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

IN RE: COMMUNITY BANK OF NORTHERN VIRGINIA MORTGAGE LENDING PRACTICES LITIGATION	MDL NO. 1674
	CASE NO. 03-0425, CASE NO. 05-1386
	HON. ARTHUR J. SCHWAB
THIS BRIEF RELATES TO ALL ACTIONS	SUBMITTED TO SPECIAL MASTER DAVID R. COHEN PER COURT ORDER
	FILED ELECTRONICALLY

REPLY BRIEF OF DEFENDANT PNC BANK, NATIONAL ASSOCIATION IN FURTHER SUPPORT OF ITS MOTION TO DECERTIFY CLASS

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I. INTRODUCTION

Plaintiffs' Opposition to PNC's Motion to Decertify misstates applicable law and mischaracterizes the Court-ordered evidentiary process PNC undertook to adduce evidence demonstrating that class treatment is no longer warranted. Plaintiffs make these arguments because they are now confronted by the very legal and evidentiary record that they promised the Court would not exist:

> The common, predominant evidence that Plaintiffs will introduce to prove that the Shumway/Bapst Organization could not, and did not, provide any settlement services will feature testimony from former bank officers and managerial employees (both CBNV and GNBT) and testimony from the former principles [sic] in the Shumway/Bapst Organization, confirming that no settlement services were provided by Shumway/Bapst in exchange for the fees. . . Plaintiffs will put forth evidence that the title fee fields on the HUD-1s were pre-populated by Delphi loan documentation software and that the individual circumstances of the borrowers were thus irrelevant to the Line 1102 and 1103 fees that were charged to the borrowers.

Pls.' Reply Br., at 3-5 (Doc. No. 614) (also admitting that claim certification was legally appropriate as Plaintiffs "are alleging that the recipient of settlement fees provided ***no*** services" and alleging that "identical documentary evidence" will establish that 1102 and 1103 fees were "bogus" in every loan in the Class List) (emphasis in original).

However, PNC has now demonstrated by obtaining the testimony of the actual Shumway/Bapst principals, CBNV employees and title company employees that Plaintiffs' allegations of a uniform policy of charging borrowers for fees where no services were provided or bona fide title work performed is fictitious. Impermissible expert testimony opining on what might have occurred based on a sampling of loan files (but not title files) does not defeat these facts.

PNC's Motion for Decertification fully explains why class treatment is no longer warranted in this case and the intervening appeal to the Third Circuit does not preclude the Special Master or the Court from considering the additional evidence the Court exhorted Plaintiffs to find to support certification. *See* Tr. of August 28, 2013 Conf. (Doc. No. 628).

II. ARGUMENT

A. The Mandate Rule Does Not Bar Decertification

The "mandate rule" does not bar decertification in this case. The mandate rule dictates that "the decision of an appellate court on an issue of law becomes the law of the case on remand." 18 Moore's Federal Practice § 134.23[1][a] (Matthew Bender 3d ed.). PNC is not asking the District Court to deviate from the Third Circuit's mandate in *CBNV III*. On the contrary, PNC is asking the District Court to exercise its ***own power*** to decertify the class based on facts obtained in post-certification discovery, as expressly contemplated by Rule 23(c)(1)(C). The Fifth Circuit has explained that the mandate rule does not bar such a request:

> To be certain, in some scenarios, a district court may properly alter or amend a certification order after remand from this court on a Rule 23(f) appeal; a Rule 23(f) decision does not operate to automatically divest the district court of its powers under Rule 23(c)(1)(C). For example, if a district court certifies a class after preliminary discovery and the court of appeals affirms pursuant to Rule 23(f), and then during subsequent discovery it becomes clear that the district court needs to alter, amend, or even decertify the class, the district court can and should do so under Rule 23(c)(1)(C).

Gene & Gene, L.L.C. v. BioPay, L.L.C., 624 F.3d 698, 703 (5th Cir. 2010) (citing *Prado-Steinman v. Bush*, 221 F.3d 1266, 1273 (11th Cir. 2000)). *See also Glaberson v. Comcast Corp.*, No. 03-6604, 2013 U.S. Dist. LEXIS 160892, at *19 (E.D. Pa. Nov. 12, 2013) (relying on the above-quoted language in *BioPay*). Because the mandate rule does not divest this Court of its Rule 23(c)(1)(C) authority to revisit its own certification decision, *BioPay*, 624 F.3d at 703, this Court

can – and, for the reasons stated herein, should – decertify the class based on the new evidence now before it.

