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,	:	Civil No. 3:16-cv-02093-BDM-TJB
Plaintiffs,	:	Judge Brian D. Martinotti
v.	:	Magistrate Judge Tonianne J. Bongiovanni
BRANCH BANKING AND TRUST COMPANY; DOES 1-10, INCLUSIVE,	:	**Motion Day: March 19, 2018**
	:	Document Electronically Filed
Defendants.	:	

DEFENDANT'S BRIEF IN SUPPORT OF PARTIAL SUMMARY JUDGMENT
(February 23, 2018)

Respectfully submitted,

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I. STATEMENT OF UNDISPUTED MATERIAL FACTS[1]

1. Branch Banking And Trust Company And Real Estate Valuations.

Defendant Branch Banking and Trust Company ("BB&T" or "Defendant") offers clients a complete range of financial services, including commercial lending. [SUMF, ¶ 1.] The Office of the Comptroller of the Currency ("OCC"), Board of Governors of the Federal Reserve System ("FRB"), Federal Deposit Insurance Company ("FDIC"), the Office of Thrift Supervision ("OTS"), and the National Credit Union Administration ("NCUA") (collectively referred to as "the Agencies") have issued Interagency Appraisal and Evaluation Guidelines ("Guidelines"). [Id., ¶ 163.] Pursuant to those Guidelines, BB&T cannot extend a commercial loan without a real estate appraisal or, where appropriate, a real estate evaluation. [Id., ¶ 2.]

To that end, BB&T maintains a Real Estate Valuation Services organization ("REVS") which supports numerous lines of business and whose primary focus is managing real estate collateral risk through providing and ensuring timely, cost effective, quality and compliant real estate valuations. [SUMF, ¶ 3.] Within REVS is the Real Estate Appraisal Department ("READ"), which serves the organization through the overall management of the appraisal review process, as well as the Real Estate Evaluations Group ("REEG"), which serves the organization through the preparation of internally prepared real estate evaluations. [Id., ¶¶ 4, 5.]

2. Appraisal Review Officers' and Real Estate Evaluators' Licenses/Certifications.

Appraisal Review Officers ("AROs") (employed within READ) must be state certified/licensed general or residential appraisers. [SUMF, ¶ 9.] In turn, Real Estate Evaluators ("REEs") (employed within REEG) must be state certified/licensed general or residential

[1] Simultaneous herewith, Defendant has filed a Statement of Undisputed Facts. Defendant adopts these facts as true for purposes of summary judgment ***only***.

appraisers or working towards that certification. [Id., ¶ 10.] Under the provisions of Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, the Appraisal Qualifications Board ("AQB") establishes the minimum education, experience, and examination requirements for real property appraisers to obtain a state license or certification. See 12 U.S.C. § 3331, *et seq.* Each state must implement appraiser certification requirements that meet, at a minimum, the education requirements issued by the AQB. See 12 U.S.C. § 3331, *et seq.*

The AQB requires that applicants for the Certified General Real Property Appraiser hold a Bachelor's degree or higher from an accredited college or university. [SUMF, ¶ 13.] The AQB further requires that Certified General Real Property Appraiser applicants complete three hundred (300) creditable class hours in the Required Core Curriculum and three thousand (3,000) hours of qualifying experience obtained in no fewer than thirty (30) months, where a minimum of one thousand five hundred (1,500) hours must be obtained in non-residential appraisal work. [Id., ¶ 14.] Applicants for the Certified Residential Real Property Appraiser must also hold a Bachelor's degree or higher from an accredited college or university. [Id., ¶ 15.] The AQB further requires that Certified Residential Real Property Appraiser applicants complete two hundred (200) creditable class hours in the Required Core Curriculum and two thousand five hundred (2,500) hours of qualifying experience obtained in no fewer than twenty-four (24) months. [Id., ¶ 16.]

Appraisers must then pass an AQB-approved examination and complete continuing education to ensure that they maintain and increase their skill, knowledge, and competency in real property appraising. [SUMF, ¶¶ 17, 18.]

All AROs in this matter hold a Bachelor's Degree, and, at all times employed by BB&T, held an appraiser certification/license. [SUMF, ¶¶ 19-20, 26.] Of the nine (9) REEs in this matter, eight (8) held an appraiser certification/license. [SUMF, ¶¶ 21-25, 27-29.]

3. The ARO Position.

The primary purpose of the ARO position is to "conduct appraisal reviews on appraisals ordered by the Real Estate Appraisal Department (READ), and assist the Bank's lending and administrative personnel in the implementation of appraisal policy and procedure." [SUMF, ¶ 35.] AROs are required to possess the education, expertise, and competency to perform appraisal reviews commensurate with the complexity of the transaction, type of real property, and market. [Id., ¶ 35.] Most appraisal reviews performed by AROs are on commercial properties, which are more complex than residential appraisals in that different and more varied appraisal techniques and methodologies are used; there is a greater knowledge and experience base needed for understanding these appraisal methodologies; and the types of commercial properties (i.e. convenience stores, multi-family homes, golf courses) and issues associated with those commercial properties are quite varied. [Id., ¶ 36.]

Once an ARO receives a new assignment, the first step is usually for the ARO to identify certain appraisers from BB&T's Appraisal Registry to whom they should bid that appraisal report. [SUMF, ¶ 40.] AROs select the appropriate appraisers based on property type and geographic competency. [Id., ¶ 41.]

Once the appraisal report is completed and sent to the ARO, the ARO must then determine what Review Level is necessary —a Level 1 Compliance Review, a Level 2 Abbreviated Technical Review (Risk Review), or a Level 3 Technical Review— based on the ARO's determination of the necessary scope of work. [SUMF, ¶ 43.] AROs communicate their

analysis, findings, and conclusions through these review reports, and through these reports, AROs are given a means by which they can address and identify all potential risks associated with the real estate securing the transaction, including market conditions, expectations, and the quality of data used in the analysis. [Id., ¶ 44.] The review reports contain analysis, findings, and conclusions that are unique to each ARO and reflective of his or her independent discretion and judgment on the subject matter of the report. [Id., ¶ 45.] Explanation and comment from the ARO must be specifically tailored to each assignment under review, as each appraisal is unique in its own right. [Id., ¶ 46.]

When preparing a Level 1 Compliance Review, the ARO acts as a Compliance Officer. [SUMF, ¶ 49.] The ARO will enter the indicated value of the collateral, the effective date of the value, the date of the appraisal report and answer the compliance review questions. [Id.] Level 1 Compliance Reviews often require research, including reaching out to the appraiser, researching public records, or speaking to someone in the tax assessor's office. [Id., ¶ 50.] There are also times when revisions to the appraisal report are necessary, and it is the ARO's responsibility to reach out to the appraiser and tell them to make that revision. [Id., ¶ 51.] Level 1 Compliance Reviews are intended solely for the internal use of BB&T. [Id., ¶ 52.]

