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., AMROCK INC., f/k/a Title Source, Inc., d/b/a Title Source, Inc. of West Virginia, Incorporated,

Defendants-Appellants,

and

DEWEY V. GUIDA; APPRAISALS UNLIMITED, INC.; RICHARD HYETT,

Defendants.

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

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INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs' brief is an audacious retreat. Below, they persuaded the district court to adopt, often verbatim, the aggressive but unprecedented legal theories that got them both summary judgment and class certification. Now on appeal, they no longer defend those theories. They offer a breezy but irrelevant discourse on the 2008 housing crisis, complete with citations to psychology journals and a paperback bestseller. But to sustain their multimillion-dollar victory, they must reckon with the rulings below and the factual record about the appraisals performed for *this class*. Their attempted appellate makeover cannot conceal the manifold flaws in the judgment.

The key flaws, laid bare, are these:

Inducement: The district court erroneously concluded that unconscionable inducement under the WVCCPA[1] does not require proof that anyone was *induced* to do anything. Plaintiffs offer multiple new reformulations of "inducement," but inducement means what this Court has said: causing a party to enter into a loan. Because Plaintiffs provided no factual proof of inducement below and identify none on appeal, summary judgment for Plaintiffs cannot survive.

Breach of Contract: The district court held at summary judgment that every single appraisal for every class member was an express breach of contract because

[1] Abbreviations have the same meaning as in the opening brief.

it was *per se* "unacceptable" to borrowers. That holding has no basis in the text of the supposed contract, and Plaintiffs no longer claim that it does. Instead they claim breach of an *implied* duty to obtain appraisals in a particular way. *That* theory has no basis in either West Virginia law, which does not recognize a freestanding "good faith" claim, or the standards of fair dealing. The district court then ordered restitution of the entire appraisal fee, instead of the expectancy damages required by West Virginia law. Plaintiffs defend this outcome based on a rationale neither argued nor adopted below, which is precluded by the very case on which Plaintiffs rely: the common-law remedies it applied are available only where there is *no* contract—not in a suit *for breach of contract.*

Class Certification: If anything remains of Plaintiffs' claims, the class must be decertified. Certification was premised on the notion that neither the claims nor the defenses were at all individualized. That rests on legal error, misconstruing the claims *and* the defenses *and* the burden under Rule 23. Plaintiffs bore the burden, and they could not prove inducement *or* breach of contract *or* entitlement to equitable tolling *or* standing with classwide evidence.

ARGUMENT

I. This Court Reviews The Decisions The District Court Actually Entered, On The Record The Parties Actually Made.

Plaintiffs' brief describes a case that never was, inventing new justifications that the district court never adopted and even new factual contentions from outside

the record. This Court should reject Plaintiffs' rearguard reimagining; it must review the decisions the district court actually entered, based on the evidence actually in the record and the arguments the parties preserved.

First, Plaintiffs cannot raise new arguments to cloak the district court's legal errors. To take just three examples, the district court replaced the WVCCPA term "induced" with "induced *or furthered*"; invented an "acceptable appraisal" contract term; and tolled the limitations period classwide without any proof from Plaintiffs. *See* pp. 6, 15, 20, *infra*. All of those are arguments Plaintiffs themselves persuaded the district court to adopt, yet they defend none of them on appeal. The district court said what it said, and what it said is thoroughly erroneous.

Second, Plaintiffs cannot fill the gaping hole in their evidentiary submission below by citing writings outside the record. At summary judgment, Defendants introduced ample evidence that the borrower's estimate on the appraisal order form did not influence the class members' appraisals. *See* JA353-54, JA358, JA347-48, JA373-75, JA364-65. Plaintiffs insist that is wrong (*see* Pl. Br. 1, 22, 39, 54-55), but to back up that insistence at summary judgment, they needed evidence.

They did not have it. So now, on appeal, they cite an ABA magazine, a psychology journal, a law-student note, and a paperback bestseller for the proposition that *as a general matter* appraisers respond to pressure from "industry." *Id.* at 10-12. This case, however, is not about "industry." It is about

whether the *class members'* appraisers were influenced in one particular way—merely by receiving order forms containing a BEV from Quicken Loans. Plaintiffs' outside sources do not bear on that question; they also are not record evidence. *See* Fed. R. Civ. P. 56(c)(1)(A); Fed. R. Evid. 201(b).

Third, Plaintiffs cannot refashion this into a subprime-lending case. The 14-page discourse on the 2008-2009 mortgage crisis is both entirely new and entirely irrelevant. Its apparent purpose is to justify baseless name-calling, *e.g.*, that Quicken Loans is a "subprime" lender and "shadow bank" somehow at fault for the crisis. Pl. Br. 1, 8. But this case has *nothing* to do with subprime lending—Plaintiffs sued on behalf of *every* West Virginia borrower who refinanced a loan with Quicken Loans, regardless of the loan terms. JA436. Plaintiffs do not—because they cannot—identify a single subprime loan made by Quicken Loans: the Aligs, for instance, obtained a fixed 6.25% interest rate, not even close to subprime, and then refinanced to a 4.5% FHA loan. JA682, JA703-05.

