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

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

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO
DEFENDANT PNC BANK, N.A.'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The subprime mortgage market that developed in the late 1990s was rife with predatory lending practices that presaged the ultimate collapse of the mortgage market in 2008. Defendant PNC Bank, N.A. is the successor in interest to Community Bank of Northern Virginia ("CBNV"), which beginning in 1998 originated more than 26,000 second mortgage loans using abusive lending practices common in that era. CBNV and its co-conspirators used federally required loan documents designed to ensure transparency to consumers to instead conceal unearned kickbacks and phony charges that were wholly untethered to any settlement or title services performed in connection with the loans at issue. The record demonstrates that CBNV's conduct violated the Real Estate Settlement Procedures Act ("RESPA"), the Truth in Lending Act ("TILA"), the Home Ownership and Equity Protection Act ("HOEPA"), and the Racketeer Influenced and Corrupt Organizations Act ("RICO").

II. SUMMARY JUDGMENT SHOULD BE DENIED ON ALL CLAIMS ARISING FROM LOANS MADE TO BORROWERS WHO FILED BANKRUPTCIES

PNC seeks summary judgment "against 9,780 ***loans*** associated with [borrower] members of this class who filed for bankruptcy but did not disclose their claims on their bankruptcy schedules." (PNC Brief: Doc. 712, p. 3 (emphasis added)) PNC's argument is based on a faulty legal premise and is not supported by this Court's prior order dismissing certain named class plaintiffs who filed for bankruptcy. The claims associated with these 9,780 loans have not disappeared and have not been extinguished by the borrowers' bankruptcies. Further, this Court's prior dismissal of some of the named class plaintiffs who had filed bankruptcies does not mandate or support summary judgment on these claims. Unlike named plaintiffs, absent class members, or their successors in interest, are simply not required to actively prosecute their class claims.

A. The Claims Associated with the Bankrupt Borrowers Are Not Extinguished.

PNC's reliance on the Bankruptcy Code as a basis for summary judgment is entirely misplaced. The fact that some absent class members filed for bankruptcy protection does *not* extinguish the underlying claims, *even if* those claims are not scheduled.[1] *Schafer v. Decision One Mortg. Corp.*, No. 08-5653, 2009 WL 1532048, at *3 (E.D. Pa. May 29, 2009) (unscheduled TILA claims are not extinguished but remain property of the bankruptcy estate "[a]nd this is so, even after the bankruptcy has been closed and the trustee has been discharged.") (multiple citations omitted); *see also* 11 U.S.C. § 541(a) (a bankruptcy estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case"); 11 U.S.C. § 554(c), (d) (unscheduled property remains property of the estate).[2] Thus, the fact that an absent borrower class member who filed for bankruptcy did not schedule his or her claim does not warrant summary judgment; it only means that such claim became, and remains, property of the estate to be administered by the trustee for the benefit of the borrower's creditors.[3] Such bankruptcy estates, by operation of law, and similar

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[1] PNC itself acknowledges that the claims of absent class member borrowers are, by operation of law "… transferred to the bankruptcy estate when a Chapter 7 or Chapter 13 debtor files for bankruptcy protection." (PNC Brief [Doc. 712], p. 3)

[2] PNC briefly mentions in a footnote that judicial estoppel may provide grounds for granting summary judgment against class members who did not properly schedule their claim in their bankruptcies. (PNC Brief, p.5 n.5) However, the Third Circuit has held that the mere fact that a debtor did not schedule a claim is insufficient to satisfy the requirements of judicial estoppel. *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 364 (3d Cir. 1996) ("policy considerations militate against adopting a rule that the requisite [bad faith] intent for judicial estoppel can be inferred from the mere fact of nondisclosure in a bankruptcy proceeding. Such a rule would unduly expand the reach of judicial estoppel in post-bankruptcy proceedings and would inevitably result in the preclusion of viable claims on the basis of inadvertent or good-faith inconsistencies."). Moreover, a debtor's failure to schedule his or her claim cannot be used as a judicial estoppel defense against the bankruptcy trustee. *Killmeyer v. Oglebay Norton Co.*, 817 F.Supp.2d 681, 691-92 (W.D.Pa. 2011) (fact that debtor did not schedule a claim does not judicially estop the bankruptcy trustee from asserting that claim).

[3] The fact that some of the borrowers' bankruptcies may be closed does not mean there is no trustee responsible for reopening the case to administer the claims. In such circumstances, the United States trustee serves and performs the duties of a trustee in each case until an individual "panel"

to any other assignee or successor in interest, stand in the shoes of the absent class member and should be considered a class member just like any other. *See Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc*., 501 F.3d 92, 101 (2d Cir. 2007) (assignees of class claims who are not themselves members of the class as pleaded "[stand] before the district court in the shoes [of their assignors] for the purposes of this litigation, as assimilated members of the class").

B. Absent Class Members Need Not Establish Real-Party-In-Interest Status.

In its prior dismissal Order, the Court ruled that the *named plaintiffs* who had not scheduled their claims should be dismissed because they did not have standing as real parties in interest. (Doc. 605, p. 2 ¶ (1)) In so doing, the Court relied exclusively on *Killmeyer*, *a non-class case* holding that an individual plaintiff who had not scheduled her claims did not have standing as the real party in interest to pursue the lawsuit. (Doc. 610, pp. 36-37) Notably, *Killmeyer* further held that while the plaintiff was not entitled to continue prosecuting the lawsuit as the real party in interest, the bankruptcy trustee could, thus recognizing that the claim itself was not extinguished when the debtor filed bankruptcy. *Killmeyer,* 817 F.Supp.2d at 689 (Chapter 7 trustee became the real party in interest because plaintiff's claims "clearly [became] property of the estate" when plaintiff filed her bankruptcy and the trustee had not abandoned the claims back to the plaintiff).

Most importantly, however, the analysis of the real-party-in-interest issue in *Killmeyer* (*id.* at 689-690) was principally based on Rule 17, which expressly states that "[a]n action ***must be prosecuted*** in the name of the real party in interest." Fed.R.Civ.P. 17(a)(1)(emphasis added). Thus,

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trustee is appointed. 28 U.S.C. § 586(a)(1), (a)(2); *see also Thomas v. Guardsmark, Inc*., 2005 WL 1629770, at *4 (N.D. Ill. July 7, 2005) (As a matter of law, bankruptcy trustees have a positive duty to determine whether bankruptcy estates must be reopened after having knowledge of the lawsuit and a failure to do so, even though the schedule of assets has not been amended, may result in the abandonment of the asset under 11 U.S.C. § 554). This determination can and should be done as part of the administration of this class after a determination is made regarding the merits of the named class member claims.

both *Killmeyer* and this Court's prior Order were based on a finding that *named plaintiffs* who have not listed their claims on their bankruptcy schedules do not have standing as real parties in interest *to continue to prosecute the action*. Significantly, however, neither *Killmeyer* nor this Court's dismissal Order addressed whether the real-party-in-interest rule applied to *absent class members*. (Doc. 610, pp. 36-37) This key fact is determinative with respect to PNC's "law of the case" argument because, as explained below, the same analysis does not apply to the absent class members. *See, e.g., Koppers Co., Inc. by Beazer East, Inc. v. Certain Underwriters at Lloyd's, London*, 993 F.Supp. 358, 364 (W.D. Pa. 1998) ("the law of the case doctrine applies only to issues actually addressed and decided at a previous stage of the litigation").

Unlike named plaintiffs, who as the actual parties responsible for prosecuting a class action lawsuit must have standing as the real parties in interest under Rule 17, absent class members are *not* considered parties for purposes of prosecuting a class action lawsuit. As Newberg explains:

> In a class action, those represented are, in the words of the Supreme Court, passive members of the class, in contrast to the named plaintiff who is actively prosecuting the litigation in their behalf.

Rubenstein *et al.*, 1 Newberg on Class Actions § 2:7 (4th ed. 2008) (citing *American Pipe & Const. Co. v. Utah,* 414 U.S. 538 (1974));[4] *see also Perry v. Beneficial Fin. Co. of New York, Inc.*, 88

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[4] *See also* Newberg on Class Actions § 1:5 (5th ed. 2015) ("The position that absent class members occupy in class action litigation is sui generis, and attempts to analogize to conventional "party" status are likely to fail. It is more logical for a court faced with a question concerning the rights and duties of absent class members to analyze the issue presented with reference to the goals of representative litigation, not by strained analogies to conventional litigation."); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810-11 (1985) ("an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection."); *Day v. Persels & Assoc., LLC*, 729 F.3d 1309, 1317 (11th Cir. 2013) ("Absent class members are not designated on record as a plaintiff or defendant. Absent class members also ordinarily lack the power to control proceedings. And a suit is not brought "by or against" absent class members"); *accord Dewey v. Volkswagen Aktiengesellschaft,* 681 F.3d 170, 180-81 (3d Cir. 2012) ("We agree with the Seventh Circuit that unnamed class members are not 'parties'…"); *Bzdawka v. Milwaukee Cty.*, 238 F.R.D. 469, 473 (E.D. Wis. 2006)

F.R.D. 221, 223 (W.D.N.Y. 1980) ("Generally, a class action proceeding 'contemplates an adversary contest involving only the representative members of the class' and permits all other class members to passively await the outcome of the action")(citation omitted).[5] Accordingly, *and as the Third Circuit has already held in this case*, while named class plaintiffs must establish their standing as real parties in interest under Rule 17 to continue *prosecuting* an action, absent class members do not.[6] *See In re Community Bank of N. Virginia Mortg. Lending Practices Litig.,* 795 F.3d 380, 397 (3d Cir. 2015)*, cert. denied sub nom. PNC Bank v. Brian W.,* 136 S. Ct. 1167 (2016) ("only named plaintiffs, and not unnamed class members, need to establish standing").

C. The Claims of the Bankruptcy Estates are Included in the Class Notice.

PNC's arguments for summary judgment against the 9,780 loans of the absent borrower class members who have filed bankruptcy are also inconsistent with its position with respect to the class notice. Indeed, PNC agreed that the approved class notice should include a specific provision requiring any absent class member who is or was a Chapter 7 or Chapter 13 debtor "to send a copy of this *Notice of Class Action Lawsuit* to your bankruptcy attorney or your bankruptcy trustee." (Doc.

("In a class action, the unnamed class members are 'passive' in contrast to the named plaintiff, who actively prosecutes the litigation.").

[5] Although *Perry* dealt with deceased class members rather than bankrupt class member, the analysis is the same. *See In re Wood*, 643 F.2d 188,190 (5th Cir. 1980) (equating the survival of a TILA claim in bankruptcy to the survival of the claim in probate upon the debtor's death).

[6] For the reasons stated above, Rule 17 does not apply to the absent class members. However, even if it did, summary judgment would still not be warranted at this time. Rule 17(a)(3) expressly provides that the Court "may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action." Here, the objection to the real-party-in-interest status of the absent class members contemplated by the Rule was not made until PNC filed the instant motion for summary judgment and the determination of the amount of such damages, if any, and the determination of who is entitled to such damages are matters to be determined as part of the orderly administration of this class once the merits of the named plaintiffs' claims are decided, at which time the various bankruptcy trustees can decide whether to reopen the bankruptcy estates. *See* Section II.D.

701-1, p. 7; Doc. 701, p. 5 ("Defendant PNC has agreed upon the content of the Notice")) Equally telling, after the Court's ruling on the named plaintiffs who had filed bankruptcy, PNC agreed that the list of absent class members should include the named plaintiffs with CBNV claims who were dismissed as named plaintiffs due to their lack of standing as real parties in interest.[7] (RSF ¶ 82; PNC Ex. A, lines 2157, 2810, 5591, 10672, 16310, 20870) Thus, PNC has clearly acknowledged on the record that an absent borrower class member having filed a bankruptcy without scheduling his or her claim is not dispositive as to that claim.

Most importantly, to hold otherwise would directly contradict the Notice approved by this Court, which constituted the best practicable notice to all absent class members "under the circumstances of this Litigation." (Doc. 702, p. 1) With the Notice, the Court correctly recognized not only that the best practicable notice should be given to those responsible for administering the bankruptcy estates of any borrower class members, but also that those bankruptcy estates should be considered members of the class. *See Cox v. Holcomb Family Ltd. P'ship*, 2014 WL 5462022, at *9 (D.Ore. Oct. 26, 2014)(although class definition did not expressly identify assignees, transferees, and co-claimants as being included, it was sufficiently broad to include such class members by implication); *Cordes*, 501 F.3d at 101 (assignees of class claims who are not themselves members of the class as pleaded stand in the shoes of their assignors and possess the same interests and may continue to assert the same claims in a class action).[8]

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[7] PNC agreed to include Tina Boor, Melba Brown, Ruth Davis, Clell Hobson, Nora H. Miller and Ellen Sabo on the class list. The remaining dismissed named plaintiffs were not included because their claims were based on GNBT loans, not CBNV loans. (Doc. 507, ¶¶117, 156, 165, 185, 194, 204, 214, 224, 233, 242, 319)

[8] Should the Court consider it necessary, the class definition can be amended to make it explicitly clear that the class includes all successors in interest, including the bankruptcy estates of borrower class members who are or have been debtors in a Chapter 7 or Chapter 13 case. In addition, if the Court finds that more direct notice should be given, the Notice can be resent to the 21 U.S. Section Trustees responsible for the bankruptcy estates identified by PNC. If these additional measures are

D. The Effect of a Bankruptcy Should be Addressed Only After the Common Issues of Law and Fact Regarding Liability and Damages are Determined.

In light of the above, PNC's bankruptcy concerns do not have any real effect on the nature of this class action litigation, the determination of PNC's liability or the amount of each absent class members' recoverable damages (whether such damages be to an individual class member borrower or to the borrower's bankruptcy estate). Nor do these issues have anything to do with the propriety of this matter proceeding as a class action. At best, PNC's motion merely recognizes that there will be issues as to who should recover any damages ultimately awarded on the claims of absent class members who filed a bankruptcy. Accordingly, the Court must fashion a procedural remedy that protects the interests of *both* the borrower class members *and*, where necessary, their bankruptcy estates. *See generally,* Manual for Complex Litig. (4th), § 21 ("The court must protect the interests of absent class members, and Rule 23(d) gives the judge broad administrative powers to do so") (citing *Ortiz v. Fibreboard Corp*., 527 U.S. 815 (1999); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997)).

Further, whether substitution is necessary as to unnamed class members is questionable at best, since it is only the class representatives who actually prosecute the lawsuit. *See e.g., Perry*, 88 F.R.D. 221 (unnamed class members do not appear in the action and are not considered parties for purposes of substitution under Fed.R.Civ.P. 25). Even if absent class members must be considered parties for such purposes, however, Rule 25(c) makes clear that substitution is neither required nor a basis for summary judgment. Fed.R.Civ.P. 25(c) provides that "[i]f an interest is

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taken, however, they would not alter any of the substantive issues in this litigation or otherwise prejudice PNC's rights. Such measures would instead be in keeping with the Bankruptcy Code and its due process requirements; and thus procedurally appropriate to ensure that each class member's individual recovery, if any, is ultimately paid either to the borrower class member or the trustee for the benefit of the class member's bankruptcy estate.

transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined as the original party." Here, the Court has not so ordered, nor has PNC moved for such an order. As a result, this class action may still be continued in their names. *Id*.

