UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

BRIAN C. WILLIAMS, et al., Plaintiffs, v. THE ESTATES LLC, et al., Defendants.	Case No.: 1:19-cv-01076-CCE-JLW

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

The Estates and its members perpetrated an unlawful bid-rigging scheme in violation of Section 1 of the Sherman Antitrust Act (the "Sherman Act") by manipulating foreclosure sales in North Carolina and across the country. This is not speculation on the Plaintiffs' part – Plaintiffs know this because of the sworn testimony of one of the Estates' members and documents distributed to those members on the Internet (the validity of the testimony and documents is not disputed). The named Plaintiffs are property owners whose homes were sold at foreclosures at which prices were manipulated by bid-rigging, and they are bringing this Complaint on behalf of the many other individuals and companies who lost their properties as part of this illegal scheme. A search of public records shows the scope of this conspiracy – hundreds of LLCs were formed to bid at dozens of foreclosure sales. Discovery is about to begin, and while discovery is essential to determine fully the multi-state scope of this enterprise, the extent and nature of damages, and the ultimate size of the class, the Court has more than enough information today to certify a national class in this case and let the case move forward on that basis.

STATEMENT OF FACTS

The Estates, LLC, is a membership organization that, together with The Estates (UT), LLC; The Estates Real Estate Group, LLC; and Timbra of North Carolina, LLC, (collectively the "Estates Defendants"), provides information to its members about foreclosures in North Carolina through an online database compiled from public data and coordinates bidding at foreclosure sales between and among its members. (ECF No. 1 at ¶¶ 1, 9–12, 25-27). Members pay a monthly user fee to access the database, as well as an "acquisition fee" for any property acquired through the database, and they must split any profits with the Estates Defendants. *Id.* at ¶ 28. Membership in The Estates also requires members to use real estate agents, brokers, and closing attorneys selected or approved by The Estates, and members must establish separate companies to participate in foreclosure sales. *Id.* at ¶¶ 31–33.

Key to the plaintiffs' claims, all members in The Estates agree that no more than one member may bid on a given foreclosure. (ECF No. 1 at ¶ 38). Members interested in a property indicate a desire to bid on that property, whereupon The Estates ranks the potential bidders and determines who among its members will be the winning bidder allowed to submit a bid on the property. *Id.* at ¶¶ 47, 50. The Estates then assigns an "Acquisition Assistant" to attend the foreclosure sale and place the bid for the member chosen to bid on that property. *Id.* at ¶ 51.

Estates member Carolyn Souther, in testimony given under oath in another proceeding, described the bid-rigging process in some detail:

> Q. Does The Estates coordinate which properties get bidded on, is that done through the database?
>
> A. No, the database simply gives us properties.
>
> Q. What happens if three investors want to bid on a property?
>
> A. I don't know. ***If I want to bid on something, and someone else says, I want to bid, one of us needs to back down***.
>
> Q. What do you mean back down?
>
> A. I don't want to bid -- if I know somebody -- even way back, if I knew that someone wanted to buy a property and I did as well, ***I'll say no, you take this one, I'll go work on another one. So, we're not bidding against, again, my friend.***[1]
>
> …
>
> Through The Estates -- I know what you're asking. You're saying through The Estates is it -- ***So, we know if one us is bidding on a property, then the others go back for another, or we find a different property.***

Souther Deposition 57:6-22, 58:7-11. (ECF No. 1, ¶ 39), Declaration of James C. White ("White Decl.), Exh. 2.

She went on to testify:

[1] All emphasis is added unless otherwise noted.

Q. Is there any requirement if you get information on a property from The Estates database, that you tell The Estates that this is where you learned about it?

A. Yeah, if I find a property through The Estates, then I am going to pay a finders fee for that, that's part of my commitment to them.