Plaintiffs' attempts to reimagine the rulings below, supplement the factual record, and introduce irrelevant smears all underscore that they cannot defend their multimillion-dollar judgment on the merits.

II. This Court Should Apply Heightened Scrutiny To The Rulings Concededly Copied From Plaintiffs' Briefing.

Plaintiffs do not dispute that large portions of the district court's opinions were lifted verbatim from their briefing. Instead, they argue (at 24, 26) that "there

is nothing inherently wrong" with that practice. But this Court has held unambiguously that allowing a party to prepare the opinion is a "failure of the trial judge to perform his judicial function" and warrants reversal. *Chicopee Mfg. Corp. v. Kendall Co.*, 288 F.2d 719, 724-25 (4th Cir. 1961). In particular, a class-certification decision that is substantially cribbed from movants' briefing (*see*, *e.g.*, Supplemental Addendum 81-86) is not the "rigorous analysis" that Rule 23 requires, *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982). *See In re Cmty. Bank of N. Va.*, 418 F.3d 277, 300-02 (3d Cir. 2005) (vacating certification order that failed to demonstrate "why the submissions of counsel totally reflect the independent judgment of the court"). Plaintiffs do not even acknowledge these authorities.

Rather, they rely on cases holding that district courts may adopt *findings of fact* from a party's post-trial submission. *E.g.*, *United States v. Crescent Amusement Co.*, 323 U.S. 173, 184 (1961). But this Court has already found these cases inapposite: even if adopting "proposed findings of fact and conclusions of law" after a bench trial is permissible, "there is no authority in the federal courts that countenances the *preparation of the opinion* by the attorney for either side." *Chicopee*, 288 F.2d at 724-25 (emphasis added).

Plaintiffs claim (at 25) that the court had reached its "initial conclusions" in ruling on previous motions. But summary judgment and class certification

presented new issues—disputed facts, not just pleadings, plus this Court's decision in *McFarland v. Wells Fargo Bank, N.A.*, 810 F.3d 273 (4th Cir. 2016). JA386-87. And on these new issues, too, the district court lifted its reasoning straight from Plaintiffs' briefing. *E.g.*, Supplemental Addendum 28-33.

Finally, Plaintiffs halfheartedly argue that there are *some* differences between the district court's opinions and Plaintiffs' briefing. But the degree of copying indisputably exceeds the level requiring heightened scrutiny.

III. Quicken Loans Is Entitled To Judgment on the WVCCPA Count Because Plaintiffs Proved Neither Inducement Nor Unconscionable Conduct.

A. Plaintiffs' New Attempts To Redefine "Induce" Are Unsuccessful.

The WVCCPA required Plaintiffs to prove that the loan "transaction[s]" were "induced by" Quicken Loans' supposedly "unconscionable conduct"—*i.e.*, that the conduct caused Plaintiffs to enter into their loans. Plaintiffs identified no such evidence at summary judgment, but persuaded the district court that it was enough if Quicken Loans' conduct "induced *or furthered*" the transactions. JA405, Def. Br. 21-26. On appeal, Plaintiffs barely mention that construction—and never defend the atextual "furthered." And they concede (at 29) that "induce" commonly means "persuade," "as [Quicken Loans] says," and can also mean "cause."

Unable to prove inducement under either of these definitions, Plaintiffs are forced to contend (at 30, 32) that the WVCCPA *unambiguously* gives "induce" a

much broader meaning—that anything that is "part of the process leading up to" the loan can be said to have "induced" the loan, even if the consumer would have entered into exactly the same loan with that "part of the process" removed. That reading, like the district court's, deprives "induce" of any meaning. Because Plaintiffs have no evidence of actual inducement, the WVCCPA judgment must be reversed.

1. Despite Plaintiffs' repeated attempts to erase and start over, the slate is not blank. The construction of "induce" that Plaintiffs reject comes directly from *McFarland*, in which this Court interpreted the *very statutory provision at issue here*. Describing the statute's "plain meaning," this Court held that unconscionable inducement is "unconscionable conduct that *causes a party to enter into a loan*." 810 F.3d at 285 (emphasis added). The Court's reading was confirmed by the "highly instructive" commentary to the "identical" provision of the Uniform Consumer Credit Code: unconscionable inducement requires a showing that the consumer would have never entered into the contract "if unconscionable means had not been employed to *induce* the consumer *to agree* to the contract." *Id.* (quoting U.C.C.C. 1974 § 5.108 cmt. 1) (emphasis added).

