NO. 16-_____

In the
Supreme Court of the United States

JOSEPH MAZZEI, on Behalf of Himself and
All Others Similarly Situated,

Petitioners,

–v–

THE MONEY STORE, TMS MORTGAGE, INC.,
and HOMEQ SERVICING CORP.,

Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Second Circuit**

PETITION FOR WRIT OF CERTIORARI

MOSHE HORN
CHRISTOPHER M. VAN DE KIEFT
SEEGER WEISS LLP
77 WATER STREET
NEW YORK, NY 10005

PAUL GROBMAN
COUNSEL OF RECORD
555 FIFTH AVENUE, 17TH FLOOR
NEW YORK, NY 10017
(212) 983-5880
GROBTOWN@AOL.COM

NEAL A. DEYOUNG
SHARMA & DEYOUNG LLP
555 FIFTH AVENUE, 17TH FLOOR
NEW YORK, NY 10017

DECEMBER 7, 2016 *COUNSEL FOR PETITIONERS*

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QUESTIONS PRESENTED

1. Are the Seventh Amendment and/or the Rules Enabling Act violated when—on a Rule 23 motion to decertify a class after the jury has reached a verdict in the class's favor—the courts below apply a procedure which:

(i) imposes a post-verdict burden on the class to again satisfy Rule 23's prerequisites by a preponderance of the evidence; and

(ii) allows the trial court to reweigh the trial evidence and rule on a merits issue decided upon by the jury in the class's favor, disregarding the standards imposed under FRCP Rule 50; and

(iii) applies a deferential abuse of discretion standard of appellate review to a trial court's post-verdict decision to decertify the prevailing class?

2. Does decertification of a prevailing class conflict with this Court's decisions addressing Rule 23 in *Amgen v. Conn. Retir. Plans & Trust Funds,* 133 S.Ct. 1184 (2013) and *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036 (2016), where the trial court's decertification is based on its disagreement with the jury's determination on an issue going to the merits of the class claim?

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The Second Circuit's opinion is published at 829 F.3d 260 (2nd Cir. 2016) and is reproduced in the appendix at App.1a. The district court's opinion is reported at 308 F.R.D. 92 (S.D.N.Y. 2015) and is reproduced in the appendix at App.23a.

JURISDICTION

The Second Circuit entered judgment on July 15, 2016 (App.1a) and denied a timely petition for rehearing en banc on September 8, 2016 (App.78a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND JUDICIAL RULE INVOLVED

- **U.S. Constitution, Amendment VII**

  In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

- **Fed. R. Civ. P. 23**

  Federal Rule of Civil Procedure 23 is set out in the appendix at App.80a.

INTRODUCTION

This case raises a fundamental question of federal Constitutional law: Is a verdict for a class after a jury trial entitled to the same Seventh Amendment protections as jury verdicts in favor of individuals? Under the test announced by the Second Circuit which is the basis for this Petition, the answer is no.

Petitioners are 144,385 class members who, after a two-week jury-trial in federal court in December 2014, were awarded $54.8 million based on the improper collection and retention of late fees after acceleration by Defendants. Five months later, the trial court overturned the class verdict and dismissed the case—not by granting judgment notwithstanding the verdict under Rule 50—but rather by decertifying the prevailing class under Rule 23 based on the class's alleged failure to prove privity, one of the elements on the merits of its claim.

On appeal, the Second Circuit affirmed, concluding that "a district court has power, consistent with the Seventh Amendment and Rule 23, to decertify a class after a jury verdict and before a final judgment." (App.2a) While recognizing the "tension" between permitting post-verdict decertification under Rule 23 and the rights accorded to the prevailing class under the Seventh Amendment (App.13a), the Second Circuit held that the Constitution does not require evidence credited by the jury to be assessed under the stringent standards imposed by FRCP Rule 50, because a court's findings on a post-verdict motion do not "resolve the claims of the class—which withstand

decertification and survive unimpaired." (App.14a) Instead, the Second Circuit found that the following standard meshing elements of Rule 23 and Rule 50 was constitutionally permissible on a post-verdict decertification motion: (i) the prevailing class retains the burden of proof; (ii) the trial court can reweigh the evidence and the credibility of witnesses as under a motion for new trial under Rule 50; and (ii) appellate review of a decision dercertifying a prevailing class is based on abuse of discretion. (App.12a. 14a) Applying these standards, and after performing a cursory review of the evidence of privity, the Second Circuit found that the trial court did not abuse its discretion in decertifying the class because of its purported failure to prove that substantive element at trial.

This Court has repeatedly cautioned that:

> maintenance of the jury as a fact-finding body is of such importance, and occupies so firm a place in our history and jurisprudence, that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry, 494 U.S. 558, 565 (1990), *quoting Dimick v. Schiedt*, 293 U.S. 474, 486 (1935); *Jacob v. New York City*, 315 U.S. 752, 752–53 (1942) (holding the right to a jury trial "is a basic and fundamental feature of our system" and "should be jealously guarded by the courts"); *Rogers v. Mo. Pac. R. Co.*, 352 U.S. 500, 510 (1957) ("Special and important reasons for the grant of certiorari are certainly present when lower federal courts . . . persistently deprive litigants of their right to a jury determination").

In creating an extraordinary new method of attacking a jury verdict outside the carefully-constructed boundaries of Rule 50 and Rule 59, Petitioners respectfully submit that the Second Circuit test violates this constitutional limitation. In allowing the trial court to reweigh the evidence credited by the jury, and holding that an abuse of discretion standard applies on appeal, the Second Circuit decision undermines each of the longstanding safeguards designed to ensure that the right to have factual issues decided by a jury is preserved.

In fact, the decision creates a two-tiered system of trial and appellate-court review of jury determinations in federal cases. In cases involving prevailing individual plaintiffs, a trial court can overturn the jury verdict and dismiss a case only if the court finds that—"draw[ing] all reasonable inferences in favor of the nonmoving party" and without making "credibility determinations or weigh[ing] the evidence"—"no rational factfinder could conclude" as the jury did. *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 530 U.S. 133 (2000). That same stringent standard is applied on appeal. *Id.* at 2111 (reversing grant of Rule 50 where appellate court "misapplied the standard of review dictated by Rule 50," "disregard[ing] critical evidence favorable to petitioner" and "fail[ing] to draw all reasonable inferences in [his] favor.").

In contrast, in cases involving a jury verdict for a class, the Second Circuit holds that the prevailing class members "retain[ ] the burden" to demonstrate that the Rule 23 requirements" are satisfied (App.15a), that the trial court can "weigh the evidence and the

credibility of witnesses and need not view the evidence in the light most favorable to the verdict winner" (App.12a, fn. 9), and that, on appeal, the decision decertifying a class after a jury verdict in its favor is reviewed for abuse of discretion. (App.19a)

No justifiable reason exists for different treatment under the Seventh Amendment of jury verdicts in favor of an individual or a class. As shown below, each of the legal conclusions on which the Second Circuit decision rests is in conflict with existing Supreme Court and circuit court precedent.

In lawsuits involving individual litigants, Rule 50 and Rule 59 provide sufficient protection to ensure that the jury has not behaved irrationally or committed a serious error, while at the same time protecting a party's fundamental right to have issues of fact decided by a jury. Both the Seventh Amendment and the Rules Enabling Act require that class litigants be subject to the same substantive standards after a verdict has been rendered in their favor.

BACKGROUND

A. The Underlying Lawsuit

In 2001, Joseph Mazzei sued his mortgage lender and servicer on behalf of a putative class, alleging that he was charged for improper fees at the time he paid off his mortgage. In 2012, after eleven years of litigation, the district court certified a class of borrowers who were assessed and paid late fees after acceleration to the Defendants ("the Late Fee Class").

As the trial court itself recognized, the imposition of monthly late fees after a loan has been accelerated and the entire debt called due has uniformly been prohibited by each of the many courts which have considered the issue. *See Mazzei v. The Money Store*, 288 F.R.D. 45, 67 (S.D.N.Y. 2012) (in granting class certification, the trial court noted that "the defendants do not produce a single case or statute in which a state has upheld or allowed a late fee after acceleration where a contract does not expressly provide for such a fee"). In fact, at trial, the court offered to instruct the jury as to any case allowing post-acceleration late fees if HomEq could bring one to the court's attention, which Defendants could not. (A-4308)

B. The Trial of the Class Claim

In December 2014, the claims of the Late Fee Class finally went to trial. Though the court limited each sides' direct case and cross-examination to a total of fifteen hours, the jury heard the following evidence relating to the Late Fee Class's claims:

- that no provision of the uniform mortgage agreements used by Defendants allowed them to charge late fees after a loan had been accelerated;
- that the Defendants routinely collected late fees after acceleration from the Class;
- that the Defendants retained the post-acceleration late fees which they collected;

- that charging late fees after acceleration was contrary to standard mortgage-industry practice; and
- that each late fee assessed to class members could be identified based on specific codes in the Defendants' database.

The class also presented substantial testimony on the issue of privity. Professor Adam Levitin of Georgetown Law School, an expert in mortgage securitization, testified that it was standard practice in the mortgage industry during the class period for lenders to sell their loans to Trusts, which would pool thousands of these loans together and sell them to investors. (A-2775:17-2776) The Trusts would then enter into contracts with mortgage servicers like Defendants known as Pooling and Servicing Agreements ("PSAs"), which would assign servicers specific rights and obligations contained in the original loan agreement with the borrower. (A-2775-76) As Levitin testified:

> The servicer is not a signatory to the note. However, the servicer has been assigned a whole bunch of rights that are in the note. . . . And the servicer has been delegated a bunch of duties that exist under the note. . . .

(A-2787:17-2788:2) One right assigned to servicers was the right to collect certain payments the lender was entitled to under the original loan agreements:

> The way the servicer is paid is the servicer is given a piece of the IOU. . . . That seems a little confusing. How can you get a piece of the note? It's not that you tear off a corner

> of it or something. But part of the note is going to be assigned to the servicer as compensation for the duties it has.

(A-2780:3-8) As the jury heard, among the payment rights uniformly assigned to servicers was the right to collect and retain late fees:

> Q. Hypothetically Betty misses a payment, she owes a $10 late fee? That late fee goes to the servicer.
>
> A. Exactly.
>
> Q. And the servicer pockets it.
>
> A. Yes.
>
> Q. Does the institutional investor get any of the late fee?
>
> A. Not a cent. (A-2785:15-2786:8)[1]

As a result of the PSA's assignment of these contractual rights to the servicer, Professor Levitin testified that the servicer "stepped into the shoes" of the original lender with regard to these rights and duties:

> The servicer has been assigned rights in the contract and delegated duties in the contract. It's kind of Contract Law 101, but once you have been delegated duties under the contract, you have stepped into the shoes of the original party to the contract.

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[1] *See also* A-2785:15-20 ("All late fees, to the extent they are collected, go to the servicer. The servicer keeps all the late fees.").

Q. And they have rights against each other?

A. Absolutely.

(A-2792:1-10)

To corroborate Levitin's testimony, the Class introduced a PSA between Defendants and the Trust which had bought Mr. Mazzei's and thousands of other loans. Levitin described to the jury how the Mazzei PSA assigned certain payment rights in the original loan agreement to Defendants, including the right to assess and retain late fees:

Q. Could you explain to the jurors, using this case, where would the pooling and service of agreement have fit in?

A. . . . Mr. Mazzei's note was—the original lender is an entity called The Money Store California, Incorporated. The Money Store California sells the loan to a bunch of investors and then the investors have a Pooling and Servicing Agreement with an entity called, I believe, just the Money Store, Incorporated . . . . But the Money Store, Incorporated is the servicer, The Money Store California was the original lender. And at this point the—once the loan has been sold, The Money Store, Incorporated is handling the servicing and gets paid part of the interest on the loan, gets to keep the late fees . . .

(A-2801:10-25) The PSA confirmed Levitin's testimony about the routine assignment of late-fee collection rights to servicers, demonstrating that the right to retain late payments in thousands of Late Fee Class

members Notes was assigned from the lenders to the Defendants. (A-4835,¶ 7.03)

The conclusion that the Mazzei PSA was typical of the loans of other class members was further confirmed by testimony elicited from Professor Levitin on Defendants' cross-examination:

> Q: You're not expressing any opinion on any conduct of the defendants whatsoever; is that correct?
>
> A: No. That's not quite correct. What I do express in the report is that the terms of the securitization of Mr. Mazzei's loan, in other words the terms under which it was sold to the investors, are entirely typical of securitizations in general; that this was not an outlier deal or anything like that.
>
> Q: So, it was typical of the industry? Is that your point?
>
> A: Yes.

(A-2810:25-A-2811:9)

The evidence of privity presented by the Class went completely unrebutted and uncontradicted by Defendants, who did not cross-examine Levitin on the privity issue, nor present any contrary expert testimony of privity of their own. In fact, as the district court itself noted, "the defendants did not make arguments about the issue of privity to the jury during the trial." (App.62a-63a)

After Plaintiffs rested, the trial court denied Defendants' motions for judgment as a matter of law and to decertify the Late Fee Class, and denied similar

motions again at the conclusion of Defendants' case. The district court instructed the jury on the elements of the Late Fee Class's claim, including the following instruction on the question of privity:

> The plaintiff argues that the Money Store defendants were assigned the rights and obligations for those loans that they serviced such that the Money Store defendants entered into a contractual relationship with the class members. It is for the jury to decide whether the plaintiff has proved by a preponderance of evidence that a contractual relationship exists between the class members and the Money Store defendants because the Money Store defendants either originated the loans for the class members or were assigned the rights and obligations to service the loans for the class members.

(App.66a) Defendants did not object to this jury instruction, which was consistent with well-settled contract law, including cases specifically addressing the privity between mortgage servicers and borrowers. *See Ocwen Loan Serv. Mortg. Servicing Litig.*, 491 F.3d 638, 645 (7th Cir. 2007) ("the mortgagee in this case assigned some of the rights created by the mortgage contract—the 'servicing rights'—to Ocwen, which according to the complaint proceeded to violate its contractual obligations. . . . If an original mortgagee can be sued under state law for breach of contract, so may the partial assignee if he violates the terms of the part of the mortgage contract that has been assigned to him.").

Following two days of deliberations, the jury returned a verdict in favor of the Class, awarding $54.8 million dollars in damages, making it the largest consumer verdict in the U.S. in 2014.

C. The Trial Court Decertifies the Prevailing Class

Thereafter, Defendants moved to decertify the late fee class under Rule 23, or in the alternative, for judgment as a matter of law under Rule 50. On May 29, 2015, the district court overturned the verdict and dismissed the case by decertifying the prevailing class pursuant to Rule 23. While acknowledging that the Defendants had presented no evidence or even argument about privity to the jury (App.63a) and that the jury's "estimate as to the damages for the late fee class" was reasonable (App.61a), the court held that decertification was warranted because the Class had purportedly failed to establish that Defendants were in privity with members of the Late Fee Class.

Despite Professor Levitin's testimony that late fee rights were routinely assigned to servicers during the class period—and his use of the Mazzei PSA to show that Defendants followed that standard practice—the court found that Professor Levitin offered little more than "background, theoretical testimony" which was "strictly hypothetical." (App.69a) According to the court, Levitin's testimony that Mazzei's "PSA is 'typical' of the industry . . . would have required the jury to speculate that other absent class members would have had a similar PSA that assigned contractual obligations to the defendants." (App.69a) As a result, the court concluded that "it is apparent, after trial, that the Rule 23 requirements are not in fact met" because "the plaintiff[ ] did not prove that the common

question of whether the defendants breached the form loan agreements by charging post-acceleration late fees predominated over the individual issues of whether each class member is in privity of contract with the defendants." (App.71a-72a (internal citations omitted)) In the last sentence of the opinion, the court stated that, "if the court were to reach the defendants' Rule 50(b) motion, that motion would be granted" because of the absence of evidence of privity. (App.73a-74a)

D. The Second Circuit Decision

On July 15, 2016, the Second Circuit affirmed, concluding that "a district court has power, consistent with the Seventh Amendment and Rule 23, to decertify a class after a jury verdict and before a final judgment." (App.2a) While the Second Circuit recognized the "tension" between permitting post-verdict decertification under Rule 23 and the rights accorded by the Seventh Amendment, (App.13a), it found that "the right of absent class members to adjudication by jury is unimpaired" by post-verdict decertification because they could file an individual action in state court if they chose in which they would purportedly have a right to a jury. (App.9a) As a result, according to the Second Circuit, "[t]he right of absent class members to a jury trial is protected, not impaired, by the Rule 23(c)(1)(C) decertification procedure." (App.10a)

The Second Circuit further held that the prevailing class "retain[s] the burden to demonstrate that [the Rule 23] requirements were satisfied." (App.15a) As for the standard to be applied for assessing the factual determinations made by the jury, the court rejected the argument that "post-verdict decertifica-

tion should be constrained by the Rule 50 standard of 'legally insufficient evidence,'" finding that

> [t]hat stringent standard is not called for because (unlike the grant of a Rule 50 motion) decertification does not resolve the claims of the class—which withstand decertification and survive unimpaired. (App.14a)

Instead, the Second Circuit determined that a court entertaining a decertification motion against a prevailing class should apply Rule 59 in assessing the evidence credited by the jury, because "decertification [] has the same effect as would a grant of a motion for a new trial pursuant to Federal Rule 59(a)." (App.9a) Thus, as on a motion for a new trial under Rule 59, the Second Circuit found that a judge entertaining a post-verdict decertification motion

> is permitted to weigh the evidence and the credibility of witnesses and need not view the evidence in the light most favorable to the verdict winner . . .

(App.12a, n.8 (citations and internal quotations omitted)) The district court "must defer to any factual findings the jury necessarily made unless those findings were 'seriously erroneous,'" and "[a]s to questions of fact that are not necessarily decided by the jury's verdict, the court can make its own factual findings based on the preponderance of the evidence as is usually done when making a determination about class certification." (App.12a)

According to the court, "the Seventh Amendment is not violated by the district court's evaluation of trial evidence in ruling on the procedural issue of

decertification" because [t]hat is what trial judges do when considering a motion for a new trial on the ground that the verdict was against the weight of the evidence" (App.12a-13a), and [i]t is beyond dispute that the grant of such a motion does not violate the Seventh Amendment." (App.9a)

Turning to the standard of appellate review, the Court found that decertification of a class after a jury verdict in its favor "is reviewed for abuse of discretion." (App.14a) Applying that standard, the court found that the district court did not abuse its discretion in decertifying the prevailing class because its findings and conclusions on the Rule 23 motion were "within the range of permissible decisions." (App.20a) The court synthesized the lower court's findings relevant to the appeal as follows:

> The decertification was based on Mazzei's failure to prove through class-wide evidence the existence of privity and those members whose loans were serviced but not owned by it . . . The jury found that privity was proven: the district court found to the contrary, and determined that typicality and predominance were therefore lacking.

