

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

IN RE: COMMUNITY BANK OF NORTHERN  
VIRGINIA MORTGAGE LENDING PRACTICES  
LITIGATION

THIS MOTION RELATES TO ALL ACTIONS

MDL NO. 1674

CASE NO. 03-0425,  
CASE NO. 05-1386

HON. ARTHUR J. SCHWAB

SUBMITTED TO SPECIAL MASTER  
DAVID R. COHEN PER COURT  
ORDER

FILED ELECTRONICALLY

**MOTION OF DEFENDANT**  
**PNC BANK, NATIONAL ASSOCIATION FOR SUMMARY JUDGMENT**

In accordance with Fed. R. Civ. P. 56 and LCvR 56, Defendant PNC Bank, National Association (“PNC”) files this Motion for Summary Judgment and in support thereof states as follows:

**A. CONSIDERATION REQUESTED**

1. This Motion should be considered in conjunction with PNC’s contemporaneously filed Motion to Decertify Class (“Motion to Decertify”). While each Motion requests distinct relief, both Motions rely on some of the same facts (which are undisputed for purposes of this Motion for Summary Judgment but need not be undisputed, though they are undisputable, for the Motion to Decertify) and each is accompanied by a Concise Statement of Material Facts required in accordance with LCvR56 and the Court’s October 27, 2015 Second Amended Case Management Order. (Doc. No. 700). Because both Motions rely on subsets of the same documents and depositions, PNC has prepared a single combined Appendix for efficiency. The

Appendix will be cited herein and in PNC's accompanying Concise Statement of Facts and its Brief in support of its Motion for Summary Judgment as "App. \_."

**B. SUMMARY OF PLAINTIFFS' CLAIMS**

2. In their Joint Consolidated Amended Class Action Complaint ("JCAC" (Doc. No. 507), App. Tab 1), Plaintiffs allege that, between 1998-2002, Community Bank of Northern Virginia ("CBNV") engaged in a scheme with David, DeVan and Chris Shumway, and Randy Bapst (collectively, "Shumway-Bapst"), as well as with others unrelated to Shumway-Bapst, to make high volumes of second mortgage loans on which borrowers were charged allegedly improper fees. JCAC ¶¶ 439-40, 456.

3. Plaintiffs assert claims under the Real Estate Settlement Procedures Act ("RESPA"), the principal allegation being that CBNV charged borrowers origination and other loan fees (a/k/a, "Section 800 fees" because of their location on a borrower's HUD-1 Settlement Statement), portions of which were allegedly paid (or "kicked-back") to Shumway-Bapst and others who allegedly did not actually perform any work in exchange therefor. JCAC ¶¶ 121, 436-447.

4. Plaintiffs also assert claims under the Truth in Lending Act ("TILA"), as amended by the Home Ownership and Equity Protection Act ("HOEPA"), the principal allegation being that borrowers were charged certain title fees ("Section 1100 fees") that were not bona fide and, thus, should instead have been added to and disclosed as part of the Finance Charge under TILA. *Id.* ¶¶ 448-491. In addition, Plaintiffs assert claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), alleging that CBNV, Shumway-Bapst, and others, were part of a RICO "enterprise" that allegedly engaged in a pattern of mail and wire fraud consisting of the same alleged conduct underlying the RESPA and TILA/HOEPA claims. *Id.* ¶¶ 498-529.

5. This is PNC's first and only Motion for Summary Judgment. To understand why it took 13 years after commencement of the first of the now consolidated cases for this Motion to be filed, a chronology will be helpful for the Special Master and ultimately the Court.

### **C. CHRONOLOGY**

6. Several cases ultimately consolidated at the above-referenced MDL docket number were filed against CBNV beginning in 2001. CBNV no longer exists, having been acquired by Mercantile Bankshares Corp. ("Mercantile") in 2005. None of the management personnel of CBNV continued as employees of Mercantile. In 2007, PNC acquired Mercantile, meaning of course that PNC, the movant herein, and its employees had no contact with any of the events or the individuals surrounding this action during the 1998-2002 class period.

7. Initially there were several other Defendants in the MDL litigation, but they have since disappeared. Guaranty National Bank of Tallahassee, Florida which, like CBNV, also made second mortgage loans that were encompassed within the several complaints consolidated in the MDL, was dismissed for lack of subject matter jurisdiction as a result of it being placed in receivership by the Federal Deposit Insurance Corporation on March 12, 2004. Order of Court, at 2 (Doc. No 605), App. Tab 3. Initial Defendant Residential Funding Corporation ("RFC") was the secondary market purchaser of most of the CBNV second mortgage loans at issue, but the litigation against it was stayed after it filed bankruptcy proceedings in 2012.<sup>1</sup> Order of Court, at 1 (Doc. No. 584).

