No. 19-1059

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PHILIP ALIG, SARA J. ALIG, ROXANNE SHEA and DANIEL V. SHEA, individually and on behalf of a class of persons,

Plaintiffs-Appellees,

v.

QUICKEN LOANS INC., and TITLE SOURCE, INC.,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of West Virginia,
Nos. 5:12cv114, 5:12cv115, Judge John Preston Bailey

APPELLANTS' OPENING BRIEF

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS (QUICKEN LOANS INC.)

Pursuant to FRAP 26.1 and Local Rule 26.1, Quicken Loans Inc., who is Appellant, makes the following disclosure:

1. Quicken Loans Inc. is not a publicly held corporation or other publicly held entity.

2. Quicken Loans Inc. does have a parent corporation. The parent corporation is Rock Holdings Inc.

3. There is no publicly held corporation or other publicly held entity that holds more than 10% of the stock of Quicken Loans Inc.

4. There is no other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation.

5. Quicken Loans Inc. is not a trade association.

6. This case does not arise out of a bankruptcy proceeding.

/s/ William M. Jay

William M. Jay

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS (AMROCK INC. F/K/A TITLE SOURCE, INC.)

Pursuant to FRAP 26.1 and Local Rule 26.1, Amrock Inc. f/k/a Title Source, Inc., who is Appellant, makes the following disclosure:

1. Amrock Inc. f/k/a Title Source, Inc., is not a publicly held corporation or other publicly held entity.

2. Amrock Inc. f/k/a Title Source, Inc., does have a parent corporation. The parent corporation is Rock Holdings Inc.

3. There is no publicly held corporation or other publicly held entity that holds more than 10% of the stock of Amrock Inc. f/k/a Title Source, Inc.

4. There is no other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation.

5. Amrock Inc. f/k/a Title Source, Inc., is not a trade association.

6. This case does not arise out of a bankruptcy proceeding.

/s/ William M. Jay

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INTRODUCTION

In decisions substantially cut-and-pasted from Plaintiffs' briefs below, the district court awarded a $10.5-million class recovery to nearly 3,000 West Virginians who refinanced their mortgages with Quicken Loans. That award was based primarily on an erroneous legal conclusion that the court could award penalties for "unconscionable inducement" under the West Virginia Consumer Credit and Protection Act ("WVCCPA") without requiring the plaintiff class to demonstrate that anyone was actually induced to do anything. The court thought it could simply penalize anything it labeled "per se unconscionable."

What the district court deemed "per se unconscionable" was in fact an industry-standard practice. Homeowners applying to refinance home loans gave lenders their estimate of their property's value. Like other lenders, Quicken Loans included that number on appraisal order forms; among other reasons, it helped match appraisals with qualified appraisers. Plaintiffs contend, and the district court agreed, that providing that number to the appraiser is *per se* unconscionable conduct (and a class-wide breach of contract), *regardless* of whether it affected anyone's decision to refinance, or whether it harmed anyone at all. In fact, many class members demonstrably benefited from refinancing with Quicken Loans—a twelve-time J.D. Power award winner for client satisfaction—through lower payments, lower rates, or cash to pay off other debts. One class member was so

satisfied with his loan, he opted out rather than take a penny of the judgment.

The judgment is based on three fundamental errors of law that require reversal.

First, the district court granted Plaintiffs summary judgment on "unconscionable inducement" without requiring them to prove inducement. As this Court has made clear, unconscionable inducement under the relevant WVCCPA provision is "unconscionable conduct that *causes a party to enter into a loan*." *McFarland v. Wells Fargo Bank, N.A.*, 810 F.3d 273, 285 (4th Cir. 2016) (emphasis added). Plaintiffs presented no evidence on that key element of inducement, and certainly did not show that anyone was harmed. The district court nonetheless granted summary judgment for Plaintiffs, holding the practice "*per se* unconscionable," and awarded punitively high statutory penalties of $3,500 per loan.

Second, the district court granted Plaintiffs summary judgment on a claim that Quicken Loans breached a supposed contractual duty to "obtain an acceptable appraisal," but both the term itself and the supposed class-wide breach are entirely spurious. The phrase "obtain an acceptable appraisal" appears *nowhere* in the relevant contracts. The only contractual reference to an "acceptable appraisal" does not oblige Quicken Loans to provide one; it merely recognizes that the *lender's* "untimely receipt of an acceptable appraisal" might delay funding the

loan. The court upended the plain language by ruling that Quicken Loans must provide an appraisal "acceptable" to the *borrower*. Compounding its error, the court declared every appraisal *per se* un-"acceptable"—indeed, worthless—if the order form mentioned the borrower's estimated value, even if the appraisal was accurate and a beneficial loan went through. That misconception infected the district court's rulings on both breach and damages, which awarded *every* class member *every* penny of the appraisal fee (averaging $350) as "restitution." But under black-letter West Virginia law, breach-of-contract plaintiffs can recover only expectancy damages (which would have been zero, or close to it).

Third, these legal errors (and others) also led the district court to certify a class despite a host of individualized issues. To grant class certification, the district court had to: erase the "inducement" requirement from the statute; apply its unconscionability ruling class-wide; refuse to consider whether the challenged appraisals caused borrowers any cognizable injury; invent a non-existent contractual duty to "obtain an acceptable appraisal"; find a class-wide "breach" of that spurious duty without considering whether any borrower found her appraisal "acceptable"; employ a legally invalid damages methodology; misplace the burden of persuasion; and preclude Quicken Loans from litigating many individualized defenses, including class members' lack of standing and untimeliness. These individualized issues predominated over any purportedly common ones, yet the

district court imposed a judgment of more than $10 million class-wide.

In reaching that judgment, the district court lifted large portions of its decisions on liability, class certification, and damages directly from Plaintiffs' briefing—often with typos and grammatical errors included—with very little independent reasoning. This Court should subject those decisions to particularly exacting scrutiny. But even under ordinary standards of review, the district court's judgment is legally erroneous and cannot stand.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1332(d). It entered final judgment on December 14, 2018. JA627. Defendants noticed a timely appeal on January 10, 2019. JA631. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES ON APPEAL

1. Whether the district court erred by awarding Plaintiffs judgment on unconscionable inducement without requiring any evidence of inducement.

2. Whether the district court erred by holding Quicken Loans liable for breach of a supposed contractual obligation that appears nowhere in the contract.

3. Whether the district court erred in certifying the class.

4. Whether the district court erred in awarding Plaintiffs equitable damages for breach of contract without trial.

STATEMENT OF THE CASE

I. Appraisals Are Independent Estimates, And An Appraiser Is Not Tainted Merely By Learning What The Borrower Thinks The Property Is Worth.

This case is about appraisals used in refinancing home-mortgage loans. Because the real estate secures the loan, lenders generally use appraisals to verify the collateral's value. JA219. As this Court has explained, the lender arranges the appraisal because "it is not the borrower but the bank that typically is disadvantaged by an under-collateralized loan." *McFarland*, 810 F.3d at 280.

During the relevant time, the Uniform Residential Loan Application (created by Fannie Mae and used throughout the industry) asked borrowers to estimate the value of their real estate, including the property being refinanced. JA205. Among other things, the borrower's estimate of value ("BEV") is used by the lender to determine what loan programs may be available to the borrower. JA322, JA197.

Likewise, it was common practice for lenders to include borrowers' estimates on appraisal order forms submitted to appraisers and appraisal management companies. JA328. The estimate helped price the job and match it with an appraiser who had the right licensure. JA933, JA471-474.

Plaintiffs claim that every time this common practice was followed, the appraisal was automatically and irreparably tainted. But appraisers are independent professionals and rely on their own knowledge, experience, and

techniques, rather than on the opinions of laypeople. JA221-22. They conduct appraisals consistent with the Uniform Standards of Professional Appraisal Practice ("USPAP"), which provide that an appraiser is required to act impartially, objectively, and independently. JA250.

Throughout the class period, USPAP guidance specifically recognized that an appraiser could perform an appraisal independently even if he or she learns what the borrower thinks the property is worth. It expressly permitted appraisers to accept assignments in which lenders provided an "[o]wner's estimate of value" or even an "[a]pproximate (or Minimum) value needed," so long as reaching those values was not "a condition … of th[e] assignment." JA257. In fact, in the context of a sale, appraisers were *required* to learn the sale price, *Id.*, which necessarily reflects the borrowers' (*i.e.*, the buyers') opinion of the property's fair market value. West Virginia law expressly authorizes lenders to rely on appraisals "prepared in compliance with [USPAP]." W. Va. Code § 31-17-8(m)(8).

All the appraisers who provided evidence, even Plaintiffs' experts, testified that they were never influenced by the BEV. JA353-54, JA358, JA344, JA347-48, JA373-75, JA364-65. Indeed, appraisers sometimes did not even see that information before valuing the property. JA1052, JA1059-60. Moreover, each appraiser expressly certified (subject to criminal penalties) that the appraisal had been prepared "in accordance with" USPAP and was not "conditioned on any

agreement or understanding" about what value to return. *E.g.*, JA211-12.

In 2009, after the conduct at issue in this case, the rules changed. Freddie Mac and other market participants and regulators adopted the Home Valuation Code of Conduct ("HVCC"), which for the first time prohibited lenders from giving BEVs to an appraiser in connection with refinance loans. JA378-79. For *purchase* loans, the HVCC still permitted passing on the buyer's opinion of the home's value, *i.e.*, the sale price.[1]

II. Named Plaintiffs Seek Refinancing.

In 2007 and 2008, the named plaintiffs (two couples) sought to refinance their home loans with Quicken Loans to lower their payments and interest rates. JA323. The loan applications asked them to estimate the value of the property they sought to refinance. JA322, JA937-40.

A. TSI Requests Appraisals.

Quicken Loans contracted with Title Source, Inc. ("TSI") to manage ordering appraisals. TSI (now called Amrock) is an appraisal-management company for Quicken Loans and other lenders. Through an automated process, TSI used the information it received from Quicken Loans to generate an appraisal-request form, which it shared with licensed third-party appraisers and appraisal

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[1] *See* Freddie Mac, *Home Valuation Code of Conduct*, § I.B(6) (Dec. 2008), http://www.freddiemac.com/singlefamily/pdf/122308_valuationcodeofconduct.pdf.

companies experienced in the area where the properties were located. JA378. TSI's appraisal-request forms included the "Applicant's Estimated Value," identified as such. *E.g.*, JA935-36. The number provided to the appraiser originated with the borrower; Quicken Loans did not provide or suggest it. JA322.[2]

B. Plaintiffs Sign Disclosure and Deposit Agreements.

In addition to completing the loan application, the Aligs and Sheas paid Quicken Loans a deposit and signed a one-page "Interest Rate Disclosure and Deposit Agreement." *See* JA382, JA381. They signed different versions of that document. Both versions had three sections.

In the "Deposit Agreement" section, the Sheas' document stated that the Sheas would deposit $300 to "authorize [Quicken Loans] to begin processing your loan application and advance out-of-pocket expenses on your behalf to obtain an appraisal and/or credit report." JA381. The Aligs' was similar but omitted the language about "obtain[ing] an appraisal and/or credit report." JA382. Both provided that at closing Quicken Loans would credit the deposit against the cost of the appraisal and credit report. JA381-82.

