JAMES CROUSE,	*	IN THE
Plaintiff,	*	CIRCUIT COURT
v.	*	FOR
FIRST NATIONAL BANK OF PENNSYLVANIA,	*	BALTIMORE COUNTY
	*	Case No.: C-03-CV-24-000522
Defendant.	*	

* * * * * * * * * * * *

DEFENDANT FIRST NATIONAL BANK OF PENNSYLVANIA'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT IN ITS ENTIRETY OR, IN THE ALTERNATVE, MOTION TO DISMISS CLASS ALLEGATIONS

Defendant, First National Bank of Pennsylvania, successor by merger to Howard Bank, successor by merger to First Mariner Bank, by and through its undersigned counsel, pursuant to Maryland Rules 2-322(b) and 2-231(g)(4), hereby moves this Court to dismiss Plaintiff's Amended Complaint in its entirety or, in the alternative, to dismiss the class allegations set forth therein. The grounds for this Motion are fully set forth in the accompanying Memorandum of Law. A proposed Order is also submitted herewith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of October, 2024, copies of (1) Defendant First National Bank of Pennsylvania's Motion to Dismiss Plaintiff's Amended Complaint in its Entirety or, in the Alternative, Motion to Dismiss Class Allegations; (2) the supporting Memorandum of Law, and (3) Proposed Order were served electronically via MDEC on:

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* * * * * * * * * * * * *

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT FIRST NATIONAL BANK OF PENNSYLVANIA'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT IN ITS ENTIRETY OR, IN THE ALTERNATIVE, MOTION TO DISMISS CLASS ALLEGATIONS

Defendant, First National Bank of Pennsylvania, successor by merger to Howard Bank, successor by merger to First Mariner Bank ("1st Mariner"), by and through its undersigned counsel, pursuant to Maryland Rules 2-322(b) and 2-321(g)(4), submits this Memorandum of Law in support of its Motion to Dismiss Plaintiff's Amended Complaint in its Entirety or, in the Alternative, Motion to Dismiss Class Allegations.

I. INTRODUCTION

On February 9, 2024, Plaintiff, James Crouse ("Crouse"), initiated this putative class action lawsuit in this Court,[1] alleging that 1st Mariner employees violated the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607, *et seq.* ("RESPA"), by referring residential mortgage loans to Genuine Title for title services in exchange for kickbacks. *See* Am. Compl. ¶¶ 132-50 (asserting two causes of action, one under Section 2607(a) and one under Section 2607(b)). Crouse's case is the latest in a series of class action lawsuits filed by Crouse's counsel in both state and federal courts in connection with residential mortgage loan closings that occurred more than a decade ago.

[1] Crouse filed an Amended Complaint on July 11, 2024. *See infra* note 7.

As discussed below, the Court should grant 1st Mariner's Motion to Dismiss for two separate and independent reasons.

First, the Court should dismiss Crouse's Amended Complaint in its entirety because he lacks standing to pursue his RESPA claims in this Court. After 1st Mariner removed this case to the U.S. District Court for the District of Maryland, Crouse moved the District Court to remand his case to this Court, arguing that 1st Mariner failed to prove that the District Court could exercise subject matter jurisdiction over his RESPA claims. The District Court agreed with Crouse, finding that, because Crouse crafted his Complaint to omit any allegation that he suffered a concrete injury-in-fact in a transparent attempt to circumvent federal jurisdiction, 1st Mariner did not establish that Crouse had standing to pursue his claims under Article III of the United States Constitution. Crouse, however, fares no better under Maryland law. The same artful pleading that enabled him to forum shop his way out of federal court is equally detrimental to his ability to proceed in this Court. Crouse's failure to plead that he suffered an injury-in-fact as a result of any RESPA violation alleged in the Amended Complaint is fatal to his attempt to assert his RESPA claims in this Court as well. In the absence of any allegation that he suffered an actual, concrete injury, the Court should dismiss Plaintiff's Amended Complaint in its entirety for lack of standing.

Second, in the event that this Court determines that Crouse somehow has standing to pursue this matter in the absence of an injury-in-fact (which it should not), at a minimum, the Court must dismiss his class allegations as untimely. Following the Supreme Court of the United States' decision in *China Agritech, Inc. v. Resh*, 584 U.S. 732 (2018), which the Supreme Court of Maryland adopted wholesale in *Cain v. Midland Funding, LLC*, 475 Md. 4 (2021), it is well-settled that class action tolling principles do not permit a plaintiff seeking to represent a class of claimants, whose claims would otherwise be time-barred, to "piggyback on an earlier, timely filed class

action." *China Agritech*, 584 U.S. at 740; *Cain*, 475 Md. at 64-65. Here, Crouse—who was previously a member of the class certified in *Bezek v. First National Bank of Pennsylvania*, SAG-17-2902, which has been pending in the U.S. District Court for the District of Maryland since 2017—seeks to do precisely that which is prohibited under *China Agritech* and *Cain*. After unsuccessfully pursuing his RESPA claims against 1st Mariner in *Bezek*, Crouse now seeks to bring a "piggyback" class action in this Court on behalf of a putative class of individuals whose loans are indisputably time-barred under RESPA. Because class action tolling principles do not extend to Crouse's attempt to pursue a second, untimely class action lawsuit, the Court must dismiss the class action allegations in his Amended Complaint as a matter of settled Maryland law.

II. BACKGROUND

A. The *Bezek* Case

Because this case involves factual allegations largely identical to those at issue in *Bezek*, some background on *Bezek* is appropriate.[2] On September 29, 2017, Jill Bezek and Michelle Harris (collectively the "*Bezek* Plaintiffs") filed a putative class action lawsuit in the U.S. District Court for the District of Maryland, alleging that, from 2009 to 2014, 1st Mariner employees violated RESPA through the same alleged kickback scheme with Genuine Title alleged in Crouse's Amended Complaint. *See generally* SAG-17-2902, ECF #1, attached hereto as **Exhibit 1**. The *Bezek* Plaintiffs sought and, on October 2, 2020, successfully obtained certification of a class consisting of "[a]ll individuals in the United States who were borrowers on a federally related mortgage loan . . . originated or brokered by First Mariner Bank for which Genuine Title provided

[2] This Court may take judicial notice of the prior proceedings and uncontroverted facts in the *Bezek* case. *Price v. Upper Chesapeake Health Ventures*, 192 Md. App. 695, 706 n.11 (2010) (taking judicial notice of public records in affirming order granting motion to dismiss); *Higginbotham v. Pub. Serv. Comm'n of Md.*, 171 Md. App. 254, 262, (2006) (citing *James*, taking judicial notice of references to filings in a related case raised in briefing on motion to dismiss).

a settlement service, as identified in Section 1100 on the HUD-1, between January 1, 2009 and December 31, 2014." *See* SAG-17-2902, ECF #47, attached hereto as **Exhibit 2**. Crouse was one of the members of the class certified in *Bezek*. *See* Am. Compl. ¶ 114.

Following the completion of discovery, 1st Mariner moved for summary judgment and decertification of the *Bezek* class. On January 20, 2023, the District Court (Gallagher, J.) granted in part and denied in part 1st Mariner's motion for summary judgment and denied its motion for decertification. Relevant here, the District Court awarded partial summary judgment to 1st Mariner on the method of calculating damages under RESPA. In so doing, the District Court rejected the *Bezek* Plaintiffs' argument that, under RESPA's damages provision, 12 U.S.C. § 2607(d)(2), they and other class members were entitled to treble damages based on the total amount Genuine Title charged them for all title services (including legitimate services for which they were not overcharged), concluding instead that "the best reading of § 2607(d)(2)" is that "the damages Plaintiffs may seek are treble the amount (if any) that they were overcharged by Genuine Title as a result of the alleged illegal kickbacks." *Bezek v. First Nat'l Bank of Pennsylvania*, No. CV SAG-17-2902, 2023 WL 348967, at *16 (D. Md. Jan. 20, 2023).

Following its ruling on dispositive motions, the District Court directed the *Bezek* Plaintiffs to submit a proposed trial plan addressing their view that they should be allowed to pursue claims alleging that Genuine Title overcharged them for title insurance—a theory they had never before raised in their pleadings, discovery, or dispositive motions briefing. On October 23, 2023, the District Court rejected the *Bezek* Plaintiffs' proposed trial plan, explaining that, even if they had properly raised the issue (which they had not), such claims "are not amenable to class treatment." *See* SAG-17-2902, ECF #142 at 1, attached hereto as **Exhibit 3**. Less than two months later, on December 13, 2023, the District Court reaffirmed its ruling that "title insurance overcharges are

not amenable to classwide disposition." *See* SAG-17-2902, ECF #150 at 2-3, attached hereto as **Exhibit 4**. Accordingly, the District Court instructed that "any class members wishing to establish that they were overcharged for title insurance as a result of a kickback paid to a First Mariner loan officer will have to proceed with their claim on an *individual* basis." *Id.* at 3 (emphasis added).[3]

Additionally, during a November 7, 2023 status conference, the *Bezek* Plaintiffs, for the first time, claimed that class members fall into two groups with respect to establishing evidence of title fee (i.e. title search, examination, or abstract) overcharges: (1) the "Pobletts group," consisting of borrowers whose loans were processed at the 1st Mariner branch managed by Angela Pobletts;[4] and (2) the "Wells Fargo group," consisting of borrowers whose fees for title services exceeded the 80th percentile figures listed on a Wells Fargo "state averages" chart.[5] Following additional

[3] Here, even if Crouse's class claims were not time-barred (which they are), he cannot pursue class claims based on any purported title insurance overcharges. The District Court has repeatedly ruled that such claims are not appropriate for class treatment. *See* Ex. 3 at 1; Ex. 4 at 2-3; *see also Edmondson v. Eagle Nat'l Bank*, 16-CV-3938, 2023 WL 5336994, *13-14 (D. Md. Aug. 18, 2023) (concluding that "the inclusion of title insurance overcharges as a basis for class member standing and damages would destroy predominance and require decertification of the class"); *Brasko v. First Nat'l Bank of Pa.*, No. CV SAG-20-3489, 2024 WL 69580, *3 (D. Md. Jan. 5, 2024) ("Title insurance overcharges are inherently individualized in terms of the required proof, and are not amenable to being adjudicated as a class action). Such claims are no more appropriate for class treatment in state court, where the requirements for maintaining a class action are substantially similar to those in federal court. *Compare* Md. Rule 2-231 *to* Fed. R. Civ. P. 23(a)-(e); *see also Phillip Morris, Inc. v. Angeletti*, 358 Md. 689, 724-25 (2000).

[4] The *Bezek* Plaintiffs indicated that they planned to calculate overcharges for members of the "Pobletts group" using the testimony of Genuine Title's former president, Jay Zukerberg, that he "calculated his kickbacks to Pobletts by taking the charges to the borrowers on the referred loans, subtracting $500 to $600, and dividing by two." *See Bezek v. First Nat'l Bank of Pa.*, No. SAG-17-2902, 2023 WL 348967, at *2 n.3 (D. Md. Jan. 20, 2023)

[5] As the District Court explained: "The chart was distributed to Wells Fargo's retail loan processing employees in March 2010 for use as a reference when analyzing title costs for certain types of loans . . . If the title charges on a Wells Fargo retail loan exceeded the 80th percentile amount for the state where the loan was issued, this signaled to Wells Fargo employees that the cost of the title services was unreasonable. Plaintiffs claim that the chart provides an 'objective measure' of the customary and reasonable costs of title services throughout the relevant period." *See Bezek*,

briefing, on December 13, 2023, the District Court concluded that "the existence of [] two inconsistent methods of determining overcharge" (i.e. the Wells Fargo Chart, on one hand, and the Pobletts overcharge, on the other hand) "would call both theories into question as the appropriate way to determine whether any particular class member was overcharged," and because neither Bezek nor Harris was a member of the "Pobletts group," both naturally had "some disincentive to forcefully advocate for the proposed Pobletts group method of calculation, given that it is inconsistent with the Wells Fargo theory on which they personally can recover." Ex. 4 at 4. Consequently, the District Court ruled that it "no longer believes that the class as presently defined meets the criteria for Rule 23 class treatment." *Id.* at 4-5. But rather than decertify the *Bezek* class, the District Court utilized its discretion to redefine the class definition to include only 1st Mariner borrowers "whose HUD-1 reflects the payment of title, abstract, search and/or examination services exceeding the 80th percentile cost in their state according to the then-applicable Wells Fargo Chart." *Id*.

B. Crouse's Amended Complaint

In his Amended Complaint,[6] Crouse alleges that, on November 14, 2012, he refinanced the mortgage on his Maryland home through 1st Mariner branch manager Angela Pobletts, who referred his loan to Genuine Title for settlement services. *See id.* ⁋⁋ 63-64. He repeats the same essential allegations that were made in *Bezek*—namely, that 1st Mariner employees and Genuine Title were involved in a purported "kickback scheme," whereby Genuine Title paid unearned fees to 1st Mariner employees for referrals in violation of RESPA. *See generally id*. Crouse also seeks relief identical

2023 WL 348967, at *8 (internal citations omitted). 1st Mariner disagrees with the *Bezek* Plaintiffs' interpretation of the Wells Fargo chart.

[6] Although Crouse's Amended Complaint is the operative pleading for purposes of this Motion, he filed it while this case was pending in federal court.

to that sought by the *Bezek* Plaintiffs—namely, "[t]reble damages for all title and settlement services charges by Genuine Title including, but not limited to, title insurance premiums, in an amount equal to three times the amount of any charge paid for such settlement services, pursuant to 12 U.S.C. § 2607(d)(2)." Am. Compl. at 32.

In addition to his individual claims, Crouse seeks to represent the following proposed class:

> All individuals in the United States who were borrowers on a federally related mortgage loan (as defined under the Real Estate Settlement Procedures Act, 12 U.S.C. § 2602) from, or originated by, First Mariner Bank for which Genuine Title provided a settlement service, as identified in Section 1100 on the HUD-1, between January 1, 2009, and December 31, 2014, but not those borrowers who are members of the class certified in *Bezek v. First National Bank of Pennsylvania*, Case No. 17-cv-2092-SAG (D. Md) as amended by order dated December 31, 2023, ECF No. 151.

See Am. Compl. ⁋ 122.[7] Thus, the class that Crouse purports to represent in this case is practically identical to the *Bezek* class as originally certified, only it is limited to those individuals who, like Crouse, were excluded from the Bezek class when the District Court modified the *Bezek* class definition. *See* Am. Compl. ¶ 115.

C. Removal to Federal Court and Remand

On April 25, 2024, 1st Mariner removed the instant case to the U.S. District Court for the District of Maryland on the basis of diversity and federal question jurisdiction. *See Crouse v. First Nat'l Bank of Pa.*, SAG-24-1216. Crouse promptly sought remand to this Court, arguing that 1st

[7] When he filed his Amended Complaint on July 11, 2024, the sole amendment to his original pleading was altering the proposed class definition in this matter to exclude "those borrowers who are members of the class certified in *Bezek v. First National Bank of Pennsylvania*, Case No. 17-cv-2092-SAG (D. Md) as amended by order dated December 31, 2023, ECF No. 151." Notably, Crouse filed this amendment just two days after a hearing in the District Court regarding 1st Mariner's pending Motion to Strike or Dismiss Class Claims and Crouse's pending Motion to Remand, during which the District Court (Gallagher, J.) expressed concerns regarding two different lawsuits with overlapping classes.

Mariner failed to meet its burden, as the removing party, of establishing the District Court's subject matter jurisdiction because (by Crouse's strategic design) it was unable to point to any allegation in the Complaint that Crouse had a suffered a concrete injury sufficient to confer Article III standing. *See generally*, SAG-24-1216, ECF # 6, attached hereto as **Exhibit 5**.[8] Opposing remand, 1st Mariner highlighted that Crouse (through counsel) had *already* represented to 1st Mariner and the District Court that he, like everyone who was then a member of the *Bezek* class, had suffered a concrete injury and had standing due to 1st Mariner's alleged RESPA violations, and arguing that he should not be permitted to abandon his previous representations to avoid federal jurisdiction.

Following additional briefing by both parties, in a Memorandum Opinion issued on August 30, 2024, the District Court discussed the unconventional standing dispute before it:

> As the party seeking removal, [1st Mariner] Bank bears the burden of establishing federal jurisdiction. Defendant faces a challenging hurdle because Plaintiff has transparently crafted his Compliant to circumvent federal jurisdiction. Nowhere in the Complaint is any assertion that Plaintiff or any person he seeks to represent suffered any concrete injury. . . . He has not tried to allege that he personally suffered any harm at all, but rather that the Bank violated RESPA, and he had loans with the Bank. . . . Plaintiff lacks Article III standing.

Exhibit 6, SAG-24-1216, ECF # 19 at 4-5. The District Court concluded that because the requirements of Article III standing had not been established, it lacked subject matter jurisdiction over this case and was obligated to remand to this Court. *Id.* at 5-6.

[8] Days after Crouse filed his Motion to Remand, 1st Mariner filed a Motion to Strike or Dismiss Class Allegations raising the same arguments raised *infra* in Section IV.B. Because the District Court ultimately concluded that it lacked subject matter jurisdiction over this case, it did not address the merits of 1st Mariner's arguments.

III. ARGUMENT

A. The Court Should Dismiss the Amended Complaint in Its Entirety Because Crouse Lacks Standing to Pursue This Action Under Maryland Law.

