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

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

REPLY BRIEF OF DEFENDANT PNC BANK, NATIONAL ASSOCIATION IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Abandoned claims – Plaintiffs have admitted factually, Pls.' Resp. to Concise Facts, ¶¶ 45, 48-49, 79-81, and otherwise not opposed at all PNC's Motion for Summary Judgment with respect to (i) Plaintiffs' RESPA discount fee claim and (ii) their non-principal TILA/HOEPA claims as to the timeliness and conspicuousness of disclosures and pre-payment penalties, including whether the non-principal TILA/HOEPA claims are barred by the statute of limitations. As such, PNC is entitled to summary judgment in its favor on those claims. *E.g.*, *Uhl v. Cnty. of Allegheny*, No. 06-01058, 2008 U.S. Dist. LEXIS 55587, at *29-30 (W.D. Pa. July 22, 2008).

Plaintiffs' remaining claims are already addressed by PNC's filings, which fully explain Plaintiffs' failure to produce evidence to support them. This Reply is therefore limited to a few "twists" raised in Plaintiffs' Opposition.

II. ARGUMENT

A. Bankruptcy Filings Bar Any Recovery For Class Members Associated With 9,780 Loans In This Litigation

In their appellate briefing in the Third Circuit, Plaintiffs did not contest that the filing of bankruptcy by any member of the class would bar him or her from recovery. Appellees' Br. at 23-25, App. Tab 54. Rather, Plaintiffs asserted that evidence of such filings should not defeat class certification but simply place a burden upon Plaintiffs to identify the real party in interest at some later date by conducting a "simple electronic database search and a brief review of the bankruptcy records . . . . to provide PNC with documentary evidence to support class membership as necessary." *Id.* at 24. In holding that the class was ascertainable, the Third Circuit accepted that "Plaintiffs here have identified a reliable, repeatable process whereby ***members of the putative class may be identified***: consult CBNV's business records and then

follow a few steps to determine ***whether the borrower*** is the real party in interest." *CBNV III*, 795 F.3d 380, 397 (2015) (emphasis added).

PNC has conducted the very "electronic database search" and "reliable" review process advocated by Plaintiffs and relied upon by the Third Circuit. That process establishes that Plaintiffs cannot provide "documentary evidence to support class membership" for class members associated with 9,780 loans in the class.[1] That 36.6% of the loans in the class have an associated bankruptcy filing is no longer "speculation," *CBNV III*, 795 F.3d at 397, but undisputed fact.

Plaintiffs' reliance on cases holding that class members do not need to establish standing to prosecute a class action or maintain Article III jurisdiction is misplaced. SJ Opp., at 4-5. Those cases deal only with the question whether, under Article III, the case can proceed if some class members lack standing. None of these cases hold that class members may recover when they have no claims because their claims are actually the property of a bankruptcy estate.[2]

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[1] Plaintiffs are simply wrong that "bankruptcy estates are included" in the certified class by virtue of the inclusion of debtors on the Class List or any instruction included in the class notice. Pls.' Opp. to Summ. Judg., at 5 (Doc. No.731) ("SJ Opp."). PNC's consent to the Class List was made subject to its reservation of rights to assert defenses against any members of the class. *See* Supp. App. Tab 166. Obviously, PNC cannot unilaterally exclude persons from the class; that is what the Court has the authority to do, on PNC's Motion.

[2] Plaintiffs are well aware that all claims relating to the 9,780 loans in bankruptcy are property of the bankruptcy estates identified by PNC. *See, e.g.*, *Schafer v. Decision One Mortg. Corp.*, No. 08-5653, 2009 U.S. Dist. LEXIS 45474, at *14 (E.D. Pa. May 29, 2009) ("TILA claims arising from the loan documents themselves" accrued at loan closing prior to petition date and, therefore, were property of the estate). In contrast, the right to a tax refund accrues each time an overpayment is made. *In re Machia*, 360 B.R. 416, 420 (Bankr. D. Vt. 2007); *In re De Voe*, 5 B.R. 618, 619 (S.D. Ohio 1980). That chapter 13 debtors may retain concurrent standing with their chapter 13 trustees to prosecute an action ***during the pendency of a bankruptcy case*** for the benefit of the estate does not save their ability to recover on unscheduled claims following a bankruptcy discharge. *E.g.*, *Prekop v. PNC Bank*, No. 2:10-cv-1691, 2013 U.S. Dist. LEXIS 6193, at *4 (W.D. Pa. Jan. 16 2013) (chapter 13 trustee's failure to pursue unscheduled claim "does not constitute abandonment, such that a debtor may pursue it" following discharge).

