IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PHILLIP KARALI and GREGORY SHELLEY, on behalf of themselves and all others similarly situated, Plaintiffs, v. BRANCH BANKING AND TRUST COMPANY; DOES 1-10, INCLUSIVE, Defendants.	Civil. No. 3:16-cv-02093-BRM-TJB Judge Brian R. Martinotti Magistrate Judge Tonianne J. Bongiovanni *Document Electronically Filed*

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PARTIAL SUMMARY JUDGMENT

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

On April 15, 2016, Plaintiffs Phillip Karali and Gregory Shelley sued Defendant Branch Banking and Trust Company ("BB&T") on behalf of themselves and a putative collective class of Appraisal Review Officers ("AROs") and Real Estate Evaluators ("REEs"), seeking overtime compensation under the federal Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* ("FLSA"). (Dkt. 1)[1] Plaintiffs and the opt-ins, in total nine (9) REEs and three (3) AROs seeking unpaid overtime,[2] now move for summary judgment on all of Defendant's asserted exemption defenses. Specifically, Defendant asserts the administrative and highly-

[1] The parties later stipulated to conditional certification. The approved collective class includes: "All Persons who have been employed by [BB&T] as Appraisers, including employees with the job titles 'Appraisal Review Officer,' and 'Real Estate Evaluator' and any other employee performing the same or similar duties for [BB&T], within the United States at any time starting [on April 15, 2013] until the final disposition of this case," but excluding BB&T's "current or former employees who served in the position of Appraisal Review Officer Manager and / or Appraisal Review Officer Regional Manager during the time period(s) he or she served in that role." (Dkt. 48 p. 1 of 3). All class members are referred to herein colloquially as "Appraisers," because their work relates to assessing the value of property for lending transactions, but not to denote that they have appraisal licenses. *See Merriam-Webster.com.* Merriam-Webster, n.d. Web. 15 Oct. 2017 ("Appraise": "1: to set a value on: to estimate the amount of.").

[2] The REE opt-ins are Gregory Shelley (Dkt. 1-3, Ex. B), Irene Degraw (Dkt. 54), Elisabeth Hamrick (Dkt. 50), Jared Harrison (Dkt. 52), Mary Jarrett-Jones (Dkt. 29), Ralph Pena (Dkt. 27), Todd Wood (Dkt. 56), Jeffrey Woodruff (Dkt. 53), and Marvin Wooley (Dkt. 28). The ARO opt ins are Phillip Karali (Dkt. 1-2, Ex. A), John Gapszewicz (Dkt. 32), and Nancy Smith (Dkt. 51).

compensated employee exemption defenses.[3] Courts have found employees in similar and, in one case, nearly identical positions to be non-exempt as a matter of law, so Defendant will be unable to bear its burden to demonstrate the exemptions plainly and unmistakably apply. Because such exemptions must be construed narrowly, the undisputed facts entitle Plaintiffs to partial summary judgment.

Plaintiffs also seek summary judgment on Defendant's asserted good-faith defenses to liquidated damages and the longer, FLSA three-year statute of limitations (under FLSA, 29 U.S.C. §§ 255(a) and 260), since Defendant acted willfully in continuing to misclassify Appraisers, even after competitors reclassified their appraisers. Defendant knew another court granted summary judgment against another bank on nearly the same facts present here, and

[3] Defendant's Answer raised three exemptions as affirmative defenses – including the professional exemption in addition to the administrative and highly-compensated exemptions. (Dkt. 10, at p. 16 of 25). However, Defendant has since admitted in response to Plaintiffs' request for admission that it has not utilized the professional exemption in classifying the Appraisers. Specifically, BB&T "admits that during the period of time from April 15, 2013 to the present it did not classify the [REE or ARO] position[s] as exempt from overtime based on the professional employee exemption under Section 13(a)(1) of the [FLSA]." (Statement of Material Facts Not in Dispute ("SMFND") 1 & 2). Appraisers are not exempt under the professional employee exemption, based not only on Defendant's admission, but also because BB&T does not require individuals in these positions to hold an academic degree of any kind (SMFND 3 & 4), and only the AROs are even required to hold a state issued appraiser license. (SMFND 5 & 6). The opt-in AROs required little more than passing an exam and on-the-job training (SMFND 6). In light of Defendant's admission and this evidence, Plaintiffs move for summary judgment as to the professional exemption, without consuming further briefing on the question.

apparently maintained Appraisers' exempt status to avoid the high cost of paying overtime.

Appraisers are not administratively exempt. The test for the administrative exemption requires Defendant to establish that Appraisers perform work "*directly related* to the management or general business operations of the employer or the employer's customers." Governing regulations and case law make clear that Appraisers' work does not satisfy this prong; rather, Appraisers are production workers. 29 C.F.R. §§ 541.200, 541.201, 541.203; *Boyd v. Bank of Am.*, 109 F. Supp. 3d 1273, 1286-92 (C.D. Cal. 2015) (appraisers not administratively exempt because they do not meet the "directly related" prong); *see also McKeen-Chaplin v. Provident Savings Bank*, 862 F.3d 847 (9th Cir. 2017) (mortgage underwriters non-exempt based upon administration-production dichotomy); *Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529 (2d Cir. 2009) (same). Their jobs require them repeatedly to perform a transaction-specific task on the front lines of Defendant's business – a mandatory step in the day-to-day process of issuing loan, credit, or other financial products for which the borrowers' real property serves as collateral. Appraisers do not perform work tied to BB&T's general administration, such as human resources or business strategy; instead they help churn out BB&T's lending products.

Defendant also fails the administrative exemption test because Appraisers do

not exercise "discretion and independent judgment *with respect to matters of significance*." 29 C.F.R. §§ 541.200, 541.202, 541.203. Even assuming for this motion that Appraisers exercise some "discretion and independent judgment" – though the United States Department of Labor has previously found that similar appraisers *do not*[4] – they do not do so "with respect to matters of significance." *Boyd*, 109 F. Supp. 3d at 1292-97 (appraisers do not meet the "matters of significance" prong of the administrative exemption). Appraisers do not have authority to alter the policies and guidelines about how to complete appraisal reports; they cannot bind BB&T to decisions; they do not negotiate on the company's behalf or spend BB&T's money (as distinguished from, *e.g.*, claims adjusters at an insurance company); they do not advise BB&T as a whole, or make any decisions for the company, beyond providing the valuations included in the reports they generate; and, each valuation report typically relates to a single property. Narrowly applying the exemption, the Court must find that Appraisers do not meet the "matters of significance" prong. Because they fail the administrative exemption tests as to their only duty – producing appraisals – BB&T also cannot claim the highly-compensated exemption.