1. Standard of Review.

Under Rule 2-322, a defendant may move to dismiss a complaint for lack of subject matter jurisdiction or because the complaint fails to state a claim on which relief can be granted. Md. R. 2-322(b)(1), (2). Dismissal is proper where, as here, "the facts and allegations . . . fail to afford a claimant relief if proven, or . . . establish a lack of subject matter jurisdiction." *Lewis v. Murshid,* 147 Md. App. 199, 203 (2002); *see also Ricketts v. Ricketts*, 393 Md. 479, 492 (2004) ("Dismissal is proper [when] alleged facts and permissible inferences, so viewed, would, if proven, nonetheless fail to afford relief to the plaintiff."). Stated otherwise, "[t]he grant of a motion to dismiss is proper if the complaint does not disclose on its face a legally sufficient cause of action." *Lubore v. RPM Assocs., Inc.*, 109 Md. App. 312, 326 (1996). Additionally, a court considering a motion to dismiss may take judicial notice of a fact "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Md. R. 5–201(b). "Judicial notice may be taken at any stage of the proceeding," including at the motion to dismiss stage. Md. R. 5–201(f).[9]

2. Crouse's claims fail as a matter of law because he has failed to allege an injury.

As the party seeking removal, 1st Mariner bore the burden of establishing subject matter jurisdiction, and thus Crouse's Article III standing, in federal court. *See* Ex. 6 at 4 (citing *Burrell v. Bayer Corp.*, 918 F.3d 372, 380-81 (4th Cir. 2019)). Upon remand to this Court, however, Crouse "alone is responsible for raising the grounds for which his right to access the [state] judiciary system exists." *State Ctr., LLC v. Lexington Charles Ltd.*, 438 Md. 451, 517 (2014).He

[9] *See also supra* note 2.

has not done so. As the District Court observed, Crouse "has not tried to allege that he personally suffered any harm at all" and his Amended Complaint "contains no allegation of concrete injury." Ex. 6 at 5. Crouse's election not to plead an injury-in-fact, which proved detrimental to 1st Mariner's attempts to establish federal subject matter jurisdiction, is equally fatal to Crouse's ability to bring his claims in this Court.

First, by deliberately declining to allege an injury, Crouse lacks standing to pursue his RESPA claim in this Court. Under Maryland law, standing "is a practical concept designed to insure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests." *Superior Outdoor Signs v. Eller Media*, 150 Md. App. 479, 505-06 (2003). To have standing, a plaintiff must have "'suffered an injury in fact that is fairly traceable to the defendant's conduct and that is likely to be redressed by a decision in the plaintiff's favor.'" *Grueff v. Vito*, 229 Md. App. 353, 378 (2016), *aff'd*, 453 Md. 88 (2017) (quoting *State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 491 (2014)). As Maryland courts have recognized, "[s]tanding is a threshold issue; a party may proceed only if he demonstrates that he has a real and justiciable interest that is capable of being resolved through litigation." *Phillips*, 210 Md. App. at 257 (quoting *Norman v. Borison*, 192 Md. App. 405, 420 (2010), *aff'd on other grounds*, 418 Md. 630 (2011)). Thus, although Maryland law and federal law apply different terminology to define the standing requirement, both state and federal law require a plaintiff to plead a sufficient injury-in-fact before being permitted access to the judicial system.

"The 'injury' which Congress sought to address with RESPA is the increased costs resulting from kickbacks." *Bezek*, 2023 WL 348967, at *15 n.12 (citing *Baehr v. Creig Northrop Team, P.C.*, 953 F.3d 244, 254-56 (4th Cir. 2020)). Merely alleging the existence of a RESPA violation, however, is not sufficient to establish that the plaintiff suffered the requisite injury-in-

fact. *Baehr*, 953 F.3d 244, 253-58. Here, Crouse "has not alleged that he was overcharged or suffered any increased costs;" in fact, as the District Court recognized based on Crouse's arguments in support of remand, "he has not tried to allege that he personally suffered any harm at all." Ex. 6 at 5 (emphasis added). Rather, he alleges simply that a "kickback scheme" existed and that he should be able to recover damages as a result. Essentially, he seeks to deputize himself as a private RESPA enforcer. No fair reading of Maryland standing principles supports his effort.

By his own admission and by his own design, Crouse did not plead that he suffered a concrete injury-in-fact as a result of 1st Mariner's alleged RESPA violations in his Amended Complaint. If he had, Crouse and 1st Mariner would be litigating this case now in federal court. By electing not to do so in a transparent attempt to forum shop, Crouse must live with the consequences of his tactical legal decision.[10] Accordingly, because Crouse has failed to allege that he suffered any particularized injury as a result of the RESPA violations alleged in the Amended Complaint, he lacks standing to bring his claims in this Court and the Court should dismiss his Amended Complaint in its entirety.

Second, by deliberately declining to allege an injury, Crouse has failed to plead an essential element of his RESPA claim. Unless Crouse was actually overcharged for settlement services (i.e. injured), he cannot recover under RESPA. *See, e.g., Bezek v. First Nat'l Bank of Pennsylvania*, No. CV SAG-17-2902, 2023 WL 348967, at *16 (D. Md. Jan. 20, 2023) (recognizing that "the best reading of § 2607(d)(2)" is that "the damages Plaintiffs may seek are treble the amount (if any) that they were overcharged by Genuine Title as a result of the alleged illegal kickbacks"); *Brasko v. First Nat'l Bank of Pennsylvania*, No. CV SAG-20-3489, 2023 WL 7191120, *15 (D.

[10] The Court should not permit Crouse to engage in such gamesmanship. The Court should require Crouse to disclose whether he alleges an injury-in-fact. If he does, then this case belongs in the District Court. If he does not, then this Court should dismiss his Amended Complaint.

Md. Nov. 1, 2023) ("[P]ursuant to § 2607(d)(2), the damages Plaintiffs may seek are treble the amount (if any) that they were overcharged by All Star as a result of the alleged illegal kickbacks."); *Edmondson v. Eagle Nat'l Bank*, No. CV SAG-16-3938, 2023 WL 5336994, at *18 (D. Md. Aug. 18, 2023) ("[T]he damages Plaintiffs may seek are treble the amount (if any) that they were overcharged by Eagle as a result of the alleged illegal kickbacks."). Thus, the fact that Crouse has asserted a cause of action under RESPA, for which he seeks damages, *see* Am. Compl. at p. 1, necessarily establishes that he alleges he was overcharged as a result of the alleged RESPA violations about which he complains.

Accordingly, the Court should dismiss Crouse's Amended Complaint in its entirety for want of standing and for failure to allege a claim on which relief can be granted.

B. In the Alternative, the Court Should Dismiss Plaintiff's Class Allegations as Time-Barred.

1. Standard of Review.

Maryland Rule 2-231(g)(4) provides that, in conducting a class action, a court may enter appropriate orders "requiring that the pleading be amended to eliminate allegations as to the representation of absent persons, and that the action proceed accordingly." While research reveals no Maryland case law applying Rule 2-231(g)(4) in the context of a preliminary motion to dismiss class allegations, it is widely recognized that "when interpreting a Maryland Rule that is similar to a Federal Rule of Civil Procedure," Maryland courts "may look for guidance to federal decisions construing the corresponding federal rule." *Saint Luke Inst., Inc. v. Jones*, 471 Md. 312, 339 (2020). Applying Federal Rule 23(d)(1)(D)—the federal analogue to Rule 2-231(g)(4)—several circuit courts of appeal, including the Fourth Circuit, have recognized that the rule "permits defendants to file preemptive motions to deny certification before discovery is completed." *Williams v. Potomac Fam. Dining Grp. Operating Co., LLC*, No. GJH-19-1780, 2019 WL

5309628 at *4 (D. Md. Oct. 21, 2019) (citing *Richardson v. Bledsoe*, 829 F.3d 273, 288-89 (3d Cir. 2016)); *Strange v. Norfolk & W. Ry.*, No. 85–1929, 1987 WL 36160 at *3 (4th Cir. Jan. 12, 1987)). "The guidelines for making this assessment are provided by the familiar standard of review for motions to dismiss" for failure to state a claim. *Newman v. Direct Energy, LP*, No. GJH-21-2446, 2022 WL 4386235 at *4 (D. Md. Sept. 22, 2022) (citation omitted). This enables a court to "eliminat[e] all allegations as to class representation because the court has decided against adjudicating the dispute as a class action." 7B WRIGHT & MILLER, FED. PRAC. & PROC. § 1795 (3d ed. 2010). In such event, the litigation may nonetheless "proceed to determine the rights of the individual plaintiffs . . . who originally were named as the class representatives." *Id.*

2. Plaintiff's class allegations fail as a matter of law because American Pipe *tolling does not apply.*

RESPA requires Section 8 claims, such as those advanced by Crouse here (and by the *Bezek* Plaintiffs), to be brought within one year "'from the date of the occurrence of the violation,' which generally refers to the date of closing for loan origination violations." *Grant v. Shapiro & Burson, LLP*, 871 F. Supp. 2d 462, 470 (D. Md. 2012) (quoting 12 U.S.C. § 2614). Here, Crouse alleges that his loan closed in November 2012. *See* Am. Compl. ¶ 63. Because Crouse waited to file this action until February 9, 2024, well over 10 years after the closing of his loan, his claims are untimely on their face. Likewise, because the proposed class consists of individuals whose loans closed between January 1, 2009, and December 31, 2014 (Am. Compl. ¶ 122), all of the purported class members' claims are untimely on their face as well.

Crouse acknowledges that his and putative class members' RESPA claims against 1st Mariner are well outside of the limitations period for such claims. In an effort to save his and putative class members' otherwise time-barred claims, he argues that "[t]he filing of the *Bezek* action [in 2017] tolled, and continues to toll, the statute of limitations applicable to Plaintiff

Crouse's RESPA claims pled herein." *See* Am. Compl. ¶ 113. To support that assertion, he cites *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal, Co., Inc. v. Parker*, 462 U.S. 345, 354 (1983). *Id.* Class action tolling, however, does not entitle Crouse (or any other former *Bezek* class member) to bring subsequent class claims after the expiration of the limitations period. *See China Agritech*, 584 U.S. at 739 ("*American Pipe* and *Crown, Cork* addressed only putative class members who wish to sue individually after a class-certification denial."). As the Supreme Court explained in *Crown, Cork*, the class action tolling principles articulated in *American Pipe* protect former class members who, following the expiration of the limitations period, "choose to file their own suits or to intervene as plaintiffs in the pending action." 462 U.S. at 354.

Crouse's reliance on *American Pipe* and *Crown, Cork* is misplaced because neither case deals with limitations tolling for a successive class action, which is what Crouse seeks here. In *China Agritech*, however, the Supreme Court of the United States expressly rejected the argument, advanced by Crouse here, that class action tolling principles apply to successive *class* claims. 584 U.S. at 740. There, the Supreme Court explained that a plaintiff seeking to represent a class of claimants whose claims would otherwise be time-barred, as Crouse seeks to do here, cannot "piggyback" on the class claims "on an earlier, timely filed class action." *Id.* As the Supreme Court reasoned:

> *American Pipe* tolls the limitation period for individual claims because economy of litigation favors delaying those claims until after a class-certification denial. If certification is granted, the claims will proceed as a class and there would be no need for the assertion of any claim individually. If certification is denied, only then would it be necessary to pursue claims individually.
>
> With class claims, on the other hand, efficiency favors early assertion of competing class representative claims. If class treatment is appropriate, and all would-be representatives have come forward,

> the district court can select the best plaintiff with knowledge of the full array of potential class representatives and class counsel. And if the class mechanism is not a viable option for the claims, the decision denying certification will be made at the outset of the case, litigated once for all would-be class representatives.
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> . . . .
>
> The watchwords of *American Pipe* are efficiency and economy of litigation, a principal purpose of Rule 23 as well. Extending *American Pipe* tolling to successive class actions does not serve that purpose. The contrary rule, allowing no tolling for out-of-time class actions, will propel putative class representatives to file suit well within the limitation period and seek certification promptly.

Id. at 740, 748. The Court further explained that permitting successive class action tolling "would allow the statute of limitations to be extended time and again; as each class is denied certification, a new named plaintiff could file a class complaint that resuscitates the litigation . . . Endless tolling of a statute of limitations is not a result envisioned by *American Pipe*." *Id.* at 744; *see also In re Chinese-Manufactured Drywall Prod. Liab. Litig.*, 854 F. App'x 570, 572 (5th Cir. 2021) (rejecting plaintiff's effort to apply equitable tolling "from the filing of an earlier class action" as precluded by *China Agritech*); *Blake v. JP Morgan Chase Bank N.A.*, 927 F.3d 701, 709 (3d Cir. 2019) ("*China Agritech* is clear and unequivocal: courts may not toll new class actions under *American Pipe*, period."); *Porter v. S. Nev. Adult Mental Health Servs.*, 788 F. App'x 525, 526 (9th Cir. 2019) (declining "to apply any principles of equitable tolling to [plaintiff's] successive class claims" as precluded by *China Agritech*).

Three years after *China Agritech*, the Supreme Court of Maryland adopted the U.S. Supreme Court's "logic and reasoning", concluding that it was "unwilling to expand our class action tolling doctrine to include successive class actions." *Cain*, 475 Md. at 55, 64. In doing so, the Supreme Court of Maryland observed that "[t]here is no persuasive authority or policy considerations that would support the recognition of tolling of successive class action suits—such

an exception is inconsistent with notions of judicial economy and efficiency that form the basis of our Rule 2-231 class certification process." *Id.* at 64. As a result, consistent with *China Agritech*, the Supreme Court of Maryland held that "class action tolling does not apply to permit a putative class member, upon denial of class certification, to file a successive class action past the expiration of the statute of limitations. *Id.*

The "endless tolling" that the Supreme Courts rejected in *Cain* and *China Agritech* is precisely what Crouse proposes. *See* Am. Compl. ⁋ 113 ("The filing of the *Bezek* action tolled, *and continues to toll*, the statute of limitations applicable to Plaintiff Crouse's RESPA claims pled herein." (emphasis added)). Having been excluded from the class in *Bezek*, Crouse now seeks to bring his RESPA claims in this Court not only on his own behalf, but also on behalf of all other individuals who were similarly excluded under the District Court's amended class definition in *Bezek*. Crouse's attempt to do so now, long after the expiration of the applicable statute of limitations,[11] is improper under Maryland law following *Cain*. Because Crouse advances untimely class claims, not simply his own individual claim, he is not entitled to class action tolling for the successive class claims. Accordingly, even if the Court does not dismiss Crouse's Amended

[11] Crouse also relies on allegations of fraudulent concealment (the same as those made by the *Bezek* Plaintiffs) to argue that the statute of limitations as to his and putative class members' claims should be tolled from the date of their respective loan settlements "until the amendment of the *Bezek* First Mariner Class, on or about December 14, 2023." *See* Am. Compl. ⁋⁋ 117, 118. But this Court can take judicial notice of the fact that Crouse and other members of the initial *Bezek* class were notified of their potential claims against 1st Mariner no later than December 1, 2020, when the *Bezek* Plaintiffs mailed them their class notice. *See* Am. Compl. ¶ 114. The pendency of the *Bezek* class, from its inception on September 29, 2017 to the Court's amended class definition on December 13, 2023, simply means that former *Bezek* class members (like Crouse) now have until December 14, 2024 (one year from the date of the amendment of the class definition) to file an *individual* claim. It does not give class counsel (who represents Crouse and the *Bezek* Plaintiffs) license to regroup and refile essentially the same class action, with a new class representative, more than a year after those claimants developed actual knowledge of their potential claims under the guise of *American Pipe* tolling principles.

Complaint in its entirety for lack of standing (as it should), the Court must strike the class allegations from his Amended Complaint as time-barred.

IV. CONCLUSION

For the foregoing reasons, 1st Mariner respectfully requests that this Court grant its Motion and dismiss the Amended Complaint in its entirety. In the alternative, if the Court does not dismiss the Amended Complaint, the Court should dismiss the class allegations in the Amended Complaint as untimely.

Dated: October 8, 2024

Respectfully submitted,

/s/ Peter W. Sheehan, Jr.
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Attorneys for Defendant,
First National Bank of Pennsylvania

JAMES CROUSE,	*	IN THE
Plaintiff,	*	CIRCUIT COURT
v.	*	FOR
FIRST NATIONAL BANK OF PENNSYLVANIA,	*	BALTIMORE COUNTY
	*	Case No.: C-03-CV-24-000522
Defendant.	*	

* * * * * * * * * * * *

ORDER

Upon consideration of the Motion to Dismiss Plaintiff's Amended Complaint in its Entirety or, in the Alternative, Motion to Dismiss Class Allegations ("Motion to Dismiss") filed by Defendant, First National Bank of Pennsylvania, successor by merger to Howard Bank, successor by merger to First Mariner Bank ("1st Mariner"), any Opposition thereto, any Reply in further support thereof, the applicable law, and the record in this case, it is this _____ day of _____, 2024, by the Circuit Court for Baltimore County, hereby

ORDERED, that 1st Mariner's Motion to Dismiss shall be, and hereby is, **GRANTED**; and it is further,

(a) ORDERED, that Plaintiff James Crouse's Amended Complaint shall be, and hereby is, **DISMISSED** in its entirety.

[OR, IN THE ALTERNATIVE]

(b) ORDERED, that all class allegations in Plaintiff James Crouse's Amended Complaint shall be, and hereby are, **DISMISSED**.