Q. ***And part of your commitment is that you're not going to bid on a property with another Estates member, against another member?***

A. ***Right.***

…

A. ***I will not bid against someone else bidding on The Estates. If somebody else finds the property, I will not go in and bid against them.***

Q. ***Is that something that you're prohibited from doing?***

A. ***It's an agreement that we make within The Estates.***

…

A. ***If I did want to bid on it, I would call that person, and I have, to say are you still interested in this particular property, in which case they might say, no, I'm not, and go for it. And I'll say okay. Or they'll say, I am. And I'll say, let me know if you decide against it.***

Souther Deposition 59:6-16, 102:12-18, 102: 21-103:2 (ECF No. 1, ¶ 40), White Decl., Exh. 2.

She also expressly testified about how bid prices were coordinated:

Q. Approximately, how many people are in The Estates that you would discuss such a bid; are going to do this, or are you not going to do this with?

A. I'm not sure I understand.

Q. Whenever you're talking about the people you're not going to bid against, are you talking about five people, ten people, 100 people?

A. There might be two interested in a property. If it's a nice property, and it looks like it would renovate and flip easily, there might be four or five people interested in that property. Everybody in the room might be interested in a property if it's a great investment.

…

Q. You talked about just you, personally, despite whatever agreement, wouldn't bid on a property that someone else was interested in, and ***you would talk to them about it?***

A. Yes.

Q. Was that because you didn't want to unnecessarily drive the price up for them?

A. Nothing to do with it.

Q. Why --

A. If they say, like on this HOA, they say, ***I'm only willing to bid $10,000 for it, then at the point they hit the 10,000, and they're not going higher, I can call*** and say, are you still not interested. And they'll say, no, I'm done.

In that case I'll ask Tonya to go bid on my behalf.

Souther Deposition at 103:2-16, 108:15 – 109:5 (ECF No. 1, ¶ 41), White Decl., Exh. 2.

She also testified:

> Q. Do[es] [The Estates] have to approve, saying yes, no, you can go bid on this property because they cleared it in terms of the other investors?
>
> A. ***Again, we don't cross bids. If someone is interested in a property, I'm not going to bid against them, or will they bid against me. That's probably within the organization.***

Souther Deposition at 99:16-23 (ECF No. 1, ¶ 42), White Decl., Exh, 2.

Significantly, neither Souther nor the Estates deny any of this. In her Answer to Plaintiffs' Complaint, Souther repeats the following in response to paragraphs 39 – 42, which contain the above testimony:

> This paragraph contains a summary of Defendant's deposition testimony… . To the extent that an Answer is required, admit that the deposition testimony states what was reported but deny that given the context, it meant what the Plaintiffs purport that it means.

Answer of Carolyn Souther (ECF No. 51, ¶¶ 39 – 42). In their own answer, the Estates Defendants do not dispute the validity of Souther's testimony, simply stating: "This paragraph contains a summary of Carolyn Souther's purported deposition testimony of which Defendants are without personal knowledge."

Answer of The Estates, LLC, The Estates (UT), LLC, The Estates Real Estate Group, LLC, and Timbra of North Carolina, LLC (ECF No. 49, ¶¶ 39-42).

The Plaintiffs owned homes in North Carolina that were sold in foreclosure proceedings to a member, or to an entity created by a member, using the services provided by the Estates Defendants. (ECF No. 1 at ¶ 2). Brian Williams owned a townhome in Durham, North Carolina. *Id.* at ¶¶ 57–60. In August 2015, the townhome went into foreclosure after he failed to pay money owed to the homeowners' association. *Id.* at ¶¶ 58–60. This property was listed in The Estates database. *Id.* at ¶ 63. The defendant Versa Properties, LLC is either a member of The Estates or was formed by a member at the direction of The Estates for the purpose of buying the Williams property. *Id.* at ¶ 62. Versa or its members entered into an agreement with The Estates and the other members that only one member could bid on the Williams property. *Id.* at ¶ 65. Versa was chosen as the member to bid on the property. *Id.* at ¶ 66. Tonya Newell, an acquisition assistant for The Estates, *id.* at ¶ 14, placed the bid and paid a deposit on the Williams property on behalf of Versa, and Versa's bid was the highest at the foreclosure sale. *Id.* at ¶¶ 61, 68. Versa then purported to assign its bid to Red Tree Holdings, LLC, a company set up at the direction of The Estates. *Id.* at ¶¶ 20, 69.

