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

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

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 11th Circuit Rule 26.1-2, Plaintiffs-Appellants certify that the Certificate of Interested Persons and Corporate Disclosure Statement in their Initial Brief is true and correct.

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INTRODUCTION

Caliber and ASIC argue that the filed-rate doctrine bars Appellants' claims because ASIC filed its rates for lender-placed insurance ("LPI") with Florida and Pennsylvania regulators. Both Appellees, however, disregard one critical fact: state legislatures, regulators, and ASIC itself all define LPI as "collateral protection insurance" issued to protect not homeowners, but the *lender*'s interest in the collateral for its mortgage loan. Only by basing their arguments on a contrary, legally baseless premise—that LPI is residential coverage purchased by Caliber for the borrower—can Appellees posit that Caliber is a "mere[] … go-between" for LPI transactions between ASIC and its borrowers and then argue that the filed-rate doctrine bars Appellants' claims. Caliber and ASIC reach this conclusion only by mischaracterizing facts and applicable law, and still, in this second appeal, fail to explain exactly *how* the resolution of Appellants' claims would in any way impede regulators' rate-setting authority, require the District Court to "unbundle" ASIC's collateral protection insurance rates, or amount to a judicial determination on the reasonableness of those rates.

Caliber and ASIC also ask the Court to review the sufficiency of Appellants' claims under Rule 12(b)(6), but the better course is to leave these issues for resolution by the District Court. Judge Goodman has carefully considered claims based on almost identical facts in other LPI actions and is familiar with the issues presented. *See, e.g., Montoya v. PNC Bank, N.A.*, 94 F. Supp. 3d 1293 (S.D. Fla. 2015). Additionally, Appellants retain their right to amend under Rule 15, and remand would allow them to refine their claims before further appellate review. Nevertheless, Appellants' claims are sound, and none of Caliber's or ASIC's arguments compels dismissal.

The Court should reverse on the filed-rate doctrine and remand Appellants' claims for further proceedings below.

I. THE FILED-RATE DOCTRINE DOES NOT APPLY.

A. LPI Charges Are Not Passed Through an Intermediary.

Both Caliber and ASIC characterize LPI as a product passed from insurer to borrower through a "mere[] … go-between," the lender, in a single transaction. Caliber Br. at 27; ASIC Br. at 21. This characterization misleads as to not only the nature of LPI, but also the transactions between ASIC and Caliber, and then Caliber and its borrowers. ASIC issues LPI to Caliber long before any borrower's coverage has lapsed, intending to protect Caliber's interests, not those of individual borrowers. [D.E. 1 ¶¶ 29-31, 44.] The policy issued is "Mortgagee Interest Protection," and covers Caliber's entire portfolio of mortgage loans. [*Id.* at 17 n. 9 & ¶ 27.] Caliber purchases coverage on its own behalf, not as the agent, broker, or "go-between" for any borrower, [*id.* ¶ 44]; a mere intermediary would purchase coverage on the borrower's behalf without retaining any stake.

ASIC and Caliber argue that an "intermediary" relationship is evidenced by regulators' awareness that the amounts charged the lender for coverage will ultimately be passed on to the borrower.[1] *See* Caliber Br. at 28; ASIC Br. at 26. But regulators' "awareness" neither defines their task, nor binds this Court—applicable law guides both regulators' review of ASIC's filed rates and this Court's analysis. That law is clear. According to the Florida Statutes, LPI is "collateral protection insurance," or "commercial property insurance under which a creditor is the primary beneficiary and policyholder and which protects or covers an interest of the creditor[,]" and "is not residential coverage." Fla. Stat. § 624.6085 (2016).

The Pennsylvania Statutes similarly define "property or casualty insurance" to exclude "[c]redit insurance, vendors' single interest insurance or collateral protection insurance or any similar insurance protecting the interests of a creditor arising out of a creditor-debtor transaction." 40 Pa. Stat. § 991.1802. Neither ASIC nor Caliber has addressed this law or disputed that LPI is collateral protection insurance issued to cover mortgage lenders' interests.[2]

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[1] ASIC observes that the National Association of Insurance Commissioners has explained that consumers "are obligated to pay the cost of coverage," ASIC Br. at 26, and that is exactly right. Borrowers are obligated to pay Caliber's cost of coverage, not Caliber's "premium" or anything more than that cost.

