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

IN RE: COMMUNITY BANK OF NORTHERN VIRGINIA MORTGAGE LENDING PRACTICES LITIGATION	MDL NO. 1674 CASE NO. 03-0425, and CASE NO. 05-0688
THIS DOCUMENT RELATES TO ALL ACTIONS	Hon. Arthur J. Schwab ELECTRONICALLY FILED

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION OF PNC BANK, NATIONAL ASSOCIATION TO DECERTIFY CLASS

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INTRODUCTION

The Motion of Defendant PNC Bank, National Association to Decertify the Class (ECF No. 714) (the "Motion to Decertify") and accompanying brief in support (ECF No. 715) (the "Br. in Supp. of Decert.") is based upon two strikingly and demonstrably false assertions. The first false assertion is that the Court's prior decision to certify the class, and the Court of Appeals decision to affirm class certification, was "based on Plaintiffs' allegations, rather than on any evidence." (ECF No. 715 at 1) The second false assertion, repeated throughout its brief in support of decertification, is that PNC has obtained, for the first time, "new" evidence never before presented to the Court illustrating that individual issues will predominate in Plaintiffs' claims.

The inaccuracy of the first assertion is manifest – PNC's contention completely ignores the twenty exhibits filed with Plaintiffs' motion for class certification (ECF. Nos. 607–09) ("Mot. for Class Cert."), including class member loan files, business records and other testimonial evidence, including four different expert declarations. PNC's contention furthermore completely ignores the substantial evidence presented by PNC itself in its Brief in Opposition to Plaintiffs' Motion for Class Certification (ECF No. 612) ("Opposition to Class Certification"), to which PNC referred the Court during the class certification hearing: "PNC has directed Your Honor -- and I have a binder full of it if it would make it easier for Your Honor -- directed Your Honor to evidence in the record that actually contradicts each and every point made by Plaintiff's so-called experts." (ECF No. 615-1) (July 19, 2013 Hearing on Motion for Class Certification, p.14-15). All of this evidence was presented, disputed, and considered by the Court in its decision to certify the Class and Subclasses. It is simply incredible for PNC to now contend that the Court's decision to certify the Class was not based upon any evidence.

PNC's second assertion fares no better. A cursory review of the purportedly "new" evidence that PNC now presents to the Court (and complains was not available before Plaintiffs

moved for class certification) reveals that it is, in reality, substantially and in some cases virtually identical to the evidence PNC and Plaintiffs previously presented to the Court.[1] Nothing has changed. PNC has not presented any material new evidence, and PNC's Motion to Decertify should be denied on this basis alone.

Regardless, however, of the merits of PNC's contention that this purportedly "new" evidence "changed" the circumstances of this case, this new evidence still does not weigh in favor of decertifying the Class and moreover Plaintiffs, themselves, have obtained additional evidence that further confirms that the Court's decision to certify the Class was correct and that PNC's Motion to Decertify should be denied.[2]

ARGUMENT

I. Standards for Class Decertification and Deviation From the Court of Appeals Mandate.

PNC's attempt to contort its arguments to appear as though it is not contesting the Court's prior decision is understandable. PNC is no doubt well aware of the heavy burden it must overcome - to not only convince the Court to reverse its prior decision to certify the class but also to deviate

[1] PNC's contention that certain evidence was "not available when the class was first certified" is simply without merit. (*See* Br. in Supp. of Decert. at 13) The Court of Appeals rejected this very complaint when it noted that although PNC had the opportunity to engage in substantial discovery prior to the Motion for Class Certification, it chose not to do so. *In re Community Bank of Northern Virginia Mortgage Lending Practices Litigation*, 795 F.3d 380, 392 n.18 (3d Cir. 2015) ("*CBNV III*") ("[PNC] apparently failed to engage in rigorous discovery while it waited for the District Court to rule on its motion to dismiss. That is not an adequate response, particularly given that the District Court denied a motion to stay discovery on November 10, 2011, and did not rule on PNC's motion to dismiss until June 12, 2013").

[2] PNC's self-serving statement that its new testimony is from "non-parties to this case who have no interest in its outcome" (Br. in Supp. of Decert.at 2) is an obvious attempt to mislead the Court into thinking that these witnesses are somehow unbiased, which is simply not true. Most of the purportedly relevant testimony was taken from title agents and employees, a number of whom are either attorneys or still doing business in the same field. Plaintiffs' allegations as to the misconduct of these witnesses and their companies with respect to the Class Member loans, while not the basis for any claims against them personally, still reflects badly on their professionalism and even points to possible ethical lapses, and therefore these witnesses have every reason to be biased.

from the Court of Appeals mandate. PNC notably omitted the standard for either in its Brief in Support of Decertification. While PNC is correct that the Court retains the authority to alter or amend its decision to grant class certification at any time before final judgment, PNC has completely ignored the effect of the Court of Appeals opinion and subsequent mandate, and similarly failed to even mention the burden it must overcome to show that decertification is warranted, especially at such an advanced stage in the litigation.

First, the effect of the mandate rule on PNC's Motion simply cannot be overlooked. "It is axiomatic that on remand for further proceedings after decision by an appellate court, the trial court must proceed in accordance with the mandate and the law of the case as established on appeal." *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 949-50 (3d Cir. 1985) (internal citations omitted). "A trial court must implement both the letter and spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces." *Id.* "[A]n inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Casey v. Planned Parenthood of Southeastern Pennsylvania*, 14 F.3d 848, 856 (3d Cir. 1994).

There is no question that certification of this class and consequent satisfaction of the predominance and manageability requirements under Rule 23 (the only two requirements apparently contested by PNC in its Motion to Decertify) were squarely addressed and affirmed by the Court of Appeals. PNC challenged both of those requirements on appeal, and the Court of Appeals held "[w]e have considered each of those arguments and a number of subsidiary ones and find them unpersuasive." *CBNV III*, 795 F.3d at 385. And "while [Rule 23(c)(1)(C)] vests significant discretion in the district court, 'the district court's discretion in managing trials only extends on remand to all areas not covered by the higher court's mandate.'" *Gene & Gene, L.L.C. v. BioPay, L.L.C.*, 624 F.3d 698, 703 (5th Cir. 2010) (internal citation omitted). Consequently, the mandate rule applies to and constrains PNC's current request to decertify the class on either basis.