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<sup>1</sup> Plaintiffs' counsel filed a proof of claim on behalf of the class in RFC's bankruptcy and negotiated a substantial payout for members of the Plaintiff Class and themselves. While the issue of a credit or setoff to PNC for amounts paid to class members in the RFC bankruptcy has been preserved in the event PNC does not obtain summary judgment and/or decertification, it is not presently ripe.

8. The extended number of years it took to get to this point in the litigation stems from the fact that many of the Defendants initially named in the MDL litigation, including CBNV, decided to settle rather than litigate. They entered into a settlement agreement that was approved by the then trial judge but reversed and remanded by the Court of Appeals for the Third Circuit based upon objections advanced by a law firm (Walters Bender Strohhahn & Vaughan, P.C.) now, but not then, acting as co-counsel for the Plaintiff Class. *In Re Community Bank of Northern Va.*, 418 F.3d 277 (3d Cir. 2005) (“*CBNV I*”).

9. By the time of remand, CBNV had been acquired by Mercantile. After remand, a second settlement was crafted, this time substituting Mercantile and ultimately PNC for CBNV. The second settlement was also approved by the trial court but was again reversed and remanded by the Court of Appeals in 2010, after the same law firm again objected to the settlement. *In re Community Bank of Northern Va.*, 622 F.3d 275 (3d Cir. 2010) (“*CBNV II*”). The Court in *CBNV II* specifically noted that it was not rejecting the settlement because the payment to the class was inadequate. *Id.* at 311.

10. After the second remand, the original counsel for the proposed class joined with objector counsel as co-counsel and filed the JCAC on October 4, 2011; a 112-page pleading containing the following five Counts:

- COUNT I – Violations of RESPA
- COUNT II – Violations of TILA and HOEPA
- COUNT III – Multiple Violations of the Substantive Provisions of TILA and HOEPA
- COUNT IV – Declaratory Judgment that the Class Members have a Right to Rescind Their Loans
- COUNT V – Violation of RICO

JCAC ¶¶ 436-529.

11. CBNV's Motion to Dismiss was filed before the same trial judge (Honorable Gary L. Lancaster) who had handled the cases from their inception, but he passed away on April 24, 2013 without deciding the Motion to Dismiss and this matter was thereafter assigned to the Honorable Arthur J. Schwab.

12. Judge Schwab, recognizing that this case was more than 10 years old, moved with alacrity to decide PNC's Motion to Dismiss, which he granted in part and denied in part on June 27, 2013. Order of Court (Doc. No. 605), App. Tab 3. The Court also ordered briefing on class certification, and ultimately granted class certification on July 31, 2013.<sup>2</sup> Order of Court (Doc. No. 618). PNC then sought permission to pursue an interlocutory appeal of the Class Certification Order, which permission was granted in October 2013 by the Court of Appeals. The Court of Appeals did not issue its decision affirming class certification until July 29, 2015. *In Re Community Bank of Northern Va.*, 795 F.3d 380 (3d Cir. 2015) ("*CBNV III*"). Shortly thereafter, Judge Schwab proposed, and the parties agreed to, the appointment of a Special Master to consider pretrial motions and David R. Cohen was appointed.

#### **D. DISCOVERY**

13. The above chronology is instructive both procedurally and substantively. Procedurally, the two settlements, followed by two appeals, followed by two reversals, followed by a decision by previously opposed class and objectors' counsel to join together in the filing of the JCAC, followed by the death of the initial trial judge and followed by decisions by Judge Schwab on a Motion to Dismiss and a Motion for Class Certification, explain how this case persisted for more than a decade without any meaningful document discovery or depositions being pursued. Substantively, what this means is that the Court of Appeals decided *CBNV I*,

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<sup>2</sup> Count IV of the JCAC was not certified on behalf of the class.

*CBNV II* and *CBNV III* entirely on the pleadings and accepted for purposes of review the truth of all allegations, and that the trial court did the same with respect to both PNC's Motion to Dismiss and Plaintiffs' Motion for Class Certification. Thus, for the majority of the life of this case Plaintiffs obtained the benefit of having all that they alleged accepted as true; but no more.

14. It was not until late 2013 through early 2014 – after class certification had been granted and PNC's Motion to Dismiss decided – that the discovery upon which both this Motion for Summary Judgment and PNC's Motion to Decertify was undertaken. Over a period of just a few months, concentrated discovery was pursued consisting of the production of documents and the depositions of (1) the class representative Plaintiffs, (2) several former employees of CBNV, (3) owners/employees of title companies that had performed work in connection with CBNV second mortgages and (4) David Shumway, the individual repeatedly identified in the JCAC as the architect of the alleged scheme (even though curiously he was never named by Plaintiffs as a defendant).