_____
Judge, Circuit Court for Baltimore County

Exhibit

1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

JILL BEZEK 1749 Forrest Avenue Baltimore, MD 21234 and **MICHELLE HARRIS** 249 Foster Knoll Drive Joppa, MD 21085 Plaintiffs, v. **FIRST MARINER BANK** **Serve on:** Joseph Howard, Resident Agent 3301 Boston Street Baltimore, MD 21224 Defendant.	Civil Action No.:

CLASS ACTION COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiffs, Jill Bezek and Michelle Harris, on behalf of themselves and on behalf of the entire class of persons similarly situated, by and through their attorneys, Michael Paul Smith, Melissa L. English and Sarah A. Zadrozny of Smith, Gildea & Schmidt, LLC and Timothy F. Maloney, Veronica B. Nannis and Megan Benevento of Joseph, Greenwald and Laake, P.A., file this Class Action Complaint, sue the defendant for cause, claim damages, and state as follows:

INTRODUCTION

1. Plaintiffs are borrowers who currently have or had a federally related mortgage loan, as defined by 12 U.S.C. § 2602, originated and/or brokered by Defendant First Mariner Bank ("First Mariner"), which was or is secured by Plaintiffs' residential real property.

First Mariner referred Plaintiffs to Genuine Title, LLC for title insurance and settlement services. Based on First Mariner's referral and recommendation, Plaintiffs purchased title insurance from Genuine Title and used Genuine Title for escrow and settlement services.

2. Plaintiffs and Class Members were victims of an illegal kickback scheme between First Mariner and Genuine Title. Under the scheme, First Mariner's branch managers, loan officers, agents and/or other employees received unearned fees and kickbacks paid by Genuine Title, LLC, in violation of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601, *et seq.* ("RESPA"). These kickbacks were paid under a quid pro quo agreement for kickbacks in exchange for the referrals of borrowers by First Mariner to Genuine Title. Neither First Mariner nor any of its employees and/or agents receiving the kickbacks performed any title or settlement services associated with the kickbacks.

3. These kickbacks were fraudulently concealed by First Mariner and Genuine Title from Plaintiffs and Class Members and were omitted from Plaintiffs' and Class Members' HUD-1s and other required loan documents in an effort to hide the kickbacks from Plaintiffs and Class Members.

PARTIES

4. Plaintiffs bring this action pursuant to Federal Rule of Civil Procedure 23 as a class action on their own behalf and on behalf of the entire class of people similarly situated.

5. Plaintiff Jill Bezek is a resident of Baltimore County, Maryland.

6. Plaintiff Michelle Harris is a resident of Harford County, Maryland.

7. Defendant First Mariner Bank is a Maryland corporation and independently owned bank. During the relevant time frame, First Mariner Bank was engaged in the business of

consumer mortgage brokering and/or lending and/or otherwise transacted business in Maryland and elsewhere.

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331.

9. This Court has personal jurisdiction over the parties. Personal jurisdiction over First Mariner is appropriate because the principal place of business for First Mariner is in Maryland and at all relevant times First Mariner transacted business in Maryland and currently transacts business in Maryland.

10. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because a substantial part of the conduct, events and omissions giving rise to the claims occurred within this District and First Mariner systematically and continually transacted business in this District during the applicable time period.

FACTUAL ALLEGATIONS FOR INDIVIDUAL AND CLASS RELIEF

11. Congress enacted RESPA in 1974 as a response to certain abusive practices in the real estate settlement process. Congress found that kickbacks and unearned fees in the settlement process harmed residential mortgage borrowers by impeding fair competition among title and settlement service providers and depriving consumers of impartial advice and information regarding title and settlement services and providers. Congress recognized that these abusive practices also harmed consumers because the amounts charged to consumers for title and settlement services were higher than they would have been without the abusive practices and with fair and impartial competition.

12. 12 U.S.C. § 2607 states in relevant part:

> (a) Business Referrals. No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any

> agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.
>
> (b) Splitting charges. No person shall give and no person shall accept any portion, split or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving federally related mortgage loan other than for services actually performed.

13. 12 U.S.C. § 2607(d)(2) states in relevant part:

> Any person or persons who violate the prohibitions or limitations of [12 USC § 2607] shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.

14. The purpose of 12 U.S.C. § 2607 is to eliminate payment of unearned fees in connection with settlement services provided in federally related mortgage transactions, and to protect consumers from the harms caused by coordinated business relationships for title and settlement services, including unnecessarily high title and settlement service charges. *See* 12 U.S.C. § 2601.

15. Genuine Title was at all relevant times a title services company licensed in various states, including Maryland, and regulated by the Maryland Insurance Commissioner.

16. At all relevant times, First Mariner's employees and/or agents were licensed mortgage brokers and/or authorized loan officers (collectively referred to herein as "Referring Brokers"), and at all relevant times were acting within scope of the business relationship and duties of their employment on behalf of First Mariner, specifically seeking borrowers ("First Mariner Borrowers") and securing loans for residential mortgages through First Mariner and/or brokering such loans through First Mariner to other lenders with whom First Mariner authorized, referring First Mariner Borrowers to title companies, and

working with title companies to close these loans. All activities, including the Referring Brokers' interaction with Genuine Title, were for the benefit of First Mariner.

The Kickback Scheme

17. Beginning in 2009, and continuing until or about early 2014, Genuine Title perpetrated the Kickback Scheme by adopting a business model and practice of paying kickbacks to mortgage lenders and brokers, including First Mariner, for the referral of mortgage loans for title and settlement services.

18. Genuine Title paid kickbacks in three forms: 1) "Referring Cash," 2) "Free Marketing Materials" (including postage, leads and other data and information, and direct mail production), 3) "Marketing Credits," and 4) "Turn Down Credits."

Referring Cash

19. Genuine Title paid Referring Cash directly to lenders' employees and/or agents in exchange for referrals of loans for settlement services.

20. The Referring Cash was paid by Genuine Title, Competitive Advantage Media Group, LLC ("CAM"), a company formed by Brandon Glickstein, Genuine Title's lead marketing and account representative, and/or Brandon Glickstein, Inc. ("BGI"), another company formed by Brandon Glickstein. Specifically, CAM was created "to provide marketing services to businesses." *See* CAM SDAT Records, attached hereto as **Exhibit 1**. The Resident Agent for CAM at the time of organization was Jonathan S. Bach, Esq., the in-house attorney for Genuine Title. Additionally, the address for CAM was the same physical address of Genuine Title. On or about May 13, 2013, CAM changed its Resident Agent and Resident Agent's address to Michael N. Mercurio at 8171 Maple Lawn Boulevard, Suite 200, Fulton, Maryland 20759. *See* **Exhibit 1**. Brandon

Glickstein, Inc. was created for the purpose of "advertising and marketing and to engage in any other lawful purpose and business." *See* BGI SDAT Records, attached hereto as **Exhibit 2**.

21. CAM and BGI were formed in part to facilitate Genuine Title's payment of kickbacks and unearned fees in exchange for referring borrowers to Genuine Title.

22. The Referring Cash kickbacks varied in amount and correlated to the volume of referrals to Genuine Title by the lenders' branch managers, loan officers, employees and/or agents.

23. Genuine Title calculated and paid Referring Cash kickbacks monthly and the kickbacks paid in a given month were equal to a per unit payment for each referred loan closed by Genuine Title in the previous month.

24. In order to disguise and conceal receipt of Referring Cash payments, some Referring Brokers created shell companies to receive the Referring Cash payments. The shell companies had no business purpose except to serve as a conduit for the Referring Cash Payments. Other Referring Brokers used existing companies that they may have had to receive the Referring Cash Payments. In either situation, the Referring Cash payments were solely for the purpose of the referral agreement and in furtherance of the Kickback Scheme.

25. Referring Cash payments were made and received in this way to conceal, and did conceal, the Kickback Scheme from borrowers, including Plaintiffs and Class Members, and regulators.

26. Referring Cash kickbacks were paid and received solely pursuant to the referral agreement and in furtherance of the Kickback Scheme and were not related to any legitimate services rendered by either Genuine Title or the person receiving the kickback.

Free Marketing Materials

27. Genuine Title also paid kickbacks in the form of Free Marketing Materials.

28. As part of and in furtherance of the Kickback Scheme, Genuine Title, either directly and/or through CAM, paid for marketing materials that were provided to mortgage branch managers, brokers, loan officers and/or other employees at lenders.

29. These Free Marketing Materials included but were not limited to: the culling and selecting of the highest value leads to send mail that would most closely match the mortgage products and programs that the lender would be featuring, payment for sales leads, payment for inserting and folding of mail pieces and/or postage. *See* B. Glickstein 9/15/16 Deposition at 16:7-18:18, attached hereto as **Exhibit 3**.

30. Genuine Title provided Free Marketing Materials under the referral agreement whereby the receiving branch manager, broker, loan officer and/or other employee agreed to refer all loans generated by the Free Marketing Materials to Genuine Title for settlement services. *See* J. Zukerberg 4/24/2014 Deposition at 90:21-91:11, attached hereto as **Exhibit 4**.

31. Free Marketing Materials were provided and received to conceal, and did conceal, the Kickback Scheme from borrowers, including Plaintiffs and Class Members, and regulators.

32. The Free Marketing Materials kickbacks were paid and received solely pursuant to the referral agreement and in furtherance of the Kickback Scheme and were not related to any services rendered by either Genuine Title or the person receiving the kickback.

Marketing Credits

33. Genuine Title also paid kickbacks in the form of Marketing Credits applied to invoices for marketing services lenders purchased from CAM. While in operation, CAM provided marketing services to primarily smaller and/or regional lenders. These marketing services included designing, writing and printing marketing letters and other solicitation materials sent out on behalf of the lender, culling and selecting the highest value leads to send mail that would most closely match the mortgage products and programs that the lender would be featuring, and procurement of sales leads.

34. As part of and in furtherance of the kickback scheme, Genuine Title entered into a referral agreement whereby a lender, branch or the loan officer (collectively, "Lender") would agree to refer loans to Genuine Title for settlement services and in return Genuine Title agreed to pay for marketing credits to be applied against that Lender's bill for services purchased from CAM.

35. The Marketing Credit kickbacks were calculated monthly and the Marketing Credit in a given month was determined on a per unit amount or basis for each referred loan closed by Genuine Title in the previous period.

36. Genuine Title paid CAM the amount of the Marketing Credit and, in turn, CAM applied the Marketing Credit against the Lender's bill for CAM services.

37. Marketing Credits and the multi-party marketing credit system was used by all parties to conceal, and did so conceal, the Kickback Scheme from borrowers, including Plaintiffs and Class Members, and regulators.

Turn Down Credits

38. During the time period of, and as a result of, the Kickback Scheme, Genuine Title had a large stable of various lenders who were referring borrowers to Genuine Title to perform closings and settlement services. ("Referring Lenders").

39. Genuine Title recognized that all of the various Referring Lenders had different lending criteria, meaning one Referring Lender may not be able to make a loan to a particular borrower, but that the same borrower might qualify for a refinance at a different Referring Lender ("Turn Down Opportunity").

40. Referring Lenders had at least type of Turn Down Opportunity whereby borrowers who had loans originated or serviced by one Referring Lender could get approved for a refinancing of their loan from that same Referring Lender, even if their credit score or the amount of the loan as compared to the appraised value (commonly known as Loan to Value or LTV) did not meet the criteria required by other Referring Lenders.

41. Genuine Title established referral agreements and kickbacks specifically related to Turn Down Opportunities whereby Genuine Title recruited Referring Lenders to send Turn Down Opportunities to other Referring Lenders in exchange for, and with the understanding that, Genuine Title receive the title work. The Referring Lenders who sent the Turn Down Opportunity ("Sending Lender") would receive either Referring Cash, Marketing Credits, and/or a combination thereof for every loan that was referred to, and closed with, Genuine Title.

42. In addition, the Referring Lender who received the Turn Down Opportunity ("Receiving Lender") received Kickbacks in the form of Turn Down Opportunities as well as

Referring Cash, Marketing Credits, and/or a combination thereof for every loan that was referred to, and closed with, Genuine Title.

43. Under this Turn Down Opportunity portion of the Kickback Scheme, the Receiving Lender obtained refinances that they would not otherwise have received during that timeframe as well as Referring Cash, Marketing Credit, and/or a combination thereof. The Sending Lender received Referring Cash, Marketing Credits, or a combination thereof when it would otherwise have received nothing because they could not do the loan. Genuine Title received a referral of another borrower to close their loan from the combined effort of the Receiving Lender and the Sending Lender (collectively known as "Turn Down Credits").

44. Neither the Receiving Lender nor the Sending Lender nor any of it agents, servants or employees performed any Settlement Services in connection with their receipt of the kickbacks or credits outlined herein.

45. The Referring Cash, Free Marketing Materials, Marketing Credits, and Turn Down Credits were provided as a quid pro quo, and pursuant to and with an understanding and agreement that the lenders' branch managers, loan officers, agents, and/or employees receiving the Referring Cash, Free Marketing Materials, Marketing Credits, and Turn Down Credits would refer borrowers to Genuine Title for real estate title and settlement services, including performing a title search and procuring title insurance.

46. When regulators began to investigate Genuine Title around October 2013, Genuine Title drafted and back-dated sham Title Services Agreements for some Referring Brokers with the intent to disguise and conceal the Referring Cash kickbacks as legitimate fees for alleged services provided by Referring Brokers. However, the kickbacks were not

provided in accordance with the fee schedule in the Title Services Agreements and the branch managers, loan officers, agents, and/or employees performed no services for Genuine Title. *See* sham Title Service Agreement with former First Mariner branch manager Angela Pobletts, attached hereto as **Exhibit 5**.

47. Upon information and belief, the sham Title Services Agreements were used to conceal, and did so conceal, the Kickback Scheme from borrowers, including Plaintiffs and Class Members, and regulators.

48. The receipt of Referring Cash, Free Marketing Materials, and/or Marketing Credits were omitted from borrowers' HUD-1s to conceal, and did in fact conceal, the Kickback Scheme from borrowers, including Plaintiffs and Class Members, and regulators.

49. While Genuine Title would have preferred to compete by providing lower pricing of its title and settlement services to borrowers instead of paying kickbacks, the payment of kickbacks was the more effective way to increase Genuine Title's market share in the title and settlement services market, even though it was prohibited by law. *See* J. Zukerberg 5/20/16 Aff. ¶ 6, attached hereto as **Exhibit 6**.

50. Genuine Title has admitted that no title services were provided by any lender receiving kickbacks, in whatever form those kickbacks were paid. *See id.*

51. Genuine Title has admitted that borrowers, including Plaintiffs and Class Members, paid the cost of the concealed kickbacks out of the title and settlement costs charged and identified on their HUD-1s. *See id.*

First Mariner's Participation in the Kickback Scheme

52. First Mariner and its managers and employees participated in the Kickback Scheme. Genuine Title's records indicate that from 2009 through 2014, First Mariner referred more than 250 loans to Genuine Title for settlement services.

53. Beginning in 2009, and upon information and belief, continuing until on or about early 2014 based upon Genuine Title and First Mariner's agreement and continuing pattern of practice, licensed mortgage brokers employed by First Mariner received kickbacks in the form of Referring Cash, Free Marketing Materials, Marketing Credits, and other things of value from Genuine Title, CAM, and/or BGI in exchange for referrals of First Mariner Borrowers to Genuine Title for settlement services ("Referring Agreement"), in violation of RESPA. During the relevant time period, Angela Pobletts, Tony Sergi, Brad Restivo, Walter Alton, and Tom Bowen were employed by First Mariner as branch managers and/or loan officers.

54. From September 2012 to February 2014, Angela Pobletts was a branch manager employed by First Mariner at its White Marsh branch. At all times while Pobletts was employed with First Mariner, and within the course and scope of that employment, Genuine Title paid, and Pobletts received and accepted, kickbacks via her sham company MARC, LLC, totaling at least $34,000.00 in Referring Cash in exchange for referrals of borrowers from the First Mariner branch managed by Pobletts. *See* checks to MARC, LLC, attached hereto as **Exhibit 7**.

55. From December 2008 to December 2014, Tony Sergi was a branch manager employed by First Mariner at its White Marsh branch. At all times while Sergi was employed with First Mariner, and within the course and scope of that employment, Genuine Title via CAM paid, and Sergi received and accepted, kickbacks totaling at least $8,000 in Referring Cash in exchange for referrals of borrowers from the First Mariner branch managed by Sergi. *See* checks to Tony Sergi, attached hereto as **Exhibit 8**.

56. Based upon Genuine Title and First Mariner's continuing pattern of practice, Plaintiffs believe and therefore aver that, in addition to Pobletts and Sergi, other currently known or unknown Referring Brokers, loan officers, and other employees and/or agents employed by First Mariner participated in the Kickback Scheme, including but not limited to Brad Restivo, Walter Alton, and Tom Bowen.

57. Based upon Genuine Title and First Mariner's continuing pattern of practice, Plaintiffs believe and therefore aver that Genuine Title provided, and currently known and unknown Referring Brokers employed by First Mariner received and accepted, other things of value in exchange for referring borrowers to Genuine Title.

58. No title services were provided by First Mariner and/or its Referring Brokers, agents, and/or employees associated with the receipt of the kickbacks. *See* **Exhibit 6**, ¶ 6.

59. The payment by Genuine Title and acceptance by First Mariner of the kickbacks were solely for the referral of borrowers to Genuine Title.

60. Plaintiffs were charged for settlement services related to their federally-related mortgage by Genuine Title while First Mariner was engaging in the Kickback Scheme.

61. As a result of the Kickback Scheme, Plaintiffs and class members were deprived of kickback-free settlement services and impartial and fair competition, as required by 12 U.S.C. § 2607, and as a result paid higher settlement charges, among other harms.

62. Plaintiffs and class members paid more for their settlement services because First Mariner's Referring Brokers performed no services in exchange for the kickbacks paid and kickbacks were paid instead of lower charges to the consumers.