The intent of a Level 2 Abbreviated Technical Review (Risk Review) and Level 3 Technical Review is to confirm that the value is reasonable and reliable for loan underwriting and that the appraisal is in compliance with the Uniform Standards of Professional Appraiser Practices ("USPAP"). [SUMF, ¶¶ 53, 61.] The ARO must also render a decision regarding the quality of work. [Id.] To this end, when preparing a Level 2 Abbreviated Technical Review (Risk Review), the ARO must, in relevant part:

a. ***Identify*** the report under review, the real estate and property rights being appraised, the effective date of the opinion of value in the report, date of the appraisal report, the effective date of the appraisal review and the date of the review report.

b. ***Form an opinion as to the adequacy and relevance of the data*** and the ***appropriateness*** of any adjustments applied to the data. ***The ARO must determine whether the report contains data relevant to the appraisal problem which supports the appraiser's opinions and conclusions.***

c. ***Form an opinion*** as to the appropriateness of the methods and techniques employed in the appraisal.

d. ***Form an opinion*** as to the soundness and appropriateness of the analysis, opinions and conclusions in the report under review, and explain the reasons for any disagreement with these conditions.

e. Give a brief description of the ***reasonableness of the analysis***; e.g., the approaches employed, the indicated range of the comparables, the date of sales, the cost numbers are current, the expenses were estimated based on historical records and expense comparables, the cap or discount rate selected was abstracted from the market or national surveys.

f. ***Discuss significant issues*** which effect the value, such as property conditions, zoning, compliance issues and highest and best use.

g. Appropriate deductions and discounts ***should be analyzed*** and reported for certain valuation scenarios including land development tracts, proposed construction or partially completed properties; properties partially leased or leased at other than market rates; or any tract or development with unsold units.

h. ***Provide a final decision regarding the reasonableness of the analysis and credibility of the report*** consistent with USPAP AO-20 without a reviewer opinion of value when "Accepted" or "Accepted as Appraiser Revised," or if "Accepted as Reviewer Modified" with a reviewer opinion of value.

i. Comply with the standard rules of the USPAP promulgated by the Appraisal Foundation.

j. ***Conclude*** whether the appraisal information received from the appraiser is ***reasonable and supportable***. . . The ARO has the responsibility to ensure the most appropriate value is reported given the Purpose of the Loan submitted with the request.

[Id., ¶ 54 (emphasis added).]

Level 2 Abbreviated Technical Reviews (Risk Reviews) and Level 3 Technical Reviews often require independent research on comparable rental data, comparable sales data, or something to do with the specific property. [SUMF, ¶ 55.] Ultimately, the ARO will determine that the value is reasonable and reliable for loan underwriting based upon the review of the appraisal and any independent research. [Id., ¶ 56.] The intended use of these Reviews is to assist BB&T in establishing a collateral value in a lending transaction. [Id., ¶¶ 58, 63.] The analysis, opinions, and conclusions in the Reviews are based on an ARO's personal, impartial, unbiased professional analyses, opinions, and conclusions. [Id., ¶¶ 59, 64.] No one provides AROs with significant professional assistance in completing these Reviews [Id., ¶¶ 60, 65.]

Often, AROs encounter appraisal reports that do not meet BB&T's quality standards and/or communicate a credible market value estimate. [SUMF, ¶ 68.] When this occurs, AROs have to address those deficiencies with the appraiser to get them corrected. [Id.] AROs also act as a liaison between the appraiser, lending staff, and management to ensure that independence in the process is maintained in accordance with regulatory requirements. [Id., ¶¶ 70-71.]

The final step in completing a Level 2 Abbreviated Technical Review (Risk Review) or a Level 3 Technical Review is to grade appraisers on their appraisal reports. [SUMF, ¶ 72.] If an appraiser rating falls below a certain threshold, that appraiser may be subject to removal or suspension from the BB&T Appraiser Registry. [Id., ¶ 73.]

4. The REE Position.

The primary purpose of the REE position is to "[p]erform independent evaluations[2] of real estate serving as collateral for business loans that meet evaluations standards" and

[2] An evaluation is a "valuation permitted by the agency's appraisal regulations for transactions that qualify for the appraisal threshold exemption, business loan exemption or subsequent transaction exemption." [SUMF, ¶ 87.]

"[c]onduct a thorough analysis of real estate property to provide an estimate of the real estate's market value." [SUMF, ¶ 83.]

REEs are required to possess the appropriate appraisal or collateral valuation education, expertise, and experience relevant to the type of property being valued. [SUMF, ¶ 85.] REEs must be aware of, understand, and be able to correctly employ recognized methods and techniques that are necessary to produce a credible evaluation report. [Id., ¶ 86.]

Once a REE receives a new assignment, the REE has to determine whether he/she is competent, which speaks to the knowledge and experience to complete the evaluation assignment, as well as to the analytical or appraisal methodologies necessary for the assignment. [SUMF, ¶ 88.] REEs next determine the scope of work necessary to undertake the assignment, for instance: what data sources to use; who to talk to; steps taken to perform the evaluation; and what level of data needs to be in the evaluation. [Id., ¶ 89.] The scope of work varies from property to property and evaluation to evaluation. [Id., ¶ 90.]

REEs then notify the loan officer and/or engagement specialist as to what additional due diligence is required to perform an adequate evaluation, such as a missing rent roll, an up-to-date operating statement, or a lease. [SUMF, ¶ 91.] The documents needed to perform an adequate evaluation vary from property to property. [Id., ¶ 92.]

The REE also needs to set-up an inspection of the property, and it is the responsibility of the REE to determine the appropriate degree of inspection to produce a credible evaluation result. [SUMF, ¶ 93.] Inspections are not completed the same way for each property, and the scope of the inspection depends on the property type. [Id., ¶ 94.]

To complete a valuation, REEs also need to identify appropriate comparable properties (hereinafter "comparables"), and make adjustments from these comparables to support an

opinion regarding the value of the property. [SUMF, ¶ 95.] Determining which comparables to give more weight varies by property and assignment. [Id., ¶ 96.] REEs use their independent judgment and discretion in selecting appropriate comparables. [Id., ¶ 97.]

