No. 19-1059

In the 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 AMROCK INC.,
Defendants-Appellants,

DEWEY V. GUIDA, APPRAISALS UNLIMITED, INC., and RICHARD HYETT,
Defendants.

On Appeal from the United States District Court
for the Northern District of West Virginia
Case Nos. 5:12-cv-114, 5:12-cv-115 (The Honorable John P. Bailey)

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INTRODUCTION

Although this case concerns practices that contributed to the worst and most complex financial crisis since the Great Depression, the basis for the plaintiffs' claims is simple: They paid money to subprime mortgage lender Quicken Loans in exchange for the company's agreement to obtain fair and independent appraisals of their homes. What they did not know was that Quicken had a longstanding practice of skewing the appraisal process by, among other things, sending its appraisers "estimated values" in advance—a "universally condemned" practice that had "no legitimate purpose" other than "to inflate the true value of the property." [ECF.353.at.3-4]. The strategy was effective: Many appraisals came in at exactly the estimated value, and the average difference between Quicken's estimated value and the appraiser's value was less than five percent. [ECF.336.at.191-92; ECF.353.at.72].

The appraisals that the plaintiffs got back from Quicken thus could not be trusted to represent the value of their homes. [ECF.353.at.33]. A biased appraisal is not just "worthless"; it is potentially dangerous. *Id.* "When a borrower is bound to a mortgage that exceeds the value of his home, he is trapped, unable to refinance to obtain better terms or sell his home to relocate, and foreclosure is the result." *McFarland v. Wells Fargo Bank, N.A.*, 810 F.3d 273, 280 (4th Cir. 2016). In *Brown v. Quicken Loans Inc.*, a West Virginia court found that "[n]o legitimate purpose is served by providing an appraiser with an estimated value" and that "the only purpose could be to inflate the true value of the property." [ECF.173-Ex.W.at.10]. Based in part on the company's failure to address the appraisal's "obvious flaws," the court found that the resulting mortgage had been unconscionably induced in violation of the West Virginia Consumer Credit and Protection Act (WVCCPA), *id.* at 11, 17—a conclusion upheld by the Supreme Court of Appeals of West Virginia. *Quicken Loans, Inc. v. Brown*, 737 S.E.2d 640, 657 (W. Va. 2012).

In this case, the district court correctly concluded that Quicken's act of providing appraisals to the plaintiffs without disclosing their inherent unreliability was a misrepresentation that constituted unconscionable inducement under the WVCCPA. And because the plaintiffs never got the impartial appraisal for which they paid, it was also a breach of contract under West Virginia common law. Neither of those claims depended on contested or individualized facts. Each class member paid Quicken for an appraisal. And, in each case, Quicken contaminated that appraisal by giving the appraiser an estimated value in advance. As a consequence, all the class members suffered identical injuries: All lost the money they paid to Quicken, and all were denied the credible appraisal for which they paid. The district court was thus able to efficiently resolve each claim as to the whole class as a matter of law and in a single stroke.

Members of the class were easy to identify and locate because Quicken, as their mortgage lender, was already in possession of most of their home addresses. The final class consisted of borrowers on 2,769 West Virginia loans—not a small class, but well within the margin of what district courts in this circuit routinely handle. *Krakauer v. Dish Network, L.L.C.*, No. 18-1518, 2019 WL 2292196, at *3 n.1, 9 (4th Cir. May 30, 2019) (affirming certification of 18,066-member class as "easily meet[ing] the demands of Rule 23"). Calculation of the plaintiffs' damages was also a simple matter. For unconscionable inducement, the court awarded each plaintiff an identical amount of statutory civil penalties, which under the WVCCPA do not require proof of actual damages. For breach of contract, the court awarded a refund of the appraisal fee paid by each plaintiff, the amount of which varied slightly but was easily determined with Quicken's class-wide records. In short, "[t]he problems that so often plague class actions under Rule 23(b)(3)" were "wholly absent" here. *Id.* at *7.

Quicken does its best to characterize a simple, already-completed case as an unmanageable one. As to virtually every issue, it urges this Court to apply standards that would not only be difficult or impossible to satisfy in an individual case, but would also unnecessarily raise fact-intensive questions that Quicken has devised for the purpose of foreclosing class treatment. Quicken's lead argument, for instance, is that an unconscionable-inducement claim under the WVCCPA requires a showing of reliance, for which the plaintiffs would have to submit "individual, not class-wide" evidence that Quicken's "lack of disclosure" about its practice of tipping off appraisers "induce[d] Plaintiffs to enter into refinancing arrangements." Quicken Br. at 13, 25. But, as the Supreme Court of Appeals of West Virginia has recognized, requiring plaintiffs to prove reliance on a "failure to disclose" is not just an unnecessarily "artificial" requirement—it is "an impossibility." *White v. Wyeth*, 705 S.E.2d 828, 837 (W. Va. 2010). This federal Court, sitting in diversity, has no license to erect a substantive legal barrier that the state's highest court has firmly rejected.

Quicken raises many more evidentiary hurdles in the same vein—none any more relevant and all seemingly designed to frustrate efficient adjudication. The state legislature's purpose in enacting the WVCCPA, however, was to "provid[e] an avenue of relief for consumers who would otherwise have difficulty proving their case under a more traditional cause of action." *Dunlap v. Friedman's, Inc.*, 582 S.E.2d 841, 846 (2003). That legislative purpose warrants respect—particularly when a federal court is called upon to predict state law. "It would be dispiriting beyond belief if courts defeated" the state's "obvious attempt to vindicate the public interest with interpretations that ignored the purpose, text, and structure of this Act at the behest of those whose abusive practices the legislative branch had meant to curb." *Krakauer,* 2019 WL 2292196, at *13. The district court should be affirmed.

STATEMENT OF THE ISSUES

I. Summary judgment

- Did the plaintiffs' claim for unconscionable inducement under the West Virginia Consumer Credit and Protection Act (WVCCPA) require them to prove that they *relied* on Quicken's unconscionable conduct to their detriment?
- Did the district court correctly predict that West Virginia's highest court would hold that Quicken's practice of influencing appraisers by secretly passing them estimated property values constituted unconscionable conduct under the WVCCPA?
- Did the district court correctly predict that West Virginia's highest court would hold that Quicken breached its contract with the plaintiffs by violating its implied covenant of good faith and fair dealing?

II. Class certification

- Did common issues predominate in classwide treatment of the plaintiffs' unconscionable-inducement and breach-of-contract claims? In particular, was class certification rendered improper by Quicken's unproven assertion that some claims may be time barred or by a variety of hypothetical contract defenses?
- Did the class members lack justiciable injury in fact?

- Was there a valid class-wide damages methodology?

III. Remedies

- Was restitution a proper remedy for the plaintiffs' breach-of-contract claim under West Virginia law and, if so, was a refund of the plaintiffs' appraisal fees a proper measure of restitution?

STATEMENT OF THE CASE

A. The problem of appraisal inflation in mortgage lending

The sudden implosion of the United States banking system in 2008 pushed the world's economy to the brink of collapse. Although the origins of the crisis are complex, "[i]nflated real estate appraisals played a critical role." Green, *Re-Appraising the Appraisers*, Prob. & Prop., November/December 2011, at 10, 17. Mortgage lenders consistently pressured appraisers over many years to raise their estimates of property values, allowing the real-estate bubble to form. *See id.* When the system could no longer sustain itself, the ensuing crash led to a years-long recession and the biggest government bailout in history. In the end, millions of Americans lost their jobs and their homes. Financial Crisis Inquiry Commission, *The Financial Crisis Inquiry Report* xi (2011), http://bit.ly/2x0txko.

All of that was possible only because unscrupulous subprime lenders like Quicken skewed the lending and appraisal processes, turning traditional banking upside down.

1. Appraisers are supposed to protect lenders and borrowers.

Traditional banks are risk averse—they don't want to make loans unless they're confident that the borrower can repay. Because they hold mortgages for the life of the loan, banks have "the incentive to ensure responsible lending practices." Moran, *Wall Street Meets Main Street*, 13 N.C. Banking Inst. 5, 32 (2009). They therefore evaluate borrowers carefully. *See id.* Banks conduct that evaluation by hiring a professional appraiser to independently estimate the value of a property to be mortgaged. *See* Nakamura, *How Much Is That Home Really Worth?*, Bus. Rev. (Fed. Reserve Bank of Phila.), Q1 2010. The appraiser assesses value in part by examining market conditions and looking at recent sales of nearby properties that are comparable in terms of size, condition, and other factors. *Id.*

The appraisal "is supposed to be an objective and expert dollar valuation … that should help make a mortgage less risky." *Id.* at 11. Done properly, it protects the bank by ensuring that it is not loaning more than the value of its collateral. Thus, lenders "would rarely want appraisers to overestimate the value of a house, since the equity in the home protects the lender if the borrower fails to repay the loan." Eggert, *Great Collapse: How Securitization Caused the Subprime Meltdown*, 41 Conn. L. Rev. 1257, 1283, 1287 (2009).