Furthermore, as noted above, this argument is contrary to the Third Circuit's conclusion – in reliance on Plaintiffs' argument – that the parties will engage in a process "whereby members of the putative class may be identified." *CBNV III*, 795 F.3d at 397. This is in accord with well-settled law. *See, e.g.*, C*audill v. Sears Transition Pay Plan*, No. 06-12866, 2011 U.S. Dist. LEXIS 45294, at *11 (E.D. Mich. Apr. 26, 2011) (granting defendant's post-judgment motion to exclude unnamed class members from class who had filed bankruptcy).

On PNC's Motion to Dismiss, the Court already held that it would be "unprecedented" for named Plaintiffs who had filed bankruptcy to be permitted to "wait until final judgment" "to reopen their bankruptcies, and substitute the bankruptcy trustee as the real party in interest." Mem. Op. at 37, App. Tab 4. Thus, Plaintiffs' "solution" has already been rejected.[3] Indeed, Plaintiffs fail to mention another court's rejection of their counsel's suggestion. *Mayo v. USB Real Estate Sec., Inc.*, No. 08-00568, 2012 U.S. Dist. LEXIS 135454, at *15-16 (W.D. Mo. Sept. 21, 2012) (court "cannot find, any authority holding that a federal court may certify a class where some members lack standing on the grounds that the court can later substitute a bankruptcy trustee for those class members"). Plaintiffs cite no authority holding that individuals are permitted to substitute their bankruptcy trustees ***after final judgment***. The cases they cite permit individual class members to remain in the class only if they demonstrate they have scheduled and exempted their litigation claims in their bankruptcy cases. SJ Opp., at 8-9.

Since PNC has demonstrated, and Plaintiffs admit, that virtually all if not all of the 9,780 bankruptcy filers have not scheduled or exempted their claims, Jt. Stmt. of Facts ¶¶ 97-99,

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[3] Plaintiffs' interpretation of *Killmeyer v. Oglebay Norton Co.*, 817 F. Supp. 2d 681, 689 (W.D. Pa. 2011) does not provide a rationale for permitting automatic substitution of bankruptcy trustees for absent debtor class members. As *Killmeyer* held, the reason the trustee was substituted for the individual plaintiff in that case was because "upon being informed of the existence of the suit, the trustee promptly moved to reopen the bankruptcy." *Id.* This has not occurred here.

judgment should be entered, or the class should be decertified on that basis.

B. Plaintiffs' RESPA Opposition Is Unavailing

1. Plaintiffs' Arguments Cannot Save The RESPA ABA Claim

Plaintiffs do not challenge PNC's arguments that the ABA claim: (i) is limited to loans made during the ABA Disclosure subclass period on which EquityPlus, LLC was used, and (ii) cannot be based on use of alleged affiliated title companies. Br. in Supp. of Summ. Judg., at 12, 15-16 (Doc. No. 712) ("SJ Br."). The remainder of the ABA claim – involving use of EquityPlus, LLC for origination services during the ABA Disclosure subclass period – fails based on PNC's argument that the ABA requirements do not apply to origination services, *id.* at 12-14, which Plaintiffs do not even counter.[4]

2. Plaintiffs' Arguments On The RESPA Kickback Claim Fail

In an effort to cast the CBNV-EquityPlus relationship during the consulting agreement period as one involving illegal "referrals," Plaintiffs selectively cite only alleged facts relating to the marketing and advertising aspects of the relationship. *Id.* at 12-16. In reality, as explained in PNC's opening brief, it is undisputed that EquityPlus provided numerous managerial and other services, and substantial goods and facilities, to CBNV's second mortgage operation at the Reston North LPO, thus defeating Plaintiffs' RESPA kickback claims. *Id.* at 22-34.