FACTS FOR INDIVIDUAL CLASS REPRESENTATIVES

63. In or about December 2010, Plaintiff Jill Bezek obtained a residential mortgage from First Mariner through Referring Broker Tony Sergi in relation to the refinancing of her residential real property in Baltimore County, Maryland.

64. First Mariner Referring Broker Sergi referred Plaintiff Bezek to Genuine Title for title and settlement services. On the basis of this referral, Plaintiff Bezek used Genuine Title for title and settlement services and settled on December 13, 2010. Plaintiff Bezek paid Genuine Title for title and settlement services.

65. First Mariner Referring Broker Sergi referred Plaintiff Bezek to Genuine Title for title and settlement services pursuant to an agreement with Genuine Title for Referring Cash as quid pro quo for referrals to Genuine Title and did so receive Referring Cash from Genuine Title via CAM.

66. Plaintiff Bezek paid Genuine Title for those title and settlement services. A portion of that payment was illegally split and shared with First Mariner through the payment of an illegal kickback to Sergi.

67. First Mariner and Genuine Title falsely represent on Plaintiff Bezek's HUD-1 that Genuine Title retained all amounts that it charged Plaintiff Bezek, and does not state that any portion of the amounts charged Plaintiff Bezek by Genuine Title were paid to First Mariner.

68. First Mariner and Genuine Title falsely represent on Plaintiff Bezek's HUD-1 that First Mariner did not receive any compensation from Genuine Title related to Plaintiff Bezek's loan.

69. First Mariner and Genuine Title made these and other false representations on Plaintiff Bezek's HUD-1 and other required loan documents in an effort to conceal the kickbacks from Plaintiff Bezek, and did so conceal the kickbacks from Plaintiff Bezek.

70. As a pattern of practice, and as a precondition to closing a loan or refinance, First Mariner required borrowers to fully participate in the loan transaction, including receiving and signing government-required loan documents before and at a loan closing.

71. Plaintiff Bezek fully participated in her loan transaction as evidenced by her loan funding on or about December 17, 2010.

72. In or about October 2012, Plaintiff Michelle Harris obtained a residential mortgage from First Mariner through Referring Broker Tony Sergi in relation to the refinancing of her residential real property in Harford County, Maryland.

73. First Mariner Referring Broker Sergi referred Plaintiff Harris to Genuine Title for title and settlement services. On the basis of this referral, Plaintiff Harris used Genuine Title for title and settlement services and settled on October 19, 2012. Plaintiff Harris paid Genuine Title for title and settlement services.

74. First Mariner Referring Broker Sergi referred Plaintiff Harris to Genuine Title for title and settlement services pursuant to an agreement with Genuine Title for Referring Cash as quid pro quo for referrals to Genuine Title and did so receive Referring Cash from Genuine Title via CAM.

75. Plaintiff Harris paid Genuine Title for those title and settlement services. A portion of that payment was illegally split and shared with First Mariner through the payment of an illegal kickback to Sergi.

76. First Mariner and Genuine Title falsely represent on Plaintiff Harris' HUD-1, and various HUD-1 Addendums, that Genuine Title retained all amounts that it charged Plaintiff Harris, and does not state that any portion of the amounts charged Plaintiff Harris by Genuine Title were paid to First Mariner. *See* Harris HUD-1, attached hereto as **Exhibit 9**.

77. First Mariner and Genuine Title falsely represent on Plaintiff Harris' HUD-1, and various HUD-1 Addendums, that First Mariner did not receive any compensation from Genuine Title related to Plaintiff Bezek's loan. *Id.*

78. First Mariner and Genuine Title made these and other false representations on Plaintiff Harris' HUD-1 and other required loan documents in an effort to conceal the kickbacks from Plaintiff, and did so conceal the kickbacks from Plaintiff.

79. As a pattern of practice, and as a precondition to closing a loan or refinance, First Mariner required borrowers to fully participate in the loan transaction, including receiving and signing government-required loan documents before and at a loan closing.

80. Plaintiff Harris fully participated in her loan transaction as evidenced by their loan funding on or about October 24, 2012.

81. Under federal law, First Mariner is required to provide each borrower with a Good Faith Estimate ("GFE") within three days of taking a loan application. On the GFE, the loan officer or broker "must state here all charges that all loan originators involved in this transaction will receive." 12 C.F.R. 1024, App'x C – Instructions for Completing Good Faith Estimate (GFE) Form.

82. As a continuing pattern of practice, and in an effort to conceal its fraud, First Mariner did not report on Plaintiffs Bezek's or Harris's or on any borrower's GFE the kickback

received from Genuine Title under the Referring Agreement, despite the fact that the kickbacks were charged to and paid by the borrowers and received and accepted by First Mariner. *See* Harris GFE, attached hereto as **Exhibit 10**.

83. As a result of this act of concealment, no borrower, including Plaintiffs Bezek and Harris, received a GFE associated with a loan originated or brokered by First Mariner reflecting a payment of any kind from Genuine Title to First Mariner. Therefore, borrowers, including Plaintiffs Bezek and Harris, did not know and could not have known of the kickback to First Mariner, or the Kickback Scheme, before the closing of their loan.

84. RESPA requires that each borrower receive a HUD-1 Settlement Statement. 12 U.S.C. § 2603(a). The purpose of the HUD-1 statement is to, among other things, "conspicuously and clearly itemize all charges imposed upon the borrower. . . ." *Id.* Under regulations imposed by the federal government, "[t]he loan originator must transmit to the settlement agent all information necessary to complete the HUD-1 or HUD-1A." 12 C.F.R. § 1024.8(b). As such, First Mariner was responsible for all information included in the HUD-1 that was then generated by Genuine Title.

85. As a continuing pattern of practice, and in an effort to conceal its fraud, First Mariner did not provide to Genuine Title for inclusion in the HUD-1 any information necessary to itemize the kickback payments made to First Mariner by Genuine Title under the Referring Agreement, despite the fact that the kickbacks were charged to and paid by the borrowers.

86. Despite being required by law to report the amounts paid and received as a result of the transaction, First Mariner and Genuine Title falsely represented that Genuine Title retained all amounts charged borrowers for title and settlement services and that no

compensation was paid by Genuine Title to First Mariner related to the transaction. First Mariner and Genuine Title omitted the fact and amount of the kickbacks from all lines and sections of Plaintiffs' HUD-1 settlement statement and all other required loan documents in an effort to intentionally conceal the kickbacks from Plaintiffs, and did so conceal the kickbacks from Plaintiffs.

87. As a pattern of practice and in an effort to conceal its fraud, Genuine Title purposefully did not produce a HUD-1 Settlement Statement that itemized the kickbacks paid to and received and accepted by First Mariner under the Referring Agreement, despite the fact that the kickbacks were charged to and paid by the borrowers. *See* **Exhibit 6**, at ¶ 6; **Exhibit 3**, 159:15-160:1.

88. As a result of these acts of concealment, no borrower, including Plaintiffs Bezek and Harris, received a HUD-1 statement reflecting a payment of any kind from Genuine Title to First Mariner, and did not know and could not have known of the kickback, or the Kickback Scheme, at or after the closing of their loan. *See* **Exhibit 9**.

89. Because no payment from Genuine Title to First Mariner was disclosed on their HUD-1, Plaintiffs Bezek and Harris did not have, and could not have had, any knowledge of the kickbacks during or after the settlement on their mortgage loan, or that a portion of their payment to Genuine Title for title and settlement services was illegally split and shared with First Mariner through the payment of the illegal kickbacks to Tony Sergi.

90. As a direct and proximate cause of the actions of First Mariner, Plaintiffs Bezek and Harris and other Class Members were deprived of impartial and fair competition between settlement service providers in violation of RESPA, denied kickback-free settlement services, and paid more for said settlement services.

CLASS ALLEGATIONS

91. The allegations in the above stated paragraphs are incorporated by reference as if fully restated herein.

92. Plaintiffs bring this action on behalf of themselves and all other similarly situated individuals pursuant to Fed. R. Civ. P. 23, and the alleged class is defined as follows:

> All individuals in the United States who were borrowers on a federally related mortgage loan (as defined under the Real Estate Settlement Procedures Act, 12 U.S.C. § 2602) originated or brokered by First Mariner Bank for which Genuine Title provided a settlement service, as identified in Section 1100 on the HUD-1, between January 1, 2009, and December 31, 2014. Exempted from this class is any person who, during the period of January 1, 2009 through December 31, 2014, was an employee, officer, member and/or agent of First Mariner Bank, Genuine Title, LLC, Competitive Advantage Media Group, LLC, Brandon Glickstein, Inc., and/or Dog Days Marketing, LLC.

93. There are questions of law and fact common to the claims of each and all members of the Class. These common questions include, but are not limited to:

a. Whether First Mariner and its employees and/or agents received unearned fees and illegal kickbacks from Genuine Title and/or CAM for the referral of business to Genuine Title;

b. Whether payments to First Mariner and its employees and/or agents violated RESPA;

c. Whether Plaintiffs and Class Members were forced to pay more for said settlement services;

d. Whether First Mariner actively concealed the Kickback Scheme to avoid detection by Plaintiffs and Class Members;

e. Whether Plaintiffs and the Class are entitled to treble damages under RESPA;

f. Whether Plaintiffs and the Class are entitled to attorneys' fees and expenses under RESPA;

g. Whether Genuine Title failed to disclose and concealed to Plaintiffs and Class Members that Genuine Title and/or CAM was participating with banks, referring branch managers, loan officers, employees and/or agents and failed to disclose and concealed, among other things, their affiliated business arrangements and/or relationships; and

h. Whether despite exercising reasonable due diligence, Plaintiffs and Class Members did not and could not have learned of the illegal kickbacks until contacted by counsel.

94. These common issues of law and fact predominate over any question affecting only individual Class members.

95. Due to Genuine Title and First Mariner's efforts to conceal the kickbacks from Plaintiffs, Class Members, regulators, and the public through the payment of kickbacks to sham LLCs, a multi-layered marketing credit system, and the execution of sham Title Services Agreements, which were extraordinary circumstances beyond Plaintiffs' control, Plaintiffs did not, and could not have discovered the Kickback Scheme before, at the time of, or after the settlement of their residential mortgage loan and within the statutory filing period. No reasonable borrower diligence or investigation would have uncovered the fact, mechanics and extent of this illegal kickback scheme until contacted by counsel.

96. Due to Genuine Title and First Mariner's omission of kickbacks from any line and section on borrowers' GFEs, HUD-1s, and or other loan documents, Plaintiffs and Class

Members did not and could not have known of the kickbacks or the Kickback Scheme before, during, or after the settlement of their residential mortgage loans.

97. Plaintiffs acted reasonably and diligently. Plaintiffs did not and could not through any reasonable diligence have known about the concealed Kickback Scheme until contacted by undersigned counsel on or about August 24, 2017.

98. The Plaintiffs' transaction and the course of events thereafter exemplify the working of the Kickback Scheme, and are typical of the transactions involving all members of the proposed class.

99. The Plaintiffs' claims are typical of the claims or defenses of the respective Class members, and are subject to the same statutory measure of damages set forth in 12 U.S.C. § 2607(d)(2).

100. Plaintiffs will fairly and adequately protect the interests of the Class. The interests of the named Plaintiffs and all other members of the Class are identical.

101. Plaintiffs' counsel has substantial experience in complex litigation and class action proceedings, have been approved as class counsel in related litigation, and will adequately represent the Class's interests.

102. The Class consists, upon information and belief, of hundreds of borrowers, and thus are so numerous that joinder of all members is impracticable.

103. Separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for First Mariner.

104. This action entails questions of law and fact common to Class Members that predominate over any questions affecting only individual Plaintiffs, and, therefore, a class action is superior to other available methods of fair and efficient adjudication of this litigation.

105. Most members of the Class are unaware of their rights to prosecute a claim against Defendant.

106. No member of the Class has a substantial interest in individually controlling the prosecution of a separate action, but if he or she does, he or she may exclude himself or herself from the class upon the receipt of notice under Fed. R. Civ. P. 23(c).

COUNT I
Violation of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2607(a) and (b)

107. Plaintiffs incorporate the above stated paragraphs as if restated herein.

108. All transactions at issue in the instant complaint are incident to or part of real estate settlement services involving federally related mortgage loans and thereby are subject to the provisions of RESPA, 12 U.S.C. § 2601, *et seq.*

109. At all relevant times, Genuine Title was subject to the provisions of RESPA, 12 U.S.C. § 2601, *et. seq.*

110. As a lender and/or broker and/or servicer of federally related mortgage loans, First Mariner is subject to the provisions of RESPA, 12 U.S.C. § 2601, *et seq.*

111. Genuine Title and/or CAM paid First Mariner kickbacks and/or things of value in exchange for referrals of business to Genuine Title in violation of RESPA, 12. U.S.C. § 2607(a) and (b).

112. First Mariner by and through its brokers, loan officers, employees and/or agents received and accepted things of value for referrals of business as part of real estate settlement

services provided to Plaintiffs and Class Members, in violation of RESPA, 12 U.S.C. § 2607(a) and (b).

113. All loans referred to Genuine Title as part of the Kickback Scheme were secured by first or subordinate liens on residential real property and were made in whole or in part by First Mariner and/or its affiliates whose deposits or accounts are insured by the Federal Government and/or who are regulated by an agency of the Federal Government.

114. The payment and/or arranging of payment of kickbacks to First Mariner by Genuine Title and/or CAM and First Mariner's receipt thereof constitute a violation of § 8(a) of RESPA, which prohibits the payment of referral fees or kickbacks pursuant to an agreement in connection with the origination or brokering of federally related mortgage loans.

115. The kickbacks paid by Genuine Title and/or CAM to First Mariner were also made solely for the purpose of Genuine Title receiving referrals and no services were actually performed by First Mariner in connection with the receipt of these payments and/or things of value, in violation of 12 U.S.C. § 2607(b), which prohibits the splitting of fees in connection with the origination of federal related mortgage loans.

116. Genuine Title and First Mariner fraudulently and actively concealed the kickbacks paid to Referring Brokers from Plaintiffs and Class Members by refusing to list the kickbacks on Plaintiffs and Class Members' HUD-1 settlement statements and settlement documents, and failed and refused to disclose their affiliated business arrangement and by engaging in an elaborate payment scheme to conceal the illegal kickbacks.

117. Despite acting reasonably and exercising due diligence, Plaintiffs and Class Members did not and could not have known about the Kickback Scheme until contacted by undersigned counsel.

118. As a direct and proximate cause of Genuine Title's actions, Plaintiffs and Class Members used Genuine Title for title and settlement services, paid for said services and were deprived of impartial and fair competition and the costs paid by Plaintiffs and Class Members to Genuine Title for settlement services would have been lower.

WHEREFORE:

a. Plaintiffs respectfully demand this Court to certify this class action pursuant to Federal Rule of Civil Procedure 23 and set this matter for trial; and

b. Demand judgment for Plaintiffs and Class Members against First Mariner and award Plaintiffs and Class Members an amount equal to:

    1. Treble damages for settlement services charged by Genuine Title, including, but not limited to, title insurance premiums, in an amount equal to three times the amount of any charge paid for such settlement services, pursuant to 12 U.S.C. § 2607(d)(2);

    2. Reasonable attorneys' fees, interest and costs pursuant to 12 U.S.C. § 2607(d)(5); and

    3. Such other and further relief as this Court deems proper.

Respectfully submitted,

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PRAYER FOR JURY TRIAL

Plaintiffs and Class Members hereby request a trial by jury on the foregoing Class Action Complaint.

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Exhibit

2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JILL BEZEK, *et al.*,	*-	
	*	
Plaintiffs,	*	
	*	
v.	*	**Civil Case No. SAG-17-2902**
	*	
FIRST MARINER BANK,	*	
	*	
Defendant.	*	
	*	

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MEMORANDUM OPINION

This matter concerns a Motion to Certify Class pursuant to Rule 23 of the Federal Rules of Civil Procedure ("the Motion"). ECF 34. Jill Bezek and Michelle Harris (collectively "Plaintiffs") seek to represent a class of borrowers who had a federally related loan serviced by Defendant, First Mariner Bank ("First Mariner"). ECF 1 ¶ 1. First Mariner opposed the Motion, ECF 39, and Plaintiffs filed a Reply, ECF 44. A telephonic hearing was held on September 10, 2020. For the reasons that follow, the Motion, ECF 34, will be GRANTED.

I. FACTUAL BACKGROUND

First Mariner is a Maryland corporation and independently owned bank. ECF 1, ¶ 7. Genuine Title was a title service company operating in Maryland. Plaintiff alleges that, from 2009 through 2014, First Mariner brokers referred more than 250 loans (including Plaintiffs') to Genuine Title for settlement services, pursuant to an illegal kickback scheme. *Id.* ¶ 52. In general terms, Plaintiffs allege that Genuine Title would provide First Mariner loan officers with one of four forms of kickbacks, in exchange for referrals: (1) cash payments ("Referral Cash"), (2) free marketing materials ("Marketing Materials"), (3) credits for future marketing services ("Marketing Credits"), or (4) customer referrals from other lenders who turned down the borrower for not meeting their institution's required qualifications ("Turn Down Credits"). ECF 1, ¶¶ 19-43. Bezek

refinanced her mortgage with First Mariner through loan officer Tony Sergei, at First Mariner's White Marsh, Maryland branch, in December, 2010. ECF 1 at ¶ 63. Likewise, Harris refinanced her mortgage with Sergei in October, 2012. *Id.* at ¶ 72. As a result of this scheme, Plaintiffs claim they were deprived of kickback-free settlement services and impartial and fair competition, as the Real Estate Settlement Procedures Act ("RESPA") requires, 12 U.S.C. § 2607, and paid more for their settlement services than they otherwise would have. *Id.* ¶¶ 61-62. Brandon Glickstein, who worked for Genuine Title, explained that Sergei received around $200 per loan referred to Genuine Title. ECF 34-17 at ¶ 8(a).

