UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:15-cv-24542-GOODMAN [Consent Case]

RICHARD L. FOWLER, GLENDA KELLER, and YVONNE YAMBO-GONZALEZ on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

CALIBER HOME LOANS, INC. individually and as successor-in-interest to Vericrest Financial and Caliber Funding, and AMERICAN SECURITY INSURANCE COMPANY,

Defendants.
____/

NOTICE OF FILING PROPOSED ORDER
DENYING DEFENDANTS' MOTIONS TO DISMISS

Plaintiffs give notice of filing their proposed order denying Defendants' motions to dismiss, pursuant to this Court's Administrative Order of May 17, 2016 [ECF No. 68]. The proposed order is attached as **Exhibit A**.

Respectfully submitted this 24th day of June, 2016.

By: /s/ Adam M. Moskowitz

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was filed electronically via CM/ECF on the 24th day of June, 2016 and served by the same means on all counsel of record.

By: /s/ Adam M. Moskowitz

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ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS

INTRODUCTION

The main issue before the Court is whether the filed-rate doctrine bars Plaintiffs' claims as a matter of law. The parties' counsel have been litigating lender-placed or "force-placed" insurance class actions for more than five years, mostly before this Court. Different judges within this district have decided this issue, all holding that the doctrine does not bar the alleged claims,[1] prior to a recent ruling by the Second Circuit in *Rothstein v. Balboa Insurance Co.,* 794 F.3d 256 (2d Cir. 2015). Since then, two judges have applied the doctrine.[2] The Eleventh Circuit has yet to address the specific issue.

In its analysis, the Court considered the parties' extensive briefs and conducted a four-hour hearing discussing all aspects of the filed-rate doctrine. The key to the Court's analysis is not simply to accept the parties' terms and labels (such as what is a "commission"), but instead to go behind these labels and understand the larger picture as to how these terms are actually utilized and applied in the real world. It is only with that understanding that the Court concludes, as explained below, that the filed-rate doctrine *does not* apply under the facts alleged in this case.

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[1] *See Abels v. JPMorgan Chase Bank, N.A.,* 678 F. Supp. 2d 1273 (S.D. Fla. 2009); *Kunzelmann v. Wells Fargo Bank, N.A.*, No. 11-cv-81373, 2012 WL 2003337 (S.D. Fla. June 4, 2012); *Saccoccio v. JP Morgan Chase Bank, N.A.*; No. 13-cv-21107; *Fladell v. Wells Fargo Bank, N.A.*, No. 13-cv-60721; *Diaz v. HSBC Bank (USA), N.A.*, No. 13-cv-21104; *Popkin v. Citibank, N.A.*, No. 13-cv-60722; *Montoya v. PNC Bank, N.A.*, No. 14-cv-20474, 2014 WL 4248208 (S.D. Fla. Aug. 27, 2014); *Jackson v. U.S. Bank, N.A.*, 44 F. Supp. 3d 1210 (S.D. Fla. 2014); *Circeo-Loudon v. Green Tree Servicing, LLC,* No. 14-cv-21384, 2015 WL 1914798 (S.D. Fla. Apr. 27, 2015); *Wilson v. Everbank, N.A.*, 77 F. Supp. 3d 1202 (S.D. Fla. 2015); *Almanzar v. Select Portfolio Servicing*, *Inc.,* No. 14-cv-22586, 2015 WL 1359150 (S.D. Fla. Mar. 24, 2015).

[2] *See Trevathan v. Select Portfolio Servicing, Inc.*, No. 15-cv-61175 (J. Dimitrouleas) (Plaintiffs' counsel in *Trevathan* had no experience in lender-placed insurance cases and barely attempted to defend their claims—their response on the filed-rate doctrine spanned less than one page); *Patel v. Specialized Loan Servicing*, No. 15-cv-62600 (J. Cohn) (dismissing case based upon filed-rate doctrine without conducting an oral argument on the matter).

LEGAL STANDARD

To survive a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (citations omitted).

A court reviewing a Rule 12(b)(6) motion to dismiss must construe the complaint in the light most favorable to the plaintiff and take all factual allegations as true. *See Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997). A court's analysis "is limited primarily to the face of the complaint and the attachments thereto." *Id.* at 1368. The court may also consider other documents to be part of the pleadings if the plaintiff refers to the documents in the complaint and those documents are central to the plaintiff's claim. *Id.* at 1369.[3]

LEGAL ANALYSIS

This Court has already written extensively about the background of these lender-placed cases. Plaintiffs here raise claims challenging the Defendants' conduct with regard to lender-placed or "force-placed" insurance. [ECF No. 1.] This matter is before the Court on Caliber Home

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[3] Defendants suggest that the question of the application of the filed rate doctrine is an issue of standing triggering Rule 12(b)(1) review. [Hrg. Tr. 15:5-17.] This Court finds that application of the doctrine does not invoke questions of standing. *See, e.g., Hoover v. HSBC Mortg. Corp. (USA)*, 2014 U.S. Dist. LEXIS 40743, at *22-24 (stating same and citing authority). Defendants have also argued that the Court should take judicial notice of the rate filings. The Court declines to do so because they are irrelevant to Plaintiffs' alleged claims. *See, e.g., Couch v. Broward Cty.*, No. 11-62126-CIV, 2012 WL 2007148, at *1 (S.D. Fla. June 5, 2012) (declining to take judicial notice of irrelevant documents) (citations omitted). Plaintiffs clearly state that they do not, and will never during this litigation, challenge any of ASIC's filed rates.

Loans, Inc.'s ("Caliber") and American Security Insurance Company's ("ASIC") motions to dismiss the Complaint [ECF Nos. 22, 23]. This is the fourth lender-placed class action to be brought before this Court and extensive briefing was submitted in three of those matters on these specific issues.

The basic facts in this case are not disputed. Residential mortgagors are required by the terms of their mortgage contracts to maintain hazard insurance coverage on the properties securing their loans. When the mortgagor does not maintain the insurance, the lender is authorized by the mortgage contract to purchase new insurance to protect its interest in the property. Plaintiffs Fowler, Keller, and Yambo-Gonzalez allege that Caliber and ASIC entered into an exclusive arrangement by which they charged borrowers amounts for lender-placed insurance beyond the cost of actual coverage, in violation of their mortgage agreements with Caliber, the covenant of good faith and fair dealing implied in those contracts, and the federal Racketeer Influenced and Corrupt Organizations ("RICO") and Truth in Lending statutes ("TILA"). Plaintiffs also contend that Defendants were unjustly enriched, and that ASIC tortiously interfered with Plaintiffs' mortgage contracts.