15. Since no meaningful discovery had previously been undertaken, PNC had to search for and/or subpoena key witnesses as none of them had ever worked for PNC. This presented, and presents, a somewhat unusual situation where PNC finally began the journey of testing the veracity of Plaintiffs' allegations in the JCAC not by looking to its own present or former employees, but by deposing the named Plaintiffs themselves and by finding those who had once worked for CBNV, those who had performed title services 12-14 years earlier and, in the case of David Shumway, the person identified by Plaintiffs as a primary culprit even though they did not join him as a Defendant nor seek prior discovery from him.

## E. THE STRUCTURE OF PLAINTIFFS' CLAIMS

16. Plaintiffs' 112-page JCAC segregates CBNV's second mortgage business activities into three segments or phases ("Phases"), and certain aspects of Plaintiffs' claims differ depending on the particular Phase. JCAC ¶¶ 68-77. The three Phases can be described as follows:

- **First Phase** – In 1998, CBNV became involved in the second mortgage business through Donald Schmaltz, who proposed a structure in which CBNV could work with others who had experience and expertise in second mortgage lending. These individuals included Shumway-Bapst. On May 29, 1998, CBNV and an entity called EquityPlus, Inc. ("EquityPlus") operated by David Shumway formed an LLC for the purpose of originating second mortgage loans. Operating Agreement of EquityPlus Financial, LLC, App. Tab 9. The LLC operated from a loan production office ("LPO") in Reston, Virginia and provided origination services for second mortgage loans to be funded by CBNV. Operating Agreement of EquityPlus Financial, LLC, App. Tab 9; Mortgage Origination Agreement, App. Tab 10; Shumway Tr. 54:16-55:18, App. Tab 7. David Shumway was in charge of the LLC. Shumway Tr. 65:21-66:5, App. Tab 7.
- **Second Phase** – A few months later in the fall of 1998, CBNV's state banking regulators expressed a desire for the LPO's employees to become bank employees. Schmaltz Tr. 119:16-120:8, App. Tab 8. In response, CBNV proposed, and then implemented, a process that replaced the LLC structure used during the First Phase with an October 29, 1998 Consulting Agreement between CBNV and EquityPlus. Consulting Agreement, App. Tab 11. In the Second Phase, the dozens of individuals performing the second mortgage loan-level origination services became employees of CBNV, though the cost of their salaries and benefits continued to be an expense paid by EquityPlus. Consulting Agreement Addendum A, App. Tab 11; Shumway Tr. 82:6-83:19, 86:11-89:5, 192:12-22, App. Tab 7; Benedict Tr. 73:15-76:8, App. Tab 12. David Shumway did not become a CBNV employee, but his company EquityPlus assumed extensive obligations as set forth in the Consulting Agreement. Consulting Agreement § 3, App. Tab 11. Otherwise, however, the business's operational structure did not change. For example, David Shumway continued to run all facets of the operation, had ongoing managerial obligations and retained responsibility for producing second mortgage loans in full compliance with all laws and regulations. Shumway Tr. 80:17-82:5, 81:12-19, App. Tab 7; Consulting Agreement § 4, App. Tab 11. During the Second Phase, CBNV entered into similar agreements with other second mortgage LPOs that had no relation to Shumway-Bapst.
- **Third Phase** – 13 months later, on November 21, 1999, the Consulting Agreement structure at the Reston office was terminated and replaced with a

structure that was patterned after the Second Phase except that in this Third Phase David Shumway also became an employee of CBNV. Employment Agreement, App. Tab 18. As it had done in the Second Phase, CBNV applied this same process to other individuals and entities, not related to Shumway-Bapst, with whom it had formed Consulting Agreements in the Second Phase. Again, the change in structure did not result in any operational changes to the origination and underwriting of second mortgage loans. Employment Agreement §§ 1, 4, 8, 9, App. Tab 18; Shumway Tr. 100:11-20, 108:11-109-17, 110:14-20, App. Tab 7.

17. The JCAC alleges that during the First Phase, CBNV violated RESPA's Affiliated Business Arrangement ("ABA") provisions by not providing borrowers with ABA disclosures in connection with their loans. JCAC ¶ 69. Plaintiffs do not assert RESPA claims regarding alleged "kickbacks" as to the First Phase.