Accordingly, the Court should grant Plaintiffs' motion for partial summary

[4] *See* "Administrative Employees/Appraisers," Opin. Ltr. DOL Wage & Hour Div., 1986 WL 1171077 (Feb. 25, 1986).

judgment.

II. THE MATERIAL FACTS ARE UNDISPUTED.

A. Appraisers Complete One Mandatory Step In BB&T's Underwriting Process.

BB&T is a bank that sells borrowers loans, extensions of credit, and other financial products that are secured by real estate. (SMFND 7). *Cf.* 12 C.F.R. § 34.3(a) (banking regulation governing such lending). Before approving the sale of such products, BB&T must obtain value estimates for the collateral real estate in the form of an appraisal or an evaluation. (SMFND 8); 12 C.F.R. § 34.43 ("An appraisal performed by a State certified or licensed appraiser is required for all real-estate-related financial transactions" with exceptions including when evaluations will suffice, for which the preparer need not be licensed or certified). The role of BB&T's Real Estate Valuation Services ("REVS") department within BB&T's Credit Services division is to provide "timely, cost effective, quality, and compliant real estate valuations" of collateral properties, that comply with state standards and federal statutes and regulations, as well as and BB&T's internal policies. (SMFND 9 & 10). The valuations are then used by employees in other BB&T departments (*i.e.*, not in REVS) as part of the underwriting process. (SMFND 11).

REVS has three divisions: the Real Estate Evaluation Group ("REEG") comprised of REEs who produce evaluation reports; the Real Estate Appraisal

Department ("READ") comprised of AROs who produce review reports of outside appraisals; and a Real Estate Compliance and Quality Control Group ("Quality Control Group") which, *inter alia*, provides quality control supervision of REEs' and AROs' work. (*See* SMFND 9 &12 (REVS Organizational Chart)).

BB&T charges borrowers fees for the valuation services according to fixed schedules. (SMFND 13). Defendant's 30(b)(6) witness estimates the fees for ARO review reports run between $300 and $500 each, and the fees for REE evaluation reports run between $450 and $1200 each. (SMFND 13).

BB&T classifies Appraisers as exempt, and does not pay them overtime. (SMFND 14). BB&T does not track the hours Appraisers work, but REVS management knows and expects that Appraisers typically work more than forty hours per week (SMFND 15) (Fed.R.Civ.P. 30(b)(6) witness testified, "I don't know a lot of jobs in this profession where you don't work more than 40 hours.").

B. Appraisers are Production Workers Whose Primary Role Is to Produce Thousands of Reports Every Year, Each One Related to a Single Loan or Line of Credit.

1. REEs Produce Reports.

REEs' primary duty is to produce evaluation reports. (SMFND 16) (Fed.R.Civ.P. 30(b)(6) deponent testified "the evaluators are responsible for creating . . . evaluations. That's their primary role."). REEs typically try to produce at least one evaluation product per day in order to keep up with their production

points requirements. (SMFND 17). REEs' managers manage how many assignments REEs receive in their electronic workbasket. (SMFND 18). Together, REEs typically average about 500 products per month, and 6,000 products per year. (SMFND 19). Managers would not permit REEs to turn down assignments. (SMFND 20). Typically, each report is tied to a single loan or credit transaction. (SMFND 21).

To produce a report, the REE follows BB&T's prescribed policies, procedures, and processes, as set forth in the Real Estate Valuation Services Compliant Operating Process Manual ("REVS Manual"), Evaluation Compliance Checklist, Quality Control Checklist, and other guiding company documents. (SMFND 22). The REE determines whether the evaluation requires a Level 1, Level 2, Level 3 or Level 4 report according to BB&T's guidelines. (SMFND 23) The REE then retrieves the appropriate standard BB&T evaluation form from several available templates. (SMFND 24). To complete the forms, REEs must gather information about the property from public records and databases, as well as from an in-person inspection – the latter performed either by the REE or a third-party inspector who BB&T engages through a mandated vendor. (SMFND 25 & 26). REEs must also identify at least three comparable properties, as defined by BB&T's guidelines. (SMFND 27). REEs use the data to arrive at a market valuation of the property based on one or more of three valuation methodologies,

e.g., the sales, costs, and/or income approach. (SMFND 28). BB&T provides REEs template language to paste into their evaluations. (SMFND 29). The REE must also complete a cover sheet, and obtain and attach photographs of the property. (SMFND 30).

2. AROs Produce Reports.

AROs' primary duty is to produce review reports. (SMFND 31). AROs review appraisals of collateral properties performed by outside appraisers. (SMFND 32). AROs typically report completing two or more review reports per day in order to keep up with their production requirements. (SMFND 33). AROs' managers control how many assignments AROs receive through their electronic workbasket. (SMFND 34). If they turn down assignments, AROs can be penalized. (SMFND 35). Together the AROs typically produce over 1,000 review products each month, and over 12,000 review products per year. (SMFND 36). Like the REEs' reports, ARO reports are each typically tied to a single loan or credit transaction. (SMFND 37).

To produce a report, the ARO follows BB&T's prescribed policies, procedures, and processes, and other requirements set forth in the REVS Manual, Review Compliance Checklist, Quality Control Checklist, and other documents. (SMFND 38). To perform a review, the ARO must complete one of three standard template forms provided by BB&T, either a Level 1, Level 2, or Level 3 review

form, corresponding to the level of detail BB&T requires in the report. (SMFND 39). AROs do not have discretion to change the level of the report without a manager's approval. (SMFND 40). In their reports, AROs apply BB&T's criteria to confirm that each appraisal contains data points to support the outside appraiser's opinions and conclusions, confirms that the outside appraiser used comparables within the defined parameters, and confirms that the outside appraiser used an approved valuation methodology, *e.g.* the sales, cost, and/or income approach. (SMFND 41). AROs copy and paste template language into their reports, which BB&T provides to them. (SMFND 42). An ARO is unable to reject an outside appraisal without first receiving approval from his/her supervisor. (SMFND 43).

3. BB&T Considers Appraisers to be Production Workers.

Defendant views Appraisers as "production" workers. Defendant's 30(b)(6) witness, Lamar Jerman, who heads the REVS department, repeatedly referred to evaluation and review reports as the "products" REVS produces. (SMFND 44). Plaintiffs testified similarly. (SMFND 45 (citing Karali Dep. 42:6-11 ("my role was predominantly production. I was . . . a cog in the wheel."); Gapszewicz Dep. 72:6-15 ("BB&T's emphasis was on production."); Shelley Dep. 223:5-8 ("I just needed to move reports . . . . you stayed at the bank by producing reports.")).

