IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SEAN LOUGHLIN and ANTONIO GONZALEZ, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

AMERISAVE MORTGAGE CORP., NOVO APPRAISAL MANAGEMENT CORP., and PATRICK MARKERT,

Defendants.

CIVIL ACTION NO.
1:14-CV-3497-LMM-LTW

MAGISTRATE JUDGE'S ORDER AND REPORT AND RECOMMENDATION

This case is presently before the Court on Plaintiffs Sean Loughlin and Antonio Gonzalez's Motion for Class Certification. (Doc. 95). For the reasons outlined below, this Court **RECOMMENDS** that Plaintiffs Loughlin and Gonzalez's Motion for Class Certification be **DENIED**. (Doc. 95). Also before the Court is Defendants' Amerisave Mortgage Corporation, Novo Appraisal Management Corporation, and Patrick Markert's Motion for Leave to File Sur-Reply in Opposition to Plaintiffs' Motion for Class Certification. (Doc. 121). For good cause shown and because the Defendants' Sur-Reply is helpful to the Court, Defendants' Motion for Leave to File a Sur-Reply is **GRANTED**. (Doc. 121).

MOTION FOR CLASS CERTIFICATION

I. BACKGROUND

On September 20, 2014, Plaintiff Sean Loughlin filed a putative class action complaint ("Complaint") against Defendants Amerisave Mortgage Corporation ("Amerisave"), Novo Appraisal Management Corporation ("Novo"), and Patrick Markert ("Markert") (collectively "Defendants") in the Superior Court of Fulton County and Defendants removed Loughlin's Complaint her on October 30, 2014. (Doc. 1-1). Plaintiff Loughlin amended his Complaint on November 7, 2014, and on January 2, 2015.[1] (Docs. 6, 29). The original Complaint alleged only one count that Defendants violated Section 2607(a) of the Federal Real Estate Settlement Procedures Act ("RESPA") in connection with a fee charged by Novo for an appraisal related to Loughlin's refinanced home. Id. at 7-8. The First Amended Complaint ("FAC") added Antonio Gonzalez ("Gonzalez") as a Plaintiff and an additional claim asserting that the appraisal fee charged to Gonzalez violated Section 2607(b) of RESPA. (FAC (Doc. 6) at ¶¶ 27-36). On January 2, 2015, Plaintiffs Loughlin and Gonzalez ("Plaintiffs") filed a Second Amended Complaint ("SAC") which added Kenneth Adams as a Plaintiff and

[1] Plaintiff Loughlin amended his Complaint as a matter of right on November 7, 2015. Plaintiff, having used his one opportunity to amend as a matter of right, nevertheless amended his Complaint again on January 2, 2015, without seeking leave of the Court. Defendants never objected and filed a consent motion (Docs. 51, 53) to allow them more time to answer or otherwise respond to the Second Amended Complaint. (Docs. 55-57). Defendants answered Plaintiff's Amended Complaint on October 1, 2015. As the parties have not challenged the propriety of Plaintiffs' Second Amended Complaint and have proceeded as if it was proper, the Court will permit the amendment.

attempted to clarify certain allegations supporting the Section 2607(b) claim. (SAC, Doc. 29). On January 23, 2015, Kenneth Adams voluntarily dismissed his claims. (Doc. 35). The District Court subsequently dismissed the 2607(b) claim (Count Two of the FAC). (Docs. 6, 50).

Plaintiffs Loughlin and Gonzalez ("Plaintiffs") allege in their SAC that Plaintiff Loughlin financed the purchase of his home through Defendant Amerisave and Plaintiff Gonzalez refinanced his home loan through Amerisave, a mortgage lender that operates primarily online through its website. (SAC ¶¶ 1-2, 10). Plaintiffs aver that Amerisave has generally required its customers to use Defendant Novo, an appraisal management service which provides lenders with a network of appraisers throughout the country. (SAC ¶¶ 11, 14). According to Plaintiffs, Novo is not an appraiser, but rather, an appraisal manager. (SAC ¶ 12). As an appraisal manager, Novo receives referrals from Amerisave, and then retains a real estate appraiser to conduct the appraisal and prepare the appraisal report. (SAC ¶ 17). Once the appraisal is complete, Novo forwards the appraisal report to Amerisave. (SAC ¶ 17).

Plaintiffs aver that Novo and Amerisave are affiliates, and Amerisave refers 99% of its appraisal business to Novo. (SAC ¶ 12). Amerisave did not allow consumers to choose their own appraisal management company. (SAC ¶ 15). Additionally, Plaintiffs aver that Markert is a beneficiary of trusts which own both Novo and Amerisave. (SAC ¶ 13). Markert received shareholder distributions from Novo during 2011, 2012, and 2013, most of which came from profits Novo generated from referrals from Amerisave.

(SAC ¶ 18). According to Plaintiffs, Markert set the price Novo charged Amerisave for appraisals and the base amount that Novo paid appraisers. (SAC ¶ 18). Plaintiffs argue Amerisave did not adequately disclose its affiliated relationship with Novo and Markert to consumers. (SAC ¶ 16).

Plaintiffs also argue Defendants violated Section 2607(a) of RESPA because Novo has given, and Markert and his affiliates have accepted a thing of value from Novo, that is they have accepted profit distributions from Novo, pursuant to an agreement or understanding that appraisal management services would be referred to Novo. (SAC ¶¶ 53, 56). Plaintiffs further argue Defendants violated Section 2607(a) of RESPA when they failed to disclose their affiliated business arrangement and required Loughlin and other customers to pay for an appraisal obtained via Novo's appraisal management services denying Plaintiffs the opportunity to shop around for a better or cheaper alternative. (SAC ¶¶ 56-58). With respect to Gonzalez, Plaintiffs contend that even if Defendants properly disclosed their affiliated business arrangement, they still violated RESPA because they required Gonzalez to use Novo's service and did not disclose that under the law Gonzalez had the option to use other non-affiliated providers. (SAC ¶ 60).

Section 2607(a) of RESPA prevents kickbacks and unearned fees occurring in exchange for the referral of real estate settlement service business. Spicer v. Ryland Grp., Inc., 523 F. Supp. 2d 1356, 1359 (N.D. Ga. Oct. 18, 2007), aff'd 294 F. App'x 434 (11th Cir. 2008); see also Culpepper v. Inland Mortg. Corp., 132 F.3d 692, 696 (11th

Cir. 1998) (explaining that Section 2607(a) of RESPA is violated if "(1) a payment of a thing of value is (2) made pursuant to an agreement to refer settlement business and (3) a referral actually occurs"). RESPA provides:

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

12 U.S.C. § 2607(a). RESPA, however, provides an exemption for affiliated business arrangements under Section 2607(c) which refer real estate settlement service business amongst affiliates as long as:

> (A) disclosure is made of the existence of the affiliated business relationship to the person referred . . ., (B) such person is not required to use any particular provider of settlement services, and (c) the only thing of value that is received from the arrangement is a return on the ownership interest or franchise relationship.

12 U.S.C. § 2607(c)(4); see also Spicer, 523 F. Supp. 2d at 1360. Plaintiffs maintain that Defendants violated Section 2607(a) because they never disclosed to Plaintiff Loughlin that Amerisave and Novo had an affiliated business arrangement during the loan process. (Dep. of Sean Loughlin, hereinafter "Loughlin Dep.," 41:10-12). On the other hand, Plaintiffs argue Plaintiff Gonzalez was provided with an Affiliated Business Arrangement disclosure ("ABA disclosure") informing him of the relationship between Amerisave and Novo, but was told that he would be required to use Novo in order to proceed with the loan. (Pl. Br. 8-9).

Plaintiffs now seek certification for two proposed classes for the period of

September 10, 2013, through the date of class certification:

> (1) All Amerisave . . . customers in the United States who used Novo . . . as a provider of settlement services on their federally related mortgage loan with Amerisave without being advised that Amerisave and Novo had an affiliated business arrangement (the "No Notice class")
>
> (2) All Amerisave . . . customers in the United States who, while advised of the affiliated business arrangement between Amerisave and Novo . . . , were required by Amerisave to use Novo as a provider of settlement services on their federally related mortgage loan (the "Defective Notice class")

(Pl.'s Br. 1).

Plaintiffs maintain and Defendants do not dispute that between September 2013 and year end 2016, Amerisave generated 35,217 mortgage loans. (Pl.'s Br. 14-15). Neither party offers numbers for how many loans Amerisave closed in 2017.

II. <u>CONTENTIONS OF THE PARTIES</u>

Plaintiffs argue that each of the requirements for class certification under Rule 23(a) for numerosity, commonality, typicality, and adequate protection of the class are met. First, Plaintiffs argue the numerosity requirement is met because, for the sample period of October 1, 2013, and December 31, 2015, Amerisave originated 17,237 loans and for each customer, Amerisave either failed to disclose its relationship with Novo or issued a disclosure form which required that each customer use Novo for their appraisal. In support, Plaintiffs urge that their review of 400 sample loans revealed that for 7.75% of the sample loans, Amerisave failed to disclose the affiliated business relationship. Plaintiffs contend that when this rate is extrapolated over the 17,237 loan files, there are likely 1,335 No Notice class members. Plaintiffs contend that the remaining sample loan files had disclosure forms, but they required the customer to use Novo. Thus, Plaintiffs' reason 92.25% of the customers had a disclosure form requiring them to use Novo and extrapolating that percentage against the number of loan files through 2015 showed that there were approximately 15,902 Defective Notice class members as of the close of 2015.

Second, Plaintiffs contend that there are common questions of law and fact because for the No Notice class, the question is whether Defendants violated RESPA by failing to disclose the relationship between Amerisave and Novo. Plaintiffs argue that as for the Defective Notice class, the questions common to the class are whether Defendants provided a disclosure form that required the use of Novo and whether the use of such a form violated RESPA. Third, Plaintiffs argue their claims are typical of the two classes because their claims arise out of the same course of conduct and are based on the same legal theory as those of the absent class members.

Fourth, Plaintiffs assert that they will fairly and adequately protect the class because their interests are aligned and there is no conflict. Plaintiffs argue they are represented by qualified lawyers who are experienced in the successful prosecution of consumer class actions and have obtained substantial recoveries in class litigation. Plaintiffs further argue they have proven that they are adequate class representatives because they have shouldered the burden of serving as class representatives by participating in discovery and providing information as needed, and assert that they will be available to attend the hearing and trial.

Plaintiffs also maintain that common issues of fact and law predominate in this lawsuit because the evidence needed to establish Plaintiffs' claims are common to both Plaintiffs and all members of the classes and the same for Amerisave's failure to provide an ABA disclosure or Amerisave's practice of providing a disclosure form that identifies its relationship with Novo, but mandates that the customer use Novo. Plaintiffs allege that the requisite information can easily be attained because Amerisave's loan files can be analyzed quickly with optical character recognition software that can search digital document images. Plaintiffs contend that it will be simple to calculate damages because they can attain through discovery only the federally related loan files which included a payment to Novo and multiply the amount paid to Novo from line 804 of the HUD-1 form times three to show the statutory damage owed each class member. Thus, Plaintiffs argue, the class members and their statutory damages are ascertainable in formulaic fashion through information readily available in Amerisave's records. Finally, Plaintiffs argue handling this action as a class case is superior, because (1) the value of the class members' individual claims are small and it would cause them more to litigate than they can hope to recover in damages, (2) no other cases have commenced against Novo and Amerisave, (3) having the case concentrated in the Atlanta forum is sensible because Amerisave, Novo, and the Plaintiffs are located in Atlanta, and (4) the case presents no unusual difficulties in management of a class action given that the class size is modest and the proof of liability, the data for the damages calculation, and the contact information for class members is readily found in Defendants' records.

Defendants contend that the Defective Notice class should not be certified because the class is defined such that each class member's RESPA Section 8(a) claim would fail because each member of the class falls within the safe harbor for affiliated businesses. In support, Defendants argue the claims fall within the safe harbor provision (1) in Section 8(c)(4)(B) because it is an arrangement that requires a buyer to pay for the services of a real estate appraiser chosen by the lender, and by extension, an appraisal management company, and in (2) Section 8(c)(2) because the appraisal fees were bona fide compensation for services actually performed. Defendants also contend that Gonzalez and the putative Defective Notice plaintiffs lack standing because they have not suffered an injury in fact. In support, Defendants further contend that because the claims fall within the safe harbor, there is no liability under Section 8(a) and no legal harm to the putative Defective Notice plaintiffs has been done.

Defendants next argue Plaintiffs fail to show that the proposed classes are ascertainable because they have no admissible evidence to show that there is a reasonable way to ascertain the classes. Although Plaintiffs rely on the statement of Drago Cepar who offers expert testimony, Cepar was not certified as an expert and did not provide a written report as required by the federal rules. Defendants argue Plaintiffs also failed to identify Cepar's qualifications, the facts or data underlying his testimony, the methodology used, or the reliability of the methodology. Defendants argue Plaintiffs' chosen method of ascertaining the class is not administratively feasible because in order to determine whether a putative class member falls within the classes, someone must search each of Amerisave's loan files for the necessary information, each loan file is hundreds or thousands of pages in length, and Amerisave originated tens of thousands of loans during the alleged class period. Defendants posit that based on the time it took Plaintiffs' reviewers to complete their manual sample review of four hundred loan files, it would take eight work years. Additionally, Plaintiffs do not explain how they would isolate the files which involve federally related mortgage loans (covered under RESPA) and segregate out loan files for credit transactions primarily for business purposes (not covered under RESPA). Amerisave asserts that Plaintiffs also fail to describe a methodology for locating loan files which show that an appraisal was completed by Novo without having to review each file by hand. Amerisave maintains that if the putative plaintiffs did not pay for the Novo service, they would not have standing to pursue their RESPA claims. With respect to the No Notice class, Defendants Plaintiffs do not explain how to determine whether putative class members may have been notified of the affiliated business relationship though ways other than the disclosure form.