Unable to meet this standard, Plaintiffs argue (at 30-32) that "induce" must have a broader meaning whenever the object of the verb is not a person. But such

a rule, even if it exists,[2] would not be relevant here. Agreements do not form themselves; they require a "meeting of the minds." An "agreement" is "the bargain *of the parties*." W. Va. Code § 46A-1-102(2) (emphasis added). Inducing an agreement therefore means influencing people. That is why a corresponding provision of the WVCCPA authorizes the attorney general to enjoin "unconscionable conduct in *inducing consumers* to enter into consumer credit sales, consumer leases or consumer loans." W. Va. Code § 46A-7-109(1)(b); *see U.S. Life Credit Corp. v. Wilson*, 171 W. Va. 538, 542 (1982) (using the enforcement provision to interpret the substantive prohibition). A consumer loan transaction "assumes the presence of a second person," just as in one of Plaintiffs' examples. Pl. Br. 30 n.2 (citation omitted). For these reasons, *McFarland* refers interchangeably to inducing a loan agreement and to influencing parties to enter into a loan agreement. *See* 810 F.3d at 278, 285. So does the UCCC commentary. U.C.C.C. §5.108 cmt. 1 (1974) (equating using unconscionable acts to "induce the consumer to agree" to a contract and using unconscionable acts to "obtain an agreement"). In this context, they are no different.

Even the "broader sense of 'induce'" that Plaintiffs urge is still a synonym

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[2] Plaintiffs' authorities do not actually support such a rule, much less a rule of West Virginia law that would trump *McFarland*. Plaintiffs' main sources—a D.C. Circuit dissent and an Eleventh Circuit opinion—are not even on point; they argue with each other about the breadth of the phrase "persuades, induces, entices, or coerces" in a sex-crime statute.

for "to cause." Pl. Br. 29, 30; *see, e.g.*, *Public Citizen v. Young*, 831 F.2d 1108, 1120 (D.C. Cir. 1987) (a substance that "cause[s] cancer in animals in the conventional sense of the term" unambiguously "induce[s] cancer"). That is not materially broader than what this Court said in *McFarland*, or what Quicken Loans argued. Persuading a person to enter into a transaction is the same thing, in this context, as causing the transaction.

2. Whether "induce" means "persuade" or "cause," Plaintiffs still cannot satisfy that indispensable element. Both in the district court and now on appeal, Plaintiffs have failed to identify any evidence that merely including the borrower's estimate on an appraisal order form had any effect on borrowers, and thus that it "brought about" or "caused" the agreements. *See* Def. Br. 25-26.

Plaintiffs therefore seek to broaden *their own* already-broad definition—beyond what any dictionary or case says. They argue that the WVCCPA "requires only that the unconscionable conduct *contributed to the formation* of an agreement, or that, in other words, *it was part of the process leading up to the agreement's creation*." Pl. Br. 32 (second emphasis added); *see id.* at 29. Plaintiffs cite no source—no legal authority and no speaker of ordinary English—that has ever used "induce" that way. A signing bonus is an "inducement" to take a job; the application form is not, even though it is "part of the process." Plaintiffs' construction would stretch the cause of action for inducement to regulate *any* of the

myriad things that could be called “part of the process” of a consumer-finance transaction—down to the choice of font on an invoice.

Plaintiffs contend that the Court must adopt their peculiar definition because unconscionable inducement is “found ‘as a matter of law.’” Pl. Br. 31. This amounts to an argument that the WVCCPA permits no factfinding and no factual disputes—but West Virginia courts do not read the “matter of law” language that way. *See, e.g.*, *Herrod v. First Republic Mortg. Corp.*, 218 W. Va. 611, 616-19 (2005) (explaining that “[o]nly when there are no factual disputes in existence can an unconscionability claim under [Section] 46A-2-121 be determined as a question of law”). The statute unambiguously requires inducement, and inducement (like all questions of factual causation) is inherently factual. *E.g.*, *Ilosky v. Michelin Tire Corp.*, 172 W. Va. 435, 444 (1983). That factual element cannot be read out of the statute just because the *ultimate* question of liability is an issue of law.

3. Elsewhere, Plaintiffs offer yet another brand-new formulation: unconscionable inducement, they say, is the same as procedural unconscionability, and *McFarland* “equated” the two. Pl. Br. 21; *see id.* at 33 (similar). Not so. *McFarland* held that an unconscionable-inducement claim, unlike a claim attacking the agreement itself, does not require evidence of substantively unconscionable *terms* and thus “may be based entirely on evidence going to process.” 810 F.3d at 283. But this Court clearly stated that “the standard for

unconscionable inducement *is different and higher* than that for procedural unconscionability." *Id.* at 286 (emphasis added). Inducement also requires that the "unconscionable conduct…*cause*[] *a party to enter into a loan*." *Id.* at 285 (emphasis added).

