17-8(m)(8), against all defendants by the named plaintiffs only. Only counts 1, 4, and 7 are at issue in this appeal.

The district court conditionally certified Plaintiffs' class and granted in part and denied in part each of the parties' motions for summary judgment. The court then held an evidentiary hearing on damages, after which it imposed a statutory penalty of $3,500 as to unconscionability for each of the 2,769 violations, for a total of $9,691,500. The court also awarded Plaintiffs the appraisal fees they had paid as damages for breach of contract, for a total of $968,702.95. The court did not award separate damages for conspiracy.

II.

On appeal, Defendants first challenge the district court's decision to certify the class under Rule 23. Defendants argue that individual issues predominate over common ones, precluding class treatment. We disagree and affirm the district court's decision to certify the class.

A.

This Court reviews a class-certification decision for abuse of discretion.[8] *See Sharp Farms v. Speaks*, 917

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[8] We reject Defendants' contention that we should instead apply an unspecified level of "heightened scrutiny" because much of the language of the district court's opinions closely tracked that of Plaintiffs' briefs. Opening Br. at 16. In arguing for "heightened scrutiny," Defendants rely on this Court's decision in *Chicopee Manufacturing Corp. v. Kendall Co.*, 288 F.2d 719 (4th Cir. 1961).

That reliance is misplaced. *Chicopee* belongs to a line of Fourth Circuit cases that the Supreme Court limited long ago. *See Anderson v. City of Bessemer City*, 717 F.2d 149 (4th Cir. 1983), *rev'd*, 470 U.S. 564 (1985). In *Anderson*, we cited *Chicopee* and similar cases to support "[o]ur close scrutiny of the record"

F.3d 276, 290 (4th Cir. 2019) (certification); *Brown v. Nucor Corp.*, 785 F.3d 895, 901 (4th Cir. 2015) (decertification); *see also Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 654 (4th Cir.) ("Our review of class certification issues is deferential[.]"), *cert. denied*, 140 S. Ct. 676 (2019). "A district court abuses

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where the district court had directed the plaintiff's counsel to submit proposed findings of fact and conclusions of law and then partially incorporated them into the court's final order. *Id.* at 156; *see id.* at 152. The Supreme Court reversed, noting that the district court "d[id] not appear to have uncritically accepted findings prepared without judicial guidance by the prevailing party." 470 U.S. at 572. Instead, "the findings it ultimately issued … var[ied] considerably in organization and content from those submitted by petitioner's counsel." *Id.* at 572-73. Thus, the Supreme Court concluded that "[t]here [wa]s no reason to subject those findings to a more stringent appellate review than is called for by the applicable rules." *Id.* at 573.

Following *Anderson*, we have taken a more lenient approach to district court opinions that closely mirror a party's submissions. *See, e.g.*, *Aiken Cnty. v. BSP Div. of Envirotech Corp.*, 866 F.2d 661, 676-77 (4th Cir. 1989) (holding that a district court's near-verbatim adoption of an ex parte proposed order was not improper where the opposing party had the opportunity to air its views fully and the court appeared to have exercised independent judgment).

The circumstances of this case pass muster under *Anderson* and *Aiken County*. The district court engaged extensively with the issues over several years. There is substantial evidence that the court exercised independent judgment. While the court's opinion adopted significant language from Plaintiffs' briefs, it also included substantial sections the court wrote itself—as well as language adopted from *Defendants'* briefs. And, relevant to the class-certification question, the record shows that the court conducted its own Rule 23 analysis. The opinion "var[ies] considerably in organization and content from" Plaintiffs' briefs, and "[t]here is no reason to subject" the court's class-certification decision "to a more stringent appellate review than is called for by the applicable rules." *Anderson*, 470 U.S. at 572-73.

its discretion when it materially misapplies the requirements of [Federal] Rule [of Civil Procedure] 23," *EQT Prod. Co. v. Adair*, 764 F.3d 347, 357 (4th Cir. 2014), or "makes an error of law or clearly errs in its factual findings," *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 317 (4th Cir. 2006).

B.

A plaintiff seeking class certification under Rule 23 has the burden of demonstrating that the class satisfies the requirements for class-wide adjudication. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). The plaintiff must establish several "threshold requirements applicable to all class actions, commonly referred to as 'numerosity,' 'commonality,' 'typicality,' and 'adequacy.'" *Krakauer*, 925 F.3d at 654 (citing Fed. R. Civ. P. 23(a)). Rule 23 also contains an implicit requirement of ascertainability. *Id.* at 654-55. To obtain certification under Rule 23(b)(3), the plaintiff must additionally show that "[1] questions of law and fact common to class members *predominate* over any questions affecting only individual class members, and [2] that a class action is *superior* to other available methods for fairly and efficiently adjudicating the controversy." *Id.* at 655 (alterations in original) (emphases added) (citing Fed. R. Civ. P. 23(b)(3)). Here, Defendants challenge the class certification only on the issue of predominance.

The district court concluded that the central question underlying the statutory unconscionable-inducement claim was whether Defendants' practice of providing the borrowers' estimates of value to appraisers was unconscionable conduct under the

West Virginia Consumer Credit and Protection Act. Because that analysis focused on Defendants' behavior, the district court concluded that it concerned questions of law and fact common to all class members. Additionally, the court determined that the statutory damages could be determined class-wide at a set amount.

As for breach of contract, the parties stipulated that the named plaintiffs' interest-rate disclosures and deposit agreements were "representative of the standard deposit agreements used by Quicken Loans" throughout the class period. J.A. 185. Thus, the court concluded that questions of fact concerning the breach-of-contract claim could be resolved class-wide. And while individual evidence was required to determine the amount each class member paid for their appraisal—the cost the district court used to calculate the breach-of-contract damages award—Defendants have not suggested that evidence is difficult to obtain.

Nevertheless, on appeal, Defendants contend that individualized issues predominate. They argue that questions of standing, their statute-of-limitations defense, the unconscionable-inducement analysis, various breach-of-contract issues, and the calculation of damages all require individual determinations that should defeat class certification. We are not persuaded.

1.

First, Defendants argue that a significant number of the class members are uninjured and therefore lack standing. The question of class members' standing "can be seen as implicating either the jurisdiction of the court under Article III or the procedural issues embedded within Rule 23's requirements for class certification." *Krakauer*, 925 F.3d at 652. While we review class-certification questions for abuse of discretion, our review of our Article III jurisdiction is de novo. *See Curtis v. Propel Prop. Tax Funding, LLC*, 915 F.3d 234, 240 (4th Cir. 2019).

Defendants argue that there are class members who have not suffered any injury. Accordingly, in Defendants' view, the district court lacked Article III power to award damages to those class members. And moreover, they argue, the district court should not have certified a class containing uninjured members. But whether framed through Article III or Rule 23, Defendants' arguments lack merit.

Plaintiffs paid an average of $350 for independent appraisals that, as we conclude below, they never received. Instead, they received appraisals that were tainted when Defendants exposed the appraisers to the borrowers' estimates of value and pressured them to reach those values. Of course, "financial harm is a classic and paradigmatic form of injury in fact," *Air Evac EMS, Inc., v. Cheatham*, 910 F.3d 751, 760 (4th Cir. 2018) (quoting *Cottrell v. Alcon Laboratories*, 874 F.3d 154, 163 (3rd Cir. 2017)), and "[f]or standing purposes, a loss of even a small amount of money is ordinarily an 'injury,'" *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) (citing *McGowan v. Maryland*, 366 U.S. 420, 430-431 (1961), in which the Court concluded that "appellants fined $5 plus costs had standing").

Defendants argue that Plaintiffs were not injured because they benefitted from obtaining the loans. Even if that is true, "[o]nce injury is shown, no attempt is made to ask whether the injury is outweighed by benefits the plaintiff has enjoyed from the relationship with the defendant. Standing is recognized to complain that *some particular aspect* of the relationship is unlawful and has caused injury." 13A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3531.4 (3d ed. 2008 & Supp. 2020) (emphasis added); *see, e.g.*, *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 95 n.10 (2d Cir. 2017) ("[T]he fact that an injury may be outweighed by other benefits, while often sufficient to defeat a claim for damages, does not negate standing." (quoting *Ross v. Bank of Am., N.A. (USA)*, 524 F.3d 217, 222 (2d Cir. 2008))).[9] In sum, "there is simply not a large number of

[9] This is not a case where facts related to the same transaction demonstrate there was never an injury in the first place. *See Texas v. United States*, 809 F.3d 134, 155-56 & n.59 (5th Cir. 2015) (collecting cases and distinguishing *Henderson v. Stalder*, 287 F.3d 374, 379 (5th Cir. 2002), in which the Fifth Circuit had declined to find taxpayer standing where it did not appear that the taxpayers actually had to pay for the program at issue, and noting that in *Henderson*, "the extra fees paid by drivers who purchased the [challenged license] plates could have covered the associated expenses"; since "[t]he costs and benefits arose out of the same transaction, … the plaintiffs had not demonstrated injury"), *aff'd by an equally divided Court*, 136 S. Ct. 2271, 2272 (2016). Here, there is no doubt that Plaintiffs actually paid for the appraisal, and thus were injured. We decline to apply the "same transaction" test more broadly than our sister circuit did in *Texas* and contrary to the general rule that benefits conferred upon a plaintiff by a defendant cannot defeat standing.

uninjured persons included within the plaintiffs' class." *Krakauer*, 925 F.3d at 658.

2.

Next, the statute-of-limitations question is straightforward and susceptible to class-wide determination.[10] When Plaintiffs commenced this suit in 2011, the statute of limitations for the unconscionable-inducement claim was "one year after the due date of the last scheduled payment of the agreement." W. Va. Code § 46A-5-101(1) (2011).[11] Here, the district court pointed to several ways in which Defendants could perform the "ministerial exercise" of determining which loans fell outside the applicable limitations period.[12] J.A. 433. Section 46A-5-101(1)'s objective test for determining the limitations period distinguishes this case from those

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[10] This defense relates only to the statutory and conspiracy claims, which have the same statute of limitations for purposes of this case. *See Dunn v. Rockwell*, 689 S.E.2d 255, 269 (W. Va. 2009) ("[T]he statute of limitation for a civil conspiracy claim is determined by the nature of the underlying conduct on which the claim of conspiracy is based[.]"). Defendants have not suggested that Plaintiffs' contract claims—which are subject to a ten- year limitations period—are time-barred. *See* W. Va. Code § 55-2-6.

[11] After a 2015 amendment, the statute now provides a limitations period of "four years after the violations occurred." 2015 W. Va. Acts ch. 63 (codified at W. Va. Code § 46A-5-101(1)). Plaintiffs do not argue that the new limitations period applies retroactively. *Cf. Cruz v. Maypa*, 773 F.3d 138, 144 (4th Cir. 2014) (describing the analysis required for determining whether a statute lengthening the limitations period applies retroactively).

[12] At the initial class-certification phase, Defendants provided no evidence of any loans falling outside the limitations period. Defendants later located evidence of only three such loans.

where the statute of limitations depended on, for example, determining when the cause of action accrued—a question that requires analyzing "the contents of the plaintiff's mind." *Thorn*, 445 F.3d at 320.

Notwithstanding this straightforward analysis, Defendants seek to attack the district court's *alternative* conclusion that even if Defendants could demonstrate that some of Plaintiffs' claims were untimely, equitable tolling would apply. Defendants argue that equitable tolling requires individual determinations that counsel against class certification. That may be correct. *E.g.*, *EQT Prod. Co.*, 764 F.3d at 370. But the district court's class-certification order is not dependent on this alternative ground.

3.

Defendants also argue that Plaintiffs' unconscionable-inducement claims must be analyzed individually. They contend that Plaintiffs needed to prove that they were "actually induced to enter into a loan by the challenged practice," which would require peering into each class member's state of mind at the time of the loan signing. Opening Br. at 38. This argument implicates the merits of the unconscionable-inducement claim, which we discuss in detail below.

For present purposes, suffice it to say that we conclude Plaintiffs need only show misconduct on the part of Defendants, and concealment thereof, relating to a key aspect of the loan-formation process which necessarily contributed to the class members' decisions to enter the loan agreements. This is a determination that can be made across the class, since (1) for every member of the class, Defendants engaged in the same allegedly unconscionable practice—sharing borrowers' estimates of value with appraisers while failing to disclose that practice to Plaintiffs, and (2) unconscionable behavior affecting the appraised value of a property inherently impacts the borrower's decision to obtain a loan based on that number.

4.

Turning to the contract claim, Defendants first allege that Plaintiffs failed to perform their end of the contract. They base this assertion on the dubious ground that the record supports that *some* homeowners (not specifically any member of the class) *sometimes* seek to persuade appraisers to increase their appraisal values. Even if that evidence could be enough to suggest that the *class members* attempted to influence the appraisers, we conclude that Plaintiffs fully performed by paying the agreed-upon deposit.

Defendants also argue that the contractual element of damages should have been litigated on an individual basis. They contend that there are no damages, and thus there can be no breach of contract, if the appraiser would have reached the same result with or without the borrower's estimate of value. For example, even assuming that the borrower's estimate of value influenced the appraiser, one might expect the resulting appraisal to be the same with or without exposure to that value if the borrower's estimate of value was accurate. But even if such evidence is necessary—a question we address below—it can be evaluated through the ministerial exercise of comparing actual home values to estimates of value.

5.

Finally, Defendants contend that the district court could not order statutory penalties class-wide, arguing that the court was required to consider the level of harm suffered by each class member individually. But the Supreme Court of Appeals of West Virginia has clarified that "an award of civil penalties pursuant to" section 46A-5-101(1) is "conditioned only on a violation of a statute" and is permissible even for "those who have suffered no quantifiable harm" as long as they have been "subject to undesirable treatment described in [section 46A-2-121 or related provisions] of the [West Virginia Consumer Credit and Protection] Act."[13] *Vanderbilt Mortg. & Fin., Inc. v. Cole*, 740 S.E.2d 562, 566, 568-69 (W. Va. 2013). Moreover, the amount of damages "is within the sole province of the trial judge." *Id.* at 569. The district court acted within its discretion when it determined that the statutory damages could be assessed uniformly across the class.

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[13] We recognize that, in federal court, "a statutory violation *alone* does not create a concrete informational injury sufficient to support standing" for Article III purposes. *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 345 (4th Cir. 2017) (emphasis in original). There is no need to wade into that complicated area of the law here, however, because the class members suffered financial injuries sufficient to confer standing.

Accordingly, we affirm the district court's decision to certify Plaintiffs' class.[14]

III.

Having determined that Plaintiffs may pursue their claims as a class, we turn to the question of whether Defendants breached their contracts with each of the class members. We review de novo the district court's interpretation of state law, grant of summary judgment, and contract interpretation. *See Schwartz v. J.J.F. Mgmt. Servs., Inc.*, 922 F.3d 558, 563 (4th Cir. 2019); *Seabulk Offshore, Ltd. v. Am. Home Assurance Co.*, 377 F.3d 408, 418 (4th Cir. 2004). "Summary judgment is appropriate when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014) (internal quotation marks omitted).

For the reasons that follow, we conclude that the district court prematurely awarded summary judgment to Plaintiffs on their breach-of-contract claim. Accordingly, we vacate and remand for further proceedings.

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[14] Defendants have pointed to four loans for which the class member did not sign the stipulated document and therefore may not have paid a deposit. Of course, as federal courts, our Article III power limits us to providing relief for only those claimants who have been harmed, including in class actions. *See Lewis v. Casey*, 518 U.S. 343, 349 (1996). On remand, therefore, we instruct the district court to determine whether the class members who signed those four loans must be denied damages as to the unconscionable-inducement claim, the breach-of-contract claim, or both.

A.

"Because this case involves solely state-law matters, 'our role is to apply the governing state law, or, if necessary, predict how the state's highest court would rule on an unsettled issue.'" *Askew v. HRFC, LLC*, 810 F.3d 263, 266 (4th Cir. 2016) (quoting *Horace Mann Ins. Co. v. Gen. Star Nat'l Ins. Co.*, 514 F.3d 327, 329 (4th Cir. 2008)). Under West Virginia law, "[a] claim for breach of contract requires proof of the formation of a contract, a breach of the terms of that contract, and resulting damages." *Sneberger v. Morrison*, 776 S.E.2d 156, 171 (W. Va. 2015). We therefore begin our inquiry by considering whether the parties formed a contract at all.

Formation of a contract under West Virginia law requires "an offer and an acceptance supported by consideration." *Dan Ryan Builders, Inc. v. Nelson*, 737 S.E.2d 550, 556 (W. Va. 2012). The parties stipulated that the disclosures and agreements for the named plaintiffs' loans "are representative of the standard deposit agreements used by Quicken Loans" during the class period. J.A. 185. The named plaintiffs include both the Aligs, who serve as the class representatives, and another couple, Roxanne and Daniel Shea.

Two sections of the representative forms are relevant here. The first section, labeled "DISCLOSURE" on the Sheas' form and unlabeled on the Aligs' form, provides:

> Lender will begin processing your application (which may include ordering an appraisal …)

> immediately upon the submission of your application and deposit.… Lender's objective is to have your application fully processed … [before the] anticipated closing date. However, please note that some parts of this process aren't under Lender's control. For instance, Lender can't be responsible for delays in loan approval or closing due to … the untimely receipt of an acceptable appraisal ….

J.A. 381-82. The second section, labeled "DEPOSIT AGREEMENT" on both the Sheas' and Aligs' forms, states:

> With your deposit …, you authorize Lender to begin processing your loan application and advance out-of-pocket expenses on your behalf to obtain an appraisal and/or credit report.… If your application is approved, at the closing, Lender will credit the amount of your deposit on your closing statement toward the cost of your appraisal and credit report. Any additional money will be credited to other closing costs. If your application is denied or withdrawn for any reason, Lender will refund your deposit less the cost of an appraisal and/or credit report.

J.A. 381.[15]

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[15] The above-quoted "Deposit Agreement" language comes from the Sheas' form. The language used on the Aligs' form is substantially and substantively the same, though not identical. *See* J.A. 382. The most significant difference is that the Aligs' form lacks the phrase "to obtain an appraisal and/or credit report." However, like the Sheas' form, the Aligs' form still

The district court concluded that Quicken Loans was obligated to provide each class member with "an 'acceptable' appraisal, which, at a minimum, would require [it] to deal [reasonably and] honestly with its borrowers." J.A. 409. The court appears to have based this conclusion on the forms' reference to "the untimely receipt of an acceptable appraisal," from which the court deduced a contractual duty on the part of Quicken Loans to provide an "acceptable" appraisal. J.A. 381-82.

In our view, however, the natural reading of the key language—that Quicken Loans "can't be responsible for delays in loan approval or closing due to … the untimely receipt of an acceptable appraisal"—is to limit Quicken Loans' liability for delays, not to make promises as to the quality of the appraisal. J.A. 381-82. We therefore conclude that the text of the "Disclosure" section of the form signed by the Sheas and the untitled, yet identical section of the form signed by the Aligs does not create a contractual obligation for Quicken Loans to provide an "acceptable" appraisal.

But that is not the end of the matter because we hold that, instead, the forms create a contract in the Deposit Agreement section. The section is labeled "agreement" and includes an offer, acceptance, and consideration: Plaintiffs pay a deposit in exchange for Quicken Loans beginning the loan application process, which could include an appraisal or credit report. Plaintiffs' deposit is to be applied toward that

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specifies that the deposit is to be credited toward the cost of the appraisal and credit report.

cost regardless of whether the loan ultimately goes forward. Thus, Plaintiffs agreed to pay Quicken Loans for an appraisal or credit report. And because of how Plaintiffs' class is defined, all class members have necessarily paid for an appraisal.

We therefore agree with the district court that the parties formed a contract, albeit a different one from that found by the district court. But we conclude that whether *that* contract was breached—and whether there were resulting damages—are questions that the district court must review in the first instance. *See Fusaro v. Cogan*, 930 F.3d 241, 263 (4th Cir. 2019) ("We adhere … to the principle that the district court should have the first opportunity to perform the applicable analysis."). In particular, the district court will need to address Defendants' contention that there were no damages suffered by those class members whose appraisals would have been the same whether or not the appraisers were aware of the borrowers' estimates of value—which one might expect, for example, if a borrower's estimate of value was accurate.

B.

Plaintiffs urge us to uphold the district court's conclusion that "it was a necessary corollary of obtaining an appraisal that the [D]efendant[s] would obtain a fair, valid and reasonable appraisal of the property." J.A. 409. They contend that we may do so, even subtracting the word "acceptable" from the contract, by reference to the covenant of good faith and fair dealing. We agree that the covenant applies to the parties' contract. While the covenant may therefore come into play on remand, we conclude that it cannot by itself sustain the district court's decision at this stage.

1.

In West Virginia, there is an implied "covenant of good faith and fair dealing in every contract for purposes of evaluating a party's performance of that contract." *Evans v. United Bank, Inc.*, 775 S.E.2d 500, 509 (W. Va. 2015) (internal quotation marks omitted). The covenant requires "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." *Barn-Chestnut, Inc. v. CFM Dev. Corp.*, 457 S.E.2d 502, 508 (W. Va. 1995) (quoting *Ashland Oil, Inc. v. Donahue*, 223 S.E.2d 433, 440 (W. Va. 1976)) (discussing the covenant in the context of agreements governed by the Uniform Commercial Code).

Despite the Supreme Court of Appeals of West Virginia's broad statement in *Evans* that the covenant applies to *every* contract, Defendants imply that it is inapplicable here, noting in passing that "West Virginia courts have yet to apply the duty of good faith and fair dealing to a lender/borrower relationship in West Virginia." Opening Br. at 34 n.11 (citing *Quicken Loans, Inc. v. Brown*, 737 S.E.2d 640, 652 n.26 (W. Va. 2012)). Even assuming Defendants have preserved this issue,[16] we find their argument unpersuasive.

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[16] "A party waives an argument by failing to … develop its argument—even if its brief takes a passing shot at the issue." *Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir.

The case on which Defendants rely, *Quicken Loans v. Brown*, provides little guidance on the matter. In fact, in *Brown*, the Supreme Court of Appeals of West Virginia noted only that the "[p]laintiff also filed a claim for breach of the covenant of good faith and fair dealing, which the trial court found 'has not been applied to a lender/borrower relationship in West Virginia' and therefore was not addressed by the court." *Brown*, 737 S.E.2d at 652 n.26. The Court provided no further analysis.

Nevertheless, in more recent lender/borrower cases, the state Supreme Court has affirmed dismissal on the grounds that the plaintiffs' "failure to allege a breach of contract was fatal to their claim for a breach of the implied covenant of good faith and fair dealing." *Evans*, 775 S.E.2d at 509; *see also Brozik v. Parmer*, No. 16-0238, 2017 WL 65475, at *17 (W. Va. Jan. 6, 2017) (same). If the implied covenant was simply inapplicable to lender/borrower relationships, there would have been no need for the Court to engage in such analysis.

To be sure, *Evans* and *Brozik* do not explicitly hold that the implied covenant of good faith and fair dealing *does* apply to lender/borrower contracts. But given the presumption under West Virginia law that an implied covenant of good faith and fair dealing applies to every contract, we will not exclude lender/borrower cases from the ambit of that covenant in the absence of some affirmative direction from West Virginia courts to do so—particularly in light of the

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2017) (internal quotation marks and alterations omitted) (citing *Brown*, 785 F.3d at 923).

implication in *Evans* and *Brozik* that the covenant could apply in such cases when properly pleaded.

2.

Defendants are on stronger footing with their second argument. They contend that, even if the implied covenant can apply to lender/borrower contracts, West Virginia courts do not recognize a "freestanding claim of breach of the implied covenant of good faith and fair dealing where there is no breach of contract" and thus that Plaintiffs' claim under the covenant fails for lack of any breach of contract. Opening Br. at 34.

Defendants are correct that West Virginia law does not allow an independent claim for breach of the implied covenant unrelated to any alleged breach of contract. *Evans*, 775 S.E.2d at 509. Thus, the Supreme Court of Appeals of West Virginia has repeatedly held that plaintiffs cannot pursue a claim for breach of the implied covenant where they failed to allege breach of contract. *See id.*; *Brozik*, 2017 WL 65475, at *17 (same); *see also Gaddy Eng'g Co. v. Bowles Rice McDavid Graff & Love, LLP*, 746 S.E.2d 568, 578 (W. Va. 2013) (affirming summary judgment on good faith and fair dealing claim where trial court had "proper[ly] grant[ed] … summary judgment to the contract-based claims").

But here, Plaintiffs do not pursue a stand-alone claim of breach of the implied covenant of good faith and fair dealing. Rather, their complaint clearly alleges a claim of breach of contract and cites the implied covenant as relevant to that claim. That is proper under West Virginia law.

However, while Plaintiffs and the district court are correct that Quicken Loans was obligated to "obtain a fair, valid and reasonable appraisal of the property," that is only relevant for determining whether there was a breach. J.A. 409; *see Evans*, 775 S.E.2d at 509 (courts may consider the implied covenant of good faith and fair dealing when "evaluating a party's performance of th[e] contract" (quoting *Stand Energy Corp. v. Columbia Gas Transmission Corp.*, 373 F. Supp. 2d 631, 644 (S.D.W. Va. 2005))). There must also have been resulting damages for Plaintiffs' breach-of-contract claim to succeed. *See Sneberger*, 776 S.E.2d at 171. Accordingly, on remand, the district court may only grant summary judgment to Plaintiffs on the breach-of-contract claim if it concludes that (1) Quicken Loans breached its contracts with the class members, an analysis which may take into consideration how the covenant of good faith and fair dealing impacts the evaluation of Quicken Loans' performance under the contracts; and (2) the class members suffered damages as a result.

In sum, we conclude that a contract was formed between each class member and Quicken Loans. On remand, the district court should consider whether Plaintiffs have demonstrated an absence of genuine issues of material fact as to the other elements of a breach-of-contract claim. In conducting this analysis, the district court may consider the implied covenant of good faith and fair dealing to the extent that it is relevant for evaluating Quicken Loans' performance of the contracts.[17] *Evans*, 775 S.E.2d at 509.

IV.

We reach a different conclusion when it comes to Plaintiffs' claim under the West Virginia Consumer Credit and Protection Act (the "Act"). Although the claim is similar to the contract claim—in that both are based on Defendants' alleged misbehavior in the appraisal process—there is a key difference between the two: while breach of contract requires a demonstration of damages, the Act does not. Indeed, the Supreme Court of Appeals of West Virginia has made plain that the Act is to be construed broadly and that it is intended to fill gaps in consumer protection left by the common law, such as in breach-of-contract actions.

Prior to finalizing loan agreements with the class members, Defendants sought to pressure appraisers to inflate their appraisals of the class members' homes. For all class members, Defendants provided appraisers with estimated home values, and they at least sometimes followed up on appraisals that fell short of these targets with phone calls designed to persuade appraisers to reconsider their valuations. The record makes clear that, regardless of any legitimate objective Defendants had in providing the borrowers' estimates of value, they *also* provided

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[17] Because we vacate the district court's decision to grant summary judgment on Plaintiffs' contract claim, we also vacate the court's award of damages for that claim. Accordingly, we do not reach Defendants' arguments regarding the district court's order of damages related to breach of contract.

those estimates to an unscrupulous end: inflating appraisals. The record demonstrates that this pressure tainted the appraisal process, and it is beyond dispute that the appraisal process was central to the formation of the loan agreements. Moreover, Defendants did not reveal this practice to Plaintiffs. Given the centrality of appraisals in loan formation, Defendants' concealment of the scheme to inflate appraisals was unconscionable behavior that contributed to Plaintiffs' decisions to enter the loan agreements. Thus, we affirm the district court's holding that Plaintiffs are entitled to summary judgment on their unconscionable-inducement claim.

A.

As noted, we review the district court's interpretation of state law and grant of summary judgment de novo, *see Schwartz*, 922 F.3d at 563; *Seabulk Offshore*, 377 F.3d at 418, and summary judgment is only appropriate when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law, *Bostic*, 760 F.3d at 370.

Additionally, "[b]ecause federal jurisdiction in this matter rests in diversity, our role is to apply the governing state law." *Stahle v. CTS Corp.*, 817 F.3d 96, 99-100 (4th Cir. 2016) (footnote omitted). In deciding questions of state law, we first turn to the state's highest court and "giv[e] appropriate effect to all [the] implications" of its decisions. *Id.* at 100 (quoting *Assicurazioni Generali, S.p.A. v. Neil*, 160 F.3d 997, 1002 (4th Cir. 1998)). But "[i]f we are presented with an issue that [the state]'s highest court has not directly or indirectly addressed, we must anticipate how it would rule." *Liberty Univ., Inc. v. Citizens Ins. Co. of Am.*, 792 F.3d 520, 528 (4th Cir. 2015). "In making that prediction, we may consider lower court opinions in [the state], the teachings of treatises, and 'the practices of other states.'" *Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C.*, 433 F.3d 365, 369 (4th Cir. 2005) (quoting *Wade v. Danek Med., Inc.*, 182 F.3d 281, 286 (4th Cir. 1999)).

B.

The West Virginia Consumer Credit and Protection Act authorizes a court to act when a loan agreement was "unconscionable at the time it was made" or "induced by unconscionable conduct." W. Va. Code § 46A-2-121(a)(1). The Act permits courts to "refuse to enforce the agreement" as well as to order actual damages and a penalty. *Id.* § 46A-2-121(a)(1); *see id.* § 46A-5-101(1). The statute "protect[s] consumers … by providing an avenue of relief for consumers who would otherwise have difficulty proving their case under a more traditional cause of action"—such as a common-law contract claim. *Barr v. NCB Mgmt. Servs., Inc.*, 711 S.E.2d 577, 583 (W. Va. 2011) (quoting *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 461 S.E.2d 516, 523 (1995)). Because the "[A]ct is clearly remedial in nature," the Supreme Court of Appeals of West Virginia has instructed that courts "must construe the statute liberally so as to furnish and accomplish all the purposes intended." *Id.* (quoting *McGraw*, 461 S.E.2d at 523).

Unconscionable inducement under the Act is broader in scope than both substantive unconscionability and the "traditional cause of action" of common-law fraudulent inducement. *Id.*; *see McFarland v. Wells Fargo Bank, N.A.*, 810 F.3d 273, 284 (4th Cir. 2016); *Brown*, 737 S.E.2d at 658. The Supreme Court of Appeals of West Virginia hinted at both conclusions in *Quicken Loans v. Brown*. In that case, a borrower complained that Quicken Loans unconscionably induced a loan by, among other things, including an estimated home value in its appraisal request form. *See Brown*, 737 S.E.2d at 648 & n.8. The estimated home value was $262,500, and the appraiser—Dewey Guida, who also performed the appraisal of the Aligs' home in this case—valued it at $181,700. *Id.* The home's actual value was $46,000. *Id.* That Guida's appraisal was massively inflated should have been apparent to any observer, barring an extreme shift in the market, as the plaintiff had refinanced the mortgage on the property for between roughly $40,000 and $67,000 in the years immediately before obtaining the loan at issue. *Id.* at 647.

Nevertheless, Quicken Loans persuaded the plaintiff in a rushed closing process to refinance her home and assume a loan of $144,800—with a massive balloon payment to boot. *Id.* at 649-50. The trial court found that Quicken Loans engaged in common-law fraudulent inducement and unconscionable inducement under the Act by, among other things, negligently conducting the appraisal review. *Id.* at 652, 657. The Supreme Court of Appeals of West

Virginia affirmed,[18] though it did not specifically reach the issue of the appraisal because it concluded that the balloon payment and Quicken Loans' false promises to the plaintiff were sufficient to support common-law fraudulent inducement. *Id.* at 652, 656, 658. Moreover, the Supreme Court concluded that that common-law violation alone was enough to find a statutory violation under the Act for unconscionable inducement. *Id.* at 658. Finally, the Supreme Court agreed with the lower court that the contract was substantively unconscionable, despite Quicken Loans' contention that the plaintiff received "benefits" from the loan. *Id.* at 658; *see id.* at 659.

This Court extrapolated from *Brown*'s reasoning in *McFarland v. Wells Fargo Bank*, predicting that the Act "is to be read as diverging from th[e] traditional understanding" of unconscionability. *McFarland*, 810 F.3d at 284. We noted that the Supreme Court of Appeals of West Virginia had "sustained findings of 'unconscionability in the inducement' based entirely on conduct predating acceptance of the contract and allegations going to the fairness of the process, without regard to substantive unconscionability." *Id.* Accordingly, we concluded that the Act "authoriz[es] a claim for unconscionable inducement that does not require a showing of substantive unconscionability."[19] *Id.*

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[18] West Virginia's state-court system has no intermediate appellate courts.

[19] By contrast, the other cause of action under the Act—where the agreement was "unconscionable at the time it was made"—"requires a showing of both substantive unconscionability, or unfairness in the contract itself, and procedural

Further, it is clear from *Brown* that an unconscionable-inducement claim is not defeated by a showing that the plaintiff benefitted from the resulting loan. *Brown*, 737 S.E.2d at 651, 658-59 (holding the defendant liable for statutory unconscionable inducement despite the fact that "[w]ith the loan proceeds, [the p]laintiff paid off her previous mortgage and consolidated debt; received $40,768.78, with which she purchased a new vehicle (for $28,536.90); [and] retired other existing debt").

Thus, unconscionable inducement is simply "unconscionable conduct that causes a party to enter into a loan." *McFarland*, 810 F.3d. at 285. Courts are to analyze such claims "based solely on factors predating acceptance of the contract and relating to the bargaining process," that is, "the process that led to contract formation." *Id.* at 277-78. Procedural unfairness alone is insufficient—while procedural unconscionability can be shown by demonstrating severe discrepancies in the parties' bargaining positions, "it appears that [the unconscionable-inducement analysis] will turn not on status considerations *that are outside the control of the defendant*, but instead on *affirmative misrepresentations or active deceit*." *Id.* at 286 (emphases added). *McFarland*'s analysis on this point was prescient: a few months after the decision was filed, the West Virginia legislature amended the statute to include "affirmative misrepresentations, active deceit[,] or concealment of a material fact" as examples of "unconscionable conduct." 2016 W. Va.

unconscionability, or unfairness in the bargaining process." *McFarland*, 810 F.23d at 277.

Acts. ch. 41 (codified at W. Va. Code § 46A-2-121). In other words, unconscionable inducement requires that the defendant have taken some unconscionable action within its control to forward the loan process.

Based on binding precedent from this Court and the state Supreme Court, then, some key principles guide our analysis. We are to construe the Act liberally. Its purpose is to protect consumers, especially where the common law cannot provide them with relief. Unconscionable inducement does not require substantive unconscionability in the loan itself, and any benefit the plaintiff received from that loan is irrelevant. Instead, unconscionable inducement relates only to contract formation. However, to prove unconscionable inducement, a plaintiff must show more than procedural unconscionability: he or she must demonstrate unconscionable behavior on the part of the defendant, such as an affirmative misrepresentation or active deceit.

C.

This leaves us to "anticipate how [the Supreme Court of Appeals of West Virginia] would rule" regarding one key question. *Liberty Univ.*, 792 F.3d at 528. By definition, the word "inducement" implies that the affirmative misrepresentation or active deceit in some way caused the plaintiff to enter the loan. Black's Law Dictionary defines "inducement" generally as "[t]he act or process of enticing or persuading another person to take a certain course of action," and, specific to contracts, as "[t]he benefit or advantage that causes a promisor to enter into a contract." *Inducement*, Black's Law Dictionary (11th ed. 2019). To resolve this appeal, we must predict the level of causality that the Supreme Court of Appeals of West Virginia would require.

We predict that plaintiffs alleging unconscionable inducement in the form of active deceit or concealment may succeed on their claims by proving that the defendants omitted information that corrupted a key part of the process leading to loan formation. Additionally, we predict that plaintiffs alleging unconscionable inducement based on affirmative misrepresentations must demonstrate that they relied on the defendants' affirmative misrepresentations in entering the loan. However, both predictions are based on West Virginia precedent that relates to other causes of action potentially calling for a *higher* level of causality than section 46A-2-121 requires. In other words, our predictions come with the caveat that we think it possible that the Supreme Court of Appeals of West Virginia would reduce the causality required even further for claims under section 46A-2-121. We need not press on into this uncharted territory of state law, however, because we may affirm the district court's judgment even under these more cautious predictions.

Discussing common-law fraudulent concealment in *Quicken Loans v. Brown*, the Supreme Court of Appeals of West Virginia held that "it is not necessary that the fraudulent concealment should be the sole consideration or inducement moving the plaintiff. If the concealment *contributed to the formation of the conclusion in the plaintiff's mind*, that is enough." *Brown*, 737 S.E.2d at 654 (emphasis added) (internal quotation marks and alterations omitted). And

Brown makes clear that an act that constitutes common-law fraudulent inducement also constitutes unconscionable inducement under the Act. *See id.* at 658. Accordingly, for claims based on concealment, it "is enough" for a plaintiff to show that the defendant's concealment "contributed to the formation" of the plaintiff's decision to enter the loan.[20] *Id.* at 654.

