**NOT FOR PUBLICATION**

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

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| JOSE GRULLON, on behalf of himself and all others similarly situated<br><br>Plaintiffs,<br><br>v.<br><br>BANK OF AMERICA, N.A.,<br>BAC HOME LOANS SERVICES, L.P<br><br>Defendants. | Civ. Action No. 10-5427 (KSH) (PS)<br><br>**OPINION** |

**Katharine S. Hayden, U.S.D.J.**

## I. INTRODUCTION

This matter is before the Court on cross-motions for summary judgment and plaintiff Jose Grullon's motion for class certification. Grullon asserts that he, and others similarly situated, are entitled to relief under the New Jersey Consumer Fraud Act because Bank of America's bad practices, including: robo-signing foreclosure documents, concealing the true owner of loans from the borrowers, and initiating foreclosure proceedings before it had the right to, resulted in unreliable and unfair foreclosure proceedings and ascertainable losses. Bank of America argues that, unable to prove the case he originally brought challenging the Bank's loan modification practices, Grullon now dramatically shifts course by asserting entirely new legal theories and factual assertions that do not appear in the complaint. In addition to the procedural maladies, the Bank argues that Grullon's new theories fail as a matter of law and are inappropriate for class certification. The Court held oral argument on the parties' motions on March 5, 2013.

## II. FACTUAL BACKGROUND

In July 2005, Grullon executed an adjustable rate note payable to Countrywide Home Loans, Inc., which was endorsed in blank. [Bank Stmt. Facts ¶ 11; Grullon Response ¶¶ 11.] Grullon executed to Mortgage Electronic Registration Systems, Inc. ("MERS") a mortgage on his home securing the note. [Grullon Stmt. Facts ¶¶ 69-70; Bank Response ¶¶ 69-70.][1] Under this loan, Grullon was initially required to make monthly payments of $1,995.83. [Grullon Stmt. Facts ¶ 69; Bank Response ¶ 69.]

Some time prior to 2009, Grullon stopped making the required monthly payment. [Final Pretrial Order ("FPTO") § 3 ¶ 36 ("Grullon did not make the monthly payment due on December 1, 2008.).] On January 16, 2009, Grullon received a Notice of Intention to Foreclose ("NOI") from Countrywide Home Loans Servicing, L.P. [FPTO § 3 ¶ 37; Jan. 16, 2009 NOI (appended as Exh. 39 to Friscia Decl.)[2].] The NOI specifically stated that Countrywide "services the mortgage on the property . . . representing the holder of the promissory note." [Jan. 16, 2009 NOI.] Fannie Mae owned, and still owns, the underlying debt. The NOI further stated:

> You have the right to remedy the default within THIRTY (30) DAYS from the date of this letter. To remedy the default, Countrywide needs to receive the amount of $6,404.61, plus any other monthly payment and surcharge payment that may come due during the period of thirty (30) days after the date of this letter.
> Payments must be made via cashier's check or certified check within thirty (30) days from the date of this letter to:
> Countrywide Home Loans Servicing LP
> P.O. Box 660694
> Dallas, TX 75266-0649
> 1-800-641-5302

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[1] The parties' L. Civ. R. 56.1 statements of undisputed material facts are largely undisputed. However, the Bank "globally object[ed]" to Grullon's statement because "the 'facts' alleged relate to new claims and theories, which [he has] not pleaded." [Bank's Resp. at p. 1.]

[2] "Frisca Decl." refers to the declaration of Lawrence Friscia submitted in support of Grullon's motions.

> If the default is not remedied within THIRTY (30) DAYS from the date of this letter, the mortgage payments will be accelerated and the mortgage will be considered in a state of default and we will immediately begin mortgage foreclosure procedures on your property. We will also have the right to resort to any other legal action available to us under law, including but not limited to, a ruling of deficiency against you.
>
> . . .
>
> If you are unable to remedy the default on or before February 15, 2009, Countrywide wants you to be aware of the different options that may be available through Countrywide to prevent a foreclosure sale of your property. For example:
>
> - Payment Plan: It is very possible that you are eligible for some form of payment assistance through Countrywide. Our basic plan requires that Countrywide receive, in advance, at least half of the amount necessary to bring the account up to date, and the balance of the amount due is paid along with the normal monthly payment in a defined period of time. Other payment plans are also available.
> - Loan Modification: Or it is possible that regular monthly payments can be reduced through a loan modification to reduce the interest rate and adding the payment in arrears to the current balance of the loan. However, this mortgage foreclosure alternative is limited to certain types of loans.
> - Selling Your Property: Or, if you are willing to sell your home to avoid mortgage foreclosure, your home sale may be approved by Countrywide, even if your home is worth less than you owe on it.
> - Deed in Lieu of Mortgage Foreclosure: Or, if your property is free of liens and if default is due to serious financial hardships that are beyond your control, you may be eligible to pass your property directly to the Holder of the Promissory Note and prevent the mortgage foreclosure sale.
>
> If you are interested in discussing any of these mortgage foreclosure alternatives with Countrywide, you need to contact us immediately. . . .

[*Id.*][3]

On April 16, 2009, MERS assigned Grullon's mortgage to Countrywide. [Grullon Assignment of Mortg., Exh. G to Pakrul Cert.[4]).] The assignment was signed by Micall

[3] The NOI Grullon received was in Spanish and was translated to English in connection with the state foreclosure proceeding. [Friscia Decl. Exhs. 38 (Spanish) & 39 (English).]

Bachman as the authorized officer executing the document and was witnessed by Renee Hertzler.[5] [*Id*. ¶¶ 14, 15.] Bachman and Hertzler executed foreclosure documents after the document execution team, foreclosure specialists, and foreclosure counsel reviewed the assignment document. [Grullon Stmt. Fact ¶¶ 16-24.] The parties agree that in signing, Bachman and Hertzler did not confirm the accuracy of the data contained therein. [Grullon Stmt. Fact ¶¶ 43, 50; Bank Response ¶ 43, 50.]

Also on April 16, 2009, Countrywide[6] filed a foreclosure complaint against Grullon in state court. [Foreclosure Compl., Exh. J to Pakrul Cert.] As part of the foreclosure litigation, Grullon and the Bank attended mediation on January 8, 2010. [FPTO § 3 ¶ 49.] The parties developed and executed a Foreclosure Mediation Settlement Memorandum ("Settlement Memo") that provided that "upon receipt of [six specific documents from Grullon,[7] the Bank] will review and determine if offer on the terms discussed at the 1/8/10 mediation will be provided. . . ." [*Id*. ¶ 49; Settlement Memo, Exh. D to Second Am. Compl.] Grullon claims he sent financial documents to the Bank and followed up several times regarding the steps laid out in the Settlement Memo. He further states that he was told that he was still under review until he was eventually told in spring 2010 that he did not qualify for assistance. [Bank Stmt. Fact ¶ 21; Grullon Response ¶ 21.] Grullon has not produced copies of any documents he claims that he

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[4] "Pakrul Cert." refers to the certification of Marc Pakrul submitted in support of the Bank's motion.

[5] Hertzler's signature follows the phrase "signed, sealed and delivered in the presence of or attested by:." Grullon Assignment of Mortg., Exh. G to Pakrul Cert.

[6] Countrywide, which became an indirect operating subsidiary of Bank of America on July 2, 2008, changed its name to BAC Home Loan Servicing, L.P. on April 27, 2009. [Defs.' Summ. J. Br. 19, n. 5.]

[7] These documents included: "(a) copy of financial worksheet with the information provided at the 1/8/10 mediation; (b) pay-stubs for all employment for past 30 days; (c) bank statements for past 30 days; (d) 2008 Tax return; (e) lease agreement with tenant; and (f) hardship letter." Settlement Memo, Exh. D. to Second Am. Compl.

sent to the Bank. [Bank Stmt. Fact ¶ 22 (citing Grullon Dep. 39:15-41:14); Grullon Response ¶ 22.]

On September 10, 2010, Grullon answered the foreclosure complaint and filed counterclaims against the Bank for breach of contract, breach of covenant of good faith and fair dealing, and fraud. [Grullon Answer & Counterclaims, Exh. L to Pakrul Cert.] A foreclosure trial was held on June 21, 2011 and June 28, 2011 before Judge Margaret Mary McVeigh. [FPTO § 3 ¶ 56.][8] On December 1, 2011, Judge McVeigh struck Grullon's answer and counterclaims and directed that the matter return to the Office of Foreclosure to proceed as an uncontested matter for final judgment. [Dec. 1, 2011 McVeigh Op., Exh. M to Pakrul Cert.]

Grullon moved for reconsideration, arguing that the NOI was defective because it only identified the servicer of the loan, not the lender, as is required under the Fair Foreclosure Act ("FAA"). [March 28, 2012 McVeigh Recon. Op., Exh. N to Pakrul Cert.] On March 28, 2012, Judge McVeigh held in a written opinion that she remained satisfied that Grullon's defenses failed to rebut the Bank's proofs and ruled again that the Bank "had the requisite standing and right to foreclose this mortgage." [*Id*. at 5 (emphasis in original).] Judge McVeigh ordered the Bank to re-serve the NOI in English and Spanish within 14 days and to allow Grullon 30 days to cure the default. [*Id*.]