Equally significant, requiring substitution at this time would not conclusively resolve the bankruptcy issues raised by PNC, as some of the absent class members who have not filed bankruptcy at this time may yet do so before judgment is entered, and the trustees of those who have filed may yet decide to reopen their cases to administer or abandon the claims. *See Morlan v. Universal Guar. Life Ins. Co*., 298 F.3d 609, 621 (7th Cir. 2002) (quoting *Wallace v. Lawrence Warehouse Co*., 338 F.2d 392, 394 n. 4 (9th Cir. 1964): "when the property of the bankrupt is abandoned, the title 'reverts to the bankrupt *nunc pro tunc*, so that he is treated as having owned it continuously'"). Thus, whether a particular bankruptcy estate or borrower class member is entitled to recover damages can only be determined with certainty after the common issues of law and fact regarding PNC's liability are determined and damages are awarded. Accordingly, the most effective way to protect the interests of both the borrower class member and all *known* bankruptcy estates would be to wait until the common issues are resolved, at which time the Court can issue an appropriate order to deal with this purely "procedural matter" with the certainty it requires. *See* Fed.R.Civ.P. 23(d)(1) ("In conducting an action under this rule, the court may issues orders that … determine the course of the proceedings or … deal with similar procedural matters"). Such an approach would not be unprecedented with respect to absent class members. *See e.g*., *Jordan v. Paul Fin., LLC*, 285 F.R.D. 435, 463-64 (N.D. Cal. 2012) (determination of bankruptcy status of absent class members does not require a highly fact-intensive inquiry and need not be made until the commons issues of law and fact regarding defendant's liability are determined and damages

are awarded); *Wilborn v. Dun & Bradstreet Corp*., 180 F.R.D. 347, 356 (N.D. Ill. 1998) (same); *Perry*, 88 F.R.D. at 223 (if substitution becomes necessary, the most practical approach is to wait until defendant's liability is determined).

In contrast, to enter summary judgment on the claims of absent class members who have filed bankruptcy without listing their claims would only reward PNC at the expense of the bankruptcy estates, whose rights with respect to the claims at issue are determined and protected by federal law. *See Killmeyer*, 817 F.Supp.2d at 690 (although the plaintiff may not be not entitled to continue prosecuting the lawsuit as the real party in interest, the bankruptcy trustee's interest in those claims should be recognized to prevent "injustice to [her] creditors in bankruptcy."); *Morlan*, 298 F.3d at 621 (The provisions of the Bankruptcy Code "are intended for the benefit of creditors, none of whom complained or is complaining about the trustee's failure to comply with them. They are not intended for the benefit of alleged violators of the debtor's legal rights"). Most importantly, because the bankruptcy estate can be reopened at any time, the Court's entry of summary judgment on these claims would create significant due process concerns that would subject its judgment to collateral attack in the bankruptcy courts. *See e.g*., *In re Miller*, 140 B.R. 499, 501-502 (Bankr. E.D. Ark. 1992) (prior judgment "is subject to collateral attack for lack of due process … where a creditor does not receive reasonable notice of an opportunity to appear and be heard."); *In re Hobdy*, 130 B.R. 318 (9th Cir. B.A.P. 1991).

E. PNC's Argument Is Not Credible Because Many Borrower Class Members Still Have Real-Party-in-Interest Status.

PNC also wrongly assumes that all borrower class members who filed bankruptcy without scheduling their claim have lost their real-party-in-interest status as a matter of law. This conclusion is not supported by the limited summary evidence proffered by PNC. First, because the TILA and HOEPA damages include the finance charges, the absent borrower class members who made loan

payments after they filed bankruptcy are still real parties in interest entitled to assert their claims. Simply put, such post-petition property is not, and never has been, property of the estate. *See* 11 U.S.C. § 541(a)(1) ("[the bankruptcy] estate is comprised of all the following property … all legal and equitable interests of the debtor in property *as of the commencement of the case*.")(emphasis added); *see also In re Machia*, 360 B.R. 416, 420 (Bankr. D. Vt. 2007) ("'portion of the debtor's tax refund attributable to pre-petition withholdings is an interest in property and is part of the bankruptcy estate,' while post-petition withholdings are considered the property of the debtor"); *In re Edwards*, 363 B.R. 55, 57 (Bankr. D. Conn. 2007) (bankruptcy court determined that tax refund should be apportioned pro rata between estate and debtor based upon the date of the bankruptcy filing). Not insignificantly, Plaintiff's records show that more than 2,711 absent class members who filed bankruptcies continued to make loan payments after the date of bankruptcy identified by PNC. Thus, these class members are included in this category and continue to have an interest in the outcome of this case. [PAF ¶ 482]

Second, with respect to the 1,767 loans identified by PNC as being associated with absent class members who filed Chapter 13 bankruptcies, the borrower class members never lost standing to assert their claims as the real parties in interest, as a matter of law.[9] *Martime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1209 n.2 (3d Cir. 1991) ("an essential feature of a chapter 13 case is that the debtor retains possession of and may use all property of the estate, including his prepetition causes of action…"); *In re McConnell*, 390 B.R. 170, 180 (Bankr. W.D.Pa. 2008) ("Chapter 13

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[9] PNC's reliance on *PreKop v. PNC Bank*, No. 2:10-cv-1691, 2013 U.S. Dist. LEXIS 6193 (W.D. Pa. Jan. 16, 2013) is misplaced in this case for three reasons. First, *Prekop* is distinguishable because it was a non-class case involving a party plaintiff. Second, the court incorrectly applied a Chapter 7 analysis to find that the debtor did not have standing. *Id.* at *2 (citing *Killmeyer*, 817 F.Supp.2d at 688-89). Third, there was substantial evidence that the plaintiff had acted in bad faith (which is not present here).

debtor 'steps into the role of the trustee' and exercises the power of the trustee when suing on behalf of the estate"); *In re Bowker*, 245 B.R. 192, 194 (Bankr. D.N.J. 2000) (Chapter 13 debtor has exclusive standing to initiate and control pre-petition personal injury actions); *see also* 11 U.S.C. § 1303; 11 U.S.C. § 1306(b) ("the debtor shall remain in possession of all property of the estate"). Because such debtors maintain their interest in their claims despite having filed Chapter 13 bankruptcy, they have always remained real parties in interest regardless of whether they scheduled the claim or not.

Third, PNC's summaries (PNC Exs. A and B) do not support its claim that ***all*** of the loans it lists are associated with borrowers who have not disclosed their claims in their bankruptcy. In fact, to cite but two known examples, the bankruptcies of two of the former named plaintiffs, Ruth Davis and Melba Brown, *have* been reopened and their schedules have been amended to include their CBNV claims. [PAF ¶¶ 470-73; 476-79] Additionally, those records indicate that the trustee has abandoned Ms. Brown's claim [PAF ¶¶ 474-75], which means that her interest in her claim has been restored. *See Morlan*, 298 F.3d at 621 ("when the property of the bankrupt is abandoned, the title 'reverts to the bankrupt *nunc pro tunc*, so that he is treated as having owned it continuously'"). Moreover, the court in Ms. Davis' bankruptcy administratively closed the case *except for Ms. Davis's CBNV claim*, with a further order that Ms. Davis "immediately notify both the discharged Chapter 7 Trustee and the United States Trustee in writing in the event that there is any recovery or offer to settle, whereupon, the United States Trustee will move to reopen the estate." [PAF ¶¶ 480-81] This demonstrates that the trustee and the bankruptcy court are fully expecting Ms. Davis' claim to continue in the class action. It also shows that the trustees know how to effectively, and expeditiously, deal with such claims when they are notified of them. In any event, based solely on this limited "cross examination" of PNC's summary, it is clear that PNC's

summary evidence is incomplete and inconclusive with respect to the bankruptcy issues it has raised.

III. PNC IS NOT ENTITLED TO SUMMARY JUDGMENT AS TO PLAINTIFFS' RESPA CLAIMS

A. Facts Related to Plaintiffs' RESPA Claims

CBNV's liability for RESPA violations derives from the evolution of its loan production office ("LPO") structure. CBNV originated second mortgage loans through multiple LPOs. [RSF ¶ 33; PAF ¶¶ 100–108 (describing background of CBNV mortgage operations)]. Initially, CBNV and the separately owned LPOs formed joint ventures that were organized as limited- liability companies ("the LLCs"). [PAF ¶¶ 134–139, 144–45]. CBNV and a separate, independent entity would each hold an ownership interest in the LLC LPOs; in the case of EquityPlus Financial, LLC, CBNV was a 25% owner and EquityPlus Financial, Inc. was a 75% owner, but EquityPlus Financial, Inc. was entitled to 100% of the profits and losses of the LLC. [RSF ¶¶ 10, 13; PAF ¶¶ 139–40].

The legality of CBNV's LLC LPO structure was challenged by the Commissioner of Financial Institutions for the Virginia State Corporation Commission, Bureau of Financial Institutions ("the Bureau"). [RSF ¶ 16; PAF ¶¶ 148–49]. The Bureau objected because it believed the LLCs and the individuals behind them were acting as unlicensed mortgage brokers independent of bank control. [RSF ¶ 16]. As a result, the LPO LLCs were restructured so that their principals became consultants to CBNV and their employees became employees of CBNV. [RSF ¶¶ 16, 18; PAF ¶¶ 149–51, 153].

During the consulting phase, only bank employees performed compensable settlement services on the loans; the consultants did not. [RSF ¶ 18; PAF ¶¶ 162–82, 185]. To the extent the consultants performed any "services" (as contrasted with settlement services), those services had

no connection to individual loans. [RSF ¶¶ 21–26]. Nevertheless, almost all of the settlement fees were kicked back to the consultants, at a rate of over $2 million per month during much of the consulting phase. [RSF ¶ 28 (describing calculation of consultant compensation); PAF ¶¶ 260–65, 267–71, 273, 274 (describing remittance to consultants of over $15 million in the first seven months of 1999)]. Therein lies the core of Plaintiffs' RESPA claims.

B. The Record Permits a Reasonable Jury to Find RESPA Violations.

Explaining the policy underlying RESPA, 12 U.S.C. § 2601 *et seq*., Congress stated, "[i]t is the purpose of [RESPA] to effect certain changes in the settlement process for residential real estate that will result . . . in the elimination of kickbacks and referral fees that tend to increase unnecessarily the costs of certain settlement services. . . ." 12 U.S.C. § 2601(b); *see also Kahrer v. Ameriquest Mortgage Co.*, 418 F. Supp. 2d 748, 751 (W.D. Pa. 2006) ("[I]t appears undisputed that RESPA was enacted, in part, to provide home buyers and sellers with 'more effective advance disclosure' of settlement costs and to eliminate kickback or referral fees….").

In practice, the application of RESPA is straightforward. All payments in exchange for referrals of settlement service business are prohibited, as is splitting a settlement service fee with individuals or entities who did not perform services in connection with a given mortgage loan. In this case, the relationship between CBNV and its consultants and the structure of CBNV's payments to the consultants violated both of these prongs of RESPA.

1. CBNV Violated Section 8(a) of RESPA by Participating in Illegal Referral Agreements and Paying Money in Exchange for Referrals.

Section 8(a) of RESPA provides:

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

12 U.S.C. § 2607(a). In short, "[a] company may not pay any other company or the employees of any other company for the referral of settlement service business." 12 C.F.R. § 1024.14(b). The statute defines "settlement service" as:

> [A]ny service provided in connection with a real estate settlement including, but not limited to, the following: title searches, title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus inspections, services rendered by a real estate agent or broker, the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans), and the handling of the processing, and closing or settlement;

12 U.S.C. § 2602(3). The Consumer Financial Protection Bureau ("CFPB") regulations define a "referral":

> (1) A referral includes any oral or written action directed to a person which has the effect of affirmatively influencing the selection by any person of a provider of a settlement service or business incident to or part of a settlement service when such person will pay for such settlement service or business incident thereto or pay a charge attributable in whole or in part to such settlement service or business.
> (2) A referral also occurs whenever a person paying for a settlement service or business incident thereto is required to use (see § 1024.2, "required use") a particular provider of a settlement service or business incident thereto.

12 C.F.R. § 1024.14(f). The "agreement or understanding" element is further described in the CFPB's regulations:

> An agreement or understanding for the referral of business incident to or part of a settlement service need not be written or verbalized but may be established by a practice, pattern or course of conduct. When a thing of value is received repeatedly and is connected in any way with the volume or value of the business referred, the receipt of the thing of value is evidence that it is made pursuant to an agreement or understanding for the referral of business.

12 C.F.R. § 1024.14(e). A brief review of the arrangement between CBNV and the consultants demonstrates, without a doubt, that CBNV paid the consultants significant sums of money to refer borrowers to CBNV for both their loans and settlement services, primarily the "core" settlement services of origination, processing, and closing. This is a violation of Section 8(a).

CBNV "restructured" its mortgage department in 1998 by acquiring and absorbing all the LPOs that had previously been owned and operated by the LLCs (which were jointly owned by CBNV and the consultants). [RSF ¶¶ 16, 18; PAF ¶¶ 149–51, 153] As part of the acquisition process, the LLCs were terminated and all the employees at each LPO became CBNV employees, with CBNV being responsible for all the operating expenses of each LPO and the operations of each LPO becoming part of CBNV's mortgage loan operation.[10]

Subsequent to the termination of the LLCs, the consultants continued to refer prospective borrowers to CBNV. Pursuant to the consulting agreements between CBNV and the consultants, the consultants were responsible for "[d]irecting all advertising campaigns for the Program, including market research, marketing material design and marketing material distribution." [PAF ¶¶ 256–57] To this end, the consultants, on their own initiative and at their own expense, generated loan leads through direct mail marketing. [PAF ¶¶ 241–43, 246–48, 253–54] In order to put themselves in position to refer prospective borrowers to CBNV, the consultants purchased "pre-screened" lists of individuals who met certain financial criteria (determined by the consultants) and sent those individuals solicitation mail ("flyers") indicating that the recipient was "pre-approved" for a loan. [PAF ¶¶ 241–43, 246, 248–49, 253–54] The flyers listed toll-free numbers that the recipient could call to begin the loan process. [PAF ¶¶ 251, 254] Each toll-free number

[10] PNC argues that consultants "paid the personnel performing the [loan origination] work" and that the employees' work should therefore be "credited" to the consultants for purposes of the RESPA analysis. (PNC Brief, 30–32). All of the evidence—including the evidence cited by PNC—belies PNC's assertion. During the consulting phase, *all* of the LPO workers performing work on mortgage loans were CBNV employees. [RSF ¶ 18; PAF ¶¶ 162–82, 185]. The employees were paid salaries and commissions by CBNV. [RSF ¶ 30]. The consulting agreements all show this unequivocally: "personnel expenses" were accounted for by CBNV as deductions against revenue *before* the consultants received the "net profit" of the LPO. [RSF ¶ 30].

was unique to a particular consultant, with the telephones set up to be answered by a CBNV employee at the LPO with which the consultant was affiliated. [PAF ¶¶ 304, 312].