The plaintiffs De Leon and Da Costa owned a townhome in Raleigh and had a similar foreclosure experience. (ECF No. 1 at ¶¶ 82, 85). Maldives, LLC,

another company set up at the direction of The Estates or one of its members, *id.* at ¶ 20, learned of and bid on the De Leon property through The Estates database and was chosen by The Estates to be the sole bidder on the property. *Id.* at ¶¶ 86–92. Tonya Newell placed the bid and deposit on the property on behalf of Maldives, and Maldives was the highest bidder. *Id.* at ¶¶ 86, 91.

PROPOSED CLASS

Plaintiffs seek certification of both a National Sherman Act Class and a North Carolina sub-class:

- **The National Sherman Act Class:** A class of all persons and entities whose properties were sold through foreclosure proceedings at which a Member of the Estates was the high bidder and at which the Estates placed the bid deposit on their behalf (the "Proposed Sherman Act Class").

- **The North Carolina Sub-Class:** A sub-class of North Carolina Plaintiffs consisting of all persons and entities whose properties were sold through foreclosure proceedings in North Carolina at which a Member of the Estates was the high bidder and at which the Estates placed the bid deposit on their behalf who have standing to bring North Carolina state law claims.

Although the Class Action Complaint limits the class to persons and entities whose properties were sold at foreclosure proceedings in North Carolina, Compl. ¶99, examination of public records demonstrate that the Estates is also operating in other states, including at least South Carolina, and

Texas. White Decl ¶ 5. The standards the Court will apply in determining whether to certify a class are the same whether the class is national or limited to North Carolina, and there will be no prejudice to the Defendants if the Sherman Act class extends outside North Carolina's borders. *See Roman v. ESB, Inc.*, 550 F.2d 1343, 1348-49 (4th Cir. 1976) (noting that a court has broad discretion in deciding whether to allow the maintenance of a class action and that the determination of an appropriate class usually should be predicated on more information than the complaint itself affords).

ARGUMENT

Class action lawsuits have long been recognized as an essential tool for adjudicating cases that involve multiple claims, have similar factual and/or legal issues, and might be too modest to warrant prosecuting on an individual basis. The nature of this case – multiple properties lost to foreclosures tainted by bid-rigging in violation of the Sherman Act and state laws – makes it precisely the sort of action that readily lends itself to class treatment.

In crafting Rule 23 , "the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'" *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997) ("Amchem"). Class actions give voice to plaintiffs who "would have no realistic day in court if a class action were not available." *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 809 (1985). "In addition

to promoting judicial economy and efficiency, class actions also 'afford aggrieved persons a remedy if it is not economically feasible to obtain relief through the traditional framework of multiple individual damage actions.'" *Gunnells v. Healthplan Services*, 348 F.3d 417, 424 (4th Cir. 2003) ("*Gunnell*s") (quoting 5 James Wm. Moore et al., Moore's Federal Practice § 23.02 (3d ed. 1999)). The members of this class are property owners who have been through the foreclosure process, and who were likely not even aware of the existence of the Estates and its impact on the foreclosure action that cost them their homes.

Plaintiffs seeking to certify a class must satisfy each of the requirements of Fed. R. Civ. P. 23(a) and at least one of the three criteria for certification under Rule 23(b). *See Amchem*, 521 U.S. at 614–15 (1997).

I. The Proposed Classes Satisfy the Requirements of Rule 23(a).

Before the Court can consider the criteria for class certification under Rule 23(a), Plaintiffs must demonstrate two threshold matters: (1) that a precisely defined class exists, *Haywood v. Barnes*, 109 F.R.D. 568, 576 (E.D.N.C. 1986), and (2) that the Plaintiffs as class representatives are members of the proposed class. *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977).