4. Finally, appealing to the WVCCPA's "purpose," Plaintiffs argue that causation (which they incorrectly re-brand as "reliance") is too hard for consumers to prove. But proving causation, including reliance, is routine. *See, e.g.*, *Trafalgar House Const., Inc. v. ZMM, Inc.*, 211 W. Va. 578, 582 (2002) (fraudulent-concealment claim). Nothing prevents WVCCPA plaintiffs from showing why they entered into a transaction. Initially Plaintiffs alleged reliance, JA67, JA70—but did not prove it, presumably reluctant to rely on individualized evidence while seeking class certification.

In any event, the best indication of "legislative purpose" is the statutory text, *Liberty Mutual Ins. Co. v. Morrisey*, 236 W. Va. 615, 625 (2014), and the text requires proof of inducement. Plaintiffs' contrary argument rests on one case, interpreting different wording in a different WVCCPA article. Pl. Br. 37 (citing *White v. Wyeth*, 227 W. Va. 131 (2010)). *White* involved an action for losses suffered "as a result of"—not "induced by"—a deceptive act or practice. W. Va. Code § 46A-6-106(a). And the court did not excuse plaintiffs from proving *causation*. Rather, under that statute, where plaintiffs allege an affirmative

misstatement (as Plaintiffs claim to do here, *see* pp. 12-13, *infra*), they must prove causation by proving reliance. And even where there is no misstatement, in *all* cases "the facts have to establish that 'but for' the deceptive conduct or practice a reasonable consumer would not have purchased the product and incurred the ascertainable loss." *White*, 227 W. Va. at 140. Even if *White* were on-point here, it requires exactly the proof of causation that Plaintiffs failed to adduce.

B. Plaintiffs' Unconscionability Argument Mischaracterizes Both The Record And The District Court's Decision.

Showing inducement still would not be enough; the WVCCPA requires Plaintiffs to show that the inducement arose from *unconscionable conduct.* Plaintiffs concede that unconscionability requires something akin to "affirmative misrepresentation or active deceit." Pl. Br. 37. Plaintiffs showed no such thing. That is an independent reason to reverse.

1. As the opening brief showed, the district court failed to grapple with the actual facts of Plaintiffs' appraisals, but relied instead on the invented notion that the appraisals were all "unconscionable *per se*." Plaintiffs claim that "per se" just meant amenable to summary judgment. Pl. Br. 40. But the court was clear that it was imposing its own view, notwithstanding factual disputes. *See* JA395, JA406.

2. Trying to find "misrepresentation or deceit" where the district court failed to, Plaintiffs now argue that the appraisals "misrepresent[ed]" to the

borrowers *the value of their homes*. Pl. Br. 38. They cite absolutely no record support, and there is none. Even if a third party's independent appraisal could be regarded as *Defendants'* representation of the value of a home, Plaintiffs never demonstrated that the appraised values were *all false*, and *knowingly so*, beyond any factual dispute. To the contrary, the record contains ample evidence of appraisals performed both independently (uninfluenced by BEV) and accurately (consistent with other evidence of value). *See* p. 3, *supra*; Def. Br. 6-7; JA199, JA344.

Plaintiffs' "omission" theory of unconscionability fares no better. They claim that Quicken Loans should have told borrowers their appraisals were "biased" and "compromised." Pl. Br. 38-39. But again, no evidence shows that just learning the *borrower's* estimate of value automatically biased the appraisal. Nor is there any material "omission": the borrowers themselves provided the estimated values, and there is no evidence that they thought the appraiser would *not* see their estimates. To the contrary, the record shows that borrowers themselves frequently gave value opinions and information directly to the appraisers—and that it did not affect the appraisers. JA1053, Def. Br. 6-7. The relevant professional standards expressly recognized that merely learning the "[o]wner's estimate of value" does not taint an appraisal automatically (or "per se"). Def. Br. 6. Finally, unconscionable inducement *under the WVCCPA* requires

not just an omission but *concealment* with the "intent to deceive." Def. Br. 28. Yet Plaintiffs concede that they cannot prove any intent to deceive. Pl. Br. 39.

3. Plaintiffs repeatedly misrepresent the record in an effort to bolster their claim of unconscionability. Most fundamentally, Plaintiffs refuse to acknowledge the evidence that the challenged practice served a legitimate purpose—helping to match appraisers with suitable assignments. Instead they argue forfeiture, but that is wrong: Quicken Loans cited deposition testimony, JA276, stating that the BEV was "conveyed, again, as a data point that could be utilized by the service providers to figure out whether or not they should be accepting the assignment and, if they were going to, what fee should be associated with the assignment," JA236-37.

Plaintiffs mischaracterize the testimony of one appraiser as characterizing the BEV as a "tip-off." Pl. Br. 17. As Quicken Loans already explained (Def. Br. 10 n.3) and Plaintiffs do not refute, the witness was only asked whether another appraiser *in a different case* had characterized the BEV that way. Plaintiffs also repeatedly assert that Quicken Loans and/or TSI sometimes asked appraisers to change values that came in below the BEV. Pl. Br. 16-17. Allegations about a few *individual* loans are irrelevant: the sole basis for the summary-judgment ruling under review is that the practice of listing the BEV, without telling borrowers, unconscionably induced *all* the loans. *See* JA403.