(App.15a)

Though the Second Circuit acknowledged that the lower court never articulated or applied the Rule 59-type standard the court set forth in its opinion, the Second Circuit found "significant" the district court's statement that it would have granted Defendants' alternative motion for judgment as a matter of law under Rule 50 "were it to reach it." (App.15a, 16a, n.11) According to the court, "[h]aving found the

evidence legally insufficient, the court *a fortiori* found that the jury's finding was at least 'seriously erroneous.'" *Id.*

The Second Circuit's discussion of the privity evidence was brief, restating the same generalities about Professor Levitin's testimony that were made by the lower court. (App.16a-17a) The following constitutes the Court's entire analysis of the evidence of privity in concluding that the lower court did not abuse its discretion:

> Levitin specifically conceded that he was "expressing no opinion whatsoever on the defendants in this case." App'x 2813; . . . And there was no other evidence linking Levitin's testimony about the hypothetical borrower and about the mortgage and securitization industries generally to the particular loans of absent class members. We conclude that, given Levitin's disclaimer as to the particulars of the case, and for substantially the reasons stated in the district court's opinion, Levitin's testimony was not an impediment to the court's conclusion that the jury's verdict was "seriously erroneous," a "miscarriage of justice," or "egregious."

(App.17a-18a) In reaching this conclusion, the Second Circuit again held that the standard for overturning a jury verdict under Rule 50 was not relevant to a motion to decertify a prevailing class under Rule 23:

> Since the Rule 59(a) standard applies in this context, we need not decide whether Levitin's generalized testimony was legally

> sufficient to support a jury finding that class members whose loans were not originated by (or expressly assigned to) [the defendants] were in privity.

(App. 18a, n.13)

Because of the purported failure of the class to prove privity, the Second Circuit found that the district court did not abuse its discretion in decertifying the class based on its finding that issues subject to individualized proof predominated over issues subject to only individualized proof:

> A class-wide resolution to the privity question was not possible because, without class-wide evidence that class members were in fact in privity with [defendants], the fact-finder would have to look at every class member's loan documents to determine who did and did not have a valid claim . . . It was within the range of permissible decisions for the court to determine that [common] questions did not predominate over the individual questions of whether each class member was in a contractual relationship with defendants.

(App.20a) For the same reason, the Second Circuit found that the district court did not abuse its discretion in finding that Mazzei was an atypical class member who had a "misalignment of interests" with the class because his loan was originated by the defendants. (App.19a)

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT'S CONCLUSION THAT THE SEVENTH AMENDMENT IS NOT VIOLATED BECAUSE DECERTIFIED CLASS MEMBERS ARE ENTITLED TO A JURY TRIAL IN STATE COURT DIRECTLY CONFLICTS WITH SUPREME COURT AND COURT OF APPEALS PRECEDENT

In its ruling, the Second Circuit admits that post-verdict decertification of a prevailing class is in "tension" with the Seventh Amendment right to a jury trial, but states that the right of decertified class members "to adjudication by jury is unimpaired" because "member[s] of the decertified class . . . may file an individual action" with a right to a jury. (App.9a) As a result, the Court states, "[t]he right of absent class members to a jury trial is protected, not impaired, by the Rule 23(c)(1)(C) decertification procedure . . . " (App.10a)

This holding is in direct conflict with well-settled Supreme Court and Court of Appeals precedent. As the First Circuit recently recognized in *Oyarzun v. Caribbean City Builders, Inc.*, 798 F.3d 26 (1st Cir. 2015), "the Supreme Court has consistently held that states are not constitutionally required to provide a jury trial in civil cases." *See, e.g.*, *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 418 (1996) ("The Seventh Amendment . . . governs proceedings in federal court, but not in state court"); *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974) ("The Court has not held that the right to jury trial in civil cases is an element of

due process applicable to state courts through the Fourteenth Amendment.").

Nor is there any equivalent constitutional counterpart in most states giving plaintiffs in small-claims actions the right to a jury trial. Indeed, most state courts have found that plaintiffs do not have a constitutional right to a jury trial in actions in small-claims court. A 2012 study by the National Center for State Courts found that only 13 states provided a right to a jury trial in small claims cases (*Court Statistics Project, National Center for State Courts 2012*), and most courts which have addressed the issue have found no state constitutional right to a jury trial in such actions. *See, e.g.*, *Crouchman v. Superior Court*, 45 Cal.3d 1170 (Cal. Sup. Ct. 1988) (party has no right to jury trial in small claims matters in California); *Cheung v. Dist. Ct.*, 124 P.3d 550 (Nev. Sup. Ct. 2005) (no right to a jury trial in small claims matters in Nevada).

Thus, "the right of absent class members to a jury trial" is not "protected," and is "impaired, by the Rule 23(c)(1)(C) decertification procedure." (App.10a) Decertified class-members do not have any Seventh Amendment rights in state court, nor can they obtain a jury trial under state law in the overwhelming majority of cases.

II. THE CONCLUSION THAT A COURT DOES NOT VIOLATE THE SEVENTH AMENDMENT ON A POST-VERDICT DECERTIFICATION MOTION BY REWEIGHING THE EVIDENCE CREDITED BY THE JURY DIRECTLY CONFLICTS WITH SETTLED PRINCIPLES AND DECISIONS OF THIS COURT

The Re-Examination Clause of the Seventh Amendment states: "In suits at common law, . . . no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." (U.S. Const. Amend. VII) Over two centuries of jurisprudence, the right of a federal court to reexamine a jury's factual findings without violating the Seventh Amendment has been limited to two situations: it may grant a new trial where the jury verdict was against the weight of the evidence, or grant judgment notwithstanding the verdict where there is no evidence to support the jury's conclusion. *See Capital Traction Co. v. Hof*, 174 U.S. 1, 13 (1899) ("no other mode of reexamination is allowed than upon a new trial . . . and therefore that, unless a new trial has been granted in one of those two ways, facts once tried by a jury cannot be tried anew, by a jury or otherwise, in any court of the United States."). In limiting the re-examination of jury findings to those which existed under English common law, the Seventh Amendment reflects "a studied purpose to protect" the right to trial by jury "from indirect impairment through possible enlargements of the power of reexamination existing under the common law." *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 659-61 (1935). The exceptions to judicial reexamination of a jury's conclusions are

limited to those in Rules 50 and 59 of the Federal Rules of Civil Procedure.

The Second Circuit now creates a new method of re-examining jury verdicts under Rule 23, finding that a prevailing class has the burden of proof on a post-verdict decertification motion, and that the trial court entertaining the motion can "weigh the evidence" and judge the credibility of witnesses without viewing either "in the light most favorable to the verdict winner." (App.12a, n.8) According to the Second Circuit, re-examining the evidence on a decertification motion does not violate the Seventh Amendment because findings made on the motion "do not bind the trier of fact" or "resolve the claims of the class—which withstand decertification and survive unimpaired." (App.12a, 14a) Thus, the court finds, decertification of a prevailing class "has the same effect as . . .grant-[ing] . . . a new trial pursuant to Federal Rule 59(a)." (App.9a)

The finding that the claims of prevailing class members "survive unimpaired" after decertification because class members can bring an individual claim cannot be reconciled with this Court's class action jurisprudence. As this Court has repeatedly recognized, absent a class action, there is no realistic possibility that individual claims involving challenged conduct will be brought:

> Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. For example, this lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would

> have no realistic day in court if a class action were not available.

Phillips Petroleum v. Shutts, 472 U.S. 797, 809 (1985) (emphasis added); *see also*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (finding that in drafting Rule 23(b)(3), "the Advisory Committee sought to vindicate 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all'"); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) (because "no competent attorney" would undertake an action to recover inconsequential damages, "[e]conomic reality dictates that petitioner's suit proceed as a class action or not at all"). As the Seventh Circuit has succinctly stated, "the realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (emphasis added).[2]

Moreover, the conclusion that a court entertaining a post-verdict decertification motion is allowed to reweigh the evidence because decertifying a prevailing class trial "has the same effect" as granting a new trial under Rule 59 cannot be reconciled with the Federal Rules. By Rule 59's very terms, the court

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[2] The Second Circuit's suggestion that the re-examination of evidence credited by the jury is permissible under Rule 23 because the court's findings "do not bind the trier of fact" suffers from a similar logical incongruity. (App.12a) Where—as here—a court grants a post-verdict decertification motion and dismisses a case by making a merits determination contrary to the jury's findings, it comprises the final word on the issue, leaving nothing left to be decided by the trier of fact.

must order a new trial for a class if it finds the jury's determination to be "seriously erroneous," with the class claims heard by a new jury. That is the only reason why a properly-analyzed Rule 59 motion withstands Seventh Amendment scrutiny, even though a judge may examine the evidence in a manner prohibited by Rule 50. As explained by several appellate courts:

> [Rule 59] has provided the one important limitation on the power of the jury to make an unimpeachable decision on the facts, even where the evidence is conflicting. The judge may not substitute the verdict he would have rendered on the evidence for that actually rendered by the jury. But he may avoid what in his professionally trained and experienced judgment is an unjust verdict by vacating it and causing the matter to be tried again by a second jury. Thus, the essential institution of jury trial is respected and an expedient middle ground is maintained between the absence of any control over a jury's verdict on conflicting evidence, on the one hand, and judicial usurpation of the fact-finding function, on the other.

Crane v. Consolidated Rail Corp., 731 F.2d 1042, 1047 (2d Cir. 1984), quoting *Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 91 (3d Cir. 1960) (en banc) (Hastie, J., dissenting) (emphasis added). In contrast to the right to a new trial mandated under Rule 59, a post-verdict decertified class under Rule 23 gets no new trial, no subsequent right to a jury, and the dismissal of the

class's case under the standard announced by the Second Circuit.[3] Thus, while the Second Circuit's mechanism employs a Rule 59 analysis, it has Rule 50 consequences.

Moreover, the court's conclusion that a court can "weigh the evidence" on a post-verdict motion to decertify and "need not view the evidence in the light most favorable to the verdict winner" appears to be in direct conflict with this Court's recent decision in *Tyson Foods v. Bouaphakeo*, 136 S.Ct. 1036 (2016). In *Tyson Foods*, the Supreme Court affirmed denial of a motion to decertify a class after a jury had rendered a verdict in the class's favor, rejecting the defendants' challenge to expert testimony which relied on a statistical sample to estimate the number of hours worked daily by each class member in donning and doffing protective clothing. Just as in this case, this Court noted that the defendants had made no *Daubert* challenge to the reliability of the expert's testimony, "nor did it attempt to discredit the evidence with testimony from a rebuttal expert." *Tyson Foods*, 136 S.Ct. at 1044. In affirming the denial of the defendant's post-verdict motion to decertify, the court expressly stated that the court could decertify the

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[3] Moreover, the assertion that "the claims of the class . . .withstand decertification and survive unimpaired" is also in direct conflict with decisions of the Supreme Court and federal appeals courts holding that a certified class "acquire[s] a legal status separate from the interest" of individual plaintiffs. *Sosna v. Iowa*, 419 U.S. 393, 399 (1975); *Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 877 (7th Cir. 2012) (when a class action is decertified, "the unnamed class members go poof and the named plaintiffs' claims revert to being individual claims").

class after the jury verdict only if "no reasonable juror could have believed" the expert's testimony:

> Once a district court finds evidence to be admissible, its persuasiveness is, in general, a matter for the jury. Reasonable minds may differ as to whether the average time [the expert] calculated is probative as to the time actually worked by each employee. Resolving that question, however, is the near exclusive province of the jury. The District Court could have denied class certification only if it concluded that no reasonable juror could have believed that the employees spent roughly equal time donning and doffing. *Cf. Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-252 (1986).

Id. at 1049.

Indeed, the Second Circuit decision conflicts with *Tyson Foods* in another significant respect. In approving a new method of attacking a class's jury verdict outside of Rule 50 and Rule 59, the Second Circuit indicates that class claims are subject to different evidentiary standards then are cases involving individual litigants. However, *Tyson Foods* seems to preclude any such argument. In finding that a class may rely on representative evidence provided by an expert, this Court found that treating a class's evidence differently from an individual plaintiff would violate the Rules Enabling Act:

> In a case where representative evidence is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed

> improper merely because the claim is brought on behalf of a class. To so hold would ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot abridge any substantive right.

Id. at 1046. Though brought to its attention, the Second Circuit did not refer in any manner to the decision in *Tyson Foods.*

III. THE CONCLUSION THAT AN ABUSE OF DISCRETION STANDARD APPLIES TO THE APPEAL OF A POST-VERDICT DECERTIFICATION CONFLICTS WITH DECISIONS OF THIS COURT AND NUMEROUS FEDERAL COURTS OF APPEALS

The Second Circuit holds that an appellate court reviewing a decision decertifying a class following a jury verdict in its favor applies an "abuse of discretion" standard to determine whether the trial court's findings were "within the range of permissible decisions." (App.14a, 20a, *quoting Myers v. Hertz*, 624 F.3d 537, 550 (2d Cir. 2010)).[4] Applying this standard, the Second Circuit concluded that the trial court did not abuse its discretion in concluding that—

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[4] The *Myers* case quoted by the Second Circuit demonstrates the latitude given district courts under the abuse of discretion standard utilized by the Second Circuit:

> this standard means that the district court is empowered to make a decision—of its choosing—that falls within a range of permissible decisions . . . "Implicit" in this "deferential" standard when applied in the class action context is a recognition of . . . the district court's inherent power to manage and control pending litigation. 624 F.3d at 547 (internal citations omitted).

contrary to the jury's findings—privity was not proven and "determin[ing] that typicality and predominance were therefore both lacking." (App.15a)

Given the importance of the jury's exclusive fact-finding function, every federal circuit court of appeals conducts a de novo review of a grant of judgment after a jury verdict under Rule 50(b), applying the same stringent standard as the trial court. *See, e.g.*, *Experience Hendrix L.L.C. v. Hendrix-licensing.com Ltd*, 762 F.3d 829 (9th Cir. 2014); *Live-say v. Shollenbarger*, 19 F.3d 1443 (10th Cir. 1994). Grants of summary judgment are also subject to de novo review, *Booth Family Trust v. Jeffries*, 640 F.3d 134 (6th Cir. 2011), as are appeals of dismissals. *Espino-za ex rel. JPMorgan Chase & Co. v. Dimon*, 797 F.3d 229, 235 (2d Cir. 2015). Moreover, this Court has also found that federal appellate courts must conduct a de novo review of determinations implicating constitu-tional rights. *Ornelas v. U.S.*, 517 U.S. 690, 691 (1996) (determination of "reasonable suspicion" under the fourth amendment requires de novo review); *Bose Corp. v. Consumer's Union of U.S.*, 466 U.S. 485, 514 (1984) (determination of reckless disregard in libel cases); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 443 (2001) (reviewing constitution-ality of punitive damage awards). In contrast, this Court has found that an abuse of discretion standard is appropriate "for issues involving what can broadly be labeled 'supervision of litigation.'" *Pierce v. Under-wood*, 487 U.S. 552, 558 n.1 (1988).

The Second Circuit applied an abuse of discretion standard to what it called "the procedural issue of decertification." (App.12a) However, while a

Rule 23 motion made before trial and a jury verdict in a class's favor may properly be characterized as "procedural", the decertification of the Class here was based on the trial court's conclusion that the jury erred in finding that the substantive element of privity had been proven. (App.15a ("The jury found that privity was proven; the district court found to the contrary, and determined that typicality and predominance were therefore both lacking")). Where, as here, a post-verdict decertification is premised on the trial court's disagreement with a factual determination made by the jury on the merits, applying a different standard of appellate review than would apply to a post-verdict dismissal under Rule 50(b) ignores the substance of the Seventh Amendment's re-examination clause. *Gasoline Prods. Co. v. Champlin Refining Co.*, 51 S.Ct. 513, 514 (1931) (The Seventh Amendment "is concerned not with form, but with substance").[5]

Review under a deferential standard would result in inconsistent conclusions concerning fundamental constitutional rights. As this Court said in finding de novo review necessary in the context of probable cause determinations, "[a] policy of sweeping deference would permit, in the absence of any significant difference in the facts, the Fourth Amendment's incidence to turn on whether different trial judges draw general conclusions that the facts are sufficient or insuffi-

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[5] Moreover, applying a more rigorous appellate standard of review to an individual jury verdict winner is, again, in conflict with the finding in *Tyson Foods* "that use of the class device cannot abridge any substantive right." *Tyson Foods*, 136 S.Ct. at 1046 (2016).

cient to constitute probable cause. Such varied results would be inconsistent with the idea of a unitary system of law" and "would be unacceptable." *Ornelas v. U.S.*, 517 U.S. 690, 697 (1996) (internal citations and quotations omitted).[6]

Indeed, even where (unlike here) a lower court grants a new trial based on a determination that the jury verdict was "seriously erroneous" because it was against the weight of the evidence, appellate courts have uniformly held that an abuse of discretion standard cannot apply because the district court "is in a sense intruding upon the jury's function and affecting a litigant's Seventh Amendment rights." *Spurlin v. G.M. Corp.*, 528 F.2d 612, 620 (5th Cir. 1976). As a result, appellate courts have uniformly held that it is "the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than is the case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial. Such a close scrutiny is required in order to protect the litigants' right to jury trial." *Lind v. Schenley Indus., Inc.*, 278 F.2d 79, 90 (3d Cir. 1960) (en banc).[7] Thus, even in the context of Rule

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[6] "Such varied results" would be virtually assured here, since the Rule 59 standard the court endorses for assessing a motion to decertify a prevailing class also mandates—by its very terms—a new trial.

[7] *See Crane v. Consolidated Rail Corp.*, 731 F.2d 1042, 1048 (2d Cir. 1984) (there is a "need [for] particularly close appellate scrutiny where the trial judge grants a new trial solely because the judge regards the verdict as against the weight of the evidence"); *United States v. Tobias*, 899 F.2d 1375 (4th Cir. 1990) (same); *Shows v. Jamison Bedding, Inc.*, 671 F.2d 927, 930 (5th Cir. 1982); *Denhof v. City of Grand Rapids*, 494 F.3d

59, the Second Circuit's application of the abuse of discretion standard cannot be reconciled with the standard of review uniformly applied by appellate courts.

IV. THE CONCLUSION THAT A COURT CAN DECERTIFY A PREVAILING CLASS BECAUSE IT PURPORTEDLY FAILED TO PROVE AN ELEMENT OF ITS SUBSTANTIVE CASE IS IN CONFLICT WITH THIS COURT'S DECISIONS IN *TYSON FOODS* AND *AMGEN*

The Second Circuit's conclusion that the district court did not abuse its discretion in decertifying the prevailing class because of its' purported failure to prove privity is also in direct conflict with decisions from this Court which have found that a class's failure to prove an element of its substantive claim is not a proper basis for decertification.

As this court stated in *Amgen Inc. v. Conn. Retir. Plans & Trust Funds*, 568 U.S.___, 133 S.Ct. 1184 (2013), "Rule 23(b)(3) requires a showing that questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen*, 133 S.Ct. at 1191 (emphasis in

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534 (6th Cir. 2007) (same); *Van Steenburgh v. Rival Co.*, 171 F.3d 1155 (8th Cir. 1999); *Auto-Owners Ins. Co. v. Southeast Floating Docks, Inc.*, 571 F.3d 1143, 1145 (11th Cir. 2009) ("Our review of a district court's grant of a new trial is 'extremely stringent' when the district court discards the verdict on the ground it is against the great weight of the evidence"); *Langevine v. District of Columbia*, 106 F.3d 1018, 1023 (D.C. Cir. 1997) (internal citations omitted) ("a more searching inquiry is required because of the concern that a judge's nullification of the jury's verdict may encroach on the jury's important fact-finding function").

original). While a court's class-certification analysis must often "entail some overlap" with the merits of the prospective class's substantive claim:

> Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.