In the "Disclosure" section, the Sheas' document stated that Quicken Loans

[2] While Plaintiffs disputed this point, all they could point to was the named plaintiffs' testimony that they did not *recall* providing estimated values. JA895, JA914, JA914C.

hoped to have the Sheas' loan "fully processed and closed" by the anticipated closing date, but that "some parts of this process aren't under [Quicken Loans'] control." JA381. "For instance, [Quicken Loans] can't be responsible for delays in loan approval or closing due to … untimely receipt of an acceptable appraisal." *Id*. The Aligs' included similar language, although not labeled "Disclosure." JA382.

C. The Named Plaintiffs Refinance Their Loans.

A third-party appraiser assessed the value of the Aligs' home as $125,500—$3,500 less than the Aligs' estimated value. JA323. Another third-party appraiser put the value of the Sheas' home at $158,000—$17,000 less than the estimate listed on their appraisal request form. *Id*.; JA935-36. Both appraisers certified that their appraisals were USPAP-compliant and independently derived. JA211-12.

Consistent with those certifications, both appraisers testified in depositions that they were not influenced by the BEVs. The Aligs' appraiser testified that he "never let it affect [him]" or "impact anything that [he]" did, because it was just "what somebody thought the property was worth" and "not necessarily what it was." JA353-54, JA358.[3] The Sheas' appraiser concurred that "[i]t didn't matter

[3] The district court stated that that appraiser characterized a BEV as "a tip-off." That is incorrect: the appraiser answered affirmatively when asked if another appraiser had characterized the BEV as such in another case. *See* JA357-58. The other appraiser's testimony is not evidence in this case.

to [him] one inkling" whether his appraisal corresponded with the borrower's number. JA347-48.

Experts deposed by *both* parties similarly testified that they were not improperly influenced by the BEV's presence on the form. Veteran appraiser Jody Hill testified that she was "not influenced by any numbers at all." JA373-75. Phillip Jackson testified that he "probably wouldn't give … any credence at all" to a homeowner's valuation "based on his idea of what houses are worth in a different neighborhood." JA364-65.

In their refinancing, the Sheas replaced an adjustable rate on the first mortgage with a fixed one; substantially lowered their interest rate, by eliminating a second mortgage with a 12.4% rate, leaving one loan with a 6.625% rate; and received a cash payout. *See* JA199. The Aligs lowered their monthly payments by $480.73 and consolidated debts by paying off two consumer loans. See JA200-01. The Aligs and Sheas never claimed they would have *declined* these obvious benefits—or passed up refinancing—had they known the appraisal-request form contained their BEV.

III. The District Court Grants Plaintiffs Summary Judgment, Certifies A Class, And Awards $10.5 Million In Damages.

The Sheas and Aligs brought this putative class action against Quicken Loans and TSI ("Defendants") in December 2011. Defendants removed to federal court under the Class Action Fairness Act. JA48.

Three counts are relevant here, all asserted on behalf of a class represented by the Aligs.[4] *First*, Plaintiffs alleged that by failing to disclose to them that the appraisal-request forms included their BEVs, Quicken Loans unconscionably induced them to enter into loan agreements in violation of the WVCCPA, W. Va. Code § 46A-2-121(a)(1). JA73. *Second*, they alleged that the Interest Rate Disclosure and Deposit Agreements[5] contractually obligated Quicken Loans to obtain a "fair and unbiased" appraisal, and that providing the BEVs to TSI breached that duty. JA75-76. *Third*, they alleged that Quicken Loans and TSI engaged in a conspiracy to engage in unconscionable inducement and breach of contract. JA72.

Plaintiffs sought to certify all three claims for class treatment on behalf of a putative class encompassing 2,769 West Virginia home-loan refinancings from 2004 to 2009. JA964, JA1019. From an early stage, the district court recognized that "[o]bviously, the only way that a claim for unconscionable conduct could prevail in a class action is if the actions of the defendant were per se

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[4] The Sheas are not class representatives. JA653. The named plaintiffs also alleged individual claims that were dismissed by stipulation and are not at issue here. JA72-78, JA177, JA383, JA597, JA604.

[5] For the purposes of the breach-of-contract claim, the parties stipulated that "the Interest Rate Disclosures and/or Deposit Agreements for the named plaintiffs' loans [citing Bates numbers] are representative of the standard deposit agreements used by Quicken Loans from 2002 to the present." JA185; *see, e.g.*, JA381 (Sheas' document with matching Bates number).

unconscionable." JA161. The parties also cross-moved for summary judgment on liability.

The district court took the motions out of the usual order, first granting Plaintiffs' motion for summary judgment on liability and denying Defendants' motion, *then* certifying the proposed class. *See* JA385.

A. The District Court Grants Plaintiffs Summary Judgment.

1. At the relevant time, the WVCCPA provided a right of action, "[w]ith respect to a transaction which is or gives rise to a consumer credit sale … or consumer loan, if … the agreement or transaction … [was] induced by unconscionable conduct." W. Va. Code § 46A-2-121(a) (1996). Despite that language, Plaintiffs argued, and the district court echoed, that they need *not* show that Quicken Loans' conduct had *any* effect on the borrowers' decision to refinance. Relying on that argument and seeking to facilitate class certification, Plaintiffs adduced no evidence of inducement whatsoever (which necessarily would have been individual, not class-wide). The district court held that the statute "says nothing of the consumer's state of mind"; therefore, "[i]f the 'transaction' itself is induced *or furthered* by the lender's unconscionable conduct, that is enough for a violation." JA405 (emphasis added); *see* JA926 (Plaintiffs' identical argument).

The district court held that merely relaying Plaintiffs' estimates on an

appraisal-order form, without disclosing that fact, was *per se* unconscionable inducement, and granted Plaintiffs summary judgment on liability. JA403, JA445.

2. Next, the district court held the same conduct was also a breach of contract. Plaintiffs argued, and the district court echoed, that Quicken Loans had an obligation under the Interest Rate Disclosure and Deposit Agreement to "obtain an 'acceptable' appraisal." JA409. The court then held Quicken Loans breached this obligation because merely providing the BEV rendered the resulting appraisals inherently unacceptable. *See Id*.

3. On the conspiracy claim, the court held that Quicken Loans' WVCCPA liability extended to TSI. JA438-39; *see also* JA446.

B. The District Court Certifies A Class Notwithstanding Predominant Individualized Issues.

After finding Defendants liable on summary judgment, the district court certified a class of "[a]ll West Virginia citizens who refinanced mortgage loans with Quicken, and for whom Quicken obtained appraisals through an appraisal request form that included an estimate of value of the subject property." JA445. The court opined that the case was disposable on a class basis because "[i]f Quicken violated the law"—something the court had already determined—"plaintiffs will ask this Court to award statutory damages and set an amount," which the court deemed "straightforward." JA425.

The court brushed aside other issues Defendants had raised that could only

be resolved individual-by-individual. For example, many class members' claims are outside the WVCCPA's one-year limitations period. JA480. The court held that even though "it is plaintiffs' burden to meet the requirements of Rule 23," it was "*defendants'* burden to demonstrate that any loan in the class is time barred." JA432 (emphasis added). The court then stated that Quicken Loans' limitations defenses would not matter, because "equitable tolling" could be applied "uniformly" across the class. JA432-35.

Later in the case, despite tight constraints that the district court imposed,[6] Defendants developed their individualized defenses further, and moved to decertify the class. Contrary to Plaintiffs' theory that the BEV inflated property values, the record showed that 1,360 appraisals—nearly half the class—came in *below* the BEV, sometimes significantly below. JA964, JA969. Nor did the record support Plaintiffs' theory that Quicken Loans sought inflated appraisals to support higher loan amounts. To the contrary, in numerous cases where the appraisals failed to support the loan amount, Quicken Loans restructured the loans to accommodate unexpectedly low appraisals—and even denied borrowers' requests to re-appraise properties in hopes of getting higher values. *See, e.g.*, JA989, JA1016, JA1026, JA1028, JA1037, JA1040.

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[6] The court refused to allow targeted discovery of class members on these issues. JA452-54, JA460.

The record also refuted the claim of class-wide injury, because many borrowers benefited from the challenged refinancings—such as the Sheas' elimination of the 12.4% second mortgage and the large balloon payment. JA1044, 1046.

Finally, the record demonstrated that a number of borrowers never entered into the purported contract that was supposedly breached. JA1065-69.

The district court nevertheless denied Defendants' motion to decertify the class. JA532-50.

C. The District Court Awards Statutory Damages For Unconscionable Inducement And Restitution For Breach Of Contract, Rather Than Actual Damages.

1. The WVCCPA authorized statutory damages between $494 and $4,941 per violation. The court awarded $3,500 per loan (10 times the average appraisal fee), for a total penalty of $9,691,500.[7] JA576, JA583, JA628.

The WVCCPA also allows plaintiffs to recover *actual* damages. W. Va. Code § 46A-5-101(1)(a). The court notified all 2,769 class members of that option. But it received only nine claims for actual damages—and five of those claimants subsequently declined to pursue them. The remaining four (including

[7] The statutory range was set at $100-to-$1000 in 1974 and adjusted for inflation annually. *See* W. Va. Code §§ 46A-5-101(1) (1996), 46A-5-106 (1994). After this case began, the statute was amended to provide for a flat $1,000 per violation, with inflation measured from 2015. *See* W. Va. Code §§ 46A-5-101(1), 46A-5-106 (2015).

the Aligs') were resolved and dismissed by stipulation. *See* JA604, JA610, JA616. Even more tellingly, one borrower opted out of the class—not because he wanted to pursue his own claim, but based on his view that his appraisal was accurate, "[t]he new loan terms saved [him] a significant amount of money," and it would not be "fair to punish Quicken Loans" after it "had been a pleasure to work with" and "saved [him] so much money." JA487-89.

For the breach-of-contract claim, the court held that all 2,769 class members were entitled to "restitution" of the *entire* appraisal fee, amounting to $968,702.95 (an average of $350 per appraisal). JA559-62.

SUMMARY OF ARGUMENT

I. This Court should apply heightened scrutiny to the district court's decisions in light of the extraordinary similarity between the wording of the district court's opinions and the wording of Plaintiffs' briefing.

II. The district court erred granting Plaintiffs summary judgment on their unconscionable-inducement claim. *First*, the plain language of the WVCCPA and this Court's case law require that a transaction be *induced* by unconscionable conduct, yet the district court read that requirement out of the statute. Plaintiffs presented no evidence that Quicken Loans' conduct caused them to refinance. The district court's interpretation of the statute even allows recovery without any injury, in violation of Article III. *Second*, Plaintiffs failed to show that Quicken

Loans' conduct was unconscionable. For both reasons, this Court should reverse the WVCCPA judgment.

The district court's decision on Plaintiffs' civil-conspiracy claim was entirely derivative of its decision on the WVCCPA claim. Therefore, Defendants are entitled to summary judgment on that claim as well.

III. The district court wrongly interpreted the Interest Rate Disclosure and Deposit Agreement as a contract that required Quicken Loans to "obtain an acceptable appraisal." That promise does not exist anywhere in the document. Even if it did, Plaintiffs failed to show breach, because they presented no evidence that their appraisals were unacceptable. Both the lack of a promise and the lack of a breach compel judgment for Quicken Loans.