Defendants argue the numerosity requirement is not satisfied because based on the above arguments all the various subgroups (e.g., those that do not have standing, those who never paid a fee, those who received notice of the affiliated business arrangement through other means) may erode the original estimates. Defendants further point out that estimates based on the 400 loan sample may not accurately project the number of class members because Amerisave added language to its website as of December 2013 disclosing the relationship between Amerisave and Novo and that the latest loan in 400 file sample that did not have a hard copy of the disclosure in the file was May 2014. Defendants contend that Plaintiffs have not shown commonality, but rather have only offered a bare-bone assertion that commonality exists because all class members have claims under RESPA and have not considered the myriad individual issues outlined above. Defendants also contend that Plaintiffs are not typical or adequate representatives because the named Plaintiffs are subject to unique defenses and lack standing because both received closing cost credits that covered their appraisal fees and the determination of whether the appraisal fee was offset for each Plaintiff is a defense unique to each Plaintiff. Defendants further argue Plaintiffs' predominance argument consists merely of conclusory assertions and ignores Defendants' varied affirmative defenses which may cause numerous individual issues and evidence to analyze. Finally, Defendants argue a class action would not be the superior method of adjudication because there are numerous fact-intensive individual inquiries which would require the need for mini-trials, Plaintiffs have failed to provide a feasible method to ascertain class members, and Plaintiffs have not presented a trial plan which would show how this case, with its individualized claims and defenses would be tried.

III. <u>LEGAL ANALYSIS</u>

Before a district court can certify a class, the named plaintiffs must have standing, and the putative class members must meet the requirements of Rule 23(a) of the federal rules of civil procedure. Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1265 (11th Cir. 2009); Fed. R. Civ. P. 23(a). Under Rule 23(a), a putative class "must satisfy the prerequisites of 'numerosity, commonality, typicality, and adequacy of representation.'" Vega, 564 F.3d at 1265; Fed. R. Civ. P. 23(a). Additionally, a putative class must meet at least one of the requirements set forth in Rule 23(b). Vega, 564 F.3d at 1265. Plaintiffs attempt to meet this requirement pursuant to Rule 23(b)(3), which requires findings that (1) "common questions of law or fact predominate over questions affecting only individual class members (predominance)"; and (2) "a class action is superior to other available methods for adjudicating the controversy (superiority)." Vega, 564 F.3d at 1265.

A. Standing of the Defective Notice Class

Defendants contend that the Defective Notice class should not be certified because the Defective Notice class members' Section 8(a) claims would fail as a matter of law. In support, Defendants argue all of the Defective Notice class members' claims fall within the safe harbor provision (1) in Section 8(c)(4) for affiliated business arrangements. The provision provides that Section 2607(a)'s anti-kickback provisions do not prohibit affiliated business arrangements so long as: (1) "a disclosure is made of the existence of such an arrangement to the person being referred," (2) "such person is not required to use any particular provider of settlement services," and (3) "the only thing of value that is received from the arrangement, other than the payments permitted under this subsection, is a return on the ownership interest or franchise interest." 12

U.S.C. § 2607(c)(4). Defendants argue they meet the first prong, requiring notice of their affiliated business arrangement, because by definition, the putative Defective Notice class members received the required disclosure of the affiliated business arrangement and that the notice was based on the model provided by the Consumer Financial Protection Board ("CFPB") which courts have found comply with RESPA. Defendants contend that they meet the third prong, Section 8(c)(4)(C), that they did not receive anything of value from the arrangements other than a return on the ownership interest or franchise relationship, because Plaintiffs concede that fact in their SAC. Defendants also argue they satisfy the second element of the safe harbor, the required use element, because they are entitled to take advantage of an exemption for payments made to appraisers selected by the lender. Defendants further argue this case involves an arrangement that required a borrower to pay for the services of a real estate appraiser chosen by the lender, and by extension, an appraisal management company. Thus Defendants are entitled to another exemption for payments made to appraisers selected by Amerisave. Defendants further contend that Plaintiffs lack standing for the Defective Notice class because they do not have an injury in fact. In support, Defendants argue that because the claims fall within the safe harbor, there is no liability under Section 8(a) and no legal harm to the putative Defective Notice Plaintiffs has been done.

Section 2607(a) of RESPA prevents kickbacks and unearned fees in exchange for the referral of real estate settlement service business. Spicer v. Ryland Grp., Inc., 523 F. Supp. 2d 1356, 1359 (N.D. Ga. Oct. 18, 2007), aff'd 294 F. App'x 434 (11th Cir.

2008); see also Culpepper v. Inland Mortg. Corp., 132 F.3d 692, 696 (11th Cir. 1998). Section 2607(a) of RESPA provides:

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

12 U.S.C. § 2607(a). RESPA, however, provides an exemption for affiliated business arrangements under Section 2607(c)(4) which refer real estate settlement service business between themselves as long as:

> (A) disclosure is made of the existence of the affiliated business relationship to the person referred . . . , (B) such person is not required to use any particular provider of settlement services, and (C) the only thing of value that is received from the arrangement, other than the payments permitted under this subsection, is a return on the ownership interest or franchise relationship.

12 U.S.C. § 2607(c)(4); see also Spicer, 523 F. Supp. 2d at 1360. Plaintiffs contend that the Defective Notice class was advised of the affiliated business arrangement between Amerisave and Novo, but Defendants still violated the Act because the Defective Notice class members were required by Amerisave to use Novo as a provider of settlement services in violation of Section 2607(c)(4)(B). Defendants maintain that while it is true that the Defective Notice putative plaintiffs may have been required to use Novo, per Section 2607(c) of RESPA, lenders such as Amerisave are permitted to require the use of a specific real estate appraiser. 12 U.S.C. § 2607(c). Defendants contend that under interpretive regulations, specifically, 12 C.F.R. § 1026.37(f)(2), by extension, Amerisave is also permitted to require the use of a specific appraisal management

company. In response, Plaintiffs contend that 12 C.F.R. § 1026.37(f)(2) does not apply because it does not address the safe harbor provisions of Section 2607(c)(4), but rather the required content of a Good Faith Estimate.

As noted above, RESPA provides an exemption from the anti-kickback prohibition in Section 2607(a) for affiliated business arrangements under Section 2607(c)(4) even when lenders refer real estate settlement service business to an affiliate when the lender has not required the borrower to use a particular provider of settlement services. 12 U.S.C. § 2607(c)(4). That being said, a lender may lawfully require the use of an affiliated settlement service for attorneys, credit reporting agencies and real estate appraisers to represent the lender's interest in a real estate transaction. 12 U.S.C. § 2607(c). Pursuant to Section 2607(c), a lender does not violate Section 2607(c)(4)(B)'s requirement not to require borrowers to use any particular provider of settlement services when there is "any arrangement that requires a buyer, borrower, or seller to pay for the services of an attorney, credit reporting agency, or real estate appraiser chosen by the lender to represent the lenders interest in a real estate transaction." 12 U.S.C. § 2607(c). Thus, although an affiliated business arrangement may violate Section 2607(a) of RESPA when one member of the affiliated business arrangement requires the borrower to use another member of the affiliated business arrangement as a particular provider of settlement services or business, an exception exists under Section 2607(c) when a lender requires the borrower to use a real estate appraiser chosen by the lender to represent the lender's interest in the real estate transaction. 12 U.S.C. § 2607(c); 12

C.F.R. § 1024.15(b)(2).

Defendants rely on a Truth in Lending Act regulation, Regulation Z, to argue that this exception for referrals to real estate appraisers chosen by the lender extends to permit a lender to require the usage of its selection for an appraisal management company without running afoul of the anti-kickback provisions of Section 2607(a) and without losing the safe harbor protections of Section 2607(c)(4). In support, Defendants cite 12 C.F.R. § 1026.37(f)(2) of Regulation Z and its commentary which explains how settlement services the lender is not allowing the consumer to shop for must be displayed on a Good Faith Estimate to be provided for the consumer. A lender is required to identify the settlement services for which the consumer is permitted to shop and the settlement services for which the lender will not permit the consumer to shop for on a Good Faith Estimate form. 12 C.F.R. §§ 1024.7, 1026.19(e)(1)(i), (vi)(C). A lender allows a consumer to shop for a settlement service if the lender "permits the consumer to select the provider of that service, subject to reasonable requirements." 12 C.F.R. § 1026.19(e)(1)(vi).

12 C.F.R. § 1026.37(f)(2) explains that lenders must provide under the subheading "Services You Cannot Shop For" of the Good Faith Estimate form, "an itemization of each amount, and a subtotal of all such amounts, the consumer will pay for settlement services for which the consumer cannot shop in accordance with § 1026.19(e)(1)(vi)A) and that are provided by persons other than the creditor or mortgage broker." The official interpretation commentary explains that items disclosed under

"Services You Cannot Shop For" heading are "those services that the creditor requires in connection with the transaction that would be provided by persons other than the creditor or mortgage broker and for which the creditor does not permit the consumer to shop in accordance with § 1026.19(e)(1)(vi)." The commentary further clarifies that a "consumer is not permitted to shop if the consumer must choose a provider from a list provided by the creditor." The official interpretation of Section 1026.37(f)(2) explains that "[e]xamples of the services and amounts to be disclosed pursuant to § 1026.37(f)(2) [services the consumer cannot shop for] might include an appraisal fee, appraisal management company fee, credit report fee, flood determination fee, government funding fee, homeowner's association certification fee, lender's attorney fee, tax status research fee, third-party subordination fee, title-closing protection letter fee, title-lender's title insurance policy, and an upfront mortgage insurance fee . . . ." Defendants posit that because the appraisal management company fee is listed as an example of an item for which the consumer cannot shop, it must be that the exemption in 12 U.S.C. § 2607(c) for situations in which a lender requires the borrower to use a real estate appraiser chosen by the lender to represent the lender's interest in the real estate transaction, should be extended to cover the situation of when a lender requires a borrower to use an appraisal management company selected by the lender. 12 U.S.C. § 2607(c).

This Court disagrees. It is apparent, based on the broad language in the commentary, that there are multiple settlement services the lender may require the consumer to use which do not run afoul of RESPA or TILA and that the creditor must disclose each of these services and their estimated costs on the good faith estimate form. The language in the commentary never limited disclosure of settlement services for which the lender will not permit the consumer to shop to just the settlement services provided in the Section 2607(c) exemption relating to attorneys, credit reporting agencies, or real estate appraisers, because the lender can lawfully require the consumer to use other types of providers other than those included within the exemption. That is because a lender's mere requirement that the borrower utilize a certain provider of settlement services selected by the lender does not violate RESPA. See Egerer v. Woodland Realty, Inc., 556 F.3d 415, 427 (6th Cir. 2009) (explaining that 12 U.S.C. § 2607(a) is only implicated when referrals are motivated by an agreement that the referee will pay or kickback to the referrer a thing of value); Culpepper v. Inland Mortg. Corp., 132 F.3d 692, 696 (11th Cir. 1998) (explaining that Section 2607(a) of RESPA is violated if "(1) a payment of a thing of value is (2) made pursuant to an agreement to refer settlement business and (3) a referral actually occurs"); Kellis v. U.S. Bank, N.A., No. 1:16CV395, 2017 WL 1194360, at *5 (M.D.N.C. Mar. 30, 2017) (dismissing RESPA claims because there were no facts relating to any payment of a kickback or unearned fees). A lender's activity requiring the use of certain settlement services only wanders into the territory of violating Section 2607(a) of the Act where there is a fee, kickback, or thing of value in exchange for referring a real estate settlement service to another. 12 U.S.C. § 2607(a); Egerer, 556 F.3d at 427; Culpepper, 132 F.3d at 696;

McCullough v. Howard Hanna Co., No. 1:09CV2858, 2010 WL 1258112, at *3 (N.D. Ohio Mar. 26, 2010) (holding no violation of RESPA even though customer was required to use particular settlement service where no facts showed that there was a kickback); Cornelius v. Fid. Nat'l Title Co., No. C08-754MJP, 2009 WL 596585, at *6 (W.D. Wash. Mar. 9, 2009) (holding that plaintiffs did not adequately plead a violation of RESPA because they did not allege that referring entity received a fee, kickback, or thing of value in exchange for the referral and that it was not violation of RESPA to merely fail to disclose affiliation with referral company or disclose that consumer is not required to use a referral company). Thus, there are instances in which a lender can control who provides settlement services consistent with RESPA when there is no kickback or referral fee involved. Therefore, it is consistent with RESPA that the good faith estimate form may broadly reflect other services for which the consumer may not shop for which are not attorneys, credit reporting agencies, or real estate appraisers. Indeed, the commentary for the regulations discuss other such settlement services which may be listed in the "Services You Cannot Shop For" section of the good faith estimate form beyond attorneys, credit reporting agencies, and real estate appraisers. For instance, the commentary also identifies flood determination fees, government funding fees, homeowner's association certification fees, third-party subordination fee, and upfront mortgage insurance fees as examples of services the borrower might not be able to shop for. Accordingly, this Court does not concur with Defendants' view that because appraisal management fees are included as an example "of the services and amounts to be disclosed pursuant to § 1026.37(f)(2) [services the consumer cannot shop for]," the exemption in Section 2607(c) relating to the lender imposing its choice of attorneys, credit reporting agencies, or real estate appraisers extends to appraisal management companies.

