

**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 TO DECERTIFY CLASS

In accordance with Fed. R. Civ. P. 23 and LCvR 56 (applied to this Motion per the Court's October 27, 2015 Second Amended Case Management Order (Doc. No. 700)), Defendant PNC Bank, National Association ("PNC") files this Motion to Decertify Class and in support thereof states as follows:

A. CONSIDERATION REQUESTED

1. This Motion should be considered in conjunction with PNC's contemporaneously filed Motion for Summary Judgment ("Motion for Summary Judgment"). While each Motion requests distinct relief, both Motions rely on some of the same facts (which are undisputed for purposes of the 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 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 to Decertify as "App. _."

B. SPECIFIC GROUNDS ON WHICH DECERTIFICATION IS SOUGHT

2. PNC's Brief in support of its Motion to Decertify sets forth in detail why each of Plaintiffs' claims is not appropriate for class treatment. In accordance with the requirements of the Court's Scheduling Order, PNC will also summarize the specific grounds here as follows:

a. The Court of Appeals affirmed class certification of Plaintiffs' claims under the federal Real Estate Settlement Procedures Act ("RESPA") because the Court of Appeals accepted Plaintiffs' *allegation* that PNC's predecessor in interest, Community Bank of Northern Virginia ("CBNV"), paid a third party portions of certain loan fees charged to borrowers at closing even though that third party allegedly performed *no* work in exchange for the amounts paid. Because the third party allegedly performed *no work* in exchange for these fees, the Court of Appeals concluded that Plaintiffs could try to prove their claims through common evidence. For reasons set forth in the Motion for Summary Judgment, the record before the Court of Appeals contained virtually no actual evidence, which is why the parties undertook discovery while the appeal was before the Court of Appeals. The evidence revealed by that discovery indisputably demonstrates that the third party in fact provided *substantial goods, services and facilities* in exchange for the fees it received, thus rendering Plaintiffs' principal RESPA claim meritless, as demonstrated in the Motion for Summary Judgment, or at the very least, impossible to prove through common evidence.

b. Similarly, the Court of Appeals affirmed class certification of Plaintiffs' claims under the federal Truth in Lending Act ("TILA"), as amended by the Home Ownership and Equity Protection Act ("HOEPA"), because the Court of Appeals accepted Plaintiffs' *allegation* that CBNV borrowers were charged title fees at their loan closings in exchange for

which title companies performed *no* bona fide work. Because the title companies allegedly performed *no bona fide work at all* in exchange for these fees, the Court of Appeals held that Plaintiffs potentially could prove their TILA/HOEPA claims by way of common proof. The evidence now revealed through discovery, however, demonstrates that the title companies in fact provided *real and substantial work* in exchange for the fees they received, and moreover, the specific work performed on each loan could vary significantly depending on the particular title problems presented on the loan and the particular title company (over 50 different title companies were used across the class members' loans) that was used on the loan. In view of this undisputed evidence, it is no longer tenable that the TILA/HOEPA claims – to the extent they do not now fail entirely as a matter of law – could be proved through common class-wide evidence.

c. The Court of Appeals affirmed class certification of Plaintiffs' claims under the federal Racketeer Influenced and Corrupt Organizations Act ("RICO") because the claims are based on the same allegations as the RESPA and TILA/HOEPA claims, and because the Court of Appeals accepted Plaintiffs' contention that the detrimental reliance element of their RICO claims did not necessarily require individualized proof of reliance by each class member, and instead could be "inferred" on the part of the class as a whole. The evidence now revealed through discovery that renders the RESPA and TILA/HOEPA claims inappropriate for class certification likewise defeats class certification of the derivative RICO claims. Moreover, testimony from the named Plaintiffs that was not available to the Court of Appeals demonstrates that this case is anything but one in which reliance can be "inferred" on behalf of all class members, and that reliance instead will present a highly individualized issue that makes class certification improper.

WHEREFORE, to the extent the Court does not grant PNC's Motion for Summary Judgment in full, the Court, at a minimum, should decertify the class on any remaining claims.

Dated: April 22, 2016

Respectfully submitted,

/s/ Martin C. Bryce, Jr.

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