Id. at 1194-95; *see also, Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2552, n.6 (a district court has no "authority to conduct a preliminary inquiry into the merits of a suit" at class certification unless it is necessary "to determine the propriety of certification").

Accordingly, this Court has held that a class should not be decertified because of a purported failure to prove an element of a claim on the merits. In *Amgen*, for instance, this Court rejected the dissent's argument that a failure of proof on a substantive element of the class's claim demonstrates that the class "should not have been certified in the first place." As the majority stated,

> Quite the contrary, the fact that a failure of proof resolves all class members claims once and for all, leaving no individual claims to be adjudicated, confirms that the original certification decision was proper.

133 S.Ct. at 1197 n.5 (emphasis added).

This Court came to the same conclusion in affirming the denial of a post-verdict motion for decertification in *Tyson Foods*. The Court noted that

the defendant's principal defense on the merits—that the testimony of the class's expert was based on a study which "was unrepresentative or inaccurate"—was "common to the claims made by all class members." The Court found that where there is "an alleged failure of proof as to an element of the plaintiffs' cause of action . . . courts should engage that question as a matter of summary judgment, not class certification." 136 S.Ct. at 1046 (emphasis added) (internal citations omitted).

As these decisions demonstrate, decertifying a class because it purportedly failed to prove an element of its substantive claim is improper.[8] Here, the Late Fee Class presented classwide proof of privity at trial through expert testimony that the right to collect late fees was uniformly assigned from mortgage lenders to servicers during the class period, as well as a PSA showing the actual assignment of late fee collection rights to Defendants on thousands of mortgage loans. If there was "an alleged failure of proof as to [the] element" of privity, then this Court's holdings dictate that a lower court should "engage that question as a matter of [directed verdict or] summary judgment,

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[8] The Second Circuit's finding in this regard also directly conflicts with circuit court cases as well. *See Vaquero v. Ashley Furniture Industries, Inc.*, 824 F.3d 1150, 1156 (9th Cir. 2016) (following *Tyson Foods*, court finds that "alleged failure of proof" should be decided through a dispositive motion, "not class certification"); *In re Modafinil Antitrust Litig.*, 837 F.3d 238, 266 n.34 (3d Cir. 2016) (following *Tyson*, court finds that whether defendant is liable on the merits "has nothing to do with whether common questions of law and fact predominate, and instead goes to the issue of liability.").

not class certification." 136 S.Ct. at 1046 (internal citations and quotations omitted).

V. THE TRIAL COURT'S REJECTION OF THE JURY'S CREDITING OF THE PRIVITY EVIDENCE—WHICH WAS NEITHER CHALLENGED NOR CONTRADICTED BY DEFENDANTS—CONFLICTS WITH DECISIONS OF THIS COURT AND EVERY OTHER CIRCUIT COURT

Finally, in affirming decertification because the trial court did not abuse its discretion in concluding that the jury's privity finding was "at least 'serously erroneous'" (App.16a), the Second Circuit ignored the fact that the evidence of privity before the jury was completely uncontradicted and unchallenged by the defendants. The class presented unrebutted expert testimony asserting that (i) lenders uniformly assigned the contractual right to collect late fees to mortgage servicers like Defendants during the class period, and (ii) servicers retained all late fees they collected. (*See* pages 7-10, *supra*) Moreover, the class also presented direct evidence showing that that standard industry practice was followed in this case, introducing one of Defendants' PSA agreements into evidence to demonstrate that the right to collect late fees on thousands of bundled loans had been assigned to the Defendants. Not only was this evidence never challenged or contradicted by the Defendants but, as the court itself noted, the Defendants did not even "make arguments about the issue of privity to the jury during the trial." (App.62a-63a)

Under these circumstances, the Second Circuit's affirmance of decertification because the trial court disagreed with the jury's conclusion that privity was proven cannot be reconciled with controlling decisions

from this Court and numerous federal courts of appeals. In fact, every appellate court to have considered the issue has held that the jury is precluded from disregarding unrebutted evidence presented at trial. In *Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209, 216 (1931), for instance, this Court reversed a jury's verdict based on the jury's rejection of a witness's testimony, stating:

> We recognize the general rule . . . that the question of the credibility of witnesses is one for the jury alone; but this does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of view is it open to doubt. . . . A reading of [the witness's testimony] discloses no lack of candor on his part. It was not shaken by cross-examination; indeed, upon this point, there was no cross-examination. Its accuracy was not controverted by proof or circumstances, directly or inferentially, and it is difficult to see why, if inaccurate, it readily could not have been shown to be so.

See also, *Chicago, Rock Island and Pacific R. Co. v. Howell*, 401 F.2d 752, 754 (10th Cir. 1968) ("The fundamental rule which makes the jury the sole judge of the weight and credibility of testimony is subject to the caveat that testimony concerning a simple fact capable of contradiction, not incredible, and standing uncontradicted, unimpeached, or in no way discredited by cross examination, must be taken as true."); *Quintana-Ruiz v. Hyundai*, 303 F.3d 62, 75-77 (1st Cir.

2002) (same); *McClure v. Cywinski*, 686 F.2d 541 (7th Cir. 1982) (same); *Quinn v. Southwest Wood Products, Inc.*, 597 F.2d 1018, 1023-24 (5th Cir. 1979) (same); *In re Wolverton Assocs.*, 909 F.2d 1286, 1296 (9th Cir. 1990) (factfinder "may not act arbitrarily in disregarding entirely probable testimony of expert witnesses whose judgments have not been discredited"). The Second Circuit's finding that the lower court did not abuse its discretion in finding that the jury should not have credited the uncontradicted evidence of privity cannot be squared with these decisions.

Defendants had the ready ability to challenge the evidence of privity presented at trial by the class if it was inaccurate. If Professor Levitin's testimony that it was standard practice in the mortgage industry to assign late fee collection rights to servicers was wrong, then Defendants could have cross-examined Levitin on the subject, or presented contrary expert testimony of their own. In the same respect, if it was standard industry practice to assign late fee rights to servicers, but that practice was not followed on loans serviced by Defendants, then Defendants could have introduced other PSA agreements to demonstrate that they were not the same as the Mazzei PSA, and thus that Professor Levitin's testimony about standard industry practice did not apply to Defendants. However, Defendants offerred no such testimony or other evidence.

There was nothing remotely illogical or speculative for the jury to infer from Levitin's testimony that—if mortgage lenders and investors routinely assigned the right to collect late fees to servicers like Defendants during the class period—then that is

what happened in this case. Though corroboration is unnecessary,[9] that conclusion was reinforced by the assignment of late fees in the Mazzei PSA, which applied to thousands of mortgages serviced by Defendants. In fact, the irony here is that the Defendants still have not even asserted, much less proven, that Levitin's testimony that the contractual right to collect late fees was routinely assigned to mortgage servicers was inaccurate, or that the Defendants were not assigned the right to collect and retain late fees on the loan of even a single member of the Late Fee Class.

In its brief discussion of the evidence, the Second Circuit found that the trial court did not abuse its discretion in coming to the opposite conclusion as the jury because Professor Levitin purportedly "conceded that he was 'expressing no opinion whatsoever on the defendants in this case.'" (App.17a) That finding is expressly contradicted by Levitin's testimony elicited on cross-examination. (*See supra*, p.10) However, even if Levitin's testimony had been contradictory in some significant respect, that does not permit a court to conclude that a verdict was erroneous. As this Court said in *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29 (1944):

> It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury

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[9] Even in a criminal trial, "[i]t is well established that the uncorroborated testimony of a single witness may be sufficient to sustain a conviction." *United States v. Katakis*, 800 F.3d 1017, 1028 (9th Cir. 2015).

> on a theory that the proof gives equal support to inconsistent and uncertain inferences . . .
>
> It is the jury, not the court, which is the factfinding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. That conclusion, whether it relates to negligence, causation, or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

Id. at 35 (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL GROBMAN
COUNSEL OF RECORD
555 FIFTH AVENUE, 17TH FLOOR
NEW YORK, NY 10017
(212) 983-5880
GROBTOWN@AOL.COM

MOSHE HORN
CHRISTOPHER M. VAN DE KIEFT
SEEGER WEISS LLP
77 WATER STREET
NEW YORK, NY 10005

NEAL A. DEYOUNG
SHARMA & DEYOUNG LLP
555 FIFTH AVENUE, 17TH FLOOR
NEW YORK, NY 10017

COUNSEL FOR PETITIONERS

DECEMBER 7, 2016

APPENDIX TABLE OF CONTENTS

OPINION OF THE SECOND CIRCUIT (JULY 15, 2016)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH MAZZEI, on Behalf of
Himself and All Others Similarly Situated,

Plaintiff-Appellant,

v.

THE MONEY STORE, TMS MORTGAGE INC.,
HOMEQ SERVICING CORP.,

Defendants-Appellees.*

Docket No. 15-2054

Before: KEARSE, WINTER, and
JACOBS, Circuit Judges.

DENNIS JACOBS, Circuit Judge:

Plaintiff-appellant Joseph Mazzei initiated a class action against The Money Store *et al.*, alleging, *inter alia*, overcharge of late fees on mortgages, and prevailed in a jury trial. The United States District Court for the Southern District of New York (Koeltl, J.) (i) granted defendants-appellees' post-verdict motion

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* The Clerk of Court is directed to amend the official caption in this case to conform to the listing of the parties above.

to decertify (under Federal Rule of Civil Procedure 23(c)(1)(C)) a class that was previously certified pursuant to Rule 23(a) and (b)(3); and (ii) entered judgment in favor only of Mazzei, the putative class representative.

We hold that a district court has power, consistent with the Seventh Amendment and Rule 23, to decertify a class after a jury verdict and before the entry of final judgment. We also hold that, in considering such decertification (or modification), the district court must defer to any factual findings the jury necessarily made unless those findings were "seriously erroneous," a "miscarriage of justice," or "egregious." Applying these principles, we conclude that the district court did not abuse discretion in determining that Rule 23's requirements were not met and in decertifying the class.

An accompanying summary order affirms the denial of Mazzei's motion for a new trial as to a second claim.

Affirmed.

BACKGROUND

In 1994, Joseph Mazzei obtained a mortgage loan from his employer, The Money Store. At that time, The Money Store was a loan servicer and mortgage lender. Mazzei missed payments on the loan for years beginning in late 1997, and received three notices of default in 1998. In 1999, The Money Store changed ownership, and Mazzei was laid off. Soon after, The Money Store ceased originating loans and became HomEq Servicing Corp.

Early in 2000, The Money Store's servicing operator, TMS Mortgage Inc., notified Mazzei that he was in default; Mazzei's loan was "accelerated" (*i.e.*, the entire sum of principal and interest became due) and foreclosure proceedings were begun. Mazzei avoided a foreclosure sale by filing for bankruptcy, and ultimately paid the full balance of the loan, with interest and various default fees. These fees included, *inter alia*, attorney's fees, and ten late fees of $26.76 each–five of which were incurred after acceleration.

Mazzei then sued The Money Store, TMS Mortgage Inc., and HomEq Servicing Corp. (collectively, "The Money Store") for breach of contract, on behalf of a putative class, challenging the imposition of post-acceleration late fees (and attorney's fees[1]). Citing terms set forth in the Fannie Mae form loan documents that Mazzei signed when the mortgage loan was originated, Mazzei contended that the Note contemplated the imposition only of *pre*-acceleration late fees, and that the imposition of *post*-acceleration late fees violated the agreement.

Mazzei achieved certification of the class, defined as:

> All similarly situated borrowers who signed form loan agreements on loans which were owned or serviced by the defendants and

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[1] The attorney's fees claim is disposed of in a summary order issued simultaneously with this opinion. Mazzei also asserted claims under the Fair Debt Collection Practices Act ("FDCPA"), the Truth in Lending Act ("TILA"), and the Real Estate Settlement Procedures Act ("RESPA"), as well as a claim of unfair deceptive business practices under California statutory law; none of these additional claims went to trial, and they are not at issue on this appeal.

> who from March 1, 2000 to the present . . . were charged: (A) late fees after the borrower's loan was accelerated, and where the accelerated loan was paid off ("Post Acceleration Late Fee Class") . . . .

Order for Certification of Class Action, *Mazzei v. Money Store*, No. 01-CV-5694 (JGK) (RLE) (S.D.N.Y. Jan. 29, 2013), ECF No. 187; *see also Mazzei v. Money Store*, 288 F.R.D. 45, 56, 66-69 (S.D.N.Y. 2012).[2]

The class definition was later amended on consent to exclude borrowers who signed loan mortgage agreements after November 1, 2006, and (for administrative purposes) to close on June 2, 2014. Order, *Mazzei v. Money Store*, No. 01-CV-5694 (JGK) (RLE) (S.D.N.Y. June 3, 2014), ECF No. 267.

The certified class action eventually went to trial. The jury returned a verdict in favor of Mazzei and the class on the late fee claims. It awarded Mazzei $133.80, and it awarded the class approximately $32 million plus prejudgment interest. (The jury found in favor of The Money Store on the remaining claims.)

After trial, and before the entry of judgment, The Money Store moved for decertification of the class pursuant to Federal Rule of Civil Procedure 23(c)(1)(C), or, in the alternative, the entry of judgment as a matter of law on the class late fee claims pursuant to Federal Rule 50. The class was composed of borrowers whose loans were <u>either owned</u> by The Money Store (via origination or assignment) <u>or serviced</u> by it. Both

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[2] The district court declined to certify three additional potential classes that corresponded to three additional breach-of-contract theories. *See Mazzei,* 288 F.R.D. at 57-62.

motions were based in relevant part on Mazzei's failure to prove class-wide privity of contract between The Money Store and those borrowers whose loans it only serviced, and did not own. The district court agreed that Mazzei's failure to prove privity with respect to such absent class members defeated class certification on grounds of typicality and predominance. The district court therefore granted The Money Store's motion for decertification of the class. *Mazzei v. Money Store*, 308 F.R.D. 92, 106-07, 109-13 (S.D.N.Y. 2015). The district court also opined that it would have granted The Money Store's motion for judgment as a matter of law if decertification had not been appropriate. *Id.* at 113. Judgment was entered for Mazzei on his individual late fee claim.

Mazzei challenges the decertification[3] on the grounds, *inter alia*, that decertification is unavailable after a jury verdict in favor of a certified class; that the findings made to support decertification were incompatible with the Seventh Amendment; and that the Rule 23 requirements for class certification were satisfied. We affirm.

DISCUSSION

I

Federal Rule of Civil Procedure 23(c)(1)(C) provides that "[a]n order that grants or denies class certification may be altered or amended before final judgment." Fed. R. Civ. P. 23(c)(1)(C). Mazzei argues never-

[3] Mazzei also appeals the district court's denial of Mazzei's motion for a new trial on the fee-splitting claim. *See Mazzei*, 308 F.R.D. at 100-06. We affirm that decision in an accompanying summary order.

theless that a class may not be decertified after a jury verdict in its favor because such decertification is tantamount to overturning a jury verdict, for which the only procedural avenue available is judgment as a matter of law under Rule 50(b); and decertification would violate the class members' Seventh Amendment right to a jury trial.[4]

A

Federal Rule 23 and our case law confirm that a district court may decertify a class after a jury verdict and before the entry of final judgment.[5] In deciding an appeal of a denial of a motion to decertify after a jury verdict in a class's favor, we observed that "a district court may decertify a class if it appears that the requirements of Rule 23 are not in fact met." *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 572 (2d Cir. 1982) (discussing post-trial motion to decertify after jury verdict in favor of subclass); *see also*

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[4] Defendants do not argue that these arguments are waived, although it is unclear that Mazzei raised them in the district court. In any event, because our waiver doctrine is "prudential, not jurisdictional, we have discretion to consider waived arguments, and we have exercised this discretion where necessary to avoid a manifest injustice or where the argument presents a question of law and there is no need for additional fact-finding." *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006) (internal quotation marks, citations, and brackets omitted). Because defendants do not argue waiver, and because Mazzei's argument involves a constitutional right and a question of law, we consider the argument.

[5] Of course, the Federal Rules authorize the use of additional post-trial procedural devices, such as a motion for a new trial. *See, e.g.*, Fed. R. Civ. P. 59(a). Mazzei's argument either overlooks or ignores these procedures.

Rossini v. Ogilvy & Mather, Inc., 798 F.2d 590, 596 (2d Cir. 1986) (affirming decertification of one class after bench trial based on evidence; reversing decertification of two other classes).

A district court's exercise of discretion is set forth clearly in both the wording and commentary of Rule 23. *See* Fed. R. Civ. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment."); Fed. R. Civ. P. 23(c)(1) advisory committee's notes to 2003 amendment ("A determination of liability after certification, however, may show a need to amend the class definition. Decertification may be warranted after further proceedings."); *see also* 7AA Wright *et al.*, *Federal Practice & Procedure* § 1785.4 (3d ed. 2016 update) ("Reference to the final judgment [in Rule 23(c)(1)(C)] avoids a possible ambiguity under the prior rule, making clear that after a determination of liability it may be permissible to amend the class definition or subdivide the class if it becomes necessary in order to define the remedy or if decertification is warranted.").

Indeed, because the results of class proceedings are binding on absent class members, *see* Fed. R. Civ. P. 23(c)(3), the district court has the affirmative "duty of monitoring its class decisions in light of the evidentiary development of the case." *Richardson v. Byrd*, 709 F.2d 1016, 1019 (5th Cir. 1983) ("The district judge must define, redefine, subclass, and decertify as appropriate in response to the progresssion of the case from assertion to facts."); *see Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) ("[T]he Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the

absent class members." (emphasis added)). The power to decertify a class after trial when appropriate is therefore not only authorized by Federal Rule 23 but is a corollary.[6]

B

The Seventh Amendment, which applies in federal court proceedings, is not to the contrary. The Amendment has two parts: The Trial by Jury Clause preserves a litigant's right to a jury trial in a subset of civil cases; the Reexamination Clause provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

As to Mazzei, there is no Seventh Amendment issue at all. Mazzei will receive damages on his individual claim in the amount awarded him by the

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[6] *See also In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 141 (2d Cir. 2001) (concluding that district court did not abuse discretion in certifying class where it "specifically recognized its ability to modify its class certification order, sever liability and damages, or even decertify the class if such an action ultimately became necessary"), overruled on other grounds by *In re IPO Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006), and superseded by statute on other grounds as stated in *Attenborough v. Constr. & Gen. Bldg. Laborers' Local 79*, 238 F.R.D. 82, 100 (S.D.N.Y. 2006); *Boucher v. Syracuse Univ.*, 164 F.3d 113, 118 (2d Cir. 1999) ("[U]nder Rule 23(c)(1), courts are 'required to reassess their class rulings as the case develops.'" (quoting *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 140 (3d Cir. 1998))); *Green v. Wolf Corp.*, 406 F.2d 291, 298 & n.10 (2d Cir. 1968) (Kaufman, J.) (a court should err on the side of certification because certification "is always subject to modification should later developments during the course of the trial so require" (quoting *Esplin v. Hirsi*, 402 F.2d 94, 99 (10th Cir. 1968))).

jury. And he has no constitutional right to represent a class; whether he may do so is purely a matter of Rule 23.