The Bank re-served Grullon with the NOI in English and Spanish. Grullon has not cured the default that originally occurred in December 2008 and continues to live in his home. [Bank's Summ. J. Opp. Br. at 22, 25-26; 03/05/13 Tr. at 38:3-4.] Grullon's state foreclosure action is still

[8] Grullon alleges that the Certification of Proof of Amount Due submitted during the foreclosure action by the Bank was executed by Melissa Viveros – the Vice President of foreclosure within Countrywide's presale division – who admitted to signing documents without notaries and without conducting an independent review before executing documents. [Grullon Br. at 8-9; Grullon Stmt. Fact ¶ 74.]

pending. At oral argument Grullon's attorney Jonathan Cuneo described the state case: "his foreclosure action is not final . . . he's got some fight left in state court." [*See* 03/05/13 Tr. at 51:19-12, and *id*. at 51:22-52:5 Grullon "is planning to make an issue of whether Fannie Mae should be identified as the lender and not Bank of America."[9]] Presently, the ball is in the Bank's court to move to final judgment against Grullon. However, counsel for the Bank represented that it "would not pursue judgment or sale while this case was pending." [03/05/13 Tr. at 57:7-58:7.][10]

## III. PROCEDURAL HISTORY

On October 19, 2010, plaintiffs filed their first class-action complaint, which they later amended. [D.E. 1, 5.] On December 17, 2010, defendants filed a motion to dismiss. [D.E. 33.] In response, plaintiffs filed a second amended complaint, reducing the number of plaintiffs to Tanya Beals, Gerald Beals, Jr., and Jose Grullon and naming Bank of America, N.A. and BAC Home Loans Servicing, LP[11] as defendants. [D.E. 40 ("Second Am. Compl.").] The second amended complaint recites seven counts as the basis of its claim for relief: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) fraud and intentional misrepresentation; (4) constructive fraud and negligent misrepresentation; (5) negligent processing of loan modifications and foreclosures; (6) violation of the New Jersey Consumer

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[9] Grullon had already raised and lost on this issue in the state court foreclosure proceeding. [Dec. 1, 2011 McVeigh Op. at 3; March 28, 2012 McVeigh Recon. Op. at 3, 5.]

[10] Procedurally, the next step would be for the Bank to serve a notice of entry of final judgment. [Bank Summ. J. Br. at 26 (citing N.J.S.A. § 2A:50-58).] The Bank then has to submit its judgment proofs to the Office of Foreclosure in accordance with N.J. Ct. R. 4:64-1(d). [*Id*.] To obtain a final judgment against Grullon, the Bank must submit a certification itemizing: the principal amount due; advances for taxes and hazard insurance; late charges; accrued interest; per diem interest; and any credits to the account. [*Id*. at 26-27 (citing N.J. Ct. R. 4:64-2(b).] Grullon then has the right to object to any charges that are not set by court rule. [*Id*. at 27.] *See, infra*, n. 17 re: Grullon's foreclosure-related fees.

[11] BAC Home Loans Servicing merged into Bank of America in June, 2011 - ("the Bank").

Fraud Act ("NJCFA"), N.J.S.A. 56:8-1, *et seq.*; and (7) violation of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1962, *et seq*. [*Id*. ¶¶ 181–238.]

Defendants filed a motion to dismiss the second amended complaint and following oral argument, the Court granted in part and denied in part defendants' motion leaving only Grullon's fraud/misrepresentation and NJCFA claims.[12] [D.E. 115, 120, 121.] On July 23, 2012, the parties stipulated to the dismissal of the claims of Tanya and Gerald Beals leaving Jose Grullon as the only named plaintiff. [D.E. 224.]

The parties exchanged motions for summary judgment and Grullon filed a motion for class certification.[13] [D.E. 185-187.] The Court held oral argument on the parties' motions on March 5, 2013. [D.E. 251 (hereinafter "03/05/13 Tr.").]

## IV. SUMMARY JUDGMENT STANDARD

Under the familiar legal standard, summary judgment is proper if there is no genuine issue of material fact and if, viewing the facts in the light most favorable to the non-moving party, the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp*. *v*. *Catrett*, 477 U.S. 317, 322 (1986). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. . . ." *Handcock Indus*. *v*. *Schaeffer*, 811 F.2d 225, 231 (3d Cir. 1987) (quotation omitted). If the moving party demonstrates the non-movant has failed to establish one or more essential elements of its case, the burden shifts to the non-movant to establish that

[12] The Beals' contract claims also survived. *But see* D.E. 224 (dismissing Beals).

[13] On April 5, 2012, following a telephone conference on the record, Magistrate Judge Patty Shwartz ordered the parties to file their briefs directly with the Court and their adversary and not electronically until after a sealing issue was resolved. [D.E. 174.] On June 20, 2012, the motions were filed electronically. [D.E. 202-213.]

summary judgment is inappropriate. *Connection Training Servs. v. City of Phila.*, 358 F. App'x 315, 318 (3d Cir. 2009).

At the summary judgment stage, the judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986); *Marino v. Indus. Crating Co.*, 358 F.3d 241, 247 (3d Cir. 2004).

## V. ANALYSIS & DISCUSSION

### A. Elements of Remaining Claims

The Bank moves for summary judgment on all remaining counts [D.E. 204] while Grullon moves for summary judgment under his NJCFA claim only [D.E. 210]. Following this Court's order on the motion to dismiss, Grullon's fraud/misrepresentation and NJCFA claims remain.

Grullon's fraud/misrepresentation and NJCFA claims are grounded in his allegation that despite its duty of disclosure, the Bank knowingly and/or recklessly misrepresented and/or failed to disclose material facts relating to its loan modification and foreclosure processes. [Second Am. Compl. ¶¶ 206, 216, 225-226.] With respect to Grullon specifically, the complaint alleges that the attesting secretary to the Assignment of Mortgage from MERS to Countrywide, Hertzler, has been revealed to be a "robo-signer." The complaint does not allege that the Assignment was defective in any substantive way. [*Id.* ¶¶ 158-60.] In addition, Grullon alleges that the Bank did not fulfill its obligations under the loan modification Settlement Memo despite its representations at the mediation. [*Id.* ¶ 167.] Grullon alleges that he suffered damages as a result of the Bank's deceptive practices, including, but not limited to, damage to his credit score, costs associated

with having to defend against the foreclosure such as attorneys' fees and foreclosure processing fees, and the loss of other options to avoid foreclosure. [*Id*. ¶¶ 173, 213, 219, 227.]

**1. Fraud/Misrepresentation Claim**

Intentional fraud consists of five elements: "(1) a material misrepresentation of presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." *Banco Popular N. Am. v. Gandi*, 184 N.J. 161, 172-73 (2005). Negligent misrepresentation is "'[a]n incorrect statement, negligently made and justifiably relied on,' which results in economic loss." *McClellan v. Felt*, 376 N.J. Super. 305, 313 (App. Div. 2005) (quoting *Kaufman v. i-Stat Corp*., 165 N.J. 94, 109 (2000)). It is essentially the same claim as fraud, except that it requires a scienter only of negligence.

**2. New Jersey Consumer Fraud Act Claim**

A claim under the NJCFA consists of three elements: "(1) an unlawful practice, (2) an 'ascertainable loss,' and (3) 'a causal relationship between the unlawful conduct and the ascertainable loss.'" *Gonzalez v. Wilshire Credit Corp*., 207 N.J. 557, 576 (2011) (quoting *Lee v. Carter-Reed Co*., 203 N.J. 496, 521 (2010)). The NJCFA defines an "unlawful practice" as

> [t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with the intent that others rely on such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived, or damaged thereby.

N.J.S.A. 56:8-2. To constitute consumer fraud, a business practice "must be 'misleading' and stand outside the norm of reasonable business practice in that it will victimize the average

consumer." *Adamson v. Ortho-McNeil Pharm., Inc.*, 463 F. Supp. 2d 496, 503 (D.N.J. 2006). "When the alleged consumer-fraud violation consists of an affirmative act, intent is not an essential element and the plaintiff need not prove that the defendant intended to commit an unlawful act." *Cox*, 138 N.J. at 17-18. In contrast, "when the alleged consumer fraud consists of an omission, the plaintiff must show that the defendant acted with knowledge, and intent is an essential element of the fraud." [*Id*.]

To recover treble damages under the NJCFA, a claimant must prove that they suffered an ascertainable loss of money or property and that the loss was proximately caused by a violation. *Id*. at 23-24; N.J.S.A. 56:8-19. Moreover, "when a plaintiff fails to produce evidence from which a finder of fact could find or infer that a plaintiff suffered a quantifiable or otherwise measureable loss as a result of the alleged CFA unlawful practice, summary judgment should be entered in favor of the defendant." *Thiedemann v. Mercedes-Benz USA, LLC*, 183 N.J. 234, 238 (2005).

### B. Summary Judgment Motions

The Bank dedicates most of its written argument to the proposition that Grullon has failed to demonstrate the Bank made material misrepresentations regarding his loan modification application. [Bank Summ. J. at 11-19.]. In his opposition papers, Grullon did not challenge the Bank's loan modification argument and, at oral argument, Grullon's attorney clarified that his loan modification theory is no longer in the case:

> **CUNEO**: Now, in terms of mortgage modification, I would like to follow what happened to those claims. We argued that Mr. Grullon's claim could proceed passed a motion for 12(b)(6) on mortgage modification. This Court disagreed and dismissed those claims. So from the plaintiffs' perspective those claims were for the moment out of the federal case and we lost is what it

> comes down to. So we see that motion for summary judgment as [un]necessary.

