No. --

In the Supreme Court of the United States

PHILIP ALIG, ET AL.,
Petitioners,

v.

ROCKET MORTGAGE, LLC, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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May 20, 2025

QUESTION PRESENTED

Whether a federal court may certify a class action pursuant to Federal Rule of Civil Procedure 23(b)(3) when some members of the proposed class lack any Article III injury.

LIST OF PARTIES TO THE PROCEEDING

The petitioners, and plaintiffs-appellees below, are Phillip Alig, Sara J. Alig, Roxanne Shea, Daniel V. Shea, and a class of 2,769 "West Virginia citizens who refinanced mortgage loans with Quicken [Loans], and for whom Quicken [Loans] obtained appraisals through an appraisal request form that included an estimate of value of the subject property." App. 3a.

The respondents, and defendants-appellants below, are Rocket Mortgage, LLC (formerly known as Quicken Loans, LLC and Quicken Loans Inc.), and Amrock, LLC (formerly known as Amrock, Inc. and Title Source, Inc.).

RELATED PROCEEDINGS

This case arises out of the following proceedings:

- *Rocket Mortg. v. Alig*, 142 S. Ct. 748 (2022)
- *Alig v. Rocket Mortg., LLC*, No. 22-2289 (4th Cir. Jan. 23, 2025)
- *Alig v. Rocket Mortg., LLC*, No. 19-1059 (4th Cir. Oct. 28, 2022)
- *Alig v. Quicken Loans Inc.*, No. 19-1059 (4th Cir. Mar. 10, 2021)
- *Alig v. Quicken Loans Inc.*, Nos. 12-114 and 12-115 (N.D. W. Va. Dec. 15, 2018)
- *Alig v. Quicken Loans Inc.*, Nos. 11-C-428 and 11-C-430 (W. Va. Cir. Ct. Ohio County)

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PETITION FOR A WRIT OF CERTIORARI

This case implicates the same question that this Court is currently considering in *Labcorp v. Davis*, No. 24-304: "[w]hether a federal court may certify a class action pursuant to Federal Rule of Civil Procedure 23(b)(3) when some members of the proposed class lack any Article III injury." *Lab'y Corp. of Am. Holdings v. Davis*, 145 S. Ct. 1133, 1134 (2025). The decision below answered that question in the negative. It decertified a Rule 23(b)(3) class on the ground that, to certify a class, Article III "requires the plaintiffs to set forth specific facts, supported adequately by the evidence, to show *each class member*'s standing to recover damages." App. 19a (emphasis added) (internal quotations omitted). This Court should hold this petition pending its disposition in *Labcorp*, and then grant, vacate, and remand in light of its holding there.

OPINIONS BELOW

The Fourth Circuit's opinion below reversing class certification is reported at *Alig v. Rocket Mortg.*, 126 F.4th 965 (4th Cir. 2025). App. 1a. Its original opinion (affirming certification) is reported at *Alig v. Quicken Loans Inc.*, 990 F.3d 782 (4th Cir. 2021). App. 49a. The district court's decisions granting summary judgment and class certification are not published in the Federal Supplement but are available at 2016 WL 10489897 and 2017 WL 5054287, respectively. App. 118a. The district court's subsequent decision on standing is also unpublished but available at 2022 WL 22906514. App. 28a.

JURISDICTION

The court of appeals entered judgment on January 23, 2025, and denied rehearing on February 19, 2025. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, § 2, cl. 1 of the United States Constitution provides:

> 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.

STATEMENT

1. *Rocket's appraisal practices.* This is a consumer class action arising out of the appraisal practices used in West Virginia by Rocket Mortgage (then known as Quicken Loans) and its title-management company before the 2008 financial crisis.

At the time, when a consumer applied to Rocket to refinance a mortgage loan, Rocket said that it would obtain an appraisal on the consumer's behalf, for which it would charge about $350. App. 62a. Rocket told borrowers that this was for their benefit, and its appraisers' certifications told the borrowers that they "may rely" on an "appraisal report as part of any mortgage finance transaction." App. 89a; *see* Joint Appendix at JA445, Alig v. Rocket Mortg., No. 22-2289 (4th Cir. May 17, 2023).

These borrowers, as the original panel in this case explained, would have "assumed" that their appraisals "provided an unbiased valuation of their homes on which they could rely as they planned their financial futures." App. 94a. But that is not what Rocket gave them. Instead, Rocket required borrowers to supply their own uninformed estimates of home value and, unbeknownst to borrowers, treated those estimates as "requested value[s]," relaying them to appraisers and even pressuring those who returned lower estimates for an increase. App. 52-56a, 76a.

This practice started out as controversial and wound up being universally condemned by state and federal regulators. *Id.*, App. 88-90a. By 2009, amid concerns that estimate-sharing had contributed to the financial crisis by baselessly inflating home values, the Home Valuation Code of Conduct banned the practice, as well. App. 52-53a. And West Virginia trial courts deemed it unconscionable. *See Brown v. Quicken Loans Inc.*, 2010 WL 9597654, at *5 (W. Va. Cir. Ct. Mar. 2, 2010), *aff'd in relevant part,* 737 S.E.2d 640, 657–58 (W. Va. 2012). Even Rocket eventually described efforts to influence appraisals as "illegal and unethical." App. 54a.

2. ***This case.*** In 2007, however, Rocket had "no such qualms." App. 55a. So when the class representatives applied to refinance their mortgages, Rocket engaged in its preferred practice: Although the class representatives paid for independent appraisals, Rocket secretly passed their uninformed estimates of home values to their appraisers—leading to biased appraisals that could not be relied on as independent estimates of value. App. 51a, 56a.

The borrowers sued Rocket and other related defendants in 2011. App. 57a. Their theory was that the defendants had sought to influence appraisers by providing them with estimated values on appraisal request forms, thereby rendering their appraisals unlawful, unreliable, and worthless. App. 51a. Employing and concealing this practice, the plaintiffs asserted, amounted to unconscionable inducement under the West Virginia Consumer Credit and Protection Act. App. 51a, 57a. The district court agreed, granting class certification and summary judgment and awarding each plaintiff an identical amount of statutory civil penalties, which do not require proof of actual damages. App. 58a.

3. ***The Fourth Circuit's first decision.*** A divided panel of the Fourth Circuit affirmed in part and reversed in part. It addressed both standing and the merits.

On standing, the panel held that the class suffered a "classic and paradigmatic form of injury in fact": They "paid an average of $350 for independent appraisals" that they "never received." App. 62a.

Instead, their appraisals were "tainted": Rocket "exposed the appraisers to the borrowers' estimates of value and pressured them to reach those values," compromising the appraisals' independence. *Id.*

The panel opinion also easily rejected Rocket's argument that whatever benefits class members might have received from their loans could somehow offset their injury. App. 62-63a. "[O]nce injury is shown," the Fourth Circuit explained, it is unnecessary "to ask whether the injury is outweighed" by some other benefits "the plaintiff has enjoyed" as part of its "relationship with the defendant." *Id.* And injury *was* shown here—this was not the sort of case in which "facts related to the same transaction demonstrate there was never an injury in the first place." App. 63a n.9.

On the merits, the panel affirmed the district court's grant of summary judgment to the class on its claim for unconscionable inducement. Recent West Virginia case law, the panel explained, supported a clear *Erie* prediction: Unconscionable inducement required showing that the defendant engaged in "unconscionable" conduct and that that conduct "contributed to" the plaintiff's decision to enter a contract. App. 76-85a. Rocket's conduct fit that description. App. 85-93a.[1]

Rocket had a duty to "obtain a fair, valid and reasonable appraisal" of each borrower's property. App. 71a. That is particularly true in the refinance

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[1] The Fourth Circuit also reversed the district court's grant of summary judgment to the class on its breach-of-contract claim, holding that the claim was premised on a misunderstanding of the parties' contract. *See* App. 67-75a.

context. After all, the panel majority explained, "[a]ppraisal procedures" are "particularly important in refinancing agreements." App. 92a. Unlike home purchases, where "adversarial parties represented by competing real estate agents" temper one another's evaluation of home value, in the refinancing context, borrowers and lenders often have a shared incentive to reach a high loan value. *Id.* "But an inflated home value posed risks to both parties, too." *Id.* "Amidst these various dangers and incentives—and stepping into the middle of a transaction between parties with unequal bargaining power—the impartial appraiser [is] the only trained professional available to objectively evaluate the value of the home." *Id.*

Yet the evidence showed that Rocket had deliberately "tainted" this appraisal process. App. 62a. It "sought to pressure appraisers to inflate their appraisals" in two distinct ways: (1) sharing estimates to engender an inevitable "anchoring effect" that at least "subconsciously" increased appraisers' estimates, and (2) imposing explicit pressure on appraisers whose estimates fell short. App. 76a, 85-90a. Given the significance of the appraisal, the panel majority explained, it was unconscionable for Rocket to conceal from its borrowers the fact that it had influenced its appraisers' estimates in these ways. App. 92-93a. This amounted to unconscionable inducement: There was "no genuine dispute" that Rocket's appraisals—"and, more importantly, their guise of impartiality"—contributed to the decision to refinance. *Id.*

The dissenting opinion took a different view of West Virginia law—but not of standing. As to unconscionable inducement, the dissent predicted that West Virginia's high court would interpret "inducement" to require that unconscionable conduct either "was material" or "would have been material" to "the other party's decision to enter" an agreement. App. 107a. And it interpreted West Virginia law to "equate[] conduct that is unconscionable with fraudulent conduct." App. 113a. Applying these standards, the dissent would have reversed the district court's grant of summary judgment. In its view, Rocket's conduct was consistent with the industry standard. App. 113-115a. It thus "was neither unscrupulous nor fraudulent," and there was no evidence that "disclosure of it would … have changed a thing." App. 115a.