IV. The district court committed multiple legal errors in certifying the class, contrary to clear precedent from the Supreme Court and this Court. Those errors included (i) precluding Quicken Loans from litigating meritorious individual defenses that would have predominated over common issues, while claiming that Quicken Loans (rather than Plaintiffs) bore the burden to establish that those defenses defeated certification; (ii) including class members with no injury and thus no Article III standing, and (iii) ignoring the requirements to determine individualized damages.

V. The district court erred awarding Plaintiffs restitution for breach of

contract and decreeing the amount without trial. The remedy for breach of contract under West Virginia law is expectancy damages, not restitution. Whatever the measure of damages, it must take into account the benefit to Plaintiffs from the appraisals, and the district court incorrectly declared that Plaintiffs received no benefit.

ARGUMENT

I. Standard of Review.

1. This Court reviews the district court's grant of summary judgment, its interpretation of state law, and its construction of a contract *de novo*. *Core Commc'ns, Inc. v. Verizon Maryland LLC*, 744 F.3d 310, 320 (4th Cir. 2014); *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991); *Seabulk Offshore, Ltd. v. Am. Home Assurance Co.*, 377 F.3d 408, 418 (4th Cir. 2004).

Class certification is ordinarily reviewed for abuse of discretion. *EQT Prod. Co. v. Adair*, 764 F.3d 347, 357 (4th Cir. 2014). A district court abuses its discretion when it "materially misapplies the requirements of Rule 23," *id.*, or "when it makes an error of law or clearly errs in its factual findings." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 317 (4th Cir. 2006).

2. Heightened scrutiny applies here given the extraordinary similarity between the wording of the district court's opinions and the wording of Plaintiffs' briefing. Federal courts do not "countenance[] the preparation of the opinion by

the attorney for either side. That practice involves the failure of the trial judge to perform his judicial function." *Chicopee Mfg. Corp. v. Kendall Co.*, 288 F.2d 719, 724-25 (4th Cir. 1961). Thus, this Court is particularly hesitant to affirm an opinion that adopts one party's briefing, and reversal may be warranted on that ground alone. *See id.*

Much of the district court's reasoning on summary judgment, class certification, and damages directly tracks Plaintiffs' briefing, even some typographical and grammatical errors. *See* Proposed Supplemental Addendum (redline comparison of opinion and Plaintiffs' briefing showing extensive duplication); *compare, e.g.*, JA397-410 *with* JA897-JA910 (summary-judgment briefing); JA416-19, JA424-26 *with* JA635-38, JA640-43, (class-certification briefing); JA431-36 *with* JA198-202 (class-certification briefing); JA531-550 *with* JA495-99 (decertification briefing); JA559-62 *with* JA942-46 (contract-damages briefing). Accordingly, this Court should give those decisions special scrutiny.

On class certification in particular, the court has an "independent obligation to perform a 'rigorous analysis.'" *EQT*, 764 F.3d at 358 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011)). Reasoning borrowed verbatim from a party does not qualify. *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 300-02 (3d Cir. 2005) (vacating class certification because the district court adopted parties' proposed order wholesale and did not conduct independent analysis).

II. Plaintiffs Proved Neither Inducement Nor Unconscionable Conduct.

Plaintiffs were not entitled to summary judgment on unconscionable inducement: they offered no evidence of inducement, and Defendants did nothing unconscionable.

A. The District Court Erred In Holding That A Claim For "Unconscionable Inducement" Does Not Require Inducement.

The district court erred in holding that "unconscionable *inducement*" under the WVCCPA does not require *inducement*. Because there was no evidence that the conduct in question had any effect on borrowers, Quicken Loans is entitled to summary judgment.

1. "Unconscionable Inducement" Under the WVCPPA Requires Evidence That The Challenged Practice Caused The Plaintiff To Enter Into An Agreement.

The WVCCPA allows a plaintiff to sue for statutory damages based on "one of two distinct findings" related to a consumer credit transaction: either (1) an "agreement or transaction" was "unconscionable at the time it was made" or (2) the transaction, though not unconscionable itself, was "*induced* by unconscionable conduct." W. Va. Code § 46A-2-121(a)(1) (emphasis added); *McFarland*, 810 F.3d at 286. Plaintiffs invoke only the second prong, claiming that their refinancings were "induced by unconscionable conduct"—insisting they need not prove actual inducement. Accepting that interpretation, the district court read "induced" completely out of the statute, contradicting not only West Virginia's

plain-meaning approach to statutory construction, *see, e.g.*, *DeVane v. Kennedy*, 205 W. Va. 519, 529 (1999), but this Court's clear and recent interpretation of this very WVCCPA provision in *McFarland*.

To "induce" a transaction, an act must have caused, or at least influenced, the result. "The term 'induce' means '[t]o lead on; to influence; to prevail on; to move by persuasion or influence.'" *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 760 (2011) (quoting *Webster's New International Dictionary* 1269 (2d ed. 1945)); *see also, e.g.*, 7 *Oxford English Dictionary* 887 (2d ed. 1989) ("to lead on, move, influence, prevail upon (any one) *to do* something").

This Court has already read the WVCCPA to have *exactly* that meaning. In *McFarland*, this Court explained that the WVCCPA creates "two distinct causes of action when it comes to consumer loans: one for unconscionability in the loan terms themselves, and one for unconscionable conduct *that causes a party to enter into a loan*." 810 F.3d at 285 (emphasis added). This Court drew on the commentary to the Uniform Commercial Credit Code ("UCCC"), which West Virginia treats as "highly instructive" because the relevant provisions of the WVCCPA are "identical." *Id.* (citation omitted). The commentary confirms that actual inducement is an indispensable element of an unconscionable-inducement claim, and that a consumer must show that she "'would never have … entered into [the contract] … if unconscionable means had not been employed *to induce the*

consumer to agree to the contract.'" *Id.* (quoting UCCC 1974 § 5.108 cmt. 1) (emphasis added).

Plaintiffs offered, and the district court accepted wholesale, three reasons justifying its nullification of the statutory term "inducement," but none has merit. *First*, the court reasoned that § 46A-2-121 "says nothing of the consumer's state of mind" but rather requires only that the "'transaction' itself [be] induced *or furthered* by the lender's unconscionable conduct." JA405 (emphasis added)]. That is doubly wrong. First, the term "furthered" appears nowhere in the statute, which unambiguously requires inducement. Second, the court was wrong to dismiss that mandatory element just because the statute does not *also* mention "the consumer's state of mind," which is not the same thing.

Second, the district court held that West Virginia law more broadly imposes "no requirement to show reliance in claims involving concealment," as it would be logically "impossible to make such a showing." JA406. But unconscionable inducement is not fraudulent concealment. And even in the fraudulent-concealment context, it is not "impossible" to show causation: to the contrary: the plaintiff is *required* to show that "the [concealment] contributed to the formation of the conclusion in the plaintiff's mind." *Trafalgar House Const., Inc. v. ZMM, Inc.*, 211 W. Va. 578, 585 (2002); *see also Pocahontas Mining Co. Ltd. v. Oxy USA, Inc.*, 202 W. Va. 169, 175 (1998) (Workman, J., concurring) ("concealment

… inducing nonaction"). The only contrary case the district court cited has since been vacated by this Court because it "misapplied the doctrine of fraudulent concealment." *EQT*, 764 F.3d at 370 (vacating *Adair v. EQT Production Co.*, No. 10-cv-00037, 2013 WL 5429882, at *39 (W.D. Va. Sept. 5, 2013)) (Virginia law).

Third, the district court thought Quicken Loans' actions were "*per se* unconscionable" and therefore must be actionable. JA405-06. But West Virginia does not analyze unconscionability wholesale like that, *see* pp. 28-30, *infra*, and even if it did, the question under the WVCCPA is whether specific types of credit transactions are *induced* by unconscionable conduct, not just whether the conduct *itself* is unconscionable.

The district court's construction of the WVCCPA also creates a constitutional problem, by eliminating an element necessary to show actual injury under Article III. Mere desire to claim statutory damages is not enough; to sue, Plaintiffs must seek "compensation for … the violation of a legally protected right." *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772-73 (2000). "[E]ven in the context of a statutory violation," Plaintiffs must have "a concrete injury," which "must affect [them] in a personal and individual way." *Spokeo Inc. v. Robins*, 136 S. Ct. 1540, 1548, 1549 (2016) (citation omitted). Plaintiffs lack standing if they fail to show that making the defendant provide the relevant disclosure "would have made any difference at all." *Dreher v. Experian*

Info. Sols., Inc., 856 F.3d 337, 345 (4th Cir. 2017).

Disregarding these principles, the district court repeatedly agreed with Plaintiffs that they can sue *without* ever showing any actual injury. JA407-08, JA577. That interpretation would allow what *Spokeo* and *Dreher* rule out: a claim for statutory damages without real harm. Here the evidence showed no harm to any borrower, and concrete *benefits* to many. *See* pp. 10-11, 15, *supra*.

2. Plaintiffs Have Not Shown Inducement.

Quicken Loans demonstrated beyond dispute that any lack of disclosure about listing the BEV on the order form did not induce Plaintiffs to enter into refinancing arrangements. Plaintiffs offered *nothing* to rebut that evidence—nothing to show that such a disclosure would have made one whit of difference to any borrower's decision to refinance. Every appraiser involved in this case, including Plaintiffs', testified that he or she was not or would not be influenced by the borrower's number: the Aligs' appraiser, JA353-54, JA358; the Sheas' appraiser, JA344, JA347-48; and both sides' experts, JA373-75, JA364-65. Quicken Loans also introduced evidence that the Aligs' and Sheas' appraisals were *lower* than the BEVs, JA323 (as were most class members', *see* pp. 14-15, *supra*). Indeed, the Aligs and Sheas *benefited* from their appraisals, which enabled them to close their refinancings, lower their payments, and pay a lower interest rate. JA198-JA204; *see supra*, pp. 10-11.

In response, Plaintiffs relied entirely on the erroneous legal argument that reliance is not an element of unconscionable inducement under the WVCCPA; they did not adduce any actual evidence of inducement. *See* JA898-99; *see also* JA656-JA664. Absent such evidence, Quicken Loans is entitled to summary judgment; no remand is needed. *See United States v. St. Louis Univ.*, 336 F.3d 294, 299-304 (4th Cir. 2003) (reversing summary judgment for plaintiff and ordering summary judgment for defendant where plaintiff argued an incorrect standard and presented no evidence under the correct standard).

B. Listing The BEV On An Appraisal Order Form, Without Specific Disclosure, Is Not Unconscionable.

Not only did Plaintiffs fail to show they were induced to refinance their loans by unconscionable conduct, they failed to show any unconscionable conduct *at all*. "[T]he standard for unconscionable inducement is different and higher than that for procedural unconscionability." *McFarland*, 810 F.3d at 286. In finding unconscionability, the district court again failed to adhere to this Court's precedents, basic summary-judgment rules, and West Virginia law.

1. The District Court Erred In Treating Silence As Akin To Misrepresentation Or Deceit.

According to the district court, "the facts here supporting a finding of unconscionable conduct" were that "Quicken [Loans] influenced the appraisers to meet a passed on value, and it did so while failing to disclose this practice to

plaintiffs." JA403. The district court treated that supposed "failure to disclose" as if it were self-evidently unconscionable, but that was baseless. The court identified no evidence of intent to deceive (which would have required individualized evidence); no requirement to "disclose this practice"; and nothing to suggest any lender *ever* "disclose[d] this practice"—which was lawful, consistent with USPAP, and accepted industry-wide. It rested on mere silence. That is not sufficient.