[03/05/13 Tr. at 11:12-20.]

Contrary to the Bank's understanding of Grullon's remaining claims, in his brief, Grullon argues there is no genuine dispute of fact that the Bank violated the NJCFA by:

> **(1)** Failing to identify the "lender" in the Notice of Intent to Foreclosure (NOIs) that it issued to residential mortgage borrowers in New Jersey,
>
> **(2)** Engaging in deceptive and unconscionable practices by sending NOIs to borrowers before actually having the right to foreclose on the subject property, and
>
> **(3)** Engaging in deceptive and unconscionable practices in the course of executing documents in support of foreclosure proceedings (*i.e*., "robo-signing").

[Grullon Summ. J. at 3, 19-20; Grullon Opp. at 16-17; 03/05/13 Tr. at 13:24-14:16.]

In response, the Bank urges the Court to bar these claims and summarily deny Grullon's motion for summary judgment arguing these new legal theories and factual premises are not rooted in the second amended complaint. [Bank Opp. Br. at 1.] The Bank maintains that this case is about its loan modification practices and alleged misrepresentations made in the course of modification negotiations -- not the "entirely new" NOI-based and "robo-signing" theories of recovery. Indeed, in its motion for summary judgment, filed on the same day, the Bank states that Grullon alleges that it violated the NJCFA by: "(1) using unlawful, false, and deceptive means to foreclosure, such as using perjured affidavits; (2) using unlawful, false, and deceptive means in offering loan modifications; and (3) using unlawful, false, and deceptive means in soliciting homeowners to modify their loans." [Bank Summ. J. at 21-22.] At oral argument, the Bank aptly characterized the pending motions as "two ships passing in the night" and described Grullon's second amended complaint, and this case after the motion to dismiss, as a case "about

Grullon's loan modification and whether the Bank led him down the path to believe that he would get a loan modification." [03/05/13 Tr. at 5:19-25; 7:23-8:1.] The Bank points out that no references to NOIs appear in the second amended complaint and that although the term "robo-signing" appears in the complaint, this happened in the context of Grullon's loan modification negotiations. [Bank Opp. Br. at 3.]

The Bank argues emphatically that revised theories and claims cannot be considered by the Court, as it is "well-established that a party cannot amend its complaint through briefing submitted on dispositive motions." [*Id*. at 4.] In *Patient Care Assocs., LLC v. N.J. Carpenters Health Fund,* Judge Chesler held that when a party, "in arguing that it is entitled to summary judgment, appears to shift the gravamen of its claim and attempts to introduce new theories of relief," such "revised theories and claims cannot be considered by the Court." *Patient Care Assocs., LLC* 10-1669, 2012 WL 1299144, at *6 (D.N.J. Apr. 16, 2012) (Chesler, J.) (citing *Federico v. Home Depot*, 507 F.3d 188, 201-02 (3d Cir. 2007)). The Bank also stresses that this applies "with even greater force when the claim at issue is subject to the heightened pleading requirements of Fed. R. Civ. P. 9(b),[14] as plaintiffs' claims undisputedly are." [Bank Opp. Br. at 5; 03/05/13 Tr. at 8:25-9:4.]

The Bank also notes that despite representing to the Court several times that he was going to amend his complaint one more time, Grullon "did not do so and, in any event, the deadline to amend the pleadings has long passed." [Bank Opp. Br. at 5; 03/05/13 Tr. at 8:8.] The Third Circuit has warned, "[a] plaintiff may not amend his complaint through arguments in his brief in

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[14] In fraud cases, a plaintiff "must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). "A properly-plead fraud claim should 'ensure that defendants are placed on notice of the precise misconduct with which they are charged' and should 'safeguard defendants against spurious charges.'" MTD Slip Op. at *5 (quoting *Craftmatic Sec. Litig. v. Kraftsow*, 890 F.2d 628, 645 (3d Cir. 1989)).

opposition to a motion for summary judgment." *Amboy Bancorporation v. Bank Advisory Grp., Inc.*, 432 F. App'x 102, 111 (3d Cir. 2011) (quotation omitted); *see also Spence v. City of Philadelphia*, 147 F. App'x 289, 291 (3d Cir. 2005) ("a claim that has not been timely raised is waived.").

For his part, Grullon calls the Bank's claim of surprise "contrived," because the second amended complaint encompasses the claims that serve as the basis for his instant motion. [Grullon Reply Br. at 1.] In addition, Grullon states that discovery inquiries related to NOI policies, robo-signing, and foreclosure fees put the Bank on notice of the challenged misconduct. [*Id*. at 2-3.] While Grullon concedes, as he must, that the complaint does not mention his NOI (or any NOI for that matter), he maintains that the Bank had adequate notice because it "knew that the NOI was the first required notice initiating the foreclosure process." [Grullon Reply Br. at 1 (citing deposition testimony of Bank employees).] During oral argument, Grullon's lawyer stated the following regarding notice of the NOI-based claims:

> **COURT**: How often does the complaint really talk about NOIs?
>
> **CUNEO**: The complaint does not mention the word NOI. It talks about failure to comply with the New Jersey Fair Foreclosure Act. . . . in this particular case after – after the date for the amendment to the complaint, the New Jersey Supreme Court accepted and then decided a case dealing with NOIs. Now, that was an issue in the state proceeding. It is something that my learned colleague Mr. Fratkin acknowledged before your Honor on October of 2011. And honestly if you were involved – was involved in foreclosure issues in this state in 2011 and '12, you would know about it even if you lived in a cave. I mean, it was a huge issue.
>
> Now having said that, this case and that aspect of the case isn't just about the failure to include the lender in the NOIs. It's about a deliberate policy of the bank to conceal the existence of the lender from the borrower. That is

> something that came out in deposition testimony, just about a year ago now from a 30(b)(6) witness of the bank.

[03/05/13 Tr. at 22:7-23:11.]

On its face, it is at best high-handed, and at worst a reason to rule against Grullon summarily, for him to move for summary judgment on claims predicated on documents that are not even referenced in the second amended complaint.[15] This is especially true where the remaining legal theories sound in fraud and are subject to Fed. R. Civ. P. 9(b)'s heightened pleading requirements. That said, the Court prefers to move beyond the procedural box that Grullon appears to have put himself in, and address merits. As will be seen below, the Court is satisfied that Grullon has failed to present substantive evidence that the Bank made material representations or engaged in conduct that resulted in an injury or ascertainable loss.

**1. Concealment of "Lender" in the 2009 NOI**

Grullon's January 2009 NOI stated that questions and/or payments should be addressed to Countrywide Home Loans Servicing LP, which "services the mortgage on the property . . . representing the holder of the promissory note." [Jan. 16, 2009 NOI.] Grullon states that the Bank purposefully concealed the identity of the lender in the January 2009 NOI in violation of the New Jersey Fair Foreclosure Act ("FFA"). [Grullon Summ. J. Br. at 20-21 (citing *U.S. Bank Nat'l Ass'n v. Guillaume*, 209 N.J. 449, 458 (2012).] Further, Grullon claims the Bank "violated the [NJ]CFA by knowingly concealing material information regarding the identity of the maker or holder of the mortgage from borrowers on a class-wide basis." [*Id*. at 22.] Grullon posits, "[t]he Bank's deception was significant because 'a misunderstanding about a lender's identity could prompt a homeowner to make a critical error at a time when he or she is struggling to avert

[15] The NOI documents were, however, a focus in the state proceedings and failed to persuade the state court. [*See, e.g.,* Dec. 1, 2011 McVeigh Op. at 3; March 28, 2012 McVeigh Recon. Op. at 3, 5.]

foreclosure,' and failing to identify the lender interferes with the homeowner's ability 'to negotiate a resolution of a default.'" [*Id*. (quoting *Guillaume*, 209 N.J. at 473).]

In response, the Bank argues that (1) the proper entity was named on the notice of intent and (2) Grullon cannot show that he was injured or suffered an ascertainable loss related to the Bank's NOI. [03/05/13 Tr. at 33:21-34:1.][16]

The FFA provides that the notice of intent shall state "the name and address of the lender and the telephone number of a representative of the lender whom the debtor may contact if the debtor disagrees with the lender's assertion that a default has occurred or the correctness of the mortgage lender's calculation of the amount required to cure the default." N.J.S.A. § 2A:50-56. "Lender" is defined under the FFA as "any person, corporation, or other entity which makes or holds a residential mortgage, and any person, corporation or other entity to which such residential mortgage is assigned." N.J.S.A. § 2A:50-55.