The consulting agreements provided for monthly payments to the consultants *only* when: (1) a borrower was referred by a consultant's flyer to the CBNV LPO affiliated with that particular consultant, and (2) CBNV closed the loan for the borrower and charged the borrower settlement fees (including, invariably, origination fees). [RSF ¶ 28]; [PAF ¶¶ 251, 259] The size of the monthly payments was tied directly to the volume of fees collected from the referrals, and the consulting agreements even included explicit "volume bonus" provisions. [PAF ¶¶ 264–65].

This evidence, at a minimum, creates a genuine issue of material fact as to whether the payments received by the consultants were "for" the referrals (thus prohibited by RESPA) or were "for" something else (thus potentially not prohibited by RESPA). *See* 12 C.F.R. § 1024.14(e) ("When a thing of value is received repeatedly and is connected in any way with the volume or value of the business referred, the receipt of the thing of value is evidence that it is made pursuant to an agreement or understanding for the referral of business.").

2. The "Safe Harbor" of Section 8(c) Does Not Save PNC.

PNC's only challenge to Plaintiffs' primary RESPA claim is that CBNV permissibly paid the consultants for "services actually performed," consistent with Section 8(c), which states:

> Nothing in this section shall be construed as prohibiting: (1) the payment of a fee… (C) by a lender to its duly appointed agent for services actually performed in the making of a loan, [or] (2) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed.

12 U.S.C. § 2607(c). However, Plaintiffs have compiled record evidence that demonstrates the consultants did not perform *any* services in connection with any individual loan. Accordingly, the Section 8(c) "safe harbor" is not applicable. To the extent the consultants performed any services

that could justify payment under Section 8(c), such services were not tied to any individual loan and, therefore, impacted each loan identically, if at all. The value of these tangential "services" did not bear a reasonable relationship to the compensation received by the consultants. Thus, Section 8(c) does not provide PNC a defense.

a. Consultants Had No Involvement in Loan Transactions.

PNC's claim that the consultants were involved in originating loans is contrary to the representations of both CBNV and David Shumway (one of the consultants) when interfacing (on separate occasions) with the Virginia state regulators. Indeed, CBNV restructured its mortgage department in 1998 specifically to avoid the challenge of Virginia's Commissioner of Financial Institutions, E.J. Face, Jr., who believed the consultants, during the period of time the LLCs were in existence, were engaged in unlicensed mortgage brokering.[11] After the 1998 restructuring, CBNV's CEO sent a letter to the Virginia State Corporation Commission representing that "[t]he loan originators and processors of the limited liability mortgage affiliates are now employees of the Bank and the principals of the limited liability companies (such as EquityPlus Financial, LLC) are now consultants of the Bank." [PAF ¶ 153].[12]

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[11] [RSF ¶¶ 16; PAF ¶¶ 148–49]. Notably, Commissioner Face's interpretation of "mortgage broker" under Virginia law was not limited to individuals who act as a borrower's agent to help match the borrower with a lender, but rather extended to anyone who "solicits and processes mortgage loans made by another person or company. [RSF ¶ 16]

[12] Having represented to the Virginia regulators that, as a result of the 1998 restructuring, all loan-making activity was being performed by CBNV employees, and, as a result, having avoided an enforcement action, CBNV (and hence PNC) should now be judicially estopped from claiming that any loan- related services were performed by the consultants. *G-I Holdings, Inc. v. Reliance Ins. Co.*, 586 F.3d 247, 262 (3d Cir. 2009), *as amended* (Dec. 4, 2009) ("Though there is no rigid test for judicial estoppel, three factors inform a federal court's decision whether to apply it: there must be (1) irreconcilably inconsistent positions; (2) adopted ... in bad faith; and (3) a showing that ... estoppel ... address[es] the harm and ... no lesser sanction [is] sufficient.") (internal quotation marks omitted).

Several years after the 1998 restructuring, while testifying under oath regarding his application for a mortgage broker license from the Commonwealth of Virginia for another, unrelated entity, David Shumway himself completely disclaimed any involvement in the day-to-day operations of the CBNV LPO in the time period after the 1998 restructuring:

> 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]. Shumway also confirmed in his deposition in this case that, after the 1998 restructuring, *every single action* that HUD or the CFPB has ever described as "origination services" was undertaken by CBNV employees only, and not by Shumway or his consulting partner, Randy Bapst. [RSF ¶ 18; PAF ¶¶ 162–182, 186, 258] [13]

b. Section 8(c) Does Not Protect Referral Payments to Individuals Who Perform No Settlement Services in Connection with a Loan Transaction.

PNC's main challenge to Plaintiffs' RESPA claims is that the consulting agreements delineate certain "duties" that the consultants were to perform, and that those activities qualify for the Section 8(c) "safe harbor."[14] PNC Brief, 22–24 (summarizing the "safe harbor" argument).

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[13] In a lengthy exchange during Shumway's deposition, Plaintiffs' counsel took Shumway through a list of actions that HUD identified as "origination services" in an interpretation letter, and subsequently in policy statements. For every single action listed, Shumway testified that during the consulting phase, the action was performed by CBNV personnel. [PAF ¶¶ 162–182, 186]

[14] Section 8(c) does not provide any "exceptions" to the main prohibition against referral agreements. *Culpepper v. Irwin Mortgage Corp.*, 253 F.3d 1324, 1330 (11th Cir. 2001) ("Everything about § 8(c) suggests that it is an interpretive gloss on § 8(a) rather than a list of exemptions bestowed upon otherwise illegal conduct."), *overruled on other grounds by Heimmermann v. First Union Mortgage Corp.*, 305 F.3d 1257 (11th Cir. 2002); *see also Howland*

This argument fails because the "services" referred to in Section 8(b)[15] and 8(c) are not just any "services," but rather services connected to individual loan transactions that provide some benefit to the borrowers or, at the very least, services necessary to move a loan towards closure.

Courts have clarified that when the word "services" appears in RESPA, it must be interpreted to mean *settlement* services:

> Section 8(b) prohibits the charging of a settlement service fee "other than for services actually performed." At issue is the meaning of the term "services." The term on its face applies to any and all services. However, the term must be interpreted in context.
>
> …
>
> The use of the word "services" in the context of the text makes clear that the only services referred to here are *settlement* services. If the word "services" were read to include all services, a settlement service provider would need only to provide a service–of any kind–in order to justify its charging of a fee for settlement service. Congress could not have intended this result.

Cohen v. J.P. Morgan Chase & Co., 608 F. Supp. 2d 330, 344–45 (E.D.N.Y. 2009) (citations omitted); *see also Augenstein v. Coldwell Banker Real Estate LLC*, No. 2:10-CV-191, 2011 WL 3837096, at *3 (S.D. Ohio Aug. 30, 2011) ("RESPA requires a direct connection between the charged fee and a specific settlement service."); *Busby v. JRHBW Realty, Inc. d/b/a RealtySouth*, 642 F. Supp. 2d 1283, 1294 (N.D. Ala. 2009) ("because the services listed by RealtySouth (and regardless of whether they were actually provided) are not settlement-related and/or provide little or no benefit to the borrower, they cannot defeat a § 8(b) no services claim.") (footnote omitted).[16] This same interpretation extends to Section 8(c):

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v. First Am. Title Ins. Co., 672 F.3d 525, 529 (7th Cir. 2012) ("Section 8[c] also, however, enumerates certain conduct or transactions that do not violate the statute.").

[15] By negative implication, Section 8(b) also indicates that a split of a settlement service charge is permissible if it is given in exchange "for services actually performed."

[16] Plaintiffs note that several cases they rely upon have been overruled on other grounds by the Supreme Court's holding in *Freeman v. Quicken Loans*, 132 S.Ct. 2034 (2012). After *Freeman*, RESPA claims for "unearned, undivided" fees are no longer viable, and the *Freeman* holding would now appear to preclude the claims brought in several pre-*Freeman* cases, including *Cohen*,

> Congress did not specifically use the phrase "settlement services" in § 2607(c)(2) when it stated that RESPA does not prohibit payment "for services actually performed." But it would be curious for Congress to use the word "services" in a broader sense than it used with "settlement services." Congress specifically defined "settlement services" as "any service provided in connection with a real estate settlement." 12 U.S.C. § 2602(3). Congress would have vitiated RESPA's purposes by permitting kickbacks as long as the recipient performed any service—even if the service bore no relationship to a real-estate settlement. The Court therefore interprets § 2607(c)(2) as exempting payments "for [settlement] services actually performed."

Henson v. Fid. Nat. Fin. Inc., 18 F. Supp. 3d 1006, 1010–11 (C.D. Cal. 2014).

This reasoning also appears in the CFPB's cogent and persuasive explanation in a recent amicus brief that the "accommodation" of Section 8(c) does not extend to "just any transfer of a thing of value between parties who might refer settlement services to each other," because such an expansive interpretation of Section 8(c) would undermine the primary thrust of RESPA "given the ease with which a party could disguise referral payments by coupling them with the purchase of any asset or service of variable or indeterminate value." Brief for the CFPB as Amicus Curiae at 15–16, *Edwards v. First American Corp.*, 798 F.3d 1172 (9th Cir. 2015);[17] *see also id.* at 16 ("[T]he the safe-harbor provisions provide only that a payment made to purchase goods, services, or facilities will not be deemed to be a payment for a referral. The safe-harbor provisions do *not* permit the parties to such a transaction to enter into a side agreement for the referral of settlement services.") (emphasis in original).

Augenstein, and *Busby*. Nevertheless, those courts' interpretations of the definition of "service" in Section 8(b) & (c)—for which Plaintiffs cite those cases—are still persuasive and consistent with the statute and accompanying regulations. Moreover, Plaintiffs' primary RESPA claim is not affected by the *Freeman* holding because Plaintiffs alleged and can now show that at all relevant times, the settlement fees collected by CBNV from borrowers were indeed split between CBNV and others: between CBNV, EquityPlus LLC, and EquityPlus Financial, Inc. at "Phase One," and between CBNV and each of the consultants affiliated with the CBNV LPOs originating second mortgages during "Phase Two."

[17] *See* http://files.consumerfinance.gov/f/201310_cfpb_amicus-brief_edvsfirstamericancorp.pdf.

RESPA itself lists examples of "settlement services." 12 U.S.C. § 2602(3). From this list, PNC argues the consultants performed "origination services." *See* PNC Br. at 27 ("EquityPlus performed not only loan origination services, but also provided numerous other goods, services and facilities."). However, as the testimony of David Shumway demonstrates, the work performed by the consultants bears no resemblance to the actions involved in the origination of a mortgage loan. [RSF ¶¶ 18; PAF ¶¶ 162–182, 186].

In a policy statement issued in 1999 by HUD (which implemented RESPA before the Dodd-Frank Act transferred that duty to the CFPB), the agency provided several examples of the types of services that are normally performed in the origination of a loan:

(a) Taking information from the borrower and filling out the application;
(b) Analyzing the prospective borrower's income and debt and pre-qualifying the prospective borrower to determine the maximum mortgage that the prospective borrower can afford;
(c) Educating the prospective borrower in the home buying and financing process, advising the borrower about the different types of loan products available, and demonstrating how closing costs and monthly payments could vary under each product;
(d) Collecting financial information (tax returns, bank statements) and other related documents that are part of the application process;
(e) Initiating/ordering VOEs (verifications of employment) and VODs (verifications of deposit);
(f) Initiating/ordering requests for mortgage and other loan verifications;
(g) Initiating/ordering appraisals;
(h) Initiating/ordering inspections or engineering reports;
(i) Providing disclosures (truth in lending, good faith estimate, others) to the borrower;
(j) Assisting the borrower in understanding and clearing credit problems;
(k) Maintaining regular contact with the borrower, realtors, lender, between application and closing to appraise them of the status of the application and gather any additional information as needed;
(l) Ordering legal documents;
(m) Determining whether the property was located in a flood zone or ordering such service; and
(n) Participating in the loan closing.

HUD, Statement of Policy 1999-1, "Regarding Lender Payments to Mortgage Brokers," 64 Fed. Reg. 10080-01 at 10085, 1999 WL 97404 (1999). Shumway testified that, after the 1998 restructuring, the actions identified above as "origination" services by HUD were all performed by CBNV employees, and not by himself or Randy Bapst. [RSF ¶ 18; PAF ¶¶ 162–182, 186].

The record is clear that the consultants had no involvement in individual loan transactions. PNC's justification for the kickback of settlement services fees to the consultants relies on generalized, amorphous activities surrounding CBNV's mortgage "operation" (hence, the "store manager" analogy). The "store manager services" supposedly provided by the consultants had nothing to do with individual loan transactions. As noted in *Cohen*, it does not suffice for a defendant to argue—as PNC does here— that settlement fees were used to pay for broad types of background work or the overhead attendant to being in the mortgage business:

> Defendant argues that the salability of loans on the secondary mortgage market is a crucial method of freeing up capital for banks to make additional mortgage offerings to borrowers. Therefore, defendant reasons, post-closing review "benefits" borrowers. ... However, this analysis could just as well encompass any 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. These overhead expenditures also "benefit" borrowers by ensuring that the infrastructure is in place for extending loans. However, this broadly understood benefit does not bear a direct relationship to the loan in the manner required of settlement services.

Cohen, 608 F. Supp. 2d at 348 n.11; *see also Busby*, 642 F. Supp. 2d at 1299 (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.").[18]

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[18] Tellingly, PNC did not cite to a single analogous case to support its position. The three cases it cited are distinguishable because they present sharp contrasts with the facts of this case. *See Clauss v. Integrated Real Estate Processing, Inc.*, 436 F. App'x 25, 26–28 (2d Cir. 2011) (finding no RESPA claim where appraisal management company retained $25 portion of appraisal fee, but

PNC also claims that it was a "service" for the consultants to assume the risk that loans would not be sold on the secondary market. First, there is record evidence that directly contradicts the assertion that the consultants assumed this risk. The consulting agreements show that losses associated with the failure to sell a loan were deducted from the gross revenue of the LPO *before* the "net profit" was paid to the consultant. [RSF ¶ 31] Thus, the amount that was actually kicked back to the consultant was free and clear of any further repurchase risk. Second, even if there is a factual dispute on this point, it is not a *material* factual dispute because an assignment of risk between two parties is neither a good, facility, nor service, let alone a settlement service performed in connection with a mortgage loan transaction.

c. The "Safe Harbor" of Section 8(c) is Not Available to PNC Given the Structure of the Payments Between CBNV and the Consultants.