In order to avoid application of the mandate rule, therefore, PNC must now prove that its current Motion to Decertify qualifies under one of the very limited exceptions to the mandate rule. Some courts have recognized that the mandate rule "contains a limited exception for the case of changed factual circumstances or a change in the law." *Aleynikov v. Goldman Sachs Grp., Inc.*, No. CIV. 12-5994 KM-MAH, 2015 WL 225804, at *2 (D.N.J. Jan. 16, 2015). Although the Third Circuit has apparently not yet enumerated the specific circumstances under which a district court can deviate from an appellate court mandate, other circuits have consistently referred to three distinct scenarios: "(1) when 'controlling legal authority has changed dramatically'; (2) when 'significant new evidence, not earlier obtainable in the exercise of due diligence, has come to light'; and (3) when 'a blatant error in the prior decision will, if uncorrected, result in a serious injustice.'" *Invention Submission Corp. v. Dudas*, 413 F.3d 411, 414-15 (4th Cir. 2005).[3] These exceptions are to be read and applied narrowly. *Leggett*, 798 F.2d at 1389 n.2 ("A district court should follow the law of the case as decided by the appellate court unless the court is certain that one of the three specifically and unquestionably applies"). PNC has only claimed that new evidence is available, and therefore does not appear to be asserting a change in legal authority or that the Court of Appeals decision was clearly in error.[4]

[3] *See also United States v. Bell*, 988 F.2d 247, 251-52 (1st Cir. 1993) ("At a minimum, reopening [an already decided matter] would require a showing of exceptional circumstances-a threshold which, in turn, demands that the proponent accomplish one of three things: show that controlling legal authority has changed dramatically; proffer significant new evidence, not earlier obtainable in the exercise of due diligence; or convince the court that a blatant error in the prior decision will, if uncorrected, result in a serious injustice"); *Leggett v. Badger*, 798 F.2d 1387, 1389 (11th Cir. 1986) ("[T]hree exceptions . . . allow a federal district court to act contrary to the appellate decision: (1) when new and substantially different evidence is presented subsequent to the appeal; (2) when controlling authority has been rendered, contrary to the law of the appellate decision; (3) when the prior decision was clearly erroneous and would work a manifest injustice if implemented").

[4] It is also not entirely clear whether any such exceptions to the mandate rule are even recognized in the Third Circuit. *See In re Phoenix Petroleum Co.*, 278 B.R. 385, 397 (Bankr. E.D. Pa. 2001) ("It is questionable whether the exceptions apply to the mandate rule in the Third Circuit") (internal citations omitted).

Even without the mandate from the Court of Appeals, a motion to decertify in and of itself presents a heavy burden that PNC must overcome. The Third Circuit has characterized decertification as a "drastic course." *See Chiang v. Veneman*, 385 F.3d 256, 268 (3d Cir. 2004), *abrogated on other grounds by In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008). "Decertification is . . . an 'extreme step particularly at a late stage in litigation, where a potentially proper class exists and can easily be created.'" *Korrow v. Aaron's Inc.*, No. CV 10-6317, 2015 WL 7720491, at *10-11 (D.N.J. Nov. 30, 2015) *quoting Gulino v. Bd. of Educ. of City Sch. Dist. of City of New York*, 907 F. Supp. 2d 492, 504 (S.D.N.Y. 2012), *aff'd sub nom. Gulino v. Bd. of Educ. of New York City Sch. Dist. of City of New York*, 555 F. App'x 37 (2d Cir. 2014). While a court is "permitted to decertify a class if it appears that the requirements of Rule 23 are not in fact met . . . a court 'may not disturb its prior findings absent some significant intervening event or a showing of compelling reasons to reexamine the question.'" *Gulino*, 907 F.Supp.2d at 504. "Consequently, when seeking decertification of a class, the defendant bears a heavy burden to show that there exist clearly changed circumstances that make continued class action treatment improper." *In re Atl. Fin. Fed. Sec. Litig.*, No. CIV. A. 89-645, 1992 WL 50072, at *2 (E.D. Pa. Feb. 28, 1992); *see also Gulino*, 907 F.Supp.2d at 504 (same); *Barkouras v. Hecker*, No. 06-0366, 2007 WL 4545896, at *1 (D.N.J. Dec. 19. 2007) (same).[5]

As will become evident, PNC has not come anywhere close to meeting these standards and overcoming its heavy burden to show decertification is warranted in this case. PNC has failed to show there are any clearly changed circumstances or significant new evidence that was unavailable

[5] Although there are some situations where the burden on decertification remains with the plaintiffs, those cases are restricted to "collective" actions under Section 216(b) of the Fair Labor Standards Act, to which Rule 23 does not apply and where a two-step approach is used and the burden at the second step, where "decertification" is considered, remains on plaintiffs after the initial "conditional" certification. *See generally Zavala v. Wal Mart Stores Inc.*, 691 F.3d 527, 536 (3d Cir. 2012). Certification under Rule 23 is markedly different, for as the Court of Appeals held in this case, conditional certification under Rule 23 is impermissible, and "that the class was not conditionally certified." *CBNV III*, 795 F.3d at 396 (3d Cir. 2015).

during its prior opposition to certification. PNC has, at best, offered nothing more than an expanded version of the arguments and evidence it set forth in its original opposition to class certification, and in many cases the "new" evidence is almost exactly the same. PNC's attempt to reargue its previous opposition should be rejected. *See Korrow*, 2015 WL 7720491, at *10-11 (D.N.J. Nov. 30, 2015) ("Thus, contrary to Defendant's assertion, the Court had an 'opportunity to fully consider the impact of the 'formidable and fact intensive' individual issues ... relating to Defendant's defenses,' and after considering these issues and the relevant case law, the Court denied Defendant's motion for denial of class certification . . . [a]ccordingly, Defendant has not shown any 'changed circumstances' that would warrant the decertification."); *see also City Select Auto Sales, Inc. v. David/Randall Associates, Inc.*, 96 F. Supp. 3d 403, 413-14 (D.N.J. 2015) ("Indeed, 'in the absence of *materially* changed or clarified circumstances courts should not condone a series of reargument's' on the propriety of class certification, and Defendants' attempt to do so here warrants, without more, the denial of the pending motion.") (internal citation omitted).