The Court notes at the start that the New York Department of Financial Services ("NYDFS") reached a settlement with ASIC and its affiliated companies by which the insurers were prohibited from continuing these practices in New York and even returned the charges to certain borrowers in New York. [D.E. 1 ¶ 8.] Fannie Mae has also issued guidelines to deter mortgage lenders and servicers from collecting these specific types of charges when seeking reimbursement from lenders, and has thus taken steps to ensure that it will no longer reimburse lenders and servicers for charges like those challenged here. This suggests that these charges are wrongful, and that borrowers should be allowed to recover them.

Plaintiffs allege they brought this action mainly to help Caliber homeowners recover specific losses they suffered as a direct result of Defendants' charging these unreasonable kickbacks during the class period and to prevent Caliber and ASIC from continuing to pursue these practices. Class members in other FPI litigation (most involving ASIC) have already received checks for thousands and even tens of thousands of dollars in settlements arising from similar litigation for this same alleged misconduct. *See Montoya v. PNC Bank, N.A.,* No. 14-cv-20474, 2016 WL 1529902, at *14 (S.D. Fla. Apr. 13, 2016) (citing checks for $43,302.50, $22,066.77, and in other amounts equaling thousands and more than ten thousand dollars paid out for the same alleged misconduct).

I. THE FILED-RATE DOCTRINE DOES NOT BAR PLAINTIFFS' CLAIMS.

Defendants contend the filed-rate doctrine prohibits any causes of action that challenge rate determinations by state or federal ratemaking authorities. [ECF No. 22 at 7-12; ECF No. 23 at 4-8]. They claim that the filed-rate doctrine bars Plaintiffs' claims because Plaintiffs purportedly challenge ASIC's insurance rates as excessive, and a judgment in Plaintiffs' favor, they say, would require the Court to adjust its rates. [*Id.*].

Plaintiffs contend that rates need not be adjusted should they prevail because ASIC's rates are set for commercial-line insurance policies designed for purchase by mortgage lenders like Caliber, which pay and will continue to pay premiums based on ASIC's filed rates regardless of the result here. [ECF No. 47 at 4-12.] Plaintiffs argue that once Caliber paid the full premium based on a filed rate that is the same for all of ASIC's lender or servicer partners, ASIC paid sums back to a Caliber affiliate as gratuitous kickbacks, disguising these kickbacks by labeling them as "commissions" or a "qualified expense reimbursements"; Caliber, however, still charges the borrower for the full cost of coverage plus the kickback. [*Id.*]. Caliber's conduct, Plaintiffs contend, violates the terms of their mortgage agreements, which allow Caliber to charge only for its cost of coverage. Plaintiffs argue that this conduct falls beyond the filed-rate doctrine's reach.

The parties cite conflicting authority from the Second and Third Circuits governing whether the filed-rate doctrine bars claims like those raised by Plaintiffs here. Last year, in *Rothstein v. Balboa Insurance Co.*, the Second Circuit reversed a New York district court and applied the doctrine to dismiss a force-placed insurance class action that involved an insurance carrier, but not their service partner. The *Rothstein* opinion stands in direct conflict with the Third Circuit's 2009 opinion in *Alston v. Countrywide Fin. Corp.*, where the Third Circuit Court of Appeals found it "absolutely clear" that the filed-rate doctrine did not apply to similar kickback scheme. Numerous district courts in both the Third and Second Circuits have followed their respective controlling authority. This Court's task, however, is not to determine whether the Second or the Third Circuit takes the more reasonable approach; this Court must instead determine how the Eleventh Circuit would decide the issue. Having reviewed the law in this Circuit and the facts presented, and conducted an extensive hearing on the issues, the Court concludes that the Eleventh Circuit would not apply the filed-rate doctrine to bar Plaintiffs' asserted claims.

The Eleventh Circuit has "emphasized the limited scope of the filed rate doctrine to preclude damage claims only where there are validly filed rates." *Florida Mun. Power Agency v. Fla. Power & Light Co.*, 64 F.3d 614, 616 (11th Cir. 1995). Most notably for the Court's purposes here, the Eleventh Circuit has never applied the filed-rate doctrine to bar claims against a defendant who was not subject to regulation with respect to the rate at issue, nor has it ever applied the doctrine to preclude claims brought by anyone *other than* the direct ratepayer. *See, e.g., Pfeil v. Sprint Nextel Corp.*, 284 Fed. App'x 640 (11th Cir. 2008) (customer challenge to interstate access surcharge by telecommunications carrier); *Hill v. Bellsouth Telecomm., Inc.*, 364 F.3d 1308 (11th

Cir. 2004) (customer challenge to service charge by telecommunications carrier); *Taffet v. Southern Co.*, 967 F.2d 1483 (11th Cir. 1992) (private suit by utility customers to recover excessive charges for electrical power and "be[] charged a lower rate than they were actually charged").

The Eleventh Circuit's reasoning on the doctrine also advises against its application here. "The filed rate doctrine dictates that the rates a carrier charges its customers, once filed with and approved by [government regulators], become 'the law' and exclusively govern the rights and liabilities of the carrier to the *customer*[.]" *Hill*, 364 F.3d at 1315 (citation omitted); *see also, e.g., Evanns v. AT & T Corp.,* 229 F.3d 837, 840 (9th Cir.2000) ("Under the doctrine, once a carrier's tariff is approved by [a state or federal agency], the terms of the federal tariff are considered to be 'the law' and to therefore 'conclusively and exclusively enumerate the rights and liabilities' *as between the carrier and the customer*.") (emphasis added).[4]

Plaintiffs argue persuasively that the filed rates in this case, once approved by state insurance regulators, do *not* govern ASIC's "rights and liabilities" with respect to Caliber's homeowner borrowers; they instead govern the insurer's relationship with *Caliber*, the party (and direct customer) that negotiated the terms of coverage. Plaintiffs explain that ASIC does not issue individual policies to Caliber borrowers; it issues a master policy to *Caliber* to cover the lender's entire portfolio of mortgage loans for a period of years. [ECF No. 1 ¶¶ 27, 30, 44.] The master policy is a commercial policy between lender and insurer and is filed and approved as such; the terms are negotiated and the rates set *for payment by Caliber* <u>before</u> any individual borrower's coverage has lapsed. [*Id.* ¶¶ 27-34, 44.] ASIC charges Caliber a premium based on the commercial

[4] Notably, the *customer* is charged with notice of the filed rate and its terms, *Pfeil*, 284 Fed. App'x at 642, having voluntarily entered into an arrangement governed by the filed rate.

rate, and later "kicks back" a portion of the premium to Caliber, thus giving Caliber a gratuitous rebate on the cost of coverage. [*Id.* ¶¶ 30-46.] As this court explained in *Wilson*:

> Plaintiffs are not the "ratepayers" for whom the commercial-line rates applied by [insurers] ASIC and SGIC were approved and who would, therefore, be barred from challenging those rates as unreasonable under the filed-rate doctrine. As Plaintiffs allege and as counsel for the Insurer Defendants described in detail at oral argument on the Motions, the rates which eventually informed the insurance costs charged to Plaintiffs were approved in the context of the group master policies procured by EverBank from ASIC and SGIC. That is, *EverBank,* not Plaintiffs, is the ratepayer on the force-placed policies—at least with respect to the filed-rate doctrine.