[2] ASIC adopted the same definition in its Consent Order with the FLOIR, which involved its "*collateral protection program.*" Consent Order, *In the Matter of Am. Sec. Ins. Co.*, Case No. 141841-13 (FLOIR Oct. 7, 2013), available at http://www.floir.com/siteDocuments/americanSecurity141841-13-CO.pdf.

As explained in Appellants' Initial Brief, this case is distinct from *Wah Chang* and *Simon*, where brokers or agents acted solely on the buyer's behalf. *See* Init. Br. at 23-26.[3] ASIC nonetheless contends that Appellants stand in the same shoes as the plaintiffs in *Wah Chang*, arguing that, like those plaintiffs, Appellants "contracted to purchase LPI at filed rates[.]" ASIC Br. at 22 n.4. This is patently false. Appellants did *not* contract with ASIC or Caliber to purchase LPI—*Caliber* contracted with ASIC to purchase a collateral protection policy and is the named insured. [D.E. 1 ¶ 24; D.E. 23-1 at 25.] Appellants contracted with Caliber, but only to cover "the cost of the insurance coverage" purchased to protect Caliber's interests. [D.E. 1 ¶ 44 ("the cost of the insurance coverage so obtained …."); D.E. 23-1 at 22 ("we may purchase hazard insurance … and charge you the cost of the insurance"); *id.* at 18 (""The cost of this insurance will be charged to you, by us.").] They did *not* contract to purchase insurance or pay a filed rate. *See id.* Accordingly,

("Consent Order") (emphasis added).

[3] The court in *Cannon v. Wells Fargo Bank, N.A.* held:

> *Wah Chang* is not on point; the core of the wrong in *Wah Chang* was the excessive rate. Although that rate was allegedly caused by anti-competitive manipulation, the Regulatory Commission approved that rate. Here, the gravamen of the complaint is not the premium rate per se, but the failure to disclose the fraudulent nature of the alleged commission charged to borrowers by Wells Fargo.

2014 WL 324556, at *6 (N.D. Cal. Jan. 29, 2014).

Caliber could not have been an intermediary for their purchase of LPI.

ASIC argues that it does not matter that Appellants "seek a contractual or tort remedy not governed by state regulators" because filed rates "become the law" once they are approved. ASIC Br. at 18. This is only so, however, as between carrier and customer, *see id.*; here, between ASIC and Caliber. ASIC Br. at 18. Borrowers never contracted to purchase LPI from ASIC; they are therefore not bound to pay ASIC's filed rates.

B. Appellants' Claims Do Not Offend Nonjusticiability.

ASIC and Caliber argue that resolving Appellants' claims would require the Court to "unbundle" ASIC's filed rates, thus offending nonjusticiability. *See* ASIC Br. at 29; Caliber Br. at 22-23. They concede that Appellants have not directly attacked ASIC's rates, yet contend that a judgment for Appellants "would necessarily cast doubt upon the propriety of filed rates charged by [ASIC] to Caliber[,]" indirectly "set[ting] a new rate … in the form of money damages." ASIC Br. at 29 (quoting *Taffet*, 967 F.2d at 1491 n.9); Caliber Br. at 23 (same).

No appellee in these consolidated appeals has explained how this is so. An award here would require Caliber to charge borrowers only its actual cost of coverage, but would not require ASIC to either reduce Caliber's collateral protection premium or stop paying kickbacks to Caliber. Appellants have not challenged ASIC's *rates* as excessive or inflated; they have challenged the amounts that Caliber passes on to borrowers as exceeding what is allowed under their mortgage contracts. [D.E. 1 ¶¶ 31-32.]

With the exception of TILA statutory damages, Appellants seek only those amounts charged them beyond Caliber's actual "cost of insurance coverage." Caliber could return these amounts without undermining regulators' authority by paying ASIC the full premium for the master policy, but then charging borrowers the full premium *less* the rebate it received from ASIC. Accordingly, Appellants' claims do not, as Appellees contend, "have the *effect* of challenging the filed rate." ASIC Br. at 20 (citation omitted) (emphasis in original).

Nor would calculating damages require the Court to "determine a reasonable rate and subtract it from the premium." Caliber Br. at 24 (citation omitted). For this reason, the rate filings submitted to the District Court are irrelevant to this Court's analysis. Should Appellants prevail, the District Court would award damages to the class in the amount they paid to Caliber, purportedly to cover "the cost of the insurance coverage," *less* the amount that ASIC paid back to Caliber in the form of a rebate. A factfinder could perform this calculation without reviewing any rate filing and without regard to ASIC's representations to state regulators justifying its rates.

