

NAME SEARCHED: Mort, Inc

PWM BIS-RESEARCH performed due diligence research in accordance with the standards set by AML Compliance for your business. We completed thorough searches on your subject name(s) in the required databases and have attached the search results under the correct heading below.

Significant negative media results may require escalation to senior business, Legal and Compliance management. Also, all accounts involving PEPs must be escalated.

Search:	Result:	Click here for results:	Reviewer Comments (as necessary):
RDC	<input checked="" type="checkbox"/> No Hit <input type="checkbox"/> Not Required <input type="checkbox"/> Hit	I. RDC Results	No RDC Alert
PCR	<input checked="" type="checkbox"/> No Hit <input type="checkbox"/> Not Required <input type="checkbox"/> Hit	II. PCR Results	No PCR Alert
BIS	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> Not Required	III. Negative Media	No Information Found
		IV. Non-Negative Media	No Information Found
		V. Other Language Media	No Information Found
D&B	Results? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Not Required	VI. D&B	Information Found (Please see attached)
Smartlinx	Results? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Not Required	VII. Smartlinx	Information Found (Please see attached)
Court Cases	<input checked="" type="checkbox"/> Review by Legal May be Required <input type="checkbox"/> No Results <input type="checkbox"/> Search not required	VIII. Court Cases	Information Found (Please see attached)

Prepared by: Akshay Davera Date: 10/01/2015

Research Analyst

Instructions:

1. Review and confirm that all results are returned for your client.
2. Please note that you are still required to perform any Martindale-Hubbell search (if applicable) on each search subject. We have attached the web link below for your convenience: [Martindale-Hubbell](http://www.martindale.com/xp/Martindale/home.xml) <http://www.martindale.com/xp/Martindale/home.xml>
3. As needed, provide comment for any negative results.
4. If applicable, please obtain clearance from Compliance for all alerts.
5. Save any changes you make to this document and attach file to your KYC.

Please note: Submission of a signed KYC is your confirmation that you have fully reviewed the research documents.

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OFAC RESULTS

RDC:

	Not Alerted	DBOI 	 Mort, Inc	City: St, Thomas Country: Virgin Islands, U.s.
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PCR:

 Mort, Inc  NCA customised Auto-Closed No-Hit 02/10/2015

BIS RESULTS:

Negative Media:

No Information Found

Non-Negative Media:

No Information Found

Other Language Media:

No Information Found

Public Record:

1 OF 2 RECORD(S)

Comprehensive Business Report

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Search Terms - company(Mort, Inc) radius(15)

- | | | | |
|--------------------------------------|------------------------|-----------------------------|-------------------------------|
| Executives - Current (0) | Incorporation/SOS (1) | Operations/Sites (2) | Sales (0) |
| Licenses (0) | URLs (0) | Real Property - Current (1) | Real Property - Prior (0) |
| MVRs - Current (0) | MVRs - Prior (1) | Watercraft - Current (0) | Watercraft - Prior (0) |
| Aircraft - Current (0) | Aircraft - Prior (0) | Bankruptcy Filings (0) | Judgments & Liens Filings (0) |
| UCC Filings (0) | Executives - Prior (2) | Registered Agents (1) | Name Variations (1) |
| Possible Employees (1) | Person Associates (0) | Business Associates (2) | TINs (0) |
| Possible Connected Business (4) | Parent Company (0) | Industry Information (0) | |
| View All Sources (9) | | | |

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DB-SDNY-0019621

EFTA_00167367

EFTA01295634

Business Summary

Name	Address	Phone
MORT, INC.	820 W Spruce St Rawlins, WY 82301-5440 Carbon County	[REDACTED] ✓ (Most Recent Listing) 05/01/2012 - 09/29/2015 Ⓟ (Business)
LexID	Established	TIN
0001-0078-5323	2004 (11 Years in Business)	

At a Glance

Real Property	1	UCC Debtor	0
Personal Property	0	Bankruptcy	0
Secured Assets	0	Judgments/Liens	0
Executives	0	Foreclosure/Notice of Default	0

Name Variations - 1 name variations found

NO.	NAME
1.	MORT, INC.

TINs - 0 TINs found**Business Profile****Executives: Current - 0 executive(s) found****Incorporation/SOS (1 active, 0 other)**

NO.	NAME	FILING TYPE	STATUS	FILING DATE	FILING NO.	STATE
1.	MORT, INC.	CORPORATION-BUSINESS	ACTIVE	03/25/1999	1999-000343534	WY

Additional Details

Business Type: CORPORATION-BUSINESS
 Business Status: ACTIVE
 Filing Type: FILING
 Expiration: PERPETUAL
 For Profit: Unknown
 Foreign/Domestic: Domestic
 Origin: State of WY

Operating Locations - Showing 2 location(s)

NO.	ADDRESS	METRO AREA	PHONE
1.	502 W Spruce St Rawlins, WY 82301-5548 Carbon County	CARBON COUNTY	[REDACTED] ✓ (Most Recent Listing) 05/01/2012 - 09/29/2015 Ⓟ (Business)
2.	820 W Spruce St Rawlins, WY 82301-5440 Carbon County	CARBON COUNTY	[REDACTED] ✓ (Most Recent Listing) 05/01/2012 - 09/29/2015 Ⓟ (Business)

Sales - 0 record(s) found

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Parent Company - 0 record(s) found

Industry Information - no information found

Licenses - 0 licenses found

URLs - 0 URLs found

Bankruptcy (0 active, 0 closed)

Judgments/Liens (0 filings)

UCC Filings (0 debtor, 0 creditor)

Real Property (1 current, 0 prior)

NO.	ADDRESS	STATUS	PURCHASE PRICE	SALE PRICE	STATE
1.	820 W Spruce St Rawlins, WY 82301-5440 Carbon County Source: B	Current			WY

Owner 1 Information

MORT INC
PO Box 357
Rawlins, WY 82301-0357
Carbon County

Legal Information

Parcel Number: 21871733100400
Assessment Year: 2014
Recording Date: 02/29/2008
Document Type: ASSESSOR
Assessed Value: \$18,654.00
Market Land Value: \$10,212.00
Total Market Value: \$196,364.00
Type of Address: COMMERCIAL OFFICE (GENERAL)

Personal Property (0 current, 1 prior)

NO.	TYPE	STATUS	YEAR/MAKE	MODEL	VIN
1.	MVR	Prior	2004 Lexus	RX 330, 4 Dr Wagon Sport Utility	[REDACTED]

Vehicle Information

VIN [REDACTED]
Year: 2004
Make: Lexus
Model: RX 330
Style: 4 Dr Wagon Sport Utility
Base Price: \$37,000.00

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Source Information

Data Source: GOVERNMENTAL

Registrant 1

MORT. INC.
 502 W Spruce St
 Rawlins, WY 82301-5548
 Carbon County
 Jurisdiction: WY
 License Plate: [REDACTED]
 Original Registration Date: 05/19/2008
 Registration Date: 03/24/2010
 Registration Expiration Date: 03/31/2011

Associates**Executives: Prior - 2 prior executive(s) found**

NO.	NAME	TITLE
1.	Mortensen, Tammy	DIRECTOR (03/25/1999)
2.	Mortensen, Troy L.	DIRECTOR (03/25/1999)

Registered Agents - 1 registered agent(s) found

NO.	NAME	ADDRESS	STATE	DATE(S)
1.	Mortensen, Tammy K	[REDACTED]	Wyoming	03/25/1999 - 09/10/2015

Possible Employees - 0 current, 1 prior employees found

NO.	NAME	ADDRESS	STATUS	DATE(S)
1.	Mortensen, Tammy N/A	[REDACTED]	Prior	03/25/1999

Person Associates - 0 other person associates found**Possible Connected Business - 4 businesses found**

NO.	NAME	ADDRESS
1.	MORT INC	PO Box 357 Rawlins, WY 82301-0357 Carbon County
2.	MORT INC	2222 Dunblane Dr Rawlins, WY 82301-4236 Carbon County
3.	MORT INC	603 W Spruce St Rawlins, WY 82301-5435 Carbon County
4.	MORT. INC.	1325 High St Rawlins, WY 82301-4642 Carbon County

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Business Associates - 2 business associates found

NO.	NAME	ADDRESS	ROLE
1.	MORT INC	PO Box 357 Rawlins, WY 82301-0357 Carbon County	Real Property
2.	MORT INCORPORATED	2222 Dunblane Dr Rawlins, WY 82301-4236 Carbon County	Real Property

Sources

All Sources	9 Source Documents
Real Property	4 Source Documents
Personal Property	2 Source Documents
Corporate Filings	1 Source Documents
Other Directories	1 Source Documents
Experian Credit Risk DB	1 Source Documents

Key:

-  High Risk Indicator. These symbols may prompt you to investigate further.
-  Moderate Risk Indicator. These symbols may prompt you to investigate further.
-  General Information Indicator. These symbols inform you that additional information is provided.
-  The most recent telephone listing as reported by Electronic Directory Assistance.
-  Wireless Phone Indicator. These symbols indicate a cell phone number.
-  Residential Phone Indicator. These symbols indicate a residential phone number.
-  Business Phone Indicator. These symbols indicate a business phone number.
-  Shared Phone Indicator. These symbols indicate the phone number may be shared between wireless and landline service.
-  FAX Indicator. These symbols indicate a FAX number.
-  Government Phone Indicator. These symbols indicate a government phone number.

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Your DPPA Permissible Use is: Debt Recovery/Fraud

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2 OF 2 RECORD(S)**Comprehensive Business Report**

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Search Terms - company(Mort, Inc) radius(15)

Executives - Current (0)	Incorporation/SOS (0)	Operations/Sites (1)	Sales (0)
Licenses (0)	URLs (0)	Real Property - Current (0)	Real Property - Prior (0)
MVRs - Current (0)	MVRs - Prior (0)	Watercraft - Current (0)	Watercraft - Prior (0)
Aircraft - Current (0)	Aircraft - Prior (0)	Bankruptcy Filings (0)	Judgments & Liens Filings (0)
UCC Filings (0)	Executives - Prior (0)	Registered Agents (1)	Name Variations (1)
Possible Employees (1)	Person Associates (0)	Business Associates (0)	TINs (0)

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Possible Connected
Business (4)
View All Sources (0)

Parent Company (0)

Industry Information (0)

Business Summary

Name	Address	Phone
MORT INC  (Company is inactive)	603 W Spruce St Rawlins, WY 82301-5435 Carbon County	
LexID	Established	TIN
0001-0078-5723	2011 (4 Years in Business)	

At a Glance

Real Property	0	UCC Debtor	0
Personal Property	0	Bankruptcy	0
Secured Assets	0	Judgments/Liens	0
Executives	0	Foreclosure/Notice of Default	0

Name Variations - 1 name variations found

NO.	NAME
1.	MORT INC

TINs - 0 TINs found

Business Profile

Executives: Current - 0 executive(s) found

Incorporation/SOS (0 active, 0 other)

Operating Locations - Showing 1 location(s)

NO.	ADDRESS	METRO AREA	PHONE
1.	603 W Spruce St Rawlins, WY 82301-5435 Carbon County	CARBON COUNTY	

Sales - 0 record(s) found

Parent Company - 0 record(s) found

Industry Information - no information found

Licenses - 0 licenses found

URLs - 0 URLs found

Bankruptcy (0 active, 0 closed)

Judgments/Liens (0 filings)

UCC Filings (0 debtor, 0 creditor)

Real Property (0 current, 0 prior)

Personal Property (0 current, 0 prior)

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Associates**Executives: Prior - 0 prior executive(s) found****Registered Agents - 1 registered agent(s) found**

NO.	NAME	ADDRESS	STATE	DATE(S)
1.				

Possible Employees - 0 current, 1 prior employees found

NO.	NAME	ADDRESS	STATUS	DATE(S)
1.	Mortensen, Tammy K N/A		Prior	03/25/1999

Person Associates - 0 other person associates found**Possible Connected Business - 4 businesses found**

NO.	NAME	ADDRESS
1.	MORT INC	PO Box 357 Rawlins, WY 82301-0357 Carbon County
2.	MORT INC	2222 Dunblane Dr Rawlins, WY 82301-4236 Carbon County
3.	MORT, INC.	820 W Spruce St Rawlins, WY 82301-5440 Carbon County
4.	MORT. INC.	1325 High St Rawlins, WY 82301-4642 Carbon County

Business Associates - 0 business associates found**Sources****Key:**

-  High Risk Indicator. These symbols may prompt you to investigate further.
-  Moderate Risk Indicator. These symbols may prompt you to investigate further.
-  General Information Indicator. These symbols inform you that additional information is provided.
-  The most recent telephone listing as reported by Electronic Directory Assistance.
-  Wireless Phone Indicator. These symbols indicate a cell phone number.
-  Residential Phone Indicator. These symbols indicate a residential phone number.
-  Business Phone Indicator. These symbols indicate a business phone number.
-  Shared Phone Indicator. These symbols indicate the phone number may be shared between wireless and landline service.
-  FAX Indicator. These symbols indicate a FAX number.
-  Government Phone Indicator. These symbols indicate a government phone number.

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July 8, 2015

Dun's Decision Makers

View the DMI Record

Glass City Mort Inc

2558 Parkway Plz Maumee,
OH 43537-3772
United States

BUSINESS ADDRESS: 2558 Parkway Plz, Maumee, OH 43537-3772, United States

MSA: Toledo, OH - 8400

COUNTY: Lucas

***** **COMPANY IDENTIFIERS** *****

DUNS NUMBER: [REDACTED]

***** **EXECUTIVES** *****

Principal:

Donald McCorkle, III, Prin

Donald McCorkle, III, Prin

***** **DESCRIPTION** *****

INDUSTRY TYPE: Retail Trade; Ret Paint/Glass/Wallpaper

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Dun's Market Identifiers Plus, 07/05/15, Mort's Inc

July 5, 2015

Dun's Decision Makers

View the DMI Record

Mort's Inc

P O Box 400 Latimer,
IA 50452
United States

BUSINESS ADDRESS: 1451a Gull Ave, Latimer, IA 50452, United States
COUNTY: Franklin

***** **COMPANY IDENTIFIERS** *****

DUNS NUMBER: 02-207-9289

***** **EXECUTIVES** *****

President:

Seth Morton, President

Seth Morton, President

Treasurer:

Tracy Morton, Treasurer

Tracy Morton, Treasurer

Administrative Secretary:

Priscilla M Eddy, Secretary

Priscilla M Eddy, Secretary

Bookkeeper:

Norma Allen, Bookeeper

Norma Allen, Bookeeper

***** **DESCRIPTION** *****

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Dun's Market Identifiers Plus, 07/05/15, Mort's Inc

INDUSTRY TYPE: Construction; Water Pump Installation Plumbing Contractor Sewer Construction & Whol & Installation Water Treatment Equipment

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June 28, 2015

Dun's Decision Makers

View the DMI Record

Mort's Inc

505 Industrial Park Rd Iowa Falls,
IA 50126-9500
United States

BUSINESS ADDRESS: 505 Industrial Park Rd, Iowa Falls, IA 50126-9500, United States
COUNTY: Hardin

***** **COMPANY IDENTIFIERS** *****

DUNS NUMBER: [REDACTED]

***** **EXECUTIVES** *****

Manager:

Deaune Sudpelgte, Manager

Deaune Sudpelgte, Manager

***** **DESCRIPTION** *****

INDUSTRY TYPE: Construction; Plumbing & Heating Contractor

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EFTA01295643



Federal Employer Identification Numbers

June 7, 2015

MORTS INC

505 INDUSTRIAL PARK RD
IOWA FALLS, IA 50126
UNITED STATES

***** COMMUNICATIONS *****

TELEPHONE: [REDACTED]

***** COMPANY IDENTIFIERS *****

FEIN: [REDACTED]

SOURCE REFERENCE NAME: MORT'S INC

HEADQUARTER/PARENT DUNS NUMBER: [REDACTED]

***** EXECUTIVES *****

TOP CONTACT: Manager Deaune Sudpelgte

***** MARKET AND INDUSTRY *****

SIC CODES:

[REDACTED]

CROSS REFERENCE:

- . PRIMARY BUSINESS NAME: Mort's Inc
- . ADDITIONAL BUSINESS NAME: Mort's Plumbing & Heating

LOAD-DATE: September 28, 2015

LEGAL RESULTS:

Court Cases:

QUINTON BROWN; JASON GUY; ALVIN SIMMONS; SHELDON SINGLETARY; GERALD WHITE; RAMON ROANE; JACOB RAVENELL, individually and on behalf of the class they seek to represent, Plaintiffs - Appellants, v. NUCOR CORPORATION; NUCOR STEEL-BERKELEY, Defendants - Appellees.

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785 F.3d 895, *, 2015 U.S. App. LEXIS 7739, **;
126 Fair Empl. Prac. Cas. (BNA) 1793; 99 Empl. Prac. Dec. (CCH) P45,306

No. 13-1779

**UNITED STATES COURT OF APPEALS FOR THE FOURTH
CIRCUIT**

**785 F.3d 895; 2015 U.S. App. LEXIS 7739; 126 Fair Empl. Prac.
Cas. (BNA) 1793; 99 Empl. Prac. Dec. (CCH) P45,306; 91 Fed. R.
Serv. 3d (Callaghan) 1169**

**September 17, 2014, Argued
May 11, 2015, Decided**

PRIOR HISTORY: [****1**] Appeal from the United States District Court for the District of South Carolina, at Charleston. (2:04-cv-22005-CWH). C. Weston Houck, Senior District Judge.

Brown v. Nucor Corp., 576 F.3d 149, 2009 U.S. App. LEXIS 17643 (4th Cir. S.C., 2009)

DISPOSITION: VACATED IN PART, AND REMANDED WITH INSTRUCTIONS.

CASE SUMMARY:

OVERVIEW: HOLDINGS: [1]-Certification of a class of black steel workers who alleged racial discrimination at a South Carolina plant was warranted for allegations of discriminatory job promotion practices because statistical and substantial anecdotal evidence suggested discrimination in promotion decisions in multiple departments for purposes of commonality under Fed. R. Civ. P. 23(a)(2); [2]-Decertification of the class was an abuse of discretion because the workers' direct evidence sufficiently showed common claims of disparate treatment and disparate impact under 42 U.S.C.S. § 2000e-2(k), and additionally, the statistical disparity actually exceeded two standard deviations; [3]-Reconsideration of the predominance requirement under Rule 23(b)(3) was error, as it was not part of the remand order and there were no new facts or legal precedent that justified revisiting that determination.

OUTCOME: Judgment vacated in part; matter remanded with instructions to recertify promotions class.

CORE TERMS: promotion, statistical, commonality, plant, predominance, anecdotal, supervisor, disparity, hostile, class certification, certification, work environment, statistical evidence, bidding, statistics, class action, certify, discriminatory, plant-wide, beam mill, black workers, class members, disparate treatment, opening, bidder, pool, standard deviations, manager, disparate impact, general manager

LexisNexis(R) Headnotes

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785 F.3d 895, *, 2015 U.S. App. LEXIS 7739, **;
126 Fair Empl. Prac. Cas. (BNA) 1793; 99 Empl. Prac. Dec. (CCH) P45,306

Civil Procedure > Class Actions > Certification

Civil Procedure > Class Actions > Appellate Review

Civil Procedure > Appeals > Remands

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

[HN1] Appellate courts typically review a district court's certification order for abuse of discretion. The appellate courts review de novo, however, whether a district court contravenes a prior express or implicit mandate issued by the appellate court.

Civil Procedure > Appeals > Remands

Civil Procedure > Class Actions > Decertification

[HN2] As to the question of whether a district court's decertification order violated the appellate court's mandate, an "extraordinary" exception to the mandate rule exists when there is a showing that controlling legal authority has changed dramatically. Moreover, Fed. R. Civ. P. 23(c)(1)(C) provides a district court with broad discretion to alter or amend a prior class certification decision at any time before final judgment.

Civil Procedure > Class Actions > Prerequisites > Commonality

[HN3] At the very least, Wal-Mart recalibrated and sharpened the lens through which a court examines class certification decisions under Fed R. Civ. P. 23(a)(2), an impact plainly manifested by the number of certifications overturned in its wake.

Civil Procedure > Class Actions > Certification

Civil Procedure > Class Actions > Appellate Review

Civil Procedure > Appeals > Appellate Jurisdiction > Lower Court Jurisdiction

[HN4] Class certification orders are not final judgments impervious to lower court review and revision.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Class Actions > Certification

Civil Procedure > Class Actions > Appellate Review

[HN5] The law gives broad leeway to district courts in making class certification decisions, and their judgments are to be reviewed by the court of appeals only for abuse of discretion. A district court abuses its discretion when it materially misapplies the requirements of Fed. R. Civ. P. 23. A district court per se abuses its discretion when it makes an error of law or clearly errs in its factual findings.

Civil Procedure > Class Actions > Prerequisites > Commonality

[HN6] Fed. R. Civ. P. 23(a)(2) establishes that a class action may be maintained only if "there are questions of law or fact common to the class."

Civil Procedure > Class Actions > Prerequisites > General Overview

Evidence > Procedural Considerations > Burdens of Proof > Allocation

[HN7] Wal-Mart reaffirmed existing precedent that courts must rigorously examine whether plaintiffs have met the prerequisites of Fed. R. Civ. P. 23(a) at the certification stage, an

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785 F.3d 895, *, 2015 U.S. App. LEXIS 7739, **;
126 Fair Empl. Prac. Cas. (BNA) 1793; 99 Empl. Prac. Dec. (CCH) P45,306

analysis that will often overlap with the merits of a claim. But as the Court later clarified, Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Instead, the merits of a claim may be considered only when relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.

***Evidence > Procedural Considerations > Weight & Sufficiency
Civil Procedure > Class Actions > Prerequisites > General Overview***

[HN8] While an evaluation of the merits to determine the strength of the plaintiffs' case is not part of a Fed. R. Civ. P. 23 analysis, the factors spelled out in Rule 23 must be addressed through findings, even if they overlap with issues on the merits.

***Civil Procedure > Class Actions > Prerequisites > General Overview
Evidence > Procedural Considerations > Weight & Sufficiency***

[HN9] Fed. R. Civ. P. 23 is not a mere pleading standard. Far from it. A court should engage the merits of a claim only to the extent necessary to verify that Rule 23 has been satisfied.

***Evidence > Procedural Considerations > Weight & Sufficiency
Labor & Employment Law > Discrimination > Disparate Treatment > Proof > General Overview***

[HN10] Of course, it belabors the obvious to observe that the alternative benchmark is a less precise measure than actual bidding data to prove discrimination. It is also clear, however, that plaintiffs may rely on other reliable data sources and estimates when a company has destroyed or discarded the primary evidence in a discrimination case. More than two decades of judicial precedent affirm as much.

Labor & Employment Law > Discrimination > Disparate Treatment > Proof > General Overview

Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Statistical Evidence

Civil Procedure > Class Actions > Prerequisites > Commonality

[HN11] The critical question is not whether the data used is perfect for purposes of establishing commonality for class certification in a discrimination matter, but instead whether it is reliable and probative of discrimination. To that end, a court must examine whether any statistical assumptions made in the analysis are reasonable.

***Civil Procedure > Class Actions > Prerequisites > Commonality
Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Statistical Evidence***

[HN12] An incremental reduction in probative value - which is a natural consequence of the use of proxy data - does not itself render a statistical study unreliable in establishing a question of discrimination common to the class. Indeed, to conclude otherwise would undermine prior precedent, rendering plaintiffs unable to bring a statistics-based employment discrimination claim after a company has intentionally or inadvertently destroyed actual applicant data.

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785 F.3d 895, *, 2015 U.S. App. LEXIS 7739, **;
126 Fair Empl. Prac. Cas. (BNA) 1793; 99 Empl. Prac. Dec. (CCH) P45,306

Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Statistical Evidence

Civil Procedure > Class Actions > Prerequisites > Commonality

[HN13] What matters for determining commonality under class certification in a discrimination matter is not whether an analysis makes assumptions based on imperfect data, but whether those assumptions are reasonable. Indeed, statistics are not certainties but are merely a body of methods for making wise decisions in the face of uncertainty.

Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Statistical Evidence

[HN14] Statistical significance is not always synonymous with legal significance, such as in the discrimination context. Indeed, the usefulness of statistical evidence often depends on all of the surrounding facts and circumstances.

Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burdens of Proof

Civil Procedure > Class Actions > Prerequisites > Commonality

[HN15] Wal-Mart instructs that plaintiffs must present a common contention capable of being proven or disproven in "one stroke" to satisfy Fed., R. Civ. P. 23(a)(2)'s commonality requirement. Thus, a class-wide proceeding must be able to generate common answers that drive the litigation. For a claim based on discrimination in employment decisions, without some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question why was I disfavored. Semantic dexterity in crafting a common contention is not enough. Commonality instead requires the plaintiff to demonstrate that the class members "have suffered the same injury." As such, a court must examine whether differences between class members impede the discovery of common answers.

Civil Procedure > Class Actions > Prerequisites > Commonality

Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Statistical Evidence

Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burdens of Proof

[HN16] In the absence of a common job evaluation procedure, Wal-Mart held that statistical proof of employment discrimination at the regional and national level, coupled with limited anecdotal evidence from some states, is insufficient to show that the company maintained a "general policy of discrimination" present in each store where class members worked for purposes of commonality for class certification.

Labor & Employment Law > Discrimination > Disparate Treatment > Proof > General Overview

Civil Procedure > Class Actions > Prerequisites > Commonality

[HN17] A more centralized, circumscribed environment generally increases the uniformity of shared injuries, the consistency with which managerial discretion is exercised, and the

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likelihood that one manager's promotions decisions will impact employees in other departments for purposes of commonality for class certification.

***Civil Procedure > Class Actions > Prerequisites > Commonality
Labor & Employment Law > Discrimination > Disparate Treatment > Proof > General Overview***

[HN18] Nothing in the Supreme Court's opinion suggests that single, localized operations must be analytically dissected into component departments for purposes of commonality for class certification in a discrimination context.

Labor & Employment Law > Discrimination > Disparate Treatment > Proof > General Overview

Labor & Employment Law > Discrimination > Racial Discrimination > Proof > General Overview

[HN19] It is difficult to fathom how widespread racial animus that consistently emphasized the inferiority of black workers bears no relationship to decisions whether or not to promote an employee of that race. Courts are not limited to the record in making such elementary judgments. Justice is not blind to history, and courts need not avert their eyes from the broader circumstances surrounding employment decisions, and the inferences that naturally follow.

Labor & Employment Law > Discrimination > Disparate Treatment > Proof > General Overview

[HN20] Companies may investigate allegations of discrimination and take statements from employees. But when it comes to assessing the probative value of those statements - when weighed against the numerous declarations of employees who took the often grave risk of accusing an employer of a workplace violation - courts should proceed with eyes open to the imbalance of power and competing interests.

Labor & Employment Law > Discrimination > Disparate Treatment > Proof > General Overview

Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burdens of Proof

[HN21] A plaintiff need not offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Instead, a bifurcated class action proceeding allows for a "liability" stage to first determine whether an employer engaged in a pattern or practice of discriminatory conduct. Upon a finding of liability, a second damages stage allows for the consideration of which individuals were specifically harmed by the policy.

Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burdens of Proof

Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Statistical Evidence

[HN22] For a liability determination in a disparate treatment claim, such a claim requires proof of a "systemwide pattern or practice" of discrimination such that the discrimination is

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"the regular rather than the unusual practice." The required discriminatory intent may be inferred upon such a showing. Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.

Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burdens of Proof

Labor & Employment Law > Discrimination > Disparate Impact > Proof > General Overview

Labor & Employment Law > Discrimination > Racial Discrimination > Proof > Statistical Evidence

[HN23] Unlike a disparate impact claim, a showing of disparate treatment does not require the identification of a specific employment policy responsible for the discrimination. A pattern of discrimination, revealed through statistics and anecdotal evidence, can alone support a disparate treatment claim, even where the pattern is the result of discretionary decision-making. To hold otherwise would dramatically undermine Title VII's prophylactic powers. A central purpose of Title VII is to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.

Labor & Employment Law > Discrimination > Disparate Impact > Proof > Burdens of Proof

Labor & Employment Law > Discrimination > Disparate Impact > Proof > Statistical Evidence

Labor & Employment Law > Discrimination > Disparate Treatment > Proof > General Overview

[HN24] Statistics and anecdotes suggesting a pattern of discrimination are not enough alone to sustain a disparate impact claim. Disparate impact liability requires the identification of a specific employment practice that caused racially disparate results. 42 U.S.C.S. § 2000e-2(k). Unlike disparate treatment, the disparate impact theory does not require proof of improper intent to sustain a Title VII violation. Instead, liability is premised on facially neutral policies.

Labor & Employment Law > Discrimination > Disparate Impact > Proof > Burdens of Proof

[HN25] Under Wal-Mart, a mere showing that a policy of discretion has produced an overall disparity does not suffice for purposes of disparate impact. Instead, plaintiffs who allege such a policy of discretion must demonstrate that a "common mode of exercising discretion" actually existed throughout a company. Wal-Mart recognizes that in certain cases, giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory because an employer's undisciplined system of subjective decisionmaking can have precisely the same effects as a system pervaded by impermissible intentional discrimination. For a nationwide class, Wal-Mart found that proving a consistent exercise of discretion will be difficult, if not impossible in some circumstances.

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Labor & Employment Law > Discrimination > Disparate Impact > Proof > Burdens of Proof

Labor & Employment Law > Discrimination > Racial Discrimination > Proof > Burdens of Proof > Employee Burdens

[HN26] For a localized, circumscribed class of workers at a single facility, a policy of subjective, discretionary decision-making can easily form the basis of Title VII liability under a disparate impact theory, particularly when paired with a clear showing of pervasive racial hostility. In such cases, the underlying animus may help establish a consistently discriminatory exercise of discretion. Several ways that such a disparate impact claim may satisfy Fed. R. Civ. P. 23 after Wal-Mart, include: (1) when the exercise of discretion is "tied to a specific employment practice" that "affected the class in a uniform manner"; (2) when there is "also an allegation of a company-wide policy of discrimination" that affected employment decisions; and (3) "when high-level personnel exercise" the discretion at issue. A specific employment practice or policy can comprise affirmative acts or inaction.

Civil Procedure > Class Actions > Prerequisites > Predominance

Civil Procedure > Class Actions > Prerequisites > Commonality

[HN27] In a class action brought under Fed. R. Civ. P. 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. But as Wal-Mart made clear, the Rule 23(a) commonality requirement and the Rule 23(b)(3) predominance requirement remain separate inquiries.

Civil Procedure > Appeals > Briefs

Civil Procedure > Appeals > Reviewability > Preservation for Review

[HN28] The doctrine of waiver derives from the Federal Rules of Appellate Procedure, which require that the argument section of an appellant's opening brief contain the appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies. Fed. R. App. P. 28(a)(8)(A). Failure of a party in its opening brief to challenge an alternate ground for a district court's ruling waives that challenge.

Civil Procedure > Appeals > Reviewability > Preservation for Review

Civil Procedure > Appeals > Briefs

[HN29] Where an argument advanced in an appellant's opening brief applies to and essentially subsumes an alternative basis for affirmance not separately argued therein, the appellant does not waive that alternative basis for affirmance.

Civil Procedure > Appeals > Reviewability > Preservation for Review

[HN30] The purpose of the waiver doctrine is to avoid unfairness to an appellee and minimize the risk of an improvident or ill-advised opinion being issued on an unbriefed issue. Even when an argument has been waived, an appellate court may nonetheless consider it if a "miscarriage of justice would otherwise result."

Civil Procedure > Appeals > Remands

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[HN31] A district court must implement both the letter and spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces. The mandate rule forecloses relitigation of issues expressly or impliedly decided by the appellate court.

Civil Procedure > Appeals > Remands

Evidence > Procedural Considerations > Burdens of Proof > Allocation

Governments > Courts > Judicial Precedents

[HN32] The "extraordinary" exception to the mandate rule is when there is a showing that controlling legal authority has changed dramatically.

Civil Procedure > Class Actions > Certification

Civil Procedure > Class Actions > Judicial Discretion

[HN33] Fed. R. Civ. P. 23 provides wide discretion to district courts, in part, to promote the systemic class action virtues of efficiency and flexibility. The realization of such benefits, however, requires that a district court exercise its judgment in a reasoned and expeditious manner.

COUNSEL: ARGUED: Robert L. Wiggins, Jr., WIGGINS, CHILDS, QUINN & PANTAZIS LLC, Birmingham, Alabama, for Appellants.

Lisa Schiavo Blatt, ARNOLD & PORTER LLP, Washington, D.C., for Appellees.

ON BRIEF: Armand Derfner, D. Peters Wilborn, Jr., DERFNER, ALTMAN & WILBORN, Charleston, South Carolina; Ann K. Wiggins, WIGGINS, CHILDS, QUINN & PANTAZIS LLC, Birmingham, Alabama, for Appellants.

Cary A. Farris, John K. Linker, J. Shannon Gatlin, ALANIZ SCHRAEDER LINKER FARRIS MAYES, LLP, Houston, Texas; Dirk C. Phillips, Sarah M. Harris, ARNOLD & PORTER LLP, Washington, D.C.; J. Tracy Walker, IV, Robert L. Hodges, Matthew A. Fitzgerald, MCGUIREWOODS, LLP, Richmond, Virginia, for Appellees.

JUDGES: Before GREGORY, AGEE, and KEENAN, Circuit Judges. Judge Gregory wrote the opinion, in which Judge Keenan joined. Judge Agee wrote the dissenting opinion.

OPINION BY: GREGORY

OPINION

[*898] GREGORY, Circuit Judge:

This case concerns the certification of a class of black steel workers who allege endemic racial discrimination at a South Carolina plant owned [**2] by Nucor Corporation and Nucor Steel Berkeley (collectively, "Nucor"). Plaintiffs-appellants ("the workers") accuse Nucor of both discriminatory job promotion practices and a racially hostile work environment under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. The district court originally denied class certification for both claims, and this Court reversed. See *Brown v. Nucor Corp.*, 576 F.3d 149 (4th Cir. 2009) ("Brown I").

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The district court has revisited certification and decertified the promotions class in light of the Supreme Court's opinion in *Wal-Mart Stores, Inc. v. Dukes*, U.S. , 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011).¹ We thus again confront the question of whether the workers' have presented a common question of employment discrimination through evidence of racism in the workplace. Despite Wal-Mart's reshaping of the class action landscape, we hold that the district court has for a second time erred in refusing to certify the workers' class, where (1) statistics indicate that promotions at Nucor depended in part on whether an individual was black or white; (2) substantial anecdotal evidence suggests discrimination in specific promotions decisions in multiple plant departments; and (3) there is also significant evidence that those promotions decisions were made in the context of a racially hostile **[**3]** work environment.

¹ The district court refused to decertify the workers' hostile work environment claim. We have previously denied as untimely Nucor's petition for interlocutory review of that decision. *Nucor Corp. v. Brown*, 760 F.3d 341, 342 (4th Cir. 2014).

Against that backdrop, the district court fundamentally misapprehended the reach of Wal-Mart and its application to the workers' promotions class. We thus vacate the district court's decision in part and remand for re-certification of the class.

I.

The Nucor plant encompasses six production departments that work together to melt, form, finish, and ship steel products to customers. See *Brown I*, 576 F.3d at 151. At the start of this litigation, 611 employees worked at the plant. Seventy-one (11.62%) were black.² There was, however, at most one black supervisor in the production departments until after the Equal Employment Opportunity Commission ("EEOC") initiated charges that preceded the putative class action.

² By comparison, more than 38% of the available local labor market is black, according to Census data provided by the workers' experts.

The workers' promotions claim rests on alternative theories of liability under Title VII, which prohibits employment discrimination because of an individual's "race, color, religion, **[**4]** sex, or national origin." 42 U.S.C. § 2000e-2. The promotions claim first alleges a pattern or practice of racially disparate treatment in promotions decisions. See *Teamsters v. United States*, 431 U.S. 324, 336, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977). Second, it charges that Nucor's facially neutral promotions policies and procedures had a racially disparate impact. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971); *Wal-Mart*, 131 S. Ct. at 2554.

Both theories are grounded in a statistical analysis of racial disparities in job pro **[*899]** motions at the plant combined with anecdotal evidence of discrimination. The workers' statistical evidence spans the four-year period preceding the litigation, between December 1999 and December 2003. Because Nucor destroyed and/or discarded the actual bidding data for the period before 2001, the workers' experts established an alternative benchmark using 'change-of-status' forms filed by the company whenever a promotion took place at

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the plant. The experts extrapolated comparative statistics for that period using an assumption that the racial composition of the bidding pool for those jobs was the same as for the post-2001 jobs analyzed (when Nucor retained actual bidding records).

The workers also presented abundant direct and circumstantial anecdotal evidence of discrimination in promotions, including:

* Anecdotal evidence provided [**5] by the seven named plaintiffs and nine other putative class members, claiming discrimination in specific promotions decisions in the Nucor production departments;

* A description of complaints, contained in affidavits and depositions, made to plant General Manager Ladd Hall, who the workers allege failed to meaningfully respond;

* Descriptions of retaliation against those who complained to management;

* A written copy of Nucor's promotions policy and testimony that the policy was largely ignored in favor of giving unbridled discretion to supervisors; and

* Testimony by a white supervisor that his department manager told him that "I don't think we'll ever have a black supervisor while I'm here."

The facts undergirding the workers' separate hostile work environment claim, not directly at issue in this appeal, also bear on the promotions analysis. Those facts are disquieting in their volume, specificity, and consistency. Supervisors allegedly routinely referred to black workers as "nigger" and "DAN (dumb ass nigger)," with one supervisor reportedly stating "niggers aren't smart enough" to break production records, while others tolerated the routine use of epithets like "bologna lips," "yard [**6] ape," and "porch monkey." These epithets and others were broadcast over the plant-wide radio system - comprising a network of walkie-talkies used to communicate - along with monkey noises and the songs "Dixie" and "High Cotton." The workers' declarations and depositions further suggest that departmental supervisors and the plant's general manager consistently ignored racial harassment carried out by white workers, including the circulation of racist emails, the prominent display of a hangman's noose, the commonplace showing of the Confederate flag, and an episode when a white employee draped a white sheet over his head with eyes cut out in the form of a KKK hood.

In 2007, the South Carolina district court denied the workers' motion for class certification for both the promotions and hostile work environment claims. In 2009, a divided panel of this Court reversed, concluding that the workers satisfied the threshold requirements of Federal Rule of Civil Procedure 23. We remanded the case "with instructions to certify the appellants' class action." *Brown I*, 576 F.3d at 160.

On February 17, 2011, the district court followed our instructions to certify the class, concluding that the workers satisfied Rule 23(b)(3)'s requirements that common questions predominate [**7] and that the class action was superior to other litigation devices [*900] to resolve the dispute. The district court later declined to stay the case pending a ruling in *Wal-Mart*, and it declined to reconsider its order certifying the class.

The Supreme Court decided *Wal-Mart* in June 2011, decertifying an unprecedented nationwide class of approximately 1.5 million female employees spread over 3,400 stores. *Wal-Mart* held that the plaintiffs had failed to present a "common contention" of employment discrimination capable of "classwide resolution," as required by Rule 23(a)(2). *Wal-Mart*, 131 S.Ct. at 2551. Given the diffuse class and number of employment decisions

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at issue, the Supreme Court observed that "[w]ithout some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all class members' claims for relief will produce a common answer to the crucial question why was I disfavored." *Id.* at 2552 (emphasis in original). The plaintiffs, Wal-Mart concluded, failed to meet that standard when they premised liability on a company policy of decentralized subjective decision-making by local managers, combined with statistics showing gender-based employment disparities, limited anecdotal evidence, **[**8]** and expert testimony about a corporate culture that allowed for the transmission of bias. See *id.* at 2551, 2554-55.

On September 11, 2012, the district court relied on Wal-Mart to decertify the workers' promotions class, invoking the court's authority under Rule 23(c)(1)(C) to amend a certification order at any time before final judgment. Wal-Mart, the court observed, clarified and heightened the commonality requirement of Rule 23(a)(2), requiring the workers to present "significant proof" that Nucor "operated under a general policy of discrimination" and that they suffered a common injury. J.A. 10934 (quoting Wal-Mart, 131 S.Ct. at 2553).

Under that standard, the district court concluded that decertification of the promotions class was required because: (1) this Court's examination of the workers' statistical analysis in *Brown I* was not sufficiently "rigorous" to assess whether it raised questions common to the class under Rule 23(a)(2); (2) the workers' statistical and anecdotal evidence failed to establish such commonality because it did not provide "significant proof" that there existed both a "general policy of discrimination" and a "common injury"; (3) the delegation of subjective decision-making to Nucor supervisors was not, without more, a sufficiently uniform policy **[**9]** to present "'common' issues appropriate for resolution on a class-wide basis"; and (4) even if the workers had identified a common question of law or fact satisfying Rule 23(a)(2), they failed to independently satisfy Rule 23(b)(3)'s requirements that common issues predominate and that the class action is a superior litigation device.

Although the court decertified the class for the promotions claim, it refused to do so for the hostile work environment claim. The district court reaffirmed that the workers had demonstrated that the "landscape of the total work environment was hostile towards the class." J.A. 10964 (quoting *Newsome v. Up-To-Date Laundry, Inc.*, 219 F.R.D. 356, 362 (D. Md. 2004)). Unlike the promotions claim, the court determined that the hostile environment allegations required no showing of a company-wide adherence to a common policy of discrimination. Still, the court found that "there is significant evidence that management ignored a wide range of harassment" and that the workers "met their burden to present significant proof of a general policy of discrimination." J.A. 10968.

[*901] On September 30, 2013, the workers appealed the district court's decertification of the promotions class.

II.

[HN1] We typically review a district court's certification order for abuse of discretion. **[**10]** *Doe v. Chao*, 306 F.3d 170, 183 (4th Cir. 2002), *aff'd* on other grounds, 540 U.S. 614, 124 S. Ct. 1204, 157 L. Ed. 2d 1122 (2004). We review *de novo*, however, whether a district court contravenes a prior express or implicit mandate issued by this Court. *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993); *S. Atl. Ltd. P'ship of Tenn. v. Riese*, 356 F.3d 576, 583

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(4th Cir. 2004) ("We review de novo . . . whether a post-mandate judgment of a district court contravenes the mandate rule, or whether the mandate has been 'scrupulously and fully carried out.'" (quoting 2A Fed. Proc., L. Ed. § 3:1016)).

Determining the appropriate standard of review thus requires a two step approach. First, we examine de novo whether the district court's decertification order violated our mandate in *Brown I* to certify the workers' class. Second, if no such violation occurred, we must determine anew whether the district court abused its discretion in decertifying the promotions class.

[HN2] As to the first question, an "extraordinary" exception to the mandate rule exists when there is "a show[ing] that controlling legal authority has changed dramatically." *Bell*, 5 F.3d at 67 (alteration in original). Moreover, Rule 23(c)(1)(C) provides a district court with broad discretion to alter or amend a prior class certification decision at any time before final judgment.

Against that backdrop, the parties disagree about whether Wal-Mart provided sufficient justification for the district court to invoke **[**11]** its powers to revisit certification. Nucor maintains that Wal-Mart represents a "sea change" and that "class actions may proceed only in the most exceptional of cases." Resp'ts' Br. 15, 20. The workers suggest, however, that the Supreme Court instead largely reaffirmed existing precedent. Appellants' Br. 34.

The truth has settled somewhere in between. See *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 113-14 (4th Cir. 2013) (discussing limitations on the scope of Wal-Mart's holding); *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 487-88 (7th Cir. 2012), cert. denied, 133 S. Ct. 338, 184 L. Ed. 2d 157 (2012) (finding that Wal-Mart provided the basis for a renewed class certification motion); *DL v. District of Columbia*, 713 F.3d 120, 126, 404 U.S. App. D.C. 316 (D.C. Cir. 2013) (surveying how Wal-Mart has changed the class action landscape); Elizabeth Tippet, *Robbing A Barren Vault: The Implications of Dukes v. Wal-Mart for Cases Challenging Subjective Employment Practices*, 29 Hofstra Lab. & Emp. L.J. 433 (2012) (using an empirical analysis to predict Wal-Mart's likely impact on class certifications in the future). [HN3] At the very least, Wal-Mart recalibrated and sharpened the lens through which a court examines class certification decisions under Rule 23(a)(2), an impact plainly manifested by the number of certifications overturned in its wake. See, e.g., *EQT Prod. Co. v. Adair*, 764 F.3d 347 (4th Cir. 2014); *Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 376 (3d Cir. 2013); *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 839, 841-44 (5th Cir. 2012); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 974 (9th Cir. 2011).

In that light, we find that the district court's decision to reconsider the certification of the workers' class did not itself violate **[**12]** our mandate in *Brown I*. Per this Court's original remand instructions, the district court certified both the promotions **[*902]** and hostile work environment classes. Although the court had no discretion to then reconsider questions decided by this Court under then-existing facts and law, Wal-Mart provided a sufficiently significant change in the governing legal standard to permit a limited reexamination of whether the class satisfied the commonality requirement of Rule 23(a)(2).³ There are, however, instances described below when the district court unnecessarily revisited other discrete determinations made by this Court in *Brown I*, such as whether the Nucor plant should be treated analytically as a single entity, and whether

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the class independently met the requirements of Rule 23(b)(3). The reconsideration of those determinations was not compelled by Wal-Mart and contravened our mandate in *Brown I*.

³ Furthermore, this Court's original mandate did not entirely divest the district court of its ongoing authority under Rule 23(c)(1)(C) to monitor the class and make changes when appropriate. See *Prado-Steiman v. Bush*, 221 F.3d 1266, 1273 (11th Cir. 2000) ([HN4] "Class certification orders . . . are not final judgments impervious to lower court review and revision."); *Gene & Gene, L.L.C. v. BioPay, L.L.C.*, 624 F.3d 698, 702-03 (5th Cir. 2010).

Because the district court could reexamine **[**13]** whether the workers met the requirement of commonality, we review those findings under the abuse of discretion standard that typically applies to certification orders. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 630, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997) ([HN5] "The law gives broad leeway to district courts in making class certification decisions, and their judgments are to be reviewed by the court of appeals only for abuse of discretion."); *Brown I*, 576 F.3d at 152; *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 317 (4th Cir. 2006). A district court abuses its discretion when it materially misapplies the requirements of Rule 23. See *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 424 (4th Cir. 2003); *Thorn*, 445 F.3d at 317-18 ("A district court per se abuses its discretion when it makes an error of law or clearly errs in its factual findings."). The decisive question here is whether the district court materially misapplied Rule 23(a)(2) to the facts at hand in light of *Wal-Mart*.⁴

⁴ The dissent is skeptical that an appellate court can articulate a deferential standard of review while then finding reversible error in many of the factual and legal determinations made by a district court. See post at 84. Deference, however, clearly does not excuse us from conducting a detailed review of the record. Nor does it blind us from factual findings that were not supported and legal determinations that represent a fundamental misunderstanding of *Wal-Mart*'s scope. Indeed, we recently **[**14]** applied similar scrutiny when overturning a district court's class certification order. See *EQT Production*, 764 F.3d at 357-58.

III.

[HN6] Rule 23(a)(2) establishes that a class action may be maintained only if "there are questions of law or fact common to the class." The district court determined that *Wal-Mart* required decertification of the workers' promotions class insofar as the Supreme Court's interpretation of the rule (1) emphasized the analytical rigor required to evaluate a plaintiff's statistical evidence of commonality at the class certification stage, (2) placed the burden on plaintiffs to provide "significant proof" of a "general policy of discrimination" and "common injury," and (3) relatedly established that a company's policy of discretionary decision-making cannot sustain class certification without a showing that supervisors exercised their discretion in a common way.

Each of these arguments is considered in turn.

[*903] A.

[HN7] *Wal-Mart* reaffirmed existing precedent that courts must rigorously examine whether plaintiffs have met the prerequisites of Rule 23(a) at the certification stage, an analysis that will often overlap with the merits of a claim. *Wal-Mart*, 131 S. Ct. at 2551

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(citing Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160-61, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)). But as the Court later clarified, "Rule 23 grants courts no license to engage in free-ranging **[**15]** merits inquiries at the certification stage." Amgen Inc. v. Conn. Ret. Plans & Trust Funds, U.S. , 133 S. Ct. 1184, 1194-95, 185 L. Ed. 2d 308 (2013). Instead, the merits of a claim may be considered only when "relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." Id. at 1195.⁵

⁵ The Wal-Mart majority confronted a split among courts regarding the depth of review necessary to sustain class certification under Rule 23. See *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 582-84 (9th Cir. 2010), rev'd, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011) (describing the split between circuits); *Wal-Mart*, 131 S. Ct. at 2551-52. On one end of the spectrum, a number of courts liberally construed the Supreme Court's language in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974), stating that "nothing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." 417 U.S. at 177. On the other end, many courts, including this Circuit, heeded the Supreme Court's later call for a "rigorous analysis," as announced in *Falcon*. See 457 U.S. at 160. As *Falcon* held, "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." Id.