77 F. Supp. 3d at 1234; *see also, e.g., Ellsworth v. U.S. Bank, N.A.*, 30 F. Supp. 3d 886, 910 (N.D. Cal. 2014) ("Plaintiffs do not challenge the rates … and they are not the ratepayers.").

Caliber is the ratepayer here; the filed-rate doctrine would preclude *Caliber* from challenging ASIC's approved rates. *See, e.g., Hill*, 364 F.3d at 1315 ("*[C]ustomers* are … charged with notice of the terms and rates set out in th[e] filed tariff and may not bring an action against a carrier that would invalidate, alter or add to the terms of the filed tariff.") (emphasis added).[5] This is reflected in Plaintiffs' pleadings, which do not challenge ASIC's filed rates, but instead Caliber's decision to seek out an insurer that would provide it the most incentives in "kickbacks" and to charge borrowers more than its actual cost of coverage. Because this conduct is not regulated by any governmental authority, claims challenging it are beyond the filed-rate doctrine's reach. *See, e.g., Gallo v. PHH Mortg. Corp.*, 916 F. Supp. 2d 537, 546 (D.N.J. 2012) (amounts billed for cost of insurance agreement between lender and insurer not subject to regulatory scheme "in the same

[5] Correspondingly, state insurance regulations cited by Defendants [Hrg. Tr. 62:24-64:7, 72:17-73:17] provide an administrative remedy for *ratepayers* who take issue with filed rates. *See, e.g., Montoya*, 2014 WL 4248208, at *6. These statutes, however, provide no recourse for borrowers challenging a *mortgage lender*'s conduct in charging more than the cost of coverage allowed by contract. *See id.* Indeed, should the Court apply the doctrine here, Plaintiffs would have no recourse against Caliber, which, according to the Complaint, retains a considerable portion of the charges Plaintiffs allege to be illegal. This result defies logic.

way that insurance rates are"); *Simpkins v. Wells Fargo Bank, N.A.*, 2013 WL 4510166, at *14 (S.D. Ill. Aug. 26, 2013) ("Plaintiffs should not be barred under the filed-rate doctrine from challenging conduct which is not otherwise addressed by a governing regulatory agency[.]"); *Abels*, 678 F. Supp. 2d at 1277 (declining to apply doctrine "because the bank is not subject to the extensive administrative oversight that insurance companies are").

This line of reasoning and logic drove the Third Circuit's opinion in *Alston*. There, the plaintiffs alleged that their mortgage lender, Countrywide, had accepted kickbacks from a private mortgage insurer by way of a Countrywide affiliate through a sham reinsurance scheme. *See Alston*, 585 F.3d at 757. Countrywide "accepted a portion of the PMI [private mortgage insurance] premiums but provided no services in return[,]" which resulted in overcharges to the plaintiffs for PMI. *Id.* Defendants raised the filed-rate doctrine because the rates used to calculate PMI premiums had been filed with state regulators; the plaintiffs countered that they had (1) "challenge[d] the payment of kickbacks, not the rates they [had] paid for PMI[;]" and (2) "challenge[d] only the commission of conduct proscribed by RESPA, such that the existence of a filed rate … [wa]s irrelevant." *Id.* at 764. The Court held that it was "*absolutely clear* that the filed-rate doctrine simply d[id] not apply … [because] Plaintiffs [had] challenge[d] Countrywide's allegedly wrongful conduct, not the reasonableness or propriety of the rate that triggered that conduct." *Id.* at 765 (emphasis added).

Defendants contend that *Alston* is inapposite, primarily because the plaintiffs' claims were for violation of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607. This Court finds, as do the plethora of district court cases that have followed *Alston* in the Third Circuit, that the kickback schemes described in *Alston* and Plaintiffs here are sufficiently similar for the analogy to hold, and finds opinions holding otherwise to be unpersuasive. The court in *Patel v.*

Specialized Loan Servicing LLC, No. 15-62600-CIV, 2016 WL 1663827 (S.D. Fla. Apr. 25, 2016), for example, distinguished *Alston* on the ground that it involved claims for violation of RESPA, which creates a "unique statutory cause of action." 2016 WL 1663827, at *4. But *Alston*'s reasoning did not focus on any specific aspect of RESPA, but instead focused on the challenge raised by the claims alleged. The court relied on a district court opinion to support its conclusion:

> Statutes like RESPA are enacted to protect consumers from unfair business practices by giving consumers a private right of action against service providers. Plaintiffs may not sue under the veil of RESPA if they simply think that the price they pay for their settlement services was unfair. Alternatively, plaintiffs bringing a suit under RESPA may allege a violation of fair business practices through the use of illegal kickback payments. The filed-rate doctrine bars suits from the former class of plaintiffs and not the latter.

Alston, 585 F.3d at 764 (quoting *Kay v. Wells Fargo & Co.*, 247 F.R.D. 572, 576 (N.D. Cal. 2007)).

By this logic, claims brought under the statute that directly challenge filed rates are barred by the filed-rate doctrine; those that attack the defendants' business practices can overcome the defense. *See id.* at 765 (doctrine did not apply because "Plaintiffs challenge[d] Countrywide's allegedly wrongful conduct, not the reasonableness or propriety of the rate that triggered that conduct"). Three years later, the district court in *Gallo*, *supra*, specifically applied *Alston* to force-placed insurance claims as well, and many others followed suit. *See, e.g., Gallo*, 916 F. Supp. 2d at 544 (finding *Alston* persuasive despite factual distinctions); *Laffan v. Santander Bank, N.A.*, No. CIV.A. 13-4040, 2014 WL 2693158, at *4 (E.D. Pa. June 12, 2014) ("[T]he Third Circuit made clear in *Alston* that "the filed rate doctrine simply does not apply" in circumstances where, as here, a plaintiff challenges the defendant's allegedly wrongful conduct, not the reasonableness of the rate."); *Xi Chen Lauren v. PNC Bank, N.A.*, No. 2:13-CV-762, 2013 WL 5565511, at *5 (W.D. Pa. Oct. 8, 2013) ("In *Alston,* the Court … recognized the distinction between wrongful conduct and rate challenges and held that wrongful conduct claims were not barred by the filed rate doctrine.").

Defendants focus on a single footnote in *Alston* that distinguishes a case involving force-placed insurance. The Court finds this focus not persuasive for many reasons, but primarily because it is based on a misreading of the footnote at issue, which reads:

> The only other case cited by Countrywide for this principal is *Stevens v. Union Planters,* No. Civ. A-CV1695, 2000 WL 331282256 (E.D. Pa. Aug. 22, 2000) where the court dismisses RESPA claims alleging that hazard insurance premiums were excessive and constituted unlawful compensation in the form of kickbacks. Stevens is inapposite because the plaintiff in that case *directly challenged the filed rate as unreasonable*.