The "lender" in *Guillaume* (cited by Grullon) was U.S. Bank, which had been assigned the mortgage and also happened to be the owner of the underlying debt. 209 N.J. at 459-460, 484. The technical violation in *Guillaume* occurred because the loan servicer for the plaintiff in the foreclosure action, America's Servicing Company, identified only itself in the NOI. *Id*. at 459-60, 462. Rather than dismiss the foreclosure action because of the technical violation, the

[16] Relying on *Starn v. BAC Home Loans Servicing, L.P.,* Slip Op., No. 947-11 (N.J. Super. Law Div., June 11, 2012), the Bank also argues Grullon's claim must fail because "[t]here is no private right of action under the FFA . . . Nor does a FFA violation constitute a basis for relief under the Consumer Fraud Act." [Bank Reply Br. 5.] This District has also held that "[t]he FFA is essentially a notice provision, which provides specific guidance to residential mortgage lenders on the steps necessary to foreclose," but it "does not mean that the legislature intended to provide homeowners the right to bring an independent action (outside of the foreclosure proceeding)" for technical FAA violations. *Rickenbach v. Wells Fargo Bank, N.A*., 635 F. Supp. 2d 389, 399 (D.N.J. 2009) (Simandle, J.) (in context of alleged improper attorneys' fees); (quoting *Whittingham v. MERS*, No. 06-3016, 2007 WL 1456196, at *5 (D.N.J. May 15, 2007) (Kugler, J.)).

trial court had permitted the service of a corrected NOI, with a new 30-day opportunity to cure. *Id*.at 457-58. Despite the borrower's urging that the foreclosure complaint should be dismissed, both the Appellate Division and the Supreme Court affirmed. *Id*. The Supreme Court held that this technical FFA violation did not provide the borrowers with a "meritorious defense" sufficient to vacate the default judgment against them. *Id*. Crucial to the court's holding and its rejection of the borrower's argument that the noncompliant NOI "confused" them, the court pointed out that the borrowers "were fully informed" of the foreclosure process against them. *Id*. at 468.

The Bank claims Grullon incorrectly relies on *Guillaume* in support of his theory that the Bank's failure to identify Fannie Mae as the lender violated the FFA. [Bank Summ. J. at 22.] This is because Fannie Mae "was and still is the owner of [Grullon's] loans, [but] was never the 'lender' as defined by the FFA because it never held or was assigned the mortgage." [Bank Opp. Br. at 11.] In other words, the Bank claims Grullon's entire theory – that had Fannie Mae been identified to him in the NOI he would have had an open line of communication to better negotiate loan modification terms – is premised on a faulty reading of the term "lender." [*Id*.][17] In addition, the Bank contends that at the time the NOI was sent, the "lender" under the FFA was MERS, which held Grullon's mortgage until assigning it to the Bank. As an electronic registration system, MERS was in no position to hold meaningful modification negotiations with Grullon. [*Id*. at 11-12 (citing *Cervantes v. Countrywide Home Loans, Inc*., 656 F.3d 1034, 1039-40 (9th Cir. 2011).] Moreover, the Bank points out that when it became the lender by virtue of the Assignment, Grullon knew of and was in contact with the Bank during the course of his default and did, in fact, negotiate his alleged loan modification agreement with the Bank.

[17] The Bank also notes that the FFA separately defines "obligation" as a "promissory note, bond or other similar evidence of duty to pay." [Bank Opp. Br. at 11.]

Finally, the Bank notes that Grullon has not identified any facts that suggest identifying Fannie Mae would have done anything for him. [03/05/13 Oral Arg. Tr. at 56:22-57:5; 55:6-12.]

In support of his argument that the Bank concealed the identity of the lender purposefully and pursuant to Bank policy, Grullon cites to the deposition testimony of the Bank's Rule 30(b)(6) designee, Sue Haumesser, the Senior VP of process control. [Grullon Summ. J. at 20.] However, at her deposition, Haumesser stated that the Bank, as loan servicer, followed the guidelines put in place by the loan owners, such as Fannie Mae. Fannie Mae, for example, wanted the Bank to be the point of contact for borrowers and had policies against disclosure of its identity to borrowers. [Haumesser Dep. at 48:21-25, 110:15-111:5, 113:17-22; Fannie Mae 2011 Servicing Guide VII, 602, Jan. 1, 2009, attached as Exh. J to Supp. Pakrul Cert.] Haumesser explained that this was because Fannie Mae was not equipped to receive calls from borrowers and, whenever contacted directly by borrowers Fannie Mae would refer the Bank to the borrowers to answer the inquiries. [Haumesser Dep. at 114:6-25; *see also* 03/05/13 Oral Arg. Tr. 56:22-57:5; 55:6-12 (Fratkin: if contacted, "Fannie Mae . . . would have said talk to the bank probably.").]

Based on the foregoing, the Court does not find that Grullon has shown the Bank's 2009 NOI contained any material misrepresentations or evidenced any unlawful practices that are causally connected to an ascertainable loss. Grullon has not shown the Bank intentionally misled or deceived him, rather, the evidence shows the Bank was following the guidelines put in place by Fannie Mae and serving as the point of contact for borrowers. [Haumesser Dep. 113:13-22.]

**2. The Bank's Ability to Foreclose**

Grullon also alleges that the Bank violated the NJCFA by "engaging in deceptive and unconscionable practices by sending NOIs to borrowers before actually having the right to

foreclose on the subject property." [Grullon Summ. J. at 3, 19-20.] Grullon argues that the Bank made a misrepresentation when it sent him the January 16, 2009 NOI that stated that "[i]f the default is not cured within thirty (30) days of the date of this letter, the mortgage payments will be accelerated and the mortgage will be considered in default, and we will immediately initiate foreclosure proceedings on your property." [Grullon Opp. Br. at 16-17.] Further, Grullon claims that the implication that the Bank had, or "immediately" would acquire, the right to foreclose on the property was "a falsehood" because it was not until April 16, 2009 that the Bank actually executed the Assignment necessary to initiate a foreclosure complaint. [*Id*. at 17.] Grullon asserts that the Bank implemented this "standard practice" of waiting three months after the NOI was mailed before considering foreclosure with the intent that borrowers, including Grullon, would rely on its misrepresentation that the loan would ultimately be approved for foreclosure referral. [*Id*.]

The Bank argues that not only has Grullon failed to proffer evidence demonstrating that it misrepresented its authority to foreclose upon his property, but all of the evidence indicates that the foreclosure was properly initiated. [Bank Summ. J. at 15-19.] The Bank maintains that the "implication" in the January 2009 NOI that it could quickly "initiate foreclosure proceedings" was not false or fraudulent because the Assignment was not necessary to establish standing to foreclose. [*Id*. at 16-17.] Citing N.J.S.A. 12A:3-109(c) and *Bank of N.Y. v. Raftogianis*, 418 N.J. Super. 323, 327-28 (Ch. Div. 2010), the Bank points out that in order to acquire authority to foreclose, all that was required was possession of Grullon's note, which was undisputedly endorsed in blank and thus a bearer note. [*Id*.] The note was physically in the possession of the Bank's wholly-owned subsidiary and, pursuant to Fannie Mae's servicing guidelines, possession of the note necessarily transferred to the Bank when foreclosure was initiated. [*Id*.] In further

support of its argument, the Bank refers the Court to Grullon's state foreclosure proceeding where Judge McVeigh struck the answer and counterclaims and held: "This Court is **not** satisfied that [Grullon has] raised sufficient facts to challenge [the Bank's] ability to go forward with this foreclosure." [McVeigh Op. at 5.]

Based on the foregoing, the Court is satisfied that the Bank did not misrepresent its authority to foreclose on Grullon's property in the January 2009 NOI. It follows that Grullon has failed to show the Bank violated the NJCFA with respect to its ability to foreclose.

**3. "Robo-signing"**

Grullon argues that the Bank's practice of "robo-signing" foreclosure-related documents violates the NJCFA. To that end, Grullon contends that the Bank claimed in documents it filed during foreclosure proceedings that affiants had personal knowledge of the substance of certain documents when, in fact, they did not. [Grullon Opp. Br. 17-18.] Specifically, Grullon states that an inaccurate Affidavit of Indebtedness ("AOI") was submitted during his foreclosure by Bank employee Melissa Viveros -- "an admitted robo-signer" who lacked personal knowledge of the documents she executed and never signed in the presence of a notary. [*Id*. at 17 (citing Viveros Dep. 64:17-22, 65:7, 73:1-6, 85:25-86:6).] Similarly, Grullon notes, the Assignment executed in the course of his foreclosure was witnessed by Bachman and attested to by Hertzler -- likewise admitted robo-signers who signed documents without personal knowledge of the information within them and failed to sign in the presence of a notary. [*Id*. at 18 (citing Bachman Dep. 105:17-24, 107:8-15, 135:12-136:1; Hertzler Dep. 86:15-87:7).] Grullon concludes that the Bank "intentionally implemented its policy of fraudulent document execution with the intention that borrowers (and the courts) rely on the robo-signed submissions in order to proceed with foreclosures." [*Id*.]

Contesting Grullon's "document execution theory," the Bank begins by clarifying that the "inaccuracies" that Grullon alleges (for the first time) with respect to the AOI signed by Viveros are either in Grullon's favor, *de minimis,* or nonexistent. [Bank Reply Br. at 5-6.] First, the incorrect amount listed as due in his AOI was actually *too low;* second, Grullon believes a particular late fee calculation is inaccurate because it is also *too low* (but the Bank has already explained to Grullon that it only charges fees for thirty days after it sends out the NOI, then stops); and third, Grullon's claim concerning interest amounts to a total of $1.91 that was incorrectly calculated. [*Id*.]