At the time of the alleged conduct in this case (between 2004 and 2009), the WVCCPA did not define "unconscionable conduct." In *McFarland*, this Court explained that, while it would "leave to West Virginia law the precise contours of an unconscionable inducement claim," it must at least involve "affirmative misrepresentations or active deceit." 810 F.3d at 286. In 2016, West Virginia essentially codified *McFarland*, amending § 46A-2-121 to specify three types of "unconscionable" conduct: "affirmative misrepresentations, active deceit or concealment of a material fact." W. Va. Code § 46A-2-121(a)(1) (2016). This case involves none of those things.[8]

Passive failure to disclose, with no evidence of intent to deceive, is not "*affirmative* misrepresentation" or "*active* deceit." "Affirmative

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[8] While the list is not exclusive, the specific examples—which all require affirmative conduct, not silence—confirm *McFarland*'s understanding of the general term. *See Ohio Cellular RSA Ltd. P'ship v. Bd. of Pub. Works*, 198 W. Va. 416, 421-23 (1996) (explaining *ejusdem generis* canon).

misrepresentation" is "[m]isrepresentation by overt action or communication rather than by failing to act or communicate." *Affirmative Misrepresentation*, *Black's Law Dictionary* (10th ed. 2014). Similarly, active deceit, to be "active," requires some affirmative statement to the borrower. And "concealment" is "suppression of the truth with the intent to deceive." *United States v. Perry*, 757 F.3d 166, 176 (4th Cir. 2014) (citation omitted). Importantly, "[s]ilence does not constitute concealment in the absence of a duty to disclose." *Bank of Montreal v. Signet Bank*, 193 F.3d 818, 827 (4th Cir. 1999); *Trafalgar House*, 211 W. Va. at 584. The district court pointed only to precedent (also discussed in *McFarland*) involving concealment of a balloon payment—but that was actionable because West Virginia law imposes a specific affirmative duty to disclose balloon payments. W. Va. Code § 46A-2-105(2); *see McFarland*, 810 F.3d at 279 n.2, 284, 286. Here, by contrast, the district court held Quicken Loans liable not for deceit, but for not saying something it had *no duty* to say.

2. The District Court Erred In Finding "*Per Se*" Unconscionability.

The district court decided liability as a matter of law by proclaiming what it called "*per se*" unconscionable conduct, instead of carefully considering the factual record. JA405. But under West Virginia law, "[t]he particular facts involved in each [unconscionability] case are of utmost importance since certain conduct … may be unconscionable in some situations but not in others." *Arnold v. United*

Cos. Lending Corp., 204 W. Va. 229, 235 (1998) (citation omitted). The district court's blanket ruling is irreconcilable with this controlling precedent.

The challenged conduct was consistent with USPAP and not prohibited by any West Virginia law, so the district court turned to cases—most *not* from West Virginia—that it thought, incorrectly, were analogous. It cited lengthy passages from New York and California district courts "discern[ing] the problem with the practice of providing a 'target number' to an appraiser." JA387-88. But that analogy presumes that "[t]he particular facts involved in [this] case," *Arnold*, 204 W. Va. at 235, involved a "target number," and the evidence here was that the BEV, like a sale price, was *not* provided as a "target number." *See* pp. 5-10, *supra*; JA335-39.[9]

Similarly, the district court relied on cases involving substantively manipulated appraisals. *See, e.g.*, JA392-93. In *Herrod v. First Republic Bank Mortgage Corp.*, 218 W. Va. 611 (2005), the plaintiff alleged that the appraiser

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[9] The district court stated that John Brenan "testified that one of the *functions* of a borrower's estimated value *was* to serve as a 'target value.'" JA395. That is the opposite of what Brenan said: USPAP suggests that appraisers may communicate with clients to "clarify that they *will not* be using [the owner's estimated value] as a target value." JA318-19 (emphasis added)]. The district court also suggested that lenders are subject to stricter rules than USPAP, *see* JA395-96, but the testimony it cited discussed 2010 federal guidelines postdating the period at issue, JA 921, and 2005 agency guidance that applied only to certain "regulated institutions" and not lenders like Quicken Loans. *See* JA1084.

"provide[d] inflated appraisals" by "providing the comparables necessary to obtain the value sought by the loan broker." *Id.* at 614 & n.10. Allegations like that got the plaintiff to trial; they did *not* result in summary judgment for the plaintiff. The only other West Virginia case the district court invoked was a trial-court decision that the district court read as holding that passing on a BEV to an appraiser serves "no legitimate purpose." JA390-91 (citing *Brown v. Quicken Loans*, No. 08-C-36 (W. Va. Cir. Feb. 25, 2011) (JA862). That "Finding[] of Fact" in *Brown* (which was not addressed on appeal, *see* 230 W. Va. at 319-23) is contrary to the factual record in *this* case, which evidenced such "legitimate purpose[s]" as allowing the project to be appropriately priced and assigned to an appraiser with the right qualifications. *See* p. 5, *supra*.

3. The District Court Overlooked Factual Disputes.

At summary judgment, the district court was required to credit the non-movant's evidence. Thus, to grant Plaintiffs summary judgment, the district court had to assume the following facts true and *still* find unconscionability:

- Knowing the BEV did not affect the appraisal, but helped match appraisers with suitable assignments. *See* pp. 5-10, *supra*.
- Providing BEVs was widely accepted in the industry. *See* pp. 5-6, *supra*; *see also Orlando v. Fin. One of W. Va., Inc.*, 179 W. Va. 447, 450 (1988) (unconscionability analysis under the WVCCPA calls for

consideration of the "setting of the market").

- Quicken Loans had no intent to deceive, and thus was not committing "affirmative misrepresentations, active deceit or concealment of a material fact."

The district court was only able to grant judgment to Plaintiffs by disregarding these facts (and the summary-judgment standard). For example, it tried to sidestep the appraisers' uniform testimony that their work was independent and unaffected by the BEV by noting that the appraisers "agreed that this information is in no way necessary to performing an appraisal." JA399. Getting from "not necessary" to "unconscionable influence" requires a giant inferential leap in favor of the Plaintiffs—precisely what a court may not do at summary judgment. Similarly, the district court focused on two emails between Quicken Loans executives and inferred from those emails that Quicken Loans provided BEVs to "influence [the appraiser's] opinion." JA395. But neither email says *anything* about *BEVs*. The district court deemed them relevant only by drawing unsupported inferences, *see* JA395-96—again, impermissible at summary judgment.

Proving unconscionable inducement requires (1) unconscionable conduct that (2) induced Plaintiffs to refinance their loans. Because Plaintiffs presented zero evidence of inducement, and Quicken Loans did not do anything

unconscionable, Quicken Loans is entitled to judgment on this claim.

C. The District Court Erred Granting Summary Judgment on Civil Conspiracy.

The district court's summary-judgment decision on Plaintiffs' civil-conspiracy claim (the only claim against both Defendants) was derivative of its ruling on the WVCCPA count. *See* JA438-JA440. The judgment on conspiracy should be reversed, and judgment entered for Defendants, for the same reasons.

III. The District Court Erred In Granting Plaintiffs Summary Judgment On The Breach-Of-Contract Claim.

The district court erred in interpreting the Interest Rate Disclosure and Deposit Agreement as a contract that required Quicken Loans to "obtain an 'acceptable' appraisal." JA409. That promise does not exist anywhere in the document. That should have been the end of the matter. But even on Plaintiffs' theory, they failed to show breach: Plaintiffs presented no evidence that the appraisals they received were unacceptable.

A. The Supposed Contract Term Does Not Exist.

The Interest Rate Deposit and Disclosure Agreements do not contain a promise by Quicken Loans to "obtain an 'acceptable' appraisal" for the borrower. That phrase is not in the document, and no other language in the document creates such an obligation. *See* JA381-82. The district court divined this promise from two separate sections of the document: the "Deposit Agreement" and the "Disclosure." Whether read together or separately, however, neither section

creates the obligation the district court perceived.

The Deposit Agreement section of the Sheas' 2008 agreement states:

> With your deposit of $300.00, you authorize Lender to begin processing your loan application and advance out-of-pocket expenses on your behalf to *obtain an appraisal* and/or credit report ….
>
> If your application is approved, at the closing, the Lender will credit the amount of your deposit on your closing statement toward the cost of your appraisal and credit report.

JA381 (emphasis added). Some of the class members' documents, including the Aligs' 2007 document, do not include the phrase "obtain an appraisal." The district court plainly erred in relying on language that *did not appear* in half the representative plaintiffs' documents to grant summary judgment to the entire class.

In any event, "obtaining *an* appraisal" says nothing about the substance of the appraisal—who will conduct it, or under what standards. It certainly does not say that the appraisal must be "acceptable," much less acceptable to the applicant as opposed to the lender. Nor does it contractually commit Quicken Loans to provide any appraisal at all—it merely "authorize[s]" Quicken Loans to advance expenses to "obtain" one. Even if the Deposit Agreement could be read to require Quicken Loans to provide an appraisal, there is no possible breach because Plaintiffs indisputably received appraisals. *See* p. 9, *supra*.

The only place the word "acceptable" *ever* appears is in a *different* section of the document. In the form used by the Sheas, that section was separately identified

with the heading "Disclosure"[10] and states:

> Lender's objective is to have your application fully processed and closed on or before the lock expiration date and/or anticipated closing date. However, please note that some parts of this process aren't under Lender's control. For instance, Lender can't be responsible for delays in loan approval or closing due to the following: *the untimely receipt of an acceptable appraisal*; the untimely receipt of required documentation; your existing home not selling; matters disclosed by a title commitment of survey; any other maters beyond Lender's reasonable control.

JA381 (emphasis added). Read in context, *see Columbia Gas Transmission Corp. v. E.I. du Pont de Nemours & Co.*, 159 W. Va. 1, 12-13 (1975), this section just "discloses" to the applicant that Quicken Loans is not responsible for steps in the mortgage process outside its control, such as an appraiser's delay. *Cf. Riley v. Healthmarkets, Inc.*, No. 09-cv-3363, 2010 WL 2671730, at *3 (D. Md. July 2, 2010) (disclosure form did not create contractual obligation). It does not oblige Quicken Loans to give the applicant an "acceptable appraisal."

Moreover, since the function of an appraisal is to inform the lender that the collateral value can support the debt, *see, e.g.*, *McFarland*, 810 F.3d at 280 ("[I]t is not the borrower but the bank that typically is disadvantaged by an under-collateralized loan."), the most natural meaning of "acceptable" in the Disclosure is an appraisal that satisfies the *lender*. That reading is confirmed by other language

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[10] This section of the Aligs' document is unlabeled, but it contains similar text to the Sheas' document. *See* JA382.

in the Disclosure stating that if the appraisal is not "acceptable," then "loan approval or closing" may be "delay[ed]." Because it is the lender that must "approv[e]" the loan, only an appraisal unacceptable *to the lender* could cause that delay.