IV. Plaintiffs Abandon Their Express Breach-Of-Contract Theory, And Their Alternative Theory Of Breach Fails.

Quicken Loans showed (Def. Br. 32-37) that the basis for the district court's breach-of-contract holding was simply wrong: the putative contracts contained no term requiring an appraisal "acceptable" to borrowers. In response, Plaintiffs disclaim any reliance on the express language of the documents, which they concede requires at most that Quicken Loans "obtain an appraisal."[3] Pl. Br. 41. Instead, they argue that the district court relied only on the *implied* duty of good faith and fair dealing—and not any express contractual language—in awarding summary judgment to Plaintiffs. *Id.* at 42.

Plaintiffs mischaracterize (again) the district court's decision. The district court held, copying almost verbatim from Plaintiffs' brief, that "[t]he agreement … specifically refers to an 'acceptable' appraisal. *This language is significant*." JA408-05 (emphasis added). The court rejected Defendants' argument that "acceptable," in context, meant acceptable to Quicken Loans. JA410. And it held (again quoting the same language) that an appraisal ordered through the process Quicken Loans used "cannot conceivably be an '*acceptable*' one." JA409. The express language was therefore central to the district court's

[3] In fact, some agreements did not even require Quicken Loans to "obtain an appraisal." Def. Br. 33. While Quicken Loans undisputedly obtained an appraisal for each loan, Plaintiffs wrongly claim (at 41) that it was contractually required to do so *in every case*.

decision. Plaintiffs' understandable refusal to defend this reasoning implicitly concedes its error.

By disclaiming reliance on any express contractual language and relying solely on the implied covenant of good faith and fair dealing, Plaintiffs have doomed their breach-of-contract claim, for three independent reasons.

First, in West Virginia there is no freestanding claim for breach of the implied covenant of good faith and fair dealing *absent* an express contractual breach. Thus, where, as here, there is no "*viable* express breach of contract claim," there "can be no claim for breach of the implied covenant of good faith and fair dealing." *Wittenberg v. Wells Fargo Bank, N.A.*, 852 F. Supp. 2d 731, 750 (N.D. W. Va. 2012) (emphasis added); *see also Clendenin v. Wells Fargo Bank, N.A.*, 2009 WL 4263506, *5 (S.D. W.Va. Nov. 24, 2009) (a bad-faith claim "will live or die by the [express] breach-of-contract claim"); Def. Br. 35-36 (citing cases).

Second, the implied covenant does not transform a disclosure that the process "may include ordering an appraisal" (JA381-82) into a *promise* to obtain one, much less to obtain one by particular means. The implied covenant does not create new substantive terms or "give contracting parties rights which are inconsistent with those set out in the contract." *Bruce McDonald Holding Co. v. Addington, Inc.*, 241 W. Va. 451, ___, & n.30, [825 S.E.2d 779, 791 & n.30]

(2019) (citation omitted).[4] Here, the documents contain no terms governing how Quicken Loans would order appraisals. Plaintiffs therefore cannot invoke the implied covenant to create new terms to which the parties never agreed.

Third, even if Plaintiffs were correct that the implied covenant obliged Quicken Loans to obtain a "reasonable, fair, and unbiased" appraisal, Pl. Br. 43, the parties *disputed* whether the appraisals were reasonable, fair, and unbiased. Defendants amassed compelling evidence that they were: all appraisers involved in this case testified that receiving order forms with the BEV had no effect on their valuation. *See* p. 14, *supra*; Def. Br. 5-10. At the very least, this evidence precluded summary judgment for Plaintiffs.

V. The District Court Erred In Awarding Restitution, Not Expectancy Damages, As The Remedy For Breach Of Contract.

Plaintiffs never proved the damages element of breach of contract. The district court awarded money anyway, without trial, calling it "restitution." But West Virginia's measure of damages for contract claims is the benefit of the contractual bargain (*i.e.*, expectancy). *See* Def. Br. 55-56; *Horn v. Bowen*, 136 W.

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[4] None of Plaintiffs' cases holds otherwise. *See Evans v. United Bank*, 775 S.E.2d 500, 509 (W. Va. 2015) (dismissing breach of implied covenant where there was no breach of contract); *Buckhannon-Upshur Cty. Airport Auth. v. R&R Coal Contracting, Inc.*, 413 S.E.2d 404, 411 (W. Va. 1991) (noting that the implied covenant suggested that insurers would not in bad faith refuse to pay insureds they were contractually obligated to pay); *Barn-Chestnut, Inc. v. CFM Dev. Corp.*, 457 S.E.2d 502, 508 (W. Va. 1995) (holding that "absent any express provisions regarding [contract] renewal," the implied covenant did not create one).