Furthermore, this Court agrees with Plaintiffs that the plain meaning of Section 2607(c) precludes Defendants' preferred interpretation. Section 2607(c) explains that the affiliated business arrangement safe harbor still applies even when the borrower has been required to use a particular provider of settlement services if the arrangement requires that the borrower "pay for the services of an attorney, credit reporting agency, or real estate appraiser chosen by the lender to represent the lender's interest in a real estate transaction." 12 U.S.C. § 2607(c). "The first step in statutory interpretation requires that the courts apply the plain meaning of the statutory language unless it is ambiguous." Johnson v. Governor of State of Fla., 405 F.3d 1214, 1247 (11th Cir. 2005); United States v. Fisher, 289 F.3d 1329, 1337 (11th Cir. 2002). The statute's plain language controls unless it is inescapably ambiguous. Wiersum v. U.S. Bank, N.A., 785 F.3d 483, 487 (11th Cir. 2015). Here, the statute plainly limits the list of services that the lender in an affiliated business arrangement can require that the borrower pay for the services of an attorney, credit reporting agency or real estate appraiser. 12 U.S.C. § 2607(c). In this case, this Court does not accept that an appraiser and an appraisal management company are one and the same because Plaintiffs aver in their SAC that Novo receives referrals from Amerisave and then retains a real estate appraiser to conduct the appraisal and prepare the report. (SAC ¶ 17). Moreover, Novo charges borrowers a $100 appraisal review fee for which Novo ordered "appraisal validation reports from third parties." (SAC ¶ 30). Thus, Novo does not prepare any appraisals for the borrower.

Additionally, the statute does not include any broad statements that similar categories of services are part of the exemption or that the list of three services was not exclusive. Furthermore, that Congress specifically enumerated the list of services the lender may choose and still fall within the safe harbor provision (attorneys, credit reporting agencies, and appraisers) militates in favor of the notion that Congress did not intend to widen the exception with other types of services not on the list. A general principle of statutory instruction is that "the mention of one thing implies the exclusion of another." United States v. Castro, 837 F.2d 441, 422 (11th Cir. 1988); see also Christian Coal. of Fla., Inc. v. United States, 662 F.3d 1182, 1193 (11th Cir. 2011) ("The principle of expressio unius simply says that when a legislature has enumerated a list or series of related items, the legislature intended to exclude similar items not specifically included in the list); Christ v. Beneficial Corp., 547 F.3d 1292, 1298 (11th Cir. 2008). While the rule has limits and will not apply "when the legislative history and context are contrary to such a reading of a statute," Defendants do not offer any legislative history or theory showing why Defendants' reading is more tenable. Here, Congress provided a narrow list of items falling within the exception; there is no indication that they intended for the list to be expanded to include other items.

Accordingly, this Court is not persuaded that appraisal management companies should be read into the list. Therefore, this Court is also not persuaded that the exemption in Section 2607(c) applies under the circumstances or divests the Defective Notice Plaintiffs of Standing.

B. The Rule 23(a) Requirements of Numerosity, Commonality, Typicality and Adequate Protection of the Classes' Interests Are Satisfied

1. Numerosity

Plaintiffs argue the numerosity requirement is met because Plaintiffs' review of 400 sample loan files revealed that 7.75% of the sample failed to include the ABA disclosure and that extrapolating that percentage to the number of loan files originated before December 31, 2015, there would be over 1,335 No Notice class members. Plaintiffs contend that the remaining sample files all had a Disclosure Form that required the customer to use Novo and that based on the remaining percentage (92.25%) of loans there would be approximately 15,902 Defective Notice class members through 2015. Plaintiffs maintain that there would be many more Defective Notice class members through the date of certification because Amerisave continues to advise customers that they are required to use Novo. (See Dep. of Larry Evans, hereinafter "Evans Dep.," 95-97, Ex. 10 (settlement service provider disclosure showing that settlement service provider for the appraisal will be either Novo or Amerisave will select an appraiser from a list of certified appraisers)). Defendants respond that Plaintiffs' class should not be certified because they cannot provide factual evidence of the number of potential class members. Defendants argue Plaintiffs' analysis of their review of the four hunderd-loan sample does not assist in satisfying the numerosity requirement because it does not account for all of the factual inquiries necessary to determine class membership and even if the files identified through the review are credited, Plaintiffs only identified thirty-one members of the No Notice class from the sample. Defendants further reason that the rate of No Notice Plaintiffs within the four hundred-loan sample cannot be extrapolated to the remainder of the loan files because Amerisave added language to its website as of December 2013 disclosing the relationship between Amerisave and Novo and none of the loan files in the 400 file sample created after May 2014 are missing the ABA disclosure. (Decl. of Larry Evans, hereinafter "Evans Decl.," ¶ 27).

Rule 23(a)(1) requires that the class be so numerous that joinder of all members would be impracticable. Fed. R. Civ. P. 23(a)(1). "Practicability of joinder depends on many factors, including, for example, the size of the class, ease of identifying its members and determining their addresses, facility of making services on them if joined, and their geographic dispersion. Kilgo v. Bowman Transp., Inc., 789 F.2d 859, 878 (11th Cir. 1986). Although mere allegations of numerosity are insufficient to meet this prerequisite, a plaintiff need not show the precise members of the class. Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1267(11th Cir. 2009); Evans v. U.S. Pipe & Foundry Co., 696 F.2d 925, 930 (11th Cir. 1983). The Eleventh Circuit has found that the numerosity requirement has been satisfied when the class has as little as thirty-one members. Kilgo, 789 F.2d at 878; Zeidman v. J. Ray McDermott & Co., Inc., 651 F.2d

1030, 1038 (11th Cir. 1981) (noting that classes as small as twenty-five or thirty members have been certified). When numerosity is in doubt, a balance should be struck in favor of finding numerosity since the court has the option to decertify the class. Evans, 696 F.2d at 930.

In this case, it may be reasonably inferred that the number of potential class members meets the numerosity requirement. First, the review of the sample 400 loan files covering the period of October 2013 until December 2015 revealed 31 files within 400 did not contain any ABA disclosure at all. (Decl. of Drago Cepar, hereinafter "Cepar Decl.," ¶ 15). Amerisave, however, originated 19,556 loans during the October 1, 2013, to December 31, 2015 period. (Amerisave's Resp.'s to Supp. Interrog. No. 10, Doc. 97-31, at 9). 1,490 of those loans were originated in the last quarter of 2013, 6,881 of the loans were originated in 2014, and 11,185 of the loans were originated in 2015. (Id.). Even if the loans beginning in June 2014 each had ABA disclosure, based on the percentage rate for the 400 loan sample, there would be 115 loans in 2013 which did not have ABA disclosures and possibly even more potential class members who closed loans in the first five months in 2014.

Amerisave posits that the number should be reduced because some of the borrowers did not obtain a federally related mortgage loan as required by RESPA or some of the borrowers might not have actually used Novo as an appraiser. A basis for estimating some of the borrowers who did not obtain a federally related mortgage loan is provided in the Affidavit of Larry Evans, who noted that 52 out of the 400 in the loan sample or 13% of the loan files were not covered by RESPA because they were secured by rental property.[2] (Evans Decl. ¶ 28). If the 115 number is reduced by 13% there still remains 100 class members. It is true that some of the remaining 100 class members might not have used Novo as an appraiser, but evidence within the record also provides a basis for extrapolating how many might have used Novo. For the 1,490 loans originated by Amerisave in the last quarter of 2013, 1,423 or 95.5% of the loans may have arranged for an appraisal by Novo. (Amerisave's Resp.'s to Supp. Interrog. No. 10, Doc. 97-31, at 9). Thus, it is a reasonable estimate that approximately 95 of the loans originated in the last quarter of 2013 may have used an appraisal by Novo. Although Defendants suggest that even though they arranged for an appraisal by Novo, they might not have actually used Novo as an appraiser, Defendants do not present any basis for showing that this attrition is significant. Thus, while the No Notice class may have had approximately 95 members generated from the loans originated in 2013, it is a reasonable inference that more No Notice class members are generated from loans originated in the first 5 months of 2014.[3] If similar reductions are applied to the

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[2] This Court notes that no party provides the Court with a way to determine how much the class may be eroded by non-federally related cash-out refinances where the funds were primarily used for business purposes. Nevertheless, Defendants do not provide any evidence that this would significantly erode the class.

[3] Defendants suggest that the number of No Notice class members should be reduced even further for loans originated December 2013 and later because Amerisave added language to its website in December 2013 disclosing the relationship between Amerisave and Novo. As discussed below, however, the notice on Defendants' website would have no affect on the numbers of class members because the notice on the website would not satisfy RESPA's requirements for notice of the affiliated

Defective Notice class, there would be tens of thousands of class members in the Defective Notice class.

Given that the potential classes are numerous and the loans were generated throughout the country, joinder of all the various class members in their various geographic locales is impracticable. (See Amerisave's Resp.'s to Supp. Interrog. No. 10, Doc. 97-31, at 9 (indicating that Amerisave originated 19,556 loans between October 1, 2013, and December 31, 2015, and that Novo may have arranged for appraisals for approximately 17,237 loans); Evans Decl. ¶ 6 (explaining that Amerisave is licensed as a mortgage lender and/or broker in forty-nine states and the District of Columbia); AmeriSave.com, https://www.amerisave.com/why-choose-amerisave (last visited Jan. 27, 2018) (explaining that AmeriSave Mortgage Corporation is considered one of the leading retail mortgage lenders in the country, with hundreds of employees serving consumers in forty-nine states and DC)). Under these circumstances, this Court concludes that the numerosity requirement is met. Kilgo, 789 F.2d at 878 (concluding that numerosity requirement was met where there was at least thirty-one members located in at least several states); 5 James Wm. Moore et al., Moore's Fed. Practice ¶ 23.22 (3d ed. 2017) (noting that a relatively small class may be sufficiently numerous when the added factor of geographic dispersion contributes to making joining impracticable and that a class of forty-one or more is usually sufficiently numerous).

business arrangement.

2. Commonality

Plaintiffs contend that the commonality requirement is satisfied because with respect to the No Notice class, a common question is whether Defendants violated RESPA by failing to provide the requisite disclosure of the relationship between Amerisave and Novo. Plaintiffs argue common questions of law and fact for the Defective Notice class include whether Defendants provided an ABA disclosure that required use of Novo and whether the use of such a form violated RESPA. Conversely, Defendants argue Plaintiffs do not establish commonality because their statement of commonality amounts to little more than conclusory questions insufficient to carry their burden and do not take into account the far more complex factual analysis of the individualized issues.

Rule 23(a) requires that there be questions of law and fact common to the class. Fed. R. Civ. P. 23(a)(2). "[E]ven a single common question will do." Carriuolo v. Gen. Motors Co., 823 F.3d 977, 984 (11th Cir. 2016) (citing Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011)). "That common contention . . . must be of such a nature that it is capable of classwide resolution–which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Carriuolo, 823 F.3d at 984; Williams v. Mohawk Indus., 568 F.3d 1350, 1355-56 (11th Cir. 2009) (explaining that "[c]ommonality requires that there be at least one issue whose resolution will affect all or a significant number of the putative class members"). Plaintiffs correctly state that with respect to the No Notice class, there is a common factual issue, whether Amerisave omitted to provide them with an ABA disclosure, and a common legal issue, whether that failure to provide an ABA disclosure violated RESPA. Likewise, with respect to the Defective Notice class members, a common question of fact existed, whether Amerisave presented a disclosure form which required them to utilize Novo, and a common legal question, whether presenting a disclosure form requiring them to use Novo violated RESPA. Each of the No Notice class members were allegedly subjected to the same practice of failing to notify them of the affiliated business relationship and injured in the same way in that they were denied the opportunity to know the relationship between Amerisave and Novo and denied the opportunity to be alerted that the relationship between the two might lead to higher pricing and the need seek a better-priced appraisal management company. Likewise, each of the Defective Notice class members were subjected to the same practice of being forced to use Amerisave's affiliated appraisal management company and denied the opportunity to seek a better-priced appraisal management company or alerted to the possible need to seek more favorable loan terms with another lender. See, e.g., In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig., 795 F.3d 380, 399 (3d Cir. 2015) (finding commonality because plaintiffs alleged that each of the proposed class members were subjected to the same unlawful scheme characterized by illegal kickbacks, materially inaccurate disclosures, and repeated mail and wire fraud); Fangman v. Genuine Title, LLC, No. RDB-14-0081, 2016 WL 6600509, at *9 (D. Md. Nov. 8, 2016) (finding that potential class members were common in that they suffered the same injury, that is, they were each deprived of kickback-free settlement services and process and that but for the alleged kickback scheme, their settlement fees would have been much lower). The fact that each claim might not be identical or share identical facts does not defeat class certification. Williams, 568 F.3d at 1355-56; Cooper v. S. Co., 390 F.3d 695, 714 (11th Cir. 2004) (explaining that "[n]either the typicality nor the commonality requirement mandates that all putative class members share identical claims, and . . . factual differences among the claims of the putative class members do not defeat certification"), reversed on other grounds by Ash v. Tyson Foods, Inc., 546 U.S. 454, 457 (2006); see also In re Cmty. Bank, 795 F.3d at 399 (concluding that even though some individualized determinations may be necessary to completely resolve the claims of each putative class member, that is not the focus of the commonality inquiry); Palombaro v. Emery Fed. Credit Union, No. 1:15-CV-792, 2017 WL 3437559, at *5 (S.D. Ohio Aug. 10, 2017) (finding that the fact that common questions for the class mirrored the elements of RESPA claim did not defeat commonality requirement). Accordingly, this Court agrees that the low hurdle of sharing common questions is met. See Williams, 568 F.3d at 1355-56 (characterizing commonality as a low hurdle and concluded that because each employee would have to prove certain common elements of their claim, commonality prerequisite was met).

3. Typicality

Plaintiffs contend that the typicality requirement is met because they possess the same interest and suffered the same injury as the putative class members. Specifically, Plaintiffs argue they and the putative class members were subjected to either Amerisave's failure to provide the required disclosure or Amerisave's use of the improper disclosure mandating the use of its affiliated business, Novo. In contrast, Defendants argue typicality is lacking because the named Plaintiffs are subject to unique defenses and lack standing to pursue a RESPA claim because the named Plaintiffs received closing cost credits that covered their appraisal fees. In support, Defendants cite Loughlin's Settlement Statement, which indicates that the seller, not Loughlin, paid $5,000 in closing costs and Gonzalez' Settlement Statement reflecting $1,265.75 cash to borrower. (Pl.'s Ex. 23, at 000449, Pl.'s Ex. 26).