BB&T evaluates Appraisers on the overall quantity of reports they produce.

(SMFND 46). BB&T assigns points to each report an REE or ARO produces. (SMFND 47 & 47). Managers use these points to track productivity. (SMFND 48) (Fed.R.Civ.P. 30(b)(6) deponent testified "at the end of the day, we care about how many times that evaluator created that evaluation. . . We're interested in how [many evaluations we] get on a month-to-month basis," and regarding AROs, "what gets measured [helps] us to understand whether [AROs] are meeting expectations."). REEG and READ managers track how many reports are produced and share that information with REVS management at monthly meetings. (SMFND 39). Appraisers testify to having weekly communications with their managers regarding production. (SMFND 49). Appraisers' compensation is based, in part, on the number of reports they produce, measured by their overall production points. (SMFND 51). Appraisers who fail to meet production expectations face discipline. (SMFND 52).

REEs and AROs also have "turnaround times" (*i.e.*, deadlines) for completing each report they are assigned. (SMFND 53). The REEs and AROS are evaluated based on the percentage of the time they successfully complete their reports within the assigned turnaround time. (SMFND 54). Failure to meet production and turnaround-time expectations for several months can lead to termination. (SMFND 55).

Appraisers' reports are subject to review by their managers and by REVS's Quality Control Group ("QC"). (SMFND 56). Appraisers may not deviate from BB&T's set procedures, practices, and processes as set forth in the REVS Manual and checklists, and the quality control reviewers assess their adherence. (SMFND 57 & 58) (Fed.R.Civ.P. 30(b)(6) deponent agreed, "All [REEs and AROs] in [his] organization are bound to this procedures manual."). Appraisers are required to submit certain reports that meet threshold requirements to their managers or designated senior Appraisers for review. (SMFND 59) (Fed.R.Civ.P. 30(b)(6) deponent estimated that 30% to 40% of the evaluations are reviewed by REEG). These reports are proofread and reviewed by the Appraiser's manager or designated senior Appraisers in accordance with either an Evaluation Compliance Checklist ("ECC") or Review Compliance Checklist ("RCC"). (SMFND 60) ("The [ECC/RCC] contains a series of compliance questions that are answered by checking the appropriate Yes, No, or N/A box."). Each month the QC Group also selects several of each REE's reports for review and reviews the reports in accordance with a detailed QC Checklist. (SMFND 61). If an Appraiser's report fails to comply with any of the extensive checklist requirements, management can require the Appraiser to revise his/her report before REVS will accept it as complete. (SMFND 62). Low scores affect Appraisers' performance reviews and compensation, and result in discipline. (SMFND 63).

Appraisers are front-line production workers, based upon the undisputed facts.

C. Appraisers Do Not Supervise Employees, Advise Management or Consult with Customers, and Lack Authority to Set Policies or Bind the Company.

Appraisers do not help run BB&T's business. Appraisers do not typically have "managerial responsibilities." (SMFND 64). They do not supervise other employees, and have no authority to hire, fire, promote, or provide annual reviews to other employees. (SMFND 65). Instead, Appraisers are subject to a high degree of supervision, including frequent staff meetings, one-on-one meetings with their managers, performance reviews, and close monitoring of their production, turnaround times, and quality by their managers and the QC Group. (SMFND 46-63, & 66)

Appraisers have no authority to determine BB&T's lending policies or priorities. (SMFND 67). Appraisers do not determine REVS's management objectives, policies, procedures, or practices. (SMFND 68). Nor do they typically advise management. (SMFND 69). Their core duties do not involve advising underwriters, lenders, clients or customers, apart from the evaluation and review reports REEs and AROs generate, respectively. (SMFND 70).

Appraisers do not make the decision to extend a loan or credit to a BB&T customer – such decisions are made outside of the REVS department. (SMFND

71). Appraisers have no authority to commit, bind, or negotiate on behalf of BB&T. (SMFND 72). The bank can decide to issue a loan based upon its business judgment regardless of the valuation in a report. (SMFND 73). Appraisers do not resolve borrower complaints. (SMFND 74).

The parties do not dispute that REEs and AROs' roles fall outside of the following functional areas: tax (SMFND 75); finance (SMFND 76); accounting (SMFND 77); budgeting (SMFND 78); insurance (SMFND 79); purchasing (SMFND 80); procurement (SMFND 81); advertising (SMFND 82); marketing (SMFND 83); safety and health (SMFND 84); personnel management or human resources (SMFND 85); employee benefits (SMFND 86); labor relations (SMFND 87); public relations (SMFND 88); government relations (SMFND 89); and computer network, internet and database administration (SMFND 90). Based upon the foregoing facts, there is also no genuine dispute of fact that REEs and AROs' duties do not fall within the functional areas of auditing (SMFND 91), quality control (SMFND 92), research (SMFND 93), or legal and regulatory compliance (SMFND 94). REEs and AROs also do not engage in sales activities (SMFND 95).

These undisputed facts establish that REEs and AROs are not administrators of Defendant's general business operations.

D. BB&T's Misclassification is Willful.

BB&T's human resources department – called Human Systems – makes BB&T's FLSA classification decisions for job positions. (*See* SMFND 96). BB&T considers AROs' and REEs' duties to be largely identical for the purposes of determining compensation. (SMFND 97). BB&T last evaluated Appraisers for FLSA classification in 2013. (SMFND 98). As part of that process, BB&T asked the REVS manager, Mr. Jerman, who was the head of evaluations at that time, to fill out a questionnaire about REEs' job duties. (SMFND 99). A Human Systems compensation consultant, Cara Morris, took notes on the questionnaire reflecting the statements Mr. Jerman's made during a follow-up conversation she had with him about the REEs. (SMFND 100). Her notes reflect that REEs can expect to work more than forty (40) hours per week, states "Financial impact – significant" and "*work overtime." (SMFND 100) Ms. Morris, testifying as a Fed.R.Civ.P. 30(b)(6) witness on the company's classification decision, acknowledged that after discussing the fact that some REEs work more than 40 hours, Mr. Jerman "must have mentioned the fact that if . . . we were to consider taking this job class nonexempt, that because they work overtime, financially there would have been a significant impact." (SMFND 101). It is clear that Defendant undertook a costs-benefits analysis about the cost of complying with the FLSA compared to the cost of reclassifying and decided to maintain its unlawful system.