B. Plaintiffs Admit That Claims Of Class Members Who Filed Bankruptcy Are No Longer Suitable For Class-Wide Treatment

As detailed in PNC's Reply Brief in Support of Summary Judgment, contrary to their prior assertions in this litigation Plaintiffs now argue that individualized issues, facts and defenses apply to 10,738 bankruptcy filings that are associated with 9,780 loans in the Class List. SJ Opp. at 2 n.2, 8-11 (arguing that individualized facts such as a debtor's good faith intent, post-petition payments, and subsequent bankruptcy case events should be examined to determine if the individual debtor remains the real party in interest). Plaintiffs cannot have it both ways. Either PNC is entitled to summary judgment or the ascertainability process for which Plaintiffs have advocated is no longer possible mandating decertification as to those members.

C. Plaintiffs Have Not Provided Any Evidence To Demonstrate That The RESPA Claims Are Appropriate For Class Treatment

In order to skirt overwhelming case law preventing class certification, Plaintiffs consciously elected to characterize their RESPA kickback claim as a "no services" claim. Mem. in Supp. of Mot. for Class Cert., at 4 (Doc. No. 609); Appellees' Br., at 43-44, App. Tab 54. Plaintiffs have thus maintained throughout this litigation that they can provide common evidence that the LPOs provided ***absolutely no*** compensable services – leaving Plaintiffs with an "onerous" evidentiary burden on the merits. *CBNV III*, 795 F.3d 380, 405 (3d Cir. 2015). What evidence could meet such a burden? According to Plaintiffs, a corporate-wide policy that the LPOs provided no services, or testimony from CBNV employees and the principals of the LPOs confirming the same. *See* Tr. of Aug. 28, 2013 Conf., at 16-17, 37-38 (Doc. No. 628); Pls.' Reply Br., at 3 (Doc. No. 614). But that evidence does not exist in this record or in this world. Faced with a self-imposed evidentiary burden adopted for short term expediency, Plaintiffs now

equivocate on their "no services" position. *See* SJ Opp., at 16-17 ("To the extent the consultants performed any services that could justify payment under Section 8(c) . . . ."). Such equivocation for the purpose of obtaining advantage at the time the statement was made should not be tolerated. In addition to wholly undermining Plaintiffs' prior position on class certification, *CBNV III*, 795 F.3d at 405, these equivocations also establish that any inquiry into the services performed, and goods and facilities provided, by the LPOs would necessarily require a loan-by-loan analysis and be highly individualized. As such, Plaintiffs' RESPA claim cannot now proceed further as a class claim. *Howland v. First Am. Title Ins. Co.*, 672 F.3d 525, 530 (7th Cir. 2012).

D. Plaintiffs' Arguments Do Not Prevent Decertification of the Remaining TILA/HOEPA Claim

Plaintiffs' Opposition offers no meaningful response to PNC's arguments in favor of decertifying Plaintiffs' remaining TILA/HOEPA claim. As an initial matter, Plaintiffs' contention that the deposition testimony from four title company representatives is "substantially the same" as evidence previously offered by PNC is utterly without merit. Pls. Opp. to Decert., at 15 (Doc. No. 729) ("Decert. Opp."). This argument flatly ignores this Court's directive that the parties seek additional discovery related to the TILA/HOEPA claims. *See generally* Tr. of August 28, 2013 Conf. (Doc. No. 628). Moreover, the evidence previously offered by PNC is simply not the same as the evidence obtained in post-certification discovery from non-party witnesses. *Compare* ECF No. 13-4273, JA 01898, 01900, 01918-01920 (one-page affidavits from Benjamin Soto and Dennis Hoover and two pages of testimony from Mary Jo Speier taken in *Bumpers v. Community Bank of Northern Virginia*, 747 S.E. 2d 220, 367 N.C. 81 (N.C. Sup. Ct. 2013)), *with* App. Tabs 47-50 (over 650 pages of sworn testimony from these three witnesses and Laura Shankes).[1]

[1] The Third Circuit made no reference to the evidentiary snippets referred to by Plaintiffs; its decision is instead replete with references to Plaintiffs' "allegations" that make it clear that, when it said it was affirming certification "at this stage and on this record," 795 F.3d at 407, it was doing

Plaintiffs' suggestion that PNC "carefully selected" testimony from certain title company representatives to the exclusion of others is similarly unfounded. Paramount Title, Home Title, and Title America performed title services on 5 of the 7 Plaintiffs' loans and 17,593 of the 25,684 loan files reviewed by PNC; that is why they were selected. Pollard Supp. Decl. ¶¶ 8-10. That hardly qualifies as "carefully selected." Moreover, Plaintiffs could have sought testimony from any of the title companies involved – it is their burden, after all – but failed to do so.