Appraisals are also supposed to protect *borrowers* by ensuring that they are not borrowing more than they should. Borrowing too much can leave buyers "upside down"—owing more than the property is worth. Williams, *Foreclosing Foreclosure*, 7 Nw. J. L. & Soc. Pol'y 455, 472-73 (2012). As this Court has recognized, "[w]hen a borrower is bound to a mortgage that exceeds the value of his home, he is trapped, unable to refinance to obtain better terms or sell his home to relocate, and foreclosure is the result." *McFarland*, 810 F.3d at 280; *see also* Williams, *Foreclosing Foreclosure*, 7 Nw. J. L. & Soc. Pol'y at 472-73.

Thus, the appraisal has "dual purposes"—"informing the buyer about the fairness and affordability of the anticipated loan and assessing the sufficiency of the collateral." Green, *Re-Appraising the Appraisers*, Prob. & Prop., at 16. Recognizing that, the appraisers' certifications in this case—adopted from standard Fannie Mae and Freddie Mac appraisal forms—expressly state that the "borrower … may rely on [the] appraisal report as part of any mortgage finance transaction." [ECF.206-5.at.52; ECF.206-6.at.23]. That language was added, as Fannie Mae has explained, to recognize that borrowers "should be able to rely on the accuracy of an appraisal report … because their reliance is customary and reasonable." [ECF.206-7.at.41].

2. Non-bank lenders like Quicken transform banking and undermine appraiser independence.

The decay in that traditional model coincided with the rise of non-bank mortgage lenders—or "shadow banks"—of which Quicken Loans is today the largest. Green, *Shadowing Lenders and Consumers: The Rise, Regulation, and Risks of Non-Banks,* 37 Banking & Fin. Servs. Pol'y Rep., no. 9, Sept. 2018, at 12, 12. These entities issue "the overwhelming proportion of subprime loans," which are "geared towards a greater number of higher-risk borrowers who do not qualify for market interest rates." Moran, *Wall Street Meets Main Street*, 13 N.C. Banking Inst. at 27. But because they are not banks, they "roam free, largely outside the purview of the bank regulators." Green, *Shadowing Lenders and Consumers*, 37 Banking & Fin. Services Pol'y Rep., at 12.

Non-bank lenders, unlike traditional banks, do not take deposits or hold loans. *See id.* Rather, they get their capital from investors and sell the loans that they originate on a secondary market. That resale process, called "securitization," allows lenders to "sell the rights to the mortgage payments and the related credit risk to investors through a process … by which individual mortgage loans are transformed into tradeable securities." Moran, *Wall Street Meets Main Street*, 13 N.C. Banking Inst. at 32. "In this way, subprime lenders [can] quickly unload much of the risk of the subprime loans as well as recoup the money lent and relend it to new subprime borrowers." Eggert, *The Great Collapse*, 41 Conn. L. Rev. at 1259.

Lenders that pass on their risk, however, no longer have an incentive to loan conservatively. Instead, their incentive is to loan as much as possible and to sell those larger, more valuable loans on the secondary market. *See McCauley v. Home Loan Inv. Bank, F.S.B.*, 710 F.3d 551, 559 n.5 (4th Cir. 2013) ("[T]he larger the loan, the larger the proceeds to the lender."). "Securitization," in other words, "encourage[s] brokers and sales agents to push borrowers to borrow the maximum possible." Eggert, *Great Collapse*, 41 Conn. L. Rev. at 1311.

And with lenders wanting to lend more, "an appraisal change[d] from a benefit allowing a lender to protect itself to a hurdle that the lender has to overcome in order to sell another mortgage." *Id.* at 1287. Lenders "gain[ed] an incentive to game appraisals" to get the price as high as possible. Because the lender could pass on the risk of default, it no longer mattered much whether a loan was covered by the value of a property. *Id.* What mattered was that it *looked* like the loan was covered. *See* Green, *Re-Appraising the Appraisers*, Prob. & Prop., at 11.

3. Appraisers are surprisingly susceptible to bias by target values.

Inevitably, appraisers began to face "pressure[] by lenders and mortgage brokers to inflate the value of homes." Eggert, *Great Collapse*, 41 Conn. L. Rev. at 1287. In 2003, fifty-five percent of appraisers reported pressure to inflate their estimates. *Id.* at 1287. By 2006, that number was up to ninety percent. *Id.*

That pressure was sometimes exerted directly, with express "target" values and threats. But "[t]he signals [were] usually more subtle." Comments of Center for Responsible Lending on Proposed Rules Regarding Unfair, Deceptive, Abusive Lending and Servicing Practices, Docket No. R-1305, at 55 (Apr. 8, 2008), https://bit.ly/2XiiAZZ. Including an "estimated" value on an appraisal order, for example, sent an unmistakable signal about the result the appraiser was expected to reach. *See id.*

Appraisers are vulnerable to these forms of influence. Appraisers develop expertise in particular geographic regions and rely on work from local employers. *See* Murray, *Issues in Appraisal Regulation: The Cracks in the Foundation of the Mortgage Lending Process*, 43 Loy. L.A. L. Rev. 1301, 1315 (2010). They are thus "highly susceptible to threats of discontinued work." *Id.* "Lenders and brokers can apply pressure through no more than a hint in a conversation." *Id.* at 1316. With their livelihood at stake, "[a]ppraisers succumb to this pressure at an alarming rate." *Id.* at 1313.

When lenders provide estimated values, appraisers are subject to manipulation by those values even if they do not realize that they are being manipulated. For example, when appraisers are asked to estimate the value of a property that has just been sold and are told the property's actual sale price, they estimate a value that is equal to or higher than the sale price 95% of the time. Nakamura, *How Much*, Bus. Rev., at 15. In 30% of the cases, the appraiser's estimate is *exactly* the sale price. *Id.* That phenomenon, called the "anchoring effect," "occurs when people consider a particular value for an unknown quantity before estimating that quantity"—just as when an appraiser is given an estimated value before trying to give an unbiased estimate. *See* Daniel Kahneman, *Thinking,* *Fast and Slow* 119 (2011). "What happens is one of the most reliable and robust results of experimental psychology: the estimates stay close to the number that people considered." *Id.*

Appraisers are also subject to "confirmation bias," under which "one selectively gathers, or gives undue weight to, evidence that supports one's position while neglecting to gather, or discounting, evidence that would tell against it." Nickerson, *Confirmation Bias*, 2 Rev. Gen. Psych. 175, 175 (1998). As with the anchoring effect, "[a] great deal of empirical evidence supports the idea that the confirmation bias is extensive and strong." *Id.* at 177. The bias's effect on appraisers was shown in a 2016 study of repeat appraisals on the same property, where only one of the appraisers knew the actual sale price. *See* Eriksen, *Contract Price Confirmation Bias*, Fannie Mae (2016), http://bit.ly/2InbfQA. "Significant differences were found between the two appraisals, where the appraiser aware of the contract price used a different set of comparable transactions" and other data "to justify appraised values which confirmed contract price." *Id.* at 2.

B. Statutory and regulatory background

1. Federal regulators respond slowly to the crisis.

Even while the growing problem of appraisal inflation was still mostly in the shadows, some regulators began to notice. In 1996, the Federal Housing Commissioner issued appraisal standards to be followed in all HUD-approved mortgage transactions. The standards required appraisers to certify that an appraisal was not "based on a requested minimum valuation, [or] a *specific valuation* or range of values." [ECF.173-Ex.U.at.2] (emphasis added). Moreover, the Comptroller of the Currency concluded three years later that providing an "owner's estimate of value," "[a]t a minimum, … suggest[s] to the appraiser the value conclusion that is needed to complete the transaction." [ECF.173-Ex.V.at.1].

As the housing bubble grew and pressure on appraisers mounted, all the major federal agencies with lending oversight came together in 2005 to address the problem. In an "Interagency Statement," they made clear that "the information provided [to the appraiser] should not unduly influence the appraiser or in any way *suggest the property's value*." [ECF.277.at.14] (emphasis added). And following litigation by the New York Attorney General, the mortgage industry in 2009 agreed to adopt the Home Valuation Code of Conduct (HVCC), which prohibited lenders and their appraisal management companies from "providing to an appraiser an anticipated, estimated, encouraged, or desired value for a subject property or a proposed or target amount to be loaned to the borrower." [ECF.353.at.57-58].

In response to the HVCC, Quicken finally stopped its practice of providing estimated values. The following year, the Dodd-Frank Act amended the Truth in Lending Act. 15 U.S.C. § 1639e (2010). Interagency guidelines implementing the new law required that institutions have "policies and procedures" to prohibit "[c]ommunicating a predetermined, expected, or qualifying *estimate of value*, or a loan amount or target loan-to-value ratio to an appraiser or person performing an evaluation." 75 Fed. Reg. 77450, 77457 (2010) (emphasis added). But it came too late to stop Quicken.

2. West Virginia's consumer-protection law fills the gap.

The West Virginia Consumer Credit and Protection Act (WVCCPA) "is a comprehensive attempt on the part of the West Virginia legislature to extend protection to consumers … who obtain credit in [the] state." *Harper v. Jackson Hewitt, Inc.*, 706 S.E.2d 63, 72 (W. Va. 2010). The WVCCPA's various sections are derived from consumer statutes and common-law decisions. *State ex rel. McGraw v. Bear, Stearns & Co.*, 618 S.E.2d 582, 586 (W. Va. 2005). The section at issue here, § 46A-2-121, governs "[u]nconscionability" and "inducement by unconscionable conduct." At the relevant time, it provided:

> (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, the court may refuse to enforce the agreement … .

