IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 16-16585

RICHARD FOWLER, *et al.*, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

vs.

CALIBER HOME LOANS, INC., *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

INITIAL BRIEF OF APPELLANTS RICHARD FOWLER, YVONNE YAMBO-GONZALEZ, AND GLENDA KELLER

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Plaintiffs-Appellants Richard Fowler, Yvonne Yambo-Gonzalez, and Glenda Keller submit the following Certificate of Interested Persons, which, in accordance with 11th Circuit Rule 26.1-1, includes the trial judge and all attorneys, associations or persons, firms, partnerships, and corporations known to have an interest in the outcome of this review:

ABI International

ABIG Holding de Espana, S.L.

ALOC Holdings ULC

American Bankers General Agency, Inc.

American Bankers Insurance Company of Florida

American Bankers Insurance Group, Inc.

American Bankers Life Assurance Company of Florida

American Bankers Management Company, Inc.

American Memorial Life Insurance Company

American Security Insurance Company

Assurant Argentina Compania de Seguros Sociedad Anonima

Assurant Chile Compania de Seguros Generales S.A.

Assurant Co. Ltd.

Assurant Consulting Company Limited

Assurant Danos Mexico S.A.

Assurant Deutschland GmbH

Assurant Direct Limited

Assurant Direta Corretora de Seguros Ltda

Assurant General Insurance Limited

Assurant Group, Limited

Assurant Holding Mexico, S. de R.L. de C.V.

Assurant Holdings France SAS

Assurant, Inc. [AIZ]

Assurant Intermediary Limited

Assurant International Division Limited

Assurant Investment Management LLC

Assurant Italia Agenzia di Assicurazioni s.r.l.

Assurant Life Limited

Assurant Life of Canada

Assurant New Ventures, Inc.

Assurant Payment Services, Inc.

Assurant Reinsurance of Turks & Caicos, Ltd.

Assurant Seguradura S.A.

Assurant Service Protection, Inc.

Assurant Services Argentina, S.A.

Assurant Services Canada Inc.

Assurant Services de Chile, SpA

Assurant Services Italia s.r.l.

Assurant Services Korea Limited

Assurant Services Limited

Assurant Services, LLC

Assurant Services of Puerto Rico, Inc.

Assurant Services (UK) Limited

Assurant Servicios de Mexico, S.A. de CV

Assurant Servicos Ltda.

Assurant Solutions Assistance B.V.

Assurant Solutions Comercio e Servicos de Equipamentos Electronicos Ltda.

Assurant Solutions Holding Puerto Rico, Inc.

Assurant Solutions Spain, S.A.

Assurant Vida Mexico S.A.

Axios Valuation Solutions, LLC

Bankers Atlantic Reinsurance Company

Blue Bananas, LLC

Broadtech, LLC

Burt, Frank G.

Bushman, Howard

Caliber Home Loans, Inc.

Caliber Real Estate Services, LLC

Caribbean American Life Assurance Company

Caribbean American Property Insurance Company

Carlton Fields Jorden Burt, P.A.

Chilton, Jan T.

Coast to Coast Dealer Services Inc.

Consumer Assist Network Association, Inc.

Cooperatieve Assurant Netherlands U.A.

CWI Corporate

CWI Distribution

CWI Group

CWork Financial Management LLC

CWork Solutions, LP

Digital Services (UK) Ltd.

Edenfield, Nathaniel M.

eMortgage Logic, LLC

Engel, Sarah Clasby

Family Considerations, Inc.

FamilySide, Inc.

FAS-Nationstar, LLC

FAS-OWB Utilities, LLC

FAS-Tenant Access Utilities, LLC

Federal Warranty Service Corp.

Field Asset Services, LLC

Florida Office Corp.

Fowler, Richard L.

Givental, Alisa A.

Goodman, Hon. Jonathan

GP Legacy Place, Inc.

Greer, Alan Graham

Guardian Travel, Inc.

Harke Clasby & Bushman, LLP

Harke, Lance

Holland, Eric. D.

Holland Groves Schneller & Stolze, LLC

Insureco Agency & Insurance Services, Inc.

Insureco, Inc.

Interfinancial Inc.

I.Q. Data International, Inc.

Jhabvala, Farrokh

John Alden Life Insurance Company

Kamba, Mary Kate

Keller, Glenda

Kemp, Erik

Kozyak, Topin & Throckmorton, LLP

Lifestyle Services Group Ltd.

LSF6 Service Operations, LLC

LSG Espana Ltd.

LSG Insurance

Merten, W. Glenn

MobileServ 5 Ltd.

Moskowitz, Adam

MS Diversified Corp.

National Insurance Agency

National Insurance Institute, LLC

Neary, Robert J.

9167-1990 Quebec Inc.

Perryman, Brian

Podhurst, Aaron S.

Podhurst Orseck, PA

Prieto, Peter

Protection Holding Cayman

Reliable Lloyds Insurance Company

Richman Greer, PA

Ronzetti, Thomas A, Tucker

Rosenthal, Stephen F.

Severson & Werson

Shipsurance Insurance Services, Inc.

Signal Financial Management LLC

Signal GP LLC

Signal Holdings LLC

Signal Northwest LLC

Solutions Cayman

Solutions Holdings

STAMS Holding Ltd.

STAMS Ltd.

Standard Guaranty Insurance Company

StreetLinks, LLC

Sullivan, John B.

Sullivan, Rachel

Summit Trustee Services, LLC

Sureway, Inc.

Telecom Re, Inc.

The Signal LP

Time Insurance Company

Tracksure Insurance Agency, Inc.

TS Holdings, Inc.

Union Security Insurance Company

Union Security Life Insurance Company of New York

United Service Protection Corp.

United Service Protection, Inc.

Vericrest Agency Funding Depositor, LLC

Vericrest Servicer Advance Funding Depositor, LLC

Vericrest Financial Advance Trust 2010-ADV1

Vericrest Financial Advance Trust 2012-ADV1A

Voyager Group, Inc.

Voyager Indemnity Insurance Company

Voyager Service Warranties, Inc.

Weinshall, Matthew P.