As of May 20, 2015, REVS management was on notice that the United States District Court for the Central District of California had granted summary judgment in favor of plaintiffs in *Boyd.*, 109 F. Supp. 3d at 1273, holding that in-house appraisers for Bank of America, whose job duties were very similar to REEs and AROs, were not exempt from FLSA overtime provisions under the administrative, professional, or highly compensated employee exemptions. (SMFND 102). After receiving an article entitled "Appraisers Entitled to Overtime, Court Holds" published in *Working RE Magazine*, BB&T's REEG Manager, John Potter emailed the REVS management team stating, "This is worrisome and should be explored." (SMFND 102). Mr. Potter testified that he found the article "worrisome," because "a lawsuit against an appraiser [company]. . . ultimately affects others in the industry." (SMFND 102). For Mr. Potter the article "raised something for us to consider to see if . . . there was any similarities in the case versus the way we do business." (SMFND 103). And yet, Mr. Potter "did not do anything further to explore the possible similarit[ies]," such as forward his concerns to the Human Systems department, the human resources department charged with making FLSA classification decisions. (SMFND 104 & 105). Mr. Potter circulated this email to REVS management witnesses Mssrs. Jerman, Potter, A.J. Hutson, and Mark Stephens. (SMFND 102 & 106). None of these individuals took steps to explore whether the REEs and AROs should be reclassified, although

Mr. Potter and Ms. Hutson admit they had discussions with other REVS managers about the case but decided against reclassification. (SMFND 106).

BB&T's 30(b)(6) designee admits the company has taken no steps to reassess REEs' and AROs' FLSA classification since receiving this lawsuit. (SMFND 107).

III. AS A MATTER OF LAW, APPRAISERS ARE NON-EXEMPT.

A. The High Standard for FLSA Exemptions Favors Granting Summary Judgment Here.

When the material facts are undisputed, "[t]he question whether [employees'] particular activities excluded them from the overtime benefits of the FLSA is a question of law." *Mazzarella v. Fast Rig. Support, LLC*, 823 F.3d 786, 790, n. 4 (3d Cir. 2016). Defendant bears the burden to prove Appraisers are exempt. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974). Any ambiguity is resolved in favor of the employees. *See Mazzarella*, 823 F.3d at 790 ("FLSA exemptions must be construed narrowly against the employer, and Defendants 'bear the burden of proving plainly and unmistakably'" that the exemption applies to the employees); *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 900 (3d Cir. 1991) ("if the record is unclear as to some exemption requirement, the employer will be held not to have satisfied its burden"); *In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litig.*, 735 F. Supp. 2d 277, 337 (W.D. Pa. Aug. 13, 2010) (citing *Mitchell v. Lubin, McGaughy &*

Assocs., 358 U.S. 207, 211 (1959)) ("the [FLSA] 'must be construed liberally to apply to the furthest reaches consistent with congressional direction.'"). Courts must give deference to the United States Department of Labor ("DOL") regulations. *Pignataro v. Port Auth. of N.Y. & N.J.*, 593 F.3d 265, 270 n.10 (3d Cir. 2010)). Defendant cannot meet its burden.

B. The Federal Administrative Exemption Does Not Apply.

Federal law exempts from its overtime requirements employees who work in a "bona fide . . . administrative . . . capacity." 29 U.S.C. § 213 (a)(1). To satisfy the FLSA administrative exemption, the employer must: (1) meet the salary-basis test (not at issue here); (2) meet the "directly-related" prong by showing the employees' "primary duty is the performance of office or non-manual work *directly related* to the management or general business operations of the employer or the employer's customers"; and (3) prove the employees' "primary duty includes the exercise of discretion and independent judgment with respect to *matters of significance*." 29 C.F.R. § 541.200(a) (current) (ital. added). The three conditions are "explicit prerequisites to exemption." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). Defendant cannot "plainly and unmistakably" satisfy conditions (2) or (3).

1. Appraisers' Primary Duty is to Produce Reports, a Non-Exempt Activity.

An employee's primary duty is "the principal, main, major or most

important duty that the employee performs." 29 C.F.R. § 541.700(a). Here, there is no dispute that REEs' and AROs' primary duty is production of evaluations and review reports, respectively. (SMFND 16 & 31) (Fed.R.Civ.P 30(b)(6) witness Lamar Jerman testified "AROs are responsible for . . . doing the review . . . appraisals . . . and the evaluators are responsible for creating these evaluations. That's their primary role. Two separate jobs doing somewhat similar things . . ."). Therefore, to prevail on its administrative exemption defense, BB&T must establish that the production of reports is "plainly and unmistakably" an exempt activity. Because the law is clear that generating such reports is a non-exempt activity, Plaintiffs are entitled to summary judgment.

2. Producing Hundreds of Single-Transaction Reports Is Part of BB&T's Day-to-Day Business Production, Not "Directly Related to the Management or General Business Operations" of Defendant or its Customers.

a. Appraisers are non-exempt production workers within the meaning of the FLSA's administrative / production dichotomy.

The Third Circuit and other Circuit Courts use the "administrative / production dichotomy" to distinguish "production workers" from exempt-administrative employees. *Martin*, 940 F.2d at 904-05; *McKeen-Chaplin*, 862 F.3d

at 851; *Davis*, 587 F.3d 529.[5] To satisfy the administrative exemption's second requirement, "an employee's primary duty must involve office or 'non-manual work directly related to the *management policies* or *general* business operations'" of the employer or the employer's customers. *McKeen-Chaplin*, 862 F.3d at 851 (quoting *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1125 (9th Cir. 2002) (emph. in orig.) (quoting 29 C.F.R. § 541.200)). Put otherwise, "an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment." *Id*. (quoting 29 C.F.R. § 541.201(a)). The purpose of this analytical tool is "to distinguish 'between work related to the goods and services which constitute the business' marketplace offerings and work which contributes to 'running the business itself.'" *Id.* (quoting DOL Wage & Hour Div. Op. Ltr., 2010 WL 1822423, *3 (Mar. 24, 2010)). An employer meets this prong "if the employee engaged in running the business itself or determining its overall course or policies, not just in the day-to-day carrying out of the business' affairs." *Id.* (internal quotes

[5] *See accord Desmond v. PNGI Charles Town Gaming, L.L.C.*, 564 F.3d 688, 694-95 (4th Cir. 2009); *Martin v. Indiana Michigan Power Co.*, 381 F.3d 574, 582 (6th Cir. 2004); *Reich v. State of New York*, 3 F.3d 581, 587 (2d Cir. 1993); *Shockley v. City of Newport News*, 997 F.2d 18, 29 (4th Cir. 1993); *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1230 (5th Cir. 1990); Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees ("2004 Final Rule"), 69 Fed. Reg. 22122, 22141 (Apr. 23, 2004).

omitted). If the employee's work "falls squarely on production side of the line," the administrative-production dichotomy is determinative and the employee is not administratively exempt. *Id.* at 852.