Because the document's language is unambiguous, there was no room for the district court to construe it against the drafter. JA408-09. That canon can resolve ambiguities, but cannot create terms to which the parties never agreed. *See SWN Production Co. v. Long*, 240 W. Va. 1, 7 (2017); *Bass v. Coltelli-Rose*, 207 W. Va. 730, 733 (2000).

The district court further erred in relying on an implied "good faith and fair dealing" theory to invent contractual terms that do not exist. *See* JA408-09. West Virginia courts consistently hold that there is no freestanding claim of breach of the implied covenant of good faith and fair dealing where there is no breach of contract. *See, e.g.*, *Evans v. United Bank, Inc.*, 235 W. Va. 619, 627-28 (2015); *Gaddy Engineering Co. v. Bowles Rice McDavid Graff & Love, LLP*, 231 W. Va. 577, 578 (2013).[11] And there is no breach here. *See* pp. 36-37, *infra*.

[11] Moreover, West Virginia courts have yet to apply the duty of good faith and fair dealing to a lender/borrower relationship in West Virginia. *See Quicken Loans v. Brown*, 230 W. Va. 306, 318 n.26 (2012).

B. The District Court Erred When It Held Appraisals Not "Acceptable" As A Matter Of Law.

Even assuming Quicken Loans was contractually obliged to obtain an appraisal acceptable to the borrowers, the district court erred finding breach as a matter of law. Breach is a question of fact, not law.

First, the district court erred in declaring that the appraisals were not "acceptable," defined as "fair, unbiased, and reasonable." JA409. To demonstrate a breach, Plaintiffs thus had to show that including the BEV on an order form rendered the resulting *appraisal* itself unacceptable.

That is a fact question, *see, e.g.*, *Jackson v. State Farm Mut. Auto Ins. Co.*, 215 W. Va. 634, 641 (2004), and Plaintiffs adduced no facts—no evidence that the appraisals were unfair, biased, or unreasonable, and certainly no evidence that they became so *because* of the BEV. *See* JA930. The district court's conclusion depended on the predicate holding that "providing a target figure to an appraiser is a practice that is universally condemned and serves no legitimate purpose" and "an appraisal obtained by that process cannot conceivably be … fair, valid or reasonable." JA409. But whether the BEV is a "target figure" is hotly contested. *See* pp. 5-7, *supra*. And the practice of listing a *BEV* on an order form is *not* "universally condemned" but was common industry practice at the time and permitted by USPAP. Pp. 5-6, *supra*. Regardless, Quicken Loans presented ample evidence that appraisers were *unaffected* by the BEV. *See* pp. 6-10, *supra*.

Accordingly, Quicken Loans was entitled to summary judgment. *See St. Louis Univ.*, 336 F.3d at 299-304.

Second, even if Plaintiffs could rely on the covenant of good faith and fair dealing as a freestanding theory, *see* JA408, JA445, it could not support summary judgment. The covenant is circumscribed by "the purposes and express terms of the contract," and it encompasses only the promises that "a reasonable promisee would understand to be included" within the contract. *See* 17A Am. Jur. 2d *Contracts* § 362; *accord Barn-Chestnut, Inc. v. CFM Dev. Corp.*, 193 W. Va. 565, 571 (1995). The scope of what a "reasonable promisee would understand to be included" (*id.*) is a question of fact. *See Heldreth v. Marrs*, 188 W. Va. 481, 491 & n.17 (1992) (how a "reasonable person" would act is a "question of fact for the jury"). Plaintiffs bore the burden to adduce proof on that point at summary judgment, and they did not. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-60 (1970).

IV. The Class-Certification Orders Rested On Multiple Legal Errors And Abuses Of Discretion.

The district court's mistakes on liability infected its class-certification analysis. The court was only able to declare that common issues predominate, as Rule 23(b)(3) requires, by assuming away individualized elements of liability and damages—reading out inducement, treating unconscionability as established "*per se*," and similarly declaring appraisals *per se* "unacceptable" for purposes of the

supposed contractual obligation. Even without those errors, no class could be certified: both Defendants' time-bar defense and Plaintiffs' Article III standing require consideration of facts specific to each of the 2,769 loans. Individualized issues far outweigh any common ones.

A. The Case Fails To Satisfy Rule 23(b)(3) Because Individualized Issues Predominate.

This is not a case in which class-wide adjudication could "generate common *answers* apt to drive the resolution of the litigation," as Rule 23(a) and (b)(3) require. *EQT*, 764 F.3d at 360 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). Showing that a common issue exists is not enough. The common issue must be one whose resolution will answer "an issue that is central to the validity of each one of the claims in one stroke," and the common questions must "predominate over other questions." *Id.* at 360, 365 (citations omitted; quoting *Wal-Mart*, 564 U.S. at 350).

Neither is true here. As this Court cautioned, "[e]ven a plethora of identical practices … will not satisfy the predominance requirement if the defendants' common conduct has little bearing on the central issue in the litigation." *Id.* at 366. On the issues "central" to each claim asserted by Plaintiffs here, the requisite common glue is lacking.

With respect to the WVCPPA claim, the district court recognized early on the "obvious" obstacle to class certification: "the only way that a claim for

unconscionable conduct could prevail in a class action is if the actions of the defendant were *per se* unconscionable." JA161. Thus, the district court could only shoehorn the WVCCPA claim into Rule 23(b)(3) by: (1) adopting a sweeping concept of *per se* unconscionability and (2) decoupling that concept from any particular loan by eliminating the inducement requirement. Both premises were wrong as a matter of West Virginia law and this Court's precedent construing it. *See* Section II.A, *supra*. Those claims are treated no differently in the class-action context. *See* Rules Enabling Act, 28 U.S.C. § 2072(b).

Proper resolution of the WVCCPA claim would have required fact-specific analysis for each borrower. For a start: Was the borrower actually induced to enter into a loan by the challenged practice? Was the conduct "unconscionable" with respect to the facts of that particular loan? Would it have affected the borrower's decision to refinance if he had known the BEV was on the order form? Did the home appraise for less than the BEV? Did Quicken Loans rely on the appraisal in making the loan? Is the borrower's only purported harm that he received "too much money," *McFarland*, 810 F.3d at 280? Did the borrower actually benefit by obtaining a better loan or paying off other debts?

On the contract claim, a court could not determine "in one stroke," *EQT*, 764 F.3d at 360, whether each appraisal was "acceptable" to the borrower. The district court got around that by declaring the appraisals *per se* unacceptable, but that

disregarded the evidence about the value each individual appraisal conferred. *Other* essential elements of the contract claim required individual evidence, most notably whether each borrower was harmed and whether each class member even signed the contract (some did not).

With "central issue[s]" on each claim requiring a trial in every case, the lack of predominance precludes certification.

B. The District Court Erroneously Premised Class Certification On The Assumption That Defendants Were Not Entitled To Present Valid Defenses To Individual Claims.

Plaintiffs' inability to prove the central issues in their case with common evidence was only half the problem. A "class cannot be certified on the premise that [the defendant] will not be entitled to litigate its … defenses to individual claims." *Wal-Mart*, 564 U.S. at 338. Yet the district court relied on *exactly* that premise—repeatedly.

1. The District Court Precluded Quicken Loans From Litigating Meritorious Statute-Of-Limitations Defenses.

Defendants were entitled to assert the WVCCPA's one-year statute of limitations,[12] yet the district court held categorically that the entire class was entitled to equitable tolling unless *Defendants* affirmatively proved individual members ineligible for tolling. This Court set aside class certification in *EQT*

[12] The same period applied to the conspiracy count asserted against both Defendants. JA432.

based on exactly the same legal error.

Defendants showed that the claims of a portion of the class were time-barred because those loans were either paid off (*e.g.*, refinanced again) or accelerated (*e.g.*, due to default) before December 27, 2010. S*ee* W. Va. Code § 46A-5-101(1); *Tribeca Lending Corp. v. McCormick*, 231 W. Va. 455, 465 (2013). Just how large a portion is unknowable without individual evidence (such as borrower testimony, or a county land records search) on every single property. JA948-49.

The district court held that this defense did not preclude certification because "it is *defendant's burden* to establish a statute of limitations defense" at the class-certification stage. JA432. That is wrong. This Court squarely "reject[ed]" the argument that "because [the defendant] bears the burden of proving the merits" of an affirmative defense, "it should also bear the burden of demonstrating that resolution of that defense cannot occur on a class-wide basis." *Thorn*, 445 F.3d at 321.

The district court then held it could apply the "discovery rule" "to the entire class" to toll the statute of limitations. JA550. The court based this holding on its belief "that there is not a single shred of evidence in the record of any class member having actual knowledge about Quicken's practice of tipping off appraisers." JA550. This reasoning is legally erroneous for reasons this Court has already recognized—it focuses exclusively on the "defendant's conduct" and

ignores that "attention must also be paid to the plaintiff's knowledge and actions." *EQT*, 764 F.3d at 370. This Court held in *EQT* that the district court abused its discretion by granting class certification without considering "what proof the plaintiff-focused elements" of tolling require. *Id.* So too here: not only is it Plaintiffs' burden to establish that common issues predominate, *Thorn*, 445 F.3d at 321, it is each plaintiff's burden to establish tolling, *Worley v. Beckley Mech., Inc.*, 220 W.Va. 633, 638 n.7 (2007), including that they neither knew of their claims nor could have discovered them through reasonable diligence. *Dunn v. Rockwell*, 225 W. Va. 43, 50 (2009). And that inquiry is "not readily susceptible to class-wide determination" because it "generally require[s] individual examination of testimony from each particular plaintiff to determine what he knew and when he knew it." *Thorn*, 445 F.3d at 320-21.

If there was "not a single shred of evidence" about tolling here, that was because Plaintiffs did not adduce it. Even if they had, Defendants were entitled to explore whether each time-barred member of the class knew of the substance of his or her claim—or reasonably should have suspected it given previous accusations in the public sphere. For example, a 2007 *Charleston Gazette* article reported on "hundreds, probably thousands" of lawsuits filed in West Virginia dating back "[e]ight years ago" alleging that lenders sought "bogus appraisal[s] that far exceed[] the value of the home." JA481. The "individual evidence" necessary to

litigate those questions "frequently defeat[s] Rule 23's requirements." *EQT*, 764 F.3d at 370.

The district court committed reversible error in assuming that timeliness could be litigated class-wide unless Defendants first identified the class members who could not establish tolling. Each defendant has the right to "litigate its statutory defenses to individual claims," *Wal-Mart*, 564 U.S. at 367, and the untimely claimants cannot make those defenses disappear by hiding behind class representatives who, unlike them, filed timely.

2. The District Court Precluded Quicken Loans From Litigating Meritorious Contract Defenses.

The district court also erroneously precluded Quicken Loans from litigating multiple individual contract defenses. First, and most fundamental, is contract formation: some class members (those who did not pay a deposit) never signed the purported contract. JA1065-69. The district court thought that litigating that issue would contradict a stipulation, but that is incorrect. The stipulation merely said that the named plaintiffs' documents (with Bates numbers identifying the Aligs' *and* the Sheas' documents, which differ from one another) were "representative of the standard deposit agreements used by Quicken Loans from 2002 to the present." JA185; *see* JA381. Establishing what standard forms Quicken Loans used does not establish that everyone signed one, or which version they signed. Some class members signed none. And, as this Court has held, "plaintiffs simply cannot

advance a single collective breach of contract action on the basis of multiple different contracts." *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998).