WePurchit.com LLC

Yambo-Gonzalez, Yvonne

STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully submit that oral argument would assist the Court in resolving the issue on appeal. The decision below calls into question the extent of the filed-rate doctrine's reach; a decision affirming the district court's dismissal would mark the first occasion on which the Court has extended the doctrine to bar claims by a non-ratepayer against a party other than the carrier or utility that set and filed the rates in question. Consideration of the question on appeal has created a circuit split between the Second Circuit Court of Appeal on the one hand, and the Third and Sixth Circuit Courts of Appeal on the other, *compare Alston v. Countrywide Financial Corp.*, 585 F.3d 753 (3d Cir. 2009) and *Williams v. Duke Energy Int'l, Inc.*, 681 F.3d 788 (6th Cir. 2012), *with Rothstein v. Balboa Insurance Co.*, 794 F.3d 256 (2d Cir. 2015), but this Circuit has not yet considered the question.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §§ 1332(d), 1453 and 1711-1715, because diversity existed between the plaintiffs and defendants, with the plaintiffs as citizens of Florida and ASIC and SLS as citizens of Georgia and Colorado, respectively, the amount in controversy exceeded $5,000,000, and there were at least one hundred members of the putative class.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, as this appeal is taken from the final judgment of a district court. This appeal is thus from a final order. Appellants Fowler, Yambo-Gonzalez, and Keller appeal the district court's order dismissing their claims in their entirety and with prejudice. [D.E. 91.]

This appeal is timely. The district court dismissed the Class Action Complaint with prejudice on September 13, 2016 [D.E. 91]. Appellants timely filed their Notice of Appeal on October 13, 2016 [D.E. 93].

ISSUE ON APPEAL

WHETHER THE FILED-RATE DOCTRINE BARS CLAIMS BY BORROWERS AGAINST THEIR MORTGAGE SERVICER AND ITS LENDER-PLACED INSURER FOR CHARGING MORE FOR INSURANCE THAN IS AUTHORIZED BY BORROWERS' MORTGAGE AGREEMENTS?

STATEMENT OF THE CASE AND FACTS

This appeal presents only one question: whether the filed-rate doctrine bars claims by mortgagors challenging force-placed insurance charges imposed by their mortgage servicers beyond the servicer's actual cost of coverage, without notice and in violation of their mortgage contracts, where the servicer has taken kickbacks or rebates from its force-placed insurer, but did not pass its savings on to mortgagors. This question has been considered by district courts nationwide on facts nearly identical to those presented below, with the vast majority holding that the filed-rate doctrine does *not* bar such claims.[1] Federal courts of appeals have split on the issue, with the Second Circuit holding that the doctrine applies, and the Third Circuit holding that it does not. The Sixth Circuit has also held that the filed-rate doctrine

[1] *See, e.g., Kennedy v. QBE Ins. Corp.*, No. 1:15-cv-522, 2015 WL 11622472, at *3 (N.D. Ga. Aug. 5, 2015); *Wilson v. EverBank, N.A.*, 77 F. Supp. 3d 1202, 1233-34 (S.D. Fla. 2015); *Longest v. Green Tree Servicing LLC*, 74 F. Supp. 3d 1289, 1299 (C.D. Cal. 2015); *Almanzar v. Select Portfolio Servicing, Inc.*, No. 14-cv-22586, 2015 WL 1359150, at *2 (S.D. Fla. Mar. 24, 2015); *Perryman v. Litton Loan Servicing, LP*, No. 14-cv-02261, 2014 WL 4954674, at *9 (N.D. Cal. Oct. 1, 2014); *Ellsworth v. U.S. Bank, N.A.*, 30 F. Supp. 3d 886, 909-10 (N.D. Cal. 2014); *Jackson v. U.S. Bank, N.A.*, 44 F. Supp. 3d 1210, 1217 (S.D. Fla. 2014); *Laffan v. Santander Bank, N.A.*, No. 13-cv-4040, 2014 WL 2693158, at *4 (E.D. Pa. June 12, 2014); *Vitek v. Bank of Am., N.A.*, No. 8:13–cv–816, 2014 WL 1042397, at *3-4 (C.D. Cal. Jan. 23, 2014); *Leghorn v. Wells Fargo Bank, N.A.*, 950 F. Supp. 2d 1093, 1115-16 (N.D. Cal. 2013); *Smith v. SunTrust Mortg., Inc.*, No. 13-cv-0739, 2013 WL 5305651, at *5-6, 9 (C.D. Cal. Sept. 16, 2013); *Simpkins v. Wells Fargo Bank, N.A.*, No. 12-cv-00768, 2013 WL 4510166, at *13-14 (S.D. Ill. Aug. 26, 2013); *Gallo v. PHH Mortg. Corp.*, 916 F. Supp. 2d 537, 545-46 (D.N.J. 2012); *Abels v. JPMorgan Chase Bank, N.A.*, 678 F. Supp. 2d 1273, 1277 (S.D. Fla. 2009).

does not apply under analogous circumstances, holding that challenges to kickbacks or rebates paid by an electricity retailer to certain large customers pursuant to side agreements did not constitute a challenge to the reasonableness of the retailer's filed rates. This majority position stands as the better reasoned, and accords with governing Eleventh Circuit precedent on the doctrine's application.

Appellants' allegations below are strikingly similar to those pled in other force-placed insurance class action litigation, as all of these cases arise from a practice that is common among major mortgage lenders and servicers. Standard mortgage contracts authorize mortgage lenders and servicers to "force" insurance coverage on a mortgagor's property when the mortgagor's voluntary coverage lapses, leaving the property uninsured. [D.E. 1 ¶ 24.] The lender or servicer may then charge the mortgagor its cost of coverage, either by deducting the cost from the mortgagor's escrow account or adding it to the balance of his or her mortgage loan. [*Id.* ¶¶ 24, 34.] Appellants' mortgage contracts provided, in pertinent part:

> **5. Property Insurance**. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires….
>
> If Borrower fails to maintain any of the coverages described above, *Lender may obtain insurance coverage, at Lender's option and Borrower's expense*. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall

> cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that *the cost of the insurance coverage* so obtained might significantly exceed the cost of insurance that Borrower could have obtained. *Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower* secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.
> …
>
> **9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument**. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture…), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property.

[*Id.* ¶¶ 48, 64, 77 & Exs. A & B (emphasis added).]

