BRIAN MCPEAKE, ET AL.	*	**IN THE**
Plaintiff	*	**CIRCUIT COURT**
v.	*	**FOR**
UNIVERSAL MORTGAGE AND FINANCE, INC.	*	**BALTIMORE COUNTY**
	*	**Case No.: C-03-CV-21-001935**
Defendant	*	
	*	

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MEMORANDUM OPINION AND ORDER

Presently before the Court is Brian McPeake, Elmer and Nichole Romero, and George and Judy Younces' ("Plaintiffs") Motion for Class Certification. On June 21, 2021, Plaintiffs filed their Class Action Complaint and Demand for a Jury Trial, alleging that Universal Mortgage and Finance, Inc. ("Defendant") engaged in illegal kickback schemes in violation of the Real Estate Settlement Procedures Act ("RESPA"). On September 17, 2021, Defendant filed a Motion to Dismiss Plaintiffs' Class Action Complaint and Demand for a Jury Trial. The Court denied Defendant's Motion to Dismiss on November 8, 2021. On November 18, 2021, Defendant filed its Answer to Plaintiffs' Class Action Complaint and Demand for a Jury Trial. On August 12, 2022, Plaintiffs filed their Motion for Class Certification and Request for Hearing. Defendant filed its Opposition to Plaintiffs' Motion for Class Certification on August 30, 2022, and on October 3, 2022, Plaintiffs filed their Reply in Support of their Motion for Class Certification.

On November 14, 2022, this Court held a hearing on Plaintiffs' Motion for Class Certification which this Court held *sub-curia* and now issues its Memorandum Opinion and Order.

I. Background

Defendant is a Maryland corporation with its principal place of business located in Anne Arundel County. Plaintiffs allege Defendant participated in multi-year kickback schemes with title and settlement companies known as All Star Title, Inc. ("All Star"), Genuine Title, LLC ("Genuine Title"), and Competitive Title Agency, Inc. ("Competitive Title"), collectively ("Title Companies"). All Star, Genuine Title, and Competitive Title are settlement service companies located in Baltimore County. Plaintiffs allege Defendant assigned and referred residential mortgage loans to the Title Companies in exchange for illegal kickbacks in violation of the Real Estate Settlement Procedures Act ("RESPA"), specifically 12 U.S.C. § 2607(a). 12 U.S.C. § 2607(a) which states, in pertinent part,

> 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.

Plaintiffs allege Defendant entered into separate agreements with the Title Companies to conceal alleged kickbacks through marketing fees charged to borrowers. The alleged marketing fees were charged to borrowers in conjunction with settlement and titling fees listed jointly as one charge for settlement and titling services on borrowers' HUD-1 settlement statements. Plaintiffs allege the charges in excess of the amount which the Title Companies actually charge for their settlement and titling services was distributed to Defendant through third-party marketing companies and sham marketing companies owned by employees of Defendant. These kickbacks allegedly occurred as part of a consistent scheme over the course of an eight (8) year period, from 2010 through 2018. Plaintiffs allege Defendant, over this eight (8) year period, received in excess of $174,000 of illegal kickbacks. Plaintiffs additionally allege 595 borrowers

were harmed as part of Defendant's kickback scheme with Title Companies and each of the 595 loans were federally related.[1] Out of the 595 loans impacted by the alleged kickback scheme, forty-eight (48) loans were referred and assigned to All Star from 2010 through 2011, 272 loans were referred and assigned to Genuine Title from 2012 through 2014, and at least 275 loans were referred and assigned to Competitive Title from 2014 through 2018.

Plaintiffs allege Defendant and All Star entered into an arrangement whereby All Star would distribute the amount in excess of All Star's settlement and titling service charge through third-party marketing companies for the referral of loans by Defendant. Allegedly, All Star typically charged $1,000 to lenders for its settlement and titling services. Plaintiffs allege Defendant referred Elmer and Nichole Romeros' ("the Romeros") loan to All Star, and All Star charged the Romeros $1,438.17 for its title and settlement services—an excess of $438.17.

Plaintiffs allege Defendant and Genuine Title entered into an arrangement whereby the amount charged in excess of settlement and titling services would be distributed through National Bond Marketing, LLC, in which Ajay Bhan, a loan officer and branch manager for Defendant, was the sole member and registered agent. Plaintiffs additionally allege that Defendant referred George and Judy Younces' ("the Younces") loan to Genuine Title and charged the Younces $1,865 for settlement and titling services, of which an excess of $632.50 was distributed to National Bond Marketing, LLC for the benefit of Defendant.

Plaintiffs allege Defendant and Competitive Title entered into an arrangement whereby the amount charged in excess of settlement and titling services would be distributed through

[1] Federally-related loans, as defined in RESPA, are, "any loan . . . which . . . is made in whole or in part by any lender the deposits or accounts of which are insured by any agency of the Federal Government, or . . . is regulated by any agency of the Federal Government." 12 U.S.C. § 2602(1)(B)(i).

various marketing companies—such as Iconic Results and C&D Marketing, LLC—for the benefit of Defendant. Competitive Title allegedly entered into an agreement with the Defendant to charge $687.50 for a title exam fee and $687.50 for a title abstract fee ($1,375), plus title insurance for titling and settlement services rendered to Mr. Brian McPeake ("Mr. McPeake"). The Plaintiffs allege the Defendant referred Mr. McPeake's loan to Competitive Title who charged him an amount totaling $1,954.24 for settlement and titling services.