This Court's precedent and its approach in *Brown I* are consistent with *Wal-Mart* and *Falcon*. See *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004) (observing that [HN8] "while an evaluation of the merits to determine the strength of the plaintiffs' **[**16]** case is not part of a Rule 23 analysis, the factors spelled out in Rule 23 must be addressed through findings, even if they overlap with issues on the merits"). In *Brown I*, this Court expressly invoked *Falcon*'s requirement of a rigorous analysis to determine compliance with Rule 23. 576 F.3d at 152. More important, of course, we actually conducted such an analysis, providing a detailed evaluation of the workers' anecdotal and statistical evidence to ensure that it presented a common question under Rule 23(a)(2). Id. at 153-56.

Contrary to the dissent's assertion, we do not (and *Brown I* did not) suggest that [HN9] Rule 23 is a mere pleading standard. See post at 92. Far from it. It is true that *Brown I* cautioned that "an in--depth assessment of the merits of appellants' claim at this stage would be improper." Id. at 156. Such a statement, however, is consistent with the Supreme Court's dictate in *Amgen* that a court should engage the merits of a claim only to the extent necessary to verify that Rule 23 has been satisfied. *Amgen*, 133 S. Ct. at 1194-95. *Brown I* did precisely that.

1.

Even evaluated in a still more painstaking manner, the workers' statistical evidence is methodologically sound while yielding results that satisfy *Wal-Mart*'s heightened requirement of commonality discussed below. The parties' **[**17]** central dispute concerns the data used to analyze the period from December 1999 to January 2001, when Nucor failed to retain actual bidding records. For that period, the workers' expert developed an alternative benchmark that uses 27 relevant 'change-of-status' forms -- filled out when an employee **[*904]** changes positions at the plant -- to extrapolate promotions data because actual bidding information was unavailable.

[HN10] Of course, it belabors the obvious to observe that the alternative benchmark is a less precise measure than actual bidding data. It is also clear, however, that plaintiffs may

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rely on other reliable data sources and estimates when a company has destroyed or discarded the primary evidence in a discrimination case. More than two decades of this Court's precedent affirm as much. See *Lewis v. Bloomsburg Mills, Inc.*, 773 F.2d 561 (4th Cir. 1985); *United States v. County of Fairfax*, 629 F.2d 932, 940 (4th Cir. 1980); see generally Ramona L. Paetzold & Steven L. Willborn, *The Statistics of Discrimination: Using Statistical Evidence in Discrimination Cases* § 4.03 (2014) (describing the use of proxy data when actual data is unavailable or unreliable). In *Lewis v. Bloomsburg Mills, Inc.*, this Court approved the use of Census data to establish a hypothetical available pool of black female job applicants after a company discarded **[**18]** employment applications for the relevant period. 773 F.2d at 568.⁶ Plaintiffs then compared the "observed" annual rate of hires of black women with the "expected" rates based upon the proportional availability of black females in the labor pool. *Id.* We endorsed a similar use of proxy data in *United States v. County of Fairfax*, involving a county government that had destroyed three years of employment applications. 629 F.2d at 940. To analyze hiring during that time, plaintiffs assumed that the proportion of black and women applicants for those years was the same as in the first year for which the county retained records. *Id.* This Court approved, concluding the alternative benchmark was "the most salient proof of the County's labor market." *Id.*⁷

⁶ In *Lewis*, the company had "improperly disposed" of the relevant employment applications, unlike the present case where there is no direct evidence of any impropriety. 773 F.2d at 568. That fact, however, does not affect our analysis of the workers' alternative benchmark.

⁷ The dissent cites *Allen v. Prince George's County*, 737 F.2d 1299, 1306 (4th Cir. 1984), to support its argument that a court has wide discretion to reject alternative benchmarks. *Post* at 110-11. In *Allen*, however, the defendants produced actual "applicant flow data" that contradicted the conclusions of **[**19]** the plaintiffs' statistics that were based on more general workforce/labor market comparisons. *Allen*, 737 F.2d at 1306. Here, like in *Lewis*, such actual applicant data is unavailable. See *Lewis*, 773 F.2d at 568 (noting that "applicant flow data" was not available). Furthermore, Nucor has not presented any alternative statistical study, or shown that data exists that may be more reliable than the alternative benchmark used by the workers.

2.

[HN11] The critical question is thus not whether the data used is perfect but instead whether it is reliable and probative of discrimination. To that end, a court must examine whether any statistical assumptions made in the analysis are reasonable. See Paetzold & Willborn, *supra*, § 4.16. The district court here identified two assumptions made by the workers' experts as problematic.

The district court first questioned the assumption that the job changes described on the 27 forms represent promotions. See J.A. 10942. As an example of clear factual error committed by the court, it quoted at length from the dissent in *Brown I* to argue that the forms may represent job changes unrelated to promotions. J.A. 10942 (quoting *Brown I*, 576 F.3d at 167-68 (Agee, J., concurring in part and dissenting in part)). The forms cited in Judge Agee's original dissent, however, are **[**20]** plainly not among the 27 **[*905]** relied upon by the workers' experts in constructing the alternative benchmark. Compare J.A. 10942 (the district court's decertification order quoting the dissent in *Brown I*), with J.A. 11005-11032 (copies of the actual change-of-status forms used in the expert analysis).

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Worse still, the dissent in *Brown I* reached the question of whether the 27 forms represented promotions without the issue having been raised, much less analyzed, by the district court in its original order denying certification, see J.A. 8979, or by Nucor itself in its briefing before this Court in *Brown I*.⁸ The dissent in *Brown I* thus both engaged in sua sponte fact-finding to divine which forms were used, and then got the facts wrong.⁹ Using the flawed data, the dissent concluded in *Brown I* that "[o]n this record, it is difficult, if not impossible to discern whether the 2000 data based on the nebulous change-of-status forms proves those positions were promotion positions available for employee bidding and thus relevant to the formulation of statistical evidence for the appellants' claims." *Brown I*, 576 F.3d at 168 (Agee, J., concurring in part and dissenting in part). The district court expressly embraced that conclusion **[**21]** in decertifying the promotions class after *Wal-Mart*. J.A. 10942.

⁸ Nucor instead argued that the change of status forms failed to capture whether black employees bid on the positions, and whether the positions were open for bidding in the first place. Given the lack of controversy surrounding whether the 27 forms described promotions, the forms themselves were not introduced into the record until 2012, after the district embraced the fact-finding conducted by the dissent in *Brown I* and observed that "the Court has never seen the 27 change-of-status forms. . . ." J.A. 10943. The workers then appended all the forms to their motion to "alter and amend" the decertification order -- a motion that was denied. J.A. 11005, 11083. Notably, it also appears that in 2006 the workers' expert provided Nucor with a list of the 27 employees used in the benchmark analysis. See J.A. 1409, 1438.

⁹ Given that history, we would be remiss not to acknowledge the irony inherent in the dissent's insistence that we are now impermissibly making factual determinations without due deference to the district court.

Upon examining the correct change-of-status forms, discerning whether they represent promotions is a relatively **[**22]** straightforward enterprise. Nineteen of the 27 forms expressly state they are for a promotion, for a "successful bidder" on a "higher position," or for a new position that was "awarded" or "earned." Two of the forms describe changes in job classification accompanied by an increase in pay. One form notes that an inspector was a "successful bidder" on a mill adjuster job -- a move referred to on another change form as a promotion. Two forms are for a "successful bidder" on a new position where no new pay grade is noted. The remaining three forms appear to involve changes in positions or training that involved a decrease in pay, but there is no indication, or argument by Nucor or the district court, that the exclusion of those forms would substantially undermine the probativeness of the expert analysis.

The second assumption criticized by the district court was that the bidding pools for the 27 positions filled between December 1999 and January 2001 had the same average racial composition as the pools for similar jobs analyzed from 2001 to December 2003, when the company retained actual bidding data. Because of discovery limitations imposed by the district court, the information available **[**23]** regarding the 2001-2003 promotions was restricted to positions similar to ones bid on by the named plaintiffs, where there was at least one black bidder. However, because Nucor failed to retain bidding records for 1999-2000, the data from that period could not **[*906]** be limited to positions where there was a known black bidder. Instead, the alternative benchmark had to assume that there was at least one black worker applying for each promotion analyzed -- an assumption that the district court concluded helped render the statistical analysis unreliable. But as we already determined in *Brown I*, the assumption does not fatally undermine the probativeness of the

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experts' findings. The workers' experts limited the records they analyzed to the same positions identified in the later period when bidding data was available, positions for which there was a black bidder. J.A. 1161-62. In its original order denying certification, the district court observed that the assumptions regarding bidding "may be reasonable and the statistics based thereon may be relevant to prove discrimination at the plant," but "the necessity of the assumptions diminishes their probative value."¹⁰ J.A. 8987; see also *Brown I*, 576 F.3d at 156. As we previously **[**24]** concluded, **[HN12]** an incremental reduction in probative value -- which is a natural consequence of the use of proxy data -- does not itself render a statistical study unreliable in establishing a question of discrimination common to the class. *Brown I*, 576 F.3d at 156. Indeed, to conclude otherwise would undermine our prior precedent in cases like *Lewis and Fairfax*, rendering plaintiffs unable to bring a statistics-based employment discrimination claim after a company has intentionally or inadvertently destroyed actual applicant data.¹¹ See *Lewis*, 773 F.2d at 568; *Fairfax*, 629 F.2d at 940.

¹⁰ After we pointed to this language in *Brown I*, the district court did an about-face and changed its conclusion to state that the statistics were "fundamentally unreliable." J.A. 10941.

¹¹ The workers' experts acknowledged that the incomplete data "undermined" their "ability to use posting and bidding records to analyze [those] promotions." J.A. 1161. In context, however, the experts were lamenting the failure of Nucor to "produce all such records." J.A. 1161. As the experts concluded, they were able to "calculate reliable statistics" for the limited universe of positions they analyzed, even though greater discovery would have allowed them to make a more "powerful" study of plantwide **[**25]** disparities. J.A. 1253-54; see also J.A. 1340-41.

3.

The dissent points to still more statistical assumptions -- assumptions not discussed by either the district court or Nucor -- to further question the reliability of the alternative benchmark. Specifically, the dissent suggests that the black workers may not have been qualified for higher paying jobs and that they may have been denied promotions because of disciplinary records that were not themselves the result of racial animus. See post at 111, 114-17. As to the qualifications of the workers, Nucor identifies nothing in the record - or in any factual findings by the district court - to suggest that black workers regularly applied for jobs for which they were not qualified, such that the reliability of the study would be compromised. Indeed, the Nucor job postings explicitly listed the minimum qualifications required, and the workers' experts reasonably assumed that individuals would normally apply only if they believe they met such qualifications. See J.A. 7763 (an example of a job posting); J.A. 1162. That is not to say that patently unqualified workers did not apply in isolated cases. But there is no reason to believe that such incidents **[**26]** would have substantially reduced the reliability of the statistical conclusions. It also bears repeating that it was Nucor that failed to retain or produce records that would have allowed the experts to take other variables like qualifications more precisely into account. See J.A. 1165.

[*907] The dissent, however, goes a step further in speculating that black workers may have been denied promotions because of their disciplinary records. See post at 111. Again, Nucor itself does not make this argument. Instead, the argument the dissent

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constructs is based on the company's self-serving responses to the workers' interrogatories and requests for production -- where Nucor asserts that some of the black workers were not chosen for promotions due to disciplinary issues. The record, however, does not include disciplinary records for the named plaintiffs or putative class members. More fundamental, the workers allege that any disproportionate disciplinary action levied against them was itself a product of racial discrimination, with the disciplinary records then used as a pretext in hiring decisions. As worker Ramon Roane has stated:

Discipline, attendance, and safety allegations are similar factors **[**27]** that are not equally applied and that have been used as an excuse to deny promotions to me and other persons of my race. The attitudes I have experienced with white supervisors lead me to believe that my race and that of other black employees makes a difference in how we are treated and viewed for discipline[,] promotions[,] and training.

J.A. 1000; see also J.A. 1024 (Alvin Simmons's statement that a white employee was promoted over him despite the fact that the white employee "had been disciplined less than a year earlier for 'not paying attention' when operating equipment"); J.A. 1111 (Earl Ravenell's statement that black workers were disproportionately singled out for disciplinary action); J.A. 6783 (Michael Rhode's description of discrimination in disciplinary action). See generally J.A. 10960-10972 (the district court's factual findings regarding the existence of a racially hostile work environment); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101-02, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003) (allowing the use of circumstantial evidence to show that race was a motivating factor in a "mixed-motive" case involving both legitimate and illegitimate reasons for an employment decision); *Rowland v. Am. Gen. Fin., Inc.*, 340 F.3d 187, 193-94 (4th Cir. 2003) (allowing the use of circumstantial evidence to show that gender was "a motivating factor" **[**28]** in a failure to promote an employee). Given that background, it is easy to see why the district court chose not to advance the arguments that the dissent makes today.

Finally, the dissent criticizes the assumption that the 27 positions identified were actually open for bidding.¹² Post at 109. That assumption, however, derives directly from Nucor's stated policy that every job vacancy is posted on plant bulletin boards and is open to bidding plant-wide -- a policy cited by Nucor's own expert and the district court. See J.A. 5887 (the Report of Finis Welch, observing that "[o]pen positions are posted on bulletin boards and through email," and that "[a]ll employees in the plant are eligible to bid on a posted job"); see also Resp'ts' Br. 9 ("Department managers set the process in motion by sending postings for available **[*908]** promotions to Personnel employees, who performed a purely clerical role and advertised postings plantwide."); J.A. 8979 (the district court's original order denying certification, finding that "[w]hen a position in a department becomes available, the job is posted on the plant's e-mail system, which is accessible to all employees in the plant"). The dissent nonetheless argues that the statistical assumption **[**29]** was unreasonable.¹³ We disagree.

¹² At times, the dissent seems to suggest that statistical assumptions themselves are to be viewed with great suspicion. [HN13] What matters, however, is not whether an analysis makes assumptions based on imperfect data, but whether those assumptions are reasonable. Indeed, statistics are not certainties but are merely "a body of methods for making wise decisions in the face of uncertainty." W. Allen Wallis & Harry V. Roberts, *The Nature of Statistics* 11 (4th ed. 2014); see also M.J. Moroney, *Facts from Figures* 3 (1951) ("A statistical analysis, properly conducted, is a delicate dissection of uncertainties, a surgery of suppositions.").

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13 The record does indicate that "supervisory positions" are not typically posted for bidding under the Nucor hiring policy. J.A. 257. Neither Nucor nor the district court, however, has provided any reason to believe that any of the 27 records at issue describe open supervisory jobs, as Nucor defined the term, and were thus not posted. Furthermore, the dissent suggests that there may have been isolated instances when Nucor did not follow its posting policy for non-supervisory jobs. The fact that a company does not follow its policy to [**30] a tee, however, does not fatally undermine a statistical assumption based upon such a policy.

4.

With the alternative benchmark evidence included, the statistical disparity in promotions is statistically significant at 2.54 standard deviations from what would be expected if race were a neutral factor. See *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n. 14, 97 S. Ct. 2736, 53 L. Ed. 2d 768 (1977) (indicating that anything greater than two or three standard deviations in racial discrimination cases is suspicious, at least for large sample sizes); *Brown I*, 576 F.3d at 156 n.9 (applying the Hazelwood standard to the workers' statistical evidence); *Jones v. City of Boston*, 752 F.3d 38, 46-47 (1st Cir. 2014) (observing that two standard deviations has become the commonly accepted threshold for social scientists and federal courts "in analyzing statistical showings of disparate impact"). According to the experts' analysis, black employees constitute 19.24% of those who applied for relevant promotions. Yet such employees were only 7.94% percent of those promoted.

Of course, [HN14] statistical significance is not always synonymous with legal significance. *EEOC v. Fed. Reserve Bank of Richmond*, 698 F.2d 633, 648 (4th Cir. 1983) rev'd on other grounds sub nom. *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 104 S. Ct. 2794, 81 L. Ed. 2d 718 (1984). Indeed, the usefulness of statistical evidence often "depends on all of the surrounding facts and circumstances." *Teamsters*, 431 U.S. at 340. Here, the surrounding circumstances and anecdotal evidence of discrimination, [**31] as described in greater detail below, are precisely what help animate the statistical findings.¹⁴ As we held in *Brown I* and reaffirm today, "because the appellants' direct evidence alone was sufficient to demonstrate common claims of disparate treatment and disparate impact, their statistical data did not need to meet a two-standard-deviation threshold." *Brown I*, 576 F.3d at 156-57. Thus it is plain that when the statistical disparity actually exceeded two standard deviations, the district court abused its discretion in decertifying the class.

¹⁴ Indeed, the workers' statistical analysis may actually underestimate the impact of race on promotions at Nucor. As worker Eric Conyers stated in his declaration: "If I believed that a truly level playing field existed at the company I would have bid on numerous other positions such as Roll Guide Builder in the Beam Mill." J.A. 1079. But the expert analysis at issue could not capture the impact of discrimination on depressed bidding rates.

B.

The district court further concluded that the workers' statistical and anecdotal [**909] evidence was insufficient for class certification insofar as the evidence did not demonstrate a uniform class-wide injury that spanned the entire Nucor plant. [**32] As the court observed, [HN15] Wal-Mart instructs that plaintiffs must present a common contention capable of being proven or disproven in "one stroke" to satisfy Rule 23(a)(2)'s commonality

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requirement. Wal-Mart, 131 S. Ct. at 2551. Thus, a class-wide proceeding must be able to generate common answers that drive the litigation. *Id.*; see also *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014) (observing that "a class meets Rule 23(a)(2)'s commonality requirement when the common questions it has raised are apt to drive the resolution of the litigation, no matter their number" (internal quotation marks omitted)). For a claim based on discrimination in employment decisions, "[w]ithout some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question why was I disfavored." Wal-Mart, 131 S. Ct. at 2552 (emphasis omitted); see also *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 113 (4th Cir. 2013).

The workers here most generally present two such common contentions capable of class-wide answers under Title VII. Under a disparate treatment theory, the common contention is that Nucor engaged in a pattern or practice of unlawful discrimination against black workers in promotions decisions. See *Teamsters*, 431 U.S. at 336. Under the workers' disparate impact theory, the common contention **[**33]** is that a facially neutral promotions policy resulted in a disparate racial impact. See *Griggs*, 401 U.S. at 429-31. As Wal-Mart observed, however, semantic dexterity in crafting a common contention is not enough. Commonality instead "requires the plaintiff to demonstrate that the class members 'have suffered the same injury[.]'" Wal-Mart, 131 S. Ct. at 2551 (quoting *Falcon*, 457 U.S. at 157). As such, a court must examine whether differences between class members impede the discovery of common answers. *Id.* at 2551.

[HN16] In the absence of a common job evaluation procedure, Wal-Mart held that statistical proof of employment discrimination at the regional and national level, coupled with limited anecdotal evidence from some states, was insufficient to show that the company maintained a "general policy of discrimination" present in each store where class members worked. See Wal-Mart, 131 S. Ct. at 2553. Similarly, the district court here found that the workers' statistical and anecdotal evidence was insufficient to show a general policy in all Nucor departments that caused the class injury.

The district court, however, failed to adequately appreciate three significant differences from Wal-Mart that make the case largely inapposite to the facts at hand.

1.

First, Wal-Mart discounted the plaintiffs' statistical **[**34]** evidence in large part because the statistics failed to show discrimination on a store-by-store basis. See Wal-Mart, 131 S. Ct. at 2555. As such, the plaintiffs could not establish that a store greeter in Northern California, for instance, was subject to the same discrimination as a cashier in New Hampshire. These dissimilarities between class members were exacerbated by the sheer size of the Wal-Mart class - 1.5 million members working at 3,400 stores under "a kaleidoscope of supervisors (male and female), subject to a variety of regional policies **[*910]** that all differed." *Id.* at 2557 (quoting *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 652 (9th Cir. 2010) (Kozinski, J., dissenting)). The scale and scope of the putative class, combined with the nature of the evidence offered, was thus essential to Wal-Mart's holding. Had the class been limited to a single Wal-Mart store spanning multiple

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departments, or had the plaintiffs' evidence captured discrimination at a store level, a very different Rule 23(a)(2) analysis would have been required.

In contrast to Wal-Mart, this litigation concerns approximately 100 class members in a single steel plant in Huger, South Carolina. The class members shared common spaces, were in regular physical contact with other departments, could apply for promotions in other **[**35]** departments, and were subject to hostile plant-wide policies and practices. See Brown I, 576 F.3d at 151. Such differences are not merely superficial. Instead, **[HN17]** a more centralized, circumscribed environment generally increases the uniformity of shared injuries, the consistency with which managerial discretion is exercised, and the likelihood that one manager's promotions decisions will impact employees in other departments. That is particularly the case where, as discussed further below, the entire Nucor plant was allegedly infected by express racial bias and stereotypes – a culture that management took few affirmative steps to meaningfully combat.

Nonetheless, the district court analogized to Wal-Mart in finding that the workers' evidence of discrimination was insufficient because it disproportionately concerned a single department – the Beam Mill – and because there was an insufficient showing that all departments operated under a common policy of discrimination. J.A. 10949-54. As such, a class-wide proceeding would not generate "common answers" as Wal-Mart required, the district court found. See Wal-Mart, 131 S. Ct. at 2551.

The district court, however, inappropriately discounted, and often ignored, evidence that establishes discrimination **[**36]** in other Nucor departments. Although 11 of the 16 employees submitting declarations on behalf of the plaintiffs worked in the Beam Mill, the declarants describe frequent instances of alleged promotions discrimination in other departments. See J.A. 1021-24; 1032-35; 1049-51; 1055-56; 1061-63; 1085-86; 1091-92; 1103; 1110-11; 1118-19. Even the additional affidavits obtained by Nucor, discussed in further detail below, present numerous allegations of discrimination in non-Beam Mill departments. See J.A. 5992-95 (discrimination in the Hot Mill and Melt Shop); 6143-45 (discrimination in the Hot Mill); 6174 (general observations of promotions discrimination); 6369-70 (discrimination in the Melt Shop); 6505-07 (discrimination in the Hot Mill); 7036 (discrimination in the Melt Shop). The record additionally indicates numerous complaints of discrimination made to the plant's general manager, who allegedly did little to nothing in response. Such alleged tolerance of discrimination from top management at the plant supports the workers' contention of a class-wide injury that affected them all.¹⁵

¹⁵ As the district court found in the context of the workers' hostile work environment claim:

These affidavits **[**37]** support the Court's conclusion that although allegations of a hostile work environment were most prevalent and severe in the Beam Mill, employees from all of the production departments were subjected to abusive behavior. Specifically, employees from every department reported seeing the Confederate flag, employees from every department reported seeing racist graffiti; and employees from every department reported receiving racially offensive e-mails. Furthermore, in several instances, employees who worked in one department indicated they were harassed by employees from other departments, and many employees reported observing what they considered to be racist symbols and racist graffiti in common areas of the plant.

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[*911] The district court made a still more fundamental error by choosing to treat the Nucor departments as autonomous operations in the first place instead of part of a single facility, contravening both this Court's instructions in *Brown I* and the district court's own prior findings. The district court's original order to certify the class recognized that a department-by-department approach had been foreclosed, writing:

Since the Fourth Circuit rejected this Court's characterization **[**38]** of the production departments as separate environments, the Court must proceed under the assumption that the production departments were permeable, if not unitary. This assumption is buttressed by the fact that Nucor's bidding is plant-wide, and this Court already has held that "potential applicants are eligible to prove they would have applied for a promotion but for the discriminatory practice."

J.A. 9705. Wal-Mart provided no grounds for the court to reconsider that finding because **[HN18]** nothing in the Supreme Court's opinion suggests that single, localized operations must be analytically dissected into component departments.¹⁶ Here, all of the workers' evidence concerns a single connected facility.

¹⁶ The dissent insists that *Brown I*'s determination that the Nucor plant should be treated as a single facility only extended to the hostile work environment claim. Post at 123-24. Yet the discussion of the issue in *Brown I* was specifically premised on the district court's findings regarding both the "pattern or practice" and the work environment claims. *Brown I*, 576 F.3d at 157. A district court may not typically relitigate "issues expressly or impliedly decided by the appellate court." *Bell*, 5 F.3d at 66. Here, even the district court has recognized **[**39]** that *Brown I* prevented a finding that the plant was not a unitary environment in the context of the promotions claim. J.A. 9705 (Certification Order).

Even if not required by our prior ruling, treating the plant as a single entity remains sound. In addition to the direct and circumstantial evidence of discrimination in promotions decisions in multiple departments, racial bias in one Nucor plant department itself diminished the promotional opportunities for black workers in all the departments -- including those who wanted promotions into the infected department and those who sought promotions to other departments and needed their supervisors' recommendations. To that end, the workers cogently observe that requirements for dual approvals for promotions -- by originating and destination department heads -- "carr[ie]d the effects of racial discrimination from one department and supervisor to another, either by systemic tolerance, acquiescence or design." Appellants' Reply Br. 24 (citing *Smith v. Bray*, 681 F.3d 888, 897 & n.3 (7th Cir. 2012)).

Such a conclusion is further strengthened by the workers' hostile work environment claim. As the district court itself found, "the plaintiffs have submitted significant proof that the landscape of the total work environment **[**40]** at the Berkeley plant was hostile towards African-Americans and that the defendants failed to take 'remedial action reasonably calculated to end the harassment.'" J.A. 10966; see also *Brown I*, 576 F.3d at 157-58. That environment, the workers argue, supports their showing of an atmosphere of systemic tolerance of racial hostility by managers and supervisors, forming part of the overall pattern or practice that "infected black **[*912]** employees' promotion opportunities." We agree.

2.

Second, the Wal-Mart plaintiffs' theory of commonality relied, in part, on showing that the company maintained a corporate culture that facilitated the uniform transmission of implicit,

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or subconscious, bias into the hiring process. See Wal-Mart, 131 S. Ct. at 2548. To that end, the plaintiffs' expert testified the company was "vulnerable" to "gender bias." Id. at 2553. The Court, however, concluded that the expert could not with specificity determine how the culture concretely influenced individual employment decisions. Id. at 2553-54. The testimony was therefore insufficient to show a common policy that produced a common injury.

Here, however, the workers have provided substantial evidence of unadulterated, consciously articulated, odious racism throughout the Nucor plant, including affirmative **[**41]** actions by supervisors and a widespread attitude of permissiveness of racial hostility. The examples in the record are ubiquitous: bigoted epithets and monkey noises broadcast across the plant radio system, emails with highly offensive images sent to black workers, a hangman's noose prominently displayed, a white supervisor stating that "niggers aren't smart enough" to break production records, and abundant racist graffiti in locker rooms and shared spaces. Moreover, no more than one black supervisor worked in the Nucor production departments until after the EEOC charge that preceded this litigation. It strains the intellect to posit an equitable promotions system set against that cultural backdrop, particularly in light of the other evidence presented.

The dissent rejects the idea that evidence of a racially hostile work environment may help establish a claim for disparate treatment in promotions decisions.¹⁷ Post at 124-25. Indeed, the dissent goes so far as to observe that "locker rooms and radios bear no relationship to promotions decisions." Id. at 125. Such a perspective, however, is perplexingly divorced from reality and the history of workplace discrimination. **[HN19]** It is difficult to fathom how widespread **[**42]** racial animus of the type alleged here, an animus that consistently emphasized the inferiority of black workers, bears no relationship to decisions whether or not to promote an employee of that race. Although the dissent asserts that "nothing in the record supports" making a connection between the work environment and promotions practices, we are not limited to the record in making such elementary judgments. Justice is not blind to history, and we need not avert our eyes from the broader circumstances surrounding employment decisions, and the inferences that naturally follow.

¹⁷ We do not suggest, of course, that evidence of a hostile work environment is sufficient by itself to support a disparate treatment or disparate impact claim. Rather, we merely observe that the substantial showing of endemic prejudice at the plant -- a prejudice that was allegedly tolerated and/or encouraged by management - heightens the probativeness of the workers' other evidence.

3.

Third, and related, the anecdotal evidence of discrimination in this case is substantially more probative than that in Wal-Mart. The Wal-Mart plaintiffs presented affidavits from about 120 female employees, representing approximately **[**43]** one affidavit for every 12,500 class members. Wal-Mart, 131 S. Ct. at 2556. The affidavits captured only 235 of Wal-Mart's 3,400 stores, and there were no affidavits **[*913]** from workers in 14 states. Id. The evidence thus fell far short of the benchmark for a showing of company-wide discrimination established by Teamsters, 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396. In Teamsters, the plaintiffs produced statistical evidence of racial bias combined with

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approximately 40 accounts of discrimination from particular individuals. *Id.* at 338. Given the class size of approximately 334 persons, there was roughly one anecdote for every eight members of the class. See *id.* at 331, 338; *Wal-Mart*, 131 S. Ct. at 2556. "[T]he anecdotes came from individuals spread throughout the company who for the most part worked at the company's operational centers that employed the largest numbers of the class members." See *Wal-Mart*, 131 S. Ct. at 2556 (internal quotation marks omitted). Similarly, this litigation includes anecdotal evidence from more than 16 individuals¹⁸ in a class that numbered approximately one-hundred "past and present black employees at the plant" at the time litigation commenced -- an approximate ratio of one anecdote for every 6.25 class members.¹⁹ See *Brown I*, 576 F.3d at 151 (describing the class size).

¹⁸ This number includes both the 16 declarations introduced by the workers and other **[**44]** accounts of discrimination included in affidavits obtained by Nucor after the EEOC charge was filed. See, e.g., J.A. 5992-95, 6143-45, 6174, 6369-70, 6505-07, 7036. Of the 16 worker-filed declarations, Byron Turner's statement fails to mention specific instances of promotions discrimination, but instead affirms that that he was "affected by the same practices that Ramon Roane and the other named plaintiffs" have raised. J.A. 1124. The dissent argues that the declaration of Walter Cook also fails to mention promotions. Post at 134. Cook's declaration, however, states that he heard white employees talking about a black worker's application for an Operator position. According to Cook, the employees stated they would "do everything that they could to make sure that nigger didn't get the job." J.A. 1075. Further, the dissent argues that the declaration from Kenneth Hubbard includes a complaint that Nucor in fact promoted him. Post at 134. Hubbard's declaration, however, accuses Nucor of placing him "in the position to get [him] out of the mill and the line of progression that lead to supervisory positions." J.A. 1097. Hubbard also observes that his trajectory at the company was dramatically different from that **[**45]** of a white co-worker who started at the plant at the same time and later became a supervisor. *Id.* Indeed, the dissent's approach to the affidavits, consistent with its approach to the anecdotal evidence throughout, appears to be to cherry pick facts from an 11,000 page record, strip those facts of context, and then argue that they undermine the substantial, credible evidence of discrimination that the workers have produced.

¹⁹ There is some uncertainty about the precise size of the class. At the time the litigation began, seventy-one workers at the Nucor plant were black. *Brown I*, 576 F.3d at 151. As the district court found, there was a total of "ninety-four black employees who worked at the plant from 2001 through 2004." *Id.* at 152. The workers' experts estimated that there may have been about 150 black workers in total who "were potentially affected by the selection decisions regarding promotion at Nucor-Berkeley." J.A. 1154. Even assuming a class size of 150, there would be more than one anecdotal account of racial discrimination for every 9.38 class members, a ratio that remains in line with the evidence in *Teamsters*. Furthermore, that number does not take into account the descriptions of discrimination in promotions **[**46]** decisions in the affidavits that Nucor itself obtained, as previously described.

Balanced against such evidence, the district court gave "limited weight" to approximately 80 affidavits from Nucor employees largely disclaiming discrimination at the plant - affidavits taken by company lawyers after the EEOC charges had been filed. See J.A. 10950-51. Common sense and prudence, however, instruct that the affidavits do little to rebut the evidence of discrimination insofar as they were given under potentially coercive circumstances, where the company reserved its ability to **[*914]** use them against other employees in any future lawsuit (a fact that was omitted from the Statement of Participation given to affiants). See J.A. 6003 (the Statement of Participation), 9379 (Nucor's statement that it intended "to use the affidavits for every purpose permitted under the Federal Rules of Evidence," including the opposition to class certification and the impeachment of witnesses); see also *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1202 (11th Cir. 1985) (observing that after a class action has been filed, "[a] unilateral communications scheme . . . is rife with potential for coercion"); *Quezada v. Schneider Logistics Transloading & Distrib.*, No. CV 12-2188 CAS, 2013 U.S. Dist. LEXIS 47639, 2013 WL 1296761, at *5 (C.D. Cal. Mar. 25, 2013) (finding in a class action context that **[**47]** "[f]ailing to inform the employees of the evidence-gathering purpose of the interviews rendered the communications fundamentally misleading and deceptive because

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the employees were unaware that the interview was taking place in an adversarial context, and that the employees' statements could be used to limit their right to relief"); Longcrier v. HL-A Co., 595 F. Supp. 2d 1218, 1228 (S.D. Ala. 2008); Mevorah v. Wells Fargo Home Mort., Inc., No. C 05-1175 MHP, 2005 U.S. Dist. LEXIS 28615, 2005 WL 4813532, at *4 (N.D. Cal. Nov. 17, 2005). Of course, [HN20] companies may investigate allegations of discrimination and take statements from employees. But when it comes to assessing the probative value of those statements -- when weighed against the numerous declarations of employees who took the often grave risk of accusing an employer of a workplace violation - courts should proceed with eyes open to the imbalance of power and competing interests.²⁰ Moreover, as previously observed, the company-obtained affidavits still contain numerous allegations of discrimination in promotions decisions - allegations that carry significant weight given the circumstances in which they were made. See J.A. 5992-95, 6143-46, 6174, 6370, 6506, 7036.

²⁰ The dissent is thus mistaken when it asserts that we are articulating a **[**48]** new rule that courts categorically may not consider the affidavits obtained by companies as part of an investigation into allegations of discrimination. See post at 141. Instead, our analysis concerns the weight that should be given to such affidavits in these circumstances.

Of course, [HN21] a plaintiff need not "offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy." Teamsters, 431 U.S. at 360; see also EEOC v. Korn Indus., Inc., 662 F.2d 256, 260 (4th Cir. 1981). Instead, a bifurcated class action proceeding allows for a "liability" stage to first determine whether an employer engaged in a pattern or practice of discriminatory conduct. Teamsters, 431 U.S. at 360; Korn, 662 F.2d at 260. Upon a finding of liability, a second damages stage allows for the consideration of which individuals were specifically harmed by the policy. Teamsters, 431 U.S. at 361; Korn, 662 F.2d at 260.

4.

Here, [HN22] for a liability determination in a disparate treatment claim, the workers' statistical and anecdotal evidence, especially when combined, thus provide precisely the 'glue' of commonality that Wal-Mart demands. See Brown I, 576 F.3d at 156. Such a claim requires proof of a "systemwide pattern or practice" of discrimination such that the discrimination is "the regular rather than the unusual practice." Teamsters, 431 U.S. at 336; Cooper, 467 U.S. at 875-76; see also Wal-Mart, 131 S. Ct. at 2552 n.7. The required discriminatory **[**49]** intent may be inferred upon such a showing. See Teamsters, 431 U.S. at 339-40; **[*915]** Hazelwood, 433 U.S. at 308-09 (observing that "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination").

Whereas there may have been many answers in Wal-Mart to the question of why any individual employee was disfavored, the workers here have sufficiently alleged that there is only one answer to the question of why Nucor's black workers were consistently disfavored.²¹ [HN23] Unlike a disparate impact claim, a showing of disparate treatment does not require the identification of a specific employment policy responsible for the discrimination. See Teamsters, 431 U.S. at 336 n.16 (discussing the legislative history of Title VII and concluding that the words "pattern or practice" should be interpreted

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according to their plain meaning). A pattern of discrimination, revealed through statistics and anecdotal evidence, can alone support a disparate treatment claim, even where the pattern is the result of discretionary decision-making.

²¹ Contrary to the dissent's assertion, we do not find "in the first instance" that the worker's allegation is correct. Instead, we conclude that the district court clearly erred in finding **[**50]** that the allegation was not sufficiently supported by the record.

To hold otherwise would dramatically undermine Title VII's prophylactic powers. As the Supreme Court observed in *Griggs*, a central purpose of Title VII is "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." 401 U.S. at 429-30; see also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975) (stressing Title VII's prophylactic goals in addition to its purpose "to make persons whole for injuries suffered on account of unlawful employment discrimination"). Here, where substantial evidence suggests a pattern of engrained discriminatory decision-making that consistently disadvantaged black workers at Nucor, to deny class certification would significantly weaken Title VII as a bulwark against discrimination.

C.

[HN24] Statistics and anecdotes suggesting a pattern of discrimination, however, are not enough alone to sustain a disparate impact claim. See *Wal-Mart*, 131 S. Ct. at 2555; *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988). Disparate impact liability requires the identification of a specific employment practice that caused racially disparate results. See 42 U.S.C. § 2000e-2(k); *Watson*, 487 U.S. at 986-87; *Griggs*, 401 U.S. at 431. Unlike disparate treatment, the disparate impact theory does not require proof of improper intent **[**51]** to sustain a Title VII violation. *Teamsters*, 431 U.S. at 349; *Griggs*, 401 U.S. at 429-31 (finding the use of standardized tests resulted in a disparate impact). Instead, liability is premised on facially neutral policies. *Griggs*, 401 U.S. at 431.

[HN25] Under *Wal-Mart*, a mere showing that a "policy of discretion has produced an overall . . . disparity does not suffice." *Wal-Mart*, 131 S. Ct. at 2556. Instead, plaintiffs who allege such a policy of discretion must demonstrate that a "common mode of exercising discretion" actually existed throughout a company. *Id.* at 2554; see also *Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1229 (10th Cir. 2013) (observing that "after *Wal-Mart*, federal courts . . . have generally denied certification when allegedly discriminatory **[*916]** policies are highly discretionary and the plaintiffs do not point to a common mode of exercising discretion that pervades the entire company" (internal quotation marks omitted)). Given that standard, the district court here found that the workers "failed to identify any factor that unites the manner in which the various decision makers throughout the Berkeley plant exercised their discretion." J.A. 10955.

Wal-Mart recognizes that in certain cases, "giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory," 131 S. Ct. at 2554, because "an employer's undisciplined system **[**52]** of subjective decisionmaking [can have] precisely the same effects as a system pervaded by impermissible intentional

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discrimination." Id. (alteration in original) (quoting Watson, 487 U.S. at 990). For a nationwide class, Wal-Mart found that proving a consistent exercise of discretion will be difficult, if not impossible in some circumstances. Id.; see also Davis v. Cintas Corp., 717 F.3d 476, 488 (6th Cir. 2013) (noting the difficulties Wal-Mart presents for parties seeking to certify a nationwide class).

But [HN26] for a localized, circumscribed class of workers at a single facility, a policy of subjective, discretionary decision-making can more easily form the basis of Title VII liability, particularly when paired with a clear showing of pervasive racial hostility. In such cases, the underlying animus may help establish a consistently discriminatory exercise of discretion.

This Court's recent opinion in Scott v. Family Dollar Stores, Inc. specifically provides several ways that such a disparate impact claim may satisfy Rule 23 after Wal-Mart, including: (1) when the exercise of discretion is "tied to a specific employment practice" that "affected the class in a uniform manner"; (2) when there is "also an allegation of a company-wide policy of discrimination" that affected **[**53]** employment decisions; and (3) "when high-level personnel exercise" the discretion at issue. Scott, 733 F.3d at 113-14.

The first and second of Scott's alternatives are most relevant to this case. A specific employment practice or policy can comprise affirmative acts or inaction. Cf. Ellison v. Brady, 924 F.2d 872, 881 (9th Cir. 1991) (explaining an employer's responsibility to act to rectify a hostile or offensive work environment under Title VII). Regarding affirmative acts, the district court has established that Nucor's promotions practice provides that "[e]mployees in each of the production departments may bid on positions available in other departments," and that in order to promote one of the bidders, "the supervisor, the department manager, and the general manager must approve a written change of status and then submit the change of status form to the personnel office." J.A. 477-78.

For purposes of class certification, the workers have provided sufficient evidence that such a policy, paired with the exercise of discretion by supervisors acting within it, created or exacerbated racially disparate results. The promotions system, requiring approvals from different levels of management, created an environment in which the discriminatory exercise of discretion by one **[**54]** department head harmed the promotions opportunities for all black workers at the plant by foreclosing on opportunities in that department and generally impeding upward mobility. Moreover, the disproportionate promotions of white workers had to be ratified by the general manager, Ladd Hall, who was thus on notice, or should have been on notice, that there were pronounced racial disparities in department-level promotion practices, **[*917]** as indicated by the statistical and anecdotal evidence presented.

The workers have also presented sufficient evidence of a practice of inaction by the general manager who ignored the evidence of, and complaints regarding, discrimination in promotions at the plant. See, e.g., J.A. 996-97, 1016, 1056, 1087, 1104. Such managerial inaction occurred despite Nucor's status as an "Equal Opportunity Employer" and its claim to have a "plantwide policy barring racial discrimination." Resp'ts' Br. 6. One black worker, Ray Roane, has testified that he complained directly to Hall about discrimination in promotions. J.A. 996-97. Hall threatened his job. J.A. 997. Consistent with that evidence, the workers observe in the context of their hostile work environment claim that **[**55]**

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despite a policy of investigating complaints of racial harassment, "[n]ot even one of the five department managers has been shown to have lifted a finger to redress the racially hostile work environment found to exist both plant-wide and in each department." Appellants' Br. 25. The workers have sufficiently alleged that such a uniform policy of managerial inaction also contributed to racial disparities in promotions decisions.

Consistent with Scott, the workers have further demonstrated that the exercise of discretion at Nucor was joined by "a company-wide policy of discrimination" that was encouraged, or at least tolerated, by supervisors and managers. See Scott, 733 F.3d at 114. In addition to the evidence of a hostile work environment previously described in detail, one white supervisor has expressly stated in a deposition that he heard the head of the Beam Mill declare, "I don't think we'll ever have a black supervisor while I'm here." J.A. 1885-86. Such facts provide a critical nexus between the racial animus at the plant and promotions decisions that impacted all black workers by foreclosing opportunities for them. Or, using Wal-Mart's language, the evidence of pervasive racial hostility in the working **[**56]** environment provides a "common mode of exercising discretion that pervade[d] the entire company." Wal-Mart, 131 S. Ct. at 2554-55.

In the end, Wal-Mart simply "found it unlikely" that thousands of managers across different regions "would exercise their discretion in a common way without some common direction." Tabor, 703 F.3d at 1222. Here, however, the workers have provided ample evidence supporting their allegation of a common, racially-biased exercise of discretion throughout the plant - demonstrated through alleged incidents of specific discrimination in promotions decisions, statistical disparities, and facts suggesting pervasive plant-wide racism. The district court abused its discretion in finding that such evidence was insufficient to meet the burden that Wal-Mart imposes.

IV.

Nucor further argues that the workers have failed to contest the district court's independent finding that the putative class failed to satisfy Rule 23(b)(3). As the company observes, the district court specifically held that the class failed to meet the rule's requirements for a class action seeking individualized money damages, namely, that common questions predominate over individualized inquiries and that the class action is "superior to other available methods for fairly and **[**57]** efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The court remarked that "even if the Fourth Circuit subsequently concludes that the plaintiffs have identified a common issue that satisfies Rule 23(a)(2), this Court nonetheless finds that 'common issues,' as that term is defined by Wal-Mart, do not predominate over individual **[*918]** issues with regard to the plaintiffs' promotions claims."²² J.A. 10956.

²² This Court has previously observed that [HN27] "[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*, 521 U.S. at 609). But as Wal-Mart made clear, the Rule 23(a) commonality requirement and the Rule 23(b)(3) predominance requirement remain separate inquiries. Wal-Mart, 131 S. Ct. at 2556.

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Nucor contends that nowhere in the workers' opening brief is the Rule 23(b)(3) ruling addressed, and that any challenge to that decision has thus been waived. [HN28] The doctrine of waiver derives from the Federal Rules of Appellate Procedure, which require that the argument section of an appellant's opening brief contain the "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant **[**58]** relies." Fed. R. App. P. 28(a)(8)(A); see also *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 376-77 (4th Cir. 2012). "Failure of a party in its opening brief to challenge an alternate ground for a district court's ruling . . . waives that challenge." *United States ex rel. Ubl v. IIF Data Solutions*, 650 F.3d 445, 456 (4th Cir. 2011) (quoting *Rodriguez v. Hayes*, 591 F.3d 1105, 1118 n.6 (9th Cir. 2010)).

The workers contend first, and we agree, that no waiver occurred because their arguments in the opening brief extended to the district court's discussion of both predominance and commonality. The single issue identified by the workers on appeal did not differentiate between the court's findings on either question. The issue, as presented, was this:

Was it error or an abuse of discretion for the district court not to follow this Circuit's mandate holding that sufficient statistical and non-statistical evidence has been presented to certify a pattern-or-practice and disparate impact class covering all six production departments of the defendants' manufacturing plant in Huger, South Carolina?

Consistent with that framing, the workers' opening brief describes the district court's decision in equally broad terms without distinguishing between commonality and predominance. See Appellants' Br. 28-29 ("The district court erred as a matter of law by declining to follow this Court's mandate that held there is sufficient statistical **[**59]** and non-statistical evidence to certify a class covering all six production departments."); Appellants' Br. 3 (citing to the portion of the district court opinion where predominance is discussed).

Although more explicit separation of the predominance and commonality inquiries would no doubt have been wise, the workers' arguments throughout their brief directly respond to the issues the district court raised in both contexts (issues that, as discussed below, were intertwined by the court). The workers, for instance, specifically cite cases discussing predominance when arguing about the extent to which a court may look to merits in deciding certification. See Appellants' Br. 34-35. Elsewhere, in discussing the sufficiency of the anecdotal evidence presented, the workers argued in favor of our holding in *Brown I* that "[t]his evidence alone establishes common claims of discrimination worthy of class certification." Appellants' Br. 42 (citing *Brown I*, 576 F.3d at 153). Certification of the workers' class required a finding that Rule 23(b) was satisfied, in addition to a finding of commonality under Rule 23(a)(2). More generally, without limiting its analysis to the question of commonality, the workers' opening brief observes **[*919]** that "[t]he district **[**60]** court's finding that there is no pattern-or-practice evidence in the non-Beam Mill departments is directly contrary to the evidence and [the Fourth Circuit's] mandate." Appellants' Br. 42-43.

It is true that the workers arguments often focus expressly on the question of commonality, as *Wal-Mart* focused its analysis. In that regard, however, the workers have merely followed the district court's lead insofar as the court itself raised the same arguments under Rule 23(b)(3) as it did regarding commonality under Rule 23(a)(2).²³ See *J.A.* 10958-

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59; see also *United States v. Goforth*, 465 F.3d 730, 737 (6th Cir. 2006) (observing that [HN29] "where an argument advanced in an appellant's opening brief applies to and essentially subsumes an alternative basis for affirmance not separately argued therein, the appellant does not waive that alternative basis for affirmance"). The district court based its conclusion that common issues did not predominate on the observation that because the workers' evidence disproportionately concerns the Beam Mill, "there is no 'glue' connecting the promotions decisions in the Beam Mill to the decisions in the other departments." J.A. 10959. That is exactly the same argument raised, and responded to by the workers, in the context of Rule 23(a)(2) commonality. See J.A. [*61] 10950-54; Appellants' Br. 42-47. Elsewhere in its Rule 23(b)(3) discussion, the court observes that "[a]lthough there are, to varying degrees, a few allegations of discrimination in promotions in departments other than the Beam Mill, there is nothing to link these allegations to the pattern of behavior alleged in the Beam Mill." J.A. 10959. Again, this argument is also made in the Rule 23(a)(2) context and responded to in detail by the workers there. Indeed, the district court itself acknowledged that it "employ[ed] the language of Wal-Mart" regarding Rule 23(a)(2) in discussing the requirements of Rule 23(b)(3). J.A. 10958-59. In responding directly to the reasons given by the district court for its predominance determination, the workers have thus done far more than take a mere "passing shot at the issue." See *Belk, Inc. v. Meyer Corp.*, 679 F.3d 146, 152 n.4 (4th Cir. 2012) (finding that an issue was waived after a party mentioned the issue in a heading but failed to further develop the argument); see also *Williams v. Woodford*, 384 F.3d 567, 587 n.5 (9th Cir. 2002) (concluding that an appellant preserved a claim for review even though the argument consisted of "eight sentences in a footnote," where the argument identified the basis of disagreement with the district court, the requested relief, and relevant citations to case law and the record).