Second, as discussed above, even if there were a duty to "obtain an acceptable appraisal" (there is not), establishing breach of that duty is a fact question. Showing that a given appraisal was not "acceptable" to the borrower requires individualized proof, which Plaintiffs never adduced. At a minimum, Quicken Loans would have been entitled to oppose any such proof with clear record evidence that the appraisals were *unaffected* by the mere inclusion of the BEV on order forms. *See* pp. 6-10, *supra*.

Third, the court cannot presume class-wide that each plaintiff performed under the contract. See *Exec. Risk Indem., Inc. v. Charleston Area Med. Ctr.*, 681 F. Supp. 2d 694, 714 (S.D. W.Va. 2009) (discussing this element). For example, the court decided that the contract was breached because appraisers were influenced by receiving the borrower's estimated value. But if that is a breach, so are attempts by the *borrower* to influence appraisers directly. The record establishes that borrowers "frequently" tried to sway appraisers directly, *e.g.*, by telling appraisers "they needed the appraisal to be at least a certain number in order to get the loan." JA1053.

The district court thought that the Deposit Agreement imposed no obligation

on borrowers "to provide a fair and accurate appraisal"—only the lender. JA542. That turns the Deposit Agreement on its head: its plain language provides the exact opposite, consistent with the background principle that appraisals primarily secure "not the borrower but the bank." *McFarland*, 810 F.3d at 280; *see* pp. 34-35, *supra*. On top of that, the Deposit Agreement explicitly requires the borrower "to cooperate in the application process." JA1048.

Damages are the final element of a contract claim. *Exec. Risk*, 681 F. Supp. 2d at 714. Many class members were demonstrably unharmed (and *benefited* from the challenged transactions), which defeats their individual contract claims on the merits even setting constitutional standing aside. For example, if the hypothetical "acceptable" appraisal would have been just as high as the allegedly unacceptable appraisal, then the class member is in exactly the same position irrespective of the breach and can recover no damages. *See* pp. 56-57, *infra*. The need to litigate that issue in every case would defeat any predominance finding.

The district court circumvented the individualized-damages issue by precluding Quicken Loans from litigating it: instead, the court awarded every class member the entire appraisal fee, calling it restitution. But the proper remedy for breach of contract under West Virginia law is expectancy damages, not restitution. *See* pp. 55-56, *infra*. And Rule 23 cannot modify that substantive right. *See* 28 U.S.C. § 2072(b). Under the correct measure, litigation over the unique

circumstances of each borrower would predominate over any common question. *See, e.g.*, *Lester v. Percudani*, 217 F.R.D. 345, 351-52 (M.D. Pa. 2003) ("[T]he very fact of injury … depends almost entirely on individual circumstances: the difference between the appraised value and the actual value of the home" and "the difference between the mortgage payments that each buyer should have made … and the payments each buyer actually made.")

C. The District Court Erroneously Certified A Class Without Article III Standing.

The district court's refusal to conduct any case-specific inquiry into inducement or harm caused yet another legal error: the class includes plaintiffs with no injury-in-fact and no Article III standing. *See* p. 24, *supra*. Indeed, unharmed class members appear to be the rule rather than the exception. The class contained nearly 3,000 members, but when the court solicited individual claims for any actual damages, they filed only nine claims and pursued only *four*—less than 0.2% of the class. P. 16, *supra*.

Unharmed plaintiffs cannot come into federal court on their own, but here, the class certification allowed them not only to sue, but to recover $3,500. The district court allowed that result based on two legal errors. First, contrary to Article III requirements recognized by at least four other circuits, the court concluded that only the named plaintiffs need have standing. Second, the court held that Plaintiffs could claim standing based on the supposed right to receive a

disclosure about sending the BEV to appraisal companies—a right invented for this case that appears in no statute. Consequently, the district court awarded $3,500 just for not knowing about the BEV, even to class members who were and are blissfully unharmed. Those legal errors require reversal of the class certification and the resulting class-wide judgment.

1. Plaintiffs Who Lack Standing To Recover Individually Cannot Recover As Class Members.

Whether "in individual or class actions," Article III limits "the role of courts to provid[ing] relief to claimants … who have suffered, or will imminently suffer, actual harm." *Lewis v. Casey*, 518 U.S. 343, 349 (1996).[13] Plaintiffs who cannot win relief in "individual … actions" likewise cannot win relief in "class actions." *Id.*; *see also Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2015) (Roberts, C.J., concurring) (explaining that because "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not," an "award cannot stand" if the court cannot "ensure that [it] goes only to injured class members"). This Court has called it "axiomatic that the procedural device of Rule 23 cannot be allowed to expand the substance of the claims of class members": under the Rules Enabling Act, the procedural provisions of Rule 23

[13] The district court relied on a portion of Justice Souter's separate opinion in *Lewis* that *disagreed* with the Court's rationale. *See* JA536 (citing *Lewis*, 518 U.S. at 395 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment)).

cannot "enlarge or modify" any "substantive right[s]," so they cannot confer standing where it is missing or allow a monetary recovery that would otherwise be unavailable. *Broussard*, 155 F.3d at 345; 28 U.S.C. § 2072(b).

Accordingly, the First, Second, Eighth, and Ninth Circuits have all squarely held that "a class cannot be certified if it contains members who lack standing…. Or, to put it another way, a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves." *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010).[14] The district court held that the Aligs *could* represent such a class, based on a misreading of *Dreher* and two out-of-circuit cases. JA535-36.

In *Dreher*, the named plaintiff lacked standing, despite a technical statutory violation, and could not recover statutory damages. 856 F.3d at 343-45. This Court therefore ordered the entire action to be dismissed, without needing to address whether the unnamed class members lacked standing too. *Id.* at 347. The

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[14] *Accord Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) ("The class must … be defined in such a way that anyone within it would have standing."); *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594-95 (9th Cir. 2012) ("[N]o class may be certified that contains members lacking Article III standing.") (citation omitted); *see also Astrazeneca AB v. UFCW (In re Nexium Antitrust Litig.)*, 777 F.3d 9, 32 & n.28 (1st Cir. 2015) (addressing requirement "that each and every member of the class who secures a recovery also ha[ve] standing" by holding that "only injured class members will recover" and mandating that "a methodology [] be developed" "at the class certification stage" "that is capable of excluding uninjured members").

Court recited the general proposition that "[w]ithout a sufficient allegation of harm to the named plaintiff in particular, he cannot meet his burden of establishing standing." *Id*. at 343 (citations omitted). The district court misread that sentence as holding that *only* the named plaintiff need establish standing—but this Court did not decide that question.

As for the two out-of-circuit cases, the first simply reaches the same result by a different pathway. The Third Circuit directed that district courts resolve the same issue (the possibility of uninjured class members winning relief) through Rule 23 rather than Article III. *Neale v. Volvo Cars of North Am., LLC*, 794 F.3d 353, 368 (3d Cir. 2015). As the court said, "a properly formulated Rule 23 class should not raise standing issues." *Id.* at 368. Thus, *hio* does not stand for the proposition that a class can include uninjured members—it merely states that the requirement to screen out uninjured members comes from Rule 23 rather than Article III. *See, e.g.*, *Branch v. GEICO*, 323 F.R.D. 539, 551-52 & n.9 (E.D. Va. 2018) (finding no need to "resolve the separate question of whether [the plaintiff] has violated the Rules Enabling Act," because the Article III standing problem "prevent[s] [the plaintiff] from satisfying the predominance requirement").

The second case acknowledges that a court must not certify a class containing a large number of uninjured class members. *Kohen v. Pacific Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677-78 (7th Cir. 2009). The lack of injury was not

quantified in *Kohen*, so the Seventh Circuit did not address it further but left it for fact development on a potential decertification motion. *Id.* at 679-80.

Here, as in other cases involving appraisals, injury is indeed a required element that prevents class certification. *E.g.*, *Lester*, 217 F.R.D. at 351-52.[15] At the very least, the contract claim requires a showing of damages, as described above.

2. The District Court Identified No Cognizable Injury.

In the alternative, the district court held that Plaintiffs had shown every class member *was* injured. JA537-40. Its reasoning does not hold water.

First, the court seized on language from *Spokeo* recognizing that "Congress [or a state] may 'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'" 136 S. Ct. at 1549 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992)). But *Spokeo* was clear that a legislature may only "elevate" statutory violations to "legally cognizable injuries" if the harms were sufficiently "concrete" in the first place. *Id.*; *accord, e.g.*, *Dreher*, 856 F.3d at 346 ("a statutory violation absent a concrete and adverse effect does not confer standing"). The district court neglected to analyze whether

[15] *See also, e.g.*, *Taddeo v. Am. Invsco Corp.*, No. 08-01463, 2011 WL 3957392, at *5 (D. Nev. Sept. 7, 2011); *Wilson v. Toussie*, No. 01-4568, 2008 WL 905903, at *4-5 (E.D.N.Y. Mar. 31, 2008); *Parnes v. Mast Prop. Inv'rs, Inc.*, 776 F. Supp. 792, 799-800 (S.D.N.Y. 1991).

the unspecified harms it attributed to class members would have been "concrete, *de facto* injuries" without the statute—and they would not.

Second, the court wrongly analogized to cases holding "that a plaintiff suffers an Article III injury when he is denied information that must be disclosed pursuant to a statute." *Doe v. Public Citizen*, 749 F.3d 246, 263 (4th Cir. 2014). But here no statute requires a lender to disclose whether it has transmitted the BEV to an appraisal company. As this Court has firmly held, cases "involv[ing] the deprivation of information" guaranteed by statute are "inapposite" to cases like this, where the "statutory violation [is] divorced from any real world effect." *Dreher*, 856 F.3d at 346.

Third, the district court pointed to cases in which "courts have found that the annoyance of receiving unwanted telemarketing calls is a sufficiently concrete injury to confer Article III standing." JA539 (citing, *e.g.*, *Mey v. Got Warranty, Inc.*, 193 F. Supp. 3d 641 (N.D. W.Va. 2016)). Whether "annoyance" is a sufficiently concrete injury for Article III purposes is completely irrelevant here: Plaintiffs did not claim such "annoyance" from a supposed disclosure they *did not receive*. And plaintiffs cannot simply rely on "any nebulous frustration resulting from a statutory violation." *Dreher*, 856 F.3d at 346. At bottom, the district court's standing analysis rests on nothing more than the fact that "[t]he legislature created a private right of action," JA539-40—exactly what the Supreme Court and

this Court have repeatedly held insufficient.

D. The District Court Contravened Supreme Court Precedent By Certifying A Class With No Valid Class-Wide Damages Methodology.

The district court forced contract damages into the class-action framework by declaring that all class members would receive restitution. But that is not a valid measure of contract damages under West Virginia law. *See* pp. 55-56, *infra*. That legal error further infects the class certification. Plaintiffs had the burden of "provid[ing] a method to measure and quantify damages on a class-wide basis." *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013). And that method must be legally valid, not arbitrarily chosen. *See id*. at 34, 36. Because the correct measure of damages—each plaintiff's expectancy—is inherently individualized, it is not appropriate for class certification. *See, e.g.*, *Broussard*, 155 F.3d at 342-43.