However, comparables are not the only analytical tool REEs use to value property, and REES must also independently analyze the effect of economic, social, and other trends on a particular real estate market. [SUMF, ¶ 98.] For instance, REEs must analyze whether neighborhood maintenance levels are excellent, good, average, fair or poor by reading an inspection report and analyzing neighborhood trends and values. [Id., ¶ 99.] REEs also have to analyze whether the demand and supply of available properties is in balance, over-supplied, or short by reading market reports, examining data, and observing trends. [Id., ¶ 100.] REEs also research whether there are known adverse site conditions, the highest and best use of the property, and overall real estate trends, which Plaintiff Shelley testified he knew how to do based on his years of experience as an appraiser. [Id., ¶ 101.]

Furthermore, if the property is a leased income producing property, a REE must analyze all of the encumbering leases, operating expenses, tenant quality and current investment rates and associated risks for the specific property type in order to determine a market value. [SUMF, ¶ 102.] The REE must also research comparable leases and market based expenses to ensure the subject's leases and operating expense ratios are within market expectations and if not, make adjustments accordingly to mirror investor typical expectations. [Id.] If the property is a special use property such as a gas station/convenience store, hotel, or car wash, the REE must analyze the financial history, operating expenses, investment rates and multipliers in order to discern a market value of the property's "going concern" value. [Id., ¶ 103.]

Once due diligence and research is complete, the REE determines what level of evaluation report to complete (Level 1, Level 2, Level 3, or Level 4) and then documents his/her evaluation through an evaluation report which details the analysis, assumptions, and conclusions to support the estimated property value. [SUMF, ¶ 105.] REEs are expected to use their own judgment and discretion to render an opinion regarding a property's market value; they perform their own analysis and come to their conclusions independently; and no one should provide them with any "suggested" value to assign to a property. [Id., ¶ 107.]

The purpose of a Level 1 Evaluation is to determine whether the use of a tax assessment or prior appraised value is safe for lending. [SUMF, ¶ 109.] The purpose of Level 2, 3, and 4 Evaluations is to estimate the value(s) of the real estate collateral specified as of the effective date(s) cited in the report. [SUMF, ¶¶ 115, 120, 125.] These Evaluations include a narrative which details the analysis, assumptions, and conclusions to support the estimated property value. [Id., ¶¶ 112, 117, 122.] The analysis, opinions, and conclusions in the Evaluations are based on a REE's personal, impartial, unbiased professional analyses, opinions, and conclusions. [Id., ¶¶ 113, 118, 123.] No one provides REEs significant professional assistance in completing these Evaluations, and these Evaluations are intended for the sole use of BB&T. [Id., ¶¶ 110, 114, 116, 119, 121, 124, 126.]

5. USPAP, The REVS Process Manual, And Review Process Does Not Tell AROs /REEs How To Perform Their Jobs.

AROs and REEs are required to follow USPAP, which is "the guideline for which a professional appraiser should practice whether they practice as an appraiser, as they practice as a reviewer, as they practice as an evaluator." [SUMF, ¶ 133.] Critically, USPAP does not tell an individual how to appraise, and it does not provide a formula for opining on a property's value. [Id., ¶¶ 135-136.] AROs and REEs must also comply with the REVS Process Manual and

compliance documents in performing their jobs. [SUMF, ¶ 145, 155.] USPAP, the REVS Process Manual, nor the compliance documents tell an ARO or REE: how to determine appropriate comparables; how to determine highest and best use of a property; how to do an inspection of the property; which appraisal methodology to apply; how to determine whether neighborhood maintenance levels are excellent, good, average, fair or poor; whether demand and supply of available properties is in balance, over-supplied, or short; and/or whether the overall real estate values are increasing, stable, in slow decline, or in rapid decline. [Id., ¶¶ 137-143, 146-162.]

6. The AROs' and REEs' Job Is Risk Management And Legal And Regulatory Compliance.

The Agencies' Guidelines address "supervisory matters relating to real estate appraisals and evaluations used to support real estate-related financial transactions." [SUMF, ¶ 163.] Among other things, these Guidelines include a specific emphasis on the appraisal review function itself and provide detailed requirements for the depth and substance of each review—including a determination as to whether the methods, assumptions, and value conclusions therein are reasonable—as well as the qualifications of the appraisal reviewers themselves. [Id.]

BB&T is committed to complying, and maintaining compliance, with all applicable laws, rules, regulations, and regulatory guidance. Consistent with this commitment, BB&T has developed a framework that uses three (3) mutually supportive lines of defense to manage risk. [SUMF, ¶ 165.] The second line of defense is formed by the Risk Management Organization ("RMO"), which provides independent risk management oversight and guidance to the individual business units. [Id.] REVS is within the RMO. [Id.]

If an ARO or REE "gets it wrong" in his or her role as such (even on a single transaction), it creates the potential for substantial risk to BB&T and includes, by way of

example and not limitation, regulatory/compliance risk, financial and credit risk, reputational risk, operational risk, the overextension of funds, inappropriate valuation functions, and the risk of regulatory criticism. [SUMF, ¶¶ 167-171.]

Notably, AROs and REEs do not sell loans on commercial properties; they do not underwrite loans on commercial properties; and they do not generate any loans on commercial properties. [SUMF, ¶¶ 172-173.]

7. BB&T's Review Of ARO/ REE Positions For Exempt Classification Status.

In 2013, Cara Nobles Morris, a Compensation Consultant III in BB&T's Human Systems department, evaluated the ARO and REE job families to determine their classification under the Fair Labor Standards Act ("FLSA"). [SUMF, ¶ 175, 180.] As part of this job evaluation process, she spoke with three (3) different managers within the department regarding the job responsibilities of AROs and REEs. [Id., ¶ 182.] She also had two (2) of those managers complete Manager Questionnaires to capture the duties and responsibilities of the ARO and REE jobs. [Id., ¶ 183.] Ms. Morris also pulled information regarding similar jobs in the marketplace. [Id., ¶ 184.]

Based upon of all this information, Ms. Morris concluded that the ARO and REE positions could be properly classified as exempt under the FLSA. [SUMF, ¶ 185.] Ms. Morris then sent this information to her team within Human Systems in advance of a call, where the team discussed the background, the positions, the job evaluation process, the resulting job grade and salary/incentives, and the FLSA classification. [Id., ¶ 186.] The purpose of that forum was for individuals to ask any and all questions and "poke holes" in the determination before the final decision was sent to executive management. [Id., ¶ 187.] No one within the team disagreed with the decision to classify the ARO and REE positions as exempt under the FLSA. [Id., ¶ 188.]

Exemption status under the FLSA was determined only by the Human Systems department. [Id., ¶¶ 189-190.]