23 Even superficially, the district [*62] court includes its predominance analysis under the heading of "Subjectivity as a Policy," dovetailing a discussion of commonality, instead of as a separate section of analysis. See J.A. 10954, 10956.

Nonetheless, the dissent argues that "many different reasons underlay [the district court's] predominance finding, including several individual questions that could 'overwhelm' common ones." Post at 69. But a plain reading of the district court's opinion belies the idea that it made any predominance arguments that were not responded to by the workers. The only specific argument cited by the dissent as unaddressed contends that because of the workers' reliance on anecdotal evidence, a jury "would have to delve into the merits of each individual promotion decision." J.A. 10959; post at 69. Yet, as observed above, the workers specifically argued that the anecdotal evidence establishes "common claims of discrimination" that merit certification, not merely a finding of commonality. [*920] Appellants' Br. 42 (quoting *Brown I*, 576 F.3d at 153). Indeed, such an argument is consistent with the workers' fundamental contention throughout their brief that plant-wide discrimination existed.

As this Court has observed, [HN30] the purpose of the waiver [*63] doctrine is to avoid unfairness to an appellee and minimize the "risk of an improvident or ill-advised opinion being issued on an unbriefed issue." *United States v. Leeson*, 453 F.3d 631, 638 n.4 (4th Cir. 2006) (citing *McBride v. Merrell Dow & Pharm., Inc.*, 800 F.2d 1208, 1211, 255 U.S. App. D.C. 183 (D.C. Cir. 1986)). Given the briefing presented, the fully developed record

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below, and the lack of any showing of unfairness or prejudice, there is simply no reason why we should exercise our discretion to discard years of litigation on appeal because of an inartful opening brief. See *A Helping Hand, LLC v. Baltimore Cnty., Md.*, 515 F.3d 356, 369 (4th Cir. 2008) (observing that even when an argument has been waived, this Court may nonetheless consider it if a "miscarriage of justice would otherwise result" (internal quotation marks omitted)); cf. *In re Am. W. Airlines, Inc.*, 217 F.3d 1161, 1165 (9th Cir. 2000) (observing that a court may refuse to find waiver and consider an argument raised for the first time on appeal when the issue "is one of law and either does not depend on the factual record, or the record has been fully developed").

Independent of the adequacy of the workers' opening brief, the district court had no grounds to revisit the question of predominance in the first place given this Court's remand instructions and mandate in *Brown I*. Unlike the requirement of commonality under Rule 23(a)(2) discussed above, Wal-Mart did not change, nor purport to change, the Rule 23(b)(3) analysis. Indeed, any **[**64]** impact of the Supreme Court's ruling on the question of whether common questions predominate is only incidental insofar as Wal-Mart recalibrated what constitutes a common question in the first place. The majority in *Wal-Mart* only invoked Rule 23(b)(3) to argue that the rule's well-established procedural protections should apply to the plaintiffs' claims for backpay. See *Wal-Mart*, 131 S. Ct. at 2559.

Following our instructions in *Brown I* for the district court to "certify the appellants' class action," the court found that "the putative class satisfied both the predominance and superiority requirements of Rule 23(b)(3)." J.A. 10930. The court then certified the class for those employed in all six Nucor operations departments. The district court cites no new facts or legal precedent after *Brown I* to justify revisiting that determination once the underlying question of commonality has been resolved.

Nonetheless, the dissent insists that our decision in *Brown I* "did not prevent the district court in any way from considering predominance because our prior decision did not say anything about predominance." Post at 75-76 (emphasis added). Such a conclusion misconstrues both the plain language of our original mandate and ignores the district court's equally **[**65]** plain understanding of it. The pivotal question in determining the scope of the mandate is whether the district court was free on remand to find that the workers had not satisfied the predominance requirement. If so, then our mandate did not reach the issue and the district court was free to reconsider it. But if the court did not have such liberty, then we must ask whether "controlling legal authority has changed dramatically" regarding Rule 23(b)(3) such that the court could reconsider the question. See *Bell*, 5 F.3d at 67. If no such change has occurred, then the district court could not revisit it.

[*921] As for the first question, the district court had no discretion to find that the workers' class failed to satisfy Rule 23(b)(3), after we expressly told it "to certify the appellants' class action and to engage in further proceedings consistent with this opinion." *Brown I*, 576 F.3d at 160; see also *Bell*, 5 F.3d at 66 (requiring that **[HN31]** a district court "implement both the letter and spirit of the . . . mandate, taking into account [our] opinion and the circumstances it embraces" (internal quotation marks and citation omitted)); *United States v. Pileggi*, 703 F.3d 675, 679 (4th Cir. 2013) (observing that the mandate rule

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"forecloses relitigation of issues expressly or impliedly decided by the appellate court" (quoting Bell, 5 F.3d at 66)); S. Atl. Ltd., 356 F.3d at 583 (observing **[**66]** that a mandate must be "scrupulously and fully carried out" (internal quotation marks and citation omitted)).

Indeed, the district court itself recognized that we had "dictate[d] the general outcome to be reached (class certification) while leaving [the district court] to fill in the details." J.A. 9886 (Order Den. Mot. for Recons. 8 n.2). Of course, the court could have, and did, evaluate whether certification was best under Rule 23(b)(2) or (b)(3). But it had no discretion to then find that the prerequisites of either rule were not met. As the court observed, Nucor's argument on remand that the workers had failed to satisfy Rule 23(b) "overlook[ed] the Fourth Circuit's prior holding in this case." J.A. 9704 (Certification Order).²⁴ Thus, the dissent misstates the record when it maintains that our original decision did not "in any way" prevent the district court from considering predominance. Post at 75-76. Indeed, following our instructions and findings in Brown I, the court proceeded to make the only finding it could under Rule 23(b)(3), namely, that "common issues predominate and that a class action is superior to any other method for adjudication of the claims in this case." The dissent is thus also misinformed when it states we are now certifying "a Rule 23(b)(3) class **[**67]** action without any court ever finding that the Rule 23(b)(3) requirements are satisfied." Post at 78.

²⁴ The dissent also maintains that our mandate did not reach the question of predominance because we amended our original opinion in Brown I to delete a specific reference to Rule 23(b)(3). Post at 77. Such a deletion, however, did not change either our mandate to certify - a mandate that required the court to find the workers had met Rule 23(b) - or the district court's express understanding of that mandate.

Given the fact that our prior ruling foreclosed the denial of certification on the basis of Rule 23(b)(3), the district court needed some compelling reason to reconsider the question. Bell, 5 F.3d at 67 (describing **[HN32]** the "extraordinary" exception to the mandate rule when there is "a show[ing] that controlling legal authority has changed dramatically"). But the court cited no such reason and, unlike the question of commonality, Wal-Mart provided none. Indeed, as the district court itself acknowledged, Wal-Mart only incidentally narrowed an inquiry into whether common questions predominate by clarifying what constitutes a common question in the first place under Rule 23(a)(2). J.A. 10971-72.

V.

More than seven years have now elapsed since the workers first filed their class certification **[**68]** motion, and the district court twice has refused to certify the class. The nature of the allegations, the evidentiary support buttressing them, and the inherent cohesiveness of the class all demonstrate that the court's failure to certify was an error. **[HN33]** Rule 23 provides wide discretion to district courts, in part, to promote the **[*922]** systemic class action virtues of efficiency and flexibility. The realization of such benefits, however, requires that a district court exercise its judgment in a reasoned and expeditious manner.

The dissent rightly observes that the majority presses forward "[o]n the road to its desired result." Post at 152. And that result is simple justice. At bottom, the workers seek nothing

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more than the chance to speak with one voice about the promotions discrimination they allegedly suffered as one class on account of one unifying feature: the color of their skin. The dissent would deny them that chance while leading this Court down a different road - a road that would further weaken the class action as a tool to realize Title VII's core promise of equality.

We vacate the district court's decertification of the workers' promotions class and remand the case to the district court with instructions **[**69]** to certify the class.

VACATED IN PART, AND REMANDED WITH INSTRUCTIONS.

DISSENT BY: AGEE

DISSENT

AGEE, Circuit Judge, dissenting:

We typically tread lightly when reviewing a class certification decision, affording "substantial deference" to the district court, especially when it provides "well-supported factual findings." *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 179 (4th Cir. 2010). Class certification proceedings often call for fact-intensive choices requiring intimate knowledge of the peculiarities of complex litigation. *Id.* We usually trust that the district court has the better eye for these sorts of questions.

The majority today declines to follow that path. It instead takes issue with almost every aspect of the district court's decision to decertify, reversing that court's determination because of newfound facts on appeal and different notions about the nature of this case. In doing so, the majority creates a split between this Court and another, see *Bennett v. Nucor Corp.*, 656 F.3d 802 (8th Cir. 2011), overlooks a plain and decisive waiver from the appellants, and drains a critical Supreme Court decision of much of its meaning, see *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011). I respectfully dissent.

I. Predominance

A.

The district court decertified Plaintiffs' promotions classes for two distinct reasons. First, the court found that Plaintiffs had not identified **[**70]** a "question[] of law or fact common to the class," as Rule 23(a)(2) of the Federal Rules of Civil Procedure requires. Second, it held that any questions common to the class members did not "predominate over any questions affecting only individual members," so the class could not be certified under Rule 23(b)(3). Each of these separate reasons -- commonality or predominance -- provide an independent ground to decertify the class. See, e.g., *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006).

Because the district court provided two different bases for its decision, Plaintiffs were required to contest both. They did not. Plaintiffs' opening brief nowhere mentions the topic of predominance. Neither does it refer to Rule 23(b). And even though "the main concern in the predominance inquiry" is "the balance between individual and common issues,"

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Myers v. Hertz Corp., 624 F.3d 537, 549 (2d Cir. 2010), a reader searches in vain for any mention of such a "balancing" in Plaintiffs' submissions. Instead, Plaintiffs' opening brief focuses solely on Rule 23(a) commonality. The brief does not even contain a simple statement that the district court erred as to predominance for the same **[*923]** reasons that it purportedly erred as to commonality -- not to say that such a statement would be sufficient, either. See Jimenez v. Allstate Ins. Co., 765 F.3d 1161, 1165 n.4 (9th Cir. 2014) (holding that "cursory statements that the district court's order also incorrectly **[**71]** applied Rule 23(b)(3)'s [predominance] requirement" are "not enough to preserve the issue for appeal").

An appellant must raise every issue that he wishes to press in his opening brief. If the appellant fails to address an issue there, then we will deem the issue waived or abandoned. We have repeated this rule so often that it might rightfully be termed the best-established rule in appellate procedure. See, e.g., Metro. Reg'l Info. Sys., Inc. v. Am. Home Realty Network, 722 F.3d 591, 602 n.13 (4th Cir. 2013); Kensington Volunteer Fire Dep't, Inc. v. Montgomery Cnty., 684 F.3d 462, 472 n.4 (4th Cir. 2012); Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 674 F.3d 369, 376 (4th Cir. 2012); A Helping Hand, LLC v. Balt. Cnty., 515 F.3d 356, 369 (4th Cir. 2008); French v. Assurance Co. of Am., 448 F.3d 693, 699 n.2 (4th Cir. 2006). As a rule that "all the federal courts of appeals employ," waiver "makes excellent sense." Joseph v. United States, 135 S. Ct. 705, 705, 190 L. Ed. 2d 461 (2014) (Kagan, J., respecting denial of certiorari).

In past cases, we have endeavored to apply our waiver rule consistently, finding waiver whenever a party fails to "develop [his] argument" -- even if his brief takes a passing shot at the issue. Belk, Inc. v. Meyer Corp., 679 F.3d 146, 152 n.4 (4th Cir. 2012). We have further found arguments waived even though they might have had merit. See IGEN Int'l, Inc. v. Roche Diagnostics GmbH, 335 F.3d 303, 308-09 (4th Cir. 2003); Pleasurecraft Marine Engine Co. v. Thermo Power Corp., 272 F.3d 654, 657 (4th Cir. 2001). And we have applied the doctrine despite its potentially significant impact. See, e.g., Carter v. Lee, 283 F.3d 240, 252 n.11 (4th Cir. 2002) (applying the doctrine in a death penalty case).

Given that Plaintiffs failed to challenge the district court's ruling on predominance, the plain and consistent waiver rule defeats their appeal. "[T]o obtain reversal of a district court judgment based on multiple, independent grounds, **[**72]** an appellant must convince us that every stated ground for the judgment against him is incorrect." In re Under Seal, 749 F.3d 276, 289 (4th Cir. 2014); accord Maher v. City of Chi., 547 F.3d 817, 821 (7th Cir. 2008); Jankovic v. Int'l Crisis Grp., 494 F.3d 1080, 1086, 377 U.S. App. D.C. 434 (D.C. Cir. 2007). Appellate courts have repeatedly affirmed district court decisions denying class certification where plaintiffs failed to contest a predominance finding. See, e.g., Little v. T-Mobile USA, Inc., 691 F.3d 1302, 1306-08 (11th Cir. 2012); Klay v. Humana, Inc., 382 F.3d 1241, 1268 (11th Cir. 2004), abrogated on other grounds by Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 (2008); Applewhite v. Reichhold Chems., Inc., 67 F.3d 571, 573-74 (5th Cir. 1995). Nothing calls for a different result here.

B.

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In view of their failure to raise the predominance issue, Plaintiffs now suggest that "[p]redominance and commonality . . . are [both] part of Rule 23(b)(3)," such that a challenge concerning one should be treated as a challenge to both. Appellant's Reply Br. 2. They are mistaken.

Commonality, found in Rule 23(a)(2), asks whether the proposed class will "resolve an issue that is central to the validity of each of one of the claims in one stroke." *EQT Prod. Co. v. Adair*, 764 F.3d 347, 360 (4th Cir. 2014). Predominance, found in **[*924]** Rule 23(b)(3), presents a "far more demanding" inquiry, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997), namely whether any common questions "pre-dominate over any questions affecting only individual members," Fed. R. Civ. P. 23(b)(3). Thus, while a "common issue" will establish commonality, that common issue only goes to one part of the predominance inquiry. Consequently, courts and parties must address these requirements separately, rather than muddle them together. See *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1268-70 (11th Cir. 2009); *In re Ins. Brokerage Litig.*, 579 F.3d 241, 277 (3d Cir. 2009); accord *Ealy v. Pinkerton Gov't Servs., Inc.*, 514 F. App'x 299, 305 (4th Cir. 2013) (" **[**73]** [T]he Rule 23(a) commonality requirement[] and the Rule 23(b)(3) predominance requirement remain separate inquiries and the inquiries should not be 'blended.'").

The majority excuses Plaintiffs' waiver because it believes that Plaintiffs "followed the district court's lead" in combining the two issues. *Maj. op.* at 55. Thus, even though commonality and predominance are legally distinct, the majority speculates that the district court did not treat them as such here. The majority's analysis mischaracterizes the district court's opinion.

The district court did not just repeat back its commonality findings in determining that Plaintiffs' class failed as to predominance. To the contrary, the court expressly held that it could not find the required predominance "even if the Fourth Circuit subsequently conclude[d] that plaintiffs have identified a common issue that satisfies Rule 23(a)(2)." J.A. 10956. The court then explained -- over several pages -- that many different reasons underlay its predominance finding, including several individual questions that could "overwhelm" common ones. *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196, 185 L. Ed. 2d 308 (2013). Because Plaintiffs heavily rely on anecdotal evidence, for instance, the district court correctly concluded that a jury "would have to delve into the merits **[**74]** of each individual promotion decision" to determine whether each decision evidenced discrimination. J.A. 10959. Thus, a trial meant to resolve class-wide issues would likely devolve into a series of mini-trials examining each promotion decision made in the Nucor plant. The court further acknowledged that "individual damages determinations," like those that would be required here, can "cut against class certification." J.A. 10956. Although it concluded that such damages determinations did not, standing alone, compel decertification in this case, J.A. 10958, they did provide the district court an additional basis for caution in making its predominance finding. See, e.g., *Cooper v. So. Co.*, 390 F.3d 695, 722-23 (11th Cir. 2004), overruled on other grounds by *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 126 S. Ct. 1195, 163 L. Ed. 2d 1053 (2006) (noting that individualized damage issues could swamp the advantages coming from an initial, class-wide liability determination); accord *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 421-22 (5th Cir. 1998), cited with approval in *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417,

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445 n.18 (4th Cir. 2003); see also Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1433, 185 L. Ed. 2d 515 (2013) (explaining that individual damage-related questions might destroy predominance); Windham v. Am. Brands, Inc., 565 F.2d 59, 71-72 (4th Cir. 1977).

The district court appropriately resolved predominance separately from commonality. Plaintiffs' failure to address the predominance finding in any way ends their appeal.

[*925] C.

The majority at least recognizes that Plaintiffs should have **[**75]** been "more explicit" in addressing predominance. Maj. op. at 54; see also id. at 55 (acknowledging that Plaintiffs' "express[]" arguments largely concern commonality). Even so, it concludes that certain oblique references in Plaintiffs' briefs preserved a predominance-related challenge on appeal. They do not.

Plaintiffs' statement of the issue on appeal, for instance, does not help them. See maj. op. at 53. The statement asks only whether "it [was] error or an abuse of discretion for the district court not to follow this Circuit's mandate" when it decertified the class. See Appellant's Br. 1. Here again, Plaintiffs never mention predominance, and the statement does not otherwise indicate any specific complaint with the district court's predominance holding. Even if it had, that reference would not have been enough without some further argument on the matter -- an argument that Plaintiffs wholly failed to provide. See Belk, Inc., 679 F.3d at 153 n.6; 11126 Balt. Blvd., Inc. v. Prince George's Cnty., Md., 58 F.3d 988, 993 n.7 (4th Cir. 1995).

The majority also ignores Plaintiffs' waiver because their brief contains some broadly stated attacks on the district court's decertification decision -- attacks purportedly not "limit[ed] to the question of commonality." Maj. op. at 55. But in the usual case, a generalized attack **[**76]** on the lower court's decision does not preserve the specific arguments that might be subsumed within the broader one. Quite the opposite: a "generalized assertion of error" will not suffice to preserve anything. MMG Fin. Corp. v. Midwest Amusements Park, LLC, 630 F.3d 651, 659 (7th Cir. 2011); see also, e.g., Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 (10th Cir. 2005); Norman v. United States, 429 F.3d 1081, 1091 n.5 (Fed. Cir. 2005). Preservation would have little to recommend it if litigants could make nebulous, broadly worded arguments and trust appellate courts to work out the details once the opposing party points out the default.

In much the same way, Plaintiffs did not preserve their predominance challenge by citing a few cases that happen to touch upon the concept. See maj. op. at 54. The traditional rule provides that citations to the "occasional case," without any fuller discussion, do not preserve an argument. Pike v. Guarino, 492 F.3d 61, 78 n.9 (1st Cir. 2007); see also Am. Wildlands v. Kempthorne, 530 F.3d 991, 1001, 382 U.S. App. D.C. 78 (D.C. Cir. 2008) ("A fleeting statement in the parenthetical of a citation is no more sufficient to raise a claim than a cursory remark in a footnote[.]"). Similarly, "[m]ere notation of the applicable law, without any argumentation as to how it applies to [this] case, does not raise the issue of its application on appeal." Sou v. Gonzales, 450 F.3d 1, 6 n.11 (1st Cir. 2006) (internal quotation marks and citations omitted here and throughout); accord Johnson v. United States, 734 F.3d 352, 360 (4th Cir. 2013).

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The majority's analysis casts an inappropriate role for an appellate court. Now, **[**77]** a court must review each decision that an appellant cites and independently consider whether any part of it might undermine the district court's judgment for some reason that the appellant never raised. That concept reconceives the appellate courts' role, as those "courts do not sit as self-directed boards of legal inquiry and research." *Nat'l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 147 n.10, 131 S. Ct. 746, 178 L. Ed. 2d 667 (2011); see also *Walker v. Prince George's Cnty., Md.*, 575 F.3d 426, 429 n.* (4th Cir. 2009) ("Judges are not like pigs, hunting for truffles buried in briefs."). In addition, using the **[*926]** majority's new rule, appellants may now launch late-in-the-day challenges to any part of a district court's certification decision so long as they serendipitously cited a case canvassing Rule 23 in their opening brief. This "preservation-by-citation" approach renders the waiver rule a nullity.

D.

In the end, the majority declares itself unwilling to exercise its "discretion" to "discard years of litigation on appeal because of an inartful brief." *Maj. op.* at 58. That approach seems to give pro se litigant treatment to a brief crafted by experienced class counsel -- counsel that has appeared in our court before. Surely it does not expect too much from veteran counsel to ask them to make their arguments straight up and square. All the more **[**78]** so when these counsel have been specifically cautioned about waiver on previous occasions. See, e.g., *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 972-73 (11th Cir. 2008) (holding that party represented by same counsel had "abandoned" claim by failing to raise it in his opening brief); see also *Angles v. Dollar Tree Stores, Inc.*, 494 F. App'x 326, 330 n.6 (4th Cir. 2012) (same); cf. *Bennett*, 656 F.3d at 821 (holding that party represented by same counsel had "essentially abandoned" argument by making only a "conclusory challenge"); *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 959 (11th Cir. 2007) (same).

The "purpose" of the preservation rule is also not served by overlooking Plaintiffs' waiver. See *maj. op.* at 57-58. The rule "ensures that the opposing party has an opportunity to reflect upon and respond in writing to the arguments that his adversary is raising." *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1319 (11th Cir. 2012); see also *United States v. Leeson*, 453 F.3d 631, 638 n.4 (4th Cir. 2006) (noting that late arguments are "unfair to the appellee"); *Pignons S.A. de Mecanique v. Polaroid Corp.*, 701 F.2d 1, 3 (1st Cir. 1983) ("In preparing briefs and arguments, an appellee is entitled to rely on the content of an appellant's brief for the scope of the issues appealed[.]"). Nucor never had a chance to address Plaintiffs' predominance arguments directly, as Plaintiffs waited until their reply brief to make them. Plaintiffs argued in their reply brief, for example, that no "heightened" predominance standard applies after *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011), and the majority agrees, see *maj. op.* at 62. There might very well be reason to believe **[**79]** otherwise, though Nucor has never had a chance to make that argument. See, e.g., *Andrey Spektor, The Death Knell of Issue Certification and Why That Matters After Wal-Mart v. Dukes*, 26 *St. Thomas L. Rev.* 165, 172 (2014) (suggesting that Wal-Mart rendered it harder for issues to predominate). It must be cold comfort to Nucor, then, to hear that it was not "prejudice[d]" by these and other unanswerable arguments. *Maj. op.* at 58.

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E.

The majority goes on to hold that the mandate rule barred the district court from examining Rule 23(b)(3) predominance. See maj. op. at 58-62. That view is factually and legally incorrect. The decision in the prior appeal in this case did not prevent the district court in any way from considering predominance because our prior decision did not say anything about predominance.

In its original class certification decision in 2007, the district court held that Plaintiffs did not satisfy three of Rule 23(a)'s four requirements. It expressly declined to consider "the remaining requirements of **[*927]** Rule 23(b)." J.A. 8997. On appeal, the parties' submissions focused solely on Rule 23(a). A majority of the Court then reviewed these "Rule 23(a) factors" and found them "satisfied." *Brown v. Nucor Corp.*, 576 F.3d 149, 160 (4th Cir. 2009) ("Brown I"). The Brown I majority initially went on to hold, in a single sentence at the end **[**80]** of the opinion, that "the requirements of [Rule] 23(b)(3) ha[d] also been satisfied for these claims." See *Brown v. Nucor Corp.*, No. 08-1247, 576 F.3d 149 at 160 (4th Cir. Aug. 7, 2009). Nucor then petitioned for rehearing en banc, arguing, among other things, that neither the lower court nor the parties had previously analyzed the Rule 23(b) issue. See *Nucor Pet. for Reh'g at 9, Brown I*, 576 F.3d 149 (No. 08-1247), ECF No. 53. In response, the Brown I panel amended its opinion and excised any mention of Rule 23(b)(3). See *Order, Brown v. Nucor Corp.*, No. 08-1247 (4th Cir. Oct. 8, 2009). One can easily discern why the opinion was amended: Brown I could not decide a fact-intensive issue -- that is, the predominance issue under Rule 23(b)(3) -- when the parties had not yet argued it and the district court had not yet addressed it. See *Transamerica Leasing, Inc. v. Instit. of London Underwriters*, 430 F.3d 1326, 1332 (11th Cir. 2005) (explaining that the mandate rule and the broader law of the case doctrine "cannot apply when the issue in question was outside the scope of the prior appeal"). In fact, up to that point, Plaintiffs had never even sought certification under Rule 23(b)(3); they sought to certify only a Rule 23(b)(2) class or, in the alternative, a so-called "hybrid" action.

By removing any reference to Rule 23(b), Brown I left it to the district court to determine in the first instance whether Plaintiffs' class **[**81]** met that provision's requirements. The district court complied with both the letter and the spirit of Brown I, and it correctly took "into account [the] opinion and the circumstances it embrace[d]." *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993); see also, e.g., *Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1404-05 (9th Cir. 1993) (affirming district court's decision not to order accounting or damages, despite appellate court's instructions to "order an accounting and to award damages," where district court acted in line with the "spirit" of the mandate). An appellate mandate "does not reach questions which might have been decided but were not." *United States v. Lentz*, 524 F.3d 501, 528 (4th Cir. 2008). And "[w]hile a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues." *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168, 59 S. Ct. 777, 83 L. Ed. 1184 (1939). Simply put, the Brown I mandate did not apply to Rule 23(b)(3), nor could it.

On remand after Brown I, the district court initially certified the two promotions classes under Rule 23(b)(3). The court later reconsidered, as it was entitled to do under Rule 23, which provides that "[a]n order that grants or denies class certification may be altered or amended before final judgment." Fed. R. Civ. P. 23(c)(1)(C); see also Fed. R. Civ. P.

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54(b). "[C]ertifications are not frozen once made," Amgen, Inc., 133 S. Ct. at 1202 n.9, and a district court has "considerable discretion to decertify the class," Cent. Wesleyan Coll. v. W.R. Grace & Co., 6 F.3d 177, 189 (4th Cir. 1993). See also PradoSteiman ex rel. Prado v. Bush, 221 F.3d 1266, 1273 (11th Cir. 2000). The district court could revisit its interlocutory decision regardless **[**82]** of whether, as the majority puts it, "new facts or legal precedent [arose] after Brown I." Maj. op. at 59.

In effect, the majority today certifies a Rule 23(b)(3) class action without any court ever finding that the Rule 23(b)(3) requirements are satisfied. It cannot genuinely contend that Brown I did the work, **[*928]** as "the Fourth Circuit has never allowed the rigorous Rule 23 analysis to be accomplished implicitly." Partington v. Am. Int'l Specialty Lines Ins. Co., 443 F.3d 334, 341 (4th Cir. 2006). And the district court ultimately did not make such a finding either. The majority's decision to certify in part on this illusory mandate, then, substantially damages Rule 23(b)(3)'s "vital prescription." Amchem, 521 U.S. at 623. The Supreme Court recently reminded us that "plaintiffs wishing to proceed through a class action must actually prove -- not simply plead -- that their proposed class satisfies each requirement of Rule 23, including . . . the predominance requirement of Rule 23(b)(3)." Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2412, 189 L. Ed. 2d 339 (2014). At least as to predominance, Plaintiffs have yet to prove anything.

* * * *

Plaintiffs did not challenge the district court's predominance ruling and do not credibly explain why they failed to do so. The district court's decision should therefore be affirmed on that basis alone.

II. Relevant Standards

Even ignoring Plaintiffs' waiver of the predominance issue, they have not **[**83]** established that the district court abused its discretion in finding insufficient commonality. To see why, it is first necessary to recognize the standard that appellate courts use in reviewing a district court's class-certification decision. Then, the standard that the district court used in evaluating the evidence at the certification stage must be considered.

A.

1.

A district court's ultimate class-certification decision -- that is, how it applied the Rule 23 factors -- is reviewed for an abuse of discretion. See, e.g., EQT Prod. Co., 764 F.3d at 357; Ward, 595 F.3d at 179; Monroe v. City of Charlottesville, Va., 579 F.3d 380, 384 (4th Cir. 2009); Gregory v. Finova Capital Corp., 442 F.3d 188, 190 (4th Cir. 2006). But reciting the standard is not enough; there must be genuine respect and adherence paid to the limits that it imposes.

The abuse-of-discretion standard does establish some substantial limits, representing "one of the most deferential standards of review." Matthew Bender & Co. v. West Publ'g Co., 240 F.3d 116, 121 (2d Cir. 2001). Under it, the appellate court may reverse only when "the [trial] court's exercise of discretion, considering the law and the facts, was arbitrary and

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capricious." *United States v. Mason*, 52 F.3d 1286, 1289 (4th Cir. 1995). We act only when the decision could not "have been reached by a reasonable jurist," or when we may call it "fundamentally wrong," "clearly unreasonable, arbitrary, or fanciful." *Bluestein v. Cent. Wis. Anesthesiology, S.C.*, 769 F.3d 944, 957 (7th Cir. 2014); accord *Am. Copper & Brass, Inc. v. Lake City Indus. Prods., Inc.*, 757 F.3d 540, 543 (6th Cir. 2014) (characterizing review of a class certification decision as "very **[**84]** limited").

Of course, deference does not equal blind acceptance. If, for instance, the district court entirely fails to undertake some part of the requisite analysis, then it may be appropriate to reverse. See, e.g., *EQT Prod.*, 764 F.3d at 371 (vacating and remanding a certification order where the district court failed to conduct an appropriately rigorous analysis of Rule 23's requirements). But when our review ventures into intensely factual matters or areas of practical concern, then our deference must be at its greatest – indeed, we **[*929]** must stand aside in those circumstances unless the lower court was "clearly wrong." *Windham*, 565 F.2d at 65; accord *CGC Holding Co., LLC v. Hutchens*, 773 F.3d 1076, 1086 (10th Cir. 2014) ("[A]s long as the district court applies the proper Rule 23 standard, we will defer to its class certification ruling provided that decision falls within the bounds of rationally available choices given the facts and law involved in the matter at hand.").

We do not then reverse anytime we disagree with the result that the district court reaches. See *First Penn-Pac. Life Ins. Co. v. Evans*, 304 F.3d 345, 348 (4th Cir. 2002). Rather, "the [abuse-of-discretion] standard draws a line . . . between the unsupportable and the merely mistaken, between the legal error, disorder of reason, severe lapse of judgment, and procedural failure that a reviewing court may always correct, and **[**85]** the simple disagreement that, on this standard, it may not." *Evans v. Eaton Corp. Long Term Disability Plan*, 514 F.3d 315, 322 (4th Cir. 2008); see also *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990) (holding that the district court did not abuse its discretion where it "applied the correct legal standard and offered substantial justification for its finding").

These principles might strike some as truisms, but they carry special force in the class-certification context. "Granting or denying class certification is a highly fact-intensive matter of practicality," *Monreal v. Potter*, 367 F.3d 1224, 1238 (10th Cir. 2004), so much so that "[h]ighly fact-based, complex, difficult matters" arise as a matter of routine, *Amchem*, 521 U.S. at 630 (Breyer, J., concurring in part and dissenting in part). Unsurprisingly, then, we give district courts "broad discretion in deciding whether to allow the maintenance of a class action." *Roman v. ESB, Inc.*, 550 F.2d 1343, 1348 (4th Cir. 1976); see also *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 757-58 (4th Cir. 1998), vacated 527 U.S. 1031, 119 S. Ct. 2388, 144 L. Ed. 2d 790 (1999), reaff'd in relevant part, 206 F.3d 431 (4th Cir. 2000). As with any other decision that appellate courts review for abuse of discretion, we should affirm a certification decision even if we are convinced that "reasons clearly existed for taking the other course." *Lewis v. Bloomsburg Mills, Inc.*, 773 F.2d 561, 564 (4th Cir. 1985); accord *Simmons v. Poe*, 47 F.3d 1370, 1382 (4th Cir. 1995).

2.

An appellate court must be even more careful in reviewing any factual findings underlying the district court's decision, as we review those only for clear error. *Thorn*, 445 F.3d at

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317-18; see also Fed. R. Civ. P. 52(a)(6). "The clear error standard . . . protects **[**86]** district courts' primacy as triers of fact." Evans, 514 F.3d at 321. Our opinions have repeatedly emphasized that clear-error review is "narrow," Walker v. Kelly, 593 F.3d 319, 323 (4th Cir. 2010), "highly deferential," Green v. Johnson, 515 F.3d 290, 301 (4th Cir. 2008), and "particularly circumscribed," Jiminez v. Mary Washington College, 57 F.3d 369, 378 (4th Cir. 1995). We may reverse findings reviewed under this standard only when, having reviewed the entire record, we are "left with the definite and firm conviction that a mistake has been committed." United States v. Heyer, 740 F.3d 284, 292 (4th Cir. 2014). If the district court chose between "two permissible views of the evidence," or if it otherwise offered a "plausible" account of that evidence, Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 574, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985), then its factual findings are "conclusive," Walker, 593 F.3d at 323. And as with the abuse-of-discretion standard, we cannot reverse **[*930]** merely because we would have decided the matter differently. See Anderson, 470 U.S. at 573.

3.

Despite these deferential standards of review, the majority identifies reversible error in virtually every legal and factual judgment that the district court rendered. Yet in searching the majority's opinion for any of the hallmarks of deference -- explanations as to how the district court clearly erred, or full analysis of how the district court abused its discretion -- we find very little.

In truth, the majority seems to apply just about every standard of review but a deferential one. For the most **[**87]** part, the majority offers bare statements that the district court erred, apparently because the district court decided things differently than the majority would have. For instance, it insists that Plaintiffs' statistical evidence is simply "less precise" and rejects out-of-hand the district court's view that the evidence was "fundamentally unreliable." Maj. op. at 18, 23. Likewise, it draws its own conclusions about the anecdotal evidence, reciting certain portions of certain affidavits and declaring them enough. It makes credibility determinations, categorically rejecting Nucor's evidence as "self-serving," id. at 25, or "coercive," id. at 42, while embracing contrary statements from Plaintiffs because the majority finds them "credible," id. at 41. And it offers its own notions about what is "plain," id. at 29, "elementary," id. at 39, or "common sense," id. at 42. The majority does so even while decrying the dangers of "cherry pick[ing] facts from an 11,000 page record." Id. at 41. In short, the majority opinion shows little respect for a district court that is far more familiar with each page of the record than we are.

Contravening our "axiomatic" rule against factual findings on appeal, Core Communs., Inc. v. Verizon Maryland LLC, 744 F.3d 310, 324 (4th Cir. 2014), the majority eventually finds in the first **[**88]** instance that "there is only one answer to the question of why Nucor's black workers were consistently disfavored," maj. op. at 45. This adventuresome approach is rather jarring when placed against the more measured methods found in some of our other class certification decisions. See, e.g., EQT Prod., 764 F.3d at 371 (remanding for further consideration of class certification after determining that district court misapplied the relevant standards); Gariety v. Grant Thornton, LLP, 368 F.3d 356, 366 (4th Cir. 2004) (same). Making matters worse, the majority offers no good reason for it. Instead, it

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engages in a rather extended discussion of the Brown I dissent and then declares any attack on the majority's factfinding today "iron[ic]." Maj. op. at 21.

Too often, we fail to give standards of review the attention that they deserve. We see them recited in boilerplate and then dispensed with when the perceived exigencies of a case seem to call for it. But "[s]tandards of review are . . . an elemental expression of judicial restraint, which, in their deferential varieties, safeguard the superior vantage points of those entrusted with primary decisional responsibility." Evans, 514 F.3d at 320-21. An appellate court should not be so quick to ignore them.

B.

We must next consider the district court's role in deciding the certification **[**89]** motion in the first place. The majority implies that the district court too readily dismissed Plaintiffs' efforts to certify. But the district court was not just permitted to **[*931]** take a hard look at Plaintiffs' submissions -- it was required to.

1.

Although plaintiffs shoulder the burden of demonstrating that a proposed class complies with Rule 23, the district court has an "independent obligation to perform a rigorous analysis to ensure that all of the prerequisites have been satisfied." EQT Prod., 764 F.3d at 358. Among other things, this "rigorous analysis" requires the district court "to resolve a genuine legal or factual dispute relevant to determining the requirements." In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320 (3d Cir. 2008).

"[C]areful attention to the requirements of [Rule] 23 remains . . . indispensable" even in cases "alleging racial or ethnic discrimination." E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 405, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977). Thus, "a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of [the Rule] have been satisfied." Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982); see also Desert Palace, Inc. v. Costa, 539 U.S. 90, 99, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003) (noting the "conventional rule[s] of civil litigation . . . generally appl[y] in Title VII cases"). And there is no "entitlement to class proceedings for the vindication of statutory rights," Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309, 186 L. Ed. 2d 417 (2013), Title VII included. Thus, **[**90]** the Court must be careful not to bend and twist the "rigorous analysis" that Rule 23 compels merely for the sake of abstract notions of Title VII's objectives and purposes. Cf. Touche Ross & Co. v. Redington, 442 U.S. 560, 578, 99 S. Ct. 2479, 61 L. Ed. 2d 82 (1979) ("[G]eneralized references to the 'remedial purposes' of [a statute] will not justify reading a provision more broadly than its language and the statutory scheme reasonably permit."). To do so would not only ignore the Supreme Court's warnings; it might also have unforeseen effects in the many other areas of law in which Rule 23 is implicated.

In basic terms, the rigorous-analysis standard tests whether plaintiffs have presented substantial evidence of compliance with Rule 23. Plaintiffs may "not simply plead" that the relevant requirements have been met, but must "actually prove" it. Halliburton, 134 S. Ct. at 2412; accord Monroe, 579 F.3d at 384. To meet that standard, plaintiffs must summon

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"evidentiary proof," Comcast, 133 S. Ct. at 1432, and "affirmatively demonstrate [their] compliance with the Rule," Wal-Mart, 131 S. Ct. at 2551. "[S]ome evidence" is not enough. In re Initial Pub. Offerings ["IPO"] Sec. Litig., 471 F.3d 24, 33 (2d Cir. 2006).

Before certifying a class action, courts will require a plaintiff to establish by a preponderance of the evidence that the action complies with each part of Rule 23. See In re U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108, 117 (2d Cir. 2013); Carrera v. Bayer Corp., 727 F.3d 300, 306 (3d Cir. 2013); Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 811 (7th Cir. 2012); Ala. Elec. Pension Fund v. Flowserve Corp., 572 F.3d 221, 228 (5th Cir. 2008), abrogated in other respects by Halliburton, 134 S. Ct. 2398, 189 L. Ed. 2d 339; accord In re Titanium Dioxide Antitrust Litig., 284 F.R.D. 328, 336 (D. Md. 2012) **[**91]**; In re Mills Corp. Sec. Litig., 257 F.R.D. 101, 104 (E.D. Va. 2009); In re Safety-Kleen Corp. Bondholders Litig., No. 3:00-1145-17, 2004 U.S. Dist. LEXIS 31099, 2004 WL 3115870, at *2 (D.S.C. Nov. 1, 2004); see also Anthony F. Fata, Doomsday Delayed: How the Court's Party-Neutral Clarification of Class Certification Standards **[*932]** in Wal-Mart v. Dukes Actually Helps Plaintiffs, 62 DePaul L. Rev. 675, 681 (2013) (reading Wal-Mart to apply a preponderance-of-the-evidence standard).

2.

"[T]he factors spelled out in Rule 23 must be addressed through findings, even if they overlap with issues on the merits." Gariety, 368 F.3d at 366; accord In re Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 249, 406 U.S. App. D.C. 371 (D.C. Cir. 2013) (recognizing that certification will sometimes "resemble[] an appraisal on the merits"). Obviously, "[a] court may not say something like 'let's resolve the merits first and worry about the class later' . . . or 'I'm not going to certify a class unless I think that the plaintiffs will prevail.'" Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 677 (7th Cir. 2001), cited with approval in Wal-Mart, 131 S. Ct. at 2552. But overlap "cannot be helped," as certification "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." Wal-Mart, 131 S. Ct. at 2551-52. Compare Brown I, 576 F.3d at 156 (citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974), and refusing to inquire into Plaintiffs' statistics because it would be an impermissibly "in-depth assessment of the merits"), with Wal-Mart, 131 S. Ct. at 2552 & n.6 (admonishing courts not to "mistakenly cite[]" Eisen for the incorrect idea that merits inquiries are barred).

3.

Contrast these well-defined and rigorous **[**92]** standards with the ambiguous and limitless ones found in the majority opinion. The majority acknowledges the "rigorous analysis" that lower courts must perform, but abandons that standard soon after mentioning it. Instead, it treats the evidentiary standard for certification as one different from that required for a party to prevail on the merits, never acknowledging that this view breaks from the many courts (including those in our Circuit) that apply the preponderance standard. Nor does it even tell us what a "rigorous analysis" might consist of. Instead, it merely invokes Amgen, a case that addresses what questions may be considered on class certification, not what evidence will suffice to answer them. 133 S. Ct. at 1194-95. Having rendered the rigorous analysis less rigorous than other courts' (though to what degree, one

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does not know), the majority then proceeds to apply its weakened test, repeatedly using mere allegations -- or, sometimes, allegations "proven" by allegations -- to justify certification. See, e.g., maj. op. at 25, 33, 34, 39, 43, 45, 50, 51, 62. The necessary implication is that the majority's "rigorous analysis" consists of very little.

One finds a further hint at the level of proof **[**93]** that the majority means to apply when it embraces Brown I's metric. Maj. op. at 16-17. Brown I held that "allegations" of disparate treatment were enough to establish commonality, a conclusion at odds with Wal-Mart. Compare Brown I, 576 F.3d at 153, with Wal-Mart, 131 S. Ct. at 2553 (distinguishing between an "otherwise unsupported allegation" and the "significant proof" required to establish a common policy). The majority in Brown I also said that anecdotes from three employees concentrated in a single department proved a common policy of discrimination. 576 F.3d at 153. And it held that statistical evidence of "relatively weak probative value" was enough, even though problems in that evidence -- the statistical evidence seen here -- might "very well discredit" it at some later stage. Id. at 156 & n.10. In short, Brown I required the plaintiffs to summon an exceptionally low, almost non- **[*933]** existent level of proof at the class-certification stage.

The majority's decision to reanimate Brown I's negligible evidentiary standard leaves this circuit alone on an island. The Brown I majority suggested that its lenient view of the necessary evidence aligned with the Second Circuit's decision in *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283 (2d Cir. 1999). See Brown I, 576 F.3d at 157 (citing *Caridad*, 191 F.3d at 293). But by the time Brown I was issued, the Second Circuit **[**94]** had already repudiated any part of *Caridad* suggesting a lesser burden of proof than a preponderance of the evidence. See *In re IPO*, 471 F.3d at 42 ("[O]ur conclusions necessarily preclude the use of a 'some showing' standard, and to whatever extent *Caridad* might have implied such a standard for a Rule 23 requirement, that implication is disavowed."). Only one circuit followed Brown I's lead and accepted such a low degree of proof: the Ninth Circuit, in its now-reversed decision in *Dukes v. Wal-Mart Stores, Inc.* See 603 F.3d 571, 595-96 & n.17 (9th Cir. 2010). (citing Brown I, 576 F.3d at 156). In the meantime, another circuit rejected Brown I outright. See *Bennett*, 656 F.3d at 816 n.2 (declining to "follow" Brown I's finding that sufficient evidence established commonality, as "Brown[I] was decided without the benefit of the Supreme Court's recent opinion in *Dukes*").

All in all, despite assurances otherwise, the majority treats Rule 23 as something akin to a pleading standard. It is not. See *Wal-Mart*, 131 S. Ct. at 2551. Were the rule written as the majority envisions it, district courts would get to "duck hard questions." *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002). But framing class certification as a mere pleading standard "amounts to a delegation of judicial power to the plaintiffs." Id. "[A] district court's certification order often bestows upon plaintiffs extraordinary leverage, and **[**95]** its bite should dictate the process that precedes it." *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 267 (5th Cir. 2007), abrogated in other respects by *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 180 L. Ed. 2d 24 (2011).

III. Commonality

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With the proper standards in mind, it becomes evident that the district court did not abuse its discretion in finding that Plaintiffs failed to establish commonality.

"In this case, proof of commonality necessarily overlaps with [Plaintiffs'] merits contention that [Nucor] engages in a pattern or practice of discrimination." Wal-Mart, 131 S. Ct. at 2552. Plaintiffs must establish a unifying policy of discrimination at certification, or "it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question [of] why was I disfavored." *Id.* In other words, Plaintiffs cannot simply identify a group of people who they allege have suffered some type of Title VII injury. *Id.* To certify the class, Plaintiffs must be able to trace that injury to a single, common source. *Id.*; accord *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011); see also William B. Rubenstein, *Newberg on Class Actions* § 3:19 (5th ed. 2014) (citing *Brown I* as an example of a case that approached commonality "loosely" and explaining that Wal-Mart articulated "a more explicit definition of commonality"). Plaintiffs here must identify **[**96]** a common policy with common injury to members of a class spanning more than a decade, covering Nucor's entire South Carolina production facility, and touching upon dozens of relevant decisionmakers. That task can be decidedly difficult, especially given that Plaintiffs premise their **[*934]** class in part on a disparate treatment theory. See *Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 274 n.10 (4th Cir. 1980); see also *Garcia v. Johanns*, 444 F.3d 625, 633, 370 U.S. App. D.C. 280 (D.C. Cir. 2006) ("Establishing commonality for a disparate treatment class is particularly difficult where, as here, multiple decisionmakers with significant local autonomy exist.").

A plaintiff who brings a class-wide charge of discrimination must traverse a "wide gap" between his claim of individual mistreatment and a class-wide harm. *Falcon*, 457 U.S. at 157. The plaintiff could do so in one of two ways. See *Wal-Mart*, 131 S. Ct. at 2553. First, he might identify a "biased testing procedure" that is used to evaluate applicants and employees. *Id.* By all accounts, Plaintiffs do not identify that sort of procedure here. Second, a plaintiff might offer "significant proof" that an employer "operated under a general policy of discrimination . . . [that] manifested itself in hiring and promotion practices in the same general fashion." *Id.* This second route forms the focus of this case.

Plaintiffs offer two types of **[**97]** evidence that they say bridge the gap between individual and class-wide claims: statistical evidence and anecdotal evidence. Whether examining these two categories of evidence separately or together, the district court did not abuse its discretion in deeming the Plaintiffs' case insufficient.

A. Statistical Evidence

1.

Plaintiffs first present a statistical study comparing a hypothesized, weighted benchmark of black bidders for promotions to the number of black employees that they assumed Nucor promoted during the relevant period. This evidence performs a double duty, as it goes to Plaintiffs' disparate impact claim and their disparate treatment claim.

As to the disparate impact claim, this sort of statistical evidence should identify disparities that are "sufficiently substantial" to raise "an inference of causation." *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 281 (4th Cir. 2005). Without

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"substantial" disparities, we cannot be confident that a challenged policy produced an injury common to the class. See Wal-Mart, 131 S. Ct. at 2551.

As to the disparate treatment claim, "gross statistical disparities" "may in a proper case constitute prima facie proof of a pattern or practice of discrimination." Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307-08, 97 S. Ct. 2736, 53 L. Ed. 2d 768 (1977); accord *Ardrey v. United Parcel Serv.*, 798 F.2d 679, 683 (4th Cir. 1986). But see *Warren v. Halstead Indus., Inc.*, 802 F.2d 746, 753 (4th Cir. 1986) ("[S]tatistics cannot alone prove the existence of a pattern or practice **[**98]** of discrimination [.]"). But not every case will present the truly egregious and unexplained disparities that leave no room for any inference other than intentional discrimination. Moreover, "[i]nferring past discrimination from statistics alone assumes the most dubious of conclusions: that the true measure of racial equality is always to be found in numeric proportionality." *Md. Trooper Ass'n, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993).

2.