Plaintiffs now seek class certification of a Universal Mortgage class for the 595 borrowers of Defendant's loans, and additionally seek class certification for an All Star subclass for the forty-eight (48) borrowers referred and assigned to All Star, a Genuine Title subclass for the 272 borrowers referred and assigned to Genuine Title, and a Competitive Title subclass for the 275 borrowers referred and assigned to Competitive Title. When it is appropriate, proposed classes "may be divided into subclasses and each subclass treated as a class." *See* RULE 2-231(e); *see also Silver v. Greater Baltimore Med. Ctr., Inc.*, 248 Md. App. 666, 708 (2020). The Romeros, the Younces, and Mr. McPeake would be class representatives for the Universal Mortgage class. The Romeros would be class representatives for the All Star subclass, the Younces would be class representatives for the Genuine Title subclass, and Mr. McPeake would be the class representative for the Competitive Title subclass.

II. Questions Presented

1. May representatives to a class action adequately represent their class where unlawful referrals are alleged and the representatives are unaware of the unlawful referrals?
2. Is a class action superior to other methods for the fair and efficient adjudication of this controversy when a multitude of factual questions are yet to be proven?

3. Is the Circuit Court for Baltimore County a desirable forum for litigation of this controversy when Defendant's principal place of business is located in Anne Arundel County?
4. Are the individual class representatives' interests in this litigation so great as to cause concern that the representatives are more likely to favor their own interests over the interests of the class?
5. Does RESPA's 1-year statutory limitations period pose a threat to the maintenance of the class action?

III. Legal Standard

The Maryland Rules set forth prerequisites for class certification. These prerequisites are enumerated in RULE 2-231(b),

> One or more members of a plaintiff class may sue as representative parties on behalf of all only if[:]
>
> (1) [(numerosity)] the class is so numerous that joinder of all members is impracticable,
>
> (2) [(commonality)] there are questions of law or fact common to the class,
>
> (3) [(typicality)] the claims of the representative parties are typical of the claims of the class, and
>
> (4) [(adequacy of representation)] the representative parties will fairly and adequately protect the interests of the class.

RULE 2-231(c) provides that class actions may be maintained if the requirements of RULE 2-231(b) are met and, . . .

> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

> (A) the interest of members of the class in individually controlling the prosecution of separate actions,
>
> (B) the extent and nature of any litigation concerning the controversy already commenced by members of the class,
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum,
>
> (D) the difficulties likely to be encountered in the management of a class action.

Id.

"A trial court must conduct a 'rigorous analysis' of these prerequisites before certifying a class" *Creveling v. Gov't Emps. Ins. Co.*, 376 Md. 72, 89 (2003) (quoting *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982)). "In so doing, a trial court should accept a plaintiff's allegations as true[.]" *Id.* (citing *Philip Morris Inc. v. Angeletti*, 358 Md. 689, 726 (2000)). "[However, the court] may look beyond the pleadings to determine whether class certification is appropriate." *Id.* (citing *Falcon*, 247 U.S. at 160; *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996) ("Going beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.").

"A trial court may not, however, conduct a review of the merits of the lawsuit." *Id.* (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177–78 (1974), which noted, "[i]n determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met[.]").

> Class relief is 'peculiarly appropriate' when the 'issues involved are common to the class as a whole' and when they 'turn on questions of law applicable in the same manner to each member of the class.' For in such cases, 'the class-action device saves the resources of both the courts and the parties by permitting an issue

> potentially affecting every [class member] to be litigated in an economical fashion.

Creveling, 376 Md. at 89. (quoting *Falcon*, 457 U.S. at 155). "[Appellate courts] ordinarily review a trial court's decision regarding whether to certify a class action for an abuse of discretion." *Id.* at 90.[2]

IV. Discussion

"[C]lass action status should not be conferred upon cases that 'would degenerate in practice into multiple lawsuits separately tried[.]'" *Philip Morris*, 358 Md. at 728 (quoting FED. R. CIV. P. 23 Advisory Committee's Note to 1966 Amendments, *reprinted in* 39 F.R.D. 69, 103 (1966)). Thus, the Maryland Rules dictate that a class may be certified only if the enumerated prerequisites are satisfied and the class action is maintainable. *See* RULE 2-231(b)–(c). These enumerated prerequisites are numerosity, commonality, typicality, and adequacy of class representation. *See id.* at 2-231(b). When looking beyond the pleadings Maryland courts may glean from both applicable state and federal substantive case law in consideration of class certification. *See* FED. R. CIV. P. 23; *see also Philip Morris*, 358 Md. at 725–28.[3]

1. Numerosity

Numerosity is the first prerequisite to class certification. *See* RULE 2-231(b)(1). "The purpose of the numerosity requirement is to ensure that there is a need for the class action; if joinder of the actions is practicable, then the class action device is unnecessary." *Philip Morris*, 358 Md. at 732. The policy rationale behind the numerosity requirement is two-fold, for

[2] *Creveling* holding the trial court did not abuse its discretion when denying class certification due to lack of commonality. *See Creveling*, 376 Md. at 90.