W. Va. Code § 46A-2-121 (1996). A separate section creates a cause of action for actual damages and statutory penalties for violating this provision. W. Va. Code. § 46A-5-101(1) (1996).

As this Court explained in *McFarland*, § 46A-2-121(a)(1) "authorizes a court to refuse enforcement of an agreement on one of two distinct findings: that the agreement was 'unconscionable at the time it was made, *or* [that it was] induced by unconscionable conduct.'" 810 F.3d at 284. The first represents "West Virginia's traditional unconscionability doctrine," which "requires a showing of both *substantive* unconscionability, or unfairness in the contract itself, and *procedural* unconscionability, or unfairness in the bargaining process." *Id.* at 277 (emphasis added). But the second, which represents a claim for unconscionable inducement, "may be based entirely on evidence going to process and requires no showing of substantive unfairness." *Id.* at 283.

Before Dodd-Frank prohibited communicating an estimate of value to appraisers, plaintiffs successfully relied on the WVCCPA to challenge the practice. In *Brown v. Quicken Loans Inc.*, a West Virginia trial court found that "[n]o legitimate purpose is served by providing an appraiser with an estimated value" and that "the only purpose could be to inflate the true value of the property." [ECF.173-Ex.W.at.10]. Based in part on the company's failure to address the appraisal's "obvious flaws," the court found that the resulting mortgage had been unconscionably induced, *id.* at 11, 17—a conclusion upheld by the Supreme Court of Appeals. *Brown*, 737 S.E.2d at 657; *see also Herrod v. First Republic Mortg. Corp.*, 625 S.E.2d 373, 376 (W. Va. 2005) (reversing grant of summary judgment to a mortgage broker where the broker inflated appraisals by "providing the comparables necessary to obtain the value sought").

C. Factual background

1. Quicken Loans

Quicken Loans is the largest non-bank mortgage lender in the United States, and the second-largest overall. Green, *Shadowing Lenders and Consumers*, 37 Banking & Fin. Servs. Pol'y Rep., no. 9, at 12 & 16 n.9. Like other non-bank lenders during the class period, Quicken sold "'100%' of [its loans] to investment banks on Wall Street, which then securitize[d] them into trusts and s[old] them to large corporate investors." *Brown*, 737 S.E.2d at 651 n.25. Lacking a traditional bank's concerns about the risk of default, the company was aggressive about pushing for bigger loans, with a "a team who [was] responsible to push back on appraisers questioning their appraised values." [ECF.173-Ex.I.at.1].

Quicken charges borrowers an average of $350 in appraisal fees. [Doc.358-Ex.A.at.1]. Quicken's standard practice during the relevant period was to provide appraisers with an estimate of the property's value. *See* [ECF.173-Ex.J.Randall.Dep.at.20:25-21:12]; *see also* [ECF.173-Ex.B.Guida.Dep.at.40:4-8; ECF.173-Ex.K.Rankin.Dep.at.32:17-23]. When a borrower applied for a loan, information from the application, including the owners' estimate, would be uploaded into Quicken's custom computer system and then sent automatically to its affiliate, Title Source, Inc. (TSI). [ECF.173-Ex.J.Randall.Dep.at.30:5-11]; *see also* [ECF.173-Ex.K.Rankin.Dep.at.17:9-17]. TSI in turn would use the information to generate an appraisal request form, including the owner's estimate of value, which it would send to an appraiser of its choosing. [ECF.173-Ex.K.Rankin.Dep.at.32:17-23]. A spreadsheet produced by Quicken shows that it included an "owner's estimated value" on every appraisal order regarding loans refinanced in West Virginia during the relevant period. [ECF.173-Ex.M]. Quicken never informed borrowers of that practice, and it discarded its appraisal request forms after sending them to the appraiser. [ECF.353.at.44-45].

The purpose of the estimated value, according to one Quicken executive, was to "give[] an appraiser an ability to see what they are going to potentially look at the property at." [ECF.173-Ex.D-Lyon.Trial.Testimony.Vol.5.at.69:25-70:7]. When appraisals came back below the estimated value, Quicken staff would call and persuade the appraiser to provide a "value bump[]." [ECF.173-Ex.I] Quicken's policy was to ask "for the max increase available." [ECF.227.at.11]. Dewey Guida, an appraiser who contracted with Quicken and a former defendant in this case, described the estimated value as a "tip-off." [ECF.227.at.12]. Guida testified that any time his evaluation was below that number, TSI would ask him to change it. [ECF.173-Ex.B.Guida.Dep.at.44:2-8]. Quicken's strategy was effective: Many appraisals came in at exactly the estimated value, and the average difference between Quicken's estimated value and the appraiser's value was less than five percent. [ECF.336.at.191-192; ECF.353-at-72].

Although Quicken denies that its use of estimated values served any purpose, it showed great reluctance to stop the practice. Following a 2007 crackdown against appraisal inflation in Ohio, Quicken changed its automated system to stop providing an estimated value *in that state*. [ECF.173-Ex.X-Lyon.Dep.at.53:16-54:6]. But it continued to provide the estimate in other states, including West Virginia, until just before the HVCC's effective date in 2009.

2. The Aligs

Plaintiffs Philip and Sara Alig refinanced their home mortgage with Quicken Loans in 2007. Quicken sent Guida, the appraiser, an appraisal request form with "estimated value" designated as $129,000. [ECF.173-Ex.B.Guida.Dep.at.79:7-81:24]; *see also* [ECF.173-Ex.C]. After Guida appraised the Aligs' home at $122,500, Quicken asked him to increase that value. *Id.* at 95:7-96:18. Guida complied, appraising the property for $125,500. Because the Aligs' loan program limited what they could borrow to ninety percent of their home's appraised value, they ultimately borrowed $112,950. [ECF.173-Ex.C.at.7]. That was $20,000 higher than the home's fair market value, leaving the Aligs underwater. The refinancing also left the Aligs with a *higher* interest rate and required them to pay more money over the life of the loan. [ECF.206-Ex.EE.at.207-08].

D. Procedural background

1. The Aligs filed this case in West Virginia circuit court, both individually and on behalf of a class of West Virginia citizens who obtained mortgage loans through Quicken. The complaint alleged that Quicken and its affiliate TSI had "sought to influence appraisers" by providing them with "suggested or estimated values on appraisal request forms." [ECF.1-1¶¶13,14]. By "compromising the integrity of the appraisal process," the plaintiffs alleged, Quicken "rendered its appraisals unreliable and worthless." *Id.* ¶ 17. The plaintiffs asserted eight claims, three of which are relevant here: 1) unconscionable conduct under West Virginia Code § 46A-2-121(1), 2) unauthorized charges under West Virginia Code § 46A-3-109(a), and 3) breach of contract.

2. Extensive discovery and motions practice followed, with the parties producing tens of thousands of documents and deposing more than two-dozen witnesses. The plaintiffs then moved to certify 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." [ECF.169]. Shortly thereafter, the parties filed cross motions for summary judgment on the class claims. [ECF.173-1]; [ECF.174].

The court granted class certification and summary judgment on the unconscionable-inducement claim. "The facts here supporting a finding of unconscionable conduct," the court wrote, "are simple and clear": "Quicken influenced the appraisers to meet a passed on value, and it did so while failing to disclose the practice to plaintiffs." [ECF.227.at.19]. The court rejected Quicken's argument that the WVCCPA requires proof that the plaintiffs were induced to enter an agreement, pointing out that a violation instead exists under the statute's language "when 'the *agreement or transaction* … [has been] induced by unconscionable conduct.'" *Id.* (emphasis added). The court also granted summary judgment to the class on its breach-of-contract claim. Noting that providing an appraiser with a target number is "universally condemned," the court held that the resulting appraisal could not "be fair, valid or reasonable" and thus violated the implied covenant of good faith and fair dealing. *Id.* at 25.

3. Quicken moved for reconsideration, arguing, among other things, that the district court's summary judgment order "flatly ignor[ed]" facts in the record. [ECF.243.at.6]. The court disagreed that it "ignore[d] anything," concluding that "Quicken's so-called facts were simply irrelevant." *Id.*

Quicken then retained additional counsel, who the district court later said "seem[ed] determined to obtain a 'do-over' of virtually every ruling in this case." [ECF.353.at.6-7]. Though them, Quicken moved for partial summary judgment on some of the class loans, arguing that the claims of individual class members were time barred. The court denied the motion, noting that the defendants had the burden of proof on their affirmative defense but had submitted only "pure conjecture." [ECF.353.at.44]. Quicken also filed a motion to decertify the class, arguing for the first time that "[n]umerous individual inquiries infect the contract claim." [ECF.353.at.26]. In a lengthy order, the court carefully rejected Quicken's arguments. It then awarded damages of $3,500 in statutory civil penalties per class member for the unconscionable-inducement claim and ordered a refund of each class member's appraisal fee for breach of contract. [ECF.433.at.2].