Plaintiffs provide additional details about the alleged Genuine Title kickback scheme in their Complaint. They allege that Glickstein created multiple business entities that could facilitate Genuine Title's kickback arrangements. Glickstein formed Brandon Glickstein, Inc. ("BGI") and Competitive Advantage Media Group ("CAM") to facilitate kickback payments, and to offer free marketing materials to lenders, in exchange for referrals. *Id.* ¶¶ 20-21. Glickstein previously testified that ninety percent of loans serviced by Genuine Title from 2009 to 2014 were tied to some kind of kickback arrangement. ECF 34-4 at 43:4-13. It was Genuine Title's "business practice." *Id.* at 12:5-11.

Plaintiffs have also submitted additional evidence linking the Genuine Title kickback scheme to specific First Mariner employees. In addition to Sergei, Glickstein identified multiple other First Mariner loan officers who participated in a kickback arrangement with Genuine Title, including Brad Restivo, Rob Iobbi, Joseph Buchanan, and Walter Alton. ECF 34-18 at ¶ 8. Jay Zukerberg, former president of Genuine Title, also named Angela Pobletts as a First Mariner loan officer who received kickbacks in exchange for referrals to Genuine Title. ECF 34-10 at ¶ 4.

Prior to this motion, United States District Judge Richard D. Bennett granted First Mariner's Motion to Dismiss. ECF 13; 293 F. Supp. 3d 528 (D. Md. 2018). Judge Bennett found that the one-year statute of limitations barred Plaintiffs' RESPA claims, and further concluded that equitable tolling could not salvage the claims. 293 F. Supp. 3d at 540. However, the United States Court of Appeals for the Fourth Circuit reversed on appeal. *Edmondson v. Eagle Nat'l Bank*, 922 F.3d 535, 558 (4th Cir. 2019). Primarily, the Fourth Circuit found that Plaintiffs had sufficiently alleged that First Mariner engaged in affirmative acts of concealment, and thus the one-year statute of limitations might be tolled based on a theory of fraudulent concealment. *Id.* at 551–58. The panel remanded for further proceedings.

Plaintiffs now seeks certification of the following class of individuals who allegedly suffered harm under RESPA, 12 U.S.C. § 2607, as a result of the alleged kickback scheme First Mariner engaged in with Genuine Title:

> All individuals in the United States who were borrowers on a federally related mortgage loan (as defined under the Real Estate Settlement Procedures Act, 12 U.S.C. § 2602) originated or brokered by First Mariner Bank for which Genuine Title provided a settlement service, as identified in Section 1100 on the HUD-1, between January 1, 2009 and December 31, 2014. Exempted from this class is any person who, during the period of January 1, 2009 through December 31, 2014, was an employee, officer, member and/or agent of First Mariner Bank, Genuine Title LLC, Competitive Advantage Media Group LLC, Brandon Glickstein, Inc., and/or Dog Days Marketing, LLC.

ECF 34 at 1.

II. LEGAL STANDARD

The "class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). Class actions are subject to Federal Rule of Civil Procedure 23(a), which requires that (1) the alleged class is so numerous that

joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the representatives' claims are typical of the claims of the class, and (4) the representatives will fairly and adequately protect the interests of the class. The party seeking certification carries the burden of demonstrating that it has complied with Rule 23. *EQT Prod. Co. v. Adair*, 764 F.3d 347, 357 (4th Cir. 2014). The four requirements of Rule 23(a)—numerosity, commonality, typicality, and adequate representation—limit the class claims to those fairly encompassed by the named plaintiff's claims. *Dukes*, 564 U.S. at 349.

After satisfying the Rule 23(a) prerequisites, the plaintiffs must show that the proposed class action satisfies one of the enumerated conditions in Rule 23(b). *E.g.*, *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 423 (4th Cir. 2003). Here, Plaintiffs seek class certification pursuant to Rule 23(b)(3). Under that rule, a class may be certified if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

Courts evaluating class certification "must rigorously apply the requirements of Rule 23." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998). Although the court's analysis must be "rigorous" and "may 'entail some overlap with the merits of the plaintiff's underlying claim,' Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen Inc. v. Ct. Ret. Plans and Trust Funds*, 568 U.S. 455, 465-66 (2013) (citation omitted) (quoting *Dukes*, 564 U.S. at 351). The merits may be considered only to the extent that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied. *Id.* at 466.

III. ANALYSIS

A. Standing

As a preliminary matter, First Mariner asserts that the Plaintiffs have not suffered a concrete injury and therefore lack Article III standing. ECF 39 at 11-15. Standing is a doctrine rooted in the traditional understanding of an Article III "case or controversy." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Standing consists of three elements: "the plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). The burden is on the plaintiffs to establish these elements. *Id.*

Injury in fact is the "first and foremost" of standing's three elements. *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 103 (1998). To establish injury in fact, "a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560). Importantly, "[i]n a class action matter, we analyze standing based on the allegations of personal injury made by the named plaintiffs." *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 343 (4th Cir. 2017); *see also Baehr v. Creig Northrop Team, P.C.*, 953 F.3d 244, 252 (4th Cir. 2020) ("The strictures of Article III standing are no less important in the context of class actions.").

Since *Spokeo*, it is clear that plaintiffs may not satisfy the strictures of Article III by alleging "a bare procedural violation." 136 S. Ct. at 1549. Rather, plaintiffs must have suffered a concrete harm as a result of the "defendant's statutory violation that is the type of harm Congress sought to prevent when it enacted the statute." *Baehr*, 953 F.3d at 253 (quoting *Curtis v. Propel Prop. Tax Funding, LLC*, 915 F.3d 234, 240-41 (4th Cir. 2019)). The Fourth Circuit has explained, that under

RESPA, "the deprivation of impartial and fair competition between settlement services providers" is not the kind of harm Congress sought to prevent and, thus, will not confer Article III standing. *Id.* at 254. Rather, "the harm it sought to prevent is the increased costs . . . for settlement services." *Id.* (holding that deprivation of fair competition "untethered from any evidence that the deprivation increased settlement costs—is not a concrete injury under RESPA"); *see also Edmondson v. Eagle Nat'l Bank*, Civil Case No. SAG-16-3938, 2020 WL 3128955, at *3 (D. Md. June 12, 2020).

First Mariner argues that Plaintiffs' claim that they were overcharged for settlement services is not supported by any "plausible facts." ECF 39 at 13. First Mariner points to Zukerberg's deposition testimony in which he stated that the costs simply "came out of [Genuine Title's] profits," ECF 39-5 at 38:4, and, so, Genuine Title, and not its customers, bore any cost of the kickback scheme. Plaintiffs, on the other hand, contend that Zukerberg's previous statements show that even if its fees were not "gross" overcharges, Genuine Title would have charged lower rates absent the kickback arrangement. ECF 44 at 3-4. Although Zukerberg stated that he believed Genuine Title's rates were "competitive" with other title companies, ECF 44-2 at 70:7-8, he also admitted that he, "like any other business tried to get top dollar for your fee," *id.* at 68:1-5. He testified that he would have preferred "to give the borrower back a couple extra hundred dollars instead of paying it to them [those with whom Genuine Title had kickback agreements]." *Id.* at 70:3-8.

In arguing that Genuine Title would have charged them a lower fee had it not been accounting for its kickback payments, Plaintiffs have alleged more than a bare statutory violation. *See Donaldson v. Primary Residential Mortg., Inc.*, No. ELH-19-1175, 2020 WL 3184089, at *19 (D. Md. June 12, 2020) (holding that plaintiffs' claim that they paid higher prices because of a kickback arrangement giving rise to a RESPA violation alleged a concrete injury). Indeed,

Plaintiffs have also presented additional, corroborating evidence indicating that they may have been significantly overcharged. According to her HUD-1 form, Bezek paid $910 for her title examination and title abstract fees. ECF 44-5. Based on data from the Department of Housing and Urban development, these fees were more than twice the average rate and more than eighty percent higher than fees in the eightieth percentile in 2010 in Maryland, a state with some of the highest fees in the country. ECF 44-4. Harris was charged $1200 for her title and examination and title abstract, more than twice as much as the eightieth percentile fee. ECF 34-20; ECF 44-4.

The Court expresses no view at this time as to whether Bezek, Harris, or any of the putative class members were actually overcharged for the services rendered by Genuine Title. The Court merely concludes that at this stage of the proceedings, Plaintiffs have proffered enough evidence to meet the requirements of Article III standing. As more factual development occurs, it may become clear that Plaintiffs were not overcharged for title and settlement services. Accordingly, First Mariner may continue to challenge Plaintiffs' Article III standing as this litigation proceeds, particularly at the summary judgment stage. *See Overbey v. Mayor of Baltimore*, 930 F.3d 215, 227 (4th Cir. 2019) (explaining that the elements of standing must be supported "with the manner and degree of evidence required at the successive stages of the litigation").

B. Class Certification

1. Readily Identifiable

In the Fourth Circuit, any proposed class must be "readily identifiable," which other courts refer to as "ascertainability." *EQT Prod.*, 764 F.3d at 358 (quoting *Hammond v. Powell*, 462 F.2d 1053, 1055 (4th Cir. 1972)). In other words, a proposed class's definition must allow a court to "readily identify the class members in reference to objective criteria." *Id.* Notably, the plaintiff "need not be able to identify every class member at the time of certification." *Id.* The class definition must simply "ensure that there will be some 'administratively feasible [way] for the

court to determine whether a particular individual is a member' at some point." *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 658 (4th Cir. 2019) (quoting *EQT Prod.*, 764 F.3d at 358). Only if a class definition renders it "impossible" to identify class members "without extensive and individualized fact-finding or 'mini-trials'" is a class action inappropriate. *EQT Prod.*, 764 F.3d at 358 (quoting *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592-94 (3d Cir. 2012)).

The proposed class is defined by simple, objective criteria: all members of the class (1) received federally related loans brokered by First Mariner between January 1, 2009 and December 31, 2014 and (2) received settlement services from Genuine Title. These criteria are easily discernable in the government-required HUD-1 forms and First Mariner's loan documents. In fact, Plaintiffs have already identified most class members through data obtained from Genuine Title. *See* ECF 34-8; ECF 34-9. Thus, this Court concludes that Plaintiffs have shown that the class is readily identifiable. *See Krakauer*, 925 F.3d at 650, 658 (finding, in a class action suit brought under the Telephone Consumer Protection Act of 1991, that documentation showing every person whose name was on the relevant Do-Not-Call registries for at least 30 days, and had received two calls in a single year, "obviated any [ascertainability] concern[s]").

First Mariner argues that the class is overbroad because Plaintiffs have not yet proven that every loan was tainted by a RESPA violation. According to First Mariner, half of the loans identified by Plaintiffs for inclusion in the class are not connected to the six First Mariner employees currently identified as accepting kickbacks from Genuine Title. Plaintiffs, however, assert that eighty-five percent of the loans identified (283 loans) are directly tied to one of the referral-and-kickback agreements documented in the undisputed Zukerberg and Glickstein affidavits. ECF 44 at 11. Glickstein stated that the kickbacks were given based on loans referred from one of the loan officer's "groups." *See* ECF 34-18 at ¶ 8 ("For each loan that Sergei's *group*

assigned . . . Genuine Title would pay around a $200 kickback." (emphasis added)). Plaintiffs have used the National Multistate Licensing System ("NMLS") to identify which First Mariner brokers worked with those named by Glickstein and Zukerberg, and claim that all of the loans generated by those brokers were also exchanged for a kickback from Genuine Title. ECF 44 at 10-11. Regardless, Plaintiffs need not prove their entire case before the Court finds the class identifiable.

Plaintiffs have adduced sufficient evidence, at this stage, to show that a common scheme of kickbacks existed between First Mariner and Genuine Title. Whether the evidence, upon the conclusion of discovery, shows that only those class members whose loans were handled by particular loan officers actually suffered an injury, does not impact the administrative ease with which this Court can ascertain each class member's existence, and provide them notice. *See Krakauer*, 925 F.3d at 658. Put differently, questions surrounding the *merits* of each class member's claim do not, in this case, impact the Court's ability to ascertain *ex ante* whether each person qualifies as a member under Plaintiffs' proposed class definition, or the ability to notify those individuals about the lawsuit.[1]

2. Rule 23(b)(3)

Plaintiffs have moved to certify a class under Rule 23(b)(3), in which "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). As a result, Rule 23(b)(3) class actions "must meet predominance and superiority requirements not imposed on other kinds of class actions."

[1] First Mariner also argues the class is not ascertainable because some of the loans in the class definition may be statutorily exempt from RESPA. ECF 39 at 17-19. The Court will address this concern in its discussion of the Rule 23(b)(3) predominance requirement, but it similarly does not impact ascertainability.

Gunnells, 348 F.3d at 424. Importantly, "[i]n a class action brought under Rule 23(b)(3), the 'commonality' requirement of Rule 23(a)(2) is 'subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class predominate over other questions.'" *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 n.4 (4th Cir. 2001) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 609 (1997)). Thus, the Court analyzes predominance and commonality together, and will begin with that inquiry before returning to the remaining requirements of Rule 23(a). *See, e.g.*, *Romeo v. Antero Res. Corp.*, No. 1:17CV88, 2020 WL 1430468, at *8 (N.D. W. Va. Mar. 23, 2020) ("[T]he Court will consider commonality in its discussion of predominance.").

Predominance of Common Questions

To satisfy predominance, common questions must have significant "bearing on the central issue in the litigation." *EQT*, 764 F.3d at 366. In other words, the requirement is met where all class members' claims "depend upon a common contention," and establishing "its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350. Here, the essence of each proposed class member's claim against First Mariner is that First Mariner referred them to Genuine Title for settlement services because Genuine Title promised to, and actually did, provide cash or other kickbacks to First Mariner in accordance with a prior common agreement. Whether this widespread scheme existed and, if so, how it was executed are common questions "at the heart of the litigation" that will produce common answers. *See EQT*, 764 F.3d at 366.

Still, First Mariner raises several issues that it believes will destroy predominance, including whether (1) each class member has standing, (2) each class member exercised due diligence to invoke equitable tolling, (3) First Mariner's vicarious liability defense applies, (4)

each class member's loan is subject to RESPA, and (5) each class member was referred to Genuine Title pursuant to a kickback arrangement.[2] The Court ultimately concludes that none of these issues will destroy predominance, and will address each of these objections in turn.

First, First Mariner argues that the Court will be drawn into separate analyses of whether each class member has standing. ECF 39 at 20-21. However, as discussed above, Plaintiffs have sufficiently alleged that they and other proposed class members have suffered a concrete injury. Plaintiffs' injury is not that they "paid too much" relative to some objectively reasonable fee. *See id.* at 21. Instead, Plaintiffs' purported injury is that they paid more for settlement services than they would have absent the kickback arrangement. Therefore, the Court need not delve into the intricacies of every class member's transaction to determine the reasonableness of the charges, and establishing standing will not destroy predominance.

Next, First Mariner contends that determining whether each borrower exercised due diligence in bringing his or her claim will require individual inquiries. *Id.* at 21-25. As explained in other related cases, the Court can assess, collectively, whether the available information and media reporting related to prior litigation and enforcement proceedings would have prompted a reasonable person to uncover the facts substantiating Plaintiffs' RESPA claims. *See Dobbins v. Bank of America, N.A.*, Civil Case No. SAG-17-0540, 2020 WL 5095855, at *7 (D. Md. Aug. 28, 2020); *Edmondson*, 2020 WL 3128955, at *5-7. Unlike in *Thorn v. Jefferson-Pilot Ins. Co.*, in which the Fourth Circuit found it impossible to determine whether 1.4 million consumers "spread out geographically over four states and temporally over 62 years" acted with due diligence, the

[2] In its Opposition, First Mariner couches some of these objections under the Rule 23(a) typicality requirement. ECF 39 at 20-27. The typicality and adequacy requirements "tend to merge" with commonality, *Broussard*, 155 F.3d at 337, and this Court will discuss the objections under commonality and predominance.

range of borrowers in this case, and their particular media exposure, is far more limited in time and geography. 445 F.3d 311 (4th Cir. 2006). The Court is not convinced at this stage that individual hearings will be necessary to determine whether class members encountered information that would have prompted them to uncover the facts substantiating their RESPA claims. Certainly, however, the Court reserves the right to decertify the class action if later factual development reveals that individual class members were uniquely situated such that disparate inquiries into their due diligence, or any other material issue, predominates over common questions. *See Minter v. Wells Fargo Bank, N.A.*, Civil Action No. WMN-07-3442, 2013 WL 1795564, at *3 (D. Md. Apr. 26, 2013) ("When the Court certified the Tolling Class it noted it was possible that proving equitable tolling might become unmanageable and thus warrant the Court's exercise of discretion to decertify the class.").

Additionally, First Mariner argues that its defense to vicarious liability "will vary depending on the [First] Mariner loan officer who worked with the borrower." ECF 39 at 26-27. However, First Mariner's assertion appears purely hypothetical. Indeed, First Mariner contends that it is not vicariously liable for the alleged misconduct of *any* of the loan officers who entered into kickback agreements with Genuine Title. *Id.* at 27. It proffers, without explanation, that its defense may vary depending on ancillary circumstances such as "whether the arrangement was memorialized in writing, whether payments were made by or to sham entities, etc." *Id.* The nature of the alleged conduct of all the loan officers, however, is largely the same. The Court is, therefore, not convinced that the vicarious liability of First Mariner for each loan officer will be decided by burdensome individual inquiries, but rather is a common question applicable to all class members.