Alston, 585 F.3d at 764 n.13.

Defendants here described the footnote as follows:

> Footnote 13, Judge Berry clarifies that her RESPA analysis has no application to overcharged claims and she cites to the Stevens case. And that is an illustration that she makes about a case where the filed rate doctrine does apply. And she explains that in the Stevens case, the Plaintiffs in the case -- and I am quoting her: Directly challenged the filed rate as unreasonable. And why is that important? Because Stevens is an LPI case. So *Alston* distinguishes itself from our situation.

[Hrg. Tr. 6:21-7:6.].

Defendants, however, failed to disclose that just four months after the first *Stevens* opinion, the *same* plaintiff filed a second suit, regarding the *same* mortgage and force-placed insurance, before the *same* judge as in the first *Stevens* case. *See Stevens v. Citigroup, Inc.*, No. 00-cv-3815, 2000 WL 1848593 (E.D. Pa. Dec. 15, 2000). The court in the second *Stevens* case held:

> In support of their Motion, defendants rely upon its Court's decision in *Stevens v. Union Planter's Corporation et al.,* No. Civ. 00-1695 (E.D. Pa. August 20, 2000) to support their Motion to Dismiss in this case. In that case, the plaintiff argued that the force placed insurance premium defendants charged plaintiff was excessive. Thus, when examining plaintiff's Complaint it was clear that plaintiff challenged the excessiveness of the insurance premiums. However, in this case, plaintiff does not appear to challenge the excessiveness of any one rate of insurance. Instead, plaintiff challenges the way in which the defendants' chose the insurance at issue. Thus, the Court will not dismiss all of the plaintiff's claims except his RESPA claim at this time.

2000 WL 1848593, at *3.

The Court notes that the Defendants did not disclose the existence of the second *Stevens* case and this appears not to be the first time they have chosen not to do so. In *Gallo,* the court discussed the same distinction between the two *Stevens* opinions:

> To the extent that Defendant asserts that *Stevens v. Union Planters Corp*.- as opposed to the Third Circuit's opinion in *Alston*-controls here and dictates the results that the filed rate doctrine bars all of Plaintiff's claims, the Court pauses to note that Defendant's failure to cite a related case, *Stevens v. Citigroup, Inc.* (citation omitted)… The court in Citigroup found that Citigroup had inaccurately characterized the plaintiff's complaint as one challenging the insurance purchased on the plaintiff's behalf as excessive in order to rely on the filed rate doctrine.

916 F. Supp. 2d at 544.

Defendants also argued for dismissal under the filed-rate doctrine of similar claims before this Court in *Beber v. Branch Banking & Trust Co.*, No. 15-cv-23294 (S.D. Fla.), and made the same argument regarding Footnote 13:

> Alston actually distinguishes itself from our situation in an LPI case. … Because in footnote 13, Alston clarifies that Judge Barry's limited RESPA analysis has absolutely no application whatsoever to overcharge claims. And it cites the *Stevens* case as an illustration of when the filed-rate doctrine does apply. Now, it says *Stevens* is inapposite. It distinguishing itself from *Stevens,* that's the opposite, Judge Barry's doing that, because the plaintiffs in that case directly challenged the filed-rate as unreasonable. And why is Judge Barry's footnote 13 explanation important? It's because *Stevens* is an LPI case, Your Honor. It's identical to this case, and it makes exactly the same claims as in this case. … So Alston and the Third Circuit opinions simply do not hold what counsel says they hold.

Beber v. BB&T, 15-cv-23294, March 4, 2016 (D.E. 61) Page 35– 36.

In any event, the court in *Alston* held that claims that directly challenged filed rates were barred by the filed-rate doctrine; however, those challenging defendants' business practices instead could overcome the defense. *See id.* at 765 (doctrine did not apply because "Plaintiffs challenge[d] Countrywide's allegedly wrongful conduct, not the reasonableness or propriety of the rate that triggered that conduct"). *Alston* reflects the majority view, which is in keeping with Eleventh Circuit jurisprudence. *Rothstein*, by contrast, fails to persuade. One court effectively distinguished

Rothstein:

> Beyond precedent, however, the Court finds that the Third Circuit's view of the filed rate doctrine in this type of case is the more sound application. The Second Circuit's fear that judicial action would undermine agency rate-making authority without the filed rate doctrine bar, … is not a concern when a mortgagee challenges his mortgage servicer's relationship with the insurer and their scheme of hiding the nature of fees under the guise of regulatory-approved rates. Regardless of the rate charged for LPI, what is being challenged here and in similar cases is not the rate itself, but rather the mortgage servicer's alleged exploitation of its ability to force-place hazard insurance in order to reap additional, unjustified profits in the form of payments disguised as purportedly legitimate fees. The protection of the filed rate doctrine should not be extended to shelter mortgage servicers and their co-conspirator insurers from liability for their fraud, if such fraud can be proven.

Burroughs v. PHH Mortg. Corp. 2016 WL 1389934, at *4 (D.N.J. Apr. 8, 2016).

The Court agrees with this interpretation of *Rothstein*, and does not see the relationship between Plaintiffs and Defendants as the straightforward "A-to-B-to-C" transaction described by the Second Circuit, whereby insurance premiums are simply passed through from the insurer to the borrower through the mortgage lender.[6] Instead, the Court sees two distinct transactions—in the first, ASIC sells a commercial-line master policy to Caliber at a commercial rate to cover its entire portfolio of loans; in the second, once a borrower's individual coverage has lapsed, Caliber decides what to charges its borrowers as the "cost of insurance coverage." [ECF No. 1 ¶¶ 27-34.].

Given this focus, Plaintiffs' claims run afoul of neither the nonjusticiability nor the

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[6] Nor is the Court persuaded by those opinions that have followed *Rothstein*. Two of these opinions, *Clarizia v. Ocwen Fin. Corp.*, 2016 WL 439018 (S.D.N.Y. Feb. 2, 2016), and *Lyons v. Litton Loan Servicing LP*, 2016 WL 413104 (S.D.N.Y. Feb. 2, 2016), issued from the Southern District of New York and were bound by *Rothstein*. In *Trevathan v. Select Portfolio Servicing, Inc.*, No. 15-cv-61175, 2015 WL 6913144 (S.D. Fla. Nov. 6, 2015), the court applied the doctrine only to claims for excess flood insurance—for coverage that is, greater than the noteholder's security interest in the property. 2015 WL 6913144, at *2. But more importantly, the plaintiffs in *Trevathan* barely attempted to defend their claims—their conclusory argument on the filed-rate doctrine spans less than one page. As a result, the bulk of the defendants' substantive argument for the doctrine's application—including their citation to *Rothstein*—went unanswered. *See Trevathan*, No. 15-cv-61175 [ECF Nos. 18, 22, 28, 38, 40]. *See also*, discussion of *Patel*, *supra*.