Section 5 of the contracts authorized Appellee Caliber Home Loans, Inc. ("Caliber"), the mortgage servicer, to procure insurance coverage in the event of a lapse and charge Appellants the "cost of the insurance coverage," or the amounts "disbursed" to procure coverage. [*Id.*] Section 9 authorized Caliber to "do and pay for whatever is reasonable or appropriate to protect [its own] interest" in Appellants' properties, the collateral for its mortgage loans. [*Id.*]

Appellants allege that Caliber breached these provisions of their mortgage

agreements, as well as the implied covenant of good faith and fair dealing, by charging mortgagors more than Caliber's cost of insurance and more than was "reasonable or appropriate" to protect Caliber's interest in any mortgagor's property. [*Id.* ¶¶ 99-112.] They also allege that Caliber's conduct violated the federal Truth in Lending and Racketeering Influenced and Corrupt Organizations Acts, because Caliber did not disclose charges imposed beyond the cost of coverage, and, in the alternative to their contractual claims, that Caliber was unjustly enriched by charging more than its true cost of coverage. [*Id.* ¶¶ 135-69.] Appellants also brought claims against American Security Insurance Company ("ASIC"), Caliber's insurer, for unjust enrichment, for tortiously interfering with borrowers' mortgage agreements by facilitating Caliber's breaches, and for participating in the operation of the alleged RICO enterprise and conspiracy, the purpose of which was to charge borrowers costs beyond that of coverage. [*Id.* ¶¶ 122-34, 147-69.]

The alleged scheme operated as follows. Caliber and ASIC agreed that ASIC would serve as Caliber's exclusive provider of force-placed insurance coverage. [*Id.* ¶¶ 26, 27.] Pursuant to this agreement, ASIC contracted to undertake various loan-servicing obligations that would otherwise belong to Caliber, and Caliber purchased a master collateral-protection insurance policy from ASIC to cover Caliber's entire mortgage loan portfolio. [*Id.*] The master policy was a commercial insurance policy bearing the title "Mortgag*ee* Interest Protection." [*Id.* ¶ 44 & n.9 (emphasis added).]

ASIC's role in the scheme was to issue the master policy to Caliber and then perform Caliber's mortgage-servicing functions pursuant to Appellees' outsourcing agreement. ASIC was responsible for monitoring Caliber's loan portfolio for lapses in voluntary coverage and, upon identifying one, sending a cycle of notices to mortgagors on Caliber letterhead notifying them that if the lapse were not cured, Caliber would force new coverage to protect its interests and deduct the cost of the coverage from the borrower's escrow account. [*Id.* ¶¶ 28, 33.] Nowhere did the letters disclose that mortgagors would be charged any amount beyond the actual cost of the coverage procured by Caliber. [*Id.* ¶¶ 25, 57-59, 71-73, 81-83.]

Appellants contend that Caliber charged mortgagors more than the cost of the insurance purchased to protect its interest in their properties, contrary to the express and implied covenants in their mortgage agreements and notices mailed to borrowers before coverage was forced. [*Id.* ¶¶ 3, 6, 34, 99-112.] These unearned charges were levied pursuant to an undisclosed kickback scheme: once Caliber forced new coverage to protect its own interest in the mortgagor's property and paid ASIC the premium arising from its commercial master policy for that coverage, ASIC would kick a portion of that amount back to Caliber, thereby reducing Caliber's ultimate cost of coverage. [*Id.* ¶¶ 31-33.] Caliber and ASIC claimed that the payments were "commissions," "expense reimbursements," or premiums for riskless reinsurance, but they were, in fact, gratuitous payments constituting an effective rebate on the

cost of coverage to Caliber. [*Id.* ¶¶ 31-40.]

Ultimately, the "cost of the insurance coverage" to Caliber equaled the amount it had paid ASIC as a premium under the commercial master policy, *less* the value of the gratuitous rebates it took from ASIC after forcing coverage on a mortgagor's property. [*Id.* ¶¶ 3, 6, 103 & p. 47.] And the amount ultimately "disbursed" to ASIC under Section 5 of Appellants' mortgage agreements for coverage to protect the collateral for its mortgage loan was the same—the commercial premium minus *x*, with *x* representing the gratuitous and undisclosed kickbacks passed from ASIC to Caliber. [*Id.*] Finally, Caliber's ultimate cost of coverage plus *x* exceeded "whatever [wa]s reasonable or appropriate to protect [Caliber's] interest in the Property." [*Id.*]

Procedural History

Both Caliber and ASIC moved to dismiss the Complaint, arguing that the filed-rate doctrine barred the claims asserted because Appellants had challenged ASIC's filed rates as excessive. [D.E. 22 at 7-9; D.E. 23 at 4-8.] Appellants responded that the filed-rate doctrine does not apply because, among other things, their claims did not challenge the reasonableness of ASIC's filed rates, but instead Caliber's conduct in charging borrowers more than its cost of coverage in violation of the mortgage agreements and notices mailed to borrowers. [D.E. 47 at 4-12.]

Caliber and ASIC filed their replies [D.E. 51, 52], and on May 16, 2016, the district court held a hearing on the Defendants' motions to dismiss. [D.E. 73.] On

July 8, 2016, the court entered an order granting the motions to dismiss with prejudice pursuant to the filed-rate doctrine. [D.E. 83.] Plaintiffs moved for clarification of that order, and to alter or amend the judgment, asking the court to revise key language in the order on the ground that it did not fairly represent Plaintiffs' position. [D.E. 84.] The court granted that motion, and on September 13, 2016, entered an amended order dismissing Plaintiffs' claims pursuant to the filed-rate doctrine. [D.E. 91.] The court also vacated the July 8th order granting the motions to dismiss. [D.E. 92.] Appellants now appeal.

Standard of Review

This Court reviews *de novo* the grant of a motion to dismiss under Rule 12(b)(6) for failure to state a claim, "accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff." *Shoup v. McCurdy & Candler, LLC*, 465 F. App'x 882, 884 (11th Cir. 2012) (quoting *Belanger v. Salvation Army,* 556 F.3d 1153, 1155 (11th Cir. 2009)). "A complaint must state a plausible claim for relief, and '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.* (citation omitted).

SUMMARY OF THE ARGUMENT

The district court applied the filed-rate doctrine in a manner that stretches the doctrine far beyond its intended use, holding that it bars claims by mortgagors

challenging charges imposed pursuant to a contract, and as part of a transaction, not subject to review by state regulators. This violates the longstanding principle that the filed-rate doctrine protects the terms and conditions by which a common carrier provides services to its customers that are covered by a tariff or filed rate. Transactions not subject to those terms and conditions—and, in fact, governed by an entirely distinct contract with its own clear terms—are beyond the filed-rate doctrine's reach and properly subject to judicial review.