The Third Circuit has applied the administrative-production dichotomy to uphold the District of New Jersey's determination (by Judge Nicholas Politan) that a wholesaler's inside salespeople were non-exempt. In *Martin*, the Third Circuit explained, "it is important to consider the nature of the employer's business when deciding whether an employee is an administrative or production worker," and concluded the nature of the wholesaler's business was to "produce wholesale sales." 940 F.2d at 903. The Third Circuit also looked at the nature of the salespeople's work within the business: the salespeople spent the majority of their time making routine telephone sales of the wholesaler's products, which was their "primary responsibility," and they received a salary plus incentive pay tied to their sales performance. 940 F.2d at 902-904. Accordingly, the Third Circuit upheld the District Court's finding that salespersons were "production employees rather than administrative employees." *Id.* at 903.

More recently, the Ninth and Second Circuits have applied the dichotomy to hold non-exempt a bank's loan underwriters, who play a transaction-based role similar to REEs and AROs. *McKeen-Chapmin*, 862 F.3d at 851-54; *Davis*, 587 F.3d at 532-35. In *McKeen-Chapman*, the defendant bank sold mortgage loans as a

"primary font of business." 862 F.3d at 854. The primary duty of the bank's underwriters was to evaluate individual loan applications to "assess whether, given the guidelines provided to them from above, the particular loan at issue falls within the range of risk [the bank] has determined it is willing to take." 862 F.3d at 852. The Ninth Circuit deemed these mortgage underwriters "production workers" because they "are *told* what is in [the bank's] best interest, and then asked to ensure that the production being sold fits within the criteria set by others." 862 F.3d at 852.

Similarly, in *Davis* the Second Circuit held that the underwriters' "work is not related either to setting 'management policies' nor to 'general business operations' such as human resources or advertising, 29 C.F.R. § 541.2, but rather concerns the 'production' of loans – the fundamental service provided by the bank." *Davis* 587 F.3d at 532-35.; *see also id.* at 535 ("[W]e have drawn an important distinction between employees directly producing the good or service that is the primary output of a business and employees performing general administrative work applicable to the running of any business."). The underwriters were judged by the quantity of their output – a metric not readily applied to administrative employees. *Id.* at 534-35. The Court explained:

> The overtime requirements of the FLSA were meant to apply financial pressure to "spread employment to avoid the extra wage" and to assure workers "additional pay to compensate them for the burden of a workweek beyond the hours fixed in the act." While in the abstract

> any work can be spread, there is a relatively direct correlation between hours worked and materials produced in the case of a production worker that does not exist as to administrative employees.

Id.

The reasoning shared by the Third, Second, and Ninth Circuits should apply here. BB&T sells loans and extensions of credit. (SMFND 7). Appraisers' primary duties are to generate reports that are a required component of customer applications for the loans and credit that BB&T sells. (SMFND 16 & 31). These reports typically relate to a single piece of property that serves as collateral on the loan or extension of credit. (SMFND 21 & 37). Appraisers produce these reports according to BB&T's prescribed policies, procedures, and processes. (SMFND 22 & 38). Appraisers do not set BB&T's policies, procedures, and processes. (SMFND 67 & 68). BB&T evaluates REEs and AROs based on the quantity, speed, and accuracy of their output. (SMFND 47). Accordingly, REEs and AROs are production workers.

Here, rather than having REEs and AROs work 60-hour weeks to produce BB&T's 500 evaluations and 1,000 reviews per month (SMFND 15, 19 & 36), Defendant could hire additional workers to share the production burden, and ensure that these workers work 40-hour weeks, or could choose to pay overtime. Instead, Defendant has maintained REEs and AROs as exempt, squeezing as much production out of them as possible.

b. Production-based Appraisers employed in-house by banks are non-exempt.

In *Boyd*, the District Court for the Central District of California held that a bank's in-house residential appraisers were production employees. 109 F. Supp. 3d at 1287. The court made findings of facts nearly identical to those the Court should make in this case. *Id.* at 1277-82. The defendant-bank was "in the business of offering mortgages for residential properties." *Id.* at 1278. The job duties of the appraisers involved:

- "apprais[ing] and generat[ing] appraisal reports for properties on which [the bank] offer[ed] mortgages;"
- "each appraisal report relate[d] to a single [] mortgage on a single piece of residential property;"
- the appraisals were a required component of the process of selling mortgages;
- appraisers were subject to minimum production requirements; and,
- appraisers' compensation was based, in part, on their productivity, in addition to their error rate ("quality") and turnaround time. *Id.*

Completion of appraisal products in *Boyd*, involved: filling out standard forms; collecting information related to the property from databases, and inspections; identifying comparable properties; and providing the appraiser's opinion as to the value of the property. *Id.* at 1279. These are the same required

steps as the REE's take to complete their evaluation reports, and largely similar to those of AROs who review outside appraiser's reports for, *inter alia*, compliance with the above steps. (SMFND 16-43).[6]

Like the AROs and REEs, the *Boyd* appraisers were required to "follow standard policies and guidelines" in conducting appraisals, including Uniform Appraisal Standards of Professional Appraisal Practice ("USPAP") standards, and the defendant-bank's internal guidelines. *Id.* at 1279-80; (SMFND 10). Like here, a percentage of the appraisers' reports were subject to review by in-house quality control reviewers or managers. *Id.* at 1281. Like here, completed reports were incorporated into the bank's loan and credit packages, and bank customers were charged a small fee for each report. *Id.* Appraisers did not "regularly communicate directly with management," and though a corporate program permitted appraisers to provide feedback on issues of concern, "it was not part of their general job duties." *Id.* Nor did appraisers communicate with the eventual borrowers, other than as to logistics when arranging an inspection. *Id.* Bank of America's appraisers – like BB&T's – did not supervise other employees. *Id.* On these facts, the *Boyd* court found that the appraisers, whose primary duty was generating appraisals,

[6] In *Boyd*, the bank settled the review appraisers' claims before summary judgment, paying $5.8 million to approximately 370 review appraisers and reclassifying the position as non-exempt. *See Boyd, et al. v. Bank of America, et al.*, 13-cv-00561-DOC, 2014 WL 6473804 (C.D. Cal. Nov. 18, 2014).

were engaged in the Bank's production work. *Id.* at 1287. The court also found that none of the appraisers' duties fell within the functional areas elaborated in 29 C.F.R. § 541.201(b). *Id.* at 1291.