Moreover, in *White v. Wyeth*, the Supreme Court of Appeals of West Virginia evaluated a different section of the Act that protects consumers when they purchase or lease goods or services. The court reasoned that "when consumers allege that a purchase was made because of an *express or affirmative misrepresentation*, the causal connection between the deceptive conduct and the loss would necessarily include *proof of reliance* on those overt representations." *White v. Wyeth*, 705 S.E.2d 828, 837 (W. Va. 2010) (emphases added). However, "[w]here *concealment, suppression or omission* is alleged, and *proving reliance is an impossibility*, the causal connection between the deceptive act and the ascertainable loss is established by presentation of

[20] It is possible that the Supreme Court of Appeals of West Virginia would hold that the necessary showing of causality is even further reduced under the Act. Notably, *Brown* was discussing *common-law* fraudulent concealment. But because the Act is intended to fill the gaps left by the common law, *Barr*, 711 S.E.2d at 583, unconscionable inducement under the Act ought to be easier for plaintiffs to prove than common-law fraudulent inducement. We decline to make a prediction as to exactly what standard the state Supreme Court would apply, however, because we conclude that it is appropriate to affirm summary judgment for Plaintiffs even under *Brown*'s more exacting standard.

facts showing that the deceptive conduct was the proximate cause of the loss." *Id.* (emphases added).

Importantly, the provision of the Act analyzed in *White* explicitly requires a showing of causation for a consumer to sue a merchant or service provider. W. Va. Code § 46A-6-106(a) (providing a private cause of action to a consumer who "purchases or leases goods or services and thereby suffers an ascertainable loss … *as a result of* the use or employment by another person of a method, act or practice prohibited" by the Act (emphasis added)). Here, by contrast, the relevant provision has no comparable language explicitly requiring causation for a plaintiff to sue a lender, except insofar as causation is implied by the concept of inducement. W. Va. Code § 46A-2-121(a)(1) (providing a cause of action where the court finds a consumer loan "to have been induced by unconscionable conduct"). Therefore, logic necessitates that, at most, the same standard regarding reliance articulated in *White* for section 46A-6-106(a) would apply to section 46A-2-121(a)(1): proof of subjective reliance is necessary for actions based on affirmative representations, but not for actions based on concealment.[21]

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[21] Indeed, we think it possible that the state Supreme Court would conclude that reliance would be unnecessary for either affirmative representations *or* concealment in actions under section 46A-2-121(a)(1). Crucially, the court's reasoning in *White* was dependent on the specific language in section 46A-6-106(a). *White*, 705 S.E.2d at 833 (noting that the certified question before it was the proper interpretation of the "as a result of" language in section 46A-6-106(a)). And the current version of the Act specifically recognizes that some lawsuits against creditors

As a point of clarification, we recognize that *White*'s language about deceptive conduct needing to be the "proximate cause of the loss"—or even the "but for" cause, *White*, 705 S.E.2d at 837—appears to impose a more stringent requirement for the showing of causation than does *Brown*'s language about the concealment merely needing to "contribute[] to the formation of the conclusion in the plaintiff's mind," *Brown*, 737 S.E.2d at 654. Here, between the two, *Brown* governs. *Brown* is more recent, and it dealt directly with inducement to enter a loan, whereas *White* related to a different statutory provision. Accordingly, we discuss *White* not for its causal language, but for its discussion of whether a plaintiff alleging concealment must prove reliance.

In summary, to assess a claim of unconscionable inducement under the Act, we look to the defendant's conduct, not the bargaining strength of the parties or the substantive terms of the agreement. For claims based on affirmative misrepresentations, plaintiffs must demonstrate that they subjectively relied on that conduct. For claims based on concealment,

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or debt collectors will be class actions—but there is no comparable provision in the part of the Act at issue in *White*. *Compare* W. Va. Code Ann. § 46A-5-101(1), *with id.* § 46A-6-106. As Defendants themselves argue, it becomes much more difficult to resolve as a class action a claim requiring individualized proof of the class members' mindsets. *See* Opening Br. at 38; *see also Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 362 (4th Cir. 2004). We do not mean to imply that a class could never be certified under other provisions of the Act; that question is not before us. But we think it significant that the legislature explicitly contemplated that actions against creditors or debt collectors could employ the class-action vehicle, which suggests that no individualized inquiry is required.

however, a plaintiff need only show that the defendant's conduct was unconscionable and that this unconscionable conduct contributed to the formation of the plaintiff's decision to enter the loan. In other words, we predict that the state Supreme Court would find that a plaintiff who proves unconscionable conduct in the form of concealment will recover unless the conduct was sufficiently attenuated from or irrelevant to the loan's formation such that it did not contribute to the formation of the plaintiff's decision to enter the loan.

D.

Turning to Defendants' conduct in this case, and viewing the evidence in the light most favorable to Defendants, we agree with the district court that Defendants sought to pressure appraisers to match targeted appraisal values and concealed this practice from Plaintiffs—a process that, in combination, contributed to Plaintiffs' decisions to enter the loan agreements. Under the standard outlined above, this conduct rises to the level of unconscionable inducement under the Act.

The record clearly shows that Defendants sought to increase appraisal values by providing borrowers' estimates of home value to its appraisers and pressuring appraisers to match those values. Defendants' internal emails refer to receiving "a lot of calls from appraisers stating that they can't reach *our requested value*." District Ct. Docket No. 2062 at 39 (emphasis added). One appraiser, Guida, testified that "if [the appraisal] wasn't at the estimated value, [he] would get a call" from TSI asking him to reevaluate the appraisal. S.J.A. 669. In light of this testimony, the only reasonable inference is that the "requested value" in the email refers to the borrower's estimate of value. Internal emails also reveal that Quicken Loans had a team dedicated to "push[ing] back on appraisers questioning their appraised values," and that Quicken Loans' usual process involved "arguing over value appeal orders and debating values with bankers and appraisers." S.J.A. 711.

Moreover, Guida increased the appraised value of the Aligs' home by $3,000 after receiving documents from Defendants asking him to revisit the appraisal. Guida's revised appraisal of the Aligs' home was between 19.5% and 26% higher than their actual home value. Of course, home valuation is to some degree an art, not a science; some variability is to be expected. But Defendants themselves have suggested that "a deviation of *10%* between values is common and accepted in the industry." J.A. 277 (emphasis added).[22]

While the record contains testimony from several appraisers that they were not influenced by the estimated values, it is unclear how many of the appraisals at issue were conducted by those

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[22] The record is devoid of evidence regarding the actual home values of other class members. Accordingly, we cannot evaluate whether the appraisals for most class members were inflated. As noted above, that may preclude Plaintiffs' contract claim, which requires a showing of damages. But it does not preclude a statutory unconscionable-inducement claim, which does not require a showing of *substantive* unconscionability regarding the loan terms.

appraisers. And regardless of whether the appraisers who conducted the class members' appraisals *believed* themselves to have been influenced, the record suggests that they were. Guida's appraisal of the Aligs' home provides a particularly stark example. But additionally, testimony from a Quicken Loans executive supports that the average difference between the estimated value and the appraisal value for all class loans was within five percent. In other words, the appraisals closely tracked the borrowers' estimates of value. This uncontroverted fact can be reconciled with the appraisers' testimony because it is a well-established psychological phenomenon that an initial value can have an anchoring effect, influencing later estimates without the estimator's realization.[23] Studies have shown this to be true even for experts like real estate agents (for home prices) and judges (for sentencing decisions).[24]

Viewed in the light most favorable to Defendants, the record contains evidence that Defendants may have provided the estimates of value in part for legitimate reasons: helping appraisers determine

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[23] *E.g.*, Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 Harv. L. Rev. 1420, 1440-41 & n.82 (1999) (describing the anchoring effect).

[24] *E.g.*, Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming A Fundamental Flaw*, 104 J. Crim. L. & Criminology 489, 498 (2014) (discussing a study showing how "anchoring works at the subconscious level" for real estate agents estimating home values); *see also United States v. Parral-Dominguez*, 794 F.3d 440, 448 & n.9 (4th Cir. 2015) (noting the anchoring effect of the Sentencing Guidelines in the context of criminal sentencing).

whether to accept an assignment and, if accepted, assess an appropriate fee for the assignment. There is some dispute about whether appraisers actually used the estimates in that way. But there is no genuine dispute that Defendants *also* provided the estimates as a target—or, in their word, "requested"—value. Nor is there any genuine dispute that, at least some of the time, their efforts worked.

It is also clear that during the class period, this practice was common, but discouraged. Though it was not expressly forbidden by West Virginia law at the time, federal authorities indicated as early as 1996 that providing a target value to appraisers was improper, warning "employees of financial institutions" against "pressuring appraisers to raise their value conclusions to target values." S.J.A. 861. And the record suggests Defendants were aware that the practice of providing borrowers' estimates of value was inappropriate. They ceased doing so in at least one state that began applying more legal pressure. Yet in West Virginia, Defendants continued to forge ahead. They only stopped the practice entirely in 2009, "around the time" the Home Valuation Code of Conduct forbid it. J.A. 235. It was unethical for Defendants to attempt to pressure or influence appraisers—yet the record establishes that this was Defendants' goal.[25]

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[25] At oral argument, Defendants relied heavily on a provision of the West Virginia Code that instructs that lenders "may rely upon a bona fide written appraisal of the property made by an independent third-party appraiser" which is "prepared in compliance" with the Uniform Appraisal Standards. W. Va. Code § 31-17-8(m)(8). Their theory was that, under the Uniform

Appraisal Standards, it was not unethical for an appraiser to complete an appraisal after receiving an estimated value from the lender—and that this should absolve Defendants of any wrongdoing.

As an initial matter, Defendants waived this argument by raising it only in passing in their opening brief. *Grayson*, 856 F.3d at 316. In any event, it is without merit. Defendants are correct that, while the 2008-2009 Uniform Appraisal Standards indicated that appraisers could not ethically accept an appraisal assignment requiring a specific amount as a *condition*, the record supports that the mere receipt by an appraiser of the borrower's estimate of value did not violate the Uniform Appraisal Standards. However, the Uniform Appraisal Standards also indicated that appraisers should respond to lenders who provided the borrower's estimate of value with a clarifying statement that they could not accept the assignment if the estimate was provided as a condition. There is no evidence in the record that the appraisers made any such statements here.

Putting that issue aside, section 31-17-8(m)(8) cannot be used by lenders to justify unconscionable conduct. Section 31-17-8(m)(8) forbids lenders from "making any primary or subordinate mortgage loan" that is secured in a principal amount exceeding the fair market value of the property. In enacting that prohibition, however, the legislature gave lenders a safe harbor: they could rely on an appraiser's valuation of the home to avoid violating this rule. Reading the statute to allow lenders to attempt to influence appraisers so long as they stick within the limits of the Uniform Appraisal Standards—to wield this safe harbor *shield* as a *sword*—would defeat the purpose of section 31-17-8(m)(8), not to mention section 46A-2-121(a)(1).

Moreover, the state legislature used significant limiting language in crafting section 31-17-8(m)(8), specifying that the appraisal must be "bona fide" and that the appraiser must be "an independent third-party." And under section 31-17-8(m)(2), lenders are prohibited from "[c]ompensat[ing], … coerc[ing,] or intimidat[ing] an appraiser for the purpose of influencing the independent judgment of the appraiser with respect to the value of real estate" on which a mortgage loan is based. The language of section 31-17-8(m) thus makes clear that the legislature was

Indeed, Defendants appear to recognize that their conduct was improper. On appeal, they focus their energy on arguing that their attempts to influence appraisers were *unsuccessful* and, therefore, did not induce Plaintiffs to enter the loans. They note testimony from several appraisers that seeing borrowers' estimates of value did not influence them.

Defendants set the causational bar too high. As discussed, for claims related to concealment, unconscionable inducement under the Act turns not on Plaintiffs' subjective reliance on the concealed conduct but on Defendants' conduct itself. Plaintiffs need demonstrate only that Defendants' conduct was unconscionable and that it "contributed to the formation" of their decisions to enter the loan agreements. *Brown*, 737 S.E.2d at 654. We conclude that Plaintiffs have satisfied this standard.[26]

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concerned about the very sort of behavior at issue here—namely, lenders embarking on campaigns to sway appraisers.

[26] Defendants argue that concealment is only actionable where there is a duty to disclose—and they appear to argue that the absence of a *statutory* duty is dispositive. As an initial matter, the absence of a statutory duty does not mean there is no duty. In the tort context, for example, "[t]he ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised." *Glascock v. City Nat'l Bank of W. Va.*, 576 S.E.2d 540, 544 (W. Va. 2002) (internal quotation marks omitted). And, where a lender "possesse[s] information of no interest to 'society in general,' but of great interest to the [borrowers]," and the lender "ha[s] reason to know of the 'potential consequences of the wrongdoing,' that is, withholding the information," a special relationship exists and the lender has a duty to disclose the information. *Id.* at 545; *see id.* at 546; *cf. McCauley v. Home Loan Inv. Bank, F.S.B.*, 710 F.3d 551, 559 (4th Cir. 2013) ("A lender that informs a borrower about

The appraisal process is closely related to loan formation for loans secured by the collateral of real property. In other words, any conduct impacting the appraisal process necessarily contributes to loan formation. An appraisal provides both the mortgagor and mortgagee with a baseline value from which the parties can negotiate the terms of the loan. The appraisal value helps determine the final loan amount and terms, and an impartial appraisal gives both

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how much her property is worth, whether required to do so or not, is under an obligation not to misrepresent that value."); *Ranson v. Bank of Am., N.A.*, No. CIV.A. 3:12-5616, 2013 WL 1077093, at *6 (S.D.W. Va. Mar. 14, 2013) ("[A] duty to provide accurate loan information is a normal service in a lender-borrower relationship.").

Moreover, there is no evidence that a duty to disclose is an element of an action for unconscionable inducement by concealment under the Act. Defendants are correct that *common-law* fraudulent concealment requires the plaintiff to show the existence of a duty to disclose. *Brown*, 737 S.E.2d at 654. But, again, the Act is intended to provide consumers with a cause of action where the common law does not. *Barr*, 711 S.E.2d at 583. And research has not revealed a single West Virginia case interpreting the Act that has required a duty to disclose. Indeed, in *Brown*, the Supreme Court of Appeals of West Virginia referred to a duty to disclose only in discussing the plaintiff's common-law claim for fraudulent concealment. *Brown*, 737 S.E.2d at 654. And the trial court in *Brown*—the only other West Virginia court to review the case—made no mention of a duty to disclose in this context at all. *Brown v. Quicken Loans*, No. 08-C-36, 2010 WL 9597654, at *8 (W. Va. Cir. Ct. Mar. 2, 2010).

In light of the principle that the Act provides a cause of action where the common law runs dry, we conclude that, even assuming Plaintiffs must show that Quicken Loans had a duty to disclose, the duty arises from the Act itself. In other words, the Act provides an avenue for seeking relief when a lender conceals a fact despite having an ethical obligation to disclose it, such that the failure to disclose the fact was unconscionable.

parties confidence that the loan is tied to the home's true contemporary market value.

Appraisal procedures are particularly important in refinancing agreements. In home purchases, the loan amount is tied directly to the purchase price, which is tempered by bargaining between adversarial parties represented by competing real estate agents. Here, though, both parties had some incentive to estimate a high home value: Plaintiffs may have wanted to receive more money they could use for other purposes, *cf. McFarland*, 810 F.3d at 280, and Quicken Loans may have desired to obtain higher loan values to improve its position when reselling those loans, *see Brown*, 737 S.E.2d at 652 n.25; *cf. McCauley v. Home Loan Inv. Bank, F.S.B.*, 710 F.3d 551, 559 n.5 (4th Cir. 2013). But an inflated home value posed risks to both parties, too. *See McFarland*, 810 F.3d at 280-81. Amidst these various dangers and incentives—and stepping into the middle of a transaction between parties with unequal bargaining power—the impartial appraiser was the only trained professional available to objectively evaluate the value of the home. Thus, conduct designed to influence the appraisal process is not causally attenuated from the class members' decisions to enter the loans. Put another way, the appraisal process is sufficiently central to the refinancing agreement that any conduct designed to affect the appraisal process necessarily contributed to the Plaintiffs' conclusions to enter the loans. And where, as here, that conduct was unconscionable, it is actionable under the Act.

The evidence shows that appraisers were made aware of target values and pressured to reevaluate their appraisals if they fell below those amounts. Appraisers, thus, had in mind the target value when they assessed or reassessed Plaintiffs' home values and, at least sometimes, adjusted their appraisals in response—even if they did so only subconsciously. And as those appraisals were central components in determining the terms of each loan, there is no genuine dispute that they—and, more importantly, their guise of impartiality— contributed to Plaintiffs' decisions to enter those loans. Moreover, because Defendants' behavior was unethical, it was unconscionable under the Act. Therefore, Plaintiffs have established their claim for unconscionable inducement.[27]

E.

We close our discussion of unconscionable inducement by emphasizing the circumscribed nature of our holding—a limitation that is necessary when we are wading somewhat into uncharted waters of state law, albeit with significant guidance from West Virginia's highest court. *See id.* at 284.

Defendants' challenged actions were of a particularly questionable character and pertained to an aspect of the loan process that is particularly essential. The loans in question were secured by the collateral of the borrowers' homes—by far the most significant investment, in terms of sheer value, that most Americans will make in their lifetimes, but also property that is necessary as shelter and, for many,

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[27] Defendants do not challenge on appeal the statutory-damages award for Plaintiffs' unconscionable-inducement claim.

carries great personal significance as a home. We think it plain that reasonable borrowers would not risk their significant investments, shelters, and homes without compelling reason. Again, we emphasize that there is no evidence in the record suggesting that, when the class members estimated their home values, they knew that those values would be passed on to appraisers or used to pressure appraisers to increase appraisal values. Indeed, it is reasonable to suppose that the borrowers each assumed that the appraisal provided an unbiased valuation of their homes on which they could rely as they planned their financial futures.

Yet Defendants did not respect this process. Instead, they flexed their power as the party arranging the appraisal in an attempt to influence the impartial third parties upon whose advice Plaintiffs appropriately relied. Plaintiffs thought they were playing a fair game of poker, albeit one where the Defendants were dealing the cards. Plaintiffs did not know that Defendants were also stacking the deck.

Our holding thus should not be interpreted to open the floodgates to a deluge of litigation challenging any possible means by which a lender could attempt to better position itself in a negotiation. Parties to agreements can, of course, take some measures to protect and further their interests without coming close to violating the Act. But where a lender induces a borrower to enter a loan through deceptive practices that relate to the heart of the loan-formation process, thereby compromising the integrity and fairness of that process, West Virginia law provides the borrower with a remedy. We decline to accept Defendants' invitation to ignore that legislative cure for their misbehavior. After all, "[i]t would be dispiriting beyond belief if courts defeated [a legislature's] obvious attempt to vindicate the public interest with interpretations that ignored the purpose, text, and structure of th[e] Act at the behest of those whose abusive practices the legislative branch had meant to curb." *Krakauer*, 925 F.3d at 663.

V.

Plaintiffs' final claim, against both Quicken Loans and TSI, was for conspiracy. Defendants' only argument on appeal related to that claim is that "[t]he district court's summary-judgment decision on Plaintiffs' civil-conspiracy claim … was derivative of its ruling on the [unconscionable-inducement] count." Opening Br. at 31. And since Defendants believe reversal to be appropriate for the statutory claim, they argue the same for the conspiracy claim. Because we affirm the district court's decision to grant summary judgment to Plaintiffs on their statutory claim, this argument fails. And by not making any other arguments regarding this claim, Defendants have waived any such arguments on appeal. *See Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017). Accordingly, we also affirm the district court's grant of summary judgment to Plaintiffs on the conspiracy claim.

VI.

For the foregoing reasons, we affirm the district court's decisions to grant class certification, grant summary judgment to Plaintiffs on their conspiracy and unconscionable-inducement claims, and award statutory damages. However, we vacate the district court's grant of summary judgment to Plaintiffs on their breach-of-contract claim and the related damages award, and we remand that claim for further proceedings consistent with this opinion.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

NIEMEYER, Circuit Judge, dissenting:

Phillip and Sara Alig and Daniel and Roxanne Shea refinanced the mortgages on their homes in 2007 and 2008, respectively, with loans from Quicken Loans Inc. to consolidate their debts and reduce their payments. In the standard application form that they signed to apply for the loans, they provided, among other things, an estimated value of their homes and the amount that they wished to borrow. To qualify the loans, Quicken Loans obtained appraisals from independent, professional appraisers, who were provided with the borrowers' home-value estimates. This was, at the time, a customary and accepted industry practice. While the Aligs and the Sheas provided their estimates unconditionally, indicating that the estimates could be used by Quicken Loans, its agents, and its servicers, they were not informed in particular that their estimates would be provided to the appraisers.

At the closings, the Aligs and Sheas received the borrowed money and, as they had agreed, paid for the costs of the appraisals — \$260 in the Aligs' case and \$430 in the Sheas'. As planned, the two couples then consolidated their debts to their financial benefit. There is no dispute that they received exactly what they had bargained for and that they were highly satisfied with the transactions.

After industry standards changed in 2009 so that lenders could no longer provide appraisers with borrowers' home-value estimates and years after their loans closed, the Aligs and Sheas commenced this class action against Quicken Loans. They alleged that the practice that Quicken Loans followed in 2007 and 2008 of providing appraisers with borrowers' home-value estimates without their knowledge was "unconscionable conduct" that "induced" their loan transactions, in violation of the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46 A-2-121(a)(1) (making unenforceable consumer loans that are "induced by unconscionable conduct"). They also claimed that the practice constituted a breach of contract. With their action, the Aligs and Sheas sought to represent a class of other West Virginia residents who had also refinanced their mortgages with Quicken Loans before 2009 — a class involving nearly 3,000 loans. The district court certified the class, agreed with the Aligs and Sheas on both claims, and entered summary judgment against Quicken Loans for over $10 million. And in a startling opinion, the majority now largely affirms the district court's conclusion.

To impose liability on Quicken Loans for what was an industry-wide practice to provide relevant information to appraisers and that harmed the Aligs and Sheas *not one iota* is fundamentally unjust; it is, as we have previously observed, "not the borrower but the bank that typically is disadvantaged by an under-collateralized loan." *McFarland v. Wells Fargo Bank, N.A.*, 810 F.3d 273, 280 (4th Cir. 2016). Imposing liability here thus lacks common sense. Moreover, it stands statutory liability on its head.

West Virginia law creates lender liability for "unconscionable conduct" that "induces" the borrower to enter into a consumer loan transaction. Yet here, there is no factual or legal basis to call the challenged practice "unconscionable," a term that West Virginia courts have equated with fraudulent conduct. Nor is there any evidence that the borrowers were "induced by" the practice to enter into the loan transactions. By their own allegations, the Aligs and Sheas were unaware of the practice, and there is simply no evidence that if they had been made aware of it, they would not have proceeded with the transactions on the same terms. They were interested in receiving a loan in the amount they had applied for and at the cost that was fully disclosed to them for the purpose of consolidating their debts.

In affirming a $10-million liability in these circumstances, the majority opinion stands totally out of step with the interests of both parties to the transactions. This is an unjust punishment indeed for a company that followed a practice that was both customary and legal and only later modified to avoid potentially influencing appraisers. And regardless of the change in 2009, there is no evidence that the appraisers on these loans were influenced by the borrowers' estimates or that any kind of fraud was committed.

I conclude that the practice followed in 2007 and 2008 of providing appraisers with the borrowers' estimates of home value without disclosing that practice to the borrowers *was plainly not unconscionable conduct* under virtually any understanding of the term and certainly not under the standard imposed by West Virginia Code § 46A-2-121. There was nothing unscrupulous or akin to fraud involved in the transactions. The practice that the Aligs and Sheas challenge was related only to lenders' dealings with appraisers who were retained to protect *the lenders* from undercollateralized loans; the practice was accepted by the industry at the time; the practice did not affect — nor would it have affected if disclosed — the Aligs and Sheas' conduct in pursuing the loans; and the practice caused the Aligs and Sheas no damage.

I also conclude that the Aligs and Sheas *were not induced* by the practice to enter into the loan transactions. They did not know of it, and there is simply no evidence that had the practice been disclosed to them, they would have proceeded any differently.

I would reverse and remand with instructions to enter judgment for Quicken Loans and its agent, Title Source, Inc.

I

The practices followed by borrowers and lenders in refinancing home mortgages were and are well understood, and they are governed by numerous regulations designed to serve both borrowers and lenders. The evidence in this case showed that Quicken Loans followed the accepted practices both before 2009 and after, and the Aligs and Sheas have pointed to no deviation from them, much less deceit.

A refinancing transaction typically begins with the prospective borrower filling out a Uniform Residential Loan Application (Fannie Mae Form 1003), which requires the lender to provide, among other things, information about their income and debts, their assets, and the amount and basic terms of the loan being sought. In one portion of the application, the borrowers are specifically requested to fill in a schedule of real estate owned, providing the real estate's "present market value," as well as the mortgages and liens on it. The form expressly authorizes use of the application's information by the lender, its "agents," and its "servicers," providing that the borrower "agrees and acknowledges that … *the Lender and its agents, … [and] servicers* … may continuously rely on the information contained in the application." Lenders use the application's information to identify loan programs for which the borrowers would be eligible, to qualify the borrowers for loans with a demonstration of adequate income and collateral, to obtain credit information regarding the borrowers, and to retain appraisers to appraise the borrowers' homes.

Before 2009, lenders commonly provided the borrowers' home-value estimates to appraisers who were engaged to provide appraisals in connection with mortgage refinancings. The testimony in the record shows that this "was a common and acceptable practice for mortgage lenders." The information helped appraisers determine whether they had the right licensure to complete the appraisal, decide whether to accept the assignment, and determine what fee to charge for the appraisal. And the practice was considered appropriate under the Uniform Standards of Professional Appraisal Practice ("USPAP") issued by the Appraisal Standards Board. Indeed, under guidance published by the Board, appraisers were expressly allowed to receive borrowers' estimates. The Board recognized that the mere receipt of such information was not inconsistent with the appraisers' obligation to perform their appraisals with "impartiality, objectivity, and independence." But an appraiser was not authorized to accept an engagement that was conditioned on reporting a predetermined opinion of value.

Appraisals were (and continue to be) generally reported on a Uniform Residential Appraisal Report (Fannie Mae Form 1004). When submitting appraisals on that form, the appraiser certifies that he or she performed the appraisal "in accordance with the requirements of the" USPAP.

Quicken Loans followed these customary procedures during the pre-2009 period, using the Fannie Mae forms. It would upload information about a prospective borrower, including the borrower's estimate of home value, into a computer system that would then transmit the information to Title Source, Inc., an affiliated appraisal management company that obtained appraisals from independent appraisers and provided other loan settlement services both to Quicken Loans and other mortgage lenders. Title Source used the information it received from Quicken

Loans to generate an appraisal request form, which included the "Applicant's Estimated Value." The form was sent through an automated system to professional appraisers and appraisal companies in the area where the property was located. The appraisers in this case then reported their appraisals on Fannie Mae Form 1004.

In 2009, with the issuance of the Home Valuation Code of Conduct, a new rule went into effect that, among other things, prohibited both lenders and appraisal management companies from providing any estimated home values to appraisers in connection with refinance transactions, including the borrowers' own estimates. With the issuance of this new rule, Quicken Loans and Title Source stopped including borrowers' estimated home values on appraisal request forms. But the refinancings by the Aligs and the Sheas were completed under the former practice, before the new rule went into effect.

Phillip and Sara Alig purchased their home in Wheeling, West Virginia, in 2003 for $105,000, financing their purchase with a mortgage. In December 2007, they sought to refinance their mortgage and consolidate their debts with a loan from Quicken Loans. On the Uniform Residential Loan Application form, they indicated that the "present market value" of their home was $129,000, and this estimate was thereafter included on the appraisal request form that Title Source sent to a local appraiser who was retained to determine what the fair market value of the Aligs' home was. The appraiser at first determined that value to be $122,500. Title Source asked the appraiser, however, to “revisit [the] appraisal for [a] possible value increase to $125,500” based on an “adjusted sales price of comps.” The appraiser agreed that, in view of “the comps” (which included nearby home sales of $124,000 and $132,000), it was appropriate to increase the appraisal to $125,500. The appraiser submitted his report on the uniform form (Fannie Mae Form 1004), certifying that he had conducted the appraisal in accordance with the USPAP standards and that his compensation was not conditioned on his reporting “a predetermined specific value.” In addition, he testified that receiving homeowners’ estimated values did not influence his appraisals in any way. Quicken Loans thereafter agreed to lend the Aligs $112,950 at a fixed interest rate of 6.25%, and at closing, which took place in December 2007, the Aligs used the proceeds to pay off a car loan and credit card debt, saving them $480 per month for almost a year thereafter. Included in the closing costs that the Aligs paid with the refinancing was $260 for the cost of the appraisal.

Similarly, Daniel and Roxanne Shea purchased their home in Wheeling, West Virginia, in 2006 for $149,350, financing their purchase with two mortgage loans from Quicken Loans. In June 2008, they sought to refinance their mortgages with a loan from Quicken Loans to consolidate their debts. On the Uniform Residential Loan Application form, they indicated that the “present market value” of their home was $170,000, and this information was included on the appraisal request form that Title Source sent to a local appraiser. That appraiser appraised the Sheas’ property at $158,000, using Fannie Mae Form 1004. He testified later that the “Applicant’s Estimated

Value" was nothing more than what the borrowers assumed their house was worth and so was "irrelevant" to his task of determining market value using "comparables." He also stated that if a potential client had attempted to condition his payment on his assessing a house to be worth a certain minimum value, he would have refused to do the job. Quicken Loans agreed to lend the Sheas $155,548 at a fixed interest rate of 6.625%, which consolidated their previous mortgage loans. One of the consolidated loans had a balloon-interest provision and the other had an interest rate of 12.4%. As part of the closing costs, the Sheas paid $430 for the cost of the appraisal.

There is no evidence that either the Aligs or the Sheas were dissatisfied with their refinancing transactions with Quicken Loans. Indeed, they rated their experience at the highest level ("excellent" or 5 out of 5), and both couples improved their cash-flow circumstances. Nonetheless, after the 2009 rule change by which lenders were no longer permitted to provide the borrowers' home-value estimates to appraisers, the Aligs and Sheas decided to sue Quicken Loans and Title Source for the practice followed in their pre-2009 refinancing transactions. In their complaint, they alleged that Quicken Loans had "sought to influence appraisers" by providing them with "suggested or estimated values on appraisal request forms." They also stated that Quicken Loans had not informed them of this practice and claimed that, by so "compromising the integrity of the appraisal process," the practice had "rendered [their] appraisals unreliable and worthless." The Aligs and Sheas did not allege, however, that they would not have refinanced their home mortgages with

Quicken Loans on the same terms had they known that their home-value estimates had been sent to the appraisers. But, using the statutory language, they alleged in their complaint that their loans were "induced by unconscionable conduct," in violation of West Virginia Code § 46A-2-121(a)(1), which is part of the West Virginia Consumer Credit and Protection Act. They also alleged that by "providing value estimates to appraisers" without disclosing the practice to them, Quicken Loans breached its contractual obligation to obtain "a fair and unbiased appraisal." Finally, they alleged that Quicken Loans and Title Source engaged in an unlawful civil conspiracy that rendered Title Source equally liable for the unconscionable inducement and breach of contract claims alleged.

Following discovery, the plaintiffs filed a motion to certify their action as a class action on behalf of "[a]ll West Virginia citizens who refinanced mortgage loans with Quicken, and for whom Quicken obtained appraisals through an appraisal request form that included an estimate of value of the subject property." There were 2,769 such loans.

Shortly thereafter, the parties filed cross-motions for summary judgment, and the district court, by memorandum opinion and order dated June 2, 2016, both certified the proposed class and granted summary judgment to the plaintiffs on the three claims.

The court found as a matter of law "that the act of sending an estimated … value to an appraiser in connection with a real estate mortgage loan refinancing" without disclosing the practice to borrowers was "unconscionable conduct" within the meaning of § 46A-2-121. It reasoned that the "estimated values were used by Quicken as a means of communicating targets to its appraisers." The court also concluded as a matter of law that the unconscionable conduct induced the plaintiffs' loan agreements. Noting that "[a] violation exists when 'the agreement or transaction … [has been] induced by unconscionable conduct,'" the court explained its view that the focus of the statute "is plainly on the lender or creditor's conduct," rather than "the consumer's state of mind."

On the contract claim, the district court explained that the plaintiffs and Quicken Loans had executed a contract at the beginning of the loan process, entitled "Interest Rate Disclosure and Deposit Agreement," which provided that immediately upon receiving the borrowers' loan application and deposit, Quicken Loans would begin processing the application by, among other things, obtaining an appraisal. That agreement also noted that while Quicken Loans aimed to have the borrowers' application approved by the anticipated closing date, it could not be responsible for delays in loan approval due to, among other things, "the untimely receipt of an acceptable appraisal." The court concluded that this agreement was intended to "facilitate the loan application process by having the lender, Quicken, obtain an 'acceptable' appraisal, which, at a minimum, would require Quicken to deal honestly with its borrowers and in keeping with the prevailing standards of reasonableness." But because "providing a target figure to an appraiser is a practice that is universally condemned and serves no legitimate purpose," the court concluded that Quicken Loans had breached its obligation to obtain an "acceptable" appraisal and had violated its "duty to deal honestly" by "withholding knowledge of the true nature of the appraisal."

On the civil conspiracy claim, the court held that Quicken Loans and Title Source "consistently acted in concert to accomplish their unlawful purposes," such that they were jointly liable for the "scheme."

In a later order, the court awarded (1) statutory damages of $3,500 per loan for the unconscionable inducement claim, for a total of $9,691,500, and (2) approximately $969,000 for the breach of contract claim, which represented the aggregate amount of fees paid for appraisals that "were rendered worthless by Quicken's breach." The total judgment thus exceeded $10.6 million.

From the final judgment dated December 14, 2018, Quicken Loans and Title Source (hereafter collectively "Quicken Loans") filed this appeal.

II

On the statutory claim, the district court held that Quicken Loans' practice of obtaining appraisals through appraisal request forms that included the borrowers' estimate of their properties' value without specifically disclosing that practice to the borrowers constituted "unconscionable inducement under W. Va. Code § 46A-2-121." Quicken Loans contends, however, that the court's ruling was doubly flawed because (1) the plaintiffs "offered no evidence of inducement" and (2) Quicken Loans "did nothing unconscionable."

Quicken Loans' argument thus directs our focus to the meaning of two terms — "induce" and "unconscionable" — as they are used in imposing liability when a consumer loan transaction is "*induced by unconscionable* conduct." W. Va. Code § 46A-2-121(a)(1) (emphasis added). I start with the term "induce."

A

The relevant portion of the West Virginia Consumer Credit and Protection Act provides that "[w]ith respect to a transaction which is or gives rise to a … consumer loan, if the court as a matter of law finds … [t]he agreement or transaction … to have been *induced* by unconscionable conduct …, the court may refuse to enforce the agreement." W. Va. Code § 46A-2-121(a)(1) (emphasis added).

Beginning with the text, it is clear that to have an agreement "induced by" unconscionable conduct requires that the conduct of one party have contributed to the agreement's formation in the sense that it was material, or would have been material, to the other party's decision to enter into the agreement. Thus, if one party engaged in "unconscionable conduct" at some point in the process of the agreement's formation, but the other party would have agreed to the same transaction regardless, it cannot fairly be said that the unconscionable conduct *induced* the agreement. This much is clear from the text alone because "induce" and "inducement" have well recognized legal meanings, as even the majority acknowledges. *See ante* at 32. For instance, Black's Law Dictionary's primary definition of inducement is "[t]he act or process of *enticing or persuading* another person to take a certain course of action." *Black's Law Dictionary* 894 (10th ed. 2014) (emphasis added); *cf. Mountain State College v. Holsinger*, 742 S.E.2d 94, 100 (W. Va. 2013) (relying on the definition of "consumer credit sale" in Black's Law Dictionary when interpreting the Consumer Credit and Protection Act). In addition to this general definition, Black's Law Dictionary also recognizes several specialized meanings of "inducement." A contract's "inducement," for example, is the "benefit or advantage that *causes* a promisor to enter into a contract." *Black's Law Dictionary*, *supra*, at 894 (emphasis added). And even more telling, Black's Law Dictionary defines "[f]raud in the inducement" as "[f]raud occurring when *a misrepresentation leads another to enter* into a transaction with a false impression of the risks, duties, or obligations involved." *Id.* at 776 (emphasis added).

West Virginia courts have long given the word "induce" this same meaning when applying the State's tort law. *See, e.g.*, *Traders Bank v. Dils*, 704 S.E.2d 691, 696 (W. Va. 2010) ("The critical element of a fraudulent inducement claim is an oral promise that is used as *an improper enticement* to the consummation of another agreement. The fact that the agreement is reduced to writing … does not negate the occurrence of a precedent oral promise that was *the motivating factor for the making of such agreement*" (emphasis added)). Although the fraudulent representation or concealment need not be "the *sole* consideration or inducement moving the plaintiff," it must at least have "contributed to the formation of the conclusion *in [the plaintiff's] mind"* for an inducement to have occurred. *Horton v. Tyree*, 139 S.E. 737, 739 (W. Va. 1927) (second emphasis added).

The West Virginia Supreme Court of Appeals' decision in *Quicken Loans, Inc. v. Brown*, 737 S.E.2d 640 (W. Va. 2012), serves as a telling example of how that court understands the meaning of "induce" — specifically, the centrality of the effect of the alleged misconduct *on the individual plaintiff's decisionmaking process*. In *Brown*, the court held that the plaintiff had proved that the lender "fraudulently induced [her] to enter into [a] loan" to refinance her home mortgage by "failing to disclose [an] enormous balloon payment." *Id.* at 652. It explained that "[i]t [was] undisputed that the reason [the plaintiff] sought to refinance was to consolidate her debt and to reduce her monthly payments — in short, to save money." *Id.* at 654. Thus, "[c]oncealing such an enormous balloon payment from [the plaintiff] *was designed to mislead her and to induce* her into entering into the loan and, in fact, that is precisely what occurred." *Id.* (emphasis added). Similarly, the court concluded that a fraudulent misrepresentation by the lender "that it would refinance the loan in three to four months was clearly material because, *absent that promise*, [the plaintiff] would not have otherwise entered into the loan." *Id.* at 655 (emphasis added). On the flip side, however, the court held that the plaintiff had failed to prove that the lender's misrepresentation of a $2,100 fee as being paid to secure a lower interest rate had induced her to enter into the refinancing, agreeing there was insufficient evidence "that if the loan discount had been accurately described on the closing documents, [the plaintiff] would not have consummated the loan." *Id.* at 656.