This case involves two sequential, but separate, transactions. The first is the only transaction reviewed by regulators: ASIC's sale of a master collateral-protection insurance policy to Caliber to cover Caliber's portfolio of mortgage loans. The policy is written to protect Caliber's security interest in the collateral for its mortgage loans, but not to protect the borrower or the borrower's property. The premium that Caliber pays for the insurance is calculated based on a filed and approved commercial rate and paid on its own behalf. Borrowers have no standing to challenge these rates in an administrative proceeding.

The second, distinct transaction is between Caliber and the borrower and is entirely beyond state insurance regulators' reach. Borrowers enter into standard mortgage agreements with Caliber, which authorize Caliber to purchase insurance coverage to protect its own interests should the borrower allow his or her homeowner's coverage to lapse. Because the coverage is for Caliber's protection,

its discretion in purchasing coverage is broad—Caliber may purchase any type or amount of coverage, without regard for the borrower's needs. The borrower's only obligation, as a contractual remedy for his or her failure to provide continuous coverage, is to cover Caliber up to the "cost of the insurance."

Two circuit courts of appeal have held that the filed-rate doctrine does not apply to similar transactions. The Third Circuit found it "absolutely clear" that the doctrine did not apply to an identical kickback scheme involving private mortgage insurance in *Alston v. Countrywide Financial Corp.*, 585 F.3d 753 (3d Cir. 2009), and district courts in that circuit have extended *Alston*'s holding to cases involving force-placed insurance. Three years later, in *Williams v. Duke Energy International, Inc.*, 681 F.3d 788 (6th Cir. 2012), the Sixth Circuit held that the doctrine did not bar claims against an electricity retail service provider that had paid kickbacks to large customers pursuant to unregulated side agreements in exchange for political support. The court determined that claims challenging these kickbacks did not constitute challenges to the reasonableness of the defendant's filed rates.

The Second Circuit broke with precedent in *Rothstein v. Balboa Insurance Co.*, 794 F.3d 256 (2d Cir. 2015), holding that the filed-rate doctrine applied to force-placed insurance claims because the insurer's approved rate had simply been "passed through an intermediary," the mortgage lender, to the borrower. The district court here adopted *Rothstein*'s holding, but it is based on a flawed premise. The Second

Circuit analogized the two distinct transactions involved in force-placed insurance programs with electricity wholesaler-to-retailer-to-consumer transactions to which courts had appropriately applied the filed-rate doctrine. In those transactions, designated "A-to-B-to-C" transactions, the wholesaler sold a commodity to the consumer *through* the retailer, and the entire transactional chain was subject to review by regulators, with the retailer facilitating the transaction between the original seller and the ultimate purchaser. Here, the mortgage servicer purchases collateral protection insurance *for itself*, the "Mortgag*ee*" [D.E. 1 ¶ 44 & n.9 (emphasis added)]—it does not purchase it for resale to consumers, or to protect their interests. This "A-to-B" transaction is the only link in the "chain" subject to review by state insurance regulators, and thus the only transaction that should be subject to the filed-rate doctrine.

This analysis accords with the dual principles underlying the filed-rate doctrine, nonjusticiability and nondiscrimination. Appellants' claims do not offend the nonjusticiability principle because they do not call on the district court to pass judgment on the reasonableness of ASIC's filed rates for collateral protection insurance. Should Appellants' prevail, they will recover damages arising from Caliber's contractual breach equal to the amount Caliber charged them beyond its actual cost of insurance. Appellants' claims do not offend the nondiscrimination principle because the mortgage servicer is the ultimate ratepayer in a force-placed

insurance transaction. The filed-rate doctrine would operate to protect mortgage servicers from discrimination, not borrowers who only contract to cover the servicer's cost of insurance coverage.

The Court should reverse and remand this case for further proceedings.

ARGUMENT

I. APPELLANTS SEEK A CONTRACTUAL REMEDY NOT GOVERNED BY STATE REGULATORS.

Well-established jurisprudence on the filed-rate doctrine is clear: "The filed-rate doctrine's purpose is to ensure that the filed rates are the exclusive source of the terms and conditions by which the common carrier provides to its customers the services covered by the tariff." *AT&T v. Central Office Tel., Inc.*, 524 U.S. 214, 118 S. Ct. 1956, 1966-67, 141 L. Ed. 2d 222 (1998) (Rehnquist, C.J., concurring). The doctrine, that is, "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 v. Bellsouth Telecomms., Inc.*, 364 F.3d 1308, 1315 (11th Cir. 2004) (citation omitted).

The transactions at issue in this case are unlike any to which the filed-rate doctrine has been applied before. There are two sequential but separate contractual arrangements involved: the first between ASIC—here, the "carrier" for purposes of the filed-rate doctrine—and its customer, Caliber, and the second between Caliber and its mortgagors. Appellants' claims challenge conduct arising only from the

second transaction.

The first arrangement, which Appellants have not challenged, is a longstanding agreement between Caliber and ASIC by which Caliber purchases a master insurance policy to cover its entire portfolio of mortgage loans, and outsources certain loan servicing functions to ASIC in connection with that policy. [D.E. 1 ¶¶ 2, 3, 26-27.] This is the *only* transaction at issue in this case subject to review by state insurance regulators. Caliber pays a policy premium to ASIC for insurance coverage to protect its security interest in the collateral for its mortgage loan, which is calculated based on a *commercial* rate filed with and approved by state departments of insurance and intended for use to price portfolio coverage to protect mortgage lenders' business interests. [*Id.* ¶¶ 30, 31, 44.] The master policy is purchased neither on mortgagors' behalf, nor to protect their equity or any other interest personally held in their properties. [*Id.* ¶¶ 44, 48.]

The limited purpose of lender-placed insurance is reflected in the mortgage contracts ("such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property") and is understood by state regulators. As the Florida Office of Insurance Regulation ("FLOIR") recognizes: "[l]ender-placed … insurance is coverage that a mortgage lender or bank purchases *for property it owns to protect its interests* when the

homeowner fails to purchase this coverage."[2] The FLOIR defines lender-placed insurance with reference to section 624.6085, Florida Statutes:

> **624.6085 "Collateral protection insurance" defined.**—For purposes of ss. 215.555, 627.311, and 627.351, "collateral protection insurance" means *commercial property insurance* under which a *creditor is the primary beneficiary and policyholder and which protects or covers an interest of the creditor* arising out of a credit transaction secured by real or personal property. Initiation of such coverage is triggered by the mortgagor's failure to maintain insurance coverage as required by the mortgage or other lending document. *Collateral protection insurance is not residential coverage*.