Boyd was by no means an outlier Production-based employees engaged in banking and lending are routinely found to be not administratively exempt. *See, e.g.*, *McKeen-Chaplin*, 862 F.3d at 851-54 (mortgage underwriters); *Davis*, 587 F.3d at 532-35 (loan underwriters); *Bollinger v. Residential Capital, LLC,* 863 F. Supp. 2d 1041, 1046-1048 (W.D. Wash 2012) (holding mortgage underwriters non-exempt; "[T]he work Plaintiffs did – collecting customers' financial data and measuring that data against Defendants' lending guidelines – was necessary because Defendants provided mortgages, not because Defendants were in business generally."). *See also* DOL Wage & Hour Op. Ltr., 1986 WL 1171077, at *1 (Feb. 25, 1986) (finding real estate appraisers non-exempt); *see also* DOL Wage & Hour Div. Op. Ltr., 2010 WL 1822423, at *3 (Mar. 24, 2010) (finding that the typical job duties of a loan officer do not qualify as administratively exempt).

Defendant may argue that because evaluations and appraisal review reports assist BB&T in making lending decisions, their production is an administratively exempt activity. The argument fails. Each report relates to *one* lending decision, and does not determine lending policy generally. End customers are charged for the reports, generating revenue, and customers may not obtain loans or credit

without appraisals. Producing evaluation reports and appraisal review reports as part of a bank's core loan and credit sales business "falls squarely on production side of the line." *McKeen-Chaplin*, 862 F.3d. at 852.

3. Appraisers Do Not Exercise Discretion and Independent Judgment Regarding "Matters of Significance."

Defendant also fails to meet the "discretion and independent judgment with respect to matters of significance" prong of the federal administrative exemption. 29 C.F.R. § 541.200(a). Even if there were a fact dispute over how much discretion is exercised in completing an evaluation or review report,[7] the undisputed facts show that Appraisers have no discretion "with respect to matters of significance."

a. Discretion must be with respect to matters of significance.

The regulations explain the phrase "discretion and independent judgment *with respect to matters of significance*," stating: "[T]he exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting on or making a decision after the various possibilities have been considered. The term 'matters of significance' refers to the level of importance or consequence of the work performed." 29 C.F.R. §

[7] A DOL opinion letter concludes that real estate appraisers were non-exempt, finding that the appraisers did not exercise "discretion and independent judgment," without even reaching the issue of "matters of significance." *See* "Administrative Employees/Appraisers," Opin. Ltr. DOL Wage & Hour Div., 1986 WL 1171077 (Feb. 25, 1986).

541.202(a). Section 202(b) provides a non-exhaustive list of ten "[f]actors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance," confirming that, to constitute discretion on "matters of significance," the discretion itself must be with respect to matters of significance. The regulations provide that this requirement is not fulfilled merely because an employee's failure to perform certain duties will cause the employer to experience financial *loss*es. 29 C.F.R. § 541.202(f). For example, a bank teller might deal with hundreds of thousands of dollars each month whereas a staffer in human resources never touches a dime of the bank's money, yet the bank teller is in production and the human resources staffer is administratively exempt. *See Davis*, 587 F.3d at 533.

A significant body of case law confirms that the discretion itself must be "with respect to matters of significance" to satisfy the exemption. In *Campanelli v. Hershey Co.*, 765 F. Supp. 2d 1185, 1187 (N.D. Cal. 2011), employees selling a wholesaler's product to retailers were non-exempt, despite being "vital" to the company's sales. The court granted summary judgment to the employees, concluding that even though there was a dispute about how much discretion they exercised, it was "immaterial" because the discretion was not "with respect to matters of significance." The court evaluated the 10 factors in 29 C.F.R. § 541.202(b) and found dispositive the plaintiffs' testimony that: (1) they lacked

authority to negotiate or commit defendant to matters having a significant financial impact; (2) they could not deviate from defendant's established policies and procedures without a supervisor's permission; and (3) they did not carry out major assignments. 765 F. Supp. 2d at 1196. The same is true of REEs and AROs.

In *Calderon v. GEICO General Insurance Co.*, 917 F. Supp. 2d 428 (D. Md. 2012), the employees in question were investigators who "support[ed] the [insurance] claims function by investigating suspicious claims and preventing loss due to fraud." *Id.* at 437. The Court concluded that the employees exercised discretion and independent judgment, but not with respect to matters of significance. The investigators had great leeway with respect to how to conduct their investigations (*e.g.*, making credibility findings, choosing when to expand the scope of an investigation or deem it complete). *Id.* at 442. However, their function was to "attempt to confirm the facts surrounding a claim," not to determine whether to pay or deny the claim. The same is true of REEs: they gather facts to complete a form that provides a non-binding estimate of the market value of a property, but they do not decide whether to issue a loan, or in what amount – that decision is made by others. Similarly, AROs review outside appraisers' valuation reports to confirm the valuation is supported by reasonable data and appropriate valuation methodologies, and but do not otherwise participate in BB&T's decision to extend credit. *See also Ahle v. Veracity Research Co.*, 738 F. Supp. 2d 896, 906

(D. Minn. 2010) (insurance claims investigators did not choose when a claim merited investigation, but simply followed the employer's guidelines when a claim was assigned to them, and did not "recommend or participate in the decision whether to deny or pay a claim").

A variety of cases illustrate the principle, articulated in *Ahle*, that "[a]ll employees exercise some discretion in deciding how to perform their jobs, and the way in which they exercise that discretion likely will affect matters of significance," however, "an exercise of discretion that *impacts or affects a matter of significance* is not exercising discretion *with respect to* a matter of significance[;] [i]f the rule were otherwise, all employees would arguably meet the third element of the definition of administrative employees." *Ahle*, 738 F. Supp. 2d at 908 (ital. in original). *See, e.g.*, *Boyd*, 109 F. Supp. 3d at 1294-97 (employers did "everything in their power to delimit Appraiser discretion and thereby generate uniform results"); *Bath v. Woodland Meadows*, 2009 WL 3270532, at *5 (E.D. Mich. Oct. 5, 2009) ("plant specialist" running a gas plant "exercised some discretion in performing his job" (*e.g.*, in researching and selecting vendors for particular repair work), but was nonexempt because lacked authority to formulate, affect, interpret, or implement management policies or operating practices; lacked authority to bind the employer financially or legally; and, was not involved in the management of the business); *Turcotte v. Renton Coil Spring Co.*, 2008 WL