The Ninth Circuit recently addressed a very similar fact pattern pertaining to Section 8(c). In *Edwards v. First American Corp.*, the plaintiff alleged that the defendant, a title insurance company, paid title agencies a lump sum of cash in exchange for a minority ownership interest in the title agencies and the title agencies' agreement to refer future title insurance business to the

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performed services in connection with the loan including identifying an appraiser, ordering the report, and delivering the report back to the lender and borrower); *Sosa v. Chase Manhattan Mortgage Corp.*, 348 F.3d 979, 984 (11th Cir. 2003) (noting that it was undisputed "that the charges were paid to Chase and that Chase arranged to have items delivered to complete the closing. Through its agents, therefore, Chase performed the deliveries that were the subject of the charges."); *Kiley v. NRT Title Agency, LLC*, No. 09-3549, 2010 WL 2541627, at *5–6 (D.N.J. June 17, 2010) (finding no RESPA violation where court determined from the exhibits attached to the pleadings that settlement agent "effectuated the recording and covered the accompanying fees," "prepared other mortgage documents," and "performed other services" in connection with the plaintiff's loan). In all of these cases, the courts identified actual, loan-specific services performed by the recipient of the settlement fees. Here, the consultants did not do any work on individual loans, did not perform any work through "agents," and did not even arrange for third parties to perform settlement services; CBNV employees performed 100% of the loan origination services. [PAF ¶¶ 162–182, 186].

defendant. 798 F.3d 1172, 1176 (9th Cir. 2015). The defendant argued it was covered by the RESPA safe harbor because it was not merely paying for referrals, but also for the ownership interest in the title agencies. The court found that the transfer in ownership interest did not constitute goods, facilities, or services for purposes of RESPA. *Id.* at 1180. The defendant also argued that the transactions included acquisitions of certain specific facilities, including buildings, and thus qualified for the safe harbor on that basis. Again, the court dismissed the argument, concluding that the purchase of title agency ownership interests—which are not goods, services, or facilities—precluded defendant from relying upon the safe harbor of Section 8(c)(2). Applying *Edwards* to the facts of this case, CBNV's kickbacks to the consultants cannot qualify for the safe harbor because the portions of the kickback given in exchange for the consultant's referrals were indistinguishable from the portions of the payments that PNC argues were bona fide compensation in exchange for goods, facilities, or services.

Even if this Court does not adopt the reasoning of *Edwards*, the structure of the payments between CBNV and the consultants precludes any claim that the consultants were paid bona fide compensation in exchange for services, goods, or facilities. Pursuant to the explicit language of the consulting agreements, the consultants' compensation depended exclusively on the *volume of fees* CBNV collected from borrowers who had been referred by the consultants.[19] Hence, if there was no referral of prospective borrowers, the consultants would receive no compensation

[19] The compensation for all of the consultants was simply the "net profit" of the particular CBNV LPO affiliated with the consultant. [RSF ¶¶ 27–28, 33]. The "net profit" calculations for the LPO affiliated with each consultant were the same: *Gross income* included origination fees, discount points, other lender fees, volume bonuses, interest on loans held for sale, and investor premiums; *Deductions* included investor discounts on sold loans, investor fees, the funding fees that CBNV kept for itself, expenses (personnel, general & administrative, and "other" (including the costs associated with repurchased loans, which PNC claims was borne by the consultants)). [RSF ¶¶ 27–28, 33].

whatsoever, regardless of what goods, services, or facilities the consultants ostensibly provided. This fact completely contradicts any suggestion that CBNV's kickbacks to the consultants were bona fide compensation paid in exchange for any goods, services, or facilities.

Notably missing from each and every consulting agreement is any provision for the payment by CBNV to the consultant in exchange for any distinct good, service, or facility. To the extent the consultants were required to provide CBNV anything, it was "*at no expense*" under the express terms of the consulting agreements. [RSF ¶ 25][20]

d. Even if Section 8(c) Applies, the Payments Received by the Consultants Bore No Reasonable Relationship to the Value of the Consultants' Contributions.

Summary judgment is not warranted 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.

Where it is unclear whether a recipient of settlement fees provided bona fide services, goods, or facilities in exchange for the fees, the CFPB has set forth a "reasonable relationship" test to determine whether such payments reflect illegal referral fees or fee split arrangements:

> The Bureau may investigate high prices to see if they are the result of a referral fee or a split of a fee. If the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods actually performed or provided. These facts may be used as evidence of a violation of section 8 …. The value of a referral (i.e., the value of any additional business obtained thereby) is not to be taken into account in determining whether the payment exceeds the reasonable value of such goods, facilities or services.

[20] The consulting agreements also did not provide for any distinct payment to the consultants in exchange for recruiting, hiring, training, or supervising CBNV's loan originators and processors, all of which PNC relies on for its safe harbor argument. Instead, the agreements unambiguously give complete control over hiring to CBNV alone. [RSF ¶ 24]

12 C.F.R. § 1024.14(g)(2); *see O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 739 (5th Cir. 2003) ("This test was promulgated [to] ferret[] out kickbacks disguised as legitimate payments for goods and services in complex real estate settlement transactions.").

Here, there is, at a minimum, a genuine issue of material fact as to whether the massive kickbacks paid to the consultants bore a reasonable relationship to the value of the services PNC argues were provided by the consultants.[21] CBNV's income statements show that the consultants received a significantly larger portion of the borrowers' origination fees than CBNV, which did everything HUD and the CFPB have identified as "origination" work.[22] From that evidence, a reasonable jury could conclude that most, or all, of the compensation paid to the consultants was not for goods, facilities, or services, but was in fact payment made for the consultants' referring borrowers to CBNV, in violation of RESPA. Plaintiffs can prove this on a class-wide basis.[23]

3. CBNV Violated Section 8(b) of RESPA.

The record evidence also shows that CBNV violated Section 8(b) of RESPA during the consulting phase. Section 8(b) states, in its entirety:

> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

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[21] CBNV kicked back massive sums of money to the consultants, at an average rate of more than $2 million per month during much of the consulting phase. [PAF ¶¶ 269–70, 273–74 (describing remittance to consultants of over $15 million in the first seven months of 1999)]. During that timeframe, the consultants were referring borrowers to CBNV, and borrowers were paying CBNV large settlement charges, like the origination fees of $3,832, $3,500, and $2,640 paid by class representatives the Picards, Sabos, and Kesslers, respectively. [Kessler 0002884, PNC App. Tab 30 (Picard HUD-1); Kessler 0003214, PNC App. Tab 31 (Sabo HUD-1); Kessler 0001090, PNC App. Tab 27 (Kessler HUD-1)]

[22] [PAF ¶¶ 269–70, 273–74 (showing that most of the money generated was remitted)]

[23] *See* Pls.' Mem. in Opp.to PNC Mot. to Decertify, at p.7.

12 U.S.C. § 2607(b). During the consulting phase, CBNV split the settlement charges with the consultants by paying the consultants the "net profit" of the CBNV LPOs, which was comprised of any of the remaining origination and other fees after CBNV had taken out a small funding fee and any direct and indirect expenses incurred in connection with the loan. [RSF ¶¶ 27–28 (describing "net profit" calculation); PAF ¶¶ 269–70, 273–74 (showing that most of the money generated was remitted)] For the same reasons that the "safe harbor" does not apply to the payments CBNV made to the consultants, the portions of settlement fees given by CBNV to the consultants were not "for services actually performed" in connection with any mortgage loan transaction. *See* Sections I.B (1)–(4), *supra.*

4. CBNV Violated RESPA with Respect to the ABA Disclosure Subclass.

Defendant argues that Plaintiffs' claims for the RESPA ABA Disclosure Subclass fail because: (1) there is no automatic liability when an affiliated business arrangement ("ABA") does not meet the prerequisites for exemption under Section 8(c)(4); and (2) Plaintiffs have not directly alleged a violation of Section 8(a) or 8(b). PNC's Br. at 9.

Defendant's argument misses the mark. Multiple courts have recognized that, given the definitional structure of an ABA, any ABA that does not meet the requirements for Section 8(c)(4) exemption results in an automatic violation of the kickback prohibitions. Accordingly, failure to comply with the requirements of Section 8(c)(4) is a *per se* violation of Section 8. Additionally, notwithstanding whether the failure to meet the Section 8(c)(4) exemption requirements constitutes an automatic violation, Plaintiffs have, in fact, adequately alleged that CBNV violated Section 8(a), and there is at least a genuine issue of material fact regarding CBNV's payment of a thing of value in exchange for the referral of settlement service business.

From May 1998 through October 1998, EquityPlus Financial, LLC, owned in part by CBNV, originated loans that did not comply with Section 8(c)(4)'s prerequisites for exemption because CBNV failed to disclose its relationship with Equity Plus Financial, Inc. and EquityPlus Financial, LLC in accordance with Section 8(c)(4)(A). [Compl. ¶ 69].[24] This is an automatic violation of Section 8(a) or, at least, creates a genuine issue of material fact as to whether CBNV was referred settlement service business in exchange for a thing of value.

a. The Failure to Comply with RESPA's Exemption for ABAs Results in an Automatic Violation of RESPA's Anti-Kickback Provision.

Defendant argues the RESPA ABA claims fail because "[t]he language and structure of Section 8 of RESPA demonstrate that Section 8(c)(4) . . . does not create a cause of action." PNC Brief at 9. Defendant's interpretation is misguided and incorrect. ABAs, by their very nature, result in kickbacks every time there is a referral of settlement service business between the affiliated entities. In recognition of this fact, Section 8(c)(4) provides a limited exemption for ABAs, so long as certain prerequisites are met. Failure to meet these prerequisites, by definition, results in a non-exempt ABA that violates RESPA's anti-kickback mandate. Defendant's argument that Plaintiffs have failed to plead such a kickback ignores the inherent structure of an ABA and at best elevates form over substance and stretches the pleading standard of Fed. R. Civ. P. 8 well beyond its borders.

One of the main purposes of RESPA is "the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." *Id.* at § 2601(b). Recognizing that harm to consumers can result when affiliates refer each other business in

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[24] Citation to "Compl. ¶____" refers to paragraphs of Plaintiffs' Joint Consolidated Amended Class Action Complaint (ECF No. 507) filed on October 4, 2011.

exchange for the benefit of increasing the profits of a commonly owned entity, Congress amended RESPA to exempt ABAs "only in very limited circumstances." *Kahrer*, 418 F.Supp.2d at 754-55. In adding this narrow exemption, Congress considered that in an ABA:

> [T]he advice of the person making the referral may lose its impartiality and may not be based on his professional evaluation of the quality of service provided if the referrer or his associates have a financial interest in the company being recommended. In addition, since the real estate industry is structured so that settlement service providers do not compete for a consumer's business directly, but almost exclusively rely on referrals from real estate brokers, lenders or their associates for their business, the growth of controlled business arrangements [now referred to as ABAs] effectively reduce the kind of healthy competition generated by independent settlement service providers.

Id. at 754 (quoting H.R. Rep. No. 97-532, 97th Cong., 2nd Sess. at 52 (1982)). Consequently, courts have recognized that ABAs can "result in harm to consumers beyond an increase in settlement charges as had been the concern when RESPA was first enacted." *Kahrer*, 418 F. Supp. 2d at 754 (internal citation omitted).

Numerous courts have held that failure to meet the requirements of Section 8(c)(4) is a *per se* violation of Section 8. For instance, in *Pettrey v. Enterprise Title Agency, Inc.*, a putative class of homeowners alleged that defendants created joint ventures or partnerships that "allowed real estate agents to earn referral fees under the guise of a return on investment." 241 F.R.D. 268, 270 (N.D. Ohio 2006). In analyzing whether an ABA violates Section 8 if the requirements of Section 8(c)(4)(A) are not met, the court explained:

> Section 8(a) and 8(b) prohibit certain conduct, while Section 8(c) provides for safe harbors. The safe harbor of Section 8(c)(4), which provides for ABAs, is necessary precisely because ABAs are by their nature likely to fall under the sweeping language of Sections 8(a) and 8(b). Even allowable ABAs are arrangements whereby business is referred to a provider of settlement services and the referring party receives income from the provider. It follows that a purported ABA that fails to meet the statutory requirements for an ABA violates Section 8. This conclusion is supported by Section 8(d)(3), which provides that "no person or persons shall be liable for a violation of the provisions of subsection (c)(4)(A)" regarding disclosure of the ABA relationship if certain requirements are met. The converse is that the

> statutory ABA requirements can be "violated" such that a person is "liable." HUD regulations are to the same effect. They explain that "[an ABA] is not a violation of Section 8 of RESPA" only if the ABA requirements are met. 24 C.F.R. § 3500.15(b). [25]

Id. at 275-76 (citations omitted).

Similarly, in *Bollinger v. First Multiple Listing Service, Inc.*, a putative class action of buyers and sellers alleged, *inter alia*, that a listing service and brokers and agents violated RESPA by operating an undisclosed ABA in violation of Section 8(c)(4). 838 F. Supp. 2d 1340 (N.D. Ga. 2012). In moving to dismiss the claim under Section 8(c)(4), the defendants contended that "Section 8(c)(4) does not provide an independent cause of action for non-disclosure of ABAs." *Id*. at 1353. The court disagreed, explaining:

> Section 8(c)(4) provides an independent basis for liability under RESPA. . . . Section 8(d)(3) supports this conclusion, as this provision immunizes certain 'violations' of Section 8(c)(4) from 'liability,' thus suggesting that other 'violations' do lead to 'liability' under RESPA. Section 8(d)(3) specifically states, 'No person or persons shall be liable for violation of the provisions of subsection (c)(4)(A) of this section if such person or persons proves by a preponderance of the evidence that such violation was not intentional and resulted from a bona fide error…" 12 U.S.C. § 2607(d)(3). The converse of this provision seems to be that where a violation of § 8(c)(4) is intentional or not resulting from error, it will lead to liability under RESPA.
>
> The HUD regulations also reinforce the Court's conclusion that an ABA's failure to comply with the requirements of Section 8(c)(4) is actionable under RESPA. According to the regulations promulgated under RESPA, '[a]n affiliated business arrangement is not a violation of section 8 of RESPA . . . if the conditions set forth in this section are satisfied.' 24 C.F.R. § 3500.15. Again, the converse of this provision is that an ABA that does not satisfy the criteria of Section 8(c)(4) is a violation of RESPA.