II. PNC Has Failed to Demonstrate Why The RESPA Claims Should Be Decertified.

PNC's argument in favor of decertifying Plaintiffs' RESPA claims rests entirely on PNC's assertion that newly available deposition testimony, almost entirely from David Shumway, and "other evidence," which is only the Consulting Agreement between CBNV and EquityPlus (the "Consulting Agreement"), demonstrates that the consultants like EquityPlus provided numerous services to CBNV's loan production offices ("LPOs") in exchange for the Section 800 fees charged to each Class Member. PNC argues, therefore, that a loan by loan analysis is required to determine whether any kickbacks were given to the consultants for services that were not actually performed. PNC's argument fails on multiple levels. First, the "new" evidence relied upon by PNC is far from new, but is instead primarily based upon the same evidence, the Consulting Agreement, previously presented to the Court as part of Plaintiffs' and PNC's briefing with respect to Plaintiffs' Motion for

Class Certification. A closer comparison of the "new" deposition testimony from Mr. Shumway with the Consulting Agreement evidence the parties previously presented to the Court reveals that PNC is, in reality, simply manufacturing an excuse to rehash the same arguments and evidence previously presented to and rejected by both this Court and the Court of Appeals. Regardless, however, of the "newness" of PNC's purported evidence that legitimate settlement services were performed, PNC's argument also fails as a matter of law based upon this evidence – none of the purported services testified to by Mr. Shumway can be considered compensable settlement services under the law of RESPA. PNC, therefore, even on the face of its own evidence, has once again failed to contradict Plaintiffs' class-wide evidence that no compensable settlement services were performed for the fees charged to Class Members that CBNV kicked back to the various consultants including EquityPlus. Further, however, and in any event, Plaintiffs have presented additional evidence obtained post certification that both directly contradicts PNC's purportedly new evidence and further confirms that no compensable settlement services were performed by the consultants. Finally, and perhaps most significantly for purposes of class certification, even if the Court determined that consultants provided something to CBNV that could be paid for using portions of borrowers' settlement fees, the analysis of whether such payments to the consultants bore a reasonable relationship to the market value of the alleged services performed by the consultants can be done on a classwide basis, because none of the ostensible work performed by the consultants was loan specific and therefore impacted each loan, if at all, in an identical way. For these reasons the Court should reject PNC's arguments to decertify Plaintiffs' RESPA claims.[6]

[6] PNC's additional argument, that the Subclass 2 definition is overbroad because PNC may be held liable for Class Member loans that were originated by a particular LPO when there was no Consulting Agreement in place with CBNV, is unsupported and without merit. (Br. in Supp. of Decert. at 11 fn.3) PNC has failed to identify a single Class Member loan that was originated when no Consulting Agreement was in effect. In addition, Plaintiffs' dispute the purported dates the various Consulting Agreements were terminated, because the dates cited by PNC are at odds with the terms of the Consulting Agreements themselves. (*See* Plaintiffs' Response to

A. PNC has Offered No New Material Evidence to Support Its Argument That Plaintiffs' RESPA Claims Should Be Decertified.

To begin with, PNC is simply wrong to assert that the evidence it now presents, to show that various services the consultants were performing during the "Second Phase" of CBNV's mortgage lending operation, is somehow new or materially different than the evidence previously put before the Court. PNC's current statement of facts (in support of its summary judgment motion) relevant to the purported services provided by the consultants during the Second Phase relies heavily upon the Consulting Agreement that was also an exhibit used by both parties in the previous class certification briefing. (*See* PNC SJ SOF ¶¶ 16–33; ECF No. 608-5 Consulting Agreement attached as Exhibit 13 to Plaintiffs' Declaration in Support of Class Certification). The only arguably new evidence PNC now presents regarding services comes from the deposition testimony of Mr. Shumway. A simple comparison of Mr. Shumway's testimony, however, with what PNC previously represented to the Court of Appeals that the Consulting Agreement and other evidence proved, reveals that PNC relied upon the Consulting Agreement for the very same propositions testified to now by Mr. Shumway. Thus, there is virtually nothing of substance that Mr. Shumway testified to that was not already covered, presented and allegedly proven by the Consulting Agreement according to PNC.

PNC's Reply Brief filed in the Court of Appeals stated that "PNC would demonstrate that such goods, facilities and services *were* provided" and that "the evidence that a district court must consider on class certification establishes this for purposes of predominance analysis," such evidence "includ[ing] the Consulting Agreements" that were before the district court. (PNC Reply Brief at 23-24, P's App. Ex 158) PNC went on to elaborate that this evidence, which had been

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Decertification Facts "PRDF" ¶¶ 2-6) Moreover, and in any event, the termination date of each Consulting Agreement is not a reliable indicator of which loans were originated pursuant to each Consulting Agreement. Class Member loans that were committed to and "in the pipeline" when the Consulting Agreement ended would still be considered originated pursuant to the terms of the Consulting Agreement. (*See* Id.)

presented to the Court, established that:

> [E]ach consultant that allegedly received a kickback was contractually required to provide all hardware, software, furniture and equipment, as well as the real property, for the loan production office where the consultant worked; the consultant paid for all expenses of the office; the consultant provided advice regarding interest rate exposures; the consultant provided recommendations regarding hiring and office administration; and the consultant performed market research and directed advertising campaigns.

(*Id*. at 24) Upon comparison, the "new" testimony of Mr. Shumway that PNC now relies upon as proof that the circumstances of this case have changed, in large part mimics this previous evidence PNC asserted was already before the Court. To illustrate, the following facts recited by PNC in its Motion for Summary Judgment, relevant to services provided, depended in whole or in part upon the "new" testimony of David Shumway:

> "David Shumway testified without contradiction that EquityPlus performed its obligations under the Consulting Agreement" (PNC SJ SOF ¶ 22);
> "Shumway continued to manage the LPO during the Consulting Agreement time period" (PNC SJ SOF ¶ 23);
> "During the duration of the Consulting Agreement, EquityPlus was responsible for providing all hardware, software, furniture and equipment for the LPO, and for paying substantially all expenses incurred in operating the office, including rent" (PNC SJ SOF ¶ 25);
> "The salaries of the LPO employees were included within "personnel expenses" under the Consulting Agreement" (PNC SJ SOF ¶ 30).

Clearly, the "new" testimony from Mr. Shumway is not materially different from the evidence previously presented to this Court and the Court of Appeals, and in some cases is virtually identical. This evidence cannot constitute "materially changed or clarified circumstances" necessary to decertify the Class, and absolutely cannot constitute "significant new evidence, not earlier obtainable in the exercise of due diligence" to allow the Court to deviate from the Court of Appeals mandate.[7] PNC's arguments to decertify Plaintiffs' RESPA claims should be rejected on

[7] And as previously mentioned in fn. 1, even if any portion of Mr. Shumway's testimony could be considered in any way new, PNC still cannot claim it exercised due diligence in obtaining his testimony prior to Plaintiffs' Motion for Class Certification. PNC simply cannot justify waiting almost two years after Plaintiffs' filed their Joint Consolidated Class Action Complaint

this basis alone.