nondiscrimination principle underlying the filed-rate doctrine. The nonjusticiability principle instructs that courts "should not undermine [] agency rate-making authority by upsetting approved rates[.]" *Rothstein*, 794 F.3d at 261 (citation, quotations omitted; brackets in original). Here, a decision for Plaintiffs would not "overlay" state regulators' determinations on the reasonableness of ASIC's filed commercial rates, because Plaintiffs do not ask the Court to judge the propriety of the amount that ASIC charges to Caliber as part of the "A-to-B" transaction. Should the Court find that Caliber breached its contracts with Plaintiffs, ASIC will not need to adjust its rates at all; it will remain free to charge *Caliber* the same premium based on its filed *commercial* rates. Caliber, however, will only be allowed to charge borrowers the amount that it ultimately paid for coverage. Whatever Caliber decides to charge their customers in this separate transaction is never subject to state nor governmental oversight. *See, e.g., Jackson*, 44 F. Supp. 3d at 1217.

Similarly, this Court's holding cannot violate the nondiscrimination principle, which dictates that "litigation should not become a means for certain ratepayers to obtain preferential rates[.]" *Rothstein*, 794 F.3d at 261 (citations omitted). The reason is simple: by challenging the amounts charged them by Caliber beyond its actual cost of coverage, Plaintiffs do not challenge ASIC's filed commercial rates. *See, e.g., Almanzar*, 2015 WL 1359150, at *2. As a result, Plaintiffs' claims do not threaten the "scheme of uniform rate regulation"—their resolution will not end in Caliber paying a lower rate than similarly situated lenders because the *commercial* rates attached to the master policies are not implicated. This is the playing field on which the filed-rate doctrine prohibits discrimination. *See, e.g., Hill, Inc.*, 364 F.3d at 1316 (nondiscrimination "prevent[s] carriers from engaging in price discrimination *as between ratepayers*" and aims to prevent carrier from favoring one customer over another) (emphasis added).

ASIC also contends that the filed-rate doctrine must apply because commissions and expense reimbursements are disclosed in ASIC's rate filings. As Plaintiffs argue, however, these line items in the rate filings are for *actual* commissions and expenses. The charges of which Plaintiffs complain are allegedly gratuitous kickbacks or rebates that Defendants have *labelled* as commissions and expense reimbursements to lend their scheme an air of legitimacy and avoid judicial review; these gratuitous charges were never approved by state regulators.

This type of word play was previously addressed by this court in *In re Managed Care Litigation*, 150 F. Supp. 2d 1330 (S.D. Fla. 2001) when dealing with the filed rate doctrine. There, the plaintiffs' claims turned on alternate definitions of "medical necessity," and the defendants asserted that their plans were reviewed by state authorities and that the specific alleged misconduct alleged, which depended on a tortured definition of "medical necessity," was authorized by state law. Judge Moreno reasoned:

> [I]n view of the Plaintiffs' allegations, it may be that the definition of "medical necessity" acquires an Alice–in–Wonderland flavor, whereby the managed care insurance company manipulates those words so that they mean one thing within the context of regulatory review but something quite different in actual practice. The Defendants' arguments would require a factual inquiry extending beyond the pleadings to verify whether, how and which practices have been reviewed, certified or statutorily authorized by governmental authorities. Therefore, it would be premature to undertake such an examination at this stage of the case.

Id. at 1345.

As this Court held in *Montoya*, 2014 WL 4248208, at *5-6, and in keeping with *Managed Care,* Plaintiffs' allegations about the alleged kickbacks in this case have no relation and/or impact to the rates filed by ASIC regarding their dealings with their bank/servicer partners and thus the filed rate doctrine is not implicated.[7] The Court is persuaded that claims like

[7] In the least, the true nature of alleged kickbacks by ASIC to Caliber would require additional factual inquiry and thus such inquiry would be premature on a motion to dismiss.

Plaintiffs' do not challenge the filed rates.

A. PLAINTIFFS HAVE STATED CLAIMS FOR VIOLATION OF RICO.

In *Montoya*, this Court considered the plaintiffs' federal RICO claim twice, first dismissing it for failure to sufficiently allege the defendants' participation in the operation or management of the RICO enterprise, *Montoya*, 2014 WL 4248208, at *20-21 (S.D. Fla. Aug. 27, 2014), and then denying motions to dismiss the amended claim, *see Montoya v. PNC Bank, N.A.*, 94 F. Supp. 3d 1293, 13005-20 (S.D. Fla. 2015) ("*Montoya II*"). Plaintiffs' RICO claim is materially identical to the amended claim in *Montoya*, as are Defendants' arguments for its dismissal. Accordingly, the Court denies Defendants' motions to dismiss, and addresses Defendants' arguments briefly below.

A. Plaintiffs Have Alleged That They Were Injured By Reason of Defendants' Scheme.

Both Defendants argue that Plaintiffs have not pled RICO causation. For a civil RICO claim, "proximate cause requires 'some direct relation between the injury asserted and the injurious conduct alleged.'" *Corcel Corp. v. Ferguson Enters., Inc.*, 551 Fed. App'x 571, 576 (11th Cir. 2014) (quoting *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006)). Proximate cause, however, "is generally not amenable to bright-line rules[.]" *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 659 (2008). It is a "flexible concept" evaluated on a case-by-case basis, and turns on the directness of the relationship between conduct and injury, the foreseeability of the plaintiff's injury, and whether the causal connection between the conduct and injury alleged is "logical and not speculative." *Wallace v. Midwest Fin. & Mortg. Servs., Inc.*, 714 F.3d 414, 419 (6th Cir. 2013).

Defendants' first argument is a veiled suggestion that Plaintiffs have not alleged reliance. This Court was clear in *Montoya*, however, that "a plaintiff asserting a RICO claim predicated on mail fraud need not show, *either as an element of its claim or as a prerequisite to establishing proximate causation*, that it relied on the defendant's alleged misrepresentations." 94 F. Supp. 3d at 1308 (emphasis in original; quoting *Bridge*, 553 U.S. at 661). This conclusion derives from basic statutory interpretation: the RICO statute provides a private right of action to "[a]ny person injured in his business or property by reason of a violation of [18 U.S.C § 1962,]" which in turn renders it unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c).

> The upshot is that RICO provides a private right of action for treble damages to any person injured in his business or property by reason of the conduct of a qualifying enterprise's affairs through a pattern of acts indictable as mail fraud. Mail fraud, in turn, occurs whenever a person, "having devised or intending to devise any scheme or artifice to defraud," uses the mail "for the purpose of executing such scheme or artifice or attempting so to do." § 1341. The gravamen of the offense is the scheme to defraud, and any "mailing that is incident to an essential part of the scheme satisfies the mailing element," *Schmuck v. United States,* 489 U.S. 705, 712, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989) (citation and internal quotation marks omitted), even if the mailing itself "contain[s] no false information," *id*., at 715, 109 S.Ct. 1443.