Nor is the selection of a penalty under the WVCCPA. The court ordered a uniform class-wide penalty without regard for the harm, if any, suffered by individual members. But West Virginia law mandates consideration of harm in the statutory-penalty assessment. *See, e.g.*, *Endicott v. Hager*, No. 98-1839, 2000 WL 35542409, at *1 (W. Va. Cir. Ct. Aug. 25, 2000) (assessing "penalty at the lower end of the statutorily mandated range" because "Plaintiffs were not unduly harmed"); *Clements v. HSBC Auto Fin., Inc.*, No. 5:09-00086, 2011 WL 2976558, at *7 (S.D. W.Va. July 21, 2011) ("The amount of a penalty should have a direct

relationship to the egregiousness of the violation."). Identical penalties can be awarded class-wide *only* when all class members suffer identical harm. *See, e.g.*, *Soutter v. Equifax Info. Servs., LLC*, 498 F. App'x 260, 265 (4th Cir. 2012) (setting statutory damages "typically require[s] an individualized inquiry" into "harms" to "particular class members").

Plaintiffs' evidence about the alleged "egregiousness" of Quicken Loans' actions applied to cherry-picked individual loans, not class-wide conduct. Plaintiffs complained, for example, about *one* loan Quicken Loans made based on an automated valuation instead of an appraisal; one other loan (the Aligs') where Quicken Loans used the higher of two appraisals; and other specific loans they claimed were "inflated" or had supposedly objectionable features like balloon payments, subprime interest rates, or interest-only or negative-amortization payment schedules. JA1089, JA1091, JA1096, JA1101-02, JA1110, JA1115, JA1117. Even if *any* of these factors made loans "egregious," none had to do with the BEV and there was no evidence that they applied to more than a handful of loans in the class. The remaining borrowers were unaffected by these features—and derived significant financial benefits from refinancing.

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A class action is a means of resolving truly common issues "in one stroke." *EQT*, 764 F.3d at 360. It is *not* a procedural device to relieve plaintiffs from

proving every element of their claim; to prevent defendants from asserting their defenses; or to excuse courts from adhering to constitutional limitations on recovery. To certify this class, the district court not only read out critical parts of the WVCCPA and ignored circuit precedent on its meaning, but set aside standing *and* individualized elements *and* individualized defenses to liability *and* the proper measure of damages *and* variances in supposed culpability. Each one is a legal error demanding reversal.

V. The District Court Erred In Awarding Plaintiffs Restitution For Breach Of Contract And In Decreeing The Amount Without Trial.

The district court also committed two final legal errors on the breach-of-contract claim by awarding Plaintiffs their entire appraisal fees, which the court referred to as "restitution." *First*, the correct breach-of-contract remedy under West Virginia law is expectancy damages, not restitution. *Second*, whatever the measure of damages, it must take into account the benefit Plaintiffs got from their appraisals. The district court erred by granting summary judgment on damages, declaring the appraisals valueless, and awarding more than $968,000.

A. Restitution Is An Improper Remedy For Breach Of Contract Under West Virginia Law.

Under black-letter West Virginia law, the remedy for breach of contract is expectancy damages. "In an action for breach of contract the damages recovered must be such as will give, *and only* such as will give, compensation for the actual

loss directly flowing from the breach of contract." *Horn v. Bowen*, 136 W. Va. 465, 469 (1951) (emphasis added). Those contract damages "cannot be punitive." *Id.* The measure is "what the injured party would have received had the contract been performed." *In re Ellison*, 296 F.3d 266, 273 (4th Cir. 2002) (following *Horn*).

Neither plaintiffs nor the district court cited a single West Virginia case awarding this type of restitution for breach of contract. *See* JA559. Instead, the court over-read *Parker v. Sayre*, No. 13-0428, 2013 WL 6153063 (W. Va. Nov. 22, 2013) (memorandum decision). The remedy in that case—not even contested on appeal—was not restitution, but specific performance. *Id.* at *2. *That* remedy is "routinely awarded in contracts involving real property," because parcels of property are "unique" and money damages are inadequate. *Allegheny Country Farms, Inc. v. Huffman*, 237 W. Va. 355, 360 (2016). This case does not involve a claim to real property. And *Parker* certainly does not establish broadly that any and all "equitable relief is appropriate in breach of contract cases in West Virginia," as the district court incorrectly thought. JA559.[16]

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[16] The other cases the district court cited (JA559-60) do not award restitution for breach of contract; they stand for the uncontroversial proposition that disgorgement and restitution, when available, are generally equitable remedies rather than legal. *See Prudential Ins. Co. of Am. v. Couch*, 180 W. Va. 210, 214 (1988); *Gerald M. Moore & Son, Inc. v. Drewry & Assocs. Inc.*, 945 F. Supp. 117,

B. The District Court Erred In Awarding Contract Damages Without Trial.

Plaintiffs did not seek to prove any expectancy damages. Indeed, they offered no facts to prove damages at all; they relied on the *legal* argument that they were entitled to appraisal fees as restitution. JA942-43.[17] Rejecting their restitution theory therefore means their claim cannot proceed, because damages are an element of their breach-of-contract claim. *See, e.g.*, *Sneberger v. Morrison*, 235 W. Va. 654, 669 (2015). And even accepting their restitution theory would still leave a factual dispute about how much to award.

1. Plaintiffs' only attempt to quantify expectancy damages was the conclusory assertion that the damages would total the same amount under any measure. JA963. That is incorrect. Expectancy, unlike restitution, measures the difference between what plaintiffs currently have and what they contracted to receive. *E.g.*, *Clayton v. Martin*, 108 W. Va. 571, 574 (1930). To recover the full value of every appraisal, Plaintiffs would have to show beyond factual dispute that what they currently have is nothing—that *every appraisal* was *completely*

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120 (E.D. Va. 1996) (citing *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U.S. 134 (1919)); *Sivolella v. AXA Equitable Funds Mgmt., LLC*, No. 11-4194, 2013 WL 4096239, at *5-6 (D.N.J. July 3, 2013); *Nat'l Sec. Sys., Inc. v. Iola*, 700 F.3d 65, 101 (3d Cir. 2012); *Hanwha Azdel, Inc. v. C&D Zodiac, Inc.*, No. 6:12-023, 2013 WL 3989147, at *2 (W.D. Va. Aug. 2, 2013). Only *Prudential* even applies West Virginia law.

[17] Plaintiffs did not even file a Statement of Undisputed Facts in support of their motion for summary judgment on damages.

valueless to the borrower. *See Am. Sugar Ref. Co. v. Martin-Nelly Grocery Co.*, 90 W. Va. 730, 762 (1992) (court must consider value of even a deficient product). That plainly is not so.

Every class member was able to refinance, so the appraisal, which was a necessary part of the application and underwriting process, demonstrably had at least some value. And if a borrower would have obtained the exact same loan without the supposed breach, the borrower is no worse off, and her damages are zero. In fact, borrowers were *better* off after refinancing to obtain lower monthly payments and better interest rates. *See* pp. 10-11, 15, *supra*. At summary judgment, the district court was not free to ignore the real value borrowers derived from their appraisals.

2. Even if the district court's restitution award were legally permissible, it was factually flawed. Restitution measures the *benefit* to the breaching party from the breach, and therefore must take account of any expense the breaching party occurred in performing (even in part) its obligations. *See* Restatement (Second) of Contracts §§ 371 cmt. a, 344 cmt. a.[18] Thus, even if restitution were the measure of damages, Quicken Loans' $968,000 in gross revenue from appraisal

[18] West Virginia courts follow the Restatement as an authority on contract law. *E.g.*, *Waddy v. Riggleman*, 216 W. Va. 250 (2004); *Lang v. Derr*, 212 W. Va. 257 (2002).

fees would not be the measure of restitution. Instead, the amount should have been reduced by the cost of the appraisal to Quicken Loans.

* * * *

The district court's apparent determination to certify this case as a class action, despite the numerous and glaring obstacles, led it to make legal rulings that enabled liability and damages to be decided class-wide. But those decisions were contrary to Supreme Court and circuit precedent, to West Virginia law, and to the terms of the supposed contract. For all these reasons, the judgment cannot stand.

CONCLUSION

The judgment of the district court should be reversed, and judgment should be entered for Defendants.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A). This brief contains 12,986 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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/s/ William M. Jay
William M. Jay

CERTIFICATE OF SERVICE

I, William M. Jay, hereby certify that on August 15, 2019, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ William M. Jay

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ADDENDUM

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West's Annotated Code of West Virginia
Chapter 46A. West Virginia Consumer Credit and Protection Act
Article 2. Consumer Credit Protection (Refs & Annos)

W. Va. Code, § 46A-2-121

§ 46A-2-121. Unconscionability; inducement by unconscionable conduct

Effective: June 8, 2016
Currentness

(a) With respect to a transaction which is or gives rise to a consumer credit sale, consumer lease or consumer loan, if the court as a matter of law finds:

(1) The agreement or transaction to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct such as affirmative misrepresentations, active deceit or concealment of a material fact, the court may refuse to enforce the agreement; or

(2) Any term or part of the agreement or transaction to have been unconscionable at the time it was made, the court may refuse to enforce the agreement, or may enforce the remainder of the agreement without the unconscionable term or part, or may so limit the application of any unconscionable term or part as to avoid any unconscionable result.

(b) If it is claimed or appears to the court that the agreement or transaction or any term or part thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its setting, purpose and effect to aid the court in making the determination.

(c) For the purpose of this section, a charge or practice expressly permitted by this chapter is not unconscionable.

Credits
Acts 1974, c. 12; Acts 1996, c. 160, eff. 90 days after March 8, 1996; Acts 2016, c. 41, eff. June 8, 2016.

Notes of Decisions (35)

W. Va. Code, § 46A-2-121, WV ST § 46A-2-121
Current with legislation of the 2018 First Extraordinary Session.

End of Document

West's Annotated Code of West Virginia
Chapter 46A. West Virginia Consumer Credit and Protection Act
Article 2. Consumer Credit Protection (Refs & Annos)

This section has been updated. Click here for the updated version.

W. Va. Code, § 46A-2-121

§ 46A-2-121. Unconscionability; inducement by unconscionable conduct

Effective: [See Text Amendments] to June 7, 2016

(1) With respect to a transaction which is or gives rise to a consumer credit sale, consumer lease or consumer loan, if the court as a matter of law finds:

(a) The agreement or transaction to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct, the court may refuse to enforce the agreement, or

(b) Any term or part of the agreement or transaction to have been unconscionable at the time it was made, the court may refuse to enforce the agreement, or may enforce the remainder of the agreement without the unconscionable term or part, or may so limit the application of any unconscionable term or part as to avoid any unconscionable result.

(2) If it is claimed or appears to the court that the agreement or transaction or any term or part thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its setting, purpose and effect to aid the court in making the determination.

(3) For the purpose of this section, a charge or practice expressly permitted by this chapter is not unconscionable.

Credits
Acts 1974, c. 12; Acts 1996, c. 160, eff. 90 days after March 8, 1996.

W. Va. Code, § 46A-2-121, WV ST § 46A-2-121
Current with legislation of the 2018 First Extraordinary Session.

End of Document

West's Annotated Code of West Virginia
Chapter 46A. West Virginia Consumer Credit and Protection Act
Article 5. Civil Liability and Criminal Penalties

This section has been updated. Click here for the updated version.