The majority observes that Plaintiffs' evidence is "statistically significant at 2.54 standard deviations from what would be expected if race were a neutral factor." *Maj. op.* at 28. Statistical significance, however, is a necessary but not sufficient condition to finding a discriminatory practice or policy; statistical significance does not axiomatically equate with legal significance. **[**935]** See *EEOC v. Fed. Reserve Bank of Richmond*, 698 F.2d 633, 648 (4th Cir. 1983) (" [S]tatistical significance as measured by the standards of acceptable statistical principles will not necessarily be legally significant[.]"), *rev'd sub nom* on other grounds, *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 104 S. Ct. 2794, 81 L. Ed. 2d 718 (1984). High statistical significance levels might lack practical and legal significance, for instance, because "a high significance level may be a misleading artifact of the study's design." *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359, 362 (7th Cir. 2001). Thus, determining what is legally significant -- as opposed to statistically significant **[**99]** -- "is a legal determination properly made by the court and not by an expert." *Fed. Reserve Bank of Richmond*, 698 F.2d at 648; cf. *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 706 n.29 (D.D.C. 2006) (criticizing one of Plaintiffs' experts for his undue reliance on statistical significance).

Nevertheless, the majority seems to defer to Plaintiffs' experts and assume legal significance because the statistical evidence crosses the two-standard-deviation threshold, the threshold for statistical significance at a 95% confidence level. Yet "courts of law should be extremely cautious in drawing any conclusions from standard deviations in the range of one to three." *EEOC v. Am. Nat'l Bank*, 652 F.2d 1176, 1192 (4th Cir. 1981); see also *Kingsley R. Browne, Statistical Proof of Discrimination: Beyond "Damned Lies"*, 68 *Wash. L. Rev.* 477, 503 (1993) ("Random disparities of this magnitude are pervasive in the workplace and are not suggestive of a nonrandom cause, let alone an illegal one."). In specific cases, even higher numbers may not be enough. *EEOC v. Western Electric Co., Inc.*, 713 F.2d 1011 (4th Cir. 1983), provides one example. There, we held that a district court clearly erred in finding a policy or practice of discrimination, even though statistics showed overall disparities of 4.7955 and 5.883 standard deviations. *Id.* at 1018-19.

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Similarly, other courts have rejected statistical evidence even though the evidence met the two-standard-deviation threshold. See, e.g., **[**100]** *Carpenter*, 456 F.3d at 1201 (7.95 and 38.03 standard deviations); *Lopez v. Laborers Int'l Union Local No. 18*, 987 F. 2d 1210, 1213-14 (5th Cir. 1993) (3.26 and 3.01 standard deviations); *Waisome v. Port Auth. of N.Y. & N.J.*, 948 F.2d 1370, 1376 (2d Cir. 1991) (2.68 standard deviations); *EEOC v. Chi. Miniature Lamp Works*, 947 F.2d 292, 300 (7th Cir. 1991) (20.1 standard deviations); *Gay v. Waiters' & Dairy Lunchmen's Union, Local No. 30*, 694 F.2d 531, 551 (9th Cir. 1982) (2.45 standard deviations). In short, "there is nothing magical about two or three standard deviations." Ramona L. Paetzold & Steve L. Willborn, *The Statistics of Discrimination* § 4:13 (2014).

3.

Instead of assuming "that any particular number of 'standard deviations'" establishes a discriminatory policy, courts must evaluate statistical evidence on a "case-by-case basis." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 995 n.3, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988) (plurality opinion); see also *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 340, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977) . Neither "courts [n]or defendants [are] obliged to assume that plaintiffs' statistical evidence is reliable." *Watson*, 487 U.S. at 996. And we must always keep in mind that we are looking for reliable indications of "gross" or "substantial" disparities that amount to "significant proof." *Wal-Mart*, 131 S. Ct. at 2551, 2553; **[*936]** *Hazelwood*, 433 U.S. at 307-08.

The duty to test the relevant statistical evidence attaches at the class certification stage, *Comcast*, 133 S. Ct. at 1433, as "reliance on unverifiable evidence is hardly better than relying on bare allegations," *Unger v. Amedisys, Inc.*, 401 F.3d 316, 324 (5th Cir. 2005) . District courts must probe the validity of statistical evidence, as "any method of measurement" would otherwise become "acceptable so long as it c[ould] be applied classwide, no matter how arbitrary the measurements may **[**101]** be." *Comcast*, 133 S. Ct. at 1433; accord *Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d at 254; *Am. Honda Motor Co., Inc. v. Allen*, 600 F.3d 813, 815 (7th Cir. 2010).

In this case, the district court evaluated Plaintiffs' statistical evidence, reasonably found it wanting, and explained in detail why that was so. It should not then be said that the district court clearly erred by refusing to give weight to unconvincing evidence. And when one takes a closer look, Plaintiffs' statistical evidence truly is fundamentally unconvincing, not just -- as the majority calls it -- "less precise." *Maj. op.* at 18.

4.

"[T]rial judges may evaluate the data offered to support an expert's bottom-line opinions to determine if that data provides adequate support to mark the expert's testimony as reliable." *Milward v. Acuity Specialty Prods. Grp., Inc.*, 639 F.3d 11, 15 (1st Cir. 2011). And in any case involving expert testimony, "a court may conclude that there is simply too great an analytical gap between the data and the opinion offered." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997).

Plaintiffs' own experts conceded that they used problematic data. In support of a motion to compel, one of Plaintiffs' experts affirmed under oath that the information he had received

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thus far was "incomplete in a number of important ways that ma[d]e it impossible to calculate reliable statistics." J.A. 399. Because of this "inadequate" data, the expert opined that he could not calculate "proper statistics" **[**102]** or perform "any of th[e] three standard forms of statistical analysis." J.A. 403, 409. Without additional data, it was concededly "impossible to calculate . . . statistical patterns that might show whether or not a common issue of fact exists in this case." J.A. 403-04. Ultimately, the expert did not receive any of the additional data that he professed to need for a scientifically valid analysis. But, despite his sworn statements that the task was "impossible," he and another expert nevertheless produced statistical analyses based on the "incomplete" and "inadequate" data.

Plaintiffs' experts' report confirms that they used incomplete data to support and reach their conclusions. For instance, even though the experts drew conclusions about positions throughout the Nucor plant, they did not employ any data from either the shipping or maintenance departments. J.A. 1154. They used only a "limited amount of data" for the remaining departments. J.A. 1153. And although Plaintiffs' experts chose to use bidding data to determine an expected number of black promotions, they conceded that incomplete data "undermined" their "ability to use posting and bidding records to analyze [those] promotions." **[**103]** J.A. 1161. Nucor's expert identified other basic issues in Plaintiffs' experts' data that the majority opinion ignores. See J.A. 5892. For instance, Plaintiffs' experts included a promotion won by an external candidate in their pool – even though this case only concerns internally filled promotions. They further overlooked seven selections of **[*937]** black employees for promotions. See J.A. 5891.

The district court did not clearly err in discrediting this incomplete work and deeming it unworthy of evidentiary weight.

5.

a.

To further understand why Plaintiffs' statistical evidence is problematic, it helps to consider how it came about. In discovery, Nucor produced bidding packets and other promotion-related applicant data covering certain promotions from January 2001 to February 2006. Plaintiffs' analysis of the 2001-2006 data indicated that the black selection rate fell only 0.84 standard deviations from the mean -- a statistically insignificant result. See J.A. 5872. Fortunately for Plaintiffs, the district court limited the use of the actual data to the January 2001 to December 2003 period. But an analysis of that period's data did not produce a statistically significant disparity, either. **[**104]** At best, analysis of the 2001-2003 data produced disparities falling only 1.53 standard deviations from the mean. See J.A. 1449.

Left with no results from actual records that suggested discrimination, Plaintiffs' experts set about creating extrapolated "benchmark" figures for promotions bidding between December 1999 and January 2001. They began by using so-called "change-of-status" forms plucked from personnel records to identify 27 purported promotions during the period. The experts then constructed a hypothetical bidding pool by essentially guessing that bidders in early years were racially identical to bidders in later ones. See J.A. 1162. With their theoretical promotion and bid figures established, Plaintiffs' experts then

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calculated an expected black promotion rate and compared it to the "actual" black promotion rate for the same period. Tied with the actual promotions figures from 2001 through 2003, Plaintiffs' extrapolated figures produced the number on which the majority now relies – 2.54 standard deviations.

b.

Plaintiffs' experts, however, based their extrapolations on several erroneous assumptions that render their model unreliable.

It begins with the change-of-status forms, **[**105]** which Nucor used to record any change of employee status. Because the forms also recorded demotions, pay increases, reassignments, and transfers, one cannot and should not assume that every form reflects a posted promotion. But up to the time that the district court decertified the promotions classes, Plaintiffs had never provided the 27 relevant change-of-status forms to the district court. Quite understandably, the district court wanted more concrete assurance that Plaintiffs' selected forms showed actual promotions. The district court never got that assurance, and it was "not inclined" to "take [Plaintiffs'] word for it." J.A. 10943. Plaintiffs did eventually submit the 27 relevant change-of-status forms – but only after the district court decertified the promotions classes. As it turns out, those forms do little to dispel the concern that Plaintiffs misidentified promotions. For example, two forms seem to show transfers, not promotions, J.A. 11006 (Reynolds), 11028 (Forsell), while another just reflects training, J.A. 11029 (Green). Others do not involve pay raises, suggesting no promotion occurred. See J.A. 11006 (Haselden), 11030 (Cooper). Certain other forms are ambiguous, **[**106]** failing to indicate whether pay rates changed or what the nature of the position change was. See, e.g., J.A. 11022 (Anderson), 11024 (Proskine), 11025 (Pope). Most of the forms fail **[*938]** to indicate whether Nucor posted the relevant opening for bidding. See, e.g., J.A. 11006-15, 11019-21, 11023, 11026-32. So, the district court was reasonably concerned that the 27 purported promotions – representing nearly half of the promotions in Plaintiffs' statistical analysis – were suspect and statistically useless.

The problems with Plaintiffs' experts' model continue to mount when the hypothesized bidding pools for the purported promotions are examined. Plaintiffs' experts hypothesized that at least one black employee bid on each of the 27 assumed promotion opportunities. But that approach rejects the prospect of an all-white bidding pool during the projected period, something likely to randomly happen from time to time given Nucor's 11% black workforce. Consequently, Nucor's expert concluded that Plaintiffs' experts' model "overstat[ed] the expected number of African American selections" between December 1999 and January 2001, as the model very likely inflated the number of black bidders. J.A. 5912. And indeed, **[**107]** Plaintiffs' experts calculated that black workers applied to jobs at a substantially higher pace than their actual percentage of the workforce, further suggesting some degree of inflation. Compare J.A. 1157 (noting that workforce was "11.3% African-American"), with J.A. 1162 ("The racial composition of the bidders . . . was 19.24% African-American.").

An "inflated pool" like the one that Plaintiffs used "can undermine the validity of a statistical study to determine imbalances." *Smith v. Va. Commonwealth Univ.*, 84 F.3d 672, 677 (4th Cir. 1996). When a statistical model overestimates the number of black bidders, for

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instance, then black bidding rates artificially rise and black selection rates artificially fall. These effects might explain, for instance, why the black bidder selection rate for January 2001 to December 2003 -- when actual data was available -- was three times higher than the calculated selection rate for December 1999 to January 2001 -- when projected data was used. If, during the projected period, the hypothesized number of black bidders in the pool (artificially) rose while the number of black bidder selections stayed the same, then the hypothesized black selection rate would be (artificially) driven down during the projected period. **[**108]**

c.

The majority nevertheless dubs the extrapolated data "sound." Maj. op. at 17. That conclusion, however, reflects an unwillingness to confront genuine concerns over statistical validity.

For instance, although admitting that the change-of-status forms are ambiguous, the majority blames Nucor for not explaining how these ambiguities would affect Plaintiffs' statistical accuracy. Maj. op. at 22. That burden was not Nucor's. Cf. *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 199 (4th Cir. 2001) (noting that the "proponent of the testimony" bears the burden of proving that it is reliable). Recently, for example, the Court affirmed a district court's refusal to consider statistical evidence offered to show disparate impact because the evidence contained a number of "mistakes and omissions" in its analysis. *EEOC v. Freeman*, 778 F.3d 463, 467 (4th Cir. 2015). The Court did so even though the plaintiff there raised the very same argument that the majority now embraces: that the employer never "show[ed] that correcting the errors would negate the disparate impact." Brief for Appellant at 26, *Freeman*, 778 F.3d 463, 2014 WL 320746. The Court appropriately rejected that argument then; it should have done the same now.

[*939] Rather than focusing on the reliability of the extrapolated statistics, the majority prefers to revisit the *Brown I* dissent. **[**109]** See maj. op. at 20-21. That dissent noted some of the concerns mentioned here: not all change-of-status forms used to extrapolate openings reflect promotions, many forms are unclear, and few forms indicate whether positions were posted. See *Brown I*, 576 F.3d at 168 (Agee, J., concurring in part and dissenting in part). To illustrate these concerns, the dissent examined "the change-of-status forms found in the record for 2000." *Id.* Bear in mind that, at least up to that point, Plaintiffs had never produced the particular change-of-status forms that they relied upon to guesstimate their statistics. Nor had they informed the Court that the forms in the record were not those upon which they based their statistical evidence. So, the *Brown I* dissent used the only change-of-status forms that were available to assess whether they could credibly support Plaintiffs' alleged statistical disparities. *Id.* Although the majority labels this exercise "sua sponte fact-finding," maj. op. at 21, the discussion in the *Brown I* dissent consisted of nothing more than explication by example.

The majority then attempts to tie the district court's decertification decision to the "error" that the majority mistakenly identifies in the **[**110]** *Brown I* dissent. According to the majority, the district court committed "clear factual error" by assuming that the change-of-status forms discussed in the *Brown I* dissent were those that Plaintiffs relied upon to build their statistical model. But here's the rub: the district court expressly disclaimed that very

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assumption. The district court noted that, at the time of decertification, Plaintiffs still had not produced the relevant forms. So, it had "never seen the 27 change-of-status forms upon which [Plaintiffs'] experts apparently relied." J.A. 10943. Thus, the district court cited the Brown I dissent only to emphasize the potential problems inherent in using the forms and why it needed to see them. See J.A. 10942-43. The majority's protracted discussion of the Brown I dissent therefore does nothing to rehabilitate Plaintiffs' evidence, resting as it does on a twofold misreading of the Brown I dissent and the district court's decertification decision.

Nor does the majority explain why inflated black bidding rates can be excused. Rather than address that obstacle, the majority assures the reader that the problem causes only "an incremental reduction in probative value" that does **[**111]** not "fatally undermine the probativeness of the experts' findings." Maj. op. at 23. But it is hard to minimize these defects so quickly when Plaintiffs' experts offered few explanations for their assumptions or any assessment of the expected impact of those assumptions. The experts did not say, for instance, whether black bidding rates varied during the years for which data was available. If they had shown that the rates remained steady, then one might assume that those same rates applied to the extrapolated years. But if the rates varied, then Plaintiffs' experts' assumptions are not sustainable. Oddly, the majority again blames Nucor for not summoning any evidence going to variation, but that tack once more reverses the burden of proof. "It is the plaintiffs' burden to demonstrate compliance with Rule 23," not Nucor's. EQT Prod. , 764 F.3d at 358. The majority further finds that Plaintiffs' experts reasonably assumed that "every" position was posted for bidding. But Plaintiffs themselves submitted testimony identifying several unposted positions. See, e.g., J.A. 1010, 1051, 1091, 1110. Nucor's stated policies also indicated that, at least for a time, "[v]acant supervisory positions [were] not [to] be posted for bidding." **[**112]** J.A. 257.

[*940] The majority stresses that, as a general matter, plaintiffs may employ extrapolated data to prove discrimination. Maj. op. at 18-19. That can be true in some cases, but extrapolated data must still be statistically valid. And the majority ignores a significant and telling distinction between this case and past ones: Plaintiffs' experts extrapolated two data points -- the composition of the applicant pool and the success rates -whereas experts in our prior cases only extrapolated one data point. See Lewis, 773 F.2d at 568; United States v. Cnty. of Fairfax, Va., 629 F.2d 932, 940 (4th Cir. 1980).

The majority's cited cases also involved defendants who wrongfully destroyed relevant evidence. See Lewis, 773 F.2d at 568 (noting that the defendant "improperly disposed" of applicant records); Cnty. of Fairfax, 629 F.2d at 936 n.4 (noting that the defendant destroyed applicant data "[i]n violation of the record keeping regulations of [two statutes]"). In a situation involving spoliation of evidence, the Court commonly draws adverse inferences against the spoliators. But this record contains no evidence of spoliation.

Regardless, no authority requires the district court to find extrapolated data convincing in every case. Our precedent holds just the opposite. In Allen v. Prince George's County, 737 F.2d 1299, 1306 (4th Cir. 1984), for example, the district court relied solely upon actual applicant flow **[**113]** data "to the exclusion of all [other] statistical evidence," including evidence crafted from alternative benchmarks. We affirmed, emphasizing that we could not "second-guess" a fact-bound decision concerning "the relative weights to be accorded to

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the parties' respective evidence." *Id.* The district court here did essentially the same thing as the district court in *Allen*, giving weight for good reason to the actual data available to the exclusion of the speculative extrapolation evidence. As in *Allen*, we should not say that the district court clearly erred in doing so.

6.

a.

Plaintiffs' statistical evidence also does not apply controls for non-discriminatory factors that could very well have caused any observed disparities. See *Lowery*, 158 F.3d at 764. Seniority, for instance, influences promotions decisions at Nucor. See, e.g., J.A. 257. Disciplinary issues also led Nucor to reject certain applicants for promotion -- including frequent bidder Jason Guy, who is black. See J.A. 659-67; see also *Coates v. Johnson & Johnson*, 756 F.2d 524, 544 n.20 ("[A]n employee's prior discipline record seems likely to be a major, if not the most important, factor in [an employment] decision."). But Plaintiffs' experts admitted that they did not control for these or any other "additional [****114**] factors beyond the control for each job posting." J.A. 1164. The majority would wish these considerations away, reasoning that Nucor never raised them. But Nucor's expert noted the need to "control for characteristics that would seem to affect the chance of selection," which would include matters like seniority and discipline. See J.A. 5893. Anyway, we could have affirmed the district court's decision here on "any basis supported by the record." *Defenders of Wildlife v. N.C. Dep't of Transp.*, 762 F.3d 374, 392 (4th Cir. 2014).

The majority also tries to summon its own justifications for these omissions, implying that records were not available to control for matters like discipline. *Maj. op.* at 25. Even Plaintiffs' experts conceded that they were. See J.A. 1165 (acknowledging that Nucor had maintained and produced "bidders' training, discipline, and bidding records"); see also J.A. 5893 (Nucor's expert observing that "separate [****941**] discipline and training files [were] provided to Drs. Bradley and Fox and [him]"). And, based on allegations and personal assessments from Plaintiffs themselves, the majority assumes that potential explanatory variables are themselves racially biased. See *maj. op.* at 25-26. Yet here again, Plaintiffs' experts do not assume so, perhaps because [****115**] there is no concrete evidence of such taint in the record. See *Ottaviani v. State Univ. of N.Y. at New Paltz*, 875 F.2d 365, 375 (2d Cir. 1989) (holding that district court correctly required the plaintiffs to account for potential explanatory variable where the plaintiffs alleged but did not prove that the variable was biased). And even if one were to indulge the majority's assumption that discipline at Nucor was itself biased, that outcome would not justify excluding the variable from the statistical model completely. "[T]ainted variables should not be routinely excluded from the regression equation. Instead, the effects of the inclusion of a tainted variable must be assessed and minimized." *Paetzold & Willborn*, *supra*, § 6:13. The majority's reasons, then, do not fill the gaps in Plaintiffs' experts' work.

The failure to control for non-race-related explanatory variables "is sufficiently serious so as to weaken the statistical study's probativeness." *Lowery*, 158 F.3d at 764; see also *Smith*, 84 F.3d at 676; accord *Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 384-85 (3d Cir. 2013); *Morgan v. United Parcel Serv. of Am., Inc.*, 380 F.3d 459, 468 (8th Cir. 2004); *Munoz v. Orr*, 200 F.3d 291, 301 (5th Cir. 2000); *Sheehan v. Daily Racing Form, Inc.*, 104

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F.3d 940, 942 (7th Cir. 1997); *Penk v. Or. St. Bd. of Higher Educ.*, 816 F.2d 458, 465 (9th Cir. 1987). A trier of fact must determine whether racial discrimination -- rather than chance or some other "confounding factor[]" -- caused an alleged disparity. In *re Navy Chaplaincy*, 738 F.3d 425, 429, 407 U.S. App. D.C. 436 (D.C. Cir. 2013). Only a controlled model can provide that answer, and Plaintiffs' experts' evidentiary model did not meet that definition.

b.

In most every employment case, a valid statistical **[**116]** model must account for one particularly important explanatory variable: the applicant pool's qualifications. "[T]he relevant comparison is between the percentage of minority employees and the percentage of potential minority applicants in the qualified labor pool." *Carter v. Ball*, 33 F.3d 450, 456 (4th Cir. 1994); see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501-02, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989); *McNairn v. Sullivan*, 929 F.2d 974, 979 (4th Cir. 1991). If courts were to accept statistical models containing unqualified applicants, then employers could be punished merely because of a "dearth of qualified nonwhite applicants (for reasons that are not [the employers'] fault)." *Wards Cove Packaging Co. v. Atonio*, 490 U.S. 642, 651, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989). Thus, "statistics based on an applicant pool containing individuals lacking minimal qualifications for the job [are] of little probative value." *Watson*, 487 U.S. at 997; see also *Paetzold & Willborn*, *supra*, § 4:3 ("[W]hen considering potential discrimination in promotions within an organization, only employees qualified for promotion should be considered in the proxy pool."). Furthermore, "[n]o rational enterprise that has several qualified candidates for a position selects among them by lot; it picks the best qualified." *Mason v. Cont'l Ill. Nat'l Bank*, 704 F.2d 361, 364 (7th Cir. 1983). So, a truly effective statistical model will not just account for minimum qualifications, but should control for the variations in skills even among minimally qualified applicants.

[*942] By this point, Plaintiffs and their experts should **[**117]** have known better than to ignore other explanatory factors. In a related case challenging promotions practices at a different Nucor facility, the Eighth Circuit found that similarly substandard work from the same expert did not create a triable question of fact on summary judgment. See *Bennett*, 656 F.3d at 812. In so holding, the Eighth Circuit emphasized that the expert's statistics had "little force" because they "assumed that all applicants were qualified for promotion to each available position." *Id.* at 818. The Eighth Circuit is not alone. Other courts have criticized Plaintiffs' principal expert for employing his "warm body hypothesis," which "assumes that every person is just as qualified and skilled and experienced as everyone else." *Davis v. Ala. Dep't of Educ. Dep't of Disability Determination Serv.*, 768 F. Supp. 1471, 1477 (N.D. Ala. 1991); accord *Adams v. Austal, U.S.A., L.L.C.*, No. 08-00155--KD--N, 2011 U.S. Dist. LEXIS 44424, 2011 WL 1558790, at *8 (S.D. Ala. Apr. 25, 2011); *Rollins v. Ala. Cmty. Coll. Sys.*, No. 2:09cv636--WHA, 2010 U.S. Dist. LEXIS 113534, 2010 WL 4269133, at *8-9 (M.D. Ala. Oct. 25, 2010); *Bennett v. Nucor Corp.*, No. 3:04CV00291 SWW, 2007 U.S. Dist. LEXIS 59598, 2007 WL 2333193, at *3 (E.D. Ark. Aug. 13, 2007); *Yapp v. Union Pac. R.R. Co.*, 229 F.R.D. 608, 619 (E.D. Mo. Aug. 5, 2005); *Rhodes v. Cracker Barrel Old Country Store, Inc.*, No. Civ.A. 4:99--CV--217--H, 2002 U.S. Dist. LEXIS 25962, 2002 WL 32058462, at *65 (N.D. Ga. Dec. 31, 2002). We

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even affirmed a district court's choice to exclude work from the same expert precisely because he did not incorporate adequate controls. See **[**118]** Anderson, 406 F.3d at 262-63 (agreeing with the district court's view that the expert had ignored "actual job performance or job requirements" even though he "conceded" that he could have "use[d] a control factor that would control for the actual job title or the job duties").

Plaintiffs' experts assumed that all persons in each bidding pool were equally qualified because "only persons who decided to bid based on the posted qualifications were included." J.A. 1162. This opaque language obscures another faulty assumption built into the model: the experts assumed that only qualified persons applied for each promotion opportunity. It takes no expertise to comprehend that some people "might be discouraged from applying because of a self-recognized inability to meet the [opening's] standards." Dothard v. Rawlinson, 433 U.S. 321, 330, 97 S. Ct. 2720, 53 L. Ed. 2d 786 (1977). But one could hardly assume that every job applicant is so discerning, and even the majority seems unwilling to make that assumption. See maj. op. at 25. The majority prefers to guess that the number of unqualified applicants will be so trivially small as to be statistically irrelevant, and it makes that guess simply because the job announcement includes job requirements. In practical effect, the majority has read the "qualified **[**119]** applicants" limitation found in our prior cases out of the law, as most every job opening provides some minimal description of what skills are required.

"A statistical study that fails to correct for explanatory variables, or even to make the most elementary comparisons, has no value as causal explanation[.]" People Who Care v. Rockford Bd. of Educ., 111 F.3d 528, 537 (7th Cir. 1997). Plaintiffs presented just such a study here, and the district court did not clearly err in rejecting it.

7.

Lastly, Plaintiffs' statistical evidence improperly aggregates data in a way that distorts the results.

a.

The objective in a class action -- even in a proceeding that alleges disparate treatment -- is **[*943]** to identify a common, uniform policy. "While in a case alleging intentional discrimination, such as this one, a plaintiff need not isolate the particular practice and prove that such practice caused the discrimination, plaintiffs must make a significant showing to permit the court to infer that members of the class suffered from a common policy of discrimination that pervaded all of the employer's challenged employment decisions." Love v. Johanns, 439 F.3d 723, 728, 370 U.S. App. D.C. 96 (D.C. Cir. 2006).

Thus, if the class challenges a policy implemented at the nationwide level, then plaintiffs might use applicable statistics showing nationwide disparities **[**120]** to establish the policy's effects. Conversely, if the class challenges policies implemented on a plant-by-plant or department-by-department basis, then the class must summon statistics showing disparities at that level. Otherwise, non-uniform decisions made by one discriminatory decisionmaker might create disparities that, when aggregated with other, neutral decisions, misleadingly indicate discrimination across the whole group of decisionmakers.

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Wal-Mart demonstrates these concepts well. There, the plaintiffs offered statistics purporting to show regional and national disparities in employment decisions at Wal-Mart. Wal-Mart, 131 S. Ct. at 2555. Those decisions, however, were made at the store level. *Id.* at 2547. Because of that disconnect, the Supreme Court held that plaintiffs' statistics did not establish a common policy. Once again, the broader disparities might have been "attributable only to a small set of Wal-Mart stores" and did not "establish the uniform, store-by-store disparity upon which plaintiffs' theory of commonality depend[ed]." *Id.* at 2555. In essence, Wal-Mart agreed with our own, earlier cases indicating that statistics should not be aggregated together to create disparities that are not actually representative of **[**121]** the class as a whole. Compare *Stastny*, 628 F.2d 279-80 (requiring the plaintiffs' statistics to focus on the "locus of autonomy"), with *Elizabeth Tippet, Robbing a Barren Vault: The Implications of Dukes v. Wal-Mart for Cases Challenging Subjective Employment Practices*, 29 Hofstra Lab. & Emp. L.J. 433, 447 (2012), cited with approval by *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 113 (4th Cir. 2013) (explaining that Wal-Mart requires that plaintiffs' statistics focus on "the locus of the subjective decision-making").

In requiring the plaintiffs' statistics to be centered at the level of relevant decisionmaking, Wal-Mart did not distinguish between nationwide and other class actions. Rather, Wal-Mart asked whether the plaintiffs there were too dissimilar to bring their claims together, regardless of how many claims there might be. Thus, courts have applied principles from Wal-Mart in cases involving classes of roughly the same size as the class at issue here. See, e.g., *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 544 (9th Cir. 2013) (200 class members); *Ealy*, 514 F. App'x at 304-08 (150 class members). Even statisticians agree that Wal-Mart reaches classes big and small. See, e.g., *Dr. Mary Dunn Baker, Class Certification Statistical Analysis Post-Dukes*, 27 ABA J. Lab. & Emp. L. 471, 479 (2012) ("[T]he size of the putative class or the number of establishments the defendant operates will have little to **[**122]** do with whether the Dukes commonality approach is applicable."). So, even though Plaintiffs here challenge practices in one plant, they still must offer statistics showing disparities among all the relevant decisionmakers, regardless of that one-plant focus. See *Rubenstein*, *supra*, § 24:40 ("Courts have certified [only] limited classes when the facts show that no uniform personnel policies are applied **[*944]** among the various plants, departments, or levels of employees.").

b.

Here, as the *Brown I* majority agreed, the evidence indicates "that each department manager" in each of Nucor's six production departments "has unbridled discretion to make promotions within his department utilizing whatever objective or subjective factors he wishes." *Brown I*, 576 F.3d at 151. Department managers took full advantage of that discretion, developing processes that they recurrently characterized as unique and independent. See *J.A.* 7887, 7894-95, 7900, 7906-07. Indeed, these processes were so varied that one supervisor declared that he had "no idea what other departments d[id]." *J.A.* 8109. Even the decisionmakers varied. In some departments, such as the hot mill and shipping departments, supervisors and the department managers made promotion decisions. In other **[**123]** departments, such as maintenance and the cold mill, promotions decisions were a more collaborative effort involving even lower-level lead men.

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These different decisionmakers then applied different standards. In the beam mill, for example, the process centered upon interviews alone. In contrast, the melt shop looked to applicants' work history, safety record, psychological interview, job skills, training, attendance, and scores on a job-specific aptitude test. Nucor's general manager quite reasonably described the promotions processes when he said that "each department ha[d] their own way of doing [promotions]." J.A. 1723.

Plaintiffs' own expert found that each department had its own procedures, and at least eight different criteria -- not including "numerous other idiosyncratic factors" -- might or might not be considered in making any employment decision. J.A. 1518-19. "Different supervisors," he explained, "utilized different criteria weighting schemes with little consistency among the selection officials and among the different hiring/promotion/transfer opportunities." J.A. 1525. Taking all this dissimilarity together, the expert concluded that Nucor's selection process was only "consistent **[**124]** in its inconsistency." J.A. 1519.

Yet Plaintiffs' statistical evidence incorrectly assumed the exact opposite: perfect, plant-wide consistency as to promotions. Given that promotions decisions were made at the department or supervisor level using different and independent criteria, we cannot rightfully assume that a plant-wide disparity resulted from a uniform problem arising in the same way in each Nucor department. See Wal-Mart, 131 S. Ct. at 2555. Put differently, the district court reasonably found that the "locus of autonomy" rested at the departmental level, not a plant-wide one. We cannot then assume that department decisions were made in lockstep, such that plant-wide disparities necessarily reflect common, departmental ones. See Bolden v. Walsh Constr. Co., 688 F.3d 893, 896 (7th Cir. 2012) (rejecting aggregate data because it did not necessarily imply that "all 25 superintendents behaved similarly, so it would not demonstrate commonality").

We have already seen these concepts play out in another employment discrimination action involving a similar Nucor facility. Applying Wal-Mart, the Eighth Circuit rejected statistics -- from the same expert -- that reflected plant-wide disparities in promotions at an Arkansas Nucor plant. Bennett, 656 F.3d at 815-16. Just as in this case, the statistical **[**125]** evidence there indicated that different departments in the plant applied different criteria for promotions decisions. Id. at 815. The plant-wide evidence therefore "ha[d] little **[*945]** value in the commonality analysis" because it "did not differentiate between the hiring and promotion decisions made in each department." Id. The Eighth Circuit found that, in those sorts of circumstances, "a bottom-line analysis [wa]s insufficient to demonstrate that any disparate treatment or disparate impact present in one department was also common to all others." Id. at 815-16.

As in Bennett, Nucor here provided its own analysis that demonstrated how the statistical disparities varied among the different departments in the plant. Nucor's expert measured how selection rates varied between white and black applicants on a department-by-department basis over the period for which bidding information was available. With proper controls applied, the expert found that race differences between departments could vary by as much as 2.44 standard deviations. J.A. 5894. In other words, some departments experienced decidedly smaller disparities in selection rates, undermining any inference of uniformity and commonality among all departments.

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Given **[**126]** the wide variance in promotions practices at the Nucor facility, the district court did not clearly err in rejecting a statistical study that failed to account for that variance.

c.

The majority finds, however, that Nucor's entire plant should be treated "as a single entity" when it comes to promotions decisions. Maj. op. at 35-36 (alluding to Brown I, 576 F.3d at 158). Although the majority suggests otherwise, Brown I did not decide this issue. Brown I held that the district court should treat Nucor's various production departments as a single facility only for purposes of Plaintiffs' hostile work environment claim. 576 F.3d at 158 ("[T]he affidavits of employees in one department are admissible to prove a plant-wide hostile environment that affected employees in other departments, and the plaintiffs have satisfied the commonality requirement for their hostile work environment claim." (emphasis added)); see also id. at 157 (discussing how a "hostile environment determination" must be made in the context of discussing Plaintiffs' "single entity" argument). It said nothing about the uniformity of promotions decisions across the plant. Id. The Brown I majority did so because Plaintiffs likewise focused their "single entity" argument on **[**127]** only the hostile work environment claim. See Brief for Appellant at 25-35, Brown I, 576 F.3d 149, 2008 WL 2307453. Thus, as with predominance, the district court was not constrained in deciding the "single facility" issue, as no Brown I mandate existed as to that issue.

Nonetheless, the majority concludes that facts establishing a single hostile work environment claim also establish a common promotions policy. Maj. op. at 37. Yet "[d]isparate treatment . . . is inherently different from hostile work environment. The federal courts treat the two types of cases differently for good reason." See Pollard v. E.I. DuPont de Nemours Co., 213 F.3d 933, 943 (6th Cir. 2000), rev'd on other grounds, 532 U.S. 843, 121 S. Ct. 1946, 150 L. Ed. 2d 62 (2001). And no court has held that a common hostile work environment establishes that a facility must be treated as a single entity for purposes of every other kind of employment discrimination claim.

In finding a common environment, Brown I focused on shared locker rooms and spaces, plant-wide email, and plant-wide radio systems. 576 F.3d at 158. When it comes to a hostile work environment claim, those facts may matter: racial slurs and "monkey noises" uttered in a common space or transmitted via plant-wide **[*946]** radio can affect whoever hears them. See Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 762, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998) ("[A]nyone who has regular contact with an employee can inflict psychological injuries **[**128]** by his or her offensive conduct."). But locker rooms and radios bear no relationship to promotions decisions; certainly nothing in the record supports such a concept. Only supervisors can inflict the "pain" of a denied promotion, and they can do so only when empowered by company structure, not common spaces. We should not assume that dozens of supervisors acted in concert merely because their employees might have changed clothes in the same room. Nor should we assume -- in the face of expressly different criteria applied to different groups of employees -- that applicants in each department nevertheless suffer the same injury merely because of their physical proximity to one another at some point during a workday. Though the majority insists that "centralized, circumscribed environments" will "generally" increase "consistency" in managerial decisionmaking, maj. op. at 33, Plaintiffs' own expert made

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clear that this hypothesized general rule cannot apply here, see J.A. 1519 ("The best sentiment I can muster in favor of the [Nucor] selection procedure is that it is consistent in its inconsistency."). See also, e.g., *Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1229 (10th Cir. 2013) (affirming denial of class certification where "Plaintiffs challenge[d] a highly **[**129]** discretionary policy for granting promotions").

The majority also notes that the general manager formally approved promotions in the plant. Maj. op. at 50. Without saying so explicitly, the majority seems to propose that the general manager provided some common, plant-wide direction that drove common, plant-wide disparities. Yet even the *Brown I* majority recognized that the general manager played no genuine role in the promotions decisionmaking process. 576 F.3d at 152 ("Although, by policy, the plant's general manager approves all promotions and handles discrimination and harassment investigations, the record suggests that each department manager has unbridled discretion to make promotions within his department utilizing whatever objective or subjective factors he wishes."). The evidence confirms that proposition. Promotions, the general manager explained, were "not [his] area of responsibility," as he had "department managers that ma[d]e those decisions." J.A. 8163. Nucor instead trained its department managers to make promotions decisions and implement the anti-discrimination policy.

The majority nevertheless says the general manager engaged in "inaction." Maj. op. at 48, 50. The majority's theory -- **[**130]** premised on an assumed culture of "odious racism" and passive enabling -- resembles a theory that Wal-Mart out-and-out rejected. See 131 S. Ct. at 2553-54 (refusing to credit evidence asserting that a "strong corporate culture," enabled by policies of discretion, permitted bias in pay decisions); accord *Davis v. Cintas Corp.*, 717 F.3d 476, 489 (6th Cir. 2013).

Even if one assumes that such a theory were viable and relevant here, it would not prove commonality. "Inaction" -- letting supervisors do as they wish -- is just discretion by another name. "[I]t is a policy against having uniform employment practices." Wal-Mart, 131 S. Ct. at 2554. "Wal-Mart tells us that local discretion cannot support a company-wide class no matter how cleverly lawyers" (or judges) "may try to repackage local variability as uniformity." *Bolden*, 688 F.3d at 898; accord *In re Navy Chaplaincy*, No. 1:07--mc--269 (GK), 306 F.R.D. 33, 2014 U.S. Dist. LEXIS 122936, 2014 WL 4378781, at *15 (D.D.C. Sept. 4, 2014). Were it otherwise, one could find a common **[*947]** policy in most every case, as most every company has a management head at the top that could be accused of not doing enough. Beyond that, Plaintiffs' experts never traced their identified disparities to the general manager, and their reports never even mention him. For good reason. Individual acts of discretion, not the general manager's purported acquiescence, would have caused any disparities **[**131]** and the injuries that they reflect. Thus, the not-very-common common policy does not present a common injury.

Nucor also used a plant-wide "dual-approval" scheme, under which promotions required approval from both "originating" and "destination" department heads. The majority sees this as a case of potential "cat's paw" liability, wherein a non-decisionmaker influences the ultimate decisionmaker's choice in a discriminatory way. Maj. op. at 36-37 (citing *Smith v. Bray*, 681 F.3d 888, 897 & n.3 (7th Cir. 2012)). But nothing other than speculation indicates that dual approval was used to effect discrimination in any common way, and any

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cat's paw must be the "proximate cause" of the discriminatory harm to be actionable. *Staub v. Proctor Hosp.*, 562 U.S. 411, 131 S. Ct. 1186, 1192, 179 L. Ed. 2d 144 (2011). Not even Plaintiffs' statistical experts attempt to tie their disparities to a dual-approval policy.

The majority surmises that a discriminatory supervisor in one department could have theoretically used dual approval to inflict his animus upon employees outside his own department. But if a racist department head had tried to use the dual-approval scheme to disadvantage black workers, he would not have been able to reach all or even most of the promotions decisions in the plant, dual approval notwithstanding. A discriminatory **[**132]** department head in the beam mill, for instance, would have had no say when it came to a cold mill employee seeking a higher position within the cold mill, hot mill, melt shop, maintenance department, or shipping department. Perhaps, then, the majority's concept -- if properly supported with evidence -- might justify a class of persons applying in and out of a particularly problematic department. In fact, the district court proposed certifying just such a class as to the beam mill. See J.A. 10953-54 & n.16. But it would not justify the plant-wide class action that Plaintiffs now mean to bring. Cf. *Ellis*, 657 F.3d at 983 ("A disparity in only 25% of the regions, however, would not show that discrimination manifested in promotions practices in the same general fashion.").

* * * *

In sum, the district court did not clearly err in choosing not to rely on Plaintiffs' statistical evidence. Faced with evidence based on questionable data, uncontrolled explanatory variables, and poorly structured methodologies, the district court did not act irrationally in determining that such evidence was of negligible credence. The "troubling effects of statistical inferences require thoughtful consideration in each case," *Mister v. Ill. Cent. Gulf R.R. Co.*, 832 F.2d 1427, 1437 (7th Cir. 1987), and **[**133]** that consideration is sorely lacking from the work of Plaintiffs' experts. Thus, Plaintiffs' evidence, with its many deficiencies, does not establish the common policy necessary for class certification. The district court did not abuse its discretion in making that finding.

B. Anecdotal Evidence

Plaintiffs also present affidavits from sixteen employees in support of certifying the promotions classes. The district court did not abuse its discretion in refusing to certify Plaintiffs' proposed class based on this limited evidence.

[*948] 1.

In their original class certification motion, Plaintiffs never argued that anecdotal evidence, standing alone, could establish a common policy of discrimination. Rather, Plaintiffs presented the anecdotal evidence only to supplement their statistical evidence. See *Brown I*, 576 F.3d at 164 (Agee, J., dissenting). The *Brown I* majority constructed its own theory of the case, finding that Plaintiffs could in fact advance their case on anecdotal evidence "alone." *Id.* at 153. Plaintiffs now take up the *Brown I* majority's theory in this appeal.

Plaintiffs made the better choice in their initial offering, as anecdotes only help tell the story. They are meant to bring "the cold numbers convincingly **[**134]** to life," *Teamsters*,

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431 U.S. at 339, providing "texture" for statistical evidence. *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 168 (2d Cir. 2001), abrogated on other grounds by *Wal-Mart*, 131 S. Ct. at 2560-62. But standing alone, "anecdotal evidence . . . [will] rarely, if ever, . . . show a systemic pattern of discrimination." *O'Donnell Constr. Co. v. Dist. of Columbia*, 963 F.2d 420, 427, 295 U.S. App. D.C. 317 (D.C. Cir. 1992); accord *Briggs v. Anderson*, 796 F.2d 1009, 1019 (8th Cir. 1986) (observing that plaintiffs "punished themselves" by choosing to rely on anecdotal evidence); *EEOC v. Bloomberg L.P.*, 778 F. Supp. 2d 458, 470-71 & n.8 (S.D.N.Y. 2011) (collecting cases); see also Michael Selmi, *Theorizing Systemic Disparate Treatment Law: After Wal-Mart v. Dukes*, 32 *Berkeley J. Emp. & Lab. L.* 477, 501 (2011) ("[A]necdotal evidence is always of marginal significance in a pattern or practice claim.").

In discrimination cases, courts move anecdotal evidence to the background because such evidence does not prove much. "Anecdotal reports . . . are ordinarily more helpful in generating lines of inquiry than in proving causation." Federal Judicial Center, *Reference Manual on Scientific Evidence* 217 (2011). Individual stories say little, for instance, about the frequency of an event's occurrence or the reasons for that occurrence. Without knowing at least those two items, it can hardly be assumed that the stories reflect a broader trend flowing directly from intentional discrimination. See *Wessmann v. Gittens*, 160 F.3d 790, 805-06 (1st Cir. 1998); *Coral Constr. Co. v. King Cnty.*, 941 F.2d 910, 919 (9th Cir. 1991). Anecdotes are also more susceptible to mistaken perception, leading to erroneous conclusions **[**135]** – especially when collections of stories are treated as quasi-statistics. See *Fisher v. Vassar Coll.*, 70 F.3d 1420, 1444-45 (2d Cir. 1995). And bias can skew anecdotal evidence, as when only those who feel most strongly about an issue offer anecdotes or when the soliciting party has a particular objective in mind. Cf. *United States v. Local 560 of Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, & Helpers of Am.*, 780 F.2d 267, 277 (3d Cir. 1985) (finding that a survey that was meant to show the "reputation" of a particular organization should have been excluded when it only surveyed persons known "to be hostile" to the organization). Because "anecdotes provide no mechanism for assessing truthfulness, typicality, or frequency," courts can and should question their usefulness, just as "[s]cientists and medical researchers" have done for many years. David A. Hyman, *Lies, Damned Lies, and Narrative*, 73 *Ind. L. J.* 797, 803 (1998).

2.

The majority finds Plaintiffs' anecdotal evidence sufficient principally because the ratio reflecting the number of affidavits alleging discrimination compared to the number of class members is purportedly **[*949]** small. *Maj. op.* at 40-41. As of 2006, Plaintiffs' experts determined that "approximately 150 African-Americans" comprised the class. J.A. 1154. Given that the class period extends well into 2011, it is reasonable to assume that Nucor hired additional black applicants since 2006, conservatively **[**136]** setting the present class size at 160 black employees or more. The sixteen affidavits that Plaintiffs provide therefore represent roughly one affidavit for every ten class members -- a weak sample from the entire class. "[A] court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless free-standing trees." *Cooper*, 467 U.S. at 879-80. When ten percent of a class (or less)

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complains of mistreatment in a discrimination case, a district court does not clearly err in finding that such complaints do not establish a "standard operating procedure" of discrimination, *Teamsters*, 431 U.S. at 336, "significant adverse effects" on the relevant class, *Watson*, 487 U.S. at 986, or "significant proof" of class-wide discrimination, *Wal-Mart*, 131 S. Ct. at 2553.

3.

What may matter more than the quantity of a plaintiff's evidence is its quality. If, for instance, the anecdotal evidence is indirect and circumstantial, the district court might justifiably probe whether that evidence truly gives rise to a necessary inference of discrimination. After all, "a district court may properly consider the quality of any anecdotal evidence." *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 604 (2d Cir. 1986); accord *Eastland v. Tenn. Valley Auth.*, 704 F.2d 613, 625 (11th Cir. 1983).

At least as to the promotions-related matters at issue in this appeal, Plaintiffs **[**137]** do not present compelling anecdotal evidence. Byron Turner, for instance, does not address promotions at all. Neither does Walter Joseph Cook. In what might be an employment law first, Kenneth Hubbard complains that Nucor promoted him. See J.A. 1097; cf. *Kalamazoo Cnty. Rd. Comm'n v. DeLeon*, 135 S. Ct. 783, 784, 190 L. Ed. 2d 887 (2015) (Alito, J., dissenting from denial of certiorari) ("Respondent's supervisors did not violate federal law by granting him the transfer that he sought and that they had no reason to believe he did not want."). And Earl Ravenell testifies about a time that he applied for a promotion and was not selected – because another black employee was selected for that opening. He also tells us that he chose not to apply for any other positions because of "the look on his [supervisor]'s face." J.A. 1111. These and other examples are not "cherry pick[ed]," maj. op. at 41, but merely offer some insight into why the district court could reasonably decide differently than the majority does.

Much of the anecdotal evidence also amounts to conclusory and speculative statements of personal belief. For instance, even those employees who do mention job qualifications rely almost exclusively on their personal, subjective, and unsubstantiated views of their own abilities. **[**138]** We usually do not give such testimony much, if any, weight. See *Williams v. Giant Food Inc.*, 370 F.3d 423, 433 (4th Cir. 2004); *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 960 (4th Cir. 1996). Other employees assume racism in the process without identifying an objective fact to support that view. Named plaintiff Ramon Roane declares, for example, that he applied for a position that was "suddenly cancelled because Nucor was not ready for an African American to hold a supervisory position." J.A. 996. Yet he does not explain how or why he came to that conclusion, **[*950]** and "[a] plaintiff's self-serving opinions, absent anything more, are insufficient to establish a prima facie case of discrimination." *Mackey v. Shalala*, 360 F.3d 463, 469-70 (4th Cir. 2004).

In addition, Plaintiffs' evidence is often so incomplete that it lacks any probative value. For example, Bernard Beaufort discusses a promotions decision that he believes "was made unfairly." J.A. 6008. But he does not know who eventually received the job, what his or her race was, "what [the decision] was based on," or whether "it was based on [his] race." J.A. 6008. Other employees testify about not receiving promotions, but many of these declarants do not indicate whether they were minimally qualified for the position or whether

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the selected employee was of another race. Without these fundamental facts, we cannot **[**139]** know whether particular promotions decisions raise even a circumstantial inference of discrimination. See *Cline v. Roadway Express, Inc.*, 689 F.2d 481, 485 n.4 (4th Cir. 1982); accord *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

4.

The majority concentrates on one anecdotal comment from one supervisor in the beam mill: "I don't think we'll ever have a black supervisor while I'm here." J.A. 1885-86; see also maj. op. at 6, 51. That comment could be compelling evidence in a case hinging on decisions made by that particular decisionmaker. On the other hand, it might not be, as we have discounted "stray or isolated" remarks, even at summary judgment. *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 608 (4th Cir. 1999); see also *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 511-12 (4th Cir. 1994) (finding that decisionmaker's singular remark did not evidence discriminatory practices at company).