B. PNC's Purportedly New Evidence Fails to Identify a Single Compensable Settlement Service.

PNC's argument for decertification of Plaintiffs' RESPA claims also fails because, regardless of the effect of the Court of Appeals mandate and the burden PNC must overcome for decertification, none of the purported new evidence PNC now offers as proof of services that consultants performed for CBNV's LPOs in exchange for the fees charged to Class Members identifies a single act that qualifies as a compensable settlement service under RESPA.

First, PNC argues that David Shumway's testimony now shows that he "managed" the CBNV Reston North LPO during the Consulting Phase by "hiring," "training," and "supervising" the CBNV employees who originated the loans. (PNC Br. in Supp. of Summ. Judgment at 27) But even if the Court were to accept Mr. Shumway's testimony as true, unbiased, and undisputed fact – which it is not[8] – these activities simply do not qualify as compensable settlement services under RESPA. (*See* Pls.' Br. in Opp. to Summ. Judgment at Section III.B.2) (*citing*, *e.g.*, *Cohen v. J.P.*

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to take Mr. Shumway's deposition – PNC could have subpoenaed him at any point, but deliberately chose not to engage in any discovery at all during this period. *See CBNV III*, 795 F.3d at 392 n.18 (noting PNC's failure to engage in discovery).

[8] Contrary evidence, including the Consulting Agreement, shows that during the Consulting Phase EquityPlus and its principal, Mr. Shumway, were only empowered to provide CBNV with "advice and recommendations" as to the Bank's personnel and other administrative decisions related to the LPO. (Consulting Agreement § 3, PNC App. Tab 11) Furthermore, Mr. Shumway's sworn testimony before Virginia regulators shows that his responsibilities at the LPO during the Consulting Phase bore no resemblance to the "management" functions PNC now claims he performed:

> A: Moving to a consultant then, that left me as not an employee of the bank, so my duties there changed to consulting to the operation itself, as opposed to being actively as involved in every day-to-day aspect.
> …
> Q: How did what you did differ when you were consulting, as opposed to being employed?
> A: Well, as a consultant, I was not able to interact with any of the customers in the transaction. I didn't get involved in the day-to-day troubleshooting with loan officers or the day-to-day activities of the operation itself….

(PAF ¶ 185).

Morgan Chase & Co., 608 F.Supp.2d 330, 348 n.11 (E.D.N.Y. 2009) ("actions taken on behalf of the bank to keep its loan process functioning such as…the conducting of staff training….do[] not bear a direct relationship to the loan in the manner required of settlement services") Thus, Mr. Shumway's testimony that he purportedly "managed" the LPO by hiring, training, and supervising CBNV staff during the Consulting Phase is legally irrelevant.

Next, PNC argues that its newfound evidence demonstrates that "EquityPlus paid the personnel performing the work" and therefore should be "credited" for that work as part of the RESPA analysis. (PNC Br. in Supp. of Summ. Judgment at 30–32) This litigation-inspired spin on the flow of settlement fee funds under the Consulting Agreement is a complete fallacy. All of the evidence – including the "new evidence" cited by PNC – shows that PNC's argument relies on the fantasy that EquityPlus could "pay" CBNV employees with money it never possessed and was never legally entitled to receive under the Consulting Agreement. The reality is that during the Consulting Phase, *all* of the LPO workers who performed compensable settlement services on mortgage loans were CBNV employees who were paid salaries and commissions by CBNV alone. (RSF ¶ 30). The Consulting Agreement also shows this unequivocally: "personnel expenses" were accounted for by CBNV as deductions from settlement fee revenues and were paid out by CBNV to its employees *before* EquityPlus was distributed the "net profit." (*Id.*) Thus, the facts show the exact opposite of PNC's proposition: CBNV was paying the loan originators, who were now CBNV employees, and the kickbacks or "net profit" received by the consultants represented pure profit that was calculated *after* CBNV deducted funds to pay its loan origination employees.

Finally, PNC argues that Mr. Shumway's testimony now proves that CBNV paid the consultants bona fide compensation under Section 8(c)'s "safe harbor" provision in exchange for "other various services, goods, and facilities" furnished by the consultants such as telephones, computers, and office space. (PNC Br. in Supp. of Summ. Judgment at 32–33) But again, these

purported "services" are not compensable settlement services under RESPA because they bear no direct connection to the individual loan transactions. (*See* Pls.' Br. in Opp. to Summ. Judgment at Section III.B.2) (*citing Cohen*, 608 F.Supp.2d at 348 n. 11 ("actions taken on behalf of the bank to keep its loan process functioning such as the purchasing of computers, or the conducting of staff training….do[] not bear a direct relationship to the loan in the manner required of settlement services"); *Busby v. JRHBW Realty, Inc.*, 642 F. Supp. 2d 1283, 1299 (N.D. Ala. 2009) (explaining that a fee cannot be used for overhead, regulatory compliance costs, or other general administrative expenses because "such variables fall outside the parameters of a loan settlement and, substantively, the borrower receives no benefit.") Because the "other various services, goods, and facilities" that Mr. Shumway testified EquityPlus provided in exchange for the fees were not meaningful, identifiable settlement services performed in connection with individual loans, none of them are legally compensable with Section 800 fees.

It should also be noted that PNC has also utterly failed to offer *any* testimony specific to the services allegedly performed by the six other consultants that CBNV kicked back fees to and that also form the basis for Plaintiffs' remaining RESPA claims. For all of these reasons, PNC's rehashed arguments fail as a matter of law.

C. The Record Clearly Establishes That EquityPlus Never Performed Any Compensable Settlement Services.

PNC's argument for decertification of Plaintiffs' RESPA claims also fails because Plaintiffs' have uncovered post-certification evidence that directly contradicts PNC's contentions that compensable services were performed. At his deposition, Mr. Shumway testified that during the Consulting Phase *every single action* that HUD or the CFPB have ever recognized as a compensable settlement or loan origination service under RESPA was performed solely by CBNV employees, and not by Mr. Shumway or any other principal or employee of EquityPlus. (RSF ¶ 18; PAF ¶¶ 162–182, 186). This additional evidence makes it even more clear that the consultants

never performed *any* settlement services in connection with *any* loan during the pendency of the Consulting Agreement because the entire purpose of the Consulting Agreement (which the additional evidence shows was faithfully executed) was to shift the performance of all settlement services to CBNV employees.