The Court denied Rocket's petition for rehearing en banc. *See* Order, *Alig v. Quicken Loans, Inc.*, No. 19-1059 (4th Cir. April 20, 2021), ECF No. 114.

4. *Rocket's petition for certiorari.* Rocket petitioned this Court for certiorari, asking for two forms of relief. First, it urged the Court to grant its petition, vacate the Fourth Circuit's opinion, and remand for further consideration in light of *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), which this Court decided shortly after the Fourth Circuit's opinion below. See Pet. 18–22. Second, it sought plenary review on the ground that the Fourth Circuit's decision allegedly implicated two circuit splits, including on the question whether a class may be certified when absent class members lack standing. *Id.* at 27–33.

This Court showed no interest in resolving the alleged circuit split. Instead, it granted Rocket's narrower request for a GVR, summarily vacating the Fourth Circuit's judgment and remanding "for further consideration in light of *TransUnion*." *Rocket Mortg., LLC v. Alig*, 142 S. Ct. 748 (2022).

5. *Proceedings on remand.* On remand from this Court, the Fourth Circuit entered a per curiam decision vacating its decision and remanding the case to the district court. App. 40-42a. The Fourth Circuit noted its prior holding that the plaintiffs "had standing because all of the class members had paid for independent appraisals that they never received." App. 40a. But it "conclude[d] that the district court should apply *TransUnion* to the facts of this case in the first instance." App. 41-42a.

In carrying out that order, the district court found that nothing in *TransUnion* warranted a different outcome. "Each of the plaintiffs and class members," it wrote, "paid up front for a fair, valid and reasonable appraisal of the property." App. 36a. "Due to the actions of the defendants," however, "they did not receive fair, valid and reasonable appraisals." App. 37a. That "financial harm," the court concluded, is a "classic" injury in fact suffered by all class members. *Id.* As the district court observed, *TransUnion* does not even purport to "alter[] this settled basis for Article III standing." *Id.* To the contrary, the decision reiterates that "monetary harms" are among the "most obvious" kinds of concrete harms, and thus "readily qualify as concrete injuries under Article III." *TransUnion*, 594 U.S. at 425. The court therefore recommended that the Fourth Circuit "reissue its prior opinion, with the added clarification that nothing in *TransUnion* alters this settled basis for Article III standing." App. 37a.

6. *The Fourth Circuit's second decision.* On appeal of the district court's order on standing, the Fourth Circuit panel's composition changed when the author of the original opinion was unable to attend oral argument and was replaced by a district judge sitting by designation. In a new majority opinion (authored by the formerly dissenting judge), the court of appeals rejected the district court's conclusion. The panel majority did not question the standing of the four named plaintiffs, affirming the district court's judgment in their favor "for the reasons given in [its] earlier decision." App. 21a. But it reached the opposite conclusion as to other members of the class, "revers[ing] the portion of the district court's judgment certifying a class and awarding it damages." *Id.* *TransUnion*, the court held, "requires the plaintiffs to set forth specific facts, supported adequately by the evidence, to show *each class member*'s standing to recover damages." App. 19a (emphasis added).

Because the plaintiffs here had not "set forth specific facts" showing "*each* class member's standing," the court directed that the class be decertified, allowing the case to "proceed … only as to the individual named plaintiffs." App. 19-21a. Even though every class member spent hundreds of dollars on an appraisal that was unethical, unconscionable, and ultimately unlawful—and even though the opinion reaffirmed the panel's prior merits ruling to this effect, *id.*—the panel held that this was not enough for Article III standing. To establish a cognizable injury, it wrote, the plaintiffs would also have to show some additional downstream harm—in other words, that they "received, used, or were harmed by the actual appraisals they received." App. 18a. Because they could not do so, the panel reversed class certification and the class-wide judgment. App. 20-21a.

In dissent, the remaining member of the former panel majority "agree[d] with the [new] majority to the extent it concludes the named plaintiffs possess Article III standing," but "disagree[d] that the class must be decertified." App. 22a. As the dissent explained, "the plaintiffs in this case—named and unnamed class members alike—have made the required showing" of Article III injury by demonstrating that they "paid an average of $350 each for independent appraisals of their homes," and yet "did not receive independent appraisals." App. 23-24a. That "financial harm is a classic and paradigmatic form of injury in fact for purposes of Article III standing." App. 23a.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit in this case reversed the district court's class-certification order based on its resolution of the same question that this Court is currently considering in *Labcorp v. Davis*, No. 24-304. The question presented in *Labcorp* asks "[w]hether a federal court may certify a class action pursuant to Federal Rule of Civil Procedure 23(b)(3) when some members of the proposed class lack any Article III injury." *Lab'y Corp. of Am. Holdings v. Davis*, 145 S. Ct. 1133, 1134 (2025). The decision in this case answered that question in the negative, decertifying a Rule 23(b)(3) class on the ground that, to certify a class, Article III "requires the plaintiffs to set forth specific facts, supported adequately by the evidence, to show *each class member*'s standing to recover damages." App. 19a (emphasis added).

Because the question presented in *Labcorp*, at a minimum, substantially overlaps with the issue decided by the Fourth Circuit, this Court should hold this petition pending its disposition of that case, and then grant, vacate, and remand in light of its holding there. *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (holding that a GVR is appropriate where there is a "reasonable probability" that an intervening authority would change the result below).

1. The Fourth Circuit in this case issued two published opinions on class certification that reached opposite results. In the first, the court affirmed the district court's certification of a class under Rule 23(b)(3), rejecting the defendants' argument that "a significant number of the class members [were] uninjured and therefore lack[ed] standing." App. 61a. As the court explained, every class member suffered a classic injury-in-fact because each paid Rocket hundreds of dollars for an independent appraisal that was "never received." *Id.* "Of course," the panel wrote, this sort of "financial harm is a classic and paradigmatic form of injury in fact." *Id.* Even the dissenting opinion never questioned that the plaintiffs' out-of-pocket injury gave them Article III standing.

After this Court remanded "for further consideration in light of *TransUnion*." *Alig*, 142 S. Ct. 748, a reconstituted Fourth Circuit panel issued a second published opinion—with the former dissenting judge now authoring the majority opinion and a member of the former majority now in dissent. The court, "for the reasons given in [its] earlier decision," affirmed the district court's judgment in favor of the named plaintiffs. App. 21a. But it "reverse[d] the portion of the district court's judgment certifying a class and awarding it damages," App. 20-21a, holding that *TransUnion* "requires the plaintiffs to set forth specific facts, supported adequately by the evidence, to show *each class member*'s standing to recover damages," App. 19a (emphasis added). Because the plaintiffs here had not made that factual showing as to "*each* class member[]," the court directed that the class be decertified, allowing the case to "proceed … only as to the individual named plaintiffs." App. 19-21a.

But *TransUnion*, contrary to the Fourth Circuit's analysis, did not impose any Article III requirement on class certification. True, the Court held that "every class member must have Article III standing in order to *recover individual damages*." *TransUnion*, 594 U.S. at 431 (emphasis added). It declined, however, to resolve the "distinct question whether every class member must demonstrate standing *before a court certifies a class*." *Id.* at 431 n.4 (emphasis added). Indeed, this Court's order remanding to the Fourth Circuit in light of *TransUnion* separately *denied* Rocket's petition for certiorari on the question "[w]hether a class can be certified" when some class members "suffered no Article III injury." Rocket Pet. i. The Court's remand order thus necessarily did not ask the Fourth Circuit to resolve that question.

2. The Fourth Circuit's decision to decertify the class here rested on the court's resolution of the second, "distinct" question of class certification, under which Article III imposes a freestanding jurisdictional barrier to certification of a class with uninjured members—regardless of whether the plaintiffs satisfy the requirements of Rule 23. *See* App. 19-21a (decertifying the class on the ground that Article III requires a showing of "*each* class member's standing" and allowing the case to "proceed … only as to the individual named plaintiffs"). That is the same question on which this Court granted certiorari in *Labcorp*. *See* 145 S. Ct. at 1134 ("Whether a federal court may *certify* a class action pursuant to Federal Rule of Civil Procedure 23(b)(3) when some members of the proposed class lack any Article III injury." (emphasis added)).

Because the rationale of the decision below, at a minimum, substantially overlaps with the question that this Court took up in *Labcorp*, the Court should hold this petition pending its decision in that case. There is at least a "reasonable probability" that the Fourth Circuit, based on that decision, would reach a different result on remand. *Lawrence*, 516 U.S. at 167.

The Fourth Circuit premised its abrupt reversal of its prior decision on its view that all class members must demonstrate an Article III injury before a district court may certify a class. But, for the reasons explained by the respondents in *Labcorp*, that view is mistaken. "Article III poses no freestanding barrier to certifying a class containing uninjured members." *Labcorp* Resp'ts' Br. at 13. At certification, only the named plaintiff, as the party invoking federal jurisdiction, must show standing. Indeed, this Court has rejected as "surely erroneous" the "argument that a nonnamed class member is a party to the class-action litigation *before the class is certified*." *Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011) (emphasis in original). Rather, "[a]t certification, only the named plaintiff, as the party invoking federal jurisdiction, must show standing." *Labcorp* Resp'ts' Br. at 13. As long as the named plaintiffs have standing, then, the court has Article III jurisdiction over the case and may rule on the named plaintiffs' motion to certify.