In the end, the question proves academic. A class-wide claim challenging decisions made by many different decisionmakers plainly requires something more than a single comment from just one of them. We see this rule -- that sparse comments are not enough for class treatment -- illustrated in cases like *King v. General Electric Company*, 960 F.2d 617 (7th Cir. 1992). There, the Seventh Circuit found that the plaintiffs' anecdotal evidence in an age-discrimination case was not enough, even though the record contained testimony from a higher manager that the company was "going to get rid of these old farts **[**140]** and get some new blood in here." *Id.* at 628 (Cudahy, J., dissenting) (summarizing evidence rejected by the majority). This Court, too, has rejected anecdotal evidence of a similarly "damning character," this time in a racial discrimination case. See *Coker v. Charleston Cnty. Sch. Dist.*, No. 92-1589, 1993 U.S. App. LEXIS 20836, 1993 WL 309580, at *6 (4th Cir. Aug. 16, 1993). We found that the plaintiffs had not established a policy or practice of discrimination despite testimony that a black principal was told the community would not "accept" him at a predominantly white school. 1993 U.S. App. LEXIS 20836 [WL] at *4. All this goes to illustrate that plaintiffs likely cannot prove a class-wide policy with a single comment, no matter how bigoted the comment may be. One comment certainly does not make the showing that Plaintiffs insist they make here: a common, uniform policy of animus inflicted by 55 or more independent supervisors upon more than 150 employees scattered throughout a multi-department plant. Consequently, the district court did not abuse its discretion in refusing to certify Plaintiffs' class based on a single comment.

5.

a.

The district court also gave "limited weight" to almost 80 affidavits from black **[*951]** employees at the Nucor plant. J.A. 10950. The affidavits consistently rejected the idea of discrimination in the promotions process, **[**141]** and the district court did not abuse its discretion in affording them some minimal value. Repeatedly, the affidavits suggest that the promotions process was fair. See, e.g., J.A. 6024, 6042, 6052, 6069, 6078. One such employee specifically remarked that "[n]ot all African-Americans feel like they have been

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discriminated against at Nucor." J.A. 6109. The same employee was actually "upset by this racial discrimination issue because it is not something that has happened to me or is happening across the board here at Nucor." Id. Another employee explained that "the way things are done . . . at Nucor are not influenced by race." J.A. 6164.

The list goes on: black employees approved of management's handling of race-related issues in the plant, see, e.g., J.A. 6109, 6215, 6480-81, 6943, explained that they were treated well, see, e.g., J.A. 6350, 6361, and often reasoned that complaints of racism from other employees were unjustified, see, e.g., J.A. 6566. Even those who felt that promotions were not made fairly often blamed factors other than race, such as a "buddy" system in which supervisors promoted friends. See, e.g., J.A. 6258, 6299, 6438, 6494. Some affidavits also directly contradicted **[**142]** the sixteen declarations that Plaintiffs submitted. In fact, Jacob Ravenell, Kenneth Hubbard, Robyn Spann, and Byron Turner all expressly denied that they had been denied promotions because of their race, even though Plaintiffs cite them as four of their sixteen key witnesses. See J.A. 6400, 6746, 6933, 6964. The district court had every right to weigh such self-contradictory testimony and conclude as it did. See *Stevenson v. City of Seat Pleasant, Md.*, 743 F.3d 411, 422 (4th Cir. 2014).

b.

Based on "[c]ommon sense and prudence," however, the majority finds yet again that the district court clearly erred – this time by finding that "potentially coercive" affidavits supported Nucor to some small degree. Maj. op. at 42. The majority's naked credibility determination is exactly the sort of decision we are not meant to undertake on appellate review. "[W]hen a trial judge's finding is based on his decision to credit the testimony of [a witness who] . . . has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Anderson*, 470 U.S. at 575.

The majority nevertheless adopts a self-contradictory credibility rule: statements made in support of an employer must be rejected when the employer **[**143]** obtains them, while statements made against the employer will be given "significant weight given the circumstances in which they were made." Maj. op. at 43. The majority draws this distinction by assuming that an employer exercises coercive power in most any interaction with its employees. "However, it is well settled that not every interrogation of employees by Company officials constitutes coercion[.]" *NLRB v. Lexington Chair Co.*, 361 F.2d 283, 289 (4th Cir. 1966). And one must not lose sight of the practical effect of the majority's novel approach: employers now have no incentive to investigate and remedy claims of discrimination. Employers will well understand that investigations can no longer benefit them -- at most, facts developed during an investigation will only be used against the employer. Even an employer with a supportive workforce will be unable to defend itself with beneficial employee testimony, lest it be accused of unproven coercion. Informal resolution, **[*952]** Congress' preferred course, will therefore become even more difficult. See *West v. Gibson*, 527 U.S. 212, 218-19, 119 S. Ct. 1906, 144 L. Ed. 2d 196 (1999) (noting Congress's intention that Title VII claims would be resolved informally).

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One is further left to wonder where the majority's new imagined-coercion-based rule comes from. Generally, the purportedly **[**144]** "coercive nature of the employer-employee relationship . . . is insufficient to demonstrate that . . . [employer-employee] interviews were improper." *Slavinski v. Columbia Ass'n, Inc.*, No. CCB-08-890, 2011 U.S. Dist. LEXIS 33729, 2011 WL 1310256, at *4 (D. Md. Mar. 30, 2011) (collecting cases); accord *Maddock v. KB Homes, Inc.*, 248 F.R.D. 229, 237 (C.D. Cal. 2007); *McLaughlin v. Liberty Mut. Ins. Co.*, 224 F.R.D. 295, 298 (D. Mass. 2004); cf. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 104, 101 S. Ct. 2193, 68 L. Ed. 2d 693 (1981) ("[T]he mere possibility of abuses does not justify routine adoption of a communications ban[.]"). Certainly it cannot be found in the cases the majority cites, which all raised questions about defendants who contacted putative class plaintiffs after a class action had been filed. Here, Nucor investigated and obtained affidavits before any lawsuit was filed, so it could not have been attempting to break up the class -- the class did not even exist yet. The majority's cases also involved a level of egregious misconduct not found in this case, suggesting that those cases were directed at a problem that does not exist here. See, e.g., *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1197-98 (11th Cir. 1985) (finding unilateral contacts improper where counsel violated direct court order and conducted a vast "selling job" seeking class opt-outs in "[s]ecrecy and haste" during "the district judge's vacation"); see also *Burrow v. Sybaris Clubs Int'l, Inc.*, No. 13 C 2342, 2014 U.S. Dist. LEXIS 148576, 2014 WL 5310525, at *4-5 (N.D. Ill. Oct. 17, 2014) (summarizing many of the same cases and concluding that they "depict[ed] communications so extreme that they actually cut against [the **[**145]** majority's present] position").

We also need not speculate about "potential" coercion, as the circumstances make plain that Nucor did not coerce its employees into making positive statements. No employee has claimed that the affidavits were coercive. No employee has suggested that Nucor retaliated against employees who complained of discrimination. And the contents of the affidavits do not imply coercion either. Employees evidently felt free to speak honestly, as the affidavits were not universally favorable to Nucor. See, e.g., J.A. 10950 (district court noting that the affidavits "actually bolstered the plaintiffs' claims of a common hostile work environment"). Some employees also chose not to give statements at all. See, e.g., J.A. 6911. And still other employees made handwritten corrections to their typed affidavits, indicating that the employees had complete control over their statements. See, e.g., J.A. 6120.

What is more, Nucor gave each employee a written notice explaining that the interview was voluntary, that the interviews were being taken on behalf of the company, that employees could decline to participate, and that they would not face any retaliation for what they said. **[**146]** See, e.g., J.A. 6003. In other contexts, the Court has said that disclosures like these prevent coercion. See, e.g., *Overnite Transp. Co. v. NLRB*, 280 F.3d 417, 434 (4th Cir. 2002). Each employee who chose to participate then signed an acknowledgement and noted in his or her affidavit that Nucor did not coerce the employee. See, e.g., J.A. 6003.

The majority nevertheless condemns Nucor for not informing the employees that the company might use their statements **[*953]** in litigation. This novel requirement -- a sort of "civil Miranda rule" -- seems an odd one given that litigation had not been filed. Instead, interviewees were accurately informed that "[t]here ha[d] been a few charges of

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discrimination filed by African-American employees at Nucor," and the interview was meant to "determine what happened." J.A. 6003.

The district court did not clearly err in affording some weight to these many contrary affidavits.

6.

In addition to the affidavits supporting Nucor's view, Plaintiffs' affidavits must also be weighed against the company's announced anti-discrimination policy. In *Wal-Mart*, the Supreme Court found that a "general policy of discrimination" was harder to find given the company's "announced policy forbid[ding] . . . discrimination and . . . impos[ing] penalties for denials of equal [**147] opportunity." *Id.* at 2553. The same holds true here. Nucor is an equal-opportunity employer with an express anti-discrimination policy that harshly penalizes employees engaging in discriminatory conduct. Nucor policies even punish supervisors who fail to put an end to their subordinates' discriminatory conduct. The record also contains accounts of instances in which Nucor's general manager condemned discriminatory acts and punished employees for using offensive language. This countervailing evidence supports the district court's conclusion that, as a whole, the anecdotal evidence favored Nucor rather than Plaintiffs.

7.

a.

Aside from the qualitative and quantitative deficiencies in Plaintiffs' anecdotal evidence, it also does not tell a plant-wide story. In *Wal-Mart*, plaintiffs' anecdotal evidence failed in part because "[m]ore than half of the[] reports [we]re concentrated in only six States." 131 S. Ct. at 2556. As a result, even if one assumed that "every single one of these accounts [were] true, that would not demonstrate that the entire company operate[d] under a general policy of discrimination." *Id.*

The lack of dispersion that proved fatal to the class in *Wal-Mart* presents itself here. Eleven of the sixteen declarations – again, [**148] more than half – come from employees in a single department: the beam mill. No cold mill or maintenance employees are represented, while only one shipping employee and one melt shop employee appear. And as the district court recognized, when one examines the individual instances of discrimination alleged in Plaintiffs' declarations, most of them concern just one manager and three supervisors who all worked in the beam mill. See J.A. 10951. As one black employee put it, "Whatever [wa]s happening in the beam mill [wa]s not a plant wide problem." J.A. 6109.

b.

The majority somehow finds clear error in the district court's finding that Plaintiffs' accounts were concentrated in the beam mill. But it proves easy to see why the district court found what it did: Plaintiffs do not cite useful, relevant evidence from outside the beam mill. Some anecdotes fall outside the class period. See, e.g., J.A. 1085. Others involve promotions that did in fact go to a black employee. See, e.g., J.A. 1110-11. Some involve

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transfers, not promotions. See, e.g., J.A. 1063. Still others trace back to beam mill supervisors, not supervisors in other departments. See, e.g., J.A. 1079-80. Plaintiffs count six other instances **[**149]** twice. See Appellant's Br. 9-10. And some of the cited "instances of alleged promotions discrimination" **[*954]** amount to no evidence at all. See, e.g., id. at 9 (citing J.A. 7237 -- an application for transfer -- as one instance of "promotion discrimination"). Most incredibly, Plaintiffs' argument -- which the majority appears to adopt -- assumes that one can find evidence of discrimination in every single instance where a black employee does not receive a promotion for which he applies. That concept finds no support in any part of our jurisprudence. Indeed, it turns the Teamsters framework into a circular absurdity. Plaintiffs presume that each denied promotion evidences a discriminatory policy or practice, even though -- under Teamsters -- Plaintiffs must prove that a discriminatory policy or practice existed before the court may presume that a particular denied promotion was discriminatorily made. See *Teamsters*, 431 U.S. at 362.

The district court recognized, as it should have, that the anecdotal evidence was more substantial when it came to the beam mill. For that reason, the district court explained that it was willing to certify a class of those applying out of and into the beam mill. J.A. 10953-54 & n.16. Plaintiffs **[**150]** never accepted the invitation, so they remain responsible for proving plant-wide commonality. That effort requires a substantial showing beyond a single department. See, e.g., *Bennett*, 656 F.3d at 816 (holding that the district court properly declined to certify a hostile work environment class where anecdotal evidence was concentrated in a single department).

Outside the beam mill, Plaintiffs at best present a few scattered anecdotes in each department. That's not enough. "[A] class plaintiff's attempt to prove the existence of . . . a consistent practice within a given department[] may fail even though discrimination against one or two individuals has been proved." *Cooper*, 467 U.S. at 878; accord *Ste. Marie v. E. R.R. Ass'n*, 650 F.2d 395, 406-07 (2d Cir. 1981). The district court might very well have clearly erred had it accepted such evidence. One can hardly say that it clearly erred in doing just the opposite.

8.

In a last effort to save their class-wide claim, Plaintiffs make much of other facts that do not relate directly to promotions. They seem to give special attention to the facts underlying their already-certified hostile work environment claim. The majority agrees that such evidence provides a "cultural backdrop" that renders an "equitable promotions system" essentially impossible. **[**151]** Maj. op. at 38. Notably, that view never appeared in *Brown I*, but references to Plaintiffs' hostile work environment claims now appear at least a dozen times in the majority opinion. The majority also finds evidence of a "culture" in the alleged fact that Nucor hired only one black supervisor before the EEOC investigation, even though "[t]he mere absence of minority employees in upper-level positions does not suffice to prove [even] a prima facie case of discrimination without a comparison to the relevant labor pool." *Carter*, 33 F.3d at 457.

We have never held that class plaintiffs may establish a common, classwide policy of discrimination with mere evidence of company "culture." Other decisions, including *Wal-Mart*, reject the notion that "culture" is enough. See *Wal-Mart*, 131 S. Ct. at 2553; *Davis*,

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717 F.3d at 487-88. The majority would nevertheless "sweep many individual plaintiffs and sets of facts into one class on the premise that all reflect illegal conduct by the defendant in practice and culture if not in policy" -- even though that is "precisely the sort of class that the Supreme Court recently rejected in [Wal-Mart]." *Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481, 504 (7th Cir. **[*955]** 2012) (Rovner, J., concurring in part). Furthermore, simply saying that a company has a "cultural problem" does not identify any particular **[**152]** employment policy or practice, *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 274 (5th Cir. 2008), let alone a common, uniform policy spanning the class.

We have also never held that facts establishing a hostile work environment unavoidably relate to all other employment decisions made in the same company. Such a connection would be hard to justify, as acts giving rise to a hostile work environment are only distantly related to the discrete acts that underlie disparate treatment and impact claims. "The probative value of other discriminatory acts depends . . . on the nature of the discrimination charged." *Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417, 1424 (7th Cir. 1986), abrogated on other grounds by *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989). And "[h]ostile environment claims are different in kind from discrete acts." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002). In contrast to acts creating a hostile work environment, discriminatory employment decisions "inflict[] direct economic harm." *Burlington Indus.*, 524 U.S. at 762. They will often require "the imprimatur of the enterprise and the use of its internal processes." *Id.*

The "probativeness" of items like comments, jokes, and other acts "is [also] circumscribed if they were made [or done] in a situation temporally remote from the date of the employment decision[s], or if they were not related to the employment decision[s] in question or were made by nondecisionmakers." *McMillan v. Mass. Soc'y for Prevention of Cruelty to Animals*, 140 F.3d 288, 301 (1st Cir. 1998). Here, Plaintiffs' evidence suffers to **[**153]** some degree from all three of these defects. For instance, Plaintiffs' statements often do not tell us when the offensive conduct occurred, so we have no way of assessing temporal proximity. None of the "cultural" evidence pertains specifically to promotions. And most all of the relevant hostile-work-environment conduct came from non-decisionmakers, even though it "is the perception of the decisionmaker that is relevant" in claims like Plaintiffs'. *Smith v. Flax*, 618 F.2d 1062, 1067 (4th Cir. 1980); accord *Mateu-Anderegg v. Sch. Dist. of Whitefish Bay*, 304 F.3d 618, 623 (7th Cir. 2002) ("[S]tatements are only relevant if they come from a decisionmaker, someone involved in the adverse employment decision[s]"). Lastly, to the limited extent that supervisors did involve themselves in the incidents that Plaintiffs described, those supervisors chiefly worked in the beam mill -- undermining any inference of a common, plant-wide policy.

At bottom, the majority concludes that we should permit Plaintiffs to pursue two class claims pertaining to promotions because they have successfully established their right to pursue a separate, distinguishable hostile-work-environment claim. Title VII does not work that way, and, rhetoric aside, the majority is unable to identify a single decision to support that kind of proposition. "In the law, the absence **[**154]** of precedent is no recommendation." *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1200 (9th Cir. 2007) (Kleinfeld, J., dissenting). Moreover, to assume that a plaintiff establishes a right to class treatment for his discrete-act class merely because he has established such a right as to a hostile-

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work-environment class is to reinstate a suspect revision of the "across-the-board" rule that the Supreme Court rejected three decades ago. See Falcon, 457 U.S. at 153, 157-59 (rejecting the idea that "an employee complaining of [**956] one employment practice" may automatically "represent another complaining of another practice" merely because both alleged discrimination based on the same protected trait). The district court did not abuse its discretion in refusing to exhume that long-dead idea.

The district court did not clearly err in declining to give dispositive weight to evidence going to Plaintiffs' hostile-work-environment claim when deciding whether to certify Plaintiffs' separate promotions-related classes.

When closely examined, Plaintiffs' anecdotal evidence proves to be just as unconvincing as their statistical proof. "Because [Plaintiffs] provide no convincing proof of a companywide discriminatory . . . promotion policy, . . . they have not established the existence of any [**155] common question." Wal-Mart, 131 S. Ct. at 2556-57. The district court therefore did not abuse its discretion in declining to certify the class because of its lack of commonality.

IV.

On the road to its desired result, the majority undermines well-established judicial processes, causes a rift between this Court and a co-equal circuit court without explanation, and brings substantial uncertainty to an area of law that begs for clarity.

As to judicial processes, the majority opinion evidences little respect for the role of the district court and the standard of review. The district court has lived with this matter for several years now, and it best understands how the case has developed. Its actions bespeak a court striving to scrupulously apply Rule 23's requirements. The district court complied with our mandate, rejected more than one request to decertify from Nucor, and continually endeavored to respect findings that this Court has (actually) made. Yet the majority shows no concern for that effort. And it shows just as little concern for this Court's well-established waiver rule, which should plainly apply here.

As to our sister circuits, the majority opinion begets a circuit split. The Eighth Circuit affirmed the denial of [**156] class certification in a case involving the same claims, the same experts, and the same defendant. As should be clear by now, that decision cannot be reconciled with this one. The majority never even tries to do so.

And as to cases to come, the majority's decision will offer far more questions than answers. What standard of review really applies in this context? How much evidence must a plaintiff summon to comply with Rule 23? Does appellate waiver matter? Does class treatment of one cause of action necessarily warrant class treatment for another? Must statistical evidence prove to be reliable? Does Wal-Mart reach only nationwide class actions? Can a sufficiently "common" policy result from inaction? These are only some of the questions that the majority opinion leaves unresolved.

We should hardly take this troubled road in the name of "simple justice." Maj. op. at 63. "Simple justice' is achieved when a complex body of law developed over a period of years

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is evenhandedly applied." San Remo Hotel, L.P. v. City & Cnty. of San Fran., Cal., 545 U.S. 323, 345, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005). Evenhandedness is nowhere to be found here, so justice remains unserved.

Perhaps the Supreme Court will act to rectify the problems that are sure to follow from today's opinion. One can only hope that it will do **[**157]** so soon. In the meantime, I respectfully dissent. The district court did **[*957]** not abuse its discretion, and its judgment to decertify should be affirmed.

**ROBERT DIGIACOMO, Plaintiff, v. STATEBRIDGE COMPANY,
LLC, et al., Defendants.**

CIVIL ACTION NO. 14-6694 (JEI)

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
NEW JERSEY**

2015 U.S. Dist. LEXIS 82496

**June 25, 2015, Decided
June 25, 2015, Filed**

CORE TERMS: mortgage, borrower's, kickback, lender, force-placed, premium, coverage, insurer, servicer, covenant of good faith, fair dealing, breach of contract, rating-system, hazard, contract claim, fiduciary duty, escrow funds, escrow account, citations omitted, fiduciary, bargain, insurance premiums, excessive, authorize, rating, insurance policy, undisclosed, lapse, insurance coverage, policy of insurance

COUNSEL: For Plaintiff: Roosevelt N. Nesmith **[*1]**, Esq., LAW OFFICE OF ROOSEVELT N. NESMITH, LLC, Montclair, New Jersey.

For Defendant Statebridge Company, LLC: John M. Falzone, III, Esq., PARKER IBRAHIM & BERG LLC, Somerset, New Jersey.

For Defendants American Modern Insurance Group, American Modern Home Insurance Company, and Midwest Enterprises, Inc. d/b/a Ameritrac Business Solutions: Lesley Mccall Grossberg, Esq., BAKER & HOSTETLER LLP, Philadelphia, Pennsylvania.

JUDGES: HONORABLE JOSEPH E. IRENAS, Senior United States District Judge.

OPINION BY: JOSEPH E. IRENAS

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OPINION**IRENAS**, Senior District Judge:

Plaintiff Robert DiGiacomo ("Plaintiff") took a mortgage loan from non-party EquiFirst Corporation ("Equifirst") on March 17, 2008, secured by real property in West Berlin, New Jersey. (Complaint, Dkt. No. 1 ("Compl.") ¶ 45)¹ Defendant Statebridge Company LLC ("Statebridge") serviced the loan, and pursuant to the mortgage agreement, required Plaintiff to provide proof of insurance on his real property. (Id. ¶¶ 45-46) When Plaintiff failed to do so, Statebridge "force-placed" an insurance policy on the property through Defendant American Modern Home Insurance Company ("American Modern"). (Id. ¶ 47)

¹ The Court recognizes that Plaintiff [*2] has filed an Amended Complaint (Dkt. No. 58) but understands the amendments to have no substantive effect on the instant motion.

Plaintiff filed the instant class action against Statebridge, American Modern, American Modern's corporate parent American Modern Insurance Group ("AMIG"), and Midwest Enterprises, Inc. d/b/a Ameritrac Business Solutions ("Ameritrac"), the wholly owned subsidiary of AMIG that acts as the program manager for American Modern's force-placed insurance programs. (Id. ¶¶ 3-5) Alleging that American Modern, AMIG, and Ameritrac (collectively, "AMIG Defendants") and Statebridge "manipulated the force-placed insurance market through collusive agreements involving kickback arrangements and other forms of improper compensation," (id. ¶ 7), Plaintiff brings suit against Statebridge for breach of contract, breach of implied covenant of good faith and fair dealing, violation of the New Jersey Consumer Fraud Act ("NJCFA"), breach of fiduciary duty, and violations of the Racketeer Influenced and Corrupt Organizations ("RICO") Act.

Presently before the Court is Statebridge's Motion to Dismiss Plaintiff's Class-Action Complaint, Dkt. No 9 ("SMTD") for failure to state a claim [*3] upon which relief can be granted pursuant to Rule 12(b)(6).² For the reasons below, the motion will be GRANTED in part and DENIED in part.

² Plaintiff also brings suit against AMIG Defendants for tortious interference with a business relationship and violations of RICO and the NJCFA. AMIG Defendants filed an Answer (Dkt. No. 25) to Plaintiff's Complaint and do not join the instant motion.

I. Relevant Facts

Plaintiff alleges the following facts in his Complaint. Under a typical mortgage agreement, lenders and servicers have a right to "force-place" insurance upon borrowers who fail to obtain or maintain the requisite insurance coverage on property that secures a loan. (Compl. ¶ 10) As is typical, Plaintiff's mortgage agreement with Equifirst requires in Section 5 that Plaintiff maintain insurance against loss by fire, flood, earthquake "and any other hazards . . . for which Lender requires insurance . . . in the amounts (including deductible levels) and for the periods Lender requires." (Compl. Ex. A, Dkt. 1-2 ("Mortgage Agreement") at 3) "If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense." (Id.)

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After executing [*4] his mortgage agreement in 2008, Plaintiff appears to have made voluntary insurance payments for some time before his coverage lapsed; in any event, Statebridge did not seek to impose force-placed insurance until 2012. (Compl. ¶ 31)

The agreement makes it clear that borrowers are better off maintaining their own insurance rather than being subject to any coverage that the lender may apply by force:

Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained.

(Mortgage Agreement at 3)

However, Section 9 further provides that where Borrower "fails to perform the covenants and agreements contained in" the agreement, "Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security [*5] Instrument." (Id. at 4-5)

According to Plaintiff's Complaint, Statebridge arranged to purchase force-placed hazard insurance exclusively from AMIG Defendants, even though these insurance plans provided less coverage and cost borrowers such as Plaintiff considerably higher premiums than voluntary insurance. (Compl. ¶¶ 8-9, 26) Statebridge then charged Plaintiff (and other borrowers in the putative class) even higher premiums than was "reasonable or appropriate to protect [their] interest in the Property," because it used the excess amount collected to give itself "kickbacks disguised as 'commissions,' . . . lucrative reinsurance arrangements which included unmerited charges, and/or . . . other financial benefits which are not attributable to the cost of insuring the individual property." (Id. ¶ 26)

"AMIG Defendants have acknowledged that they pay 'commissions' in connection with force-placed insurance," but Plaintiff alleges that these payments are kickbacks for maintaining exclusive agreements with AMIG, rather than "commissions" awarded for legitimate services. (Id. ¶¶ 35, 37) Since no individualized underwriting is required to force-place insurance, Plaintiff alleges that acquisition [*6] expenses should be lower, not higher. (Id. ¶ 29) Moreover, the kickbacks incentivize Statebridge "to purchase the high-priced force-placed insurance policies from American Modern, rather than simply renew the lower priced insurance policy obtained by the borrower in the open market," since "the higher the cost of the insurance policy, the higher the kickbacks to Statebridge." (Id. ¶ 37)³

³ AMIG Defendants stated during oral argument that Statebridge could not actually buy Plaintiff's original insurance, because they have no insurable interest in Plaintiff's equity or personal effects, and individual borrowers such as Plaintiff have access to cheaper voluntary insurance rates that are not available to commercial parties such as Defendants. (Hr'g Tr. 35-36, Apr. 23, 2015, Dkt. No. 52) Because commercial borrowers have such limited options for purchasing insurance, AMIG Defendants also argue that even if the kickback scheme alleged were shown to be true, the rate charged would have been no higher than the rate charged without such a scheme. The Court does not reach such a fact-intensive dispute at this stage of litigation.

Plaintiff states that in addition to "commissions," AMIG Defendants [*7] returned some of the excessive premiums to Statebridge via reinsurance agreements: "while Statebridge

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and/or its affiliates purportedly provided reinsurance, they did not assume any real risk." (Id. ¶ 40) Consequently, these "ceded premiums are nothing more than a kickback[.]" (Id.)

In addition to these alleged kickbacks, Plaintiff claims that Statebridge used the excess premiums to subsidize a service AMIG Defendants provide wherein AMIG Defendants monitor or track Statebridge's entire loan portfolio below cost.

[B]ecause insurance-lapsed mortgage property generally comprises only 1-2% of the lenders' total mortgage portfolio, the borrowers, like Plaintiff DiGiacomo, who pay these premiums unfairly, bear the entire cost to service and monitor or track the entire Statebridge loan portfolio.

(Id. ¶ 38)⁴

⁴ The Court understands from the Complaint that Plaintiff believes this cost of monitoring or tracking Statebridge's loan portfolio ought to be spread across all loans rather than just the 1-2% of loans related to insurance-lapsed mortgage property but is otherwise a legitimate expense.

Finally, Plaintiff alleges that Defendants⁵ overcharged borrowers by charging for time periods when they were already **["8]** protected (noting that the Standard Mortgage Clause or the Lender's Loss Payable Endorsement ("LLPE") "typically protects the lender for a period of at least ten days after the termination of the homeowner's voluntary insurance policy" (id. ¶ 41)) and by imposing retroactive insurance costs to cover time periods when the property was not insured, even though no damage occurred during the period of the lapse (id. ¶ 30).

⁵ As Plaintiff explains it, "AMIG Defendants generate a premium charge to Statebridge for th[e] retroactive coverage" and "Statebridge then charges the borrower in the amount it was billed from the AMIG Defendants." (Id. ¶ 30)

Defendants allegedly engaged in these activities with regard to many borrowers but Statebridge informed the instant Plaintiff that it was force-placing insurance on his property on July 6, 2012, to be applied retroactively to January 29, 2012. (Id. ¶ 31) The five months of insurance charges were then applied to Plaintiff's escrow account, plus interest. (Id. ¶ 33) While Plaintiff previously paid an annual premium of \$1,165.14 through his voluntary insurer, Defendants' policy increased his premium 17.5% to \$1,368, despite dropping his coverage from \$289,000 **["9]** to \$152,000 and no longer covering contents, personal effects, or liability. (Id. ¶ 47)

II. Jurisdiction

Though the parties did not address the issue of standing in their briefs, "standing is a jurisdictional matter" raised "[p]ursuant to Rule 12(b)(1)." *Ballentine v. United States*, 486 F.3d 806, 810, 48 V.I. 1059 (3d Cir. 2007) (internal quotations and citations omitted). Therefore, "we are required to raise issues of standing *sua sponte* if such issues exist." *Addiction Specialists, Inc. v. Twp. of Hampton*, 411 F.3d 399, 405 (3d Cir. 2005) (internal quotations and citations omitted). Prior to reaching the merits of Statebridge's motion, however, the Court must confirm that Plaintiff has established standing to bring this suit.

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"[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III" of the Constitution. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992). Article III constitutional standing requires that (1) plaintiff has suffered an injury in fact -- an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that a causal connection exists between the injury and the conduct complained of; and (3) that it is likely, not merely speculative, that the injury will be redressed by a favorable decision. *Ballentine v. United States*, 486 F.3d 806, 814, 48 V.I. 1059 (3d Cir. 2007) (internal quotations and citation omitted).

Moreover, "plaintiffs in a putative class [*10] action must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Montanez v. HSBC Mortgage Corp. (USA)*, 876 F. Supp. 2d 504, 512 (E.D. Pa. 2012) (citing *Klein v. Gen. Nutrition Cos.*, 186 F.3d 338, 345 (3d Cir. 1999)) (finding a concrete and particularized injury where plaintiffs alleged they paid too much for force-placed insurance, a causal connection where defendants allegedly worked to conceal kickbacks and redundant charges, and redressability where plaintiffs sought the "very conventional remedy" of money damages).

Here, Plaintiff states facts similar to those in *Montanez*: "[o]nce coverage is forced on the property, Defendants charge the borrower, an amount they attribute to the AMIG forced-placed premium, which is either deducted from the borrower's mortgage escrow account by the Defendants or added to the balance of the borrower's loan." (Compl. ¶ 33) But because "plaintiffs in a putative class action must allege and show that they personally have been injured," *Montanez* at 512, it is insufficient to make general statements of injury to the class without specifying injuries to Plaintiff himself. Plaintiff must state whether charges were deducted from *his* escrow account or whether *his* loan balance [*11] increased in a way that made it more difficult to resolve *his* mortgage situation.

Regarding his own finances, Plaintiff alleges that "escrow funds of Plaintiff which were designated to pay insurance, taxes and other items were used to pay non-designated costs of Defendants, including kickbacks, reinsurance fees and ceded premiums, and low cost loan tracking services." (Compl. ¶ 102) Because "general factual allegations of injury resulting from the defendant's conduct may suffice" to state an injury at this stage of litigation, the Court finds this allegation sufficient to state an injury and establish Article III standing at this stage of litigation.⁶

⁶ As the Court recognized during oral argument, "the typical case here is, there is nothing left in the escrow account" from which Defendants may deduct the premiums. Hr'g Tr. 50. Instead, "[i]t's very likely that [Plaintiff] wasn't paying [the excessive premiums] directly" and that "[i]f he was going to pay [such a premium], he was going to pay it down the line, indirectly in some fashion, and even then, we don't know, because we don't know what equity there was in the property." (Hr'g Tr. 30) Nonetheless, such factual determinations are inappropriate [*12] at this stage, and the Court restricts itself to the allegations in Plaintiff's Complaint.

In addition, Plaintiff alleges that Defendants charged him excessive premiums, which constitute an injury regardless of whether he ever actually paid them. For example, Plaintiff alleges that Defendants informed him in a letter dated July 6, 2012, "that insurance

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charges will be applied to [his] account, plus interest" and that Defendants "charged his account the prior month for the five months of insurance premiums" they claimed he owed since the lapse of his previous policy. (Compl. ¶ 33) See also *id.* ¶¶ 81 and 85, describing the application of the charge to Plaintiff's loan balance and against his escrow account. Plaintiff does not clearly assert what portion (any or all) of these charges he actually paid.

A charged fee, though unpaid, can constitute injury. See *Barrows v. Chase Manhattan Mortgage Corp.*, 465 F. Supp. 2d 347, 366 (D.N.J. 2006) (finding that plaintiff had standing to claim a breach of implied covenant of good faith and fair dealing, because "Plaintiff's contention that Defendants had a duty to insure the propriety of any attempt to collect [the fees charged] negates Defendants' argument that Plaintiff needed to have actually paid such fees.") (emphasis added). [*13] Moreover, the application of allegedly unlawful charges to Plaintiff's loan balance (*id.* ¶ 81) necessarily increased his balance, and this accumulation of debts may reduce equity, affect credit ratings, limit borrowing capacity, or otherwise cause a concrete injury to a plaintiff, even if he never actually pays the debt accumulated, perhaps due to foreclosure or bankruptcy.

Beyond Article III standing, this Court has statutory jurisdiction over "any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs" and where "any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(2). Plaintiff here, a citizen of New Jersey, alleges against Defendants, citizens of Ohio or Colorado, an amount in controversy exceeding \$5 million. (Compl. ¶¶ 20-23)

Having confirmed jurisdiction, the Court now turns to the merits of Statebridge's motion to dismiss.

III. Legal Standard

Federal Rule of Civil Procedure 12(b)(6) provides that a court may dismiss a complaint "for failure to state a claim upon which relief can be granted." In order to survive a motion to dismiss, a complaint must allege facts that raise a right to relief above the speculative level. [*14] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); see also Fed. R. Civ. P. 8(a)(2).

When considering a Rule 12(b)(6) motion, the reviewing court must accept as true all allegations in the complaint and view them in the light most favorable to the plaintiff. *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008). In reviewing the allegations, a court is not required to accept sweeping legal conclusions cast in the form of factual allegations, unwarranted inferences, or unsupported conclusions. *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997). Instead, the complaint must state sufficient facts to show that the legal allegations are not simply possible, but plausible. *Phillips*, 515 F.3d at 234. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

Finally, the Court considers "only the allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim." *Lum v.*

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Bank of Am., 361 F.3d 217, 221 n.3 (3d Cir. 2004). A document forms the basis of a claim when it is "integral to or explicitly relied upon in the complaint." *Id.* (citing *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997)).

IV. Discussion

Statebridge moves to dismiss Plaintiff's Complaint on the grounds that a) all of Plaintiff's claims are barred by the filed rate doctrine; b) Plaintiff cannot claim breach of contract because Statebridge was [*15] not a party to the contract, the contract authorized the actions alleged to be unlawful, and Plaintiff himself violated the contract; c) Plaintiff cannot claim breach of the implied covenant of good faith and fair dealing, because Plaintiff has failed to allege that Statebridge deprived him of the benefit of his bargain or that Statebridge acted in bad faith; d) Plaintiff cannot claim breach of fiduciary duty, because no such duty exists between a mortgagor and mortgagee; e) Plaintiff cannot claim violation of the NJCFA, because Plaintiff has failed to allege that Statebridge engaged in an unlawful practice or that Plaintiff suffered an ascertainable loss; and f) Plaintiff cannot claim RICO violations, because Plaintiff has failed to allege a RICO enterprise or a pattern of racketeering activity.

The Court considers each of these arguments in turn.

A. The Filed Rate Doctrine

Statebridge first argues that all of Plaintiff's claims are barred by the filed rate doctrine, which "provides that a rate filed with and approved by a governing regulatory agency is unassailable in judicial proceedings brought by ratepayers." *Clark v. Prudential Ins. Co. of Am.*, 736 F. Supp. 2d 902, 913 (D.N.J. 2010) (citing *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 763 (3d Cir. 2009)).

Specifically, "[t]he filed rate doctrine bars suits that challenge [*16] the reasonableness of filed rates or that would have the practical effect of causing certain consumers to pay a rate that varies from the filed and approved rate." (SMTD at 25 (citing *Smith v. SBC Commc'ns, Inc.*, 178 N.J. 265, 274-75, 839 A.2d 850 (2004))) Statebridge argues that this non-justiciability strand deprives courts of subject-matter jurisdiction over such suits and "reflects the courts' 'general reluctance to substitute their judgment for the judgment of the regulatory agency vested with primary authority to make such decisions and the courts' limited ability to determine the reasonableness of rates.'" (*Id.* at 26 (quoting *Clark v. Prudential Ins. Co. of Am.*, 736 F. Supp. 2d 902, 913 (D.N.J. 2010))).

However, the filed rate doctrine does not apply to bar claims where "Plaintiffs challenge [Defendant's] allegedly wrongful conduct, not the reasonableness or propriety of the rate that triggered that conduct." *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 765 (3d Cir. 2009). In *Alston*, the Third Circuit considered allegations of wrongful conduct involving unlawful kickbacks. "Plaintiffs may not sue . . . if they simply think that the price they paid for their settlement services was unfair," the Court found, but plaintiffs "may allege a violation of fair business practices through the use of illegal kickback payments. The filed-rate doctrine bars suit from the former class of plaintiffs [*17] and not the latter." *Id.* at 764 (internal quotation marks and citation omitted).

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Here, Plaintiff alleges that Defendants engaged in an unlawful, undisclosed kickback scheme, colluding to charge borrowers rates the borrowers believed were necessary to cover their insurance costs but which were actually used to fund kickbacks to Statebridge, among other improper benefits. These rates were higher than the voluntary rates borrowers were able to obtain on the open market, but Plaintiff does not allege that they were unreasonable in absolute terms. Rather, Plaintiff objects to Defendants' allegedly wrongful conduct, which "was neither filed with, nor approved by, the state regulatory agency and thus fell firmly outside the scope of the filed rate doctrine." (Plaintiff's Opp. to SMTD, Dkt. No. 23 ("Pl.'s Opp.") at 10)

Under New Jersey law, "every insurer shall, before using or applying any rate⁷ to any kind of insurance, file with the commissioner a copy of the rating-system⁸ upon which such rate is based, or by which such rate is fixed or determined." N.J.S.A. 17:29A-6. "No insurer . . . shall give false or misleading information . . . to the commissioner, which will in any manner affect the proper determination of [*18] reasonable, adequate, and nondiscriminatory rates." N.J.S.A. 17:29A-16.

If, after examination thereof, the commissioner shall find that such rating-systems filed by or on behalf of an insurer provide for, result in, or produce rates that are unreasonably high or excessive, or are not adequate for the safeness and soundness of the insurer, or are unfairly discriminatory between risks in this State involving essentially the same hazards and expense elements, he shall issue an order to such insurer . . . directing that such rating-systems be altered in the manner and to the extent stated in such order, to produce rates that are reasonable and adequate, and not unfairly discriminatory. . . . [Otherwise,] he shall approve such rates[.]

N.J.S.A. 17:29A-7.⁹

⁷ "Rate" means the unit charge by which the measure of exposure or the amount of insurance specified in a policy of insurance or covered thereunder is multiplied to determine the premium." N.J.S.A. 17:29A-1(a).

⁸ "Rating-system" means every schedule, class, classification, rule, guide, standard, manual table, rating plan, or compilation, by whatever name described, containing the rates used by any rating organization or by any insurer, or used by any insurer or by any rating organization in determining [*19] or ascertaining a rate and includes any policy form, or part thereof, used therewith." N.J.S.A. 17:29A-1(d).

⁹ "In making such determination, the commissioner shall consider the factors applied by insurers and rating organizations generally in determining the bases for rates; the financial condition of the insurer; the method of operation of such insurer; the loss experience of the insurer, past and prospective, including where pertinent, the conflagration and catastrophe hazards, if any, both within and without this State; to all factors reasonably related to the kind of insurance involved; to a reasonable profit for the insurer, and in the case of participating insurers, to policyholders' dividends." N.J.S.A. 17:29A-11.

Once a rate is approved, "[n]o insurer . . . shall knowingly charge, demand or receive a premium for any policy of insurance except in accordance with the respective rating-systems on file with and approved by the commissioner." N.J.S.A. 17:29A-15.

Here, Statebridge's filed rating-system was approved, and the rate that Statebridge charged Plaintiff complied with the rate on file. However, there is no evidence that Defendants included in their application for approval of their ratingsystem the portion of the premium devoted to kickbacks, [*20] as Plaintiff has alleged. Such extraneous payments are forbidden as follows:

No insurer . . . shall pay, allow, or give, or offer to pay, allow, or give, directly or indirectly, as an inducement to insurance, or after insurance has been effected, any rebate, discount, abatement, credit, or reduction of the premium

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named in a policy of insurance, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever, not specified in the policy of insurance, except to the extent that such rebate, discount, abatement, credit, reduction, favor, advantage or consideration may be provided for in rating-systems filed by or on behalf of such insurer and approved by the commissioner. No insured named in a policy of insurance . . . shall knowingly receive or accept, directly or indirectly, any such rebate, discount, abatement, or reduction of premium, or any such special favor or advantage or valuable consideration or inducement.

N.J.S.A. 17:29A-15.

Plaintiff DiGiacomo alleges that AMIG Defendants paid and Statebridge accepted, as an inducement to insurance, or after insurance has been effected, kickbacks that would qualify as the sort of payments [*21] prohibited by N.J.S.A. 17:29A-15.

The filed rate doctrine cannot offer any protection against such a charge. While the doctrine precludes a borrower from bringing a claim challenging the rate of force-placed insurance, Plaintiff here is not challenging the rate: a finding in his favor would establish only that Defendants engaged in an unlawful kickback scheme that was not disclosed to New Jersey regulators, not cast doubt on any determination such regulators made that a certain rate is reasonable. In imposing a rate that regulators deem reasonable, Defendants may nonetheless engage in conduct that violates, as Plaintiff alleges, the NJCFA or RICO statutes or Defendants' contractual and fiduciary obligations.

Statebridge's motion to dismiss Plaintiff's Complaint based on the filed rate doctrine will therefore be denied.

B. Breach of Contract

Statebridge next argues that Plaintiff cannot claim breach of contract because Statebridge was not a party to the contract, the contract authorized the actions alleged to be unlawful, and Plaintiff did not perform his own duties under the contract.

a. Statebridge was plausibly a party to the mortgage contract.

Only a party to a contract can be found liable for breach of [*22] contract, and a loan servicer is not an original party to a mortgage agreement between a lender and a borrower as a matter of law.¹⁰ However, a loan servicer can become a party to a mortgage agreement between a lender and a borrower via assignment, and whether or not such assignment has occurred is a question of fact. *See Ellsworth v. U.S. Bank, N.A.*, 30 F. Supp. 3d 886, 913 (N.D. Cal. 2014) ("[A] servicer can stand in the shoes of the party to the contract to the extent that rights are assigned. If rights are not assigned, then [loan servicer] U.S. Bank is off the hook for breach of contract."). Not only is it "plausible to infer that 'a servicer can stand in the shoes of the party to the contract to the extent that rights are assigned[]' . . . it is somewhat implausible that the servicers acquired the rights to enforce the lender's rights under the deed of trust without becoming parties to the contract." *Perryman v. Litton Loan Servicing, LP*, No. 14-CV-02261-JST, 2014 U.S. Dist. LEXIS 140479, 2014 WL 4954674, at *13 (N.D. Cal. Oct. 1, 2014) (quoting *Ellsworth*, 30 F. Supp. 3d at 913)(emphasis in original). In *Perryman*, as in *Ellsworth*, the Court declared the matter a fact issue for which Plaintiff would need to produce evidence of assignment but found "nothing implausible about the allegation." *Id.*

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10 See *Ruff v. America's Servicing Co.*, No. 07-0389, 2008 U.S. Dist. LEXIS 33447, 2008 WL 1830182, at *4 (W.D. Pa. Apr. 23, 2008) ("Defendant America's Servicing was not a party to the mortgage. Therefore, it cannot be held liable for breach of contract."); [*23] *Cannon v. Wells Fargo Bank, N.A.*, 917 F. Supp. 2d 1025, 2013 WL 132450 *22 (N.D. Cal. 2013) ("[A] breach-of-contract claim cannot be maintained against Wells Fargo [the loan servicer] as it was not a contracting party."); *McKenzie v. Wells Fargo Home Mort., Inc.*, 2012 U.S. Dist. LEXIS 155480, 2012 WL 5372120 *20 n.12 (N.D. Cal. Oct. 30, 2012) ("The mortgage contract is between Lender and Borrower. If Wells was acting as servicer, and not as Lender or Lender's agent, when it required increased insurance coverage, it could not be sued for breach of contract since it is not a party to the contract.").

Here, Statebridge argues that Plaintiff has failed to state a claim for breach of contract, because "a 'servicer' only receives limited rights and obligations under the mortgage contract relating to servicing" and Statebridge therefore "does not have the required privity between the parties[.]" (SMTD at 29) However, this question of fact should not be resolved at this stage. For now, the Court notes only that Statebridge is the party listed on Plaintiff's "Evidence of Insurance" form under "Insured / Lender" (Dkt. No. 9-1 at 16) and finds that Statebridge plausibly stands in the shoes of EquiFirst with regard to Plaintiff's mortgage agreement with EquiFirst.

Statebridge's motion to dismiss Plaintiff's breach of contract claim on the basis that Statebridge is not a party to the contract will therefore [*24] be denied.

b. The contract does not authorize Defendants' actions.

Statebridge also argues that the mortgage agreement authorizes Defendants' actions, because it alerts borrower that they must maintain insurance "in the amounts . . . and for the periods that Lender requires," and that if such coverage lapses, the Lender "is under no obligation to purchase any particular type or amount of [force-placed] coverage" which "shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect." (SMTD at 30-31) The agreement further provides that the cost of force-placed insurance "might significantly exceed the cost of insurance that Borrower could have obtained." (Id. at 31) Based on this language, Statebridge concludes that the breaches that Plaintiff alleges "are in fact contemplated by and expressly authorized by the Mortgage." (Id.)

This conclusion is not persuasive. Section 9 of the Mortgage Agreement authorizes a Lender to "do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property [*25] and rights under this Security Instrument." (Mortgage Agreement at 4-5) But Plaintiff has alleged a kickback scheme that imposes costs on the borrower beyond the costs of providing force-placed insurance. In executing the Mortgage Agreement, Plaintiff may have agreed, in the event of a lapse in voluntary coverage, to allow the force-placement of insurance that is more expensive and less protective of Plaintiff's interests than the coverage that lapsed; however, the agreement in no way evidences Plaintiff's consent to or awareness of the alleged kickback scheme driving some portion of those additional costs. In fact, Plaintiff alleges that Defendants used the Mortgage Agreement to suggest that excessive premiums were legitimately necessary to cover the costs of providing force-placed insurance, masking the illegitimate profits Statebridge collected instead. The agreement authorizes no such action, as it is neither reasonable nor appropriate to protect the Lender's interest, and the Court will therefore deny Statebridge's motion to dismiss Plaintiff's breach of contract claim on that basis.

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c. Plaintiff has not pled his own performance under the contract.

Finally, Statebridge asserts that [*26] Plaintiff has not asserted his own performance of the contract. Specifically, plaintiff satisfies his pleading requirements if he alleges (1) a contract; (2) a breach of that contract; (3) damages flowing therefrom; and (4) that plaintiff performed his own contractual duties. *Pub. Serv. Enter. Grp., Inc. v. Philadelphia Elec. Co.*, 722 F. Supp. 184, 219 (D.N.J. 1989) (citing 5 Wright & Miller, *Federal Practice and Procedure*, § 1235 at 189-90). In other words, "when pleading a claim for the breach of an express contract . . . the complaint must contain some allegation that the plaintiffs actually performed their obligations under the contract." *R.H. Damon & Co. v. Softkey Software Products, Inc.*, 811 F. Supp. 986, 991 (S.D.N.Y. 1993) (dismissing plaintiff's case for failure to do so).

Here, Statebridge has alleged that "Plaintiff failed to perform his contractual duties under the Mortgage," because he "failed to make timely payments pursuant to the Note and Mortgage" and is thereby estopped from bringing a breach of contract claim against Statebridge under the Mortgage Agreement. (Def.'s Reply at 12) By nature, Defendants use force-placed insurance only when a mortgagor has failed to maintain insurance on the property at issue, and the Court recognizes that a financially distressed borrower failing to make insurance payments may simultaneously fail to make mortgage [*27] payments as well. Nonetheless, Plaintiff must show his own performance in order to collect damages under the contract itself. Finding that Plaintiff has failed to do so, the Court will dismiss Plaintiff's breach of contract claim.