[3] The court in *Philip Morris* correlating RULE 2-231 to RULE 23 amid discussion of threshold requirements and maintenance of class actions, as RULE 2-231 models itself after RULE 23 to the Federal Rules of Civil Procedure.

litigants—especially those with small individual claims—to have access to the legal system and to promote judicial economy. *See id.* at 732. "Whether numerosity is met depends on a court's practical judgment, given the facts of a particular case." *Id.* (citing *Gen. Tel. Co. of the Nw. v. Equal Emp. Opportunity Comm'n*, 446 U.S. 318, 330 (1980) ("The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations.")). Numerosity is satisfied when there are hundreds, or thousands, of members to a class, *pariter*, courts have found classes with as few as forty (40) members to be sufficiently large enough to make joinder impracticable. *See id.*; *see also Mitchell-Tracey v. United Gen. Title Ins. Co.*, 237 F.R.D. 551, 556 (D. Md. 2006) (citing *Town of New Castle v. Yonkers Contracting Co.*, 131 F.R.D. 38, 40 (S.D.N.Y. 1990).

In the instant case Plaintiffs are seeking certification of a Universal Mortgage class with 595 members, and All Star, Genuine Title, and Competitive Title subclasses with forty-eight (48), 272, and 275 members respectively. Each proposed class member is a residential mortgage borrower. Each borrower is individually alleging Defendant engaged in an illegal scheme with various titling and settlement companies for the purpose of providing kickbacks to Defendant for the referral of borrowers' loans. The 595 claims alleged are each small individual claims which constitute the alleged combined harm of approximately $174,000. The policy behind the numerosity prerequisite is to afford small claims litigants—such as the claimants here—access to the legal system. *See Philip Morris*, 358 Md. at 732. Additionally, joinder of even forty-eight (48) litigants to a single claim would be impracticable and would run counter to judicial economy. Thus, as pleaded, this Court finds the numerosity prerequisite satisfied.

2. Commonality

In consideration of the commonality prerequisite, courts are only constrained to the determination of whether questions of common fact or law are present in the action. *See* RULE 2-231(b)(1); *see also Philip Morris*, 358 Md. at 734. This threshold is not high and is generally met with relative ease, as this prerequisite "does not ask [courts] to assess the common issues vis-à-vis individual issues, but only to ask whether common issues exist." *See id.* at 734–35. "Although the standard for commonality varies among jurisdictions, a common articulation requires that the lawsuit exhibit a 'common nucleus of operative facts.'" *Id.* at 734 (quoting *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992)). The rationale behind this less demanding prerequisite is that the issue of commonality is "subsumed in the more exacting requirement of predominance of common issues over individual questions[.]" *Id.* at 737.

In the case at issue Plaintiffs allege Defendant engaged in kickback schemes in violation of RESPA. The only variances in the allegations at issue are: (1) that various Title Companies entered into agreements with Universal for kickbacks in violation of RESPA; (2) that various loan officers employed by Universal entered into the kickback agreements with the Title Companies; (3) the marketing companies that received the alleged kickbacks differed; and (4) that the amount in damages differs between the Plaintiffs. These alleged schemes span over a number of years and the alleged patterns of harm are nearly identical for each claimant. Therefore, questions of both law and fact are common throughout this action.

3. Typicality

The prerequisite of typicality is satisfied only if "the claims of the representative parties are typical of the claims of the class[.]" RULE 2-231(b)(1). The prerequisite's aim is to assure the

interest of the representative parties is aligned with those of the class members. *See Philip Morris*, 358 Md. at 737 (citing 1 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS, § 3.01, at 3–4 to 3–5 (3d ed. 1992)). In NEWBERG ON CLASS ACTIONS, Professor Newberg outlines the prerequisite in the following manner,

> [A] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims.

1 NEWBERG, *supra*, § 3.13, at 3–76 to 3–77. The requirement demands common-sense inquiry into the alignment of interests between the representatives and remaining class members. *See Philip Morris*, 358 Md. at 737–38. "Representative claims need not be identical to those of the rest of the class; instead, there must be similar legal and remedial theories underlying the representative claims and the claims of the class." *Id.* at 738. Thus, if each of the Plaintiffs' cases are factually distinct such distinction does not defeat typicality. *See id.* at 740. However, the Plaintiffs must sufficiently allege that "the same unlawful conduct was directed at or affected . . . the named plaintiff[s] and the class[es] sought to be represented[.]" *Id.* (quoting 1 NEWBERG, *supra*, § 3.13, at 3–77).

To ensure representative interests align with the remainder of the class, this Court will conduct analysis into the alignment of interests between the representative parties and remaining class members to this action:

The Romeros

The Romeros are representatives to the Universal class and All Star subclass. On or about August 2011, the Romeros obtained a federally-related VA residential refinance mortgage through the Defendant, via Mr. Michael Losten ("Mr. Losten")—a loan officer employed by

Defendant. Plaintiffs allege Mr. Losten referred the Romeros' loan to All Star for the performance of titling and settlement services. All Star then allegedly charged the Romeros $1,438.17 for titling and settlement services—allegedly $438.17 in excess of the typical $1,000 fee for the performance of such services. Plaintiffs allege the amount in excess was disbursed to third-party marketing companies for the benefit of Defendant and the amount in excess was a kickback disguised as the fee charged for the titling and settlement services by All Star within the Romeros' and All Star class members' HUD-1s.

The Younces

The Younces are representatives to the Universal class and Genuine Title subclass. On or about May 2012, the Younces obtained a conventional residential mortgage loan through Defendant, via Mr. Ajay Bhan ("Mr. Bhan")—a branch manager employed by Defendant. Plaintiffs allege Mr. Bhan referred the Younces' loan to Genuine Title for the performance of titling and settlement services. Genuine Title allegedly charged the Younces $1,865 for titling and settlement services—an alleged $632.50 in excess of the typical fee for the performance of such services. Plaintiffs allege the amount in excess was disbursed to National Bond Marketing, LLC, a company to which Mr. Bhan was the registered agent and sole member, for the benefit of Defendant. The amount in excess was alleged kickback disguised as the fee charged for the titling and settlement services by Genuine Title within the Younces' and Genuine Title class members' HUD-1s.