Similarly, First Mariner argues that because it is possible that some "federally related" loans are not subject to RESPA, determining whether each loan in the proposed class is governed

by RESPA will require a "mini trial." *See* ECF 39 at 17-19. Indeed, RESPA does not apply to mortgages on residential property acquired "primarily for business, commercial, or agricultural purposes," among other exemptions. 12 U.S.C. § 2606(a); 12 C.F.R. § 1024.5(b). While it is possible that some putative class members' loans will fall within a relevant exemption, the Court is not persuaded that this number will exceed a negligible percentage of loans encompassed by the class definition. Based on Genuine Title's loan processing data, Plaintiffs have determined that sixty-five percent of the loans identified as falling within the proposed class definition are either VA refinance loans or FHA loans, both of which impose limitations that would render RESPA's exemptions inapplicable. *See, e.g.*, ECF 44 at 16, 16 n.8 (describing restrictions for VA refinance loans). Defendants merely hypothesize, with no support, that some loans may fall within a RESPA exemption. However, Plaintiffs contend that the information needed to determine whether a RESPA exemption applies is contained in the loan application forms in the custody and control of First Mariner. ECF 44 at 17. Plaintiffs sought discovery of information that would show whether any of the identified loans were exempt from RESPA, but First Mariner objected to their interrogatories because, among other reasons, it believed the questions were "premature" where the class had not yet been certified. ECF 44-6 at 10-12. Plaintiffs have proffered enough evidence at this stage to show that only a minority of loans could fall outside of RESPA's statutory boundaries. This Court will not deny certification based on First Mariner's bald assertion that further evidence could prove otherwise, given that the relevant evidence was within First Mariner's control and was not produced. Moreover, if it becomes necessary, the parties can discern which class members' loans fall within a RESPA exemption through other ordinary discovery processes (with a survey, for example) without the need for court-sponsored individualized hearings. In any

event, this issue regarding RESPA exemptions does not predominate over the numerous, imperative questions that are answerable on a class-wide basis.

Finally, First Mariner contends that individual inquiries are necessary to prove that each class member chose to use Genuine Title based on a referral from First Mariner, and not due to some unrelated reason. However, a RESPA referral "need not be the exclusive or even the primary reason that influenced a home buyer's choice of a real estate service provider." *Edwards v. First Am. Corp.*, 798 F.3d 1172, 1184 (9th Cir. 2015) (interpreting implementing regulation 24 C.F.R. § 3500.14(f)); *Palombaro v. Emery Fed. Credit Union*, No. 1:15-cv-792, 2017 WL 3437559, at *11-12 (S.D. Ohio Aug. 10, 2017) (finding common questions predominated over the proposed class even where a class member may have chosen Genuine Title prior to a referral). Ultimately, whether a kickback arrangement between Genuine Title and First Mariner had any impact on borrowers' choice of title company is a common question that predominates over potential individual inquiries.

In sum, none of the issues raised by First Mariner destroy the predominance of common questions pertinent to each class members' claim. Indeed, some tend to identify more common questions. First Mariner may ultimately prove that a common agreement and pattern of practice, central to Plaintiffs theory of liability, did not exist, or were not as pervasive as alleged, but doing so will involve questions of law and fact common to all class members.

Superiority

In addition to finding that common questions predominate under Rule 23(b), the Court finds that the class action vehicle is "superior to other methods" of adjudicating this controversy. *See* Fed. R. Civ. P. 23(b)(3). Based upon the common questions that predominate, as explained

above, a class action is more efficient than allowing potentially hundreds of individual claims arising from this purported kickback arrangement.

3. Rule 23(a)

Numerosity

Plaintiffs have identified over 250 loans that meet the objective class criteria, and First Mariner does not dispute that the numerosity requirement is met. Thus, the Court finds that there are sufficiently numerous proposed class members.

Typicality

The typicality requirement in Rule 23 requires that "claims or defenses of representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). This prerequisite "goes to the heart of a representative parties' [sic] ability to represent a class." *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006). For that reason, the "plaintiff's claim cannot be so different from the claims of absent class members that their claims will not be advanced by plaintiff's proof of his own individual claim." *Id.* The representative plaintiff's claims "need not be 'perfectly identical or perfectly aligned'" with other class members' claims, but "the representative's pursuit of his own interests 'must simultaneously tend to advance the interests of the absent class members.'" *Ealy v. Pinkerton Gov't Servs. Inc.*, 514 F. App'x 299, 305 (4th Cir. 2013) (unpublished) (quoting *Deiter*, 463 F.3d at 466). This analysis "tend[s] to merge" with adequacy and commonality. *See Broussard*, 155 F.3d at 337 (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n. 13 (1982)).

As discussed above, Plaintiffs allege First Mariner has harmed all putative class members by violating the same statutory provision based on a common scheme between First Mariner and Genuine Title. Although class members may have worked with different loan officers, proof that

the named Plaintiffs' loan officer received a kickback from Genuine Title based on a referral would tend to advance the argument that other loan officers were similarly involved. Other minor differences, such as the form of kickback received by each loan officer, similarly do not make Plaintiffs' claims materially different from those of other class members. *See Broussard*, 155 F.3d at 338 (explaining that class certification primarily requires the class representative to have the "same interest" and "same injury" as other class members); *Palombaro*, 2017 WL 3437559 at *7 (finding the typicality requirement met where proposed RESPA class members worked with different loan officers because "[d]ifferences in the form or amount of kickback are not relevant to whether [the defendant's] overall conduct, if otherwise uniform and proven, is culpable"). Moreover, First Mariner has not alleged, and this Court does not find, any conflict of interest that would impair Plaintiffs from advancing the claims of the entire class.

Adequate Representation

Finally, Plaintiffs must illustrate that they will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). First Mariner argues that Bezek and Harris are inadequate representatives because they lack independent knowledge about their claims. ECF 39 at 28-29. However, the Fourth Circuit has recognized that a plaintiff "need not have extensive knowledge of the facts of the case in order to be an adequate representative," particularly in a "complex case." *Gunnells*, 348 F.3d at 430; *see also City of Cape Coral Mun. Firefighters' Ret. Plan v. Emergent Biosolutions, Inc., HQ*, 322 F. Supp. 676, 683-84 (D. Md. 2018); *Benway v. Res. Real Estate Servs., LLC*, 239 F.R.D. 419, 425-26 (D. Md. 2006). Bezek and Harris have relied significantly on their attorneys to understand the intricacies of the RESPA statute and their potential relief, but this does not disqualify them as adequate representatives.

Similarly, First Mariner argues that Bezek and Harris have not done enough to supervise the litigation because, for example, Harris does not know how many motions have been filed in the case, and Bezek has not reviewed documents produced in discovery. ECF 39 at 29. "However, 'Rule 23 does not require the representative plaintiffs to have extensive knowledge of the intricacies of litigation, rather, the named plaintiffs must have a general knowledge of what the action involves and a desire to prosecute the action vigorously.'" *Fangman v. Genuine Title LLC*, Civil Action No. RDB-24-0081, 2016 WL 6600509, at *11 (D. Md. Nov. 8, 2016) (quoting *Benway*, 239 F.R.D. at 425-26). The Court notes that both Bezek and Harris attended the telephonic hearing on this motion to certify the class, demonstrating their interest and involvement in the case. The Court concludes that none of the knowledge deficiencies identified by First Mariner show Bezek and Harris are not willing and able to represent the class.

Additionally, Plaintiffs' counsel, which is largely the same counsel for the class certified in *Dobbins*, 2020 WL 5095855, *Edmondson*, 2020 WL 3128955, *James v. Acre Mortg. & Fin., Inc.*, Civil Case No. SAG-17-1734, 2020 WL 2848122, at *1 (D. Md. June 2, 2020), and *Fangman*, 2016 WL 6600509, will adequately represent the proposed class.

IV. CONCLUSION

For the reasons set forth above, Plaintiffs' Motion to Certify Class, ECF 34, is GRANTED. An accompanying Order follows.

Dated: October 2, 2020

/s/
Stephanie A. Gallagher
United States District Judge

Exhibit

3

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
STEPHANIE A. GALLAGHER
UNITED STATES DISTRICT JUDGE

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October 23, 2023

LETTER ORDER

Re: Bezek, et al. v. First Mariner Bank
Civil Case No. SAG-17-2902

Dear Counsel,

During a conference call in August, 2023, this Court requested Plaintiffs' proposed trial plan and motions in limine on the issue of title insurance. ECF 137, 138. In response, Plaintiffs filed supplemental briefing asking this Court to bifurcate the issues of title insurance overcharge and damages and to appoint a special master to determine the latter. ECF 139. I have reviewed this briefing, Defendant's response, and Plaintiffs' reply. ECF 140, 141. No hearing is necessary. *See* Loc. R. 105.6 (D. Md. 2023). For reasons explained below, Plaintiffs cannot proceed with title insurance overcharge claims in this litigation on either a classwide or an individual basis.

First, title insurance overcharge claims are not properly before this Court. Plaintiffs never raised these claims in their Complaint, at any point during discovery, or in any dispositive motion briefing. Plaintiffs point to three cursory mentions of "title insurance" in the Complaint, including a request for treble damages for "settlement services . . . including, but not limited to, title insurance premiums . . . ." ECF 1 at 24. At that point in the case, Plaintiffs sought to have the entirety of their settlement costs trebled, whether any particular cost had been overcharged or not. While the Complaint may have put Defendant on notice that Plaintiffs were seeking to include title insurance premiums in their damages, the Complaint did not allege that Plaintiffs or any class members were overcharged for title insurance or were issued an improper type of title insurance policy. The Complaint never mentions "overcharge," "reissue rates," or "enhanced policies." Even more importantly, those theories of overcharge were never raised during discovery, and Defendant therefore had no opportunity to explore the relevant facts during the discovery process. Plaintiffs cannot assert these claims now. *See S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013) ("It is well-established that parties cannot amend their complaints through briefing or oral advocacy.").

Second, even if title insurance claims were properly before this Court, they are not amenable to class treatment. As this Court explained in a related case, claims based on the denial of discounted reissue rates require an assessment of the term of each borrower's loans, where each loan occurred, and whether each borrower satisfied the insurer's eligibility for the discounted rate. *Edmondson v. Eagle Nat'l Bank*, No. 16-CV-3938, 2023 WL 5336994, at *13 (D. Md. Aug. 18, 2023). Claims based on the issuance of enhanced policies require an assessment of "why and how each borrower obtained expanded title insurance to determine whether such [policies were] in fact

inappropriate." *Id.* If allowed, these individualized inquiries would defeat the predominance of common questions in this litigation.

Third and finally, even if this Court were to allow title insurance claims to proceed on a classwide basis, the appointment of a special master would be procedurally inappropriate. In jury trials, a special master can only be appointed when the parties have given their consent. 9C CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2604 (3d ed. 2019); *see also* Fed. R. Civ. P. 53(a)(1)(A) (requiring both parties' consent for appointment of a special master).[1] Here, Defendant does not waive its right to a jury trial and objects to the use of a special master. Therefore, this Court does not have the power to appoint a special master to adjudicate title insurance overcharge or anything else.

In light of these shortcomings, this Court rejects Plaintiffs' trial plan, including its request for bifurcation of trial and appointment of a special master. Instead, this Court will schedule a status conference to explore with the parties how this case—without title insurance overcharge claims—will be tried in front of a jury.

Despite the informal nature of this letter, it is an Order of the Court and will be docketed as such.

Sincerely yours,

/s/
Stephanie A. Gallagher
United States District Judge

[1] Plaintiffs attempt to invoke a different subsection of Rule 53 that permits a special master to adjudicate "issues to be decided without a jury" when warranted by particular conditions, including "the need to . . . resolve a difficult computation of damages." Fed. R. Civ. P. 53(a)(1)(B). But that subsection does not apply here, because whether any class member was overcharged for title insurance is not simply a damages issue. It is a factual question for the jury that could have implications for both liability and standing.

Exhibit 4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JILL BEZEK, *et al.*,	*	
Plaintiffs,	*	
v.	*	**Civil No. SAG-17-2902**
FIRST NATIONAL BANK OF PENNSYLVANIA,	*	
Defendant.	*	

* * * * * * * * * * * *

MEMORANDUM OPINION

As this Court has explained in prior opinions, Jill Bezek and Michelle Harris (collectively "Plaintiffs") represent a class of borrowers who had a federally related loan serviced by First Mariner Bank ("First Mariner"). They sued First Mariner's successor entity, First National Bank of Pennsylvania ("Defendant"), seeking damages relating to kickbacks that First Mariner employees allegedly received from a title company, Genuine Title. Plaintiffs allege that the kickbacks violated the Real Estate Settlement Procedures Act ("RESPA") in that First Mariner's actions caused them to be overcharged for their settlement services.

This case became ready for trial after this Court adjudicated dispositive motions earlier this year. This Court conferred with the parties and asked Plaintiffs to submit a proposed trial plan. The parties submitted briefing, ECF 139–41, but upon review, this Court rejected Plaintiffs' proposed trial plan, deeming it unworkable. ECF 142. This Court then held an in-person status conference on November 7, 2023, to discuss its concerns about whether a single classwide trial is feasible.[1]

[1] When this Court inquired at the status conference, counsel could not identify any similar RESPA case in the country that has been brought to trial as a class action incorporating a variety of overcharge theories, as Plaintiffs suggest bringing here.

After the status conference, Plaintiffs filed a supplement at this Court's request. ECF 149. Upon review of the parties' filings and the information gleaned at the status conference, this Court has determined that this case cannot proceed to a classwide trial with the class as presently certified. This Court will therefore amend the class definition *sua sponte* as described below, and will order the parties to confer regarding an opt-out procedure to take place before the case is set for trial.

The background of this case has been reviewed in this Court's previous opinions. *See, e.g.,* ECF 47, 115. Relevant to the instant issue, on October 2, 2020, this Court certified a class consisting of:

> All individuals in the United States who were borrowers on a federally related mortgage loan (as defined under the Real Estate Settlement Procedures Act, 12 U.S.C. § 2602) originated or brokered by First Mariner Bank for which Genuine Title provided a settlement service, as identified in Section 1100 on the HUD-1, between January 1, 2009 and December 31, 2014. Exempted from this class is any person who, during the period of January 1, 2009 through December 31, 2014, was an employee, officer, member and/or agent of First Mariner Bank, Genuine Title LLC and/or Competitive Advantage Media Group LLC.

ECF 48, *see also* ECF 47 at 7–17. During class certification, Plaintiffs argued that the chart prepared by Wells Fargo—setting forth the average, median, and 80th percentile for title service fees—established that class members had been overcharged. *See* ECF 44 at 4 ("Plaintiff Bezek was charged $910 for her abstract or title search, title examination, and title insurance binder, almost three time[s] the Maryland average for these settlement services, three and a half times the state median, and 83% above the 80th percentile of fees."). But in their summary judgment reconsideration briefing, for the first time, Plaintiffs contended that some of the class members had been subject to "title insurance overcharges" that, in Plaintiffs' view, resulted from the kickbacks being paid to First Mariner loan officers. ECF 118 at 9 n.3; ECF 120 at 13–16. Plaintiffs did not timely introduce "title insurance overcharges" as an issue in this case. ECF 142. Moreover, as this Court has concluded in a similar case, title insurance overcharges are not amenable to classwide

disposition. *Edmondson v. Eagle Nat'l Bank*, No. 16-CV-3938, 2023 WL 5336994, at *13 (D. Md. Aug. 18, 2023). Thus, any class members wishing to establish that they were overcharged for title insurance as a result of a kickback paid to a First Mariner loan officer will have to proceed with their claim on an individual basis.

Given that trial was ready to be scheduled, this Court focused on logistics and raised several issues at the status conference: (1) that some class members may not want to forego title insurance overcharge claims or certain other theories of damages by participating in this classwide trial; and (2) that Plaintiffs propose to use a variety of different mechanisms to establish alleged overcharges to various class members, some of which are inconsistent and pose a risk of prejudicing some class members at the expense of others if tried jointly.[2] At the status hearing, Plaintiffs stated that the *Bezek* class members fall into two categories: (1) the "Pobletts group," defined as borrowers whose loans were processed at the First Mariner branch managed by Angela Pobletts; and (2) the "Wells Fargo group," borrowers whose fees for title services exceeded the 80th percentile figures listed on the relevant Wells Fargo chart.[3] As to the Pobletts group, Plaintiffs have testimony from Genuine Title's former President, Jay Zuckerberg, that he calculated his kickbacks to Pobletts by taking the charges to the borrowers on the referred loans, subtracting $500 to $600, and dividing by two. ECF 94-16 ¶ 4. Some class members belong to both the Pobletts group and the Wells Fargo

[2] For example, in their recent letter supplement, Plaintiffs argue that there are five different ways to prove overcharges for a certain subset of the class members. ECF 149 at 2–3. One way is the provision of enhanced title insurance policies, which this Court has explained in other cases is not an issue amenable to adjudication in a class action. *Edmondson*, 2023 WL 5336994, at *13.