There is no indication that the West Virginia Supreme Court of Appeals would understand "induced by" in § 46A-2-121 to have any meaning other than this settled one. *See Napier v. Bd. of Educ. of Cnty. of Mingo*, 591 S.E.2d 106, 110 (W. Va. 2003) ("When presented with a matter of statutory interpretation, this Court typically first looks to the precise language employed by the Legislature in order to determine the meaning of the controverted statute.... If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed" (cleaned up)). To the contrary, in *Brown* itself, the court signaled the similarity between a statutory unconscionable inducement claim under § 46A-2-121 and a common law fraudulent inducement claim, reasoning that because the plaintiff had established the latter, she had also established the former. *Brown*, 737 S.E.2d at 658.

Moreover, in *Brown*, the court also explained that when interpreting § 46A-2-121, it "found the drafters' comments to the [Uniform] Consumer Credit Code ["UCCC"] to be highly instructive," as "the unconscionability provisions of [the UCCC] are identical to West Virginia Code § 46A-2-121(a) and (b)." 737 S.E.2d at 656-57. Significantly, an early version of the UCCC only provided for nonenforcement of an agreement respecting a consumer credit sale, consumer lease, or consumer loan if the agreement was "unconscionable at the time it was made." Unif. Consumer Credit Code 1968 § 5.108(1). In the 1974 version, however, the provision was expanded to include unconscionable inducement. *See* Unif. Consumer Credit Code 1974 § 5.108(1). And in explaining this amendment, the UCCC's accompanying comments stated:

> Subsection[] (1) … [is] derived in significant part from UCC Section 2-302. Subsection (1), as does UCC Section 2-302, provides that a court can refuse to enforce or can adjust an agreement or part of an agreement that was unconscionable on its face at the time it was made. However, many agreements are not in and of themselves unconscionable according to their terms, *but they would never have been entered into by a consumer if unconscionable means had not been employed to induce the consumer to agree to the contract.* It would be a frustration of the policy against unconscionable contracts for a creditor to be able to utilize unconscionable acts or practices to obtain an agreement. Consequently subsection (1) also gives to the court the power to refuse to enforce an agreement if it finds as a matter of law that it was induced by unconscionable conduct.

Unif. Consumer Credit Code 1974 § 5.108 cmt. 1 (emphasis added). These comments — which, again, the West Virginia Supreme Court of Appeals has specifically recognized as being "highly instructive" in interpreting § 46A-2-121, *see Brown*, 737 S.E.2d at 657 — only further confirm that a contract is induced by unconscionable conduct when such conduct is used *to help secure the consumer's agreement* to the contract. Indeed, relying on the UCCC comments quoted above, we recognized as much in *McFarland*, where we stated that § 46A-2-121 supports "two distinct causes of action when it comes to consumer loans: one for unconscionability in the loan terms themselves, and one for unconscionable conduct *that causes a party to enter into a loan*." 810 F.3d at 285 (emphasis added).

Tellingly, the Aligs and Sheas *have not even attempted* to argue that they presented sufficient evidence to prove that the allegedly unconscionable conduct at issue here induced them to refinance their mortgages with Quicken Loans. Rather, they stake their position on the proposition that all that is required to establish a lender's liability under § 46A-2-121 is simply that unconscionable conduct was *part of the process leading to the agreement's creation*, regardless of whether it had any effect on "the formation of the conclusion in the plaintiff's mind." *Brown*, 737 S.E.2d at 654. Their posited interpretation, however, is at odds with not only the statute's text and case law construing "induce," but also the provision's purpose of ensuring that consumers are protected when a lender has used "unconscionable acts or practices to obtain an agreement" from them, even if the terms of that agreement are not themselves unconscionable. Unif. Consumer Credit Code 1974 § 5.108 cmt. 1.

Here, the plaintiffs have simply failed to establish that their loan agreements were "induced by" Quicken Loans' failure to disclose that the home-value estimates that they themselves had provided had been included on the appraisal request forms. In other words, they failed to prove that Quicken Loans' lack of disclosure was a "motivating factor for [their] making of" the loan agreement, *Traders Bank*, 704 S.E.2d at 696; or that it "contributed to" their decision to enter into the loan, *Brown*, 737 S.E.2d at 654; or that it "cause[d] [them] to enter into [the] loan," *McFarland*, 810 F.3d at 285. This failure should have entitled Quicken Loans to judgment as a matter of law on the statutory claim.

To avoid the plaintiffs' obvious failure, the majority opinion manufactures an approach alien to West Virginia law. It reasons that even though "'inducement' implies that the affirmative misrepresentation or active deceit in some way *caused* the plaintiff to enter the loan," *ante* at 32 (emphasis added), it can nonetheless find this element satisfied by "predict[ing] that the state Supreme Court would find that a plaintiff who proves unconscionable conduct in the form of concealment will recover unless the conduct was *sufficiently attenuated from or irrelevant to the loan's formation that it did not contribute to the formation of the plaintiff's decision to enter the loan,*" *id.* at 35-36 (emphasis added). Such a prediction is unprecedented and has no rational foundation. It fundamentally fails to take into account that to establish that the lender's concealment of something induced the plaintiff's agreement requires proof that the *disclosure* of that information would have changed their decision. *See Brown*, 737 S.E.2d at 655-56; *cf. White v. Wyeth*, 705 S.E.2d 828, 837 (W. Va. 2010).

Because the record contains no evidence that it would have made any difference to the Aligs or the

Sheas to have learned that their estimates had been provided to the appraisers — the plaintiffs having indeed foresworn the need to make such a showing — I would vacate the district court's summary judgment on the statutory claim and remand with instructions to grant summary judgment to the defendants.

B

To prove a claim under § 46A-2-121, the Aligs and Sheas would not only have to prove inducement but also establish that the inclusion of their home-value estimates on the appraisal request forms without disclosure to them amounted to "unconscionable conduct" as a matter of law. W. Va. Code § 46A-2-121(a)(1). In asserting that they established that element, they argue that providing appraisers with their estimates of home value "bias[ed] the result" of the appraisals, but that Quicken Loans had presented the appraisals to them as if they were "independent estimates." They characterize these posited facts as the "'equivalent to' an affirmative misrepresentation." Surprisingly, the majority opinion simply accepts the plaintiffs' argument.

The plaintiffs' elaboration of facts purporting to demonstrate unconscionable conduct, however, is sheer speculation. The record shows nothing malignant about the specific practice at issue here — a practice that was common in the lending industry and entirely consistent with the ethical standards for appraisers under the USPAP. Certainly, the record supports no claim that this conduct amounted to fraud. Yet, in interpreting § 46A-2-121(a)(1), the West Virginia Supreme Court of Appeals has expressly "equated" "conduct that is 'unconscionable' … with fraudulent conduct." *One Valley Bank of Oak Hill, Inc. v. Bolen*, 425 S.E.2d 829, 833 (W. Va. 1992); *see also Mountain State College*, 742 S.E.2d at 102 n.9 (same, quoting *One Valley Bank of Oak Hill*, 425 S.E.2d at 833).

The unvarnished facts of record show that the Aligs estimated the value of their home at $129,000 and that the appraiser, despite having knowledge of their estimate, gave an appraisal of $125,500, certifying that the appraisal represented his impartial, objective, and independent judgment based on comparable sales. Likewise, the Sheas estimated the value of their home at $170,000, and the appraiser, despite having knowledge of their estimate, gave an appraisal of $158,000, again certifying that the appraisal represented his impartial, objective, and independent judgment based on comparable sales. He testified affirmatively that his appraisal was not influenced by the Sheas' estimate and that if he believed that he had been retained to satisfy their estimate, he would not have undertaken the engagement.

Testimony was also presented that the practice of providing the borrowers' estimates to appraisers served the legitimate purposes of helping price the appraisal project and assigning it to an appraiser with the right qualifications. And virtually every appraiser who testified said that the inclusion of the borrowers' home-value estimate on the order form engaging their services did not affect their appraisals. The Uniform Standards of Professional Appraisal Practice allowed the appraisers to receive a borrower's estimate so long as it was recognized that such estimate was only informational and "not a condition for [the] placement of [the] assignment."

It defies common sense to suppose that, had the Aligs and Sheas been told that the home-value estimates in their loan applications would be provided to the appraisers, they would have been outraged by the practice. Indeed, their loan applications suggest otherwise, as they agreed that Quicken Loans and its agents or servicers could rely on the information. It is quite telling that the Aligs and Sheas only challenged the practice several years later, after the adoption of the Home Valuation Code of Conduct, when regulators changed the rules in recognition of the practice's potential for pernicious systemic effects. But it certainly does not follow that Quicken Loans' adherence to the prior practice can — standing alone — be said to amount to conduct so "unconscionable" that it would permit a court to "refuse to enforce" the consumer's refinance loan under § 46A-2-121 (a)(1). Its conduct was neither unscrupulous nor fraudulent, and disclosure of it would not have changed a thing.

The district court at least should have recognized that it was engaging in unsupported findings of fact that were rebutted by the evidence presented by Quicken Loans, thus precluding summary judgment. But based on the record before the court, it is apparent that, as a matter of law, the Aligs and Sheas have not shown that the practice that Quicken Loans followed in 2007 and 2008 in processing their refinancing loans was "unconscionable."

III

Finally, I would also vacate the district court's summary judgment in favor of the plaintiffs on their contract claim and remand with instructions to grant summary judgment to Quicken Loans.

The Aligs and the Sheas' breach of contract claim is based on the one-page Interest Rate Disclosure and Deposit Agreement that Quicken Loans entered into with prospective borrowers who were applying for loans. As relevant here, that document provided:

> Lender will begin processing your application (which may include ordering an appraisal, credit report, title commitment and other necessary items) immediately upon the submission of your application and deposit.…
>
> With your deposit …, you authorize Lender to begin processing your loan application and advance out-of-pocket expenses on your behalf.…
>
> If your application is approved: At the closing, Lender will credit the amount of your deposit on your closing statement toward the cost of your appraisal and credit report. Any additional money will be credited to other closing costs. If your application is denied or withdrawn for any reason: Lender will refund your deposit less the cost of your appraisal and/or credit report.

The agreement thus contemplated that, in the course of processing the prospective borrowers' mortgage loan applications, Quicken Loans would obtain an appraisal of the subject property and that the borrower would pay for that appraisal. And in this case, Quicken Loans did, as agreed, obtain appraisals in connection with the Aligs and Sheas' refinancing transactions, and the Aligs and Sheas did, at closing, pay for those appraisals.

The Aligs and Sheas contend — as the district court ruled — that they did not get the benefit of this bargain. They maintain that, by operation of the implied covenant of good faith and fair dealing, Quicken Loans was obligated to obtain a fair, valid, and reasonable appraisal and that, because they were not told that their home-value estimates had been included on the appraisal order forms, they were "deprived of the reasonable, fair, and unbiased appraisals that they paid for." The majority agrees as to Quicken Loans' contractual obligation to the borrowers to obtain a fair, valid, and reasonable appraisal, although it remands the claim for further proceedings on whether *that* contract was breached and whether damages resulted.

Even accepting that the Interest Rate Disclosure and Deposit Agreement should be read as requiring Quicken Loans to obtain fair and unbiased appraisals, the mere provision of the borrower's estimated value to the appraiser could not categorically render each appraisal unfair and biased, so as to give rise to a breach of contract claim. Indeed, the evidence in this case showed that when completing their appraisal reports, each appraiser certified that he "performed [the] appraisal in accordance with the requirements of the Uniform Standards of Professional Appraisal Practice," and this certification was consistent with the USPAP even when the appraiser received the "owner's estimate of value." It is an erroneous exercise of judicial hindsight to now conclude from the simple fact that Quicken Loans, like others in the industry, included borrowers' estimates on appraisal request forms that the resulting certified appraisals were categorically and necessarily biased and unfair in breach of contract.

*   *   *

The judgment entered against Quicken Loans in this case is manifestly inconsistent with West Virginia law. As important, it is palpably unjust. A thoughtful change in industry practice must not be taken as an invitation to file such opportunistic, and plainly wanting, litigation.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling

PHILIP ALIG, **SARA J. ALIG**, **ROXANNE SHEA** and **DANIEL V. SHEA**, individually and on behalf of a class of persons,

Plaintiffs,

v.

QUICKEN LOANS INC., and **TITLE SOURCE**, **INC.**, dba Title Source Inc. of West Virginia, Incorporated,

Defendants.

Civil Action No. 5:12-CV-114
Judge Bailey

ORDER RESOLVING MOTIONS

Pending before this Court are the following motions:

1. Plaintiffs' Motion for Class Certification [Doc. 169];

2. Defendant Hyett's Motion for Summary Judgment [Doc. 172];

3. Plaintiffs' Motion for Partial Summary Judgment [Doc. 173-1];

4. Motion for Summary Judgment [Doc. 174];

5. Defendants Quicken Loans Inc.' and Title Source, Inc.'s Motion to Exclude the Opinions and Testimony of Plaintiffs' Experts, Matthew Curtin, Pursuant to Rule 702 and ***Daubert*** [Doc. 176];

6. Defendants Quicken Loans Inc.'s and Title Source, Inc.'s Motion to Exclude the Opinions and Testimony of Plaintiffs' Expert, Stephen McGurl, Pursuant to Rule 702 and ***Daubert*** [Doc. 178];

7. Defendants Quicken Loans Inc.'s and Title Source, Inc.'s Motion *In Limine* to Exclude Evidence of Appraisers Petition [Doc. 201];

8. Defendants Quicken Loans Inc.'s and Title Source, Inc.'s Motion *In Limine* to Exclude Evidence or Argument Related to The Home Valuation Code of Conduct or Dodd Frank Act [Doc. 203];

9. Plaintiffs' Motion to Strike Portions of the Declaration of Sherry Dukic which Are Inconsistent with Deposition Testimony [Doc. 209].

Hyett's Motion for Summary Judgment

This Court finds it appropriate to first address the defendants' motions for summary judgment, for the reason that, if granted, the remaining motions may be mooted. In response to the Motion filed by defendant Richard Hyett [Doc. 172], the plaintiffs state that the Sheas and Mr. Hyett have reached a settlement of all claims and request that the Court deny the Motion as moot [Doc. 196]. Inasmuch as the motion does appear to be moot, this Court will deny the Motion as moot and, by separate order, has dismissed the claims against defendant Hyett.

Quicken and Title Source's Motion for Summary Judgment

I. Providing a Value to an Appraiser

The Motion filed by Quicken Loans and Title Source, Inc. are not so easily resolved. In their motion, the remaining defendants contend that under ***McFarland v. Wells Fargo Bank***, 810 F.3d 273 (4th Cir. 2016), the plaintiffs' claims are no longer viable. The defendants argue that providing the appraiser with the prospective borrowers' own opinion as to property value is not unconscionable as a matter of law and in no way constitutes an attempt to influence the appraiser's opinion. The defendants also posit that under ***McFarland*** unconscionable inducement requires a higher standard of proof of fraud.

This Court views this Motion as a rehash of the arguments made in connection with Defendants Quicken Loans Inc. and Title Source, Inc.'s Motion for Partial Judgment on the Pleadings [Doc. 72] and Defendant Quicken Loans Inc.'s Motion to Strike Class Allegations [Doc. 74], with the exception of the arguments that the information conveyed to the appraisers was the *borrowers'* estimate of value and that ***McFarland*** altered the landscape.

In response to the previous motions, this Court noted that the Fourth Circuit succinctly summarized the plaintiffs' allegations as follows:

> Plaintiffs complain that Quicken Loans originated unlawful loans in West Virginia and that Defendant Appraisers, which includes both the named appraisers and the unnamed class of appraisers, were complicit in the scheme. Plaintiffs allege that, before Defendant Appraisers conducted an appraisal, Quicken Loans would furnish them with a suggested appraisal value. Then, after purportedly conducting the appraisal, Defendant Appraisers arrived at the same appraisal value as the suggested appraisal value. The problem with that scheme, according to Plaintiffs, is that the borrower would then close on a loan that was underwater from the beginning.

Quicken Loans v. Alig, 737 F.3d 960, 963 (4th Cir. 2013).

Other courts have discerned the problem with the practice of providing a "target number" to an appraiser:

Appraisals are, essentially, an estimate of a property's market value as of a given date. A central component of all residential appraisals is the selection of comparable properties with which to assess the value of the subject property ("comparables"). Appraisers are supposed to select the best comparables—which typically means the geographically closest properties with the most similar characteristics, such as lot size, house size, style, and number of bathrooms—that have been the subject of sales transactions within the past year. Appraisers also consider market conditions, including housing supply and demand in the property's neighborhood.

…

While accuracy and good faith should be the watchwords of appraisers, it is easy for appraisers to inflate their appraisals through their selection and analysis of comparables. For instance, an appraiser can choose a comparable from a nicer neighborhood, ignore key features of a comparable's sales price, such as thousands of dollars of assistance with closing costs or escrowed repair funds that are not associated with the value of the property, or ignore more recent comparables that reflect a local market's turn for the worse. An appraiser might also mislabel the number of stories in a comparable, or fail to follow up on evidence that a property had been flipped, raising doubt about the sales price's reflection of market value. For these reasons, the URAR [Uniform Residential Appraisal Report] is supposed to include sufficient information about each selected comparable and its relevant characteristics to permit meaningful review.

Appraisers may inflate their appraisals because of pressure from loan officers. An officer may mention the desired appraisal value he is seeking, ask for the appraiser to call back if she cannot hit a specific value, or send out appraisal assignments to multiple appraisers with the explanation that the assignment will be given to the first one who can find the target value. Appraisers can be made to understand that their ability to receive future assignments depends upon delivery of the desired results.

During the overheated housing market at issue here, residential appraisers felt intense pressure to inflate appraisals. Defendants' appraisal expert, Hedden, observed that such pressure was simply part of what appraisers were faced with "on a regular basis." Defendants' appraiser witnesses acknowledged that they and other appraisers with whom they worked experienced pressure to provide "predetermined appraisal values."

In a national survey of appraisers conducted in late 2006, 90% of the participating appraisers indicated that they felt some level of "uncomfortable pressure" to adjust property valuations. This was an increase of 35% from a survey conducted three years earlier.

Fed. Housing Fin. Agency v. Nomure Holding America, Inc., 104 F.Supp.3d 441 (S.D. N.Y. 2015).

In ***Spears v. Wash. Mut., Inc.***, 2009 WL 605835 (N.D. Cal. March 9, 2009), the Court noted the allegations of the complaint:

> Plaintiffs bring this class action on behalf of all consumers in California who received home loans from WMB on or after June 1, 2006 with appraisals obtained through EA or LSI. According to the first amended complaint, home purchases in the United States have traditionally been financed through a third-party lender who retains a security interest in the property until

> the loan is repaid. In order to ensure that the secured lender will recoup the value of the loan if the borrower defaults, the lender generally requires that the property be professionally appraised. Plaintiffs allege that in June of 2006 WMB, with EA and LSI, began a scheme to inflate the appraised values of homes receiving loans in order to sell the aggregated security interests in the financial markets at inflated prices. According to the complaint, banks like WMB changed from a business model in which they held the mortgage loans until repaid to one where they sold the loans to financial institutions. This "paradigm shift" created an incentive for the bank to seek higher appraisals in higher volume.
>
> The complaint describes a scheme in which WMB allegedly conspired to inflate the appraised value of property underlying their mortgage loans. In 2006 WMB retained EA and LSI to administer WMB's appraisal program. EA and LSI have since performed almost all of WMB's appraisals, and WMB's borrowers have become EA and LSI's largest source of business. WMB created a list of "preferred appraisers," selected by WMB's origination staff, that it requested to perform appraisals for WMB borrowers.

2009 WL 605385, at *1.

In the trial court case in ***Brown v. Quicken Loans, Inc.***, Ohio County Circuit Court No. 08-C-36, Judge Recht issued his findings of fact and conclusions of law [Doc. 15-1]. With respect to the appraisal issue, Judge Recht found: (1) that the appraisal was conducted by Mr. Guida, who was formerly a defendant in this case;

(2) that at the time the assignment was made, the defendants provided Guida with an estimated value of the property; (3) that there was no legitimate purpose being served by providing the appraiser with an estimated value of the property; (4) that the estimated value given to the appraiser was $262,500, nearly $200,000 more than the highest sale in the applicable area; (5) that Guida appraised the property at $181,700; (6) that the property was retrospectively appraised at $46,000; and (7) that the appraisal gave the plaintiff a false sense as to her ability to repay the loan.

Judge Recht found that, as a matter of law, the loan was induced by unconscionable conduct due to, inter alia, negligently conducting the appraisal review and failing to realize the highly inflated appraisal. The Judge also found that the loan contained unconscionable terms, including being based upon an appraisal of $181,700 when the proper fair market value was $46,000.

On appeal, the West Virginia Supreme Court of Appeals found that based upon the appraisal and other factors, the trial court was correct in finding unconscionability. The Court did reverse a portion of the remedy imposed by the Judge. ***Quicken Loans, Inc. v. Brown***, 230 W.Va. 306, 737 S.E.2d 640 (2012). Syllabus Point 3 to the decision states:

> 3. "“The legislature in enacting the West Virginia Consumer Credit and Protection Act, W.Va. Code 46A-1-101 *et seq.*, in 1974, sought to eliminate the practice of including unconscionable terms in consumer agreements covered by the Act. To

> further this purpose the legislature, by the express language of W.Va. Code, 46A-5-101(1), created a cause of action for consumers and imposed civil liability on creditors who include unconscionable terms that violate W.Va. Code, 46A-2-121 in consumer agreements." Syl. pt. 2, ***U.S. Life Credit Corp. v. Wilson,*** 171 W.Va. 538, 301 S.E.2d 169 (1982).' Syl. pt. 1, ***Orlando v. Finance One of West Virginia, Inc.,*** 179 W.Va. 447, 369 S.E.2d 882 (1988)." Syl. Pt. 3, ***Arnold v. United Companies Lending Corp.,*** 204 W.Va. 229, 511 S.E.2d 854 (1998), *overruled, in part, on other grounds,* ***Dan Ryan Builders, Inc. v. Nelson,*** 230 W.Va. 281, 737 S.E.2d 550 (2012).

230 W.Va. 306, 737 S.E.2d at 644.

The fact pattern in ***Herrod v. First Republic Mortgage Corp.***, 218 W.Va. 611, 625 S.E.2d 373 (2005) is similar. According to the West Virginia Supreme Court, "[f]ollowing the home visit, the loan brokers prepared an appraisal request form on which Mr. Young provided two figures suggesting alternative values of $118,000 and $137,000 for the Herrod home. The form was transmitted by facsimile to Mr. Jack Weaver who worked for a real estate appraisal company known as Craddock's Last Stand in Parkersburg, West Virginia. Purportedly, there was an arrangement between Mr. Weaver and First Security whereby Mr. Weaver would provide inflated appraisals in connection with loans being pursued by First Security. When the appraisal report came back, the Herrod home was valued at $118,000." 218 W.Va. at 614, 625 S.E.2d at 376.

The Court added in footnote 11 that "[t]he arrangement purportedly involved the use of two figures on the appraisal request form; one being a "deal breaker" and the other a so-called "Christmas figure." Mr. Weaver would instruct one of his appraisers to inspect the property and then someone in the home office would complete the report by providing the comparables necessary to obtain the value sought by the loan broker.

Similarly, in ***Carroll v. JPMorgan Chase Bank, N.A.***, 2013 WL 17328, *1 (S.D. W.Va. Jan. 16, 2013) (Copenhaver, J), the plaintiff alleged that the defendant "solicited Plaintiff and her husband to refinance their home, and in connection therewith Aegis intentionally obtained an inflated appraisal—as was its practice—which wrongfully valued the home to be worth at least $290,000."

In ***Hatcher v. Bank of America***, 2013 WL 1776091, * 1 & 4 (S.D. W.Va. April 25, 2013) (Copenhaver, J), the defendant is alleged to have arranged for an appraisal with an inflated suggested value in excess of the property's true value, as was its normal procedure.

Chief Judge Chambers of the Southern District of West Virginia also refused to dismiss a claim of unconscionability where the allegations included the overvaluation of plaintiff's home. ***Petty v. Countrywide Home Loans, Inc.***, 2013 WL 1837932, *4 (S.D. W.Va. May 1, 2013). In accord is ***Heavener v. Quicken Loans, Inc.***, 2013 WL 2444596 (N.D. W.Va. June 5, 2013) (Groh, CJ).

In its Order Denying Defendant Quicken Loans Inc.'s Motion to Strike Class Allegations [Doc. 105], this Court noted that the then state of West Virginia law required a finding of both substantive and procedural unconscionability, but noted that certain members of the Court were questioning whether both were required. The Fourth Circuit, in ***McFarland***, resolved the issue finding that only procedural **or** substantive unconscionability is required.

This Court finds that the estimated value may have been provided by the borrower is a distinction without a difference. According to Quicken, when a borrower applied for a loan, information was entered into Quicken's loan origination system, including an estimated home value, for purposes of developing a loan proposal. [Doc. 206-1, Exh. A, Lyon Dep.]. The estimated value, along with a borrower's contact information, would be uploaded into Quicken's computer system AMP and then sent automatically to Quicken's sister company, TSI. [Doc. 206-1, Exh. B, Randall Dep. & Exh. C, Rankin Dep.]. TSI in turn would use this information, including the estimate of value, to generate an appraisal request form. [Doc. 206-1, Exh. C, Rankin Dep.]. The request form along with the estimated value would be passed to the appraiser selected from a pre-approved list of appraisers through a proprietary internet based system, known as Appraisal Port. [Doc. 206-1, Exh. C, Rankin Dep. & Exh. A, Lyon Dep.].

It is actually unclear who really provided the estimated value. For example, both the Aligs and Sheas denied having provided such a figure to the lender. [Doc. 206-1, Exh. D., Alig Dep. & Exh. E, Shea

Dep.]; *see also* [Doc. 206-2, Exh. F., Mem. of Op. & Order in ***Brown v. Quicken Loans*** (Findings of Fact & Conclusions of Law) (Feb. 25, 2010) at ¶ 18 ("It is unclear as to who provided the Anticipated Property Value."); [Doc. 206-2, Exh. G, Lyon Trial Testimony Vol. 5 (Oct. 9, 2009) at 84:15-85:4 ("I do not know if [the applicant's estimated value] came from [the consumer] or came from [Quicken's mortgage banker])].

While the factual issue of who really supplied the estimated value to the appraiser might be sufficient in and of itself to defeat the defendants' motion for summary judgment, for the purposes of this order, the Court will accept that the value was supplied to Quicken by the borrower.

A borrower's estimated value is not materially or logically distinguishable from a "target appraisal value" or "predetermined value". This Court is not aware of any industry source or other authority that has drawn such a distinction. In fact, John Brenan, the corporate designee for the Appraisal Foundation, actually testified that one of the *functions* of a borrower's estimated value *was* to serve as a "target value". [Doc. 193-7 at 231:3-234:12.]

No matter who supplied the estimated value, this Court cannot imagine any logical basis for sending an estimated value to the appraiser other than to influence his or her opinion.

This is supported by e-mails written by Quicken's executives that were uncovered by the Department of

Justice in a recent investigation of Quicken, one of which stated:

> FNMA [Fannie Mae] is being dragged into a lawsuit in the state of New York over lender pressure on appraisals. I don't think the media and any other mortgage company (FNMA, FHA, FMLC) would like the fact we have a team who is responsible to push back on appraisers questioning their appraised values.

[Doc. 206-2, Exh. I, Email from C. Bonkowski to H. Lovier, cc: M. Lyon (Dec. 13, 2007)].

In another e-mail uncovered by the Department of Justice, senior management at Quicken acknowledged in November of 2007 that its sister company, TSI, was receiving "a lot of calls from appraisers stating that they can't reach our requested value." Senior management's directive was to simply ask the appraisers "for the max increase available." [Doc. 206-2, Exh. J, Email from D. Thomas to E. Czyzak, *et. al.*, cc: D. Wright (Nov. 27, 2007)].

The defendant appraiser in ***Quicken Loans v. Brown***, 230 W.Va. 306, 737 S.E.2d 640 (2012), and former defendant here, Dewey Guida, recently conceded after surrendering his appraisal license that Quicken was regularly and actively attempting to influence his appraisals. Appraiser Guida testified on January 12, 2016, that any time his appraised value came in lower than the owner's estimated value, he received a telephone call from TSI asking that he change his figures. [Doc. 169-2, Guida Dep. at 44:2-8]. Guida went on to characterize the providing of an "owner's estimated value" as a "tip-off" [Doc. 169-2 at

40, 42-45, 104-105, 107-109]. This same scenario played out in the Alig 2007 loan, where Guida acquiesced to the requested value increase that was needed to qualify that loan. [Doc. 169-2 at 95:7-96:18, 99:5-100:18].

After an amendment to statute made Ohio's Consumer Sales Act applicable to mortgage lenders effective January 1, 2007, the Ohio Attorney General's office wasted no time and filed a number of lawsuits targeting the practice of lenders and brokers influencing appraisers by placing a "borrower's estimated value" on the appraisal order. Ohio courts uniformly concluded that the act of providing an estimated value for a property in connection with a mortgage loan is an unconscionable act or practice in violation of Ohio law because it is an attempt to improperly influence the appraiser's independent judgment. *See, e.g.,* ***State ex rel. Dann v. Premiere Service Mortgage Corp.***, Case No. CV-2007-06-2173 (Butler Cty. Apr. 30, 2008); ***State ex rel. Rogers v. Ace Mortgage Funding, LLC***, Case No. A0705054 (Hamilton Cty. Sept. 23, 2008); ***State ex rel. Cordray v. First Ohio Banc & Lending, Inc.***, Case No. 07-CV-259 (Belmont Cty. Nov. 24, 2009); ***State ex rel. Cordray v. Apex Mortgage Services, LLC***, Case No. 07-CV-261 (Belmont Cty. Mar. 10, 2009), [collectively Doc. 206-3, Exh. O].

It is undisputed that Quicken did not inform borrowers of its appraisal practices. TSI's third party software, Appraisal Port, is designed to "ensure[] that information exchanged between [TSI] and the appraiser is *not accessible to any third party*." [Doc. 2062, Exh. K, Petkovski Decl. at ¶ 5 (emphasis added)]. Moreover, Quicken did not produce a single appraisal request form and discarded them after providing the form to the appraiser. [Doc. 206-2, Exh. L, Petkovski Dep. at 59:18-60:8].

Quicken first contends that passing an "applicant's estimated value" on appraisal engagement letters was not improper. However, in February, 2010, Judge Recht concluded in an Ohio County, West Virginia case styled ***Brown v. Quicken Loans Inc.***, Civ. Action No. 08-C-36, that "[n]o legitimate purpose is served by providing an appraiser with an estimated value of a property. The only purpose could be to inflate the true value of the property." [Doc. 206-2, Exh. F]. This finding supported multiple liability conclusions. *See also*, ***Herrod v. First Republic Mortgage Corp.***, 218 W.Va. 611, 617-618, 625 S.E.2d 373, 379-380 (2005) (reversing a trial court's grant of summary judgment to a mortgage lender where an appraiser was provided with an estimated value).

Efforts to regulate this practice go back more than 20 years. For example, in 1996, the Federal Housing Commissioner issued appraisal standards to be followed in all HUD-approved mortgage transactions. Under these standards, the appraiser was required to certify that the appraisal was not "based on a requested minimum valuation, [or] a specific valuation or range of values."[1] In 2005, all the major federal agencies with lending oversight joined in and

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[1] [Doc. 206-7, Exh. LL, pp. 30-32, Mortgagee Letter 96-26, dated May 21, 1996 and authored by Nicholas P. Retsinas, Assistant Secretary for Housing, on behalf of the Federal Housing Commissioner].

issued an "Interagency Statement," advising in pertinent part: "the information provided [to the appraiser] should not unduly influence the appraiser ***or in any way suggest*** the property's value."[2] (Emphasis added).

Quicken argues that USPAP does not forbid the practice. Quicken ignores the fact that USPAP does not apply to lenders. Lending standards regarding appraiser independence are separate and stronger than standards set by the appraisal industry. [Doc. 206-7, pp. 13-21, Exh. JJ, Brenan Dep. at Dep. at 280:15-281:8; 290:8-292:4 (agreeing lender restrictions pertaining to estimated values go "beyond what USPAP requires.")].

John Brenan ***did not*** endorse the use of estimated values under USPAP. Instead, he acknowledged that estimated values are potentially a problem and can be used by the lender as a means to provide a target figure. (*Id*. at 233:5-235:16). If a lender provided an estimated value, the appraiser was advised in Advisory Opinion 19 of USPAP [*See* Doc. 206-7, pp. 23-28, Exh. KK] to communicate directly with the lender to insure a full understanding that the appraiser was not "hitting a target" figure. *Id*. The better practice, however, and the one insuring the appraiser's

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[2] Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of Thrift Supervision, National Credit Union Administration, Frequently Asked Questions on the Appraisal Regulations and the Interagency Statement on Independent Appraisal and Evaluation Functions, March 22, 2005. Available at http://www.occ.gov/news-issuances/bulletins/2005/bulletin-2005-6a.pdf.

independence, was to remove the estimate entirely. [*See* id. at 241:20-242:18].

While several of the appraisers that testified in this matter denied giving in to the attempts of Quicken and other lenders at influencing them, even the defendant appraisers agree an applicant's estimated value is not a relevant data point. In fact, the testifying appraisers distanced themselves from such figures as taboo and all agreed that this information is in no way necessary to performing an appraisal. [*See, e.g.*, Doc. 206-5, Exh. Y, Guida Dep. at 107:23-108:7; Doc. 206-7, Exh. II, Hyett Dep. at 353:7-21; 355:4-11 (figure was not relevant and serves no purpose); Doc. 206-3, Exh. N, Sneddon Dep. at 181:13-182:25 (estimated values on order forms are "inappropriate," and Advisory Opinion 19 tells appraisers that they are "delving into" a "dangerous area" and "there might be a problem" with such a form).] Plaintiffs' appraisal expert, John Kelly, testified that USPAP required him to refuse assignments that contained an estimated value. [Doc. 206-3, Exh. M, Kelly Dep. at 69:6-15*; see also* Doc. 206-7, Exh. MM, Lyon Dep. at 52:15 - 53:6 (agreeing estimated values were not necessary)]. In addition, appraisers like Jody Hill, who only worked for local lenders such as Wesbanco Bank and Main Street Bank, were not subject to such a practice. [Doc. 206-6, Exh. FF, Hill Dep. at 14:19-15:6, 100:22-103:23.]

Quicken next attempts to argue that unconscionability is equivalent to fraudulent inducement and requires proof by clear and convincing evidence. The ***McFarland*** Court declined to make that finding, nor did the legislature choose to equate the two concepts. Quicken further contends that it took no affirmative acts to deceive plaintiffs or conceal any material facts from them or that its failure to disclose this practice caused plaintiffs to enter into the loan contracts. This Court cannot agree. Quicken "affirmatively" passed on the estimated values to TSI, who in turn passed them to appraisers, while failing to disclose this conduct from plaintiffs. Finally, Quicken erroneously argues that there is no remedy for this conduct.

W.Va. Code § 46A-2-121 broadly addresses the subject of unconscionability in consumer contracts. Both the plain language of the statute and the courts interpreting the statute are clear that W.Va. Code § 46A-2-121 recognizes two species of unconscionability, general unconscionability and inducement by unconscionable conduct. Importantly, the inducement by unconscionable conduct claim is predicated solely on the process leading up to contract formation and entirely independent of any showing of substantive unconscionability. ***McFarland***, 810 F.3d at 283.

In ***McFarland***, like here, plaintiff alleged that the defendant lender had inflated his home appraisal. 810 F.3d at 277. However, as counsel for Wells Fargo repeatedly stressed:[3]

> There is no evidence whatsoever that the appraisal was "fraudulent" or that the appraiser was provided with an estimated value. Nor is there evidence that Wells Fargo or U.S. Bank had

[3] The defendants here are represented by the same counsel.

> any knowledge that the appraisal was anything other than a bona fide appraisal on which they could rely. In short, this case does not involve the sort of unscrupulous conduct the West Virginia legislature sought to prevent by enacting the WVCCPA.

Appellee Br. in ***McFarland*** (Appeal No. 14-2126, Doc. 33 at 26.)

The Fourth Circuit was also persuaded by the West Virginia Supreme Court's decision in ***Quicken Loans I***, *supra*, where the court "sustained findings of 'unconscionability in the inducement' based entirely on conduct predating acceptance of the contract and allegations going to the fairness of the process, without regard to substantive unconscionability: a 'false promise' of refinancing, the sudden introduction of a balloon payment at closing, a negligently conducted appraisal review, and other similar factors." 810 F.3d at 284 (citing ***Quicken I,*** 230 W.Va. 323-324, 737 S.E.2d at 657-58). The Court further noted that unconscionable inducement was not equivalent to procedural unconscionability and should turn on a defendant's misconduct, such as "affirmative representations," and "active deceit." 810 F.3d at 286. The Court left "to West Virginia law the precise contours of an unconscionable inducement claim". ***Id.***

According to Quicken, "the Fourth Circuit equated unconscionable inducement with fraudulent inducement." [Doc. 175, at 18.] Ignoring most of ***McFarland's*** analysis, Quicken simply leaps to the conclusion that an unconscionable inducement claim under W.Va. Code § 46A-2-121 is nothing more than a straw man for fraud.