Mr. McPeake

Mr. McPeake is a representative to the Universal class and Competitive Title subclass. On or about June 2015, Mr. McPeake obtained a federally-related VA residential refinance mortgage through Defendant, via Mr. Ryan P. Bannahan ("Mr. Bannahan")—a loan officer

employed by Defendant. Plaintiffs allege Mr. Bannahan referred Mr. McPeake's loan to Competitive Title for the performance of titling and settlement services. Competitive Title allegedly charged Mr. McPeake $1,954.24 for titling and settlement services, with respect to which Plaintiffs allege Competitive Title charged a title exam fee for $687.50 and a title abstract fee for $687.50 plus title insurance under the HUD-1s for Mr. McPeake and the Competitive Title class members. Plaintiffs allege Defendant and Competitive Title entered a kickback arrangement where Competitive Title charged borrowers $1,375 plus title insurance. The Plaintiffs allege the amount in excess of the titling and settlement services was a kickback disguised as the fee charged for such services, and the kickback was disbursed to various marketing companies, such as Iconic Results and C&D Marketing, LLC, for the benefit of Defendant.

There is not a high degree of variance between each of the named representatives' and proposed class members' claims as all representatives borrowed from the Defendant. Additionally, Plaintiffs allege the Defendant engaged in a common scheme of entering into kickback arrangements with titling and settlement service companies where an amount charged in excess of the services rendered was allegedly disbursed to various marketing companies for the benefit of Defendant.[4] In the opinion of this Court, the Plaintiffs have successfully alleged a pattern indicating Universal received illegal kickbacks in violation of RESPA. These claims are typical among the representatives and class members.

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[4] The court in *Philip Morris* gave pause when concerned there was of a high degree of variance between the plaintiffs' claims, but stated the variance was to be further discussed under the predominance prong—not the typicality prerequisite. *See Philip Morris*, 358 Md. at 740. The court ultimately found typicality to be satisfied despite the high degree of variance between plaintiffs' claims stating, "[r]espondents have sufficiently alleged that the 'same unlawful conduct was directed at or affected both the named plaintiff[s] and the class[es] sought to be represented[.]'" *Id.* (quoting 1 NEWBERG, *supra*, § 3.13, at 3–77).

4. Adequacy of Representation

Representation is adequate when, "the representative parties will fairly and adequately protect the interests of the class." RULE 2-231(b)(1). This prerequisite's aim is to "ensur[e] that both the class representatives as well as class counsel are adequate to represent the interests of all class members." *Philip Morris*, 358 Md. at 740.

> The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. '[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members.'

Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 625–26 (1997) (quoting *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (in turn quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974))); *see also Philip Morris*, 358 Md. at 740–41. The prerequisite requires the named representatives to "have no conflicts of interest with class members and that [they] prosecute the action vigorously on behalf of the class." *See Philip Morris*, 358 Md. at 740 (quoting 1 NEWBERG, *supra*, § 3.01, at 3–5). The second factor to this prerequisite is "to verify that counsel is adequate to represent the class." *See id.* at 741. "This precondition also necessitates that a court focus on conflict of interest concerns, which represent '[b]y far the greatest difficulty for the courts in assessing whether attorneys are adequate representatives'" *Id.* at 741–42. (quoting 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1769.1, at 383 (2d ed.1986)).

Defendant does not contend that counsel for the Plaintiffs have conflicts of interest in this matter nor does Defendant attack the adequacy of counsels' ability to represent the proposed classes. Moreover, counsel for the Plaintiffs are experienced in litigating and maintaining class actions. Therefore, this Court finds that Plaintiffs' counsel is adequate to represent the classes.

The Class Representatives will Fairly and Adequately Protect the Interests of the Class as the Representatives have both Suffered the same Injury and Possess the same Interest of Proposed Class Members.

"[T]he general standard is that the representatives must be of such character as to assure the vigorous prosecution or defense of the action so that the members' rights are certain to be protected[.]" 7A WRIGHT, MILLER, & KANE, *supra*, § 1766, at 302–303.

The Defendant does not contend the representatives have a conflict of interest. Rather it contends that the Romeros and Younces are unable to recall communications with Mr. Losten, Mr. Bhan, or any other employee of Defendant regarding their loans, any communication between Mr. Losten or Mr. Bhan and the Title Companies, or any communication with Title Companies in reference to their loans. The Defendant contends the Romeros and Younces are unable to credibly testify that they were required to use their respective Title Companies or that their loan officers engaged in actions influencing their selection in a titling and settlement service provider or whether an unlawful referral occurred in violation of RESPA. Defendant asserts that it is due to this lack of recollection and credible testimony that both the Romeros and Younces are inadequate representatives for their respective classes. The Defendant does not contend however that Mr. McPeake would render inadequate representation of his respective classes.

While this Court may look beyond the pleadings to determine if class certification is appropriate, this Court may not conduct a review of the merits for purposes of class certification. *See Creveling*, 376 Md. at 89. What is before this Court in consideration of class certification is not the credibility of testimony, rather a determination on whether class certification is appropriate in this matter. With respect to the consideration of whether the Romeros and Younces would render adequate representation, the representative parties have suffered the same alleged injury and have the same interest in litigation as their respective classes. The Romeros'

and Younces' lack of knowledge of the alleged scheme does not automatically equate to an inability to vigorously prosecute the action on behalf of the proposed class members.