To meet the typicality requirement, plaintiffs must prove that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The claim of a class representative is typical "if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory." Williams, 568 F.3d at 1357.

In this case, the named Plaintiffs do possess the same interest and suffered the same injury as the class members. As discussed above, Plaintiff Loughlin, like the No Notice class members, was not provided the required disclosure, and Plaintiff Gonzalez, like the Defective Notice class members, received a notice which mandated his use of the affiliated business. This Court does not agree with Defendants that Plaintiffs' alleged receipt of reimbursements for closing costs defeat the named Plaintiffs' standing. Based on Loughlin's settlement statement, Loughlin paid $425.00 directly to

Novo prior to the closing. (Doc. 97-23, at 280). While Loughlin's settlement statement reflects that there was a $5,000 credit to closing costs from the seller, it also reflects that the settlement charges to the borrower totaled $5,462.03. (Id.). Thus, had Loughlin not been charged $425.00 for Novo's services, the seller's contribution would have covered almost all of his closing costs. Likewise, it is true that Gonzalez's Settlement Statement reflects that Gonzalez received a $2,480.20 adjustment for origination charges. (Pl.'s Ex. 26, Doc. 97-26, at 3, Line 803). The Settlement Statement also reflects that the $2,480.20 credit for settlement charges exceeded Gonzalez's actual settlement charges by $618.59 and the remainder of his credit was applied against the amount needed to pay off his former mortgage with Wells Fargo which had a payoff balance of $95,352.84. The amount needed to pay off the loan from the borrower was reduced by the remainder of the credit to $94,734.25. (Doc. 97-26, at 2). That amount was subtracted from Plaintiff Gonzalez's $96,000 refinance loan amount and he was given $1,265.75 cash back at closing. Had Plaintiff's $2,480.20 credit not needed to be applied to pay Novo's appraisal management fee of $100.00, Plaintiff Gonzalez's settlement charges would have been $100.00 lower and his cash back amount would have been $100.00 higher. (Doc. 97-26, at 3). Thus, at this juncture, this Court cannot conclude based on the Settlement Statements that neither Plaintiff avoided paying for the appraisal management fee to Novo, and indeed, it appears to this Court that both Plaintiffs paid the appraisal management fees one way or another. Accordingly, this Court is not persuaded that the credits against closing costs defeated the named Plaintiffs' standing or typicality at this time.

4. Fair and Adequate Protection of the Classes

Plaintiffs argue they meet the adequacy requirement because they do not have interests which are antagonistic to those of the class. In support, Plaintiffs assert Amerisave's failure to provide customers with an ABA disclosure or its use of a form that mandated that the customer use Novo are common to both Plaintiffs and the classes and Plaintiffs have a strong interest in proving Amerisave's improper conduct and obtaining redress. Plaintiffs also argue they and their counsel are qualified to represent the class. Plaintiffs further argue that they have already demonstrated that they have shouldered the responsibility of serving as class representatives by participating in discovery, being deposed, et cetera. Plaintiffs contend that the law firm seeking to represent the classes has very qualified lawyers who are experienced in the successful prosecution of consumer class actions. In response, Defendants argue Plaintiffs are not adequate class representatives because they received closing cost credits that covered their appraisal fees and thus, they are subject to unique defenses and lack standing to pursue their RESPA claims.

Under Rule 23(a)(4), Plaintiffs must demonstrate that they and their counsel "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The purpose of the adequacy requirement is to protect the legal rights of absent class members because all members of the class are bound by the res judicata effect of the judgment and to uncover conflicts of interest between named plaintiffs and the class they represent. London v. Wal-Mart Stores, Inc., 340 F.3d 1246, 1253 (11th Cir. 2003). There is no presumption of adequacy; parties seeking certification bear the burden of establishing adequacy. London, 340 F.3d at 1253. Additionally, the court is required to "undertake a stringent and continuing examination of the adequacy of representation by the named class representative[s] at all stages of the litigation where absent members will be bound by the court's judgment." London, 340 F.3d at 1254.

Here, Plaintiffs demonstrate that they will adequately represent the class. Both have maintained their involvement in the case and based on the record, it appears that their interests align with, and are not antagonistic to the class. (Aff. of Sean Loughlin, hereinafter "Loughlin Aff.," ¶¶ 6-8; Aff. of Antonio Gonzalez, hereinafter "Gonzalez Aff.," ¶¶ 4-6). Likewise, this Court agrees with Plaintiffs that their counsel are experienced and competent to represent the interests of the class and have vigorously and competently represented the settlement class in this action. Furthermore, Plaintiffs' counsel have obtained significant recoveries in other class actions. (See Pl.'s Exs. 33, 34; see generally Dockets in Champs Sports Bar & Grill Co., et al. v. Mercury Payment Sys., et al., No. 1:16-CV-00012-MHC (N.D. Ga. 2016); Lunsford v. Woodforest Nat'l Bank, No. 1:12-CV-103-CAP (N.D. Ga. 2012)). Additionally, as discussed above, this Court does not agree with Defendants that the named Plaintiffs are subject to the unique defenses and lack standing to pursue their RESPA claim based on their receipt of closing cost credits that would exceed the amount of their appraisal fees.

C. Plaintiffs Have Not Demonstrated that the Classes Are Ascertainable

1. The Parties' Contentions

Plaintiffs argue the class will be easily ascertained by reviewing the loan file records of the loans produced during the class period because the loan files contain all the information that will be necessary to identify the members of the class. Plaintiffs reason that if there is an ABA disclosure in the file, then the customer is a member of the Defective Notice class, because according to Plaintiffs, all of the notices included the same deficiency. Likewise, if there is no disclosure form in the file, the customer is a member of the No Notice class. Plaintiffs admit that analyzing the loan files will be time consuming, but argue that they can utilize optical character recognition software to search digital document images and perform the analysis quickly and certainly.

Defendants contend that Plaintiffs cannot show that the classes are ascertainable because they have not presented admissible evidence identifying a reasonably manageable way to identify the members of the classes. In support, Defendants contend that although Plaintiffs have presented the Affidavit testimony of Drago Cepar for the proposition that Plaintiffs can employ an OCR software program to review Defendants' loan files in order to determine membership in each of the proposed classes, Cepar's testimony is inadmissible. Defendants maintain that Cepar's testimony is inadmissible because his statements are expert testimony. In support, Defendants observe that Cepar only offers an untested hypothesis as to the effectiveness of the OCR software program to assist in ascertaining class membership, that this type of electronic review has not yet been performed, and he is not offering testimony based on his experience. Defendants also argue Plaintiffs have not proven that Cepar's testimony satisfies the requirements of Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993). Additionally, Defendants also object to Plaintiffs' failure to disclose Cepar as an expert and furnish a written report as required by the federal rules.

Defendants further contend that because Amerisave has originated tens of thousands of loans during the alleged class period, requiring individuals to search each file for each putative class member would require a burdensome review because each loan file is hundreds or thousands of pages in length. Defendants point out that it took two of Plaintiffs' reviewers 18 days to review 400 sample loan files. (Dixon Decl. ¶¶ 1-7). With at least 35,247 loan files in issue, at the same pace, Defendants posit that it would take reviewers eight work years to complete their review. Even at a rate of one minute per loan for Plaintiffs' suggested computer review, Defendants calculate that the review would take seventy-three work days. Plaintiffs respond that it is not accurate to extrapolate how long the review of the loan files would take based on the efforts of their two reviewers of the sample files because the sample reviewers did not simply determine which files contained an ABA disclosure, but rather were instructed to examine every page. (Cepar Decl. dated Nov. 2, 2017 ("Cepar 2 Decl."), ¶ 3-6). Plaintiffs contend that because the vast majority of the pages of the loan files were irrelevant, a focused search to determine whether there was an ABA disclosure and find the final HUD-1 statement will take considerably less time and because each of the pages have a distinctive appearance, "they could be pulled for each loan in a matter of minutes." (Cepar 2 Decl. ¶ 6).

Defendants further suggest that the review would take longer because not only would the reviewers need to locate and review the ABA disclosures and the HUD-1's, but also the reviewers would need to determine which customers obtained a federally related mortgage loan and used Novo for appraisal services. Thus, the files would need to be reviewed to ascertain whether Plaintiffs obtained credit for purposes covered under the Act and not, for example, for business purposes, such as for the purchase of investment properties or cash-out refinances where the borrower's equity would be used to finance a business or pay off a business debt. Amerisave's employees reviewed the four hundred sample loans and discovered that fifty-two of the files were secured by investment property based on indications in the loan application, leases within the loan file, and riders to the mortgage, such as an Assignment of Rents rider, and the HUD-1. (Decl. of Larry Evans, hereinafter "Evans Decl.," ¶¶ 27-28). Defendants argue Plaintiffs do not explain how to identify and exclude such borrowers.

Plaintiffs respond that it is enough that such loans are excluded from the class definition because they do not qualify as federally related mortgage loans; they do not have to demonstrate how they will ascertain them. Plaintiffs further argue Defendants have shown that the investment properties can be easily identified because Defendants' employees performed such a search. (Evans Decl. ¶¶ 27-28). Defendants were able to alert Plaintiffs to the fact that former Plaintiff Kenneth Adams had an investment loan not covered by RESPA and that all Defendants did was review the first page of the loan application. (Pls.' Ex. B, Doc. 116-2).

Defendants further contend that Plaintiffs do not explain how to ascertain whether the borrowers used Novo. While Amerisave can identify loan files which reflect an appraisal was ordered from Novo, it is not able to identify whether an appraisal was obtained from Novo. Plaintiffs maintain that they can identify whether an appraisal was procured through Novo by reviewing the final HUD-1 in each loan file.

2. Legal Analysis

"Before a district court may grant a motion for class certification, a plaintiff seeking to represent a proposed class must establish that the proposed class is adequately defined and clearly ascertainable." Walewski v. Zenimax Media, Inc., 502 F. App'x 857, 861 (11th Cir. 2012); Little v. T-Mobile USA, Inc., 691 F.3d 1302, 1304 (11th Cir. 2012). "[A] class is not ascertainable unless the class definition contains objective criteria that allow for class members to be identified in an administratively feasible way." Karhu v. Vital Pharmaceuticals, Inc., 621 F. App'x 945, 946 (11th Cir. 2015). Identification "of class members is administratively feasible when it is a 'manageable process that does not require much, if any, individual inquiry.'" Karhu, 621 F. App'x at 946 (citing Bussey v. Macon Cty. Greyhound Park, Inc., 562 F. App'x 782, 787 (11th Cir. 2014)). "A plaintiff cannot establish ascertainability simply by asserting that class members can be identified using the defendant's records; the plaintiff must also establish that the records are in fact useful for identification purposes, and that identification will be administratively feasible." Karhu, 621 F. App'x at 948; Owens v. Metro. Life Ins. Co., No. 2:14-CV-00074-RWS, 2017 WL 6302384, at *4 (N.D. Ga. Sept. 29, 2017). Likewise, a class should not be certified if the court must engage in individualized determinations of disputed fact in order to ascertain a person's membership in the class. Lea Family P'ship Ltd. v. City of Temple Terrace, No. 8:16-CV-3463-T-30AAS, 2017 WL 4155459, at *2 (M.D. Fla. Sept. 19, 2017).

a. No Individual Inquiry Into the Notice Class' Understanding of Amerisave and Novo is Required

While this Court ultimately agrees with Defendants that there are obstacles to ascertainability of the class, in this Court's view, several of the purported obstacles presented by Defendants do not defeat ascertainability of the class. Defendants argue one hurdle to ascertainability is that while the No Notice class did not receive a copy of the ABA disclosure, members of the No Notice class may not have an actionable claim because they may have received notice through other means, such as being advised of Amerisave and Novo's relationship via Amerisave's website. Amerisave's website provides the following notification before the customer submits credit card information for the appraisal: "Most appraisal reports, appraisal reviews, and AVMs (Automated Valuation Models) are completed by Novo Appraisal Management Corporation, which is an affiliate of Amerisave. The estimated cost of your appraisal is $450.00." (Evans Decl. ¶¶ 18-19; Decl. of Brian Forbes, hereinafter "Forbes Decl.," ¶ 4, Ex. 33). Defendants further maintain that loan officers may have told the customer about the relationship between Amerisave and Novo or the borrower may have pre-existing knowledge of the relationship via past dealings with Amerisave. Plaintiffs respond that it not necessary to look beyond whether there was an ABA disclosure in the loan files or receive testimony to determine whether disclosure was given to potential class members because the regulations are very specific about the contents of the disclosure and the way in which the disclosure must be made and the alternate methods for disclosure proposed by Defendants do no satisfy the requirements. As Plaintiffs point out, 12 C.F.R. § 1024.15 provides that an affiliated business arrangement must provide the borrower with a "written disclosure, in the format of the Affiliated Business Arrangement Disclosure Statement set forth in appendix D of this part, of the nature of the relationship (explaining the ownership and financial interest) between the provider of settlement services (or business incident thereto) and the person making the referral and of an estimated charge or range of charges generally made by such provider." 12 C.F.R. § 1024.15(b)(1). Additionally, the disclosure "must be provided on a separate piece of paper no later than the time of each referral or, if the lender requires use of a particular provider, the time of the loan application." 12 C.F.R. § 1024.15(b)(1). The regulations provide that the ABA disclosure should include the following language if a lender is making the referral to an entity other than an attorney, credit reporting agency, or real estate appraiser:

> This is to give you notice that [referring party] has a business relationship with [settlement services provider(s)]. [Describe the nature of the relationship between the referring party and the provider(s), including

> percentage of ownership interest, if applicable.] Because of this relationship, this referral may provide [referring party] a financial or other benefit.
>
> Set forth below is the estimated charge or range of charges for the settlement services listed. You are NOT required to use the listed provider(s) as a condition for [settlement of your loan on] [or] [purchase, sale, or refinance of] the subject property. THERE ARE FREQUENTLY OTHER SETTLEMENT SERVICE PROVIDERS AVAILABLE WITH SIMILAR SERVICES. YOU ARE FREE TO SHOP AROUND TO DETERMINE THAT YOU ARE RECEIVING THE BEST SERVICES AND THE BEST RATE FOR THESE SERVICES.
>
> [provider and settlement service]________________________________
>
> [charge or range of charges]____________________________________
>
> ACKNOWLEDGMENT
>
> I/we have read this disclosure form, and understand that referring party is referring me/us to purchase the above-described settlement services(s) and may receive a financial or other benefit as the result of this referral.
>
> ____
> Signature

12 C.F.R., pt. 1024, app. D. Even if it were acceptable for Amerisave to deviate from the language in the regulations or provide a notice which substantially complied with the regulations, Defendants have not provided evidence of their use of an ABA disclosure that provided the same level of information and safeguards as the one in the regulations. See White v. JRHBW Realty, Inc., No. 2:14-CV-01436–RDP, 2015 WL 5470245, at *3 (N.D. Ala. Sept. 16, 2015) (excusing technical deviations from language in regulations because notice provided substantially similar information); Toldy v. Fifth Third Mortg. Co., 721 F. Supp. 2d 696, 710-11 (N.D. Ohio 2010) (noting deviations in

ABA disclosure should be considered by a jury because the jury could find that the effectiveness of the disclosure was impaired). The only way Defendants' website notification and the possible verbal notifications could stand in place of the form notification in 12 C.F.R., part 1024, appendix D, is if the deviation of the Defendants' notice from the regulation's notice was so slight that the alternative notice safeguarded the consumer as well as the regulation's version did. Powers v. Fifth Third Mortg., No. 1:09-CV-2059, 2011 WL 3811129, at *13-14 (N.D. Ohio Aug. 12, 2011).

That level of protection is not achieved here. Based on the evidence before the Court, the website merely mentioned that Novo was an affiliate and that the estimated cost was $450. Neither the website nor an oral notification, would have satisfied the requirement of providing a separate, written paper notice complete with a signature line for the borrowers' acknowledgment that he or she has read the disclosure form and understands that the referring party may receive a financial or other benefit as a result of the referral as required by the regulations. Likewise, the website did not explain the nature of the relationship beyond that Amerisave and Novo were "affiliates." There was no information about Markert's ownership of Amerisave and Novo and there was no indication of any percentages of ownership interest. Likewise, the obvious problem with a verbal disclosure is that it is not in writing or in a form that the borrower can keep. Defendants provide no showing that any alleged verbal notification would have provided the same quality of information or protections insisted upon in the regulations as discussed above. Powers, 2011 WL 3811129, at *14. Thus, the deviations from the form provided in the regulations were not insubstantial. Under these circumstances, the other possible methods of notification cited by the Defendants do not provide an obstacle to ascertainability of the class.

b. Putative Class Members' Standing Is Not an Obstacle to Ascertainability of the Class

Defendants further contend that Plaintiffs' methodology for ascertaining the classes fails to exclude from the classes Amerisave customers who lack standing to pursue their claims under Section 2607(a) of RESPA. Specifically, Defendants contend that some of the putative Plaintiffs would not have standing if they did not pay the appraisal fee, such as in circumstances where the borrower received closing cost credits that reimbursed him or her for their fee. Additionally, Defendants contend that a borrower who had knowledge of the affiliated business arrangement would also lack standing as their claim would be for a purely technical violation and they would not have suffered an injury in fact. Plaintiffs respond that they are not required to demonstrate that they have article III standing for each of the putative class members at the time of class certification, only the named Plaintiffs. Defendants contend that to adopt this view of standing would violate the Rules Enabling Act because it would enlarge the putative plaintiffs' substantive rights by creating claims where none exist. Defendants maintain that a class member without injury could not bring individual claims, but by using the class action mechanism, they can ignore the standing requirement of Article III and create a substantive right where none existed before.

At the class certification stage, the class representatives bear the burden of demonstrating their standing and not the standing of every putative class member. Spokeo v. Robins, 136 S. Ct. 1540, 1547 n.6 (2016) (holding that "named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of a class to which they belong"); Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1265 (11th Cir. 2009) ("For a district court to certify a class action, the named plaintiffs must have standing, and the putative class must meet each of the requirements specified in Federal Rule of Civil Procedure 23(a), as well as at least one of the requirements set forth in Rule 23(b); Etzel v. Hooters of Am., LLC, 223 F. Supp. 3d 1306, 1313-14 (N.D. Ga. 2016) (Judge May) (explaining that plaintiff does not have to show that each member of the putative class would have an injury in fact); see also In re Horizon Healthcare Servs. Inc. Data Breach Litig., 846 F.3d 625, 634 & n.11 (3d Cir. 2017) (explaining that "[n]amed plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent," that "unnamed, putative class members need not establish Article III standing," and that [i]nstead, the case or controversies requirement is satisfied so long as a class representative has standing"); In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig., 795 F.3d 380, 397 (3d Cir. 2015); Lowden v. T-Mobile USA, Inc., 512 F.3d 1213, 1215 n.1 (9th Cir. 2008). Thus, Plaintiffs are correct that they do not have to establish standing of the putative class members in order to satisfy the ascertainability requirement.

c. Determining Whether Putative Class Members Have a Federally Related Mortgage Loan Is an Obstacle

Nevertheless, Plaintiffs have not met their burden of showing that ascertaining the class is administratively feasible. First, Plaintiffs have not indicated how the threshold determination of whether the class members have the type of loan transaction covered under RESPA may be accomplished. RESPA does not apply to credit transactions involving extensions of credit primarily for business, commercial or agricultural purposes. 12 U.S.C. § 2606(a); Gonsalves-Carvalhal v. Aurora Bank, FSB, No. 1:14-CV-151-SCJ-LTW, 2016 WL 5339695, at *7 (N.D. Ga. July 1, 2016); Cooper v. Am.'s Serv. Co., No. 2:08-CV-01170-KOB, 2010 WL 11565365, at *1 (N.D. Ala. Dec. 15, 2010); 12 C.F.R. § 1024.5(b)(2). Amerisave offers loan products which are outside of RESPA's coverage. For instance, Amerisave provides residential mortgage loans for investment properties. (Evans Decl. ¶ 10). Loans for the purpose of acquiring property which would not be owner-occupied and are instead used to obtain rental income are not covered under RESPA. Johnson v. Wells Fargo Home Mortg., Inc., 635 F.3d 401, 417 (9th Cir. 2011) (holding that where mortgages were for "non-owner-occupied rental properties," such mortgages were business-purpose loans and "RESPA does not apply to them"); Hernandez v. M&T Bank, No. 15-CV-470 (KM), 2016 WL 816746, at *2 (D.N.J. Feb. 25, 2016) (dismissing RESPA claim even though the complaint did not specify that the mortgaged premises are non-owner-occupied rental property because it was clear from the mortgage documents that the loan was for non-owner occupied rental property).

Amerisave also offers a "cash-out" refinance option where the customer receives a lump sum payment for equity the customer built in their property. (Evans Decl. ¶ 11). Amerisave does not track what its customers do with such cash-out proceeds unless the funds are used to pay off a debt that was required as a condition of closing. (Evans Decl. ¶ 11). Thus, the cash received from the loan could be used for commercial purposes and be excluded from RESPA. In such situations, even if the property securing the loan is the borrower's personal dwelling, the loan transaction may fall outside of RESPA's coverage. When determining whether credit was extended for business or personal reasons, the entire transaction as a whole and the surrounding factual circumstances are taken into consideration. Sherlock v. Herdelin, No. 04-CV-3438, 2008 WL 732146, at *3 (E.D. Pa. 2008), aff'd 434 F. App'x 57 (3d Cir. 2011); see also Hinchliffe v. Option One Mortg. Corp., No. 08-2094, 2009 WL 1708007, at *3 (E.D. Pa. June 16, 2009). "[T]he emphasis should be on the purpose of the transaction and not the categorization of the properties used to secure the loan." Sylvester v. Interbay Funding LLC, No. 15-CV-1736 (JPO), 2017 WL 4382056, at *4 (S.D.N.Y. Sept. 29, 2017); Sherlock, 2008 WL 732146, at *3-4 (explaining that the purpose for which the credit was obtained and not the nature of the collateral used to get it is the focus of the inquiry). Therefore, the fact that a cash-out refinance is secured by a party's personal residence does not automatically bring the transaction within RESPA's coverage. Powers v. Fifth Third Mortg. Co., No. 1:09-CV-2059, 2011 WL 3811129, at *15-16 (N.D. Ohio Aug. 12, 2011) (explaining that even if loans are secured by the borrower's primary residence, this is not sufficient to determine whether the loan is covered by RESPA); Hinchliffe, 2009 WL 1708807, at *4; Sherlock, 2008 WL 732146, at *3. Cash-out refinances where the equity in the borrower's residence will be used for a business purpose have been excluded from coverage under RESPA. Powers, 2011 WL 3811129, at *15-16; Hinchliffe, 2009 WL 1708807, at *4; Sherlock, 2008 WL 732146, at *3. Accordingly, the factfinder in the instant case will not only need to know whether the loan was utilized to purchase rental property versus an owner-occupied residence, but also whether "the proceeds from the [cash-out refinance] loans were used primarily for purposes other than business, commerce, or agriculture." Powers, 2011 WL 3811129, at *16; Toldy v. Fifth Third Mortg. Co., No. 1:09 CV 377, 2011 WL 4634154, at *3 (N.D. Ohio Sept. 30, 2011) (explaining that whether a putative class member's loan garners RESPA coverage cannot be shown short of a case by case analysis and that establishing coverage cannot be deferred until a claims-administration process is conducted after trial as the question of coverage is a central element bearing on liability). Defendants acknowledge that it may be determined whether the loan was obtained for investment purposes in some cases can be ascertained by reviewing the loan file and in fact, Defendants have identified some files among the four hundred loan sample in which the borrower obtained a loan for the purchase of rental property. Where the loan is secured by investment property, there may be indications in the loan application, leases within the loan file, or Assignment of Rents riders in the closing documents. (Evans Decl. ¶ 28). Nevertheless, every putative class member's loan file will have to be reviewed for purposes of ascertaining whether the loan was for investment property.

That being said, Plaintiffs do not provide a plan for determining whether a refinance with a cash-out option was utilized for business purposes. According to Larry Evans, who is Amerisave's Assistant Vice President of Compliance Systems and Reporting, Amerisave does not have records of how the borrowers use cash-out funds. Evans states that "Amerisave does not have, track, or maintain any information on what its customers do with any cash-out proceeds they receive from their loan transactions, except for funds used to pay off a debt that was required to be paid off as a condition of closing." (Evans Decl. ¶ 11). Plaintiffs do not dispute Evans' assertions. Thus, there is presently no basis or plan for determining which of the more than 35,000 loan files at issue are a cash-out refinance for a non-covered purpose. The Court cannot simply include people within the classes because their mortgage is most likely federally related; Plaintiffs must prove this point. Henson v. Fid. Nat'l Fin., 300 F.R.D. 413, 420 (C.D. Cal. June 18, 2014) (rejecting the notion that the court can simply assume that putative class members loans are federally related simply because it is likely that they are); Toldy, 2011 WL 4634156, at *5 (explaining that the Court cannot assume that loans are federally related mortgage loans).

d. Plaintiffs Do Not Provide a Viable Plan for Ascertaining the Class

Furthermore, Plaintiffs do not provide an viable plan for management of the process of ascertaining the class in light of other challenging administrative issues. As noted above, in order to determine if the putative class members' loan was for the purpose of obtaining rental property and was therefore not covered under RESPA, the file will have to be examined to determine whether the rental purpose was noted on the loan application, whether there are leases within the loan file, and/or whether an assignment of rents riders is present in the closing documents. (Evans Decl. ¶ 28; Pl.'s Ex. B, Doc. 116-2, at 2-3, letter from Defendants' counsel indicating that Defendants were able to determine that former Plaintiff Adams' loan was not federally related by analyzing the loan application, Schedule E to his tax return listing the property as rental real estate property, a copy of the lease between Adams and his tenants, Adams' disclosure and affidavit of occupancy indicating that the property was an investment property, and Adams' signature on a 1-4 Family Rider acknowledging his intent to rent the property and requiring the assignment of rents from Adams' tenants to the lender).

Additionally, in order to identify the No Notice class, each of the loan files must be reviewed to determine whether the ABA form was provided. Likewise, members of the Defective Notice class may be identified if there is an ABA disclosure in the file. In order to determine whether there was a completed referral of business to Novo, Line 804 of the HUD-1 must be reviewed to determine whether an appraisal management fee was paid to Novo as part of the loan transaction. (See, e.g., Doc. 97-26, at 3 (indicating on Line 804 that appraisal fee was paid to Novo), Doc. 97-21, at 3 (indicating on Line 804 that appraisal fee was paid to Novo); 24 C.F.R., pt. 3500, app. A (explaining that the HUD-1 settlement statement was "to be a statement of actual charges and adjustments paid by the borrower and seller" and that Line 804 of the HUD-1 is used to record the appraisal fee). Plaintiffs do not provide a plan for efficient review of the more than 35,000 loan files at issue in order to segregate from the classes, loans which were not federally related, loans in which no completed referral was made to Novo, and loans where no ABA disclosure was included in the file.