This Court does not understand ***McFarland*** the same way. First of all, ***McFarland*** makes it clear that it is the conduct of the lender that is relevant, rather than the status of the plaintiff. 810 F.3d at 286. The conduct forming the basis of the claim here is passing a tip off figure to an appraiser without a borrower's knowledge or consent. ***McFarland*** did not delve deeply into the nature of unconscionable conduct, leaving that process to West Virginia's courts. However, we can gain some understanding of what unconscionable conduct means through the facts of the ***Brown*** and ***McFarland*** cases.

In ***Brown,*** the plaintiffs alleged that the lender, Quicken, engaged in a pattern of unconscionable conduct with the intent of inducing them into accepting an underwater mortgage loan. The West Virginia Supreme Court agreed:

> With regard to unconscionability in the inducement, the circuit court in the present case concluded that the unconscionable conduct of Quicken included "[t]he false promise of refinancing; [i]ntroducing a balloon payment feature at closing; [f]ailing to properly disclose the balloon payment; [f]alsely representing that the plaintiffs were buying the interest rate down; and [n]egligently conducting the appraisal review and failing to realize the highly inflated appraisal from Guida[.]"

230 W.Va. at 323, 737 S.E.2d at 657.

The Supreme Court affirmed, concluding that "there is no merit to Quicken's contention that it did not violate West Virginia Code 46A-2-121 in this regard." 230 W.Va. at 324, 737 S.E.2d at 658. Thus, the Court expressly found that Quicken's conduct before and during the closing was unconscionable in nature.

Quicken's conduct in ***Brown*** fell into two broad categories—false statements and withholding facts from the plaintiffs. ***McFarland*** did not attempt to precisely define unconscionable inducement, but it did expressly identify two of the potential hallmarks of unconscionable conduct, misrepresentations and deceit. ***McFarland*** did not define unconscionable inducement to mean fraud. In fact, the lender in ***McFarland*** specifically argued that "unconscionable inducement requires a heightened showing akin to fraud" in arguing against certification of plaintiff's question regarding an unconscionable inducement claim. (Appeal 14-2126, Def. Opp. to Pl. Motion to Certify Questions, Doc. No. 65-1 at 8 (Nov. 23, 2015)). ***McFarland*** apparently rejected the invitation to equate unconscionable inducement with fraud, and the word "fraud" never appears in its discussion of the unconscionable inducement issue. Instead, ***McFarland*** offers misrepresentation and deceit as examples of conduct that could constitute unconscionable inducement--examples drawn from the facts of the ***Brown*** case itself.

Quicken points to a footnote in ***Mt. State College v. Holsinger,*** 230 W.Va. 678, 742 S.E.2d 94 (2013), for the proposition that unconscionable inducement can be equated to fraudulent conduct. It is settled that "language in a footnote generally should be considered obiter dicta and that if [the West Virginia Supreme Court of Appeals] is to create a new point of law, it will do so in a syllabus point and not in a footnote. " ***Valentine v. Sugar Rock, Inc.***, 234 W.Va. 526, 532, 766 S.E.2d 785, 791 (2014) (quotation omitted). Unconscionable inducement could, of course, be satisfied by demonstrating fraudulent conduct, but that is not to say that this case stands for the proposition that only fraudulent conduct will satisfy the unconscionability standard.

The facts here supporting a finding of unconscionable conduct, as in ***Brown***, are simple and clear. Quicken influenced the appraisers to meet a passed on value, and it did so while failing to disclose the practice to plaintiffs. The CCPA must be liberally construed so as to effect its remedial purposes. ***Barr v. NCB Mgmt. Servs., Inc.***, 227 W.Va. 507, 711 S.E.2d 577 (2011). It makes no sense to extend the CCPA in the fashion proposed by Quicken so as to limit borrowers' rights to those that already exist at common law. There is ample evidence in the record that passing on an estimated value is an unconscionable practice that was part of the inducement for plaintiffs' loans.

Quicken's conduct here also falls within the two examples, misrepresentation and/or deceit, of unconscionable conduct given by ***McFarland***. Deceit is by its nature broad in scope and would encompass Quicken's conduct in the instant matter. Deceit is defined as "a fraudulent or deceptive misrepresentation, artifice, or device used by one or more persons to deceive or trick another." Black's Law Dictionary (5th Ed. 1979). Deceit, then, would not only cover Quicken's attempts to prejudice or influence appraisers but also Quicken's withholding of such practice from borrowers. As it did in the ***Brown*** case, Quicken possessed knowledge of the true facts of the Aligs' loan, namely that it was actively attempting to compromise the appraisal process. Specifically, pressure was being brought to bear on the appraiser, who was expected to meet or exceed a target figure that Quicken itself had provided not once but twice (in the case of the Aligs). By concealing these facts, Quicken meant to "deceive or trick" the plaintiffs. Quicken's conduct was therefore unconscionable even if the definition of unconscionability was limited to the two examples given by ***McFarland***.

We see this in ***Brown's*** treatment of the balloon note. Quicken did not secrete the balloon note or say anything at the closing to deflect the borrower's attention from it. Instead, the balloon note simply appeared within the settlement package that was presented to the borrowers for signing. Quicken knew it was there. The borrowers did not know what they were walking into. As ***Brown*** noted, "fraud is the concealment of truth just as much as it is the utterance of a falsehood." 230 W.Va. at 320, 737 S.E.2d at 654. Nothing further was required to prove that the loan was, in fact, unconscionably induced as a result of concealing the balloon note.

The same logic applies here. To repeat, Quicken had full knowledge of its practice of providing estimated values to its appraisers for purposes of influencing their appraisals. Quicken's Rule 30(b) witness and internal documents confirm beyond any doubt that estimated values were used by Quicken as a means of communicating targets to its appraisers. Quicken knew these facts. The plaintiffs did not. Under the analytical framework of both ***McFarland*** and ***Brown,*** this constituted unconscionable inducement.

Defendants set up four additional arguments why their conduct is not actionable. First, defendants argue there is no proof their unconscionable conduct actually induced the plaintiffs to enter into their loan agreements. It is important to again note the statutory language. A violation exists when "the agreement or transaction … [has been] induced by unconscionable conduct." W.Va. Code § 46A-2-121. The focus is plainly on the lender or creditor's conduct. The statute says nothing of the consumer's state of mind. If the "transaction" itself is induced or furthered by the lender's unconscionable conduct, that is enough for a violation.

Apparently, Quicken is not taking the extreme position that there is no remedy for conduct that is unconscionable *per se*. Indeed, Quicken acknowledges in its Memorandum in Support of Summary Judgment that a practice that is illegal would be *per se* unconscionable. [Doc. 175 at n. 18 (citing ***Dijkstra v. Carenbauer,*** 2014 WL 791140 (N.D. W.Va. Feb. 26, 2014)]. In ***Dijkstra***, this Court granted summary judgment to the plaintiff and found the closing of a loan without an attorney present to be unconscionable *per se* on account of West Virginia common law and an opinion of the Committee on Unauthorized Practice of Law. ***Dijkstra,*** 2014 WL 791140, at **4-5. The plaintiffs here are asking the Court to do what it did in ***Dijkstra***: to find that based on West Virginia common law and other persuasive authority identified above the lender's practices constitute unconscionable inducement.

Under West Virginia law there is no requirement to show reliance in claims involving concealment. Logically, it would be impossible to even make such a showing: How can anyone prove that they relied on a fact that was concealed from their knowledge? Even the higher standard for fraudulent concealment would not require proof of reliance, but instead involves only "concealment of facts by one with knowledge, or the means of knowledge, and a duty to disclose, coupled with an intention to mislead or defraud." ***Livingston v. K-Mart Corp.,*** 32 F.Supp.2d 369, 374 (S.D. W.Va. 1998) (Haden, J.) citing ***Pocahontas Min. Co. Ltd. P'ship v. Oxy USA, Inc.,*** 202 W.Va. 169, 175, 503 S.E.2d 258, 264 (1998) (in turn explaining that "[o]bviously, one who is defrauded [by fraudulent concealment] cannot possibly take any affirmative action to indicate reliance, since he knows nothing of the deception"); *see also* ***Adair v. EQT Prod. Co.,*** 2013 WL 5429882, at *39 (W.D. Va. Sept. 5, 2013) ("the doctrine of fraudulent concealment does not focus on the actions or knowledge of the plaintiffs, but on the actions of the defendant.").

Quicken's second argument is that "appraisals are obtained for the benefit of the lender, not the borrower." [Doc. 175, at 22]. In other words, as borrowers, plaintiffs were not justified in relying on the appraisal because it was obtained by the bank and for the bank. This is not borne out by the record. Quicken itself represents to borrowers that "[t]he appraisal will protect you from owing more on your loan than your home is worth, which is known as being underwater." The certification by the appraisers here explicitly states that others, including the borrower, can rely on the appraisal and its figures. In November 2005, Fannie Mae explained that the certification appearing on all of its appraisal forms was revised to reflect the fact that borrowers "should be able to rely on the accuracy of an appraisal report prepared by a state-licensed or state-certified appraiser and the appraiser should be held accountable for the quality of that appraisal because their reliance is customary and reasonable." [Doc. 206-7, Exh. NN at 3]. Finally, it should be noted this court itself addressed the same issue in a prior order, finding that the plaintiffs' negligence claim against one of the appraisers, i.e., Hyett, was viable because the plaintiffs were justified in relying on the appraisal he prepared. [Doc. 61].

Quicken's third argument is that it took no "affirmative action" with respect to concealing the passing of the estimated value. But in the same paragraph, it acknowledges that Quicken passed the estimated value on to TSI, who, in turn, included the estimated value on the appraiser engagement letters. [Doc. 175, at 20-21]. In fact, TSI's third party software, Appraisal Port, is designed to "ensure[] that information exchanged between [TSI] and the appraiser is not accessible to any third party, including the lender." [Doc. 206-2, Exh. K, Petkovski Decl. at ¶ 5].

Quicken's fourth argument is that the plaintiffs did not suffer any damage or detriment. Specifically, Quicken argues that plaintiffs must show that plaintiffs and other class members were actually harmed by this practice by receiving an upside down mortgage. This standard is contrary to the stated purpose of this claim, which is to provide a cause of action in situations where damages in the form of a substantively unconscionable loan are not present. For that reason, the WVCCPA provides that a person who has been subjected to unconscionable conduct may recover actual damages and the right to recover of $1,000 per violation. West Virginia Code § 46A-5-101. *See* Syl. pt. 2, ***Vanderbilt Mortg. & Fin., Inc. v. Cole,*** 230 W.Va. 505, 740 S.E.2d 562 (2013) ("under W.Va. Code § 46A-5-101(1) (1996), an award of civil penalties is not conditioned on an award of actual damages."). Actual damages are therefore not a necessary component of the claim. In this respect this case is no different from ***Dijkstra,*** where this Court did not require plaintiff to prove that each individual class member had suffered actual damages due to a witness only closing.

The defendants are also not entitled to summary judgment on the plaintiffs' contract claims. West Virginia law implies in every commercial contract a covenant requiring the parties to act in good faith. *See, e.g.*, ***Barn-Chestnut, Inc. v. CFM Dev. Corp.,*** 193 W.Va. 565, 572, 457 S.E.2d 502 (1995). The duty of good faith imposes real obligations that are grounded in honest dealing and compliance with standards of commercial reasonableness: "The test of good faith in a commercial setting is … honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." ***Barn-Chestnut,*** 193 W.Va. at 572, 457 S.E.2d at 509 (interior quotes omitted).

The plaintiffs and Quicken executed a contract at the beginning of the loan application process known as an "Interest Rate Disclosure and Deposit Agreement." [Doc. 206-5, Exh. X]. Quicken argues that no part of the contract imposes any obligation on Quicken to obtain an acceptable appraisal. Under the language of the contract, Quicken undertakes to "[o]btain an appraisal." At the end of the process the lender must make a proper accounting of the deposit and credit it "toward the cost of your appraisal."

The agreement also specifically refers to an "acceptable" appraisal. This language is significant. What exactly is an "acceptable" appraisal? Because the contract is silent on the subject, it must, under settled law, be interpreted against the lender and in favor of the borrower. *See, e.g.*, ***Auber v. Jellen***, 196 W.Va. 168, 469 S.E.2d 104 (1996) (ambiguous contract provisions, "especially those having the qualities of a contract of adhesion," must be construed against the drafter). Furthermore, because this involves how Quicken must perform under the contract, the implied covenant also comes into play.

All of this demonstrates that the agreement in question is meant to facilitate the loan application process by having the lender, Quicken, obtain an "acceptable" appraisal, which, at a minimum, would require Quicken to deal honestly with its borrowers and in keeping with the prevailing standards of reasonableness. Quicken has admitted that the borrower has an expectation of a fair, unbiased, and reasonable proposal. [Doc. 206-1, Exh. B, Randall II Dep. at 99:18-100:5]. In refusing to dismiss this Count in its October 2015 Order, this Court stated: "What is clear is that the plaintiffs each deposited a sum of money with Quicken, and, in turn, Quicken agreed to obtain an appraisal of the property and process the loan application. This Court finds that it was a necessary corollary of obtaining an appraisal that the defendant would obtain a fair, valid and reasonable appraisal of the property." (Order Denying in Part & Granting in Part Motion for Partial Summ. J. at 7) [Doc. 107].

Inasmuch as providing a target figure to an appraiser is a practice that is universally condemned and serves no legitimate purpose, an appraisal obtained by that process cannot conceivably be an "acceptable" one. Nor could an appraisal obtained by such a scheme be fair, valid or reasonable. Furthermore, withholding knowledge of the true nature of the appraisal violates Quicken's duty to deal honestly.

According to Quicken, however, the language requiring an "acceptable" appraisal "appears in the disclosure portion of the document. Under no plausible construction can this language be read as a promise by Quicken Loans to do anything." [Doc. 175, at 25]. The language is clearly contractual in nature--it imposes specific duties that must be fulfilled in connection with the deposit and the processing of the appraisal. For example, the lender undertakes to "begin processing your application ... immediately upon the submission of your application and deposit." The borrower "agree[s] to cooperate in the application process." In addition, the borrower "agree[s] to notify lender of any changes in any information submitted."

These are not disclosures; they are part and parcel of the contractual undertaking.

Quicken also tries to dismiss the reference to an "acceptable" appraisal, claiming that "receipt of an acceptable appraisal clearly means an appraisal acceptable ***to the lender,*** not the borrower, to support the loan." [Doc. 175, at 25 (emphasis in original)]. But this is nothing more than Quicken's own, self-serving interpretation. The contract itself is silent. Any appraisal Quicken obtained was intended for the benefit of both the lender and the borrower.

The Motion will be denied as to this issue.

II. Flat Fee for Courier Services

The plaintiffs also claim that the imposition of a flat rate for courier fees is excessive and therefore unconscionable. Title Source charged plaintiffs a $45 flat fee for express mail and courier services provided in connection with the closings. [Docs. 174-12, 174-17 & 174-20]. The express mail/courier fee was not paid directly to any third party because it is charged for services provided by multiple entities. [Doc. 174-28, ¶ 6]. Defendants claim to have set the $45 fee after conducting a market analysis to determine what other lenders in the industry charged for similar services and the average number and cost of services provided per transaction. [Doc. 174-28].

The $45 fee compensates defendants for express mail and courier services actually performed, including, but not limited to: (i) mailing the executed closing package back to Title Source via next day air delivery; (ii) sending via overnight delivery or wiring the payoffs for the borrower's preexisting mortgage(s), third party debts, judgments, liens, taxes, homeowner's insurance, and/or cash-out proceeds to the borrower; (iii) delivering the executed deed of trust to the county for recording; and (iv) employee time in tracking deliveries, preparing documents for mailing, and scanning in executed documents. [Doc. 174-28, ¶ 7; Doc. 174-13, Exh. A at 11].

The number and type of services provided to each borrower - which is not known until after closing - varies based on the borrowers' individual circumstances. [Doc. 174-13, ¶ 3-4, Exh. A at 12-13].

For UPS services, Title Source receives a monthly discount that fluctuates based on volume for that month. [Doc. 174-31, p. Dep. 32]. Plaintiffs' expert, Stephen McGurl, admitted that the exact cost of UPS services, without the end-of-month discount, is more than double the amount of the discounted charge. [Doc. 174-32, 134-35]. In other words, had Title Source charged the exact UPS fee at the time of the shipments, plaintiffs would likely have paid well over $45.

The express mail/courier fee of $45 is disclosed to borrowers before closing on the good faith estimate (GFE) and again on the HUD-1 settlement statement. [Doc. 174-28, ¶ 5; Exhs. 12, 17, 20.]. Plaintiffs received and signed these documents, agreeing to the fee in advance of closing. [Id.]. None of the plaintiffs questioned or disputed the fee.

Plaintiffs do not dispute that Title Source *actually provided* courier services to plaintiffs in connection with their loan closings and disbursements. The evidence shows that Title Source arranged for at least four express mail/courier services for each of the plaintiffs' loans, including sending the return package, deed of trust to the county for recording, payoffs for liens, and cash to borrowers. [Doc. 175, at 20]. In addition, Title Source employees provided services in connection with these deliveries, such as printing labels, tracking packages and confirming delivery. [Doc. 174, at 19]. Plaintiffs have presented no evidence that the $45 fee is anything other than reasonable in light of the services actually provided by Title Source.

Likewise, plaintiffs do not dispute that it is impossible to know, prior to closing, exactly what charges will be incurred for express mail/courier services. One may not know the exact cost of mailing something in advance - it depends on the service used, the number of packages, the size of the packages, the weight of the packages, the locations to which the packages are mailed, and other pricing considerations. Given the impossibility of determining costs before closing, it is standard in the industry - and permitted by RESPA - to charge a flat fee for express mail/courier services. *See, e.g.,* ***Price v. Landsafe Credit, Inc.***, 2006 WL 3791391 *7 (S.D. Ga. Dec. 22, 2006) ("Courts have rejected challenges to the reasonableness of flat-fee price structures, even though cross-subsidization between customers is inherent in such an arrangement.").

Plaintiffs rely upon ***Dijkstra v. Carenbauer,*** 2014 WL 791140 (N.D. W.Va. Feb. 26, 2014) to support their claim. In ***Dijkstra***, however, the amount of the notary's fee was set by statute. There is no comparable statute in this case.

This Court will grant summary judgment on this claim.

Class Certification

With regard to the issue of class certification, the plaintiff seeks certification of two classes. This Court's ruling on the issue of courier fees obviates the need for the second class. With respect to the first class, plaintiff seeks a class defined as follows:

> All West Virginia citizens who refinanced mortgage loans with Quicken, and for whom Quicken obtained appraisals through an appraisal request form that included an estimate of value of the subject property.

According to plaintiffs, this case is ideally suited for class certification because it will allow resolution of distilled factual and legal issues through this superior mechanism. Presenting the legal issues on behalf of a class will allow the Court to determine, in one fell swoop on a class wide basis whether it is unlawful in West Virginia for a lender to provide appraisers with target figures. Plaintiffs' class certification proposal thus allows for the "consolidation of recurring common issues" which "make up the heart of Plaintiffs' case," ***Gunnells v. Healthplan Servs., Inc.,*** 348 F.3d 417, 426 (4th Cir. 2003) (quoting ***Central Wesleyan v. W.R. Grace & Co.***, 6 F.3d 177, 185 (4th Cir. 1993)), and are therefore ideal for resolution through the class action mechanism.

"A district court 'has broad discretion in deciding whether to certify a class, but that discretion must be exercised within the framework of Rule 23.'" ***Lienhart v. Dryvit Sys., Inc.***, 255 F.3d 138, 146 (4th Cir. 2001), quoting ***In re American Med. Sys., Inc.,*** 75 F.3d 1069, 1079 (6th Cir. 1996). "[P]laintiffs bear the burden … of demonstrating satisfaction of the Rule 23 requirements and the district court is required to make findings on whether the plaintiffs carried their burden …." ***Thorn v. Jefferson-Pilot Ins. Co.***, 445 F.3d 311, 317 (4th Cir. 2006), quoting ***Gariety v. Grant Thornton, LLP,*** 368 F.3d 356, 370 (4th Cir. 2004).

In an action such as this, class certification may be granted only if the plaintiff satisfies the requirements of numerosity, commonality, typicality, representativeness, predominance, and superiority of

Rule 23(a)[4] and (b)(3)[5] are met. ***Lienhart***, 255 F.3d at 146.

"[N]umerosity requires that a class be so large that 'joinder of all members is impracticable.' Fed.R.Civ.P. 23(a)(1). Commonality requires that 'there are questions of law or fact common to the class.' Fed.R.Civ.P. 23(a)(2). The common questions must be dispositive and over-shadow other issues." ***Id.***, citing ***Stott v. Haworth,*** 916 F.2d 134, 145 (4th Cir. 1990). "In a class action brought under Rule 23(b)(3), the

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[4] Rule 23(a) provides:

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

5 Rule 23(b)(3) provides:

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

'commonality' requirement of Rule 23(a)(2) is 'subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class "predominate over" other questions.'" ***Id.***, at n.4, quoting ***Amchem Prods., Inc. v. Windsor,*** 521 U.S. 591, 609 (1997).

"Typicality requires that the claims of the named class representatives be typical of those of the class; 'a class representative must be part of the class and possess the same interest and suffer the same injury as the class members.' ***General Tel. Co. of Southwest v. Falcon,*** 457 U.S. 147, 156 (1982) (internal quotation marks omitted). Representativeness requires that the class representatives 'will fairly and adequately protect the interests of the class.' Fed.R.Civ.P. 23(a)(4).... [T]he final three requirements of Rule 23(a) 'tend to merge, with commonality and typicality "serv[ing] as guideposts for determining whether … maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence."' ***Broussard v. Meineke Discount Muffler Shops, Inc.,*** 155 F.3d 331, 337 (4th Cir. 1998) (quoting ***Falcon,*** 457 U.S. at 157 n. 13)." ***Id.*** at 146-47.

"In contrast to actions under Rule 23(b)(1) and (b)(2), Rule 23(b)(3) actions are '[f]ramed for situations in which class-action treatment is not clearly called for,' but 'may nevertheless be convenient and desirable.' ***Amchem Prods., Inc. v. Windsor,*** 521 U.S. 591, 615 (1997) (internal quotation marks omitted). In addition to the four Rule 23(a) requirements, Rule 23(b)(3) actions such as this one must meet two requirements: predominance and superiority. Predominance requires that '[common] questions of law or fact … predominate over any questions affecting only individual members.' Fed.R.Civ.P. 23(b)(3). The predominance inquiry 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.' ***Amchem,*** 521 U.S. at 623. Superiority requires that a class action be 'superior to other methods for the fair and efficient adjudication of the controversy.' Fed.R.Civ.P. 23(b)(3)." ***Id***. at 147.

Plaintiffs are asking this Court to determine whether passing an owner's estimate of value constitutes unconscionable conduct under West Virginia Code § 46A-2-121. [Doc. 1-1, p. 5, Count IV]. Plaintiffs also ask this Court to address whether Quicken breached the parties' contracts by depriving plaintiffs and Class Members of the benefit of their bargain -specifically, of a fair and unbiased appraisal - based on the alleged improper appraiser influence. [Id., Count VII].

These questions present common legal issues which this Court already had occasion to analyze earlier in this order and earlier in this litigation in the context of denying Quicken's motion to strike class allegations. [*See* Doc. 105, Order Denying Def. Motion to Strike Class Allegations (Oct. 15, 2015)]. In that Order, this Court observed that other courts have discerned the problem with Quicken's practice of providing a "target number" to the appraiser in connection with the loan, and discussed several decisions under West Virginia law regarding claims for inflated appraisals. [Doc. 105, at 7-13].

It was not the first time this Court had an opportunity to study appraisal influence. In a similar case, this Court recognized the plausible "inference" created when a bank provides appraisers with suggested or estimated values of homes:

> Taken as true, these allegations create an inference that [lenders'] practice of providing estimated values of homes was for the purpose of influencing the appraiser's independent judgment. It certainly is plausible that an appraiser would seek to meet a client's suggested outcome in order to receive future business from the client.

[Doc. 169-12, ***DiLoreti v. Countrywide Home Loans, Inc.****,* No. 5:14-cv-76 (N.D. W.Va. Nov. 14, 2014), Order Granting Bank Defendants' Motion in Part and Denying in Part and Denying Funari's Motion for Judgment on the Pleadings, at 7].

Plaintiffs propose that if this Court finds that passing estimated values to appraisers does constitute unconscionable conduct or a breach of contract, the case will then proceed to Phase II. During Phase II, plaintiffs propose to ask the Court to address whether a statutory penalty should be awarded for any violation of the WVCCPA, and if so, in what amount. Under West Virginia Code § 46A-5-101, a Court may award a statutory penalty if it finds that the defendants engaged in "unconscionable conduct." Plaintiffs also ask the Court to address whether a refund of the appraisal fees paid by class members is warranted under the CCPA or due to the breach of contract.

Finally, in Phase III, plaintiffs suggest that the Court address any individualized questions and permit class members who believe they have additional individual damages due to defendants' conduct to present those damages. Trial courts have great discretion to conduct and manage litigation in an efficient and equitable manner. Manual for Comp. Litig., at Introduction, 10.13 (4th ed. 2005). Particularly in the context of a class action, Rule 23 "allows district courts to devise imaginative solutions to problems created by … [determining] individual damages issues." ***Carnegie v. Household Int'l, Inc.***, 376 F.3d 656, 661 (7th Cir. 2004); *see also* ***In re Scientific Atlantic Inc., Sec. Litig.,*** 571 F.Supp.2d 1315, 1343 (N.D. Ga. 2007) (quoting ***Carnegie*** for this proposition and certifying class upon finding, "even if the Court ultimately concludes that aggregate damages models are not sufficiently reliable for use in this case, the Court is convinced that other viable alternatives exist to address any individual damages issues that may arise."). Accepted methods of assessing the individual issues relating to class members include:

> (1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class.

Id. (citing ***In re Visa Check/MasterMoney Antitrust Litig.,*** 280 F.3d 124, 141 (2d Cir. 2001)).

This Court used a similar process to resolve a similar class action in ***Dijkstra v. Carenbauer,*** No. 5:11-cv-152 (N.D. W.Va.). Specifically, in ***Dijkstra***, the Court made liability findings on the class claims and awarded statutory and disgorgement damages on a class-wide basis, and then allowed for individual class members to come forward with any claims of actual damages beyond those compensable on a class-wide basis. [***Dijkstra*** Orders at Docs. 210 & 242]. The defendant in ***Dijkstra*** filed two separate petitions for appeal, challenging this Court's certification decisions. Both were rejected. (*See* U.S.C.A. Case No. 13-107, petition denied Feb. 6, 2013 [***Dijkstra*** Doc. 129]; U.S.C.A. Case No. 14-386, petition denied July 31, 2014 [***Dijkstra*** Doc. 256]).

I. Numerosity:

"Rule 23(a)(1) requires that the class be of sufficient size that joinder of all members is 'impracticable.' In determining whether joinder is impracticable, a court should analyze the factual circumstances of the case rather than relying on numbers alone. ***Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n,*** 375 F.2d 648 (4th Cir. 1967). Factors to be considered are 'the estimated size of the class, the geographic diversity of class members, the difficulty of identifying class members, and the negative impact of judicial economy if individual suits were required.' ***Christman v. American Cyanamid Co.,*** 92 F.R.D. 441, 451 (N.D. W.Va. 1981); ***McGlothlin v. Connors,*** 142 F.R.D. 626, 632 (W.D. Va. 1992)." ***In re Serzone***

Prods. Liab. Litig., 231 F.R.D. 221, 237 (S.D. W.Va. 2005) (Goodwin, J.).

"Impracticable does not mean impossible." ***Hewlett v. Premier Salons, Int'l, Inc.***, 185 F.R.D. 211, 215 (D. Md. 1997) (Chasanow, J.)(quoting ***Robidoux v. Celani***, 987 F.2d 931, 935 (2d Cir. 1993)). "When a class is extremely large, the numbers alone may allow the court to presume impracticability of joinder. ***Buford v. H & R Block, Inc.,*** 168 F.R.D. 340, 348 (S.D. Ga. 1996) (citing ***Finnan v. L.F. Rothschild & Co., Inc.,*** 726 F.Supp. 460, 465 (S.D. N.Y. 1989); ***Riordan v. Smith Barney,*** 113 F.R.D. 60, 62 (N.D. Ill. 1986)). There is no bright line test for determining numerosity; the determination rests on the court's practical judgment in light of the particular facts of the case. ***Id***. (citing ***Deutschman v. Beneficial Corp.,*** 132 F.R.D. 359, 371 (D. Del. 1990))." ***Id.***

There is no set minimum number of potential class members that fulfills the numerosity requirement. *See* ***Holsey v. Armour & Co.,*** 743 F.2d 199, 217 (4th Cir. 1984) (citing ***Kelley v. Norfolk & Western Ry. Co.,*** 584 F.2d 34 (4th Cir. 1978)). However, where the class numbers twenty-five or more, joinder is usually impracticable. ***Cypress v. Newport News General & Nonsectarian Hosp. Ass'n,*** 375 F.2d 648, 653 (4th Cir. 1967) (eighteen class members sufficient).

Quicken has already admitted that, based on the allegations in the First Amended Complaint, "the number of members of all proposed plaintiff classes well exceeds 100." [Doc. 1]. The numerosity requirement is therefore satisfied.

II. Commonality:

Rule 23(a)(2) requires a showing of the existence of "questions of law or fact common to the class." Rule 23(b)(3) requires that questions of law or fact common to the class predominate over any questions affecting only individual members. The Fourth Circuit has held that "[i]n a class action brought under Rule 23(b)(3), the 'commonality' requirement of Rule 23(a)(2) is 'subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class "predominate over" other questions.'" ***Lienhart v. Dryvit Sys., Inc.***, 255 F.3d 138, 147 n. 4 (4th Cir. 2001)(quoting ***Amchem,*** 521 U.S. at 609). Because this is a class action brought under Rule 23(b)(3), this Court will analyze the two factors together in the predominance section of this opinion. *See* ***In re LifeUSA Holding Inc.,*** 242 F.3d 136, 144 (3d Cir. 2001) (analyzing the two factors together).

III. Typicality:

"To satisfy the typicality requirement under Rule 23(a)(3), the 'claims or defenses of the representative parties [must be] typical of the claims or defenses of the class.' *Fed.R.Civ.P.* 23(a)(3). 'A sufficient nexus is established [to show typicality] if the claims or defenses of the class and class representatives arise from the same event or pattern or practice and are based on the same legal theory.' ***In re Terazosin Hydrochloride Antitrust Litig.,*** 220 F.R.D. 672, 686 (S.D. Fla. 2004) (quoting ***Kornberg v. Carnival Cruise Lines, Inc.,*** 741 F.2d 1332, 1337 (11th Cir. 1984)); *see also* ***In re Diet Drugs,*** 2000 WL 1222042 at *43 (E.D. Pa. Aug. 28, 2000). The class representatives and class members need not have suffered identical injuries or damages. ***United Broth. of Carpenters v. Phoenix Assoc., Inc.,*** 152 F.R.D. 518, 522 (S.D. W.Va. 1994); *see also* ***Mick v. Ravenswood Aluminum Corp.,*** 178 F.R.D. 90, 92 (S.D. W.Va. 1998)." ***In re Serzone Prods. Liab. Litig.***, 231 F.R.D. 221, 238 (S.D. W.Va. 2005) (Goodwin, J.).

"The typicality requirement has been observed to be a redundant criterion, and some courts have expressed doubt as to its utility. ***Buford,*** 168 F.R.D. at 350 (citing ***Sanders v. Robinson Humphrey/American Express, Inc.,*** 634 F.Supp. 1048, 1056 (N.D. Ga. 1986), *aff'd in part, rev'd in part on other grounds sub nom.,* ***Kirkpatrick v. J.C. Bradford & Co.,*** 827 F.2d 718 (11th Cir. 1987), *cert. denied,* 485 U.S. 959 (1988)). Some courts treat typicality as overlapping with commonality, *see* ***Zapata*** [***v. IBP, Inc.***], 167 F.R.D. at 160; *cf.* ***Falcon,*** 457 U.S. at 157 n. 13 (noting that typicality and commonality 'tend to merge'); other courts equate typicality with adequacy of representation. ***Buford,*** 168 F.R.D. at 350 (citing ***Alfus v. Pyramid Technology Corp.,*** 764 F.Supp. 598, 606 (N.D. Cal. 1991)). Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct. ***Zapata,*** 167 F.R.D. at 160 (citing 1 *Newberg on Class Actions* § 3.13). A plaintiff's claim may differ factually and still be typical if 'it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.' ***Id***. (quoting 1 *Newberg on Class Actions* § 3.13). So long as the plaintiffs and the class have an interest in prevailing in similar legal claims, then the typicality requirement is satisfied. ***Buford,*** 168 F.R.D. at 351 (citing ***Meyer v. Citizens and Southern Nat'l Bank,*** 106 F.R.D. 356, 361 (M.D. Ga. 1985)). The existence of certain defenses available against plaintiffs that may not be available against other class members has been held not to preclude a finding of typicality. *See* ***id***. (citing ***International Molders' and Allied Workers' Local Union No. 164 v. Nelson,*** 102 F.R.D. 457, 463 (N.D. Cal. 1983)). The burden of showing typicality is not meant to be an onerous one, but it does require more than general conclusions and allegations that unnamed individuals have suffered discrimination. ***Kernan,*** 1990 WL 289505, at *3 (citing ***Paxton v. Union Nat'l Bank,*** 688 F.2d 552, 556 (8th Cir. 1982), *cert. denied,* 460 U.S. 1083 (1983))." ***Hewlett v. Premier Salons, Int'l, Inc.***, 185 F.R.D. 211, 216 (D. Md. 1997) (Chasanow, J.).

In this case, the claims of each of the putative class members arise from the same pattern or practice on the part of the defendants - the provision of a target value to its selected appraiser without the knowledge of the borrower. This Court finds that the requested class satisfies the typicality requirement.

IV. Adequacy of Representation:

"The final requirement of Rule 23(a) is set forth in subsection (4), which requires that 'the representative parties will fairly and adequately protect the interests of the class.' *Fed.R.Civ.P.* 23(a)(4). This determination requires a two-pronged inquiry: (1) the named plaintiffs must not have interests antagonistic to those of the class; and (2) the plaintiffs' attorneys must be qualified, experienced and generally able to conduct the litigation**.** ***Hewlett v. Premier Salons Int'l, Inc.,*** 185 F.R.D. 211, 218 (D. Md. 1997)." ***Serzone***, 231 F.R.D. at 238.

The defendants do not contest plaintiffs' counsel's ability to conduct the litigation, nor does this Court. The defendants have not pointed out any interests that the named plaintiffs have that are antagonistic to the interests of the proposed class.

Accordingly, this Court finds that the named plaintiffs and their counsel are able to fairly and adequately protect the interests of the class.

V. Predominance

The first factor under Rule 23(b)(3) requires that the questions of law or fact common to all class members predominate over questions pertaining to individual members. ***In re Serzone Prods. Liab. Litig.***, 231 F.R.D. at 239. Common questions predominate if class-wide adjudication of the common issues will significantly advance the adjudication of the merits of all class members' claims.

"The predominance inquiry 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" ***Lienhart***, 255 F.3d at 147 (quoting ***Amchem Prods., Inc. v. Windsor,*** 521 U.S. 591, 623 (1997)); ***Gariety v. Grant Thornton, LLP***, 368 F.3d 356, 362 (4th Cir. 2004).

In this case, the issues common to all class members predominate over any individual questions. There is no dispute that the defendants provided a target value to the appraisers which they selected. The liability phase of this case presents the following issues, which are common to all potential class members:

(1) whether defendants' practice of passing owners' estimates of value constitutes unconscionable inducement under the CCPA;

(2) whether defendants' breached the parties' contracts;

(3) whether class members are entitled to statutory penalties for each violation of the West Virginia Consumer Credit and Protection Act; and

(4) whether borrowers should receive a refund of the appraisal fees that they paid.

The common questions discussed above predominate. To put this into perspective, either it was permissible for Quicken to send appraisal request forms with target numbers or not. *See* ***Dijkstra v. Carenbauer***, *supra,* 2014 WL 791140, at *14 (granting affirmative judgment on class procedural unconscionability claim when defendant lender used non-attorneys to close loans and charged illegal notary fees).

If Quicken violated the law, plaintiffs will ask this Court to award statutory damages and set an amount. These resolutions will largely dispose of this litigation. Surely these determinations are much more straightforward than other certified classes of which the Fourth Circuit has approved. *See, e.g.,* ***Brown v. Nucor Corp.***, 785 F.3d 895 (4th Cir. 2015) (vacating district court's decertification of Title VII class of black steelworkers and remanding with instructions to certify the class in light of the "inherent cohesiveness of the class"); ***Gray v. Hearst Communs., Inc.***, 444 Fed. Appx. 698, 702 (4th Cir. 2011) (affirming certification of advertisers' class claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair and deceptive trade practices against directory distributors upon finding that "the common question regarding [defendant's] distribution obligation predominates over any individual issues because the putative class members all assert injury from the same action (*i.e.* failure by [defendant] to follow its standard distribution practice), and determination of whether [defendant] breached its standard distribution obligation will resolve in one stroke an issue that is central to the validity of the class members' breach of contract claims"); ***Central Wesleyan v. W.R. Grace & Co.***, 6 F.3d 177, 188 (4th Cir. 1993) (affirming conditional certification of a nationwide class of colleges and universities with asbestos in their buildings despite the "daunting number of individual issues", including the ability of each college to prove liability, differing statutes of limitation, differing asbestos products and exposures, present in the case).