Fla. Stat. § 624.6085 (2016) (emphasis added).

ASIC's sale of collateral-protection insurance—here force-placed insurance—ends with Caliber's payment of the policy premium and does *not* involve any interest of or participation by the mortgagor.

The second arrangement at issue here—and the transaction from which Appellants' claims arise—is Caliber's mortgage contract with the borrower. The mortgage contracts provide that, should the borrower's "voluntary" coverage lapse, the lender is authorized to take steps "to protect *Lender's* interest in the Property and rights under this Security Instrument," including forcing new coverage to cover those interests, but is under *no obligation* to "protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability."

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[2] *See* FLOIR, "Lender-Placed Insurance Coverage," http://www.floir.com/Sections/PandC/lenderplacedincoverage.aspx (emphasis added) (last visited 2/14/2017).

[D.E. 1 ¶¶ 48, 64.] The mortgage contracts are also clear with regard to the borrower's contractual obligation: reimbursing the Lender for its "insurance coverage," up to the "cost of the insurance." [*Id.*]

Appellants challenge this second transaction, but not the former. They challenge Caliber's breach of the mortgage contract by charging the borrower more than the cost of insurance, and more than was required to cover its security interest in their properties, as well as ASIC's participation in the scheme that facilitated that breach, but *not* the premium that ASIC charges Caliber for its master collateral-protection insurance policy. [*Id.* ¶¶ 99-169.] The challenged transaction between Caliber and its borrowers is *not* subject to regulation by state departments of insurance, nor does it involve the borrower's purchase of any service the price of which was calculated based on a filed rate. *Cf. Central Office Tel.*, 524 U.S. at 214 (filed rate is "the exclusive source of the terms and conditions by which the *common carrier provides to its customers the services covered by the tariff*") (emphasis added). This Court has never applied the filed-rate doctrine to bar claims against a party not subject to regulation with respect to the rate at issue, such as Caliber here, nor has it applied the doctrine to preclude claims by anyone other than a direct ratepayer, which Appellants here are not. *See, e.g., Pfeil v. Sprint Nextel Corp.*, 284 F. App'x 640 (11th Cir. 2008) (barring customer challenge to charge by telecommunications carrier); *Taffet v. S. Co.*, 967 F.2d 1483 (11th Cir. 1992)

(barring suit by utility customers to recover charges). This precedent is in keeping with this Court's holding that filed rates "become 'the law' and exclusively govern the rights and liabilities of the carrier to the *customer*[.]" *Hill*, 364 F.3d at 1315 (citation omitted; emphasis added). To be sure, no federal appellate court had applied the filed-rate doctrine in this manner before the Second Circuit issued its opinion in *Rothstein*.

This limit on the doctrine's application stands to reason, as state insurance regulators have jurisdiction *only* to regulate the transaction between lender and insurer. This understanding is reflected in an opinion by the California Insurance Commissioner declining to rule on the same question presented by Appellants' claims below. In that opinion, the Commissioner found that he was powerless to rule on such claims, because "[t]he jurisdiction of the Commissioner extends to issues concerning the reasonableness of insurance rates vis-à-vis [ASIC] as the insurer and [the mortgage lender] as the insured … *The Department has no jurisdiction to decide the scope of charges which would be reasonable as between a lender and its borrower*." *Perryman v. Litton Loan Servicing, LP*, No. 14-cv-02261, 2014 WL 4954674, at *8 (N.D. Cal. Oct. 1, 2014) (quoting *In the Matter of the Rates, Rating Plans, or Rating Sys. of Am. Sec. Ins. Co.*, Cal. Ins. Comm. No. OV-01-01-8309 (Apr. 18, 2001) ("California Regulatory Opinion")) (emphasis added); *cf. Wilson.*, 77 F. Supp. 3d at 1234; *see also Ellsworth*, 30 F. Supp. 3d at 910 ("Plaintiffs

do not challenge the rates … or the process of rate-setting, and they are not the ratepayers.").

Regulators' lack of jurisdiction over claims like Appellants' leads to the conclusion that the filed-rate doctrine does not apply. To be sure, Appellants' Complaint raises no challenge to ASIC's filed rates.[3] Appellants have challenged Caliber's act of charging borrowers more than its actual cost of coverage, in violation of the express terms of their mortgage agreements, and ASIC's facilitation of Caliber's breach of contract. [D.E. 1 ¶¶ 99-169.] The damages Appellants seek are contractual in nature—the difference between the amounts the contract obligated them to pay and what they were actually charged. [*Id.* at 47.] Extending the filed-rate doctrine to these facts would stretch its application beyond its intended limits; it would then apply to claims by non-ratepayers against non-regulated entities that merely touch upon a regulated product, in this case, insurance. *See Hill*, 364 F.3d at 1315. Because Caliber's private contractual dealings with its customers (mortgagors) are not reviewed by state regulators, the filed-rate doctrine does not

[3] For this reason, the district court should not have granted judicial notice to ASIC's exhibits documenting the approval of ASIC's rates in Florida as matters of public record. *See Fowler*, 2016 WL 4761838, at *4-5. Appellants' claims do not implicate the rates that ASIC filed in connection with its commercial policies, thus the rate filings submitted by ASIC (which bear the title "Mortgag*ee* Interest Protection"), are irrelevant to the claims asserted. *See, e.g., Couch v. Broward Cnty.*, 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).

bar claims addressing them. *See, e.g., Gallo*, 916 F. Supp. 2d at 546 (amounts billed plaintiffs for cost of insurance agreement between lender and insurer were not subject to regulatory scheme "in the same way that insurance rates are"); *Simpkins*, 2013 WL 4510166, at *14 ("Plaintiffs should not be barred … from challenging conduct … not otherwise addressed by a governing regulatory agency, particularly where defendants bear the burden on the issue of dismissal.").

The Court should reverse the decision below.