In response, Plaintiffs argue that EquityPlus's contributions do not count because RESPA requires "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." SJ Opp., at 19. As a corollary of this position, Plaintiffs further argue that contribution of "overhead

[4] Also fully dispositive of this claim is that there is no affirmative cause of action for violation of the ABA requirements. On this point Plaintiffs rely on the minority view, SJ Opp., at 28-31, but PNC has already explained how this is flawed. SJ Br. at 9-10. And Plaintiffs' purported distinction of the cases cited by PNC, SJ Opp., at 31-32 & n.27, relating to the EquityPlus ownership interest in EquityPlus, LLC, is not only absurd but not pled in the JCAC.

attendant to being in the mortgage business" does not count under RESPA. *Id.* at 22. Before proceeding to debunk that argument, PNC first notes that even under Plaintiffs' formulation EquityPlus did provide services to move loans to closure because the payment of the loan-level employees at the LPO, and the risk of unsold or repurchased loans, were deducted from payments otherwise due EquityPlus. SJ. Br., at 31-32. Plaintiffs try to distort this issue, see SJ Opp. at 15 n.10, 23, but, as explained in Paragraph 152 of PNC's Reply to Plaintiffs' Statement of Additional Facts, EquityPlus clearly paid these expenses and bore these liabilities.

Moreover, Plaintiffs rely on *Cohen v. J.P. Morgan Chase & Co.*, 608 F. Supp. 2d 330 (E.D.N.Y. 2009), *Busby v. JRHBW Realty, Inc.*, 642 F. Supp. 2d 1283 (N.D. Ala. 2009), and *Augenstein v. Coldwell Banker Real Estate LLC*, No. 2:10-cv-191, 2011 WL 3837096 (S.D. Ohio Aug. 30, 2011). As Plaintiffs concede, these cases have been overruled, SJ Opp., at 19-20 n.16, and so their persuasive value is nil at the outset. And the court in each of these cases addressed solely ***Section 8(b)***, which provides for liability if a portion of a charge for rendering a settlement service is given "other than for services actually performed." PNC, however, is focusing on the safe harbor under ***Section 8(c)***, which applies to payments "for goods or facilities actually furnished or for services actually performed" and any salary arrangement for services to a lender's agent or contractor. 12 U.S.C. § 2607(c)(1)(C), (c)(2). *See also* 12 C.F.R. § 1024.14(g)(1)(iii) (RESPA permits payment to lender's "duly appointed agent or contractor for services actually performed").

As its language makes clear, Section 8(c)(2) is not limited to "services," much less "services connected to individual loan transactions." Rather, it encompasses "***goods***" and "***facilities***," as those terms are ordinarily defined. *See Edwards v. First Am. Corp.*, 798 F.3d 1172, 1180 (9th Cir. 2015) ("[T]he meanings of 'goods' [and] 'facilities' [under Section 8(c)(2)] . . . are plain. 'Goods' are 'tangible movable personal property having intrinsic value excluding

money'; a 'facility' is 'something (as a hospital, machinery, plumbing) that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end.'").[5]

If anything other than common sense is necessary to see that what EquityPlus contributed to the origination process amply satisfies RESPA, the inclusion of "goods" and "facilities" removes all doubt. Computers and office space are not connected to any one individual loan any more so than a manager who hires and supervises the work done by the loan originators in the office, and yet Section 8(c)(2) provides that furnishing these goods and facilities triggers the safe harbor. Accordingly, Plaintiffs' construction of Section 8(c)(2) cannot possibly be right.[6] Since Plaintiffs do not contest that EquityPlus provided the goods, services and facilities that PNC's Motion establishes it did, there were no "kickbacks."[7]

In addition to the plain meaning of the statutory text, PNC has cited case law showing that providing services to the process of originating loans is just as compensable under RESPA as working on a specific loan. Plaintiffs try to distinguish these cases by arguing that they

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[5] Plaintiffs argue that the facts of *Edwards* are analogous to those here. SJ Opp., at 23-24. But *Edwards* involved the provision of "equity shares," which the court concluded are "not goods, services, or facilities," and thus did not fall within Section 8(c)(2). 798 F.3d at 1180. Here, in contrast, what Plaintiffs concede EquityPlus provided indisputably included goods, facilities and services, and not "equity shares" or any other such intangible.

[6] Nor do Plaintiffs' cases really support it. For example, in *Cohen* the court constructed a "working definition" of closing service (it subsumed origination services within "closing" services) as "that which either directly benefits the consumer, or is performed at or before the closing." 608 F.Supp.2d at 348. Here, the EquityPlus services directly benefited consumers by facilitating their loans, and they were indisputably provided before closing.