Bridge, 553 U.S. at 647.

Accordingly, to establish a RICO violation predicated on mail fraud, "[a] plaintiff need only show use of the mail in furtherance of a scheme to defraud and an injury proximately caused by that scheme." *Wallace*, 714 F.3d at 420. The relevant question is not whether the plaintiff relied on a fraudulent misrepresentation sent through the mails, "but whether the fraudulent scheme furthered by that [mailing] caused his financial injuries." *Id.*

Plaintiffs allege that Caliber, ASIC, and their affiliates engaged in a fraudulent scheme to compel borrowers to pay more than Caliber had paid ASIC for force-placed insurance. [ECF No. 1 ¶¶ 24-46.] The scheme worked as follows: ASIC would charge Caliber an amount certain for the coverage, which Caliber would then pass on to borrowers under the pretense that it was the "cost of insurance." [*Id.* ¶¶ 48, 64; *see, e.g.,* ECF No. 23-3 at 11.] Defendants did not disclose to borrowers, however, that Caliber's cost of insurance was that amount certain minus *x*, with *x* representing a gratuitous and undisclosed rebate that ASIC kicked back to Caliber after Caliber had paid the initial premium. [ECF No. 1 ¶¶ 3, 25, 34.] In furtherance of the scheme, Defendants mailed letters to borrowers that were designed to lull them into believing the charges were legitimate and represented to borrowers that the "cost of insurance" would likely be higher than the cost of voluntary coverage [ECF No. 23-2 at 11], when borrowers were actually charged more than the cost of coverage; that affiliates of the lender "[m]ight *earn* commissions or income in conjunction with the placement of this coverage[,] when, in fact, neither Caliber nor its affiliates earned the kickbacks paid to them, and ASIC did not pay any Caliber affiliate a true commission for procuring the coverage [ECF No. 23-2 at 195 (emphasis added) ; ECF NO. 1 ¶¶ 32, 33]; and that their "monthly mortgage payments w[ould] be increased to include *the cost of this policy*[,]" when, in fact, mortgage payments were increased to include the cost of coverage plus the amount of the kickback from ASIC to Caliber [ECF No. 23-3 at 11 (emphasis added); ECF No 1 ¶ 34], among other things. Plaintiffs' allegations that the letters lent the scheme an air of legitimacy, thus advancing the scheme, find support in the law: "mailings are sufficiently a part of the execution of a fraudulent scheme if they are used to lull the scheme's victims into a false sense of security that they are not being defrauded, thereby allowing the scheme to go undetected." *United States v. Hill*, 643 F.3d 807, 859 (11th Cir. 2011); *see also, e.g., TransFirst Holdings, Inc. v. Phillips*, 2007 U.S. Dist. LEXIS 36590, at *17 (N.D. Tex. May 18, 2007) ("Mailings that serve[] to 'lull' the plaintiff into a false sense of security, postpone inquiries or complaints, or to lessen the suspect appearance of the fraudulent transaction are mailings in execution of the fraudulent scheme[.]"). Thus, even Defendants warnings advising borrowers against forced coverage might be viewed as a means to advance Defendants' scheme.

Defendants also argue that Plaintiffs allegations of "but for" causation are implausible, contending that it is implausible that Plaintiffs would have "breached a contractual obligation to pay" had they known that Caliber had charged them more than the cost of coverage in violation of their mortgage contracts. [ECF No. 22 at 15, ECF No. 23 at 15.] This contention, however, disregards the rule of first breach; if the evidence shows that Caliber breached its contracts with borrowers (or the covenants implied therein) by charging them more than was contractually authorized, then borrowers were excused from their obligations to perform under the contracts by paying overcharges for LPI coverage. *See, e.g., Hamilton v. SunTrust Mortg., Inc.*, 6 F. Supp. 3d 1300, 1309 (S.D. Fla. 2014) ("[O]nce [the mortgage lender] chose to continue the mortgage contracts by exercising its discretion to force-place insurance after Plaintiffs' admitted breaches, SunTrust was obliged to do so in good faith. For this reason, Plaintiffs' prior breaches of their mortgage contracts—regardless of whether they were material breaches—do not preclude their claim for breach of the implied covenant of good faith and fair dealing against SunTrust.").

ASIC argues that allegations that Plaintiffs would have contested or not paid are implausible because Caliber disclosed that its affiliate would "earn commissions or income," but Plaintiffs have alleged that the "commissions" were simply unwarranted kickbacks and entirely unearned and that these omissions (failing to inform homeowners that their cost allegedly includes unwarranted and unearned kickbacks that have been prohibited by regulatory officials) would have resulted in action by a reasonable consumer. [ECF No. 1 ¶¶ 32, 33.] Plaintiffs have sufficiently pled RICO causation. *See, e.g., Perryman v. Litton Loan Servicing, LP*, No. 14–cv–02261, 2014 WL 4954674, at *16 (N.D. Cal. Oct. 1, 2014) ("[Plaintiff] could conceivably have declined to enter into the deed of trust had she known that the types of LPI penalties she ran the risk of incurring were attributable not [to] the servicers' costs but rather to the … manipulation of the market for insurance"); *Cannon v. Wells Fargo Bank, N.A.*, No. C–12–1376 EMC, 2014 WL 324556, at *3 (N.D. Cal. Jan. 29, 2014) ("[I]t is plausible that Plaintiffs would not have paid, or would have contested, the premiums for the force-placed insurance, if Defendants had disclosed that the premiums included unearned kickbacks rather than earned commissions.").

B. Plaintiffs Have Alleged a Scheme to Defraud.

Defendants argue that Plaintiffs have not alleged material misrepresentations or omissions or a plausible scheme to defraud, [ECF No. 22 at 12-14; ECF No. 23 at 10-13], but Plaintiffs have plainly have. Plaintiffs allege that the notices stated that Caliber would take a "commission or income" for placement, when the "commission" was in fact an unearned kickback unrelated to the placement of coverage; the inflated cost of coverage was attributable to the lack of underwriting when, in fact, that cost was at least in part attributable to kickbacks paid to Caliber; and the borrower would be charged the "annual premium" for coverage when he or she was, in fact, charged far more. [ECF No. 1 ¶¶ 156-60.] Plaintiffs also allege that Defendants failed to disclose the true nature of the costs imposed on borrowers, and that Caliber had paid ASIC less for coverage than it charged them. [*Id.* ¶ 57-59, 71-73, 81-83, 156-57.] Finally, Plaintiffs allege that the letters were designed to lull borrowers into a false sense of security that the charges were legitimate. [*Id.* ¶ 157.] These allegations support Plaintiffs' RICO claims.[8] *See, e.g., Hill*, 643 F.3d at 859 ("mailings are sufficiently a part of the execution of a fraudulent scheme if they are used to lull the scheme's victims into a false sense of security that they are not being defrauded, thereby