II. THE BETTER-REASONED APPELLATE PRECEDENT SUPPORTS REVERSAL OF THE DISTRICT COURT.

A. *Alston* and *Williams* Are the Better-Reasoned Opinions and Support Reversal Here.

The district court adopted the Second Circuit's decision in *Rothstein* almost without question. Although the district court found that the Second Circuit had provided an "extensive discussion of the filed-rate doctrine," it did not explain with sufficient analysis *how* the dual principles underlying the filed-rate doctrine would be offended by a decision for the Plaintiffs—why resolving Appellants' claims would have constituted an opinion on the reasonableness of ASIC's rates or why the Second Circuit's reasoning should prevail over that first set forth by the Third Circuit in *Alston*. Instead, though conceding that *Alston* and *Rothstein* conflict, the district court summarily dismissed *Alston* as not addressing "a true filed-rate issue," and concluded without basis that the Third Circuit had not intended its clear holding in

Alston. *See Fowler*, 2016 WL 4761838, at *14. The Third Circuit in *Alston*, however, asserted its opinion unequivocally, and without dissent or reservation: "It is *absolutely clear* that the filed rate doctrine simply does not apply here. Plaintiffs challenge Countrywide's allegedly wrongful conduct, not the reasonableness or propriety of the rate that triggered that conduct." 585 F.3d at 765 (emphasis added).

Alston was the first appellate opinion to address application of the doctrine on facts analogous to those presented here. The *Alston* plaintiffs alleged that their mortgage lender, Countrywide, had referred them to a private mortgage servicer that paid kickbacks to Countrywide through a Countrywide affiliate using a sham reinsurance scheme that operated precisely like the one described in Appellants' Complaint below. *See Alston*, 585 F.3d at 757; *compare* D.E. 1 ¶¶ 31-40. Like Caliber here, Countrywide had "accepted a portion of the [private mortgage insurance ("PMI")] premiums but provided no services in return[,]" which resulted in charges to the plaintiffs unrelated to the provision of PMI. *Id.* The defendants raised the filed-rate doctrine because the rates used to calculate the PMI premiums had been filed with Pennsylvania 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 Third Circuit sided with the plaintiffs, holding not only that applying the

doctrine would run contrary to Congressional intent, but also that the plaintiffs had not challenged the reasonableness of the underlying filed rates. *See Alston*, 585 F.3d at 765 ("Plaintiffs challenge Countrywide's allegedly wrongful conduct, not the reasonableness or propriety of the rate that triggered that conduct."). District courts in the Third Circuit have uniformly applied *Alston*'s holding to force-placed insurance claims like Appellants' here. *See, e.g., Burroughs v. PHH Mortg. Corp.*, No. 15-cv-6122, 2016 WL 1389934, at *4 (D.N.J. Apr. 8, 2016) (finding *Alston* "more sound" than *Rothstein* in force-placed insurance case); *Gallo*, 916 F. Supp. 2d at 544 (finding *Alston* persuasive despite factual distinctions); *Laffan*, 2014 WL 2693158, at *4 ("[T]he Third Circuit made clear in *Alston* that "the filed rate doctrine simply does not apply" in circumstances where … 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[.]").

The Third Circuit's holding in *Alston* finds further support from the Sixth Circuit's more "extensive" decision in *Williams v. Duke Energy International, Inc.*, 681 F.3d 788 (6th Cir. 2012). There, the Sixth Circuit held that the filed-rate doctrine did not apply to claims brought by Ohio plaintiffs against an electricity retail service

provider, alleging that the service provider had violated statutory and common law by paying substantial rebates to certain large customers in exchange for those customers' withdrawal of objections to a rate-stabilization plan that the service provider sought to have approved by the Public Utilities Commission of Ohio ("PUCO"). *See Williams*, 681 F.3d at 792-93. The plaintiffs characterized the payments as kickbacks paid in exchange for customers' silence. *See id.* at 797.

The Ohio district court had applied the filed-rate doctrine, reasoning that "[w]hether payments are rebates or kickbacks depends upon an analysis of the filed rate." *Id.* (quoting *Williams v. Duke Energy Int'l, Inc.,* 606 F. Supp. 2d 783, 790 (S.D. Ohio 2009)). The Sixth Circuit disagreed, explaining that the filed-rate doctrine does not bar all claims involving *analysis* of a filed rate, but only those challenging the *reasonableness* of a filed rate. *See id.* at 797-98. The court held:

> This case does not involve the challenge by Plaintiffs of any filed rates. Rather, Plaintiffs challenge the lawfulness and purpose of payments made by Appellee Duke's affiliate DERS pursuant to various side agreements. Plaintiffs argue that these side agreements were not filed with any agency, including the PUCO, and are unlawful….
>
> Nor do the alleged "rebates" or "kickbacks" actually involve a challenge to the reasonableness of any filed rate. Plaintiffs do not challenge whether the rates set by the PUCO were reasonable; rather, they contend that Defendants conspired to aid certain favored companies in avoiding paying the actual filed rate, and that this action on the part of Defendants harmed Plaintiffs by giving the favored companies competitive advantage over Plaintiffs.

Id.

The Sixth Circuit held that challenges to kickbacks paid pursuant to side agreements do not constitute challenges to filed rates. The court's conclusion makes sense: the filed-rate doctrine exists to protect customers of a carrier or utility from price discrimination, as well as the authority of the administrative agencies that approve the rates. *See* Section III, *infra*. The claims in *Williams* challenged the payment of rebates pursuant to an unregulated agreement as bribes to withdraw their objections to a proposed rate-stabilization plan; these payments were made pursuant to separate "side" agreements *after* prices based on filed rates had been paid in full. *See Williams*, 681 F.3d at 797-98. A decision that the payments were unlawful would require the defendant to stop paying rebates pursuant to that side agreement, but would not upset the rates approved by Ohio regulators. *See id.* Similarly, here, Appellants challenge Caliber's conduct in charging them costs in excess of that of coverage for force-placed insurance in violation of their mortgage agreements, which are not subject to review by state regulators. [D.E. 1 ¶¶ 31-40.] The payment of kickbacks underlying that conduct is also governed by side agreements not regulated by state authorities. [*Id.* ¶ 30.] Applying the reasoning of *Williams* here, the filed-rate doctrine does not bar Appellants' claims.