C. Breach of Implied Covenant of Good Faith and Fair Dealing

Plaintiff has, however, stated a claim for breach of the implied covenant of good faith and fair dealing, because he has pleaded that Statebridge deprived him of the benefit of his bargain and that Statebridge acted in bad faith.¹¹

¹¹ Plaintiff need not plead his own performance to assert a claim for breach of implied covenant of good faith and fair dealing, so long as plaintiff has asserted the existence of a valid contract. See *DBA Distribution Servs., Inc. v. All Source Freight Solutions, Inc.*, No. CIV.A. 11-3901 JAP, 2012 U.S. Dist. LEXIS 33697, 2012 WL 845929, at *4-5 (D.N.J. Mar. 13, 2012)(rejecting breach of contract claim for plaintiff's failure to plead its own performance but still reaching implied covenant claim (and rejecting it on other grounds)).

The implied covenant of good faith and fair dealing, which accompanies all contracts under New Jersey law, "mandates that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Faistl v. Energy Plus Holdings, LLC*, No. CIV.A. 12-2879 JLL, 2012 U.S. Dist. LEXIS 125334, 2012 WL 3835815, at *6 (D.N.J. Sept. 4, 2012) (quoting *Seidenberg v. Summit Bank*, 348 N.J.Super. 243, 254, 791 A.2d 1068 (App. Div. 2002)).

"A party exercising its right [*28] to use discretion in setting prices under a contract breaches the duty of good faith and fair dealing if that party exercises its discretionary authority arbitrarily, unreasonably, or capriciously, with the objective of preventing the other party from receiving its reasonably expected fruits under the contract." *Wilson v. Amerada Hess Corp.*, 168 N.J. 236, 251, 773 A.2d 1121, 1130 (2001). "Essential to a

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breach of the good faith obligation is a finding of improper motive. "Without bad motive or intention, discretionary decisions that happen to result in economic disadvantage to the other party are of no legal significance." *Bartello v. Option One Mortgage Corp.*, No. A-2492-07T1, 2009 N.J. Super. Unpub. LEXIS 264, 2009 WL 137229, at *4 (N.J. Super. Ct. App. Div. Jan. 22, 2009) (quoting *Wilson*, 168 N.J. at 251).

It is undisputed here that Statebridge retained discretionary authority to choose a force-placed insurance provider. However, the implied covenant of good faith precluded Defendants from exercising that discretion "unreasonably . . . with the objective of preventing the other party from receiving its reasonably expected fruits under the contract." Statebridge argues that Plaintiff cannot meet this standard, because he has failed to allege sufficient facts showing that Statebridge deprived him of the benefit of his bargain. (SMTD 32-37)

In support of this position, Statebridge quotes *Bartello*, 2009 N.J. Super. Unpub. LEXIS 264, 2009 WL 137229, at *5:

The benefit of [plaintiff]'s bargain under [*29] the mortgage agreement was to obtain a loan to purchase a home. By allowing the loan to remain in effect, and enabling [plaintiff] to keep his home, although paying a somewhat higher insurance premium because he failed to keep his own insurance in effect, [defendant] can hardly be said to have taken action depriving [plaintiff] of the benefit of his bargain.

(SMTD 32) In other words, Plaintiff signed the Mortgage Agreement to obtain a loan to purchase a home and received that loan, so he cannot now claim a breach of the implied covenant of good faith.

However, this characterization of Plaintiff's bargain is incomplete.¹² In denying a motion to dismiss plaintiff's claim for breach of an implied covenant, the Court in *Laffan v. Santander Bank, N.A.*, No. CIV.A. 13-4040, 2014 U.S. Dist. LEXIS 79915, 2014 WL 2693158 (E.D. Pa. June 12, 2014)) observed the following:

The purpose of a clause in a mortgage allowing a lender to force-place insurance is to protect the lender's interest in the property that is collateral for the mortgage. Plaintiff claims that [Defendant] made additional profits at his expense by force-placing insurance on his property and receiving kickbacks on that insurance, rather than placing insurance to protect its interest in the property. While the mortgage did not require [Defendant] to place [*30] the cheapest insurance available, it was not entitled to use its discretion to obtain secret kickbacks[.]

Laffan, 2014 U.S. Dist. LEXIS 79915, 2014 WL 2693158 at *5.

¹² *Bartello* is also not as factually similar to the instant matter as Statebridge suggests. Despite involving force-placed insurance, *Bartello* involved no allegations of fraud and kickbacks, as alleged here, only a dispute over the coverage the force-placed insurance provided.

Similarly here, while Statebridge was allowed to forceplace insurance "to protect the lender's interest in the property," Statebridge "was not entitled to use its discretion to obtain secret kickbacks." Defendants had the discretion to force-place insurance at a price to be determined by the market, but they were required to exercise that discretion reasonably. Artificially inflating that price to benefit themselves through undisclosed kickbacks, as Plaintiff has alleged, would qualify as an "unreasonable" exercise of their discretion and would therefore breach the implied covenant of good faith and fair dealing.

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Statebridge also argues that Plaintiff has failed to allege sufficient facts showing that Statebridge acted in bad faith. (SMTD 32-34) However, Plaintiff's allegation that Defendants intentionally force-placed [*31] insurance upon him with a deliberately undisclosed and unlawful profit motive extraneous to the terms agreed upon in the mortgage contract sufficiently alleges bad faith. The Court will therefore deny Statebridge's motion to dismiss Plaintiff's claim that Statebridge breached the implied covenant of good faith and fair dealing.

D. Fiduciary Duty

Plaintiff alleges that Statebridge acted as a fiduciary in holding Plaintiff's escrow funds and violated that duty by applying the funds towards undisclosed kickbacks for itself rather than the legitimate costs of providing force-placed insurance. Statebridge claims that it engaged Plaintiff only in a debtor-creditor relationship, which imposes upon Statebridge no fiduciary duty. (SMTD 37) However, Statebridge's fiduciary obligation roots from its control over Plaintiff's escrow funds, independent of its identity as Plaintiff's lender.

"Escrow agents have a fiduciary responsibility to the parties to an escrow transaction." *Laffan*, 2014 U.S. Dist. LEXIS 79915, 2014 WL 2693158, at *6 (citing *Snyder v. Dietz & Watson, Inc.*, 837 F.Supp.2d 428, 444 (D.N.J. 2011)). In *Laffan*, the Court denied a motion to dismiss a fiduciary duty claim:

Plaintiff pled that Defendant held funds in escrow for the purpose of paying insurance premiums and other items in borrower's mortgages . . . [*32] that Defendant was obligated to hold, manage and control any escrow funds in trust and owed Plaintiff the highest fiduciary duty with respect to the handling of escrow funds . . . [and] that Defendant breached its fiduciary duty to him by, *inter alia*, abusing its discretion to buy hazard insurance by knowingly paying for items unrelated to providing forceplaced insurance, such as kickbacks.

Id.

Similarly, the Court finds here that Plaintiff has sufficiently pled that Statebridge abused its discretion over his escrow funds by funding undisclosed kickbacks unrelated to providing force-placed insurance. Consequently, Statebridge's motion to dismiss Plaintiff's fiduciary duty claim will be denied.

E. New Jersey Consumer Fraud Act ("NJCFCA")

"To state a cause of action under the [NJ]CFA, a plaintiff must allege: (1) an unlawful practice by the defendants; (2) an ascertainable loss by plaintiff; and (3) a causal nexus between the first two elements -- defendants' allegedly unlawful behavior and the plaintiff's ascertainable loss." *Arcand v. Brother Int'l Corp.*, 673 F. Supp. 2d 282, 296 (D.N.J. 2009).

In moving to dismiss Plaintiff's claims under the NJCFCA, Statebridge argues that Plaintiff's allegations were not an unlawful practice because they were consistent with the [*33] Mortgage Agreement¹³; that Plaintiff cannot demonstrate an ascertainable loss pursuant to the filed rate doctrine; and that Plaintiff has failed to plead fraud with the particularity required by Fed. R. Civ. P. 9(b). (SMTD at 29-33)

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13 Statebridge also argues that the allegations were consistent with the notices that Statebridge provided to Plaintiff regarding the lapse of his primary insurance, but Plaintiff did not include them with his Complaint, and the Court does not consider them at this stage of litigation.

As discussed above, the Mortgage Agreement does not authorize the kickbacks alleged, and the filed rate doctrine does not apply here. Rule 9(b)¹⁴ requires that a plaintiff alleging fraud "state the circumstances of the alleged fraud with sufficient particularity to place the defendant on notice of the 'precise misconduct with which [it is] charged.'" *Frederico v. Home Depot*, 507 F.3d 188, 200 (3d Cir. 2007) (internal citation omitted). "To satisfy this standard, the plaintiff must plead or allege the date, time and place of the alleged fraud or otherwise inject precision or some measure of substantiation into a fraud allegation." *Id.*

14 Rule 9(b) provides: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. [*34] Malice, intent, knowledge and other conditions of mind of a person may be averred generally."

Plaintiff here has alleged with sufficient particularity a fraudulent scheme wherein Defendants led Plaintiff to believe that his higher force-placed insurance premiums were necessary to provide him coverage, when they were actually used to provide kickbacks to Statebridge. (Compl. ¶¶ 81-82) These kickbacks were not disclosed to Plaintiff and qualify as a material omission in Statebridge's communications with Plaintiff, such as the July 6, 2012, letter. Consequently, Statebridge's motion to dismiss Plaintiff's claims under the NJCFA will be denied.

F. Racketeer Influenced and Corrupt Organizations ("RICO") Act

Finally, Statebridge seeks to dismiss Plaintiff's RICO claims, which allege mail and wire fraud (Count VII) and RICO conspiracy (Count VIII) under 18 U.S.C. § 1962(c) and (d).¹⁵

Establishing liability under [section (c)] of the RICO statute 'requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity,' plus an injury to 'business or property.' . . . Under Section 1962(d), [i]t is also unlawful for anyone to conspire to violate § 1962(c). . . . Section 1961(1) of RICO provides a list of the federal and state crimes which [*35] constitute 'racketeering activity' and includes mail and wire fraud, and Section 1961(4) of RICO defines the term 'enterprise' to 'include[] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.'

In re Ins. Brokerage Antitrust Litig., 579 F.3d 241, 269 (3d Cir. 2009) (internal citations omitted).

15 Part (c) of the RICO statute, 18 U.S.C. § 1962, provides: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." Part (d) provides: "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

First, Statebridge alleges that Plaintiff has failed to plead a RICO enterprise, because he "has failed to allege wrongful actions in the conduct of the enterprise" beyond the "procurement of insurance [which] is one of [Statebridge's] duties as a servicer of the Mortgage." (SMTD at 44) However, Plaintiff pleads more than mere procurement of insurance; he pleads that Defendants made material [*36] omissions and

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misrepresentations regarding the purposes of the force-placed insurance premiums, "knowingly and intentionally foster[ing] the mistaken impression that the force-placed insurance premiums that Plaintiff was charged represented the 'cost' of the policies and that it was authorized to impose costs of the kickbacks and improper expenses under the Loan Agreement or Mortgage." (Compl. ¶¶ 116-17) Plaintiff also alleges that Defendants "transferred sums among themselves, including but not limited to kickbacks[.]" (Id. ¶ 118) These actions, as alleged, go well beyond Statebridge's duties as a loan servicer.

Second, Statebridge argues that Plaintiff has alleged insufficient facts regarding Statebridge's participation in the enterprise alleged. But Plaintiff alleges, among other things, that Statebridge "directed and controlled the enterprise by . . . drafting of [sic] the language of the letters and correspondence to borrowers that were specifically designed to deceive borrowers related to what the 'cost' of the insurance purchased for them was . . . [and] caus[ing] debits to the borrowers [sic] escrow accounts amounts which are not the actual or effective cost for lender placed insurance." (Compl. [*37] ¶ 119)

Finally, Statebridge argues that Plaintiff has not asserted any facts that substantiate his allegations of kickbacks. However, Plaintiff has asserted that "AMIG Defendants have acknowledged that they pay 'commissions' in connection with force-placed insurance," (Id. ¶ 35), that very few insurance companies control virtually the entire market for force-placed insurance (Id. ¶ 15), and that Plaintiff's force-placed premiums were 17.5% higher than his primary insurance (Id. ¶ 47). The Court finds these facts sufficient to warrant discovery.

Consequently, the Court will deny Statebridge's motion to dismiss Plaintiff's RICO claims.

VI. Conclusion

For the reasons set forth above, Statebridge's motion to dismiss Plaintiff's breach of contract claim will be granted; the remainder of its motion will be denied. An appropriate Order accompanies this Opinion.

Date: June 25, 2015

/s/ Joseph E. Irenas Joseph E. Irenas

JOSEPH E. IRENASIRENASJOSEPH E. IRENAS, S.U.S.D.J.

ORDER

(Dkt. No. 9)

JOSEPH E. IRENASIRENASJOSEPH E. IRENAS, Senior District Judge:

This matter having appeared before the Court upon Defendant Statebridge Company LLC's ("Statebridge") motion to dismiss (Dkt. No. 9); the Court having reviewed [*38] the parties' submissions and having heard oral argument on April 23, 2015; for the reasons set forth in an Opinion on even date herewith; and for good cause appearing:

IT IS on this 25th day of June, 2015,

ORDERED THAT:

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2015 U.S. Dist. LEXIS 82496, *

Statebridge's motion to dismiss Plaintiff's claim for breach of contract is **GRANTED**; the remainder of the motion is **DENIED**.

/s/ Joseph E. Irenas Joseph E. Irenas

JOSEPH E. IRENAS IRENAS JOSEPH E. IRENAS, S.U.S.D.J.

**FRATELLI COSULICH UNIPESOAL, S.A., f/k/a FRATELLI
COSULICH CONSULTADORA E PARTICIPACOES
UNIPESOAL, LDA, Plaintiff, v. SPECIALTY FUELS BTU, LLC;
F. JAVIER BRITO; and BUNKERS INTERNATIONAL CORP.,
Defendants.**

CA 13-00545-KD-C

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF ALABAMA, SOUTHERN DIVISION**

2015 U.S. Dist. LEXIS 86119

June 4, 2015, Decided

June 4, 2015, Filed

SUBSEQUENT HISTORY: Adopted by, Motion denied by, Motion granted by, in part, Motion denied by, in part Fratelli Cosulich Unipessoal, S.A. v. Specialty Fuels Bunkering, LLC, 2015 U.S. Dist. LEXIS 86117 (S.D. Ala., July 1, 2015)

PRIOR HISTORY: Cosulich v. Specialty Fuels Bunkering, LLC, 2014 U.S. Dist. LEXIS 79183 (S.D. Ala., June 11, 2014)

CORE TERMS: bunkering, undersigned, misrepresentation, suppression, deceit, duty to disclose, financial condition, material facts, fuel, disclose, fuel oil, fraudulent, insolvency, right of action, inducement, broker, confidence, collateral, confidential relationship, recommendation, misrepresented, quotation, owed, fiduciary, breach of fiduciary duty, criminal statute--, confidential, financially, misconduct, wantonness

COUNSEL: [*1] For Fratelli Cosulich Unipessoal, S.A., f/k/a Fratelli Cosulich Consultadoria E Participacoes Unipessoal, LDA, Plaintiff: Charles J. Potts, Mack B. Binion, LEAD ATTORNEYS, Briskman & Binion, P.C., Mobile, AL.

For Specialty Fuels BTU, LLC, Defendant: James B. Newman, LEAD ATTORNEY, Helmsing, Leach, Herlong, Newman & Rouse, P.C., Mobile, AL.

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JUDGES: WILLIAM E. CASSADY, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: WILLIAM E. CASSADY

OPINION

REPORT AND RECOMMENDATION

This cause is before the Magistrate Judge for issuance of a report and recommendation, pursuant to 28 U.S.C. § 636(b), on the motions to dismiss filed by the Defendants, Specialty Fuels BTU, LLC, ("BTU"), F. Javier Brito ("Brito"), and Bunkers International Corp. ("BIC") (docs. 65 and 67), the response filed by the Plaintiff, Fratelli Cosulich Unipessoal, S.A., ("Fratelli") (doc. 73), and the replies filed by the Defendants (docs. 74 and 75). Upon consideration of the foregoing pleadings, the Magistrate Judge **RECOMMENDS** that BIC's motion to dismiss (doc. 65) be **DENIED** and that BTU and Brito's motion to dismiss (doc. 67) be **GRANTED IN PART** and **DENIED IN PART**, as discussed below.

I. Background and Relevant Allegations in the Third Amended Complaint ("TAC")

As alleged by the Plaintiff [***2**] in the TAC (doc. 64), this matter arises from a series of transactions involving the Plaintiff, the Defendants, and former Defendant Specialty Fuels Bunkering, LLC, ("Bunkering").¹ (*Id.*)

¹ Bunkering was named as a Defendant in the original Complaint (doc. 1). Subsequently, however, Bunkering filed for Chapter 7 bankruptcy protection, and the Plaintiff chose not to pursue this action against Bunkering in Plaintiff's amended pleadings. (See doc. 30 at 6 ("As the [proposed second amended complaint] deletes Bunkering as a defendant entirely in this action, Bunkering is no longer a party to this action."); doc. 64, ¶ 2.)

A. The Parties.

The Plaintiff is a foreign corporation "engaged, in part, in the business of vessel bunkering and the trading of fuel oil and fuel oil by-products." (*Id.*, ¶ 1.) Bunkering and BTU are domestic limited liability companies that "were engaged in the business of wholesale supply of fuel products." (*Id.*, ¶¶ 2-3, 8.) Brito allegedly was the controlling member of both Bunkering and BTU. (*Id.*, ¶ 4.) According to the TAC, "Brito was the principal founder [and] investor . . . and . . . the disputed managing member of Bunkering," as well as "the principal founder [and] investor [***3**] . . . and . . . the managing and sole member of BTU." (*Id.*) The Plaintiff alleges that Bunkering and BTU

operated, jointly and/or separately, by buying fuel components, blending them to make specific types of fuel, and then selling the finished fuel or fuel oil by-product to a buyer. This type of operation required enough capital or credit on the part of Bunkering and BTU to enable each entity to purchase the component parts of the fuel, store them, blend them, sell them, deliver the product and then await payment. Bunkering and BTU engaged in business in such a manner, and through representations by their representatives and [BIC], that [the Plaintiff] considered them to be essentially the same company, "Specialty",² owned, managed and controlled by one person, Brito.

(*Id.*, ¶ 8.) BIC is a domestic corporation that served as the exclusive broker for the Plaintiff's transactions with Bunkering and BTU from 2011 onward. (*Id.*, ¶¶ 5, 10-11.)

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2 In the TAC the Plaintiff refers to Bunkering and BTU collectively as "Specialty." For ease of reference, the undersigned uses that designation herein.

B. BIC's relationship with the Plaintiff and Specialty.

Prior to 2011, the Plaintiff transacted directly [*4] with Bunkering and BTU. (*Id.*, ¶ 9.) Paul Pappaceno handled those transactions on behalf of the Plaintiff. (*Id.*) At the time, he was employed by the Plaintiff's agent, Asamar, Inc. (*Id.*) However, Pappaceno began working for BIC in late 2010. (*Id.*, ¶ 10.)

Shortly thereafter at Pappaceno's urging, he and [the Plaintiff's] management orally agreed that [BIC] would act as [the Plaintiff's] broker for all Bunkering and BTU transactions.

... From the time that Pappaceno began working for [BIC] through and including one or both of the transactions that are the subject of this lawsuit, all of [the Plaintiff's] transactions and dealings with Bunkering and BTU were conducted solely through Pappaceno and his employer, [BIC], as broker for [the Plaintiff], and as the exclusive representative of Bunkering, BTU and Brito.

... In consideration for these services, [BIC] received monetary commissions from [the Plaintiff] on the transactions.

...

... During this time frame, Pappaceno, on behalf of [BIC], demanded that [the Plaintiff] not directly contact anyone at Bunkering or BTU which resulted in Pappaceno and [BIC] becoming the sole intermediary and conduit for information between [the Plaintiff] [*5] and "Specialty" (Bunkering and BTU). Because of this insistence, [the Plaintiff] was placed into a position of having to trust that Pappaceno and [BIC] would provide it with timely and accurate information concerning "Specialty's" financial ability to perform on the transactions, among other things.

... Over this same considerable time frame, Pappaceno and [BIC], for their own financial gain, cultivated a position of trust and confidence with [the Plaintiff] in its dealings with all of the Defendants ... by reassuring [the Plaintiff] that they could be trusted and relied upon.

(*Id.*, ¶¶ 10-12, 14-15.) Specifically, in the course of the Plaintiff's dealings with BIC on transactions with Bunkering and BTU, Pappaceno sent messages to the Plaintiff stating "[y]ou can trust me" and "[d]on't worry" to assure the Plaintiff that it would receive payment from Bunkering and BTU. (*Id.*, ¶¶ 15(a)-15(b).)

BIC further established a position of trust and confidence by informing the Plaintiff of its extensive relationship with Bunkering and BTU. (*Id.*, ¶ 15.) Specifically, BIC disclosed to the Plaintiff that it had participated in factoring arrangements with Bunkering and BTU, including instances where it paid [*6] Bunkering and/or BTU's financial obligations to the Plaintiff. (*Id.*, ¶ 15(c).) BIC also informed the Plaintiff that it participated in other independent transactions with Bunkering and BTU where it acted as a principal and bought and sold fuel oil on extended credit terms. (*Id.*, ¶ 15(e).)

Additionally, Pappaceno informed the Plaintiff that he invested his personal funds in Bunkering and/or BTU. (*Id.*, ¶ 15(f).) Based on the aforesaid information conveyed by BIC, the Plaintiff reasonably inferred that BIC "was not engaged in typical broker conduct"; "was privy to detailed financial information about the business operations of Bunkering[,] BTU and Brito"; and "was by its own conduct vouching for Bunkering and BTU's reliability as financially sound and responsible business entities ... when it solicited [the Plaintiff] to do business with those entities." (*Id.*, ¶¶ 15(c)-15(f).) Additionally, BIC conveyed the closeness of its relationship with Brito and "Specialty" by informing the Plaintiff of BIC's

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direct conversations with Brito regarding the status of payments owed to the Plaintiff. (*Id.*, ¶ 16.) Such conduct demonstrated BIC's "apparent, if not actual, insider position with Bunkering [*7] and BTU." (*Id.*)

Through this conduct and course of dealings over time, [BIC] created and assumed certain duties, including the duty to conduct its brokerage activities with reasonable skill and diligence, the duty to engage in due diligence, and the duty to inform [the Plaintiff], its principal, of material information it acquired through the exercise of reasonable diligence, as a result of its expansive, close individual dealings with Bunkering, BTU and Brito.

...

... All of this created a custom and practice over time between [BIC] and [the Plaintiff] and established a course of dealings upon which [the Plaintiff] reasonably relied and placed its trust as was intended by [BIC] and resulted in the creation of a "special" or fiduciary relationship between [the Plaintiff] and [BIC].

(*Id.*, ¶¶ 18-19.)

C. The transactions at issue.

Central to this action are two agreements--"STEM 6277" and "STEM 6322"--involving the sale and repurchase of oil. The Plaintiff describes these transactions "as a close-in-time purchase (by [the Plaintiff]) and sale (by Bunkering or BTU) of oil or fuel oil by-product on the promise that "Specialty" (i.e., Bunkering or BTU, depending on the transaction), would buy [*8] the product back at a higher price." (*Id.*, ¶ 13.) BIC brokered both agreements. (*Id.*, ¶ 11, 29.)

Pursuant to the STEM 6277 agreement, on January 11, 2013, the Plaintiff paid BTU \$2,828,322.00 for the purchase of 22,447 barrels of cutterstock,³ and BTU was obligated to purchase those barrels back in thirty days at the price of \$2,857,503.10. (*Id.*, ¶ 29(a).) Subsequently, BTU requested, and the Plaintiff agreed, to roll over the agreement four times such that the due date for BTU's payment for the repurchase of the fuel-oil was extended into August 2013 and interest was added to the outstanding payment. (*Id.*) On July 24, 2013, the Plaintiff received \$1,500,000.00 in partial satisfaction of the outstanding debt. (*Id.*) However, the remainder has not been paid. Thus, the Plaintiff alleges that it is still owed \$1,532,589.70, plus interest, under the STEM 6277 agreement. (*Id.*)

³ Cutterstock, apparently, is a fuel-oil product.

STEM 6322 involved two payments by the Plaintiff to Bunkering for the purchase of a total of 23,500 barrels of Number 2 diesel fuel, which Bunkering was required to purchase back. (*Id.*, ¶ 29(b).) Pursuant to the STEM 6322 agreement, on April 22, 2013, the Plaintiff paid Bunkering [*9] \$1,600,000.00 for a portion of the diesel fuel, and Bunkering was obligated to purchase that portion back in thirty days at the price of \$1,616,377.93. (*Id.*) On May 21, 2013, the Plaintiff paid Bunkering \$1,384,500.00 for the remainder of the diesel fuel, and Bunkering was obligated to repurchase that amount in thirty days at the price of \$1,398,671.94. (*Id.*) As with the STEM 6277 agreement, the STEM 6322 agreement was rolled over multiple times such that the due date for Bunkering's payment was extended to August 2013 and interest was added to the balance. (*Id.*) However, the Plaintiff received no payments from Bunkering and, therefore, Bunkering owes the Plaintiff \$3,092,527.82, plus interest, under the STEM 6322 agreement. (*Id.*)

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Accordingly, the Plaintiff alleges that the grand total that Bunkering and/or BTU owes the Plaintiff under the STEM agreements is \$4,625,117.52, plus interest. (*Id.*, ¶ 30.)

D. Warehouse Receipt and status of fuel-based product serving as collateral.

The Plaintiff alleges that, on April 8, 2013, Bunkering, BTU and Brito "issued a 'Warehouse Receipt' to [the Plaintiff] to lead [the Plaintiff] to believe that [the Plaintiff] had and maintained a right to possess [*10] the product at issue as security for the debt evidenced by the invoices." (*Id.*, ¶ 49.) Additionally, three days later, BIC represented to the Plaintiff that the Plaintiff's transactions with Specialty were secured by fuel oil. (*Id.*, ¶ 57(k)-(l).)

The Plaintiff alleges that the Warehouse Receipt was false and misleading and that the Plaintiff's accounts were not, in fact, secured by fuel-based product. (*Id.*, ¶¶ 49, 57(l), 61.)⁴ Thus, the Plaintiff alleges that the Defendants misrepresented that fuel oil secured the transactions at issue and failed to disclose the true status of that collateral. (*Id.*, ¶¶ 64, 74.)

⁴ The undersigned notes that the Plaintiff also alleges elsewhere in the TAC that the transactions were secured by fuel-based collateral. (Doc. 64, ¶ 13.) The Plaintiff's inconsistent pleading is permissible. See Fed. R. Civ. P. 8(d); *Ocean's 11 Bar & Grill, Inc. v. Indemnity Ins. Corp. of DC*, No. 11-61577-CIV, 2011 U.S. Dist. LEXIS 95836, 2011 WL 3843931, at *3 (S.D. Fla. Aug. 26, 2011).

E. Specialty's financial condition.

The Plaintiff alleges that Specialty's financial condition began deteriorating in May 2012. "On May 29, 2012, Bunkering commenced litigation against Brito in the Circuit Court of Baldwin County, Alabama, in which other members of Bunkering sought, among other things, [*11] to wrest control of Bunkering from Brito." (*Id.*, ¶ 23.) Due to the management dispute involved in that lawsuit, Bunkering could not meet its financial obligations. (*Id.*, ¶ 24.) In June 2012, Brito filed pleadings in the Baldwin County matter representing that

Bunkering's financing sources, . . . including [BIC], were not being paid and that Bunkering's customers' ships or vessels were at risk of seizure by [BIC];

Bunkering was losing the trust and good will of its customers thereby damaging Bunkering's ability to do business in the future;

Bunkering's relationship with [BIC] (a finance source) was being "irreparably damaged"; [and]

Bunkering's ability to conduct business in general was being "irreparably damaged[.]"

(*Id.*) The Plaintiff alleges that BIC was aware of the Baldwin County litigation and the financial difficulties that had "irreparably damaged" its relationship with Bunkering. (*Id.*, ¶ 25.) The Plaintiff further alleges that Bunkering's financial difficulties "worsened over time such that the ability of Bunkering and BTU to do business as normal became materially impaired," (*id.*, ¶ 26), and that BIC knew that Bunkering's and BTU's financial condition was deteriorating, (*id.*, ¶ [*12] 27). "On April 29, 2013, Brito filed a Motion for Judicial Dissolution as to Bunkering in the [Baldwin County] litigation based on allegations of financial misconduct, misappropriation and waste." (*Id.*, ¶ 32.)

On or about July 19, 2013, Brito filed an affidavit executed by him in support of his . . . Motion for Judicial Dissolution . . . in which he testified that "Specialty [i.e., Bunkering] [was] operating at a negative equity position . . . its liabilities exceed[ed] its assets. . . . Specialty ha[d] no cash reserves, no available credit on terms that are viable to the continued operation of the business and thus ha[d] no way to operate as it ha[d] operated in the past."

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(*Id.*, ¶ 46.)

The Plaintiff alleges that, despite the foregoing, the Defendants failed to disclose Specialty's precarious financial condition and misrepresented that Specialty was financially sound. (*Id.*, ¶¶ 64, 74.)

F. Claims asserted in the TAC.

The Plaintiff asserts thirteen counts in the TAC. (Doc. 64.) In Counts I and II, the Plaintiff asserts breach of contract claims against BTU, only. (*Id.* at 30-31.) In Count III, the Plaintiff asserts fraudulent misrepresentation claims against all the Defendants pursuant to sections 6-5-101 and 6-5-103 of the Code of Alabama. (*Id.* at 31-43.) In [*13] Count IV, the Plaintiff asserts fraudulent suppression claims against all the Defendants pursuant to section 6-5-102. (*Id.* at 43-49.) In Count V, the Plaintiff asserts fraudulent deceit claims against all the Defendants pursuant to section 6-5-104. (*Id.* at 49-55.) In Count VI, the Plaintiff asserts fraud in the inducement claims against all the Defendants. (*Id.* at 55-58.) In Count VII, the Plaintiff asserts fraud in insolvency claims against BTU and Brito pursuant to section 13A-9-48 of the Code of Alabama. (*Id.* at 58-65.) In Counts VIII-IX, the Plaintiff asserts negligence and wantonness claims against BIC. (*Id.* at 65-73.) In Counts X-XI, the Plaintiff asserts breach of fiduciary duty claims against BIC. (*Id.* at 73-81.) In Count XII, the Plaintiff asserts that the corporate veil should be pierced as to Bunkering and BTU so that the Plaintiff may recover against Brito personally. (*Id.* at 82-84.) In Count XIII, mislabeled as Count XI, the Plaintiff asserts a claim for injunctive relief against BTU and Brito. (*Id.* at 84-87.)

BTU and Brito moved to dismiss Counts IV and VII for failure to state a claim, and moved to strike Count VI as redundant.⁵ (Doc. 67.) BIC moved to dismiss all Counts asserted against BIC (Counts III-VI, VIII-XI) for failure to state a claim. (Doc. 65.) Counts I, II, XII and XIII are not addressed in the [*14] motions to dismiss and, thus, they are not discussed herein.

⁵ BTU and Brito indicate in one sentence on the first page of their motion to dismiss that Count VI should be dismissed for failure to state a claim. (Doc. 67, ¶ 1.) However, in their brief they provide no argument regarding the dismissal of Count VI for failure to state a claim and failed to even reassert the statement made on the face of their motion. (Doc. 67-1.) The only discussion of Count VI relates to their argument that it should be stricken as redundant of other claims. (*Id.* at 5.) Accordingly, with respect to Count VI, the undersigned construes BTU and Brito's motion as asserting the redundancy argument, only.

II. Motion to Dismiss Standard

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a defendant may move to dismiss a complaint on the basis that the plaintiff has failed to state a claim upon which relief may be granted. See Fed. R. Civ. P. 12(b)(6). A Rule 12(b)(6) motion questions the legal sufficiency of a complaint (or portions of a complaint); therefore, in assessing the merits of a Rule 12(b)(6) motion, the court must assume that all the factual allegations set forth in the complaint are true. See, e.g., *United States v. Gaubert*, 499 U.S. 315, 327, 111 S. Ct. 1267, 1276, 113 L. Ed. 2d 335 (1991); *Powell v. Lennon*, 914 F.2d 1459, 1463 (11th Cir. 1990). Moreover, all factual allegations are to be construed in the light most favorable

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to the plaintiff. [*15] See, e.g., *Brower v. County of Inyo*, 489 U.S. 593, 598, 109 S. Ct. 1378, 1382, 103 L. Ed. 2d 628 (1989).

Rule 8(a)(2) generally sets the benchmark for determining whether a complaint's allegations are sufficient to survive a Rule 12(b)(6) motion. See *Iqbal v. Ashcroft*, 556 U.S. 662, 677-678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) ("Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.' As the Court held in *Twombly*, . . . the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation."). Indeed, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* at 678, 129 S. Ct. at 1949 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964-1965, 167 L. Ed. 2d 929 (2007)). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557, 127 S. Ct. at 1955).

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant [*16] has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged--but it has not show[n]--that the pleader is entitled to relief.

Id. at 678-679, 129 S. Ct. at 1949-1950 (internal [*17] citations and quotation marks omitted); see also *id.* at 680, 129 S. Ct. at 1950-1951 (a plaintiff must nudge his claims "'across the line from conceivable to plausible.'"); see *Speaker v. United States Dept of Health & Human Services Centers for Disease Control & Prevention*, 623 F.3d 1371, 1381 (11th Cir. 2010) ("[G]iven the pleading standards announced in *Twombly* and *Iqbal*, [plaintiff] must do more than recite [] statutory elements in conclusory fashion. Rather, his allegations must proffer enough factual content to 'raise a right to relief above the speculative level.'").

III. Discussion

A. The TAC meets basic pleading requirements.

BIC first argues that, as a general matter, the TAC does not contain enough factual allegations to meet the facial plausibility pleading standard explained in *Iqbal* and *Twombly*. (Doc. 65 at 2-3.) The undersigned disagrees. With respect to BIC, the Plaintiff asserts fraud, breach of fiduciary duty, negligence and wantonness claims. The 87-page and 164-paragraph TAC, with 20 pages of attached exhibits, contains more than enough facts to show that those claims are plausible on their face. (See doc. 64.) The Plaintiff alleges numerous facts to explain (1) the transactions at issue in this case through which

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the Plaintiff lost millions of dollars; (2) BIC's involvement in those transactions as the Plaintiff's broker and agent; (3) the [*18] duties BIC owed to the Plaintiff arising from their working relationship and course of dealings; and (4) BIC's breach of those duties through its alleged misrepresentations and suppression of material facts, among other things. (See *id.*) The Plaintiff's claims are discussed in more detail below, but the TAC clearly contains plausible claims with much more than conclusory statements or threadbare recitals of the elements of a cause of action.

BIC next argues that the TAC violates Rule 8(a)(2) and Rule 8(d)(1). (Doc. 65 at 3-5.) Rule 8(a)(2) provides that a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule 8(d)(1) provides that "[e]ach allegation must be simple, concise, and direct." Fed. R. Civ. P. 8(d)(1). While the TAC is somewhat sprawling, with some paragraphs appearing repetitive and unnecessary, the undersigned acknowledges that the length and repetition is due, in part, to the fact that the Plaintiff has restated certain allegations to cure shotgun pleading deficiencies in the Second Amended Complaint. (*Compare* doc. 64, *with* doc. 31.) In the Court's Order granting the Plaintiff leave to file its Proposed Second Amended Complaint ("PSAC"), United States District Judge Kristi K. DuBose [*19] noted that

the PSAC is a "shotgun pleading," as it "incorporate[s] every antecedent allegation by reference into each subsequent claim for relief . . ." *Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1279 (11th Cir. 2006). The Eleventh Circuit greatly disfavors such pleadings, *see, e.g., id.* . . . However, having reviewed the PSAC, the Court does not find it confusing on its face and will not *sua sponte* deny amendment on this basis.

(Doc. 30 at 7-8.) After the Plaintiff filed the Second Amended Complaint (doc. 31), the Defendants filed motions for a more definite statement (docs. 46 and 49), and the Plaintiff, subsequently, filed the TAC to clarify its claims. The undersigned agrees with the Plaintiff that, at this point, its claims are sufficiently clear. The TAC gives BIC fair notice of the Plaintiff's claims "and the grounds upon which [they] rest,"⁶ such that it allows BIC to frame a responsive pleading. Accordingly, the undersigned finds that the TAC complies with the pleading requirements of Rule 8.

⁶ *See Twombly*, 550 U.S. at 555, 127 S. Ct. at 1964-65 (observing that Rule 8(a)(2) requires that the pleading "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests" (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))).

B. The Plaintiff's claims against BIC are properly asserted in tort.

BIC argues that all claims Plaintiff asserts against [*20] it--fraud, breach of fiduciary duty, negligence and wantonness--arose from their contract and, thus, those claims "must be dismissed insofar as the allegations therein assert a cause of action sounding in tort but based on a contract." (Doc. 65 at 6.) The undersigned disagrees.

It is well settled in Alabama that "a mere failure to perform a contractual obligation is not a tort." *Barber v. Business Products Center, Inc.*, 677 So. 2d 223, 228 (Ala. 1996)[, *overruled on other grounds by White Sands Group, L.L.C. v. PRS II, LLC*, 32 So. 3d 5, 14 (Ala. 2009)]. It is also true, however, that Alabama courts have recognized exceptions to this rule. *See, e.g., Powers v. CSX Transp., Inc.*, 190 F. Supp. 2d 1284, 1295 (S.D. Ala. 2002) (collecting cases). The Eleventh Circuit has construed Alabama law on this point as providing that, while ordinary breach of contract does not constitute a tort, "[i]t is possible for a tort to arise in Alabama out of a breach of a duty implied by or arising out of a contract." *Brown-Marx Associates, Ltd. v. Emigrant Sav. Bank*, 703 F.2d 1361, 1371 (11th Cir. 1983); *see also Hamner*

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v. Mutual of Omaha Ins. Co., 49 Ala. App. 214, 270 So. 2d 87, 90 (Ala. Civ. App. 1972) (similar). The *Brown-Marx* panel distinguished between claims for breach of an obligation expressly set forth in the contract (which are not actionable in tort under Alabama law) and claims for breach of a duty implied by or arising out of the contract (which may be actionable in tort). See *Brown-Marx*, 703 F.2d at 1371.

Hardy v. Jim Walter Homes, Inc., Civil Action No. 06-0687-WS-B, 2008 U.S. Dist. LEXIS 26842, 2008 WL 906455, at *14 (S.D. Ala. April 1, 2008) (footnote omitted). See *Eastern Shore Marine, Inc. v. M/V Mistress*, 717 F. Supp. 790, 792 (S.D. Ala. 1989) ("If a cause of action arises [*21] from a breach of a promise, the action is *ex contractu*; if it arises from a breach of a duty which grows out of the relationship of the parties because of the contract, the action is in the form *ex delicto*. . . . Therefore, a contract for the performance of an act which contains no contractual provision that the act will be done in a proper manner or free from negligence, by law, creates a duty but does not imply a contract, that the act will be done in a proper manner when its performance is undertaken, and a breach of this legally created duty will give rise to an action *ex delicto*." (citing *C & C Products, Inc. v. Premier Indus. Corp.*, 290 Ala. 179, 275 So. 2d 124, 129-30 (Ala. 1972)); *Brooks v. Hill*, 717 So. 2d 759, 763 (Ala. 1998) ("[W]here the parties have entered into a contract, if the cause of action arises from a breach of duty arising out of the contract, rather than from a breach of a promise of the contract itself, the claim is *ex delicto*." (citations omitted)); *Sanford v. W. Life Ins. Co.*, 368 So. 2d 260, 263 (Ala. 1979) (concluding that the plaintiff's fraud claim sounded in tort even though it arose from a contract because "the contract merely establishes the relationship from which such a legally imposed duty could spring." (citations omitted)); *Great N. Land & Cattle Inc. v. Firestone Tire & Rubber Co.*, 337 So. 2d 1323, 1327-28 (Ala. Civ. App. 1976) ("When the contract does not in terms require reasonable care in doing the act stipulated to be done, the law imposes a duty--But [*22] does not imply a contract--to exercise due care in doing the act; and, therefore, when negligence exists in doing that act an action in tort only is available because there is No express or implied contract which is breached." (citations and internal quotation marks omitted)); see also *Mechler v. John Hancock Life Ins. Co.*, Civil Action No. 07-0724-CB-M, 2008 U.S. Dist. LEXIS 75955, 2008 WL 4493230, at *4 (S.D. Ala. Sept. 30, 2008) (concluding that, under Alabama law, the plaintiff could pursue tort actions for fraud and fraudulent suppression against insurer, where the defendant argued that said tort claims were foreclosed because they arose from a breach of the terms of the insurance policy).

In *Hardy* this Court, applying Alabama law, considered whether plaintiffs could bring tort claims arising from a Purchase and Sale Agreement for the construction of a house. *Hardy*, 2008 U.S. Dist. LEXIS 26842, 2008 WL 906455, at *1-2. The plaintiffs, the purchasers of the home, asserted negligence actions against the builder for its failure to apply for construction permits, failure to communicate with the plaintiffs regarding the construction status, and failure to begin construction in a timely manner. 2008 U.S. Dist. LEXIS 26842, [WL] at *13. The builder moved for summary judgment on the negligence claims arguing that the plaintiffs improperly transformed breach of contract [*23] claims into tort claims. 2008 U.S. Dist. LEXIS 26842, [WL] at *14. This Court rejected the builder's argument, noting that the builder had not identified any provision in the contract requiring the builder to perform the acts at issue. *Id.* This Court concluded that, "[b]ecause [the plaintiffs'] negligence claims concern duties arising from the Purchase and Sale Agreement rather than breach of express contractual obligations in that agreement, . . . [those] claims are cognizable in tort under Alabama law." *Id.*

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In this case, the Plaintiff asserts fraud, breach of fiduciary duty, negligence and wantonness claims against BIC. (Doc. 64 at 31-81.) The Plaintiff alleges, among other things, that BIC misrepresented and failed to disclose Specialty's financial condition and that BIC acted negligently and recklessly when it vouched for Specialty and failed to advise the Plaintiff as to Specialty's financial troubles. (*Id.*) The Plaintiff's claims are firmly grounded in tort, even more so than in *Hardy*, because the claims here involve duties arising primarily from the circumstances of the working relationship between the parties. See *infra* § III.C.4.a. While the relationship between the Plaintiff and BIC arose, in part, from the oral agreement [*24] whereby BIC agreed to serve as the Plaintiff's broker, it is clear from the TAC that the Plaintiff's claims did not arise from a breach of a specific promise in a contract with BIC. The only reference in the TAC to the agreement between the Plaintiff and BIC is the allegation that "[Pappaceno] and [Plaintiff]'s management orally agreed that [BIC] would act as [Plaintiff]'s broker for all Bunkering and BTU transactions." (Doc. 64, ¶ 10.) Like the defendant in *Hardy*, BIC has pointed to no provisions of the agreement with the Plaintiff imposing the duties alleged by the Plaintiff in the TAC. (Doc. 65 at 5-6.)

Furthermore, in *Ex parte Certain Underwriters at Lloyd's of London*, the Alabama Supreme Court analyzed this issue by considering the distinction between nonfeasance and misfeasance and looking to the gravamen of the complaint. See *Ex parte Certain Underwriters at Lloyd's of London*, 815 So. 2d 558, 562-63 (Ala. 2001) ("The theory on which the cases have been decided is often difficult to discern, but basically [it] may be stated that if there is [a] failure or refusal to perform a promise the action is in contract; if there is a negligent performance of a contractual duty or the negligent breach of a duty implied by law, such duty being not expressed in the contract, [*25] but arising by implication of law from the relation of the parties created by the contract, the action may be either in contract or [in] tort. In the latter instance, whether the action declared is in tort or [in] contract must be determined from the gist or gravamen of the complaint. Basically, the line of division between [an action in contract and an action in] tort in such instances is [the line between] nonfeasance and misfeasance." (quoting *Hamner*, 270 So. 2d at 90-91)). Applying that analysis to this case, the undersigned has confirmed that the Plaintiff's claims against BIC are properly asserted in tort. First, the allegations in the TAC present a case of misfeasance, as opposed to nonfeasance, because the Plaintiff alleges that, while BIC brokered numerous transactions with Specialty, as agreed by the parties, BIC handled those transactions in a wrongful manner. Second, the gravamen of the Plaintiff's claims against BIC sounds in tort. As discussed above, the Plaintiff alleges that BIC violated duties imposed by law based on the relationship between the parties. (Doc. 64 at 31-81.) The only reference to an agreement between the parties is found in a single paragraph of the 164-paragraph TAC. (*Id.*, ¶ [*26] 10.)

C. Misrepresentation, suppression, deceit and fraud in inducement claims (Counts III-VI).

1. With respect to Counts III-VI the Plaintiff has satisfied the heightened pleading requirements of Rule 9(b).

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BIC argues that the fraud claims asserted against BIC do not meet the heightened pleading standard of Rule 9(b), which provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b).⁷

Rule 9(b) is satisfied if the complaint sets forth "(1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud." *Brooks v. Blue Cross and Blue Shield of Florida, Inc.*, 116 F.3d 1364, 1371 (11th Cir. 1997) (internal quotation omitted).

Ziamba v. Cascade Int'l, Inc., 256 F.3d 1194, 1202 (11th Cir. 2001). However, the application of this rule "must not abrogate the concept of notice pleading." *Id.* (citation and internal quotation marks omitted). Furthermore, "[t]here is no 'one size fits all' checklist [*27] for satisfying [the Rule 9 pleading] requirement. *Claybar v. Huffman*, 54 F. Supp. 3d 1284, 1288 (S.D. Ala. 2014) (citing *Tello v. Dean Witter Reynolds, Inc.*, 494 F. 3d 956, 972-73 (11th Cir. 2007) ("While allegations of date, time or place satisfy the Rule 9(b) requirement that the *circumstances* of the alleged fraud must be pleaded with particularity, we have acknowledged that alternative means are also available to satisfy the rule in substantiating fraud allegations."); *Mechler*, 2008 U.S. Dist. LEXIS 75955, 2008 WL 4493230, at *3 ("Plaintiffs' fraud/fraudulent suppression claim could be better pled; however, the complaint, taken as a whole, sufficiently alerts the defendant to the misconduct with which it is charged.")).

⁷ BIC also argues that the Plaintiff's fraud claims fail to meet the pleading requirements of Rule 9(f); however, BIC fails to clearly articulate this argument or distinguish it from BIC's argument under Rule 9(b). (Doc. 65 at 6-7.) Rule 9(f) provides that "[a]n allegation of time or place is material when testing the sufficiency of a pleading." Fed. R. Civ. P. 9(f). The only case cited by BIC with regard to Rule 9(f) is *Micor Indus., Inc. v. C2JS Holdings, Inc.*, in which the Northern District of Alabama briefly summarized the allegations in the complaint before it and found that it satisfied the requirements of Rules 9(b) and 9(f). *Micor Indus.*, Civil Action No. 12-S-02654-NE, 2012 U.S. Dist. LEXIS 167300, 2012 WL 5931707, at *7 (N.D. Ala. Nov. 26, 2012). The court in *Micor Indus.* did not conduct any discussion of Rule 9(f) or otherwise [*28] provide support for BIC's assertion that the TAC does not comply with that Rule. In any event, "pleadings that are specific enough to satisfy Rule 9(b) are also specific enough to satisfy Rule 9(f)." *Orix Real Estate Capital Markets, LLC v. Superior Bank, FSB*, 127 F. Supp. 2d 981, 986 (N.D. Ill. 2000). Thus, because the undersigned finds below that the TAC complies with Rule 9(b), the undersigned also finds that the TAC does not run afoul of Rule 9(f).