Assuming, *arguendo*, that the representative's lack of knowledge of the unlawful referral potentially poses a threat to vigorous prosecution, regulations issued pursuant to RESPA put to rest such a threat through its provision stating how an unlawful arrangement may be proven:

> *An agreement or understanding for the referral of business incident to or part of a settlement service* need not be written or verbalized but *may be established by a practice, pattern or course of conduct*. When a thing of value is received repeatedly and is connected in any way with the volume or value of the business referred, the receipt of the thing of value is evidence that it is made pursuant to an agreement or understanding for the referral of business.

12 C.F.R. § 1024.14(e) (emphasis added). RESPA guidelines indicating no such knowledge is needed to establish unlawful referrals. Therefore, the contention that the Romeros' and Younces' lack of knowledge of the unlawful referrals does not hinder their ability to vigorously prosecute the matter on behalf of their respective classes is misplaced. The Court finds that the representative parties can fairly and adequately protect the interests of their respective class members.

5. Predominance

Class actions may only be certified if the class action may also be maintained. *See* RULE 2-231(c). Class actions may be maintained if the requirements of RULE 2-231(b) are met and, "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Id.* at (c)(3). The requirement of predominance is crucial to "'the notion that the adjudication of common issues will help achieve judicial economy.'" *Philip Morris*, 358 Md. at 743 (quoting *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996)). The purpose of the test

for predominance "really involves an attempt to achieve a balance between the value of allowing individual actions to be instituted so that each person can protect his own interests and the economy that can be achieved by allowing a multiple party dispute to be resolved on a class action basis." *Id.* (quoting 7A WRIGHT, MILLER, & KANE, *supra*, § 1777, at 518–19.

Courts inquire into "'whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Id.* (quoting *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). The same common nucleus of operative facts must account for a significant part of individual claims for the predominance test to be satisfied. *See id.*

While there are some variances in Plaintiffs' allegations, the essence of this cause of action is that Defendant defrauded the Plaintiffs when the Defendant took kickbacks in violation of RESPA. *See supra* Section 2. Plaintiffs' allegations present common questions of law and fact which predominate over any individualized questions in this matter. Further, "Rule 23 contains no suggestion that the necessity for individual damage determinations destroys commonality, typicality, or predominance, or otherwise forecloses class certifications." *Gunnells v. Healthplan Services, Inc.*, 348 F.3d 417, 427–28 (4th Cir. 2003). The Rule envisions individualized damage determinations for class actions. *See id.*

6. Superiority

"In addition to predominance, the Circuit Court must find that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Philip Morris*, 358 Md. at 762. This Court must find,

> that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:
>
> > (A) the interest of members of the class in individually controlling the prosecution of separate actions,

> (B) the extent and nature of any litigation concerning the controversy already commenced by members of the class,
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum,
>
> (D) the difficulties likely to be encountered in the management of a class action.

RULE 2-231(c). Prior to class certification a class action must be shown to be the most efficient means for adjudication. *See Philip Morris*, 358 Md. at 762. In consideration of efficiency and judicial economy, the pertinent factors are outlined in Rule 2-231(c)—however this list is non-exhaustive. *See id.* at 762–63 (citing FED. R. CIV. P. 23 Advisory Committee Note, *supra*, 39 F.R.D. at 104).

A. The Interests of Class Members in Individually Controlling Prosecution of Separate Actions is Minor.

The first factor this Court must consider in its determination of whether certification of this class action is the most efficient and fair means of adjudicating this matter is analyzing the "interest of members of the class in individually controlling the prosecution of separate actions[.]" RULE 2-231(c)(3)(A). As referenced *supra*, the policy at the heart of class certification is, "[to] provide access to the courts for those with claims that would be uneconomical if brought in an individual action." *Gunnells*, 348 F.3d at 426; *see also Amchem*, 521 U.S. at 617; *and Philip Morris*, 358 Md. at 732. Therefore, the premise surrounding the first factor of superiority, in weighing individuals' stakes in litigation and their interests in controlling their own actions in individual litigation, is vital to ensuring the vigorous advocacy on behalf of class members—as the greater the individuals' stakes the greater their interest. *See Philip Morris*, 358 Md. at 763 (citing *Emig v. Am. Tobacco Co.*, 184 F.R.D. 379, 393 (D. Kan. 1998)).

In the matter at hand, each proposed class member's stake in this litigation is substantially low, as among the 595 alleged violations is an amount in damages alleged to total

an excess of $174,000. The essence of the policy surrounding class actions is to provide access to the legal system for those with uneconomical claims as is alleged in the instant. *See Amchem*, 521 U.S. at 617; *see also Philip Morris*, 358 Md. at 732; *and Gunnells*, 348 F.3d at 426. The purpose of analyzing the class members' interests is to promote vigorous advocacy, as the greater an individual's stake in the matter the less likely vigorous advocacy transpires on behalf of the class and greater the likelihood the individual advocates vigorously on behalf of their own interest. *See Philip Morris*, 358 Md. at 763. No one individual's stake in this matter is so great wherein this Court would draw concern over diminished advocacy on behalf of the proposed classes.