II. PROCEDURAL HISTORY

Plaintiffs Phillip Karali and Gregory Shelley, on behalf of themselves and all others similarly situated, filed this collective action against BB&T and John Does 1-10, inclusive, alleging that they were improperly classified as exempt employees, and they did not receive wages for any overtime worked, in violation of the FLSA. [See Complaint (Dkt. No. 1).] Plaintiff Karali also brought an individual claim under the New Jersey State Wage and Hour Law, N.J.S.A. 34:11-56a4 ("NJWHL"). [Id.] The matter was conditionally certified under the FLSA on May 9, 2017. [See Order (Dkt. No. 48).] Ten (10) other individuals, who worked for BB&T in similar capacities, have opted-in to this lawsuit since its filing.[3] [See Consent Form (Dkt. Nos. 27-29, 32, 50-54, 56-58).] This matter is ripe for summary disposition on liability issues.[4]

III. STANDARD OF REVIEW

Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56.

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[3] These individuals (none of whom currently work for BB&T) include: Ralph Pena, III (REE); Marvin Wooley (REE); Mary Jarrett-Jones (REE); John Gapszewicz (ARO); Elizabeth Hamrick (REE); Nancy Smith (REE); Jared Harrison (REE); Jeffrey Woodruff (REE); Irene Degraw (REE); and Todd Wood (REE).

[4] This Partial Motion for Summary Judgment addresses only issues of liability. Upon decisions on both Plaintiffs' and Defendant's Partial Motions for Summary Judgment, and completion of discovery on damages, Defendant reserves the right to file a separate partial motion for summary judgment related to damages issues (including, but not limited to, application of the fluctuating workweek method), if necessary.

Although inferences must be drawn in favor of the nonmoving party, "an inference based upon speculation or conjecture does not create a material factual dispute sufficient to defeat entry of summary judgment." Robertson v. Allied Signal, Inc., 914 F.2d 360, 382 n.12 (3d Cir. 1990). Similarly, the non-moving party cannot rely on unsupported assertions, speculation, or conclusory allegations to avoid a motion for summary judgment. Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1989) (citing Celotex v. Catrett, 477 U.S. 317, 324 (1986)).

IV. ARGUMENT[5]

The FLSA's overtime provision does not apply to "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1).

1. The ARO/ REE Positions Fall Within The FLSA Administrative Exemption.

An individual employed in a "bona fide administrative capacity" is someone: (1) who is compensated on a salary basis of not less than $455 per week; (2) who primarily performs office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and (3) whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. 29 C.F.R. § 541.200. There is no dispute that AROs and REEs were paid at least $455 per week to meet the salary threshold.[6] Moreover, for the reasons set forth below, the undisputed facts demonstrate that AROs and REEs satisfy the second and third requirements of the administrative exemption.

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[5] For purposes of brevity, and because Defendant believes that the ARO and REE positions are both properly exempt, Defendant addresses applicability of the FLSA exemptions as to both the ARO and REE positions under the same Sections in this Brief. However, Defendant notes, as set forth in the Undisputed Statement of Material Facts, that the ARO and REE positions are distinct positions that perform similar, but different, responsibilities. Accordingly, should this Court disagree with Defendant's analysis that both positions are exempt under the FLSA, this Court has the right to separately classify either of those positions as properly exempt.

[6] See SUMF, ¶¶ 34, 81; see also Plaintiffs' Brief in Support of Partial Motion for Summary Judgment (Dkt. No. 60-1), p. 23 (stating that the salary-basis test is "not at issue here.").

A. The Undisputed Facts Demonstrate That The AROs'/REEs' Primary Duties Are Directly Related To BB&T's General Business Operations.

To satisfy the second requirement of the administrative exemption, Defendant must establish that the employee's "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." 29 C.F.R. § 541.200(a)(2). An employee's "primary duty" is the "principal, main, major or most important duty that employee performs." 29 C.F.R. § 541.700.

The regulations further provide that to be "directly related to the management or general business operations," an employee must perform work that is "directly related to ***assisting with the running and 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." 29 C.F.R. § 541.201(a) (emphasis added); see also Swartz v. Windstream Communications, Inc., 429 Fed. Appx. 102, 104-105 (3d Cir. 2011); Antiskay v. Contemporary Graphics and Bindery, Inc., 2013 WL 6858950, *9 (D.N.J. Dec. 26, 2013).

For example, in Swartz v. Windstream Communications, Inc., the employee was employed as a Sales Engineer II who custom-designed telecommunication platforms for Windstream's clients. Id. at 103. Holding that the employee satisfied the second prong of the administrative exemption, the Third Circuit Court of Appeals stated:

> Windstream is a telecommunications provider; its business is to sell communications systems. Swartz did not sell these systems himself. ***Rather, he assisted with the sales by custom-designing telecom systems to meet each prospective customer's unique needs. In this manner, Swartz's primary duty constituted work that serviced Windstream's core business –the sale of telecom systems.***

Id. at 102 (emphasis added). Similarly, in Antiskay v. Contemporary Graphics and Bindery, Inc., plaintiff was employed as a Production Planner/Customer Service employee for a printing

and fulfillment company. 2013 WL 6858950, at *1. In holding that this position satisfied this second prong of the administrative exemption, the District of New Jersey district court stated:

> With respect to whether the type of work Plaintiff performed was directly related to Contemporary Graphics Management or General Business Operations, the Court notes at the outset that Contemporary Graphics is a printing and fulfillment company which provides design, printing, and finishing, die-cutting, warehousing, fulfillment and mailing services to its customers in order to generate printed products.
>
> In this regard, the record reflects that Plaintiff did not actually produce these printed products. Rather, Plaintiff assisted and serviced the actual manufacturing process by converting estimates into job jackets to initiate the production process, entering job information into the company's computer systems, approving proofs prior to commencement of manufacturing, receiving and responding to customer calls, emails, and requests, and monitoring the overall progress of products as they moved through different departments . . . ***In this way, Plaintiff's primary duties constituted the type of work that serviced and assisted in Contemporary Graphics' core business –the production of printed products, and the Court finds that the second prong of the administrative exemption is satisfied here.***

Id. at *11-12 (emphasis added).