18. In the Second Phase, however, the JCAC alleges that CBNV violated RESPA by giving "kickbacks" of Section 800 fees to EquityPlus and various other loan origination consultants notwithstanding that the recipients allegedly performed no work for the fees received. JCAC ¶¶ 121, 440. Thus, while the loan origination work done by EquityPlus (mostly by David Shumway) did not change from the prior phase, and while the compensation also did not change, Plaintiffs contend that the allocation of Section 800 fees between two entities (CBNV and EquityPlus), instead of having them divided in the same manner within a single LLC, created an illegal "kickback." The JCAC further alleges that during the Second Phase CBNV charged loan discount fees in Section 800 that violated RESPA because no reduced interest rate was given in exchange. JCAC ¶¶ 142, 446.

19. In the Third Phase, the work done by EquityPlus in originating second mortgage loans again did not change from the prior phase. But here, the "kickback" claims are not asserted because in the Third Phase Shumway was now an employee of CBNV (as were the remaining unrelated LPO managers) and, accordingly, Shumway's share of revenues (which did



not change from either the First or Second Phases) was now employee compensation instead of payment by CBNV to EquityPlus.

20. In all three Phases, the JCAC alleges that all second mortgage loans funded by CBNV violated TILA and HOEPA, primarily based on the repeated allegation that borrowers were charged Section 1100 fees for which no bona fide services were provided – meaning, if that were true, that the Section 1100 fees charged for these services should instead have been added to the “Finance Charge” to be paid by borrowers and disclosed as such. JCAC ¶¶ 436-447. The JCAC then tacks on several other ways (detailed below) in which it is alleged that CBNV loan documents allegedly violated HOEPA. JCAC ¶¶ 448-491.

21. Because of statutes of limitation that would bar all of Plaintiffs’ claims under RESPA and a substantial portion of their claims under TILA and HOEPA, Plaintiffs admit that a significant number of class members must rely on the doctrine of equitable tolling in order to recover. Thus, Plaintiffs have conceded that every class member must rely on equitable tolling to assert a RESPA claim. *See* Mem. in Support of Pls.’ Mot. for Class Cert., at 5 n.6 (Doc. No. 609) (concession in Plaintiffs’ brief that “every putative Class Member relies on equitable tolling to assert a timely RESPA claim”) and that many class members also must rely on equitable tolling for their TILA/HOEPA claims. *Id.* at 7 n.7.

22. Finally, the JCAC alleges that the same conduct described above as violating RESPA, TILA and HOEPA constituted in turn a RICO “enterprise” that allegedly engaged in a pattern of mail and wire fraud to the detriment of the class. JCAC ¶¶ 498-529.

#### **F. THE PLAINTIFF CLASS AND SUBCLASSES**

23. The Court certified the following General Class:

All persons nationwide who obtained a second or subordinate, residential, federally related, non-purchase money, mortgage loan from CBNV that was secured by residential real property used by

the Class Members as their principal dwelling, for the period May 1998 – December 2002 [this covers all three Phases].

24. To correspond with the three Phases and the need for certain class members to rely on equitable tolling, in granting class certification, Order of Court (Doc. No. 618), the Court further divided the General Class into a number of Subclasses:

Sub-Class 1: (RESPA ABA Disclosure Sub-Class) (Plaintiffs: Philip and Jeannie Kossler) – All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1998-October 1998 [this roughly tracks the First Phase].

Sub-Class 2: (RESPA Kickback Sub-Class) (Plaintiffs: Brian and Carla Kessler; John and Rebecca Picard) – All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period October 1998-November 1999 [this roughly tracks the Second Phase].

Sub-Class 3: (TILA/HOEPA Non-Equitable Tolling Sub-Class) (Plaintiffs: Kathy and John Nixon; Flora Gaskin; and, Tammy and David Wasem) – All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1, 2000-December 2002.

Sub-Class 4: (TILA/HOEPA Equitable Tolling Sub-Class) (Plaintiffs: All Plaintiffs other than: Kathy and John Nixon, Flora Gaskin, and Tammy and David Wasem) – All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1998-April 30, 2000.

Sub-Class 5: (RICO Sub-Class) (Plaintiffs: John and Rebecca Picard; Brian and Carla Kessler) – All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1998-November 1999 [later

amended by stipulation to be May 1998 to December 2002, *see* Stipulation, at 1 (Doc. No. 696)] [this tracks all three Phases].