As to the class, there is no violation. The right of absent class members to adjudication by jury is unimpaired. Their claims survive by virtue of American Pipe tolling. *See American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1978). Under this rule, the filing of a putative class action tolls the statute of limitations with respect to all absent would-be class members until the time class certification is denied. *See American Pipe*, 414 U.S. at 554; *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54 (1983). Therefore, any putative member of the decertified class who wishes to do so may file an individual action seeking breach-of-contract damages on a similar claim (so long as the individual action is instituted during whatever amount of time remains in the limitations period). *See Crown, Cork & Seal*, 462 U.S. at 347, 353-54.

The district court's decertification thus has the same effect as would a grant of a motion for a new trial pursuant to Federal Rule 59(a). The grant of such a motion does not mean that there must be a new trial, or that there will be one; it just means that there can be one if an individual claimant chooses to continue pursuit of the claim. It is beyond dispute that the grant of such a motion does not violate the Seventh Amendment. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 432-33 (1996); *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 539-40 (1958); *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 250 (1940); *Raedle v. Credit Agricole*

Indosuez, 670 F.3d 411, 418 (2d Cir. 2012); *United States v. Landau*, 155 F.3d 93, 104-06 (2d Cir. 1998).

There are many procedural devices that impose "judicial control on juries," *Binder v. Long Island Lighting Co.*, 57 F.3d 193, 202 (2d Cir. 1995), *abrogated in part on other grounds in banc by Fisher v. Vassar Coll.*, 114 F.3d 1332, 1340 (2d Cir. 1997), and such controls are not only compatible with the Seventh Amendment jury trial right, but necessary to the institution. *See Dagnello v. Long Island R.R. Co.*, 289 F.2d 797, 805 (2d Cir. 1961) ("The jury does not function alone, but in cooperation with the judge presiding over the trial. . . . Without judicial supervision over what Blackstone called the 'misbehavior' of juries, a trial by jury would lack one of 'the essentials of the jury trial as it was known to the common law before the adoption of the Constitution.'" (footnotes omitted)). Permissible controls include certain procedures that were "not in conformity with practice at common law when the Amendment was adopted." *Gasperini*, 518 U.S. at 436 n.20.

The right of absent class members to a jury trial is protected, not impaired, by the Rule 23(c)(1)(C) decertification procedure, which protects their due process rights (and defendants') by ensuring that any class claim that proceeds to final judgment–and thus binds them–is fairly and appropriately the subject of class treatment. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011) ("Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate."); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997) ("Subdivisions (a) and (b) [of Rule 23] focus court attention on whether a proposed class has sufficient unity so

that absent members can fairly be bound by decisions of class representatives."); *Shutts*, 472 U.S. at 812 (consistent with the Due Process Clause, absent class members may be bound to a class judgment only if they are adequately represented by the named plaintiffs); *Hansberry v. Lee*, 311 U.S. 32, 42-43, 45 (1940) (same); *see also supra* Part I.A.

C

Decertification in this case provokes a further question: the power of the court to make the findings that supported its ruling. Decertification was based on the district court's determination that Mazzei had failed to prove through class-wide evidence at trial that borrowers whose loans were only serviced (not owned) by The Money Store were nevertheless in a contractual relationship with The Money Store. This factual question–whether Mazzei proved that absent class members were in privity with The Money Store–was both relevant to the (de)certification motion and an element of the class's merits claim. And on the merits, the jury obviously found that privity has been established.

Normally, the district court resolves factual issues related to class certification, making its findings based on the preponderance of the evidence,[7] even if they overlap with the merits of the case. *See Amgen v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1195 (2013) ("Merits questions may be considered

[7] *See Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 202-03 (2d Cir. 2008) (holding that the "preponderance of the evidence standard applies to evidence proffered to establish Rule 23's requirements").

to the extent . . . that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."); *Dukes*, 564 U.S. at 351 ("Frequently that 'rigorous [Rule 23] analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped."). But such findings do not bind the trier of fact. *In re IPO*, 471 F.3d at 41. The question becomes: How does a jury's factual finding impact the district court's decision about whether decertification is appropriate or not?

We hold that when a district court considers decertification (or modification) of a class after a jury verdict, the district court must defer to any factual findings the jury necessarily made unless those findings were "seriously erroneous," a "miscarriage of justice," or "egregious." *See Raedle*, 670 F.3d at 418. This is the standard that a district court applies to a Rule 59 motion for a new trial on weight-of-the-evidence grounds; and we conclude that it is appropriate in this context as well.[8] As to questions of fact that are not necessarily decided by the jury's verdict, the court can make its own factual findings based on the preponderance of the evidence as is usually done when making a determination about class certification.

For the reasons discussed *supra* (Part I.B), the Seventh Amendment is not violated by the district court's evaluation of trial evidence in ruling on the procedural issue of decertification. That is what trial

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[8] The judge is permitted to "weigh the evidence and the credibility of witnesses and need not view the evidence in the light most favorable to the verdict winner," but "should rarely disturb a jury's evaluation of a witness's credibility . . . simply because the judge disagrees with the jury." *Raedle*, 670 F.3d at 418 (citations and internal quotation marks omitted).

judges do when considering a motion for a new trial on the ground that the verdict was against the weight of the evidence. *See Landau*, 155 F.3d at 106 (the Seventh Amendment does not prevent a district court from "substitut[ing] its view of the evidence for that of the jury, provided the judge is 'convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice'"). At the same time, we have explained that the judge's power to do so is in "tension" with the Seventh Amendment. *Raedle*, 670 F.3d at 418; *Landau*, 155 F.3d at 105 (same). Given that "tension" (here, with the Reexamination Clause), it is imprudent and likely improper to further relax the standard by which a trial court may "substitute its view of the evidence for that of the jury." *Landau*, 155 F.3d at 106. By respecting the jury's work, the Seventh Amendment issue is avoided.[9] This approach makes full use of the work the jury has already done; and it fits the post-trial procedural scheme set forth in Federal Rules 50(b) and 59(a).

Mazzei argues that post-verdict decertification should be constrained by the Rule 50 standard of "legally insufficient evidence." *See* Fed. R. Civ. P. 50(a)(1); *Galdieri-Ambrosini v. Nat'l Realty & Dev.*

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[9] *See also* 11 Wright *et al.*, *Federal Practice & Procedure* § 2806 (3d ed. 2016 update) ("The judge's power to set aside the verdict is supported by clear precedent at common law and, far from being a denigration or a usurpation of jury trial, has long been regarded as an integral part of trial by jury as we know it. On the other hand, a decent respect for the collective wisdom of the jury, and for the function entrusted to it in our system, certainly suggests that in most cases the judge should accept the findings of the jury, regardless of the judge's own doubts in the matter." (footnote omitted)).

Corp., 136 F.3d 276, 289 (2d Cir. 1998). That stringent standard is not called for because (unlike the grant of a Rule 50 motion) decertification does not resolve the claims of the class–which withstand decertification and survive unimpaired. The "seriously erroneous" formulation better comports with the district court's authority to manage the class action and to protect the rights of absent class members, *see, e.g.*, Fed. R. Civ. P. 23(d), (e); it respects the trial court's position as best-situated to evaluate class issues, *see In re Sumitomo Copper Litig.*, 262 F.3d 134, 139 (2d Cir. 2001) (referring to Second Circuit's "longstanding view that the district court is often in the best position to assess the propriety of the class"); and it recognizes Rule 23's explicit contemplation of post-merits decertification, *see* Fed. R. Civ. P. 23(c)(1)(C).

II

A district court order granting or denying class certification is reviewed for abuse of discretion. *Myers v. Hertz Corp.*, 624 F.3d 537, 547 (2d Cir. 2010). This standard applies to the ultimate decision on class certification and to rulings on each of the Rule 23 requirements. *Id.* A district court decision granting certification is given greater deference than a decision denying certification (or, *a fortiori*, an order decertifying a class). *See Johnson v. Nextel Commc'ns Inc.*, 780 F.3d 128, 137 (2d Cir. 2015) (citing *Moore v. Paine Webber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002)).

A plaintiff seeking certification of a Rule 23(b)(3) damages class action has the burden to establish numerosity, commonality, typicality, adequacy of representation, predominance of common questions of law or fact, and the superiority of a class action to other

procedures. Fed. R. Civ. P. 23(a), (b)(3); *see Amgen*, 133 S. Ct at 1191; *Teamsters Local 445*, 546 F.3d at 202-03. In opposing the decertification motion, Mazzei retained the burden to demonstrate that these requirements were satisfied. *See Rossini*, 798 F.2d at 596-600; *cf.* Rubinstein, *Newberg on Class Actions* § 7:22 (5th ed. 2016 update) (when a defendant moves for an order denying class certification, the burden to prove compliance with Rule 23 remains with the plaintiff).

The class included borrowers whose loans were either owned or serviced by The Money Store. To prove a breach-of-contract claim on its behalf, Mazzei was required to prove, *inter alia*, that class members were in a contractual relationship with defendants. *See Diesel Props S.R.L. v. Greystone Bus. Credit II LLC*, 631 F.3d 42, 52 (2d Cir. 2011). The decertification was based on Mazzei's failure to prove through class-wide evidence the existence of privity between The Money Store and those class members whose loans were serviced but not owned by it. This factual question was relevant both to the merits of the class claim and to the certification inquiry.

The jury found that privity was proven; the district court found to the contrary, and determined that typicality and predominance were therefore both lacking. As held *supra* (Part I.C), the district court was required to defer to the jury's finding of fact as to privity unless the finding was "seriously erroneous," a "miscarriage of justice," or "egregious." It is therefore significant that the district court ruled in the alternative that the evidence for such a finding was

legally insufficient.[10] Having found the evidence legally insufficient, the court *a fortiori* found that the jury's finding was at least "seriously erroneous."

This was not an abuse of discretion. We also conclude that the district court did not abuse discretion in determining that, given the failure of class-wide evidence as to privity at trial, Rule 23(a) and (b)(3) requirements were not satisfied and decertification was therefore warranted.

A

To establish privity, Mazzei relies exclusively on testimony by Adam Levitin, Mazzei's opening expert witness concerning mortgages and mortgage securitizations, and the single Pooling and Service Agreement ("PSA") introduced at trial, which applied to Mazzei's 1994 loan.[11] Levitin testified generally as to mortgages and securitizations, described the life of a hypothetical loan issued to "Betty Borrower," and (in the course of that testimony) opined that the hypothetical

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[10] Defendants moved in the alternative for judgment as a matter of law pursuant to Rule 50(b), and the district court explained that it would grant this motion were it to reach it. *See Mazzei*, 308 F.R.D. at 113 ("[D]efendants would be entitled to judgment as a matter of law on the claim on behalf of the Late Fee Class because of the 'complete absence of evidence' supporting a contractual relationship between the members of the Late Fee Class and the defendants." (quoting *Galdieri-Ambrosini*, 136 F.3d at 288-90)). In fact, the district court appears to have applied the Rule 50 standard in adjudicating the motion for decertification. *See id.* at 110-13.

[11] Mazzei's spoliation-based argument was not raised below and is therefore waived. *See In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133 (2d Cir. 2008); *see also* Dist. Ct. Dkt. 497; App'x 5302-17.

servicer of the hypothetical borrower's loan would be assigned rights to payment; and that if the servicer did not credit those payments Betty Borrower could sue the servicer for breach of contract. App'x 2787-89; *see also* App'x 2792 (opining that "once you have delegated duties under the contract, you have stepped into the shoes of the original party to the contract").

Levitin also opined that the PSA for Mazzei's loan (which was originated by a defendant entity in 1994) imposed certain duties on the servicer (another defendant) in connection with servicing the loan, including the power to waive or modify the terms of the loan and to collect checks, assess fees, etc. App'x 2804-05. Mazzei's PSA, Levitin opined, was "typical" of the securitization industry, "not an outlier deal." App'x 2811.

However, Levitin specifically conceded that he was "expressing no opinion whatsoever on the defendants in this case." App'x 2813; *see also* App'x 2807 (describing "the role I've been asked to play here explaining the background of how mortgage lending works today"). And there was no other evidence linking Levitin's testimony about the hypothetical borrower and about the mortgage and securitization industries generally to the particular loans of absent class members.[12] We conclude that, given Levitin's

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[12] Mazzei argues that The Money Store did not object to Levitin's testimony, and that testimony regarding industry custom and practice is admissible in breach-of-contract actions. *See* Br. of Appellant 48; Reply Br. 17 (citing cases). True; but the issue is whether the testimony (admissible or not) supported the jury finding that a contract existed between defendants and absent class members. *See Cherry River Music Co. v. Simitar Entm't, Inc.*, 38 F. Supp. 2d 310, 319 & n.56 (S.D.N.Y. 1999) ("industry custom and usage . . . 'cannot create a contract

disclaimer as to the particulars of the case, and for substantially the reasons stated in the district court's opinion, Levitin's testimony was not an impediment to the court's conclusion that the jury's verdict was "seriously erroneous," a "miscarriage of justice," or "egregious."[13]

B

"Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate," *Dukes*, 564 U.S. at 349, by "effectively 'limit[ing] the class claims to those fairly encompassed by the named plaintiff's claims,'" *General Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (quoting *General Tel. Co. of Nw. v. EEOC*, 446 U.S. 318, 330 (1980)).

Typicality requires that "the disputed issue[s] of law or fact occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class." *Cardidad v. Metro-N. Commuter R.R.*, 191 F.3d 283, 293 (2d Cir. 1999) (internal quotation marks omitted), overruled on other grounds by *In re IPO*, 471 F.3d 24. One purpose of the typicality requirement is "to ensure that . . . 'the named plaintiff's claim and the class claims are so interrelated that the interests of the

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where there has been no agreement by the parties'" (quoting *Stulsaft v. Mercer Tube & Mfg. Co.*, 43 N.E.2d 31, 33 (N.Y. 1942)) (citing cases)).

[13] Since the Rule 59(a) standard applies in this context, we need not decide whether Levitin's generalized testimony was legally insufficient to support a jury finding that class members whose loans were not originated by (or expressly assigned to) The Money Store were in privity.

class members will be fairly and adequately protected in their absence.'" *Marisol A. ex rel. Forbes v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997).

The Money Store did not deny its contractual relationship with class members (such as Mazzei) whose loans it owned; but it did dispute privity as to other class members. Whether borrowers whose loans were serviced but not owned by The Money Store were in fact in privity with The Money Store is an issue central to the claims of those class members. The issue is not central to Mazzei's individual claim (a misalignment of interests that may be one reason for Mazzei's failure to introduce sufficient evidence on their behalf). The district court's post-trial ruling as to typicality was not an abuse of discretion.[14]

"The 'predominance' requirement of Rule 23(b)(3) 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Myers*, 624 F.3d at 547 (quoting *Amchem*, 521 U.S. at 623). "The requirement's purpose is to 'ensure[] that the class will be certified only when it 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.'" *Id.* (quoting *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 104 (2d Cir. 2007)). "Therefore the requirement is satisfied 'if resolution of some of the legal or

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[14] Mazzei argues for the first time on appeal that, if he was no longer "typical," the court should have simply substituted a new class representative. This argument is waived for failure to raise it below. *See In re Nortel Networks*, 539 F.3d at 133; *see also* Dist. Ct. Dkt. 497; App'x 5302-17.

factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof.'" *Id.* (quoting *Moore*, 306 F.3d at 1252).

A class-wide resolution to the privity question was not possible because, without class-wide evidence that class members were in fact in privity with The Money Store, the fact-finder would have to look at every class member's loan documents to determine who did and who did not have a valid claim. *See Dukes*, 564 U.S. at 351 ("What matters to class certification . . . is . . . the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009))).

The district court identified the common questions raised in the pleading: whether defendants charged post-acceleration late fees and whether this breached the Fannie Mae form agreement. It was "within the range of permissible decisions" for the court to determine that these questions did not predominate over the individual questions of whether each class member was in a contractual relationship with defendants. *See Myers*, 624 F.3d at 550-51 (affirming denial of class certification for failure to demonstrate predominance of common issues over individualized defenses).

III

"[O]rdinarily, if a court discerns a conflict . . . the proper solution is to create subclasses of persons whose interests are in accord." *Boucher v. Syracuse Univ.*, 164 F.3d 113, 118-19 (2d Cir. 1999) (quoting *Payne v. Travenol Labs, Inc.*, 673 F.2d 798, 812 (5th Cir. 1982)). Here, however, there was no apparent basis on which the court or the parties could have determined which members of the Late Fee Class had loans that were owned by The Money Store, and which had loans that were only serviced by The Money Store. So decertification was appropriate rather than a narrowing of the class definition or creation of subclasses.

Mazzei cites testimony that The Money Store originated 130,000 of the approximately 185,000 loans that were being serviced by it in 2000, the beginning of the class period, and speculates that the Late Fee Class's loans were among these defendant-originated loans. There is no evidence at all about which, if any, of these loans satisfied criteria for membership in the class. Notably, The Money Store stopped originating loans in 2001[15]; by 2003, The Money Store was servicing approximately 380,000 loans; and the class period extended into 2014. Over its full span of years, the database contained over one million loans. It is entirely unclear how many loans serviced by The Money Store during the full class period were owned by it.

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15 One example loan that Mazzei's database expert presented to the jury was originated in 2006–this loan could not have been originated by The Money Store.

CONCLUSION

For the foregoing reasons, the judgment is affirmed.

OPINION AND ORDER OF THE DISTRICT COURT OF NEW YORK (MAY 29, 2015)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPH MAZZEI, on Behalf of Himself and all Others Similarly Situated,

Plaintiff,

v.

THE MONEY STORE, ET AL.,

Defendants.

01 Cv. 5694 (JGK)

Before: John G. KOELTL,
United States District Judge

JOHN G. KOELTL, District Judge:

In 1994, the named plaintiff in this action, Joseph Mazzei, took out a mortgage loan from The Money Store on his home in Sacramento, California. After Mazzei defaulted on his loan, The Money Store charged him various fees, which Mazzei paid when he paid off the loan in full in October 2000. Thereafter, Mazzei sued The Money Store and related defendants TMS Mortgage, Inc. ("TMS") and HomEq Servicing Inc. (collectively, the "Money Store

defendants"), alleging, among other claims, that the Money Store defendants were not permitted to charge certain fees under the uniform mortgage note signed by Mazzei and The Money Store (the "Note" or "Uniform Note").