After reviewing Counts III-VI, the undersigned concludes that the Plaintiff has met the Rule 9 pleading requirements. With respect to the misrepresentation claim, the Plaintiff alleges, in paragraph 57 of the TAC, that BIC misrepresented Specialty as being financially sound. (Doc. 64, ¶ 57.) Paragraph 57 contains numerous subparagraphs setting forth multiple representations with varying degrees of particularity. Although certain subparagraphs do not contain clear statements described with particularity, some statements are alleged with sufficient detail. For example, the Plaintiff alleges that, on February 6, 2013, Pappaceno sent the Plaintiff an instant message stating, with respect to Specialty, that "Business is good," and that "[Specialty] should have [the Plaintiff's] invoice paid within 10 business days." (*Id.*, ¶ 57(i) (emphasis omitted).) Additionally, the Plaintiff alleges [*29] that BIC misrepresented the status of fuel oil securing the Plaintiff's transactions with Specialty when, on April 11, 2013, Pappaceno sent the Plaintiff an instant message proposing that the Plaintiff enter into another purchase agreement with Specialty and stating that the

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purchase "gives [the Plaintiff] title to fuel." (*Id.*, ¶ 57(k) (emphasis omitted).) The Plaintiff alleges that it relied on those statements when it continued to transact business with Specialty, including rolling over Specialty's debts, and that, as a result of those transactions, the Plaintiff lost millions of dollars. (*Id.*, ¶ 65-66.) Furthermore, the Plaintiff alleges that, as a consequence of BIC's fraud, "[BIC] was able to secure millions of dollars worth of extended credit from [the Plaintiff] for Bunkering and BTU and secure brokerage commissions for itself." (*Id.*, ¶ 63.) The Plaintiff alleges that "[BIC] may have also lessened direct financial risk to itself for any credit which it may have extended to Bunkering and BTU during the same time period by securing for Bunkering and BTU the ability to perform debt service to [BIC] through the receipt of funds provided by [the Plaintiff]." (*Id.*) Based on these [*30] allegations, and considering the TAC as a whole, the undersigned finds that the Plaintiff has satisfied the Rule 9 pleading standard. See *Claybar*, 54 F. Supp. 3d at 1288 ("Examining the Second Amended Complaint *in toto*, the Court readily concludes that it adequately pleads the circumstances constituting the alleged fraud for Rule 9(b) purposes. . . . In light of those particularized factual allegations, no viable argument can be made that defendants have not been alerted to the 'precise misconduct with which they are charged,' . . . which is, after all, the purpose of the particularity rule."). Although the Plaintiff failed to identify Pappaceno's location when he made the aforementioned statements, (see doc. 64, ¶ 57), that detail is unnecessary given that Pappaceno's statements were transmitted electronically and the Plaintiff alleged numerous other details that alert BIC to the misconduct charged. See *Claybar*, 54 F. Supp. 3d at 1288 n.4 ("That the pleading does not enumerate 'where it was made' is not fatal to the sufficiency of Count IV. Again, the Rule 9(b) requirement that fraud be pleaded with particularity is not a rigid, inflexible checklist.").

8 BIC also argues that these statements do not constitute misrepresentations of material facts. That issue is discussed [*31] below. See *infra* § III.C.2.

The undersigned likewise finds that the Plaintiff has met the Rule 9 pleading standard with respect to its suppression, deceit, and fraudulent inducement claims found in Counts IV, V and VI. Those fraud claims are essentially variations of the misrepresentation claim arising from the same events. (See doc. 64, ¶ 74 (alleging that BIC "suppress[ed] material facts . . . as to (a) the true state of the financial condition of Bunkering and BTU and (b) the status of fuel based product serving as security or collateral"); *id.*, ¶ 85 (alleging that BIC deceived the Plaintiff when it "intentionally misrepresented . . . (a) the true state of the financial condition of Bunkering and BTU and (b) the status of fuel based product serving as security or collateral"); *id.*, ¶¶ 90-92 (alleging that BIC fraudulently induced the Plaintiff to continue to transact business with Specialty and roll over debts when BIC misrepresented (a) the true state of the financial condition of Bunkering and BTU and (b) the status of fuel based product serving as security or collateral").) BIC has failed to demonstrate how the TAC provides inadequate notice of those claims.

2. Misrepresentation and deceit claims [*32] against BIC (Counts III and V).

The Plaintiff's misrepresentation and deceit claims are brought pursuant to sections 6-5-101, 6-5-103, and 6-5-104 of the Code of Alabama. (Doc. 64 at 31-43, 49-55.) Section 6-5-

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101 provides that "[m]isrepresentations of a material fact made willfully to deceive, or recklessly without knowledge, and acted on by the opposite party, or if made by mistake and innocently and acted on by the opposite party, constitute legal fraud." Ala. Code § 6-5-101 (1975). Sections 6-5-103 and 6-5-104 address actions for deceit. Pursuant to section 6-5-103,

[w]illful misrepresentation of a material fact made to induce another to act, and upon which he does act to his injury, will give a right of action. Mere concealment of such a fact, unless done in such a manner as to deceive and mislead, will not support an action. In all cases of deceit, knowledge of a falsehood constitutes an essential element. A fraudulent or reckless representation of facts as true, which the party may not know to be false, if intended to deceive, is equivalent to a knowledge of the falsehood.

§ 6-5-103.⁹ Furthermore, section 6-5-104 provides as follows:

(a) One who willfully deceives another with intent to induce him to alter his position to his injury or risk is liable for any damage which he thereby suffers.

(b) A deceit within the meaning of this section [*33] is either:

- (1) The suggestion as a fact of that which is not true by one who does not believe it to be true;
- (2) The assertion as a fact of that which is not true by one who has no reasonable ground for believing it to be true;
- (3) The suppression of a fact by one who is bound to disclose it or who gives information of other facts which are likely to mislead for want of communication of that fact; or
- (4) A promise made without any intention of performing it.

§ 6-5-104.

⁹ The undersigned notes that, although section 6-5-103 provides for an action for deceit, the Plaintiff refers to that section within Court III in which the Plaintiff asserts a claim for misrepresentation. (Doc. 64, ¶ 66.) As stated below, actions for misrepresentation and deceit are very similar.

"The elements of a misrepresentation claim are 1) a misrepresentation of material fact, 2) made willfully to deceive, recklessly, without knowledge, or mistakenly, 3) which was reasonably relied on by the plaintiff under the circumstances, and 4) which caused damage as a proximate consequence." *Bryant Bank v. Talmage Kirkland & Company, Inc.*, 155 So. 3d 231, 238 (Ala. 2014) (citations omitted). A claim for deceit

is extremely similar to [a misrepresentation claim], except that "a[n] action for deceit, under . . . § 6-5-103 and § 6-5-104, results from either [*34] a willful or reckless misrepresentation or a suppression of material facts with an intent to mislead," *Whitlow v. Bruno's Inc.*, 567 So. 2d 1235, 1241 (Ala. 1990), while an action for misrepresentation of material fact can be based on an unintentional misrepresentation. [§ 6-5-101].

Montgomery Rubber & Gasket Co. v. Belmont Machinery Co., 308 F. Supp. 2d 1293, 1299 (M.D. Ala. 2004).

With respect to the Plaintiff's misrepresentation and deceit claims, BIC asserts the same argument--that the Plaintiff failed to allege a misrepresentation of a material fact. (See doc. 65 at 10, 15.)

[A] misrepresentation requires an affirmative statement or misrepresentation. *Mann v. Adams Realty Co.*, 556 F.2d 288, 296 (5th Cir. 1977). . . . The representation normally must be of a present fact not a future fact, *Sly v. First National Bank*, 387 So. 2d 198 (Ala. 1980)[.] nor an opinion, promise, or prophesy, *Fidelity & Casualty Co. v. J. D.*

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Pittman Tractor Co., 244 Ala. 354, 358, 13 So. 2d 669 (1943), unless the statement was expressed such that the other person may reasonably treat it as a fact, *id.* at 358, 13 So. 2d at 672, or if "there are circumstances tending to show fraudulent intent at the time of the promise or representation," *Ringer v. First National Bank*, 291 Ala. 364, 368, 281 So.2d 261, 265 (1973).

...
 Whether a given representation is an opinion or a fact "depends upon all the circumstances of the particular case, such as the form and subject matter of the representation and the knowledge, intelligence and relation of the respective parties." *Fidelity & Casualty Co.* [], 244 Ala. [at] 358, 13 So. 2d [at] 672 []. When parties deal at arm's length and the recipient [*35] of a statement is not fraudulently induced to forbear inquiries that a competent person would make for his own protection, "expressions of opinion as to matters which lie in opinion merely--opinions as to current market values furnishing the most common example--" will not be grounds for a misrepresentation claim because the recipient, knowing the nature of such expressions, has no right to rely on them. *Id.* Even an opinion on value is actionable, however, if the recipient states his ignorance and invites the opinion, and the speaker understands the recipient relies on the speaker's opinion as a fact so that the onus of a confidential relation results: if the recipient forbears independent inquiry because of an opinion elicited under these circumstances of confidence, Alabama courts will treat the statement as a fact reasonably relied upon. *Id.*

Kaye v. Pawnee Const. Co., Inc., 680 F.2d 1360, 1367-68 (11th Cir. 1982) (footnote omitted); see *Bryant Bank*, 155 So. 3d at 239-40 (citing *Kaye*, 680 F.2d at 1368).

As discussed above, the Plaintiff alleges that BIC misrepresented that Specialty was financially sound and able to pay the Plaintiff when it stated that "[b]usiness is good" and that "[Specialty] should have [the Plaintiff's] invoice paid within 10 business days." (*Id.*, ¶ 57(i) (emphasis omitted).)¹⁰ The Plaintiff also alleges [*36] that BIC misrepresented that fuel oil served as collateral securing the Plaintiff's accounts with Specialty when BIC stated that entering into the STEM agreements with Specialty "gives [the Plaintiff] title to fuel." (*Id.*, ¶ 57(k) (emphasis omitted).) Standing alone, these statements appear that they could be mere opinions rather than representations of fact. However, when viewed in conjunction with all the circumstances of this case, the Court could ultimately determine that these statements should be treated as facts. See *Ringer*, 281 So. 2d at 265 ("[A] representation of an opinion or a prediction of a future event can be an actionable fraud, but such opinions or predictions are not actionable unless 'there are circumstances tending to show an actual fraudulent intent at the time of the promise or representation' is made." (quoting *Scholz Homes, Inc. v. Hooper*, 287 Ala. 628, 254 So. 2d 328, 332-33 (Ala. 1971)); *Scholz Homes*, 254 So. 2d at 332 ("[I]t is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. . . . If the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion." (quoting *Shepherd v. Kendrick*, 236 Ala. 289, 181 So. 782, 784 (Ala. 1938)); *Fidelity & Casualty Co.*, 13 So. 2d at 672 ("Whenever a person [*37] states a matter which might otherwise be only an opinion, not as a mere expression of his own opinion but as an existing fact material to the transaction, so that the other party may reasonably treat it as a fact, the statement clearly becomes a statement of fact.").

¹⁰ "Under Alabama law a misrepresentation of financial condition can be actionable." *Ringer*, 281 So. 2d at 264.

"An unbending rule can not be laid down for all cases, where, upon the representations of an uninterested person, one trusts another, and suffers loss. Much must depend on the circumstances of the particular case. But when, as in this case, the person recommending knows that the object of the party procuring the recommendation is to obtain credit at a distance; knows that the proposed seller is unacquainted with the financial condition and credit of the proposed buyer, the law, in harmony with good morals and good neighborhood, requires that the same shall be faithfully and truthfully given. A representation, as fact, of that which the party knows to be false; or, of that, of the truth of which he has no knowledge or well-founded belief,

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falls below the standard of legal requirement. And if it turn out in fact that the representation is false, [*38] and the seller is deceived and suffers loss in consequence of the sale he made on the strength of it, the party recommending must make good the loss. . . ."

Id. (quoting *Einstein, Hirsch & Co. v. Marshall & Conley*, 58 Ala. 153 (1877)).

Here, the Plaintiff alleges that BIC was in a position of superior knowledge regarding Specialty's business operations and that BIC knew that the Plaintiff relied on its statements when making determinations as to whether to transact business with Specialty. (Doc. 64, §§ 14-16, 57-59, 80-84.)¹¹ Furthermore, the Plaintiff alleges that BIC knew the statements were untrue when it made them and that BIC made them with a fraudulent intent to induce the Plaintiff to continue transacting business with Specialty. (Doc. 64, §§ 23-25, 60-64, 85.) Therefore, when viewed within the context of the entire TAC, the undersigned cannot find that the Plaintiff has not sufficiently alleged misrepresentations of material¹² facts. See *Ringer*, 281 So. 2d at 263-64 (finding that, within the context of all the circumstances alleged, the representation that a potential buyer is "better and more dependable" could be sufficient to be given to the jury, provided that the allegations were supported by the evidence); *Mason & Dixon Lines, Inc. v. Byrd*, 601 So. 2d 68, 72-73 (Ala. 1992) (concluding that the representations that one party would give "100 percent support" and that [*39] equipment would be available were properly considered by the jury within the context of the other facts of the case).

¹¹ For example, the Plaintiff alleges that BIC had a close relationship with Specialty amounting to an "apparent, if not actual, insider position"; that BIC insisted that the Plaintiff trust and rely on BIC's representations regarding Specialty; and that the Plaintiff not contact Specialty directly. (Doc. 64, §§ 14-16.)

¹² As alleged, the facts at issue were clearly material. "A material fact is one which would induce the plaintiff to take action," *Lawson v. Cagle*, 504 So. 2d 226, 227 (Ala. 1987) (citing *Bank of Red Bay v. King*, 482 So. 2d 274, 282 (Ala. 1985)), and the Plaintiff alleges that BIC's misrepresentations "induced [the Plaintiff] to provide credit terms exceeding several millions of dollars and to roll over that indebtedness." (Doc. 64, ¶ 60.)

The Plaintiff also alleges that BIC's misrepresentations were willful, intentional and reckless,¹³ that the Plaintiff reasonably relied on BIC's representations when it continued to transact business with Specialty and rolled over its agreements, and that it sustained significant financial losses as a result. (Doc. 64, ¶¶ 64-66, 85-87.) Therefore, the undersigned finds that the Plaintiff has stated a plausible claim for misrepresentation. [*40] See *Bryant Bank*, 155 So. 3d at 238.¹⁴ Because the Plaintiff also alleges that BIC made the aforesaid misrepresentations with the intent to mislead and induce the Plaintiff to continue to transact business with Specialty, (doc. 64, §§ 80-81, 85), the Plaintiff has stated a plausible claim for deceit.¹⁵ See § 6-5-104(a); *Whitlow*, 567 So. 2d at 1241. Accordingly, the undersigned **RECOMMENDS** that BIC's motion to dismiss be denied with respect to Plaintiff's misrepresentation and deceit claims.

¹³ BIC argues that the Plaintiff has not alleged any facts showing that BIC's alleged misrepresentations were made willfully or recklessly. (Doc. 65 at 11.) The Plaintiff, however, need not allege additional facts to demonstrate knowledge, willfulness or recklessness on the part of BIC. Such allegations may be made generally. Fed. R. Civ. P. 9(b).

¹⁴ BIC, relying on *Dewitt Apparel, Inc. v. F.D.I.C.*, Civil Action No. 94-1009-AH-M, 1996 U.S. Dist. LEXIS 8593, at *21 (S.D. Ala. June 7, 1996), argues that the Plaintiff has failed to make a sufficient showing of fraud. (Doc. 65 at 11.) However, in *Dewitt*

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Apparel the Court considered a motion for summary judgment and determined whether the plaintiff had produced substantial evidence supporting the elements of its fraud claim. *Dewitt Apparel*, 1996 U.S. Dist. LEXIS 8593, at *21. Thus, the Court's analysis in *Dewitt Apparel* is not applicable to the determination of whether the [*41] Plaintiff in this case has failed to state a claim.

15 The undersigned also notes that, even if the Plaintiff failed to sufficiently allege a material misrepresentation of fact, the Plaintiff's deceit claim would still survive based on the allegations that BIC suppressed information regarding Specialty's financial condition with the intent to mislead the Plaintiff, (doc. 64, ¶¶ 79-88). See § 6-5-103 ("Mere concealment of such a fact, unless done in such a manner as to deceive and mislead, will not support an action."); § 6-5-104 ("A deceit within the meaning of this section [includes] . . . [t]he suppression of a fact by one who is bound to disclose it."); *Whitlow*, 567 So. 2d at 1241 ("An action for deceit . . . results from . . . a suppression of material facts with an intent to mislead.").

3. Fraud in the inducement claim against BIC, BTU and Brito (Count VI).

The Defendants all argue that the Plaintiff's fraud in the inducement claim should be stricken or dismissed for being redundant of the Plaintiff's misrepresentation and deceit claims. (Doc. 65 at 16; doc. 67-1 at 5.) First, the undersigned notes that the Defendants improperly seek the dismissal of Count VI on redundancy grounds. "[M]otions to dismiss made under Rule 12(b)(6) only test the validity of [*42] a claim, not its redundancy; a redundant claim should not be dismissed as long as it is valid." *Michael v. Wal-Mart Stores East, LP*, No. 6:14-cv-579-Orl-40DAB, 2014 U.S. Dist. LEXIS 153908, 2014 WL 5502442, at *2 (M.D. Fla. Oct. 30, 2014) (citing *Bangkok Crafts Corp. v. Capitolo Di San Pietro in Vaticano*, No. 03 Civ. 15(RWS), 2007 U.S. Dist. LEXIS 42639, 2007 WL 1687044, at *10 (S.D.N.Y. June 11, 2007)); see *id.* (finding that a duplicative negligence claim cannot be dismissed for being redundant). Thus, the Defendants' motions with respect to Count VI are properly understood as motions to strike pursuant to Fed. R. Civ. P. 12(f). Rule 12(f) provides that "[t]he court *may*¹⁶ strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f) (emphasis added).

The purpose of a motion to strike is to clean up the pleadings, streamline litigation, and avoid unnecessary forays into immaterial matter. A court will not exercise its discretion under the rule to strike a pleading unless the matter sought to be omitted has no possible relationship to the controversy, may confuse the issues, or otherwise prejudice a party. Because striking a portion of a pleading is a drastic remedy and because it often is sought by the movant simply as a dilatory tactic, motions under Rule 12(f) are viewed with disfavor and are infrequently granted.

Principal Bank v. First American Mortgage, Inc., No. 2:10-cv-190-FtM-29DNF, 2014 U.S. Dist. LEXIS 41001, 2014 WL 1268546, at *1 (M.D. Fla. Mar. 27, 2014) [*43] (internal citations, quotation marks, and brackets omitted); see also *TracFone Wireless, Inc. v. Zip Wireless Products, Inc.*, 716 F. Supp. 2d 1275, 1290 (N.D. Ga. 2010) ("Rule 12(f) reflects the inherent power of the Court to prune down pleadings so as to expedite the administration of justice and to prevent abuse of its process. Motions to strike are generally viewed with disfavor and are often considered time wasters. A motion to strike is a drastic remedy to be resorted to only when required for the purposes of justice . . . and should be granted only when the pleading to be stricken has no possible relation to the controversy." (internal citations, quotation marks, and brackets omitted)). Indeed, stated more succinctly, "[i]n addressing a Motion to Strike, 'a court will not exercise its discretion . . . unless **the matter sought to be omitted** has no possible relationship to the controversy, may confuse the issues, or otherwise prejudice a party.'" *Hepp v. Paul Revere Life Ins. Co.*, No. 8:13-CV-02836-EAK-TBM, 2014 U.S. Dist. LEXIS 107393, 2014 WL 3865389, at *7 (M.D. Fla. Aug. 5, 2014) (emphasis supplied); see also *Tracfone Wireless, Inc. v. Access Telecom, Inc.*, *supra*, 642 F. Supp. 2d at 1361 ("A motion to strike will usually be denied

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unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties.'" (citations omitted)).

16 "The Court has broad discretion in considering a [*44] motion to strike under Federal Rule of Civil Procedure 12(f)." *Tracfone Wireless, Inc. v. Access Telecom, Inc.*, 642 F. Supp. 2d 1354, 1360 (S.D. Fla. 2009) (citations omitted).

In support of their motion to strike the Plaintiff's fraud in the inducement claim, asserted in Count VI, the Defendants solely argue that the elements of that claim mirror the elements of the Plaintiff's misrepresentation and deceit claims. (Doc. 65 at 16; doc. 67-1 at 5.) The Defendants assert no argument that Count VI somehow prejudices the Defendants, that it confuses the issues, or that it has no relation to this controversy, (doc. 65 at 16; doc. 67-1 at 5), and the undersigned's review of Count VI reveals that it does not suffer from those flaws. While the undersigned acknowledges that the fraud in the inducement claim is very similar to the Plaintiff's misrepresentation and deceit claims,¹⁷ the similarity of claims in the TAC does not warrant the drastic remedy sought. Accordingly, the undersigned **RECOMMENDS** that the Defendants' motions to dismiss or strike Plaintiff's fraud in the inducement claim be denied.¹⁸

17 Indeed, "[a] claim of fraudulent inducement under Alabama law is similar to one of misrepresentation." *Whitney Bank v. Murphy*, Civil Action No. 11-00614-KD-M, 2013 U.S. Dist. LEXIS 40046, 2013 WL 1191235, at *11 (S.D. Ala. Mar. 22, 2013).

18 The undersigned notes that BIC also argues in a single sentence that Plaintiff's [*45] fraud in the inducement claim fails for the same reasons that Plaintiff's misrepresentation, suppression and deceit claims are due to be dismissed. (Doc. 65 at 16.) However, as discussed herein, the undersigned finds that Plaintiff's misrepresentation, suppression and deceit claims are sufficiently stated and are *not* due to be dismissed. Therefore, the undersigned rejects this undeveloped argument from BIC.

4. Suppression claims against BIC, BTU and Brito (Count IV).

The Plaintiff alleges that BIC, BTU and Brito concealed and suppressed material facts in violation of section 6-5-102 when they failed to disclose facts "as to (a) the true state of the financial condition of Bunkering and BTU and (b) the status of fuel based product serving as security or collateral." (Doc. 64, ¶ 74.) Section 6-5-102 provides as follows:

"Suppression of a material fact which the party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case." § 6-5-102. "The elements of a suppression claim are '(1) a duty on the part of the defendant to disclose facts; (2) concealment or nondisclosure of material facts by the [*46] defendant; (3) inducement of the plaintiff to act; [and] (4) action by the plaintiff to his or her injury.'" *Freightliner, L.L.C. v. Whatley Contract Carriers, L.L.C.*, 932 So. 2d 883, 891 (Ala. 2005) (quoting *Lambert v. Mail Handlers Benefit Plan*, 682 So. 2d 61, 63 (Ala. 1996)).

BIC, BTU and Brito have all moved to dismiss the Plaintiff's suppression claim on the grounds that there are no allegations supporting a duty to disclose. (Doc. 65 at 12-14; doc. 67-1 at 1-3.) The undersigned first considers this argument with respect to BIC.

a. Suppression claim against BIC.

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To adequately allege a duty to disclose, the Plaintiff must allege facts upon which that duty may arise. See *Fowler v. Goodman Mfg. Co. LP*, No. 2:14-CV-968-RDP, 2014 U.S. Dist. LEXIS 172114, 2014 WL 7048581, at *9-10 (N.D. Ala. Dec. 12, 2014); *Shedd v. Wells Fargo Home Mortgage, Inc.*, Civil Action No. 14-00275-CB-M, 2014 U.S. Dist. LEXIS 160997, 2014 WL 6451245, at *5 (S.D. Ala. Nov. 17, 2014).

A duty to disclose often arises when there is a confidential or fiduciary relationship between the parties. [*Ellis v. Zuck*, 409 F. Supp. 1151, 1157 (N.D. Ala. 1976), *aff'd*, 546 F.2d 643 (5th Cir. 1977).] The Alabama courts do not seem to focus on the "designation of the relationship, such as vendor-vendee, etc., but instead look to the relative bargaining positions of the parties." *Id.* (citing [*Hall Motor Co. v. Furman*, 285 Ala. 499, 234 So. 2d [37.] 41 [(Ala. 1970)], *Metropolitan Life Ins. Co. v. James*, 238 Ala. 337, 191 So. 352 (1939)] (cited with approval in *Jim Walter Homes, Inc. v. Waldrop*, 448 So. 2d 301, 305 (Ala. 1983) (per curiam)); *Jim Short Ford Sales, Inc., v. Washington*, 384 So. 2d [83.] 87 [(Ala. 1980)].¹⁹ Even when a confidential relationship between the parties does not exist, the particular circumstances of a situation can give rise to an obligation to disclose. [*47] *Mann [v. Adams Realty Co.]*, 556 F.2d [288.] 297 [(5th Cir. 1977)]; [§ 6-5-102]. When the accused has superior knowledge or expertise not shared by the plaintiff, the obligation to disclose is compelling. *Mann*, 556 F.2d at 297 (citing *Chapman v. Rivers Constr. Co.*, 284 Ala. 633, 227 So. 2d 403, 410-13 (1969)); *Ellis*, 409 F. Supp. at 1157-58. In order to determine whether a duty to disclose exists, we must examine the facts of each individual case; "a rigid approach is impossible, and, indeed, the words of the statute itself counsel flexibility." *Jim Short Ford Sales*, 384 So. 2d at 87. Finally, even if one is not under a duty to speak, if he decides to do so, "he must make a full and fair disclosure," without concealing any facts within his knowledge. *Ellis*, 409 F. Supp. at 1158 (citing *Jackson Co. v. Faulkner*, 55 Ala. App. 354, 315 So. 2d 591 (1975)).

First Ala. Bank of Montgomery, N.A. v. First State Ins. Co., 899 F.2d 1045, 1059 (11th Cir. 1990).

¹⁹ *Jim Walter Homes* and *Jim Short Ford Sales* were overruled on other grounds by *State Farm Fire and Casualty Co. v. Owen*, 729 So. 2d 834, 838-42 (Ala. 1998), where the Alabama Supreme Court held that the duty to disclose is a question of law to be determined by the Court. *Id.* ("[W]e hereby overrule that line of cases that gives to the jury the responsibility of determining the existence of a duty on the defendant's part.")

After reviewing the TAC, the undersigned has concluded that the Plaintiff has alleged facts giving rise to a confidential and fiduciary relationship between the Plaintiff and BIC, triggering a duty to disclose. The Alabama Supreme Court has defined a confidential or fiduciary relationship as follows: [*48]

A confidential relationship is one in which one person occupies toward another such a position of adviser or counselor as reasonably to inspire confidence that he will act in good faith for the other's interests, or when one person has gained the confidence of another and purports to act or advise with the other's interest in mind; where trust and confidence are reposed by one person in another who, as a result, gains an influence or superiority over the other; and it appears when the circumstances make it certain the parties do not deal on equal terms, but, on the one side, there is an overmastering influence, or, on the other, weakness, dependence, or trust, justifiably reposed; in both an unfair advantage is possible. It arises in cases in which confidence is reposed and accepted, or influence acquired, and in all the variety of relations in which dominion may be exercised by one person over another.

DGB, LLC v. Hinds, 55 So. 3d 218, 231-32 (Ala. 2010) (quoting *Bank of Red Bay*, 482 So. 2d at 284) (internal quotation marks omitted).

The Plaintiff alleges that BIC was the Plaintiff's exclusive broker and agent with respect to its dealings with Specialty, (doc. 64, §§ 15(c), 18, 71); that BIC "insisted that [the Plaintiff] not contact 'Specialty' directly and required [the Plaintiff] [*49] to use [BIC] as the sole intermediary between the parties," (*id.*, P72(g)); that, consequently, the Plaintiff bec[a]me dependent and reliant on [BIC] for all current and accurate information" as to whether Specialty was financially able to perform the transactions at issue, (*id.*); that BIC informed the Plaintiff of BIC's independent dealings with Specialty, including transactions involving

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extended credit arrangements, which suggested to Plaintiff that Specialty was financially reliable, (*id.*, ¶¶ 72(c)-(d)); that BIC communicated directly with Brito regarding Specialty's transactions, further demonstrating BIC's superior position of knowledge and leading the Plaintiff to place more confidence and trust in BIC, (*id.*, ¶ 16); and that when the Plaintiff directed inquiries to BIC regarding Specialty's ability to make payments, BIC advised the Plaintiff not to worry and reminded the Plaintiff that it could trust BIC, (*id.*, ¶ 72(a)-(b)). Based upon this alleged course of dealings, the Plaintiff has sufficiently alleged a fiduciary or confidential relationship between the Plaintiff and BIC. See *Express Oil Change, LLC v. ANB Ins. Services, Inc.*, 933 F. Supp. 2d 1313, 1351-52 (N.D. Ala. 2013) (finding that a confidential relationship existed between the plaintiff and its insurance broker when the broker [*50] "inspired confidence in [the plaintiff] that [it] would act in good faith for its interests"). Furthermore, the Plaintiff has adequately alleged that BIC owed a duty to disclose arising from their fiduciary or confidential relationship. See *Hinds*, 55 So. 3d at 231-34 (concluding that the plaintiffs sufficiently alleged that the defendants owed a duty to disclose arising from their confidential and fiduciary relationship with the defendants when they alleged, among other things, that they "entrusted [the defendants] with the negotiation of [the transaction] based on [the defendants'] superior experience and knowledge"); *State Farm Mut. Auto. Ins. Co. v. Ling*, 348 So. 2d 472, 474-76 (Ala. 1977) (holding that an insurer owed a duty to disclose arising from its confidential relationship with the plaintiff where the plaintiff developed trust and confidence in his insurer through their course of dealings in which the insurer made assurances that it would take care of the plaintiff's interests).

Moreover, even if a confidential relationship did not arise from the alleged facts, the undersigned finds that a duty to disclose on the part of BIC could arise from the particular circumstances of this case. When determining whether a duty arises under the particular circumstances of a case, the [*51] court shall consider the following factors: "(1) the relationship of the parties; (2) the relative knowledge of the parties; (3) the value of the particular fact; (4) the plaintiffs' opportunity to ascertain the fact; (5) the customs of the trade; and (6) other relevant circumstances." *Freightliner*, 932 So. 2d at 891 (quoting *Armstrong Bus. Services, Inc. v. AmSouth Bank*, 817 So. 2d 665, 677 (Ala. 2001)) (internal quotation marks omitted).

The first four factors identified in *Freightliner* all weigh in favor of finding a duty, should the proof ultimately support the Plaintiff's allegations.²⁰ The relationship of the parties weighs in favor of finding a duty because the Plaintiff alleges that BIC is the Plaintiff's exclusive broker and agent, that Pappaceno had handled the Plaintiff's transactions with Specialty for several years and that Pappaceno and BIC fostered a relationship whereby the Plaintiff trusted and relied on Pappaceno and BIC's representations regarding Specialty. The knowledge of the parties supports the finding of a duty because the Plaintiff has alleged that BIC had far superior knowledge based on its direct access to Specialty's business operations and BIC's insistence that the Plaintiff not contact Specialty. Similarly, the Plaintiff was less likely to ascertain the facts at [*52] issue because BIC had established that the Plaintiff's inquiries regarding Specialty should be directed to BIC. The value of the facts at issue--Specialty's financial instability and the lack of collateral securing transactions with Specialty--supports the finding of a duty because the Plaintiff alleges that, had it known those facts, it would have ceased doing business with Specialty and

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immediately sought to collect the funds owed. Thus, the circumstances of this case could give rise to a duty to disclose the information at issue. See *First Ala. Bank of Montgomery*, 899 F.2d at 1059 (concluding that, despite the fact that the plaintiff was a sophisticated financial institution, its insurer owed a duty to disclose under the particular circumstances of the case, including the insurer's superior knowledge regarding the dealings at issue); *Independent Life & Accident Ins. Co. v. Harrington*, 658 So. 2d 892, 896-97 (Ala. 1995) (concluding that, under the circumstances of the case, including the plaintiff's reliance on the defendant's superior knowledge, the defendant owed a duty to disclose).

20 The parties have not provided the Court with any information regarding the customs of the trade with respect to this issue. Therefore, the undersigned cannot make a determination as to whether the fifth factor supports a duty in this [*53] case.

Because the Plaintiff has alleged that BIC had a duty to disclose Specialty's poor financial condition and the lack of fuel oil securing plaintiff's transactions with Specialty, that BIC failed to disclose those facts, that BIC solicited the Plaintiff to enter into purchase agreements with Specialty, and that the Plaintiff sustained serious financial losses as a result of those transactions, the Plaintiff has stated a claim against BIC for suppression. Therefore, the undersigned **RECOMMENDS** that BIC's motion to dismiss should be denied with respect to Plaintiff's suppression claim.

b. Suppression claim against BTU and Brito.

With respect to BTU and Brito, the Plaintiff did not allege a confidential relationship or special circumstances giving rise to a duty on the part of BTU and Brito to disclose its poor financial condition or the status of fuel oil securing the purchase agreements with the Plaintiff. (*Compare* doc. 64, ¶ 72, *with id.*, ¶¶ 68-77.) Furthermore, the Plaintiff asserts no argument in that regard.²¹ (See doc. 73 at 22-23.) Instead, the Plaintiff argues that BTU's and Brito's duty to disclose arose from a criminal statute--section 13A-9-48 of the Code of Alabama. (Doc. 73 at 23.) As discussed [*54] below, the Plaintiff's reliance on a criminal statute is unconvincing. While the Plaintiff concedes that section 13A-9-48 does not give rise to a private right of action, it argues that the statute, nevertheless, imposes a duty satisfying a critical element in the Plaintiff's fraudulent suppression claim brought pursuant to section 6-5-102. (Doc. 73 at 23.) The Plaintiff provides no authority supporting this argument, and the undersigned does not find it persuasive. See *infra* § III.D.

21 The undersigned notes that, "[w]hen the parties to a transaction deal with each other at arm's length, with no confidential relationship, no obligation to disclose information arises when the information is not requested." *Freightliner*, 932 So. 2d at 892 (citing *Mason v. Chrysler Corp.*, 653 So. 2d 951, 954-55 (Ala. 1995)).

Nevertheless, the undersigned finds that a duty for BTU and Brito to disclose the facts at issue could arise from BTU and Brito's alleged misleading representations. See *CNH Am., LLC v. Ligon Capital, LLC*, 160 So. 3d 1195, 1111204, 2013 WL 5966782, at *5 (Ala. 2013) ("[O]nce a party elects to speak, he or she assumes a duty not to suppress or conceal those facts that materially qualify the facts already stated." (quoting *Freightliner*, 932 So. 2d at 895)). The Plaintiff alleges that, by May 2012, Specialty's financial condition

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was deteriorating, (doc. 64, ¶¶ 23-24); that, in [*55] July 2012, while the Plaintiff was touring Specialty's facilities in Mobile, Alabama, BTU and Brito represented to the Plaintiff that their business was growing, (*id.*, ¶ 22); that, on May 10, 2013, during a meeting at BTU's office in Mobile, BTU and Brito represented to the Plaintiff that they were financially sound and that business was proceeding as usual, (*id.*, ¶¶ 41-42); and that, at that time, Specialty was in financial distress, (*id.*, ¶¶ 32, 46).²² Thus, based on the allegations in the TAC, the Court could determine that, by making the aforesaid representations, BTU and Brito assumed a duty to disclose facts regarding Specialty's alleged deteriorating financial condition.²³ Similarly, the Court could determine that BTU and Brito assumed a duty to inform the Plaintiff as to the lack of fuel oil securing their transactions when they sent the Plaintiff the April 8, 2013 Warehouse Receipt, which, allegedly, was false and misled the Plaintiff into believing that fuel oil served as collateral for their repurchase agreements, (*id.*, ¶¶ 49, 57(1)). Accordingly, the allegations in the TAC support the duty to disclose element of the Plaintiff's suppression claim with respect to BTU and Brito. [*56] BTU and Brito make no other argument with respect to Plaintiff's suppression claim, (doc. 67-1 at 1-3), and the undersigned finds that said claim is sufficiently stated in the TAC. Thus, the undersigned **RECOMMENDS** that BTU and Brito's motion to dismiss be denied with respect to Plaintiff's suppression claim.

22 Specifically, the Plaintiff alleges that, "[o]n April 29, 2013, Brito filed a Motion for Judicial Dissolution as to Bunkering . . . based on allegations of financial misconduct" and, on July 19, 2013, Brito filed an affidavit in support of that motion in which he stated that

"Specialty [i.e., Bunkering] [was] operating at a negative equity position . . . its liabilities exceed[ed] its assets. . . Specialty ha[d] no cash reserves, no available credit on terms that are viable to the continued operation of the business and thus ha[d] no way to operate as it ha[d] operated in the past."

(Doc. 64, ¶¶ 32, 46.) On November 14, 2013, Bunkering filed for bankruptcy protection. (*Id.*, ¶ 2.)

23 The undersigned notes that "[the Alabama Supreme Court] has recognized[] [that] the law generally allows a business to keep confidential its internal operating procedures and data unless that information is specifically requested." [*57] *Freightliner*, 932 So. 2d at 892 (citing *Ex parte Ford Motor Credit Co.*, 717 So. 2d 781, 787 (Ala. 1997)). However, as stated above, the moment a party speaks it "assumes a duty not to suppress or conceal those facts that materially qualify the facts already stated." *Id.* at 895.

D. Plaintiff's "Fraud in Insolvency" Claim (Count VII) against BTU and Brito should be dismissed because there is no private right of action under the criminal statute that BTU and Brito allegedly violated.

In Count VII, the Plaintiff alleges that, by concealing their insolvency, BTU and Brito violated section 13A-9-48 of the Alabama Criminal Code. (Doc. 64 at 58-65.) Specifically, the Plaintiff states that it "claims a private right of action against BTU and/or Brito for violation of [that section]." (*Id.*, ¶ 113.) However, "[o]ne claiming a private right of action within a statutory scheme must show clear and convincing evidence of legislative intent to impose civil liability for a violation of the statute." *Liberty Nat'l Life Ins. Co. v. Univ. of Ala. Health Servs. Found., P.C.*, 881 So. 2d 1013, 1025 (Ala. 2003) (quoting *Blockbuster, Inc. v. White*, 819 So. 2d 43, 44 (Ala. 2001)) (internal quotation marks and other citations omitted); accord *Woods Knoll, LLC v. City of Lincoln, Ala.*, 548 F. App'x 577, 581 (11th Cir. 2013).

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Section 13A-9-48 is a criminal statute that provides as follows:

§ 13A-9-48. Fraud in insolvency.

(a) A person commits the crime of fraud in insolvency if, with the intent to defraud a creditor and with knowledge or reason to believe either that proceedings have been or are about [*58] to be instituted for the appointment of a receiver or that a composition agreement or other arrangement for the benefit of creditors has been or is about to be made, he:

- (1) Conveys, transfers, removes, conceals, destroys, encumbers or otherwise disposes of any part of or any interest in the debtor's estate; or
- (2) Presents to any creditor or to the receiver any writing or record relating to the debtor's estate, not otherwise within the coverage of Sections 13A-10-101, 13A-10-102 or 13A-10-109, knowing or having reason to believe that it contains a false material statement; or
- (3) Misrepresents or refuses to disclose to the receiver, under circumstances not amounting to a violation of Section 13A-10-4, the existence, amount or location of any part of or an interest in debtor's estate, or any other information that he is legally required to furnish to the administrator.

(b) "Receiver" means an assignee or trustee for the benefit of creditors, a conservator, a liquidator or any other person legally entitled to administer property for the benefit of creditors.

(c) Fraud in insolvency is a Class B misdemeanor.

Ala. Code § 13A-9-48 (1975). The language of the statute provides no indication that the Legislature intended to create a private right of action, or otherwise [*59] impose civil liability, *id.*, and the Plaintiff has made no showing regarding the Legislature's intent, (see doc. 64 at 58-65; doc. 73 at 23).

In *Dysart v. Trustmark Nat'l Bank*, the Northern District of Alabama considered a motion to dismiss a claim for "deed forgery" asserted pursuant to a criminal forgery statute, section 13A-9-3, found within the same chapter of the Criminal Code--Chapter 9 (Forgery and Fraudulent Practices)--that contains the fraud in insolvency statute. *Dysart v. Trustmark Nat'l Bank*, No. CV-13-BE-2092-S, 2014 U.S. Dist. LEXIS 59877, 2014 WL 1765120, at *11-12 (N.D. Ala. Apr. 30, 2014). After reviewing the plaintiff's deed forgery claim, the Northern District found that

[the plaintiff] is attempting to assert a violation of a criminal statute, § 13A-9-3(a)(1) in [a] civil case. . . . However, the Alabama statute upon which she relies appears to be designed for the protection of the public, and no language in it indicates that it creates a private right of action. [The plaintiff's] reliance on the criminal statute to create a private right of action is misplaced. See *Linda R.S. v. Richard [D]*, 410 U.S. 614, 619, 93 S. Ct. 1146, 35 L. Ed. 2d 536 (1973) ("[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."); see also *Love v. Delta Air Lines*, 310 F.3d 1347, 1352-53 (11th Cir. 2002) ([concluding that] [c]riminal statutes generally do [*60] not provide a private cause of action[]); *Gibson v. Gains*, [No. 05-15997.] 2006 U.S. App. LEXIS 8111, 2006 WL 858336[, at *3] (11th Cir. [April 4.] 2006) (finding that "to the extent that [the plaintiff] raises criminal allegations against the defendants, [he] lacks standing to raise such claims and the district court properly dismissed them."). Accordingly, the motions to dismiss are due to be GRANTED WITH PREJUDICE as to [the deed forgery] claim against all Defendants.

Id. at 12.

Like the forgery statute in *Dysart*, the fraud in insolvency statute "appears to be designed for the protection of the public" without any imposition of civil liability through a private right of action. Compare § 13A-9-3, with § 13A-9-48. Furthermore, the Plaintiff has not provided the Court with any authority demonstrating that a fraud in insolvency claim is actionable in Alabama, (see doc. 73 at 23),²⁴ and the undersigned has not found any support for such a claim. Accordingly, the undersigned finds that the Plaintiff has not stated a plausible claim for fraud in insolvency. See *Liberty Nat'l*, 881 So. 2d at 1025 (concluding that the plaintiff could not bring a private action for an alleged breach of a statutory provision where the

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plaintiff failed to show that the statutory provision implied or created a private right of action); see [*61] also *Chen ex. rel. V.D. v. Lester*, 364 F. App'x 531, 536 (11th Cir. 2010) ("Criminal statutes generally do not provide a private cause of action. . . . Because these are all criminal statutes, the district court did not err in dismissing those claims." (citation omitted)); *Muhammad v. Bethel-Muhammad*, Civil Action No. 11-0690-WS-B, 2012 U.S. Dist. LEXIS 70330, 2012 WL 1854315, at *7 (S.D. Ala. May 21, 2012) ("We have been quite reluctant to infer a private right of action from a criminal prohibition alone. . . .") (quoting *Central Bank v. First Interstate Bank, N.A.*, 511 U.S. 164, 190, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994)). As such, the undersigned **RECOMMENDS** that BTU and Brito's motion to dismiss be granted with respect to Plaintiff's fraud in insolvency claim (Count VII) and that said claim be dismissed with prejudice.

²⁴ The Plaintiff cites *Rawlings v. Dovenmuehle Mort., Inc.*, 64 F. Supp. 2d 1156 (M.D. Ala. 1999), and *Gowens v. Tys. S. ex rel. Davis*, 948 So. 2d 513, 527-28 (Ala. 2006), for the general proposition that "a legal duty may arise from statute." (Doc. 73 at 23.) However, the Plaintiff fails to discuss meaningfully the statute at issue or provide any authority relating to the claim Plaintiff seeks to assert. (*Id.*)

E. Negligence, wantonness and breach of fiduciary duty claims against BIC (Counts VIII-XI).

BIC argues that the Plaintiff's negligence, wantonness and breach of fiduciary duty claims fail because they arise in contract, rather than tort. (Doc. 65 at 16-18.) This argument has already been rejected above. See *supra* § III.B. As previously discussed, [*62] the Plaintiff claims that BIC breached duties arising from its relationship with the Plaintiff and course of dealings over multiple years. (See doc. 64, ¶¶ 14-20.) The Plaintiff does not allege that BIC violated a promise contained within a contract with the Plaintiff. (See doc. 64 at 65-81.) Accordingly, the Plaintiff's negligence, wantonness and breach of fiduciary duty claims do not fail for being brought as tort claims. See, e.g., *Hardy*, 2008 U.S. Dist. LEXIS 26842, 2008 WL 906455, at *14.

BIC also argues that the Plaintiff has not alleged sufficient facts to support a fiduciary relationship between BIC and the Plaintiff. (Doc. 65 at 17-18.) That argument was rejected above as well. See *supra* § III.C.4.a. (citing *Express Oil Change*, 933 F. Supp. 2d at 1351-52; *DGB*, 55 So. 3d at 233-34; *Hinds*, 55 So. 3d at 231-34). Therefore, the undersigned **RECOMMENDS** that BIC's motion to dismiss be denied with respect to Counts VIII-XI.

IV. Conclusion

For the reasons stated above, it is hereby **RECOMMENDED** that BIC's motion to dismiss (doc. 65) be **DENIED** and that BTU and Brito's motion to dismiss (doc. 67) be **GRANTED IN PART** and **DENIED IN PART**. BTU and Brito's motion should be granted with respect to Plaintiff's fraud in insolvency claim (Count VII), which should be **DISMISSED WITH PREJUDICE** for failure to state a claim. Their motion should be **DENIED [*63]** in all other respects.

NOTICE OF RIGHT TO FILE OBJECTIONS

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A copy of this report and recommendation shall be served on all parties in the manner provided by law. Any party who objects to this recommendation or anything in it must, within fourteen (14) days of the date of service of this document, file specific written objections with the Clerk of this Court. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); S.D. Ala. L.R. 72.4. The parties should note that under Eleventh Circuit Rule 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice." 11th Cir. R. 3-1. In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the Magistrate Judge's report and recommendation where the disputed determination [*64] is found. An objection that merely incorporates by reference or refers to the briefing before the Magistrate Judge is not specific.

DONE this the 4th day of June 2015.

/s/ WILLIAM E. CASSADY

UNITED STATES MAGISTRATE JUDGE

**ADRIAN STEADMAN, Plaintiff, v. GREEN TREE SERVICING,
LLC, Defendant.**

CASE NO. C14-0854JLR

**UNITED STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON**

2015 U.S. Dist. LEXIS 58928

May 5, 2015, Decided

May 5, 2015, Filed

CORE TERMS: modification, modification agreement, statute of frauds, assignee, modified, summary judgment, deceptive, unfair, part performance, servicing, assignor, reply, independent duty, foreclosure, monthly payments, hearsay, duty of good faith, negligence claim, apparent authority, contractual, assigned, notice, real property, out-of-court, mortgage, consumer, default, duty of care, economic loss, nonmoving

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COUNSEL: [*1] For Adrian Steadman, Plaintiff: Kathleen Sophia Box, LEEN & O'SULLIVAN, SEATTLE, WA.

For Greentree Servicing, LLC, Defendant: William G Fig, LEAD ATTORNEY, SUSSMAN SHANK, PORTLAND, OR; Susan S Ford, SUSSMAN SHANK WAPNICK CAPLAN & STILES, PORTLAND, OR.

JUDGES: JAMES L. ROBART, United States District Judge.

OPINION BY: JAMES L. ROBART

OPINION

ORDER GRANTING IN PART AND DENYING IN PART SUMMARY JUDGMENT

I. INTRODUCTION

This matter comes before the court on Defendant Green Tree Servicing, LLC's ("Green Tree") motion for summary judgment. (See Mot. (Dkt. # 24).) This action arises out of Green Tree's servicing of Plaintiff Adrian Steadman's loan. Having considered the submissions of the parties, the balance of the record, and the relevant law, and deeming oral argument unnecessary, the court grants in part and denies in part the motion.

II. BACKGROUND

In March 2003, Mr. Steadman obtained a loan for \$190,000.00, which was secured by the property at 9015 171st Ave NE, Redmond, WA, 98052, and evidenced by a Note and Deed of Trust. (See Hamm Decl. (Dkt. # 25) Ex. 1 ("Note"), Ex. 2 ("Deed of Trust").) This loan required Mr. Steadman to pay the noteholder monthly payments of \$1109.79 for 30 years. (*Id.*) The servicing rights for the [*2] loan were eventually transferred to Bank of America, N.A. ("BoA"). (See *generally* Ford Decl. (Dkt. # 26) Ex. 2 at 67-82 ("Mod. Agreement").)

In 2010 and 2011, Mr. Steadman struggled to make payments on the loan. (See Ford Decl. Ex. 2 at 45-49.) Beginning early 2012, Mr. Steadman worked with BoA representative Eric Ngo to apply for a loan modification under the federal Home Affordable Modification Program ("HAMP"). (Ford Decl. Ex. 3 ("2d Steadman Dep.") at 13:1-14:21, Ex. 4 at 180-87 (1/17/12 email from Mr. Ngo requesting that Mr. Steadman provide documents necessary to apply for a loan modification), Ex. 2 at 50-53 (final HAMP application signed by Mr. Ngo and Mr. Steadman).) At the time, Mr. Ngo's title was Assistant Vice President, Mortgage Service Specialist II, at BoA's downtown Seattle branch office. (See *id.* at Ex. 4 at 180-87.)