Va. 465, 469 (1951); *Clayton v. Martin*, 108 W. Va. 571, 574 (1930). Plaintiffs counter that proving benefit-of-the-bargain damages would be "messy" and "complicate[d]," while awarding the entire appraisal fee as restitution is "straightforward." Pl. Br. 54. Of course, the pertinent question is not which measure is easier, but which measure is *required*.

For breach of an actual contract, that measure is expectancy, not restitution. The only case Plaintiffs cite addresses restitution as a remedy for "quasi-contract" claims of "unjust enrichment" where there is no contract. *See Realmark Devs. v. Ranson*, 214 W. Va. 161, 164, 165 (2003); *Realmark Devs. v. Ranson*, 208 W. Va. 717, 721-22 (2000). By contrast, "[i]f a contract exists between two parties, a party may not sue under a theory of restitution for the other's breach of contract; instead, the party's remedy lies in breach of contract." *Smith v. 21st Cent. Natural Fuels, LLC*, 2016 WL 1465431, at *5 n.7 (S.D. W.Va. Apr. 14, 2016).

Plaintiffs argue for the first time that the WVCCPA invalidates the contract and restitution fills the void. Pl. Br. 55. But if that is Plaintiffs' position, then reversal on the WVCCPA claim (Part III, *supra*) also defeats their contract recovery. Furthermore, Plaintiffs could not sue for breach of an "unenforceable" contract, much less an implied term of one. *RLM Communs., Inc. v. Tuschen*, 831 F.3d 190, 198 (4th Cir. 2016); *see*, *e.g.*, *Kreiss v. McCown de Leeuw & Co.*, 37 F. Supp. 2d 294, 301-02 (S.D.N.Y. 1999) ("no implied duty of good faith and fair

dealing may attach to an unenforceable contract").

Even if Plaintiffs had sued for unjust enrichment and not breach, such a claim "is an action at law," entitling the defendant "to a jury trial," because "the relief given is a simple money judgment." *Realmark*, 214 W. Va. at 164-65. The district court held *it* could award money because restitution is "equitable" and conveys "no right to a jury trial." JA559-60. *Realmark* expressly held that this "confusion with equity" was error. 214 W. Va. at 164.

The court also erred in performing only *part* of the restitution analysis. Plaintiffs did not pay money and get nothing; they got value for their money—an appraisal and a loan that closed based on it. "[A]ll courts are in agreement that restitution by the defendant will not be enforced unless the plaintiff returns in some way what the plaintiff has received as a part performance by the defendant." 11 Joseph M. Perillo, *Corbin on Contracts* § 61.13 (rev. ed. 2005). West Virginia courts are no exception. *Cf. Quicken Loans, Inc. v. Brown*, 236 W. Va. 12, 22 (2014) (plaintiff who successfully challenged a loan obligation would have to return loan principal). Tendering back the benefits of refinancing would net many Plaintiffs zero—and, worse, would require "reinstatement of the prior loan[s]," with their higher payments. *Watkins v. SunTrust Mortg., Inc.*, 663 F.3d 232, 239 (4th Cir. 2011).

The restitution award is legally invalid, and Plaintiffs never made any

attempt to prove contract damages under any other measure. Because damages are an element of Plaintiffs' claim for breach, *Sneberger v. Morrison*, 235 W. Va. 654, 669 (2015), Quicken Loans is entitled to summary judgment.

VI. If Judgment Is Not Ordered In Quicken Loans' Favor, The Erroneous Class Certification Must Be Reversed.

If this Court holds that Defendants were entitled to summary judgment on liability, it need not proceed any further. If any claims survive the analysis above, however, the class must be decertified, because individual issues predominate.

Plaintiffs contend that liability "turns entirely on *Quicken's* conduct" and not on any facts about individual borrowers. Pl. Br. 44. But as Defendants have already shown, both of Plaintiffs' claims turn on individualized elements. The district court held otherwise only by misconstruing the elements.

The class-certification order also misapplies Rule 23 to affirmative defenses, class members' standing, and classwide damages. Each requires reversal.

A. Individualized Limitations Defenses Preclude Class Certification.

Plaintiffs admit that the certified class includes borrowers with time-barred claims. Pl. Br. 45. The district court certified the class nonetheless, by holding that (1) all time-barred class members were uniformly entitled to toll the statute of limitations, *unless* (2) Defendants affirmatively proved otherwise. JA434-35, JA548-50. This Court has squarely rejected both approaches: the "plaintiff-focused elements" of tolling "generally require individual examination of

testimony from each particular plaintiff to determine what he knew and when he knew it." *EQT Prod. Co. v. Adair*, 764 F.3d 347, 370 (4th Cir. 2014); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 320-21 (4th Cir. 2006). That is an exercise "not readily susceptible to class-wide determination." *Thorn*, 445 F.3d at 320, 321-22. And the burden of proving that a case *is* susceptible to class-wide adjudication *never* shifts away from the plaintiff, even if the obstacle to certification is a defense. *Id.* at 321, 322, 324.