This Court eventually certified two classes in this action: (1) a "Post Acceleration Late Fee Class," (or alternatively, the "Late Fee Class"), on whose behalf Mazzei asserted a breach of contract claim alleging that borrowers were assessed late fees after their loans were accelerated in breach of the Uniform Note; and (2) a "Fee Split Class," on whose behalf Mazzei asserted a breach of contract claim alleging that borrowers were assessed attorneys' fees that were improperly shared with a nonlawyer entity, Fidelity National Solutions ("Fidelity"), in breach of the Uniform Note. After a two week trial, the jury returned a verdict in favor of Mazzei and the Late Fee Class on the first claim, and in favor of the defendants on the second claim. The defendants now move for decertification of the Late Fee Class pursuant to Federal Rule of Civil Procedure 23(c)(1), and, in the alternative, for judgment as a matter of law as to the Late Fee claim pursuant to Federal Rule of Civil Procedure Rule 50(b). The plaintiff moves for a new trial as to the Fee Split claim pursuant to Federal Rule of Civil Procedure 59.

I.

Mazzei brought this action on or about June 22, 2001. He originally asserted claims against the defendants pursuant to the Fair Debt Collection Practices Act ("FDCPA"), the Truth in Lending Act ("TILA"), the Real Estate Settlement Procedures Act

("RESPA"), and various related state law claims, including the breach of contract claims. In two separate opinions, Judge Sprizzo, who presided over this action until he passed away in late 2008, granted summary judgment for the defendants dismissing the plaintiff's FDCPA and RESPA claims.[1]

On or about October 19, 2010, after this case had been reassigned to this Court, the plaintiff filed his most recent complaint, the Third Amended Complaint. The Third Amended Complaint alleged six causes of action, including the FDCPA and RESPA claims that had been dismissed by Judge Sprizzo, a TILA claim, a breach of contract claim, and an Unfair Business Practices claim under California statutory law. On December 20, 2012, after previously denying another summary judgment motion by the defendants,[2] this Court granted in part and denied in part the plaintiff's motion for class certification. *See Mazzei v. Money Store*, 288 F.R.D. 45, 69 (S.D.N.Y. 2012). Specifically, this Court certified two classes based on breach of contract claims against the defendants: the Post-Acceleration Late Fee Class and the Fee Split Class. *Id.* at 66, 69. In a subsequent Order for Certification of Class Action, the Court defined the two classes as follows:

All similarly situated borrowers who signed

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[1] *See Mazzei v. Money Store*, 349 F. Supp. 2d 651, 661 (S.D.N.Y. 2004) (dismissing the plaintiff's FDCPA claim); *Mazzei v. The Money Store*, 552 F. Supp. 2d 408, 413 (S.D.N.Y. 2008) (dismissing the plaintiff's RESPA claim).

[2] *See Mazzei v. Money Store*, No. 01cv5694, 2011 WL 4501311, at *5 (S.D.N.Y. Sept. 29, 2011).

> form loan mortgage agreements on loans which were owned or serviced by the defendants and who from March 1, 2000 to the present ("Class Period") were charged: (A) late fees after the borrower's loan was accelerated, and where the accelerated loan was paid off ("Post Acceleration Late Fee Class"), and/or (B) amounts paid to Fidelity, a non-lawyer entity, from attorneys' fees charged to borrowers ("Fee-Split Class").

Order Dated Jan. 28, 2013 (No. 01cv5694, ECF No. 187). As noted in the Court's decision on class certification, the Post Acceleration Late Fee Class did not include borrowers who had foreclosed loans. *See Mazzei*, 288 F.R.D. at 66.

In December 2014, the case proceeded to trial on the two breach of contract claims, after the plaintiff dropped the TILA claim shortly before trial. After a two week trial, the jury returned a verdict for the plaintiff and for the Late Fee Class on the Late Fee claim, and a verdict for the defendants on the Fee Split claim. In January 2015, this Court agreed to delay the entry of judgment to allow the parties to make their respective post-trial motions. Thereafter, the parties filed these motions.

II.

There was sufficient evidence introduced at trial from which the jury reasonably could have found as follows.

A.

In September 1989, the plaintiff, Joseph Mazzei, began working for The Money Store in its offices in Atlanta, Georgia. Tr. 269.[3] At the time, The Money Store was a second mortgage lender and a loan servicer. Tr. 272-74. The defendant TMS was the servicing operator for The Money Store. Tr. 747. In 1999, First Union Bank purchased The Money Store and closed The Money Store's loan origination business. Tr. 269, 790. Thereafter, The Money Store became HomEq Servicing Inc. Tr. 586.

In 1992, Mazzei accepted a promotion within The Money Store that sent him to work in Sacramento, California. Tr. 274-75. In 1994, Mazzei purchased a house in Sacramento County with a mortgage loan he obtained from The Money Store. Tr. 277-78. As part of the loan transaction, Mazzei signed a Note and a Deed of Trust. Tr. 279-80; Pl's Ex. 2 ("PX 2") (Deed of Trust); PX 119 (Note). The bottom of the Note showed the letters "FNMA," which indicated that the Note was a Federal National Mortgage Association ("Fannie Mae") form document, PX 119, and the defendants used substantially similar Fannie Mae form documents for most borrowers. Tr. 872-73.

The Note laid out the terms of the loan from The Money Store to Mazzei, and the Deed of Trust secured Mazzei's property. Mazzei promised to make monthly payments on a principal loan of $63,700.00, plus interest, over a thirty-year period. PX 119. Section 4 of the Note, "Borrower's Failure to Pay as

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[3] All references to "Tr." are to the transcript of the trial held in this case from December 8, 2014, to December 19, 2014.

Requested," provided remedies for the Money Store in the event Mazzei failed to pay. Section 4(A) provided that if the Note Holder did not receive a monthly payment by the end of ten days after it was due, Mazzei agreed to pay a late charge of 5% of his overdue payment, but not less than $5 or more than $50.

Section 4(B) of the Note governed the written notice that the Note Holder must send to notify the borrower that the payments were overdue, and to specify a date by which the borrower would be in default if the borrower failed to make a payment. Under § 4(C), the Note Holder was given the right to accelerate the loan if the borrower failed to make a payment by that date. Specifically, that subsection provided: "If I do not pay the overdue amount by the date stated in the notice described in (B) above, I will be in default. If am in default, the Note Holder may require me to pay immediately the full amount of principal which has not been paid and all the interest that I owe on that amount." Finally, § 4(D) allowed the Note Holder to recover costs and expenses from the borrower, stating: "If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back for all of its costs and expenses to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees, trustee foreclosure fees."

In late 1997 and throughout 1998, Mazzei missed loan payments to The Money Store. Tr. 592-93. In March, May, and November of 1998, Mazzei received letters from a law firm on behalf of the Money Store defendants notifying him that he was in default on the loan. Def. Ex. 13 ("DX 13"); DX 14; DX 15. Mazzei

testified that he missed payments principally because he was disputing nonsufficient funds ("NSF") charges that he believed were erroneous. Tr. 508-09. In May 1999, Mazzei was laid off from The Money Store when it was taken over by First Union Bank, and he continued to miss payments. Tr. 269, 642. In a letter dated February 23, 2000, a law firm retained by TMS informed Mazzei that he was in default on his loan, and that if he did not pay the full amount of the default within thirty days, TMS would "accelerate the entire sum of both principal and interest," which equaled roughly $61,000. DX 33. The parties agree that TMS accelerated Mazzei's loan approximately thirty days later. In a letter dated March 22, 2000, Mazzei received notice that his property was in foreclosure. DX 39.

While his property was in foreclosure and after his loan had been accelerated, Mazzei sent cashier's checks to The Money Store in the amount of monthly payments, rather than the full amount due, in an attempt to "forestall the foreclosure." Tr. 579-80. The Money Store returned the cashier's checks to Mazzei because they were insufficient to reinstate the loan. *Id.*; PX 105. Mazzei also filed for bankruptcy in July 2000, days before the scheduled sale of his house in foreclosure, preventing the sale. Tr. 610; DX 59. Mazzei's bankruptcy filing was later dismissed. Tr. 615. On October 17, 2000, Mazzei paid off the full balance of the loan, including the principal, interest, and fees. Tr. 578-79; PX 124.

At least as early as November 15, 1999, and extending through July 2000, The Money Store assessed Mazzei for late charges amounting to $26.76 each. PX 1; DX 97. Mazzei was assessed ten late

charges in total, five of which came after his loan was accelerated. DX 97. A "Payoff Quote" sent to Mazzei in October 2000 identified several other fees, including "Attorney Outsourcing Fees." PX 13. The plaintiff also produced invoices created in 2000 and 2001, relating to Mazzei's loan file, which showed several charges submitted by Fidelity National Foreclosure Solutions to HomEq. PX 7. In February 2001, Mazzei wrote to The Money Store requesting information about several of the fees he was charged, including the attorney outsourcing fees. Tr. 529; PX 16. Mazzei initiated this case when the dispute over fees persisted. Tr. 586.

At trial, the parties disputed the propriety of charging late fees after acceleration under the Note and of charging attorneys' fees under the Note, portions of which were allegedly shared with Fidelity, a nonlawyer entity. The plaintiff argued that both of these practices violated the terms of the Note, and thus constituted breaches of contract. The defendants argued that the Note permitted both types of fees. The parties also offered dueling data experts to dispute the number of borrowers in each class and total damages.

B.

In presenting his case on behalf of the Late Fee class, the plaintiff relied on various expert witnesses, and on cross-designated deposition testimony of a Money Store representative. The plaintiff first called Adam Levitin, a Georgetown Law Professor, to present background information about the mortgage servicing industry, to explain mortgage loan securitization, and to opine on the relationship between borrowers

and servicers. Levitin testified generally about the ability of borrowers to bring legal actions against servicers, opining that a hypothetical borrower could bring a breach of contract action against the servicer if the servicer charged unreasonable attorneys' fees. Tr. 116. Levitin described the agreements between loan servicers and the investors that purchase collateralized loans, or pooling and servicing agreements ("PSAs"). Levitin testified that a PSA assigns rights and delegates duties under the form note to the servicer, and that the servicer and borrower have rights and duties against each other. Tr. 118-19. While Levitin did not offer an opinion on any of the defendants' practices in this case, he did review a PSA to which The Money Store was a party, PX 99, and explained how it delegated certain duties and powers to the Money Store defendants in order to service loans. Tr. 128-32.

The plaintiff next called Jacqui Peace, a former head of risk management for GE Capital, the financial services arm of General Electric, to testify about industry practices in the loan servicing industry and to opine on the propriety of post-acceleration late fees. Peace explained that once a loan is accelerated, the full amount of the loan is due and there are no longer any individual payments due. Tr. 184. Therefore, she stated that there are no individual payments against which late fees can be calculated. *Id.* She testified that she had never seen post-acceleration late fees charged at any institution at which she had worked, and that such fees were inconsistent with industry practices. Tr. 186, 218. Having reviewed Mazzei's loan file, she testified that the Money Store defendants charged Mazzei late fees

after his loan was accelerated, which was inconsistent with the Note. Tr. 217-18.

The jury also heard cross-designated deposition testimony from John Dunnery, a Money Store employee through 2007. Dunnery testified that in 2000, around the time The Money Store's loan origination program was closed down, the Money Store defendants were servicing approximately 185,000 loans, about 130,000 of which the Money Store defendants had originated. Tr. 790. By October 2005, the defendants were servicing about 380,000 loans. *Id.* Dunnery admitted that Mazzei was charged late fees after his loan was accelerated, and that the defendants regularly charged post-acceleration late fees in states where the practice had not yet been prohibited. Tr. 820-21, 825. Dunnery also suggested that the Note permits the Money Store defendants to charge fees based on "the absence of state law stating that post-acceleration late fees should not be assessed and collected from the borrower." Tr. 881-82. The defense expert witnesses agreed. The defendants called Carl Levinson, a former Chief Executive Officer ("CEO") of CitiMortgage Inc., and Michael Shaw, a Chief Risk Officer for multiple companies and for Fannie Mae. Both Levinson and Shaw testified that loan servicers regularly charged late fees after acceleration, and that the Money Store defendants did not deviate from standard industry custom and practices in charging Mazzei late fees after his loan was accelerated. Tr. 1078, 1090-91, 1185, 1188, 1191-92.

The parties analyzed the size of the Late Fee Class and the amount of fees assessed by reference to the "Ocwen Database," a large database encompassing between 1.3 and 1.5 million loans, including all of the

loans serviced by the defendants. Tr. 322, 1331. The plaintiff's expert in data analytics, Professor Richard Holowczak, testified about the steps he took to identify the Late Fee Class and the total number of late fees paid in accordance with the Class Certification Order. First, in order to identify loans that were accelerated, Holowczak assumed that all loans on which no payment had been made by the borrower for ninety days were accelerated on the ninety-first day. Tr. 312. There was some dispute at trial as to the validity of this assumption. Shaw testified that it was not warranted because the noteholders only have the option under the Note to accelerate after ninety days, and that they do not always do so. Tr. 1183-84. Both Levitin and Peace, on the other hand, testified that it was the industry standard to accelerate loans after ninety days without payment. Tr. 96-97, 178. And Dunnery testified that the "standard time period" in which the Money Store defendants accelerated loans was "somewhere between day 55 to day 75 of the delinquency." Tr. 819.

After this first step, Holowczak identified, by their specific codes in the database, the number of late fees assessed, the number of those that were actually paid by the borrower, and then excluded all loans that were not paid off. Tr. 312, 324. Holowczak included loans with the database code 081—denoting loans that were "Paid off"—and the roughly 70,000 loans with the code 082—the code for "Loan Liquidated." Tr. 347-48. Faced with the suggestion that the 082 code included loans that were foreclosed upon, and thus not within the Late Fee Class definition, Holowczak testified that the 082 code was

not a reliable indicator of whether or not the loans had been foreclosed upon, and that he thus did not exclude any loans on the basis of that code. Tr. 384-85. Ultimately, Holowczak identified 144,385 loans on which late fees were charged for a total of $59,367,756 in late charges. Tr. 350. The plaintiff's damages expert, Dr. Stan Smith, calculated prejudgment interest on that total according to state statutes, and concluded that there was roughly $41 million in prejudgment interest for the Late Fee Class, for a total of approximately $100 million in damages for the Late Fee Class. Tr. 449.

The defense database expert, Jared Crafton, disagreed strongly with Holowczak's conclusions as to the Late Fee Class. In determining which loans were accelerated, Crafton used the same 90-day assumption as Holowczak. Tr. 1400. However, Crafton excluded the approximately 70,000 loans with the 082 code that Holowczak had included. Tr. 1332; DX 5006. Crafton found that all loans in the Ocwen Database that had completed foreclosures were coded 082, and thus concluded that the "082— Loan Liquidated" code included many loans that were foreclosed upon. Tr. 1346; DX 5005. Therefore, he excluded those loans from the Late Fee Class. Crafton also excluded any loans that he believed were reinstated after acceleration, and he determined that loans were reinstated if he found any payment, however minor, made after acceleration. Tr. 1343-44. Crafton concluded that in the event the defendants were found liable on the Late Fee Claim, the Late Fee Class consisted of 18,894 loans for a total of approximately $4 million in damages, including prejudgment interest. Tr. 1332-33.

The jury returned a verdict on the Late Fee Claim in favor of the plaintiff and the Late Fee Class. The jury found that the defendants breached the Note by charging Mazzei and the Late Fee Class monthly late fees after their loans were accelerated and they paid off the loans. The jury found that Mazzei was entitled to $133.80, constituting the five post-acceleration late charges that he paid, and that the Late Fee Class was entitled to $54,786,201, which included $22,374,684 of prejudgment interest, amounting to somewhat more than half of the damages estimate by Holowczak and Smith.

C.

On behalf of the Fee Split Class, the plaintiff argued that the defendants breached § 4(D) of the Note, which allowed The Money Store to recover expenses from borrowers "to the extent not prohibited by applicable law," such as "reasonable attorneys' fees." PX 119. The plaintiff argued that by sharing legal fees with a nonlawyer entity, the defendants violated the various state equivalents of Rule 5.4 of the Model Rules of Professional Conduct, which prohibits fee sharing with nonlawyers. Thus, the plaintiff argued that the defendants had charged fees that were prohibited by "applicable law" under the Note. In the alternative, the plaintiff argued that by charging borrowers for legal fees that included in part payment to Fidelity for its outsourcing operations, the defendants were not charging "reasonable attorneys' fees."

At trial, the jury heard evidence about the relationship between the Money Store defendants, Fidelity, and the attorney networks overseen by

Fidelity. In the Master Service Agreement ("MSA") between The Money Store and Fidelity, The Money Store agreed to outsource to Fidelity the necessary legal services for foreclosure, bankruptcy, and other services relating to The Money Store's loan servicing business. DX 101. The Money Store worked with several outsourcers, but Fidelity was the largest. Tr. 792-93. Fidelity referred The Money Store's legal work to various law firms, and then provided oversight, monitoring, and other administrative services for those law firms. DX 101; Tr. 196-97, 886.

Generally, the Money Store defendants did not compensate Fidelity directly, leaving it to the various law firms to compensate Fidelity for its services. Tr. 855-56, 858, 875-76. There was some suggestion at trial that Fidelity was compensated out of the Fannie Mae allowable, Tr. 849-50, the standard fee set by Fannie Mae that loan servicers such as The Money Store paid to attorneys. Tr. 188-89. Jacqui Peace explained that the Fannie Mae allowable is an "upper limit" on attorneys' fees that servicers may pass through to borrowers for processes such as foreclosure and bankruptcy. Tr. 190. However, the plaintiff presented no direct evidence of payments from attorneys to Fidelity. When calculating the amount of attorneys' fees that were allegedly shared with Fidelity, the plaintiff relied on percentages specified in various "network agreements" between Fidelity and law firms. PX 107; PX 108.

The parties' experts disagreed as to whether the defendants were violating "applicable law" in compensating Fidelity through fees paid to attorneys. The plaintiff called Professor Bruce Green, who explained Model Rule 5.4 to the jury (the rule

prohibiting the sharing of legal fees with nonlawyers) and noted that every state had adopted the rule in some form. Tr. 678-83. Green testified that assuming Fidelity and the law firms were paid out of the Fannie Mae allowable, this would constitute impermissible fee sharing under the laws of every state. Tr. 689. Green also opined that it was deceptive for the Money Store defendants to characterize the fees encompassing Fidelity's work charged to borrowers as "legal fees." Tr. 701-02. The plaintiff called a borrower, Lori Jo Vincent, who testified that she was never aware that the attorneys' fees she paid were paid to a non-attorney entity. Tr. 483.

The defendants called Professor Roy Simon as their expert on legal ethics, and Simon testified that paying Fidelity out of the Fannie Mae allowable would not be fee splitting, because the law firms were simply paying Fidelity a set rate for its administrative services. Tr. 1038-39, 1043. Accordingly, Simon concluded that the outsourcing agreement contemplated by the MSA and network agreements did not constitute a violation of the ethical rules as long as fees charged to borrowers were within "a reasonable range." Tr. 998. Simon explained that lawyers are permitted to hire people outside the law firm to perform services and assist the lawyers in providing legal services. *Id.* Simon also informed the jury that the Rules of Professional Conduct do not apply to nonlawyers, such as the defendants and Fidelity, Tr. 997, and that he did not see any payments by law firms to Fidelity. Tr. 998. Based on the evidence presented at trial, the jury reasonably could have found that the plaintiff failed to prove that the Money Store defendants violated "applicable

law" by charging borrowers for fees that were paid in part to Fidelity.