Plaintiffs' expert, Drago Cepar, suggests that determining the amount paid to Novo for appraisal services could be done by utilizing OCR software and fashioning a query which contained the words "Novo," "$," and "apprais!" (Cepar Decl. ¶¶ 12-13). The problem with excepting Cepar's testimony on the matter is that he is offering expert testimony and he has not been qualified as an expert, Plaintiffs do not dispute that they did not provide Defendants with advance notice of their intent to utilize Cepar as an expert or provide Defendants with expert reports, and Plaintiffs have not shown his methodology is reliable.

First, the statements offered by Cepar about the capability of OCR software is expert testimony and not lay testimony. Lay witness testimony includes opinions that are "(1) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701. The problem with accepting Cepar's opinion as lay testimony is that it is based on technical knowledge within the scope of Rule 702. Cepar testifies as to the capability to design queries and perform a computerized search of each of the loan files using a "proper OCR software program." (Cepar Decl. ¶¶ 12-13). This hypothesis requires the application of knowledge and familiarity with computers and the functionality of the OCR software beyond that of the average layperson. See United States v. Ganier, 468 F.3d 920, 925-26 (6th Cir. 2006) (finding that special agent who utilized forensic software to determine what searches were run on three computers could not offer testimony as a layperson because the average layperson would not have the knowledge needed to make sense of software reports); Point 4 Data Corp. v. Tri-State Surgical Supply & Equip., No. 11-CV-726 (CBA), 2013 WL 4409434, at *12 (E.D.N.Y. Aug. 2, 2013) (noting that many courts have found that testimony concerning computers or software is based on scientific, technical or other specialized knowledge outside the scope of Rule 701); Malin v. JP Mortg. Chase Bank, N.A., No. 3:11-CV-554, 2013 WL 12123512, at *5 (E.D. Tenn. July 8, 2013) (refusing to accept testimony of expert in the field of high technology computer document forgery cases as lay witness and noting that witnesses who perform after-the-fact investigations were not generally allowed to apply specialized knowledge in giving lay testimony); Cohorst v. BRE Props., Inc., No. 3:10-CV-2666-JM-BGS, 2011 WL 7061923, at *11 (S.D. Cal. Nov. 14, 2011) (explaining that "[c]omputer or website programming and/or engineering are areas clearly reserved for expert testimony”). Accordingly, this Court will not accept Cepar’s testimony as lay testimony.[4]

Second, notwithstanding the lack of fairness if the Court were to accept Cepar’s testimony when Defendants were not notified of Plaintiffs’ intent to rely upon him as an expert, this Court also cannot accept Cepar’s testimony as expert testimony. Under Rule 702 of the Federal Rules of Evidence, expert testimony is admissible if “(1) the expert is qualified to testify regarding the subject of the testimony; (2) the expert’s methodology is sufficiently reliable as determined by the sort of inquiry mandated in Daubert; and (3) the expert’s testimony will assist the trier of fact in understanding the evidence or determining a fact at issue.” Chapman v. Procter & Gamble Distrib., 766 F.3d 1296, 1304-05 (11th Cir. 2014). The burden of establishing qualification, reliability, and helpfulness rests on the proponent of the expert opinion. Chapman, 766 F.3d at 1304. Here, Plaintiffs do not provide enough evidence to either qualify Cepar as an expert or demonstrate that his methodology is reliable. Four factors which guide

[4] Plaintiffs cite United States v. Hamaker, 455 F.3d 1316, 1331-32 (11th Cir. 2006), in support of their argument that Cepar is offering lay testimony. In that case, the Eleventh Circuit found that an FBI financial analyst was not an expert witness and could offer lay testimony because although he had financial expertise, he did not offer it, but rather reviewed extensive records and added and subtracted numbers and compared the numbers in a straight forward fashion and that although his expertise and use of computer software may have made him more efficient, his review was within the capacity of any reasonable lay person. Here, however, reasonable lay people do not necessarily have technical expertise about the capacities of OCR software and what queries could be performed to efficiently extract necessary information from tens of thousands of loan files. Unlike Hamaker, the analysis of the functionality of the OCR software is not an issue of simple math equations that can be performed by lay people.

district judges in assessing the reliability of the expert's methodology include: "(1) whether the expert's methodology has been tested or is capable of being tested; (2) whether the theory or technique used by the expert has been subjected to peer review and publication; (3) whether there is a known or potential error rate of the methodology; and (4) whether the technique has been generally accepted in the relevant scientific community." Chapman, 766 F.3d at 1305. Here, Cepar's statements on the matter are conclusory and unspecific and therefore, do little to persuade the Court of their reliability. See, e.g., Maldonado v. Snead, 168 F. App'x 373, 386 (11th Cir. 2006) (concluding that the district court properly excluded purported expert affidavit which contained nothing but legal conclusions, conclusory statements of fact, and facts which would be inadmissible at trial); Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cty., 402 F.3d 1092, 1111 (11th Cir. 2005) (explaining that "a trial court may exclude expert testimony that is imprecise and unspecific, or whose factual basis is not adequately explained").

Even if the Court were to accept Cepar's testimony, it is too conclusory to aide the Court in evaluating how much assistance the OCR technology can provide in tackling the various administrative obstacles. While Cepar asserts that "[p]erforming a complete review of all of Amerisave's loan files to determine membership in each of the two classes proposed by Plaintiffs would be a very simple process so long as the loan files are formatted with a proper OCR software program," Cepar does not explain his understanding of what would be necessary to determine membership in each of the two classes. (Cepar Decl. ¶ 12). While it appears that Cepar may have factored in the amount of time it would take to determine whether or not there is an ABA disclosure in the file, there is no indication that Cepar is considering any of the other factors that must be evaluated, such as whether the referral to Novo was completed or whether the loan is a federally related mortgage loan. Likewise, Cepar does not explain how the OCR software may be employed to determine the purpose of the loan. Furthermore, although Cepar testified that utilization of the OCR software could cut the review time of each of the over 35,000 loan files to less than a minute for each file is not clear whether Cepar is referring to the amount of time it would take to simply determine whether or not there is an ABA disclosure form in the file, or whether he is taking into account the other information that will need to be obtained from each of the files. (Cepar Decl. ¶ 17). Cepar also qualifies his statement that utilizing the OCR software would be a simple process if the loan files are formatted with a proper OCR software program, but indicates that the sample of four hundred files were not provided by Amerisave in a digital format that allowed for full searchability. (Cepar Decl. ¶¶ 11-12). Cepar fails to advise how long it would take to load/format the over 35,000 loan files at issue with a proper OCR program.

Setting aside for a moment the question of what the OCR software can and cannot do, Plaintiffs do not lay out the process for how all of the loan files will be reviewed and how determinations as to whether the loan is federally related will be made. Other than the conclusory information provided within Cepar's Affidavits, Plaintiffs do not explain the process for how the necessary information will be obtained from the files, who will complete the process, or how long it is expected to take. Given that there are over 35,000 files and no clear method to determine whether the loans were for a business purpose, the Court needs more to determine whether the classes may be ascertained in an administratively feasible way. See, e.g., Foster v. Green Tree Serv., No. 8:15-CV-1878-T-27MAP, 2017 WL 5508371, at *4 (M.D. Fla. Nov. 15, 2017) (holding that it was not administratively feasible for the defendant to have to conduct a file by file review of 560 files to determine which customers qualify as class members where it would require defendant to review service notes, call recordings, and correspondence since communications at issue varied); Christie v. Bank of Am., N.A., No. 8:13-CV-1371-T-23TGW, 2016 WL 654818, at *8 (M.D. Fla. Jan. 7, 2016) (finding that plaintiffs failed to demonstrate that the defendants' records were useful for class identification purposes or that the identification would be administratively feasible where there was 283,000 loans and loan files would have to be pulled to determine whether a loan used forms mentioned in the class definition and individual files would have to be reviewed to determine whether proceeds came from force-placed insurance policies); Haskins v. First Am. Title Ins. Co., No. 10-5044 (RMB/JS), 2014 WL 294654, at *11, 14 (D.N.J. Jan. 27, 2014) (explaining that class was not ascertainable because data was missing from computer system and file by file review was required to determine whether a new loan was used to refinance a prior mortgage and whether the transaction involved the same borrowers and the same property as well as to determine the amount of the prior loans and the dispositions of the loans per the rate manual's requirement).

D. Plaintiffs Have Not Demonstrated that the Common Questions of Law and Fact Predominate

1. The Parties' Contentions

Plaintiffs further contend that this case meets the requirements of Rule 23(b) because common questions of law or fact predominate over questions affecting individual class members and class treatment is superior to other methods available for adjudication. Plaintiffs contend that they would present the same evidence of Amerisave's failure to provide an ABA disclosure form or Amerisave's practice of providing a disclosure form that identified its relationship with Novo, but mandated that the customer use Novo. Plaintiffs maintain that such evidence has a direct impact on each class member's effort to establish liability and entitlement to relief. Plaintiffs further contend that damages may be ascertained by using Amerisave's loan files to identify the members of the classes and to calculate the damages to each member of the class. Plaintiffs argue first, that Defendants can review the loan files and provide for them every federally related loan which contained a payment to Novo. Then Plaintiffs or a third party can search each file to determine if there is an ABA disclosure. If there is not, then the customer is a member of the No Notice class. If there is a disclosure form, the customer is a member of the Defective Notice class because each of the notices included the same deficiency. The names of each class member, their contact information, and the amount they paid to Novo may be retrieved from the loan file and can be added to a spreadsheet. In a separate column, the spreadsheet can multiply the Novo payment times three to show the statutory damage owed. Plaintiffs contends that because the necessary information may be mined from a spreadsheet, Defendants operated in the same manner with regard to all customers, and damages may be calculated by applying a mechanical method, the common issues predominate. Plaintiffs contend that Defendants' affirmative defenses do not vitiate predominance because their defenses lack sufficient detail or foundation making it difficult to discern whether they apply or what facts, if any, support them. Plaintiffs also argue Defendants' defenses do not meet the Twombly pleading standards and thus, cannot defeat certification.

In response, Defendants argue Plaintiffs' arguments for predominance consist of conclusory assertions and an unmeritorious argument that Defendants' affirmative defenses do not meet the Twombly pleading standard. Defendants further argue individual issues predominate for both classes because: (1) each loan file must be reviewed loan by loan to determine whether each borrower received an ABA disclosure form, which would take months; (2) in order to evaluate whether the loan customers are covered under RESPA, the loan files must be reviewed loan by loan to determine whether the loan was obtained for a business purpose such as for investment property or where the borrower uses cash-out refinance funds for business purposes and Amerisave does not have records of how borrower's use cash-out funds; (3) in order to establish that there was a referral, the loan files must be reviewed on an individual basis to determine whether Novo completed and was paid for appraisal management work in each putative class member's transaction; (4) in order to determine whether Section 2607(c)(2) applies, the loan files must be individually reviewed to determine whether the money paid to Novo was bona fide compensation for services actually performed and as a result, the Court must determine and then compare the fee paid for the appraisal, the services rendered in connection with the appraisal, and whether the fee paid was within the market rate for the services provided; and (5) an individualized review is necessary to determine whether Defendants are entitled to an offset for the distribution of redress funds under the Consumer Financial Protection Bureau ("CFPB") consent order[5] or whether a closing cost credit completely covered each class member's appraisal fee in order to calculate damages and determine whether the class member has standing. Defendants contend that individualized inquiries are required for each of the class members in the proposed Defective Notice class because an individualized review of all of the communications between each class member and employees of Amerisave is necessary to determine whether the borrower was informed that he was not required to use Novo and simply reviewing the HUD-1 is not sufficient because the borrower could have affirmatively elected to use Novo regardless of being verbally told they did not have to do so. Defendants argue individualized issues also predominate in the No Notice class because an individualized review of the loan file will have to be made to determine whether borrower learned of the affiliated business arrangement between

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[5] The CFPB reviewed certain practices of Amerisave, Novo, and Markert and found violations of 12 U.S.C. § 2607(a). Pl.'s Ex. 29, at 12-18. The CFPB issued a consent order. (Pls.' Ex. 29).

Novo and Amerisave through other means and as a result, the loan by loan review will have to include communications between borrowers and Amerisave personnel.

2. Legal Analysis

The Plaintiffs may establish the predominance requirement if "the questions of law or fact common to class members predominate over any questions affecting only individual class members." Fed. R. Civ. P. 23(b)(3). "To determine whether the requirement of predominance is satisfied, a district court must first identify the parties' claims and defenses and their elements. Brown v. Electrolux Home Prods., 817 F.3d 1225, 1234 (11th Cir. 2016). Next, "[t]he district court should then classify these issues as common questions or individual questions by predicting how the parties will prove them at trial." Brown, 817 F.3d at 1234. "Common questions are ones where 'the same evidence will suffice for each member,' and individual questions are ones where the evidence will 'vary from member to member.'" Brown, 817 F.3d at 1234. The test for predominance has been described as follows:

> Where, after adjudication of the classwide issues, plaintiffs must still introduce a great deal of individualized proof or argue a number of individualized legal points to establish most or all of the elements of their individual claims, such claims are not suitable for class certification under Rule 23(b)(3). . . . [I]f common issues truly predominate over individualized issues in a lawsuit, then the addition or subtraction of any of the plaintiffs to or from the class [should not] have a substantial effect on the substance or quantity of evidence offered. Put simply, if the addition of more plaintiffs to a class requires the presentation of significant amounts of new evidence, that strongly suggests that individual issues (made relevant only through the inclusion of these new class members) are important. If, on the other hand, the addition of more plaintiffs leaves the quantum of evidence introduced by the plaintiffs as a whole relatively

undisturbed, then common issues are likely to predominate.

Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1270 (11th Cir. 2009) (citing Klay v. Humana, Inc., 382 F.3d 1241, 1255 (11th Cir. 2004)). The Eleventh Circuit, however, has clarified that predominance is not "bean counting" and that the "relative importance of the common versus individual questions also matters." Predominance should be assessed with its "overarching purpose in mind–namely, ensuring that 'a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Brown, 817 F.3d at 1235.

a. Consideration of the Exemption under Section 2607(c)(2) Will Not Require an Evaluation of Whether Putative Plaintiffs' Charges for Their Appraisals Were Excessive

While this Court ultimately agrees with Defendants that individual questions predominate instead of common ones, this Court disagrees with Defendants' assessment of what individual questions will need to be answered. For instance, Defendants argue it is not enough to know whether Plaintiffs paid for an appraisal, they need to evaluate whether the amounts putative plaintiffs paid for their appraisal were excessive. Defendants contend that they will be entitled to the exemption under Section 2607(c)(2) for bona fide compensation for services actually performed, and that as a result, some analysis will have to be done to determine whether the amount Novo charged had a reasonable relationship to the goods and services provided. As a result, the Court must determine and compare the fee paid for the appraisal, the services rendered in connection with the appraisal, and whether the fee paid was within the market rate for the services provided. Plaintiffs argue in response that the exemption in Section 2607(c)(2) does not apply when there is an affiliated business arrangement and that Defendants are limited to the exception in Section 2607(c)(4).

While this Court does not share Plaintiffs' view that the affiliated business arrangements are not entitled to the exemption in Section 2607(c)(2),[6] this Court also concludes that the exemption in Section 2607(c)(2) does not create an individual inquiry under the circumstances of this case. There is no violation of Section 2607(a) of RESPA until there is an exchange of a thing of value for a referral of settlement services.[7] Edwards v. First Am. Corp., 798 F.3d 1172, 1178-79 (9th Cir. 2015). Thus,

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[6] Plaintiffs argue no individualized review is required for purposes of evaluation of the Section 2607(c)(2) exception because affiliated business arrangements which do not satisfy the requirements of the Section 2607(c)(4) exemption are per se violations of RESPA and are not entitled to the exemption under Section 2607(c)(2). In support, Plaintiffs rely on a series of cases in which the district courts have concluded that Section 2607(c)(4) provides an independent cause of action under RESPA and that affiliated business arrangements which do not satisfy Section 2607(c)(4) are liable per se. Notwithstanding the fact that Plaintiffs have not asserted claims under Section 2607(c)(4) of RESPA, this Court disagrees that Section 2607(c)(4) is independently actionable and instead, is of the view that it is merely an exemption from liability under 2607(a) or 2607(b) for certain affiliated business arrangements that satisfy the requirements. See Collins v. First Fin. Servs., Inc., No. 7:14-CV-288-FL, 2016 WL 589688, at *8 (E.D. N.C. Feb. 10, 2016); Benas v. Shea Mortg., Inc., No. 11cv1461-IEG (BGS), 2011 WL 4635645, at *5 (S.D. Cal. Oct. 4, 2011); Wash. v. Nat'l City Mortg., No. C 10-5042 SBA, 2011 WL 1842836, at *8 (N.D. Cal. May 16, 2011). Accordingly, this Court also disagrees with Plaintiffs' conclusion that the exception under Section 2607(c)(2) is foreclosed.

[7] Section 2607(a) provides:

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or

"[i]n order for there to be a violation of 12 U.S.C. § 2607(a), three elements must be present: 1) a payment or a thing of value; 2) made pursuant to an agreement to refer settlement business; and 3) an actual referral." Egerer v. Woodland Realty, Inc., 556 F.3d 415, 427 (6th Cir. 2009) (citing Culpepper v. Irwin Mortg. Corp., 491 F.3d 1260, 1265 (11th Cir. 2007)); White v. JRHBW Realty, Inc., No. 2:14-CV-01436-RDP, 2015 WL 854348, at *1 (N.D. Ala. Feb. 27, 2015). RESPA defines a "thing of value" as "any payment, advance, funds, loan, service, or other consideration." 12 U.S.C. § 2602(2); Edwards, 798 F.3d at 1178. Despite the general prohibition of exchanging any thing of value for a referral, a statutory safe harbor in Section 2607(c)(2)[8] exempts the payment of the thing of value from being a RESPA violation "if the thing of value–despite being made simultaneously with a referral–was for goods or facilities actually furnished or for services actually performed." Edwards, 798 F.3d at 1179. Either the giver or recipient of the "thing of value" can invoke this defense since Congress did not limit it, but "the crucial inquiry is whether the alleged kickback was really given for services actually performed." Henson v. Fid. Nat'l Fin., 18 F. Supp. 3d 1006, 1013 (C.D. Cal. Apr. 29,

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> otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

12 U.S.C. § 2607(a).

[8] Section 2607(c)(2) provides "nothing in this section shall be construed as prohibiting . . . (2) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed." 12 U.S.C. § 2607(c).

2014).

This Court disagrees with Defendants' argument that Plaintiffs' payment to Novo is covered under Section 2607(c)(2) because the payment to Novo is not the "thing of value" contemplated by Section 2607(a). Instead, this Court finds that Section 2607(c)(2) is an exemption and provides a fair harbor for conduct that otherwise would have violated Section 2607(a). Thus, Section 2607(a) is not violated by the payment from the borrower to Novo. Section 2607(a) is not violated unless and until there is a kickback. 12 U.S.C. § 2607(a); see, e.g., Kiefaber v. HMS Nat'l, Inc., 284 F.R.D. 370, 372 (E.D. Va. Feb. 10, 2012) (explaining that in scheme where home warranty company was alleged to violate RESPA by paying kickbacks and referral fees to real estate agents to promote its home warranty insurance, RESPA does not prohibit a real estate broker from referring business to a home warranty company, it only prohibits the broker from receiving a fee for that referral, but if the fee for the broker is for a compensable service, then the fee is exempt from liability under Section 2607(c)(2)); Gaines v. Home Loan Ctr., No. SA CV 08-667 AHS , 2010 WL 11506442, at *18 (C.D. Cal. May 24, 2010). The kickback here is not the payment to Novo. The payment to Novo is the referral for purposes of Section 2607(a). The alleged kickback is the ultimate profit paid to Markert. (SAC ¶ 56 (explaining that "Novo has given, and Markert and his affiliates (also the beneficial owners of Amerisave) have accepted, a thing of value, in the form of profit distributions from Novo, pursuant to the agreement or understanding that appraisal management services involving federally related mortgage loans of Amerisave consumers would be referred to Novo, in violation of Section 8(a) of RESPA"); see also Gaines, 2010 WL 11506442, at *18 (explaining that in scheme where defendant lender referred business to bundled settlement service provider, but retained portion of the fee to bundled settlement service provider and both lender and settlement service provider had been acquired by same entity which received profits from both, under Section 2607(c)(2), lender could lawfully pay bundled settlement service provider for its services but could not lawfully retain part of bundled settlement service provider's fee); Spears v. Wash. Mut., No. C-08-00868 RMW, 2009 WL 605835, at *3 (N.D. Cal. Mar. 9, 2009) (explaining that where the plaintiff alleged that lender had a scheme whereby it would refer appraisals to certain appraiser, and in exchange, it would received appraisal which had an inflated value, exception in Section 2607(c)(2) did not apply to portion of transaction in which borrower paid for appraisal services because such payments were not alleged to violate RESPA, rather it was the appraisal with a high appraised value made in exchange for the referral of the appraisal business which should be considered for purposes of application of the exception). Thus, this Court does not agree with Defendants that every Amerisave loan originated during the class period will have to be screened and analyzed for the purpose of determining the fee paid for the appraisal, the services rendered in connection with the appraisal, or whether the fee paid was within the market rate for the services provided. Furthermore, the exception applies when there is a payment for bona fide salary, compensation, goods, facilities, or services. Edwards, 798 F.3d at 1180. Defendants do not present any authority for the proposition that the exception applies when the payment is for an ownership interest. Edwards, 798 F.3d at 1180 (finding that the exception does not apply when the payment is for an ownership interest). Even if the exception did apply in the case of an ownership interest, however, it would not require a loan by loan review because the profit consideration would be the same no matter who the class member is.

b. No Need to Assess Putative No Notice Class for Prior Knowledge of the Affiliated Business Arrangement Between Amerisave and Novo

Defendants argue that individualized inquiries exist for each class member in the No Notice class because even if the ABA disclosure did not satisfy the requirements of Section 2607(c)(4), class members may have been made aware of the relationship between Novo and Amerisave via prior knowledge, communications with loan officers, and the disclosure on Amerisave's website. Defendants contend due to the absence of such information in the individual loan files, information will need to be gathered from each putative class member and reviewed individually. Plaintiffs respond that individualized inquiries of this nature are unnecessary because the borrower's knowledge is irrelevant under Section 2607(c)(4) of RESPA, which explicitly requires that proper disclosure be made in writing and contain certain information; thus, website disclosures and oral disclosures do not satisfy the requirements. As discussed above in Part II(C)(2)(a), this Court agrees with Plaintiffs that there is no necessity for individualized review of the loan files and other communications to ascertain the putative class members' prior knowledge, oral communications with lenders, or

Amerisave's website. The borrower's independent knowledge is irrelevant to the inquiry. See, e.g., Powers v. Fifth Third Mortg. Co., No. 1:09-CV-2059, 2011 WL 3811129, at *13-14 (N.D. Ohio Aug. 12, 2011) (explaining that the only time a plaintiff's understanding of the required disclosures is an issue is when a defendant's written disclosures deviate only slightly from the requirements in 24 C.F.R., Pt. 3500, App. D).

c. Individual Assessment Will Be Needed to Determine Whether the Putative Plaintiffs Have Federally Related Mortgage Loans

The Court agrees with Defendants that some individualized questions will result in this case. As noted above, individual assessment will be necessary to determine whether the putative plaintiffs have a federally related mortgage loan. As discussed above, RESPA does not apply to credit transactions involving extensions of credit primarily for business, commercial or agricultural purposes. 12 U.S.C. § 2606(a); Gonsalves-Carvalhal v. Aurora Bank, FSB, No. 1:14-CV-151-SCJ-LTW, 2016 WL 5339695, at *7 (N.D. Ga. July 1, 2016); Cooper v. Am.'s Serv. Co., No. 2:08-CV-01170-KOB, 2010 WL 11565365, at *1 (N.D. Ala. Dec. 15, 2010); 12 C.F.R. § 1024.5(b)(2). Thus, loans for the purpose of acquiring rental property or cash out refinances where the loan proceeds are used for business purposes are not covered under RESPA. Johnson v. Wells Fargo Home Mortg., Inc., 635 F.3d 401, 417 (9th Cir. 2011) (holding that where mortgages were for "non-owner-occupied rental properties," such mortgages were business-purpose loans and "RESPA does not apply to them");

Hernandez v. Bank, No. 15-CV-470 (KM), 2016 WL 816746, at *2 (D.N.J. Feb. 25, 2016) (dismissing RESPA claim even though the complaint did not specify that the mortgaged premises are non-owner-occupied rental property because it was clear from the mortgage documents that the loan was for non-owner occupied rental property). Accordingly, the factfinder in the instant case will not only need to know whether the loan was utilized to purchase rental property versus an owner-occupied residence, but also whether "the proceeds from the loans were used primarily for purposes other than business, commerce, or agriculture." Powers, 2011 WL 3811129, at *16; Toldy v. Fifth Third Mortg. Co., No. 1:09-CV-377, 2011 WL 4634154, at *3 (N.D. Ohio Sept. 30, 2011) (explaining that whether a putative class member's loan garners RESPA coverage cannot be shown short of a case by case analysis and that establishing coverage cannot be deferred until a claims-administration process is conducted after trial as the question of coverage is a central element bearing on liability). Thus, each of the loan files will have to be reviewed to determine whether each borrower obtained their loan for a business purpose in order to ascertain the members of the class and determine their eligibility for recovery under RESPA.

d. Individual Assessment Will Be Necessary to Determine Whether Amerisave Referred the Putative Plaintiffs to Use Novo

Additionally, as Defendants pointed out, Plaintiffs must show that there was a referral to Novo in order to establish their claim. "In order for there to be a violation of 12 U.S.C. § 2607(a), three elements must be present: 1) a payment or a thing of value;

2) made pursuant to an agreement to refer settlement business; and 3) an actual referral." Egerer v. Woodland Realty, Inc., 556 F.3d 415, 427 (6th Cir. 2009) (citing Culpepper v. Irwin Mortg. Corp., 491 F.3d 1260, 1265 (11th Cir. 2007)); White v. JRHBW Realty, Inc., No. 2:14-CV-01436-RDP, 2015 WL 854348, at *1 (N.D. Ala. Feb. 27, 2015). In that vein, Defendants emphasize that a referral under Regulation X is only a referral "when [Plaintiffs] pay for such settlement service or business incident thereto or pay a charge attributable in whole or in part to such settlement service or business." See 12 C.F.R. § 1024.14(f)(1). Plaintiffs contend that whether Amerisave referred the putative Plaintiffs to Novo and whether the borrower paid for the appraisal can be determined by viewing line 804 of the HUD-1, which depicts whether or not Novo was paid for services. Accordingly, the HUD-1 from each putative borrower's loan file will have to be evaluated.

Defendants also contend that further individual inquiries will be required as to whether the putative class members in the Defective Notice class were actually forced to use Novo. In support, Defendants contend that Amerisave permits borrowers to use another appraisal management company upon their request and therefore, the Court will need to assess all communications between each class member and employees of Amerisave to determine if the borrower was informed that he or she did not need to use Novo. Defendants contend that the fact that Novo was used in the transaction is not sufficient to show required use because the borrower could have affirmatively elected to use Novo. In response, Plaintiffs argue Amerisave's former compliance manager testified that applicants are not allowed to choose their own appraisers. Plaintiffs further argue that it is indisputable that Defendants' disclosure explicitly required the use of Novo and said nothing about a separate list of certified appraisers.