Even if this Court in *Labcorp* were to decide that a pre-certification showing of injury is required, the substantial overlap between the Court's rationale for its holding and the Fourth Circuit's decision here would still create at least a "reasonable probability" that the Fourth Circuit would reach a different result. *Lawrence*, 516 U.S. at 167; *see* Shapiro et al., *Supreme Court Practice* 5-42 (11th ed. 2019) (noting that a GVR order is appropriate where an intervening precedent *"may or may not* compel a different result" (emphasis added)).

A significant dispute between the parties in *Labcorp* is whether the pre-certification showing—assuming one exists—arises from Article III or from Rule 23(b)(3)'s predominance requirement. *See Labcorp* Resp'ts' Br. at 30–46; *see also* App. 61-62a (recognizing that uninjured class members "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"). Because the Fourth Circuit took the view that the question was one of Article III standing, *see* App. 61-

62a, it did not conduct a predominance analysis of class members' injuries. But if, as appears likely, this Court goes the other way on that question, the presence of uninjured class members would instead be a question for resolution under Rule 23—not Article III. Thus, regardless of who prevails in *Labcorp*, this Court's decision will likely shed significant light on the Fourth Circuit's decision to decertify the class.

CONCLUSION

This Court should hold this petition pending its disposition of *Labcorp v. Davis*, No. 24-304, and then grant, vacate, and remand in light of its decision there.

Respectfully submitted,

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May 20, 2025

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APPENDIX

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Appendix A

PUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

NO. 22-2289

PHILLIP ALIG; SARA J. ALIG; ROXANNE SHEA; DANIEL V. SHEA,

Plaintiffs - Appellees,

v.

ROCKET MORTGAGE, LLC, f/k/a Quicken Loans Inc.; AMROCK, LLC, f/k/a Title Source, Incorporated, d/b/a Title Source Inc. of West Virginia, Incorporated,

Defendants - Appellants,

and

DEWEY V. GUIDA; APPRAISALS UNLIMITED, INCORPORATED; 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: September 26, 2024. Decided: January 23, 2025

Before NIEMEYER, Circuit Judge, FLOYD, Senior Circuit Judge, and Kenneth D. BELL, United States District Judge for the Western District of North Carolina, sitting by designation.

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

ARGUED: William M. Jay, GOODWIN PROCTER LLP, Washington, D.C., for Appellants. Deepak Gupta, GUPTA WESSLER PLLC, Washington, D.C., for Appellees. **ON BRIEF:** Helgi C. Walker, Jesenka Mrdjenovic, Andrew G.I. Kilberg, Washington, D.C., Theodore J. Boutrous, Jr., GIBSON, DUNN & CRUTCHER LLP, Los Angeles, California; Thomas M. Hefferon, Brooks R. Brown, Jaime A. Santos, Keith Levenberg, Rohiniyurie Tashima, Washington, D.C., Edwina B. Clarke, GOODWIN PROCTER LLP, Boston, Massachusetts, for Appellants. Jonathan R. Marshall, Charleston, West Virginia, Patricia M. Kipnis, BAILEY & GLASSER LLP, Cherry Hill, New Jersey; Gregory A. Beck, Linnet Davis-Stermitz, GUPTA WESSLER PLLC, Washington, D.C.; Jason E. Causey, BORDAS &

BORDAS, PLLC, Wheeling, West Virginia, for Appellees.

NIEMEYER, Circuit Judge:

Phillip and Sara Alig and Daniel and Roxanne Shea commenced this action on behalf of themselves and purportedly on behalf of a class of similarly situated persons in West Virginia against Quicken Loans, Inc. (now Rocket Mortgage, LLC), and its affiliate, Title Source, Inc. (now Amrock, Inc.). They alleged that in refinancing their home mortgage loans, they paid for appraisals that turned out not to be "independent" because the defendants had transmitted to the appraisers the homeowners' estimates of their homes' value, which they had provided to Quicken Loans in their loan applications. Based on this, they claimed that the appraisals they paid for were "worthless." They asserted a statutory claim that their loans had been "induced by unconscionable conduct," in violation of West Virginia Code § 46A-2-121(a)(1), a common law breach of contract claim, and a conspiracy claim.

The district court entered an order certifying a class 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," which amounted to 2,769 loans. The court then granted summary judgment to the plaintiffs and class members and awarded them more than $10.6 million, consisting of statutory damages of $3,500 per loan for the unconscionable inducement claim and a refund of the fees they had paid for the appraisals for the breach of contract claim. The court also found that the plaintiffs had conclusively established a conspiracy between the defendants and therefore entered judgment against both of them.

On appeal, we affirmed the district court's certification of the class, rejecting the defendants' argument that "a significant number of the class members [were] uninjured and therefore lack[ed] standing." *Alig v. Quicken Loans Inc.*, 990 F.3d 782, 791 (4th Cir. 2021). We also affirmed the district court's summary judgment on the statutory and conspiracy claims but vacated and remanded the judgment on the breach of contract claim. *Id.* at 808.

The Supreme Court granted the defendants' petition for a writ of certiorari, vacated our judgment, and remanded the case to us "for further consideration in light of *TransUnion LLC v. Ramirez*, 594 U.S. [413] (2021)." *Rocket Mortg., LLC v. Alig*, 142 S. Ct. 748 (2022). In *TransUnion*, the Court reiterated its standing jurisprudence that "only those plaintiffs who have been concretely harmed by a defendant's statutory violation" have standing to sue in federal court and applied that principle to class actions, holding that "*every class member* must have Article III standing in order to recover individual damages." 594 U.S. at 427, 431 (cleaned up).

On return of the case to our court, we vacated the district court's judgment and remanded the case for further proceedings to allow the district court to "apply *TransUnion* to the facts of this case in the first instance." *Alig v. Rocket Mortg., LLC*, 52 F.4th 167, 168 (4th Cir. 2022) (per curiam).

On remand, the district court entered a judgment reinstating its original judgment and stating that

TransUnion "does not impede the class's showing on standing." It explained that "[e]ach member of the class . . . paid . . . for *an independent appraisal that they never received*" and thus suffered a concrete harm, as necessary for Article III standing. (Emphasis added).

Based on *TransUnion*, we conclude that the plaintiffs have not established that the class members, as borrowers, suffered a concrete harm as a result of the defendants' transmission to appraisers of their home-value estimates, and therefore we reverse the district court's judgment to the extent that it certified the class and awarded its members damages. Otherwise, we adopt and incorporate our earlier judgment on the merits of the individual plaintiffs' claims, *see Alig*, 990 F.3d at 808, and remand for further proceedings consistent with this opinion.

I

When homeowners seek to refinance a home mortgage loan, the transaction typically begins with the homeowners, as prospective borrowers, completing a Uniform Residential Loan Application (Fannie Mae Form 1003), which requires them to provide, among other things, information about their income, debts, and assets, as well as the amount and basic terms of the loan being sought. In one portion of the application, borrowers are specifically requested to provide the "present market value" of the real estate that they own, as well as the mortgages and liens on it. In signing the standard loan application form, prospective borrowers agree that the lender and its agents and servicers "may continuously rely on the information contained in the application."

Before 2009, lenders commonly provided the borrowers' home-value estimates to the appraisers engaged to provide appraisals in connection with refinancing transactions. The information helped appraisers determine whether they had the right licensure to complete the appraisal, whether to accept the assignment, and what fee to charge for the appraisal. And the practice was considered appropriate under the Uniform Standards of Professional Appraisal Practice ("Uniform Appraisal Standards") 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' ethical obligation to perform their appraisals with "impartiality, objectivity, and independence." Moreover, during the relevant time and still today, appraisers generally reported their appraisals by completing a Uniform Residential Appraisal Report (Fannie Mae Form 1004), which requires the appraiser to certify that he or she performed the appraisal "in accordance with the requirements of the" Uniform Appraisal Standards.

Quicken Loans followed these customary procedures during the pre-2009 period, using the Fannie Mae forms. Generally, it uploaded information about the prospective borrowers, including the borrowers' 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." Title Source then sent the form through an automated system to nearby professional appraisers and appraisal companies. Following the prevalent practice, the appraisers 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 refinancing transactions, including the borrowers' own estimates. With the issuance of this new rule, Quicken Loans and Title Source ceased including borrowers' estimated home values on appraisal request forms.

The refinancings by the Aligs and the Sheas, as well as all class members, were completed under the pre-2009 practice, before the 2009 rule went into effect.

The Aligs purchased their home in Wheeling, West Virginia, in 2003 for $105,000, financing their purchase with a loan secured by a mortgage on their home. In December 2007, they sought to refinance their mortgage and consolidate their debts with a loan from Quicken Loans. On their 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 the local appraiser who was retained to determine the fair market value of the Aligs' home. The appraiser at first determined that value to be $122,500. Title Source, however, asked the appraiser 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 an appraisal report (Fannie Mae Form 1004), certifying that he had conducted the appraisal in accordance with the Uniform Appraisal Standards and that his compensation was not conditioned on his reporting "a predetermined specific value." In addition, he testified later that his receipt of 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 when the loan closed 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 a charge of $260 for the cost of the appraisal.