The remainder of Plaintiffs' Opposition to Decertification parrots their Opposition to Summary Judgment and relies solely on the opinions of an expert in the absence of any factual evidence to refute the extensive evidence offered by PNC. Decert. Opp., at 17-21; SJ Opp., at 38-45. In an attempt to prevent decertification and create an issue of material fact out of thin air, Plaintiffs characterize this case as one of "competing experts." SJ Opp., at 39. This is a gross mischaracterization. PNC has not relied on any expert testimony to support its Motion, but has instead presented the ***factual testimony*** of the very fact witnesses who performed the work associated with the Section 1100 fees. App. Tabs 47-50.

Further, Mr. Dodson's opinion is entirely premised on the assumption that the work performed by the title companies did not constitute the type of work that should have been reported at lines 1102 or 1103 of the HUD-1 settlement statement. For the reasons explained in PNC's Reply Brief in Support of Summary Judgment, the entire premise underlying his opinion is wrong and, therefore, his opinion is both irrelevant and unhelpful to the trier of fact. *See* Reply Br. on SJ, at 8; Fed. R. Evid. 403, 702.

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so based solely on those allegations. *See, e.g.*, *id*. at 385-86 (section captioned "The Alleged Illegal Lending Scheme"), 400, 401, 402, 405, 406, 407, 408 (all describing "allegations" of complaint in addressing whether the claims and defenses are subject to class certification).

Having no facts to offer, Plaintiffs use Mr. Dodson in an attempt to create a factual dispute with the testimony of the witnesses who performed the work necessary to provide CBNV with appropriate assurances that it was in fact obtaining an enforceable second mortgage. But expert testimony may not be used to create a disputed issue of fact. It is well settled that factually unsupported testimony of one party's expert is insufficient to defeat summary judgment. *See Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) ("When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict."); *Advo, Inc. v. Phila. Newspapers*, 51 F.3d 1191, 1198-99 (3d Cir. 1995) (expert opinion which "lack[ed] a factual basis" was insufficient to defeat summary judgment); *Hirsch v. CSX Transp., Inc.*, 656 F.3d 359, 363 (6th Cir. 2011) ("[A] plaintiff cannot survive summary judgment with an expert's bare opinion on the ultimate issue.") (internal citation omitted); *In re IKON Office Solutions, Inc. Sec. Litig.*, 131 F. Supp. 2d 680, 700-01 (E.D. Pa. 2001) (where "expert opinions [did] not provide sufficient facts in support of their conclusions," they were insufficient to defeat summary judgment).[2]

Mr. Dodson admits his report is primarily based on his review of the named Plaintiffs' loan files and a sampling of 1,190 loan files, or 4.4% of the class. Dodson Rep. at ¶ 8. Mr. Dodson's opinions based upon the remnants of loan files (not even title files) cannot defeat summary judgment in light of contradictory testimony of the people at the title companies who ***actually***

[2] Expert opinion testimony is only admissible in opposition to summary judgment if the expert's "scientific, technical, or other specialized knowledge will help the trier of fact understand the evidence or determine a fact in issue" and if the testimony is based on "sufficient facts or data." Fed. R. Evid. 702(a), (b). Plaintiffs present no evidence or argument as to why the trier of fact in this case would need expert testimony to determine whether work was actually performed on the loans at issue in light of the ***uncontradicted*** testimony of the people who actually performed the work.

performed the work at issue. *See Pa. Dental Ass'n v. Med. Serv. Ass'n*, 745 F.2d 248, 262 (3d Cir. 1984) (affirming grant of summary judgment where only evidence plaintiff offered as to boundary of competitive market area was expert opinion that was contradicted by affidavits of business people actually competing in area); *Johnson v. SmithKline Beecham Corp.*, 55 F. Supp. 3d 603, 613-14 (E.D.Pa. 2014) (expert report insufficient to defeat summary judgment where record evidence contradicts it). A contrary result would make it "virtually impossible for a court to grant summary judgment as long as the non-moving party could locate a sole expert" willing to create a genuine issue of material fact. *State Farm Fire & Cas. Co. v. Miles*, 730 F. Supp. 1462, 1473 (S.D. Ind. 1990).