[8] Numerous courts, including this Court, have found plaintiffs to have stated federal RICO claims on similar allegations. *See, e.g., Santos*, 2015 WL 4162443, at *9-12; *DiGiacomo v. Statebridge Co, LLC*, No. 14–6694 , 2015 WL 3904594, at *12-13 (D.N.J. June 25, 2015); *Almanzar*, 2015 WL 1359150; *Circeo-Loudon*, 2015 WL 1914798, at *3; *Jackson*, 44 F. Supp. 3d at 1217-18; *Montoya*, 94 F. Supp. 3d at 1306-11. *See also, e.g., Perryman*, 2014 WL 4954674, at *15 *Cannon*, 2014 WL 324556, at *2-3.

allowing the scheme to go undetected."); *Cannon*, 2014 WL 324556, at *3 ("Defendants' non-disclosure of the kickbacks may be a basis for the scheme to defraud.").[9]

C. Plaintiffs Have Alleged that Caliber and ASIC Participated in the Operation of Management of a RICO Enterprise.

This Court dismissed the First Amended Complaint in *Montoya* for failure to plead sufficiently that the defendants had each participated in the operation and management of the alleged RICO enterprise, but then found the plaintiffs' amended allegations to satisfy this requirement. *See Montoya II*, 94 F. Supp. 3d at 1305-06; *Montoya*, 2014 WL 4248208, at *20-21. Plaintiffs' allegations here are like the amended allegations in *Montoya.* Plaintiffs detail the role played by each defendant in directing the RICO scheme. They allege that Caliber entered into an exclusive arrangement with ASIC; outsourced certain loan-servicing functions to ASIC to move the scheme forward; authorized ASIC to send misleading letters to borrowers; charged Plaintiffs amounts for insurance in excess of its actual cost; and reinsured coverage forced on borrowers' properties without assuming any real risk, among other things. [ECF. No. 1 ¶¶ 26-46, 153.]

Plaintiffs also allege that ASIC directed and controlled the enterprise by, *inter alia*, developing guidelines and standards for the timing and content of the notice letters; drafted the language of the letters; paid kickbacks to Caliber; and ran the day-to-day operations of the force-placed insurance scheme, tracking Caliber's portfolio and mailing notice letters to borrowers that included material misrepresentations (the amount charged represented the "cost of insurance";

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[9] Caliber also argues that it had no duty to disclose, but this argument disregards basic RICO principles. The law is clear that "under the mail fraud statute, it is just as unlawful to speak 'half truths' or to omit to state facts necessary to make the statements made, in light of circumstances under which they were made, not misleading." *United States v. Townley*, 665 F.2d 579, 585 (5th Cir. 1982); *see, e.g., Kemp v. Am. Tel. & Tel. Co.*, 393 F.3d 1354, 1360 (11th Cir. 2004) (disclosure of certain charges in long distance section of telephone bill created duty to correct mistaken impression that they were for long distance calls) (citation omitted).

Caliber affiliates had "earned" a "commission" or income"). [ECF No. 1 ¶ 153.] These are not, as Caliber claims, [ECF No. 22 at 16], the "ordinary business practices" of a mortgage servicer or an insurance provider. *See, e.g., Montoya*, 94 F. Supp. 3d at 1305-06.

D. Plaintiffs Have Alleged an Enterprise Separate from the Pattern of Racketeering.

ASIC also argues that Plaintiffs have not pled a RICO enterprise distinct from its pattern of racketeering activity. [ECF No. 23 at 15-16.] To do so, a RICO plaintiff must plead both an enterprise and a pattern of racketeering activity, though the evidence used to prove the elements "may in particular cases coalesce." *Boyle v. U.S.*, 556 U.S. 938, 947 (2009) (citation omitted). Plaintiffs have pled both distinct elements. *See Montoya*, 94 F, Supp. 3d at 1311-15.

E. The Claims Are Not "Reverse Preempted" Under the McCarran-Ferguson Act.

ASIC argues that the RICO claims are "reverse preempted" by state insurance law under the MFA, which requires that no federal statute "be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance … unless such Act specifically relates to the business of insurance[.]" 15 U.S.C. § 1012(b).

This Court has already held that RICO claims materially identical to Plaintiffs' here are not reverse preempted by state insurance statutes because such claims "do not challenge conduct that touches on the ordinary business of insurance." *Montoya*, 94 F. Supp. 3d at 1315. Plaintiffs here "do not challenge, for example, ASIC's pricing determinations or the rates that it sets for coverage to [Caliber]." *Id.* Accordingly, Pennsylvania and Florida insurance regulations do not "reverse preempt" Plaintiffs' federal RICO claims.

B. PLAINTIFFS HAVE STATED TILA CLAIMS.

Since this Court ruled on the motions to dismiss in *Montoya*, several courts have denied motions to dismiss TILA claims in force-placed insurance litigation. *See, e.g., Santos v.*

Carrington Mortg. Servs., LLC, No. 2:15–cv–864, 2015 WL 4162443, at *7 (D.N.J. July 8, 2015); *Almanzar*, 2015 WL 1359150, at *3-4; *Wilson*, 77 F. Supp. 3d at 1221-23. The Court finds these opinions to be persuasive, and denies Caliber's motion to dismiss Count VI.

C. PLAINTIFFS HAVE STATED COMMON LAW CLAIMS.

A. Plaintiffs Have Stated Claims for Breach of Contract Against Caliber.

Caliber rests its argument for dismissal of Plaintiffs' breach of contract claims on the Seventh Circuit's opinion in *Cohen v. American Insurance Security Co.*, 735 F.3d 601 (7th Cir. 2013), which involved force-placed hazard insurance claims brought under Illinois law, and the Eleventh Circuit's opinion in *Feaz v. Wells Fargo Bank, N.A.*, 745 F.3d 1098 (11th Cir. 2014), which addressed Alabama force-placed flood insurance claims and cited *Cohen* for a limited purpose related to a breach of fiduciary duty claim. This Court has previously addressed the application of both *Cohen* and *Feaz*, and while rejecting the application of those opinions to other claims, relied on *Cohen* in dismissing the plaintiffs' claims for breach of contract. *See Montoya*, 214 WL 4248208, at *10-11(dismissing breach of contract claim because notices included disclosures that lender would receive benefit or income and citing *Cohen*). The Court reaches a different conclusion here, both because its decision on the breach of contract claim in *Montoya* should not have turned on notices sent to borrowers after their mortgages were executed.[10] Even were that not the case, the disclosures in this case were different. In *Montoya*, this Court held:

> [Plaintiffs] say they … challenge the costs beyond that of coverage that PNC deducts from their escrow accounts … The problem for Plaintiffs, as the Court sees it, is that their agreements do not say that PNC cannot charge them these extra costs.