[7.] For additional authority that Section 8(c)(2) covers goods and facilities in the nature of overhead, see HUD's Statement of Policy 1999-1, "Regarding Lender Payments to Mortgage Brokers," 64 Fed. Reg. 10080, 10081, 10085-86 (1999) (discussed in PNC's opening brief, SJ Br., at 33-34, and cited approvingly by Plaintiffs, SJ Opp., at 20-21), and *Price v. Landsafe Credit, Inc.*, No. 205-156, 2006 WL 3791391, at *4 (S.D. Ga. Dec. 22, 2006) (discussed in PNC's opening brief, SJ Br., at 33, and not addressed by Plaintiffs).

involved services that were connected to individual loan transactions, SJ Opp., at 22-23 n.18, but that is not correct. While there is no discussion of the point in *Kiley* or *Sosa* because the question was not relevant to those courts' decisions, the Second Circuit in *Clauss* went out of its way to point out that this is a holistic process not connected to specific loans. In addition to continually noting that the defendant managed the appraisal "process," it stated: "Moreover, the services IREP provided cannot be viewed in isolation, but rather, incorporate ***extensive ongoing work to expand and maintain its network***—*e.g.*, efforts to identify, solicit, audit, and monitor appraisers." 436 Fed. App'x 25, 28 (2d Cir. 2011) (unpublished) (emphasis added). Ongoing work to expand a network of appraisers is a quintessential example of work not connected to a particular loan transaction.

Finally, Plaintiffs argue in the alternative that, even if EquityPlus's contributions counted for purposes of RESPA, disputed issues of fact still would exist as to whether the amounts paid for these contributions bore a "reasonable relationship" to their market value. SJ Opp., at 25-26. In support, Plaintiffs cite non–Third Circuit authorities. This is not only directly contrary to what Plaintiffs argued to the Third Circuit to obtain affirmance of class certification, but in any event Third Circuit precedent forecloses Plaintiffs' argument. *See Santiago v. GMAC Mortg. Corp.*, 417 F.3d 384, 387 (3d Cir. 2005) (rejecting borrower's argument that RESPA imposes "requirement that the cost of a service bear a reasonable relationship to its market value," explaining that RESPA "does not provide a cause of action for overcharges").

C. Plaintiffs Still Have Not Provided Any Evidence Supporting Their TILA/HOEPA Claims

Throughout this litigation, Plaintiffs have asserted a single, "very basic" TILA/HOEPA claim: because no services were performed in exchange for the title examination and abstract fees charged by CBNV, such fees should have been included in CBNV's calculation of the

Finance Charge and APR. *E.g.*, JCAC ¶ 465, App. Tab 1; Appellees' Br. at 46, App. Tab 54. Plaintiffs now proffer a different theory: even if CBNV charged fees in exchange for work performed, CBNV did not record such fees in the proper line on class members' HUD-1 statements. SJ Opp. at 34. This theory amounts to an admission that the title companies performed real and substantial work in exchange for the fees they received; such admission defeats Plaintiffs' sole remaining TILA/HOEPA claim.

1. There is No TILA/HOEPA Violation For Performing Title Work Even If The Charge Is Allegedly Reflected On The Wrong Line

As a preliminary matter, Regulation Z is clear that "[c]harges excluded from the finance charge" include "[f]ees for title examination, abstract of title, title insurance, property survey, ***and similar purposes***." 12 C.F.R. § 226.4(c)(7) (emphasis added) (also excluding bona fide fees for "preparing loan-related documents, such as deeds, mortgages, and reconveyance or settlement documents"). Thus, the regulation's exclusion is not strictly limited to abstract of title and title examination fees but rather encompasses all fees for "similar purposes." *Id.* Moreover, 12 C.F.R. § 226.4(c) establishes no requirement that fees charged for certain services be allocated to any particular HUD-1 line item. (The HUD-1 is a creature of RESPA, and this is not a RESPA claim.). What is clear – and all that needs to be clear – from the testimony and loan file documentation is that CBNV LPOs used the HUD-1 to record fees actually charged for title and settlement services actually performed by third-party vendors.