Courts nationwide frequently recognize that cases involving fee overcharging are appropriate for class treatment. *See* ***Mahon v. Chicago Title Ins. Co.***, 296 F.R.D. 63 (D. Conn. 2013) (certifying class of persons overcharged for title insurance in connection with refinance transactions, explaining that "[t]he statutorily filed premium rates must be applied uniformly" and that in "each transaction, (i) the putative class member paid the premium charged/collected by [defendant] in exchange for a title insurance policy; (ii) [defendant] was required by law to charge a premium in accordance with its filed rates; (iii) the putative class member paid the premium charged by [defendant], which was an overcharge; and (iv) the putative class member was damaged by being overcharged for the title insurance); ***Spano v. Boeing Co.***, 294 F.R.D. 114 (S.D. Ill. 2013) (certifying ERISA class with various subclasses alleging imposition of excessive fees, noting several times that certification was appropriate because plaintiffs had alleged that all class members had complaints concerning the excessive fees); ***Markocki v. Old Republic Nat'l Title Ins. Co.***, 2015 WL 3421401 (E.D. Pa. May 27, 2015) (declining to decertify class claim under Real Estate Settlement Procedures Act where common question was whether defendant split a charge for settlement services not actually performed, and question predominated over any individual issues).

The issues common to the class predominate over any individual issues here. The central issue is whether passing an estimated value constitutes unconscionable conduct or a breach of the parties' contract. The Court can award class-wide damages in the form of statutory penalties and a refund of any fees paid.

These common questions are broad and apply to all potential class members. Accordingly, the predominance requirement is met.

VI. Superiority

"The superiority test of Rule 23(b)(3) requires the court to find that the class action instrument would be better than, not just equal to, other methods of adjudication. The four factors listed in this subsection (interest in controlling individual prosecutions, existence of other related litigation, desirability of forum, and manageability) are simply a guideline to help the court determine the benefit of the proposed class action. Advisory Committee's Notes to Fed.R.Civ.P. 23." ***Hewlett v. Premier Salons, Intern., Inc.***, 185 F.R.D. 211, 220 (D. Md. 1997).

A. Interest in controlling individual prosecutions

"The first factor identified in the rule is 'the interest of members of the class in individually controlling the prosecution or defense of separate actions.' Fed.R.Civ.P. 23(b)(3)(A). 'This factor has received minimal discussion in Rule 23(b)(3) actions.' ***Buford,*** 168 F.R.D. at 361 (quoting 1 *Newberg on Class Actions* § 4.29). According to the drafters of the rule:

> The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these

> interests may be theoretic[al] rather than practical; the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable.

Advisory Committee's Notes to Fed.R.Civ.P. 23." ***Hewlett***, at 220-21.

This case falls into the latter category, considering the likely relatively small potential individual recoveries, and fact that no other cases appear to have been filed.

B. Existence of other related litigation

"Under Rule 23(b)(3)(B), the court should consider the 'extent and nature of any litigation concerning the controversy already commenced by or against members of the class.' This factor is intended to serve the purpose of assuring judicial economy and reducing the possibility of multiple lawsuits. 7A *Federal Practice and Procedure* § 1780, at pp. 568-69. 'If the court finds that several actions already are pending and that a clear threat of multiplicity and a risk of inconsistent adjudications actually exist, a class action may not be appropriate since, unless the other suits can be enjoined, which is not always feasible, a Rule 23 proceeding only might create one more action.... Moreover, the existence of litigation indicates that some of the interested parties have decided that individual actions are an acceptable way to proceed, and even may consider them preferable to a class action. Rather than allowing the class action to go forward, the court may encourage the class members who have instituted the Rule 23(b)(3) action to intervene in the other proceedings.' ***Id.*** at 569-70." ***Hewlett***, at 221.

This factor is, in this case, a non-factor, since this Court has been made aware of no other lawsuits against the defendants concerning this issue.

C. Desirability of forum

Rule 23(b)(3)(C) requires the court to evaluate the desirability of concentrating the litigation in a particular forum. Because all of the potential class members are residents of the State of West Virginia, because the class representative and class counsel live here, and because defendant has counsel here, this forum is as good as any.

D. Manageability

"The last factor that courts must consider in relation to superiority is the difficulty that may be 'encountered in the management of the class action.' Fed.R.Civ.P. 23(b)(3)(D). 'Of all the superiority factors listed in Rule 23, *manageability* has been the most hotly contested and the most frequent ground for holding that a class action is not superior.' ***Buford,*** 168 F.R.D. at 363 (quoting 1 *Newberg on Class Actions* § 4.32). Some courts have said, however, '[t]here exists a strong presumption against denying class certification for management reasons.' ***Id.*** (citing ***In re Workers' Compensation,*** 130 F.R.D. 99, 110 (D. Minn. 1990); ***In re South Central States Bakery Prod. Antitrust Litig.***, 86 F.R.D. 407, 423 (M.D. La. 1980))." ***Hewlett***, at 221.

"The manageability inquiry includes consideration of the potential difficulties in identifying and notifying class members of the suit, calculation of individual damages, and distribution of damages. ***Six Mexican Workers v. Arizona Citrus Growers,*** 904 F.2d 1301, 1304 (9th Cir. 1990); ***Maguire v. Sandy Mac, Inc.,*** 145 F.R.D. 50, 53 (D. N.J. 1992); ***Kernan*** [***v. Holiday Universal, Inc.***], 1990 WL 289505 at *7 [D. Md. Aug. 14, 1990]; ***In re Folding Carton Antitrust Litig.,*** 88 F.R.D. 211, 216 (N.D. Ill. 1980)." ***Hewlett,*** at 221-22.

In ***Gunnells v. Healthplan Servs., Inc.***, 348 F.3d 417 (4th Cir. 2003), the Fourth Circuit stated:

> First, it appears likely that in the absence of class certification, very few claims would be brought against TPCM, making "the adjudication of [the] matter through a class action ... superior to no adjudication of the matter at all." *See* 5 *Moore's Federal Practice* § 23.48[1] (1997). Thus, class certification will provide access to the courts for those with claims that would be uneconomical if brought in an individual action. As the Supreme Court put the matter, "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." ***Amchem,*** 521 U.S. at 617 (citation omitted).

348 F.3d at 426.

In this case, the plaintiff's claims are easily susceptible to resolution on a classwide basis. The plaintiff has already obtained basic class list information, and Quicken can readily supply additional details regarding the identity of class members.

In the event that the class would become unmanageable, this Court can decertify the class. ***Gunnells v. Healthplan Servs., Inc.***, 348 F.3d at 426 (4th Cir. 2003); ***Central Wesleyan College v. W.R. Grace & Co.***, 6 F.3d 177, 184 (4th Cir. 1993).

Likewise, in the unlikely event that damages issues would require individual inquiry, the damage issues may be bifurcated. "Rule 23 contains no suggestion that the necessity for individual damage determinations destroys commonality, typicality, or predominance, or otherwise forecloses class certification. In fact, Rule 23 explicitly envisions class actions with such individualized damage determinations. *See* Fed.R.Civ.P. 23 advisory committee's note (1966 Amendment, subdivision (c)(4)) (noting that Rule 23(c)(4) permits courts to certify a class with respect to particular issues and contemplates possible class adjudication of liability issues with 'the members of the class ... thereafter ... required to come in individually and prove the amounts of their respective claims.'); *see also* 5 *Moore's Federal Practice* § 23.23[2] (1997) ('[T]he necessity of making an individualized determination of damages for each class member generally does not defeat commonality.'). Indeed, '[i]n actions for money damages under Rule 23(b)(3), courts *usually* require individual proof of the amount of damages each member incurred.' *Id.* at § 23.46[2][a] (1997) (emphasis added). When such individualized inquiries are necessary, if 'common questions predominate over individual questions as to liability, courts generally find the predominance standard of Rule 23(b)(3) to be satisfied.' ***Id***." ***Gunnells***, at 427-28.

"Courts have routinely rejected this argument, concluding, as we have in previous cases, that the need for individualized proof of damages alone will *not* defeat class certification. *See* ***Central Wesleyan,*** 6 F.3d at 189; ***Hill v. W. Elec. Co., Inc.***, 672 F.2d 381, 387 (4th Cir. 1982) ('Bifurcation of ... class action proceedings for hearings on ... damages is now commonplace.'); ***Chisolm v. TranSouth Fin. Corp.***, 184 F.R.D. 556, 566 (E.D. Va. 1999) (collecting cases)." ***Gunnells***, at 429 (emphasis in original).

Quicken contends that its statute of limitations defense presents a barrier to certification. The statute of limitations for the WVCCPA claims is provided by West Virginia Code § 46A-5-101(1), which states that no action may be brought more than one year after the due date of the last scheduled payment. W.Va. Code § 46A-5-101(1). Both the West Virginia Supreme Court and the Fourth Circuit have confirmed that this means that "the statute of limitation begins to run on the date under the parties' agreement providing for the final periodic payment of the debt." Syl. pt. 6, ***Tribeca Lending Corp. v. McCormick,*** 231 W.Va. 455, 745 S.E.2d 493 (2013); *see also* ***Delebreau v. Bayview Loan Serv., LLC,*** 680 F.3d 412, 415 (4th Cir. 2012). The statute of limitations for the conspiracy claim is determined by the nature of the underlying conduct on which the conspiracy claim is based. Syl. pt. 3, ***Dunn v. Rockwell,*** 225 W.Va. 43, 689 S.E.2d 255 (2009). Breach of contract claims have a ten year statute of limitations. W.Va. Code § 55-2-6.

The statute of limitations for the RMLA claim is two years from the date of closing. W.Va. Code § 55-2-12; ***Fluharty v. Quicken Loans, Inc.**,* 2013 WL 5963060 (N.D. W.Va. Nov. 7, 2013). Quicken has presented no compelling reason why the group of class members whose claims fall within any of these statutes of limitation cannot be determined.

Quicken's argument that individualized statute of limitations issues preclude class certification, [Doc. 185 at 17-20], ignores one important truth: while it is plaintiffs' burden to meet the requirements of Rule 23, ***Thorn v. Jefferson-Pilot Life Ins. Co.**,* 445 F.3d 311, 321 (4th Cir. 2006), it is *defendant's burden* to establish a statute of limitations defense. ***Hanshaw v. Wells Fargo Bank**,* 2015 WL 5345439, at fn. 5 (S.D. W.Va. Sept. 11, 2015) (Johnston, J.)(citing ***Burgess v. Infinity Fin. Employment Servs., LLC**,* 2012 WL 399178, at *5 (S.D. W.Va. Feb. 7, 2012)).

It is therefore defendants' burden to demonstrate that any loan in the class is time barred, and Quicken argues that it cannot do so because it sells the mortgage loans after origination and does not have records about them after that time. [Doc. 185 at 19]. None of the cases on which defendants rely, [Id. at 18], present a situation, like here, where a defendant in a proposed class action failed to produce evidence supporting its own affirmative defense because of its own record keeping practices. *See, e.g.* ***Hunter v. Am. Gen. Life & Acc. Ins. Co.**,* 2004 WL 5231631, *12 (D.S.C. Dec. 2, 2004) (individualized statute of limitations issues arose because of questions about when class members had inquiry notice.)

It is not plaintiffs' obligation to discover facts about Quicken's defense. In the absence of any such evidence, this argument must fail. *See* ***Sensormatic Sec. Corp. v. Sensormatic Elec. Corp.,*** 455 F.Supp.2d 399, 425 (D. Md. 2006) (defendant failed to meet burden of proof on statute of limitations defense when it presented insufficient proof of when plaintiff was on notice of alleged tort); ***In re Falwell,*** 434 B.R. 779, 786 (Bankr. W.D. Va. 2009) (refusing to sustain objection based on statute of limitation when defendant provided no evidence in support.)

In the event defendants produce evidence about the loans, determining which loans fall within the applicable period would ultimately prove to be a ministerial exercise. Plaintiffs do not dispute that the statute of limitations under § 46A-5-101 is affected by certain circumstances of the loan such as acceleration. *See, e.g.,* ***Delebreau v. Bayview Loan Serv., LLC,*** 680 F.3d 412, 416 (4th Cir. 2012). This is a simple task which Quicken could perform, but has not. For example, electronic information exists from Fannie and Freddie on defaults, accelerations, discharges, and payoffs. Defendants did not ask for this information [Doc. 193-12, at 50:2-18), but it could be used to identify and match with those loans. Similar information is held by MERS. [Id. at 54:8-17]. Moreover, the bulk of its loans were sold to Countrywide, JP Morgan, Bank of America or Wells Fargo. [Id. at 49:15-25]. Quicken could certainly request or subpoena records from these entities. Quicken has not availed itself of these readily available sources. Further, all the deeds of trust were recorded, so determining whether the statutes of limitation are affected by early repayment or foreclosure is simply a matter of searching public records to identify those loans that have not been either paid and released or foreclosed upon one year prior to the filing of the Complaint.

According to plaintiffs, this exercise is what the parties successfully performed in ***Dijkstra***. In that case, the Court certified the class after requesting and receiving briefing specifically on the statute of limitations issue. After certification and judgment, the parties worked collaboratively to identify which class members' loans fit into the certified class definitions based on the limitation period. Like Quicken here, the defendant in ***Dijkstra*** was an internet lender, and that defendant, LendingTree, in the same position as Quicken, was able to perform this ministerial task.

Finally, even if the defendants could present evidence regarding the class loans, plaintiffs have demonstrated that the practice of passing on estimated values to appraisers was unknown and not disclosed by defendants to borrowers, therefore tolling the statute. This was precisely the case last year in a Third Circuit decision affirming class certification. ***In re Comm. Bank of N. Va. Mortg. Lending Prac. Litig.***, 795 F.3d 380, 400-405 (3d Cir. 2015). In ***Community Bank,*** the defendant argued that equitable tolling was a "highly individualized inquiry that is not susceptible to common proof" and that "inquiries about equitable tolling" would predominate. 795 F.3d at 400. The court disagreed, finding that plaintiffs had shown an "independent act of concealment with respect to each loan" because material facts had been misrepresented in the HUD-

1 settlement statements used in closing the loans of each class member. ***Id***. at 402. The court therefore found that common issues predominated over individual issues as to whether applicable statutes of limitation on class members' claims were equitably tolled due to concealment. ***Id***. at 403; *see also* ***In re Urethane Antitrust Litig.,*** 251 F.R.D. 629, 639-40 (D. Kan. 2008) (predominance and superiority requirements satisfied upon allegations that manufacturers engaged in a horizontal price-fixing conspiracy when key issues of antitrust impact and fraudulent concealment were susceptible to common proof on a class-wide basis.) As in ***Community Bank,*** plaintiffs and the class members assert a common theory of concealment which would uniformly toll all of their claims.

Because this Court can easily determine whether the discovery rule applies class-wide to toll class members' claims, defendant's statute of limitations argument presents no barrier to certification. *See* ***Hamilton v. Pilgrim's Pride Corp.,*** 314 F.Supp.2d 630, 635 (N.D. W.Va. 2004) (under West Virginia law, the discovery rule tolls the statute of limitation until a claimant knows or by reasonable diligence should know that he has been injured and who is responsible).

This was the conclusion of the Southern District of California in ***Cohen v. Trump,*** 303 F.R.D. 376, 387 (S.D. Cal. 2014). In ***Cohen,*** the court granted class certification of mail and wire fraud claims based on advertising for a real-estate investment seminar, over defendant Trump's arguments that individualized determinations on statute of limitations defense would be necessary. The plaintiff had countered that the action was a "prototypical case where a statute of limitations defense does not undermine class certification because all of the facts that Trump claims satisfy the discovery rule are the same as to all Class members." 303 F.R.D. at 387. The court agreed and recognized that discovery facts "apply to nearly all of the putative class members and constitute common proof" regarding discovery of alleged injury. ***Id.**; see also* ***Kennedy v. United Healthcare of Ohio, Inc.***, 206 F.R.D. 191, 199 (S.D. Ohio 2002) (finding superiority and manageability satisfied and certifying class when evidence of discovery of claim "may be amenable to a common proffer.").

Rule 23(g) requires that a court certifying a class also appoint class counsel. The Rule directs a court to consider several factors, including "[t]he work counsel has done in identifying or investigating potential claims in the action; [c]ounsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action; [c]ounsel's knowledge of the applicable law; and [t]he resources counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(C)(i).

Proposed class counsel are qualified and able to represent the class. Bailey & Glasser in particular is well-versed in class action litigation. [*See* Doc. 169-16]. Jason Causey and the attorneys of Bordas & Bordas are also experienced consumer class action litigators. [*Id.*].

For the reasons stated above, Plaintiffs' Motion for Class Certification [Doc. 169] will be granted. This Court will conditionally certify the following class:

> All West Virginia citizens who refinanced mortgage loans with Quicken, and for whom Quicken obtained appraisals through an appraisal request form that included an estimate of value of the subject property.

Plaintiffs' Motion for Partial Summary Judgment

In their Motion, the plaintiffs seek summary judgment on the following issues:

(1) whether the act of sending an estimated or "target" value to an appraiser in connection with a real estate mortgage loan refinancing was unconscionable inducement under W.Va. Code § 46A-2-121 (Count IV);

(2) whether the act of sending an estimated or "target" value to an appraiser in connection with a real estate mortgage loan refinancing was a breach of the implied covenant contained in Quicken's contract with the borrower (Count VII);

(3) whether Quicken's routine assessment of $45 courier fees which did not reflect the actual cost of the services provided constitutes unauthorized charges under the West Virginia Consumer Credit and Protection Act ("WVCCPA") and West Virginia Residential Mortgage Lender, Broker

and Servicer Act ("RMLA") such that affirmative summary judgment on Counts III (RMLA), and VI (Unauthorized Charges) is warranted; and

(4) whether Defendants Quicken and TSI acted in concert to perform these acts such that there is no genuine dispute of fact remaining as to plaintiffs' conspiracy claim (Count I).

This Court will not reiterate and rehash the law and facts discussed above. With respect to the following this Court finds that, unless otherwise stated, there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law.

1. This Court finds that the act of sending an estimated or "target" value to an appraiser in connection with a real estate mortgage loan refinancing was unconscionable inducement under W.Va. Code § 46A-2-121;

2. This Court finds that the act of sending an estimated or "target" value to an appraiser in connection with a real estate mortgage loan refinancing was a breach of the implied covenant of good faith and fair dealing contained in Quicken's contract with the borrowers;

3. This Court finds that Quicken's routine assessment of $45 courier fees which did not reflect the exact, actual cost of the services provided does not constitute an unauthorized charge under the West Virginia Consumer Credit and Protection Act ("WVCCPA") and West Virginia Residential Mortgage Lender, Broker and Servicer Act ("RMLA"); and

4. This court finds that defendants Quicken and TSI acted in concert to perform the acts above such that there is no genuine dispute of fact remaining as to plaintiffs' conspiracy claim (Count I).

This Court has not heretofore discussed the conspiracy aspect of this case. A civil conspiracy is:

> a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose not in itself unlawful, by unlawful means. The cause of action is not created by the conspiracy but by the wrongful acts done by the defendants to the injury of the plaintiff.

Dixon v. Am. Indus. Leasing Co., 162 W.Va. 832, 253 S.E.2d 150, 152 (1979). "At its most fundamental level, a civil conspiracy is 'a combination to commit a tort.'" ***Wolfe v. Tackett,*** 2009 WL 973442, at *6 (S.D. W.Va. Apr. 9, 2009) (Copenhaver, J.)(quoting ***Kessel v. Leavitt***, 204 W.Va. 95, 511 S.E.2d 720, 753 (1998)).

The undisputed evidence shows that Quicken and TSI consistently acted in concert to accomplish their unlawful purposes of providing appraisers with estimated values. Quicken's testimony is that when a borrower applied for a loan, information, including an owners' estimate of value would be generated. [Doc. 173-11 at 20:25-21:12]. This information, along with a borrower's contact information, would be uploaded into Quicken's computer system, AMP, and then sent automatically to Quicken's sister company, TSI. [Doc. 173-11 at 30:5-11]; *see also* [Doc. 173-12 at 17:9-17]. TSI testified that it would in turn use this information, including the owners' estimate of value, to generate an appraisal request form. [Doc. 173-12 at 32:17-23]. The request form along with the owners' estimate of value would be passed to the appraiser selected by TSI to perform this practice. [Id.]. The scheme of passing estimated values to appraisers thus involved the concerted efforts of both defendants, which happen to be owned by the same parent company. [*See* Doc. 173-26 at 60:2-8].

While conspiracy claims against parent and child companies are generally not permitted under federal antitrust law, ***Copperweld Corp. v. Independence Tube Corp.,*** 467 U.S. 752 (1984), that holding is limited to the Sherman Act. ***Princeton Ins. Agency, Inc. v. Erie Ins. Co.***, 225 W.Va. 178, 185, 690 S.E.2d 587, 594 (2009).

Moreover, there is no prohibition on claims for conspiracy between or among "sister" or related companies like Quicken and TSI. *See* ***In re Ray Dobbins Lincoln-Mercury, Inc.,*** 604 F.Supp. 203, 205 (W.D. Va. 1984), *judgment aff'd*, 813 F.2d 402 (4th Cir. 1985) (finding "***Copperweld*** is of no effect" as to conspiracy alleged between two subsidiaries and refusing to dismiss conspiracy claim against defendants with common parent); ***Christou v. Beatport, LLC,*** 849 F.Supp. 2d 1055, 1073 (D. Col. 2012) (refusing to dismiss conspiracy claim against "related entities" with "some common ownership").

Defendants' Motions to Exclude the Opinions and Testimony of Matthew Curtin and Stephen McGurl

The defendants have moved to exclude the opinions and testimony of plaintiffs' expert witnesses Matthew Curtin and Stephen McGurl. This Court did not rely upon the opinions of either witness in deciding the issues before it. In light of the above rulings, it would appear to the Court that the Motions are moot.

Defendants' Motion *In Limine* to Exclude Evidence of Appraisers Petition

In the above Motion, the defendants seek to exclude as not relevant an "Appraisers Petition" signed by a number of appraisers and sent to the Appraisal Subcommittee of the Federal Financial Institutions Examination Council. The defendants argue that it is plain from the face of the Appraisers Petition that it has nothing to do with the owner's or applicant's estimate of value. Rather, the petition refers only to various categories of "pressure" that involve withholding business or refusing to pay or employ appraisers. The defendants note that the Appraisers Petition does not even mention the owner's estimate of value, let alone complain that the practice of providing such an estimate is one of the ways in which lenders are "pressuring" appraisers.

In the 2000s, a petition was posted online at AppraisersForum.com, a general website for real estate appraisers. The petition was signed by over 11,000 appraisers from across the country including one of the Plaintiffs' experts, Troy Sneddon.

Eventually, the signed petition was provided to the Appraisal Subcommittee of the Federal Financial Institution Examination Council and other federal and state regulatory agencies.

The petition expressed concern over an ongoing "problem" within the mortgage industry--i.e., lenders "who, as a normal course of business, [were] apply[ing] pressure on appraisers to hit or exceed a predetermined value." Among other things, lenders threatened to refuse payment, withhold future business, or even blacklist appraisers for failing to inflate their appraisals so as to meet or exceed the lender's target figure. As a result, the independent judgment of appraisers was being compromised. Furthermore, the appraisers contended that homeowners were being damaged by purchasing overvalued homes and the economy as a whole faced the prospect of "great financial loss." The appraisers signing the petition urged regulators to "hold … lenders responsible" for this misconduct and to provide for an appropriate penalty.

As noted above, in a similar case, this Court recognized the plausible "inference" created when a bank provides appraisers with suggested or estimated values of homes:

> Taken as true, these allegations create an inference that [lenders'] practice of providing estimated values of homes was for the purpose of influencing the appraiser's independent judgment. It certainly is plausible that an appraiser would seek to meet a client's suggested

> outcome in order to receive future business from the client.

[Doc. 169-12, ***DiLoreti v. Countrywide Home Loans, Inc.,*** No. 5:14-cv-76 (N.D. W.Va. Nov. 14, 2014), Order Granting Bank Defendants' Motion in Part and Denying in Part and Denying Funari's Motion for Judgment on the Pleadings, at 7].

The petition is relevant to demonstrate that in fact pressure was being placed on appraisers to meet target values. Rule 401 of the Federal Rules of Evidence establishes a broad, liberal test for relevancy. Professor Cleckley has noted that "[d]eterminations of relevancy … are based on the presence of a nexus, that is, a relationship between the evidence offered for admission and a fact or issue of consequence to the case." F. Cleckley, *Handbook on Evidence for West Virginia Lawyers* §4-1(E)(3). The test for relevancy, in essence, is one of probability: "[W]hether a reasonable person, with some experience in the everyday world, would believe that this piece of evidence ***might*** be helpful in determining the falsity or truth of any material fact." *Id.*, at §4-1(C) (emphasis in original). Moreover, the Fourth Circuit recognizes that industry standard evidence is relevant. *See, e.g.,* ***Advo-System. Inc. v. Maxway Corp.,*** 37 F.3d 1044, 1048 (4th Cir. 1994) ("ordinary business terms" analysis requires reference to prevailing industry standards); ***Reed v. Tiffin Motor Homes, Inc.,*** 697 F.2d 1192, 1196 (4th Cir. 1982) (industry standards are relevant to show reasonableness of design).

Here, the petition is relevant to show that appraisers understood the deleterious effects of providing any kind of target value. Indeed, the petition acknowledges that influencing appraisers was inappropriate under industry standards because it stripped appraisers of their independent judgment and resulted in a dishonest and potentially harmful process. Furthermore, the petition is relevant because it confirms that the practice of using target figures was widely, if not universally, condemned. For these reasons, the petition is both relevant and admissible, and defendants' motion will be denied.

Defendants' Motion *In Limine* to Exclude Evidence or Argument Related to The Home Valuation Code of Conduct or Dodd-Frank Act

In this Motion, the defendants seek to exclude as not relevant evidence concerning the Home Valuation Code of Conduct ("HVCC") or the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") on the basis that the HVCC went into effect in May 2009 and that Title Source made changes to its appraisal request forms for the specific purpose of complying with the HVCC. Dodd-Frank was not enacted until July 21, 2010 - by which time it had been more than a year since Title Source had stopped including the owner's estimate of value on appraisal engagement letters. In addition, defendants argue that Dodd-Frank does not address the owner's estimate of value.

The plaintiffs reply that they are not attempting to show that the defendants violated HVCC or Dodd-Frank, rather the plaintiffs contend that the fact that certain actions are prohibited by these remedial provisions is evidence of unconscionable conduct.

With the passage of Dodd-Frank in 2010, enforcement against appraiser influence finally came. *See* 15 U.S.C. § 1639e (2010). Federal guidelines interpreting the Dodd-Frank Act expressly prohibit a lender from "[c]ommunicating a predetermined, expected, or qualifying estimate of value, or a loan amount or target loan-to-value ratio to an appraiser or person performing an evaluation." 75 Fed. Reg. 77450, 77457 (2010).

In addition, the provisions of HVCC and Dodd-Frank refute the position taken by defendants that there is some difference between sending the "owner's estimate of value" to an appraiser as opposed to a "target value." The HVCC prohibits lenders and their appraisal management companies from "providing to an appraiser an anticipated, estimated, encouraged, or desired value for a subject property or a proposed or target amount to be loaned to the borrower."

Moreover, TSI has acknowledged that Dodd Frank banned this practice. [Doc. 2113, Petkovski Dep. at 96:13-97:17]. Specifically, TSI's representative testified that TSI's "Dodd-Frank Compliance and Non-Influence Certificate" states that TSI does not provide estimated values, loan amounts, or loan-to-value ratios to the appraiser, and prohibits appraiser communications with the lender-client and borrower property owner, in order to be "consistent with elements of Dodd-Frank."

For these reasons, defendants' motion will be denied.

Plaintiffs' Motion to Strike Portions of the of Sherry Dukic Declaration

The plaintiffs have moved to strike portions of the Sherry Dukic Declaration which are inconsistent with her deposition testimony. While this Court did rely upon portions of Ms. Dukic's declaration in ruling on the pending motions, the Court did not rely upon the portions of the declaration which the plaintiffs seek to have stricken. Furthermore, in light of this Court's ruling on the issue of courier fees, this declaration will no longer be relevant. Accordingly, the Motion will be denied as moot.

Conclusion

For the reasons stated above:

1. Defendant Hyett's Motion for Summary Judgment [**Doc. 172**] is **DENIED AS MOOT**;

2. The Motion for Summary Judgment filed by Quicken and TSI, Inc. [**Doc. 174**] is **DENIED IN PART AND GRANTED IN PART**. The claim related to providing a value to the appraiser will go forward. The claim regarding courier fees is dismissed;

3. Plaintiffs' Motion for Class Certification [**Doc. 169**] is **GRANTED**. This Court will conditionally certify the following class:

> All West Virginia citizens who refinanced mortgage loans with Quicken, and for whom Quicken obtained appraisals through an

appraisal request form that included an estimate of value of the subject property.

4. Plaintiffs' Motion for Partial Summary Judgment [**Doc. 173-1**] is **GRANTED IN PART AND DENIED IN PART**. Specifically:

A. This Court finds that the act of sending an estimated or "target" value to an appraiser in connection with a real estate mortgage loan refinancing was unconscionable inducement under W.Va. Code § 46A-2-121;

B. This Court finds that the act of sending an estimated or "target" value to an appraiser in connection with a real estate mortgage loan refinancing was a breach of the implied covenant of good faith and fair dealing contained in Quicken's contract with the borrowers;

C. This Court finds that Quicken's routine assessment of $45 courier fees which did not reflect the exact, actual cost of the services provided does not constitute an unauthorized charge under the West Virginia Consumer Credit and Protection Act ("WVCCPA") and West Virginia Residential Mortgage Lender, Broker and Servicer Act ("RMLA"); and

D. This court finds that defendants Quicken and TSI acted in concert to perform the acts above such that there is no genuine dispute of fact remaining as to plaintiffs' conspiracy claim (Count I).

5. Defendants Quicken Loans Inc.' and Title Source, Inc.'s Motion to Exclude the Opinions and Testimony of Plaintiffs' Experts, Matthew Curtin, Pursuant to Rule 702 and ***Daubert*** [**Doc. 176**] is **DENIED AS MOOT**;

6. Defendants Quicken Loans Inc.'s and Title Source, Inc.'s Motion to Exclude the Opinions and Testimony of Plaintiffs' Expert, Stephen McGurl, Pursuant to Rule 702 and ***Daubert*** [**Doc. 178**] is **DENIED AS MOOT**;

7. Defendants Quicken Loans Inc.'s and Title Source, Inc.'s Motion *In Limine* to Exclude Evidence of Appraisers Petition [**Doc. 201**] is **DENIED**;

8. Defendants Quicken Loans Inc.'s and Title Source, Inc.'s Motion *In Limine* to Exclude Evidence or Argument Related to The Home Valuation Code of Conduct or Dodd Frank Act [**Doc. 203**] is **DENIED**;

9. Plaintiffs' Motion to Strike Portions of the Declaration of Sherry Dukic which Are Inconsistent with Deposition Testimony [**Doc. 209**] is **DENIED AS MOOT**.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record herein.

DATED: June 2, 2016.

[signature]
JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling

PHILIP ALIG, SARA J. ALIG, ROXANNE SHEA and **DANIEL V. SHEA,** individually and on behalf of a class of persons,

Plaintiffs,

v.

QUICKEN LOANS INC., and **TITLE SOURCE, INC.,** dba Title Source Inc. of West Virginia, Incorporated,

Defendants.

Civil Action No. 5:12-CV-114
Judge Bailey

SECOND ORDER RESOLVING MOTIONS AND AWARDING CLASS-WIDE STATUTORY DAMAGES

Pending before this Court are the following motions:

1. Plaintiffs' Brief on Class-wide Statutory Penalties and Motion for Summary Judgment on Class-wide Contract Damages [Doc. 293-1];

2. Defendant's (*sic*) Motion for Summary Judgment on Certain Class Loans [Doc. 298-3];

3. Defendants' Motion in Limine and Memorandum of Law to Exclude Prior Testimony of Michael Lyon [Doc. 301];

4. Plaintiffs' Motion in Limine to Preclude Witnesses at Damages Hearing, and Memorandum in Support [Doc. 311];

5. Defendants' Motion and Incorporated Memorandum to Strike Plaintiffs' Response to Defendants' Memorandum Regarding Classwide Penalty under the WVCCPA [Doc. 312];

6. Quicken Loans and Title Source's Combined Motions in Limine and Memoranda of Law to Exclude Documents Cited in Plaintiffs' Summary Judgment Briefing and Damages Briefing [Doc. 325]; and

7. Defendant's (*sic*) Motion to Decertify the Class [Doc. 327].

Before addressing the merits of the various motions, it would be beneficial to recount a portion of the history of this case. This litigation effectively commenced on June 15, 2012, when plaintiffs filed an Amended Complaint in the Circuit Court of Ohio County individually and on behalf of a class of West Virginians who obtained mortgage loans through Quicken. The case proceeded through several years of motion practice, a stay, and exchange of discovery. The course of discovery included the exchange of over 15,000 pages of documents and the depositions of twenty-three witnesses. Discovery on all aspects of the case closed on December 29, 2015 [Doc. 97].

Plaintiffs subsequently moved for class certification as well as for summary judgment on the class claims. On June 2, 2016, this Court found that Quicken's uniform practice of providing estimated home values to appraisers constitutes unconscionable conduct under the West Virginia Consumer Credit and Protection Act ("WVCCPA") [Doc. 227]. The Court found that Quicken did so while failing to disclose the practice to plaintiffs. The Court recognized that, by "concealing these facts, Quicken deceived the plaintiffs" as understood by the Fourth Circuit in ***McFarland v. Wells Fargo Bank,*** 810 F.3d 273 (4th Cir. 2016). Moreover, the Court found "ample evidence in the record that passing on an estimated value is an unconscionable practice that was part of the inducement for plaintiffs' loans." The Court rejected Defendants' argument that appraisals are obtained for the benefit of the lender, not the borrower, [Id. at 22], explaining that Quicken itself represents to borrowers that "[t]he appraisal will protect you from owing more on your loan than your home is worth, which is known as being underwater."

This Court also made findings as to intent: "To repeat, Quicken had full knowledge of its practice of providing estimated values to its appraisers for purposes of influencing their appraisals. Quicken's Rule 30(b) witness and internal documents confirm beyond any doubt that estimated values were used by

Quicken as a means of communicating targets to its appraisers. Quicken knew these facts. The plaintiffs did not. Under the analytical framework of both ***McFarland and Brown,*** this constituted unconscionable inducement." [Id. at 20-21].

The Court also rejected any argument that plaintiffs must show actual harm to recover under the WVCCPA. [Id. at 23]. It explained that Quicken's belief that plaintiffs must show actual harm caused by its conduct to be "contrary to the stated purpose of this claim, which is to provide a cause of action in situations where damages in the form of a substantively unconscionable loan are not present. For that reason, the WVCCPA provides that a person who has been subjected to unconscionable conduct may recover actual damages and the right to recover of $1,000 per violation. West Virginia Code § 46A-5-101. See Syl. pt. 2 ***Vanderbilt Mortg. & Fin., Inc. v. Cole,*** 230 W.Va. 505, 740 S.E.2d 562 (2013) ('under W.Va. Code § 46A-5-101(1) (1996), an award of civil penalties is not conditioned on an award of actual damages.')." [Id].

As to the breach of contract claim, the Court analyzed the contract into which plaintiffs and Quicken entered in which Quicken undertook to obtain an acceptable appraisal [Id. at 24]. The Court went on to find that an appraisal obtained by the process of providing a target figure to an appraiser is a universally condemned process that serves no legitimate purpose and "cannot conceivably be an 'acceptable' one." [Id. at 25]. Further, "[n]or could an appraisal obtained by such a scheme be fair, valid or reasonable" and "withholding knowledge of the true nature of the appraisal violates Quicken's duty to deal honestly" [Id.].

Finally, this Court also found that the "undisputed evidence shows that Quicken and TSI consistently acted in concert to accomplish their unlawful purposes of providing appraisers with estimated values" and granted affirmative summary judgment on plaintiffs' conspiracy claim [Id. at 54-55].

This Court also analyzed plaintiffs' motion for class certification and, finding all Rule 23 requirements met, certified a class defined as:

> All West Virginia citizens who refinanced mortgage loans with Quicken, and for whom Quicken obtained appraisals through an appraisal request form that included an estimate of value of the subject property.

[Id. at 61]. In doing so, the Court found that it would be able to "easily determine whether the discovery rule applies class-wide to toll class members' claims" and that therefore "defendant's statute of limitations argument presents no barrier to certification" [Id. at 51].

Defendants unsuccessfully moved for reconsideration as well as interlocutory appeal to the Fourth Circuit. [Docs. 243 & 237].