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[10] In *Cohen*, the plaintiff received pre-closing disclosures in connection with the mortgage contract, which, under Illinois law, were incorporated into the contract. In this case, however, the notices sent to Plaintiffs were mailed and received *post*-closing, once Plaintiffs' voluntary coverage had lapsed. The notices were not, therefore, part of their mortgage contracts.

> To the contrary, they say the opposite. Just like in *Cohen,* Plaintiffs' agreements and "related notices" "specifically contemplate"—and "warned [the plaintiffs] accordingly"—that the lender would receive a benefit or income "when lender-placed insurance becomes necessary." *Cohen,* 735 F.3d at 612.
>
> Accordingly, as in *Cohen,* because "the loan agreement and related notices and disclosures specifically contemplate" the actions allegedly taken by PNC of which Plaintiffs now complain, "[Plaintiffs have] not alleged a viable breach-of-contract claim against [PNC]." *Id.* at 613. Consequently, the Court dismisses Count I with prejudice.

2014 WL 4248208, at *10-11.

The *mortgage agreements* here did not warn the plaintiffs that Caliber would receive "a benefit or income" when coverage was forced. Those warnings, as in *Montoya*, were in the notices that Plaintiffs received long after their mortgages had been executed.[11] The mortgages in this case authorized Caliber to "obtain *insurance coverage*" and disclose that the "cost of insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained[,]" and that "[a]ny amounts disbursed by Lender under this Section … [i.e., for insurance coverage] shall become additional debt of Borrower[.]" [ECF No. 1 ¶ 48.]

Plaintiffs allege that Caliber charged them more than the cost of the insurance coverage obtained because it required them to pay amounts that were kicked back to Caliber in addition to Caliber's actual cost of coverage. [*Id.* ¶¶ 26-46, 103.] These allegations state a claim for a direct and material breach of the mortgage contacts. *See, e.g., Wilson*, 77 F. Supp. 3d at 1217 (allegations that lender charged for costs beyond coverage stated breach of contract claim).

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[11] The notices in this cases were different in those in *Montoya*. Many of Caliber's notices did *not* warn that the lender might take a benefit from the placement of coverage. [ECF Nos. 23-2, 23-3.] Those that included similar disclosures warned that Caliber affiliates might "*earn* commissions or income" in conjunction with the placement of coverage. [ECF No. 23-2.] Plaintiffs here allege that the kickbacks to Caliber and its affiliates were not, in fact, commissions and were entirely unearned. [ECF No. 1 ¶ 26-46.] Taking the facts in the pleadings as true, these disclosures were misleading and would not insulate the lender from liability in this case.

B. Plaintiffs Have Stated Breach of the Implied Covenant Claims.

This Court held that the Plaintiffs in *Montoya* had stated claims for breach of the implied covenant of good faith and fair dealing because the lender/servicer, here Caliber, was granted substantial discretion in forcing coverage on the plaintiffs' properties, and Plaintiffs had alleged that it exercised that discretion in bad faith by entering into "back room" deals with ASIC, fostering a noncompetitive market for force-placed insurance, and passing impermissible amounts on to borrowers, among other things. *See Montoya*, 2014 WL 4248208, at *11-12. The Court followed the well-reasoned opinion in *Abels* and its progeny in concluding that the simple "failure to perform a discretionary act in good faith may be a breach of the implied covenant." *Id.* at *12 (quoting *Abels*, 678 F. Supp. 2d at 1278); *see also, e.g., Carden v. ING Bank, FSB*, 2014 U.S. Dist. LEXIS 121609, at *6 (S.D. Fla. Mar. 24, 2014) (denying motion to dismiss breach of implied covenant claim, among others, and noting that "the majority, if not all, [FPI cases that have preceded the current case] have allowed the plaintiffs' FPI claims to proceed[,]"); *Montanez v. HSBC Mortgage Corp. (USA)*, 876 F. Supp. 2d 504, 513-14 (E.D. Pa. 2012) ("courts around the country have held in cases with almost identical facts that plaintiffs stated a claim for breach of the covenant of good faith and fair dealing"). The Court denies Caliber's motion as to Count II.

C. Plaintiffs Have Stated Unjust Enrichment Claims.

Plaintiffs bring unjust enrichment claims against Caliber and ASIC. Both Defendants ask the Court to dismiss the unjust enrichment claims because an express contract governs the subject matter of Plaintiffs' claims. [ECF No. 22 at 20-21; ECF No. 23 at 17-18.] Because alternative pleading is allowed by the Federal Rules, the Court denies Defendants' motions as to the unjust enrichment claims, and otherwise adopts its reasoning in *Montoya*, 2014 WL 4248209, at *12-13.

D. Plaintiffs Have Stated Tortious Interference Claims.

Plaintiffs allege that ASIC tortiously interfered with their mortgage contracts by entering into an exclusive relationship with Caliber and paying Caliber and its affiliates kickbacks knowing that these amounts would be paid by borrowers. [ECF No. 1 ¶¶ 130-134]. ASIC argues that it was privileged to interfere because the ASIC's conduct was directed at protecting its own financial and business interests under its agreement with Caliber. [ECF No. 23 at 19-20.] As this Court held in *Montoya*, ASIC cannot succeed with a justification or privilege argument at this stage under Florida law because these are affirmative defenses not proper on a motion to dismiss. *See Montoya*, 2014 WL 4248208, at *17. Under Pennsylvania law, a lack of justification or a privilege to interfere is an element of a tortious interference claim. *See, e.g., Empire Trucking Co. v. Reading Anthracite Coal Co.*, 71 A.3d 923, 933 (Pa. Super. 2013). Plaintiffs have alleged that ASIC's interference was unjustified, and undertaken in bad faith, by charging that ASIC's payment of improper kickbacks and unearned fees interfered with Plaintiffs' rights under their mortgage contract to have insurance placed in good faith and without illegal charges. [ECF No. 1 ¶¶ 34, 133.] This suffices to plead lack of justification or privilege. *See, e.g., In re 400 Walnut Assocs., L.P.*, 454 B.R. 60, 79 (Bankr. E.D. Pa. 2011) ("the extent of [Defendant's] involvement could be found as a matter of law unjustified … [T]he Complaint does not portray [Defendant's] actions as proper (i.e., privileged) in this context.) Plaintiffs have stated claims for tortious interference.

It is hereby **ORDERED AND ADJUDGED** that Defendants' motions to dismiss [ECF Nos. 22, 23] are DENIED. Defendants shall have twenty days from the date of this Order to file their answers.

DONE AND ORDERED in Chambers in Miami, Florida this ___ day of ___________, 2016.

JONATHAN GOODMAN
UNITED STATES MAGISTRATE JUDGE

Copies furnished to: All counsel of record