Both are true here. As set out above, the Plaintiffs seek certification of a carefully defined class and sub-class. The Proposed Sherman Act Class consists

of all persons and entities whose properties were sold through foreclosure proceedings at which a Member of the Estates was the high bidder and at which the Estates placed the bid deposit on their behalf, and the North Carolina Subclass is limited to North Carolina foreclosures, since only those class members would have standing to bring the related state law claims. The class is precisely defined and readily identifiable, satisfying the precise definition requirement. *Haywood*, 109 F.R.D. at 576.

"The plaintiffs need not be able to identify every class member at the time of certification." *Scott v. Family Dollar Stores, Inc.,* No. 3:08-cv-00540-MOC-DSC, 2016 U.S. Dist. LEXIS 105267, at *14 (W.D.N.C. June 24, 2016). Where, as here, the identities of all class members can be readily determined from defendants' business records, the Plaintiffs have demonstrated that the class is readily ascertainable. *Id.* at *15.

Plaintiffs Williams and the de Leons both had properties that were, in fact, sold through foreclosure proceedings in North Carolina at which members of the Estates bid and at which the Estates paid the initial deposits on behalf of its members. Because the testimony of Carolyn Souther demonstrates the pervasive bid-rigging that was inherent in the Estates' system, this is sufficient to make both Plaintiffs appropriate representatives to the defined class and sub-class.

Because there is a well-defined class and sub-class, and because the Plaintiffs are appropriate representatives of those classes, the Court should proceed to examine whether the numerosity, commonality, typicality and adequacy requirements of Rule 23(a) are satisfied. "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule--that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Although the district court does not examine the merits of the underlying claims when it decides a motion for class certification, "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question[.]" *Id.* (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982) ("*Falcon*")). "Thus, while an evaluation of the merits to determine the strength of plaintiffs' 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." *Gariety v. Grant Thornton*, 368 F.3d 356, 366 (4th Cir. 2004). Nonetheless, it is well-settled that courts should "give Rule 23 a liberal rather than a restrictive construction, adopting a standard of flexibility in application which will in the particular case best serve the ends of justice for the affected parties and . . . promote judicial efficiency." *Gunnells v. Healthplan Servs.*, 348 F.3d 417, 424

(4th Cir. 2003). The merits of a claim may be considered only when "relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Brown v. Nucor Corp.*, 785 F.3d 895, 903 (4th Cir. 2015).

A. Numerosity -- The Class is sufficiently numerous and joinder is impracticable.

The numerosity requirement of Fed. R. Civ. P. 23(a)(1) mandates that the class be "so numerous that joinder of all members is impracticable." There is no set number of members necessary for class certification and the decision to certify or not certify a class must be based upon the particular facts of each case. *See Haywood*, 109 F.R.D. at 576-77 (courts have "certified classes composed of as few as eighteen . . . and twenty-five members") (citations omitted). The Fourth Circuit has held that "no specified number is needed to maintain a class action under Fed. R. Civ. P. 23 ; application of the rule is to be considered in light of the particular circumstances of the case." *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967).

"Size, modesty of monetary interest, inability to locate members and difficulty of obtaining jurisdiction should all be considered in determining impracticability of joinder." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 183 (1974). Impracticability of joinder is not determined by a numerical test alone, in addition to the potential size of the class, the Court should also consider the

geographic dispersion of the class. *In re Se. Hotel Props. Ltd. P'ship Inv'r Litig.*, 151 F.R.D. 597, 601 (W.D.N.C. 1993).

Plaintiffs contend that members of the Estates are required to form individual LLCs for each foreclosure. This makes it far more difficult to identify individual class members, since a different entity was involved in each transaction. However, the Estates also centralized the creation of these entities, and Plaintiffs contend that members were required to use an attorney and broker recommended by the Estates. The entities that are Defendants in this action were formed by attorney Stephanie Cooper Roberts, and Roberts serves as their Registered Agent. A search of the North Carolina Secretary of State's database for additional limited liability companies formed by Roberts that appear to be formed for the purpose of purchasing real estate produced a list of 236 entities that were potentially involved with the Estates. White Dec ¶ 3. Exh 1. One hundred and nine separate managers are identified – all of whom (along with their LLCs) are possible defendants. *Id.* at ¶ 4. Cross-referencing these LLCs with registers of deeds in some of the largest counties help to locate some (but far from all) of the foreclosures they bid on, and this admittedly incomplete and fragmentary method has already allowed Plaintiffs to identify an initial 40 potential class members. *Id.* at ¶ 4. These potential class members are located in all three of North Carolina's federal judicial districts, *id.*, and discovery will likely identify far more potential plaintiffs in North Carolina and other states.

