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 RENEWED MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

Earlier this year, the Plaintiffs filed their motion for class certification, asking the Court to certify (1) a nationwide class seeking redress for their claims under Section 1 of the Sherman Antitrust Act (the "Sherman Act") and (2) a North Carolina subclass, seeking damages under N.C. Gen. Stat. § 75-1 and a common law claim of unjust enrichment. Doc. 56. Although the Court denied the motion, it did so without prejudice while acknowledging that the Plaintiffs "have made the necessary showing for many of the required elements." Doc. 70 at 4. The Court went on to observe that:

> While it seems likely that the potential class members are or should be readily identifiable from the defendants' business records, the exact number of class members is uncertain. If there are too few class members, the numerosity requirement might not be met. If the number is voluminous, that has manageability implications. The plaintiffs' rough estimate, despite its potential flaws, and the declaration from a former member of The Estates, Doc. 65, do provide significant assurance that there are likely to be a sufficient number of class members. And the plaintiffs correctly note that the defendants here control the information that will allow them to begin identifying class members.

Id. at 5.

At this stage, and despite Defendants' refusal to produce relevant information, Plaintiffs' argument for class certification is even stronger now than it was before, and the record is sufficiently developed for the Court to conduct the rigorous analysis that is necessary prior to certification. *See*

Gariety v. Grant Thornton, LLC, 368 F.3d 356, 359 (4th Cir. 2004). While we will address all of the Rule 23 requirements in this renewed motion, we also address at the outset any concerns the Court may have concerning Rule 23's numerosity requirement. According to Defendants' records and information obtained by Plaintiffs, there are a total of at least 137 class members – 120 in North Carolina, 6 in South Carolina, and 9 in Texas. Although there likely are more, there is no indication that there are so many members that class certification will present manageability problems.

Likewise, although Plaintiffs have now identified several of the "Does" alleged in the initial complaint, *see* Doc. 1 ¶ 20, and simultaneously with the filing of this motion are asking for permission to amend the complaint to name them specifically, *see* Doc. 85, discovery has made clear that The Estates operates as a single cartel that has been intentionally and excessively fragmented to conceal and shield member assets. Despite the seemingly large number of cartel members, they operate as a joint enterprise and therefore no issues of manageability exist.

For these and the following reasons, Plaintiffs' motion for class certification should be granted.

STATEMENT OF FACTS[1]

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 and coordinates bidding at foreclosure sales between and among its members. Doc. 1 at ¶¶ 1, 9–12, 25. The Estates Defendants maintain an online database that provides real estate information compiled from public data, along with their opinions on the properties and acts as the portal for members to find foreclosure sales and bid on them. *Id.* at ¶¶ 26–27. In sum, the Estates Defendants are a series of companies that are directly associated with the management of the Estates cartel and the online database through which the Estates operates.

The Estates and ensuing cartel was founded by Craig Brooksby. Brooksby has direct and/or indirect ownership interests in the Estates Defendants and two other types of companies that he described at his deposition – the Estates' "Bidding LLCs" and the Estates' "Equity Shares." The Bidding LLCs are established for the purpose of placing bids at foreclosures and purchasing the foreclosed properties. The Equity Shares are formed to

[1] The instant motion for class certification is based upon the operative complaint before the Court.

receive title and/or an ownership interest in the properties obtained in some instances by the Bidding LLCs.

Members of the Estates 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. Doc. 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 in some detail how Estates members coordinate who will bid on what property. *See* Souther Deposition 57:6-22, 58:7-11. (Doc. No. 1, ¶ 39), Declaration of James C. White ("White Decl.") (Doc. 58, Ex 2.). In so doing, she confirmed that membership in the

Estates includes an agreement not to bid against other Estates members. Souther Deposition 59:6-16, 102:12-18, 102: 21-103:2 (Doc No. 1, ¶ 40), White Decl., Ex. 2. She also expressly testified about how bid prices were coordinated. Souther Deposition at 103:2-16, 108:15 – 109:5 (Doc. 1, ¶ 41), White Dec., Ex. 2.