SUMMARY OF ARGUMENT

I.A. The plaintiffs' unconscionable-inducement claim does not require proof of individual reliance on unconscionable conduct. The WVCCPA requires a court to find not that the conduct induced a *person* to do something, but that it induced an *agreement*. All that is required under the statute is thus that the conduct *contributed to the formation* of an agreement. That conclusion is backed up by this Court's decision in *McFarland v. Wells Fargo Bank*, which equated unconscionable inducement with the concept of procedural unconscionability—that is, unconscionability in the process of contract formation. To instead interpret the statute as requiring proof of the plaintiffs' reliance on Quicken's failure to disclose would undermine the WVCCPA's purpose of providing consumers a simple avenue of relief by requiring the plaintiffs to prove "an impossibility." *White*, 705 S.E.2d at 837.

Quicken's conduct was, by definition, "unconscionable" under the WVCPPA. Communicating the results of the plaintiffs' appraisals without disclosing that those appraisals were untrustworthy was, at best, a half-truth and thus an "affirmative misrepresentation" under the statute. In finding unconscionable conduct, the district court did not disregard Quicken's evidence or adopt a new theory of "per se unconscionability." Rather, the court relied on the undisputed evidence in the record to conclude that Quicken's conduct was unconscionable "as a matter of law"—exactly what the WVCCPA requires. W. Va. Code § 46A-2-121(a)(1).

I.B. The plaintiffs' claim for breach of contract does not turn, as Quicken claims, on whether the appraisals were subjectively "acceptable" to the plaintiffs. Rather, the plaintiffs' claim is that Quicken's misrepresentations and unconscionable conduct breached its implied covenant of good faith and fair dealing. Quicken misreads West Virginia law when it asserts that a claim for breach of the implied covenant requires a separate breach-of-contract allegation.

II. Without the requirements of individual reliance or subjective "accessibility," predominance is easily established by the overwhelmingly common issues of liability, damages, and class-wide proof. Because Quicken has the burden of proof on statute-of-limitations defenses, its unsubstantiated assertion that time-barred claims might exist does not defeat predominance. Even if Quicken could show the existence of other time-barred claims, the ministerial task of resolving those claims would not overcome the strong predominance of the common liability and damages issues in the case.

Quicken has not identified any individualized contract defenses that would defeat predominance. The company waived its argument that some plaintiffs never signed their contracts, and, in any case, its identification of only four such contracts cannot overcome predominance. Individualized evidence of the appraisals' "acceptability" is not required because the plaintiffs are not asserting a contractual right to deem appraisals "acceptable." And Quicken's assertion that *plaintiffs* might have breached their contracts lacks any support in the record.

Finally, all the plaintiffs were injured in the same way. Their payment for a worthless appraisal was an economic harm that constitutes a classic injury in fact. It also deprived them of the benefit of their bargains and of reliable information about the value of their properties.

III. A plaintiff can elect restitution damages for breach of contract. Restitution entitles the plaintiffs to a refund of the whole fee that they paid Quicken, not just the company's net profit.

STANDARDS OF REVIEW

I. This Court "review[s] a grant of summary judgment de novo." *Jones v. Chandrasuwan*, 820 F.3d 685, 691 (4th Cir. 2016). It also "review[s] the district court's summary judgment ruling on damages de novo." *Pine Ridge Coal Co. v. Local 8377, United Mine Workers of Am.*, 187 F.3d 415, 419 (4th Cir. 1999). When sitting in diversity, this Court's role is to apply West Virginia law, "or, if necessary, predict how the state's highest court would rule." *McFarland*, 810 F.3d at 279.

II. "Class certification decisions" are reviewed "only for abuse of discretion," and "[t]he law gives broad leeway to district courts in making" those decisions. *Brown v. Nucor Corp.*, 785 F.3d 895, 902 (4th Cir. 2015). Review is "deferential, cognizant of both the considerable advantages" of district courts "in managing complex litigation and the need to afford them some latitude in bringing that expertise to bear." *Krakauer*, 2019 WL 2292196, at *6.

III. Quicken argues that this Court should impose extra scrutiny on the district court's decisions below because the court used portions of the plaintiffs' briefs in crafting some of its written opinions. We disagree.

To begin with, there is nothing inherently wrong with a judge incorporating material from a party's briefs when appropriate. When the court adopts findings drafted by a party, for example, "they are nonetheless the findings of the District Court." *United States v. Crescent Amusement Co.*, 323 U.S. 173, 184 (1961). If the judge substantially agrees with what a party has written, it may be more efficient to use that text as a starting point, and judges have long requested findings and conclusions for just that purpose. *See id.*

Here, Quicken appears to be suggesting that the district judge's use of material from the plaintiffs' briefs was extensive enough that it demonstrates the lack of independent judgment or the presence of bias. The record does not back that up. The court reached its initial conclusions regarding the plaintiffs' unconscionable-inducement and breach-of-contract claims in its orders denying Quicken's motions to strike class allegations and for partial judgment on the pleadings. *See* [ECF.105,107]. Those decisions do not resemble the plaintiffs' briefs. *See* [ECF.79,81]. The court viewed Quicken's later summary-judgment largely "as a rehash of the arguments made in connection with" those earlier motions. [ECF.227.at.3]. To the extent that the court used portions of the plaintiffs' briefs, it was therefore in support of views that the court had already reached on its own, and expressed in its own words.

Moreover, it is apparent from the record that the judge was not simply rubber-stamping the plaintiffs' arguments. Quicken's supplemental addendum does show areas of similarity, but also many important differences—including the vast majority of the court's Rule 23 analysis. See Supp. Addendum at 10-34. For example, an important part of the plaintiffs' motion for summary judgment was that Quicken should be collaterally estopped from defending its conduct—an argument that the court did not adopt and that does not appear in the addendum. [ECF.173-1.at.16-19].

Elsewhere, the court declined to include the plaintiffs' assertions of fact and law, altered their conclusions, and ruled against them on key issues. *See, e.g.*, Supp. Addendum at 13 (changing "The estimated value … is often more appropriately attributable to Quicken." to "It is actually unclear who really provided the estimated value."). Most notably, the court granted summary judgment against the plaintiffs on their illegal-fee claim, thus effectively terminating half of the plaintiffs' case. And the court took that portion of its decision largely from *Quicken's* briefs.[1]

In short, the district court's orders did not "simply adopt" the plaintiffs' briefs, but "vary considerably in organization and content" from them. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 572-73 (1985). Because there is thus "no reason to doubt that the findings issued by the District Court represent the judge's own considered conclusions," there is "no reason to subject those findings to a more stringent appellate review than is called for by the applicable rules." *Id.* at 573.

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[1] *Compare* Defs.' MSJ, [ECF.175.at.13¶45] ("The express mail/courier fee was not paid directly to any third party because it is charged for services provided by multiple entities.") *with* Order, [ECF.227.at.27] ("The express mail/courier fee was not paid directly to any third party because it is charged for services provided by multiple entities."); Defs.' MSJ, [ECF.175.at.33-34] ("Plaintiffs do not dispute that Title Source *actually provided* courier services to Plaintiffs in connection with their loan closings and disbursements. … Plaintiffs have no evidence that the $45 fee is anything other than reasonable in light of the services actually provided by Title Source.") *with* Order, [ECF.277.at.28] ("Plaintiffs do not dispute that Title Source *actually provided* courier services to plaintiffs in connection with their loan closings and disbursements. … Plaintiffs have presented no evidence that the $45 fee is anything other than reasonable in light of the services actually provided by Title Source.").

ARGUMENT

Quicken challenges nearly every aspect of the district court's resolution of this case below. Its arguments are of three main types. *First*, it disputes the district court's grant of summary judgment to the plaintiffs on the merits of their claims. *Second*, it raises numerous challenges to the court's certification of the class action. *Third*, it disputes the court's award of damages to the prevailing class members. As to each, Quicken argues that the plaintiffs' claims require difficult and fact-intensive inquiries into the circumstances of each individual member of the class. Quicken is wrong on all points.

I. The district court properly granted summary judgment to the plaintiffs on their unconscionable-inducement and breach-of-contract claims.

A. Unconscionable inducement

On the plaintiffs' claim for unconscionable inducement under the WVCCPA, Quicken argues that the evidence failed to show either "inducement" or "unconscionability." First, it contends that, by failing to require the plaintiffs "to demonstrate that anyone was actually induced to do anything," the district court "read 'induced' completely out of the statute." Quicken Br. at 1, 21. Second, it claims that the district court either "overlooked" or "disregarded" all of the relevant record evidence because it "thought it could simply penalize anything it labeled 'per se unconscionable.'" Quicken Br. at 1, 30-31, 40.

Quicken's criticisms of the district court are baseless. The court's reading of the WVCCPA was not only a reasonable prediction of how the Supreme Court of Appeals of West Virginia would interpret the WVCCPA, it is the *only* reasonable way to read the statute. As that Court held in examining another section of the same law, when an alleged misrepresentation is a "failure to disclose," "it would be artificial to require a pleading that plaintiff had 'relied' on that non-disclosure." *White*, 705 S.E.2d at 837. In such cases, "proving reliance is an impossibility." *Id.*

1. Unconscionable inducement does not require a showing of reliance.

Quicken's primary argument on appeal is that a claim for unconscionable-inducement requires proof of individual reliance. To derive that requirement, Quicken begins with the statute's language requiring a court to find that an "agreement or transaction" was "*induced* by unconscionable conduct." W. Va. Code § 46A-2-121(a)(1) (emphasis added). Relying on dictionary definitions, Quicken interprets "induce" to mean "to move by persuasion or influence." Quicken Br. at 22. It concludes that the plaintiffs were required to show that Quicken's unconscionable conduct "caused, or at least influenced" the plaintiffs to enter the agreement—or, in other words, that the plaintiffs relied on the unconscionable conduct in making that decision. *Id.*

That reading, however, cannot be squared with the WVCCPA's plain language, judicial interpretation of that language, or the purposes of the statute.