Even this initial public records research alone provides more than enough information for Plaintiffs to satisfy the numerousity requirements of Rule 23(a)(1) .

II. Commonality - The Named Plaintiffs and Class Members share common questions of law and fact.

Under the "commonality" requirements of Rule 23(a)(2), Fed.R.Civ.P., at least one common question of law or fact must exist among class members. *See* Haywood, 109 F.R.D. at 577-78. A common question is one that arises from a "common nucleus of operative facts" regardless of whether "the underlying facts fluctuate over the class period and vary as to individual claimants." *Id.* at 577 (*quoting Cohen v. Uniroyal, Inc.*, 77 F.R.D. 685, 690-91 (E.D.Pa. 1977)). But it is not necessary that all of the questions of law or fact in a case be common to all putative class members, only that "a single common question . . . exist." *Rodger v. Elec. Data Sys. Corp.,* 160 F.R.D. 532, 537 (E.D.N.C. 1995). "Indeed, a single common question is sufficient to satisfy the rule." *Haywood*, 109 F.R.D. at 577.

The principal question in this case, a question that impacts all prospective class members, is whether Defendants engaged in an illegal conspiracy to rig bids at public foreclosure auctions giving rise to civil claims under the Sherman Act. Other questions flow from that: who are the co-conspirators; what was the duration of the conspiracy; what is the geographic scope of the conspiracy.

Here, the question of whether a conspiracy existed to rig bids at foreclosure proceedings participated in by the Estates and its members is a fact capable of common proof because Plaintiffs' allegations of bid rigging "indisputably will focus on the actions of the defendants, and, as such, proof for these issues will not vary among class members." *In re Titanium Dioxide Antitrust Litigation*, 284 F.R.D. 328, 344 (D. Md. 2012). Without the benefit of discovery, Plaintiffs already have forecast precisely the type of evidence they will present to the jury to prove the existence of the antitrust conspiracy.

To establish a violation of Section 1 of the Sherman Act, the Plaintiffs must allege: ""(1) a contract, combination, or conspiracy; that (2) imposed an unreasonable restraint of trade." *Masco Contr. Servs. East, Inc. v. Beals*, 279 F. Supp. 2d 699, 704 (E.D. Va. 2003). A bid-rigging conspiracy necessarily satisfies both prongs and constitutes a *per se* violation of the Sherman Act. *See United States v. Joyce*, 895 F.3d 673, 677 (9th Cir. 2018) ("Bid rigging is … a *per se* violation of the Sherman Act."); *United States v. W.F. Brinkley & Son Constr. Co.*, 783 F.2d 1157, 1160 (4th Cir. 1986) ("[A]ny agreement between competitors pursuant to which contract offers are to be submitted to or withheld from a third party constitutes bid rigging *per se* violative of 15 U.S.C. § 1.") The "*per se* rule is applied when the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Joyce*, 895 F.3d at 676. Such agreements or practices are

"conclusively presumed to be unreasonable" because of their "pernicious effect on competition and lack of any redeeming virtue." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). Plaintiffs' common proof of the bid-rigging conspiracy alleged in the Complaint is sufficient at the class certification stage.