In order to take advantage of the exemption in Section 2607(c)(4) for affiliated business arrangements, Amerisave could not have required its borrowers to use Novo. 12 U.S.C. § 2607(c)(4)(B). Under Regulation X, required use is defined as when "a person must use a particular [settlement service provider] in order to have access to some distinct service or property, and the person will pay for the settlement service of the particular provider, or will pay a charge attributable, in whole or in part, to the settlement service." 12 C.F.R. § 1024.2. While both Plaintiffs' and Defendants' evidence suggests that Amerisave often required its borrowers to use Novo, it does not show that borrowers were always required to use Novo in every circumstance. First, while Plaintiffs point to the Deposition of Glenn Sedgwick, Amerisave's former compliance manager, for the purpose of showing that applicants were not permitted to choose their own appraisers (Dep. of Glenn Sedgwick, hereinafter "Sedgwick Dep.," 55), there is a difference between not being permitted to choose their own appraiser and being required to use Novo as their appraisal management company. Sedgwick testified that loan applicants were not permitted to choose their own appraisers for fraud reasons, but he did not testify that there was no provider list beyond Novo or that loan applicants could not choose from Amerisave's list of providers. (Sedgwick Dep. 55). Indeed, when Sedgwick was asked whether he agreed with a statement by the CFPB consent order that Amerisave does not allow consumers to choose their own appraiser or appraisal management company and that since about January 2011 AmeriSave has referred over 99% of its appraisals to Novo, Sedgwick testified that he did not know what the percentage breakdown was. (Sedgwick Dep. 48-50). Additionally, even if Sedgwick's testimony should be interpreted as suggesting that Amerisave always required its borrowers to use Novo, there is no foundation for the notion that Sedgwick could testify as to Amerisave's referrals to Novo during the entire class period as Sedgwick left Amerisave in April 2014. (Sedgwick Dep. 62).

Plaintiffs also contend that because Gonzalez' disclosure clearly required that Gonzalez use Amerisave, no individualized inquiries are necessary. Plaintiffs, however, do not lay a foundation for the notion that every disclosure, not just Gonzalez' form clearly required the use of Amerisave. One of the sample disclosure forms provided by Plaintiffs shows that the appraiser is Novo Appraisal Management Corporation or that Amerisave would select the appraiser from a list of certified appraisers. (Pl.'s Ex. 18, Doc. 97-18, at 4, 7, 10).

Larry Evans, who is Amerisave's Assistant Vice President of Compliance Systems and Reporting, states that "if a borrower does not want to use Novo, the borrower may ask to use another appraiser or appraisal management company and Amerisave may permit it." (Evans Decl. ¶ 14). While Amerisave does not permit borrowers to demand a specific appraiser or appraisal management company, Amerisave has worked with appraisal management companies other than Novo. (Evans Decl. ¶¶

15-16, 20).

Situations in which the customer was not required to use Novo, and indeed, did not use Novo, may be ascertained by reviewing the HUD-1 to determine whether or not an entity other than Novo was utilized and paid. Defendants argue that what the HUD-1 cannot identify, however, is customers who have been verbally told that they did not have to use Novo, but nevertheless ultimately did use Novo even though they were not required to do so. Defendants, however, do not point to any evidence stating that this scenario occurs frequently or any basis for inferring that this will be a frequent occurrence. Nevertheless, some individualized inquiry may be necessary in this regard.

e. Individual Inquiries Will Need to be Made to Ascertain the Class Members' Damages

Defendants contend that individualized inquiries are necessary to determine whether each class member has standing, or even if they do, the extent of their damages. In support, Defendants contend that a loan by loan review would be required to determine whether the putative plaintiffs were reimbursed for their appraisal fees and would require investigation into whether a closing cost credit was received by the borrower, the total amount of closing costs paid by the borrower, and the extent to which the closing costs were reduced or completely covered. Additionally, Defendants contend that putative class members may have already received redress that offsets or eliminates their injury via the CFPB's distribution of redress funds paid by Defendants. Plaintiffs do not dispute Defendants' contention that analysis will be required as to damages because Defendants may be entitled to offset the putative plaintiffs' damages with payments Defendants have already made per the CFPB's consent order or that some Plaintiffs' damages will be offset because they never paid for Novo's services. Plaintiffs merely argue that differing amounts of damages do not defeat prominence.

While the individualized questions associated with damages in this case do not defeat the predominance requirement on their own, they are considered in connection with the determination of whether the common questions predominate. The Eleventh Circuit has held that "the presence of individualized damages issues does not prevent a finding that the common issues in the case predominate." Brown v. Electrolux Home Prods., 817 F.3d 1225, 1239 (11th Cir. 2016). Indeed, "individual issues of damages are sometimes easy to resolve when the calculations are formulaic" and the district courts have many tools to decide individual damages, such as bifurcating the damage phase of the trial, appointing a special master to preside over individual damages proceedings, decertifying the class after liability and providing notice to class members concerning how they prove their damages, creating subclasses, or amending the class. Brown, 817 F.3d at 1239; contrast Klay v. Humana, 382 F.3d 1241, 1260 (11th Cir. 2004) ("Of course, there are also extreme cases in which computation of each individual's damages will be so complex, fact-specific, and difficult that the burden on the court system would be simply intolerable."), abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639 (2008). That being said, "the individual nature of the plaintiffs' damages is still relevant to whether predominance is satisfied." Brown, 817 F.3d at 1239. Individual damages will defeat predominance "when they are accompanied by significant individualized questions going to liability" or "if computing them will be so complex, fact-specific, and difficult that the burden on the court system would be simply intolerable." Brown, 817 F.3d at 1240; Klay, 382 F.3d at 1260 ("It is primarily when there are significant individualized questions going to liability that the need for individualized assessments of damages is enough to preclude 23(b)(3) certification."); Rutstein v. Avis Rent-A-Car Sys., 211 F.3d 1228, 1235-36 (11th Cir. 2000). "Although damages often raise numerous 'individual' questions, predominance is a 'qualitative rather than quantitative concept. It is not determined simply by counting noses: that is, determining whether there are more common issues or more individual issues, regardless of relative importance." Brown, 817 F.3d at 1239. Accordingly, the individualized inquiries associated with determining Plaintiffs' damages are considered for purposes of evaluating predominance.

f. Given All of the Individualized Issues, the Predominance Requirement Is Not Satisfied

Plaintiffs contend that the common questions of law and fact predominate because the salient evidence necessary to establish their claims is common to all members of the classes in that they all seek to prove that Amerisave's conduct in failing to disclose its relationship with Novo or mandating that its customers use Novo violated RESPA and that each of the class members would be presenting the same evidence of Amerisave's failure to provide an ABA disclosure form or Amerisave's disclosure form which identified the relationship with Novo, but mandated that the customer use Novo.

Admittedly in this case, some of the issues to be assessed will be common across the class members such as whether the arrangement between Amerisave and Novo was an affiliated business arrangement, whether the ABA disclosures Amerisave provided to borrowers fell short of RESPA's requirements, whether it was a violation of RESPA for Amerisave to fail to provide ABA disclosures, and whether the profits Markert received were a payment or thing of value with respect to Section 2607(a). Most of these issues appear straight-forward.

In contrast, as discussed above, individual questions for each class member remain as to whether the referral to Novo was complete, i.e., was a payment made to Novo, was the customer forced to use Novo or did they acquiesce to using Novo after being offered an alternative, whether or not an ABA disclosure was made, whether the loan was a federally related mortgage loan, and whether an offset for damages is due. Some of these questions require significant analysis and an individual loan-by-loan review. For instance, determining whether a loan is a federally related mortgage loan is not always a simple task. The regulations provide that RESPA applies to all federally related mortgage loans except for exemptions in 12 C.F.R. § 1024.5, such as whether or not the loan is primarily for a business, commercial, or agricultural purpose. 12 C.F.R. § 1024.5. That inquiry will require significant record review for each prospective class member in order to determine if there is documentation in the file indicating whether the loan was for rental purposes or if there is any indication as to a business purpose. Even then, as discussed above, if the purpose was to cash-out the equity of the home to be utilized for business, commercial, or agricultural purposes, that purpose may not be evident from the documentation maintained in the loan file.

Furthermore, the determination of whether a loan was for a business purpose is not always a check-the-box, no analysis decision. When determining whether credit was extended for business or personal reasons, the entire transaction as a whole and the surrounding factual circumstances are taken into consideration. Sherlock v. Herdelin, No. 04-CV-3438, 2008 WL 732146, at *3 (E.D. Penn. Mar. 17, 2017; see also Hinchliffe v. Option One Mortg. Corp., No. 08-2094, 2009 WL 1708007, at *3 (E.D. Pa. June 16, 2009). "[T]he emphasis should be on the purpose of the transaction and not the categorization of the properties used to secure the loan." Sylvester v. Interbay Funding LLC, No. 15-CV-1736 (JPO), 2017 WL 4382056, at *4 (S.D.N.Y. Sept. 29, 2017); Sherlock, 2008 WL 732146, at *3-4 (explaining that the purpose for which the credit was obtained and not the nature of the collateral used to get it is the focus of the inquiry). Relevant inquiries will include whether the home will be owner occupied, whether the home will be the primary residence, or whether the borrower received cash back. Powers v. Fifth Third Mortg., No. 1:09-CV-2059, 2011 WL 3811129, at *16 (N.D. Ohio Aug. 12, 2011). Additionally, if the loan was a cash-out refinance, inquiries are necessary to determine whether the majority of the money "cashed out" was used for a business, commercial, agricultural, or personal purpose. Powers, 2011 WL 3811129, at *16; Toldy v. Fifth Third Mortg. Co., No. 1:09 CV 377, 2011 WL 4634154, at *3

(N.D. Ohio Sept. 30, 2011) (explaining that whether a putative class member's loan garners RESPA coverage cannot be shown short of a case by case analysis and that establishing coverage cannot be deferred until a claims-administration process is conducted after trial as the question of coverage is a central element bearing on liability). If the loan was a cash-out refinance for the purpose of paying off debt, inquiries are necessary to determine whether the debt being paid was primarily incurred for business purposes. Powers, 2011 WL 3811129, at *16; Sherlock, 2008 WL 732146, at *4. Ultimately, there may be situations where it is not clear where the loan was for personal and business purposes, and further inquiries may be required. Hinchliffe, 2009 WL 1708007, at *4. In any event, as discussed above, Plaintiffs fail to demonstrate that sufficient information exists in the loan file or otherwise to make such calls and there appears to be the potential that determining whether the loans were for personal purposes would not only involve significant individualized inquiry and analysis, but also could devolve into individual mini-trials.

Additionally, Plaintiffs have failed to dispute that the damage calculation for each putative class member will involve individualized analysis loan by loan to determine whether the putative plaintiffs have already been reimbursed for their appraisal/appraisal management fees and would require investigation into whether a closing cost credit was received by the borrower, the total amount of closing costs paid by the borrower, and the extent to which the closing costs were reduced or completely covered. Plaintiffs also do not dispute that Defendants are entitled to an offset for putative class members who have already received redress via the CFPB's distribution of redress funds paid by Defendants.

Given the quantity and quality of individualized inquiries and issues that will arise in this case, this Court concludes that the predominance requirement is not satisfied. See Henson v. Fid. Nat'l Fin., 300 F.R.D. 413, 419-22 (C.D. Cal. June 18, 2014) (concluding that in Section 2607(a) case, individualized issues of whether loans at issue were federally related mortgages and whether putative class member's claims would be barred by statute of limitations defeated predominance); Toldy, 2011 WL 4634154, at *3 (concluding that plaintiffs failed to demonstrate that common questions predominated over the need for individualized inquiry in Section 2607(a) case where case by case analysis was required to determine whether each putative class member's loan was federally related mortgage loan and the defendants' loan files were not adequate to make the determination); Powers, 2011 WL 3811129, at *14-19 (concluding that predominance element not satisfied for Section 2067(a) claim where significant individualized inquiries would be required to determine whether each class member's loan was a federally related mortgage loan and defendant's records did not contain sufficient information to make the determination); Pettrey v. Enter. Title Agency, 241 F.R.D. 268, 283-84 (N.D. Ohio 2006) (finding that individual issues of statute of limitations and whether loan was federally related defeated predominance in Section 2607(a) case); cf. McCamis v. Servis One, Inc., No. 8:16-CV-1130-T-30AEP, 2017 WL 589251, at *5 (M.D. Fla. Feb. 14, 2017) (finding that predominance requirement was not satisfied where the court would need to make individual inquiries as to each class member's use of property and loan proceeds to determine whether debt was consumer debt and the defendant's records were insufficient to track whether customers used property for investment purposes as well as other individual issues); Riffle v. Convergent Outsourcing, Inc., 311 F.R.D. 677, 684 (M.D. Fla. 2015) (finding predominance requirement was not satisfied in FDCPA case because even though all class members were sent same collection letter and claimed the same violations of FDCPA, each plaintiff's claim had to be individually evaluated to determine whether each plaintiff's debt was unlawfully being collected because the debt was time-barred). Because the ascertainability and predominance requirements are not satisfied, this Court **RECOMMENDS** that Plaintiffs' Motion for class certification be **DENIED**.

CONCLUSION

Based on the foregoing reasons, this Court **RECOMMENDS** that Plaintiffs Loughlin and Gonzalez's Motion for Class Certification be **DENIED**. (Doc. 95). Additionally, Defendants' Motion for Leave to File a Sur-Reply is **GRANTED**. (Doc. 121).

SO ORDERED and REPORTED AND RECOMMENDED this 7 day of February, 2018.

/s/ Linda T. Walker
LINDA T. WALKER
UNITED STATES MAGISTRATE JUDGE