Rather than requiring the plaintiffs to show that they *relied* on unconscionable conduct in entering their refinancing agreements, the statute requires only that the conduct *contributed to the formation* of those agreements—that is, that it was part of the process leading to the agreements' creation. That much more reasonable burden is one that the plaintiffs easily satisfy here.

A. Quicken's position hinges on its reading of the word "induce" to mean "persuasion." What it fails to acknowledge, however, is that "'[i]nduce' can be defined in two ways." *United States v. Murrell*, 368 F.3d 1283, 1287 (11th Cir. 2004). In the narrow sense in which Quicken uses it, the word does mean, as it says, something like "to persuade." *See id.* But in its more general sense, it can instead mean simply to "stimulate the occurrence of" something or to "cause" something to happen. *See id.*; *see also Promega Corp. v. Life Techs. Corp.*, 773 F.3d 1338, 1351 (Fed. Cir. 2014), *rev'd on other grounds*, 137 S. Ct. 734 (2017) ("[I]nduce also encompasses the more broad concept of 'to bring about, to cause.'"). Dictionaries, including those cited by Quicken, include both definitions. *See*, *e.g.*, *Black's Law Dictionary* (6th ed. 1990) (giving one meaning of "induce" as "[t]o bring on or about, to effect, cause"); *Webster's New International Dictionary* (2d Ed. 1945) (same).

Unlike Quicken's definition, the broader sense of "induce" does not require influence over the mind of another. To say, for example, that a doctor "induced" labor means only that the doctor *caused* or *stimulated* labor to occur, not that the doctor persuaded a woman to give birth. Likewise, to say that a scientist "induced" a chemical reaction suggests only that the scientist caused the reaction to occur. *See Pub. Citizen v. Young*, 831 F.2d 1108, 1120-22 (D.C. Cir. 1987) ("induce cancer" means "cause cancer").

Although the dual meanings of "induce" create the potential for ambiguity, the word is not ambiguous as it is used here. That is because the narrow definition of "induce"—the one that Quicken favors—works only when the *object* of the inducement (*i.e.*, the thing being induced) is a person that is susceptible to persuasion or influence. *See United States v. Laureys*, 653 F.3d 27, 41 (D.C. Cir. 2011) (Brown, J., dissenting) (applying that definition because "the verb 'induce' ha[d] a person as its object"). That meaning of "induce" would make sense, for example, if the statute required "a *consumer* to have been induced to enter into an agreement by unconscionable conduct." In that case, the object of inducement would be a *person* (the consumer) who the statute requires to have been persuaded.[2]

[2] When the object of "induce" is an *action*, the existence of a person can sometimes be implied. For example, the statute in *Global-Tech Appliances, Inc. v. SEB S.A.*, on which Quicken relies, imposed liability on anyone who "induces infringement of a patent." 563 U.S. 754, 760 (2011). In that case, "infringement" is as an action (i.e., the "making, using, offering to sell, selling, or importing of a patented invention") that the statute requires to have been committed by someone other than the one charged with inducement (i.e., the direct infringer). *Id.* at 760. The statute thus "assumes the presence of a second person as a direct infringer," and it is reasonable to read it as requiring influence over that person. *Promega Corp.*, 773 F.3d at 1353.

But what the statute's language actually requires is an "*agreement or transaction* … to have been induced by unconscionable conduct." W. Va. Code § 46A-2-121(a)(1) (emphasis added). The object of inducement is thus not a person, but an "agreement or transaction"—a thing not capable of persuasion. *See Promega Corp.*, 773 F.3d at 1351 & n.9 (distinguishing inducement of a "thing" from "other areas of the law, where statutes describe the inducement of 'another person,' 'any individual,' or a third party"). Because the statute does not provide a person to persuade or explain what that person must be persuaded to do, reading "induce" to require persuasion is simply "incompatible with that word's statutory context." *Laureys*, 653 F.3d at 41.[3]

Quicken's reading would also be inconsistent with the statute's requirement that unconscionable inducement be found "as a matter of law." W. Va. Code § 46A-2-121(a)(1). Quicken's reading of the law would move the focus of the inquiry from the objective unconscionability of the defendant's conduct to the subjective thought processes of its victims. As a result, "resolution of the WVCCPA claim would have required fact-specific analysis for each borrower." Quicken Br. at 39.

[3] It is true that the word "agreement," standing alone, could refer to an action (the act of agreeing) rather than a thing (a written contract). The WVCCPA, however, defines "agreement" using its sense as a thing: "the bargain of the parties … as found in their language or by implication." W. Va. Code § 46A-1-102(2).

But delving into the thought processes of individual plaintiffs can never be done "as a matter of law" and thus cannot be what the statute requires.

For those reasons, the statute can only mean that the unconscionable conduct must have "induced" an agreement in the broader sense of the word. *See Laureys*, 653 F.3d at 41 ("'induce' only means 'cause' when its object is inanimate"); *see also Promega Corp.*, 773 F.3d at 1351 (adopting the broader definition where "the object of the transitive verb 'induce'" was "a thing"). Instead of persuading or influencing a person, the conduct need only "bring about" or "cause the formation of" the agreement. *See Induce*, Merriam-Webster Online Dictionary, https://bit.ly/2RidffR. Moreover, nothing in the language of § 46A-2-121(a)(1) suggests that unconscionable conduct must be the *only* inducement for the agreement. If parties do many things in the course of forming an agreement, and only one of those things constitutes unconscionable conduct, it still makes sense to say that the unconscionable conduct "induced" the agreement. In sum, the statute 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 to the agreements' creation.

That sensible interpretation of the WVCCPA's language is precisely the interpretation that the district court adopted below. As the court pointed out, the "statutory language" does not require that a *person* was induced to do anything—

the "statute says nothing of the consumer's state of mind." [ECF.227.at.21]. Rather, "[a] violation exists when 'the *agreement or transaction* … [has been] induced by unconscionable conduct.'" *Id.* (emphasis added). Thus, the court concluded, "[i]f the 'transaction' *itself* is induced or furthered by the lender's unconscionable conduct, that is enough for a violation." *Id.* (emphasis added). Far from reading "'induced' completely out of the statute," the district court thus gave the word its only logical meaning—a meaning that Quicken ignores. Quicken Br. at 21.

B. That unconscionable inducement is really about unconscionable conduct's impact on the *process* of forming an agreement is backed up this Court's reading of the WVCCPA in *McFarland*, 810 F.3d 273. The Court in *McFarland* compared unconscionable inducement under § 46A-2-121(a)(1) with the traditional concept of "procedural unconscionability." *See id.* at 277. As the Court explained, "West Virginia's traditional unconscionability doctrine, as is customary, requires a showing of both *substantive* unconscionability, or unfairness in the contract itself, and *procedural* unconscionability, or unfairness in the bargaining process." *Id.* (emphasis added). But an unconscionable inducement claim, "unlike its common-law antecedents, may be based entirely on evidence going to process and requires no showing of substantive unfairness." *McFarland*, 810 F.3d at 283. Unconscionable inducement, in other words, is about *procedural* unconscionability, "predicated on the process leading up to *contract formation*." *Id.* at 284 (emphasis added).

Ignoring *McFarland*'s analysis, Quicken focuses on a single sentence of the decision to reach the opposite conclusion. There, in the course of identifying the existence of a claim for unconscionable inducement under § 46A-2-121(a)(1), the Court described the claim as "one for unconscionable conduct *that causes a party to enter into a loan*." 810 F.3d at 285 (emphasis added). Quicken seizes on that language, arguing that it requires persuasion. But judicial opinions are not intended to be "parsed as though … dealing with [the] language of a statute." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979); *see also Ass'n of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1052 (D.C. Cir. 2000). The language on which Quicken relies is just a shorthand way of emphasizing that unconscionable inducement is about *process* and can be satisfied sometimes through actions that tend to cause a person to enter into the agreement. This Court could not have expected that its passing description could be enshrined as the claim's formal definition under state law. In fact, it expressly disclaimed any intent to decide the "precise contours of an unconscionable inducement claim," leaving that issue instead as a question for "West Virginia law." *McFarland*, 810 F.3d at 286.[4]

[4] Elsewhere in *McFarland*, the Court makes clear that it is the *agreement* that must be induced. *See id.* at 276 ("remand[ing] so that the district court may consider in the first instance whether *McFarland's mortgage agreement* was induced by unconscionable conduct"); *id.* at 278 (noting the plaintiff's argument that his "*Wells Fargo Loan* was 'induced by misrepresentations'" (emphasis added)); *id.* at 283 (describing the plaintiff's claim as "that *the loan agreement* … was induced by

Quicken likewise relies on a portion of a comment to the Uniform Consumer Credit Code, which has language identical to § 46A-2-121(a)(1). *Id.* at 285. In describing the policy behind the unconscionable inducement language, the comment notes that "[m]any agreements … would never have been entered into by a consumer if unconscionable means had not been employed to induce the consumer to agree." U.C.C.C. § 5.108 cmt. 1 (1974). That statement is not inconsistent with our reading of the statute. Unconscionable conduct that induces a *plaintiff* to agree to a contract (for example, through trickery or duress) is unquestionably part of the contract-formation process, and thus also induces the *agreement* under our definition. And the sentence on which Quicken relies does not purport to describe *every* unconscionable inducement case. To the contrary, the comment goes on to say that "[i]t would be a frustration of the policy against unconscionable contracts for a creditor to be able to utilize unconscionable acts or practices *to obtain an agreement*." *Id.* (emphasis added).