Years later, an expert retained by the plaintiffs indicated that she would have appraised the Aligs' home in December 2007 as being worth $99,500, and another expert retained by the plaintiffs estimated that the home's value in 2007 was $105,000, *i.e.*, the price that the Aligs had paid for the home in 2003.

The Sheas purchased their home in Wheeling, West Virginia, in 2006 for $149,350, financing the purchase with two loans from Quicken Loans secured by mortgages on their home. In June 2008, they sought to refinance their mortgages with a loan from Quicken Loans to consolidate their debts. During the application process, the Sheas estimated the value of their home to be $175,000, and this information was included on the appraisal request form that Title Source sent to a local appraiser. That appraiser appraised the Sheas' home 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 thus 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 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 mortgage loans that the Sheas refinanced 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.

An expert retained years later by the plaintiffs indicated that she would have appraised the Sheas' home in July 2008 as being worth $135,000 — *i.e.*, $14,350 less than the Sheas had paid to purchase the home in 2006 and $23,000 less than the 2008 appraisal. The Sheas sold their home in 2015 for $165,000, thus receiving nearly $10,000 more than they had borrowed when they refinanced their mortgage loans in 2008.

There is no evidence that either the Aligs or the Sheas were dissatisfied at the time with either the substance or the procedure of their refinancing transactions with Quicken Loans. To the contrary, they rated their experience at the highest level ("excellent," or 5 out of 5), and both couples improved their cash flow.

Nonetheless, after the 2009 rule change, the Aligs and Sheas commenced this class action against Quicken Loans and Title Source for, among other things, having included their home-value estimates on the forms used to hire the appraisers who appraised their homes in connection with 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 noted 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." Their complaint included several claims, only three of which are relevant here. *First*, they alleged that their loans had been "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. *Second*, they alleged that "by providing value estimates to appraisers" without disclosing the practice to them, Quicken Loans had breached its contractual obligation to obtain "a fair and unbiased appraisal." And *third*, they alleged that Quicken Loans and Title Source had engaged in an unlawful civil conspiracy that rendered Title Source equally liable for the unconscionable inducement and breach of contract claims alleged against Quicken Loans. They purported to represent a class of all other West Virginia citizens similarly situated.

Following discovery, the Aligs and Sheas filed a motion to certify a class 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 turned out to be 2,769 such loans. The parties also filed cross-motions for summary judgment on the merits of the plaintiffs' claims. By a memorandum opinion and order dated June 2, 2016, the district court certified the proposed class and granted the named plaintiffs and class members summary judgment on all three claims. In the ultimate judgment on these claims, dated December 14, 2018, the court awarded the Aligs, the Sheas, and the class members (1) statutory damages of $3,500 per loan for the unconscionable inducement claim, for a total of $9,691,500, and (2) $968,702.95 for the breach of contract claim, which represented the aggregate amount of appraisal fees paid by the plaintiffs. The court thus entered a final judgment awarding the named plaintiffs and the class more than $10.66 million.

On appeal, a divided panel of this court affirmed the district court's decision to certify the class, rejecting, among other challenges, the defendants' argument that "a significant number of the class members [were] uninjured and therefore lack[ed] standing." *Alig*, 990 F.3d at 791. We reasoned that all of the class members had paid "for *independent* appraisals" but instead "received appraisals that were tainted when Defendants exposed the appraisers to the borrowers' estimates of value and pressured them to reach those values." *Id.* at 791–92 (emphasis added). We concluded that the "financial harm" involved in paying for something that was different from what was received was "a classic and paradigmatic form of injury in fact," even if the plaintiffs financially "benefited from obtaining the loans." *Id.* at 792 (cleaned up).

We also affirmed the district court's holding on the merits of the plaintiffs' statutory claim for unconscionable inducement, reasoning that the defendants' practice of including the prospective borrowers' estimates on the appraisal request forms without disclosing the practice to the borrowers was unconscionable and that all of the borrowers' loans were necessarily induced by this unconscionable conduct because "the appraisal process [was] 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." *Alig*, 990 F.3d at 806. And we affirmed the district court's judgment on the conspiracy claim, holding Title Source liable for the statutory violations as well.

Finally, on the plaintiffs' breach of contract claim, we vacated the district court's grant of summary judgment, concluding that, while "a contract was formed between each class member and Quicken Loans" under which "Quicken Loans was obligated to 'obtain a fair, valid and reasonable appraisal of the property,'" a remand was necessary to allow the district court to consider whether "Quicken Loans breached its contracts with the class members" and whether "the class members suffered damages as a result." *Alig*, 990 F.3d at 797–98. "In particular," we recognized that "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." *Id.* at 796; *see also id.* at 803 n.22 (noting that, based on the record, "we cannot evaluate whether the appraisals for most class members were inflated").

Three months after we published our *Alig* decision, the Supreme Court issued its decision in *TransUnion*, which applied "the Article III requirement that the plaintiff's injury in fact be concrete" to every member of the class in a class-action case. 594 U.S. at 424 (cleaned up). Subsequently, the Court also granted the defendants' petition for a writ of certiorari in this case, vacated our judgment, and remanded the case to us "for further consideration in light of *TransUnion*." *Rocket Mortg.*, 142 S. Ct. at 748.

After receiving supplemental briefing and hearing argument on remand from the Supreme Court, we issued an order dated October 28, 2022, that vacated the district court's judgment and remanded the case to the district court to "apply *TransUnion* to the facts of this case in the first instance." *Alig*, 52 F.4th at 168. In doing so, we observed that "following *TransUnion*, it is clear that, to recover damages from Quicken Loans, *every class member* must have Article III standing for each claim that they press, requiring proof that they suffered concrete harm from the challenged conduct." *Id.* (cleaned up).

Several weeks later, the district court issued an order dated November 28, 2022, concluding that "nothing in *TransUnion* changes the findings of the majority of the Fourth Circuit panel." The district court explained, quoting our vacated opinion,

> Plaintiffs paid an average of $350 for independent appraisals that . . . 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.

(Quoting *Alig*, 990 F.3d at 791–92). The court advised that "[t]he Fourth Circuit panel should therefore reissue its prior opinion, with the added clarification that nothing in *TransUnion* alters [the] settled basis for Article III standing" on which our court had previously relied. Then, on December 12, 2022, the district court entered a judgment that incorporated its *TransUnion* ruling and "reinstate[d] its judgment of December 14, 2018" in its entirety. This appeal followed.

II

The Supreme Court vacated our judgment reported at 990 F.3d 782 and remanded the case to us for further consideration in light of its decision in *TransUnion*. *See Rocket Mortg.*, 142 S. Ct. at 748. On remand, we vacated the district court's judgment of December 14, 2018, and remanded for it to consider *TransUnion*'s application to this case in the first instance. The district court has now concluded that "nothing in *TransUnion*" undermines the ability of the class members in this action to establish standing because each and every one of them paid for something "that they never received" — namely, "an independent appraisal." It reinstated its original judgment of December 14, 2018, which included the certification of the class. The issue we address therefore is whether this portion of the district court's judgment complies with *TransUnion*.

TransUnion addressed "the Article III requirement that the plaintiff's injury in fact be concrete" in the context of a class action. 594 U.S. at 424 (cleaned up). The named plaintiff in that case brought a class action, alleging that TransUnion, a credit reporting agency, had violated the Fair Credit Reporting Act by failing to use reasonable procedures before placing a misleading alert in his credit file that labeled him as a potential terrorist, drug trafficker, or serious criminal. *Id.* at 419–21. He also asserted two claims based on TransUnion's having sent him two mailings that did not comply with certain formatting requirements imposed by the statute. *Id.* at 421. The district court certified a class of more than 8,000 people who had the same misleading alert added to their credit files and who had also received similar mailings during a certain time period. A jury then awarded each class member statutory and punitive damages, and the judgment was largely affirmed by the Ninth Circuit. *Id.* at 422. The Supreme Court reversed and remanded, holding that only a subset of the class had established Article III standing to sue TransUnion for its failure to use reasonable procedures to ensure the accuracy of their credit files — namely, those 1,853 class members whose credit reports had been provided to third-party businesses and who had suffered "concrete reputational harm" as a result. *Id.* at 417. With respect to the two claims relating to the formatting defects in the mailings, the Court held that no class member other than the named plaintiff had demonstrated any concrete harm caused by the formatting errors, such that only he had standing to recover on those claims. *Id.* at 418.

In explaining its decision, the Court reiterated and emphasized that, "under Article III, an injury in law is not an injury in fact" and that "[o]nly those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation in federal court." *TransUnion*, 594 U.S. at 427. Put simply, "[n]o concrete harm, no standing." *Id.* at 417. The Court explained that while "[t]he most obvious" concrete injuries are "tangible harms, such as physical harms and monetary harms," "[v]arious intangible harms can also be concrete," depending on whether they have "a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." *Id.* at 425. Then, as is important here, the Court applied those principles to class actions, observing that "standing is not dispensed in gross." *Id.* at 431. It emphasized that federal courts lack "the power to order relief to any uninjured plaintiff, class action or not," *id.* (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466 (2016) (Roberts, C.J., concurring)), and that, as a result, "[e]very class member must have Article III standing in order to recover individual damages," *id.* Moreover, "plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek." *Id.* Finally, the Court also made clear that the form of relief sought matters when assessing the sufficiency of the alleged harm. Thus, while "a person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring," *id.* at 435, "the riskof future harm on its own does not support Article III standing for [a] damages claim," *id.* at 441.