B. The Second Circuit's Opinion in *Rothstein* Broke with Deeply Entrenched Precedent and Fails to Persuade.

Creating a circuit split, the Second Circuit in *Rothstein* applied the filed-rate doctrine to bar claims against a force-placed insurer, Balboa Insurance Company,

challenging kickbacks arising from below-cost servicing subsidies that the insurer had paid to the lender. *See Rothstein*, 794 F.3d at 262-66. The court found that the doctrine applied because the filed rate set by the insurer had simply been "passed through an intermediary," the mortgage servicer, to borrowers, and because resolution of the claims in the plaintiffs' favor would have undermined regulators' authority and given plaintiffs, whom the court characterized as "the suing ratepayer[s]," a preferential rate. *See id.* at 259, 262-66.

Rothstein fails to persuade, first because the insurance policies at issue are *commercial* policies designed for sale to mortgage lenders. [D.E. 1 ¶ 44.] Borrowers like plaintiffs do not purchase the insurance coverage to protect themselves from losses relating to their homes; mortgage lenders like Caliber purchase it to protect their own security interest in the collateral for their mortgage loans. *See* pp. 12-13, *supra*. Borrowers reimburse their lenders pursuant to their mortgage contracts, *not* as payment for coverage that the lenders purchased on their behalf, but instead to remedy for the borrower's failure to meet his or her contractual obligation to provide continuous "voluntary" coverage. [D.E. 1 ¶ 48, 64.] Appellants were not the "ratepayers" for whom the commercial rates were approved, nor do they ask the Court to adjust those rates. *See, e.g., Wilson*, 77 F. Supp. 3d at 1234 (lender is ratepayer); *Jackson*, 44 F. Supp. 3d at 1217 (same).

Nor have Appellants challenged these commercial rates. They have instead

challenged Appellees' practice of charging borrowers more than Caliber's "cost of the insurance" in violation of their mortgage agreements and state and federal statutes. This practice is not subject to regulatory review, and "Plaintiffs should not be barred under the filed-rate doctrine from challenging conduct which is not otherwise addressed by a governing regulatory agency, particularly where defendants bear the burden on the issue of dismissal." *Simpkins*, 2013 WL 4510166, at *14. Stated differently, as elaborated in Section III below, judicial review of Appellant's claims would not offend the nonjusticiability rationale underlying the filed-rate doctrine.

Both Appellees and the Second Circuit in *Rothstein* failed to appreciate the salience of these distinctions, instead analogizing the plaintiffs' allegations to the facts presented in cases involving a plaintiff's indirect purchase of a product through a retailer or broker on his or her own behalf. But the cases on which they relied described different transactional relationships than the ones at issue in this and other force-placed insurance actions. In *Wah Chang v. Duke Energy Trading & Marketing, LLC*, 507 F.3d 1222 (9th Cir. 2007), for example, a corporation brought claims against energy companies, alleging that the rate it had paid was higher than the rate that would have applied but for the defendants' manipulation of the market. *See* 507 F.3d at 1224. The plaintiff had purchased electricity from a retailer, which had in turn purchased it wholesale from the defendant; thus the transaction was

facilitated by an "intermediary" between the buyer and the original seller. *See id.* at 1224, 1226. The rate that the plaintiff had paid was "a retail rate based upon the wholesale rate," which a federal agency had reviewed and filed. *Id.*

Unlike Appellants here, the plaintiff in *Wah Chang* had contracted to purchase electricity at a retail price calculated based on a filed and approved rate, and challenged that rate head-on as unfair based on alleged market manipulation. *See id.* at 1226. Accordingly, the court held: "Wah Chang cannot avoid the facts that it seeks what amounts to having the courts determine what rates the Energy Companies should have charged instead of the rates they did charge." *Id.*

Similarly, in *Simon v. KeySpan Corp.*, 694 F.3d 196, 198 (2d Cir. 2012), a retail consumer brought antitrust claims against a producer of electricity, alleging that the producer had colluded with one of its rivals to drive rates up as part of a market-based auction process designed and closely supervised by the Federal Energy Regulatory Commission ("FERC"). *See* 694 F.3d at 198. As in *Wah Chang*, the plaintiff had purchased electricity through an intermediary—ConEdison, a New York electricity retailer that had participated in the auction. *See id.* Reasoning that the auction process had been tightly controlled by regulators, the court concluded that the filed-rate doctrine applied to bar challenges by purchasers of electricity to the reasonableness of the resulting rates. *See id.* at 204-05, 207-08.

Critically, the court in *Simon* noted that FERC had not only "tightly

control[led] the auction process[,]" but also "ha[d] mechanisms in place to remedy the kind of misconduct" that Plaintiffs had alleged. *Id.* at 207. FERC had promulgated a rule barring fraud or deceit in connection with the sale of energy, and "ha[d] the authority to investigate market manipulation in the energy market." *Id.* Specifically, FERC had investigated the precise misconduct at issue and concluded that such conduct did not constitute market manipulation. *See id.*

The transactions at issue in *Wah Chang* and *Simon* are the "A-to-B-to-C' transactions to which the *Rothstein* Court looked in concluding that "a claim challenging a regulator-approved rate is subject to the filed-rate doctrine whether or not the rate in passed through an intermediary." 794 F.3d at 259. The district court here relied on the same logic, and on the same authority, reasoning that Plaintiffs are complaining about "amounts included in *their LPI premiums*," *Fowler*, 2016 WL 4761838, at *4 (emphasis in original), suggesting that the amounts paid by borrowers were "premiums" for their own coverage, purchased through Caliber.[4] But in both *Wah Chang* and *Simon*, regulators oversaw each transaction in the A-to-B-to-C chain (wholesaler to retailer to customer), because each purchaser—both the wholesaler and the retailer—were purchasing a commodity at a price set based on an approved

[4] The district court repeatedly mischaracterized the amounts borrowers paid to Caliber as premiums for insurance coverage, but it was *Caliber* that paid insurance policy premiums to ASIC, and those premiums are the only charges that were calculated based on filed rates.

rate. The *entire transactional chain*, that is, fell underneath the regulatory umbrella.

Appellants' claims are different. Appellants do not allege that they purchased insurance from ASIC through an intermediary. Caliber, that is, was not a retailer or broker facilitating ASIC's sale of insurance coverage to individual homeowners. Instead, Caliber purchased insurance coverage from ASIC *for itself*—to cover its interest in the collateral for its loan. [D.E. 1 ¶¶ 44, 48, 64.] This "A-to-B" transaction was the *only* link in the chain subject to regulation by state departments of insurance: the rates were filed and approved as commercial rates for collateral-protection insurance, and state insurance regulators had jurisdiction to investigate wrongdoing by ASIC and hear complaints by mortgage servicers. *See, e.g.,* California Regulatory Opinion ("The jurisdiction of the Commissioner extends to issues concerning the reasonableness of insurance rates vis-à-vis [ASIC] as the insurer and [the mortgage lender] as the insured.").