Citing *Livonia Props. Holdings, LLC v. 12840-12976 Farmington Road Holdings, LLC,* 339 F. App'x 97, 102 (6th Cir. 2010), the Bank also argues that Grullon lacks standing to challenge the Assignment or its contents because he is not a party to that assignment and it does not convey any rights or benefits to him. [Bank Summ. J. Br. at 17.] Notwithstanding the fact that Grullon lacks standing, the Bank notes that Grullon has also failed to identify any specific deficiency in the Assignment and instead relies upon: the Assignment itself; Hertzler's testimony that she does not believe she verified its contents; and Bachman's testimony that she would not have personal knowledge of the information within an assignment when she executed it. [*Id*. at 18 (citing Hertzler Dep. at 108:7-13; Bachman Dep. at 105:5-24).] The Bank points out that an assignment is not an affidavit; an individual who executes an assignment is not attesting to the truth of any then-existing fact, but rather is exercising his or her authority to initiate the transfer described in the document. [*Id*. (citing Bachman Dep. 84:8-19, 93:13-16 (stating she was a MERS officer and that she had authority to execute the assignment); Bank Reply Br. at 11.] In that regard, the fact that the document may be subsequently filed with the court to demonstrate the transfer occurred does not alter the document signer's role in executing the assignment or

render the filing a fraud on the court. [*Id*. (citing *In re Samuels*, 415 B.R. 8, 21 (Bankr. D. Mass. 2009)).] In addition, the Bank argues that Grullon's vague and conclusory allusions to "robo-signing" "cannot erase the loan documentation establishing that the proper party initiated foreclosure proceedings against Grullon." [*Id*. at 19 (citing McVeigh Op. at 2, 4).]

In light of the lack of- or de minimis nature of- the errors found on the documents said to have been "robo-signed," and Grullon's lack of standing to challenge the Assignment, the Court is not satisfied that Grullon has proffered sufficient evidence to support his NJCFA claim on this basis.

In conclusion, therefore, the Court finds that Grullon has failed to adduce evidence supporting his claim that the Bank made detrimental material misrepresentations or engaged in unlawful conduct under the NJCFA.

**4. Ascertainable Loss**

Even if the Court were to find that Grullon procedurally and substantively successfully alleged that the Bank engaged in unlawful conduct, he would still have to show that he suffered an ascertainable loss that is causally connected to this unlawful conduct. *Gonzalez*, 207 N.J. at 576; N.J.S.A. 56:8-19. "In cases involving . . . misrepresentation, either out-of-pocket loss or a demonstration of loss in value will suffice to meet the ascertainable loss hurdle." *Thiedemann*, 183 N.J. at 248. A plaintiff must allege facts "from which a factfinder could [plausibly] find or infer that the plaintiff suffered an *actual* loss." *Id*. (emphasis added). In other words, this loss must not be "hypothetical or illusory." *Id*. The Court is not satisfied that Grullon has successfully shown that he suffered any ascertainable loss that is causally related to the Bank's alleged unlawful practices.

**a. Foreclosure Fees**

Grullon asserts that upon the expiration of the 30-day period set forth in the NOI, he was assessed a uniform set of quantifiable and measurable fees for services including property inspections, the preparation of title reports, attorney fees and costs incurred by the foreclosing plaintiff, broker price opinions, and forced place insurance. [Grullon Summ. J. at 27.] Grullon claims that such costs and fees -- which would not have been imposed absent the mailing of an NOI -- constitute "ascertainable losses" for which he is entitled to recover treble damages. [*Id*.] To that end, Grullon cites a report prepared by his expert, Adam J. Levitin, which states: "The fees for the filing of an improper NOI and for foreclosure work done subsequent to the filing of the improper NOI, but prior to the filing of a proper NOI . . . are not reasonable fees. . ." [*Id*. at 28 (citing Levitin Expert Report)] Grullon further alleges that the fees assessed by the Bank amount to approximately $5,824. [*Id*. at 29 (citing Rossi Expert Report).]

In response, the Bank notes that Grullon has not paid any of the fees or charges outlined above as they only exist in the Bank's records and are tagged on his loan, not charged to Grullon himself. [Bank Opp. Br. at 22 (citing Decl. of Mark Steinman ¶¶ 4,6).] Citing *Perkins v. Wash. Mut*., 655 F. Supp. 2d 463, 468 (D.N.J. 2009) (Irenas, J.), the Bank contends that Grullon cannot base his NJCFA claim on the Bank's allegedly improper assessment of fees that are not paid as that would not constitute an ascertainable loss. [*Id*.]

The Bank also argues that New Jersey courts have refused to recognize attorneys' fees as an ascertainable loss under NJCFA when the fees were incurred in a prior unsuccessful action

such as Grullon's foreclosure action. [*Id*. at 24-25 (citing *Wenger v. Cardo Windows, Inc*., 2009 N.J. Super. Unpub. LEXIS 454 (App. Div. Mar. 16, 2009).][18]

Finally, the Bank contends that Grullon fails to establish that the robo-signing caused his foreclosure and thus the processing fees cannot be said to be causally connected to the robo-signing. Indeed, in *Bucy v. Aurora Loan Servs*., *LLC*, No. 10-1050, 2011 WL 1044045, at * 6 (S.D. Ohio Mar. 18, 2011), the court dismissed plaintiff's "robo-signing"-based fraud claim where "there [was] no reasonable inference to be drawn from" allegations of lack of personal knowledge that such irregularity "was the proximate cause of the foreclosure, where plaintiff [did] not dispute the accuracy of any of the salient facts, such as the amount owed or the amount in default."

### b. Damage to Credit Score

Grullon also alleges that the Bank's unlawful conduct damaged his credit score. [Second Am. Compl. ¶ 173.] In response, the Bank directs the Court's attention to Grullon's deposition where he admitted that he has not even checked his credit score since he applied for his mortgage. [Bank Summ. J. at 25-26.][19] Grullon disputes this fact but curiously cites to the same portion of his deposition where he admits he has **not** checked his credit score since he applied for his mortgage:

[18] The Bank also notes that Grullon's alleged damages are procedurally barred because he failed to disclose them in discovery in accordance with Rule 26, which requires that a party's initial disclosures include "a computation of each category of damages claimed . . ." [Bank Opp. Br. at 19 (quoting Fed. R. Civ. P. 26(a)(1)(A)(iii)).] In accordance with Fed. R. Civ. P. 37(c)(1), "[i]f a party fails to provide information . . . required by Rule 26(a) . . .the party is not allowed to use that information . . . to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless."

[19] The Bank also notes that to the extent that his claims rely on damage to his credit score, this state law claims are preempted by the Fair Credit Reporting Act, 15 U.S.C. § 1681t(b)(1)(F). [Bank Summ. J. Br. at 26.]

**Q:** Do you know whether your credit score has been harmed as a result of . . . the bank's actions?
**A:** Yeah. That's one of the things that has occurred.
**Q:** And how has your credit score been affected, do you know?
**A:** Yes. My credit went down, no? I can't even get a – I can't get nothing now by credit.
**Q:** Have you applied for credit and been denied?
**A:** I think one time I did, yes.
**Q:** What did you apply for?
**A:** For credit card to see…
**Q:** *Have you looked up your credit score or obtained a copy of your credit report?*
**A:** *I haven't even bothered.*
**Q:** *Do you know what your credit score is?*
**A:** *Not right now.*
**Q:** *At any time did you know what your credit score was?*
**A:** *Just at the – at the time of getting the loan for the house.*

[Grullon Response ¶ 28 (quoting Grullon Dep 52:1-53:16) (emphasis added).]

**c. Lost Occupancy Damages**

Grullon also says that some class plaintiffs were forced out of their homes which cost them additional money and that they should be given "Lost Occupancy Damages." Because Grullon is still living in his home these damages are not applicable.

**Ascertainable Loss Conclusion**

The Court is not satisfied that Grullon has adequately shown that he suffered any ascertainable loss as a result of the 2009 NOI or the "robo-signed" documents. Grullon has not produced evidence sufficient to prove that these fees are causally connected to any conduct of the Bank because he has admitted to defaulting on his mortgage payment meaning that any fees or costs incurred after the initiation of the foreclosure proceedings amount to a cost he likely would have incurred regardless of whether another entity's name was included on the NOI. Moreover, Grullon has failed to demonstrate that he suffered any ascertainable loss as a result of the Bank's document execution procedures. Lastly, while the Court is aware that ascertainable

loss need not yet been experienced as an out-of-pocket loss to the plaintiff, *Cox,* 138 N.J. at 22-23, the loss cannot be hypothetical and here many of the foreclosure fees must be approved by the state court in the still-pending foreclosure action and can be objected to by Grullon at that time.

In conclusion, therefore, the Court finds that Grullon has failed to adduce evidence supporting his claim that the Bank made detrimental material misrepresentations or engaged in unlawful conduct under the NJCFA. Additionally, he has failed to adduce sufficient evidence to show that he suffered any ascertainable loss as a result of the Bank's conduct. As such, Grullon's remaining claims cannot survive and must be dismissed on the merits.