A violation of Section 1 is not enough by itself, however, to support a civil lawsuit for restraint of trade. 15 U.S.C. § 15, also known as Section 4 of the Clayton Act, is the required vehicle for a civil lawsuit for restraint of trade or other antitrust violations. Under Section 15(a) "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States." In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477 (1977), the Supreme Court held that Section 15(a) creates an additional element for a civil claim based upon an alleged antitrust violation. A plaintiff

> must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

429 U.S. at 489.

In *United States v. Joyce*, 895 F.3d 673, 677 (9th Cir. 2018), the court rejected a defendant's argument that a bid-rigging scheme "involved 'a few participants in a narrow set of public foreclosure auctions,' [and] did not have

any 'demonstrable effect on the pricing or quantity of the real estate sold.'" *Id.* In this case, the scheme was highly organized and impacted dozens of foreclosure auctions in multiple states. The Estates received profits skimmed from multiple foreclosures, and its members benefitted from the reduced prices generated by the bid-rigging cartel. Simply put, the Estates and its members would not have engaged in such obviously risky behavior unless that behavior was profitable. *See United States v. Giraudo*, No. 14-cr-00534-CRB-1, 2018 U.S. Dist. LEXIS 81019, at *11 (N.D. Cal. May 14, 2018) ("The scheme's longevity and the persistence with which [the individual defendant] and other members of the [conspiracy] pursued it, despite clear awareness of the legal risks, also belies the claim that it was not lucrative."); *United States v. Florida*, No. 4:14-cr-00582-JD, 2017 U.S. Dist. LEXIS 31561, at *6-7 (N.D. Cal. Mar. 6, 2017) (rigging bids at a public foreclosure "was done for the shared purpose of making money from rigged bids").

The ability to profit from bid rigging is baked into the structure of public foreclosures.

> Bid-rigging schemes at foreclosure auctions are likely to be more profitable than other price-fixing ventures because (1) the public nature of the bids makes it easier to catch and punish those who cheat on the cartel; (2) the cartel underpay does not reduce output (the same number of homes come to auction whatever the sale price); and (3) banks are relatively price-insensitive sellers.

Giraudo, 2018 U.S. Dist. LEXIS 81019, at *11-12.

For the purpose of establishing a claim, this is enough. Even though there is an individualized component to the damages suffered by the class, "in cases where the fact of injury and damage breaks down in what may be characterized as 'virtually a mechanical task,' 'capable of mathematical or formula calculation,' the existence of individualized claims for damages seems to offer no barrier to class certification on grounds of manageability." *Windham v. American Brands, Inc.*, 565 F.2d 59, 68 (4th Cir. 1977). Importantly, in an antitrust case such as this one, the "burden of proving antitrust damages is not as rigorous as in other types of cases." *New York v. Julius Nasso Concrete Corp.*, 202 F.3d 82, 87-89 (2d Cir. 2000) . Indeed, antitrust damages "are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts." *Id.* "[I]n the absence of more precise proof, the jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business and from [injury] not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs." *Bigelow v. RKO Radio Pictures, Inc.,* 327 U.S. 251, 264 (1946).

Both the Sherman Act and Chapter 75 of the North Carolina General Statutes allow for the recovery of nominal damages. *U.S. Football League v. Natl'. Football L.*, 644 F. Supp. 1040, 1052-53 (S.D.N.Y. 1986); *Estate of Hurst v. Morehead I*, 748 S.E.2d 568, 578 (N.C. App. 2013) ("Here, the jury awarded

nominal damages to plaintiffs to compensate for the injuries found by the jury to have proximately resulted from the various defendants' unfair or deceptive acts. The jury's findings and award of nominal damages are sufficient[.]") Nominal damages are *not* inconsequential – they are acknowledgment that the Plaintiffs have sustained damages, but that the amount of damage suffered by each individual Plaintiff is not substantial, and are enough to allow the Plaintiffs to meet their burden under Section 4 of the Clayton Act. *See Coleman v. Cannon Oil Co.,* 849 F. Supp. 1458, 1471 (M.D. Ala. 1993) ("The jury's nominal damages award reflected not only a recognition of a violation of § 1 of the Sherman Act, but also a finding of actual injury to the property of the plaintiffs, as required for relief under § 4 of the Clayton Act.").