The facts here warrant an identical conclusion. It is undisputed that AROs and REEs exclusively perform non-manual work that is directly related to the general business operations of BB&T.[7] Specifically, BB&T is a bank, and its business is to provide clients a complete range of financial services, including commercial lending. [SUMF, ¶ 1.] AROs and REEs do not sell commercial loans; they do not underwrite loans on commercial properties; and they do not generate any loans on commercial properties. [SUMF, ¶¶ 172-173.] Rather, AROs and REEs

[7] The primary duties of AROs and REEs is ***not*** production. AROs and REEs communicate their analysis, findings, and conclusions through appraisal review reports and evaluation reports, respectively. Simply, these reports are a ***means*** by which AROs and REEs can address and identify all potential risks associated with the real estate securing the transaction, including market conditions, expectations, and the quality of data used in the analysis. These review and evaluation reports are intended for the sole use of BB&T, and AROs' and REEs' completion of these reviews and evaluations is a "support function auxiliary" to BB&T's primary function of commercial lending, and not the marketplace offerings of BB&T (i.e. the commercial loans).

assist and service the sale of commercial loans by advising the lending side, through their reviews and evaluations, as to the soundness of the value of a certain property. [Id., ¶ 175.] To that end, and similar to the plaintiff employees in both Swartz and Antiskay, the AROs' and REEs' primary duties constitute work that services BB&T's core business –the sale of commercial loans.

Furthermore, it is undisputed that the jobs of AROs and REEs is risk management and regulatory compliance. Housed within the RMO, AROs' and REEs' primary focus is managing real estate collateral risk through providing and ensuring timely, cost effective, quality and compliant real estate valuations. [SUMF, ¶ 3.] Plaintiff Karali concedes that the review process is "a key component to –to the risk management that is –is important to activities of the Bank." [Id., ¶ 167.] To be sure, the regulations expressly consider "legal and regulatory compliance[;] and similar activities" (i.e. risk management) as examples of work that will satisfy the second prong of the administrative exemption. See 29 C.F.R. § 541.201(b). Accordingly, because the AROs' and REEs' primary duties include non-manual work directly related to Defendant's general business operations, the second prong of the administrative exemption test is satisfied.

B. The AROs'/REEs' Primary Duties Include The Exercise Of Discretion And Judgment With Respect To Matters of Significance.

The third prong of the administrative exemption requires that the employee's "[p]rimary duty includes the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200(a)(3). Whether an employee exercises discretion or independent judgment must take into account "all the facts involved in the particular employment situation in which the question arises." 29 C.F.R. § 541.202(b).

i. The Undisputed Facts Demonstrate That AROs'/REEs' Primary Duties Include The Exercise Of Discretion And Independent Judgment.

"Department of Labor regulations explain that 'the exercise of discretion and independent judgment involves the comparison and evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered.'" Swartz, 429 Fed. Appx. at 105 (citing 29 C.F.R. § 541.202(a)). Furthermore, whether an employee exercises discretion and independent judgment is a fact-specific inquiry, guided by a non-exhaustive list of regulatory factors including, but not limited to, "whether the employee carries out major assignments in conducting the operations of the business"; "whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business"; and "whether the employee investigates and resolves matters of significance on behalf of management." 29 C.F.R. § 541.202(b).[8]

Here, there is no dispute that AROs regularly exercise discretion and independent judgment by selecting/scoring an appraiser for bid[9]; identifying and analyzing all potential risks associated with the real estate collateral, including market conditions, expectations, and the quality of the data used in the analysis; managing deficiencies with the third-party appraiser; weighing the information received from the BB&T loan staff; and ultimately forming an opinion as to whether the value was reasonable and reliable for loan underwriting.

Furthermore, there is no dispute that REEs regularly exercise discretion and independent judgment regarding how to approach an evaluation and render a professional opinion on the

[8] With respect to these factors, "courts generally find that employees who meet at least two or three of these factors are exercising discretion and independent judgment, although a case-by-case analysis is required." Swartz v. Windstream Communications, Inc., 2010 WL 2723213, *5 (W.D. Pa. July 8, 2010) (citing 69 Fed.Reg. 22122, 22143 (Aug. 23, 2004) (citing cases)).

[9] See 29 C.F.R. § 541.202(c) (recognizing that "recommendation for action" can adequately satisfy the discretion requirement).

value of a property. In arriving at a valuation, REEs must consider competency to complete the assignment, scope of work, inspect the property, identify appropriate comparables, and also independently analyze the effect of economic, social, and other trends on a particular real estate market.

To be sure, courts have determined that employees with similar duties have the discretion and independent judgment necessary to satisfy the administrative exemption test. See e.g. Urnikis-Negro v. American Family Property Services, Inc., 2008 WL 5539823, *3 (N.D. Ill. July 21, 2008) ("One of the key aspects of a real estate appraisal is to determine appropriate 'comparables' (comparable properties). The associate appraiser would include in his or her report . . . a selection of comparable properties, as well as the adjustments necessary to determine a value for the property being appraised. The selection of comparables involves the exercise of judgment."); Crowe v. Examworks, Inc., 136 F. Supp. 3d 16, 42 (D. Mass. 2015) (work of a clinical quality assurance coordinator ("CQAC") required the exercise of discretion and independent judgment where CQAC: had to make an independent choice in reaching the conclusion that reviewing physician has erred or that his or her rationale was not clear, resulting in a conversation with the reviewing physician; had to determine "whether the reviewing physician's rational is supportable," and had to "determine whether the information in the case file was sufficient to demonstrate that a request was related to the injury") (internal citations omitted); Estrada v. Maguire Ins. Agency, Inc., 2014 WL 795996, *6-7 (E.D. Pa. Feb. 28, 2014) (claims examiner exercised discretion and independent judgment by evaluating and making recommendations regarding coverage; inspecting property damage; interviewing witnesses and insured; and distinguishing genuine claims from fraudulent claims; and determining liability and the value of the claims); Weis v. Advanced Construction Services, Inc., 2005 WL 2176829, *1

(W.D. Pa. Aug. 19, 2005) (cost estimator had independence and discretion where he "note[d] missing information from the drawings . . ., formulate[d] questions to obtain the needed information, [and] contact[ed] the client or architect to get the information to do [the] estimates;" located and contracted subcontractors; determined scope of work; qualifyied the submitted bids; made subjective judgments as to whether the bids were adequate by comparing them against his own estimates; and determined the appropriate bid price).

But, perhaps most importantly in this analysis, Plaintiffs' very own testimony concedes[10] that they maintain this discretion and independent judgment. Consider the following:

- Plaintiff Karali testified: "You're being asked as a –as an appraiser to determine in your review capacity whether the quality of the work was acceptable so that the bank could rely upon that final value estimate." [SUMF, ¶ 51.]

- Plaintiff Karali also testified: "[I]t was [the ARO's] responsibility to weigh the information that was provided by the loan staff or officer and determine whether it was relevant to be shared with the appraiser. And if so, to facilitate that process." [SUMF, ¶ 69.]