4542436, at *5 (W.D. Wash. Oct. 8, 2008) (employee charged with marketing products at trade shows worked largely unsupervised and had discretion about which shows to attend and how to market product, but was "not given the responsibility of making . . . major decisions," and therefore was not exempt, noting lack of "any authority for the proposition that setting your own work schedule supports a finding that the employee exercised independent judgment and discretion relating to matters of significance").

b. The discretion that Appraisers exercise does not extend to "matters of significance"

Applying each factor of 29 C.F.R. § 541.202(b) here demonstrates that Appraisers' work does not extend to "matters of significance," as defined in the regulation: Appraisers lack "authority to formulate, affect, interpret or implement management policies or operating practices." *Id.* They do not "resolve[] matters of significance on behalf of management." *Id.* They do not "carr[y] out major assignments" – each report is worth between $300 and $1,200. *Id.*; (SMFND 13). They do not have "authority to commit the employer" (29 C.F.R. § 541.202(b)) – distinguishing Appraisers from exempt insurance adjusters. *See* 29 C.F.R. § 541.203(a); (SMFND 71) (Fed.R.Civ.P. 30(b)(6) deponent testified that "it's ultimately not . . . the evaluators and the review officers' decision whether or not to lend; . . . other people at the bank make the call . . . There's a line of independence."). They do not "ha[ve] authority to waive or deviate from

established policies and procedures" – rather, they "have some leeway in the performance of their work but only within closely prescribed limits." *See* 29 C.F.R. § 541.203(g), (h). *See also Boyd*, 109 F. Supp. 3d at 1297 (finding the 29 C.F.R. § 541.202 factors did not support claimed administrative exemption for similarly-situated appraisers).

Appraisers are more like ordinary inspectors, or graders of materials such as lumber, who are non-exempt. Like Appraisers, such employees "perform specialized work along standardized lines involving well-established techniques and procedures" and "rely on techniques and skills acquired by special training or experience" in exercising their limited leeway. See 29 C.F.R. § 541.203(g), (h).

Appraisers do not have authority to negotiate and bind the company, again distinguishing them from claims adjusters. *See* 29 C.F.R. § 541.203(a) (claims adjustors). They do not typically provide consultation or advice to management (SMFND 69), contrasting with the way exempt adjusters advise management regarding litigation decisions. *See* 29 C.F.R. § 541.203(a). Appraisers do not set business objectives. (SMFND 67 & 68). They do not represent the company in handling complaints, disputes, or grievances with borrowers. *Id.*; (SMFND 74).

REEs and AROs are also unlike exempt financial services employees who determine "which financial products best meet the customer's needs and financial circumstances," and market or service those products. 29 C.F.R. § 541.203(b);

(SMFND 70) (Fed.R.Civ.P. 30(b)(6) deponent testified "[Appraisers] are not speaking to the borrower saying, here's what you should do . . . That would be very inappropriate.").

Appraisers do not "perform[] work that affects business operations to a substantial degree" except in the aggregate. Evaluations and reviews are a required step in the loan- and credit-selling process, and the fees charged for reports are a revenue source to BB&T. This does not lead "plainly and unmistakably" to application of the administrative exemption. Virtually any position, in aggregate, affects business operations (as discussed in *Ahle*, 738 F.Supp.2d at 908), or the position would not exist. Assembly-line workers perform work that "affects business operations," but like Appraisers, they work on individual products, no one of which "affect[s] business operations to a substantial degree."

C. Defendant cannot meet the highly-compensated exemption.

Although Defendant must satisfy all three prongs to claim the administrative exemption, under the "highly compensated employees" rule, employees earning $100,000 or more per year are exempt under the FLSA if Defendant satisfies *either* the second *or* the third prong. *See* 29 C.F.R. § 541.601. "An employee with total annual compensation of at least $100,000 is deemed exempt . . . if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee." 29

C.F.R. § 541.601.[8] Here (as in *Boyd*, which considered and rejected this exemption), the Plaintiffs and Appraiser opt-ins perform(ed) only one duty – generating appraisal reports. *Boyd*, 109 F.Supp.3d at 1304. The Court cannot "deconstruct" the Appraisers' duty in order to find parts of that primary duty exempt as meeting part of one of the duties prongs. *Id*. at 1303.

In *Boyd*, defendants argued that, in generating reports, "Appraisers have to engage in research (or another administrative or professional-*esque* activity), and research is similar to some part of an exempt activity; therefore Appraisers "customarily and regularly" perform one or more of an administrator's or professional's exempt duties or responsibilities." *Id.* The court in *Boyd* found – and the Court here should likewise find – no support for such an expansive reading. The *Boyd* court explained:

> Deconstructing Appraisers' duty into component parts that may align with part of an exempt administrative exemption would allow nearly any employee who earns over $100,000 per year to be classified as exempt. No court has found this exemption to apply based on

[8] [1] The DOL's Overtime Final Rule, which would have raised the highly-compensated employee earnings threshold from $100,000 to $134,004 was set to take effect on December 1, 2016, but nationwide enforcement of the new rule was enjoined in *State of Nevada v. DOL*, Case No. 4:16-cv-00731-ALM, 218 F. Supp. 3d 520 (E.D. Tex. Nov. 22, 2017). On October 30, 2017, the DOL filed a notice of appeal of subsequent orders by the District Court for the Eastern District of Texas granting summary judgment and entering final judgment against the DOL, such that the highly-compensated employee earnings threshold may wind up increasing shortly. Case No. 4:16-cv-00731-ALM, Dkt. Nos. 99, 100, 120.

> breaking down one job duty into component parts to meet a part of a "duties prong." Rather, other courts considering the issue have looked at discrete and separate duties that employees perform, and assessed whether that duty meets a "duties prong" of an exemption. *See, e.g.*, *McCoy v. N. Slope Borough*, 2013 WL 4510780, at *11–12 (D. Alaska Aug. 26, 2013) (applying the highly compensated employee exemption, considering multiple positions, finding the search and rescue [SAR] coordinator who spent about 80 percent of his time on tasks "directly related to the management or general business operations of SAR" and only about 20 percent of his time flying, and pilot who flew in emergency situations thereby exercising discretion and independent judgment with regard to matters of significance, met one of the duties prongs of the administrative exemption and thereby qualified for the highly compensated employee exemption); *Mohorn v. Tennessee Valley Auth.*, 2007 WL 2077549, at *8 (E.D.Tenn. July 17, 2007) (concluding plaintiff RadCon Supervisors were not exempt based on "overseeing their RadCon technicians and ensuring that they perform their work in accordance with applicable procedures" because "they primarily engage in document review and otherwise occasionally engage[d] in task prioritization and the conducting of performance reviews"). *Id.*