The plaintiff also attempted to show that fees paid to Fidelity were not "reasonable" by reference to Fannie Mae guidelines. During Jacqui Peace's testimony, and on cross-examination of Michael Shaw, the plaintiff referenced a series of Fannie Mae guidelines that stated that outsourcing fees should not be charged to the borrower. Tr. 203-04, 1261-62; PX 163; PX 164. However, those guidelines appeared to apply only if Fannie Mae was using its own attorney network, unlike the situation in this case, where the defendants were using Fidelity to oversee their own attorney networks. Tr. 1269; PX 163; PX 164. Moreover, multiple witnesses, including Ms. Peace, testified that the Fannie Mae allowable simply set an "upper limit" on the size of the attorney fees that could be charged to the borrower, rather than restricting the defendants' ability to charge for outsourcing services. Tr. 190, 1165-68. The plaintiff did not argue that the fees charged to borrowers exceeded the Fannie Mae allowable. Based on the evidence presented at trial, the jury reasonably could have found that the plaintiff failed to prove that the Money Store defendants charged attorneys' fees that were not reasonable under § 4(D) of the Note.

For the plaintiff's damages calculation, Professor Holowczak testified that the Fee Split Class included 243,805 loans that were charged roughly $283 million in attorneys' fees. Tr. 354. Of these, Holowczak estimated that roughly $229 million of those fees were charged in connection with loans that Fidelity was overseeing. Tr. 373. Dr. Smith further refined the number by using the network agreements to

estimate the average percentage of those fees that were paid from law firms to Fidelity, and arrived at a damages estimate of $42 million. Tr. 444-47. For the defendants, Jared Crafton testified that these numbers were inflated because they included payments to several outsourcers other than Fidelity. Tr. 1366-71. Crafton did not provide an estimate of damages for the Fee Split Class because he did not see payments made to Fidelity by lawyers. Tr. 1370, 1374-76.

Ultimately, the jury found that the plaintiff failed to prove that the Money Store defendants breached the Note with Mazzei or with borrowers in the Fee Split Class by charging attorneys' fees that attorneys paid to Fidelity.

This is only a summary of some of the evidence from the two week trial which is recounted here to place the parties' motions in perspective.

III.

The plaintiff moves for a new trial as to the Fee Split Claim pursuant to Federal Rule of Civil Procedure 59.

Under Rule 59, a "court may, on motion, grant a new trial on all or some of the issues—and to any party . . . after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). The Court of Appeals for the Second Circuit has explained that "[a] district court may grant a new trial pursuant to Rule 59 even when there is evidence to support the jury's verdict, so long as the court 'determines that, in its independent judgment, the

jury has reached a seriously erroneous result or its verdict is a miscarriage of justice.'" *AMW Materials Testing, Inc. v. Town of Babylon*, 584 F.3d 436, 456 (2d Cir. 2009) (quoting *Nimely v. City of New York*, 414 F.3d 381, 392 (2d Cir. 2005)).

The plaintiff contends that the Fee Split verdict was a miscarriage of justice. As set forth in more detail below, the Court has rejected most of the plaintiff's arguments previously, either at trial or in prior motions, and the remaining arguments are without merit.

A.

Some of the plaintiff's bases for a new trial—those pertaining to the New Invoice System database—are intertwined. The plaintiff argues that he was deprived of crucial evidence at trial because of the defendants' failure to preserve the New Invoice System, a database containing some information about invoices Fidelity sent to the Money Store defendants. Initially, the plaintiff's claim fails because it is clear from the jury's verdict that any additional evidence from the New Invoice System would not have made any difference in this trial. The plaintiff obtained the records from the New Invoice System relating to Mazzei and introduced them at trial. PX 7. They showed invoices for various services relating to Mazzei that Fidelity sent to HomEq. Despite access to the New Invoice documents relating to Mazzei, the jury returned a verdict in favor of the defendants on Mazzei's individual Fee Split claim. The plaintiff has not shown how his inability to offer evidence from the New Invoice System as to other members of the Fee Split Class could conceivably have resulted in a

different verdict. *See Pouncy v. Danka Office Imaging Co.*, No. 06cv4777, 2009 WL 3415142, at *2 (S.D.N.Y. Oct. 22, 2009) (denying a motion for a new trial where the plaintiff failed to show that new evidence "would have had a material effect on the jury's verdict"), *aff'd*, 393 F. App'x 770 (2d Cir. 2010). Even with the evidence from the New Invoice System, Mazzei could not prove his individual claim. There is thus no basis to believe that evidence from the New Invoice System would have proved any claim with respect to the class. On this basis alone, the plaintiff's motion based on the New Invoice System should be denied.

For the sake of completeness, the Court will address the plaintiff's other contentions relating to the New Invoice System. The plaintiff faults the defendants for their conduct throughout trial in referring to the absence of evidence of payments from lawyers to Fidelity, evidence that the plaintiff contends could have been presented if the defendants had preserved the New Invoice system in the same accessible form in which it had once existed, and faults the Court for declining to grant trial sanctions for the defendants' failure to preserve the New Invoice System in that form. The plaintiff's contentions are without merit, but do require recounting some history of this litigation.

The New Invoice System is the subject of a longstanding dispute. On or about May 5, 2009, the plaintiff moved for sanctions against the defendants for having failed to preserve and maintain records pertaining to the litigation from at least July 2002. The motion was based on Dunnery's deposition testimony, in which he testified that HomEq purged its

accounting system annually of all loans that had been paid off. May 4, 2009, Grobman Decl. Ex. E, at 84-87 (No. 03cv2876, ECF No. 86). The defendants responded with a declaration of Hans Kobelt, then an attorney for the Money Store defendants, in which he swore that all of the defendants' records were being retained "in either the IT Turbo system, the New Invoice system, or Oracle, as well as hard copies and imaged loan documents from the loan files themselves." June 10, 2009, Decl. of W. Hans Kobelt ¶ 9 (No. 03cv2876, ECF No. 82). Based on this and other representations, the plaintiff withdrew his motion at the time.

In October 2013, the plaintiff filed a letter in this Court claiming that the defendants had failed to preserve information in the New Invoice System. *See* Letter Dated October 17, 2013 (No. 01cv5694, ECF No. 219). The Court referred the matter to Magistrate Judge Ellis, and in July 2014, Judge Ellis granted the plaintiff's motion for sanctions, holding that the defendants failed to maintain the New Invoice System in an accessible format. Judge Ellis ordered the defendants to bear the cost of determining whether the New Invoice System was searchable and to pay the plaintiff attorneys' fees for the sanctions motion. *See* Opinion and Order Dated July 18, 2014 (No. 01cv5694, ECF No. 273). The parties filed objections to Judge Ellis's opinion, and the plaintiff moved for trial sanctions against the defendants, such as an adverse inference or a default judgment on liability. Prior to trial, the plaintiff moved to preclude the defendants from questioning Professor Holowczak on the fact that the Ocwen Database did not contain any evidence of fee splitting because, according to the plaintiff, the

New Invoice System would have contained that evidence but the defendants failed to preserve it.

On November 24, 2014, this Court held a final pretrial conference where it resolved all of the above motions and objections. The Court affirmed Judge Ellis's opinion in all relevant parts, and denied the plaintiff's motion for additional sanctions. *See* Nov. 24, 2014, Hr'g Tr. 61, 67. The Court described the New Invoice System, noting that it was a "web-based system that was used to submit invoices to The Money Store by Fidelity and vendors such as law firms and trustee firms." *Id.* at 63. The New Invoice System did "not contain records of bills submitted to law firms or payments made by the law firms for technology or administrative services fees." *Id.*

The Court held that although the defendants willfully failed to preserve the New Invoice System in the same accessible form that had previously existed, as Judge Ellis found, "there was no evidence of the defendants' bad faith in the sense that the defendants were intentionally depriving the plaintiff of information for use in this litigation." *Id.* at 65; *see Linde v. Arab Bank*, No. 04cv2799, 2009 WL 8691096, at *2, (E.D.N.Y. June 1, 2009) (considering, as a factor in determining sanctions, "whether the party is motivated by a bad faith desire to deprive the court of evidence that would be damaging to it"). The Court noted that additional sanctions were inappropriate because the New Invoice System would not have shown actual payments to Fidelity or the lawyers or charges to the members of the plaintiff class. Nov. 24 Hr'g Tr. 67.

The Court also denied the plaintiff's *Daubert* motion to preclude the defendants from informing the

jury that there was no evidence of fee splitting in the Ocwen database. *Id.* at 94. To the extent that the Ocwen database was discussed at trial, it would be useful for the jury to understand how it was constructed and why it was not constructed in certain ways to show the existence or non-existence of fee splitting. *Id.* at 96. But, in light of the fact that the Ocwen database was not constructed to show fee splitting, the Court noted that "[i]f the defendants harp on the fact that the Ocwen database does not include evidence of fee splitting when the foundation testimony shows why it would not include such evidence, then the Court would sustain appropriate objections to the testimony at that point." *Id.* The Court reiterated this ruling at the beginning of the trial, stating that "there could be a few questions to show that's not what this invoice system is constructed to show." Tr. 11.

The plaintiff now objects to the Court's failure to grant the plaintiff's motion for further sanctions, and argues that defense counsel crossed the line set by the Court in referring to the absence of evidence of fee-splitting throughout trial. But, as the Court explained several times during this litigation, the plaintiff's failures in proof are due principally to his lack of diligence in pursuing evidence. In the time since this Court was assigned to this case in the beginning of 2009, the plaintiff cannot point to any requests for discovery that were denied by this Court. Despite that fact, the plaintiff never deposed any corporate representatives of Fidelity or of Lender Processing Services, the successor entity that controlled the New Invoice System, nor did he ever seek any court orders for other databases mentioned by the defendants in the course of the 2009 sanctions motion.

Moreover, the plaintiff never deposed a single lawyer who allegedly split fees with Fidelity, not even the lawyers who worked on Mazzei's account. In sum, there were no discernible efforts to seek evidence of fee splitting from any source other than the New Invoice System, a database that, as the Court has explained, only contained tangential information.

In his current motion, the plaintiff argues that he could not have sought fee-split data from Fidelity prior to the Class Certification Order because courts "ordinarily refuse[] to allow discovery of class members' identities at the pre-certification stage." *Dziennik v. Sealift, Inc.*, No. 05cv4659, 2006 WL 1455464, at *1 (E.D.N.Y. May 23, 2006). But the evidence the plaintiff failed to seek pertained to the alleged merits of the plaintiff's attorney fee splitting claim, not to the identities of class members. Judge Sprizzo allowed class discovery to begin in 2008. *See* Order Dated May 29, 2008 (No. 01cv5694, ECF No. 78). The plaintiff contends that the defendants had the obligation to preserve the other databases mentioned in connection with the 2009 sanctions motion, but the plaintiff never made any discovery motion as to the other databases. Despite rehashing the same spoliation arguments in this motion, the plaintiff has yet to offer a satisfactory explanation for his failures to pursue evidence diligently. The Magistrate Judge imposed an appropriate narrowly-tailored sanction for the defendants' failure to assure that the New Invoice System was retained in the same accessible form in which it had previously existed and this Court affirmed that sanction. The plaintiff failed to seek a greater sanction in his initial motion and this Court appropriately refused to grant

a more severe sanction at trial in view of the tangential nature of the New Invoice System and the plaintiff's failure to pursue evidence diligently from alternative and more relevant sources.

Moreover, the defendants' conduct at trial did not violate the Court's pretrial rulings. During witness testimony and summation, the defendants noted the absence of evidence of payments from lawyers to Fidelity, which they also referred to as an absence of evidence of fee splitting. While the plaintiff argues that this conduct was improper, the Court did not preclude the defendants from referring to the absence of evidence of fee splitting in general. Rather, the Court held that the defendants could not suggest to the jury that the absence of fee splitting in the Ocwen database meant that there was no evidence of fee splitting, because the Ocwen database was not constructed to show fee splitting. During the trial, the defendants followed the Court's instructions and did not harp on the absence of evidence of fee splitting in the Ocwen database.[4] But in disputing the plaintiff's

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[4] The plaintiff argues that during trial, the Court sustained several objections to the defendants' conduct as it related to the Court's pretrial ruling on this matter. This is inaccurate. There was one instance where defense counsel began to cross the line with a question asking about the absence of Fidelity invoices, and the Court interrupted *sua sponte* before defense counsel finished the question. Tr. 727-28. Because the New Invoice System did include evidence of Fidelity invoices to HomEq, a question about their absence may have opened the door for the plaintiff to introduce testimony about the defendants' failure to maintain the database in the same accessible form in which it had previously existed. By contrast, all of the defendants' questions about the absence of evidence of fee splitting, or payments from attorneys to Fidelity, were proper and the Court did not sustain objections to them.

claim that attorneys' fees were improperly shared with Fidelity, the defendants properly could argue that the plaintiff had not presented evidence of actual payments from attorneys to Fidelity. This was evidence that the plaintiff had failed to pursue and did not present, and which would not have been contained in the New Invoice System. Nothing in the Court's rulings prevented the defendants from arguing that the plaintiff had not satisfied his burden of proof on the Fee Split claim.

B.

The plaintiff also argues that a new trial is warranted because the jury's verdict as to the Fee Split Class was against the weight of the evidence. In arguing that it was unreasonable for the jury not to find that attorneys' fees were improperly shared with Fidelity, the plaintiff points to the MSA, the network agreements, and some portions of Dunnery's deposition testimony, particularly Dunnery's testimony that Fidelity was "compensated out of the Fannie Mae fee." Tr. 849.

A jury verdict should only be found to be against the weight of the evidence if it is "seriously erroneous." *Piesco v. Koch*, 12 F.3d 332, 345 (2d Cir. 1993). "Where the resolution of the issues depended on assessment of the credibility of the witnesses, it is proper for the court to refrain from setting aside the verdict and granting a new trial." *Id.* (internal quotation marks omitted) (quoting *Metromedia Co. v. Fugazy*, 983 F.2d 350, 361 (2d Cir. 1992)).

The plaintiff principally argues that the defendants did not present any evidence to counter Dunnery's testimony that Fidelity was paid "out of" the Fannie

Mae allowable. But the ultimate issue for the jury was not whether Fidelity was paid out of the Fannie Mae allowable, but whether payments to Fidelity were in breach of the Note, either because they were "prohibited by applicable law" or because the fees were not "reasonable." PX 119. Professor Simon testified as an expert in legal ethics that he did not find any ethical violation in the MSA or the network agreements, and that, in any event, the Professional Rules of Conduct did not apply to nonlawyers. Simon testified credibly that lawyers can hire persons outside a law firm to perform services to assist the lawyers in providing legal services. Tr. 998. Simon also testified that there was no requirement that Fidelity's charges be billed separately from the attorneys' fees, because Fidelity's administrative services were "all in league with and coordination with the lawyers or assisting the lawyers to perform legal services." Tr. 1039. The jury was entitled to creditd Simon's testimony. *See DLC Management Corp. v. Town of Hyde Park*, 163 F.3d 124, 134 (2d Cir. 1998) (explaining that, on a Rule 59 motion, "a court should rarely disturb a jury's evaluation of a witness's credibility"); *S.E.C. v. Zwick*, No. 03cv2742, 2007 WL 831812, at *16 (S.D.N.Y. Mar. 16, 2007) (rejecting an argument in a Rule 59 motion that the jury should not have credited witness testimony), *aff'd*, 317 F. App'x 34 (2d Cir. 2008).

The jury also could have credited the multiple witnesses, including Ms. Peace, who testified that the Fannie Mae allowable was only an "upper limit" on the amount of attorneys' fees that could be charged to borrowers. Tr. 190, 998, 1165. The plaintiff did not argue that the Fee Split Class was charged attorneys' fees that were too high, and accordingly the jury

could have found that the fees were "reasonable" under the Note. Finally, the jury could have found that, based on the lack of evidence of payments to Fidelity by attorneys, the plaintiff did not satisfy his burden to show fee splitting. Based on the evidence in this case, it was not seriously erroneous for the jury to conclude, as a matter of contract interpretation, that the plaintiffs failed to prove that the defendants breached § 4(D) of the Note by charging attorneys' fees that attorneys paid to Fidelity. The jury reasonably rejected Mazzei's individual claim and the class claim by the Fee Split Class.

C.

The plaintiff next argues that the Court erred in declining to admit an affidavit submitted earlier in this case by Mark Buechner, an attorney for Wells Fargo (the "Buechner Affidavit"). The defendants originally submitted the Buechner Affidavit in September 2014, in opposition to the plaintiff's motion for further sanctions for the defendants' failure to maintain the New Invoice System in the same accessible format in which it had previously existed. The Buechner Affidavit contains some background information on the defendants' litigation holds, the New Invoice System, and other databases. *See* Buechner Affidavit (No. 01cv5694, ECF No. 305). On December 2, 2014, shortly prior to trial, the plaintiff submitted a letter to this Court outlining the plaintiff's "proffer of evidence to be elicited through the testimony of Mark Buechner," requesting the Court to permit Buechner's testimony, which the plaintiff claimed would be confined to the topics discussed in his affidavit. On December 3, 2014, the plaintiff

submitted a brief reply requesting that in the event Buechner is outside the Court's subpoena power, the plaintiff be permitted to offer the Buechner Affidavit as evidence.

Shortly thereafter, this Court denied the plaintiff's requests. *See* Order Dated Dec. 3, 2014 (No. 01cv5694, ECF No. 442). The Court noted that Buechner was outside the Court's subpoena power because the defendants represented, without contradiction, that Buechner resides and works in North Carolina, and there was no indication that his testimony could be compelled. And the plaintiff could point to no rule under the Federal Rules of Evidence that would allow the Buechner Affidavit, which is hearsay, to be admitted at trial. The Court also noted that the plaintiff had not proffered what admissible testimony he would offer from Buechner. The plaintiff appeared to intend to elicit testimony from Buechner about the defendants' failure to preserve the New Invoice System in the same accessible format, but that testimony would not have been proper in light of the Court's denial of the plaintiff's motion for additional sanctions.

In his current motion, the plaintiff does not present any reason for disturbing the Court's initial ruling. The plaintiff argues, as he did in his original motion, that the defendants did not object to the admissibility of the Buechner Affidavit, but this is incorrect; the defendants objected when the plaintiff made the motion. None of the Federal Rules of Evidence the plaintiff now points to support the admissibility of the affidavit.[5] The plaintiff argues that the Court

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[5] The plaintiff argues that the Buechner Affidavit is a statement of a party opponent under Rule 801(d)(2) of the Federal Rules of Evidence, but Buechner is employed by Wells

failed to reconsider admitting the affidavit when the plaintiff renewed his motion during trial. However, the Court did reconsider the motion and rejected it, stating during the trial that the affidavit was "plainly hearsay" and "no more admissible today than it was [before trial]." Tr. 903.