## CLASS CERTIFICATION

The Court examines Grullon's arguments for class certification recognizing its analysis is academic because the substantive claims do not survive summary judgment. Notwithstanding, as the Bank has pointed out, Grullon has in some respect switched gears, and so has the legal landscape changed.[20] As such a thorough examination of what Grullon purports to do by way of a class action deserved scrutiny, and having looked carefully, the Court is convinced that the proposed class fails to comport with the requirements of Fed. R. Civ. P. 23 for a number of reasons, and chiefly because: (1) plaintiffs will not be able to produce class wide evidence in support of its theories of liability under the NJCFA (especially with respect to issues of ascertainable loss and causation); (2) Grullon cannot adequately represent the proposed class as a result of the specific facts and defenses associated with his claim; and (3) class action is not a superior means for adjudicating these claims when individual relief is available under New

[20] *See* discussion below concerning the Bank's participation in the National Mortgage Settlement and Consent Order in the Office of the Comptroller of the Currency, and developments in the state court.

Jersey's foreclosure proceedings. Nationwide remediation of bank practices will further complicate any determination of individual damages.

Addressing Grullon's motion: He alleges that from January 1, 2008 through October 31, 2010 the Bank violated the NJCFA on a class-wide basis by failing to identify the lender in the NOI, threatening foreclosure without the authority to foreclose, robo-signing, and assessing excessive and unreasonable fees. [Grullon Class Cert. Br. at 1-3.] In the opposition brief, the Bank maintains that these theories are entirely different from the theories previously articulated (in the complaint, amended complaints, and motion to dismiss), which was that the Bank acted improperly during the loan modification process. [Bank Class Cert Opp. Br. at 1.] Moreover, the Bank argues that given the relief sought and the problems with managing the case, class certification would not be superior to adjudicating these claims as counterclaims or defenses in the individual state foreclosure cases. [*Id*.] In response, Grullon contends that federal court is the appropriate venue for these claims in accordance with the Class Action Fairness Act ("CAFA"). [03/05/13 Oral Arg. Tr. at 26:24-27:4.]

### A. <u>Proposed Class</u>

Grullon seeks to certify the following class and subclasses:

> All New Jersey homeowners whose mortgage loans have been serviced by Bank of America during the period of January 1, 2008, until October 31, 2010, who received a Notice of Intention to Foreclose.
>
> Subclass 1: All members of the Class against whom a foreclosure complaint was initiated and for whom Assignments of Mortgage and/or Affidavits of Indebtedness were signed and/or notarized by Bank of America employees.
>
> Subclass 2: All members of the Class who were assessed fees for the preparation of title reports.

> Excluded from each of the Classes are governmental entities, the Bank, its affiliates and subsidiaries, Bank of America's current employees and current or former officers, directors, agents, representatives, their family members, and members of this Court and its staff.

[Plfs.' Class Cert. Br. at 17.]

### B. Certification Standard

Grullon bring this action pursuant Fed. R. Civ. P. 23, which allows class certification only if four requirements are met:

> **(1)** the class is so numerous that joinder of all members is impracticable;
> **(2)** there are questions of law or fact common to the class;
> **(3)** the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> **(4)** the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). In addition to the four requirements enumerated under subsection (a) above, parties must satisfy at least one of three criteria under Rule 23(b). Grullon states that he can satisfy the requirements for a class under Rule 23(b)(3), which allows class certification only when

> the court finds that the questions of law or fact common to class members *predominate* over any questions affecting only individual members, and that a class action is *superior* to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (A) the class members' interests in individually controlling prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in a particular forum; and (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3) (emphasis added). "Failure to meet any [one] of Rule 23(a) or 23(b)'s requirements precludes certification." *Danvers Motor Co., Inc. v. Ford Motor Co.*, 543 F.3d 141, 147 (3d Cir. 2008).

Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2550 (2011) (marks and citation omitted). "In order to justify a departure from that rule, a class representative must . . . possess the same interest and suffer the same injury as the class members." *Id.* (marks and citation omitted). In deciding whether a plaintiff has met his or her burden, the court is required to conduct "a thorough examination of the factual and legal allegations" which "may include a preliminary inquiry into the merits." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 317 (3d Cir. 2008) (quotation omitted). "'Factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence.'" *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 262 (3d Cir. 2011) (quoting *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 320)).

While the foregoing prerequisites for certification are distinct, the following discussion and analyses of these requirements may overlap as the concepts are often discussed together. *See, e.g., Newton v. Merrill Lynch*, 259 F.3d 154, 182, 186 (3d Cir. 2001).

## C. Rule 23 Elements

### 1. Numerosity

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." To determine if numerosity is satisfied, a court should "consider the estimated number of parties in the proposed class, the expediency of joinder, and the practicality of multiple lawsuits." *Cannon v. Cherry Hill Toyota, Inc.*, 184 F.R.D. 540, 543 (D.N.J. 1999) (Simandle, J.) (citations omitted). The numerosity "requirement does not demand that joinder would be impossible, but rather that joinder would be extremely difficult or inconvenient." *Szczubelek v. Cendant Mortg. Corp.*, 215 F.R.D. 107, 116 (D.N.J. 2003) (Brotman, J.). While no

minimum number of plaintiffs is required, "generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met." *Stewart v. Abraham,* 275 F.3d 220, 226–27 (3d Cir. 2001).

Grullon reports that in 2008, a total of 8,686 loans were referred to foreclosure counsel in New Jersey, in 2009, 16,492 loans were referred, and in 2010, 13,700 loans were referred. [Grullon's Class Cert. Br. at 18 (citing Exh. 43 (Bank of America, Loan Referrals, FCL Sales, Total Active Inventory 2008-2010)).] Further, Grullon states that in 2008, 1,119 foreclosure sales were completed, in 2009, 967 were completed, and in 2010, 1,354 were completed. *Id*.

The proposed class is without question too numerous for the action to proceed through conventional joinder.

**2. Commonality & Predominance**

The commonality requirement of Rule 23(a)(2) tends to overlap significantly with the predominance inquiry of Rule 23(b)(3), as such, these requirements will be discussed together.

"The predominance inquiry [of Rule 23(b)(3)] 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation' . . . and assess[es] whether a class action 'would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated.'" *Sullivan v. DB Inv., Inc*., 667 F.3d 273, 297 (3d Cir. 2011) (alteration added) (quoting *In re Ins. Broker Antitrust Litig*., 579 F.3d 241, 266 (3d Cir. 2009) and Fed. R. Civ. P. 23(b)(3)). Relatedly, Rule 23(a)(2)'s commonality inquiry requires questions of law or fact common to the entire class. *Id*. The commonality requirement "does not mean merely that [class members] have all suffered a violation of the same provision of law"; rather, "[t]heir claims must depend upon a common contention . . . of such a nature that it is capable of classwide resolution." *Dukes*, 131 S. Ct. at 2551. Rule 23(b)(3) "imposes a more

rigorous obligation upon a reviewing court to ensure that issues common to the class predominate over those affecting only individual class members," and it is therefore appropriate to consider "the Rule 23(a) commonality requirement to be incorporated into the more stringent Rule 23(b)(3) predominance requirement." *Sullivan*, 667 F.3d at 297 (citation omitted).

Grullon alleges that common issues of fact and law predominate over individual issues and the claims are capable of proof at trial through common evidence. More specifically, he states that the proposed class members' all allege that the Bank violated the CFA by: (1) failing to identify the "lender" in the NOIs that it issued to residential mortgage borrowers in New Jersey; (2) sending NOIs to borrowers before it had the right to foreclose on their property; (3) engaging in deceptive and unconscionable practices in the course of executing documents in support of foreclosure proceedings; and (4) assessing excessive and unreasonable fees. [Grullon Class Cert. Br. at 19.] Grullon contends that distinctions in damages should not defeat class certification because there are core common liability issues to be determined. [Grullon Class Cert. Br. at 28 (citing *Behrend v. Comcast Corp*., 655 F.3d 182, 204 (3d Cir. 2011) and *In re Community Bank of Northern Virginia*, 418 F.3d 277, 306 (3d Cir. 2005)).]

The Bank asserts that Grullon "utterly fail[s]" to establish predominance of common issues because many elements of his claims – including liability itself – cannot be proven using class wide evidence, particularly given that at least some class members will receive payments under the National Mortgage Settlement and/or OCC Consent Order. [Bank Class. Cert. Opp. Br. at 8-9.] To give context for the validity of this argument, the Court notes the following about recent developments in the nationwide remediation efforts undertaken since the housing bubble burst.

A comprehensive National Mortgage Settlement was reached on March 4, 2012 that requires the Bank to revamp its mortgage loan origination, servicing, and foreclosure processes. Under the National Mortgage Settlement, the Bank has paid $2.38 billion to a fund, which will, in turn, distribute a portion of the funds among the state governments and borrowers who were foreclosed on between January 1, 2008 and December 31, 2011 – beyond Grullon's proposed class. Payments made to foreclosed borrowers under the National Mortgage Settlement will then count as offsets against any other liability the Bank may have. [21] In addition, in April 2011, the Bank executed a Consent Order with the Office of the Comptroller of the Currency, its primary federal regulator. The OCC Consent Order requires the Bank to establish new mortgage-servicing and foreclosure practices, and initially created a Foreclosure Review applicable to foreclosures pending between January 2009 and December 2010. *In re Bank of America*¸ AA-EE-11-12, Comptroller of the Currency (April 13, 2011) at 14, 17).