C. Requiring the plaintiffs to prove reliance in every instance would also fly in the face of the WVCCPA's purpose. The Supreme Court of Appeals of West Virginia has explained that purpose as "to protect consumers from unfair, illegal, and deceptive acts or practices by providing an avenue of relief for consumers who

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unconscionable means" (emphasis added)); *id.* at 286 (requiring "the district court to consider McFarland's evidence that his *loan agreement* was 'induced by misrepresentations'" (emphasis added)).

would otherwise have difficulty proving their case under a more traditional cause of action." *Barr v. NCB Mgmt. Servs., Inc.*, 711 S.E.2d 577, 583 (W. Va. 2011). A court's "primary objective" in interpreting the statute is "to give meaning and effect to this legislative purpose." *Id.*

One such "traditional cause of action" that has been notoriously difficult for consumers to prove is common-law fraud, which requires that a plaintiff justifiably relied on the defendant's fraudulent act and was thereby damaged. *See Lengyel v. Lint*, 280 S.E.2d 66, 69 (W. Va. 1981). Reliance in fraud cases often requires "a plaintiff to show a speculative state of facts," such as "how he would have acted if … the misrepresentation had not been made," and thus creates "an unnecessarily unrealistic evidentiary burden." *Basic Inc. v. Levinson*, 485 U.S. 224, 245 (1988). "[C]ases involving omissions," especially, "create difficult problems of proof of reliance." *Edens v. Goodyear Tire & Rubber Co.*, 858 F.2d 198, 207 (4th Cir. 1988). For that reason, this Court in *Edens* held proof of reliance on concealment unnecessary in a claim for fraudulent breach of contract under state law, because it would have been "practically impossible to prove, by direct evidence, reliance on that which had been intentionally concealed." *Edens*, 858 F.2d at 206-07.

Recognizing that problem, the Supreme Court of Appeals of West Virginia reached the same conclusion as to a section of the WVCCPA. *White*, 705 S.E.2d at 837. Where the defendant's conduct is a failure to disclose, the Court held, "it would be artificial to require a pleading that plaintiff had 'relied' on that non-disclosure." *White*, 705 S.E.2d at 837. Indeed, such proof would often be "an impossibility." *Id.* Quicken has cited no opinion of the West Virginia courts that supports a different reading of the section at issue here, and there is no reason to read it differently. *See Smith v. State Workmen's Comp. Comm'r*, 219 S.E.2d 361, 365 (W. Va. 1975) ("[S]tatutes which relate to the same subject matter should be read and applied together … .").

2. Quicken's conduct was unconscionable.

In addition to arguing that the plaintiffs failed to show inducement from its appraisal practices, Quicken also challenges the district court's conclusion that those practices were "unconscionable conduct." This Court has previously declined to set forth the "precise contours of an unconscionable inducement claim." *McFarland*, 810 F.3d at 286. In *McFarland*, however, the Court turned for guidance to *Brown*, 737 S.E.2d at 657-58, where the Supreme Court of Appeals of West Virginia "sustained findings of 'unconscionability in the inducement'" based on "a 'false promise' of refinancing, the sudden introduction of a balloon payment at closing, a negligently conducted appraisal review, and other similar factors." 810 F.3d at 284. The Court concluded that the existence of unconscionable conduct "appears [to] turn not on status considerations that are outside the control of the defendant, but instead on affirmative misrepresentations or active deceit." *Id.* at 286.

Quicken argues that "affirmative misrepresentations" and "active deceit" both require *active* deception, while it is charged only with "[p]assive failure to disclose." Quicken Br. at 27. The acts that are the basis of the plaintiffs' claims, however, were not "passive." Quicken cannot dispute that passing the results of the appraisal to the plaintiffs was an affirmative, communicative act. And having communicated that information, Quicken cannot escape responsibility by relying on a lack of duty to disclose. "Regardless of whether a lender has such a duty, … [a] lender that informs a borrower about how much her property is worth, whether required to do so or not, is under an obligation not to misrepresent that value." *McCauley*, 710 F.3d at 559.

Quicken will probably respond that the appraised values it communicated were not false because they were intended as estimates and because it did not claim that they were perfectly accurate. But Quicken's presentation of the appraisals as the independent estimates of appraisers—knowing that borrowers contracted for and would reasonably have expected fair, unbiased, and reasonable proposals—*is* the misrepresentation. Given that Quicken was itself responsible for biasing the result, it cannot honestly blame the problem on the general unreliability of estimates. Moreover, even a "true statement" is a misrepresentation if it "fail[s] to include qualifying matter necessary to prevent the implication of an assertion that is false." Restatement (Second) of Contracts § 159, cmt. a (Am. Law Inst. 1981).

Giving the plaintiffs a purportedly independent estimate without revealing that it is biased is, at best, a "half-truth" that is just "as misleading as an assertion that is wholly false." *Id.*

Even if Quicken's communication of unreliable values was not itself false, the failure to disclose the attempted influence was "equivalent to an assertion that the fact does not exist." Restatement (Second) of Contracts § 161. Where "one party knows that the other is mistaken as to a basic assumption, he is expected to disclose the fact that would correct the mistake." Restatement (Second) of Contracts § 161, cmt. d. Here, Quicken knew that the plaintiffs were unaware that the appraisals they were relying on to obtain mortgages had been compromised. Especially because Quicken itself was responsible for compromising the appraisal process, its failure to disclose that fact "amount[ed] to a failure to act in good faith and in accordance with reasonable standards of fair dealing." Restatement (Second) of Contracts § 161. It is thus "equivalent to" an affirmative misrepresentation. *Id.*

Given that it engaged in misrepresentations, Quicken's assertion that it "had no intent to deceive" is irrelevant. Quicken Br. at 31 "[O]ne who believes that another is substantially certain to be misled as a result of a misrepresentation intends to mislead even though he may not desire to do so." Restatement (Second) of Contracts § 162, cmt. a.

B. Quicken complains that the district court "disregarded" the evidence on summary judgment because it "thought it could simply penalize anything it labeled 'per se unconscionable.'" Quicken Br. at 1. But the court did no such thing. To be sure, the Court concluded Quicken's conduct to be unconscionable "as a matter of law," as the WVCCPA requires. W. Va. Code § 46A-2-121(a)(1). But it based that conclusion on the undisputed facts on summary judgment. As it explained to Quicken below, "[t]here is ample evidence in the record that passing on an estimated value is an unconscionable practice that was part of the inducement for plaintiffs' loans." [ECF.227.at.19]. That is all that the district court meant by "per se unconscionable." Per se, *Black's Law Dictionary* (11th ed. 2019) ("As a matter of law.").

Quicken argues that the district court "overlooked" its evidence that providing estimates to appraisers served a legitimate purpose because it "helped match appraisers with suitable assignments." Quicken Br. at 30. The reason the Court did not address that evidence, however, is that Quicken did not rely on it. *See* [ECF.175]. Instead, Quicken's opposition to summary judgment said only that estimates "provided another data point" for the appraiser. [ECF.175.at.11]. That assertion did not undermine the plaintiffs' claims, which were based on the improper influence of that irrelevant "data point." The testimony of "all of the appraisers" was that "a borrower's 'estimated value is not a *relevant* data point' for appraisal purposes," has "no bona-fide purpose," and "is in no way necessary to performing an appraisal." [ECF.243.at.7-8] (emphasis added). In any event, Quicken's evidence that "[a] lot of appraisers" liked to use estimated values when choosing assignments did not show that it would otherwise have been unable to hire appraisers or justify contaminating their results.

B. Breach of contract

On the plaintiffs' breach-of-contract claim, Quicken does not seriously dispute that its contract with the plaintiffs obligated it to "obtain an appraisal" of their homes on their behalf. Instead, the company insists that it never promised that the appraisals would be "acceptable." Quicken Br. at 33. Because the plaintiffs did, in fact, "indisputably receive[] appraisals," Quicken concludes that it fulfilled all its responsibilities under the contract regardless of the state those appraisals were in. *Id.*

To be clear, the plaintiffs' breach-of-contract claim has never been that the contract language referring to "acceptable" appraisals gave class members the right to reject any appraisal that they subjectively judged "unacceptable." There was thus no need for individual class members to present "evidence that their appraisals were unacceptable," as Quicken claims. Quicken Br. at 18. Nor do any of the district court's decisions below contain anything like Quicken's concept of "per se unacceptable." *Id.* at 40.