The plaintiff argues that the Buechner affidavit should have been allowed after the defendants designated some portions of the Dunnery deposition that referenced the New Invoice System. But the jury only heard a few scattered references to the New Invoice System during Dunnery's deposition testimony, and those references were read without objections by the plaintiff. Tr. 902. Thus the information in the Buechner Affidavit about the New Invoice System would only have been confusing to the jury. The Court offered to strike the references to the New Invoice System, but the plaintiff declined the invitation. Tr. 902-03. The plaintiff also presents arguments about the need to correct for the defendants' alleged spoliation and the defendants' references to the absence of evidence of fee splitting, but the Court has rejected that argument several times, including prior to and during trial, and in the context of this motion. The Court declined prior to trial to grant any additional sanctions for the defendants' failure to preserve the New Invoice System

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Fargo, who is not a party opponent. The plaintiff argues that it is a statement against interest from an unavailable declarant, but has not identified any statement in the affidavit that Buechner only would have made if he believed it to be true because "it was so contrary to [his] proprietary or pecuniary interest . . . ." Fed. R. Evid. 804(b)(3).

in a more accessible form, and the defendants obeyed the Court's instructions during the trial.

Accordingly, the Court did not err in declining to admit the Buechner Affidavit.

D.

Finally, the plaintiff argues that the Court erred in denying the plaintiff's request for a jury instruction on restitution damages for the Fee Split Class, or what the plaintiff terms the Court's "*sua sponte* dismissal" of the restitution request. However, because the jury returned a verdict in favor of the defendants on the plaintiff's Fee Split claim and thus did not reach damages, the plaintiff's argument is moot.

In any event, the Court did not err in denying the plaintiff's request. The plaintiff's argument that the Court dismissed the request *sua sponte* is frivolous. Relying on a restitution theory, the plaintiff sought to recover the entire amount of fees paid by the class to attorneys, not simply the amount that had been allegedly wrongfully paid to Fidelity. The plaintiff proposed a request to charge the jury on that theory. Not surprisingly, this request was vigorously contested by the defendants. Not only did the defendants oppose the request in their requests to charge, but during the trial the Court alerted the plaintiff to the precise questions and doubts that the Court had about the restitution jury charge proffered by the plaintiff and allowed the parties to brief the issue further, whereupon the plaintiff submitted a letter outlining his arguments. *See* Tr. 956-58; Pl's Letter Dated Dec. 14, 2014 (No. 01cv5694, ECF No. 452). At the charge conference, when the Court presented a draft jury charge that

did not include a restitution theory of damages, the plaintiff did not object. The plaintiff then raised the issue immediately prior to summations, where the Court noted that it had been waived but was without merit, in any event. Tr. 1649.

The plaintiff devotes his entire argument regarding the Court's denial of the restitution charge to the frivolous *sua sponte* issue and to arguing that the plaintiff's failure to object at the charge conference did not constitute waiver, because only a "[f]ailure to object to a jury instruction . . . prior to the jury retiring results in a waiver of that objection." *Jarvis v. Ford Motor Co.*, 283 F.3d 33, 57 (2d Cir. 2002) (internal quotation marks omitted). However, immediately after the Court deemed the request waived, the Court also held that, "in the alternative, it's plain that a damages theory of restitution is not an available damages theory in this case." Tr. 1649. The plaintiff does not explain why restitution damages were appropriate for the breach of contract claim on behalf of the Fee Split Class.

"The decision whether to award restitution damages lies within the discretion of the trial court." *Waxman v. Envipco Pick Up & Processing Servs., Inc.*, No. 02cv10132, 2006 WL 236818, at *5 (S.D.N.Y. Jan. 17, 2006). Restitution damages are sometimes awarded in cases of total breach or repudiation, allowing the non-breaching party to claim restitution damages in order to be restored to its original position. *See Summit Props. Int'l, LLC v. Ladies Prof'l Golf Ass'n*, No. 07cv10407, 2010 WL 4983179, at *3 (S.D.N.Y. Dec. 6, 2010). But in this case, there was no total breach or repudiation of the contract. Indeed, in Mazzei's case, the loan under the Note was

made and then paid off together with interest and charges. Mazzei's claim is only that part of the amounts for attorneys' fees that were paid to Fidelity were charged in breach of the contract. Thus this theory of restitution damages would not apply. *See* Restatement (Second) of Contracts § 373 Cmt. a (1981) ("[R]estitution [under § 373] is available only if the breach gives rise to a claim for damages for total breach and not merely to a claim for damages for partial breach."); *Direction Assocs., Inc. v. Programming & Sys., Inc.*, 412 F. Supp. 714, 719 (S.D.N.Y. 1976) (denying restitution damages where there was no material or total breach of contract).

Alternatively, restitution damages may be awarded where a party "renders performance under an agreement that is illegal or otherwise unenforceable for reasons of public policy." Restatement (Third) of Restitution and Unjust Enrichment § 32 (2011); *see also Norman v. Salomon Smith Barney, Inc.*, 350 F. Supp. 2d 382, 389-90 (S.D.N.Y. 2004) (allowing recovery of restitution "where contract is void for illegality of performance"). However, the plaintiff does not contend that the entire agreement is unenforceable; rather, the plaintiff is challenging only the defendants' ability to charge certain types of fees under one portion of the contract, namely the portion of the attorneys' fees that the plaintiff claims were wrongfully paid to Fidelity. As the Court noted when denying the request, the "particular breach in this case was the payment of the attorneys' fees that went to Fidelity. So, the correct amount of restitution in this case would be the same as compensatory damages." Tr. 1650. Accordingly, the Court appropriately denied

the request to charge the jury on the theory of restitution damages.

Because the plaintiff has not shown that "the jury has reached a seriously erroneous result or its verdict is a miscarriage of justice," *AMW Materials Testing*, 584 F.3d at 456 (internal quotation marks omitted), the plaintiff's motion under Rule 59 is denied.

IV.

The defendants move for decertification of the Late Fee Class pursuant to Rule 23 of the Federal Rules of Civil Procedure. In the alternative, the defendants move for judgment as a matter of law on the Late Fee claim pursuant to Rule 50(b) of the Federal Rules of Civil Procedure. The defendants advance the same two bases for each motion—that the plaintiff failed to prove on a classwide basis that the members of the class actually had their loans accelerated, and that the plaintiff failed to prove on a classwide basis that the members of the class were in privity of contract with the defendants.

Pursuant to Rule 23(c)(1)(C), "[a]n order that grants or denies class certification may be altered or amended before final judgment." Fed. R. Civ. P. 23(c)(1)(C); *see also Boucher v. Syracuse Univ.*, 164 F.3d 113, 118 (2d Cir. 1999) ("[U]nder Rule 23(c)(1), courts are required to reassess their class rulings as the case develops." (internal quotation marks omitted)). A court may "decertify a class if it appears that the requirements of Rule 23 are not in fact met." *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 572 (2d Cir. 1982). However, a court "may not disturb its prior findings absent some significant intervening event or

a showing of compelling reasons to reexamine the question." *Gulino v. Bd. of Educ.*, 907 F. Supp. 2d 492, 504 (S.D.N.Y. 2012) (internal quotation marks omitted). *aff'd*, 555 F. App'x 37 (2d Cir. 2014). Compelling reasons "include an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Id.* (internal quotation marks omitted). The moving party in a decertification motion bears "a heavy burden to prove the necessity of either the drastic step of decertification or the less draconian but still serious step of limiting the scope of the class." *Gordon v. Hunt*, 117 F.R.D. 58, 61 (S.D.N.Y. 1987).

It is well-established that a district court should deny a Rule 50 motion unless "viewed in the light most favorable to the nonmoving party, 'the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable [persons] could have reached.'" *Cruz v. Local Union No. 3 of the Int'l Bhd. of Elec. Workers*, 34 F.3d 1148, 1154–55 (2d Cir. 1994) (alteration in original) (quoting *Simblest v. Maynard*, 427 F.2d 1, 4 (2d Cir. 1970)). A trial court considering a motion under Rule 50(b) "must view the evidence in a light most favorable to the nonmovant and grant that party every reasonable inference that the jury might have drawn in its favor." *Samuels v. Air Transp. Local 504*, 992 F.2d 12, 16 (2d Cir. 1993). A jury verdict should be set aside only when "there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or [where

there is] such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded [jurors] could not arrive at a verdict against [the movant]." *Logan v. Bennington Coll. Corp.*, 72 F.3d 1017, 1022 (2d Cir. 1996) (alterations in original) (internal quotation marks omitted); *see also AIG Global Sec. Lending Corp. v. Banc of Am. Sec. LLC*, 646 F. Supp. 2d 385, 388-89 (S.D.N.Y. 2009), *aff'd*, 386 F. App'x 5 (2d Cir. 2010).

A.

Initially, the defendants argue that the Late Fee Class should be decertified and that, in the alternative, judgment should be granted as a matter of law in their favor on the Late Fee claim because the plaintiff failed to prove, on a classwide basis or as a matter of law, that the Money Store defendants actually accelerated the class members' loans.

In its decision on class certification, this Court held that the plaintiff had satisfied his burden under Rule 23(b)(3) to show that common questions predominated over individual questions for the Late Fee Class. *Mazzei v. Money Store*, 288 F.R.D. 45, 67 (S.D.N.Y. 2012). The plaintiff showed that the defendants had a policy of charging post-acceleration late fees, and that state contract law was sufficiently uniform to allow for classwide adjudication of whether that policy violated the Uniform Notes signed by borrowers. *Id.* The defendants now contend, in an argument not raised when the Late Fee Class was certified, that Rule 23(b)(3) is no longer met in this case because the plaintiff did not prove on a classwide basis that the defendants actually accelerated each class member's loan. For substantially

the same reasons, the defendants argue that they are entitled to judgment as a matter of law on the Late Fee claim.

At the close of trial, the Court instructed the jury that a "loan is accelerated when the lender or servicer provides notice or demand to the borrower that the entire balance of the loan is due immediately." Tr. 1750. The Court stated that "the plaintiff must prove by a preponderance of evidence that his loan and the class members' loans were accelerated," that they were charged late fees after the acceleration, that those fees were not permitted under the contract, that they paid off their loans, and that they were injured as a result. Tr. 1750-52. *See also Beal Bank v. Crystal Props. Ltd., L.P. (In re Crystal Props., Ltd., L.P.)*, 268 F.3d 743, 749 (9th Cir. 2001) ("Both state and federal courts have made clear the unquestionable principle that, even when the terms of a note do not require notice or demand as a prerequisite to accelerating a note, the holder must take affirmative action to notify the debtor that it intends to accelerate." (emphasis in original)). The jury returned a verdict in favor of the plaintiff and the Late Fee Class on the Late Fee claim, and thus concluded that the defendants had accelerated the class members' loans and charged them post-acceleration late fees.

The defendants argue that the plaintiff did not present evidence that the absent class members' loans were in fact accelerated, but instead relied on the expert witnesses' assumption that the loans were accelerated after 90 days without payment from the borrower. *See, e.g.*, Tr. 312, 1400. The defendants argue that such an assumption cannot constitute sufficient

classwide evidence that the loans were in fact accelerated. *See, e.g., Alphamed Pharm. Corp. v. Arriva Pharm., Inc.*, 432 F. Supp. 2d 1319, 1347 (S.D. Fla. 2006) (granting a defendant's Rule 50 motion for judgment as a matter of law where the evidence at trial demonstrated that the plaintiff's "assumptions" were "at the very least, speculative"), *aff'd*, 294 F. App'x 501 (11th Cir. 2008). However, contrary to the defendants' argument, the plaintiff presented evidence to support the 90-day assumption. Jacqui Peace and Adam Levitin testified that it was "standard practice in the mortgage industry" to accelerate loans after 90 days of nonpayment on the loan from the borrower. Tr. 96-97, 178. Dunnery also testified that the Money Store defendants tended to accelerate loans "somewhere between day 55 to day 75 of the delinquency," although The Money Store "may have gone to day 95." Tr. 819-20. Based on this testimony, the jury could reasonably infer that the defendants followed the mortgage industry standards and generally accelerated loans after 90 days without payment from the borrower. The experts' testimony about industry practices and the Dunnery testimony about the Money Store defendants' loan acceleration practices applied to the borrowers on a classwide basis such that the common question of the defendants' liability still predominated at trial. *See Fort Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co.*, 301 F.R.D. 116, 136 (S.D.N.Y. 2014) (finding predominance requirement met as to liability because the proof of liability centered on the defendants' loan underwriting practices).[6]

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[6] Relying on *Marlo v. United Parcel Service, Inc.*, 639 F.3d 942 (9th Cir. 2011), the defendants argue that industry practice

The defendants argue that the circumstances surrounding Mazzei's loan illustrate the impropriety of relying on the 90-day assumption. The parties agree that Mazzei's loan was accelerated on or about March 22, 2000, but Professor Holowczak testified that according to the 90-day assumption, Mazzei's date of acceleration occurred on November 3, 1999. Tr. 338. The defendants were free to argue at trial that Mazzei's circumstances undermined the experts' and Dunnery's testimony that the defendants accelerated loans on or prior to the 91st day without payment. But in light of the jury's verdict in favor of the plaintiff, the Court "must resolve this conflict in the evidence in favor of [the nonmoving party]." *Stratton v. Dep't for the Aging for N.Y.*, 132 F.3d 869, 874 n.2 (2d Cir. 1997). At the very least, the history of Mazzei's loan indicated that it was in fact accelerated and that he paid post-acceleration late fees. Indeed, the defendants pointed to no case out of the thousands of loans included in the class where no payments were made on a loan for more than 90 days, and where the loan was never accelerated. In the absence of any contrary evidence, the jury could rely on the expert testimony of industry practice and Dunnery's testimony as to the defendants' practice.

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cannot serve as proof that the defendants accelerated the class members' loans. But that case is inapposite and does not support the defendants' stated proposition. *See id.* at 948 (finding, in a fair-wages action, that the plaintiff did not establish predominance by reference to generalized policies of the defendant because individual questions predominated). Nothing prevented the jury from inferring that it was standard mortgage industry practice to accelerate loans at a certain period, and that the defendants followed that practice.

Ultimately, the issue the defendants raise as to acceleration affects the proper amount of damages, and not the defendants' liability. If the jury calculated damages using the 90-day assumption, but some borrowers' loans were actually accelerated later, the jury's estimation of the damages may be somewhat inflated. But the jury's estimation of damages does not require mathematical precision, because "a plaintiff need only demonstrate a stable foundation for a reasonable estimate as to damages." *Boyce v. Soundview Tech. Grp., Inc.*, 464 F.3d 376, 392 (2d Cir. 2006) (internal quotation marks omitted) (holding that the breaching party must "shoulder the burden" in proving uncertainty of damages). In this case, the jury awarded Mazzei a total of five late fees, apparently accepting Mazzei's date of acceleration as March 22, 2000, and awarding Mazzei the late fees that he paid after that date. The jury awarded the Late Fee Class approximately $54 million, including approximately $22 million of prejudgment interest, or roughly half of Dr. Smith's calculations based on Holowczak's estimate of the Late Fee Class. Tr. 449. Roughly half of the loans in Holowczak's estimate were coded "082," and the jury reasonably could have excluded those loans based on Crafton's testimony that the 082 code included loans that had been foreclosed upon and that there was no basis to conclude that loans in that category were paid off as required to be included in the class definition. Tr. 1346. Accordingly, the jury made a reasonable estimate as to the damages for the Late Fee Class.

In sum, the defendants have not presented any new evidence or pointed to a significant intervening event after this Court's certification order, and the

defendants' argument based on the acceleration of the loans does not present a compelling reason for decertifying the Late Fee Class. *See Stinson v. City of New York*, No. 10cv4228, 2014 WL 4742231, at *5 (S.D.N.Y. Sep. 23, 2014). The defendants also have not shown, on this basis, that "reasonable and fair minded" persons could not have "arrive[d] at a verdict against [the defendants]." *Logan*, 72 F.3d at 1022.

B.

The defendants' second basis for decertifying the Late Fee Class and granting them judgment as a matter of law on the Late Fee claim is much more substantial. The defendants argue that the plaintiff did not prove that the borrowers in the class were in a contractual relationship with the Money Store defendants. The defendants concede that they have contractual relationships with the borrowers who signed Uniform Notes for mortgage loans originated by the Money Store defendants. However, in 2001, the Money Store defendants ceased originating loans, Tr. 873-74, and only serviced loans originated after that point. Thus, the Money Store defendants were not signatories to any borrowers' Uniform Notes originated after the defendants ceased originating loans. The defendants contend that the plaintiff has not shown, on a classwide basis or as a matter of law, that the defendants had a contractual relationship with those borrowers. Because the only claim in this case is for breach of contract, the existence of a contractual relationship between the class members and the defendants is critical.

Although the defendants did not make arguments about the issue of privity to the jury during

the trial, the Court instructed the jury on the necessity of finding that the class members entered into a contractual relationship with the Money Store defendants, even where the defendants "only serviced the loans of many class members." Tr. 1749-50. The jury returned a verdict in favor of the plaintiff and the Late Fee Class with respect to the Late Fee claim, thus concluding that a contractual relationship existed between the members of the Late Fee Class and the defendants. The defendants argue that the plaintiff did not prove such a contractual relationship on a classwide basis, and that there is a complete absence of evidence supporting the jury's finding that a contractual relationship existed between the defendants and the class members whose loans were only serviced, and not originated, by the defendants.

It is "hornbook law that a nonsignatory to a contract cannot be named as a defendant in a breach of contract action unless it has thereafter assumed or been assigned the contract." *Harte v. Ocwen Fin. Corp.*, No. 13cv5410, 2014 WL 4677120, at *5 (E.D.N.Y. Sept. 19, 2014) (internal quotation marks omitted) (quoting *In re Cavalry Constr., Inc.*, 428 B.R. 25, 30 (S.D.N.Y. 2010)). The Late Fee Class included borrowers whose loans were only serviced and not originated by the defendants, and the plaintiff was required to prove at trial that those borrowers were in "privity of contract" with the defendants in order to assert a breach of contract claim on behalf of the class. *See, e.g., Impulse Mktg. Grp., Inc. v. Nat'l Small Bus. Alliance, Inc.*, No. 05cv7776, 2007 WL 1701813, at *6 (S.D.N.Y. June

12, 2007) ("Privity of contract has long been held as a requirement for a breach of contract action.").