- Opt-In Plaintiff Gapszewicz testified: "Q: Did you have to reach a final regarding the reasonableness of the analysis and credibility of the appraiser –of the appraisal provided by the outside appraiser? A: Yes, I did."] [SUMF, ¶ 53.]

- Plaintiff Shelley testified: "USPAP don't tell you how to appraise . . . It does not tell you how to appraise." [SUMF, ¶ 133.]

- Opt-In Plaintiff Ralph Pena testified: "Q: And when you're selecting those comparables, you're using your judgment to do so, correct? A: Correct." [SUMF, ¶ 97]. He also testified that he must analyze the effect of economic, social, and other trends on a particular real estate market (such as highest and best use, demand and supply, etc.) and determine which appraisal methodology to apply and that neither the REVS Process Manual nor the compliance document advised him how to do that. [SUMF, ¶¶ 149, 151, 156, 157, 160, 161, 162.]

In sum, it remains clear that both AROs and REEs exercise discretion and independent judgment in connection with their job duties and responsibilities.

[10] It bears noting that Plaintiffs do not contest (and thereby concede) this point in their Brief in Support of Partial Motion for Summary. [See Brief in Support (Dkt. No. 60-1), p. 32.]

ii. The Undisputed Facts Demonstrate That AROs/REEs Exercise Their Discretion And Independent Judgment With Respect To Matters of Significance.

Finally, it cannot be disputed that the AROs' and REEs' job duties, and thereby exercise of that discretion and independent judgment, are critical to Defendant's business. See 29 C.F.R. § 541.200(a)(3) (the exercise of discretion must be related to "matters of significance"). BB&T, by regulation, cannot even extend a commercial loan without a real estate appraisal and review or, where appropriate, a real estate evaluation. Without appropriately qualified, licensed, and certified AROs and REEs, BB&T would be criticized for an inappropriate appraisal and evaluation program by the federal regulators. [SUMF, ¶ 168.]

Furthermore, if an ARO or REE "gets it wrong" in his or her role as such (even on a single transaction), it creates the potential for substantial risk to BB&T and includes, by way of example and not limitation, regulatory/compliance risk, financial and credit risk, reputational risk, operational risk, the overextension of funds, inappropriate valuation functions, and the risk of regulatory criticism. [SUMF, ¶¶ 164, 165, 167]. See 29 C.F.R. § 541.200(b) (considering "whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business.").

Accordingly, as the ARO and REE positions meet all prongs of the administrative exemption test, Plaintiffs were properly classified as exempt employees under the FLSA, and they are not entitled to overtime compensation. Therefore, Defendant is entitled to summary judgment on Plaintiffs' FLSA claims.

2. Alternatively, The ARO/REE Positions Fall Within The Learned Professional Exemption Of The FLSA.

The learned professional exemption requires that the employees' "primary duty . . . be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized instruction." 29 C.F.R. § 541.301(a). To determine whether an employee qualifies for the exemption, the following requirements must be met: (1) the employee must be compensated on a salary basis at a rate of not less than $455 per week; and (2) the employee's primary duties consist of (a) "work requiring advanced knowledge," (b) "in a field of science or learning," and (c) the "advanced knowledge must be customarily acquired by a prolonged course of specialized instruction." 29 C.F.R. §§ 541.300 and 541.301(a)(1)-(3).

Again, there is no dispute that AROs and REEs were paid at least $455 per week to meet the salary threshold.[11] Moreover, for the reasons set forth below, the undisputed facts demonstrate that the AROs and REEs satisfy each remaining element as a matter of law.

A. AROs'/ REEs' Work Requires Advanced Knowledge.

"Work requiring advanced knowledge" means work "which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment." 29 C.F.R. § 541.301(b). Furthermore, "[a]n employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret, or make deductions from varying facts or circumstances." Id.

The discretion and judgment standard for the professional exemption is "less stringent" than the discretion and independent judgment standard of the administrative exemption.

[11] See SUMF, ¶¶ 34, 81; see also Plaintiffs' Brief in Support of Partial Motion for Summary Judgment (Dkt. No. 60-1), p. 23 (stating that the salary-basis test is "not at issue here.").

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, the Preamble to the 2004 Final Rule, 69 Fed. Reg. 22122, 22151 (Apr. 23, 2004). The professional exemption is characterized by "app[lication] [of] special knowledge or talents with judgment and discretion." Id. (quoting 29 C.F.R. § 541.305(b)).

"[W]orkers apply discretion in the application of advanced knowledge when they interpret and analyze information central to the practice of the profession." Pippins v. KPMG, LLP, 759 F.3d 235, 250-251 (2d Cir. 2014). See e.g. Piscione v. Ernst & Young, LLP, 171 F.3d 527, 543, 545 (7th Cir. 1999) (human resources consultant who dealt with financial planning and performed "both routine and complex tasks . . . [and] frequently . . . exercise[d] discretion with regard to the analysis of data," was a learned professional because "[a]n employee may be required to collect information, but would still be within the professional exemption if he had to interpret that data, as well").[12]

Here, there is no dispute that AROs and REEs regularly rely on advanced knowledge of appraisal practices, and they practice that judgment and discretion characteristic of their profession. To that end, AROs' work consists of reviewing appraisal reports to confirm that the value is reasonable and reliable for loan underwriting and that the appraisal is in compliance with USPAP. [SUMF, ¶ 35.] In doing so, AROs must interpret and analyze data to determine

[12] Furthermore, "workers may be found to exercise professional judgment even when their discretion in performing their core duties is constrained by formal guidelines, or when ultimate judgment is deferred to higher authorities." Pippins, 759 F.3d at 243. See e.g. Oswley v. San Antonio Independent School District, 187 F.3d 521, 527 (5th Cir. 1999) (athletic trainers did not lack discretion and judgment even though they performed duties within "standard treatment guidelines" and "act[ed] under the supervision and the direction of the team physician" because there was "no immediate expectation of physician intervention" and "no evidence that the physicians supervise the trainers' activities at all times, or even most of the time. Instead, trainers exercised discretion through making discrete decisions dependent on specialized knowledge").

whether the appraisal information received from the appraiser is reasonable and supportable, and the quality of work is sufficient. [Id., ¶¶ 44, 54.] Similarly, REEs' work consists of valuing real estate used as collateral in commercial lending, which requires REEs to independently research and analyze data related to comparables and other trends on a particular real estate market to reach an opinion of value. [Id., ¶¶ 83, 87-107.] Plaintiffs could do none of this without utilizing their advanced knowledge about real estate markets and appraising.