By narrowly focusing almost its entire contract argument on whether appraisals were "acceptable," Quicken fails to come to grips with the plaintiffs' *actual* argument, on which the district court granted summary judgment below. That argument is that every contract includes "an implied covenant of good faith and fair dealing that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." *Buckhannon-Upshur Cty. Airport Auth. v. R & R Coal Contracting, Inc.*, 413 S.E.2d 404, 411 (W. Va. 1991). To the extent that the district court discussed the word "acceptable" at all, it was to note its consistency with the implied covenant. [ECF.227.at.25].

Quicken's only response to its alleged breach of the implied covenant is to rely on cases that, it claims, deny the existence of a "freestanding claim of breach of the implied covenant … where there is no breach of contract." Quicken Br. at 35-36. Quicken, however, misreads the cases on which it relies. What those courts actually hold is that "such a claim sounds in breach of contract" rather than as an "independent claim" for breach of the implied covenant. *Evans v. United Bank, Inc.*, 775 S.E.2d 500, 509 (W. Va. 2015).

Here, the plaintiffs did allege a breach-of-contract claim and can thus claim breach of the implied covenant of good faith and fair dealing. Neither *Evans* nor any other West Virginia court has held, as Quicken appears to believe, that a plaintiff must also allege a *separate* breach of contract claim before asserting a breach of the implied covenant.

Quicken makes little effort to square its conduct with the requirements of the implied covenant, which include "honesty in fact and the observance of reasonable commercial standards of fair dealing." *Barn-Chestnut, Inc. v. CFM Dev. Corp.*, 457 S.E.2d 502, 508 (W. Va. 1995). Quicken's conduct deprived the plaintiffs of the reasonable, fair, and unbiased appraisals that they paid for, thus denying them the "benefits of the agreement." *Buckhannon-Upshur Cty. Airport Auth.*, 413 S.E.2d at 411. Its unconscionable conduct flouted "reasonable commercial standards of fair dealing." *Barn-Chestnut, Inc.*, 457 S.E.2d at 508. And its misrepresentations were inconsistent with the "honesty in fact" that the implied covenant requires. *Id.*

II. The district court correctly certified the class.

Quicken's challenge to class certification—that the district court made "multiple legal errors and abuses of discretion"—is a laundry list of arguments challenging all aspects of the district court's certification order. Liability, damages, and proof, however, are overwhelmingly common to the class. Quicken cannot overcome the predominance of those core issues based on the few hypotheticals and edge cases on which it relies, most of which are not even relevant to the claims and defenses actually at issue in this case.

A. Common issues predominate on the merits.

Quicken first argues that the district court erred in concluding that common issues predominate under Rule 23(b)(3) by "assuming away individualized elements of liability and damages." Quicken Br. at 38. As is often the case with issues of predominance, Quicken's arguments are "enmeshed in the factual and legal issues comprising the plaintiffs' cause[s] of action.'" *Krakauer*, 2019 WL 2292196, at *6. Its position, in short, is that "[t]he district court's mistakes on liability infected its class-certification analysis." Quicken Br. at 37-38. But the opposite is also true: If the district court was right that the plaintiffs' claims do not require the fact-intensive, individualized inquiries that Quicken reads into them, then the court's conclusion that common issues predominate was also sound.

As explained in Part I, the district court was correct to hold both that a reliance requirement is not required in light of the language and purpose of the WVCCPA and that the statute does not prohibit—in fact, it requires—finding unconscionable conduct "as a matter of law." W. Va. Code § 46A-2-121(a)(1). And the district court was also correct to find a breach of Quicken's contractual duty of good faith and fair dealing without relying on a far-reaching interpretation of the word "acceptable." With those questions out of the way, liability "involve[s] no questions of individual reliance" and "no complicated contractual obligations." *Krakauer*, 2019 WL 2292196, at *7. Rather, it turns entirely on *Quicken's* conduct, which, for purposes of the plaintiffs' claim, is identical as to each class member and for which the plaintiffs "can rely largely on common proof." *Id*. For those reasons, "the issues common to the plaintiffs clearly predominated over individual issues" in this case. *Id.* at 9.

B. Certification would not preclude Quicken from presenting statute-of-limitations defenses.

Quicken claims that it showed in the district court "that the claims of a portion of the class were time-barred." Quicken Br. at 41. But, it says, "[j]ust how large a portion is unknowable without individual evidence (such as borrower testimony, or a county land records search) on every single property." *Id.* If the class were certified, it argues, it would thus "not be entitled to litigate its … defenses to individual claims." *Id.* at 40.

Quicken's argument is confused. Nobody has threatened to take away the company's right to assert statute of limitations defenses to individual claims. On the contrary, the district court told Quicken that, if it could "bring evidence" that particular class members' claims were time barred, the court would "boot them." [ECF.353.at.44].

Nor do the statute-of-limitations issues that Quicken identified undermine the predominance finding. When Quicken writes that "the claims of a portion of the class were time-barred," Quicken Br. at 41, what it apparently means is that it has uncovered a total of three such claims, [ECF.295-Ex.M]. It should go without saying that three class members out of 2,769 is not such a "large number" as to require denial of class certification. *Krakauer*, 2019 WL 2292196, at *9. Quicken doesn't argue otherwise.

That reduces Quicken's argument to the assertion that the existence of other time-barred plaintiffs is "unknowable." That, too, is not enough to defeat predominance. Although it is the plaintiffs' burden to establish predominance under Rule 23, Quicken retains the burden of proof on its affirmative defenses. *True Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923, 931 (9th Cir. 2018). And where the defendant has the burden, courts "assess predominance by analyzing the … defenses [a defendant] has *actually advanced* and for which it has presented *evidence*." *Id.* at 931-32 (emphasis added). In the absence of evidence, its "mere mention" of a *possible* defense "is not enough to defeat the predominance requirement of Rule 23(b)(3)." *Bridging Cmtys. Inc. v. Top Flite Fin. Inc.*, 843 F.3d 1119, 1126 (6th Cir. 2016).

Quicken relies on *Thorn v. Jefferson-Pilot Life Ins. Co.*, in which this Court affirmed denial of class certification based on the presence of statute-of-limitations defenses. 445 F.3d 311 (4th Cir. 2006). *Thorn*, however, rejected the view that "individual questions necessarily arise *any time* a defendant raises a statute of limitations defense." *Id.* at 327 (emphasis added). Resolution of the defenses there turned on a complex claims-accrual rule that "focuse[d] on the contents of the plaintiff's mind" and thus was "not readily susceptible to class-wide determination." *Id.* at 320. Here, in contrast, the date on which the plaintiffs' claims begin running—one year after the last payment on their loans—would require little or no individual inquiry to discern. W. Va. Code § 46A-5-101(1) (1996). As the district court found, "determining which loans fall within the applicable period" would "be a ministerial exercise." [ECF.227.at.49].

Even assuming there were a significant number of additional time-barred claims to be sorted out, it would not destroy predominance. When there are differences among class members, the predominance inquiry asks "whether the differences … are so great that individual adjudication subsumes the class-wide issues." *Krakauer*, 2019 WL 2292196, at *9. The presence of a single individualized issue would not overcome the overwhelmingly common issues of liability, damages, and class-wide proof in this case.

C. Quicken has not identified any valid contract defenses to defeat predominance.

Quicken next claims that the district court "erroneously precluded [it] from litigating multiple individual contract defenses." Quicken Br. at 43. All those "contract defenses" share the same flaw: Quicken did not raise them until a year after the court had already granted class certification and summary judgment. [ECF.353.at.31-32]. Quicken would thus have been foreclosed from raising those arguments as defenses to the breach-of-contract claim, and for that reason alone the district court was justified in concluding that they could not defeat predominance.

Each of Quicken's defenses is flawed for additional reasons.

1. Quicken's "[f]irst and most fundamental" defense is that some class members signed different versions of the contract and some did not sign a contract at all. Quicken Br. at 43. As the district court held, that argument is foreclosed by Quicken's stipulation that the contracts in the record were "representative of [its] standard deposit agreements." [ECF.168]. It cannot be true both that a contract is "representative" of another and that the contracts are different texts that impose different legal obligations. But even setting that aside, the district court concluded that Quicken had "never before questioned whether the contracts were uniform" and that its argument was "in direct contrast to [its] position throughout this litigation." [ECF.353.at.31-32]. The argument is therefore waived.

In any event, Quicken has only identified four contracts that are unsigned, despite the fact that it maintains the contracts in its records. [ECF.324-2-Appx.5&Ex.B]. And even assuming there were more, they would be easy to weed out and would not defeat predominance. *See Krakauer*, 2019 WL 2292196, at *9.

2. Quicken argues that individual proof is required to show that "a given appraisal was not 'acceptable' to the borrower." Quicken Br. at 44. As already explained, the plaintiffs have never argued, and the district court did not hold, that the word "acceptable" in the contract gave class members the right to deem an appraisal "unacceptable" any time they were unhappy with the results. There is thus no need for individualized proof on this issue.