Defendants then moved for entry of a scheduling order, after which the Court held an in person status conference on November 17, 2016. As a result of that conference, this Court issued an Order [Doc. 248] as follows:

- The Court noted that defendants sought additional discovery and that "defendants also seek to demonstrate that they did not engage in any sort of 'bad faith' in making a referral to the appraisers" and further "seek to demonstrate that there was no causal connection between their conduct and a biased appraisal as to damages;"

- The Court further stated that plaintiffs "contend that defendants are merely asking for a 'do-over' both on discovery and the merits arguments that they have already presented thus far" and that plaintiffs had pointed out that "defendants already have the discovery which they seek, including their lending patterns and practices, and information about individual class members' loans;"

- As a result, the Court concluded that defendants were simply asking for a period of time to go through their own loan information and glean statistical and anecdotal evidence to support their positions as well as to obtain an expert witness, and allowed defendants a period of time to go through the loan information already in their possession;

- The Court set forth the class notice procedures, including that a first class opt-out notice must be sent by December 15, 2016; and that a second notice must be sent "after the Court has ruled on statutory damages and the return of the appraisal fees, so that individual plaintiffs can estimate the amount of monetary compensation that they will receive by opting into or out of the class;"

- The Court ordered Defendants to provide plaintiffs with information as to the amount of appraisal fees by March 1, 2017;

- The Court set a hearing as to damages on April 20, 2017, with concurrent memoranda as to class damages to be filed by April 6, 2017, understanding that if the defendants desired to call a witness on the issue of egregiousness, the Court would hear the testimony.

In January of this year, the defendants retained additional counsel, who seems determined to obtain a "do-over" of virtually every ruling in this case. On February 24, 2017, the defendants filed Quicken Loans and Title Source's Motion for Modification of Order as to Status Conference [Doc. 266]. In that motion, the defendants argue that the damages "trial" would last several days, that the issue of contract damages must be heard by a jury, that all compensatory damages had to be decided before the Court could make its determination as to the statutory penalty, and requesting the re-opening of discovery.

Despite the fact that discovery was closed, on February 24, 2017, the defendants filed interrogatories and requests for admission on the plaintiffs. In addition, on March 10, 2017, the defendants filed Second Supplemental Rule 26(a)(1) disclosures, identifying, for the first time, seven new witnesses from Quicken and TSI; two witnesses of a company identified as "FNC, Inc."; "members of the class certified by the Court on June 2, 2016"; four individuals who opted out of the class; the general categories of "West Virginia appraisers and/or individuals who conducted or were otherwise involved in appraisals for the loans in the class certified by the Court on June 2, 2016"; and Quicken and TSI employees generally who had contact with any member of the certified class. The disclosure also listed many new documents generally, including:

1. [d]ocuments and information relating to members of the class certified by the Court on June 2, 2016 and the loans they obtained during the class period, including loan files and loan journal notes;

2. records relating to the discharge, modification, acceleration, refinance, surrender, foreclosure, and/or modification of those loans, and public records concerning the class members (e.g., bankruptcy and other public filings);

3. "Emails and other business records of Defendants which relate to the appraisal ordering and review processes, or to legal and industry requirements and guidelines";

4. "Publicly-available documents relating to appraisals, appraisal ordering, and appraisal review"; and

5. "Publicly-available documents relating to the discharge, modification, acceleration, refinance, surrender, foreclosure, and/or modification of loans obtained by members of the class certified by the Court on June 2, 2016, and publicly-available documents relating to the sale of any property securing those loans."

On March 30, 2017, the parties again appeared for a status conference and to address Quicken Loans and Title Source's Motion for Modification of Order as to Status Conference [Doc. 266]. Again the defendants reiterated that they wished an opportunity to present evidence on egregiousness and on the issue of harm to the class members, as well as a request for "very targeted" discovery. The Court stated as follows:

> All right. I've carefully gone over all of this. The determination of the statutory penalties under the Consumer Protection Act does involve evidence of intent, knowledge and harm. And the amount of penalty to be imposed by the Court should have a relationship to the egregiousness of the violation. However, this Court believes that the egregiousness of the violation is something the Court considers based upon the actions of Quicken Loans and TSI. Therefore, I will permit the defendants to present, I'll say for right now, two witnesses on the issue of their policies. And there's arguments made about how careful they are and that's fine, I'll be glad to hear that.
>
> The defendants make the argument that any statutory penalty must bear a reasonable relationship to the actual harm. I think that's wrong. I think the ***Vanderbilt*** case[1] settles that issue.

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[1] ***Vanderbilt Mortgage & Finance, Inc. v. Cole,*** 230 W.Va. 505, 740 S.E.2d 562 (2013) ("under W. Va. Code § 46A-5-101(1) (1996), an award of civil penalties is not conditioned on an award of actual damages.").

In a footnote, the defendants argue that that's limited to five times the actual harm. That's under **Garnes,**[2] which is a punitive damages case. And that was in the ***Brown***[3] case where the Court was considering damages for common law fraud, not damages for a violation of the Consumer Protection Act. These are not punitive damages. It's a statutory civil penalty. While there may be somewhat of a punitive element to it, they are not to be determined under the same standard as punitive damages.

The issue of a jury demand on whether the return of the appraisal fees is a request for which there will be a jury, this Court disagrees. It's a request for equitable relief. The return of payments or the disgorgement of payments is an equitable form of relief. And that's backed up by both the ***Sivolella***[4] case, S-i-v-o-l-e-l-l-a, out of

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[2] ***Garnes v. Fleming Landfill, Inc.,*** 186 W. Va. 658, 667, 413 S.E.2d 897, 908 (1991).

[3] ***Quicken Loans, Inc. v. Brown,*** 236 W. Va. 12, 40, 777 S.E.2d 581, 609 (2014).

[4] ***Sivolella v. AXA Equitable Funds Mgmt., LLC,*** 2013 WL 4096239, at **5-6 (D. N.J. July 3, 2013) (finding that because plaintiffs were seeking disgorgement of the fees they were charged, they were not seeking "some funds" … "but rather ***the*** funds allegedly charged and retained by Defendants, and therefore, "Plaintiffs' claim is for equitable restitution and, as a result, not triable to a jury"), citing ***Nat'l Sec. Sys., Inc. v. Iola,*** 700 F.3d 65,101 (3d Cir. 2012) ("It is undisputed that restitution of ill-gotten commissions is an equitable remedy."); ***Hanwha Azdel, Inc. v. C&D Zodiac, Inc.,*** 2013 WL 3989147, at *2 (W.D. Va. Aug. 2, 2013) (a claim for disgorgement of specific profits and to prevent unjust enrichment constitutes equitable restitution and would be a remedy imposed "if at all, by the court and no[t] by the jury.").

New Jersey in 2013; and the ***Gerald Moore and Sons***[5] case out of the Eastern District of Virginia in 1996. The defendants have cited ***Curtis versus Loether,*** L-o-e-t-h-e-r, 1974, U.S. Supreme Court case,[6] but it specifically does not apply to cases requiring the defendant to disgorge funds wrongfully withheld from the plaintiff. It does not apply to equitable restitution.

The defendants argue that we can't have a statutory penalty imposed until the damages trial has been completed. Again, this Court disagrees. I think that argument rests on the faulty premise that the statutory penalties have to bear a reasonable relationship to the harm.

On the issue of discovery, we had -- first of all, this case has been pending for almost five years now. We had a hearing on November 17th. At that time it was determined what the defendant's really wanted was time to prepare and marshal their evidence. And there was no need for discovery. But they wanted 150 days to prepare. And this Court gave them 150 days. Now less than two months before the hearing, they want massive discovery. You can call it targeted, but that's a lot of discovery. In addition, I don't think the information sought is relevant for this hearing

[5] ***Gerald M. Moore & Son, Inc. v. Drewry & Assocs., Inc.,*** 945 F.Supp. 117, 120 (E.D. Va. 1996), citing ***Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.,*** 249 U.S. 134 (1919).

[6] ***Curtis v. Loether,*** 415 U.S. 189, 194 (1974) ("Nor is there any sense in which the award here can be viewed as requiring the defendant to disgorge funds wrongfully withheld from the plaintiff.").

> under the way this Court has interpreted the rules or the rulings and the law concerning the statutory damages.
>
> Now, with regard to the issue of statute of limitations, the burden's on the defendant. If the defendant can bring evidence that the class member had actual knowledge that the defendant sent an estimate of value to the appraiser and that no payments were made within one year before June 15th, 2012, I'll boot them. In the absence of that evidence, it's not an issue.

Transcript of Proceedings, March 30, 2017 [Doc. 277, pp. 4-7, (footnotes added)].

During the March 30 hearing, there was a discussion of witnesses and exhibits. The defendants indicated that they wished to call nine witnesses. The Court indicated that nine witnesses appeared to be excessive and repetitive. The defendants countered that they could reduce the number of live witnesses to five and present affidavits of the remaining four. It is important to note that at no time did the defendants request an opportunity to cross examine or challenge any of the witnesses or documents which were already in the record. Furthermore, the defendants' willingness to submit affidavits discloses that, contrary to their present position, the defendants were well aware that the hearing was not intended to be a full hearing, but rather an opportunity for the defendants to present additional evidence on the issue of egregiousness.

The defendants identified Clint Bonkowski, A. J. Ureel, Kristine Hughes, Amy Bishop and William

Banfield as the five live witnesses to be called. Four of these witnesses, all but Mr. Banfield, had never been disclosed until March 10, 2017. Despite the failure of the defendants to timely disclose these potential witnesses, the Court determined to allow the testimony (to the extent relevant) provided that the defendants made the witnesses available for deposition, so that the plaintiffs could discover the witnesses' expected testimony and the areas upon which testimony would be given.

The depositions were taken on April 13 and 14 in Detroit, Michigan. During the deposition, a portion of the testimony was as follows:

> Q. Do you know where the documents came from?
>
> A. No.
>
> Q. Aside from lawyers, did you talk to anybody about the testimony that you're going to provide today?
>
> A. No.
>
> Q. So this matter has been set for a damages hearing, and you've been disclosed as a potential witness. Do you know what your expected testimony will be at that hearing?
>
> A. No.
>
> Q. Do you know any of the questions that you'll be asked at that hearing?
>
> A. No.
>
> Q. Do you know any of the issues that you'll be asked to address at that hearing?

A. No.

Q. Do you know how - do you know if you'll be asked to provide testimony regarding any damages that class members may have suffered?

A. No, I don't know.

Q. Do you know why you were asked to testify?

A. No.

Q. The loan documents that you reviewed, do you know why you were asked to review those documents?

A. No.

[Doc. 289-2, p. 24].

During the deposition of Mr. Ureel, the following occurred:

Q. What is going to be your expected testimony at trial?

Mr. Savage (defense counsel): Well, if you know. If it's something that you know from lawyers, then you don't answer.

A. I can't answer that.

Q. What were you - what are you here to talk about? What knowledge or information do you have to talk about today?

Mr. Savage: Objection. He's here to answer your questions.

A. I'm here to answer your questions.

Q. Well, I kind of need to know what I need to ask you. So you've been designated as a potential witness at a hearing that's going to be held on May 9th. And I'm trying to figure out - and the whole reason for all of this is to figure out what you intend to say. So what do you intend to say?

A. I intend to answer the questions that are posed to me.

…

Q. What do you expect - - what are the types of questions that you expect that you'll answer?

A. I can't answer that.

[Doc. 289-3, pp. 33-34].

This Court found this type of gamesmanship to be unacceptable, being the type of conduct that the Federal Rules were adopted to prevent and remedy. The whole purpose of the depositions ordered by the Court was so that the plaintiffs could have learned the intended testimony of the late disclosed witnesses and ameliorate the prejudice of having the witnesses disclosed so very late in the proceedings.

For those reasons, this Court excluded Clint Bonkowski and A.J. Ureel as witnesses at the hearing on May 9. The parties had stipulated that Kristine Hughes' deposition may be used at the hearing [Doc. 294].

With respect to documents to be presented at the hearing, any document that was not disclosed to the plaintiffs by the disclosure of March 10, 2017, or before was excluded. *See* Order Granting in Part and Denying in Part Plaintiffs' Motion to Exclude

Witnesses and Documents at Damages Hearing [Doc. 310].

I. Defendants' Motion in Limine and Memorandum of Law to Exclude Prior Testimony of Michael Lyon [Doc. 301]

Prior to the May 9 hearing, the defendants filed Defendants' Motion in Limine and Memorandum of Law To Exclude Prior Testimony of Michael Lyon [Doc. 301]. In that motion, the defendants sought to exclude the deposition and trial testimony of Michael Lyon, alleging that this Court denied the defendants the opportunity to present the testimony of Michael Lyon at the May 9 hearing and that his testimony was hearsay. At the beginning of the May 9 hearing, this Court denied the Motion, noting that Michael Lyon was one of the nine witnesses listed by the defendants. When the defendants reduced their list of live witnesses to five, it was the defendants who determined not to include Michael Lyon among the live witnesses, opting instead to file his affidavit (which was not done). Defendants did, however, designate portions of Mr. Lyon's testimony for consideration [Doc. 321].

In addition, the argument that Mr. Lyon's prior testimony in deposition and trial in the ***Brown*** case is unavailing. Mr. Lyon was deposed and appeared as a 30(b)(6) witness on behalf of Quicken Loans in the ***Brown*** case. His statements are, therefore, the official position of Quicken.

II. Plaintiffs' Motion in Limine to Preclude Witnesses at Damages Hearing, and Memorandum in Support [Doc. 311]

Also prior to the May 9 hearing, the plaintiffs filed Plaintiffs' Motion in Limine to Preclude Witnesses at Damages Hearing, and Memorandum in Support [Doc. 311]. This motion sought the exclusion of Phillip Alig as a live witness. According to the motion, after reducing the number of witnesses to five and specifically naming those witnesses, the defendants gave notice that they would also call Mr. Alig as a live witness. In light of the fact that the witness list was set and that the defendants did not seek leave to add Mr. Alig to the list and in light of the fact that this Court had previously ruled that damage to the plaintiffs was not a issue at the hearing, this Court ruled that the defendants could not call Mr. Alig as a live witness, but could designate any portions of his deposition that they desired.

III. Defendants' Motion and Incorporated Memorandum to Strike Plaintiffs' Response to Defendants' Memorandum Regarding Classwide Penalty under the WVCCPA [Doc. 312]

In Defendants' Motion and Incorporated Memorandum to Strike Plaintiffs' Response to Defendants' Memorandum Regarding Classwide Penalty under the WVCCPA [Doc. 312], filed May 3, 2017, the defendants seek to exclude Plaintiffs' Response to Defendants' Memorandum Regarding Classwide Penalty under the WVCCPA [Doc. 300], on the basis that at the November 17, 2016, status conference, this Court directed that such memoranda be limited to ten pages, while the challenged memorandum greatly exceeds the page limit. On May 5, the plaintiffs filed Plaintiffs' Motion for Leave to File an Amended Response to Defendants' Memorandum Regarding Classwide Penalty under the WVCCPA [Doc. 315], noting that they had inadvertently overlooked the Court's directive and instead complied with this Court's Local Rules. The motion sought leave to file Plaintiffs' Amended Response to Defendants' Memorandum Regarding Classwide Penalty under the WVCCPA [Doc. 315-1], in place of the challenged document.

This Court granted the motion on May 5, 2017, [Doc. 314], and the amended response was docketed [Doc. 315], rendering the Defendants' Motion and Incorporated Memorandum to Strike Plaintiffs' Response to Defendants' Memorandum Regarding Classwide Penalty under the WVCCPA [Doc. 312] moot.

IV. Quicken Loans and Title Source's Combined Motions in Limine and Memoranda of Law to Exclude Documents Cited in Plaintiffs' Summary Judgment Briefing and Damages Briefing [Doc. 325]

In this Motion, the defendants seek to exclude a number of items from consideration by the Court in determining the amount of statutory damages to be awarded in this case for the violations of the WVCCPA. Many of the items about which the defendants complain were not considered by the Court in determining the appropriate relief, and the Motion is moot with respect to those items. It would appear that the cleanest way to resolve the Motion is to discuss the items which the Court did consider and the basis upon which the items were deemed admissible.

First this Court considered a number of governmental publications or directives, to which it would appear the defendants did not object, including (1) the Mortgagee Letter 96-26, authored by Nicholas P. Retsinas, Assistant Secretary for Housing, on behalf of the Federal Housing Commissioner (May 21, 1996); (2) the letter from the Office of the Comptroller of the Currency to K. Kaiser, Chairman of The Appraisal Standards Board (July 28, 1999); (3) the 2005 "Interagency Statement" issued by the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of Thrift Supervision, and National Credit Union Administration; and (4) the Home Valuation Code of Conduct.

The defendants object to this Court's consideration of Mortgagee Letter 2009-28, which is cited solely for the purpose of demonstrating that the letter reconfirmed the position taken in the 1996 letter concerning transmitting suggested values to an appraiser. For that purpose, the letter is certainly relevant.

In addition, the Court considered the 2007 Online Appraiser Petition, to which the defendants do object. The Petition is not relevant for the purpose of proving that Quicken applied pressure. Rather, the Petition is relevant to show that the appraisal industry deemed attempts to influence appraisers was inappropriate under industry standards because it stripped appraisers of their independent judgment and resulted in a dishonest and potentially harmful process. Furthermore, the petition is relevant because it confirms that the practice of using target figures was widely, if not universally, condemned. For these reasons, the petition is both relevant and admissible, and defendants' motion will be denied with respect to this information.

The Court also considered the survey of appraisers referred to and considered by the United States District Court for the Southern District of New York in ***Fed. Housing Agency v. Nomura Holding Amer., Inc.,*** 104 F.Supp.3d 441, 461 (S.D. N.Y. 2015). Again, this survey is relevant to demonstrate the level of condemnation of the practice of providing suggested values to appraisers.

The Court also considered Judge Recht's order in ***Brown v. Quicken Loans Inc.,*** Civ. No. 08-C-36, Ohio County, W. Va., in which he found "[n]o legitimate purpose is served by providing an appraiser with an estimated value of a property. The only purpose could be to inflate the true value of the property." This order is certainly not hearsay and is relevant to show that other jurists share this Court's opinion of the propriety of sending values to an appraiser.

This Court also considered the deposition testimony of Michael Lyon, Jennifer Randle, and Jordan Petsovski. These depositions are clearly admissible under Fed.R.Civ. P. Rule 32(a)(4)(B). In fact, the only deposition to which the defendants object is that of Michael Lyon, which is discussed in Section III of this Order, *supra.*

Finally, this Court considered two emails among Quicken executives. As noted by the defendants, emails do present difficulties in connection with the business records exception to the hearsay rule. "While properly authenticated e-mails may be admitted into evidence under the business records exception, … [a]n e-mail created within a business entity does not, for that reason alone, satisfy the business records exception of the hearsay rule." ***United States v. Cone,*** 714 F.3d 197, 220 (4th Cir. 2013) (internal quotations and citations omitted).

Rule 803(6)(B) allows for the introduction of records that are "kept in the course of a regularly conducted activity of a business." For a record to be admitted as a business record, it must be "(1) made by a regularly conducted business activity, (2) kept in the 'regular course' of that business, (3) 'the regular practice of that business to make the memorandum,' (4) and made by a person with knowledge or from information transmitted by a person with knowledge." ***Id.*** at 219.

In this case, the Court is considering the emails. These emails were uncovered by the Department of Justice in its investigation of Quicken. They represent a regularly conducted activity. They have been kept for years in the records of the Quicken. They deal with a subject matter clearly within the business of Quicken and TSI. They are made by high ranking executives with knowledge of the defendants' processes and procedures. Finally, the defendants have never questioned the authenticity of the emails.

Returning to the defendants' Motion, the following are sought to be excluded:

A. Plaintiffs Should Be Precluded from Introducing Exhibits And Portions of the Record Related to Fees

This Court did not consider any such evidence in ruling on the award of statutory damages.

B. Plaintiffs Should Be Precluded from Introducing Documents Related to Loans Outside the Scope of the Class

Defendants seek to exclude documents related to the Sheas' 2006 loan and the Aligs' 2011 loan, including trial testimony from ***Walters v. Quicken Loans, Inc.,*** No. 11-C-1123 at 68-69 (April 19, 2015) [Doc. 293 Ex. D]; Brown Dep. at 168:18-169:10 (discussing Alig 2011 loan) [Doc. 199 Ex. EE]; Alig 2011 HUD-1 Settlement Statement [Doc. 199 Ex. P]; Alig Loan Files including 2011 HUD-1 Settlement Statement [Doc. 173 Ex. C]; and Shea 2006 HUD-1 Settlement Statements [Doc. 199 Ex. Q].

The Court did not consider any of these items in ruling on the award of statutory damages.

C. Websites from after the Class Period Should Be Excluded

Defendants seek to exclude two articles from Quicken Loans' website from after the class period in this case—one from 2010 and the other from 2015. See Quicken Loans, Important Information You Should Know Regarding Appraisals, available at https://www.quickenloans.com/blog/important-information-appraisals (December 15, 2010) [Doc. 300 at 9]; Blog Post: Terms You Should Understand When Getting a Mortgage, available at http://www.quickenloans.com/blog/terms-you-should-understand-when-getting-a-mortgage (July 27, 2015) [Doc. 199 at 5, 22]. The Court did not consider any of these items in ruling on the award of statutory damages.

D. Plaintiffs Should Be Precluded from Offering Regulatory Evidence Dated after the Class Period

Defendants seek to exclude Mortagee Letter 2009-28, discussed above. This letter is relevant to show that it reconfirmed the prior opinion that suggested values should not be sent to appraisers and to dispel the argument that it was not until this letter came out that the defendants were aware of the problem.

E. Plaintiffs Should Be Precluded from Introducing Deposition Testimony

Defendants seek to exclude the deposition testimony of the Aligs, Jody Hill, Philip Jackson, Troy Sneddon, and John Kelly, none of which was considered by the Court in ruling on the issue of statutory damages.

The persons whose deposition testimony was considered are or were Quicken and/or TSI employees who live more than 100 miles from the Courthouse.

F. The Appraiser Petition Should Be Excluded

This issue is addressed above.

G. Plaintiffs Should Be Precluded from Offering Quicken Loans' Employees' Emails

This issue is addressed above.

H. Plaintiffs Should Be Precluded from Introducing Expert Reports

The defendants seek to exclude the expert reports of Jody Hill and Philip Jackson, neither of which were considered by the Court in ruling on the issue of statutory damages.

I. Various Opinions by Third Parties about the Mortgage Industry Should Be Excluded

The defendants seek to exclude Michael Lewis, The Big Short: Inside the Doomsday Machine [Doc. 199 at 5 n. 10] and National Community Reinvestment Coalition Executive Vice President David Berenbaum's testimony before the Senate Committee on Banking, Sub-Committee on Housing, Transportation and Community Development (June 26, 2007), available at http://www.banking.senate. gov/public/_files/berenbaum.pdf [Doc. 212 at 3 n. 4], neither of which were considered by the Court in ruling on the issue of statutory damages.

J. Plaintiffs Should Be Precluded from Introducing Treatises And Industry Sources

The defendants seek the exclusion of several treatises and industry sources for the truth of certain statements alleging that representations and warranties and the repurchase process did not deter improper conduct in the lending industry. See Fitch Ratings, The Impact of Poor Underwriting Practices and Fraud in Subprime RMBS Performance, http://blenderlaw.umlaw.net/wpcontent/uploads/2007/11/fitchfraud1 .pdf [Doc. 300 at 10]; Patricia McCoy & Susan Wachter, Representations and Warranties: Why They Did Not Stop the Crisis, Digital Commons @ Boston College Law School (June 2, 2016), available at http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2044&context=lsfp [Doc. 300 at 11]; NCLC, Mortgage Lending §6.6.1 [Doc. 300 at 10]. This Court did not consider any such materials in reaching its statutory damage decision.

K. Documents from Other Court Cases Should Be Excluded

This Court disagrees that the rulings and findings of courts with jurisdiction are hearsay. This Court considered the findings of Judge Recht as noted above. This Court also considered other cases for their legal findings.

L. Michael Lyon's Testimony from Brown V. Quicken Loans and Nicewarner V. Quicken Loans Should Be Excluded

This issue is discussed above.

M. Plaintiffs Should Be Precluded from Introducing Statements or Pleadings from Other Cases Against Quicken Loans

In this category, Quicken seeks to exclude plaintiffs' citation to case law involving Quicken. Again, plaintiffs offer these cases as background and legal authority within a legal brief, for the Court to consider in making legal determinations as appropriate. The Court is able to take judicial notice of these sources, just as it took judicial notice of West Virginia statutes during the recent hearing. It is wholly appropriate for the Court to review and rely on other decisions as it sees fit. For example, this Court has repeatedly relied on the decisions in the ***Brown v. Quicken*** litigation as support in this case. [Doc. 227 at 6-7, 10, 12, 17, 19-21]. In fact, this Court cited with approval Judge Recht's determination that "[n]o legitimate purpose is served by providing an appraiser with an estimated value of a property. The only purpose could be to inflate the true value of the property." Nonetheless, the Court went on to independently come to the same conclusion. [Id. at 11]. Likewise, the Court may consider that the District Court for the Eastern District of Michigan found that it is plausible that lenders were on notice in 1996 that "[p]roviding to the appraiser an anticipated, estimated, encouraged or desired value for a subject property or a proposed or target amount to be loaned to the borrower …" was prohibited by FHA regulations. *See,* ***United States v. Quicken,*** 2017 WL 930039, at **7-8.

The case law cited may also be considered in testing the credibility of Quicken's testimony that it acted at all times in good faith and engaged in conservative lending practices. The body of case law documents a series of complaints from consumers, the government and former employees relating to inflating appraisals and predatory lending. The very existence of the present DOJ action, which alleges pursuant to the False Claims Act that Quicken knowingly approved loans that violated the Fair Housing Act (FHA) while falsely certifying compliance with those rules and submitted claims for payment when those loans defaulted, undermines Quicken's unsupported testimony at the hearing that it "does the right thing"; is economically motivated to avoid predatory conduct; or utilizes conservative policies and procedures. Through this action, the government alleged specifically that Quicken systematically sought to influence appraisers. *See* ***United States v. Quicken,*** 2017 WL 930039, at **6-8. The Court may of course consider the existence of this action in weighing the evidence. Indeed, the ***Nicewarner*** court similarly cited the DOJ action in denying Quicken's summary judgment motion.

The decisions in ***Bishop v. Quicken Loans, Inc.,*** 2011 WL 1321360 (S.D. W.Va. 2011); ***O'Brien v. Quicken Loans, Inc.,*** 2013 WL 2319248, at *6 (S.D. W.Va. May 28, 2013); and ***Nicewarner v. Quicken Loans Inc.*** (Cir. Ct. Kanawha Cty. W.Va. Jan. 13, 2016) all reflect consumer complaints that Quicken chose to utilize the higher of two available appraisals allegedly resulting in upside down loans. Likewise, ***Henry v. Quicken Loans Inc.,*** 2009 WL 3270768 (E.D. Mich. July 16, 2009) reflects complaints by Quicken's employees regarding such things as training them to overcome consumers' objections. See *also,* ***Brown I,*** 230 W. Va. 306, at fn. 6 (quoting a script Quicken used to overcome objections).

The repeated complaints of this nature, which are indisputably reflected in the cited litigation, makes Quicken's self-serving overtures that it does "the right thing" difficult to believe and, therefore, may be considered for that non-hearsay purpose, as well as legal authority.

V. Defendant's *(sic)* Motion to Decertify the Class [Doc. 327]

Almost one year since this Court certified the class in this case, new counsel for the defendants moves to decertify the class despite the fact that no new discovery has occurred.

"[D]istrict courts have an affirmative duty to reassess their class certification rulings as the case develops, and to decertify a class or otherwise alter a certification decision as appropriate in light of developments in the case." ***Moore's Federal Practice*** § 23.87 at 23-405 (3d ed.).

However, "[i]n revisiting an earlier certification decision, a court may modify or decertify, but decertification is a drastic step, not to be taken lightly." 3 ***Newberg on Class Actions*** § 7:37 (5th ed. 2013). To be sure, an "order granting class certification is not an untouchable determination." ***Minter v. Wells Fargo Bank,*** 2013 WL 1795564, *2 (D. Md. Apr. 26, 2013). Indeed, "an order certifying a class must be reversed if it becomes apparent, at any time during the pendency of the proceeding, that class treatment of the action is inappropriate." ***Stott v. Haworth,*** 916 F.2d 134, 139 (4th Cir. 1990). A motion to decertify is not, however, to be treated as another bite at the apple in the absence of changed circumstances. As the United States District Court for the District of Maryland recently observed, "[t]he breadth of this obligation [to reverse certification if necessary] … is tempered by commentary in the Advisory Committee Notes which provide that altering certification is appropriate 'upon fuller development of the facts.'" ***Minter,*** *2 (citing 1996 Amendment Advisory Committee Notes).

Courts thus consistently hold that "there must be some development or change in circumstances to merit revisiting a class certification decision." ***In re J.P. Morgan Chase Cash Balance Litig.,*** 255 F.R.D. 130, 133 (S.D. N.Y. 2009) (citing cases). As such, courts should be wary of motions to decertify which simply reargue certification "[i]n the absence of materially changed or clarified circumstances." 3 ***Newberg on Class Actions*** § 7:47 (4th ed. 2012). That new facts or law should support a motion is a widely recognized concept. *See* ***Zimmerman v. Portfolio Recovery Assocs., LLC,*** 2013 WL 1245552, at *5 (S.D. N.Y. March 27, 2013) (declining to decertify class when there was "no new evidence concerning the nature of the class members' debts"); ***Connor B. v. Patrick,*** 278 F.R.D. 30, 35 (D. Mass. 2011) ("[a]llowing litigants to file a motion to decertify at any time during the litigation, even when no subsequent case law or new facts have had any impact on the original rationale, would render Rule 23(f) meaningless."); ***Schell v. OXY USA Inc.,*** 2013 WL 4857686, at *4 (D. Kan. Sept. 11, 2013) (denying motion to decertify class after discussing arguments presented and finding "[a]ll of these circumstances were known by the parties at the time they briefed the motion for certification. [Defendant] has provided no new evidence or law on this element, so the court finds that the named plaintiffs still meet the adequacy of representation element."); ***Kubiak v. S.W. Cowboy, Inc.,*** 2015 WL 12859422 (M.D. Fla. Mar. 11, 2015) (same); ***J.S. v. Attica Cent. Sch.,*** 2011 WL 4498369, *6 (W.D. N.Y. Sept. 27, 2011) (denying motion to decertify when defendant "fail[ed] to present new facts or legal argument"); ***Elias v. Ungar's Food Prods., Inc.,*** 2009 WL 2581502, *5 (D. N.J. Aug. 20, 2009) (no decertification because court already rejected proposition "that an individual inquiry would be necessary for each class member"); ***Connor B.*** **ex** ***rel. Vigurs v. Patrick,*** 278 F.R.D. 30, 34, 36 (D. Mass. 2011) (denying decertification where defendants argued that plaintiffs failed to satisfy the commonality requirement because the argument was "largely identical to the argument this court rejected in its original certification order").

In addition, "[c]ourts faced with a motion to decertify must also take account of the progression of the litigation." ***Jermyn v. Best Buy Stores,*** 276 F.R.D. 167, 169 (S.D. N.Y. 2011); *see also* **Woe** ***v. Cuomo,*** 729 F.2d 96, 107 (2d Cir. 1984) (finding abuse of discretion where district court decertified the class after granting summary judgment in part). "Decertification is an 'extreme step,' particularly at a late stage in the litigation, 'where a potentially proper class exists and can easily be created." ***Gulino v. Bd. of Educ. of City School Dist.,*** 2012 WL 6043803, at *8 (S.D. N.Y. Dec. 5, 2012) (quoting **Woe,** 729 F.2d at

107; *see also* ***Easterling v. Conn. Dep't of Corr.,*** 278 F.R.D. 41, 42 (D. Conn. 2011) ("[a] court should be wary of revoking a certification order completely at a late stage in the litigation process.").

Defendants seek to decertify the class, advancing the following arguments:

1. The class includes borrowers with no injury and thus no standing;

2. Numerous individual inquiries infect the contract claim;

3. Statutory penalties cannot be awarded without individualized evidence; and

4. Equitable tolling cannot be decided without individualized evidence.

Despite the re-assertion of these arguments, this Court remains convinced that the class certified in this case is appropriate and manageable.

Quicken's first argument is that some class members did not suffer a "concrete injury" and therefore lack standing under the Supreme Court's decision in ***Spokeo v. Robins,*** 136 S.Ct. 1540 (2016). This argument fails as a matter of law from the outset, as it is well settled that "if a class representative has standing, the case is justiciable and the proponent of the class suit need not demonstrate that each class member has standing." ***Newberg on Class Actions*** § 2:3 (5th ed.); *see also* ***Dreher v. Experian Info. Solutions, Inc.,*** 856 F.3d 337 (4th Cir. 2017) ("In a class action matter, we analyze standing based on the allegations of personal injury made by the named plaintiff'), quoting ***Beck v. McDonald,*** 848 F.3d 262, 269-70 (4th Cir. 2017), in turn citing ***Doe v. Obama,*** 631 F.3d 157, 160 (4th Cir. 2011); see *also* ***Neale v. Volvo Cars of North Am., LLC,*** 794 F.3d 353, 362 (3d Cir. 2015); ***Kohen v. Pacific Inv. Mgmt. Co. LLC,*** 571 F.3d 672, 676 (7th Cir. 2009); ***Milbourne v. JRK Residential Am., LLC,*** 2016 WL 1071564, at *6 (E.D. Va. Mar. 15, 2016) (Payne, J.); ***Lewis v. Casey,*** 518 U.S. 343, 395 (1996) (Souter, J., concurring).

There is no question that the Aligs have standing to redress the concrete injury incurred by Quicken's conduct. In ***Spokeo,*** the Supreme Court addressed the injury-in-fact requirement for Article III standing. The Court's decision did not change the law of standing, and Quicken is wrong as to its application here. Instead, the Court confirmed the long-established principle that "standing consists of three elements." ***Spokeo v. Robins,*** 136 S.Ct. 1540, 1547 (May 16, 2016) (citing ***Lujan v. Defenders of Wildlife,*** 504 U.S. 555, 560 (1992)). "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." ***Id.*** The Court further confirmed that to establish injury in fact—the element primarily at issue in ***Spokeo***—a plaintiff must "allege an injury that is both 'concrete' ***and*** 'particularized.'" ***Id.*** at 1545 (citing ***Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,*** 528 U.S. 167, 180-81 (2000) (emphasis added in ***Spokeo***)). According to the Supreme Court, a "particularized" injury "must affect that plaintiff in a personal and individual way." ***Spokeo,*** 136 S.Ct. at

1548. The Court agreed with the Ninth Circuit that the ***Spokeo*** plaintiff had suffered a particularized injury because he claimed that the defendant—an alleged credit-reporting agency that had reported false information about him— "violated his statutory rights," and his "interests in the handling of his credit information are individualized rather than collective." ***Id.*** (quotation omitted). Further, ***Spokeo*** confirmed that a "concrete" injury "must actually exist." ***Id.*** However, a "concrete" injury may also be "intangible." ***Id.*** at 1549. ***Spokeo*** indicated two approaches for establishing that an intangible injury is "concrete." "In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles." ***Id.*** First, courts should consider whether an alleged intangible harm "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." ***Id.*** (citing ***Vermont Agency of Nat'l Res. v. U.S. ex rel. Stevens,*** 529 U.S. 765, 775-77 (2000)). A plaintiff may therefore demonstrate that she suffered a concrete injury by showing that her injury is analogous to a harm traditionally recognized at common law.

Second, Congress may identify and "elevate to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate at law." ***Id.*** (citation and internal quotation marks omitted). Congress "has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before" because Congress "is well positioned to identify intangible harms that meet minimum Article III requirements." ***Id.*** Of course, state statutes may also serve to define these injuries. See ***Gen. Tech. Applications, Inc. v. Exro Ltda,*** 388 F.3d 114, 118 (4th Cir. 2004) ("In a diversity case, [the court] must consult state law to determine the nature of the litigant's rights and whether he is entitled to assert the claims he makes.").

Courts applying ***Spokeo*** in consumer credit cases have overwhelmingly found that violations of the Fair Debt Collection Practices Act ("FDCPA") provide for Article III standing even with violations far less serious than Quicken's conduct here. In ***Church v. Accretive Health, Inc.,*** the Eleventh Circuit found Article III standing when a plaintiff alleged that defendant violated the FDCPA by not including in its debt collection letter certain disclosures required by the Act. 654 Fed. Appx. 990 (11th Cir. 2016). The plaintiff did not allege that she suffered actual damages, but the court found she had "alleged injury to her statutorily-created right to information pursuant to the FDCPA" because that Act "creates a private right of action, which Church seeks to enforce." ***Id.*** at 994. Importantly, while "the injury may not have resulted in tangible economic or physical harm that courts often expect, the Supreme Court has made clear that an injury need not be tangible to be concrete." ***Id.,*** citing ***Spokeo,*** 136 S.Ct. at 1549. "Rather, this injury is one that Congress has elevated to the status of a legally cognizable injury through the FDCPA," and plaintiff therefore satisfied the injury-in-fact requirement. ***Id.***

Courts around the country have been in accord when considering various violations of the FDCPA's debt collection provisions that did not necessarily give rise to actual damages. *See* ***Linehan v. Allianceone Receivables Mgmt., Inc.,*** 2016 WL 4765839, at *7 (W.D. Wash. Sept. 13, 2016) ("The goal of the FDCPA is to protect consumers from certain harmful practices; it logically follows that those practices would themselves constitute a concrete injury"); ***Prindle v Carrington Mortg. Servs., LLC,*** 2016 WL 4369424, at *9 (M.D. Fla. Aug. 16, 2016); ***Larson v. Trans Union, LLC,*** 201 F.Supp.2d 1103 (N.D. Cal. 2016); ***Dickens v. GC Servs. Ltd. P'ship,*** 2016 WL 3917530, at **1-2 (M.D. Fla. July 20, 2016); ***Lane v. Bayview Loan Servicing, LLC,*** 2016 WL 3671467, at **3-5 (N.D. Ill. July 11, 2016); ***Macy v. GC Servs. Ltd. P'ship,*** 2016 WL 5661525, at **2-4 (W.D. Ky. Sept. 29, 2016); ***Daubert v. Nra Grp., LLC,*** 2016 WL 4245560, at *4 (M.D. Pa. Aug. 11, 2016); ***Quinn v. Specialized Loan Servicing, LLC,*** 2016 WL 4264967, at *5 (N.D. Ill. Aug. 11, 2016); ***Irvine v. I.C. Sys., Inc.,*** 198 F.Supp.3d 1232, 1237 (D. Colo. 2016); ***McCamis v. Servis One, Inc.,*** 2016 WL 4063403 at *2 (M.D. Fla. July 29, 2016).