W. Va. Code, § 46A-5-101

§ 46A-5-101. Effect of violations on rights of parties; limitation of actions

Effective: June 12, 2015 to July 3, 2017

(1) If a creditor or debt collector has violated the provisions of this chapter applying to collection of excess charges, security in sales and leases, disclosure with respect to consumer leases, receipts, statements of account and evidences of payment, limitations on default charges, assignment of earnings, authorizations to confess judgment, illegal, fraudulent or unconscionable conduct, any prohibited debt collection practice, or restrictions on interest in land as security, assignment of earnings to regulated consumer lender, security agreement on household goods for benefit of regulated consumer lender, and renegotiation by regulated consumer lender of a loan discharged in bankruptcy, the consumer has a cause of action to recover: (a) Actual damages; and (b) a right in an action to recover from the person violating this chapter a penalty of $1,000 per violation: *Provided,* That the aggregate amount of the penalty awarded shall not exceed the greater of $175,000 or the total alleged outstanding indebtedness: *Provided, however,* That in a class action the aggregate limits on the amount of the penalty set forth above shall be applied severally to each named plaintiff and each class member such that no named plaintiff nor any class member may recover in excess of the greater of $175,000 or the total alleged outstanding indebtedness. With respect to violations arising from consumer credit sales, consumer leases, or consumer loans, or from sales as defined in article six of this chapter, no action pursuant to this subsection may be brought more than four years after the violations occurred. This limitations period shall apply to all actions filed on or after September 1, 2015.

(2) If a creditor has violated the provisions of this chapter respecting authority to make regulated consumer loans, the loan is void and the consumer is not obligated to pay either the principal or the loan finance charge. If he has paid any part of the principal or of the finance charge, he has a right to recover in an action the payment from the person violating this chapter or from an assignee of that person's rights who undertakes direct collection of payments or enforcement of rights arising from the debt. With respect to violations arising from regulated consumer loans made pursuant to revolving loan accounts, no action pursuant to this subsection may be brought more than four years after the violation occurred. With respect to violations arising from other regulated consumer loans, no action pursuant to this subsection may be brought more than four years after the violation occurred. This limitations period shall apply to all actions filed on or after September 1, 2015.

(3) A consumer is not obligated to pay a charge in excess of that allowed by this chapter and if he has paid an excess charge, he has a right to a refund. A refund may be made by reducing the consumer's obligation by the amount of the excess charge. If the consumer has paid an amount in excess of the lawful obligation under the agreement, the consumer may recover in an action the excess amount from the person who made the excess charge or from an assignee of that person's rights who undertakes direct collection of payments from or enforcement of rights against the consumer arising from the debt.

(4) If a creditor or debt collector has contracted for or received a charge in excess of that allowed by this chapter, the consumer may, in addition to recovering such excess charge, also recover from the creditor or the person liable in an action a penalty of $1,000 per violation: *Provided,* That the aggregate amount of the penalty awarded shall not exceed the greater of $175,000 or the total alleged outstanding indebtedness: *Provided, however,* That in a class action the aggregate limits on the amount of the penalty set forth above shall be applied severally to each named plaintiff and each class member such that no named plaintiff nor any class member may recover in excess of the greater of $175,000 or the total alleged outstanding indebtedness. With respect to excess charges arising from consumer credit sales, consumer leases, or consumer loans, no action pursuant to this subsection may be brought more than four years after the time the excess charge was made.. This limitations period shall apply to all actions filed on or after September 1, 2015.

(5) Except as otherwise provided, a violation of this chapter does not impair rights on a debt.

(6) If an employer discharges an employee in violation of the provisions prohibiting discharge, the employee may within ninety days bring a civil action for recovery of wages lost as a result of the violation and for an order requiring the reinstatement of the employee. Damages recoverable shall not exceed lost wages for six weeks.

(7) A creditor or debt collector has no liability for a penalty under subsection (1) or (4) of this section if, after discovering an error and prior to the institution of an action under this section or the receipt of written notice of the error, the creditor notifies the person concerned of the error and corrects the error: (a) Within fifteen days if the error affects no more than two persons; or (b) within sixty days if the error affects more than two persons. If the violation consists of a prohibited agreement, giving the consumer a corrected copy of the writing containing the error is sufficient notification and correction. If the violation consists of an excess charge, correction shall be made by an adjustment or refund.

(8) If the creditor or debt collector establishes by a preponderance of evidence that a violation is unintentional or the result of a bona fide error of fact notwithstanding the maintenance of procedures reasonably adapted to avoid any such violation or error, no liability is imposed under subsections (1), (2) and (4) of this section and the validity of the transaction is not affected.

Credits
Acts 1974, c. 12; Acts 1996, c. 73, eff. 90 days after March 9, 1996; Acts 2015, c. 63, eff. June 12, 2015.

W. Va. Code, § 46A-5-101, WV ST § 46A-5-101
Current with legislation of the 2018 First Extraordinary Session.

End of Document

West's Annotated Code of West Virginia
Chapter 46A. West Virginia Consumer Credit and Protection Act
Article 5. Civil Liability and Criminal Penalties

This section has been updated. Click here for the updated version.

W. Va. Code, § 46A-5-101

§ 46A-5-101. Effect of violations on rights of parties; limitation of actions

Effective: [See Text Amendments] to June 11, 2015

(1) If a creditor has violated the provisions of this chapter applying to collection of excess charges, security in sales and leases, disclosure with respect to consumer leases, receipts, statements of account and evidences of payment, limitations on default charges, assignment of earnings, authorizations to confess judgment, illegal, fraudulent or unconscionable conduct, any prohibited debt collection practice, or restrictions on interest in land as security, assignment of earnings to regulated consumer lender, security agreement on household goods for benefit of regulated consumer lender, and renegotiation by regulated consumer lender of loan discharged in bankruptcy, the consumer has a cause of action to recover actual damages and in addition a right in an action to recover from the person violating this chapter a penalty in an amount determined by the court not less than one hundred dollars nor more than one thousand dollars. With respect to violations arising from consumer credit sales or consumer loans made pursuant to revolving charge accounts or revolving loan accounts, or from sales as defined in article six of this chapter, no action pursuant to this subsection may be brought more than four years after the violations occurred. With respect to violations arising from other consumer credit sales or consumer loans, no action pursuant to this subsection may be brought more than one year after the due date of the last scheduled payment of the agreement.

(2) If a creditor has violated the provisions of this chapter respecting authority to make regulated consumer loans, the loan is void and the consumer is not obligated to pay either the principal or the loan finance charge. If he has paid any part of the principal or of the finance charge, he has a right to recover in an action the payment from the person violating this chapter or from an assignee of that person's rights who undertakes direct collection of payments or enforcement of rights arising from the debt. With respect to violations arising from regulated consumer loans made pursuant to revolving loan accounts, no action pursuant to this subsection may be brought more than four years after the violation occurred. With respect to violations arising from other regulated consumer loans, no action pursuant to this subsection may be brought more than one year after the due date of the last scheduled payment of the agreement pursuant to which the charge was paid.

(3) A consumer is not obligated to pay a charge in excess of that allowed by this chapter, and if he has paid an excess charge he has a right to a refund. A refund may be made by reducing the consumer's obligation by the amount of the excess charge. If the consumer has paid an amount in excess of the lawful obligation under the agreement, the consumer may recover in an action the excess amount from the person who made the excess charge or from an assignee of that person's rights who undertakes direct collection of payments from or enforcement of rights against the consumer arising from the debt.

(4) If a creditor has contracted for or received a charge in excess of that allowed by this chapter, the consumer may, in addition to recovering such excess charge, also recover from the creditor or the person liable in an action a penalty in

an amount determined by the court not less than one hundred dollars nor more than one thousand dollars. With respect to excess charges arising from consumer credit sales or consumer loans made pursuant to revolving charge accounts or revolving loan accounts, no action pursuant to this subsection may be brought more than four years after the time the excess charge was made. With respect to excess charges arising from other consumer credit sales or consumer loans no action pursuant to this subsection may be brought more than one year after the due date of the last scheduled payment of the agreement pursuant to which the charge was made.

(5) Except as otherwise provided, a violation of this chapter does not impair rights on a debt.

(6) If an employer discharges an employee in violation of the provisions prohibiting discharge, the employee may within ninety days bring a civil action for recovery of wages lost as a result of the violation and for an order requiring the reinstatement of the employee. Damages recoverable shall not exceed lost wages for six weeks.

(7) A creditor has no liability for a penalty under subsection (1) or subsection (4) of this section if within fifteen days after discovering an error, and prior to the institution of an action under this section or the receipt of written notice of the error, the creditor notifies the person concerned of the error and corrects the error. If the violation consists of a prohibited agreement, giving the consumer a corrected copy of the writing containing the error is sufficient notification and correction. If the violation consists of an excess charge, correction shall be made by an adjustment or refund.

(8) If the creditor establishes by a preponderance of evidence that a violation is unintentional or the result of a bona fide error of fact notwithstanding the maintenance of procedures reasonably adapted to avoid any such violation or error, no liability is imposed under subsections (1), (2) and (4) of this section, and the validity of the transaction is not affected.

Credits
Acts 1974, c. 12; Acts 1996, c. 73, eff. 90 days after March 9, 1996.

W. Va. Code, § 46A-5-101, WV ST § 46A-5-101
Current with legislation of the 2018 First Extraordinary Session.

End of Document

West's Annotated Code of West Virginia
Chapter 46A. West Virginia Consumer Credit and Protection Act
Article 5. Civil Liability and Criminal Penalties

W. Va. Code, § 46A-5-106

§ 46A-5-106. Adjustment of damages for inflation

Effective: June 12, 2015
Currentness

In any claim brought under this chapter applying to illegal, fraudulent or unconscionable conduct or any prohibited debt collection practice, the court may adjust the damages awarded pursuant to section one hundred one of this article to account for inflation from 12:01 a.m. on September 1, 2015, to the time of the award of damages in an amount equal to the consumer price index. Consumer price index means the last consumer price index for all consumers published by the United States Department of Labor.

Credits
Acts 1994, c. 26; Acts 2015, c. 63, eff. June 12, 2015.

Notes of Decisions (2)

W. Va. Code, § 46A-5-106, WV ST § 46A-5-106
Current with legislation of the 2018 First Extraordinary Session.

End of Document

West's Annotated Code of West Virginia
Chapter 46A. West Virginia Consumer Credit and Protection Act
Article 5. Civil Liability and Criminal Penalties

This section has been updated. Click here for the updated version.

W. Va. Code, § 46A-5-106

§ 46A-5-106. Adjustment of damages for inflation

Effective: [See Text Amendments] to June 11, 2015

In any claim brought under this chapter applying to illegal, fraudulent or unconscionable conduct or any prohibited debt collection practice, the court may adjust the damages awarded pursuant to section one hundred one of this article to account for inflation from the time that the West Virginia consumer credit and protection act became operative, specifically 12:01 a.m. on the first day of September, one thousand nine hundred seventy-four, to the time of the award of damages in an amount equal to the consumer price index. Consumer price index means the last consumer price index for all consumers published by the United States department of labor.

Credits
Acts 1994, c. 26.

W. Va. Code, § 46A-5-106, WV ST § 46A-5-106
Current with legislation of the 2018 First Extraordinary Session.

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