B. The Extent of Litigation Surrounding Violations of RESPA in Maryland.

The second factor this Court takes into consideration for superiority of class certification is, "the extent and nature of any litigation concerning the controversy already commenced by members of the class[.]" RULE 2-231(c)(3)(B). "[This] factor focuses upon the extent and nature of litigation concerning the controversy that has already been commenced[,] [and] evaluation 'is aimed at determining whether there is so much pre-existing litigation that a class would be unproductive[.]'" *Philip Morris*, 358 Md. at 764 (quoting *Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 143 F.R.D. 628, 640 (D.S.C. 1992), *aff'd*, 6 F.3d 177 (4th Cir. 1993)). This Court's review of pending cases "is intended to serve the purpose of assuring judicial economy and reducing the possibility of multiple lawsuits." *See id.* (quoting 7A WRIGHT, MILLER, & KANE, *supra*, § 1780, at 568–69).

To the best of this Court's knowledge, and according to the parties, there are few, if any, cases alleging kickbacks in violation of RESPA currently pending in Maryland courts. While Defendant references litigation involving the named Title Companies, "there hardly exists any

'risk of inconsistent adjudication or multiplicity of actions at this point[,]'" as the litigation of such cases has concluded. *Philip Morris*, 358 Md. at 764 (quoting *Emig*, 184 F.R.D. at 393).[5]

C. The Circuit Court for Baltimore County is a Desirable Forum in Which to Concentrate the Litigation of These Claims.

Upon consideration of the third factor to the superiority prong, this Court must weigh the desirability and undesirability of permitting litigation in this forum. *See* RULE 2-231(c)(3)(C); *see also Philip Morris*, 358 Md. at 764.

> This factor embodies basically two considerations. First, a court must evaluate whether allowing a Rule 23(b)(3) action to proceed will prevent the duplication of effort and the possibility of inconsistent results . . . .
>
> The other consideration . . . is whether the forum chosen for the class action represents an appropriate place to settle the controversy, given the location of the interested parties, the availability of witnesses and evidence, and the condition of the court's calendar.

Id. at 764–65 (quoting 7A WRIGHT, MILLER, & KANE, *supra*, § 1780, at 572–73).[6]

If this Court grants certification of the proposed class and subclasses, duplication of effort in this matter would be minimal as the alleged RESPA violation and resulting harm common among Plaintiffs' claims permeates throughout the case. Further, the potential for inconsistent

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[5] In *Robert Dustin, et al. v. 1st Reliant Home Loans, Inc.*, No. C-03-CV-19-1231 (Md. Cir. Ct. Sept. 8, 2021) (order granting judgment by default), the Circuit Court for Baltimore County granted a judgment by default against 1st Reliant Home Loans, Inc. for an award of damages, in accordance with 12 U.S.C. § 2607(d)(2), to which plaintiffs alleged 1st Reliant Home Loans, Inc. entered into an agreement with All Star to distribute kickbacks for the referral of loans to All Star for settlement and titling services. Additionally, in *Fangman v. Genuine Title, LLC*, No. CV RDB-14-0081, 2016 WL 6600509 (D. Md. Nov. 8, 2016), class certification was granted where Genuine Title was a named party in the matter involving allegations of kickback arrangements in violation of RESPA with West Town Bank & Trust. The *Fangman* court granted the final approval of settlement agreement in this matter. *See Fangman v. Genuine Title, LLC*, No. CV RDB-14-0081, 2017 WL 2591525, at *1 (D. Md. June 15, 2017).

[6] As to the first factor, the court in *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 67 (4th Cir. 1977), held that in certifying a class action with a host of intertwined claims with separate allegations of conspiracy violations and individualized injury the court would overwhelm itself with a "deluge of mini-trials[.]" The *Windham* court finding individual trials would likely create inconsistent results, which would run counter to the promotion of judicial economy. *See id.* Upon consideration of sales for individual tobacco farmers to a proposed class, the court, in *Galloway v. Am. Brands, Inc.*, 81 F.R.D. 580, 585 (E.D.N.C. 1978), found, "no substantive difference in how the case might be handled if it were prosecuted as a class action instead of through thousands of individual actions." Further, that "duplication of effort in the class action would be staggering; the risk of inconsistent results would be high." *Id.*

results would be low due to the nature of the violation and harm alleged in Plaintiffs' claims. *See Galloway*, 81 F.R.D. at 584–85 (explaining how the calculation of thousands of individual tobacco farmers' claims in consideration of their sales related to one of the conspiracy violations alleged by the representative plaintiff would create a high risk of inconsistent results).

"[A] civil action shall be brought in a county where the defendant resides, carries on a regular business, is employed, or habitually engages in a vocation." MD. CODE, CTS. & JUD. PROC. § 6-201(a). "[W]ith respect to suits where regular business is carried on, the broader term 'defendant' is used to encompass persons and corporations." *Hansford v. D.C.*, 329 Md. 112, 123 (1993) (quoting MD. CODE, CTS. & JUD. PROC. § 6-201). While Defendant's principal place of business is located in Anne Arundel County, Defendant allegedly engaged in a kickback scheme in violation of RESPA referring each proposed class member's loan to the named Title Companies, all located in Baltimore County, over a period of eight (8) years.[7] Therefore, the Circuit Court for Baltimore County is an appropriate forum for the litigation of this controversy.

D. Difficulties Likely to be Encountered in Management of this Class Action.

The last factor the Court considers is the manageability of this lawsuit over the duration of litigation of this controversy. *See* RULE 2-231(c)(3)(D). The Supreme Court stated consideration of this factor, "'encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit.'" *Philip Morris*, 358 Md. at 765 (quoting *Eisen*, 417 U.S. at 164).