Post-***Spokeo*** decisions issued within the Fourth Circuit interpreting other consumer protection statutes with statutory damage provisions are no different. For example, courts have found that the annoyance of receiving unwanted telemarketing calls is a sufficiently concrete injury to confer Article III standing. ***Mey v. Got Warranty, Inc.,*** 193 F.Supp.3d 641 (N.D. W.Va. 2016); ***Krakauer v. Dish Network L.L.C.,*** 168 F.Supp.3d 843 (M.D. N.C. 2016) (Eagles, J.) (declining to decertify classes upon finding class representative's allegations showed a "concrete injury to him and to each class member"). Courts have similarly recognized a right of privacy in one's consumer report under the Fair Credit Reporting Act. ***Burke v. Fed. Nat'l Mortg. Assoc.,*** 2016 WL 4249496, at *4 (E.D. Va. Aug. 9, 2016) (Hudson, J.), vacated upon parties' settlement and finding of no jurisdiction by 2016 WL 7451624 (Dec. 6, 2016); ***Thomas v FTS USA, LLC,*** 193 F.Supp.3d 623, 637 (E.D. Va. 2016) (Payne, J.)

The West Virginia legislature enacted the WVCCPA to "protect consumers from unfair, illegal, and deceptive acts or practices by providing an avenue of relief for consumers who would otherwise have difficulty proving their case under a more traditional cause of action." ***Bourne v. Mapother & Mapother, P.S.C.,*** 998 F.Supp.2d 495, 501 (S.D. W.Va. 2014) (Faber, J.) (quoting ***State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.,*** 194 W.Va. 770, 461 S.E.2d 516, 523 (1995)). The legislature created a private right of action for violations. W. Va. Code § 46A-5-101. This Court has found that defendants violated a section of the WVCCPA, § 46A-2-121, which prohibits unconscionable inducement of consumer loans, with respect to each class member's loan. [Doc. 227, p. 54]. In enacting this provision of the WVCCPA, the legislature recognized that West Virginia consumers have the right to consumer loans that are not unconscionably induced. Consistent with the authority above recognizing concrete, particularized harm created by statutory violations far less egregious than Quicken's conduct here, Quicken's violation of this statutorily-created, legally cognizable right creates a concrete harm to the Aligs as class representatives – and indeed as to each class member – sufficient to establish standing for each member of the class.

In addition, Quicken misinterprets this Court's findings when it represents that the Aligs' unconscionability claim relied on any individualized facts. As this Court has already determined when it certified the class, the injury of receiving a tainted, unreliable loan as a result of Quicken's unconscionable conduct does not rely on any appraiser's individual testimony or the facts of any individual loan. Tellingly, Quicken does not cite a single case interpreting ***Spokeo,*** let alone one in a consumer statute case, alleging common class-wide conduct like that this Court has already found here, and where statutory damages are sought. Instead, Quicken cites pre-Spokeo cases where plaintiffs' proof was individualized or where class members sought actual damages which necessarily depended on individualized facts. Plaintiffs and all class members unquestionably have standing to redress Quicken's unconscionable conduct.

Next, defendants state, in direct contrast to their position throughout this litigation and to their executed stipulation on file with the Court, that not all class members had a contract, and some signed a different agreement from the Deposit Agreement. [Doc. 324-3, at 8]. Yet the stipulation Quicken's counsel executed and filed on March 15, 2016, stated:

> Quicken Loans stipulates that the Interest Rate Disclosures and/or Deposit Agreements for the named Plaintiffs' loans (Quicken 15, 699, 1031, 1625) are representative of the standard deposit agreements used by Quicken Loans from 2002 to the present.

[Doc. 168].

This stipulation was submitted during the class certification briefing and Quicken has never before questioned whether the contracts were uniform. The declaration contradicting the stipulation filed in March 2016 will be stricken because it contradicts evidence Quicken has already submitted in this case. While technically applicable to motions for summary judgment, defendants' conduct here is generally improper under the sham affidavit rule, a firmly established part of Fourth Circuit law. See ***Rohrbough v. Wyeth Labs., Inc.,*** 916 F.2d 970, 975 (4th Cir. 1990). Under the "sham affidavit" rule, "a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement (by, say, filing a later affidavit that flatly contradicts that party's earlier sworn deposition) without explaining the contradiction or attempting to resolve the disparity." ***Cleveland v. Policy Mgmt. Sys. Corp.,*** 526 U.S. 795, 806 (1999).

This Court will leave until later, if necessary, to determine whether there would exist an implied contract to receive a fair, untainted appraisal.

Defendants next argue, also for the first time, that class members' own performance under the contracts cannot be "presumed on a class basis". Defendants speculate that, if any class member attempted to influence an appraiser, it would constitute a breach of the agreement by the borrower. This argument is frankly illogical. Putting aside the fact that Quicken has never before raised such a defense, there is no language in the Deposit Agreement obligating a borrower to provide a fair and accurate appraisal; that obligation falls solely on the part of the lender, Quicken. Of course, this makes sense, as it is the lender, not the borrower, who is responsible for hiring the appraiser – and from whom the appraiser can expect repeat business if expectations are met.

Quicken's remaining contract arguments were already addressed by this Court at the March 30, 2017 hearing when the Court found that plaintiffs' request for equitable relief in the form of the return or disgorgement of payments is simply an equitable form of relief. [Doc. 277, Mar. 30, 2017 Transcript at 5-6]. The issue was also thoroughly briefed in conjunction with plaintiffs' motion for summary judgment on contract damages, discussed below. The primary flaw in Quicken's argument is that the Deposit Agreement was a separate, stand-alone contract that was independent from the loan agreements. The status of the loans is irrelevant to the separate contract duty that this Court explained required Quicken to obtain the fair, valid and reasonable appraisals that plaintiffs and class members bargained (and paid) for but did not receive. Instead, they received unreliable, worthless appraisals and have all been damaged, making restitution appropriate.

In sum, Quicken's position that the Court may not award a refund of the contract fees on a class-wide basis is incorrect, and there are no individualized issues bearing on predominance because this relief may be readily awarded based on class-wide data already available.

Defendants next argue that class-wide statutory penalties cannot be awarded without individualized evidence. However, as this Court has repeatedly recognized, the amount of the award of statutory penalties is dependent on the level of egregiousness of **Quicken's conduct.** [Doc. 277, pp. 4-5]. ("[T]he amount of penalty to be imposed by the Court should have a relationship to the egregiousness of the violation. However, this Court believes that the egregiousness of the violation is something the Court considers based upon the actions of Quicken Loans and TSI"; see also [Doc. 336, May 9, 2017 Transcript at 6:22-25]; ***Clements v. HSBC Auto Finance, Inc.,*** 2011 WL 2976558, at *7 (S.D. W.Va. July 21, 2011) ("The amount of a [WVCCPA] penalty should have a direct relationship to the egregiousness of the violation"). This Court has already considered and rejected defendants' argument – which is still, and has always been, about actual harm.

Statutory damages may be awarded on a class-wide basis here because Quicken's conduct was uniform as to the class. ***Soutter v. Equifax Info. Servs., LLC,*** 498 F.App'x 260 (4th Cir. 2012), a Fair Credit Reporting Act case, is readily distinguishable because that court recognized that the methods the defendant credit reporting agency used to collect credit information from the courts had a significant bearing on individual claims. For example, Equifax used "at least three different means of collecting general district court records during the class period," and Soutter's claims therefore "varie[d] from any potential class plaintiff with a circuit court judgment, and from many potential plaintiffs with general district court judgments," which made proof of whether Equifax's behavior was unreasonable vary case-by-case. In contrast, there is absolutely no difference in defendants' conduct here as to the members of the proposed classes, let alone a meaningful one. In such circumstances, where defendant's conduct is uniform as to the class, class certification is appropriate. *See* ***Stillmock v. Weis Mkts., Inc.,*** 385 Fed.App'x 267, 273 (4th Cir. 2010) (reversing denial of certification and finding questions of liability predominating because "the qualitatively overarching issue by far is the liability issue of the defendant's willfulness, and the purported class members were exposed to the same risk of harm every time the defendant violated the statute in the identical manner"); ***Ealy v. Pinkerton Gov't Servs., Inc.,*** 514 F.App'x 299, 305 (4th Cir. 2013) (same); ***Ramirez v. Trans Union, LLC,*** 301 F.R.D. 408, 420 (N.D. Cal. 2014) (finding typicality met and finding defendant's reliance on Soutter "misplaced" because the Soutter court found there were "meaningful differences between her claim and class claims" but that in present case the record showed that defendant's conduct was uniform as to the class). *See also* ***Deiter v. Microsoft Corp.,*** 436 F.3d 461, 466-67 (4th Cir. 2006) (typicality does not require "that the plaintiff's claim and the claims of class members be perfectly identical or perfectly aligned.").

Quicken's argument that class members did not necessarily suffer identical harm – even if relevant as a matter of law to this WVCCPA case – would effectively preclude class certification in any consumer case. Instead, consumer statutes allow for, and courts award, uniform class-wide penalties in such cases. For example, the Telephone Consumer

Protection Act of 1991, 47 U.S.C. § 227 ("TCPA") is a federal consumer statute which restricts telephone solicitations and the use of automated telephone equipment. The "Do Not Call" provisions of the TCPA, like the WVCCPA, allow for statutory penalties. 47 U.S.C. § 227(b)(3)(B). In a recent class case, ***Krakauer v. Dish Network L.L.C.,*** a jury awarded $400 for each call that violated the Do Not Call provisions of the TCPA. 2017 WL 2242952, at *2 (M.D. N.C. May 22, 2017). The district court then trebled that award upon finding that defendants had willfully and knowingly violated the TCPA. ***Id.*** at *12. In a prior order examining standing under Spokeo and denying defendants' motion to decertify the class, the ***Krakauer*** court recognized that not every class member's experience was the same: "While class members did not necessarily pick up or hear ringing every call at issue in this case, each call created, at a minimum, a risk of an invasion of a class member's privacy. ***Spokeo*** clarified that a "risk of real harm" was enough to show concrete injury." ***Krakauer v. Dish Network L.L.C.,*** 168 F.Supp.3d 843, 845 (M.D. N.C. 2016). Here, the Court's liability finding recognizes the class-wide risk that Quicken's unconscionable conduct created, and a class-wide award is consistent with that finding as well as expressly permitted by the statute.

Uniform statutory penalties are also frequently awarded under the WVCCPA, most often in a settlement class context. This Court has awarded class-wide statutory penalties not only in ***Dijkstra v. Carenbauer,*** 5:11-cv-152, where each class member was subject to the same unconscionable lending practice but not necessarily to the same actual harm, and in ***Diloreti v. Countrywide Home Loans, Inc.,*** No. 5:14-cv-00076, wherein it approved a class settlement that resolved identical allegations of appraiser influence to those here and wherein class members received the same penalty amount. [Doc. 341-1]; see also Final Orders approving settlements [Doc. 341-2], in ***Archbold v. Wells Fargo Bank, N.A.,*** 2015 WL 4276295 (S.D. W.Va. July 14, 2015) (approving settlement involving "per loan statutory penalty amount to settlement class members" whose loans were serviced by Wells Fargo and who were assessed and paid attorneys' fees); ***Triplett v. Nationstar Mortgage, LLC,*** No. 3:11-cv-238 (S.D. W.Va. Oct. 16, 2012) (approving settlement involving class-wide statutory penalties awarded via pro rata distribution to class members charged unlawful late fees and to whom partial payments were returned); ***Muhammad v. National City Mortgage, Inc.,*** No. 2:07-0423 (S.D. W.Va. Dec. 19, 2008) (same). Moreover, the ***Vanderbilt*** court itself approved a uniform penalty of $2,250 for each of the ten offensive phone calls at issue in that matter. It did not require an individualized analysis of the harm resulting from each of the discrete calls, because it flatly rejected an effort to import the "reasonable relationship" analysis from punitive damages cases to civil penalties. ***Vanderbilt Mortg. & Fin., Inc.* v. *Cole,*** 230 W.Va. 505, 512, 740 S.E.2d 562, 569 (2013). Relying upon ***Vanderbilt,*** this Court has already found that any statutory penalty need not bear a reasonable relationship to the actual harm. [Doc. 277, at 5].

Courts frequently make the same class-wide penalty determinations in FDCPA cases, where statutory damages in class actions are awarded "as the court may allow" but not to exceed $500,000, or 1 per centum of the debt collector's net worth under 15 U.S.C. § 1692k(a)(2)(B). ***See Miller v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, LLC,*** 198 F.R.D. 503, 507 (N.D. Ill. 2001) (certifying FDCPA class, entering summary judgment on liability, and awarding the maximum allowable statutory damages to the class because defendant's "noncompliance here involved thousands of individual violations over several years: it was frequent and persistent. The nature of the noncompliance was blatant."); ***Weissman v. Gutworth,*** 2015 WL 3384592 (D. N.J. May 26, 2015) (approving settlement fund in FDCPA case awarding pro rata share to each class member); ***Harlan v. Transworld Sys., Inc.,*** 302 F.R.D. 319 (E.D. Pa. 2014) (same); ***Stinson v. Delta Mgmt. Assocs., Inc.,*** 302 F.R.D. 160 (S.D. Ohio 2014) (same); ***Garland v. Cohen & Krassner,*** 2011 WL 6010211, at *8 (E.D. N.Y. Nov. 29, 2011) (same); ***Bonett v. Educ. Debt Servs., Inc.,*** 2003 WL 2165827 (E.D. Pa. May 9, 2003) (same). *See also* ***Kemply v. Cashcall, Inc.,*** 2016 WL 1055251, at *16 (N.D. Cal. Mar. 16, 2016) (finding members of certified class entitled to statutory penalty of $500,000 under Electronic Funds Transfer Act, 15 U.S.C. § 1693k(1) because defendant's "noncompliance with the statute was frequent and persistent."). See *also* ***Singleton v. Domino's Pizza, LLC,*** 976 F.Supp.2d 665 (D. Md. 2013) (Chasanow, J.) (approving class action settlement agreement in FCRA case involving pro rata distribution of settlement fund).

Finally, Quicken attempts to use the overwhelming evidence of notice regarding the culpability of its conduct to contend that, because it arguably had less notice earlier in the class period, class members whose loans were closed earlier should be entitled to a smaller penalty and that this determination affects predominance. This argument rests on no legal support, and plaintiffs again note that this type of argument would effectively preclude any class action where a defendant naturally became more aware of a problem as time went on. As a practical matter, Quicken never changed its conduct during the class period.

The argument also ignores the Court's findings that indications in law and industry that passing on estimated values was wrong go back more than 20 years, long before the start of the class period in 2004, beginning with the FHC appraisal standards of 1996. [Doc. 227 at 13]. Quicken has still has not come forward with any authority demonstrating this practice ever served a bona fide purpose in the industry. The best it can do is cite two sources – Advisory Opinion 19 of USPAP issued in 1999 (discussed by this Court in its Order Resolving all Motions [Doc. 227 at 14]) and the Ameriquest enforcement action by the states attorney generals both acknowledging the substantial problems with this practice and suggesting, at a minimum, a disclaimer, which Quicken never gave, is needed to lessen the potential for corruption. This Court finds that the defendants were unaware of the Ameriquest consent decree until long after the critical period of this action.

The oft cited finding from ***Brown*** that "[n]o legitimate purpose is served by providing an appraiser with an estimated value of a property. The only purpose could be to inflate the true value of the property" may have been made in 2010, but it applied to a 2006 loan. The ***Brown*** court made that finding after listening to six days of trial testimony, including Quicken's executives and its loan level personnel. This Court has reviewed even more testimony and made a similar finding for loans issued from 2004 through 2009. The fact that enforcement and regulatory efforts continued throughout the class period is a distinction without a difference.

Quicken's final argument is that equitable tolling cannot be resolved on a class-wide basis. To the extent that the burden has shifted to any class members to demonstrate that their claims were equitably tolled, this Court "can easily determine whether the discovery rule applies class-wide to toll class members' claims" and that "defendant's statute of limitations argument presents no barrier to certification." [Doc. 227 at 51-52], citing ***In re Community Bank of N. Va. Mortg. Lending Prac. Litig.,*** 795 F.3d 380 (3d Cir. 2015) (common issues predominated over individual issues as to whether applicable statutes of limitation on class members' claims were equitably tolled due to concealment); ***In re Urethane Antitrust Litig.,*** 251 F.R.D. 629 (D. Kan. 2008); ***Hamilton v. Pilgrim's Pride Corp.,*** 314 F.Supp.2d 630 (N.D. W.Va. 2004); ***Cohen v. Trump,*** 303 F.R.D. 376 (S.D. Cal. 2014); ***Kennedy v. United Healthcare of Ohio, Inc.,*** 206 F.R.D. 191 (S.D. Ohio 2002). This authority is consistent with the Fourth Circuit's decision in ***Thorn v. Jefferson-Pilot Life Ins. Co.,*** 445 F.3d 311 (4th Cir. 2006), holding that a statute of limitations defense may be resolved on a class-wide basis by looking to the record when the "defense is so dependent upon facts applicable to the entire class ... that individual hearings would not be necessary." 445 F.3d at 327; see *also* ***Minter v. Wells Fargo,*** 279 F.R.D. 320 (D. Md. 2012); ***Fangman v. Genuine Title,*** 2016 WL 6600509, at *7 (D. Md. Nov. 8, 2016) (Bennett, J.); ***Baker v. Castle & Cooke Homes Hawaii,*** 2014 WL 1669158, at *14 (D. Haw. 2014); ***Thurman v. CUNA,*** 836 N.W.2d 611, 621 (So. Dak. 2013); ***In re U.S. Foodservice Inc. Pricing Litig.,*** 2011 WL 6013551, at *17 (D. Conn. 2011); ***In re NASDAQ Market-Makers Antitrust Lit.,*** 169 F.R.D. 493, 520 (S.D. N.Y. 1996).

Quicken is incorrect when it suggests that the Third Circuit's decision in ***Cunningham v. M&T Bank Corp.,*** 814 F.3d 156 (3d Cir. 2016) or the Fourth Circuit's decision in ***EQT Prod. Co. v. Adair,*** 764 F.3d 347 (4th Cir. 2014) foreclose the potential to resolve equitable tolling on a class-wide basis. ***Cunningham*** was not a class certification decision but a summary judgment opinion wherein the court affirmed the district court's decision that a disclosure form received, signed and dated by each plaintiff had made them aware of their claims. It sheds no light whatsoever on the equitable tolling analysis as to class claims. The ***Adair*** court found that the district court had misapplied the doctrine of fraudulent concealment by wholly ignoring the plaintiff's knowledge and actions. 764 F.3d at 370. It cited ***Thorn*** for the proposition that this inquiry can require individual evidence; it is only fair to refer to ***Thorn*** for its holding that in cases like this one, where the statute of limitation defense relies on common facts applicable to the entire class, certification is appropriate.

Here, those common facts applicable to the entire class are that Quicken affirmatively kept its conduct hidden from class members, [Doc. 227 at 15-16], and that there is not a single shred of evidence in the record of any class member having actual knowledge about Quicken's practice of tipping off appraisers.

VI. Defendant's *(sic)* Motion for Summary Judgment on Certain Class Loans [Doc. 298-3]

Defendants have also filed Defendant's *(sic)* Motion for Summary Judgment on Certain Class Loans [Doc. 298-3]. In that Motion, defendants move for summary judgment as to (1) all Class Loans where a borrower filed for bankruptcy and failed to disclose his or her West Virginia Consumer Credit and Protection Act ("WVCCPA") and breach of contract causes of action against Defendants in bankruptcy; (2) the WVCCPA claims on all Class Loans that were paid off or became fully due prior to December 27, 2010; and (3) the WVCCPA claims on all Class Loans obtained by a borrower who is deceased.

The defendants argue that those class members who filed bankruptcy and did not disclose their claims (of which they had no knowledge) in their bankruptcy cases must be dismissed.

The Third Circuit has rejected the argument that class members in bankruptcy must demonstrate standing, finding it "unpersuasive." ***In re Comm. Bank,*** 795 F.3d at 397. The court explained, consistent with Fourth Circuit precedent, that "only named plaintiffs, and not unnamed class members, need to establish standing." ***Id.*** Further, in ***Community Bank,*** the plaintiffs had "identified a reliable, repeatable process whereby members of the putative class may be identified: consult CBNV's business records and then follow a few steps to determine whether the borrower is the real party in interest." ***Id.***

The bankruptcy issue is not a unique one in class actions, and it does not defeat class certification. *See* ***Wilborn v. Dun & Bradstreet Corp.,*** 180 F.R.D. 347, 356 (N.D. Ill. 1998) (certifying class over objection that some class members' claims may have become part of a bankruptcy estate, noting that the issue does not preclude predominance because "determining whether they have exempted their claims against defendant should be a relatively straightforward matter); ***Jordan v. Paul Fin.,*** 285 F.R.D. 435, 464 (N.D. Cal. 2012) (same). As in ***Community Bank,*** a process has been identified here to determine the group of class members who filed for bankruptcy, in that Quicken has in fact already done so. The only issue that separates these class members from those who did not file bankruptcy is distribution, and the issue is not ripe. After the Court determines the amount of statutory penalties; whether class members are entitled to a refund of the appraisal fees; and whether any class members are entitled to recover actual damages, and after any appeals have been exhausted, this issue can indeed be addressed in a "straightforward" fashion. Plaintiffs' counsel indicate that they are already in contact with the Trustees regarding the most efficient and equitable way of approaching distribution.

Defendants also take the position that since the class members who filed for bankruptcy and did not list the claim in their petitions are estopped from being members of the class, even though they were unaware of their claim at the time their petitions were filed.

There is no evidence that the debtor class members knew of their claims when they filed for bankruptcy. As discussed further below, Quicken itself concealed the passing of the estimated values. Quicken has provided no evidence that any class member was aware of Quicken's conduct or whether they had a legal claim arising from it. In such circumstances, courts refuse to apply judicial estoppel. *See* ***Skrzecz v. Gibson Island Corp.,*** 2014 WL 3400614, at *6 (D. Md. July 11, 2014) (Bennett, J.) (debtor plaintiff was not judicially estopped from asserting her civil claims because the "[p]laintiff did not have sufficient knowledge of a potential claim to deliberately omit it from her petition" when the plaintiff's "level of knowledge as to her claim for unpaid wages [was] in dispute"); ***Sibert v. Wells Fargo Bank,*** 2015 WL 3946698 (E.D. Va. June 26, 2015) (Hudson, J.) (judicial estoppel not applicable when "[p]laintiff did not intentionally mislead the bankruptcy court regarding his claim" and plaintiff "testified that when he filed for bankruptcy in 2011, he was unaware that he had a potential cause of action"); ***Smith-Anthony v. Buckingham Mortg. Corp.,*** 2009 WL 2500445 (D. Md. Aug. 13, 2009) (Quarles, J.) (refusing to dismiss case on judicial estoppel grounds when there was no evidence of intent in not including claims in bankruptcy petition). Defendants' argument that judicial estoppel may apply here is wholly unsupported by the facts.

If these class members are found to be entitled to receive a distribution and do not opt out of the class, they can petition to reopen their bankruptcy cases and allow the trustee and the Bankruptcy Court to determine the distribution of the proceeds.

Quicken next argues that summary judgment should be entered as to a second category of class members, those whose loans were paid off or otherwise became fully due on or before December 27, 2010, one year before the lawsuit was filed. The statute of limitations is an affirmative defense which defendants bear the burden of demonstrating. ***Columbia Venture, LLC v. Dewberry & Davis, LLC,*** 604 F.3d 824, 829 (4th Cir. 2010). Quicken has not met its burden here. Instead of showing that particular class members' claims were time-barred, Quicken relies on pure conjecture, stating that "at least some" of the loans were time-barred but that it is "expensive and time-consuming for defendants to search the state and local government land records to determine if a Class Loan was paid off." [Doc. 298-4 14]. Such arguments are insufficient to shift the burden to plaintiffs.

The burden only shifts "once the defendant shows that the plaintiff has not filed his or her complaint within the applicable statute of limitations." ***Smith v. Velotta,*** 2016 WL 597743, at *3 (W.Va. Feb. 12, 2016). This Court has already stated that: "If the defendant can bring evidence that the class member had actual knowledge that the defendant sent an estimate of value to the appraiser and that no payments were made within one year before June 15, 2012, I'll boot them. In the absence of that evidence, it's not an issue." [Doc. 277 at 7].

This Court has already found that TSI's third-party software, Appraisal Port, "is designed to ensure that information exchanged between TSI and the appraiser is not accessible to any third party, including the lender." [Doc. 227 at 23]. The record also demonstrates that TSI discarded old appraisal order forms. [Doc. 199-3, Ex. L, Petkovski Dep. at 59:18-60:8]. This finding was confirmed at the recent evidentiary hearing through Amy Bishop's testimony:

> Q. And they did not -- and Quicken Loans, as part of its practice, did not keep appraisal order forms in its loan files?
>
> A. In the paper loan files?
>
> Q. In any. In the paper, electronic, anywhere.
>
> A. That is my understanding.
>
> Q. Right. And TSI didn't even keep the appraisal order forms, did they?
>
> A. That is also my understanding.

[Doc. 336 at 76:10-17].

Ms. Bishop further testified that Quicken did not believe it was obligated to disclose to borrowers that estimated values were being shared with appraisers. [Id. at 29:15-19]. In fact, Ms. Bishop testified that this was not even "material" information that "should have been disclosed to a borrower" and is not something borrowers require as part and parcel of being what Quicken terms "very informed of the process." [Id. at 29:24:30:10]. There is no genuine dispute that Quicken concealed this practice from its customers and did so with knowledge that passing estimated values to an appraiser had been balked at by regulators and other authorities since at least 1996. [Doc. 227 at 13-14 ("Efforts to regulate this practice go back more than 20 years.")]. See also ***United States v. Quicken,*** 2017 WL 930039, at **7-8 (E.D. Mich. Mar. 9, 2017) (finding that lenders were on notice in 1996 that "[p]roviding to the appraiser an anticipated, estimated, encouraged or desired value for a subject property or a proposed or target amount to be loaned to the borrower …" was prohibited by FHA regulations).

In addition, this Court has already recognized Quicken's admission that each borrower "has an expectation of a fair, unbiased, and reasonable [appraisal]." [Doc. 227 at 25, citing Doc. 206-1, Exh. B, Randall Dep. at 99:18-100:5]. This expectation would certainly also encompass an expectation that the appraisal was not based on the unconscionable and hidden practice of passing on estimated values.

In sum, the defendants have not identified a single shred of evidence in the record of any class member having actual knowledge about Quicken's practice of tipping off appraisers. Instead, incredibly, Quicken speculates that class members should have known of their claims by reviewing case law, government investigations, or news sources about appraisal fraud generally. [Doc. 298-4 at 16-18]. Rather, it is clear that the only evidence relating to notice to class members of their potential claims is the fact, applicable to the entire class, that Quicken affirmatively kept its conduct hidden from class members. Indeed, this Court has already found that Quicken "fail[ed] to disclose this conduct [to] plaintiffs." [Doc. 227 at 15-16]. Quicken's contention that class members' theoretical knowledge of their claims is "inherently individualized and fact dependent" is thus unavailing, and further is wholly unsupported by case law in the class action arena.

This Court has already specifically rejected this "individualized" argument when it found last year that "this Court can easily determine whether the discovery rule applies class-wide to toll class members' claims" and that "defendant's statute of limitations argument presents no barrier to certification." [Doc. 227 at 51-52], citing ***Community Bank, supra*** (common issues predominated over individual issues as to whether applicable statutes of limitation on class members' claims were equitably tolled due to concealment); ***In re Urethane Antitrust Litig.,*** 251 F.R.D. 629 (D. Kan. 2008) (predominance and superiority requirements met when fraudulent concealment susceptible to common proof on a class-wide basis); ***Hamilton v. Pilgrim's Pride Corp.,*** 314 F.Supp.2d 630 (N.D. W.Va. 2004) (under West Virginia law, the discovery rule tolls the statute of limitation until a claimant knows or by reasonable diligence should know that he has been injured and who is responsible); ***Cohen v. Trump,*** 303 F.R.D. 376 (S.D. Cal. 2014) (granting class certification of fraud claims over defendant's arguments that individualized determinations on statute of limitations would be necessary); ***Kennedy***

v. United Healthcare of Ohio, Inc., 206 F.R.D. 191 (S.D. Ohio 2002) (certifying class when discovery of claim "may be amenable to a common proffer").

Consistent with the authority already cited by this Court above, Fourth Circuit law holds that a statute of limitations defense may be resolved on a class-wide basis by looking to the record when the "defense is so dependent upon facts applicable to the entire class … that individual hearings would not be necessary." ***Thorn v. Jefferson-Pilot Life Ins. Co.,*** 445 F.3d 311, 327 (4th Cir. 2006). The ***Thorn*** court contemplated situations where a statute of limitations defense could be resolved on a class-wide basis, including: (1) where defendant relied on mailings that it sent to all of its insureds on a particular date to argue that the class received notice outside of the applicable statute of limitations period; and (2) where the class demonstrated that the statute of limitations defense was "so patently without merit that the district court could find that the defense was not even a real 'issue' in the case." ***Id.*** at 327 n. 19. This case falls squarely within the type of example (1), as there is common, class-wide evidence of concealment in Quicken's failure to maintain the appraisal forms or disclose its conduct to borrowers.

Like the ***Thorn*** court and the other authority already recognized by this Court, courts confronting the statute of limitation and equitable tolling issues in class cases where there is common, class-wide evidence find that this issue may be resolved in one fell swoop as to the entire class. For example, in ***Minter v. Wells Fargo,*** 279 F.R.D. 320 (D. Md. 2012), a case alleging that defendant lenders had developed a front organization ("Prosperity") to circumvent lending regulations, the court certified a class created specifically for the purpose of equitably tolling the statute of limitations. In doing so, it recognized that the tolling analysis could be completed on a class-wide basis because all class members "rely on the same course of conduct perpetrated by Defendant when arguing the elements of equitable tolling, specifically that this conduct (1) concealed their claims and (2) lulled them into believing in the legitimacy of Prosperity without provoking them to make any inquiry into potential claims." ***Id.*** at 325-26. In finding commonality and predominance met, the court recognized that the "test for equitable tolling relies on Prosperity's uniform and consistent course of conduct, so there is no need to inquire into transaction-specific details." ***Id.*** at 327. The court rejected defendants' argument that each borrower's level of due diligence must be examined, because "due diligence is evaluated using an objective standard" and the court had already "determined that all borrowers went through generally the same uniform and consistent process when transacting with Prosperity." ***Id.***

Other courts are in accord with the ***Minter*** decision in recognizing the susceptibility of the equitable tolling issue to class-wide proof. *See* ***Fangman v. Genuine Title,*** 2016 WL 6600509, at *7 (D. Md. Nov. 8, 2016) (Bennett, J.) (certifying class upon finding that the "named Plaintiffs have provided sufficient evidence that their individual claims are entitled to equitable tolling to proceed as representatives of the proposed class" and "issues surrounding equitable tolling in this case are susceptible to class-wide proof because the Plaintiffs have demonstrated that it was

West Town's 'pattern of practice' to not disclose the alleged kickback scheme on any class members' HUD-1 form and it was a pattern among West Town agents to receive kickbacks in the manner discussed above"); ***Baker v. Castle & Cooke Homes Hawaii,*** 2014 WL 1669158, at *14 (D. Haw. 2014) ("When there is no reason to suspect that potential class members have or will discover product defects at significantly different times, the presence of a statute of limitations provision, by itself, is insufficient reason to compel all potential class members to pursue their claims individually"); ***Thurman v. CUNA,*** 836 N.W.2d 611, 621 (So. Dak. 2013) ("constructive notice of claims accrual can be determined on a class-wide basis because the test to determine constructive notice is objective, applying a reasonable person standard.... All of the borrowers and insureds in this case went through roughly the same process to obtain their loans and credit disability insurance. Because BHFCU used a uniform process to sell credit disability insurance, changed the policy at the same time, sent out its newsletter to all of the borrowers, and sent statements to all borrowers, the claims regarding constructive notice may be decided by a jury applying the objective test to the circumstances in this case"); ***In re U.S. Foodservice Inc. Pricing Litig.,*** 2011 WL 6013551, at *17 (D. Conn. 2011) ("plaintiffs have produced common evidence showing that USF intended to conceal the VASPs and, therefore, it cannot reasonably be expected that the plaintiffs could have discovered the injury until they became more fully aware of VASPs existence and purpose. Therefore, common issues regarding fraudulent concealment exist and the statute of limitations does not bar certification of the RICO class"); ***In re NASDAQ Market-Makers Antitrust Lit.,*** 169 F.R.D. 493, 520 (S.D. N.Y. 1996) (finding defendant's misrepresentations to the market, which were relevant to fraudulent concealment analysis, to be susceptible to common proof).

VII. Plaintiffs' Motion for Summary Judgment on Class-wide Contract Damages [293-1]

In Plaintiffs' Motion for Summary Judgment on Class-wide Contract Damages [293-1], the plaintiffs seek class-wide damages for breach of contract in the form of disgorgement of the amounts paid by the class members for their tainted appraisals.

Quicken argues that it is entitled to a jury trial addressing the amount of damages recoverable as a result of its breach of contract. However, in their complaint plaintiffs specifically demanded a disgorgement and restitution of all illegal fees associated with their loans [Doc. 1-1]. It is well settled that equitable relief is appropriate in breach of contract cases in West Virginia. *See, e.g.,* ***Parker v. Sayre,*** 2013 WL 6153063 (W.Va. Nov. 22, 2013) (affirming summary judgment on breach of contract claim in which court had ordered equitable remedy of specific performance). In this particular case, the plaintiffs are seeking the disgorgement of fees that were illegally collected as part of the appraisal process.

The law in West Virginia, and elsewhere, clearly provides that an order requiring the return of any illegal or ill-gotten gains is restitution, which is an equitable remedy. *See, e.g.,* ***Prudential Ins. Co. of America v. Couch,*** 180 W.Va. 210, 376 S.E.2d 104, 108 (1988) (restitution is available whenever "the party who received the money has no basis for retaining it ... [and] has received money ... to which he was not entitled."); see also ***Gerald M. Moore & Son, Inc. v. Drewry & Assocs. Inc.,*** 945 F.Supp. 117, 120 (E.D. Va. 1996), citing ***Arkadelphia Milling Co. v. St. Louis Southwester Ry. Co.,*** 249 U.S. 134 (1919). Because Plaintiffs are seeking disgorgement of the appraisal fees, they are seeking a remedy akin to equitable restitution. See ***Sivolella v. AXA Equitable Funds Mgmt., LLC,*** 2013 WL 4096239, at **5-6 (D. N.J. July 3, 2013) (finding that because plaintiffs were seeking disgorgement of the fees they were charged, they were not seeking "some funds" ... "but rather the funds allegedly charged and retained by Defendants, and therefore, "Plaintiffs' claim is for equitable restitution and, as a result, not triable to a jury"), citing ***Nat'l Sec. Sys., Inc. v. Iola,*** 700 F.3d 65, 101 (3d Cir. 2012) ("it is undisputed that restitution of ill-gotten commissions is an equitable remedy."); ***Hanwha Azdel, Inc. v. C & D Zodiac, Inc.,*** 2013 WL 3989147, at *2 (W.D. Va. Aug. 2, 2013) (a claim for disgorgement of specific profits and to prevent unjust enrichment constitutes equitable restitution and would be a remedy imposed "if at all, by the court and no[t] by the jury.").

There is no right to a jury trial in equity. Equitable issues are, instead, addressed solely to the court. ***Barton v. Constellium Rolled Products-Ravenswood, LLC,*** 2014 WL 3696646 (S.D. W.Va. July 23, 2014) (Goodwin, J.) ("if an action will resolve 'legal rights,' the courts must provide a trial by jury; however, if an action involves only equitable rights, a jury trial is not required"). The amount of damages is a simple, straightforward calculation. The appraisals were rendered worthless by Quicken's breach and, thus, plaintiffs are entitled to a restitution of the full amount of the appraisal fees. Indeed, independence is of foremost importance in the appraisal process. See 15 U.S.C. § 1639e (2010). Once an appraisal is tainted by the implication of influence over the appraiser especially by the party compensating the appraiser, the resulting appraisal cannot by any established standard be fair, valid and reasonable. Here, Plaintiffs failed to receive the benefit of their bargain—a fair, valid and reasonable appraisal. This Court will enter judgment accordingly requiring restitution of the appraisal fees in the amount of $968,702.95. [See Doc. 293-9].