Because Plaintiffs' Dodson-related arguments against decertification as constructed are derivative of their summary judgment arguments, and since Plaintiffs cannot defeat summary judgment with Mr. Dodson's report, they likewise cannot defeat decertification with it. Even apart from its derivative nature, if a purported piece of evidence is inadmissible on summary judgment and utterly immaterial, then it cannot stand in the way of decertification.

Finally, Plaintiffs' attempts to avoid summary judgment on the TILA/HOEPA claims prove fatal to their arguments on decertification, as Plaintiffs admit that necessary title work varied from loan to loan. *See* SJ Opp., at 41 (admitting that "[n]ot every borrower, for example, would have had a tax or judgment lien . . ."). Thus, to the extent that summary judgment is not granted as to Plaintiffs' TILA/HOEPA claims, Plaintiffs' failure to cast even a shred of doubt that the real and extensive work performed on the subject loans varied among the various title companies, and varied by loan file depending on what work was needed, mandates decertification.[3]

[3] Plaintiffs' contention that "required use" of title companies would warrant inclusion of the title fees in the calculation of the Finance Charge and APR is meritless. The evidence cited by Plaintiffs in support of this contention actually contradicts their argument. *E.g.*, PAF ¶ 290

E. Deposition Testimony Cited By Plaintiffs Themselves Demonstrates That The RICO Claim Should Be Decertified

The deposition testimony cited by Plaintiffs in their Opposition bolsters PNC's evidence that the Plaintiffs did not rely on any alleged misrepresentations contained in their HUD-1s. A RICO injury must be proximately caused by the alleged RICO predicate act. 18 U.S.C. § 1964; *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). Proximate cause requires "some ***direct*** relation between the injury asserted and the injurious conduct alleged." *Id.* at 268 (emphasis added). Evidence of a direct relationship is often established through "[p]roof that [a] plaintiff relied on [a] defendant's misrepresentations." *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 659 (2008). Indeed, that has been Plaintiffs' theory of proximate cause throughout this litigation. JCAC ¶ 523; RICO Case Stmt. 151; Appellees' Br., at 52, App. Tab 54.

Faced with conclusive evidence refuting that theory, Plaintiffs now retreat from it, and instead argue that first-party reliance is not an element of proximate causation. SJ Opp., at 58 (citing *Bridge*, 553 U.S. at 649). What Plaintiffs fail to mention is that "the absence of first-party reliance . . . tend[s] to show that an injury was not sufficiently direct to satisfy [RICO's] proximate cause requirement." *Bridge*, 553 U.S. at 659. Such is the case here. Plaintiffs' attempts to establish third-party reliance fail for the reasons explained in PNC's Summary Judgment Reply.

Their attempts to argue inferred reliance also fail. As already demonstrated by PNC, this is not an appropriate case for inferred reliance. Br. in Supp. of Decert., at 16-20 (Doc. No. 715). Plaintiffs are therefore tasked with providing ***actual evidence*** that all class members relied on the accuracy and truthfulness of representations on their HUD-1s and TILA/HOEPA disclosures

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(named Plaintiffs' Good Faith Estimates demonstrate that more than one title company was listed as a "required" title company); ¶ 296 (July 7, 1999 Jack Grace memo stating CBNV's "preference" that the Reston South LPO use Resource Title); Pollard Supp. Decl. ¶ 6, Supp. App. Tab 167 (only ***3*** of the 190 loans closed by Reston South after July 7, 1999 used Resource Title).

regarding the ultimate recipient of any fees. This they cannot do. Far from uniform, the hodge-podge of additional testimony cited by Plaintiffs in their Opposition "reveal[s], at best, that none of [the named Plaintiffs] remembered any specific details of their loan closings." Decert. Opp., at 25. Such evidence cannot establish reliance on an individual – much less classwide – basis, and is further refuted by the indisputable fact that the two borrowers who testified to whether they cared about the recipients of, or work done in exchange for, certain fees answered those questions in the negative. *Id.* at 17-19. Plaintiffs are simply unable to provide any common, classwide evidence of reliance. As such, individualized questions of reliance predominate and make class treatment of the RICO claims improper. *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 194 (3d Cir. 2001).

III. CONCLUSION

For the foregoing reasons, PNC respectfully requests that, to the extent the Court does not grant PNC's Motion for Summary Judgment in full, the Court decertify the class on any remaining claims, and grant PNC such other relief as the Court deems proper.

Dated: May 20, 2016

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