The Defendant raises two potential hinderances in managing the litigation of this controversy: (1) whether an unlawful referral occurred—causing each individual Plaintiff to be

[7] Moreover, this Court Denied Defendant's Motion to Dismiss Class Action Complaint and Demand for a Jury Trial, of which the Court considered the question of improper venue—finding venue to be proper in this matter. *See Brian McPeake, et al. v. Universal Mortgage and Finance, Inc.*, No. C-03-CV-21-1935 (Md. Cir. Ct. Nov. 8, 2021) (order denying motion to dismiss).

overcharged for their title and settlement services, and (2) whether individual Plaintiffs would be barred by the statute of limitations. Defendant contends the factual determinations, regarding whether an unlawful referral occurred in each individual Plaintiff's claim and whether each individual Plaintiff was overcharged for their titling and settlement services in accordance with the alleged unlawful referrals, will overwhelm the court with a deluge of mini-trials. *See Windham*, 565 F.2d at 67; *see also Galloway*, 81 F.R.D. at 585. Additionally, Defendant asserts that the statute of limitations for a § 2607 violation may bar individual Plaintiffs from litigating this cause of action. *See* 12 U.S.C. § 2614; *see also Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013).[8]

i. The Unlawful Referral of Loans may be Proven via a Determination upon the Evidence of a Pattern, Practice, or Course of Conduct.

Certification of a class action in which intertwined claims present differing individualized claims of fraud would run counter to judicial economy as class certification would overwhelm this Court with a "deluge of mini-trials[.]" *See Windham*, 565 F.2d at 67; *see also Galloway*, 81 F.R.D. at 585. However, the existence of unlawful referrals in violation of RESPA "may be established by a *practice, pattern or course of conduct*." *See supra* Section 4 (emphasis added).

Defendant contends that proposed class members' individualized claims would create the necessity for this Court to conduct hundreds of mini-trials. In support of this contention, Defendant suggests that individual inquiries are necessary to show whether each proposed class member was overcharged for title and settlement services, whether alleged kickbacks in violation of RESPA occurred, whether such kickbacks were included in the settlement and titling service,

[8] The *Hayes* court stating, "'[i]f class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate." *Hayes*, 725 F.3d at 355 (quoting *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012) and citing 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 3:3 (5th ed. 2011)).

whether joint marketing occurred for the service, and what damages there were, if any.[9] *See* Def.'s Opp'n 14. However, 12 C.F.R. § 1024.14(e) does not require the Court to consider each of the proposed class member's individualized claims for determination of whether kickbacks in violation of RESPA occurred; further, as discussed *supra*, the proposed members' claims allege common questions of law and fact in this matter, the litigation of such common questions in one class action would promote judicial economy. *Compare* 12 C.F.R. § 1024.14(e), *with Windham*, 565 F.2d at 67.

ii. Management of this Lawsuit may be Hindered by the Estoppel of Plaintiffs' Claims in Accordance with the 1-Year RESPA Statute of Limitations Period.

> Any action pursuant to the provisions of section . . . 2607 . . . of this title may be brought in the United States district court or in any other court of competent jurisdiction, for the district . . . where the violation is alleged to have occurred, within . . . 1 year . . . from the date of the occurrence of the violation[.]

12 U.S.C. § 2614. However, "[f]raud perpetrated by an adverse party may also serve to postpone the accrual date of a cause of action." *Frederick Rd. Ltd. P'ship v. Brown & Sturm*, 360 Md. 76, 98 (2000). In Maryland it is well-settled that "'[i]f the knowledge of a cause of action is kept from a party by the fraud of an adverse party, the cause of action shall be deemed to accrue at the time when the party discovered, or by the exercise of ordinary diligence should have discovered the fraud.'" *Id.* (quoting MD CODE, CTS. & JUD. PROC. § 5-203). § 5-203 is applicable "where two conditions are met: (1) the plaintiff has been kept in ignorance of the cause of action by the

[9] The Defendant also contends, discussed *infra*, that the Court must also consider whether proposed class members' claims are barred by the statute of limitations. *See infra* Section IV.D.ii. Additionally, Defendant raises a contention that this Court must take into consideration (1) "whether a particular plaintiff was previously awarded damages in connection with an action against their respective title company; and [(2)] what award of damages, [if] any, is still owed to that particular plaintiff." *See* Def.'s Opp'n 14. However, the allegations at issue in this matter are that this Defendant referred loans to the named Title Companies, the Title Companies charged to Plaintiffs an amount in excess of fees attributable to settlement and titling services, and distributed kickbacks in violation of RESPA to various marketing companies for the benefit of the Defendant. Further, for the purposes of class certification, a necessity for individualized damage determinations would not foreclose a class action. *See supra* Section 5.

fraud of the adverse party, and (2) the plaintiff has exercised usual or ordinary diligence for the discovery and protection of his or her rights." *Id.* (citing *Piper v. Jenkins*, 207 Md. 308, 318 (1955); *Mettee v. Boone*, 251 Md. 332, 339 (1968)).

"Notice is critical to the discovery rule[,] [b]efore an action can accrue under the discovery rule, 'a plaintiff must have notice of the nature and cause of his or her injury.'" *Windesheim v. Larocca*, 443 Md. 312, 327 (2015) (quoting *Frederick Rd. Ltd. P'ship v. Brown & Sturm*, 360 Md. 76, 94 (2000)). There are two types of notice, actual or constructive. *Id.* (citing *Poffenberger v. Risser*, 290 Md. 631, 636–37 (1981)). Actual notice consists of either express notice or implied notice. *Id.*

> Implied notice, also known as 'inquiry notice,' is notice implied from 'knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry (thus, charging the individual) with notice of all facts which such an investigation would in all probability have disclosed if it had been properly pursued.'