Moreover, as a result of a January 7, 2013 agreement between the OCC, the Federal Reserve Board ("FRB"), and the Bank, there will be no case-by-case review of individual borrower's loans. Notably, however, an OCC press release provides:

> Ten mortgage servicing companies subject to enforcement actions for deficient practices in mortgage loan servicing and foreclosure processing [including BOA] have reached an agreement in principle with the Office of the Comptroller of the Currency (OCC) and the Federal Reserve Board to pay more than $8.5 billion in cash payments and other assistance to help borrowers.
>
> *The sum includes $3.3 billion in direct payments to eligible borrowers and $5.2 billion in other assistance, such as loan modifications and forgiveness of deficiency judgments*. The payments involve mortgage servicers operating under enforcement

[21] Going forward, the National Mortgage Settlement establishes a Monitor, quarterly reports, and various metrics to keep the Bank's foreclosure processes free from problems. It also specifies timelines for implementing proper procedures, and penalties for failing to comply. Consent Judgment at 1-10.

> actions issued in April 2011 by the OCC, the Federal Reserve, and the Office of Thrift Supervision. *The agreement ensures that more than 3.8 million borrowers whose homes were in foreclosure in 2009 and 2010 with the participating servicers will receive cash compensation in a timely manner*.
>
> *Eligible borrowers are expected to receive compensation ranging from hundreds of dollars up to $125,000, depending on the type of possible servicer error*.
>
> * * *
>
> As a result of this agreement, the participating servicers would cease the Independent Foreclosure Review . . . Eligible borrowers will receive compensation whether or not they filed a request for review form, and borrowers do not need to take further action to be eligible for compensation.

[Jan. 7, 2012 OCC Press Release; *see also* February 28, 2013 amendment to the OCC Consent Order.]

Lastly, on April 4, 2012, the New Jersey Supreme Court issued an order in furtherance of its holding in *U.S. Bank N.A. v. Guillaume*, 209 N.J. 449 (2012) that appointed judges to hear "summary actions"[22] to allow service of corrected NOIs in pending foreclosure actions.

The Bank notes that Grullon's purported experts never considered the effects of the settlements and had they done so, they would have observed that the OCC Consent Order requires the Bank to review foreclosures pending at any time during 2009 or 2010, and to "reimburse[e] or otherwise appropriately remediat[e] . . . financial injury identified." [*Id*. at 13 (citing OCC Consent Order at 14, 17).] Similarly, the Bank claims that the National Mortgage Settlement will pay cash to borrowers whose houses were taken in foreclosure between January 2008 and December 2011. [*Id*. (citing Consent Judgment at 4; Settlement Executive Summary at 4) (estimating the payments will be around $2,000 each).] The Bank concludes that the National Mortgage Settlement explicitly states that any payments a borrower receives will be considered

[22] Judge McVeigh was appointed to this review board.

an "offset and operate to reduce any other obligation Defendant has to the borrowers to provide compensation." [*Id*. (citing Consent Judgment at 2).]

In response, Grullon argues that these government settlements do not serve as a bar to class certification. First, he claims that the National Mortgage Settlement contemplates parallel class actions, because it provides that "[c]laims and defenses asserted by third parties, including individual mortgage loan borrowers on an individual or class basis" are "hereby not released and are specifically reserved." [Grullon Class Cert. Reply Br. at 1-2 (quoting Consent Judgment at G-6, G-10).] In addition, Grullon points out that the OCC Consent Order provides no release of borrowers' rights and does not cover the first year of the proposed class period. [*Id*. at 2 (citing OCC Consent Order at 14).] Finally, Grullon alleges that the April 4, 2012 order does not address the forms of monetary damages awards or equitable relief sought here. [*Id*.]

With respect to damages under the NJCFA, the Bank argues that these claims cannot feasibly be tried on a class wide basis because the elements of ascertainable loss and causation, essential to any NJCFA claim, are not subject to class wide proof and because each plaintiff would be subject to highly individualized defenses. [Bank Class. Cert. Opp. Br. at 16-17 (citing *In re Hydrogen Peroxide*, 552 F.3d at 311 ("If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable.").] The Bank notes that on the NOI claim, proof that the NOI caused a "critical error," along with exactly what financial injury it caused, would have to be accomplished individually; for the robo-signing claim, ascertainable losses will be based on lost occupancy; and for the fees claim, some members (like Grullon) may not have been damaged because they never paid any fees. [*Id*. 18-19.] In response, Grullon argues that only he, as the named plaintiff, must satisfy this threshold NJCFA standing requirement. [Grullon Class Cert. Reply Br. at 8 (citing *Laufer v. U.S. Life Ins. Co. in City of*

*New York*, 385 N.J. Super. 172, 188 (2006)).] In the alternative, Grullon states that ascertainable loss can be established on a class wide basis because the defective NOIs and robo-signed foreclosure documents resulted in the imposition and continuance of procedurally improper foreclosures that caused ascertainable losses in the form of foreclosure-related fees, harmed credit scores, payment of attorneys' fees, higher reinstatement calculations, and/or lost occupancy damages. [*Id*. at 8-9.] Grullon claims that variations in class members' ascertainable losses can be identified and addressed through a review of AS-400s for fee-related damages, and expert proof for lost occupancy damages. [*Id*. at 10.]

Regarding the causation element, the Bank argues that on the NOI claim, plaintiffs will have to prove that each class member was affected in the same way by the Bank's allegedly defective NOIs; for the Bank's right to foreclose claim, an individualized inquiry on the timing of the NOI versus the assignment would need to be conducted for each class member;[23] for the robo-signing claim, plaintiffs will have to show that robo-signing actually occurred in their individualized circumstance and that it actually caused foreclosures that would not have otherwise occurred or would have occurred later; and for the fees claim, plaintiffs will have to show they paid fees and explain how they can be represented by a person who has not paid fees. [Bank Class. Cert. Opp. Br. at 20-21.] In response, Grullon argues that causation can be established on a class wide basis because the class members would not have been charged foreclosure-related fees, been required to pay attorneys' fees in defending foreclosure, suffered damage to their credit scores, and/or have been subject to heightened reinstatement calculations, if the Bank had not improperly instituted and then continued foreclosure proceedings against them. [Grullon Class Cert. Reply Br. at 10-11.]

[23] Grullon rejects this argument because he claims it was the Bank's standard practice to execute assignments after the NOI was mailed. [Grullon Class Cert. Reply Br. at 11.]

**3. Superiority**

The superiority requirement set forth in Rule 23(b)(3) requires the court to "balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication." *Danvers*, 543 F.3d at 149 (citation and internal quotations omitted). A class action is superior only if "there is no other available method of handling multiple plaintiffs' claims which has greater practical advantages." *Novak v. Home Depot USA, Inc.*, 259 F.R.D. 106, 116 (D.N.J. 2009).

Grullon claims that the prosecution of this litigation as a class action is the superior method of proceeding with this case because it would "verge on absurd" to require thousands of individual cases to be filed to address the claims in this case – with the attendant possibility of inconsistent adjudications. [Grullon Class Cert. Br. at 30 (citing *Amchem*, 521 U.S. at 617).] Grullon notes that these concerns are particularly apposite where, as here, the class will certainly contain poor and marginalized homeowners who are unlikely to be able to litigate these cases individually. [*Id*.] In response to this argument, the Bank states that the notion that these members would have no opportunity to litigate their claims is false because New Jersey is a judicial foreclosure state that requires Banks to file an individual adversary proceeding against every single class member and allows each borrower to raise defenses and counterclaims based on the exact issues here. [Defs. Class Cert. Opp. at 27-28.] In addition, the Bank argues that the each individual plaintiff has adequate incentive to bring her claim as an individual action given the fact that the NJCFA offers treble damages plus attorney's fees and costs. [*Id*. at 29-30.]

The Bank also argues that Grullon fails to demonstrate superiority because: (1) the National Mortgage Settlement, OCC Consent Order, and April 4 Order, as well as the individual foreclosure actions that every class member may face, provide a superior method of adjudication;

and (2) the proposed action would be unmanageable, especially because Grullon has not offered a trial plan. [Bank Class. Cert. Opp. Br. at 8-9 (citing *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig*., 174 F.R.D. 332, 353 (D.N.J. 1997) (Simandle, J.)).]

The Consent Order addresses the Bank's robo-signing problems by requiring "processes to ensure that all factual assertions made in . . . affidavits, or other sworn statements . . . are accurate, complete and reliable [and] . . . based on personal knowledge or a review of the Bank's books and records . . .[and] executed and notarized in accordance with state legal requirements." [Defs. Class Cert. Opp. Br. at 10-11 (citing OCC Consent Order at 6-7).] The settlements also address the imposition of unreasonable or excessive fees. They require the Bank to ensure "that all fees, expenses, and other charges . . . are assessed in accordance with the terms of the underlying mortgage" and legal requirements; to assess the reasonableness of fees charged to delinquent borrowers; and to reimburse borrowers for excessive fees paid. [*Id*. at 11 (citing OCC Consent Order at 8, Consent Judgment at 35-37).] In addition, the settlements protect against foreclosures based on improperly-assigned mortgages by, for example, requiring the Bank to ensure that ownership of the promissory note or mortgage is properly documented, including its transfer, delivery, and endorsement. [*Id*. (citing OCC Consent Order at 7; Consent Judgment at 8).] Lastly, the April 4, 2012 order in furtherance of *Guillaume* allows corrected NOIs to be served in pending foreclosure actions to redress any issues implicated by incorrect NOIs, and to provide individual mortgagor-defendants an opportunity to object to the procedure. The Bank claims, the order "provides a judicially-administered method for solving NOI problems that is superior to plaintiffs' proposed class action, which appears to seek only damages." [Bank Class Cert. Opp. Br. at 12 (citing *Kamm v. California City Development Co*., 509 F.2d 205 (9th Cir. 1975)).]