Id. at 1354; s*ee also Minter v. Wells Fargo Bank*, 274 F.R.D. 525, 538 (D. Md. 2011) ("ABAs avoid RESPA liability only if they satisfy the requirements of Section 8(c)(4); otherwise, they

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[25] *See* 12 C.F.R. § 1024.15(b) ("An [ABA] ***is not a violation of section 8 of RESPA*** . . . and of § 1024.14 ***if the conditions*** set forth in this section are satisfied.") (emphasis added).

violate the statute."); *Robinson v. Fountainhead Title Group Corp.*, 252 F.R.D. 275, 287 (D. Md. 2008) ("[A]n ABA must comply with the enumerated conditions of the section 8(c)(4) exception and the HUD 10-factor test in order to avoid a RESPA violation."); *Kahrer*, 418 F. Supp. 2d at 754 n.8 ("The **prerequisites** for controlled business arrangements . . . are set forth in [Section 8 (c)(4)].") (emphasis added); *Gardner v. First Am. Title Ins. Co.*, 296 F. Supp. 2d 1011, 1017 (D. Minn. 2003) ("the failure . . . to meet any one of the [ABA] requirements is sufficient to establish a RESPA violation, so long as no other exception is met").[26]

c. Regardless of Whether the Failure to Fulfill the Prerequisites of Section 8(c)(4) Results in a *Per Se* Violation, Plaintiffs Have Adequately Alleged, and a Jury Could Reasonably Find, a Violation of Section 8(a)

Despite Defendant's contention to the contrary, Plaintiffs have alleged an underlying violation of Section 8(a). The initial ABA structure utilizing the LLCs was in place for approximately five months from May 1998 through October 1998. [RSF ¶¶ 10, 17; PAF ¶¶ 135–142, 161–62]. During that period, Plaintiffs alleged that the LLCs originated loans that violated RESPA's ABA exemption because: (a) the relationship among CBNV, the consultants, and the LLCs was not disclosed; (b) borrowers were required to use the settlement services being provided by the ABAs; and (c) a thing of value was provided pursuant to the arrangement other than a return on ownership interest. [Compl. ¶ 69]. These allegations are sufficient to put PNC on notice of

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[26] The cases Defendant relies upon are inapposite. In *McCullough v. Howard Hanna Co.*, 2010 WL 1258112, at *3 (N.D. Ohio Mar. 26, 2010), the court relied upon a Proposed Rule that was never adopted or codified. In *Cornelius v. Fidelity National Title Co.*, No. C08–754MJP, 2009 WL 596585 (W.D. Wash Mar. 9, 2009), the court held that plaintiffs had not adequately pled a violation of RESPA because they did not directly allege a kickback. In the case *sub judice*, however, Plaintiffs explicitly alleged the providing of a thing of value pursuant to the arrangement that was other than a return on ownership interest. [Compl. ¶ 69]. Finally, in *Washington v. Nat'l City Mortgage Co.*, 2011 WL 1842836, at *8 (N.D. Cal. May 16, 2011), Plaintiff's Section 8(a) and 8(b) claims were time-barred.

Plaintiffs' Section 8(a) claim. From the record evidence, and from the structure of affiliated business arrangement itself, there is at least a genuine issue of fact regarding the existence of a referral payment being made in exchange for the payment of a thing of value, i.e., the return on investment in the LLCs.[27]

5. PNC Does Not Make Any New Equitable Tolling Argument with Respect to RESPA.

PNC needlessly argues that Plaintiffs' RESPA claims fail on statute of limitations grounds because "the evidence…indisputably demonstrates that EquityPlus performed real and substantial services during the Second Phase on behalf of CBNV[.]" PNC Brief at 34. In essence, PNC is arguing that because Plaintiffs cannot prove that CBNV's disclosure of Section 800 fees on Plaintiffs' HUD-1 settlement statements were inaccurate, Plaintiffs also cannot demonstrate that they are entitled to equitable tolling of their RESPA claims. This argument is entirely duplicative of PNC's summary judgment argument as it is directed to the merits of Plaintiffs' RESPA claims.

In the end, if the Court were to find that CBNV properly disclosed the recipient of the Section 800 fees on Plaintiffs' HUD-1s, *viz.* that EquityPlus performed real and substantial settlement services as an agent of CBNV in exchange for the portion of the fees that it received, then Plaintiffs' RESPA claims would fail before the Court even reached the issue of whether Plaintiffs are entitled to equitable tolling of their RESPA claims. On the other hand, if the Court

[27] Plaintiffs alleged, and the record shows that, during the pendency of the LLC structure described above, the consultants referred mortgage loan business to the LLCs and CBNV, and these mortgage loans were then funded by CBNV with all origination services other than loan funding being provided by the LLCs. [Compl. ¶ 70; RSF ¶¶ 11, 42; PAF ¶¶ 132, 141]. As Plaintiffs have alleged, most of the services were being performed by the LLC, and the majority of the fees for the services were being paid to the LLC. [Compl. ¶ 70; RSF ¶ 13]. By virtue of their ownership of the LLC, the consultants received a thing of value in exchange for their referrals: 100% of the LLC's profits. [RSF ¶ 13]. Defendant's failure to meet the prerequisites for the Section 8(c)(4) exemption leaves the LLC structure exposed as a violation of Section 8(a).

determines that the Section 800 settlement service fees were illegally kicked back to or split with EquityPlus, as Plaintiffs' have alleged, then the "active misleading" element of Plaintiffs' equitable tolling claims would also be satisfied per the Third Circuit's most recent decision in this matter. *See In re CBNV III*, 795 F.3d at 403. Therefore, Plaintiffs' right to equitable tolling of their RESPA claims will invariably rise or fall with the underlying merit of those claims.

IV. PNC IS NOT ENTITLED TO SUMMARY JUDGMENT AS TO PLAINTIFFS' TILA/HOEPA APR DISCLOSURE CLAIM

A. Overview

As PNC acknowledges, Plaintiffs' core TILA and HOEPA claims are quite simple. TILA and HOEPA require that certain disclosures be made to a borrower including the loan's annual percentage rate ("APR"). The APR calculation depends upon categorizing the totality of the borrowing as being within either the Amount Financed or the Finance Charge. Certain title related charges can be excluded from the Finance Charge and therefore included in the Amount Financed if they are bona fide and reasonable. The Class Members were charged for an abstract or title search at line 1102 of their HUD-1 Settlement Statement and for a title examination at line 1103 of the HUD-1 when in fact no such services were provided. Accordingly, those charges are neither bona fide nor reasonable. The exclusion of those amounts from the Finance Charge was therefore improper and resulted in inaccurate APR disclosures to the Class in violation of TILA and HOEPA.

PNC claims that new testimony[28] from three title companies acting as the settlement agents for a portion of the subject loans about settlement tasks they purportedly performed establishes as to the entire Class that the line 1102 abstract or title search charges and the line 1103 title

[28] The testimony is not new. [PAF ¶ 297]

examination charges were bona fide.[29] PNC claims that this evidence "destroys" Plaintiffs' TILA and HOEPA APR disclosure claims. In truth, the only thing destroyed is PNC's credibility.

The described tasks, even if actually performed, are not properly charged for at line 1102 or line 1103 as they do not constitute the performance of an abstract or title search (1102) or a title examination (1103). Rather, they are tasks a settlement agent may provide in connection with the performance of their general settlement or closing functions to be itemized on the HUD-1 at line 1101 as a "settlement or closing fee." Thus, even if PNC's version of the facts were undisputed its arguments fail. The testimony PNC relies on, however, is very much disputed. The assertion that all these tasks were performed is refuted as there is no evidence of those efforts in the loan files but those files do, on the other hand, supply affirmative evidence that the claimed work was not done. At best PNC's contentions devolve into disputed fact questions and it utterly fails to establish a right to summary judgment on the TILA/HOEPA APR disclosure claims.

B. Discussion

1. The Line 1102 and Line 1103 Charges Are Not Bona Fide

To understand why PNC's arguments fail, it is important to understand the purpose of a HUD-1 settlement statement. Congress enacted RESPA in 1974 to protect homebuyers from abusive practices. One way it sought to achieve that goal was to provide consumers more information and this included mandating the use of the HUD-1 settlement statement identifying settlement charges on a standardized form. *Schuetz v. Banc One Mortgage Corporation*, 292 F.3d 1004, 1008 (9th Cir. 2002); *see also* 12 U.S.C. § 2603; 24 C.F.R. § 3500.8 (use of the HUD-1 is

[29] The three companies, Title America, Paramount Title and Home Title, served as the settlement agents on CBNV loans as expressly indicated on the HUD-1's. PNC never acknowledges this fact but repeatedly refers to them only as "the title company/companies" apparently hoping that repetition of the terms "title company" somehow helps their cause.

required in all federally related mortgage loans). Because the HUD-1 must clearly itemize all charges imposed upon a borrower, 12 U.S.C. § 2603(a), as well as all charges paid by the borrower, 24 C.F.R. § 3500.8(b)(1), it serves essentially as the receipt of the real estate transaction listing all fees charged and the disbursement of all monies.

Line 1102 of the HUD-1 is a preprinted line item to list charges for an "abstract or title search." An abstract search consists of a research exercise where the abstractor examines deed records to establish a "chain of title" for a particular parcel of land as of a particular date. [PAF ¶ 298] Included in an abstract search is the task of reviewing conveyances throughout time going into the last deed to the borrower, the legal description of the land, tax status, liens against the property, restrictive covenants, easements and survey exceptions. *Id*. The abstractor compiles abbreviated notes (the abstracts) of the instruments referenced in the Abstract of Title. *Id*. This process of going back in time well past the last deed into the borrower is called a "full duration title search." *Id*. A "title search" is the same process as an abstract search; the terminology difference simply reflects what the process is called in different jurisdictions. [PAF ¶ 299]

Line 1103 of the HUD-1 is a preprinted line item to account for a title examination charge. A title examination is essentially the same service as an abstract or title search. [PAF ¶ 300] In some jurisdictions, however, someone separate from the party compiling the abstract or title search will then review those items and from that "examination" will give an opinion of title. *Id*. The purpose of full duration title searches, whether described as an abstract or title search or a title examination, is to determine if the seller in fact has good, clear marketable title. [PAF ¶ 301] Such

full duration searches are almost always done in connection with the issuance of a title insurance policy. [PAF ¶ 301] [30]

The loans at issue in this case are second mortgage loans and mostly what are known as "125s" because the total value of the first and second mortgage exceed the appraised value of the borrower's home (up to 125%). [PAF ¶ 305] As such, CBNV and the investors purchasing the loans from CBNV were not focused on the right to foreclose to be made whole in the event of a default given that their loan was subordinate to the first mortgage and there was not enough value in the home to cover fully the second mortgage. Instead, their underwriting focus was on whether they thought the borrower had the ability to make the loan payment each month. Therefore, CBNV's primary investors, Residential Funding Company ("RFC") and Irwin Union Bank & Trust ("Irwin"), simply imposed the requirement that CBNV confirm that the loan did in fact occupy a second mortgage lien position for loans under $100,000. [31] [PAF ¶¶ 307-08] To effectuate this requirement, CBNV, through the settlement agents, relied on what is generally known as an ownership and encumbrance report and which were referred to in this case as a "property report." [PAF ¶ 309] This property report is a fast, cheap and easy snapshot of documents found in the land records as of a given date. [PAF ¶ 310] The property reports evidence that there is a recorded deed,

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[30] Premium Title and Escrow, Mr. Soto's current title company [PAF ¶302] provides a glossary on its website that includes the following definitions which corroborate Mr. Dodson's views:

> **Abstract (of title)** – A history of all transactions shown in the public records affecting a particular tract of land.
>
> **Chain of title** – The history of successive ownership and transfer in the title to a tract of land.
>
> **Examination** – The study of the instruments and muniments to a chain of title in order to reach a conclusion as to the status of the title.
>
> **Title search** – A review of all recorded documents in the land records relating to a particular piece of real property to determine the present condition of title.

PAF ¶ 303. Mr. Soto confirmed that these definitions appeared on his website and that he considered them accurate. [PAF ¶ 304].

[31] Of the 26,699 loans, RFC purchased some 86% of them and Irwin purchased 12 %. [PAF ¶ 306].

a first mortgage, whether any tax or judgment liens exist and a legal description of the property. [PAF ¶ 311] Importantly, a property report is not a true abstract or title search. *Dayton Bar Association v. Lender's Service, Inc*. 532 N.E.2d 120, 123 (Ohio 1988) ("property report is not even a true abstract as it does not attempt to trace the chain of title back to a 'root' transaction of forty years or more prior to the search");[32] *see also* [PAF ¶ 312]. Indeed, the property reports obtained from General American Corporation, the vendor most commonly used for the subject loans, include an express disclaimer stating that it is not an opinion of title, title guarantee or title insurance. [PAF ¶ 313] Because a property report is not a true abstract or title search, it cannot be charged for at line 1102; rather, the vendor charge for that limited report should be accounted for elsewhere in a HUD-1's section 1100, specifically at one of the open line items at the bottom of that section. [PAF ¶ 314]

Again, Plaintiffs' core TILA and HOEPA claim is very basic. TILA and HOEPA mandate that the borrower be provided an accurate statement of the loan's APR. 15 U.S.C. §§1638 and 1639. The APR calculation is a function of factors that include the Amount Financed and the Finance Charge. Title charges such as the line 1102 abstract or title search and line 1103 title examination can be excluded from the Finance Charge but only if they are bona fide and reasonable. 12 C.F.R. § 226.4(c)(7). If CBNV improperly did so, then the APR was miscalculated (understated) and the disclosure of that incorrect APR is a violation of TILA and HOEPA.

The central question then is whether the abstract or title search (line 1102) and title examination (line 1103) charges were bona fide and reasonable. A bona fide charge is one that is

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[32] *Lender's Service* is particularly instructional. In the course of determining that providing a property report like the ones at issue is not the practice of law, the Ohio Supreme Court explains what is involved in an abstract search and title examination and those explanations mirror those of Mr. Dodson and, accordingly, further validate Plaintiffs' TILA and HOEPA claims. *Lender's Service*, 532 N.E.2d at 123.

genuine and accurately represents that the service identified on the HUD-1 line item was in fact provided. *Brannam v. Huntington Mortg. Co*., 287 F.3d 601, 606 (6th Cir. 2002) (bona fide inquiry focuses on whether services related to the charge were in fact provided); *accord Capparelli v. AmeriFirst Home Improv. Fin. Co.*, 535 F.Supp.2d 554, 562 (E.D.N.C. 2008). It is a charge that is without deception or fraud. *Inge v. Rock Fin. Corp.*, 388 F.3d 930, 939 (6th Cir. 2004).