Id. (quoting *Poffenberger*, 290 Md. at 637). If Plaintiffs had inquiry notice, such notice would trigger the running of the statute of limitations under the discovery rule. *See id.* Regarding questions concerning whether Plaintiffs had inquiry notice of kickback arrangements in violation of RESPA, the Court considers whether the Plaintiff established "'that it was not (and should not have been) aware of facts that should have excited further inquiry on its part'—if the plaintiff was not on inquiry notice—'then there is nothing to provoke inquiry.'" *Edmonson v. Eagle Nat'l Bank*, 922 F.3d 535, 554 (4th Cir. 2019) (quoting *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 128 (4th Cir. 1995)). Assuming, *arguendo*, a Plaintiff were put on inquiry notice, such notice would charge that Plaintiff with investigating information as a reasonable person would. *See Windesheim*, 443 Md. at 330; *see also Edmonson*, 922 F.3d at 558. However, in consideration of alleged RESPA violations, the determination of "whether one would expect a reasonable residential mortgage borrower to keep abreast of all enforcement

actions related to the mortgage lending and title services industries . . . should be decided by the finder of fact and is not amenable to resolution on the pleadings[.]" *Id.*[10]

The Defendant contends that some of the proposed class members may have been charged with inquiry notice if the proposed class members to this action were class members to prior actions brought against the Title Companies. *See supra* note 9. However, whether the proposed class members to this action should have "[kept] abreast . . . all enforcement actions related to the mortgage lending and title services industries" is a contention that should be decided by a finder of fact, not on Plaintiffs' Motion for Class Certification. *Edmonson*, 922 F.3d at 558.

Additionally, the Defendant contends that some of the proposed class members may have been sent actual notice of this cause of action outside of RESPA's 1-year statute of limitations period and a series of mini-trials would need to occur to determine if any proposed class members are barred.[11] However, "where the defendant's statute of limitations defense is so [dependent] upon facts applicable to the entire class . . . individual hearings would not be necessary." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 327 (4th Cir. 2006).[12] The issue of when the proposed class members may be addressed in an administratively feasible process,

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[10] The *Edmonson* court held Plaintiffs sufficiently pleaded the fraudulent concealment of affirmative acts in violation of RESPA. *See Edmonson*, 922 F.3d at 558. Those allegations were sufficient to withstand a motion to dismiss based upon the expiration of RESPA's 1-year statute of limitations. *See id.*

[11] In support of this contention the Defendant references a spreadsheet and suggests mailed notice was provided to some proposed class members on June 19, 2020, and that the Plaintiffs filed this action June 21, 2021. *See* Def.'s Ex. F. When a deadline for the limitations period falls on a "Saturday, Sunday, or holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday, or holiday[.]" RULE 1-203. June 19, 2021, fell on a Saturday, therefore Plaintiffs correctly assert that filing the complaint on June 21, 2021, was within the 1-year statutory limitations period.

[12] In consideration of a statute of limitations defense barring proposed class members from litigating a class action, the court in *Thorn* explained that if a defendant raises an issue of inquiry notice then individualized fact-based analysis is required. *See Thorn*, 445 F.3d at 325–27. However, if the defendant contends that the proposed class members received actual notice the question of when the class members had actual knowledge may be solved on a class-wide basis. *See id.*

as it would not require much factual inquiry. *See* 1 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS, § 3:3, at 3–14.

V. Conclusion

As pleaded by the Plaintiffs, the prerequisites of numerosity, commonality, typicality are satisfied in this matter. Regarding the prerequisite of adequacy of representation, the representatives' lack of knowledge as to the alleged fraudulent kickback scheme does not hinder their ability to vigorously prosecute the matter on behalf of their respective classes nor fairly and adequately protect the interests of their respective classes—thus, this Court finds Plaintiffs have properly pleaded that Mr. McPeake, the Romeros, and the Younces are adequate representatives for their respective class and subclasses. Additionally, there is no contention that counsel is inadequate for the representation of the class and subclasses in this matter.

As to the predominance prong of RULE 2-231(c), Plaintiffs have alleged a common kickback scheme in violation of RESPA which this Court finds does predominate over the entirety of the class action. In consideration of RULE 2-231(c) the Court must also consider whether a class action is superior to "other available methods for the fair and efficient adjudication of the controversy," superiority "'encompass[ing] the whole range of practical problems that may render the class action format inappropriate for a particular suit.'" RULE 2-231(c); *Philip Morris*, 358 Md. at 765 (quoting *Eisen*, 417 U.S. at 164). This Court finds a class action to be superior to other methods for the fair and efficient adjudication of this matter. It is for these reasons that this Court Orders Plaintiffs' Motion for Class Certification be Granted.

VI. Final Ruling

WHEREFORE, it is by the Circuit Court for Baltimore County,

ORDERED, that Plaintiffs' Motion for Class Certification shall be and is hereby **GRANTED**; and further

ORDERED, that this action shall proceed as a class action, and it is further

ORDERED, the identified Universal Mortgage Class and All Star, Genuine Title, and Competitive Title Subclasses shall be and are hereby **CERTIFIED**, and it is further

ORDERED, Plaintiffs shall be and are hereby appointed as Class Representatives of the Universal Mortgage Class and All Star, Genuine Title, and Competitive Title Subclasses.

Judge Michael J. Finifter
Circuit Court for Baltimore County
01/11/2023 12:56:15 PM

Entered: Clerk, Circuit Court for
Baltimore County, MD
January 12, 2023