Applying these principles to the facts before it, the Court held that the approximately 6,300 class members who failed to prove that the misleading alerts in their credit reports were ever provi~~ded~~ to a third party "did not suffer a concrete harm," as necessary for them to recover damages for the reasonable procedures claim. *TransUnion*, 594 U.S. at 439. The Court rejected the argument that those class members had "suffered a concrete injury for Article III purposes because the existence of misleading . . . alerts in their internal credit files *exposed them to a material risk* that the information would be disseminated in the future to third parties and thereby cause them harm." *Id.* at 435 (emphasis added). And it was also unpersuaded by the plaintiffs' argument that it could infer that those class members' credit reports had been sent to third parties because "all of the class members [had] requested copies of their reports, and consumers usually do not request copies unless they are contemplating a transaction that would trigger a credit check." *Id.* at 439. Rejecting that contention, the Court reasoned that "[t]he plaintiffs had the burden to prove at trial that their reports were actually sent to third-party businesses" and that "[t]he inferences on which the argument rests are too weak to demonstrate that the reports of any particular [class member was] sent to third-party businesses." *Id.* Finally, the Court concluded that, other than the named plaintiff, none of the class members had "demonstrated that the format of TransUnion's mailings" — even if not in compliance with the statute — caused them "any harm *at all*," let alone "a harm with a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts." *Id.* at 440.

Following *TransUnion*, it is thus clear that to recover damages from the defendants, "*[e]very class member must have Article III standing*" "for each claim that they press," requiring proof that the challenged conduct caused each of them a concrete harm. 594 U.S. at 431 (emphasis added). It is equally clear that, to establish their standing to recover damages, the plaintiffs *cannot rely on a "mere risk of future harm."* *Id.* at 437 (emphasis added). Thus, for standing purposes, it is plainly insufficient for the plaintiffs to argue that Quicken Loans and Title Source's inclusion of borrowers' home-value estimates on the form used to hire an appraiser created *a risk* that each class member would receive an inflated appraisal, which, in turn, would enhance *the risk* that they would wind up owing more on their refinanced mortgage loans than their homes were actually worth, which could, in turn, lead to concrete, real-world economic harm. Yet, while the plaintiffs continue to assert that Quicken Loans' "appraisal practices created *serious risks* for [its] customers," they nonetheless acknowledge that after *TransUnion*, such risk cannot establish the concrete injury necessary for standing. (Emphasis added). Moreover, they also seem to acknowledge that they lack evidence that the class members' appraisals were actually inflated, let alone that any such inflation was attributable to the inclusion of the borrowers' estimate on the appraisal request form *or* that any attributable appraisal inaccuracy ended up causing any of them concrete harm. Disavowing the need for any such evidence, they instead rest on their broad assertion that their "Article III injury is straightforward: They each suffered financial harm by paying [the defendants] hundreds of dollars 'for *independent* appraisals that . . . they never received.'" (Emphasis added) (quoting *Alig*, 990 F.3d at 791).

The district court on remand adopted and relied on this position in persisting with its earlier judgment that the class members have standing. The district court held,

> "Plaintiffs paid an average of $350 for *independent* appraisals that . . . they never received. Instead, they received appraisals that were *tainted* when Defendants [1] exposed the appraisers to the borrowers' estimates of value and [2] pressured them to reach those values."
>
> * * *
>
> Each of the plaintiffs and class members paid up front for a fair, valid and reasonable appraisal of the property. Due to the actions of the defendants, they did not receive [such] appraisals.

(Emphasis added) (quoting *Alig*, 990 F.3d at 791–92). The district court, however, did not point to any evidence of the circumstances under which class members received, used, or were harmed by the actual appraisals they received. Thus, its decision rested simply on the two reasons it gave in its holding. *First*, the court stated that the appraisals that class members received were influenced (*i.e.*, "tainted") by the defendants' "expos[ing] the appraisers to the borrowers' estimates." But mere exposure to the borrowers' estimates could only establish *potential* influence, *i.e.*, a risk of influence, and such a risk cannot be the basis for standing to recover damages under *TransUnion*. *See* 594 U.S. at 431. *Second*, the court accepted that the defendants "pressured" the appraisers "to reach" the borrowers' estimates. But there was no evidence to support that the class members' appraisers were subjected to pressure. Indeed, there was no evidence that any appraiser for a class member failed to provide an independent appraisal. Yet, *TransUnion* requires the plaintiffs to "set forth" "specific facts," "supported adequately by the evidence," to show each class member's standing to recover damages. *Id.* While it is true that the general practice followed at the time involved the defendants' transmitting the borrowers' home-value estimates to prospective appraisers, the record shows little beyond that, and all that it *does* show tends to establish that class members indeed received independent appraisals.

Each appraiser who testified — including the plaintiffs' experts — stated that they developed all of their appraisals independently, not based on the borrowers' estimates. Moreover, the appraisers confirmed that they certified truthfully on each appraisal that it was based on his or her "own personal, unbiased, and professional analysis"; that it was not "conditioned on any agreement or understanding" on what value to give; and that it was prepared in accordance with the industry's Uniform Appraisal Standards. Indeed, there is evidence in the record that some appraisers completed their appraisals *without even seeing* the borrowers' estimates and other evidence that property evaluations were completed *even before* the appraiser had personally received the request form.

In short, while the plaintiffs' and the district court's theory is that injury of class members was shown because they each paid a fee for an appraisal that was tainted by the borrowers' home-value estimates and therefore was worthless, there is no evidence that the class members' appraisals were in fact tainted, rendering them worthless. Yet, *TransUnion* clearly requires such a *factual* showing for each class member to claim damages. *See* 594 U.S. at 431 (explaining that "standing is not dispensed in gross" to the class but rather must be demonstrated for every class member with "specific facts").

Moreover, the plaintiffs' and district court's theory distortingly dissociates the appraisals from the refinancing transactions that they supported. A home appraisal is not an independent consumer product but is instead part of a larger financial transaction. The function of the appraisal in a loan transaction is to provide assurance that there is adequate collateral for the loan in the event the borrower should default. And, as we have previously observed, it is "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). Practically speaking, the class members paid money for appraisals, as required by their lender, so that they could benefit financially from refinancing their home mortgages, and the appraisals they received allowed them to complete those refinancing transactions. In that sense, also, the appraisals were far from "worthless." They fully accomplished their designed purpose.

Finally, we observe that the Appraisal Standards Board — the body responsible for developing the Uniform Appraisal Standards — expressly recognized that an appraiser's mere receipt of a homeowner's estimate before conducting an appraisal was *not* inconsistent with the appraiser's obligation to perform their appraisals with "*impartiality, objectivity, and independence*." (Emphasis added). Moreover, when the appraisers in this case reported their appraisals, they did so on a form on which they certified that they had performed the appraisal "in accordance with" their profession's ethical requirements. This too cuts strongly against the plaintiffs' central premise that the class members' appraisals were not "independent."

At bottom, the plaintiffs' class-wide showing in this case is simply "too speculative to support Article III standing." *TransUnion*, 594 U.S. at 438. And therefore, standing for the class members' damages claims has not been demonstrated.

III

Accordingly, we reverse the portion of the district court's judgment certifying a class and awarding it damages and direct that this action proceed hereafter only as to the individual named plaintiffs. We affirm the portion of the district court's judgment, including damages, on the named plaintiffs' statutory and conspiracy claims for the reasons given in our earlier decision. *See Alig*, 990 F.3d at 798–808. We vacate the portion of the district court's judgment on the merits of the named plaintiffs' breach of contract claim for the reasons given in our earlier decision, *see id*. at 794–98, and we remand for further proceedings on that claim.

FLOYD, Senior Circuit Judge, dissenting:

I agree with the majority to the extent it concludes the named plaintiffs possess Article III standing and remands their breach of contract claim to the district court for the reasons we gave in our prior decision in this case. *See Alig v. Quicken Loans, Inc.*, 990 F.3d 782, 794–98 (4th Cir. 2021). However, I disagree that the class must be decertified because I believe the unnamed class members have also demonstrated they suffered concrete injury resulting from Quicken's appraisal process and therefore possess standing. I would affirm the district court's judgment on that point as well. Because the majority concludes otherwise, I respectfully dissent.

I.

My disagreement with the majority lies in its determination that insufficient facts have been alleged to establish Article III standing for the unnamed class members. Specifically, the majority reasons that there was "no evidence" that the class members' appraisals were affected by Quicken's disseminating borrower home-value estimates to appraisers and pressuring them to reach those values. Majority Op. 19. Therefore, it concludes, the unnamed class members have not made a sufficient showing of harm based upon "specific facts" to satisfy Article III standing. *Id.* (quoting *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021)).

But, as I read the record, the class members have made that very showing. They sought relief under West Virginia's consumer protection statutes, which permit 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; *see also id.* § 46A-2-

121(2) (providing "affirmative misrepresentations, active deceit or concealment of a material fact" as examples of "unconscionable conduct"). Plaintiffs' theory of harm is that they paid an average of $350 each for independent appraisals of their homes, and that they did not receive independent appraisals. The class members allege those appraisals instead had been tainted when Quicken supplied borrower value estimates to appraisers and pressured appraisers to meet those values, which are aspects of the refinancing process the company concealed from the plaintiffs.