Plaintiffs' expert William Dodson performed a review of the Class Representatives' loans and 1190 randomly sample loans.[33] [PAF ¶ 315] He determined that the line 1102 charge for all Class Representatives were not bona fide. [PAF ¶ 316] For all of the randomly selected loans that had a line 1102 charge (1167 of the 1190), that charge was not bona fide as to 95.8% of those loans. [PAF ¶ 317] Regarding the line 1103 title examination charge, each Class Representative

[33] Plaintiffs have approached the establishment of class wide proof and liability through the use of random sampling. This is consistent with the directive of the Court, August 28, 2013 Status Conference Tr. 29:1-4, and an accepted method of proof in class cases and otherwise, including cases involving great numbers of mortgage loans. *See e.g. Tyson Foods v. Bouaphakeo*, __ U.S. ___, 136 S.Ct. 1036, 1046 (2016); *Assured Guaranty Municipal Corp v. Flagstar Bank FSB*, 920 F.Supp.2d 475, 513 (S.D.N.Y. 2013). Plaintiffs randomly sampled loans from the entirety of the 26,699 loans at issue to provide as to each subclass a sample size with a 95% confidence interval with ± 5% error, the standard measure for a high level of confidence. [PAF ¶ 345] Plaintiffs oversampled each subclass to account for missing loan files or incomplete loan file data. [PAF ¶ 346] From this work, some 1190 randomly selected loan files collectively from subclasses 3 and 4 (the TILA/HOEPA subclasses which together comprise the entire Class) were reviewed by Mr. Dodson, Plaintiffs' settlement agent and title search/examination expert. [PAF ¶ 315]

A liability finding as to the TILA/HOEPA APR disclosure claim does not end with a determination that a line 1102 or 1103 fee is not bona fide. There must also be a determination that the recalculation of the APR, after including those charges in Finance Charge, results in a material misstatement of the APR. Plaintiffs employed CPA Hasbrouck Haynes as an expert to perform those calculations based on Mr. Dodson's findings. [PAF ¶ 347] Mr. Haynes concluded that based on Mr. Dodson's opinion as to lines 1102 and 1103, 93.07% of the Class received a materially understated APR disclosure in violation of TILA. [PAF ¶ 348] Some 92.31% received a materially understated APR disclosure in violation of HOEPA. [PAF ¶ 348]

The findings of Mr. Dodson and Mr. Haynes can be extrapolated to the entire Class. [PAF ¶ 349]

had a line 1103 charge and 96% of the randomly sampled loans had that charge and none of them in fact received a title examination. [PAF ¶ 318]. And most certainly, the review of the ownership and encumbrance report is not a title examination. [PAF ¶ 319] Accordingly, for all such Class members, the title examination charge is not bona fide. [PAF ¶ 318] In each instance where the line 1102 or 1103 charge is not bona fide, that charge is also not reasonable. [PAF ¶ 320] [34]

2. PNC's Attempt to Cast Routine Settlement or Closing Services as an Abstract or Title Search, or Title Examination, Is Unavailing

Significantly, PNC's summary judgment motion does not dispute Mr. Dodson's explanation of what is encompassed and properly charged for when performing a true abstract or title search, or title examination. Neither does PNC directly take on his opinions that the 1102 and 1103 charges were not bona fide nor contend that in fact full duration title searches were performed. PNC also does not attempt to argue that a property report is a true abstract or title search. They don't do any of this because they have no facts to support any such arguments, but more fundamentally they know that, at best, any such contentions would involve competing expert opinions making summary judgment inappropriate. *SightSound.Com Inc., v. N2K, Inc*., 391 F.Supp.2d 321, 354 (W.D. Pa. 2003) (conflicting factual issues particularly where conflicts arise from competing expert opinions preclude summary judgment); *accord Phillips v. Cohen,* 400 F.3d 388, 399 (6th Cir. 2005) (reversing summary judgment where magistrate judge engaged in improper fact finding in weighing credibility of competing experts and noting that competing experts present the classic "battle of the experts" as to which the jury must evaluate and weigh

[34] PNC mistakenly contends that Plaintiffs waived the right to also contest the reasonableness of the line 1102 and 1103 charges. First, to be clear, Plaintiffs need only prove one or the other of these requirements to prevail. Plaintiffs have focused on the bona fide issue but Plaintiffs never waived or abandoned any right to also address reasonableness. To that end, the opinion of Mr. Dodson that the line 1102 and 1103 are not reasonable is very basic; no charge is reasonable when the charge is not bona fide.

credibility). Instead, PNC argues that work performed by three title companies serving as the settlement agent for some of the class loans – ordering the property reports and searching for tax and judgment liens, bankruptcies and unreleased prior mortgages – make the line 1102 charges bona fide. PNC makes repetitive arguments as to the line 1103 charge, contending that the same efforts plus undertaking follow up to address liens and other alleged issues somehow constitute a legitimate title examination and make the line 1103 charges bona fide.

The fundamental failure of PNC's argument is multifaceted. First, the proffered settlement agent testimony and PNC's related argument miss the mark. Even if the described tasks had been performed, the purported efforts do not constitute the performance of a true abstract or title search, or title examination. [PAF ¶¶ 12, 314, 316-19, 321-23] Rather the described work is simply part of the overall settlement or closing services that a settlement agent would perform, to be listed and charged for as a "settlement or closing fee" at line 1101 of the HUD-1. [PAF ¶¶ 321-23] Secondly, the factual claim that such work was done is wholly belied by the objective and specific loan file evidence.

Preliminarily, however, PNC's arguments fail for more fundamental reasons. There are eight primary settlement agents with respect to the entirety of the class loans at issue. [PAF ¶¶ 288-89, 326] PNC offers testimony from only three, which closed only 58% of the Class loans. [PAF ¶ 327] Conversely, PNC offers *no evidence* as to 42 % of the Class. Yet based on this patently incomplete evidence, PNC asks for summary judgment as to every one of the 26,999 loans in the Class. Ultimately this ruse does not matter because of the overall failings of PNC's arguments, but PNC's attempted slight-of-hand should be noted.

PNC's evidence is infirm for another reason. The described tasks, researching judgment and tax liens, unreleased mortgages and bankruptcies, are testified to generically. None of the

settlement agents tie any such purported work to a particular Class Representative loan, nor do they testify that such work was universal and class wide, and logically it could not have been. Not every borrower, for example, would have had a tax or judgment lien (in fact, the loan files indicate that none did). As such, the proffered evidence is patently inapplicable to resolve Class claims.

Lastly, as noted, PNC foists up the same purported tasks to support both the line 1102 and line 1103 charges. In doing so, they admit to illegal duplicative charges which are, per se, not bona fide. *See Therrien v. Res. Fin. Grp.,* 704 F.Supp. 322, 327 (D.N.H. 1989) (section 1100 fees that are doubly charged are neither bona fide nor reasonable); *accord Bynum v. Equitable Mortgage Group*, 2005 WL 818619 *9 (D.C. Cir. 2005).

a. PNC's Line 1102 Arguments Fail

In attempting to cast the line 1102 charges as bona fide, PNC points to testimony from these three settlement agents about managing the process of ordering the property reports, searching for judgment and tax liens (information PNC says does not appear in the report) and bankruptcies. PNC's contentions fail on a number of levels. Most basically and as noted before, any such work is simply part of what a settlement agent does in connection with providing their overall settlement services, chargeable as a "settlement or closing fee" at line 1101 of the HUD-1 settlement statement. [PAF ¶¶ 321-23] This categorization is recognized in the definitional section of Regulation X where a clear distinction is made between title related services "including title searches, title examinations, abstract preparations, insurability determinations, and the issuance of title commitments and title insurance" and services like processing or services "involving real property taxes or any other assessments or charges on the real property."[35] 24 CFR § 3500.2

[35] Consistent with simply and exclusively serving as a settlement agent (and not performing true abstract or title searches or title examination work), the president of Title America characterized its efforts on the CBNV loans as coordinating the efforts of vendors. Mary Jo Speier Tr. 50:16-

(a)(16)(i)-(xv) (compare parts (ix) with (ix) and (xiii)). Most basically, as *Lender's Services* and Mr. Dodson make clear, a property report is not an abstract search. Certainly then, no alleged tasks peripheral to obtaining something that itself is not an abstract search could themselves be considered to be a bona fide line 1102 charge for an abstract or title search.

Beyond the fact that even if this work were done it is not properly charged for at line 1102 or 1103, the proffered testimony is also contested. Contrary to PNC's assertion, the property reports do inform about the existence of tax and judgment liens. [PAF ¶ 313] The claim, therefore, that such a search had to be done because it was not contained in the property report is simply not true. Nor does it make sense that these settlement agents would disregard the property report and the borrower monies paid for the same and do their own search of the same records; however, if they in fact did so, that effort, again, would be improper duplicative work and not bona fide for that reason. *Therrien,* 704 F.Supp. at 327. The testimony and argument relating to the purported search of bankruptcy records is equally dubious. First, there is no supporting evidence in the loan files. [PAF ¶ 324]. Moreover, such a search is unnecessary. Bankruptcy may temporarily stay the ability to foreclose but it does not otherwise affect title to the property because even if the mortgage loan obligation is discharged, the lenders' recorded mortgage and right to foreclose remains. *Johnson v. Home State Bank*, 501 U.S. 78, 83-84 (1991) (discharge in bankruptcy extinguishes only the personal liability of the debtor; Bankruptcy Code "provides that a creditor's right to foreclose on the mortgage survives or passes through the bankruptcy").

PNC also argues that vendors were not used for all the property reports obtained and that Home Title and Paramount would do their own searches and create their own property reports.

51:7, *Bumpers v. CBNV*, Wake County North Carolina Superior Court, case no. AOC-CV-752. [PAF ¶ 328].

This contention is irrelevant because, again, a property report is not a true abstract or title search. [PAF ¶ 312] Accordingly, any line 1102 charge for a property report, whether paid to a vendor, Home Title or Paramount, is not bona fide. The argument that Paramount sometimes ordered a full duration title search is also relevant because on any reviewed loan as to which there is even marginal evidence that a full duration title search may have been done, then Mr. Dodson did not consider that loan to have a non bona fide line 1102 charge. [PAF ¶ 317]

b. PNC's Line 1103 Arguments Fail

In an attempt to paint the line 1103 charge as bona fide, PNC claims that the charge was for much more than simply examining the property report and included the same efforts offered as proof that the line 1102 charges are bona fide; the search for information as to tax and judgment liens, bankruptcies and satisfied but unreleased prior mortgages. For its line 1103 argument, PNC adds that the three settlement agents' tasks also included clearing liens or unreleased mortgages. This redundant argument underscores that redundant efforts are, again, an admission illegal duplicative fees. *Therrien,* 704 F. Supp. at 327. And again, any such searches or any follow up "clearance" efforts, if in fact they happened, do not constitute a title examination but are, instead, what a settlement agent is to do as part of providing line 1101 settlement or closing services. Thus, even were PNC's facts undisputed, its argument would fail.

But, as already noted, PNC's alleged facts are very much in dispute. There was no basis to perform the alleged lien searches because the property report vendors had already performed that work. A borrower bankruptcy, while perhaps relevant to credit worthiness, has no effect on title issues. And the loan files affirmatively dispute that any such tasks were undertaken. [PAF ¶ 324] For example, disbursements to pay off liens would be shown on the HUD-1 as disbursements. PAF ¶329. No Class Representative's HUD-1 shows any such disbursements. *Id.* ¶¶ 324-25. Of

the 1190 sampled loans, only one loan evidenced work to address back taxes owed. *Id.* ¶ 325. And the settlement agent on that loan was not one of the three upon whose (false) testimony PNC relies. [Id.] Likewise, as to those Class Representatives and those borrowers within the loan sampling that had a property report in their loan file, not a single one evidenced a tax or judgment lien issue.[36] [PAF ¶ 324]

The truth is that these settlement agents were closely affiliated with or, in the case of Title America and First National Title and Escrow, owned by the same persons operating the LPO's.[37] They saw an opportunity for a substantial profit stream and opportunity to scrape more fees off the borrowers.[38] [PAF ¶¶ 146-47, 331-32] Indeed, for the primary eight settlement agents, their average section 1100 fees were $1,046 as compared to $595 for the outliers and one-offs that had no connection to CBNV or its LPOs. [PAF ¶ 350-52] Some of those involved have been candid about what really happened. James Niblock, owner of First National Title and Escrow and in charge of the "Reston South" LPO testified that the title charges imposed on borrowers were wholly arbitrary and unrelated to any actual services performed. [PAF ¶¶ 330-31, 333-37] Dennis Hoover of Home Title, one of the settlement agents PNC relies on, testified that Home Title was just trying to make an overall per-loan dollar figure under section 1100 and it did not matter which

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[36] The property reports are clean because CBNV was not interested in making loans to borrowers who had any of these issues as that would slow down the loan assembly line. Indeed, CBNV prescreened borrowers for judgment and tax liens and bankruptcies. [PAF ¶ 244]

[37] PNC claims that these three settlement agents are particularly credible because "they have no dog in the fight." PNC's characterization is misplaced. All such witnesses would obviously be motivated to give testimony exculpating them from being involved in charging and collection fraudulent settlement fees.

[38] Ms. Speier, cousin by marriage to Randy Bapst, was a young attorney with no title company experience who went overnight to being the president of Title America and being paid a $50,000 salary and $160,000 bonus per year. [PAF ¶¶ 342-43] Title America closed 38% of the sampled loans. [PAF ¶ 327] The per loan average of the settlement fees paid to Title America were $1,171. [PAF ¶ 344] Extrapolating that average out to 38% of the 26,699 loans in the Class means that Title America grossed some $11.8 million dollars for the 19 month period it settled CBNV loans.

particular HUD-1 lines the charges were listed. [PAF ¶ 339] CBNV made these loans nationwide and the process of examining title and attendant charges should therefore vary from state-to-state. [PAF ¶ 339] But here, starkly demonstrating that the line 1103 fees were unrelated to the performance of a legitimate title examination, we see lock step jumps in the line 1103 fees across the relevant time frame. [PAF ¶ 340] And then in early 2002, as CBNV was succumbing to regulatory pressure about its 125 loan program, there is a dramatic and coordinated drop of the line 1103 title examination fees from an average of nearly $700 a loan to $220 per loan. [PAF ¶¶ 219-222, 341]

3. Conclusion

PNC seeks summary judgment against Plaintiffs' core TILA/HOEPA claim based on the dubious and contested testimony of settlement agents that closed only about half of the loans at issue. This reason alone defeats PNC. But even were that testimony uncontested, PNC could not prevail. Property reports are not abstract or title searches and reviewing the property report is not a title examination. The allegedly performed tasks PNC points to, as Plaintiffs' expert and controlling regulations establish, are simply administrative work that is done in the normal course of performing settlement and closing functions. PNC offers no contrary expert testimony but even if they did they would at best create a fact issue for the jury to determine. Quite plainly, PNC has not destroyed Plaintiffs' TILA/HOEPA APR disclosure claim.