In response, Grullon states that "[w]hile a limited number of putative class members may receive corrective NOIs and/or accept some sort of financial relief as part of the Consent Judgment or OCC review process that overlaps with the relief sought in this case, a class action remains the superior mechanism by which to prosecute this case." [Grulon Class Cert. Reply Br. at 3.] In addition to arguing that the number of class members who receive payment under the government actions is far from certain, Grullon notes that the Court can fashion remedies to account for the injuries that have been redressed and offset them accordingly. [*Id*. at 4.][24] Grullon also notes that the NJCFA provides for recovery of treble damages and attorneys' fees that would not be recouped under the government recoveries. [*Id*. at 5.] In sum, Grullon argues that these differences in damages do not undermine class certification as all of the class members were injured by a common fraudulent scheme by the Bank. [*Id*. at 4.]

**4. Typicality**

Rule 23(a)(3) also requires that the representative plaintiff's claims be "typical" of those of other class members. Akin to the predominance inquiry, the commonality and typicality requirements "tend to merge." *Gen. Tel. Co. of Southwest v. Falcon*, 475 U.S. 147, 157, n. 13 (1982); *Wilson*, 256 F.R.D. at 486, n.11 (same). "The typicality requirement is designed to align the interests of the class and class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals." *In re Warfarin Sodium Antitrust Litig*., 391 F.3d 516, 531 (3d Cir. 2004) (quotation marks and citation omitted).

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[24] Grullon suggests using a Claim Form that instructs that the signers attest that they have not already received compensation, or, if they have, how much. [Grullon Class Cert. Reply Br. at 4.] In addition, Grullon claims that the Court will not need to engage in substantial individualized inquiries regarding offsets because the Bank will be involved in identifying homeowners eligible for relief under the Consent Judgment. [*Id*. at 7.]

"[T]ypicality . . . does not require that all putative class members share identical claims," *In re Warfarin*, 391 F.3d at 531-32, and "[f]actual differences will not render a claim atypical if the claim arises from the same event or practice of course of conduct that gives rise to the claims of the class members, and it is based on the same legal theory." *Hayworth v. Blondery Robinson & Co.*, 980 F.2d 912, 923 (3d Cir. 1992). In other words, "'[t]he threshold for satisfying the typicality prong is a low one.'" *Wilson*, 256 F.R.D. at 486 (quoting *Weisfeld v. Sun Chemical Corp.*, 210 F.R.D. 136, 140 (D.N.J. 2002) (Pisano, J.))

Grullon alleges that his claims against the Bank are typical of the claims of the class because: he received an NOI from the Bank that did not identify the lender; his Assignment was executed at some point after he received the NOI; he was harmed by the Bank's "fraudulent and unconscionable course of dealings in the course of foreclosure-related matters" ("robo-signing"); and he incurred "excessive and unreasonable fees for the preparation of title reports." [Grullon Class Cert. Br. at 25.] In this respect, Grullon must make the same arguments to prosecute his claims as would be made by members of the proposed class. [*Id.*] Grullon also alleges that typicality is satisfied because the Bank acted pursuant to a series of policies and practices uniform to the proposed class. [*Id.* at 26.]

In response, the Bank contends that the proposed class cannot satisfy the typicality element because each plaintiff will face individual defenses. [Bank Class Cert. Opp. at 22-23.] In this regard, the Bank alleges that Grullon's situation is unique and will likely become a major focus of the litigation. Specifically, the Bank notes that if judgment were entered against Grullon in the state foreclosure proceeding, the entire controversy doctrine and *res judicata* would preclude him from even joining this lawsuit, much less representing the class. Moreover, the Bank alleges that entry of judgment against Grullon will continue to be delayed due to the

pendency of this case, meaning Grullon's incentives are quite different from those of the unnamed class members he proposes to represent: "the longer this litigation lasts, the longer he gets to live – for free – in the house." [*Id*. at 23.] In addition, the Bank claims that Grullon has not suffered any losses yet because he will not be charged the fees he challenges until the Bank obtains judgment in the state foreclosure proceeding. [*Id*. at 23-24.]

**5. Fair & Adequate Protection by Class Counsel and Representative Party**

The Court must be satisfied that the representative party will "fairly and adequately protect the interests of the class." *In re Warfarin*, 391 F.3d at 532. The adequacy of representation consists of two inquiries: the first "tests the qualifications of the counsel to represent the class" and the second "seeks to uncover conflicts of interest between named parties and the class they seek to represent." *Id*. (citation omitted); *see also Kalow v. Springut, LLP v. Commence Corp*., 272 F.R.D. 397, 405 (D.N.J. 2011).

Evaluating the qualifications of counsel under the first inquiry, involves considering whether the plaintiff's attorney is qualified, experienced, and able to conduct the litigation. *In re Prudential II,* 148 F.3d at 312 (quoting *In re Gen. Motors*, 55 F.3d at 800). Grullon states that the class is represented by competent and experienced counsel who have invested considerable time and resources into the prosecution of this action and who have had extensive experience in successfully litigating various forms of class actions and other complex matters, including consumer fraud and antitrust cases. [Grullon Class Cert. Br. at 27.] In response, the Bank argues that proposed class cannot show adequacy of representation because they have engaged in claim-splitting, face unique defenses, and propose relief duplicative of that provided in the OCC Consent Order, the National Mortgage Settlement, and the April 4 Order. [Bank Class Cert. Opp. Br. at 8.] The Bank claims that "[w]hen a named plaintiff asks the court to replicate the work of

government agencies, adding only the costs of classwide notice and attorneys' fees, that is a sign he is serving the interest of the attorneys instead of the absent class members." [*Id*. at 16 (citing *In re Aqua Dots Prods. Liab. Litig*., 654 F.3d 748, 752 (7th Cir. 2011)).]

Evaluating whether a conflict exists under the second inquiry requires the court to determine whether the class representative is part of the class, possesses the same interests the class, and suffers the same injury as the other class members. *Amchem Prods, Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997). This inquiry is closely tethered to the inquiry into typicality. *Danvers Motor Co, Inc. v. Ford Motor Co, Inc*., 543 F.3d 141, 149 (3d Cir. 2008). The goal is to ensure that the named plaintiff's claims "are not antagonistic to the class." *Id*. at 150 (quoting *Beck v. Maximus, Inc*., 457 F.3d 291, 296 (3d Cir. 2006)).

Grullon maintains there is no conflict between him as the class representative and members of the proposed class because he received an "improper" NOI from the Bank, his foreclosure documents were robo-signed, and he incurred "unreasonable title report fees in excess of industry norms." [Bank Class Cert. Opp. Br. at 27.] The Bank contends that Grullon's representation of the class is flawed for a number of reasons, including the fact that he has not paid the title report fees the class seeks to recover. In addition, the Bank points to the fact that Grullon now seeks to certify a class only under the NJCFA claim – not the fraud or negligent misrepresentation claim or any claim based on the Bank's loan modification program as originally alleged. [Bank Class Cert. Opp. Br. at 25.] Dropping the other claims will prevent any class members from asserting them in the future[25] and "is evidence that the named plaintiff[ ] [is] not adequate class representative[ ]." [*Id*. at 25-26.] In response, Grullon argues that his

[25] The Bank claims that if this class is certified, there is a substantial risk that unnamed class members will be precluded from raising the breach of contract, breach of covenant of good faith and fair dealing, fraud, and constructive fraud claims originally outlined in the Complaint. [Bank Class Cert. Opp. at 26.]

interests are wholly aligned with those of the class and claims that he has suffered losses as a result of the Bank's misconduct. [Grullon Class Cert. Reply Br. at 11-12.] Moreover, Grullon contests the Bank's "claim-splitting" theory and notes that Rule 23 contemplates that courts can certify specific issues and that absent class members would be afforded protection through notice and opt out rights. [*Id*. at 15.]

**6. Proposed "Assessed Fees" Subclass**

The Bank claims that Grullon's proposed subclass for "[a]ll members of the Class who were assessed fees for the preparation of title reports" is not certifiable because it is overly broad in that it includes many who have never paid any fees and thus lack standing to challenge them. [Bank Class Cert. Opp. Br. at 21.] In response, Grullon notes that while the Court should not find this proposed subclass overly broad, if it does, he requests that the Court certify the subclass with a narrowed definition. [Grullon Class Cert. Reply Br. at 9, n. 8.]

**D. <u>Class Certification Determination</u>**

For all the foregoing reasons, even had his NJCFA claim survived, Grullon has not proposed a class certifiable under Fed. R. Civ. P. 23.

Date: March 28, 2013

/s/ Katharine S. Hayden
Katharine S. Hayden, U.S.D.J.