B. Real Estate Appraisal Is A Field Of Science Or Learning.

Pursuant to applicable regulations, the phrase "field of science or learning," includes "occupations that have a recognized professional status." 29 C.F.R. § 541.301(c). Federal and state law requires that appraisers are state licensed/certified and comply with professional standards similar to other "traditional" professionals. [SUMF, ¶¶ 9-29.] See 29 C.F.R. § 541.301(c) ("field of science or learning" includes the "traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy, and other similar occupations").

It is undisputed that AROs and REEs (as licensed/certified appraisers) perform valuable professional services for BB&T. It is also undisputed that to be able to perform these valuable, professional services, these AROs and REEs must rely upon and know highly specialized appraisal methodologies and principles. [SUMF, ¶¶ 37, 85-86.] Therefore, AROs and REEs perform work "in a field of science or learning."

C. AROs/REEs Require A Specialized Course Of Study.

Finally, the phrase "customarily acquired by a prolonged course of specialized intellectual instruction" means "professions where specialized academic training is a standard prerequisite for entrance into the profession." 29 C.F.R. § 541.301(d). See Pignataro v. Port

Authority of New York and New Jersey, 593 F.3d 265, 269 (3d Cir. 2010) ("Although a college or other specific degree may not be *per se* required to qualify as a "learned professional," it is clear that employees must possess knowledge and skill 'which cannot be attained at the high school level' and which has been obtained through 'prolonged study.'") (internal and external citations omitted).

Here, the vast majority of the Plaintiff AROs and REEs required a prolonged, specialized education in appraising to fulfill their roles at BB&T, in that eleven (11) of the twelve (12) Plaintiffs held state appraisal certification/licenses. [See Section I.2, *supra*.][13] See e.g. Pippins, 759 F.3d at 250-251 (holding that Audit Associates hired by KPMG were professionally exempt because they were generally required to be either eligible or nearly eligible to become licensed as Certified Public Accountants); Oswley, 187 F.3d at 521 (holding that athletic trainers were professional, in light of Texas' requirement that trainers obtain a Bachelor's degree in *any* field,

[13] That a single REE did not have a Bachelor's Degree, or that another single REE did not have a state certification/license is not dispositive. See 29 C.F.R. § 541.301(d) ("[T]he word customarily means that the exemption is also available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. Thus, for example, the learned professional exemption is available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry."); see also Pippins, 759 F.3d at 250-251 ("[T]he critical inquiry is not whether there might be a single Audit Associate who does not satisfy a specific set of academic requirements, but whether the 'vast majority' of Audit Associates required a prolonged, specialized education to fulfill their role as accountants. . . [W]e reject plaintiffs' argument that KPMG's willingness to hire 'even one Audit Associate who did not have an accounting degree,' creates a material fact issue regarding whether Audit Associates 'required advanced accounting knowledge.'") (internal citations omitted)); Rutlin v. Prime Succession, Inc., 220 F.3d 737, 742 (6th Cir. 2000) ("The fact that Rutlin was not required to obtain a bachelor's degree fails to persuade us otherwise. The FLSA regulations do not require that an exempt professional hold a bachelor's degree; rather the regulations require that the duties of a professional entail advanced, specialized knowledge."); Stevins v. Provident Const. Co., 137 Fed. Appx. 198 (11th Cir. 2005) ("The FLSA regulations do not require that an exempt professional hold a bachelor's degree; rather the regulations require that the duties of a professional entail advanced, specialized knowledge.")

but also take courses such as anatomy and physiology, perform a three-year apprenticeship, and obtain CPR certification); Rutlin, 220 F.3d at 742 (licensed funeral director and embalmer must have advanced, specialized knowledge in order to perform his duties).

Indeed, to obtain those certifications/licenses, the Plaintiffs had to complete a specialized curriculum directly related to real estate appraising. [See Section I.2, *supra*.] This, in and of itself, is enough to satisfy the professional exemption. 29 C.F.R. § 541.301(f) (accrediting and certifying organizations "may develop similar specialized curriculums and certification programs which, if a standard requirement for a particular occupation, may indicate that the occupation has acquired the characteristics of a learned profession."). It is undisputed that these appraisal licenses/certifications relate specifically to Plaintiffs' primary duties as AROs and REEs.

Accordingly, as the ARO and REE positions meet all prongs of the professional exemption test, Plaintiffs were properly classified as exempt employees under the FLSA, and Defendant is entitled to summary judgment on Plaintiffs' FLSA claims for this alternative reason.

3. Opt-In Plaintiff Ralph Pena III Satisfies The Highly-Compensated Employee Exemption.

Under the "Highly-Compensated Employee" provision,[14] an employee will qualify as an exempt, "highly compensated employee" if he: (1) receives a weekly salary of at least $455; (2) receives total annual compensation (or if he receives a pro rata portion of the $100,000 for the portion of the 52-week period that they worked) of at least $100,000; (3) primarily performs office or non-manual work; and (4) "customarily and regularly performs any ***one*** or more of the

[14] Because Opt-In Pena was last employed by BB&T on June 12, 2015, all citations to 29 C.F.R. § 541.601 are to the version that was in effect prior to December 1, 2016.

exempt duties or responsibilities of an executive, administrative or professional employee … ." 29 C.F.R. § 541.601(a) (effective through Nov. 30, 2016) (emphasis added).

Here, at all relevant times, Opt-In Plaintiff Ralph Pena, III, met all four (4) criteria and, thus, qualified for exemption status. He was paid a salary in excess of $455 per week, and his total compensation exceeded $100,000 (or a pro rata portion thereof) effective for years 2013 through his separation in 2015 [SUMF, ¶¶ 81, 82.]. His duties as a REE consisted primarily of non-manual work, and as set forth *supra*, he customarily and regularly performed ***at least one*** of the exempt duties or responsibilities of an administrative employee. On every single evaluation, Opt-In Plaintiff Pena performed research, engaged in due diligence, and collected and analyzed information regarding the real estate collateral as part of Defendant's legal and regulatory compliance for loan underwriting. Furthermore, for all of the reasons already discussed above, Opt-In Plaintiff Pena customarily and regularly performed ***at least one*** of the exempt duties or responsibilities of a professional employee. Accordingly, Defendant is entitled to summary judgment on Opt-In Plaintiff Pena's FLSA claims for this alternative reason.