**G. SPECIFIC GROUNDS ON WHICH SUMMARY JUDGMENT IS SOUGHT**

25. The JCAC alleges a series of claims (under multiple statutes) that apply in varying ways to each of the three Phases; resulting in a panoply of claims spread across more than 110 pages. If the basis for PNC's Motion for Summary Judgment as to all of these claims had to be summarized in 50 words or less it would be as follows – *the JCAC describes in elaborate detail a “conspiracy” to effect a “kickback scheme” and to charge fees for services never provided which is utterly not true and is completely destroyed by uncontradicted testimony from all those who were actually involved.*<sup>3</sup> What renders the summary judgment process even more layered is that the uncontradicted facts and applicable law provide PNC with not just one or two levels of attack that would justify summary judgment, but in most cases multiple levels that lead to the same result.

26. PNC's Brief in Support of its Motion for Summary Judgment addresses, and deconstructs, every claim set forth in the JCAC but, per the requirements of LCvR 56(B), PNC will also list the specific grounds here as follows:

a. Class members who were debtors in bankruptcies and cannot demonstrate that they scheduled their claims in bankruptcy may not recover in this case.

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<sup>3</sup> By “all those who were actually involved,” PNC includes the named Plaintiffs themselves. Notably, none of the named Plaintiffs ever asserted a claim against PNC or others until each was affirmatively contacted by class counsel. Gaskin Tr. 13:16-14:3, App. Tab 33; B. Kessler Tr. 32:20-24, App. Tab 34; C. Kessler Tr. 97:6-23, App. Tab 35; J. Kessler Tr. 40:24-41:2, App. Tab 36; P. Kessler Tr. 42:14-43:15, App. Tab 37; J. Nixon Tr. 10:17-25, App. Tab 38; J. Picard Tr. 45:15-46:15, App. Tab 40; E. Sabo Tr. 41:18-42:1, App. Tab 42; W. Sabo Tr. 41:21-42:23, App. Tab 43; D. Wasem Tr. 62:12-63:10, App. Tab 44; T. Wasem Tr. 26:21-28:2, App. Tab 45.

b. Plaintiffs' RESPA ABA claims fail because there is no independent cause of action for an alleged violation of RESPA's ABA provisions, RESPA's ABA provisions do not apply to origination fees, and CBNV had no affiliations with any of the title companies used on the subject loans.

c. Plaintiffs' RESPA discount fee claims fail because there was no "split" of such fees, and because discount fees are not covered by RESPA anyhow given that a discount is not a settlement service.

d. Plaintiffs' RESPA discount fee claims are barred by the statute of limitations, and Plaintiffs have failed to adduce any evidence to support equitable tolling.

e. Plaintiffs' RESPA discount fee claims fail because it turns out there is zero evidence to support Plaintiffs' bald allegations that an otherwise applicable interest rate was not discounted upon the payment of a discount fee.

f. The RESPA kickback claims fail because uncontradicted evidence demonstrates beyond peradventure that those who received a portion of loan fees provided real and bona fide services, goods and facilities, in return.

g. Plaintiffs' RESPA kickback claims are also barred by the statute of limitations, and Plaintiffs have failed to adduce any evidence to support equitable tolling.

h. Plaintiffs' principal TILA/HOEPA claims are constructed on a totally false premise because, in point of fact, the uncontradicted evidence shows that the title companies utilized in connection with CBNV second mortgage loans performed real, substantial and valuable services.

i. Plaintiffs' remaining TILA/HOEPA claims for all class members in Sub-Class 4 are barred by the statute of limitations, and Plaintiffs have failed to adduce any evidence to support equitable tolling.

j. The undisputed evidence establishes that all CBNV borrowers received timely HOEPA notices.

k. CBNV's HOEPA disclosures were demonstrably clear and conspicuous.

l. The promissory notes Plaintiffs contend did not contain required prepayment penalty disclosures did not need to contain such disclosures under HOEPA or any other law. In addition, the promissory notes on the named Plaintiffs' loans that actually had a prepayment penalty did in fact contain the disclosures Plaintiffs contend are missing.

m. Since all of Plaintiffs' RICO claims are premised on alleged misconduct and misrepresentations that did not ever occur, the failure of Plaintiffs' RESPA and TILA/HOEPA claims dooms their RICO claims as well.

n. As an independent ground for summary judgment on the RICO claims, Plaintiffs cannot establish any evidence of several necessary elements of the claims, including the predicate act element, the enterprise element, the conduct element, the distinctiveness element, and the proximate causation element.

o. Plaintiffs' RICO conspiracy claims fail because the underlying RICO claims themselves fail.

## **H. CONCLUSION**

27. Based on the undisputed material facts set forth in this Motion and its accompanying Concise Statement of Facts and Appendix, and the arguments and precedent cited in the accompanying Brief, PNC is entitled to summary judgment on all claims set forth in the JCAC.

Dated: April 22, 2016

Respectfully submitted,

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