Following *Boyd*, *McCoy*, and *Mohorn*, the Court should consider Appraisers' duty (generating appraisal reports) as a separate, whole task for the purposes of the 29 C.F.R. § 541.601 exemption. *Id.* at 1303-04. The *Boyd* court gave one "counter-factual example," which is illuminating:

> Had Appraisers regularly advised management on the policies of the company, given their experience conducting appraisals, the Court could have concluded that (1) advising management on Defendants' policies was not Appraisers' primary duty, but (2) Appraisers had a separate and distinct job duty of regularly and customarily advising on policy and (3) advising management on policy was an exempt duty under the "directly related" prong of the administrative exemption. Therefore § 541.601 would apply. However, unlike our hypothetical, Appraisers in this case do not in fact have a variety of different job duties. They perform one task [appraising] that falls under neither

> duties prong of the administrative exemption, nor the professional exemption. Therefore, the Court finds as a matter of law that § 541.601 does not apply.

Id. at 1304. Just as the *Boyd* appraisers were non-exempt and did not meet the highly-compensated exemption test, the BB&T Appraisers, whose duties all pertain to the process of generating reports, are likewise exempt.

D. Defendant's Willful Acts Establish a Three-Year Statute of Limitations and Liquidated Damages.

BB&T's violations were willful, therefore, Appraisers will be entitled to three years of back pay and liquidated damages. 29 U.S.C. §§ 255(a), 260.

1. The Three-Year Statute for Willful Violations Applies.

Successful FLSA plaintiffs can recover overtime pay two years back from the date a case is filed, and three years back for a willful violation. 29 U.S.C. § 255(a). To establish a violation was willful, an employee must prove the employer "knew" or showed "reckless disregard" for whether it was violating the FLSA. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). Defendant's "[a]cting only 'unreasonably' is insufficient – some degree of actual awareness is necessary." *Souryavong v. Lackawanna Cnty.*, 872 F.3d 122, 126 (3d Cir. 2017) (citing *McLaughlin*, 486 U.S. at 135, n.13).

In *Martin v. Selker Bors., Inc.*, 949 F.2d 1286, 1296 (3d Cir. 1991), the Third Circuit found willfulness where the employer's actions showed "evident indifference toward the requirements imposed by the FLSA" by continuing to use

the exempt classification "despite concerns and doubts as to its legality." *Cf. Souryavong*, 872 F.3d at 126 (contrasting employer's prompt response to remedy violation with *Flores v. City of San Gabriel*, 824 F.3d 890, 896, 906-07 (9th Cir. 2016) *cert. denied*, 137 S.Ct. 2117 (2017), which held a district court erred in denying employees' request for summary judgment on "willfulness" after a city misclassified employee pay for nine years despite familiarity with the problem).

BB&T's violations are willful. Throughout the Class Period, management has been on notice that Appraisers regularly worked overtime. (SMFND 15). In 2013, when BB&T last formally reviewed the appropriate FLSA classifications for Appraisers, the current REVS manager raised concerns with Human Systems about the significant financial impact of classifying REEs as non-exempt and having to pay them overtime. (SMFND 99, 100, & 101). BB&T showed deliberate indifference to Appraisers' proper legal status as Human Systems – the department responsible for FLSA classifications – failed to consult with BB&T's legal department about Appraisers' classification or take into account that a DOL Opinion Letter concluding appraisers are non-exempt has existed since 1986. (SMFND 98); DOL Wage & Hour Op. Ltr., 1986 WL 1171077, at *1 (Feb. 25, 1986).

BB&T again showed deliberate indifference when, in May 2015, the REEG manager notified the other top REVS managers of the factually similar *Boyd*

decision labeling it "worrisome." Yet, no manager investigated the continued propriety of Appraisers' exempt status, or alerted Human Systems of the ruling. (SMFND 102 to 106). Even during this lawsuit, the Human Systems department has not reevaluated the proper classification of Appraisers. (SMFND 107).

BB&T showed "evident indifference" regarding its misclassification of Appraisers, and its liability must therefore extend to the three-year statutory period.

2. Defendant is Liable for Liquidated Damages.

An employer who violates the FLSA's overtime provisions under 29 U.S.C. § 207, "shall be liable" for employees' unpaid overtime wages, and "an additional equal amount as liquidated damages." 29 U.S.C. § 216. A court may limit or refrain from awarding liquidated damages only if the employer shows it acted in "good faith" and "had reasonable grounds" to believe it was not in violation of the FLSA. 29 U.S.C. § 260.

A "finding that the employer willfully violated the FLSA necessarily precludes the Court from finding that the employer acted in good faith." *Stillman v. Staples, Inc.*, 2009 WL 1437817, at **22 (D.N.J. May 15, 2009) (Shwartz, M.J.). Defendant's misclassification was willful, as explained *supra*, so summary judgment on the good-faith defense is appropriate.

Even absent a finding of willfulness, summary judgment would still be appropriate for the good faith defense. In *Martin v. Cooper Elec. Supply Co.*, the

Court held the employer acted without good faith or reason where it failed to take "affirmative steps to ascertain the legality of its pay practices," and simply followed an industry trend of not complying with the law, or violated the law to remain competitive. 940 F.2d at 10. *See also Stillman*, 2009 WL 1437817, at *14 ("lack of effort to seek advice from the [DOL] in light of the fact that it had been sued for noncompliance with the overtime laws" supported liquidated damages award).

As in *Martin v. Cooper Elec. Supply Co.*, here, BB&T failed to take the affirmative steps to determine whether the FLSA classification of Appraisers was proper. (SMFND 96-107). BB&T failed to appropriately analyze the Appraiser positions or "do any analysis or conduct any inquiry;" the company's "lack of diligence in determining the applicability of the Act's requirements" is "dispositive of the liquidated damages issue." 940 F.2d at 909. Further, by inaction, Defendant is bucking the industry trend of reclassifying in-house appraisers as non-exempt. *See, e.g. Boyd*, 2014 WL 6473804, at *3 (reclassification of review appraisers); *Lee v. JPMorgan Chase*, 2015 WL 12711659, at *5 (C.D. Cal., Apr. 28, 2015) (reclassification of review and commercial appraisers).

BB&T has no good-faith or reasonableness defense.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court grant partial summary judgment on Defendant's proffered wage law exemptions and good-faith defense, finding a three-year liability period and liquidated damages.

Respectfully submitted,
SCHALL & BARASCH LLC

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