3. Next, Quicken hypothesizes that a *plaintiff* could have improperly influenced an appraiser and thus breached the contract. As evidence of that possibility, it quotes one appraiser's vague statement that on some unspecified "occasions, … homeowners have volunteered that they needed the appraisal to be at least a certain number." Quicken Br. at 45; [ECF.324-2-Appx.3¶7]. That "defense" is pure invention—there is no indication that those "occasions" had anything to do with the plaintiffs in this case. The appraiser had worked for dozens of lenders other than Quicken and most of her time as an appraiser did not coincide with the class period. *Id.* ¶¶ 2, 6.

Even assuming that Quicken's argument would be a defense to the plaintiffs' contract claim, "the mere mention of a defense is not enough to defeat predominance." *Bridging Cmtys. Inc.*, 843 F.3d at 1126. Otherwise, litigants would have "wide latitude to inject frivolous issues to bolster or undermine a finding of predominance"—that is, exactly what Quicken is trying to accomplish here. *Id.*

4. The last contract defense that Quicken raises is damages, which is addressed below.

D. All members of the class suffered the same injury-in-fact.

Quicken makes many arguments about the plaintiffs' alleged lack of cognizable injury, but never comes to grips with the injury that the plaintiffs claimed in their complaint and throughout the litigation below. *See* [ECF.363]. As the district court repeatedly told Quicken, the plaintiffs' injuries came from paying for an appraisal report that was "tainted" and therefore "worthless." [ECF.353.at.31,33]. Those injuries satisfy Article III's injury-in-fact requirement in at least three ways.

First, and most straightforward: The plaintiffs suffered "injury in the form of lost money." *In re Asacol Antitrust Litig.*, 907 F.3d 47 (1st Cir. 2018). "For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'" *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017). Here, each of the plaintiffs paid an average of $350 out of pocket for a tainted, and therefore worthless, appraisal. [ECF.358-Ex.A.at.1]. That kind of "financial harm is a classic and paradigmatic form of injury in fact." *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 760 (4th Cir. 2018).

Quicken argues that any harm the plaintiffs suffered may have been outweighed by countervailing benefits, such as lower interest rates, in particular cases. Even the assumption that some plaintiffs benefitted in some way, however, would not detract from the injuries they suffered for Article III purposes. Standing is "not an accounting exercise." *NCAA v. Governor of N.J.*, 730 F.3d 208, 223 (3d Cir. 2013). "[A]ttempting to balance all costs and benefits associated with a challenged policy would leave plaintiffs without standing to challenge legitimate injuries." *Texas v. United States*, 787 F.3d 733, 750 (5th Cir. 2015). Thus, "the fact that an injury may be outweighed by other benefits … does not negate standing." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 265 (2d Cir. 2006).

Second, the plaintiffs were also injured because they did not get what they paid for and were thus deprived the benefit of their bargain with Quicken. When they gave Quicken money for an appraisal, the plaintiffs reasonably expected that the appraisals they received would be fair and unbiased. The tainted appraisals they received, however, could not be relied on, could not serve their intended purpose, and were therefore "worthless." [ECF.353.at.33]. "[P]aying more than [a product] is worth" is another "economic injury sufficient to establish Article III standing." *George v. Omega Flex, Inc.*, 874 F.3d 1031, 1032 (8th Cir. 2017). In *Cole v. General Motors Corp.*, for example, the Fifth Circuit held that the plaintiffs there "suffered economic injury at the moment [they] purchased" a defective car, regardless of whether those defects caused them any physical injuries. 484 F.3d 717, 723 (5th Cir. 2007). That "actual economic harm," the court held, "emanat[ed] from the loss of their benefit of the bargain" and was a cognizable Article III injury. *Id.* The same is true here.

Third, Quicken's failure to provide an appraisal untainted by influence also deprived the plaintiffs of a credible and reliable valuation of their homes. Such an "informational injury" is a "type of intangible injury that can constitute an Article III injury in fact." *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 345 (4th Cir. 2017). Moreover, this is not the kind of informational injury that is a "bare procedural violation, divorced from any concrete harm." *Id.* at 344. The plaintiffs had a contractual right to an honest valuation, and their interest was not abstract: They each contracted for the appraisal while in the process of obtaining a mortgage on their homes. Such information was of more than just "some relevance" to the plaintiffs, and depriving them of it therefore caused them a cognizable injury under Article III. *Griffin v. Dep't of Labor Fed. Credit Union*, 912 F.3d 649, 654 (4th Cir. 2019).

E. Classwide damages were straightforward.

The last challenge to class certification is Quicken's argument that the district court lacked a classwide methodology for determining damages. Quicken Br. at 52. The two forms of damages awarded by the district court, however, presented no individualized issues for which any further methodology would have been required.

First, the court awarded all the plaintiffs an identical amount of statutory civil penalties on their unconscionable-inducement claim under the WVCCPA. As this Court recently noted in *Krakauer*, such statutory damage awards promote the predominance of common issues by "preventing the need to measure individual compensatory damages." 2019 WL 2292196, at *9; *see also In re Asacol Antitrust Litig.*, 907 F.3d at 51-53.

Quicken nevertheless argues that statutory civil penalties require an individualized assessment of harm, which the district court failed to make here. The Supreme Court of Appeals of West Virginia, however, has held otherwise. In *Vanderbilt Mortg. and Fin., Inc. v. Cole*, the Court rejected the argument that civil penalties must be tied to actual harm. 740 S.E.2d 562, 569 (W. Va. 2013). Although "punitive damages are related to … actual harm suffered," it wrote, "a civil penalty is conditioned only on a violation of a statute." *Id.* Thus, civil penalties require no proof of actual damages and "the amount of a civil penalties award is within the sole province of the trial judge." *Id.* And, regardless, all the plaintiffs here suffered identical harms—they each paid money for a worthless appraisal report. Quicken does not identify any individualized harms that the district court should have considered.

Second, the court awarded the plaintiffs restitution on their breach-of-contract claim in the form of a refund of the appraisal fees they paid to Quicken, which averaged $350 per class member. [ECF.358-Ex.A.at.1]. Although the amounts that each plaintiff paid varied slightly, the district court found those amounts to be "readily calculable from the undisputed facts in the record." [ECF.353.at.53]. That "class-wide data obviated any concern" that calculation of damages could involve difficult individualized issues. *Krakauer*, 2019 WL 2292196, at *9.

Quicken's argument that damages for breach of contract are nevertheless individualized depends on its conclusion that the plaintiffs are not entitled to restitution damages and thus that the district court is required to engage in messy, individualized damage calculations designed to put the plaintiffs in the position in which they would have been had the appraisals not been compromised. As explained in the next section, Quicken is wrong about that too.

III. The district court's award of refunds of the plaintiffs' appraisal fees was both fair and proper under West Virginia law.

Finally, Quicken raises a series of highly technical arguments about the proper remedy for the plaintiffs' breach-of-contract claim. The district court's remedy on that claim was straightforward and fair: a refund of the amount that the plaintiffs paid Quicken for the flawed appraisals. Once again, however, Quicken does its best to complicate things.

According to Quicken, West Virginia law permits the district court to award damages *only* to give "compensation for the actual loss directly flowing from the breach of the contract." Quicken Br. at 55 (quoting *Horn v. Bowen*, 67 S.E.2d 737, 739 (W. Va. 1951)). As Quicken spins it, that means that only expectancy damages can be obtained from a breach-of-contract claim.

Not so. Although a party injured by breach of contract usually seeks expectancy damages, he "may, as an alternative, seek … protection of his restitution interest." Restatement (Second) of Contracts § 373, cmt. a. Moreover, a court may refuse to enforce an unconscionable contract, or one that is unconscionably induced. Restatement (Second) of Contracts § 208; W. Va. Code § 46A-2-121(a)(1). And where a contract is thus unenforceable, the plaintiff has the option of recovering restitution. *See* Restatement (Second) of Contracts § 344. Restitution to the plaintiffs of the amount they spent on the appraisals is a fair result here, where it was Quicken's actions that rendered those appraisals worthless.

Quicken's backup argument is that, even if the district court were correct to award restitution, the proper measure of damages is "the benefit to the breaching party." Quicken Br. at 57-58. Thus, it says, the judge should have deducted from the restitution award the company's own (unspecified) appraisal costs. *Id.* That is not how restitution works. The provision of the Restatement, on which Quicken relies, says that a person required to pay restitution "must pay an amount equal to the benefit that *has been conferred upon him*." Restatement (Second) of Contracts § 371, cmt. a (emphasis added). The amount "conferred upon him" is the amount *paid* to him—not the amount paid to him minus expenses. As the Restatement explains: "If the benefit consists simply of a sum of money received by the party from whom restitution is sought, there is no difficulty in determining this amount." *Id.*; *see also Realmark Developments, Inc. v. Ranson*, 588 S.E.2d 150, 155 (W. Va. 2003) (measuring restitution as "the reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from a person in the claimant's position"). The restitution remedy in that case is a full refund.

Because restitution is the proper measure of damages here, and the only fair measure, there is no need for the Court to reach Quicken's additional arguments regarding the complexities of expectancy damages.

CONCLUSION

The district court's judgment should be affirmed.

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) because this brief contains 12,977 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Baskerville font.

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fourth Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the appellate CM/ECF system.

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