2. Plaintiffs Have Not Offered Any Admissible Evidence Supporting Their TILA/HOEPA Claim

Plaintiffs have offered no evidence to refute the substantial deposition testimony underlying PNC's arguments that the 1102 and 1103 fees charged by CBNV reflected bona fide services provided by the title companies. In lieu of actual evidence, Plaintiffs rely exclusively on the conclusions of an expert unsupported by facts from a fact witness. SJ Opp., at 38-45. For

the reasons stated in PNC's Reply Brief in Support of Decertification, such reliance is impermissible. Reply Br. on Decert., at 5-7. As Plaintiffs have acknowledged throughout this litigation, to prevail on their TILA/HOEPA claims, they must provide evidence, on a ***classwide*** basis, that the title companies did not perform bona fide services in exchange for the Section 1100 fees they received. *CBNV III*, 795 F.3d at 407. Because Plaintiffs have failed to do so, summary judgment should be entered on their remaining TILA/HOEPA claim.

D. Plaintiffs' Arguments Do Not Save Their RICO Claims

Plaintiffs concede that their RICO claims are derivative of their RESPA and TILA/HOEPA claims. *See* Pls.' Reply Br., at 5 (Doc. No. 614) ("The RICO Claims Are Derivative Of The RESPA And TILA/HOEPA Claims."); *CBNV III*, 795 F.3d at 407 (Plaintiffs "can prove their RICO claims with the same classwide evidence that will be used to prove the RESPA and TILA/HOEPA claims."). Any assertion to the contrary now, Decert. Opp., at 21, thus fundamentally conflicts with Plaintiffs' representations to this Court and the Third Circuit. Because PNC is entitled to summary judgment on the RESPA and TILA/HOEPA claims, it is axiomatic that Plaintiffs' RICO claims also fail as a matter of law. These claims fail for additional, independent reasons, but PNC limits this Reply to the only new point in Plaintiffs' Opposition that requires additional response: third-party reliance. PNC's Reply Brief in Support of Decertification addresses Plaintiffs' arguments regarding reliance by Plaintiffs and the class. *See* Reply Br. on Decert., at 8-9.

Given the dearth of evidence supporting their original theory of first-party reliance, Plaintiffs invent a new theory of proximate causation: third-party reliance by credit reporting agencies. SJ Opp., at 59-60. This theory is wholly unsupported by law or fact. Plaintiffs cite no legal authority recognizing such a theory. *See id.* Additionally, proximate causation requires a relationship between injury and an alleged predicate act. Here, Plaintiffs allege that "CBNV's

predicate acts of mail and wire fraud included the purchase of customer lists from credit ratings agencies . . . and the use of the wires to obtain credit reports in connection with the origination of each loans [sic]." *Id.* at 59. However, mail and wire fraud require misrepresentation of a material fact. *United States v. Coyle*, 63 F.3d 1239, 1243 (3d Cir. 1995). Plaintiffs have not alleged – or offered any proof of – a single misrepresentation associated with this use of the mail or wires. They allege that the "credit reporting agencies[] reli[ed] on the legitimacy of CBNV's operations," SJ Opp., at 59, but offer no evidence in support thereof. *See* PAF ¶¶ 240-58 (citing evidence merely establishing that the LPOs purchased consumer lists from credit reporting agencies, but not establishing reliance on the part of those agencies). This is merely speculation built upon innuendo.

Thus, based on a complete lack of law or evidence, Plaintiffs ask this Court to accept a new theory of ***presumed*** reliance on the part of a ***third party*** to establish proximate cause. Such a theory is way too "indirect, remote, and many steps away" to come close to satisfying RICO's proximate causation requirement, *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 443, 445 (3d Cir. 2000), and PNC is thus entitled to summary judgment on the RICO claims.[8]

III. CONCLUSION

Plaintiffs' arguments confirm that the total lack of supporting evidence underlying Plaintiffs' allegations, and summary judgment should be entered in favor of PNC.

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[8] At no point have Plaintiffs ever alleged any direct causal relationship between their injuries and alleged money laundering. Rather, they state that CBNV "used and maintained various bank accounts for the [LPOs] which [it] used to commingle [its] ill-gotten proceeds and to conceal [its] unlawful activities." RICO Case Stmt. at 4. A similar argument was rejected in *Zavala v. Wal-Mart Stores, Inc.*, 447 F. Supp. 2d 379, 388 (D. N.J. 2006), *aff'd* 691 F.3d 527 (3d Cir. 2012) ("Plaintiffs contend that '[m]oney laundering also directly harmed plaintiffs inasmuch as it shielded the enterprise from detection and thereby continued its existence.' This statement is paradoxical because it fails to actually allege any direct harm while claiming to do so.") (citation omitted) (alteration in original).

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