[3] The chart was distributed to Wells Fargo's retail loan processing employees in March 2010 for use as a reference when analyzing title costs for certain types of loans. ECF 101-24 at 139:4–12, 151:5–10. Another version of the chart using updated data was distributed internally by Wells Fargo in 2013. ECF 102-2 at 90:7–11. If the title charges on a Wells Fargo retail loan exceeded the 80th percentile amount for the state where the loan was issued, this signaled to Wells Fargo employees that the cost of the title services was unreasonable. ECF 101-24 at 153:1–14. Plaintiffs claim that the chart provides an "objective measure" of the customary and reasonable costs of title services throughout the relevant period. ECF 97-1 at 40.

group because their loans were processed by Pobletts's branch and their fees exceeded the 80th percentile number. Bezek and Harris belong to the Wells Fargo group only.

The Wells Fargo chart has been a topic of discussion throughout this litigation. *See, e.g.*, ECF 115 at 15–22. By contrast, only at the recent status conference did Plaintiffs first explain their theory of the Pobletts group, by describing the number of class members belonging to that group and the anticipated method of calculating their overcharges, which are not governed by the 80th percentile chart. This Court remains uncertain about how any calculation of overcharges would occur, because of the generalities in Zuckerberg's description of how he paid kickbacks to Pobletts (for example, subtracting $500 to $600 from an unspecified calculation of "[c]harges to the borrowers"). ECF 94-16 ¶ 4. It is clear, though, that for class members who fall within both groups, the calculation of overcharges under the Pobletts group method and the Wells Fargo group method would lead to two different overcharge numbers.[4] ECF 47. Further, the existence of these two inconsistent methods of determining overcharge would call both theories into question as the appropriate way to determine whether any particular class member was overcharged. Finally, and importantly, there is no class representative who is a member of the Pobletts group, and the existing class representatives, Bezek and Harris, have some disincentive to forcefully advocate for the proposed Pobletts group method of calculation, given that it is inconsistent with the Wells Fargo theory on which they personally can recover.

Accordingly, this Court no longer believes that the class as presently defined meets the criteria for Rule 23 class treatment. "An order that grants or denies class certification may be

[4] For example, a Maryland borrower who paid $1000 for settlement services might receive $250 under one permutation of a Pobletts calculation (subtracting $500 and dividing the remainder by two), but the same borrower might receive up to $503 if the Wells Fargo 2010 chart is used, since the 80th percentile figure in that chart is $497. That borrower would be disadvantaged if a jury is permitted to choose between the two theories as opposed to simply being presented with the theory that results in a greater award.

altered or amended before final Judgment." Fed. R. Civ. P. 23(c)(1)(C). "Indeed, 'an order certifying a class must be reversed if it becomes apparent, at any time during the pendency of the proceeding, that class treatment of the action is inappropriate." *Minter v. Wells Fargo Bank, N.A.*, No. 07-CV-3442, 2013 WL 1795564, *2 (D. Md. Apr. 26, 2013) (quoting *Stott v. Haworth*, 916 F.2d 134, 139 (4th Cir.1990)). But "decertification is a drastic step, not to be taken lightly." *Alig v. Quicken Loans Inc.*, No. 12-CV-114, 2017 WL 5054287, at *10 (N.D.W. Va. July 11, 2017) (quoting 3 NEWBERG ON CLASS ACTIONS § 7:37 (5th ed. 2013)). "Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160 (1982); *see also Piotrowski v. Wells Fargo Bank, NA*, No. 11-CV-3758, 2015 WL 4602591, at *5 (D. Md. July 29, 2015) ("The court possesses the power to modify the class definition."). This Court has previously amended the class definition rather than outright decertifying a class that no longer meets Rule 23's requirements. *See In re Titanium Dioxide Antitrust Litig.*, 962 F. Supp. 2d 840, 863 (D. Md. 2013) (redefining class because of typicality, commonality, and predominance concerns related to differences in contractual relationships); *cf. In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig.*, 341 F.R.D. 128, 149 (D. Md. 2022) (concluding, at the certification stage, that certain classes did not satisfy Rule 23's typicality requirement, but nonetheless amending the class definitions rather than denying certification outright), *vacated on other grounds,* 78 F.4th 677 (4th Cir. 2023)*, reinstated*, No. 19-CV-2879, 2023 WL 8247865 (D. Md. Nov. 29, 2023).

Rule 23(a) requires that (1) the alleged class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the representatives' claims are typical of the claims of the class, and (4) the representatives will fairly and adequately protect the interests of the class. After satisfying the Rule 23(a) prerequisites, the plaintiffs must

show that the proposed class action falls within one of the categories enumerated in Rule 23(b). *E.g., Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 423 (4th Cir. 2003). Here, Plaintiffs sought and were granted class certification pursuant to Rule 23(b)(3). ECF 47 at 9–15; ECF 48 ¶¶ 6–7. Under that rule, a class may be certified if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

In light of the changed circumstances occasioned by the disclosure of the Pobletts group theory in preparation for trial, this Court believes that the Plaintiffs cannot fulfill the adequacy and typicality requirements to represent the presently certified class, for the reasons stated above. Moreover, a class action cannot be superior to other methods of adjudication where there will be no practical way to advise a jury on a workable method of assessing harm or calculating damages, and where convincing the jury of one theory might lead the jury to reject conflicting or inconsistent theories being asserted by other class members. However, the Plaintiffs' claims remain typical of the claims of the Wells Fargo group, and the Plaintiffs will fairly and adequately protect the interests of that group, which continues to be sufficiently numerous to warrant class treatment. This Court therefore finds it appropriate to revise the class definition to restrict it to the Wells Fargo group, which can be represented by Bezek and Harris in a manner fulfilling the requirements of Rule 23. Thus, the class certification order will be amended to define the class as:

> All individuals in the United States who were borrowers on a federally related mortgage loan (as defined under the Real Estate Settlement Procedures Act, 12 U.S.C. § 2602) originated or brokered by First Mariner Bank for which Genuine Title provided a settlement service, as identified in Section 1100 on the HUD-1, between January 1, 2009 and December 31, 2014, and whose HUD-1 reflects the payment of title, abstract, search and/or examination services exceeding the 80th percentile cost in their state according to the then-applicable Wells Fargo Chart. Exempted from this class is any person who, during the period of January 1, 2009

> through December 31, 2014, was an employee, officer, member and/or agent of First Mariner Bank, Genuine Title LLC and/or Competitive Advantage Media Group LLC.

This Court is persuaded that the class as redefined satisfies the requirements of Rule 23. There will be a coherent, classwide way to prove (or, from Defendant's perspective, disprove) that each class member has standing given a uniform theory of overcharge, and there will be no conflicts within the proof adduced among the various class members. While the class members may have suffered different amounts of overcharge, the jury will have a single formula to apply to determine whether any overcharges occurred and in what amount.

This Court also considers whether this amended class definition creates an impermissible fail-safe class, defined as "one that requires a finding of liability before ascertaining whether an individual is a class member." *Chado v. Nat'l Auto Inspects., LLC*, No. 17-CV-2945, 2019 WL 1981042, at *4 (D. Md. May 3, 2019). Here, class membership does not depend on a finding of liability. A jury may conclude that a borrower was charged greater than the 80th percentile amount on the Wells Fargo chart, but that the charges reflected legitimate settlement services rather than an illegal kickback arrangement. Or a jury may conclude that kickbacks were paid, but that some of all of the class members were still charged the same amount they would have otherwise paid without suffering any additional overcharge, particularly given the unregulated capitalistic business model employed by these companies. In no sense, then, does meeting the criteria for membership in this class establish that a member has a valid claim. It simply demonstrates that the class member's claim can be appropriately adjudicated in a Rule 23 proceeding represented by these Plaintiffs.

Over the course of these proceedings, this Court has made rulings that might justifiably impact the decision of one or more class members to proceed with adjudicating their claims against

Defendant within the confines of this class action. Specifically, if class members believe that they might recoup higher damages under the Pobletts theory of calculation than the Wells Fargo theory of calculation, or if they believe they have title insurance overcharge damages that are excluded from this class action, they might now wish to opt out of this class and proceed to trial on an individual basis. This Court therefore will order that an opt-out notice be disseminated to the remaining class members to advise them of the fact that they may forfeit their opportunity to raise certain damages claims by remaining in this class action. The parties should also consider whether the class members should be advised of the possibility that they will be asked to appear and testify at trial, given Defendant's intention to call 25 class members as defense witnesses. The order accompanying this opinion will direct the parties to confer to try to agree on the form and substance of an opt-out notice. After receipt of a status update from the parties, this Court will schedule a status conference promptly to discuss any issues on which the parties cannot reach agreement. Unfortunately, scheduling of a trial date must await the completion of the opt-out procedure. Given the advanced age of this case, however, this Court intends to enforce an expedited schedule.

For the foregoing reasons, this Court will enter a separate order amending the class certification order as described herein. The order will also direct the parties to confer regarding the form and prompt issuance of an opt-out notice fairly advising remaining class members that they may be foregoing certain categories of damage claims by choosing to proceed in this class action versus pursuing an individual case.

Dated: December 13, 2023

/s/
Stephanie A. Gallagher
United States District Judge

Exhibit

5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

JAMES CROUSE, **Plaintiff,** **v.** **FIRST NATIONAL BANK OF PENNSYLVANIA,** **Defendant.**	**Civil Action No.: 1:24-cv-01216-SAG**

PLAINTIFF'S MOTION TO REMAND

Plaintiff James Crouse, on behalf of himself and the entire class of persons similarly situated, by and through undersigned counsel, move pursuant to 28 U.S.C. § 1447(c), that the present case be remanded to the Circuit Court of Baltimore County, Maryland.

For the reasons set forth in the accompanying Memorandum of Law, incorporated herein, Defendant has failed, and will not be able, to allege facts sufficient to establish this Court's subject matter jurisdiction and that removal is permitted under 28 U.S.C. § 1441. Remand is mandatory. 28 U.S.C. § 1447(c).

Plaintiff respectfully requests this Court GRANT Plaintiff's Motion and remand this action to the Circuit Court for Baltimore County, Maryland. A proposed order is provided.

[SIGNATURES ON FOLLOWING PAGE]

Dated: April 30, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that on this 30th day of April, 2024, I served copies of the Plaintiff's Motion to Remand via this Court's CM/ECF system to counsel of record for the parties.

_____/s/_____
Melissa L. English, Esq, #19864

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

JAMES CROUSE, **Plaintiff,** **v.** **FIRST NATIONAL BANK OF PENNSYLVANIA,** **Defendant.**	**Civil Action No.: 1:24-cv-01216-SAG**

MEMORANDUM OF LAW SUPPORTING PLAINTIFF'S MOTION TO REMAND

Plaintiff James Crouse, on behalf of himself and the entire class of persons similarly situated, by and through undersigned counsel, file this Memorandum of Law in support of Plaintiff's Motion for Remand, and respectfully request the Motion be granted.

INTRODUCTION

It is axiomatic that federal courts are courts of limited jurisdiction. One of the most important limitations on federal jurisdiction are the requirements of Article III of the Constitution, establishing the requirements for standing. These requirements apply in federal – but not state – courts. On removal from state court, the removing party bears the burden of establishing the federal court's subject matter jurisdiction, including those requirements of Article III.

Plaintiff James Crouse filed this action in the Circuit Court for Baltimore County, Maryland. Defendant First National Bank of Pennsylvania removed this case from that court, invoking federal jurisdiction. But Defendant's notice of removal is silent as to the jurisdictional requirements of Article III of the U. S. Constitution; it has failed to plead that plaintiff has suffered a concrete injury fairly traceable to its conduct that this Court may remedy. The removed

Complaint contains no standing allegations. Without establishing facts sufficient to support Plaintiff's Article III standing, Defendant has failed to properly plead the most basic jurisdictional prerequisites for removal – this court's subject matter jurisdiction – and 28 U.S.C. § 1447(c) dictates that this action must be remanded back to the state court in which it was filed.

Plaintiff brings a factual challenge to subject matter jurisdiction such that to meet its burden to prove this Court's subject matter jurisdiction Defendant must prove the facts supporting Mr. Crouse's concrete injury and traceability to First Mariner by a preponderance of the evidence under the standard applicable to summary judgment. Defendant cannot do so because it has already sought summary judgment in the related case *Bezek v. First National Bank of Pennsylvania*, Case No. 1:17-cv-2902-SAG, pending before this Court, that Mr. Crouse, in particular, lacks standing for the lack of concrete injury traceable to First Mariner. Defendant can neither carry its burden to prove subject matter jurisdiction nor fulfill the Rule 11 certification removal requires.

The requirement that the party removing an action carry the burden of demonstrating the court's jurisdiction means that Defendant must choose which it wants – federal jurisdiction, in which case it must admit the factual predicates of standing necessary to invoke federal jurisdiction, or state court where it can continue to claim that Plaintiff was not injured by First Mariner's years long kickback scheme with Genuine Title. Defendant's notice of removal is deficient, and Plaintiff respectfully requests the case be remanded to the court from which it was improperly and inadequately removed. 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.")

LEGAL STANDARD

"Removal is proper only when a case originally could have been filed in federal court." *D.W. v. Chesterfield Cty. Sch.*, Civil Action No. 3:17cv679 (MHL), 2018 Dist. LEXIS 105144, at

*14 (E.D. Va. June 5, 2018) (citing 28 U.S.C. § 1441)(a)) *report and recommendation adopted at D.W. v. Chesterfield Cty. Sch.,* Civil Action No. 3:17cv679, 2018 U.S. Dist. LEXIS 105158 (E.D. Va. June 22, 2018); *Ruffin v. Lockheed Martin Corp.* No. WQD-13-2744, 2014 U.S. Dist. LEXIS 67148, at *9 (D. Md. May 15, 2014) (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (internal quotations omitted)). The removing party bears the burden of demonstrating by a preponderance of the evidence that the removed action could have been brought in federal court. *Ruffin*, 2014 U.S. Dist. LEXIS 67148, at *9 ((“The removing party has the burden of proving subject matter jurisdiction by a preponderance of the evidence.”); *Brown v. Brown*, No. 3:23-CV-00230-FDW-SCR, 2023 U.S. Dist. LEXIS 176331, at *10 (W.D.N.C. Sep. 27, 2023) (“The party seeking removal bears the burden of demonstrating that the district court has original jurisdiction.”)

“[E]stablishing federal subject matter jurisdiction requires more than showing the existence of a federal question. Article III standing requirements are jurisdictional and must also be satisfied.” *D.W.*, 2018 U.S. Dist. LEXIS 105144 at *15. “If a plaintiff lacks standing, then there is no case or controversy, and the court lacks subject-matter jurisdiction over their claims.” *Spokeo Inc. v. Robins*, 578 U.S. 330, 338 (2016).

The Fourth Circuit has been clear “[t]he burden of establishing standing to sue lies squarely on the party claiming subject-matter jurisdiction.” *Frank Krasner Enters. v. Montgomery Cty.*, 401 F.3d 230, 234 (4th Cir. 2005)); *see also, W. Va. Citizens Def. League, Inc. v. City of Martinsburg,* 483 F. App'x 838, 839 (4th Cir. 2012)(unpublished); *Soda v. U. S. Office of Pers. Mgmt.*, No. JKB-15-898, 2021 U.S. Dist. LEXIS 27649, at *10 (D. Md. Feb. 12, 2021)("[T]he burden of establishing standing 'lies squarely on the party claiming subject-matter jurisdiction.'") “Even on a motion to remand, the burden establishing the federal subject matter jurisdiction remains with

the party seeking removal to the federal forum." *Philips v. BJ's Wholesale Club, Inc.*, 591 F. Supp. 2d 822, 824 (E.D. Va. 2008) (citing *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994)); *see also, Meadows v. Northrop Grumman Innovation Sys.*, 436 F.Supp.3d 879, 886 (W.D. Va. 2020) ("the burden of establishing federal subject-matter jurisdiction falls on the party seeking removal to the federal forum….") (quoting *Vill. Builders on the Bay, Inc. v. Cowling*, 321 F.Supp.3d 624, 627 (E.D. Va. 2018)). If the moving party fails to meet that burden "…the case shall be remanded…". 28 U.S.C. § 1447(c); *D.W.*, 2018 Dist. LEXIS 105144 at *14 (removal is "strictly construed, and all doubts must be resolved in favor of remanding the case to state court.").[1]

The framework for evaluating the motion to remand has been helpfully described by the Ninth Circuit:

> Plaintiffs' arguments raise several novel procedural questions we have not yet squarely addressed: May a defendant establish removal jurisdiction under § 1442(a)(1) by adequately *alleging* the necessary facts, or must the defendant *prove* those facts before the case may proceed in federal court? If actual proof is required, must the district court resolve evidentiary challenges to the defendant's evidence before deciding whether removal jurisdiction exists? And if the existence of jurisdiction turns on disputed factual issues, should the district court resolve those issues itself or instead leave them to be resolved by the trier of fact?
>
> Fortunately, all of these questions have been answered in a procedurally analogous context—cases in which the plaintiff files suit in federal court and the defendant moves to dismiss for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). We'll start by sketching out the rules that govern in that context, for we conclude those same rules should apply here.

[1] Other Circuits follow the same rule, and mandate remand when a defendant fails to meet that burden. *See Collier v. SP Plus Corp.*, 889 F.3d 894, 896 (7th Cir. 2018); *Polo v. Innoventions Int'l, LLC*, 833 F.3d 1193 (9th Cir. 2016); *Wallace v. Conagra Foods, Inc.*, 747 F.3d 1025 (8th Cir. 2014); *Cox, Cox, Filo, Camel, & Wilson, LLC v. Sasol N. Am. Inc.*, 544 F. App'x 455 (5th Cir. 2013); *Me. Ass'n of Interdependent Neighborhoods v. Comm'r Mr. Dep't of Human Serv.*, 876 F.2d 1051 (1st Cir. 1989).