Plaintiffs' cursory treatment of *Thorn* does not even mention its holding that *they* bear the burden. Instead, they rely on contrary caselaw from the Ninth Circuit. Pl. Br. 46-47. That alone compels reversal.

Plaintiffs pretend that the only factual issue relevant to the limitations analysis is "the date on which the plaintiffs' claims begin running," a determination they claim would be "ministerial." Pl. Br. 47-48. But the district court relied not on the accrual date, but on *tolling*, to find the claims timely. And the factual inquiries that tolling requires "focus[] on the contents of [each] plaintiff's mind," which is "not readily susceptible to class-wide determination" and "will frequently defeat Rule 23's requirements." *Thorn*, 445 F.3d at 320; *EQT*,

764 F.3d at 370.[5]

Even just applying the limitations period, without tolling, would be anything but "ministerial." The one-year limitations period "begin[s] running" when a loan is paid off (*e.g.*, at maturity or through refinance). There is no information in the record on when loans were paid off for the loans Quicken Loans originated but did not service (and there are many).

Plaintiffs do not dispute that the class includes time-barred claims. Downplaying the problem, they claim Defendants have not identified a "large" number of them (Pl. Br. 45). But they ignore the reason why: the district court denied Defendants discovery—even while wrongly placing the burden on Defendants. JA460-61. The court held that the statute of limitations was "not an issue" unless Defendants could present "evidence" of individual time-barred claims, *id.*, but the point of seeking discovery was to uncover such evidence. And information such as "evidence of unawareness of the cause of action is information uniquely in the class's possession." *Thorn*, 445 F.3d at 324. Plaintiffs argue that time-barred borrowers could simply have been "boot[ed]" from the class, but the district court wrongly assumed there was no one to boot unless *Defendants*

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[5] West Virginia law requires inquiry into "when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action" here. *Dunn v. Rockwell*, 225 W. Va. 43, 53 (2009); JA435.

identified them. JA423-25. And even if "booting" class members after certification were a satisfactory way of making a class cohesive, here the district court did not boot anyone, even the concededly untimely borrowers.[6]

B. Individualized Standing Issues Preclude Class Certification.

Plaintiffs tacitly acknowledge that they cannot certify a class whose members lack standing, but contend that *every* class member has standing because everyone lost money. That is an entirely new argument. Invited by Plaintiffs, the district court held that it could certify the class based on the standing of the "class representative" only, with no need to "demonstrate that each class member has standing." JA535. That is wrong, *see* Def. Br. 47-50, and Plaintiffs wisely abandon that flawed reasoning now. But their brand-new theory that everyone lost money fares no better.[7]

The evidence shows that class members *gained* monetary benefits from the loan transactions the appraisals supported, and Plaintiffs never showed that the

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[6] Nor did the court "boot" borrowers whose claims abated on death or were barred by bankruptcy discharges, or otherwise could not sue. *See*, *e.g.*, JA550-59.

[7] This Court's recent decision in *Krakauer v. Dish Network, LLC*, 925 F.3d 643 (4th Cir. 2019), does not solve Plaintiffs' standing problem. *Krakauer* expressly *declined* to hold that a class can be certified without concrete injuries to each class member. *Id.* at 659. And it took care to note that the Rule 23 analysis must be specific to "the particular cause of action"—there, the TCPA—confirming that it is inapposite here. *Id.* at 655. Plaintiffs suffered no concrete injury of the sort found in *Krakauer*. *Id.* at 651, 654.

costs outweighed those benefits (since their standing theory below was entirely different). So Plaintiffs argue that *legally*, the court may not consider "countervailing benefits" in assessing whether the class members suffered an actual injury. Pl. Br. 50-51. For example, Plaintiffs cite language from *Texas v. United States*, 787 F.3d 733, 750 (5th Cir. 2015), declining to "balance all costs and benefits" in assessing standing. But later in the same case, the court recognized that "offsetting benefits" *do* negate standing—when they "arise from the same transaction as the costs." *Texas v. United States*, 809 F.3d 134, 155-56 (5th Cir. 2015); *accord Wendt v. 24 Hour Fitness USA, Inc.*, 821 F.3d 547, 550 n.10 (5th Cir. 2016). And here, Plaintiffs were charged for the appraisals in the "same transaction" (*i.e.*, closing) at which they paid off their prior loans and accepted new loans with lower payments. *See* JA681.