D. Even if the Nonspecific "Work" Performed by Consultants Constituted Compensable Services, Common Issues Predominate.

Common issues predominate even if this Court accepts PNC's argument that the consultants' "store management" services or the things the consultants supposedly provided to CBNV could qualify as compensable goods, facilities, or services, *and* that some portion of the kickbacks were bona fide compensation paid in exchange for those goods, facilities, or services. As noted in Plaintiffs' response to PNC's summary judgment motion, a reasonable jury could find under the "reasonable relationship" test that the kickbacks were actually paid in exchange for referrals because the kickbacks exceeded the market value of whatever it is that the consultants provided. (Pls.' Br. in Opp. to Summ. Judgment at Section III.B.2)

Although several courts have denied certification in cases involving the reasonable relationship test, their rationale was that each loan had to be examined individually to determine what work was done *on each individual loan* by the fee recipient.[9] That rationale does not undermine class certification here because the evidence shows that consultants did not provide goods or services with respect to individual loans. PNC does not even suggest in its summary judgment brief that the consultants did any work on an individual loan. *See* PNC Br. in Supp. of

[9] *E.g., Howland v. First American Title Ins. Co.*, 672 F.3d 525, 534 (7th Cir. 2012) ("Because there is no evidence that either the actual services performed or the compensation paid were the *same across the class*, there is no way to make this determination on a class-wide basis and offer class-wide relief.") (emphasis added); *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 741–42 (5th Cir. 2003) ("individualized factfinding will be required *for each transaction* on the issues of what goods or services [two law firms] provided to Countrywide, and whether the flat fee charged was reasonably related to their value. Plaintiffs do not attempt to argue that Countrywide provided identical goods and services—in type or quantity—in each transaction.") (emphasis added).

Summ. Judg. 30 (listing only generalized services or goods). Again, the duties of the consultants as described in the agreements did not include a single loan-specific service. (Consulting Agreement, § 3 (PNC App. Tab 11) David Shumway also disclaimed any day-to-day involvement in loan origination, even at the troubleshooting level. (PAF ¶ 185).[10]

If the consultants were credited with providing any compensable goods or services at all (and they should not be), it could only be at an overall, operational level. Going with PNC's "store manager" analogy, the consultants did not do more "managing" with respect to any particular loan versus another. The amount of "employee training" or "office space" provided by the consultant to CBNV did not fluctuate from one loan to another. Whatever the consultants were doing, they were doing it to an identical degree for every single loan. In other words, the services the consultants supposedly provided were being performed uniformly, on a *class-wide basis*. Thus, a common question still predominates: when divided across *all* of the relevant loans, did the fees received by the consultants have a reasonable relationship to the market value of what the consultants were providing to CBNV?

III. PNC Has Failed to Demonstrate Why the TILA/HOEPA Claims Should Be Decertified.

A. PNC's Motion to Decertify Relies on the Same Testimony By the Same Witnesses PNC Presented to the Court in Opposition to Plaintiffs' Motion for Class Certification.

PNC's purportedly new evidence justifying decertification of Plaintiffs' TILA/HOEPA claims closely tracks its arguments for decertification of Plaintiffs' RESPA claims, *i.e.* allegedly "new" evidence shows that services were actually performed in exchange for the fees charged to

[10] Additionally, the sheer volume of loan origination work performed by CBNV's North Reston LPO illustrates that it was not physically possible for Shumway or Bapst to have meaningful involvement in even a fraction of the loans that the CBNV Reston North LPO was producing. During the consulting phase, the CBNV Reston North LPO, staffed with 75–100 bank employees, was taking up to 20,000 calls and 14,000 loan applications per month and closing 500 to 1,000 loans a month. (PAF ¶¶ 163–65, 183–84).

Class Members. As PNC correctly notes, Plaintiffs' TILA/HOEPA claims are premised upon evidence that the Line 1102 (title search or abstract) and Line 1103 (title examination) fees charged to Class Members were not bona fide nor reasonable because those services were not actually performed. PNC now claims that the newly obtained deposition testimony of certain, carefully selected,[11] title company representatives demonstrates that the title companies did perform numerous services in exchange for those fees that constitute legitimate title searches and/or examinations, and therefore at the very least an individual inquiry into the services performed for each class member is necessary. What PNC unbelievably fails to mention, however, is that PNC had previously presented, and the Court had previously rejected, substantially the same testimony in some cases *by these very same witnesses*.

In PNC's Opposition to Class Certification, PNC stated that it "vigorously disputes this issue [that the fees were not bona fide and reasonable], and has already presented evidence in prior proceedings in this litigation demonstrating that substantial services were performed in exchange for the fees at issue," and then referred the Court to several exhibits and testimony "demonstrating that services were performed in exchange for title fees." (*See* Opposition to Class Certification, ECF No. 612 at p. 12 and n.6) As previously noted, PNC subsequently referred the Court to the "binder full" of evidence it had regarding the purported services during the class certification hearing. An examination, however, of the numerous affidavits and other exhibits presented to the Court by PNC in its Opposition to Class Certification reveals that *three of the four* witnesses PNC now relies upon in its Motion to Decertify as "new" evidence that title services were actually performed had already

[11] PNC's statement that Plaintiffs' did not "seek" discovery of the settlement agents used by CBNV is both inaccurate and not well taken. (*See* PNC Br. in Supp. of Decert. at 13) PNC obviously carefully selected which settlement agents to depose because it was Plaintiffs, not PNC, that subpoenaed James Niblock, owner of First National Title & Escrow, and who had directly contradictory testimony unfavorable to PNC, for example that the title companies were charging pre-set fees on Lines 1102 and 1103 that had no relationship to any work that was done. (PAF ¶¶ 330-331, 333-337)

presented substantially similar testimony to the Court. (RSF ¶¶ 53-73; PRDF ¶¶ 7-12)

By way of example, and using the same example cited by PNC in its Brief in Support to Decertify, PNC presents the "new" deposition testimony of Benjamin Soto, president of Paramount Title, to show how the title companies purportedly were required to perform varied and substantial work for each Class Member's loan (which Plaintiffs dispute and have shown is patently false). (*Id.*) PNC cites "new" testimony from Mr. Soto stating that Paramount Title would "create its own title report based on all sources of potential title defects and the corrective action it took." (PNC Br. in Supp. of Decert. at 14). In PNC's Opposition to Class Certification, however, PNC presented an affidavit from this same witness, Benjamin Soto, stating in part the following:

> "With respect to those loans in which Paramount Title provided title services to CBNV borrowers, Paramount Title first made arrangements to obtain an abstract of title for the relevant property. Following receipt of the abstract, professionally trained personnel at Paramount Title would perform a title examination. These title examinations always included an evaluation of the title abstract and an analysis of available information regarding any recorded judgments or liens to identify all potential issues relevant to the title of the property. This was required in order to satisfy CBNV's instructions to verify ownership and assure CBNV is in it's proper lien position."[12]