To invoke a federal court's subject-matter jurisdiction, a plaintiff needs to provide only "a short and plain statement of the grounds for the court's jurisdiction." Fed. R. Civ. P. 8(a)(1). The plaintiff must allege facts, not mere legal conclusions, in compliance with the pleading standards established by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 … (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 … (2009). Assuming compliance with those standards, the plaintiff's factual allegations will ordinarily be accepted as true unless challenged by the defendant.

Under Rule 12(b)(1), a defendant may challenge the plaintiff's jurisdictional allegations in one of two ways. A "facial" attack accepts the truth of the plaintiff's allegations but asserts that they "are insufficient on their face to invoke federal jurisdiction." The district court resolves a facial attack as it would a motion to dismiss under Rule 12(b)(6): Accepting the plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor, the court determines whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction.

A "factual" attack, by contrast, contests the truth of the plaintiff's factual allegations, usually by introducing evidence outside the pleadings. When the defendant raises a factual attack, the plaintiff must support her jurisdictional allegations with "competent proof," ... under the same evidentiary standard that governs in the summary judgment context. The plaintiff bears the burden of proving by a preponderance of the evidence that each of the requirements for subject-matter jurisdiction has been met. With one caveat, if the existence of jurisdiction turns on disputed factual issues, the district court may resolve those factual disputes itself.

Challenges to the existence of removal jurisdiction should be resolved within this same framework, given the parallel nature of the inquiry. The statute governing removal of civil actions tracks the language of Rule 8(a)(1), requiring the defendant to provide "a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). Like plaintiffs pleading subject-matter jurisdiction under Rule 8(a)(1), a defendant seeking to remove an action may not offer mere legal conclusions; it must allege the underlying facts supporting each of the requirements for removal jurisdiction. A plaintiff who contests the existence of removal jurisdiction may file a motion to remand, *see* 28 U.S.C. § 1447(c), the functional equivalent of a defendant's motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1). As under Rule 12(b)(1), a plaintiff's motion to remand may raise either a facial attack or a

> factual attack on the defendant's jurisdictional allegations, triggering application of the rules discussed above for resolving such challenges.

Leite v. Crane Co., 749 F.3d 1117, 1121-22 (9th Cir. 2014). The Fourth Circuit has long followed the same framework for factual attacks to subject matter jurisdiction on Rule 12(b)(1) motions. *See, e.g., Richmond, Fredericksburg & Potomac R.R. v. U.S.,* 945 F.2d 765, 768 (4th Cir. 1991).

ARGUMENT

I. Remand is required because Defendant has not established the Plaintiff's Article III standing or the court's subject matter jurisdiction.

As the removing party – and the party invoking the court's subject matter jurisdiction – Defendant bears the burden of establishing the Court's subject matter jurisdiction by a preponderance of the evidence including Plaintiff's Article III standing. *Strawn v. AT&T Mobility, LLC*, 530 F.3d 293, 296 (4th Cir. 2008) ("[I]t is the defendant who carries the burden of alleging in his notice of removal and, if challenged demonstrating the court's jurisdiction over the matter"). Defendant fails to carry the burden in the notice of removal which contains no representation of any fact establishing Plaintiff's Article III standing. ECF NO. The removed Complaint, ECF No. 3, contains no standing allegations and those allegations may not be presumed. *Pinkley, Inc. v. City of Frederick*, 191 F.3d 394, 399 (4th Cir. 1999) ("Federal courts are courts of limited subject matter jurisdiction, and as such there is no presumption that the court has jurisdiction. Thus the facts providing the court jurisdiction must be affirmatively alleged in the complaint.") (citing *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327, 327, 40 L. Ed. 444, 16 S. Ct. 307 (1895) (internal citation omitted)). Without a factual basis for the Court's subject matter jurisdiction, Defendant's removal, and notice thereof, is deficient, and remand is required.

II. Plaintiff raises a factual challenge to the jurisdictional allegations that Defendant must make to establish subject matter jurisdiction.

A factual challenge to jurisdiction points to "other facts, outside the four corners of the complaint," that draws into question the truthfulness of the jurisdictional allegations "or otherwise preclude the exercise of subject matter jurisdiction." *U.S. v. Alpharma, Inc.*, 928 F. Supp. 2d 840, 848 (D. Md. 2013)(citing *Kerns v. U.S.*, 585 F.3d 187, 192 (4th Cir. 2009)). "A factual attack … need only challenge the truth of the defendant's jurisdictional allegations by making a reasoned argument as to why any assumptions on which they are based are not supported by evidence." *Harris v. KM Indus., Inc.*, 980 F.3d 694, 700 (9th Cir. 2020).

With a factual challenge, Defendant "bears the burden of proving the facts supporting subject matter jurisdiction by a preponderance of the evidence." *Mack Trucks, Inc. v. Int'l Union United Auto. Aero.*, Civil Action No. GLR-19-1421, 2020 U.S. Dist. LEXIS 161424, at *6 (D. Md. Sep. 3, 2020) (citing *U.S. ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 347 (4th Cir. 2009)). To meet this burden, Defendant must prove the facts supporting Mr. Crouse's concrete injury and the traceability of that injury to First Mariner by a preponderance of the evidence under the standard applicable to summary judgment. Defendant's removal papers do not meet this burden.

Defendant will not be able to meet its burden for a simple reason: Defendant does not believe the necessary facts to be true or supported by evidence. This is fatal in the context of removal which can be obtained only when supported by Fed. R. Civ. P. 11. 28 U.S.C. 1446 (a) ("A defendant … desiring to remove any civil action …shall file … a notice of removal signed pursuant to Rule 11…"). That rule requires Defendant to make the representations required by Rule 11 as to the factual predicates of Mr. Crouse's Article III standing. *See,* Fed. R. Civ. P. 11(b)(3) (requiring the attestation that "to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances …(3) the factual contentions have evidentiary support or… will likely have evidentiary support…"). Defendant was clear in

Bezek that there is no factual or evidentiary support for the contention that Mr. Crouse, or any member of the alleged class, suffered a concrete injury fairly traceable to First Mariner:

> and this Court should not accept their invitation to do so here. Additionally, Plaintiffs have proffered no competent evidence that they (or any class member) actually paid increased settlement costs as a result of any purported kickback paid by Genuine Title to the originating loan officer, leaving the Court with no basis on which to infer that they have standing.

Def. Reply in Support of Mot. S. J., ECF No. 102 at 1-2, Case No. 1:17-cv-2902-SAG; *see also,* ECF No. 102 at 9 ("Plaintiffs have failed to proffer any evidence that they (or any class member) in fact paid Genuine Title more for title services than they otherwise would have paid in the absence of an alleged kickbacks."). Defendant identified that Mr. Crouse, in particular, could not establish an cognizable injury because his title examination and title abstract/search charges did not exceed the 80th percentile amount on the applicable Wells Fargo State Averages Chart. *See.* ECF No. 102 at n.21 (identifying the Crouse transaction as Pls. Ex. 7-bg). Defendant's belief that Mr. Crouse has not and cannot demonstrate a concrete injury traceable to First Mariner makes it impossible for Defendant to present the proof of Mr. Crouse's Article III standing or complete the Rule 11 certification necessary to avoid remand.

It is on this basis that Plaintiff mounts a factual challenge to the jurisdictional requirements underlying Defendant's removal.

III. If Defendant fails to carry his evidentiary burden, remand is mandatory.

Removal jurisdiction is strictly construed. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941). If federal jurisdiction is doubtful, remand is necessary. *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994); 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."). If Defendant cannot, or refuses, to make the evidentiary showing required to defeat

a factual challenge to the jurisdictional allegations underlying removal, then federal jurisdiction is in doubt and remand is required.

Dated: April 30, 2024

Respectfully Submitted,

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Counsel for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY certify that on this 30th day of April, 2024, I served copies of the foregoing Plaintiff's Motion to remand via this Court's CM/ECF system to counsel of record for the parties.

_____/s/_____
Melissa L. English, Esq, #19864

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

JAMES CROUSE, **Plaintiff,** **v.** **FIRST NATIONAL BANK OF PENNSYLVANIA,** **Defendant.**	**Civil Action No.: 1:24-cv-01216-SAG**

[PROPOSED] ORDER

Upon consideration of Plaintiff's Motion to Remand, and any response and reply thereto, it is this ____ day of _____, 2024, hereby,

ORDERED, that the motion be and is hereby GRANTED. It is further,

ORDERED, that the above case is hereby remanded to the Circuit Court of Baltimore County, Maryland.

_____
Hon. Stephanie A. Gallagher
United States District Judge

Exhibit
6

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES CROUSE	*	
Plaintiff,	*	
	*	**Civil Case No.: SAG-24-1216**
v.	*	
FIRST NATIONAL BANK OF PENNSYLVANIA	*	
Defendant.	*	

* * * * * * * * * * *

MEMORANDUM OPINION

Plaintiff James Crouse ("Plaintiff") filed this Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607(a–b), lawsuit against the First National Bank of Pennsylvania ("Defendant" or "the Bank")[1] in the Circuit Court for Baltimore County, Maryland. The Bank removed the lawsuit to this Court, ECF 1, and Plaintiff has filed a motion to remand to state court, ECF 6. Defendant opposed the motion, ECF 9, and Plaintiff replied, ECF 11. The Court held a motions hearing on July 10, 2024. Both parties submitted supplemental briefing following the hearing. ECF 17, 18. For the reasons that follow, Plaintiff's Motion to Remand will be granted.

I. BACKGROUND

This case is one in a series of class action lawsuits alleging violations of RESPA. Plaintiff alleges that the Bank received kickbacks in exchange for referring mortgage loans (including his) to a now-defunct title and settlement company. ECF 16, ¶ 2. Plaintiff was initially a member of the class in *Bezek v. First National Bank of Pennsylvania*, SAG-17-cv-2902 (D. Md.), which is

[1] First National Bank is a successor of First Mariner Bank, the bank that brokered the mortgage loans at issue here.

pending before this Court. That case included extensive litigation over the standing of the class (which, at that point, included Mr. Crouse). Class counsel represented in briefing that "each member of the … class ha[d] suffered a concrete injury and ha[d] standing." *Bezek*, SAG-17-cv-2902 (D. Md), ECF 97-1 at 29. The Court found that the named plaintiffs in *Bezek* had standing because they had offered sufficient evidence to create a genuine dispute that they were overcharged. *Bezek v. First Nat'l Bank of Pennsylvania*, 2023 WL 348967, *10 (D. Md. Jan. 20, 2023). This Court later amended the class certification order to exclude class members whose service fees did not exceed the 80th percentile Wells Fargo chart. *Bezek v. First Nat'l Bank of Pennsylvania*, 2023 WL 8633604, *2 (D. Md. Dec. 13, 2023). Because Mr. Crouse did not allege his service fees exceeded the 80th percentile, he was excluded alongside other plaintiffs. *Id.* at 3–4.

Plaintiff filed this lawsuit on behalf of himself and persons similarly situated on February 9, 2024, in the Circuit Court for Baltimore County, Maryland. *See* ECF 1. Defendant was served on March 27, 2024, and timely removed the case to this Court on April 25, 2024, citing federal-question jurisdiction and diversity jurisdiction as grounds for removal. *Id.* (citing 28 U.S.C. §§ 1331, 1332). Plaintiff filed an Amended Complaint on July 11, 2024, to expressly exclude members of the *Bezek* class from the proposed class definition. ECF 16.

II. LEGAL STANDARD

Federal district courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. They also have "original jurisdiction of all civil actions where the matter in controversy exceeds $75,000" and "is between citizens of different States." 28 U.S.C. § 1332(a)(1). All other cases are reserved to the state courts.

Cf. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction.").

When a case is removed to federal court, courts "strictly construe the removal statute and resolve all doubts in favor of remanding the case to state court." *Receivership Estate of Mann Bracken, LLP v. Cline*, 2012 WL 2921355, at *2 (D. Md. July 16, 2012) (internal quotation marks omitted) (quoting *Stephens v. Kaiser Found. Health Plan of the Mid–Atl. States, Inc.*, 807 F. Supp. 2d 375, 378 (D. Md. 2011)). As the Fourth Circuit has explained, "The burden of establishing federal jurisdiction is placed upon the party seeking removal. Because removal jurisdiction raises significant federalism concerns, we must strictly construe removal jurisdiction. If federal jurisdiction is doubtful, a remand is necessary." *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994) (internal citations omitted). Nevertheless, because the decision to remand is largely unreviewable, district courts should be cautious about denying a defendant access to a federal forum. *See Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 988 F. Supp. 913, 914–15 (D. Md. 1997).

Standing is a doctrine rooted in the traditional understanding of an Article III "case or controversy." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). Standing consists of three elements: "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). To establish injury in fact, "a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 339 (quoting *Lujan*, 504 U.S. at 560).

Plaintiffs cannot satisfy the strictures of Article III by alleging only "a bare procedural violation." *Spokeo*, 578 U.S. at 341. Rather, plaintiffs must have suffered a concrete harm as a result of the "defendant's statutory violation that is the type of harm Congress sought to prevent when it enacted the statute." *Baehr v. Creig Northrop Team, P.C.*, 953 F.3d 244, 253 (4th Cir. 2020) (quoting *Curtis v. Propel Prop. Tax Funding, LLC*, 915 F.3d 234, 240–41 (4th Cir. 2019)). The Fourth Circuit has explained that under RESPA, "the deprivation of impartial and fair competition between settlement services providers" is not the kind of harm Congress sought to prevent and, thus, will not confer Article III standing. *Id.* at 254. Rather, "the harm it sought to prevent is the increased costs … for settlement services." *See id.* (holding that deprivation of fair competition—"untethered from any evidence that the deprivation increased settlement costs—is not a concrete injury under RESPA"); *see also Edmondson v. Eagle Nat'l Bank*, 344 F.R.D. 72, 77 (D. Md. 2023).

III. DISCUSSION

As the party seeking removal, the Bank bears the burden of establishing federal jurisdiction. *Burrell v. Bayer Corp.*, 918 F.3d 372, 380–81 (4th Cir. 2019); *see also Strawn v. AT&T Mobility, LLC*, 530 F.3d 293, 296 (4th Cir. 2008) (noting that "it is the defendant who carries the burden of alleging in his notice of removal and, if challenged demonstrating the court's jurisdiction over the matter"); *United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 348 (4th Cir. 2009). Defendant faces a challenging hurdle because Plaintiff has transparently crafted his Complaint to circumvent federal jurisdiction. Nowhere in the Complaint is any assertion that Plaintiff or any person he seeks to represent suffered any concrete injury. *See* ECF 16. Rather, Plaintiff has taken care only to allege the kind of bare RESPA violation that the Fourth Circuit expressly found was not a concrete injury. *Baehr v. Creig Northrop Team, P.C.*, 953 F.3d 244, 254

(4th Cir. 2020) ("[T]he deprivation of impartial and fair competition between settlement services providers—untethered from any evidence that the deprivation thereof increased settlement costs—is not a concrete injury under RESPA."). Here, Plaintiff has not alleged that he was overcharged or suffered any increased costs in his Complaint, nor has any party adduced evidence that he was overcharged.[2] He has not tried to allege that he personally suffered any harm at all, but rather that the Bank violated RESPA, and he had loans with the Bank. *See* ECF 11 at 9–10 (noting that the complaint contains only a bare statutory violation).

To be sure, this is an unconventional standing dispute. Plaintiff represented to this Court in *Bezek* that he was overcharged, and he has flip-flopped here to avoid federal jurisdiction (and presumably, this Court's prior rulings). But the Court is not convinced that statements made by counsel in a prior lawsuit, where Mr. Crouse was a class member, could bind Mr. Crouse in a separate suit. And even if they could, this Court's obligation to refrain from hearing matters over which it lacks subject-matter jurisdiction is not a flexible one. *See Baehr*, 953 F.3d at 258. The Complaint contains no allegation of any concrete injury, and Defendant has failed to allege a concrete injury in either its notice of removal or its response to this Motion. Plaintiff lacks Article III standing.

Despite the unconventional backstory in this case, it ultimately does not present a particularly unusual question. Where a federal court finds a case that has been removed from state court—even one that presents a federal question—does not satisfy the requirements of Article III

[2] Defendant suggests that filing this lawsuit is evidence that Plaintiff suffered a concrete injury. *See* ECF 9 at 5–6. This Court is unaware of any court ever finding that merely filing a lawsuit evinces an Article III injury. It is right that, in general, filing a complaint in federal court would imply a good faith belief that Article III standing exists. But this complaint was filed in Maryland state court, where a different and seemingly less demanding standard applies.

standing, it is obligated to remand that matter to state court. *See, e.g.*, *Benton v. CVS Pharmacy*, 604 F.Supp.3d 889 (N.D. Cal. 2022) (Food, Drug, and Cosmetic Act); *Katz v. Six Flags Great Adventure, LLC*, 2018 WL 3831337 (D.N.J. Aug. 13, 2018) (Fair and Accurate Credit Transactions Act); *Mittenthal v. Florida Panthers Hockey Club, Ltd.*, 472 F.Supp.3d 1211 (S.D. Fl. 2020) (Telephone Consumer Protection Act).

Because this Court lacks subject-matter jurisdiction, this case must be remanded.

IV. CONCLUSION

For the reasons stated above, Plaintiff's Motion to Remand is GRANTED and this case will be REMANDED to the Circuit Court for Baltimore County, Maryland. A separate Order follows.

Dated: August 30, 2024

/s/
Stephanie A. Gallagher
United States District Judge