Appellants did *not* contract to purchase insurance coverage from ASIC *or* Caliber. They contracted *only* to cover Caliber's "cost of insurance" for coverage it had purchased on its own behalf, and *only* as a contractual remedy for failing to provide their own coverage. [*Id.* ¶¶ 48, 64.] This "B-to-C" transaction is governed by Appellants' mortgage loan agreements and is *not* subject to regulation by state insurance departments. *See, e.g.,* California Regulatory Opinion ("The Department has no jurisdiction to decide the scope of charges which would be reasonable as

between a lender and its borrower.") (emphasis added). The "B to C" transaction, that is, sits outside the regulatory umbrella.

Appellants seek damages as a result of that contractual breach—the difference between what Caliber charged them for forced coverage and Caliber's actual cost of insurance. [D.E. 1 at 47.] Contrary to the conclusions drawn by the district court, calculating these damages will require no analysis of ASIC's rates—those rates can remain intact as the rates that ASIC charges lenders and servicers for collateral protection insurance. *See* Section III, *infra*. They are a mere background fact to the distinct dispute presented by Appellants' claims.

The court in *Burroughs* distinguished *Rothstein* effectively, reasoning that judicial action would not undermine agency authority because the plaintiff had challenged the defendants' relationship and their "scheme of hiding the nature of fees under the guise of regulatory-approved rates." The court continued:

> 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[.]

2016 WL 1389934, at *4 (internal citation omitted).

The Court should apply the same logic here and reverse the decision below.

III. PLAINTIFFS' CLAIMS OFFEND NEITHER THE NONJUSTICIABILITY NOR THE NONDISCRIMINATION PRINCIPLE UNDERLYING THE FILED-RATE DOCTRINE.

The district court held, based on *Rothstein*, that resolution of Appellants' claims would offend the dual principles underlying the filed-rate doctrine: nonjusticiability and nondiscrimination. The nonjusticiability principle seeks to preserve the regulatory agencies' role in approving filed rates, and to keep courts out of the rate-making process, *see Verizon Del., Inc. v. Covad Commc'ns Co.*, 377 F.3d 1081, 1086 (9th Cir. 2004), while the nondiscrimination principle "prevent[s] carriers from engaging in price discrimination as between ratepayers[,]" *Hill*, 364 F.3d at 1316. Contrary to the district court's conclusion, analysis of these two principles instructs against application of the doctrine to Appellants' claims.

As already explained above, *see* p. 23, *supra*, Appellants' claims do not offend nonjusticiability because a decision in Appellants' favor would not trespass on insurance regulators' authority to set and approve rates for force-placed insurance or constitute an opinion on the reasonableness of those rates. *See, e.g., Burroughs*, 2016 WL 1389934, at *4; *Perryman*, 2014 WL 4954674, at *8. State insurance regulators determine the reasonableness of filed *commercial* rates for master collateral protection insurance policies, which are paid by Caliber to cover its entire portfolio of loans. [D.E. 1 ¶¶ 44, 56.] Appellants have not challenged these rates, but instead separate charges imposed pursuant to their mortgage agreements with

Caliber that exceed Caliber's cost of insurance. [*Id.* ¶¶ 31-40 & p. 47. These agreements are not subject to regulatory review; thus the filed-rate doctrine does not apply. *See, e.g., Gallo*, 916 F. Supp. 2d at 545-46 (plaintiff had not challenged rate, "[r]ather, Plaintiff [had] challeng[ed] the lawfulness and purpose of payments that PHH Mortgage received in the form of commissions, kickbacks, reinsurance premiums, or other financial benefits, pursuant to several alleged pre-arranged agreements designed to maximize profits for Defendant"); *Abels*, 678 F. Supp. 2d at 1277 ("because the bank is not subject to the extensive administrative oversight that insurance companies are, applying the filed rate doctrine in this instance would not serve either purpose").

The district court observed that the touchstone of the nonjusticiability principle is "the impact [a civil action] will have on agency procedures and rate determinations," *Fowler*, 2016 WL 4761838, at *7 (quoting *Taffet*, 967 F.2d at 1495), and concluded that the filed-rate doctrine barred the claims presented. But because Caliber is the ratepayer, ASIC's rates would *not* require adjustment should the Court reverse the opinion below. Appellants do not ask the court to assess the propriety of the premium that ASIC charges to Caliber for its master policy. Should the court find that Caliber breached its contracts with its mortgagors, or is liable for nondisclosure, ASIC would not need to adjust its rates; it would remain free to charge *Caliber* premiums based on the same approved *commercial* rates. Caliber,

however, would have to discontinue its practice of gouging borrowers beyond the true cost of coverage it purchases.

Nor do Appellants' claims offend the nondiscrimination principle. *See, e.g., Williams*, 681 F.3d at 797-98 (no rate discrimination because kickbacks not subject to regulatory review). The reason is simple: Appellants' claims do not threaten the "scheme of uniform rate regulation." Their resolution will not result in Caliber paying a lower rate than other similarly situated *lenders* because the master policy's commercial rates are not implicated. The rates charged lenders—the ratepayers—comprise the playing field on which the filed-rate doctrine would prohibit discrimination. *See, e.g., Hill*, 364 F.3d at 1316 (nondiscrimination "prevent[s] carriers from engaging in price discrimination as between ratepayers"). Variations among the charges that Caliber and its competitors impose on their customers, the mortgagors, are beyond the doctrine's reach because those charges are imposed outside the regulatory scheme. In concluding that Appellants' claims would transgress the nondiscrimination principle, the district court, following the court in *Rothstein*, focused on the wrong ratepayer.

The district court thus erred in granting Appellees' motions to dismiss.

CONCLUSION

The Court should reverse the opinion of the district court and remand this case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel for Appellants hereby certify that the type style utilized in this brief is 14-point Times New Roman proportionally spaced, and there are 7,093 words in the brief.

s/ Rachel Sullivan

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 17, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ Rachel Sullivan