As illustrated in the numerous other affidavits previously presented to the Court, much of the "new" evidence presented by PNC in its Statement of Facts follows a similar pattern, and substantially mimics the prior testimony that was previously presented to and rejected by the Court. (*See* ECF No. 243, and Exhibits 20, 22, 23, 24, 25 & 28 attached to ECF No. 244-5; RSF ¶¶ 53-73; PRDF ¶¶ 7-12) PNC has simply not offered *any* new evidence with respect to the services purportedly provided by the title companies. The Court should not condone PNC's attempt to simply reargue what was decided before. *City Select Auto Sales, Inc*, 96 F. Supp. 3d at 413 ("'in the

[12] The affidavit of a second witness relied upon by PNC in its Motion to Decertify, Dennis Hoover, was also submitted to the Court in PNC's prior Opposition to Class Certification. The third witness, Mary Jo Speier, had actually previously been deposed in a companion case and PNC cited to that prior testimony in its Opposition to Class Certification. The only "new" witness, Ms. Shankes, was actually an employee at the same title company as Mr. Hoover, and offered substantially similar testimony.

absence of *materially* changed or clarified circumstances courts should not condone a series of reargumentsʼ on the propriety of class certification").

B. Plaintiffs Previously Demonstrated and Continue to Show that Class Certification of the TILA/HOEPA Claims is Warranted.

Regardless, however, of whether PNC's purportedly new testimony has already been passed upon by the Court, Plaintiffs can, just as they did in their Motion for Class Certification, show why PNC's evidence is both suspect and capable of being refuted on a class-wide basis with common evidence. First (and again directly contradicting PNC's contention that class certification was based upon mere allegations), Plaintiffs had previously submitted testimony in its Motion for Class Certification from two expert witnesses that had examined 124 class member loan files and concluded that none of the title companies for the loans they reviewed could have 1) performed a title search, because all the title companies really did was obtain a property report, which is not nearly the same; or 2) performed a title examination because a title examination could never have been done using a simple property report. (*See* ECF Nos. 608-8, 608-9) The Court, based upon this record, concluded that individual issues regarding the 1102 and 1103 fees would not predominate at trial, and the Court of Appeals affirmed this decision. *CBNV III*, 795 F.3d at 407.

Post certification, Plaintiffs have collected a considerable amount of additional evidence, common to each Class Member, that further confirms that for the vast majority of Class Members, no services were provided for the Line 1102 title search/abstract and Line 1103 title examination charges. Plaintiffs' counsel retained a statistical expert, Kurt Krueger, Ph.D., to randomly sample loans from the entire set of 26,699 Class Member loans at issue in this case to provide a sample size with a 95% confidence interval with $\pm$ 5% error. (PAF ¶¶ 201-203, 345-346) This work resulted in 1190 representative loan files that were subsequently reviewed by Plaintiffs' title expert, William H. Dodson, II. (PAF ¶¶ 201-203) Mr. Dodson's report reveals a number of compelling conclusions that directly contradict PNC's disputed testimony from current and former title company owners

and officers, all of which can be repeated based upon a ministerial review of common and standardized loan documents contained in each loan file. (*See generally* PAF ¶¶ 297-353)

A more thorough recitation of Mr. Dodson's analysis and how it directly disproves the veracity of PNC's title company testimony is set forth in Plaintiffs' Memorandum in Opposition to Summary Judgment at Section IV. A brief summary of the conclusions reached by Mr. Dodson, however, reveals that PNC's new (and old) evidence can still be refuted based on a cursory review of one or two documents contained in each class member's loan file, and completely disproves PNC's rehashed arguments that individual issues predominate in this case. First, and perhaps most importantly, Mr. Dodson concluded that even if PNC's testimony was accepted as true, and that the delineated tasks were actually performed, none of those tasks could still ever constitute the performance of a title or abstract search or a title examination charged on Lines 1102 and 1103 of each Class Member's HUD-1 Settlement Statement, as those purported services should have instead been categorized and charged on Line 1101 of the HUD-1 as a "settlement or closing fee." (RSF ¶¶ 53-73; PRDF ¶¶ 7-12; PAF ¶¶ 312-314, 319-323) Thus, even accepting PNC's testimony as true, PNC's arguments fail on a class-wide basis.

Mr. Dodson also concludes that the testimony of these settlement agents claiming they performed these myriad tasks is directly belied by the actual loan files. (RSF ¶¶ 53-73; PRDF ¶¶ 7-12; PAF ¶ 324) The purported work done with respect to tax or judgment liens is refuted by the "clean" property reports found in Class Member's loan file, as well as the HUD-1's showing no disbursements to pay off tax or judgment liens, both of which reveal that there were no tax or judgement lien issues to address for that particular property. (PAF ¶ 324) Mr. Dodson's review found that only 1 out of the 1190 sampled Class Member HUD-1 Settlement Statements contained *any* evidence of work by the settlement agent to search liens, bankruptcies and unreleased mortgages as PNC claims. (*Id.*) These common and easily reviewed documents directly refute, on

a class-wide basis, PNC's assertion that the claimed work was actually done.

In fact, Mr. Dodson's analysis and conclusions, based upon the common documents contained in each of the sample Class Member loan files, are compelling and extraordinarily uniform across the entire representative sample. For example, Mr. Dodson concluded that of the 1,145 sample Class Member loans that had a Line 1103 Title Examination charge, *every single one* of those Line 1103 charges were not bona fide and reasonable. (PAF ¶ 318) Similarly, Mr. Dodson concluded that of the 1,167 sample Class Member loans that had a Line 1102 Abstract or Title Search charge, he could definitively conclude that 95.8% of the Line 1102 charges were not bona fide and reasonable. (PAF ¶ 317) This remarkably common evidence with respect to each Class Member is further, definitive, proof that common issues predominate in Plaintiffs' TILA and HOEPA claims.