Souther's testimony is consistent with that of Craig Brooksby, the Estates' Rule 30(b)(6) corporate designee in this case. At his deposition, Brooksby admitted that the Estates uses its database to ascertain and/or coordinate what Estates members will bid on any particular property. *See* Deposition of Craig Brooksby ("Brooksby Dep."), attached at Ex. 1, at 59:12-17 ("[I]f Client A wanted to buy a property and they clicked 'buy it' and they inserted the amount they were willing to pay and what they wanted to bid and all of the things they wanted to do with that property, then that would come to us on the backside so that we knew they were interested in that property. And then they could come in and talk to us and say, okay, well, what's the best way to buy this property, how much money."); *see id.* at 63:18-64:11 (describing coordination of bidding).

Likewise, Christian Werness, a former Estates member, described the coordination in a declaration that already has been filed in this matter:

> The Estates maintains a database of foreclosures in North Carolina as well as other states. The database is compiled from public information, but also includes assessments of

> the various properties. Members who are interested in bidding on properties indicate that interest in the database. **As members of the Estates we expressly agreed that only one member of the Estates could bid on any one property, and that we would coordinate our bidding through the Estates' database**. This was a standard practice of the Estates, and I am aware of this coordination of bidding happening in dozens of foreclosures. Craig Brooksby was the founder of the Estates, and personally told me that only one Estates member could bid at any given foreclosure.

Declaration of Christian Werness (Doc. 65) at ¶¶ 4-5.

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. Doc. 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. Doc. 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, Doc. 1 ¶99, documents produced by the Defendants confirm that they also rigged bids at foreclosure sales in South Carolina and Texas, and the proposed amended complaint makes in clear that this class is national. 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., Inc. 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 Petroleum 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) ("*Gunnells*") (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. 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*, 368 F.3d at 366. 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*, 348 F.3d at 424. 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 Rule 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 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 contended in their first motion for class certification that there were at least 40 class members. Doc. 57 at 57. Since that time, Defendants have produced records showing that there are at least 120 in North Carolina**.** *See* Doc. 81.2. While the vast majority of the class members are located in North Carolina, the remainder are in South Carolina (6) and Texas (9). *See* Ex. 2 (spreadsheet produced by Defendants Plaintiffs have satisfied the numerosity requirements of Rule 23(a)(1) .

B. 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, but only that "a single common question . . . exist." *Rodger*, 160 F.R.D. at 537. "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 there existed a conspiracy 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). With only the benefit of limited discovery, Plaintiffs can readily 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 Plaintiff 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 at least three 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 foreclose "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,* 327 U.S. at 264.

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."). Additionally,

disgorgement, which is rooted the court's inherent equitable powers, is an appropriate remedy for violations of the Sherman Act. *United States v. Keyspan Corp*., 763 F. Supp. 2d 633, 635 (S.D.N.Y. 2011).

The North Carolina sub-class has also brought a claim for unjust enrichment. Thus, as with the National Sherman Act Class, the North Carolina sub-class also may seek disgorgement of the cartel's profits.

> Under North Carolina law … an unjust enrichment claim is not limited to a plaintiff's 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 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 main purpose of the damages award is some rough kind of compensation for the plaintiff's loss. This is not the case with every kind of money award, only with the damages award. In this respect, restitution stands in direct contrast to the damages action. The restitution claim, on the other hand, is not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust for him to keep. A plaintiff may receive a windfall in some cases, but this is acceptable in order to avoid any unjust enrichment on the defendant's part. 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, in equity and good conscience, the Defendants should not keep funds that they earned as a result of collusion, then under North Carolina law, they 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.").

For purposes of the Sherman Act National Class and the North Carolina Sub-class, Plaintiffs will use the Defendants' records to prove the amount subject to disgorgement. For example, monthly subscription fees paid for

access to the Estates database, fees paid to the Acquisition Agents, and profits made from the sale of illegally obtained properties can be shown through common proof, and already has largely been disclosed by Defendants in discovery. *See* Spreadsheet. These are not complex calculations and can easily be presented to the jury in a simple spreadsheet.

C. 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 are 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) .

D. Adequacy - Named Plaintiffs Williams, de Leon and da Costa are adequate representative 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, de Leon and da Costa have met these requirements with respect to the proposed Classes.

Plaintiffs Williams, de Leon and da Costa 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, possesses a personal financial stake in the outcome.

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. ¶¶8-11; Declaration of Dhamian Blue (Doc. 59) ¶¶2-6.

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

In addition to the threshold requirements of Rule 23(a), Plaintiffs must also 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." *Id.* 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 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, all of Defendants' motions to dismiss should be denied.

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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 6,207 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 7, 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/ *Dhamian A. Blue*
Dhamian A. Blue