Those allegations are borne out in the record: it demonstrates Quicken requested the value estimates and sought to pressure appraisers to match those values. For example, internal Quicken emails show they had a team dedicated to "push[ing] back on appraisers questioning their appraised values" and their process involved "arguing over value appeal orders and debating values with bankers and appraisers." *Alig*, 990 F.3d at 803. And an appraiser testified that he would "get a call" from Quicken's co-defendant appraisal management company TSI "if [the appraisal] wasn't at the estimated value." *Id.*

Both the named and unnamed class members suffered financial harm when they paid for independent appraisals they did not receive because of Quicken's conduct. And "financial harm is a classic and paradigmatic form of injury in fact" for purposes of Article III standing. *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 760 (4th Cir. 2018) (quoting *Cottrell v. Alcon Labs.*, 874 F.3d 154, 163 (3d Cir. 2017)). Therefore, even assuming the results of the appraisals was the same with or without Quicken's behind-the-scenes conduct, the actionable harm arose when the class members paid for an appraisal which was deficient under West Virginia's consumer protection law. *See McFarland v. Wells Fargo Bank, N.A.*, 810 F.3d 273, 285 (4th Cir. 2016) (recognizing cause of action under § 46A-2-121 "for unconscionable conduct that causes a party to enter into a loan").

Finally, I disagree with the proposition that the fact the plaintiffs received a benefit through refinancing their home cuts against Article III standing. To be sure, the named plaintiffs "improved their cash flow," Majority Op. 9, and other class members at the very least received a benefit in the form of new, presumably more favorable, loan terms. However, West Virginia law recognizes that lender conduct can still be actionable under the state's consumer protection statutes even if the borrower received a benefit from the transaction. *See Quicken Loans, Inc. v. Brown*, 737 S.E.2d 640, 651, 658–59 (W. Va. 2012) (rejecting argument that lender could not be held liable for substantive unconscionability when borrower purchased new vehicle, retired other existing debt, and made payments on new loan with the benefit of refinancing proceeds).

"[S]tanding is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek." *TransUnion*, 594 U.S. at 431. I believe the plaintiffs in this case — named and unnamed class members alike — have made the required showing because they paid for appraisals that the record shows were deficient as a matter of West Virginia law. Accordingly, I would hold the unnamed class members in this case possess Article III standing.

II.

In sum, I would conclude that the Supreme Court's ruling in *TransUnion* has not undermined the class members' standing in this litigation because those individuals suffered tangible financial harm. I also see no reason to depart from the remaining reasoning in our now-vacated 2021 decision in this case. *See Alig*, 990 F.3d at 786–808. Therefore, I would reinstate the opinion we issued affirming the district court's decision to certify a class and grant it summary judgment on their statutory and conspiracy claims and remanding for further consideration the class's contractual claim. *See id.* Because the majority takes a different course of action, I respectfully dissent.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-2289
(5:12-cv-00114-JPB-JPM)
(5:12-cv-00115-JPB)

PHILLIP ALIG; SARA J. ALIG; ROXANNE SHEA; DANIEL V. SHEA

Plaintiffs - Appellees

v.

ROCKET MORTGAGE, LLC, f/k/a Quicken Loans Inc.; AMROCK, LLC, f/k/a Title Source, Incorporated, d/b/a Title Source Inc. of West Virginia, Incorporated

Defendants – Appellants

and

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

Defendants

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed in part, reversed in part, and vacated in part. This case is remanded to the district court for further proceedings consistent with the court's decision.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ NWAMAKA ANOWI, CLERK

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. Civil Action No. 5:12-CV-1
Judge Bailey

QUICKEN LOANS INC., and **TITLE SOURCE, INC.**, d/b/a Title Source Inc. of West Virginia, Incorporated,

Defendants.

<u>ORDER ON THE ISSUE OF STANDING</u>

Pending before this Court is the issue of whether the plaintiffs and class members have Article III standing to pursue this action.

Procedural Background

Plaintiffs Phillip Alig, Sara J. Alig, Roxanne Shea, and Daniel V. Shea (Plaintiffs) filed this lawsuit in West Virginia state court, both individually and on behalf of a class of West Virginia citizens. They subsequently filed an amended complaint. In the amended complaint, the plaintiff class is defined as follows:

> All West Virginia citizens at the time of the filing of this action who, within the applicable statute of limitations preceding the filing of this action through the date of class certification, obtained mortgage loans from Defendant Quicken, and (a) were provided unsigned loan documents at closing, (b) were assessed loan discount, courier, or notary fees, or (c) for whom Quicken obtained appraisals through an appraisal request form that included an estimate of value of the subject property.

[Doc. 1-1 at 15]. Plaintiffs brought their lawsuit against defendant Quicken Loans and defendant Title Source, Inc., d/b/a Title Source Inc. of West Virginia, and a class of defendant appraisers.

After plaintiffs filed the amended complaint, Quicken Loans filed a notice of removal in the United States District Court for the Northern District of West Virginia, claiming that the district court had jurisdiction pursuant to the Class Action Fairness Act ("CAFA"). Thereafter, plaintiffs filed a motion to remand, arguing that the local controversy exception applied. The district court agreed with plaintiffs and remanded the case to state court. Quicken Loans then filed a petition for permission to appeal with this Court.

On appeal, the United States Court of Appeals for the Fourth Circuit vacated the decision remanding the case and remanded the case to this Court for a determination as to whether the named defendant appraisers satisfied the "at least one defendant" requirement for the local controversy exception to CAFA. ***Quicken Loans***

Incorporated v. Alig, 737 F.3d 960 (4th Cir. 2013). Thereafter, plaintiffs withdrew their motion to remand.

This case proceeded in due course, and, ultimately this 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.

The defendants appealed the decisions of this Court to the Fourth Circuit, which, in a published split decision, affirmed in part and reversed in part. The majority found that the district court's summary judgment on the breach-of-contract claim was premised on a misunderstanding of the parties' contract and required reversal and remand for further consideration. ***Alig v. Quicken Loans Inc.***, 990 F.3d 782, 794–98 (4th Cir. 2021).

As to unconscionable inducement, the panel majority affirmed. Recent West Virginia case law, it explained, supported a clear ***Erie*** prediction. Unconscionable inducement required showing that the defendant engaged in "unconscionable" conduct and that that conduct "contributed to" the plaintiff's decision to enter a contract. ***Id***. at 798–803. And the West Virginia Supreme Court of Appeals would conclude that Rocket's conduct fit the bill. ***Id***. at 803–07.

Rocket, the panel majority had already recognized, had a duty to "obtain a fair, valid and reasonable appraisal" of each borrower's property. ***Id***. at 796. All the more so in the refinance context. After all, the panel majority explained, "[a]ppraisal procedures" are "particularly important in refinancing agreements." ***Id***. at 806. Unlike home purchases, where "adversarial parties represented by competing real estate agents" temper one another's evaluation of home value, in the refinancing context, borrowers and lenders—at least lenders planning to securitize their loans—have a shared incentive to reach a high loan value. ***Id***. "Amidst these various dangers and incentives—and stepping into the middle of a transaction between parties with unequal bargaining power—the impartial appraiser [is] the only trained professional available to objectively evaluate the value of the home." *Id.*

Yet the evidence showed that Rocket had deliberately "tainted" this appraisal process. ***Id***. at 798. It "sought to pressure appraisers to inflate their appraisals" in two distinct ways—(1) sharing estimates[1] to engender an inevitable "anchoring effect" that "subconsciously" increased appraisers' estimates, and then (2) imposing explicit pressure on appraisers whose estimates fell short. ***Id***. at 798, 803–06. Given the significance of the appraisal, the panel majority explained, it was unconscionable for Rocket to conceal from its borrowers the fact that it had

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[1] While the defendants refer to these value estimates as "owner's estimates," 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. [Docs. 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])].

sought to influence its appraisers' estimates in these ways. ***Id***. at 806. And doing so amounted to unconscionable inducement: There was "no genuine dispute" that the company's appraisals—"and, more importantly, their guise of impartiality"—contributed to the decision to refinance. ***Id***.

The defendants next petitioned the United States Supreme Court for a ***writ of certiorari***. The Supreme Court granted the writ, vacated the judgment and remanded the case to the United States Court of Appeals for the Fourth Circuit for further consideration in light of ***TransUnion LLC v. Ramirez***, 594 U.S. ——, 141 S.Ct. 2190 (2021). ***Rocket Mortg., LLC v. Alig***, 142 S. Ct. 748 (2022).

The Fourth Circuit heard argument on the remand and ultimately determined to remand the issue of standing under TransUnion to this Court.

Discussion

In ***TransUnion***, the Supreme Court held that under Article III, only those plaintiffs who have been concretely harmed by a defendant's statutory violation may sue that private defendant over that violation in federal court. ***TransUnion LLC v. Ramirez***, 141 S.Ct. 2190 (2021).

Justice Kavanaugh, writing for a 5-4 majority, wrote that "[t]o have Article III standing to sue in federal court, plaintiffs must demonstrate, among other things, that they suffered a concrete harm. No concrete harm, no standing. Central to assessing concreteness is whether the asserted harm has a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts—such as physical harm, monetary harm, or various intangible harms including (as relevant here) reputational harm." ***Id***. at 2200 (citing ***Spokeo, Inc. v. Robins***, 578 U.S. 330, 340–341 (2016)).