Plaintiffs fall back to arguing (at 51-52) that everyone was harmed by paying for appraisals that "could not serve their intended purpose," echoing the district court's characterization of the appraisals as "unreliable" and "worthless" JA542. The assertion that the appraisals were "worthless" has no basis in the record. In any event, no class member bought an appraisal—they all obtained *loans*, they paid for appraisals to support those loans, and they benefited from those loans. And there is no evidence—much less uniform, classwide evidence—that borrowers had any *other* interest in the appraisals besides closing their loans.

The only record evidence points in the opposite direction: one class member gave evidence that "it would not have affected [his] decision to take the loan" if he "had been told at the time that the appraiser had been provided [his] estimated value," because the loan saved him "a significant amount of money." JA488-89.

Plaintiffs try to evade this logic by asserting (based on a journal article, not on any record evidence) that appraisals have "dual purposes"—one for the benefit of the borrower, and the other for the benefit of the lender. Pl. Br. 8.[8] If so, then the appraisals were not "worthless," because they plainly achieved at least *one* of those purposes—supporting the loan. As for Plaintiffs' complaint that the appraisals were inaccurate: the premise is not supported by any classwide evidence, as shown above, but in any event "[n]ot all inaccuracies cause harm." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550 (2016).

This Court need not decide on appeal whether any *particular* plaintiff is injured. Merely recognizing the need to litigate this individualized standing

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[8] They also assert (falsely) that "the appraisers' certifications in this case … expressly state that the 'borrower…may rely on [the] appraisal report as part of any mortgage finance transaction.'" But Plaintiffs never showed that that language exists uniformly across all 2,769 appraisals. As one of Plaintiffs' own journal articles explains, the form appraisal certifications were changed *during the class period*—and Fannie Mae also accepts an alternative certification stating that the lender is the *only* intended user. *See* Shelby D. Green, *Re-Appraising the Appraisers*, Prob. & Prop., Nov./Dec. 2011, at 10, 15-16; JA406-07, JA202 (Aligs' cover letter so stating).

question across the plaintiff class is sufficient to reverse.

C. Plaintiffs Failed To Proffer A Legally Valid Method For Calculating Classwide Damages.

Class certification requires the proponent to demonstrate how damages can be assessed on a "class-wide" basis. Def. Br. 52; *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013). Plaintiffs failed to propose a legally valid damages methodology for any claim.

As already shown (pp. 17-20, *supra*), restitution damages for breach of contract are expressly precluded by West Virginia law. Plaintiffs never tried to prove damages using the proper benefit-of-the-bargain methodology, which they say is too "complicate[d]" to work class-wide. Pl. Br. 54.

Plaintiffs used equally flawed methodology on the WVCCPA claim: they persuaded the court simply to award everyone the same penalty. But this Court has held that fixing statutory damages within a range "typically require[s] an individualized inquiry" into "harms" to "particular class members," an obvious obstacle to class treatment. *Soutter v. Equifax Info. Servs., LLC*, 498 F. App'x 260, 265 (4th Cir. 2012). Here, the court improperly disregarded record evidence that class members were differently situated.

Plaintiffs argue that they could simply ignore differences among class members, but they merely repeat (at 53) the district court's misunderstanding of a West Virginia case stating that "an award of civil penalties is not conditioned on an

award of actual damages." *Vanderbilt Mortg. & Fin., Inc. v. Cole*, 230 W. Va. 505, 511 (2013). The district court wildly over-read that statement and held that the statutory penalty awarded to each plaintiff need not even "bear a reasonable relationship to the actual harm." JA512, JA517. That does not follow: just because actual damages are not a *prerequisite* for statutory penalties does not mean that they are irrelevant to deciding the amount of statutory penalties.

Plaintiffs' attempt to mask this error by asserting (at 53) that all class members "suffered identical harms" is impossible to square with how Plaintiffs themselves litigated the penalty hearing. Plaintiffs did not base their case for a high statutory penalty on the simple and new theory they assert on appeal—that each class member "paid money for a worthless appraisal." *Id.* Instead, they looked for the *most* objectionable loan terms they could find, to cherry-pick for evidence of "egregiousness," and they expressly claimed harms in the form of "inflated" appraisals—something they did not, and could not, adduce class-wide. JA1089, JA1091, JA1096, JA1101-02, JA1110, JA1115, JA1117. The district court's rulings let them have it both ways—denying that harm was individualized until the class was certified, but then relying on claims of individualized harm to justify a higher *classwide* penalty.

That is exactly the same error this Court identified in *Broussard v. Meineke Discount Muffler Shops*, 155 F.3d 331 (4th Cir. 1998): "[P]laintiffs enjoyed the

practical advantage of being able to litigate not on behalf of themselves but on behalf of a 'perfect plaintiff' pieced together for litigation," forcing Defendants "to defend against a fictional composite without the benefit of deposing or cross-examining the disparate individuals behind the composite creation." *Id.* at 344-45.

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 32(a)(7)(B)(ii). This brief contains 6,494 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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/s/ William M. Jay
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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.

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