C. The Borrowers Were Required to Use These Settlement Agents and Their Services.

For an additional reason, Class Members were provided an inaccurate APR in violation of TILA and HOEPA due to an improper exclusion from the Finance Charge of settlement agent charges. A lender cannot exclude from the Finance Charge those charges imposed by "third party closing agents (including settlement agents, attorney, and escrow and title companies) if the lender

requires the use of such agents and their services. 15 U.S.C. § 1605(a); 12 C.F.R. § 226.4(a)(1)-(2). PNC claims there is no evidence to support imposition of a "required use" based liability against it. For this proposition PNC relies solely on the testimony of former CBNV employee Jack Grace that CBNV never required the use of any title company. PNC Brief at p. 15. The truth and Mr. Grace's testimony do not align. *See* RSF ¶ 52. Indeed, the evidence that CBNV in fact required the use of the core settlement agents and services related to them is overwhelming. Certainly that is Mr. Dodson's observation. [PAF ¶ 289]. Donald Schmaltz, the architect of CBNV's 125 lending program, attested that the LPO's developed their own network of title companies to use, subject to his approval.[39] PAF ¶¶ 287-88. LPO operators Niblock (First National Title & Escrow) and David Shumway (Title America) created title companies for the express purpose of using them and the services they purported to perform to capture more fees from the borrowers and so plainly they required the exclusive use of their companies. The loan documents also refute PNC's position. Good Faith Estimates and the GFE Addendums expressly stated that borrowers were required to use particular title companies for particular services relating to loan settlements. PAF ¶ 290. The fact that prepopulated charges appear in numerous loan file documents relating to a service before there could be any understanding of an actual good faith charge for variable work is yet more evidence of a required use. PAF ¶¶ 291-93. That CBNV required the use of certain closing agents and services and the regulatory violations associated with CBNV's failure to disclose such relationships was a focus of and one of the FDIC's many criticisms of CBNV's 125 loan program. PAF ¶¶ 294-95. Notably, CBNV's related correspondence to the FDIC admitted that, for example, Title America was a required service provider. PAF ¶ 295. Finally, and paradoxically, Mr. Grace's

[39] Schmaltz specifically identified Home Title, Papermaster First Title and Escrow, Paramount Title, Advantage Title, First National Title, Title America, Resource Title, and First Title and Escrow. [PAF ¶ 288]

"did not require" testimony is wholly refuted by his own words as he expressly directed that Resource Title be exclusively used by the Reston South LPO. PAF ¶ 296. In short, PNC is utterly mistaken in contending that there is no evidence to support Plaintiffs' required use claims.

V. PNC HAS NOT DEMONSTRATED ITS RIGHT TO JUDGMENT ON PLAINTIFFS' RICO CLAIMS, AT 18 U.S.C. §§ 1962(C) AND (D).

A. Plaintiffs' RICO claims are not "wholly derivative" of their RESPA and TILA/HOEPA claims.

PNC's initial summary judgment argument as to Plaintiffs' RICO claims does not focus on any of the evidence but simply asserts that the claims are "wholly derivative of the alleged conduct that forms the basis" for Plaintiffs' RESPA and TILA/HOEPA claims, such that those claims must fail "as a matter of law" because Plaintiffs' RESPA and TILA/HOEPA are subject to summary judgment. There is no merit to PNC's argument.

The argument fails because Plaintiffs' RESPA and TILA/HOEPA claims are not subject to summary judgment. But even if they were, it does not follow that the RICO claims also and necessarily fail. The misrepresentations in the Class Members' federally-mandated disclosures can, independently, create liability under RICO, even if they fail to create liability under RESPA or TILA or HOEPA. Indeed, the Third Circuit's on-point decisions in this matter, and in *Tubbs v. N. Am. Title Agency, Inc.*, 531 F.Appx. 262 (3d Cir. 2013) foreclose PNC's argument:

> Federal regulations associated with that form control the nature and quality of information that is supposed to be included in each HUD–1, and borrowers should be able to rely on that information in fact being of the requisite nature and quality," [and that] "HUD–1s that deviate from the requirements of section 3500.8 thus can be materially misleading because transmission of a HUD–1 impliedly warrants compliance with that section's specific requirements.

In re CBNV III, 795 F.3d at 403 (citing 24 C.F.R. § 3500.8). In *Tubbs,* the Third Circuit rejected the exact argument made by PNC here – that a consumer fraud claim, based upon "fictitious fees"

disclosed on a HUD-1 Settlement Statement, was dependent on the merits of a RESPA fee-splitting claim – and reversed the entry of judgment in favor of the defendant. *Id*., at 266-67.

B. PNC Has Failed to Demonstrate its Right to Summary Judgment on the Contested Elements of Plaintiffs' RICO Claims

RICO, at 18 U.S.C. §§1962(c) and (d), requires Plaintiffs to demonstrate that CBNV was "associated with a RICO enterprise" and "participated in the conduct of such enterprise through a pattern of racketeering activity" and/or "conducted or participated, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." *See, e.g., Goldenstein v. Repossessors Inc*., 815 F.3d 142, 147 (3d Cir. 2016); *In re Ins. Brokerage Antitrust Litig*., 618 F.3d 300, 362 (3d Cir. 2010). There is extensive evidence to support each of these RICO elements, as well as the elements of Plaintiffs' RESPA and TILA/HOEPA claims (to the extent they are "derivative" or based on the same conduct). PAF ¶¶ 100-452. Such evidence is more than sufficient for a jury to find in favor of Plaintiffs on each claim. As such, PNC's motion for summary judgment as to Plaintiffs' RICO claims fails. These matters have been pending for over 13 years and the parties have exchanged hundreds of thousands of documents, including CBNV's examination reports, taken dozens of depositions, including those of insiders and members of the enterprise, and exchanged expert reports. PNC's motion does not squarely address the detailed evidence that will be used to prove each of the contested elements, and that evidence squarely demonstrates that a reasonable jury could find in favor of Plaintiffs on each element of §§1962(c) and (d). [PAF ¶¶ 364-469].

1. CBNV engaged in "racketeering activity."

PNC argues that Plaintiffs cannot demonstrate that PNC engaged in any "racketeering activity" because "there were no misrepresentations concerning the recipient of origination fees"

and "the TILA Disclosures premised on alleged non-bona fide fees were in fact accurate." PNC Brief, at p.51. This argument is flawed.

The "predicate acts of racketeering" forming the basis of Plaintiffs' RICO claim in the Compl., at ¶¶ 512-14; 520-22; and that are detailed throughout their First Amended RICO Case Statement, include mail fraud under 18 U.S.C. § 1341, wire fraud under 18 U.S.C. § 1343, and money laundering under 18 U.S.C. § 1956.[40] *See* 18 U.S.C. § 1961(1); *In re Ins. Brokerage*, 618 F.3d at 363; *Lum v. Bank of Am.*, 361 F.3d 217, 223 (3d Cir. 2004). The acts constituting mail and wire fraud include, but are not limited to, the false disclosures on their RESPA-required disclosures and on their TILA/HOEPA-required disclosures. Compl., at ¶¶ 512-14; 520-22; *see generally* RICO Case Statement. The false representations concerning the Line 801 charges, the Finance Charge, and APR on these federally-mandated disclosures can create liability under RICO regardless of whether they create independent liability under RESPA or TILA/HOEPA. *In re CBNV III,* 795 F.3d at 403; *Tubbs*, 531 F.Appx. at 208. PNC's only challenge to the proof of these misrepresentation elements of the predicate acts of mail and wire fraud is to claim there were "no misrepresentations" with respect to the origination fees on the HUD-1s and the Finance Charge and APR on the TILA/HOEPA Disclosures. PNC Brief, at 50-51. PNC is mistaken.

There exists in the record copious evidence of "racketeering activity," including, but not limited to, the misrepresentations in the federally-mandated disclosures concerning the Line 801 and the "material disclosures" of the Finance Charge and APR on the TILA/HOEPA Disclosures

[40] Plaintiffs also allege that PNC engaged in acts of money laundering in the Compl., at ¶¶ 515-19 and describe such acts in detail in their RICO Case Statement, at p.32-37, and generally throughout. PNC does not assert any deficiency in any element of those claims except to deny that it was involved in "any unlawful activity." PNC Brief, at p. 51, n.24. There is ample evidence of "unlawful activity" and money laundering in the record sufficient to persuade a jury to conclude CBNV engaged in money laundering. [PAF ¶¶ 259-79]

that are the sole focus of PNC's motion. [PAF ¶¶240-363] Significantly, among other things, Plaintiffs' expert, William Dodson, has concluded that the Line 1102 and 1103 fees for "abstracts or title searches" and "title examinations" on the HUD-1 Settlement Statements were not bona fide nor were they reasonable. *E.g.,* [PAF ¶¶ 315-320] Because the disclosure of these Line 1102 and 1103 charges is specially governed by RESPA, the false charges are "materially misleading" and thus lead to RICO liability. *In re CBNV III*, 795 F.3d at 403; *Tubbs*, 531 F.Appx. at 208. Similarly, there is copious evidence of the misrepresentations of the Finance Charge and APR on the TILA/HOEPA Disclosures. [PAF ¶¶ 345-49] In addition, there is also ample evidence, which PNC does not attempt to refute, that in the mass solicitations used to solicit mortgage borrowers, CBNV misrepresented such things as offered loan terms and interests rates in order to "dupe" borrowers into the high cost, high loan to value loans. [PAF ¶¶ 354-63]. There is also evidence of fraud on third parties, through the purchase of prescreened mailing lists. [PAF ¶¶ 241-58].

PNC's arguments are meritless in the face of the accumulated evidence and do not demonstrate judgment is proper on this element of Plaintiffs' RICO claims.

2. CBNV Was Associated With a Distinct Racketeering Enterprise.

a. Contrary to PNC's argument, there is no requirement that an enterprise have a particular form.

PNC's third argument is essentially a "strawman" argument. PNC argues that summary judgment is proper because Plaintiffs allege that CBNV was involved in a "hub and spoke enterprise" but do not allege a "connecting rim" as is required with an enterprise containing that structure. PNC Brief, at p.52-53. In a number of respects, the argument is legally meritless.[41]

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[41] Each of the authorities that PNC relies upon involved a Rule 12(b)(6) motion to dismiss and not a Rule 56 motion for summary judgment. *See In re Ins. Brokerage Antitrust Litig. McCullogh v. Zimmer, Inc.*, 2009 WL 775402 (W.D.Pa. 2009) and *In re Countrywide Fin. Corp. Mortgage Backed Sec. Litig.,* 2012 U.S. Dist. LEXIS (C.D. Cal. 2012). The Court has already denied PNC's

First, contrary to PNC's arguments, Plaintiffs did not allege a "hub and spoke" conspiracy or enterprise. "[E]nterprises do not require a formal structure or a systematic plan." *In re Insurance Brokerage*, 618 F.3d at 377; *H.J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 248–49 (1989). Here, Plaintiffs allege the existence of an "association-in-fact enterprise." *See* Compl., at ¶¶ 505-06.[42] This type of enterprise "'must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to pursue the enterprise's purpose.'" *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 366 (quoting *Boyle v. United States*, 556 U.S. 938, 946 (2009)); *Weiss v. Bank of Am. Corp.*, No. 15-62, 2015 WL 9304506, *10 (W.D. Pa. Dec. 22, 2015). What is required is "a group with a common purpose and course of conduct," and that "proof of a pattern of racketeering activity may be sufficient in a particular case to permit a jury to infer the existence of an association-in-fact enterprise." *Id.* (citing *Boyle,* 556 U.S. at 951); *Weiss*, 2015 WL 9304506, at *11; *Schwartz v. Lawyers Title Ins. Co.*, 970 F. Supp. 2d 395, 403-04 (E.D. Pa. 2013). These requirements are easily met, where, as here, the alleged enterprise consists of corporate entities, and entities controlled by the enterprise's members, such as the Phase I LLC's, and Phase II Consulting Agreements, that were set up to conduct the racketeering activity. PAF ¶¶ 364-437; *see Id.* at 364 (citing *Webster v. Omnitrition Int'l, Inc.,* 79 F.3d 776, 786 (9th Cir.1996); *Boyle,* 129 S.Ct. at 2249 (Stevens, J., dissenting)); *United States v. Bergrin*, 650 F.3d 257, 266 (3d Cir. 2011) (citing *United States v. Masters,* 924 F.2d 1362, 1366 (7th Cir.1991)).

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motion to dismiss Plaintiffs' RICO claims. PNC's focus on Plaintiffs' allegations and its mere denial of those allegations is insufficient to support summary judgment.

[42] RICO defines an "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. §1961(4). This definition is broadly construed and covers "both legitimate and illegitimate enterprises." *See Goldenstein*, 815 F.3d at 149 (citing *Sedima, S.P.R.L. v. Imrex Co., Inc.,* 473 U.S. 479, 497 (1985) and *United States v. Turkette,* 452 U.S. 576, 584–85 (1981)).

To factually support its "hub and spoke" argument, PNC asserts (without reference to any undisputed fact) that the LPO's were supposedly "in competition" with each other and the title companies had "no relationships" with each other. This argument fails legally. Legally, the fact that conspirators did not know each other or are supposedly in competition, does not prevent a finding by the jury that CBNV was involved in an association-in-fact enterprise. There is no requirement that an enterprise have a relationship between the spokes, *i.e.*, a "rim:"

> [C]ontrary to the implication of Defendants' arguments, there is no need for a plaintiff to prove that each conspirator had contact with all other members. Indeed, a RICO enterprise may be shown through proof of a hierarchical structure and without evidence that the lower level members of the enterprise collaborated directly with each other. Thus, Plaintiffs need not plead additional facts to show communication between the various private mortgage insurers in order to establish the existence of an enterprise."

Weiss, 2015 WL 9304506, at *12 (internal quotations omitted); *see also Schwartz*, 970 F.Supp. 2d at 404 (same analysis in enterprise involving title agents).[43]

b. Proof of the Enterprise

Factually, the argument fails because the record provides ample proof of an enterprise. Indeed, PNC has already put forth such evidence in its Concise Statement of Material Facts and its efforts to obtain summary judgment on the RESPA and TILA/HOEPA claims. Indeed, the evidence, including PNC's own facts, irrefutably establishes each of the elements of an enterprise:

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[43] PNC argues that an unreported decision dismissed on appeal from California (*In re Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.*, 2012 U.S. Dist. LEXIS 184429 (C.D. Cal. June 29, 2012), involving a motion to dismiss Ohio state law claims against Countrywide Financial Corp by corporate purchasers of residential mortgage-backed securities, is "instructive" because it involved a "similar alleged RICO enterprise." PNC Brief, at 53. The underlying facts and alleged enterprise in the *Countrywide* decision are vastly different (*e.g.*., here, the action is by mortgage borrowers, not end purchasers of securities) and PNC's effort to create an analogy with the decision is disingenuous. There is no suggestion in that decision that the plaintiffs prepared a detailed RICO Case Statement as here and of course, this Court already determined that Plaintiffs' RICO claims are not subject to dismissal under Rule 12(b)(6).

(1) a purpose (*i.e*., to make second mortgage loans for sale to investors); (2) relationships among those associated with the enterprise (*i.e*., the different consulting and employment agreements entered into to further this purpose), and (3) longevity sufficient to pursue the enterprise's purpose (*i.e*., over 26,000 loans were originated and sold to investors over a 4-year period). Given this evidence, there is no basis for summary judgment on the RICO claims as to the "enterprise" element. [PAF ¶¶ 100-213; 364-437; PNC Facts 4-7, 9-11, 16-18, 33-35, 38-40, 50, and 87-92].