Justice Kavanaugh added:

> Article III confines the federal judicial power to the resolution of "Cases" and "Controversies." For there to be a case or controversy under Article III, the plaintiff must have a "'personal stake'" in the case—in other words, standing. ***Raines*** [***v. Byrd***, 521 U.S. 811, 819 (1997)].
>
> *   *   *
>
> To answer that question in a way sufficient to establish standing, a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and
>
> (iii) that the injury would likely be redressed by judicial relief. ***Lujan v. Defenders of Wildlife***, 504 U.S. 555, 560–561 (1992). If "the plaintiff does not claim to have suffered an injury that the defendant caused and the court can remedy, there is no case or controversy for the federal court to resolve." *Casillas v. Madison Avenue Assocs., Inc.*, 926 F.3d 329, 333 (7th Cir. 2019) (Barrett, J.).
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> *   *   *
>
> In sum, under Article III, a federal court may resolve only "a real controversy with real impact on real persons." ***American Legion v. American Humanist Assn.***, 588 U. S. ——, ——, 139 S.Ct. 2067, 2103 (2019).
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> *   *   *

What makes a harm concrete for purposes of Article III? As a general matter, the Court has explained that "history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider." ***Sprint Communications Co. v. APCC Services, Inc.***, 554 U.S. 269, 274 (2008); *see also* ***Steel Co. v. Citizens for Better Environment***, 523 U.S. 83, 102 (1998). And with respect to the concrete-harm requirement in particular, this Court's opinion in ***Spokeo v. Robins*** indicated that courts should assess whether the alleged injury to the plaintiff has a "close relationship" to a harm "traditionally" recognized as providing a basis for a lawsuit in American courts. 578 U.S. at 341. That inquiry asks whether plaintiffs have identified a close historical or common-law analogue for their asserted injury. ***Spokeo*** does not require an exact duplicate in American history and tradition. But ***Spokeo*** is not an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts.

As ***Spokeo*** explained, certain harms readily qualify as concrete injuries under Article III. The most obvious are traditional tangible harms, such as physical harms and monetary harms. If a defendant has caused physical or monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III.

Id. at 2203.

Let us now compare the ***TransUnion*** requirements for standing with the majority opinion in the Fourth Circuit:

> 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.***, —— U.S. ——, 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))). In sum, "there is simply not a large number of uninjured persons included within the plaintiffs' class." ***Krakauer***, 925 F.3d at 658.

Alig v. Quicken Loans Inc., 990 F.3d 782, 791–92 (4th Cir. 2021), cert. granted, judgment vacated sub nom. ***Rocket Mortg., LLC v. Alig***, 142 S. Ct. 748 (2022).

Each of the plaintiffs and class members paid up front for a fair, valid and reasonable appraisal of the property.

Due to the actions of the defendants, they did not receive fair, valid and reasonable appraisals. The actions of the defendants in tampering with the valuations and the fact that the appraisals were not fair, valid and reasonable were concealed from the plaintiffs and class members. This was fraud, *see* ***Gaddy Engineering Co. v. Bowles Rice McDavid***, 231 W.Va. 577, 746 S.E.2d 568 (2013), which is a close historical or common-law analogue for their asserted injury.

As noted by the Judge Wynn in the Fourth Circuit opinion "financial harm is a classic and paradigmatic form of injury in fact."

This Court finds that nothing in ***TransUnion*** changes the findings of the majority of the Fourth Circuit panel. The Fourth Circuit panel should therefore reissue its prior opinion, with the added clarification that nothing in ***TransUnion*** alters this settled basis for Article III standing.

It is so **ORDERED**.

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

DATED: November 28, 2022.

/signature/
John Preston Bailey
United States District Judge

Appendix D

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.

ROCKET MORTGAGE, LLC, f/k/a Quicken Loans Inc.; AMROCK, LLC, 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; WASHINGTON LEGAL FOUNDATION,

Amicus Supporting Appellant.

On Remand from the Supreme Court
of the United States.
(S. Ct. No. 21-428)

Argued: September 13, 2022. Decided: October 28, 2022

Before NIEMEYER and WYNN, Circuit Judges, and FLOYD, Senior Circuit Judge.

Vacated and remanded with instructions for reconsideration by published per curiam order. Judge Niemeyer wrote a separate concurring opinion.

ARGUED: William M. Jay, GOODWIN PROCTER LLP, Washington, D.C., for Appellants. Deepak Gupta, GUPTA WESSLER PLLC, Washington, D.C., for Appellees. **ON BRIEF:** Helgi C. Walker, Jesenka Mrdjenovic, Andrew G.I. Kilberg, Washington, D.C., Theodore J. Boutrous, Jr., GIBSON, DUNN & CRUTCHER LLP, Los Angeles, California; Thomas M. Hefferon, Brooks R. Brown, Jaime A. Santos, Keith Levenberg, Washington, D.C., Edwina B. Clarke, GOODWIN PROCTER LLP, Boston, Massachusetts, for Appellants. John W. Barrett, Jonathan R. Marshall, Charleston, West Virginia, Patricia M. Kipnis, BAILEY & GLASSER LLP, Cherry Hill, New Jersey; Gregory A. Beck, Linnet Davis-Stermitz, GUPTA WESSLER PLLC, Washington, D.C.; Jason E. Causey, James G. Bordas, Jr., BORDAS & BORDAS, PLLC, Wheeling, West Virginia, for Appellees. John M. Masslon II, Cory L. Andrews, WASHINGTON LEGAL FOUNDATION, Washington, D.C., for Amicus Washington Legal Foundation. Jennifer B. Dickey, Tyler S. Badgley, UNITED STATES CHAMBER LITIGATION CENTER, Washington, D.C.; Matthew A. Fitzgerald, MCGUIREWOODS LLP, Richmond, Virginia, for Amicus The Chamber of Commerce of the United States of America.

PER CURIAM:

Plaintiffs in this class action are a class of all West Virginia citizens who refinanced a total of 2,769 mortgages with Defendant Quicken Loans Inc. (now Rocket Mortgage, LLC) from 2004 to 2009, for whom Quicken Loans obtained appraisals from Defendant appraisal management company Title Source, Inc. (now Amrock Inc.) using a request form that included an estimate of value of the subject property. The district court certified the proposed class and granted summary judgment to Plaintiffs on three claims: unconscionable inducement under West Virginia Code § 46A-2-121(a)(1); breach of contract; and conspiracy. The court awarded a total of more than $10.6 million in damages.

Last year, we affirmed in part and vacated in part the district court's judgment. *Alig v. Quicken Loans Inc.*, 990 F.3d 782 (4th Cir. 2021). As relevant here, we concluded that Plaintiffs had standing because all of the class members had paid "for *independent* appraisals that . . . they never received." *Id.* at 791 (emphasis added). "Instead," we held, "they received appraisals that were tainted when Defendants exposed the appraisers to the borrowers' estimates of value and pressured them to reach those values." *Id.* at 791–92. We concluded that the "financial harm" involved in paying for a product that was "never received" was '"a classic and paradigmatic form of injury in fact."' *Id.* at 791–92 (quoting *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 760 (4th Cir. 2018)).

Three months later, the Supreme Court issued its opinion in *TransUnion LLC v. Ramirez*, 594 U.S. _, 141 S. Ct. 2190 (2021), which addressed Article III standing in the context of a class-action case. Following *TransUnion*, it is clear that, to recover damages from Quicken Loans, "[e]very class member must have Article III standing" "for each claim that they press," requiring proof that they "suffered concrete harm" from the challenged conduct.[*] 141 S. Ct. at 2208.

Defendants filed a petition for a writ of certiorari, arguing that Plaintiffs lack standing under *TransUnion*. Earlier this year, the Supreme Court granted Defendants' petition, vacated our judgment, and remanded the case "for further consideration in light of" that case. *Rocket Mortgage, LLC v. Alig*, 142 S. Ct. 748, 748 (2022) (mem.).

We ordered supplemental briefing and held oral argument. Having considered the parties' submissions, we

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[*] In *TransUnion*, this meant that less than a quarter of the class had standing to pursue a claim related to the accuracy of their credit files, and that no class member other than the named plaintiff had standing to pursue two other claims related to "formatting defects in certain mailings sent to them by TransUnion." *TransUnion*, 141 S. Ct. at 2200.

conclude that the district court should apply *TransUnion* to the facts of this case in the first instance. Accordingly, we vacate and remand for further proceedings.

VACATED AND REMANDED

NIEMEYER, Circuit Judge, concurring:

I am pleased to concur in this court's order vacating and remanding this case to the district court to apply the Supreme Court's recent decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021). The Supreme Court vacated and remanded our decision in this case, giving us the task of reconsidering it in light of *TransUnion*. In passing our task on to the district court, I believe that a fuller statement of the circumstances now facing the district court would be helpful to that court.