4. Plaintiff Karali's State Law Claim Fails For The Same Reasons.

The NJWHL, like the FLSA, includes both an administrative and professional exemption to its overtime compensation requirements. See N.J.A.C. 12:56-7.1 ("Any individual employed in a bona fide . . . administrative, professional, . . . capacity shall be exempt from the overtime requirements.") Indeed, the "NJWHL is patterned after the FLSA, and New Jersey courts look to the FLSA regulations for guidance." Garcia v. Freedom Mortg. Corp., 790 F. Supp. 2d 283, 288 (D.N.J. 2011) (internal citations omitted). See also Cooper v. Green Pond Animal Care Center, 2015 WL 3385541, *2 (D.N.J. May 22, 2015) (recognizing that NJWHL adopts federal regulations defining categories for professional and administrative exemptions). Accordingly,

for the reasons set forth above, Plaintiff Karali was properly classified as exempt under the NJWHL, and Count II fails as a matter of law.

5. Opt-In Plaintiff Jared Harrison Must Be Dismissed From This Action Because He Did Not File A Proper Consent Form.

The FLSA requires that a plaintiff to an FLSA collective action "gives his consent in writing to become such a party." 29 U.S.C. § 216(b). Opt-In Jared Harrison submitted a Consent Form to Join Lawsuit and Declaration which includes an electronic signature. [SUMF, ¶ 72.] But, critically, the Court Order Approving Joint Stipulation to Conditional Certification and Amended Proposed Notice Under the Fair Labor Standards Act never authorized putative class members to execute their consent forms via an electronic signature. [SUMF, ¶ 73.] While parties can request, through the proposed notice process,[15] that opt-in forms containing electronic signatures are permitted, Plaintiffs requested no such thing here. Accordingly, Opt-In Plaintiff Harrison's consent form is insufficient to join him as a plaintiff. Thus, he should be dismissed or stricken from participating in this collective action.

6. Plaintiffs' FLSA Claims Cannot Extend Beyond The Two-Year Statute of Limitations Period Because There Is No Evidence Of Any Willful Violation.

The FLSA prescribes a two (2) year period of limitations for misclassification claims unless the claims arise out of a "willful violation." See 29 U.S.C. § 255(a). Where a willful violation occurs, the statute of limitations is extended to three (3) years. Id. To warrant application of the three-year statute of limitations, a plaintiff must provide evidence that the

[15] See e.g. White v. Integrated Electronic Technologies, Inc., 2013 WL 2903070, *9 (E.D. La. June 13, 2013) (in reviewing proposed notice to putative class members, court approved plaintiffs request to allow class members to execute electronic consent forms); cf. Cardoza v. Bloomin' Brands Inc., et al., 2014 WL 5454178, *6 (D. Nev. Oct. 24, 2014) (denying electronic signatures where putative plaintiffs' ability to return the opt-in form by mail, fax, and email would "more than facilitate their communication of their intent to join this lawsuit").

employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133 (1988).

The Third Circuit Court of Appeals recently clarified what constitutes a willful violation necessary to trigger the third year of liability under the FLSA. In Souryavong v. Lackawanna County, the Court held that "awareness of the FLSA on a basic level" was not enough to establish willfulness, and "[w]illful FLSA violations require a more specific awareness of the legal issue." 872 F.3d 122, 126 (3d Cir. 2017); see also id. at 126 ("Acting only 'unreasonably' is insufficient –some degree of actual awareness is necessary.") Second, the Court held that for an FLSA violation to be willful, it "must have a degree of egregiousness." Id. at 127.

In the case at bar, no willful violation can be found. Indeed, the classification decision at issue was the product of a thorough review led by Ms. Morris, an employee within BB&T's Human Services department who had received specific training on the FLSA. [SUMF, ¶¶ 173-174.] To gain a full understanding of the job duties and responsibilities performed by AROs and REEs, Ms. Morris conducted interviews with several management personnel, issued and reviewed written questionnaires regarding those duties and responsibilities, and consulted information regarding similar jobs in the marketplace. [Id., ¶¶ 175-177]. Based on all of this research, Ms. Morris concluded that the ARO and REE positions could be properly classified as exempt under the FLSA. [Id., ¶ 178.] Her conclusion, notably, was then subjected to scrutiny and peer review within BB&T's Human Systems department. [Id., ¶¶ 179-80.] Accordingly, to the extent the Court does not grant Defendant's summary judgment on the FLSA claims, Defendant is nevertheless entitled to partial summary judgment that the limitations period is limited to two (2) years. McLaughlin, 486 U.S. at 134 n. 13 ("If an employer acts reasonably in determining its legal obligation, its action cannot be deemed willful.") See Pignataro, 2008 WL

2625356, at *3 (holding that employer acted reasonably where it conducted extensive research before concluding that pilots could be characterized as professional employees).

7. Plaintiffs' Are Not Entitled To Liquidated Damages Because Defendant Acted Reasonably and In Good Faith.

Finally assuming, *arguendo*, that the ARO and REE positons were misclassified, Defendant respectfully submits that liquidated damages should not be awarded because the misclassification(s) giving rise to this lawsuit was/were made in good faith and there were reasonable grounds to believe that the AROs and REEs should be classified as exempt employees under the FLSA. See 29 U.S.C. § 260; cf. Johnson v. Big Lots Stores, Inc., 604 F. Supp. 2d 903, 925 (E.D. La. 2009) ("The purpose of section 260 is to allow the court to lessen the harshness of the liquidated damages provision by imposing merely compensatory damages."). In order to satisfy its burden in demonstrating that its actions were taken in good faith, and its belief reasonable, an employer "must show that [it] took affirmative steps to ascertain the [FLSA]'s requirements, but nonetheless, violated its provisions." Martin v. Cooper Elec. Supply Co., 940 F.2d 896, 908 (3d Cir. 1991). For the same reasons discussed in Section IV.7, *supra*, Defendant has shown that it acted in good faith.[16]

V. CONCLUSION

For the foregoing reasons, Defendant Branch Banking and Trust Company respectfully requests that the Court enter summary judgment in Defendant's favor, and dismiss Plaintiffs' Collective Action Complaint in its entirety with prejudice.

[16] At no point in this process can it be said that BB&T somehow "remain[ed] blissfully ignorant of FLSA requirements." Hawks v. City of Newport News, Va., 707 F. Supp. 212, 217 (E.D. Va. 1988)(no liquidated damages awarded) ("The Court finds that the defendant made a conscientious effort to comply with the FLSA by conducting the two studies of the executive status of fire captains and lieutenants. As a result of these two studies, the defendant had reasonable grounds for believing that the denial of overtime compensation to plaintiffs was not a violation of the FLSA.").

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 2018, a true and correct copy of the foregoing document was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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