Finally, PNC's purported evidence that "50 different title companies" were used for the Class Member loans during the relevant class period is misleading, unpersuasive, and ultimately inconsequential to Plaintiffs' common class-wide proof that the Lines 1102 and 1103 fees charged to Class Members were not bona fide and reasonable. Plaintiffs' review of the 1190 sample loan files revealed that 1170 of those loans, or over 98%, had title charges from one of the 7 primary title companies that Plaintiffs have consistently identified as the primary culprits in CBNV's violation of TILA and HOEPA, and which together with CBNV formed a RICO enterprise with the purpose and intent to, among other things, defraud borrowers by charging them fees for services that were never performed. (RSF ¶ 50; PAF ¶¶ 207, 288, 326, 351) Plaintiffs' review of the sample loan files also revealed an 8th title company, Turnpike Title, which also was involved in a statistically significant number of class member loans. (*Id.*) Mr. Dodson also concluded that Turnpike Title also demonstrated a consistent pattern and practice of charging Line 1102 and 1103 fees for services that were not performed. (*Id.*) Remarkably, Mr. Dodson's analysis reveals that the fees charged by

these primary title companies increased and decreased in lock step over time showing that not only were these title companies coordinating together but also that the fees they charged to borrowers nationwide were arbitrary and had absolutely no connection to the location or circumstances of each Class Member loan. (PAC ¶¶ 339-341) Despite PNC's contention otherwise, the analysis and conclusions of Mr. Dodson establishes that the practices of these 8 primary title companies was consistently uniform and did not vary to any significant degree from Class Member to Class Member.

The remaining approximately 1% of sample Class Member loans involved various other "outlier" title companies, not previously known to Plaintiffs. Even for these loans, however, Mr. Dodson determined that a considerable number of them also did not charge bona fide fees on Lines 1102 and 1103. (PAF ¶¶ 317-318) Ultimately, the fact that there are several, or even 50, outlier title companies involved with the 26,699 loans at issue in this case is unsurprising, as the class definition encompasses "[a]ll persons nationwide who obtained a second or subordinate" mortgage loan from CBNV from May 1998 through December 2002. Such a huge number of loans is bound to have at least a few that do not fit the overall pattern. What is clear, however, is that a class that contains approximately 1% outliers does not come anywhere close to proving that individual issues predominate or that the class is somehow otherwise unmanageable. *See, e.g., Castro v. Sanofi Pasteur Inc.*, 2015 WL 5770381, at * 21, 134 F.Supp.3d 820, 841 (D.N.J. Sept. 30, 2015) ("The existence of occasional outliers does not defeat predominance of common issues") *citing Haliburton Co. v. Erica P. John Fund, Inc.*, 134 S.Ct. 2398, 2412 (2014).

Moreover, the TILA and HOEPA claims of the small number of Class Members that do not involve one of the 8 primary title companies can still be established and proven using the same common evidence, such as the HUD-1 Settlement Statements, that the Class Representatives and remaining Class Members will use to establish their own claims. The possibility that PNC may be

able to show that a small number of Class Members do not have TILA/HOEPA claims because it can prove that despite the class-wide pattern, an actual title or abstract search or actual title examination was conducted for that particular Class Member, absolutely does not counsel in favor of decertification. "That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate." *Haliburton*, 134 S.Ct. at 2412; *see also Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009) ("a class will often include persons who have not been injured by the defendant's conduct . . . Such a possibility or indeed inevitability does not preclude class certification"). For all of these reasons, the Court should reject PNC's arguments to decertify Plaintiffs' TILA and HOEPA claims.

IV. PNC's Misleading Citation of Plaintiffs' Testimony Does Not Weigh In Favor of Decertifying the RICO Claims.

PNC's argument that the Court should decertify Plaintiffs' RICO claims, when separated from PNC's mistaken "tag along" argument that the RICO claims should be decertified simply because the RESPA, TILA and HOEPA claims should be decertified, entirely depends upon carefully selected and misleadingly presented testimony from two of the thirteen Class Representatives. According to PNC, this testimony purportedly shows that reliance cannot be presumed on a class-wide basis for purposes of Plaintiffs' RICO claim and therefore individual questions of reliance predominate.

As a threshold matter, however, and once again, this "new evidence" submitted by PNC is simply yet another reiteration of the same argument presented to and rejected by the Court of Appeals. PNC argued in its Appellate Brief that the testimony of two absent class members from the companion *Bumpers* case destroyed any possibility of presuming class-wide reliance:

> "CBNV obtained deposition testimony from both named plaintiffs demonstrating that *neither* entered into the loan transaction in reliance on the alleged misrepresentations at issue . . . The same alleged misrepresentations at issue in *Bumpers* are at issue here, and the fact that the two *Bumpers* plaintiffs did *not* rely on those alleged misrepresentations completely undercuts the argument that it would

> be appropriate to "presume" that the entire putative class here relied on the same alleged misrepresentations for purposes of the RICO claim."

(Brief of Appellant/Defendant PNC Bank, National Association, at 58-59, PNC App. Tab 55) The Court of Appeals rejected PNC's argument, and PNC has not even attempted to explain why its purported new evidence is materially different than what PNC presented before.

Regardless, however, and despite PNC's exhortations otherwise, the testimony from either of the two highlighted Class Representatives, Ms. Wasem and Ms. Gaskin, or any of the other Class Representatives for that matter, does not militate in favor of decertifying Plaintiffs' RICO claims - both as a matter of law, and as a practical matter because the testimony itself simply does not support PNC's position that reliance on CNBV's mail and wire fraud cannot be inferred on a class-wide basis.

First, the implicit assumption contained within PNC's argument - that each Class Member must have relied upon CBNV's mail and wire fraud in order for Plaintiffs' RICO claims to succeed – is simply incorrect. As the Court of Appeals noted in this case, "first-party" reliance is not an express element of Plaintiffs' RICO claims. *In re CBNV III*, 795 F.3d at 408 n.26 (quoting *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 119 n.6 (2d Cir.2013) (citing *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 649 (2008)); *see also Montoya v. PNC Bank, N.A.*, 94 F. Supp. 3d 1293, 1318 (S.D. Fla. 2015) ("RICO claims premised on mail and wire fraud are fundamentally different from common law fraud claims in that the federal RICO and mail and wire fraud statutes do not require a plaintiff to prove or plead reliance"). As noted in Plaintiffs' Memorandum in Opposition to Summary Judgment at Section V, Plaintiffs can offer evidence that CBNV's predicate acts of mail and wire fraud included, among other things, the purchase of customer lists from credit ratings agencies for purposes of soliciting the Class Members and the use of the wires to obtain credit reports in connection with the origination of each loans. (PAF ¶¶ 241-248) The credit reporting agencies' reliance on the legitimacy of CBNV's operations in providing those lists and

credit reports to CBNV is tied to each of the Class Members' loans. (PAF ¶¶ 249-255) The credit reporting agencies' reliance alone is enough to establish the necessary proximate causation between CBNV's predicate acts and the injury to each Class Member's property in order for Plaintiffs to prevail on Plaintiffs' RICO claim. Therefore PNC's argument with respect to particular Class Representative testimony regarding reliance is irrelevant and consequently dooms PNC's argument that individualized questions will predominate.