The North Carolina sub-class has also brought a claim for unjust enrichment. If nominal damages are sufficient for the class to establish its Sherman Act claim (and Plaintiffs believe that they will be able to establish more substantial damages than that) under North Carolina law the sub-class may seek disgorgement of the profits sustained by the Estates and its members from this enterprise.

> Under North Carolina law … an unjust enrichment claim is not limited to a plaintiffs [*sic*] losses. It is not designed to compensate a plaintiff for losses it suffered; rather it is designed to force a defendant to disgorge benefits that it would be unjust for it to keep. North Carolina law distinguishes between restitution recovery and damages recovery and observes that the damages award is designed

> to compensate a plaintiff for her loss whereas a restitution award is designed to deprive a defendant of benefits that in equity and good conscience the defendant ought not to keep. Plaintiffs [*sic*] unjust enrichment claim, and the determination whether it presents an integrated claim, must be evaluated with these principles in mind.

In re Cardizem CD Antitrust Litig., 90 F. Supp. 2d 819, 828 (E.D. Mich. 1999). In the *Cardizem* case (decided by the Eastern District of Michigan under North Carolina law) a drug manufacturer was accused of preventing lower-cost generic versions of its heart medication from entering the U.S. market, harming the class plaintiffs. *Id.* at 822. The defendant attempted to limit damages to provable actual damages, which would have been the difference in price between the generic and proprietary drugs for each class plaintiff. *Id.* at 828. Because of the state law unjust enrichment claim, the court rejected that argument. *Id.* Citing the North Carolina Court of Appeals, the district court explained: "The principle of restitution is to deprive the defendant of benefits that in equity and good conscience he ought not to keep … even though plaintiff may have suffered no demonstrable losses." *Id.* (*quoting Booher v. Frue*, 86 N.C. App. 390, 393-94, 358 S.E.2d 127, 129 (1987)).

Here, if Plaintiffs can demonstrate that it is not equitable for the Defendants to keep funds that they earned at North Carolina foreclosures, then under North Carolina law, Defendants should be forced to disgorge that entire amount. *Id.* ("Under equitable principles, it makes no sense to say that

it would be unjust for a defendant to keep a sum of money and then limit the amount disgorged to only that amount claimed by individual plaintiffs.")

B. Typicality - The Named Plaintiffs' claims are typical of those of the Class.

Rule 23(a)(3) requires that the claims or defenses of the representative parties be typical of the claims or defense of the class. *Haywood*, 109 F.R.D. at 578. "The claim of a party is typical if it arises from the same event or course of conduct which gives rise to the claims of other class members and is based on the same legal theory." *Id.* "[T]he requirements of commonality and typicality tend to merge" in that "[b]oth serve as guideposts for determining whether under particular circumstances maintenance of a class action is economical and whether the named plaintiff's claims and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Falcon*, 457 U.S. at 157 n.13. The typicality requirement does not require that all of the putative class members share identical claims. *Rodger*, 160 F.R.D. at 538 ("A court may determine that the typicality requirement is satisfied even when the plaintiffs' claims and the claims of the class members are not identical"). The prerequisite is only that Plaintiffs' claims be common, and "class representatives must not have an interest that is antagonistic to that of the class members." *Id.*

For the reasons set forth in Section B above, the facts alleged in the Complaint meet the requirements of Rule 23(a)(3) .

C. Adequacy - Named Plaintiffs Williams and de Leon are adequate representatives of the Classes.

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." This is a two-part inquiry to determine: (1) whether the class representatives' claims are sufficiently interrelated to and not antagonistic with the class' claims and (2) that legal counsel is qualified, experienced and generally able to conduct the litigation. *Rodger*, 160 F.R.D. at 539 ; s*ee also Haywood*, 109 F.R.D. at 578. Plaintiffs Williams and de Leon meet the first requirement by demonstrating their consistent involvement in the litigation. *Id.* at 578-79 . Here, as in *Haywood*, they have a common interest with class members in the litigation and possesses a personal financial stake in the outcome. *Id.*

Lastly, James C. White and Dhamian A. Blue, counsel for the named Plaintiffs, are experienced counsel who have previously been counsel in complex commercial litigation, including class actions. White Decl., Declaration of Dhamian A. Blue.