This Court may award summary judgment as to these damages. Summary judgment is appropriate where there are no disputed issues of fact and the moving party is entitled to judgment as a matter of law. ***Celotex Corp. v. Catrett,*** 477 U.S. 317 (1986). This same principle applies to damages: whenever the moving party has demonstrated that damages are undisputed and in an amount that does not require the jury or the court to resolve conflicting facts, summary judgment is proper. *See* ***Applied Capital, Inc. v. Gibson,*** 558 F.Supp.2d 1189, 1208 (D. N.M. 2007) (in a fraud case, summary judgment was appropriate where "the defrauded amount [was] a sum certain"); ***Branch Banking & Trust Co. v. Tractor Co., Inc.,*** 2016 WL 3676744 at *5 (S.D. W.Va. July 7, 2016) (Berger, J.) (finding no genuine issue of material fact regarding amount of damages awardable for breach of contract, over defendant's objection that a dispute of fact existed); ***Mountain 1st Bank & Trust v. Holtzman,*** 2012 WL 3126833, at *3 (D. S.C. 2012) (finding no genuine issue of material fact regarding amount of damages plaintiff suffered as a result of defendant's breach and awarding sum certain); ***Pin State Creamery Co. v. Land-O-Sun Dairies, Inc.,*** 1998 WL 34304526, at *2 (E.D. N.C. Aug. 25, 1998) (Boyle, J.) ("summary judgment is appropriate if the Court may determine [plaintiff's] damages as a matter of law"). *See also* ***Reedy River Ventures Ltd. P'ship v. Synoptics Communications, Inc.,*** 38 F.3d 1213 (4th Cir. 1994) (affirming district court's award of summary judgment on amount of damages in conversion action).

With respect to the breach of contract claim, this Court made specific findings establishing a contractual duty, a breach of said duty, and causation resulting in the consumer receiving something less and different than what was bargained for. Specifically, the Court deemed each appraisal to be unfair, invalid and unreasonable on account of Quicken engaging in a scheme to circumvent established standards of appraiser independence [Doc. 227 at 25]. In such circumstances, the only way a consumer can be made whole is to throw out the contaminated appraisal and refund the cost or obtain another appraisal on the consumer's behalf. Of course, a second appraisal is not free and will have a similar cost, if not more due to the passage of time, to the original appraisal.

Quicken's liability for breaching its contract has already been established. The amount of the fees collected by Quicken as a result of its breach is a sum certain that is readily calculable from the undisputed facts in the record. The parties have agreed the amount is $968,702.95.

VIII. Order Awarding Statutory Damages

Based upon the evidence presented, both that in the record and that presented at the evidentiary hearing requested by the defendants, this Court must now determine the amount of the statutory penalty to be awarded the class members under the West Virginia Consumer Credit and Protection Act.

Plaintiffs bear the burden of proving damages, and must do so by a preponderance of the evidence. *See* Syl. Pt. 4, ***Taylor v. Elkins Home Show, Inc.,*** 210 W.Va. 612, 614, 558 S.E.2d 611, 613 (2001); ***Dickens v. Sahley Realty Co., Inc.,*** 233 W.Va. 150, 154 n. 14, 756 S.E.2d 484, 488 n.14 (2014). As in other statutory penalty cases (e.g., False Claims Act), plaintiffs must prove that any penalty higher than the minimum is warranted. *Cf.* ***United States ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp.,*** 2010 WL 3730894, at *6 (D. Colo. Sept. 16, 2010) ("[T]he evidence of misconduct by the Defendant was far from 'overwhelming.' … [T]he Court finds no particular reason to assess anything more than the minimum statutory penalty").

"The determination of the statutory penalties under the Consumer Protection Act does involve evidence of intent, knowledge and harm." Chan Decl. Ex. 15, at

4:23-25; *see* ***Clements v. HSBC Auto Fin., Inc.,*** 2011 WL 2976558, at *7 (S.D. W.Va. July 21, 2011) (Berger, J.) ("The amount of a penalty should have a direct relationship to the egregiousness of the violation."); ***Kidd v. I.C. Sys., Inc.,*** 2014 WL 847692, at *6 (W.Va. Cir. Ct. Jan. 30, 2014) (lower penalty for telephone calls that were placed, but not heard or received by plaintiffs); ***Endicott v. Hager,*** 2000 WL 35542409, at *2 (W.Va. Cir. Ct. Aug. 25, 2000) (lower penalty range because plaintiffs were not "unduly harmed" by defendant's conduct).

Courts have imposed higher penalties where the plaintiffs have proven that the defendants knew their conduct violated the law, but nevertheless proceeded in complete disregard of their legal obligations. *See* ***Vanderbilt Mortg. & Fin., Inc.,*** 2011 WL 9697521, at *3 (W.Va. Cir. Ct. Aug. 15, 2011) ("Vanderbilt I") (maximum penalty based on "complete disregard" for statutory rights, where attitude conveyed "disrespect, saying 'We know what the law is in the State of West Virginia, but we do not have to follow it'"); ***Figgatt v. Green Tree Servicing, LLC,*** 2012 WL 8895246, at *3 (W.Va. Cir. Ct. Aug. 23, 2012) (maximum penalty where "[d]efendant was clearly aware of the prohibition"); ***Dijkstra v. Carenbauer,*** 2014 WL 12594132, at *2 (N.D. W.Va. July 16, 2014) (awarding mid-range penalty where "defendant continued to engage in this practice" after decision prohibiting the practice).

The defendants claim to have carefully researched the law of West Virginia to be certain that the state law did not prohibit the transmission of an estimated value to an appraiser. The defendants note that "unlike other states, West Virginia never adopted a specific law prohibiting the transmittal of values to appraisers." [Doc. 295-2, p. 9]. Defendants further indicate that had West Virginia adopted a specific prohibition against such conduct, the defendants would have stopped.

The fallacy with this argument is that the defendants confuse unlawful with unconscionable. The fact that an activity is not specifically outlawed does not prevent the activity from being unconscionable.

There was simply too much opinion and information condemning the practice of telegraphing a value to an appraiser for the defendants to hide behind "It's not illegal."

While Quicken has attempted to minimize or explain away the many sources this Court relied on in issuing its summary judgment rulings, Quicken has to this day never offered any legal or industry source that would indicate suggesting values to appraisers was considered a best or even valid lending practice. The best Quicken can do is show that some other predatory lenders did the same.

As early as 1996, the Federal Housing Commissioner issued appraisal standards to be followed in all HUD-approved mortgage transactions. Under these standards, the appraiser was required to certify that the appraisal was not "based on a requested minimum valuation, [or] a specific valuation or range of values." [Doc. 173-22, Mortgagee Letter 96-26, authored by Nicholas P. Retsinas, Assistant Secretary for Housing, on behalf of the Federal Housing Commissioner (May 21, 1996)]. The District Court for the Eastern District of Michigan recently relied on this letter as constituting notice and warning to mortgagees in 1996 regarding federal condemnation of the practice sufficient to withstand a motion to dismiss. ***United States v. Quicken,*** 2017 WL 930039, at **7-8. The court noted that the Government took the position that:

> Although the appraiser was the individual required to make the statement in the certification, this letter was sent to 'all approved mortgagees.' Thus, those mortgagees who received the letter were clearly aware, and sufficiently warned, that an appraisal could not be based on a requested or specific valuation.
>
> Furthermore, the Mortgagee Letter 2009-28 not only provides that 'new requirements set forth in this mortgagee letter will be effective for all case numbers assigned on or after January 1, 2010,' but that "existing requirements will remain in effect." Mortgagee Letter 2009-28 at 1. In the portion entitled "Affirming Existing Requirements," the letter expressly states:
>
>> FHA is reaffirming these requirements. Mortgagees and third parties working on behalf of mortgagees are prohibited from:

* * *

>> Providing to the appraiser an anticipated, estimated, encouraged or desired value for a subject property or a proposed or target amount to be loaned to the

> > borrower, except that a copy of the sales contract for purchase must be provided.
>
> **Id.** at 3. This language clearly contradicts Quicken's contention that this letter prohibited value appeals for the first time in 2009 with an effective date of 2010.

2017 WL 930039 at **7-8 (emphasis added).

Three years later, in 1999, the Comptroller of the Currency concluded that providing an "owner's estimate of value," "[a]t a minimum, … suggests to the appraiser the value conclusion that is needed to complete the transaction." [Doc. 173-23, Ltr. from OCC to K. Kaiser, Chairman of The Appraisal Standards Board (July 28, 1999)]

Then in 2005 all the major federal agencies with lending oversight, including the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of Thrift Supervision, and National Credit Union Administration, expressly addressed the issue in an "Interagency Statement," advising in pertinent part: "the information provided [to the appraiser] should not unduly influence the appraiser or in any way suggest the property's value." Frequently Asked Questions on the Appraisal Regulations and the Interagency Statement on Independent Appraisal and Evaluation Functions, March 22, 2005. Available at http://www.occ.gov/newsissuances/bulletins/2005/bulletin-2005-6a.pdf.

Because of subsequent litigation by the New York Attorney General, the industry later adopted the

Home Valuation Code of Conduct, which prohibited lenders and their appraisal management companies from "providing to an appraiser an anticipated, estimated, encouraged, or desired value for a subject property or a proposed or target amount to be loaned to the borrower." (The Home Valuation Code of Conduct (HVCC) is available at www.freddiemac.com/.../docs/030308valuationcodeofconduct.pdf. HVCC is the result of a joint agreement between Fannie Mae, Freddie Mac, Federal Housing Finance Agency, and New York state attorney general Andrew Cuomo, to improve the quality and independence of the appraisal process. Fannie Mae and Freddie Mac dictated that all major lenders and appraisal management companies must comply with HVCC.

HVVC was released for comment in March 2008 and became effective in May 2009. Quicken continued its practice of sending estimated values to an appraiser through the comment period, after passage and until just before the effective date.

In 2007, an online petition signed by 11,000 appraisers from across the country was submitted to Congress and the Appraisal Subcommittee of the Federal Financial Institutions Examination Council, copying "[o]ther state or federal agencies with authority in the ... matter."[7] In the petition, the signing appraisers acknowledge and condemn the fact

[7] The petition appears at the following website: http://appraiserspetition.com., and is discussed in the Southern District of New York's opinion in ***Nomura,*** infra, 104 F.Supp.3d at 461.

that lenders regularly "apply pressure on appraisers to hit or exceed a predetermined value." The signing appraisers agreed that the practice produced "adverse effects on our local and national economies." There was, they warned, "the potential for great financial loss."

In a national survey of appraisers conducted in late 2006, 90% of the participating appraisers indicated that they felt some level of "uncomfortable pressure" to adjust property valuations. This was an increase of 35% from a survey conducted three years earlier. ***Nomura,*** 104 F.Supp.3d at 461.[8]

At the state level, West Virginia was also deterring these practices and protecting consumers. At least one West Virginia court specifically found the practice of providing an estimated value to an appraiser to be unlawful and indefensible. In ***Brown v. Quicken Loans Inc.,*** Civ. No. 08-C-36, Ohio County, W. Va., the Honorable Judge Arthur Recht found "[n]o legitimate purpose is served by providing an appraiser with an estimated value of a property. The only purpose could be to inflate the true value of the

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[8] The 2007 National Appraisal Survey was composed of 33 questions presented to "a representative group of the nation's leading real estate appraisers." It was intended to give a comprehensive understanding of the real estate appraisal business in the second half of 2006 through 2007. Its predecessor, conducted in 2003, "shocked the industry when 55% of appraisers surveyed indicated that they felt uncomfortable pressure to overstate property values in greater than half of their appraisals." The component of the survey conducted in the last half of 2006 represented responses from 1,200 appraisers, and showed "an alarming increase" in the extent of pressure felt by real estate appraisers. ***Id.*** at fn. 12.

property." [Doc. 173-24, at ¶ 50]. This finding supported several liability findings against Quicken, which (to the extent appealed) were affirmed by the West Virginia Supreme Court of Appeals ("WVSCA") in Quicken I.

Prior to Quicken I, the WVSCA condemned this very practice in ***Herrod v. First Republic Mortgage Corp.,*** 218 W.Va. 611, 617-618, 625 S.E.2d 373, 379-380 (2005) by reversing a trial court's grant of summary judgment to a mortgage lender where the evidence demonstrated that its appraiser was influenced via an appraisal request form with target numbers, resulting in a consumer taking out an underwater loan. *See also* ***Fed. Housing Fin. Agency v. Nomura Holding Am. Inc.,*** 104 F.Supp.3d 441, 461 (S.D. N.Y. 2015) (discussing the problem with lenders providing a target number to the appraiser in connection with the loan and acknowledging that "[a]ppraisers may inflate their appraisals because of pressure from loan officers.")

West Virginia's sister state of Ohio was also at the forefront. Ohio courts uniformly concluded that the act of providing the borrower's estimated value for a property in connection with a mortgage loan is unconscionable because it is an attempt to improperly influence the appraiser's independent judgment. *See, e.g.,* ***State ex rel. Dann v. Premiere Service Mortgage Corp.,*** Case No. CV-2007-06-2173 (Butler Cty. Apr. 30, 2008); **State *ex rel. Rogers v. Ace Mortgage Funding, LLC,*** Case No. A0705054 (Hamilton Cty. Sept. 23, 2008); ***State ex rel. Cordray v. First Ohio Banc & Lending, Inc.,*** Case No. 07-CV-259 (Belmont Cty. Nov. 24, 2009); ***State ex rel.***

Cordray v. Apex Mortgage Services, LLC, Case No. 07-CV-261 (Belmont Cty. Mar. 10, 2009) [collectively found as Doc. 212-3, Exh. 16]. Ohio has expressly defined unconscionable acts in connection with residential mortgages to include any attempt to corrupt or improperly influence the independent judgment of an appraiser. O.R.C. § 1345.031 (10). This statute was amplified by Ohio Administrative Code 109:4-3-24, which as of January 7, 2007 deems "[i]n the case of any refinance loan ..., [the act of including] on the appraisal order form ... either the loan amount or any other express or implied statement of the anticipated or desired appraisal valuation of the dwelling subject to the appraisal" to be an unconscionable practice.

By Order entered June 2, 2016, this Court found that Quicken's uniform practice of providing estimated home values to appraisers constituted unconscionable conduct under the West Virginia Consumer Credit and Protection Act ("WVCCPA"). The Court found that Quicken did so while failing to disclose the practice to plaintiffs. [Doc. 227 at 19]. The Court recognized that, by "concealing these facts, Quicken meant to 'deceive or trick' the plaintiffs" as understood by the Fourth Circuit in ***McFarland v. Wells Fargo Bank,*** 810 F.3d 273 (4th Cir. 2016). Moreover, the Court found "ample evidence in the record that passing on an estimated value is an unconscionable practice that was part of the inducement for plaintiffs' loans." This Court rejected defendants' argument that appraisals are obtained for the benefit of the lender, not the borrower [Doc. 227 at 22], explaining that Quicken itself represents to borrowers that "[t]he appraisal will protect you from owing more on your loan than your home is worth, which is known as being underwater."

The Court also made findings as to intent: "To repeat, Quicken had full knowledge of its practice of providing estimated values to its appraisers for purposes of influencing their appraisals. Quicken's Rule 30(b) witness and internal documents confirm beyond any doubt that estimated values were used by Quicken as a means of communicating targets to its appraisers. Quicken knew these facts. The plaintiffs did not. Under the analytical framework of both ***McFarland*** and ***Brown,*** this constituted unconscionable inducement." [Doc. 227 at 20-21]. The Court went on to find that:

> "A borrower's estimated value is not materially or logically distinguishable from a 'target appraisal value' or 'predetermined value.'" [Doc. 27 at 11].
>
> "No matter who supplied the estimated value, this Court cannot imagine any logical basis for sending an estimated value to the appraiser other than to influence his or her opinion." [Id.].
>
> "Quicken influenced the appraisers to meet a passed on value, and it did so while failing to disclose the practice to plaintiffs." [Id. at 19].
>
> "As it did in the ***Brown*** case, Quicken possessed knowledge of the true facts of the Aligs' loan, namely that it was actively attempting to compromise the appraisal process. Specifically, pressure was being brought to bear on the appraiser, who was expected to meet or exceed a target figure that Quicken itself had provided not

> once but twice (in the case of the Aligs)." [Id. at 20].

This Court has already made findings regarding the borrower's right to a fair and unbiased appraisal, and the fact that no genuine purpose is served by providing the estimated value to the appraiser. It recognized that, "Quicken has admitted that the borrower has an expectation of a fair, unbiased, and reasonable [appraisal]. [Doc. 227 at 25].

> In addition, this Court in its Order denying Quicken's motion to dismiss:
>
> What is clear is that the plaintiffs each deposited a sum of money with Quicken, and, in turn, Quicken agreed to obtain an appraisal of the property and process the loan application. This Court finds that it was a necessary corollary of obtaining an appraisal that the defendant would obtain a fair, valid and reasonable appraisal of the property.

[Doc. 107 at 7].

The testimony in this case was consistent with Judge Recht's conclusion that there is no legitimate purpose to passing on an estimated value. As this Court found, "the testifying appraisers distanced themselves from [estimated value] figures as taboo and all agreed that this information is in no way necessary to performing an appraisal." [Doc. 227 at 15]. The Court further observed that Quicken executive and corporate designee Michael Lyon agreed in deposition testimony offered in July of 2008 in the ***Brown*** litigation that estimated values were in no way necessary to complete the appraisal process. [Id.].

As the Court noted, this case was "not the first time it had an opportunity to study appraisal influence." [Id. at 33]. In ***Diloreti v. Countrywide Home Loans, Inc.,*** the Court "recognized the plausible inference created when a bank provides appraisers with suggested or estimated values of homes":

> Taken as true, these allegations create an inference that [lenders'] practice of providing estimated values of homes was for the purpose of influencing the appraiser's independent judgment. It certainly is plausible that an appraiser would seek to meet a client's suggested outcome in order to receive future business from the client.

[Id. citing Doc. 169-12, ***Diloreti v. Countrywide Home Loans, Inc.,*** No. 5:14-cv-76 (N.D. W.Va. Nov. 14, 2014), Order Granting Bank Defendants' Motion in Part and Denying in Part and Denying Funari's Motion for Judgment on the Pleadings, at 7.)

This Court is not alone among West Virginia district or state courts in recognizing Quicken's rampant problem with appraisal valuation, which was happening via a number of mechanisms, and in recognizing the importance of a fair and unbiased appraisal. Other federal district courts in West Virginia have acknowledged the severity of Quicken's appraisal-related conduct by denying summary judgment to Quicken on its appraisal practices. For example, in ***Bishop v. Quicken Loans, Inc.,*** 2011 WL 1321360, at *6 (S.D. W.Va. 2011), Judge

Copenhaver found that the plaintiffs had raised a question of fact as to whether their mortgage "was the product of an inflated appraisal" after Quicken issued a loan based on an appraisal that came in 36% higher than another recent appraisal. The ***Bishop*** court further noted that "Quicken Loans' reliance on the 2006 appraisals is even more suspect in light of the sister-corporation relationship between [the appraiser's] employer (TSI) and Quicken Loans." ***Id.*** *See also* ***O'Brien v. Quicken Loans, Inc.,*** 2013 WL 2319248, at *6 (S.D. W.Va. May 28, 2013) (Copenhaver, J.) (denying motion to dismiss unconscionability claim when plaintiff "alleged that inflated appraisals led him unwittingly to take out loans in excess of the value of his home and rendered him unable to refinance or sell his home.) As the ***O'Brien*** court recognized, Quicken's conduct with respect to inflated appraisals "implicate[s] the onesidedness and public policy concerns that are the subject of substantive unconscionability." ***Id.***

Judge Kaufman's order in ***Nicewarner v. Quicken Loans Inc.*** (Cir. Ct. Kanawha Cty. W.Va. Jan. 13, 2016), provides another condemnation of Quicken's appraisal practices. As in this case, when ordering an appraisal for Ms. Nicewarner, Quicken "communicated a target value for the home to the appraiser." (Order at 2). In denying Quicken's motion for summary judgment on Ms. Nicewarner's claim for fraud, the court found that plaintiff had presented evidence of each element of the tort, in that:

> Defendant represented to Plaintiff- including by placing the appraisals at issue in her closing packages – that in 2007 her home had a value of

> $141,000, and that in 2008 and 2009, her home had a value of $125,000. Defendant was responsible for reviewing the appraisal and ensuring that it met all applicable standards; however it was clear that the appraisal did not meet said standards.... Plaintiff has further presented evidence, through her retrospective appraisals, that the misrepresentations were false. Plaintiff further testified that she relied on Defendant's representation as to value, and would not have entered the loans but for Defendant's representations. The appraisal itself notes that the borrower may rely on it, and such reliance is reasonable.

[Doc. 293-3 at 11-12].

Similarly, in ***Robinson v. Quicken Loans Inc.,*** 988 F.Supp.2d 615 (S.D. W.Va. 2013), Chief Judge Chambers found that a factual issue precluded summary judgment on plaintiff's fraud claim stemming from Quicken's misrepresentation of the value of the borrower's home. In ***Robinson,*** the plaintiff alleged that Quicken had misrepresented her home's value as $84,350 when in fact its value was only $33,500. 988 F.Supp.2d at 633.

Quicken's highest level executives knew that it was passing on estimated values to appraisers, in accordance with Quicken's policies and procedures. [Doc. 293-7, Hughes Dep. at 69:5-70:1, explaining that Quicken corporate officer and designee Michael Lee Lyon told her to include estimated values in order forms while working at Quicken Loans before joining TSI in July 2007]. In addition, Jennifer Randall stated in this case that Quicken was aware that estimated values were being provided to appraisers by TSI on order forms. [Doc. 212-2, Exh. 12]. Quicken's true motive in sending estimated values to appraisers was confirmed by Mr. Lyon, who during the ***Brown v. Quicken*** trial (discussed infra) conceded that the practice was meant to "give an appraiser an ability to see what they are going to potentially look at the property at." [Doc. 173-5, Lyon Trial Testimony Vol. 5 (Oct. 9, 2009) at 69-70].

Similarly, TSI executive and chief appraiser Jordan Petkovski acknowledged the practice but could not provide a reasonable basis for it in his June 2014 testimony – "I wouldn't be able to say it does or does not assist [an appraiser]." [Doc. 212-5, Petkovski Dep. at 120:7-17 & 120:24-121:6) (from ***Cline v. Quicken Loans Inc.,*** Marshall County Civil Action No. 11-C-38].

A more revealing picture of Quicken's motives is provided by e-mails written by Quicken's executives that were uncovered by the Department of Justice in a recent investigation of Quicken, one of which stated: "I don't think the media and any other mortgage company (FNMA, FHA, FMLC) would like the fact we have a team who is responsible to push back on appraisers questioning their appraised values." [Doc. 173-10, Exh. I, Email from C. Bonkowski to H. Lovier, cc: M. Lyon (Dec. 13, 2007)]. The e-mail goes on to confirm that Quicken was well aware of the crackdown on appraisal influence in the state of Ohio in 2007 and its management predicted the same would spread to other states. In another e-mail uncovered by the Department of Justice, senior management at Quicken acknowledged in November of 2007 that its sister company, TSI, was receiving "a lot of calls from appraisers stating that they can't reach our requested value." Senior management's directive was to simply ask the appraisers "for the max increase available." [Doc. 206-J, Exh. J, Email from D. Thomas to E. Czyzak, et. al., cc: D. Wright (Nov. 27, 2007)].

Lenders who violate the WVCCPA's prohibitions on the "collection of excess charges ... illegal, fraudulent or unconscionable conduct, [or] any prohibited debt collection practice," are subject to statutory penalties and actual damages. W. Va. Code § 46A-5-101(1); see also Syl. Pt. 2, ***Vanderbilt Mortg. & Fin., Inc. v. Cole,*** 230 W.Va. 505, 740 S.E.2d 562 (W. Va. 2013) ("Under W. Va. Code § 46A-5-101 (1) (1996), an award of civil penalties is not conditioned on an award of actual damages."). Each violation of the CCPA creates a single cause for recovery of a single penalty under § 46A-5-101. ***Stover v. Fingerhut Direct Mktg.,*** 2010 WL 1050426, *8 (S.D. W.Va. Mar. 17, 2010).

For violations that occurred before 2015, which covers all of the class members' appraisals, the Court has discretion to award penalties in an amount "not less than one hundred dollars or more than one thousand dollars." W. Va. Code § 46A-5-101 (1). A civil penalty imposed by the court may be adjusted for inflation since September 1, 1974, in an amount equal to the consumer price index. § 46A-5-106; ***Mallory v. Mortgage Am., Inc.,*** 67 F.Supp.2d 601, 609, n.5 (S.D. W.Va. 1999) (Copenhaver, J.). The penalty of $100 in 1974 adjusted for inflation to 2017 dollars is $494.12, and for $1000 is $4941.24. See Bureau of Labor

Statistics CPI Inflation Calculator at http://www.bls.gov/data/inflation_calculator.htm (last visited March 28, 2017). Imposition of the maximum penalty for each class member loan does not violate the due process and excessive fines clauses of the West Virginia and United States Constitution, absent an abuse of discretion by the court awarding the penalty. ***Vanderbilt,*** 230 W.Va. at 514, 740 S.E.2d at 571.

The WVCCPA does not provide specific instructions as to the variables to consider in assessing the penalty amount, but guidance may be found in case law interpretation of the WVCCPA as well as in the language of the federal corollary statute, the FDCPA, and in cases interpreting it.

In ***Dijkstra,*** 2014 WL 12594132 (N.D. W.Va. July 16, 2014), this Court found that lender's disregard for prudent lending practices deprived class members of the opportunity to ask questions or clarify issues at closing. This court was unpersuaded by any argument that in some particular cases a class member may not have had questions or required the assistance of an attorney at closing; it was the fact that "LendingTree's use of a notary foreclosed the opportunity to ask questions about the documents or the terms of the loan for these class members, matters which have the potential to affect that is likely the largest investment of their lives," ***id.,*** that constituted the CCPA violation and gave rise to the $2000 per violation penalty. The lender's conduct in ***Dijkstra,*** while wrong, was less egregious than Quicken's conduct here, which deprived class members of a fair and valid appraisal in every single loan. Quicken's conduct has corrupted the appraisal process, which rests as the foundation of any valid loan. No class member had the opportunity to obtain a meaningful and fair appraisal when the underwriting process had these polluted the appraisals. An unreliable appraisal can result in severe financial harm to borrowers stuck with the prospect of paying off loans on Quicken's terms or losing their homes. And as in ***Dijkstra,*** it makes no difference that in some particular instances a class member may not have suffered actual damages. [Doc. 227 at 24].

Other WVCCPA cases are also instructive. In ***Vanderbilt,*** the Supreme Court upheld the circuit court's award of statutory penalties under § 46A-5-101(1) after a jury found defendant liable for several CCPA violations arising from numerous unlawful debt collection practices, including refusing to provide account records and placing numerous unsolicited calls to plaintiff's mother and third parties. 230 W.Va. at 509, 740 S.E.2d at 566. Although the jury did not find that the plaintiff had suffered any actual damages, the circuit court awarded: (i) the maximum civil penalty of $4,583.45 for defendant's failure to provide a statement of account upon written request, conduct the court considered "reprehensib[le]"; (ii) ten mid-range civil penalties at $2,250.00 each for the placement of repeated and unsolicited calls to plaintiff's mother and third parties despite specific requests to cease; (iii) one civil penalty of $458.34 for the use of language intended to unreasonably abuse the hearer; and (iv) an additional maximum civil penalty of $4,583.45 for unreasonable publication of indebtedness to a third party. ***Id.***

On appeal, the Court found that the statutory penalty award need not be preconditioned on an award of actual damages, and that no constitutional limitation on the awardable amount of penalties within the limits of § 46A-5-101(1) applied, ultimately concluding that the total award of civil penalties of $32,125.24 was not an abuse of discretion. 230 W.Va. at 514, 740 S.E.2d at 571. *See also* ***Clements v. HSBC Auto Finance, Inc.,*** 2011 WL 2976558, at *7 (S.D. W.Va. July 21, 2011) ("The amount of a penalty should have a direct relationship to the egregiousness of the violation").

The ***Vanderbilt*** Court looked to Fair Debt Collection Practices Act (FDCPA) to assist it in analyzing due process concerns relative to the WVCCPA penalties. The Supreme Court of Appeals recognizes the FDCPA as the "federal equivalent to the WVCCPA, and like the WVCCPA, it also allows consumers to seek actual damages and civil penalties from creditors." ***Vanderbilt,*** 230 W. Va. at 511, 740 S.E.2d at 568.

Under that statute, the court may award up to $1,000 in statutory damages per plaintiff and, as under the WVCCPA, the specific amount of statutory damages falls within the court's discretion. ***Savino v. Computer Credit, Inc.,*** 164 F.3d 81, 86 (2d Cir. 1998). The statute itself states that, in determining liability in a class action, the court shall consider, among other relevant factors, "the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional." 15 U.S.C. § 1692k(b)(2); see also ***Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA,*** 559 U.S. 573, 578 (2010) (the court must consider the provisions of § 1692k(b) in awarding statutory damages). Therefore, awards of the statutory maximum are "typically granted in cases where the defendants' violations are particularly egregious or intimidating." ***Fuentes v. Audubon Fin. Bureau, LLC,*** 2013 WL 4780119, at *2 (W.D .N.Y. Sept. 5, 2013). A high award is also appropriate if plaintiffs show that the conduct was "repeated and persistent". ***Manopla v. Bryant, Hodge & Assocs., LLC,*** 2014 WL 793555, at *6 (D. N.J. Feb. 26, 2014), citing ***Edwards v. Niagara Credit Solutions, Inc.,*** 586 F.Supp.2d 1346, 1354 (N.D. Ga. 2008) (granting $1000 statutory damages where violation was repeated and there was evidence of a policy and practice of violation). *See also,* ***Hutchens v. West Asset Management,*** 2013 WL 1337178, at *3 (S.D. W.Va. Mar. 29, 2013) (Faber, J.) (awarding plaintiffs the maximum penalty of $1000 for only two calls).

The defendants seek to minimize their liability by arguing (1) that what they were doing was not specifically prohibited by West Virginia law; (2) that the Ameriquest consent decree shows that what they were doing was permissible; and (3) the appraisal results dispel the notion that the appraisers were affected by their actions.

This Court has already addressed the issue of illegality vs. unconscionability. With respect to the Ameriquest action, Quicken states – for the very first time in this litigation or any other of which the undersigned are aware – that it believed its behavior acceptable because of a settlement agreement entered into between another mortgagor, Ameriquest, and certain states represented by their respective State Attorneys General. The agreement supported a Permanent Injunction and Final Judgment in ***State of W. Va. ex rel. McGraw v. Ameriquest Mortg. Co.,*** No. 06-C-519 (W. Va. Cir. Ct., Kanawha Cnty., March 23, 2006). But Quicken has no evidence that it was even ***aware*** of this Judgment in a case where it was not a party. If they were aware, one would think that they would have mentioned it before in the almost five years before now. Amy Bishop was the ***only*** attorney doing compliance work for Quicken during the 2004-2009 time frame, and she was entirely unaware of this Ameriquest defense as recently as a few weeks ago when she was asked whether Ameriquest engaged in the passing on of estimated values to appraisers; Ms. Bishop testified that she "wouldn't know what Ameriquest did." [Doc. 316-3, Bishop Dep. at 14:2-11; 101:18-102:22].

The 44 page agreement was negotiated by a steering committee, not the attorneys general, and covered a myriad of lending practices under scrutiny after complaints and investigations. The terms of the settlement agreement themselves require any estimated value to be "accompanied by a statement it is being provided solely to assist the appraiser in determining the relative complexity of the Appraisal and that it is not a target or expected value." [Doc. 295-14 at 26]. ***Quicken therefore would have been noncompliant even with this separate negotiated agreement.*** Beyond the disclaimer, Ameriquest was required to make extensive changes going forward in virtually all aspects of lending. In addition, the Judgment itself disclaimed that it had any bearing on the conduct of others, in that it stated it "may only be enforced by the parties" and did not confer rights to third party beneficiaries. [Doc. 295-14 at 40]. The Judgment also stated that West Virginia consumer law – which would of course include the unconscionability statute that this Court found Quicken violated – governed over any terms of the Judgment where … greater consumer protections" are provided. ***Id.*** at 39. The only takeaway from the Ameriquest settlement for any prudent West Virginia lender (were it paying any attention at all to this deal), should have been that the passing on of estimated values could cause them to be sued for violating the law.

Finally, the defendants argue that more than 30% of the loans had an appraisal value that deviated from the borrowers estimated value by more than 10%, which they claim would tend to show that the transmission of estimated values had no effect on the appraisers. This argument overlooks the fact that hundreds of loans were second mortgage loans where Quicken did not make the underlying loan. This argument also overlooks the fact that in many occasions the appraisers told the defendants that they were unable to reach the level that Quicken wanted and were told to provide "the max increase available." The average difference between the estimated value and the appraisal value for all loans was within 5%.

Quicken ignored the overwhelming and uniform guidance of the industry when it provided appraisers with estimated home values. This conduct was truly egregious, in that it flew in the face of prudent lending practices for the benefit of Quicken's bottom line, and at the expense of each borrower's right to a fair and unbiased appraisal. Quicken did so for years and in conjunction with thousands of loans, and only stopped when the HVCC went into effect and Fannie Mae and Freddie Mac announced they would no longer buy loans from those who continued with it the practice. The nature of the conduct is deceit in the origination of what is typically the most important loan in the average consumers' lifetime – their home mortgage.

This case does not involve mere phone calls or technical violations of statute. Quicken's conduct jeopardizes the American dream of homeownership. This conduct was frequent – it occurred on nearly every refinancing loan and was repeated as necessary with value appeals. Quicken was also persistent in that it continued with this practice amongst ever growing industry scrutiny by regulators, appraisers, investors, consumer advocates and lawmakers. As discussed above, this practice was fostered and condoned by the highest levels of management and motivated by greed.

Quicken's enormous wealth further weighs in favor of a higher penalty. In ***Dijkstra,*** this Court recognized the reprehensibility of another lender's conduct when it failed to have attorneys present at loan closings by imposing a $2000 per loan penalty; in ***Vanderbilt,*** the Court affirmed the award of low-mid-max range penalties for each of the discrete debt-collection violations. In several FDCPA cases, courts awarded the highest amount permitted to remedy phone call violations. *See, e.g.,* ***Hutchens,*** *supra.* By comparison, Quicken deprived borrowers of fair and trustworthy appraisals during their loan application process via a mechanism universally condemned. It did so repeatedly and without remorse, despite all indications that it would improperly influence appraisers' judgment. A substantial penalty will fulfill the purpose of the CCPA, which is to "protect consumers from unfair, illegal, and deceptive acts or practices." ***State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.,*** 194 W. Va. 770, 777, 461 S.E.2d 516, 523 (1995) (internal quotations omitted).

Based upon all the foregoing, this Court will impose a statutory penalty of $ 3,500.00 per violation on the defendants, jointly and severally, with prejudgment interest from and after June 15, 2012.

It is so **ORDERED.**

The Clerk is directed to transmit copies of this Order to counsel of record.

DATED: July 11, 2017.

[signature]
JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

APPENDIX D

FILED: April 20, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1059
(5:12-cv-00114-JPB-JPM)
(5:12-cv-00115-JPB)

PHILLIP ALIG; SARA J. ALIG; ROXANNE SHEA; DANIEL V. SHEA, Individually and on behalf of a class of persons

Plaintiffs - Appellees

v.

QUICKEN LOANS INC.; AMROCK INC., f/k/a Title Source, Inc., d/b/a Title Source Inc. of West Virginia, Incorporated

Defendants - Appellants

and

DEWEY V. GUIDA; APPRAISALS UNLIMITED, INC.; RICHARD HYETT

Defendants

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

Amicus Supporting Appellant

O R D E R

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35.

Entered at the direction of the panel: Judge Niemeyer, Judge Wynn, and Judge Floyd.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX E

FILED: May 10, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1059
(5:12-cv-00114-JPB-JPM)
(5:12-cv-00115-JPB)

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and

DEWEY V. GUIDA; APPRAISALS UNLIMITED, INC.; RICHARD HYETT

Defendants

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

Amicus Supporting Appellant

O R D E R

Upon consideration of submissions relative to appellants' motion to stay the mandate pending the filing and disposition of their petition for certiorari to the Supreme Court, the court grants the motion.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX F

1. Article III, § 2 of the U.S. Constitution provides in pertinent part:

The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same state claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

*   *   *   *

2. 28 U.S.C. § 2072 provides:

Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

3. Rule 23 of the Federal Rules of Civil Procedure provides in pertinent part:

Class Actions

(a) PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:

* * * *

(3) the court finds that the questions of law or fact common to class members predominate over

> any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

4. Rule 82 of the Federal Rules of Civil Procedure provides:

Jurisdiction and Venue Unaffected.

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is governed by 28 U.S.C. § 1390.

5. West Virginia Code § 46A-2-121 (1996) provided in relevant part:

Unconscionability; inducement by unconscionable conduct.

(a) With respect to a transaction which is or gives rise to a ... consumer loan, if the court as a matter of law finds:

> (1) The agreement or transaction to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct, the court may refuse to enforce the agreement....

6. West Virginia Code § 46A-5-101 (1996) provided in pertinent part:

Effect of violations on rights of parties; limitation of actions.

(1) If a creditor has violated the provisions of this chapter applying to ... unconscionable conduct, ... the consumer has a cause of action to recover actual damages and in addition a right in an action to recover from the person violating this chapter a penalty in an amount determined by the court ....