First, evidence of the purpose of the enterprise is set forth in Plaintiffs' Additional Facts and details, among other things, that CBNV entered into a number of agreements, beginning in 1998 with the LPO's and their operator/managers, certain title companies, and loan purchasers, which were utilized to allow the enterprise to generate thousands of high-cost, high-interest second mortgage loans for sale to investors that were protected from state law fee limitations using the bank's federal charter and ability to export interest rates to loans made out of state to persons out of state. [PAF ¶¶ 364-68; PNC Fact No. 4-6].

Second, there is plentiful evidence of the enterprise structure and the relationships and hierarchy between the persons associated with the enterprise, which includes CBNV, its consultants and LPOs, the title companies, and CBNV's loan purchasers/investors, most of which is not disputed. PAF ¶¶100-213; 385-97. Even more, and contrary to PNC's assertions, Plaintiffs have evidence of concerted action by the LPOs and title companies which refutes its contrived "no rim" on the "hub and spoke enterprise" argument (which is, in any event, legally meritless) and the conclusory testimony (not offered as an undisputed fact) concerning "competition" and "ignorance" of what the others were doing. [PAF ¶¶ 398-428]

The evidence detailed in Plaintiffs' Additional Facts (see overall PAF ¶¶100-213; 385-97) demonstrates, among other things, the following:

- Beginning in 1998, CBNV became involved in the HLTV second mortgage origination business through professional and personal associations between Donald Schmaltz, Jack Grace, and others, such as David Shumway, Randy Bapst, James Niblock, Robert Posner and William Reichel, all of whom would operate or manage the mortgage lending operation for CBNV or loan production offices for CBNV, under different legal structures. See, e.g., [PAF ¶¶ 100-200; 369-416; PNC Fact No. 7]

- During Phase I of the mortgage lending operation, CBNV entered into limited liability company structural agreements with various individuals and their companies (such as Shumway-Bapst and EquityPlus Financial, Inc.) that were to operate loan production offices for CBNV and to provided origination services for second mortgage loans funded by CBNV. PAF ¶¶ 144-49; 385-97; PNC Fact, No. 9-11. As a result of regulatory pressure, and during Phase II of the lending operation, these same individuals and their related companies agreed to restructure their relationships into Consulting Agreement relationships and to shift employment of employees to CBNV. PAF ¶¶ 150-87; 214-39; 385-97; PNC Fact, No. 16-17, 33. As a result of continued regulatory pressure, and during Phase III of the lending operation, these same individuals and their related companies agreed to further restructure their relationships such that the individuals would became full-time employees of CBNV and to continue to manage the LPO's. [PAF ¶¶ 188-97; 214-239; 385-89; PNC Fact, No. 34, 38]

- CBNV entered into a number of agreements, "master commitments" and related agreements with RFC and Irwin, and others, to purchase CBNV's entire HLTV and 125 loan output. [PAF ¶¶ 369-84; PNC Fact, Nos. 5-6]

- CBNV and the LPO's entered into a number of agreements with, and had ownership interests in, title companies, to act as settlement agents on loans originated by the enterprise. [PAF ¶¶ 398-406]

- CBNV, the managers of the LPOs, the title companies, and investors visited other LPO's, and "compared notes" and title charges, and discussed operations. [PAF ¶¶ 407-18]

Third, there is also ample evidence of the enterprise's "longevity sufficient to pursue the enterprise's purpose." This evidence cumulatively shows, among other things, that the enterprise was in operation for over 4 years and made over 26,000 loans, with principal values in excess of $940 million, until federal regulators shut it down due to violations of federal laws and litigation. [PAF ¶¶ 429-38; PNC Fact Nos. 4, 39-40, 87-92] This is more than sufficient to satisfy this "longevity" element.

The evidence in the record establishes each of the elements of an enterprise and that summary judgment is improper on Plaintiffs' RICO claims. *Boyle*, 556 U.S. at 946.

3. CBNV Participated in the Conduct of the Enterprise's Affairs.

PNC's next argument is focused on the "conduct" element of a RICO claim. This element requires Plaintiffs to establish that CBNV was associated with and participated in the "operation or management" of the enterprise. *See Reves v. Ernst & Young,* 507 U.S. 170, 184 (1993)*; In re Ins. Brokerage*, 618 F.3d at 371. In order for CBNV "to conduct or participate" in the affairs of the RICO enterprise, it must have "directed the affairs of the enterprise" in some capacity. *See Id.* at 178–79. However, this requirement does not mean that a defendant must have a managerial position in the enterprise, but only that the defendant "knowingly further[ed] the illegal aims of the enterprise by carrying out the directives of those in control." *See, e.g., United States v. Parise,* 159 F.3d 790, 796 (3d Cir.1998). The requirement is satisfied, as here, where the "defendants band together to commit [violations] they cannot accomplish alone" such that they are "cumulatively [] conducting the association-in-fact enterprise's affairs, and not [simply] their own affairs." *In re Ins. Brokerage*, 618 F.3d at 378 (citations omitted).

PNC further contends that: (1) Plaintiffs have not alleged that CBNV had any operational or management role with respect to the enterprise; and (2) Plaintiffs cannot prove that the enterprise was distinct from CBNV. These arguments are spurious and false. First, Plaintiffs expressly allege that CBNV and others "conducted and participated, both directly and indirectly in the conducting of the affairs of such enterprises through a pattern of racketeering activity, and which Defendants conspired to violate the provisions of 18 U.S.C, § 1962(d)." Compl., at ¶ 501; RICO Case Statement, at p.4, 142. Thus, PNC's "failure to plead" argument fails. Second, there is a large body of evidence of CBNV's control and management of the enterprise, demonstrating that

it was "plainly integral to carrying out the enterprise's activities" as this element requires. *See Parise*, 159 F.3d at 796. The following evidence clearly establishes not only that CBNV managed and controlled the enterprise's affairs, but also that the enterprise was "distinct" from CBNV's own normal banking operations:

- CBNV established a full-fledged second mortgage lending operation focused on HLTV and 125 loans that was physically separate and separately operated from the Bank's normal operations, and in which it lacked any experience. [PAF ¶¶ 100-44; 364-68]

- CBNV conceived of the purpose of the enterprise, recruited its members, hired all of the LPO managers and consultants, LPO employees, and approved of all the title companies that could act as settlement agents on loans originated by the mortgage lending operations. [PAF ¶¶ 100-44; 414-28]

- CBNV entered into various agreements with various experienced professionals, consultants, third parties and separate legal entities, and created different structural arrangements for the mortgage lending operation, that were designed to facilitate the purpose of the enterprise. [PAF ¶¶ 144-97; 385-97]

- CBNV obtained numerous attorney opinion letters concerning key aspects of the lending scheme, including the licensing, structure, organization and management of the loan production offices, the exportation of interest rates and fees included within "interest," and the advertising and disclosures to second mortgage borrowers. [PAF ¶ 426]

- CBNV (and not the LPOs or their manager/consultants) took a controlling role in creating the structure and in restructuring the enterprise and dealt extensively with its state and federal regulators following state and federal regulatory exams in addressing compliance and regulatory violations. [PAF ¶¶ 100-97; 214-39; 353-63]

- CBNV terminated the second mortgage lending operations, but not its "normal bank operations," after its state and federal regulators found numerous compliance violations in the mortgage lending operations. [PAF ¶¶ 214-39]

This evidence and all other evidence detailed at PAF ¶¶ 100-469 is more than sufficient for a reasonable jury to find in favor of Plaintiffs on the "conduct" and "distinctiveness" of the enterprise element of Plaintiffs' RICO claims.

4. CBNV's predicate acts of racketeering proximately caused Plaintiffs' injuries.

PNC also asserts that the Plaintiffs and the Class cannot demonstrate that they relied on any misrepresentations in order to prove causation and injury. PNC Brief, p.56-60. PNC bases this argument on the inadmissible and equivocal testimony of only 2 of the 13 Class Representatives, asserting that this inadmissible testimony can be extrapolated to all of the Plaintiffs, and the entire Class, because the "Plaintiffs sought class certification and succeeded." PNC Brief, at p.59. The argument lacks merit for a variety of reasons.

First, there is extensive testimony of "causation" and "reliance" from the eleven other Class Representatives. [PAF ¶¶ 438-69]. Further, PNC's citations to the inadmissible and equivocal deposition testimony of two Class Representatives does not demonstrate that summary judgment is proper even as to those Class Representatives, much less the other Class Representatives, or the absent Class Members.[44] At best, the depositions show that PNC obtained testimony from the Class Representatives that revealed that none of them remembered any specific details of their loan closings given the passage of time or had reason to believe they were "dealing with crooks" at the time. PAF ¶¶ 438-69. Even more, the failure of one Representative to demonstrate reliance does not equate to a finding of non-reliance for the other Representatives or the Class. *See Gruber v. Price Waterhouse*, 776 F.Supp. 1044, 1054 (E.D. Pa. 1991).

[44] Notably, the citation to Ms. Wasem's testimony is insufficient because the questions propounded to her were objected to on form, and they are not admissible. The questions put forth to Ms. Wasem were confusing and misleading because they asked her whether she presently recalled ("Do you recall ….") whether at the time of the loan, certain things "mattered to [her]." The fact that she did not presently remember her state of mind 12 years ago during her loan transaction and gave a "No" answer to PNC's questions is understandable and does not establish any fact concerning her state of mind at the time of the loan. The citation to Ms. Gaskin's deposition testimony is not dispositive because her testimony is vague, because it is buried within a hypothetical set of questions and is taken out of context, and she gave contradictory testimony demonstrating reliance that refutes PNC's cited testimony. [RSF, ¶¶ 76-77; PAF ¶ 442]. A reasonable jury could certainly believe other of Ms. Gaskin's testimony of reliance.

Second, there is no basis to enter summary judgment on the RICO claims because PNC has not demonstrated, and cannot demonstrate, that Plaintiffs' legal theory of proximate causation lacks merit. First, as the Third Circuit noted, "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)).[45] Additionally, even if first-party reliance were necessary (which it is not), a jury is permitted to infer reliance on a class-wide basis for purposes of RICO's proximate cause requirement based upon a ***legal theory of causation*** that is based on the common proof. *See, e.g., Id.*; *In re Nat'l W. Life Ins. Deferred Ann. Litig.*, 2013 WL 593414, at *5 (S.D. Cal. 2013).

For example, Plaintiffs can also establish class-wide first-party reliance because the jury is entitled to presume reliance and proximate causation based upon the Class Members' payment of bogus or misrepresented fees and/or their decisions to enter into their loans. That is, as here, the jury may properly infer proximate causation and reliance and determine liability based upon a legal theory of causation using common evidence – Plaintiffs and the Class Members all received the standardized loan documents, HUD-1 Settlement Statements, TILA Disclosures, and HOEPA Disclosures, omitting material facts and containing misrepresentations concerning the recipient of the fees and charges and the legitimacy of the title charges and the accuracy of the TILA/HOEPA disclosures – which they relied upon by executing their loan documents, paying the misrepresented fees, entering into the CBNV loans, and making payments on those loans. *See In re CBNV III*, 795

[45] As explained by the Supreme Court, "[h]aving rejected petitioners' argument that reliance is an element of a civil RICO claim based on mail fraud, we see no reason to let that argument in through the back door by holding that the proximate-cause analysis under RICO must precisely track the proximate-cause analysis of a common-law fraud claim." *Bridge,* 553 U.S. at 655–656; *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.").

F3d at 403 ("HUD–1s that deviate from the requirements of section 3500.8 thus can be materially misleading because transmission of a HUD–1 impliedly warrants compliance with that section's specific requirements."); *In re U.S. Foodservice*, 729 F.3d at 119-20 ("payment" of false charges is circumstantial proof of reliance sufficient to be considered by the jury); *Huyer v. Wells Fargo & Co.*, 295 F.R.D. 332, 347-48 (S.D. Iowa 2013)("payment .. 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"). With respect to this legal theory of causation, PNC has not refuted Plaintiffs' class wide evidence that every Class Representative and every Class Member executed their loan documents, entered into the CBNV loans, and made payments on those loans. Indeed, there is no dispute as to these facts and each of the Class Representatives testified as to these elements of their causation theory. [PAF ¶¶ 438-69] Similarly, the jury may infer reliance and causation based upon the Plaintiffs' testimony that they relied upon the apparent legitimacy of CBNV. *See also Minter*, 274 F.R.D. at 546 ("the common inference … is that members of the plaintiff class relied upon the purported legitimacy of the defendant with which they transacted."). [PAF ¶¶ 438-43]

In addition, reliance and proximate causation can be established through third parties (*i.e.*, "third party reliance") that were encompassed in the scheme. Plaintiffs have offered proof that CBNV's predicate acts of mail and wire fraud included 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 ¶¶ 240-58] 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 ¶¶ 240-58; 438-69]

Again, in light of this evidence, and the law that forecloses PNC's arguments, summary judgment is improper on this proximate causation Plaintiffs' RICO claims.

5. Plaintiffs' Conspiracy Claims at 18 U.S.C. § 1962(d) are not subject to the entry of summary judgment.

PNC's final argument asserts that the Court should enter summary judgment on Plaintiffs' conspiracy claims under RICO, at 18 U.S.C. § 1962(d) because Plaintiffs' racketeering claims under § 1962(c) also fail. PNC's argument is not correct, not merely because PNC's motion is deficient as to the §1962(c) claims, but also because a failure of the §1962(c) claims does not necessarily mandate the entry of judgment on the §1962(d) claims. Under § 1962(d), it is unlawful to conspire to violate any of the substantive provisions of RICO. 18 U.S.C. § 1962(d). A defendant may be held liable under § 1962(d) even where its own actions would not amount to a substantive RICO violation. *See In re Ins. Brokerage,* 618 F.3d at 372-73 (a conspirator can violate § 1962(d) "in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion"); *Smith v. Berg*, 247 F.3d 532, 538 (3d Cir.2001) (as long as "he knowingly agree[d] to facilitate a scheme which includes the operation or management of a RICO enterprise")).

There is abundant evidence, set forth above and in Plaintiffs' Additional Facts, demonstrating that CBNV "knowingly agree[d] to facilitate a scheme which includes the operation or management of a RICO enterprise" and was integrally involved in the racketeering enterprise. Therefore, summary judgment is improper on Plaintiffs' §1962(d) claims.

VI. CONCLUSION

For the foregoing reasons, including Plaintiffs' incorporated responses to PNC's statement of facts and Plaintiffs' additional facts, PNC has failed to establish its right to summary judgment on Plaintiffs' claims under RESPA, TILA/HOEPA (Count II) or RICO.

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Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that I filed this document with the United States District Court for the Western District of Pennsylvania with notice of case activity to be generated and sent electronically by the Clerk of the Court to all designated persons this 13th day of May 2016.

*_/s/ R. Frederick Walters_*