III. The Classes Satisfy the Requirements of Rule 23(b).

In addition to the threshold requirements of Rule 23(a), Plaintiffs must demonstrate that the proposed class action fits within one of the categories

described in Rule 23(b). *James Foster & Stone Logistics, Inc. v. CEVA Freight, LLC*, 272 F.R.D. 171, 175 (W.D.N.C. 2011). The proposed class and sub-class may be appropriately certified under Rule 23(b)(3). To certify a class under Rule 23(b)(3) Plaintiffs must show that "the questions of law or fact common to the members of the class predominate over any questions of law or fact affecting only individual members," and that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The proposed classes satisfy both requirements.

A. The issue of Defendants' bid-rigging predominates.

The Rule 23(b)(3) predominance inquiry tests "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Dukes*, 564 U.S. at 376. To determine predominance, the court must "characterize the issues in the case as common or not, and then weigh which issues predominate." *CGC Holding Co., LLC v. Broad & Cassel*, 773 F.3d 1076, 1087 (10th Cir. 2014).

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 Rule 23(b)(3), presents a "far more demanding" inquiry, *Amchem*, 521 U.S. at, 624, namely whether any common questions "pre-dominate over any questions affecting only individual members," Fed. R.

Civ. P. 23(b)(3). In other words, to satisfy Rule 23(b)(3), "[c]ommon questions must predominate over any questions affecting only individual members; . . . [such that] a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated." *Amchem*, 521 U.S. at 615.

Because the evidence relevant to establishing that Defendants engaged in illegal bid-rigging is common to all members of the class, the class clearly meets the standard for predominance. *See e.g., Tripp v. Berman & Rabin, P.A.*, 310 F.R.D. 499, 506 (D. Kan. 2015) (finding plaintiff had satisfied predominance requirement where common evidence, i.e., a standardized letter sent to all class members, would answer common questions). Because the dispositive issues of law and fact can be resolved through common evidence, the proposed classes meet the requirements of Rule 23(b)(3). The fact that Defendants' illegal practices may have injured different people to different degrees does not alter the commonsense conclusion that common issues of law and fact predominate.

B. A class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Adjudicating the claims in one forum would avoid duplicative results and eliminate the potential for inconsistent judgments. A class action does not present any insurmountable difficulties in management. The proposed Classes

are ascertainable from a combination of records already in Defendants' possession and public court and other records, and they are limited in scope to those counties in which the Estates operated. Indeed, requiring separate individual lawsuits would likely result in far greater manageability problems, such as duplicative discovery (including numerous depositions of the same officials and repetitive production of documents), repeated adjudication of similar controversies, and excessive costs. Judicial economy will therefore be better served if the legality of Defendants' bid-rigging scheme is adjudicated in a single class proceeding rather than through a flood of individual suits. Class-wide treatment of liability is a far superior method of determining the content and legality of the Defendants' policies and practices than individual suits by the unknown number of persons who lost their properties to this scheme. To the extent that individual damages will vary, they will vary depending on readily ascertainable factors such as property values and amount bid. Determining damages for individual Class members can thus typically be handled in a ministerial fashion based on easily verifiable records in the Defendants' possession. In addition, most, if not all, of the class members are not even aware of the existence of the Estates or its bid-rigging scheme. Class adjudication is by far the most efficient way to proceed.

CONCLUSION

For each of the foregoing reasons, the motion for class certification should be granted.

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CERTIFICATE OF WORD COUNT

Pursuant to LR 7.3(d), I hereby certify that this document complies with LR 7.3(d) because it has 6,241 words, exclusive of the caption, signature blocks, certificates, cover page, and indices. I further certify that this document was prepared using Microsoft Word, and uses the 13-point proportional font Century Schoolbook.

/s/ *James C. White*
James C. White

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2020, I served the foregoing *Plaintiffs Memorandum of Law in Support of Motion for Class Certification* on all counsel of record via the CM/ECF system.

/s/ *James C. White*
James C. White