In April 2012, BoA offered Mr. Steadman the opportunity to participate in a Trial Period Plan ("Trial Period") to determine whether Mr. Steadman was eligible under HAMP. (*Id.* at 55-65 ("Trial Offer").) The Trial Period consisted of three monthly modified payments of \$732.86. (*Id.*) If Mr. Steadman successfully completed the payments, BoA would send him

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a modification [*3] agreement offering new terms for his loan. (*Id.*) BoA wrote to Mr. Steadman:

Once you have successfully made each of the payments above by their due dates, you have submitted two signed copies of your modification agreement, and we have signed the modification agreement, your mortgage will be permanently modified in accordance with the terms of your modification agreement.

(*Id.*)

Mr. Steadman accepted the offer for a Trial Period and successfully completed the Trial Period payments. (Steadman Dep. at 92:10-14; Mod. Agreement.) On August 18, 2012, BoA approved Mr. Steadman's application for a loan modification and sent him a modification agreement. (*Id.* ("Thank you for applying for a loan modification. We are pleased to inform you that you have been approved and your mortgage will soon be permanently modified to provide you with an affordable monthly payment.")) Among other things, the modification agreement reduced Mr. Steadman's monthly payments to \$724.00. (*Id.*)

BoA's offer letter stated: "The enclosed Modification Agreement reflects the new terms of your modified mortgage that will go into effect once you complete and return the enclosed documentation." (*Id.*) BoA's offer letter included [*4] the following instructions on how to accept the offer of modification:

How to Accept This Offer:

To accept this modification offer, you must sign two copies of the Modification Agreement and return both copies to use by 08/28/2012. Please sign and return both copies to us, using the enclosed pre-paid envelope to mail the documents to:

Bank of America, N.A.
11802 Ridge Parkway, Ste 100 HRM
HOME RETENTION
Broomfield, CO 80021

(*Id.*)

Mr. Steadman did not comply with the acceptance instructions: he did not sign and mail two copies of the modification agreement to the specified address by August 28, 2012. (Ford Decl. Ex. 1 ("Steadman Dep.") at 104:2-106:20.) Instead, he signed the modification agreement and delivered it to Mr. Ngo at the BoA Seattle office on August 27, 2012.¹ (*Id.* at 105:2-7.) Mr. Steadman claims that Mr. Ngo "told [him that he] could submit the final loan modification documents by bringing them to his office in downtown Seattle." (Steadman Decl. (Dkt. # 32) at 2.) He claims that Mr. Ngo "informed [him] that [his] actions were sufficient to accept the loan modification offer." (*Id.*) It was his understanding that Mr. Ngo faxed the documents to the appropriate location. (Steadman [*5] Dep. at 105:17-22.) It was also his understanding that Mr. Ngo would sign the final modification paperwork on behalf of BoA. (Steadman Decl. at 2.)

¹ The parties dispute when Mr. Steadman signed and delivered the modification agreement. Mr. Steadman testifies that he delivered the modification on August 27, 2012. (Steadman Dep. at 105:2-21.) On reply, Green Tree provides a copy of the modification agreement apparently signed by Mr. Steadman on August 29, 2012. (See Dkt. # 34 Ex. 2.) New issues and

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evidence may not be raised in reply briefs. See *Bazuaye v. I.N.S.*, 79 F.3d 118, 120 (9th Cir. 1996); *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996). Accordingly, the court STRIKES the new evidence filed in support of Green Tree's reply brief. See *Tovar v. U.S. Postal Serv.*, 3 F.3d 1271, 1273 (9th Cir. 1993) (striking portions of a reply brief that presented new information); *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 308 F. Supp. 2d 1208, 1214 (W.D. Wash. 2003) (striking a declaration with new evidence submitted in reply). Even if the court did consider Green Tree's new evidence the court is required to resolve all disputed facts in favor of the non-moving party on summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). Therefore, for purposes of this motion only, the court relies on Mr. Steadman's testimony that he delivered the modification agreement on August 27, 2012.

After delivering the signed modification agreement, Mr. Steadman began paying the modified monthly [*6] loan payments to BoA. (Steadman Decl. at 1-2.) He submitted timely payments in the amount of \$724.00 from September 2012 through May 2012 by calling BoA and paying over the phone. (*Id.* at 2; Steadman Dep. at 116:11-16.)

On October 18, 2012, Mr. Steadman received a letter from BoA stating that it was "no longer considering your request for a modification because . . . you notified us on October 3, 2012, that you did not wish to accept the offer." (Steadman Dep. at 113:19-25; Ford Decl. Ex. 2 at 84-85.) Mr. Steadman denies declining the offer. (Steadman Dep. at 113:25.) On October 23, 2013, Mr. Steadman received another letter from BoA stating that the payment it had recently received "was less than the total amount needed to bring your loan up to date," and if BoA did not receive the total amount by the specified acceleration date, "foreclosure proceedings may begin." (Steadman Dep. at 116:18-117:8; Ford Decl. Ex. 2 at 87-88.)

Mr. Steadman states that after he received these letters, he called and visited Mr. Ngo and other BoA representatives multiple times to inquire as to the status of his modification. (Steadman Dep. at 113:13-117:11; Steadman Decl. at 2-3.) Mr. Steadman claims that the BoA [*7] representatives reassured him that his modification had been approved, and he was only receiving the letters because their system was behind in formally processing the approval. (Steadman Dep. at 113:13-117:11; Steadman Decl. at 2-3.) Mr. Steadman claims that the representatives advised him to keep making payments on the loan, which he did. (Steadman Dep. at 116:11-16.) Nonetheless, on May 15, 2013, BoA sent Mr. Steadman a letter informing him of his homeowner's rights and stating, "If you do not respond within 30 days, a notice of default may be issued and you may lose your home in foreclosure." (Ford Decl. Ex. 2 at 95-96; Steadman Dep. at 135:16-25.)

On June 1, 2013, BoA transferred the servicing of Mr. Steadman's loan to Green Tree. (Ford Decl. Ex. 2 at 90-93 ("1st Transfer Letter"), 100-01 ("2d Transfer Letter").) Green Tree's notice of the transfer stated that, according to its records, Mr. Steadman's monthly payment was \$1,165.08. (2d Transfer Letter.) Mr. Steadman attempted to make a payment to Green Tree in June 2012, but was informed that Green Tree was unable to locate his loan and "could not accept payments" on his account at that time. (Steadman Decl. at 3.) It was September [*8] before Mr. Steadman was able to submit payments to Green Tree. (Steadman Decl. at 3.) Mr. Steadman made payments in the modified amount to Green Tree from September 2013 to December 2013. (*Id.*)

In December 2013, Green Tree initiated foreclosure action against Mr. Steadman's property. (Ford Decl. Ex. 2 at 129, 134-36.) Mr. Steadman received a notice of foreclosure and a notice of a trustee's sale, which indicated that the amount outstanding on his loan was over \$20,000.00. (Ford Decl. Ex. 2 at 138-39, 141-144.) When Mr. Steadman

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contacted Green Tree, he was informed that Green Tree did not have a copy of the loan modification agreement. (Steadman Decl. at 3.) Mr. Steadman submitted his copy of the modification agreement, but Green Tree would not accept it because it was not signed by BoA. (*Id.*; Steadman Dep. at 30:1-34:25.) Mr. Steadman contacted Mr. Ngo and other BoA representatives by phone and email and requested that they provide him or Green Tree with a signed copy of the modification agreement. (Steadman Decl. at 3; Steadman Dep. at 30:1-34:25; Ford Decl. Ex. 4 at 191-197 (emails).) BoA never provided a signed modification agreement; the copies it did provide were missing the last [*9] page that contained the place for a signature by a BoA representative. (Steadman Decl. at 3; Ford Decl. Ex. 4 at 191-197; Steadman Dep. at 35:1-17.) BoA also did not provide a signed copy in response to Mr. Steadman's discovery requests. (Steadman Dep. at 35:1-17.)

Because Green Tree would not acknowledge his alleged loan modification, Mr. Steadman filed this action. (See Compl. (Dkt. # 1).) Mr. Steadman brings claims against Green Tree for breach of contract, breach of the implied duty of good faith and fair dealing, negligence, violation of the Washington Consumer Protection Act ("CPA"), RCW 19.86 *et seq.*, and violation of the Washington Mortgage Loan Servicing Act ("MLSA"), RCW 19.148.030. (See Am. Compl. (DKt. # 29).) Green Tree moves for summary judgment on all claims. Green Tree's motion is now before the court.

III. ANALYSIS

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56 permits a court to grant summary judgment where the moving party demonstrates (1) the absence of a genuine issue of material fact and (2) entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *see also Galen v. Cnty. of L.A.*, 477 F.3d 652, 658 (9th Cir. 2007). The moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323.

If the moving party does not bear the ultimate burden of [*10] persuasion at trial, it can show the absence of an issue of material fact in two ways: (1) by producing evidence negating an essential element of the nonmoving party's case, or (2) by showing that the nonmoving party lacks evidence of an essential element of its claim or defense. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1106 (9th Cir. 2000). If the moving party meets its burden of production, the burden then shifts to the nonmoving party to identify specific facts from which a factfinder could reasonably find in the nonmoving party's favor. *Celotex*, 477 U.S. at 324; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In determining whether the factfinder could reasonably find in the nonmoving party's favor, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).

B. Proper Defendant

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Before turning to the merits of Mr. Steadman's claims, the court addresses the parties' dispute over whether Green Tree is a proper defendant to Mr. Steadman's claims. First, Mr. Steadman's assertion that Green Tree assumed BoA's liability in tort or under consumer protection laws is meritless. Ordinarily, an assignee does not become vicariously liable for its predecessor's torts or breaches without an explicit contractual agreement to assume [*11] such liability. See *Lewis v. Boehm*, 89 Wash. App. 103, 107, 947 P.2d 1265, 1268 (1997) ("[T]he assignee of an executory contract is not liable on the contract in the absence of an express assumption of the obligations contained therein."); see also *Kucheynik v. Mort. Elec. Registration Sys., Inc.*, No. C10-451Z, 2010 U.S. Dist. LEXIS 132547, 2010 WL 5174540, at *4 (W.D. Wash. Dec. 15, 2010) (disagreeing that "the mere assignment of contract, without more, automatically exposes the assignee to liability . . . for allegedly fraudulent conduct of the assignor" because "[u]nder Washington contract law, an assignment of contract does not impose on the assignee the liabilities of the assignor unless the assignee assumes those liabilities.")² Mr. Steadman identifies no such contractual agreement by Green Tree. And Mr. Steadman advances no other viable theory of successor liability. See *Hall v. Armstrong Cork, Inc.*, 103 Wn.2d 258, 692 P.2d 787, 789-90 (Wash. 1984). As such, Mr. Steadman may not hold Green Tree liable for prior improper acts by BoA. To the extent Mr. Steadman's claims are predicated on such acts, rather than on Green Tree's acts, they are not viable.

² See also *Johnson v. Fed. Home Loan Mort. Corp.*, No. C12-1712 TSZ, 2013 U.S. Dist. LEXIS 10485, 2013 WL 308957, at *4 (W.D. Wash. Jan. 25, 2013) ("[An] assignee is liable for past breaches of the assignor only if he has expressly assumed any duties correlative with the right assigned, there [*12] being no implication of assumption by the mere assignment.") (internal quotation and alterations omitted); *Chavers v. GMAC Mort., LLC*, No. 2:11-CV-01097-ODW SS, 2012 U.S. Dist. LEXIS 85505, 2012 WL 2343202, at *4 (C.D. Cal. June 20, 2012) ("Plaintiff has offered no authority, however, to support her position that a loan servicer, trustee, assignee, nominee beneficiary, or even a successor in interest can be liable vicariously for the actions of an originator."); *Au v. Republic State Mort. Co.*, No. CIV. 11-00251 JMS, 2012 U.S. Dist. LEXIS 106439, 2012 WL 3113147, at *11 (D. Haw. July 31, 2012) ("[A]n assignee cannot be liable for unfair or deceptive acts that may have occurred when loan was consummated, and . . . liability for damages does not attach merely because one is an assignee") (internal alterations and quotations omitted); *Uy v. Wells Fargo Bank, N.A.*, No. CIV. 10-00204 ACK, 2011 U.S. Dist. LEXIS 33629, 2011 WL 1235590, at *10 (D. Haw. Mar. 28, 2011) ("[C]laims of fraud and violations of consumer protection laws are inappropriate to assert against an assignee where there are no allegations that the assignee had any contact with the mortgagor or made any representations to the mortgagor and the factual basis for the claims occurred prior to assignment of the mortgage loan."); *U.S. v. Thompson and Georgeson, Inc.*, 346 F.2d 865, 869 (9th Cir. 1965) ("Merely as assignee one does not become affirmatively liable for a deficit in the accounts between his assignor and the other party to the assigned contract. Any such [*13] liability would have to be based upon an affirmative assumption, by the assignee, of the obligations of his assignor on the contract, or upon some independent contractual arrangement.")

Second, Green Tree's assertion that it is not the proper party to Mr. Steadman's claims for breach of contract and breach of the implied duty of good faith is mistaken. Contrary to Green Tree's assertions, it is irrelevant that Green Tree was "not a party to the alleged" loan modification agreement between Mr. Steadman and BoA. (Reply (DKt. # 33) at 8.) BoA assigned to Green Tree "all beneficial interest under [Plaintiff's] Deed of Trust . . . together with the note(s) and obligations therein described and the money due and to become due thereon with interest and all rights accrued under said Deed of Trust." (Box Decl. (Ex. 1) ("Assignment").) To the extent BoA and Mr. Steadman had previously contracted to modify the note's terms, those modified terms were what Green Tree was assigned. (See Mod. Agreement); *Morse Elec. Prod. Corp. v. Beneficial Indus. Loan Co.*, 90 Wn.2d 195, 579 P.2d 1341, 1342 (Wash. 1978) (holding that an assignee cannot acquire any rights in excess of what the assignor has the ability to transfer); *Fed. Fin. Co.*

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v. Gerard, 90 Wn. App. 169, 949 P.2d 412, 417 (1998) ("Our courts have consistently held that an assignee's rights are coextensive with [*14] those of the assignor at the time of assignment."). And to the extent Green Tree's actions subsequent to the assignment violate those modified terms, Green Tree is a proper defendant to a claim for breach of contract.

Additionally, contrary to Green Tree's assertion, the fact that Freddie Mac owns the underlying loan does not mean "there is no contract of any kind between Green Tree and [Mr. Steadman]." (See Reply at 8.) Certain rights and obligations under that loan--most pertinently, the rights to collect Mr. Steadman's monthly payments and, in the event of default, to accelerate the loan and initiate foreclosure on Mr. Steadman's property, as--have been assigned to Green Tree. (See Assignment; Box Decl. Ex. 2 (declaration by Green Tree under penalty of perjury that it holds the promissory note evidencing Mr. Steadman's loan).) As such, Mr. Steadman is contractually obligated to make monthly payments to Green Tree--and Green Tree is contractually obligated to collect those payments--in accordance with the terms of the Note and Deed of Trust. (See Note ¶ 6 (requiring Mr. Steadman to remit monthly payments to the note holder and authorizing the note holder to accelerate the amount due if [*15] a payment is missed), ¶ 8 (obligating Mr. Steadman to "keep all of the promises made in this Note"), ¶ 10; Deed of Trust ¶ 22 (permitting the lender to foreclose in the event of a default); (Ford Decl. Ex. 2 at 104-05 (notice of default identifying Green Tree as the "creditor" and stating that, if Mr. Steadman failed to cure his default, the "creditor" could exercise remedies due under the loan agreement, including foreclosure).) Green Tree--not BoA or Freddie Mac--is the entity that allegedly foreclosed on Mr. Steadman's property in violation of the modified loan terms. Green Tree--not BoA or Freddie Mac--has allegedly violated the servicing obligations as set forth in the Note and Deed of Trust. Because Mr. Steadman is suing Green Tree for violations of Green Tree's servicing obligations as set forth under the Note and Deed of Trust, Green Tree is a proper defendant to Mr. Steadman's breach of contract and duty of good faith claims.

C. Breach of Contract

Mr. Steadman contends that he entered into a loan modification agreement with BoA before his loan was assigned to Green Tree, and that Green Tree's subsequent initiation of foreclosure proceedings violated the modified terms of his loan. [*16] Green Tree raises two arguments in response: (1) no valid modification agreement exists because Mr. Steadman cannot prove that he accepted BoA's offer, and (2) the alleged modification agreement is barred by the Statute of Frauds.

1. Acceptance

A valid contract requires an offer, acceptance and consideration. See *Yakima Cnty. Fire Protection Dist. No. 12 (West Valley) v. Yakima*, 122 Wn.2d 371, 858 P.2d 245 (Wash. 1993). Acceptance of an offer must be identical to the offer or no contract is formed. See *Sea-Van Invs. Assocs. v. Hamilton*, 125 Wn.2d 120, 881 P.2d 1035 (Wash. 1994). Therefore, where the offeror specifies the manner of acceptance, no contract is formed if the specification is not followed. See *Nw Props. Agency, Inc., v. McGhee*, 1 Wn. App. 305, 462 P.2d 249, 253 (1969); *Corbit v. J. I. Case Co.*, 70 Wn.2d 522, 424 P.2d 290, 299 (Wash.

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1967) (finding no contract formation because the "offer clearly specific[d] the time and manner in which acceptance . . . was to be consummated" and the offeree had not complied with the specifications); *Johnson v. Safeco Ins. Co. of Am.*, 178 Wn. App. 828, 316 P.3d 1054, 1060 (2013) (finding no contract formation because the plaintiff's putative acceptance did not meet the plain language of the offer's requirements). Ordinarily, whether there was mutual assent to the terms of an offer is a question of fact for the jury. *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 94 P.3d 945, 949 (Wash. 2004).

Here, there is no dispute that Mr. Steadman did not comply with BoA's specified manner of acceptance. (Steadman Dep. at 104:2-106:20.) Ordinarily, this failure would prevent formation of a contract. [*17] See *Corbit*, 424 P.2d at 299. Mr. Steadman, however, claims that Mr. Ngo waived the specified requirements when he told Mr. Steadman he "could submit the final loan modification documents by bringing them to [Mr. Ngo's] office in downtown Seattle" and "informed [Mr. Steadman] that [his] actions were sufficient to accept the loan modification offer."³ (Steadman Decl. at 2.)

³ Green Tree moves to strike Mr. Steadman's testimony about Mr. Ngo's statements as hearsay. (See Reply at 2.) However, in general, "out-of-court statements that are offered as evidence of legally operative verbal conduct are not hearsay." *United States v. Pang*, 362 F.3d 1187, 1192 (9th Cir. 2004). Because such statements have independent legal significance, they are considered "verbal acts," and are exempted from the definition of hearsay. *Id.*; see also *Viall v. Scott*, 943 F.2d 56 (9th Cir. 1991). Specifically, "proof of oral utterances by the parties in a contract suit constituting the offer and acceptance which brought the contract into being, are not evidence of assertions offered testimonially but rather of utterances verbal conduct to which the law attaches duties and liabilities." *N.L.R.B. v. H. Koch & Sons*, 578 F.2d 1287, 1290-91 (9th Cir. 1978); see also *United States v. Rubier*, 651 F.2d 628, 630 (9th Cir. 1981) ("Facts of independent legal significance constituting a contract which is at issue are not hearsay.") Accordingly, the Ninth Circuit held that [*18] testimony that a third party accepted a contract during an out-of-court telephone conversation was not hearsay because it was not introduced to prove the truth of the third party's assertion, but rather "only to show that [the third party] uttered words of assent, regardless of their 'truth.'" *H. Koch & Sons*, 578 F.2d at 1290-91. The Ninth Circuit reasoned that "the truth of [the third party's] words was completely irrelevant, for to lead a person reasonably to suppose that you assent to an oral agreement is to assent to it, contrary intentions notwithstanding." *Id.* (internal quotations and alterations omitted); see also *Calif. Trucking Ass'n v. Bhd. of Teamsters & Auto Truck Drivers, Local 70*, 679 F.2d 1275, 1291 (9th Cir. 1981) ("The out-of-court statement of the [company] representative was not offered for the truth of the matter asserted; rather, the statement had an operative effect in the nature of a contract rejection wholly apart from the truth of the assertion.").

Similarly, here, Mr. Ngo's out-of-court statements are not introduced for their "truth," but rather to show that Mr. Ngo uttered legally operative words that brought a contract into being. See *H. Koch & Sons*, 578 F.2d at 1290-91. Because Mr. Ngo's representation that Mr. Steadman could tender acceptance in a different manner effectively modified or re-stated BoA's offer to Mr. Steadman, they [*19] are utterances of verbal conduct. See *id.* The truth of the words is irrelevant, for to lead Mr. Steadman to suppose that BoA assented to his different form of acceptance was to assent to it, contrary intentions (or mistaken impressions) notwithstanding. See *id.* As such, Mr. Ngo's statements are not hearsay. Therefore, the court denies Green Tree's motion to strike. See *Adair v. Safeco Ins. Co.*, No. CV-09-31-BU-SEH-RKS, 2010 U.S. Dist. LEXIS 51185, 2010 WL 2079542, at *4 (D. Mont. May 24, 2010) ("Evidence of the alleged statement is evidence of a verbal act, an utterance that is itself an operative fact giving rise to legal consequences. The statement is admitted to show that it actually occurred, not for the truth of the statement's contents."). In so ruling, the court does not pass on Mr. Ngo's actual or apparent authority to make such representations, or the extent to which the statements bind BoA. See *id.*

An agent can bind his or her principal to a contract when the agent has either actual or apparent authority. *King v. Riveland*, 125 Wn.2d 500, 886 P.2d 160, 165 (Wash. 1994). "Both actual and apparent authority depend upon objective manifestations made by the principal." *Id.* "With actual authority, the principal's objective manifestations are made to the agent; with apparent authority, they are made to a third person." *Id.* "Such [*20] manifestations will support a finding of apparent authority only if they have two effects." *Id.* "First, they must cause the one claiming apparent authority to actually, or subjectively,

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believe that the agent has authority to act for the principal." *Id.* "Second, they must be such that the claimant's actual, subjective belief is objectively reasonable." *Id.*

4 "Actual authority may be express or implied." *King*, 886 P.2d at 165. "Implied authority is actual authority, circumstantially proved, which the principal is deemed to have actually intended the agent to possess." *Id.* For example, "[a]uthority to perform particular services for a principal carries with it the implied authority to perform the usual and necessary acts essential to carry out the authorized services." *Id.* Because, at this stage, Mr. Steadman does not advance any facts or argument supporting a finding of actual authority, the court does not address that theory in this order.

The court finds that a genuine issue of material fact exists as to whether BoA made objective manifestations that caused Mr. Steadman to subjectively and reasonably believe that Mr. Ngo had authority to either modify BoA's specified terms of acceptance or to accept the modification [*21] agreement on BoA's behalf. One of the ways in which a principal can cloak a person in apparent authority is "by appointing a person to a position, such as that of manager or treasurer, which carries with it generally recognized duties; to those who know of the appointment there is apparent authority to do the things ordinarily entrusted to one occupying such a position." *King*, 886 P.2d at 165. BoA appointed Mr. Ngo to the position of Assistant Vice President, Mortgage Specialist II. (See Ford Decl. Ex. 4 at 180-87.) When Mr. Steadman requested to participate in a loan modification program, Wells Fargo assigned Mr. Ngo to assist him. (2d Steadman Dep. at 13:8-16.) Mr. Ngo was Mr. Steadman's "main contact person" with respect to his loan modification. (2d Steadman Dep. at 31:14-16.)

"One dealing in good faith with an agent who appears to be acting within the scope of his authority is not bound by undisclosed limitations on the agent's power." *King*, 886 P.2d at 165. Mr. Ngo met with Mr. Steadman and helped Mr. Steadman submit a HAMP application with proper documentation. (Steadman Decl. at 2; Steadman Dep. at 82:4-83:4; 2d Steadman Dep. at 13:1-14:21; Ford Decl. Ex. 4 at 180-87 (email from Mr. Ngo arranging a meeting with Mr. [*22] Steadman and instructing him which documents to bring), Ex. 2 at 50-53 (final HAMP application signed by Mr. Ngo and Mr. Steadman).) When Mr. Steadman contacted Mr. Ngo regarding how to deliver his acceptance and Mr. Ngo told him to bring the documents to his office, it could have reasonably appeared to Mr. Steadman that Mr. Ngo was acting within the scope of his authority.

Mr. Steadman testifies that he subjectively believed Mr. Ngo had the authority to act on behalf of BoA. (Steadman Decl. at 2-3; Steadman Dep. at 105:1-25.) And a jury viewing these facts in the light most favorable to Mr. Steadman, *Reeves*, 530 U.S. at 150, could reasonably find that Mr. Steadman's belief was objectively reasonable. See *King*, 886 P.2d at 165. As such, summary judgment on the questions of acceptance and contract formation is inappropriate. See *Keystone Land*, 94 P.3d at 949.

2. Statute of Frauds

Agreements that "by their terms are not to be performed in one year" fall within the statute of frauds. RCW 19.36.010. So do contracts creating or evidencing any encumbrance on real estate. RCW 64.04.010; RCW 64.04.020. Under the statute of frauds, such contracts are unenforceable unless they are set forth in writing and signed by the party to be bound. *Family Med. Bldg., Inc. v. State, Dep't of Soc. & Health Servs.*, 104 Wn.2d 105, 702 P.2d

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459, 461 (Wash. 1985); RCW 19.36.010; RCW 64.04.010; RCW 64.04.020. Full performance by one party removes the case from the operation [*23] of the statute. *Becker v. Lagerquist Bros.*, 55 Wn.2d 425, 348 P.2d 423, 430 (Wash. 1960). With respect to contracts regarding real property, sufficient part performance can remove the agreement from the statute of frauds. *Berg v. Ting*, 125 Wn.2d 544, 886 P.2d 564, 571 (Wash. 1995). However, the doctrine of part performance does not apply to contracts that by their terms are not to be performed in one year. *Trethewey v. Bancroft-Whitney Co.*, 13 Wn. App. 353, 534 P.2d 1382, 1386 (Wash. 1975) ("[W]here the statute is directed solely to the time of performance and not to the character or subject-matter of the contract, part performance could not remove the ban of the statute without in effect repealing the statute.")

In the same vein, modifications of contracts falling within the statute of frauds must also be made in writing and signed by the party against whom enforcement is sought. *Anderson v. Anderson*, 128 Wash. 504, 223 P. 323, 324 (Wash. 1924). However, contract modifications that have been executed, as well as executory modifications that have been sufficiently partially performed, are exempt. *Id.*; see also *Consol. Elec. Distribs., Inc. v. Gier*, 24 Wn. App. 671, 602 P.2d 1206, 1210 (Wash. 1979); *Oregon & W. R. Co. v. Elliott Bay Mill & Lumber Co.*, 70 Wash. 148, 126 P. 406, 407 (Wash. 1912) (finding that an oral agreement between a lessee and a sublessee to modify the terms of the lease was valid because it was partially performed).

Here, it is undisputed that Mr. Steadman is unable to supply a copy of the modification agreement signed by BoA.⁵ (See Steadman Dep. at 35:1-17.) As a result, the statute of frauds would ordinarily render the alleged [*24] modification of Mr. Steadman's loan unenforceable. However, after examining the controlling law, the court concludes that, in this situation, there is a question of fact as to whether Green Tree is estopped from asserting the statute of frauds as a defense.

⁵ The court notes that the absence of a Modification Agreement signed by BoA does not rule out a finding of a valid contract. See *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 162 P.3d 1153, 1165-66 (Wash. Ct. App. 2007) (finding that signatures of the parties were not essential to a finding of mutual assent to enter into a contract); *Corvello v. Wells Fargo Bank, NA*, 728 F.3d 878, 883 (9th Cir. 2013), as amended on reh'g in part (Sept. 23, 2013) (disagreeing with a bank's argument that, even upon successful completion of a Trial Period, there could be no loan modification contract unless and until the bank sent the borrower a signed copy of the Modification Agreement because the bank's position "made the existence of any obligation conditional solely on action of the bank" and "allowed banks to avoid their obligations to borrowers merely by choosing not to send a signed Modification Agreement, even though the borrowers made both accurate representations and the required payments").

The statute of frauds applies for two reasons. To begin, it appears at first glance that Mr. Steadman's loan, [*25] by its terms, is not to be performed within one year. See RCW 19.36.010; *Turning Point Cmty. Church of God in Christ v. Lee*, 152 Wash. App. 1014, at *3-4 [published in full-text format at 2009 Wash. App. LEXIS 2336] (2009).⁶ After all, the loan binds Mr. Steadman to make monthly payments to the lender over the course of 30 years. (See Note); *Lectus, Inc. v. Rainier Nat. Bank*, 97 Wn.2d 584, 647 P.2d 1001, 1003 (Wash. 1982) (finding that a contract calling for monthly payments over a period of five years was within the statute of frauds). Because the doctrine of part performance is inapplicable to contracts of this type, *Trethewey*, 534 P.2d at 1386, and Mr. Steadman does not provide an agreement signed by BoA, the alleged oral modification would ordinarily be unenforceable.

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⁶ See *Emps. Ins. of Wausau v. Granite State Ins. Co.*, 330 F.3d 1214, 1220 (9th Cir. 2003) (stating that federal courts "may consider unpublished state decisions, even though such opinions have no precedential value").

Upon further examination, however, the outcome is less clear-cut. In Washington, the test for applying the statute of frauds is whether a contract "cannot be performed within one year from its making." *Winslow v. Mell*, 48 Wn.2d 581, 295 P.2d 319, 322 (Wash. 1956) (emphasis added). Courts "will examine the surrounding circumstances to ascertain the terms of the contract and to determine whether, by those terms, the contract must of necessity require more than one year to perform." *Id.*; see also *Gronvold v. Whaley*, 39 Wn.2d 710, 237 P.2d 1026, 1030 (Wash. 1951) ("We merely look[] to the circumstances to ascertain whether the events required by the terms of the contract could not [*26] possibly take place within a year."). "That the contract was not performed within a year is of no significance; nor does it matter that it was highly improbable that the contract could be performed within one year." *Gronvold*, 237 P.2d at 1030.

Here, Mr. Steadman's loan permits him to prepay the amount due. (See Note ¶ 4.) As such, it may be possible, albeit improbable, that the contract could be performed within one year. See *Wells Fargo Bank v. Main*, 160 Wash. App. 1005, at *3 [published in full-text format at 2011 Wash. App. LEXIS 369] (2011) (finding that a loan for \$103,000.00 was exempt from the statute of frauds because it was possible, no matter how improbable, that it could be paid back within one year); *Gronvold*, 237 P.2d at 1031-32 ("Although it appears highly improbable that the contract could be performed within one year, we cannot say that the terms of the contract made performance impossible within that period; therefore it is our opinion that this contract is not void.") Therefore, the court turns to the second basis for applying the statute of frauds.⁷

⁷ Because, at the end of the day, the statute of frauds is applicable to the loan modification under both theories, the court does not address the interplay between the theories.

The second reason Mr. Steadman's loan falls within the statute of frauds is that it is an encumbrance on real property. [*27] RCW 64.04.010; RCW 64.04.020; *Algaier v. CMG Mort., Inc.*, No. 13-CV-0380-TOR, 2014 U.S. Dist. LEXIS 112363, 2014 WL 3965180, at *7 (E.D. Wash. Aug. 13, 2014) (finding that a loan secured by real property falls within the statute of frauds under Washington law because it is an encumbrance on real property); *Turning Point Cmty. Church of God in Christ*, 152 Wash. App. 1014, at *3-4 [published in full-text format at 2009 Wash. App. LEXIS 2336] (same). Although the doctrine of part performance is applicable, Mr. Steadman's evidence of part performance is insufficient to remove the alleged modification from the operation of the statute.

"Where specific performance of [an] agreement is sought, the contract must be proven by evidence that is clear and unequivocal and which leaves no doubt as to the terms, character, and existence of the contract." *Berg*, 886 P.2d at 571. Courts consider three elements to determine if there has been part performance of the agreement so as to remove it from the statute of frauds: "(1) delivery and assumption of actual and exclusive possession; (2) payment or tender of consideration; and (3) the making of permanent,

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substantial and valuable improvements, referable to the contract." *Id.* The burden is on the party asserting the part performance to show acts "unequivocally referring to, and resulting from, [an alleged] agreement." *Friedl v. Benson*, 25 Wn. App. 381, 609 P.2d 449, 455 (Wash. Ct. App. 1980).

Mr. Steadman's only evidence of part performance is that he made payments in the modified amount **["28"]** to BoA for eight months after the contract modification allegedly occurred, and BoA accepted those payments. (Steadman Decl. at 3; Steadman Dep. at 116:11-16.) However, the Washington Supreme court has held that, of the three factors, "consideration alone is insufficient evidence of part performance to take [a contract] out of the statute of frauds." *Berg*, 886 P.2d at 571. More important, the court cannot say that BoA's performance does not "leave no doubt as to the . . . existence of the contract." See *id.* BoA notified Mr. Steadman twice after he began making modified payments that the payments were insufficient, and he was in danger of defaulting. (Ford Decl. Ex. 2 at 78-88, 95-96; Steadman Dep. at 116:18-117:8, 135:16-25.) BoA also specified that, by accepting lower payments, BoA did not waive its right to full payment.⁸ (Ford Decl. Ex. 2 at 87-88.) Because the acts allegedly constituting part performance do not "point unmistakably and exclusively to the existence of the claimed agreement," the statute of frauds applies. See *Miller v. McCamish*, 78 Wn.2d 821, 479 P.2d 919, 922 (Wash. 1971).

⁸ Mr. Steadman claims that BoA representatives told him to disregard the notices of default because his modification had been approved, and he was only receiving the notices because **["29"]** their system was behind in formally processing the approval. (Steadman Dep. at 113:13-117:11; Steadman Decl. at 2-3.) However, these out-of-court statements are not admissible to prove the truth of the matter asserted. Fed. R. Evid. 801(c), 802. Mr. Steadman has not established that any hearsay exception applies. Therefore, Mr. Steadman cannot rely on these statements to show that his modification had in fact been approved.

The final question, then, is whether Green Tree may assert the statute of frauds defense in this action. It is well-established that an "assignee steps into the shoes of the assignor, and has all of the rights of the assignor." *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 191 P.3d 866, 874-75 (Wash. 2008); *Fed. Fin. Co.*, 949 P.2d at 417 ("[A]n assignee's rights are coextensive with those of the assignor at the time of assignment."). By corollary, "an assignee takes subject to defenses assertible against the assignor." *Mut. of Enumclaw Ins. Co.*, 191 P.3d at 875, n.10 (quoting *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 662 P.2d 385, 389 (Wash. 1983)). As such, Green Tree can only enforce the loan terms to the same extent as BoA was able to at the time of the assignment.

The Washington Supreme Court has held that "[a] party who promises, implicitly or explicitly, to make a memorandum of a contract in order to satisfy the statute of frauds, and then breaks that promise, is estopped to interpose the statute as a defense **["30"]** to the enforcement of the contract by another who relied on it to his detriment." *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 616 P.2d 644, 647 (Wash. 1980); see also *Lige Dickson Co. v. Union Oil Co. of Calif.*, 96 Wn.2d 291, 635 P.2d 103, 105 (Wash. 1981) ([D]efendant's failure to reduce the agreement with plaintiff to a writing, and plaintiff's reliance on such promise, estopped defendant from asserting the statute of frauds as a defense.") The court concludes that a genuine question of material fact exists as to whether BoA implicitly promised Mr. Steadman that it would sign the loan modification

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delivered by Mr. Steadman, such that BoA would be estopped from asserting the statute of frauds as a defense. See *Klinke*, 616 P.2d at 647.

Specifically, for the same reasons as discussed in the previous section regarding acceptance, a jury could reasonably find that Mr. Ngo's representations to Mr. Steadman constitute an express or implied promise on behalf of BoA make a written memorandum of the loan modification. See *supra* § III.C.1; (Steadman Dep. at 105:1-106:20; 2d Steadman Dep. 22:13-27:17; 28:7-29:8 (stating that he expected Mr. Ngo to sign the loan modification agreement when he delivered it to him, and thought that he did sign it); Steadman Decl. at 2 ("It was my understanding that Mr. Ngo signed the final modification paperwork after he accepted it from me.")). The subsequent [31] continued assurances by BoA representatives to Mr. Steadman that BoA was in the process of finalizing his loan approval also support such a finding.⁹ (See Steadman Dep. at 113:13-117:11; Steadman Decl. at 2-3.) Moreover, a jury could reasonably find that Mr. Steadman detrimentally relied on BoA's promise to sign the contract in that he continued making modified payments to BoA and Green Tree for over a year, and also apparently installed a new roof and painted his house. (See Steadman Decl. at 3; Steadman Dep. at 116:11-16; Ford Ex. 4 at 192 (3/27/14 email from Mr. Steadman).) Because there is a genuine issue of material fact as to whether BoA—and by extension, Green Tree—can assert the statute of frauds defense, summary judgment on Mr. Steadman's breach of contract claim is inappropriate. See *Celotex*, 477 U.S. at 323.

⁹ These out-of-court statements are admissible in this context because they are not offered to show the truth of the matter asserted (namely, that Mr. Steadman's modification had been approved). Rather, they are offered to show (1) that the statements occurred and (2) the effect the statements had on the listener, specifically, that Mr. Steadman could have detrimentally relied on the statements, [32] regardless of their truth. As such, they are admissible. See *H. Koch & Sons*, 578 F.2d at 1290-91; *L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924, 935 (9th Cir.) *opinion amended and superseded*, 313 F.3d 1093 (9th Cir. 2002) ("Out-of-court declarations introduced to show the effect on the listener are not hearsay.") Accordingly, the court DENIES Green Tree's motion to strike Mr. Steadman's account of those statements (see Reply at 2). For the same reasons, Mr. Ngo's alleged statements to Mr. Steadman concerning the finalization of the contract are admissible.

D. Duty of Good Faith

"A duty of good faith and fair dealing is implied in every contract." *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 807 P.2d 356, 360 (Wash. 1991); see also *Rekhter v. State, Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 323 P.3d 1036, 1041 (Wash. 2014). This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance. *Badgett*, 807 P.2d at 360. As discussed previously, Green Tree's assertion that Mr. Steadman's claim for breach of the implied duty of good faith must fail because there is no "direct" contractual relationship between Green Tree and Mr. Steadman is incorrect. See *supra* § III.B; (Reply at 7.) The contractual rights and obligations to collect payments from Mr. Steadman and to service the loan have been assigned to Green Tree. (See Assignment.) As Mr. Steadman points out, Green Tree has an implied duty to exercise those rights and perform those obligations fairly [33] and in good faith. See *Rekhter*, 323 P.3d at 1041. Therefore, the court denies Green Tree's motion for summary judgment on Mr. Steadman's claim for breach of the duty of good faith.

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In doing so, the court reiterates that Green Tree is not liable under this claim for alleged breaches by BoA. In addition, the court notes that there is no "free-floating" duty of good faith. *Id.* Instead, "the duty to cooperate exists only in relation to performance of a specific contract term." *Id.* In other words, the duty of good faith "requires only that the parties perform in good faith the obligations imposed by their agreement." *Id.* Therefore, in order to ultimately prevail on this claim, Mr. Steadman must point to a specific contract term that Green Tree did not perform in good faith.

E. Negligence

Green Tree argues that the economic loss rule bars Mr. Steadman's negligence claim. (Mot. at 13.) "Historically, Washington applied the economic loss rule to bar a plaintiff from recovering tort damages when the defendant's duty to the plaintiff was governed by contract and the plaintiff suffered only economic damages. *Donatelli v. D.R. Strong Consulting Engineers, Inc.*, 179 Wn.2d 84, 312 P.3d 620, 623 (Wash. 2013). That rule "attempted to describe the dividing line between the law of torts and the law of contracts." *Id.* In 2010, [*34] however, Washington Supreme Court, "concluded that the term 'economic loss rule' was a misnomer and renamed the rule the 'independent duty doctrine' to more accurately describe how [the] court determines whether one contracting party can seek tort remedies against another party to the contract." *Id.* (citing *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 241 P.3d 1256, 1262 (Wash. 2010). Today, the "independent duty doctrine continues to 'maintain the boundary between torts and contract' in the place of the economic loss rule." *Id.* (quoting *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 273 P.3d 965, 969 (Wash. 2012)). Accordingly, the court applies the independent duty rule, rather than the economic loss rule, to Mr. Steadman's claims.

Under the independent duty doctrine, "an injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract." *Eastwood*, 241 P.3d at 1262. "When no independent tort duty exists, tort does not provide a remedy." *Id.* The Washington Supreme Court has limited the application of the independent duty doctrine to a "narrow class of cases" limited to "claims arising out of construction on real property and real property sales." *Donatelli*, 312 P.3d at 623-24.

Additionally, the Washington Supreme Court has prohibited lower state courts from applying the independent duty doctrine to bar tort claims "unless and until" [*35] the Washington Supreme Court decided that the doctrine applies to the particular tort claim at issue. *Elcon*, 273 P.3d at 969.

Here, Mr. Steadman's negligence claim is predicated on allegations that Green Tree inappropriately serviced his loan. Mr. Steadman obtained the loan to purchase his residence, and the loan is secured by his residence. (See Not. Deed of Trust.) Therefore, this claim "arises out of" the purchase of real property. See *Donatelli*, 312 P.3d at 623-24. The elements of a negligence claim are: (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 914 P.2d 728, 731 (Wash. 1996). Whether the independent duty doctrine applies to negligence claims depends on whether the plaintiff identifies an alleged duty of care separate and distinct from the parties' contractual duties. See *Donatelli*, 312 P.3d at 623-24.

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With respect to claims for negligence, the "existence of a duty is a question of law and depends on mixed considerations of logic, common sense, justice, policy, and precedent." *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 35 P.3d 1158, 1162 (Wash. 2001). The "existence of a duty may be predicated upon statutory provisions or on common law principles." *Degel*, 914 P.2d at 731.

Here, Mr. Steadman advances two bases for finding that Green Tree owed him a duty of care. First, Mr. Steadman claims that Green Tree owed a duty to "properly [*36] service [Mr. Steadman's] loans in congruence with any contracts that exist related to [his] loan." (Resp. at 15.) Because this duty, by definition, is identical to Green Tree's contractual duties, the independent duty doctrine bars a negligence claim predicated on this duty. See *Eastwood*, 241 P.3d at 1262

Second, Mr. Steadman claims that Green Tree owed a duty to "conduct a reasonable and fair investigation in to [sic] the servicing history before taking over servicing of [Mr. Steadman's] loan and whenever any disputes arise involving the loan's servicing." (Resp. at 15.) Mr. Steadman does not identify any statutory provisions or common law principles, let alone any precedent, supporting his position. (See *id.*); see also *Degel*, 914 P.2d at 731. Neither does he identify how the considerations of logic, common sense, justice, and policy militate in favor of his position. See *Snyder*, 35 P.3d at 1162. Mr. Steadman's only argument is that it would be "unreasonable" if Green Tree was not required to honor contracts formed between Mr. Steadman and prior services. (Resp. at 15.) That argument, however, does not address whether Green Tree owes a duty independent of those contracts. Faced with a vacuum of authority, the court is unprepared and unwilling to rule [*37] that such a duty existed as a matter of law.¹⁰ Therefore, because Mr. Steadman is unable to establish the existence of a duty of care, let alone a duty of care that is independent from Green Tree's contractual duties, summary judgment on Mr. Steadman's negligence claim is appropriate.

¹⁰ The determination of the existence of an alleged duty of care for the purposes of a negligence claim is similar, if not identical, to the determination of the source of an alleged duty of care for the purposes of the independent duty doctrine. See *Eastwood*, 241 P.3d at 1262 ("Where this court has stated that the economic loss rule applies, what we have meant is that considerations of common sense, justice, policy, and precedent in a particular set of circumstances led us to the legal conclusion that the defendant did not owe a duty."). Therefore, in the alternative, and regardless of whether the independent duty doctrine applies to Mr. Steadman's negligence claim, the court finds that Mr. Steadman's claim fails for an inability to establish a duty of care owed by Green Tree to Mr. Steadman.

F. CPA

To establish a CPA claim, a plaintiff must show: (1) an unfair or deceptive trade practice; (2) that occurs in trade or commerce; (3) [*38] an impact on the public interest; (4) injury to the plaintiff in his or her business or property; and (5) a causal link between the unfair or deceptive act and the injury suffered. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531, 535 (Wash. 1986). Green Tree argues first that Mr. Steadman cannot show an unfair or deceptive trade practice, and second that Mr. Steadman cannot show damages caused by Green Tree's actions.

To begin, either unfair or deceptive conduct can form the basis for a CPA action. *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179, 1187 (Wash. 2013). To base a claim on

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deceptive action, a "plaintiff need not show the act in question was intended to deceive, only that it had the capacity to deceive a substantial portion of the public." *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 204 P.3d 885, 899 (Wash. 2009). Although the Washington Supreme Court has not provided an explicit definition for "unfair acts," *Klem*, 295 P.3d at 1187, it has held that "an act is unfair if it . . . is unethical, oppressive, or unscrupulous," *id.* at 1186. One federal interpretation, to which Washington courts interpreting the CPA may look for guidance, states that a "practice is unfair if it causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits." *Id.*

Mr. Steadman contends that Green Tree's initiation of foreclosure [*39] proceedings was deceptive because it misrepresented that Mr. Steadman had defaulted on his loan payments. (Resp. at 18.) Mr. Steadman also contends that Green Tree's failure to help him finalize and process a loan modification to which Mr. Steadman's previous servicer had agreed was unscrupulous. (Resp. at 19.) Because the CPA is to "be liberally construed that its beneficial purposes may be served," RCW 19.86.920, the court concludes that Mr. Steadman's allegations adequately support a finding of a deceptive or unfair trade practice.¹¹

¹¹ Ordinarily, whether undisputed conduct is unfair or deceptive is a question of law, not a question of fact. *Lyons v. U.S. Bank Nat. Ass'n*, 181 Wn.2d 775, 336 P.3d 1142, 1148 (Wash. 2014). However, where the allegedly deceptive conduct is disputed, the material questions of fact must be resolved by a factfinder. *Id.* Here, Green Tree disputes Mr. Steadman's allegations. Therefore, whether Green Tree's conduct was unfair or deceptive is a question for the trier of fact. See *id.*; see also 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 310.08 (6th ed.) (setting forth the definition of an unfair or deceptive act or practice for the jury's determination).

Next, the court finds that Mr. Steadman has adequately raised a material issue of fact regarding [*40] damages. Under the CPA, "the injury requirement is met upon proof the plaintiff's property interest or money is diminished because of the unlawful conduct." *Panag*, 204 P.3d at 899. Additionally, "plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury." *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 170 P.3d 10, 22 (Wash. 2007). Personal injuries such as "mental distress, embarrassment, and inconvenience are not recoverable under the CPA." *Panag*, 204 P.3d at 899.

Here, Mr. Steadman testifies that he has been charged default fees and foreclosure fees as a result of Green Tree's allegedly invalid foreclosure on his property that he would not have been charged otherwise. (See Steadman Decl. at 3.) "The injury element will be met if the consumer's property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violation are minimal." *Mason v. Mort. Am., Inc.*, 114 Wn.2d 842, 792 P.2d 142, 148 (Wash. 1990). Because Mr. Steadman provides evidence that his money has been diminished because of Green Tree's allegedly unlawful conduct, there is a question of fact regarding this element. Therefore, summary judgment on Mr. Steadman's CPA claim is inappropriate.¹²

¹² In support of his CPA claim, Mr. Steadman attaches as evidence six consumer complaints filed with [*41] the Washington State Attorney General against Green Tree for failing to credit loan modifications entered into prior to assignment. (See Box Decl. Ex. 3.) Green Tree moves to strike this evidence as unauthenticated, hearsay, and impermissible character evidence.

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(See Reply at 2.) Because the court does not rely on that evidence in deciding this motion, the court DENIES Green Tree's motion to strike as moot.

G. MLSA

Plaintiff concedes that his claim under the MLSA is preempted by the federal Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq.*, because Green Tree issued a timely, RESPA-compliant notice to Plaintiff when Green Tree began servicing Plaintiff's loan. (See Resp. at 19); *see also* 12 U.S.C. § 2605(c)(2)(A); 12 C.F.R. 1024.33(d). Therefore, the court grants summary judgment on Plaintiff's MLSA claim.

IV. CONCLUSION

For the foregoing reasons, the court GRANTS in part and DENIES in part Defendant's motion for summary judgment (Dkt. # 24).

Dated this 5th day of May, 2015.

/s/ James L. Robart

JAMES L. ROBART

United States District Judge

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