Even assuming, however, that each Class Member's reliance is necessary to find PNC liable for Plaintiffs' RICO claim, PNC has still not offered any evidence that defeats Plaintiffs' legal theory of causation based upon the common proof and evidence of the RICO violation. For example, a jury can also presume class-wide reliance and proximate causation based upon each Class Member's actual payment of bogus or misrepresented fees. *See In re U.S. Foodservice Inc.*, 729 F.3d at 119-20 (class members' "payment" of false charges is circumstantial proof of reliance on false representation concerning those charges sufficient to be considered by the jury); *Huyer v. Wells Fargo & Co.*, 295 F.R.D. 332, 347-48 (S.D. Iowa 2013) ("payment [of inspection charges automatically imposed by mortgage servicer] may constitute circumstantial proof of reliance based on the reasonable inference that customers who pay the amount specified in an inflated invoice would not have done so absent reliance upon the invoice's implicit representation that the invoice amount was honestly owed"). PNC has failed to offer any evidence that even a single Class Representative or Class Member failed to execute their loan documents, failed to enter into the CBNV loans, or failed make payments on those loans. Once again, PNC has failed to offer any evidence whatsoever that Plaintiffs' RICO claims should be decertified.[13]

[13] None of the authority cited by PNC supports their position that reliance cannot be inferred on the basis of each Class Representative's and Class Member's participation in and payments for each of their respective loans, regardless of the purported testimony cited by PNC. *Rosenstein v. CPC Intern., Inc.*, 1991 WL 1783 (E.D. Pa. Jan. 8, 1991) involved class members who did not view or know of the claimed misrepresentations because the class was not limited to

Even assuming, however, that Plaintiffs' loan participation and payments do not render PNC's cited testimony irrelevant, PNC is simply incorrect in its assertion that the testimony from two of the Class Representatives somehow defeats a class-wide presumption of reliance on CBNV's mail and wire fraud. PNC's representation of Ms. Wasem's and Ms. Gaskin's testimony is simply not what their respective testimony actually was, and PNC completely ignores contradictory testimony from those same Class Representatives and numerous others.

In the case of Ms. Wasem's testimony, all it could establish, if anything, is that Ms. Wasem did not "recall" her state of mind 12 year ago, and absolutely cannot be construed to indicate what her state of mind actually was at that time she closed her loan with CBNV. Similarly, the testimony taken from Ms. Gaskin's deposition testimony simply does not establish what PNC wants it to. Ms. Gaskin did not say that she did not care whether or not Paramount Title was charging her for bogus or nonexistent services – all of the cited questions to Ms. Gaskin implied that Paramount Title was doing something to earn fees, and not, in reality, charging something (in fact quite a lot) for services that were not actually performed. In addition, the cited testimony from Ms. Gaskin was buried within a confusing series of hypothetical questions, and PNC noticeably omitted directly contrary testimony from Ms. Gaskin stating that, had she known of a fee split with respect to the Line 801

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consumers who viewed the fraudulent advertisements. In direct contrast, every class member in this case was required to receive and sign the document containing the misrepresentations (the HUD-1 settlement statements) in order to obtain the loan in the first place. *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 194 (3d Cir. 2001) involved *oral* misrepresentations that differed from class member to class member, once again completely distinguishable from the uniform misrepresentations made on each Class Member's standard form HUD-1 settlement statements. *Haley v. Merial, Ltd.*, 292 F.R.D. 339, 358-59 (N.D. Miss. 2013), similar to *Rosenstein*, involved a deceptive marketing scheme that also included a myriad of middle men adjusting prices paid by class members that would require highly individualized inquiries into why each class member paid the price they did for each product. Finally, *Badella v. Deniro Mktg. LLC*, No. C 10-03908 CRB, 2011 WL 5358400, at *6-7 (N.D. Cal. Nov. 4, 2011) involved class members whose reliance depended upon what each class members' subjective expectations and objectives were in signing up for an online dating service. In sum, none of these cases involved uncontradicted, class-wide proof of reliance by each class member as there is in this case, where there is proof of each class member's receipt of a uniform misrepresentation and subsequent payment of fees pursuant to that misrepresentation.

Origination fee, that would have affected her decision to enter into the loan "because I feel like they should be truthful about everything, where the money is going to." (PAF ¶¶ 442, 456)

Finally, PNC notably omits the ample testimony taken from other Class Representatives regarding causation and reliance that completely affirms the presumption of class-wide reliance. (PAF ¶¶ 443-469) Moreover, the overall testimony from all of the Class Representatives simply revealed, at best, that none of them remembered any specific details of their loan closings given the passage of time or had reason to believe that they were "dealing with crooks" at the time. (*Id.*) None of this testimony is sufficient to refute a presumption that each one of the Class Representatives, and each of the Class Members, relied upon the misrepresentations of CBNV that they were getting something, instead of absolutely nothing, for the outrageous and excessive fees they were charged. None of this testimony is sufficient to decertify Plaintiffs' RICO claims.

CONCLUSION

PNC has failed to present any substantially different facts that were not already before the Court when PNC opposed class certification in 2013, and Plaintiffs have presented additional evidence that directly refutes PNC's arguments, further confirming the Court's prior decision to certify the Class. For all of the reasons set forth herein, the Court should deny the Motion of Defendant PNC Bank, National Association to Decertify the Class.

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Respectfully submitted:

By */s/ R. Frederick Walters*
R. Frederick Walters
J. Michael Vaughan
David M. Skeens
Garrett M. Hodes
WALTERS BENDER STROHBEHN & VAUGHAN, P.C.
–*Co-Lead Class Counsel*
2500 City Center Square
1100 Main
Kansas City, Missouri 64105
(816) 421-6620
(816) 421-4747 (Facsimile)

By */s/ R. Bruce Carlson*
R. Bruce Carlson (PA ID #56657)
Gary F. Lynch
Edwin J. Kilpela, Jr.
Jamisen A. Etzel
CARLSON LYNCH SWEET KILPELA & CARPENTER, LLP
–*Co-Lead Class Counsel*
1133 Penn Ave., 5th Floor
Pittsburgh, Pennsylvania 15222
(412) 322-9243
(412) 231-0246 (Facsimile)
bcarlson@carlsonlynch.com
glynch@carlsonlynch.com
ekilpela@carlsonlynch.com
jetzel@carlsonlynch.com

Counsel for Plaintiffs and Class Counsel

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Motion was served upon all counsel of record by the Court's ECF Filing System this 13th day of May, 2016.

/s/ R. Frederick Walters