Briefly, the named plaintiffs, Phillip and Sara Alig and Daniel and Roxanne Shea, refinanced their home mortgages with Quicken Loans in 2007 and 2008, respectively, and, in applying for those loans, provided Quicken Loans with an estimate of their homes' present market value. As was common in the industry at the time, Quicken Loans and its affiliate, Title Source, Inc., then included that estimate on the form used to hire an appraiser to appraise each home, identifying it on the form as the "Applicant's Estimated Value." Several years later, the Aligs and Sheas commenced this action against Quicken Loans and Title Source, purporting to represent themselves and all West Virginia citizens similarly situated and alleging that the defendants had provided their home-value estimates to appraisers as part of a "systematic[]" effort "to influence appraisers" and that doing so had "rendered [their] appraisals unreliable and worthless." As relevant to the current circumstances, their complaint included three claims: *first*, that their loans had been "induced by unconscionable conduct," in violation of West Virginia Code § 46A-2- 121(a)(1); *second*, that "by providing value estimates to appraisers" without disclosing the practice to them, Quicken Loans had breached its contractual obligation to obtain "a fair and unbiased appraisal"; and *third*, that Quicken Loans and Title Source had 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 Aligs and Sheas filed a motion to certify a class 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, certified the proposed class and granted summary judgment to the plaintiffs on the three claims. In a later order, the court awarded (1) statutory damages of $3,500 per loan for the unconscionable inducement claim, and (2) approximately $969,000 for the breach of contract claim, which represented the aggregate amount of fees that class members had paid for appraisals. The district court's total judgment against the defendants thus exceeded $10.6 million.

In an opinion dated March 10, 2021, this court affirmed in part and vacated in part the district court's judgment. *Alig v. Quicken Loans Inc.*, 990 F.3d 782 (4th Cir. 2021). First, this court affirmed the district court's decision to certify the class, rejecting, among other challenges, the defendants' argument that "a significant number of the class members [were] uninjured and therefore lack[ed] standing." *Id.* at 791. The opinion reasoned that all of the class members had paid "for *independent* appraisals" but instead "received appraisals that were tainted when Defendants exposed the appraisers to the borrowers' estimates of value . . . ." *Id.* at 791–92 (emphasis added). It concluded that the "financial harm" involved in paying for something that was different from what was received was "a classic and paradigmatic form of injury in fact," even if the plaintiffs financially "benefited from obtaining the loans." *Id.* at 792 (internal quotation marks and citation omitted).

On the merits, this court affirmed the district court's holding that the plaintiffs had established their statutory claim for unconscionable inducement as a matter of law, reasoning that the defendants' practice of providing appraisers with prospective borrowers' estimates without disclosing the practice to the borrowers was unconscionable and that all of the borrowers' loans were necessarily induced by this unconscionable conduct because "the appraisal process [was] 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." *Alig*, 990 F.3d at 806. On the plaintiffs' breach of contract claim, however, this court vacated the district court's grant of summary judgment, concluding that, while "a contract was formed between each class member and Quicken Loans" under which "Quicken Loans was obligated to 'obtain a fair, valid and reasonable appraisal of the property,'" it was necessary to remand to allow the district court to consider whether "Quicken Loans breached its contracts with the class members" and whether "the class members suffered damages as a result." *Id.* at 797–98. "In particular," this court recognized that "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." *Id.* at 796; *see also id.* at 803 n.22 (noting that, based on the record, "we cannot evaluate whether the appraisals for most class members were inflated").

I dissented, explaining that "there [was] no evidence that the appraisers on these loans were influenced by the borrowers' estimates" and also that there was "simply no evidence that had the practice been disclosed to [the Aligs and Sheas], they would have proceeded any differently." *Alig*, 990 F.3d at 809 (Niemeyer, J., dissenting). I concluded that "[t]o 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* [was] fundamentally unjust" and that we should "reverse and remand with instructions to enter judgment for" the defendants. *Id.* at 808–09.

The United States Supreme Court granted the defendants' petition for writ of certiorari on January 10, 2022, vacated the judgment of this court, and remanded the case "for further consideration in light of *TransUnion LLC v. Ramirez*, 594 U.S. _, 141 S. Ct. 2190 (2021)." *Rocket Mortgage, LLC v. Alig*, 142 S. Ct. 748, 748 (2022). The Court's *TransUnion* opinion addressed "the Article III requirement that the plaintiff's injury in fact be 'concrete.'" 141 S. Ct. at 2204. The named plaintiff in that case alleged that TransUnion, a credit reporting agency, had violated the Fair Credit Reporting Act by failing to use reasonable procedures before placing a misleading alert in his credit file and by sending him two mailings that did not comply with certain formatting requirements imposed by the statute. *Id.* at 2200–02. The district court had certified a class of more than 8,000 people who had the same misleading alert added to their credit files and had received similar mailings during a certain time period. A jury then awarded each class member statutory and punitive damages, a judgment that was largely affirmed by the Ninth Circuit. *Id.* at 2202. The Supreme Court reversed and remanded, holding that only a subset of the class had established Article III standing to sue TransUnion for its failure to use reasonable procedures to ensure the accuracy of their credit files — namely, those 1,853 class members whose credit reports were provided to third-party businesses and who had suffered "concrete reputational harm" as a result. *Id.* at 2200. With respect to the two claims relating to the formatting defects in the mailings, the Court held that no class member other than the named plaintiff had demonstrated any concrete harm caused by the formatting errors, such that only he had standing to recover on those claims. *Id.*

In explaining its decision, the Court emphasized that, "under Article III, an injury in law is not an injury in fact" and that "[o]nly those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation in federal court." *TransUnion*, 141 S. Ct. at 2205. The *TransUnion* Court also stated that "standing is not dispensed in gross" — rather, "[e]very class member must have Article III standing in order to recover individual damages," and "plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek . . . ." *Id.* at 2208. The Court further made clear that there must be a connection between the form of harm demonstrated and the form of relief sought: while "a person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring," *id.* at 2210, "the risk of future harm on its own does not support Article III standing for [a] damages claim," *id.* at 2213. Accordingly, the approximately 6,300 class members who failed to prove that the misleading alert in their credit report was ever provided to a third-party "did not suffer a concrete harm" sufficient to support their reasonable-procedures claim. *Id.* at 2212. And none of the class members "demonstrated that the format of TransUnion's mailings" — even if not in compliance with the statute — caused them "any harm *at all.*" *Id.* at 2213.

Because the district court entered its final judgment without the benefit of *TransUnion*, I agree that we should vacate its judgment and remand to allow the district court, in the first instance, to apply *TransUnion* to the facts of this case.

Appendix E

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, LLC, 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.

ARGUED: Theodore J. Boutrous, Jr., GIBSON, DUNN & CRUTCHER, LLP, Los Angeles, California, for Appellants. Deepak Gupta, GUPTA WESSLER PLLC, Washington, D.C., for Appellees. **ON BRIEF:** Helgi C. Walker, GIBSON, DUNN & CRUTCHER LLP, Washington, D.C.; William M. Jay, Thomas M. Hefferon, Brooks R. Brown, Keith Levenberg, Washington, D.C., Edwina B. Clarke, GOODWIN PROCTER LLP, Boston, Massachusetts, for Appellants. John W. Barrett, Jonathan R. Marshall, Charleston, West Virginia, Patricia M. Kipnis, BAILEY & GLASSER LLP, Cherry Hill, New Jersey; Gregory A. Beck, GUPTA WESSLER PLLC, Washington, D.C.; Jason E. Causey, James G. Bordas, Jr., BORDAS & BORDAS, PLLC, Wheeling, West Virginia, for Appellees.

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 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]

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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.

[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.*

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 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

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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.").

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 values 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.

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[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).

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 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.

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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.

> [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.

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

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.

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 F.3d

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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.

[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" 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.

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 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 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

[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.

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 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

[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.

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.

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

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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.

[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.

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.

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'

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 cost regardless of whether the loan ultimately goes forward. Thus, Plaintiffs agreed to pay Quicken Loans for an appraisal or credit report. And

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form, the Aligs' form still specifies that the deposit is to be credited toward the cost of the appraisal and credit report.

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.

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

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

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 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

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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.

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

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. 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.

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[20] It is possible that the Supreme Court of Appeals of West Virginia would hold that the necessary showing of causality is even

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 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

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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.

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]

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

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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 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.

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, 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. 206- 2 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 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]

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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.

[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*

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 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

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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).

Defendants to attempt to pressure or influence appraisers—yet the record establishes that this was Defendants' goal.[25]

[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

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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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 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,

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

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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 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.

helps determine the final loan amount and terms, and an impartial appraisal gives both 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, 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

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

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 § 46A-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).

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, 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 F

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

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

<u>ORDER RESOLVING MOTIONS</u>

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. 206- 2, 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 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).

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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].

[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

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 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

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Functions, March 22, 2005. Available at http://www.occ.gov/news-issuances/bulletins/2005/bulletin-2005-6a.pdf.

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:[1]

> 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 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

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

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)[2] and (b)(3)[3] are met. ***Lienhart***, 255 F.3d at 146.

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[2] 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.

[3] Rule 23(b)(3) provides:

"[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 overshadow 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 '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).

(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.

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 defendants' breached the parties' contracts;

(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. Manageablility

"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. 211- 3, 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 de 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 G

FILED: February 19, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-2289
(5:12-cv-00114-JPB-JPM)
(5:12-cv-00115-JPB)

PHILLIP ALIG; SARA J. ALIG; ROXANNE SHEA; DANIEL V. SHEA

Plaintiffs - Appellees

v.

ROCKET MORTGAGE, LLC, f/k/a Quicken Loans Inc.; AMROCK, LLC, f/k/a Title Source, Incorporated, d/b/a Title Source Inc. of West Virginia, Incorporated

Defendants – Appellants

and

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

Defendants

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. 40 on the petition for rehearing en banc.

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

For the Court

/s/ Nwamaka Anowi, Clerk