A number of courts have addressed whether servicers that are nonsignatories to mortgage loan agreements may be held liable by the mortgagor in a breach of contract action. A significant majority of courts have concluded that loan servicers are not in privity of contract with mortgagors where the servicers did not sign a contract with the mortgagors or expressly assume liability. *See, e.g., Perron v. JP Morgan Chase Bank, N.A.*, No. 12cv01853, 2014 WL 931897, at *4 (S.D. Ind. Mar. 10, 2014) ("The [h]omeowners have failed to cite to any case law . . . in which contractual privity between the borrower and the holder of a note was imputed to the loan servicer."); *Edwards v. Ocwen Loan Servicing, LLC*, 24 F. Supp. 3d 21, 28 (D.D.C. 2014) ("Judges around the country . . . have held that a loan servicer, as a lender's agent, has no contractual relationship or privity with the borrower and therefore cannot be sued for breach of contract.") (collecting cases).[7] The plaintiff points to two cases within the

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[7] *See also Petty v. Countrywide Home Loans, Inc.*, No. CIV.A. 3:12-6677, 2013 WL 1837932, at *10 (S.D.W. Va. May 1, 2013) (holding that the defendant who bought the loan under a pooling and servicing agreement could not be held liable in a breach of contract claim) (collecting cases); *Johnson v. Affiliated Computer Servs., Inc.*, Civ. Act. No. 3:10–CV–2333–B, 2011 WL 4011429, *7 (N.D. Tex. Sept. 9, 2011) (dismissing a breach of contract claim against a loan servicer where the plaintiff was not a party to the servicing agreement and did not allege the contract was entered into to benefit him directly); *James v. Litton Loan Servicing, L.P.*, No. 09cv147, 2011 WL 59737, at *11 (M.D. Ga. Jan. 4, 2011) ("The fact that a loan servicer, which has undertaken a contractual obligation to provide legal services for a lender, may appear in bankruptcy court to protect a claim relating to the debt it services does not mean that the

Seventh Circuit, including an opinion by the Court of Appeals for the Seventh Circuit, which hold that "[i]f an original mortgagee can be sued under state law for breach of contract, so may the partial assignee," the servicer, if the servicer "violates the terms of the part of the mortgage contract that has been assigned to [it]." *In Re Ocwen Loan Servicing, LLC Mortg. Servicing Lit.*, 491 F.3d 638, 645 (7th Cir. 2007); *see also Kesten v. Ocwen Loan Servicing, LLC*, No. 11cv6981, 2012 WL 426933, at *7 (N.D. Ill. Feb. 9, 2012). Finally, two district courts within this Circuit have held that mortgagors theoretically could state a claim against servicers that are not parties to the contract if the mortgagors demonstrate an agency relationship or the "functional equivalent of privity," but neither court found such a claim to have been pleaded in those cases. *See Harte*, 2014 WL 4677120, at *6-7; *Kapsis v. Am. Home Mortg. Servicing Inc.*, 923 F. Supp. 2d 430, 451-52 (E.D.N.Y. 2013) ("The determination of whether the 'functional equivalent of privity' exists . . . is a highly fact-dependent endeavor which must consider the de facto dealings between the relevant parties as well as the language of all relevant contracts." (quoting *Cavalry Constr.*, 428 B.R. at 31) (internal quotation marks omitted)).

All of these cases make it clear that a servicer is not automatically in privity with a borrower where

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servicer is considered in privity with a borrower for purposes of a breach of contract claim."); *Kehoe v. Aurora Loan Servs. LLC*, No. 10cv00256, 2010 WL 4286331, at *8 (D. Nev. Oct. 20, 2010) ("[C]ourts have held that a loan servicer . . . is not a party to the deed of trust . . . . Moreover, the fact that Aurora serviced Plaintiff's loan does not create contractual privity between Aurora and the Plaintiffs.").

the servicer was not also the original lender. Privity will depend on the nature of the relationship between the servicer and the borrower and whether there has been a valid assignment of contractual duties to the servicer. Indeed, the jury in this case was specifically charged:

> The plaintiff argues that the Money Store defendants were assigned the rights and obligations for those loans that they serviced such that the Money Store defendants entered into a contractual relationship with the class members. It is for the jury to decide whether the plaintiff has proved by a preponderance of evidence that a contractual relationship exists between the class members and the Money Store defendants because the Money Store defendants either originated the loans for the class members or were assigned the rights and obligations to service the loans for the class members.

Tr. 1750.

While it was theoretically possible for the plaintiff to have presented classwide proof on whether there were valid assignments relating to the borrowers whose loans the defendants only serviced, it is clear that the plaintiff never presented that evidence at trial. Moreover, in this motion the plaintiff does not explain the nature of that evidence and how individual factual issues with respect to each loan would not predominate over the classwide issues. *See* Fed. R. Civ. P. 23(b)(3). The plaintiff argues that the evidence he presented at trial demonstrated that all of the borrowers were in a contractual relationship with the Money Store defendants, even if the defendants only serviced the

absent class members' loans. But the only evidence the plaintiff offered in support of such a relationship was background testimony by Adam Levitin, a law professor, and the PSA that Levitin described. Levitin explained to the jury that his role was to educate the jury on aspects of the home mortgage industry such as "the components of the loan, the note, and the mortgage," and the "role of the servicer." Tr. 140. Levitin made clear that he was providing "no opinion whatsoever on the defendants in this case." *Id.* Levitin opined that a borrower could bring a breach of contract action against a servicer. Tr. 116. Putting aside that Levitin had no competence to testify on a conclusion of law, that testimony was strictly hypothetical and was directed to a situation where a servicer failed to credit a borrower for a payment the borrower made. Indeed, much of Levitin's testimony, designed to educate the jury, was not about any class members, but rather was about a hypothetical "Betty the Borrower." The plaintiff points to the following passage in which Levitin describes a PSA as the "contract" between investors and servicers:

> The servicer has been assigned rights in the contract and delegated duties in the contract. . . . [O]nce you have been delegated duties under the contract, you have stepped into the shoes of the original party to the contract. . . . So like Betty could sue the servicer if the servicer just takes her money and never credits her account, similarly the servicer can sue Betty when Betty doesn't pay.

Tr. 119.

Other than Levitin's general background testimony, Levitin briefly described Plaintiff's Exhibit 99. Levitin described Plaintiff's Exhibit 99 as a "filing made with the Securities Exchange Commission by The Money Store," which included a PSA. Tr. 129; PX 99. The PSA, dated November 30, 1994, transferred the servicing rights for Mazzei's loan from the Money Store lender to the Money Store servicer. Tr. 130. Levitin also testified about § 5.01B of the PSA, which he explained gives the servicer the "power to service the loan." Tr. 131. The plaintiff did not offer any other PSA in this trial, nor did he offer evidence or testimony about the Uniform Notes of any other absent class members, aside from Ms. Vincent.

The plaintiff points to Dunnery's testimony that as of 2000, 130,000 loans that the defendants originated were still active, and the plaintiff argues that the Late Fee Class included those loans. But this would be sheer surmise. To be included in the Late Fee Class, a borrower was required to have paid late fees after the borrower's loan was accelerated and then paid off the loan. The jury likely concluded that the loans constituting the Late Fee Class were those identified by Professor Holowczak with "081" codes, representing a class of approximately 70,000 loans taken out of a database of over one million loans. There was no evidence that even hinted at which of those 70,000 loans were originated by the defendants and which were merely serviced. And as to loans that were only serviced, there was no evidence of specific assignments to the defendants.

Thus, the plaintiff's entire evidentiary basis for contending that privity was established between the defendants and the class members whose loans were

not originated by the defendants is Levitin's background, theoretical testimony, a 1994 PSA, and Levitin's testimony that the circumstances behind Mazzei's loan and its securitization were "typical of the industry."[8] Tr. 138. None of these proffered bases suffice, individual or collectively, to establish privity of contract between all of the absent class members and the Money Store defendants as servicers of their loans. The PSA included in Plaintiff's Exhibit 99, dated November 30, 1994, plainly does not encompass borrowers' loans originated after 2001, when the Money Store defendants ceased originating loans. Indeed, it is not evidence of any servicing relationship between the defendants and borrowers whose mortgages were originated after November 1994. The plaintiff attempts to rely on Levitin's statement that the 1994 PSA is "typical" of the industry, which would have required the jury to speculate that other absent class members would have had a similar PSA that assigned contractual obligations to the defendants. But a verdict based on such speculation cannot stand. *See Crespo v. Chrysler Corp.*, 75 F. Supp. 2d 225, 232 (S.D.N.Y. 1999) (citing *Williams v. County of Westchester*, 171 F.3d 98, 101 (2d Cir. 1999).

Moreover, Levitin's testimony about mortgage industry standards and practices alone cannot establish a contractual relationship between the class members and the Money Store defendants. Other than Dunnery's testimony, which did not support the existence of a contractual relationship with the class members,

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[8] The plaintiff also points to Levitin and Peace's testimony about the bundles of "mortgage servicing rights" that were bought and sold by banks, under which servicers were transferred payment rights. Tr. 110, 163.

there was no evidence from any witness with personal knowledge of the defendants' practices. Moreover, the plaintiff presented no evidence about the contractual relationships of any class member other than Mazzei,[9] and Mazzei's loan was originated by the defendants and thus has no bearing on this issue. The plaintiff cannot substitute Levitin's general background testimony about industry practices as proof of contractual relationships.

The plaintiff argues that the defendants presented no evidence to show that the class members were not in privity with the defendants, but of course, the party claiming a breach of contract "carries the burden of persuasion." *Bourne v. Walt Disney Co.*, 68 F.3d 621, 631 (2d Cir. 1995) (citing *Gordon v. Leonetti*, 324 F.2d 491, 492 (2d Cir. 1963)). Without any evidence establishing that the Money Store defendants assumed or were assigned specific contractual obligations, or were otherwise in privity of contract with the absent class members whose loans they serviced, the plaintiff cannot assert a breach of contract claim on behalf of the class. *See, e.g., Phillips v. Ocwen Loan Servicing, LLC*, No. 12cv3861, 2015 WL 1138248, at *11 (N.D. Ga. Mar. 12, 2015) (granting summary judgment for defendant servicer where undisputed evidence showed that the defendant was not a party or assignee to the plaintiff's Note); *Schmidt v. Nat'l City Corp.*, No. 06cv209, 2008 WL 5248706, at *7 (E.D. Tenn. Dec. 17, 2008) (same).

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[9] The plaintiff also introduced the testimony of Lori Ann Vincent, but Vincent was not a member of the Late Fee Class and the contractual documents that led to the servicing of her loan by one of the defendants were never discussed or introduced in evidence. Tr. 477-78, 487.

The Court's certification of the Late Fee Class, which included borrowers "who signed form loan mortgage agreements on loans which were owned or serviced by the defendants," was based on the then unchallenged premise that the borrowers were similarly situated with respect to their contractual privity with the Money Store defendants, regardless of whether their loans were owned or merely serviced by the Money Store defendants. *Mazzei*, 288 F.R.D. at 56, 66. At trial, the plaintiff failed to adduce any evidence to support that premise.

It is apparent, after trial, that the Rule 23 requirements are "not in fact met." *Sirota*, 673 F.2d at 572. As the defendants admit, Mazzei has a contractual relationship with the defendants because the Money Store defendants originated his loan and signed the Note. This is also true for other class members whose loans were originated by the defendants. *See* Defs' Mem. in Supp. of Mot. to Decertify Post-Acceleration Late Fee Class (No. 01cv5694, ECF No. 467), at 12 ("Defendants had such a relationship with some class members, *i.e.* those whose loans were originated by Defendants or those whose loans the Defendants acquired by assignment."). However, this fact renders Mazzei an atypical class representative for those members of the class whose loans were merely serviced by the defendants. *See Campusano v. BAC Home Loans Servicing LP*, No. 11cv4609, 2013 WL 2302676, at *8 (C.D. Cal. Apr. 29, 2013) (finding Rule 23(a)(3) typicality requirement unmet because the loan agreements that the plaintiff signed were not typical of the class). The plaintiff also did not prove that the common question of whether the defendants breached the form loan documents by charging post-

acceleration late fees predominated over the individual issues of whether each class member is in privity of contract with the defendants. *See Wu v. Pearson Educ. Inc.*, No. 09cv6557, 2012 WL 6681701, at *8 (S.D.N.Y. Dec. 21, 2012) (decertifying a class after discovery due to issues with commonality, typicality, and predominance where there was a "multiplicity of contracts"); *Martinez v. Welk Grp., Inc.*, No. 09cv2883, 2012 WL 2888536, at *4 (S.D. Cal. July 13, 2012) (finding the Rule 23(b)(3) predominance requirement unmet for a breach of contract claim where class members did not all have the same contract).

Although decertification of a class is a "drastic step" and courts are less inclined to decertify a class after a trial on the merits, *Jermyn v. Best Buy Stores, L.P.*, 276 F.R.D. 167, 168-69 & n.1 (S.D.N.Y. 2011), a judgment on the merits in this case cannot be upheld given the plaintiff's failure of proof on behalf of the class. *See Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 596 (2d Cir. 1986) (affirming decertification of one class after trial where evidence did not support the existence of such a class but reversing decertification of other classes); *Reed v. Town of Babylon*, 914 F. Supp. 843, 849 (E.D.N.Y. 1996) (partially decertifying class due to "complete lack of evidence" to support aspect of claim). The plaintiff has failed to prove that members of the Late Fee Class whose loans were serviced but not originated by the defendants were in privity with the defendants, and the plaintiff never provided any basis to allocate the damages among members of the class whose loans were originated by the defendants and those whose loans were only serviced. Therefore, upholding the jury's

$54 million verdict against the defendants would be a manifest injustice. Moreover, the plaintiff has offered no evidence that he is a typical representative of a class that includes borrowers whose loans were only serviced by the defendants, nor has he offered evidence as to how individual questions as to the contractual status of the borrowers would not predominate if they were properly considered at trial. Accordingly, the late fee class should be decertified. Indeed, decertifying the class furthers the interests of absent class members because it protects them from being saddled with the fact that the plaintiff failed to produce enough evidence to protect their interests at trial. *See Rector v. City & Cnty. of Denver*, 348 F.3d 935, 949 (10th Cir. 2003) (decertifying class "in order to protect the interests of the absent class members").

The defendants state in their motion papers that the Court need reach their Rule 50(b) motion "only if" the Court denied the decertification motion. *See* Mem. in Supp. of Defs' Mot. for J. as a Matter of Law, at 1 (No. 01cv5694, ECF No. 496). At the argument of the current motions, however, the defendants asked the Court to rule on the alternative Rule 50(b) motion. For purposes of completeness, the Court will do so. A Rule 50(b) motion should only be granted when "there is such a complete absence of evidence supporting the verdict that the jury's verdict could only have been the result of sheer surmise and conjecture." *Logan*, 72 F.3d at 1022. In this case, the defendants would be entitled to judgment as a matter of law on the claim on behalf of the Late Fee Class because of the "complete absence of evidence" supporting a contractual relationship between the

members of the Late Fee Class and the defendants. *Galdieri-Ambrosini v. Nat'l Realty & Dev. Corp.*, 136 F.3d 276, 289-90 (2d Cir. 1998). Accordingly, if the Court were to reach the defendants' Rule 50(b) motion, that motion would be granted.

CONCLUSION

The Court has considered all of the arguments of the parties. To the extent not specifically addressed above, the remaining arguments are either moot or without merit. For the reasons explained above, the plaintiffs' motion for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure is denied. The defendants' motion to decertify the Late Fee Class pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure is granted. The Clerk is directed to close Docket Nos. 450, 466, 492, and 495.

SO ORDERED.

/s/ John G. Koeltl
United States District Judge

Dated: May 29, 2015
New York, New York

MEMORANDUM OPINION AND ORDER OF THE DISTRICT COURT OF NEW YORK (MAY 29, 2015)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPH MAZZEI, on Behalf of Himself and All Other Similarly Situated,

Plaintiff,

v.

THE MONEY STORE, ET AL.,

Defendants.

01 Cv. 5694 (JGK)

Before: John G. KOELTL, United States District Judge

From December 8 to December 19, 2014, the Court held a trial in this case regarding the plaintiff, Mazzei's two claims for breach of contract on behalf of himself and two classes of similarly situated individuals. Ultimately, the jury found the defendants liable on one of the two breach of contract claims, finding that the defendants breached the Note and Deed of Trust securing Mazzei's home mortgage loan by charging Mazzei monthly late fees after his loan was accelerated and where he paid off the loan (the "Late Fee Claim"). The jury awarded

Mazzei $133.80 plus prejudgment interest. In a separate Opinion and Order resolving the parties' post-trial motions, the Court affirmed the jury's verdict as to the individual plaintiff on the Late Fee Claim, but decertified the Late Fee Class. Accordingly, judgment should be entered for the individual plaintiff in the amount awarded by the jury.

Because Mazzei asserted his breach of contract claim under California law, California law controls the determination of prejudgment interest. *See Schwartz v. Liberty Mut. Ins. Co.*, 539 F.3d 135, 147 (2d Cir. 2008). Under California Civil Code § 3287(a), the plaintiff may recover prejudgment interest "whenever the amount of money due is liquidated—i.e., when the damages are certain, or capable of being made certain by calculation." *Marine Terminals Corp. v. Paceco, Inc.*, 193 Cal. Rptr. 687, 689 (1983) (internal quotation marks omitted). The defendants accelerated Mazzei's loan in March 2000, and assessed Mazzei five late fees of $26.76 each after his loan was accelerated, amounting to $133.80 in post-acceleration late fees, the amount awarded by the jury. In October 2000, Mazzei received a "Payoff Quote" notifying him of the total charges he was required to pay, and Mazzei paid all of these charges in full on October 17, 2000. Because Mazzei's payment of $133.80 on that date was an ascertainable sum that he paid in breach of the Note, prejudgment interest should begin accruing from October 17, 2000. *See Schwartz*, 539 F.3d at 149-50 (holding that prejudgment interest began accruing when the plaintiff paid a sum in breach of an insurance coverage agreement).

Under the California Constitution and case law, the prejudgment interest rate is 7 percent per annum,

unless the legislature has mandated a different rate. Cal. Const. Art. XV, § 1; *Lund v. Albrecht*, 936 F.2d 459, 465 (9th Cir. 1991) ("Subsequent California case law has construed [Article XV, § 1] to apply to pre- and post-judgment interest alike."). California Civil Code § 3289 provides that the legal rate of interest after a breach of contract is 10 percent per annum, but that section expressly does not apply to "a note secured by a deed of trust on real property." Cal. Civ. Code § 3289. Therefore, the prejudgment interest rate in this case is 7 percent per annum.

Accordingly, the Clerk is directed to enter judgment in this case for the individual plaintiff Joseph Mazzei in the amount of $133.80 plus prejudgment interest from October 17, 2000, to the date of judgment, at a rate of 7 percent per annum, on his breach of contract claim to recover post-acceleration late fees, to decertify the Late Fee Class, and to dismiss with prejudice all remaining claims. The Clerk is also directed to close this case and all pending motions.

SO ORDERED.

/s/ John G. Koeltl
United States District Judge

Dated: New York, New York
May 29, 2015

ORDER OF THE SECOND CIRCUIT DENYING PETITION FOR REHEARING (SEPTEMBER 8, 2016)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH MAZZEI, on Behalf of
Himself and all Others Similarly Situated,

Plaintiff-Appellant,

v.

THE MONEY STORE, TMS MORTGAGE INC.,
HOMEQ SERVICING CORP.,

Defendants-Appellees.

Docket No. 15-2054

Before: KEARSE, WINTER, and
JACOBS, Circuit Judges.

DENNIS JACOBS, Circuit Judge:

Appellant, Joseph Mazzei, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

/s/ Catherine O'Hagan Wolfe
Clerk

RELEVANT JUDICIAL RULES

Fed. R. Civ. P. 23—Class of Actions

(a) Prerequisites

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions

A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter,

would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses

(1) Certification Order

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) Judgment

Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues

When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses

When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action

(1) In General

In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) Combining and Amending Orders

An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise

The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under

this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals

A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel

(1) Appointing Class Counsel

Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.