Rothstein aside, this conclusion comports with all appellate opinions upon which Appellees rely. In *Taffet*, *New Jersey Title*, and *McCray*, utility customers and title insurance purchasers *directly* challenged rates alleged to have been wrongfully obtained by their service providers. *See Taffet*, 967 F.2d at 1485; *McCray v. Fidelity Nat'l Title Ins. Co.*, 682 F.3d 229, 241 n.11 (3d Cir. 2012) (claiming that the appellees' "[rate] filings include hidden costs based on 'kickbacks and other inducements unrelated to the business of insurance"); *In re N.J. Title Ins. Litig.*, 683 F.3d 451, 453-54 (3d Cir. 2012) (alleging that appellees had "collectively set and charge[d] uniform and supra-competitive rates for title insurance in New Jersey"). Their arguments, as stated in *Taffet*, "rest[ed] on the assumption that they enjoy[ed] a legal right to have been charged a lower rate than they actually were charged[.]" 967 F.2d at 1488.

Here, Caliber is the policyholder standing in the shoes of the plaintiffs in *Taffet*, *New Jersey Title* and *McCray*. If Caliber had challenged the rates that it pays for collateral protection insurance and sought a rate reduction, its claims would be barred by the filed-rate doctrine as well. Appellants' claims, however, are not so barred—they are not policyholders challenging the rates that ASIC filed for the commercial coverage issued to Caliber to protect its collateral. They instead sue Appellees for breaching, and participating in the breach of, Caliber's mortgage contracts with its borrowers, which are beyond regulators' purview and bind borrowers to pay only the "cost of the insurance coverage." [D.E. 1 ¶¶ 48, 64, 77.]

C. Resolution of Appellants' Claims Will Not Offend Nondiscrimination.

ASIC and Caliber argue that Appellants' claims implicate the nondiscrimination principle because "anybody would understand that these rates are eventually going to be passed on to the homeowner," and a judgment for Appellants would discriminate against non-class members with ASIC LPI. ASIC Br. at 30; Caliber Br. at 24-25. Appellants and their fellow borrowers, however, are not the consumers for whom ASIC's rates are set, and this Court's analysis is not governed by some abstract "understanding," but rather by the laws by which state insurance regulators are bound. Those laws are clear that LPI is collateral protection insurance, not residential coverage. *See* p. 3, *supra*.

Caliber is the policyholder and named insured for LPI coverage. *See* p. 4, *supra*. Some borrowers are identified on insurance certificates as "additional insureds," but even then Caliber contracts for the master policy, remains the policyholder, retains sole responsibility for paying the premium, and holds the exclusive rights to participate in claims adjustment with ASIC and cancel the policy. [D.E. 23-2 at 30-39.] Identifying the borrower as an additional insured does not create a relationship between borrowers and ASIC qualitatively different than ASIC's relationship with borrowers with "lender-only" certificates. The borrower is offered no additional protections; the policy is not somehow transformed into residential coverage, as opposed to collateral protection coverage; nonpayment by the borrower does not result in cancellation of the policy (as would nonpayment by the lender or servicer); and refunds are not paid directly from the insurer to the borrower. [*Id.*] Naming borrowers as "additional insureds" on an LPI certificate affords them *only* the right to make claims for the lender's protection.

The potential discrimination forbidden by the filed-rate doctrine would be that among the policyholders for whom ASIC's sets its rates—lenders and servicers. *See* Init. Br. at 30. Resolution of the claims below cannot trigger such discrimination because the ASIC's rates for its master policies are not implicated here. *See* pp. 2-5, *supra*.

D. *Alston* and *Williams* Bear Directly on Appellants' Claims.

ASIC and Caliber attempt to distinguish *Alston v. Countrywide Financial Corp.*, 585 F.3d 753 (3d Cir. 2009), and *Williams v. Duke Energy International, Inc.*, 681 F.3d 788 (6th Cir. 2012), arguing that *Rothstein* is the sole appellate analogue worthy of consideration. Their distinctions are forced and fail to persuade.

1. The Third Circuit Did Not Limit *Alston* to RESPA Claims.

ASIC contends that it is "logically impossible to assert" that the Third Circuit's opinion in *Alston* conflicts with the Second Circuit's in *Rothstein*, but the District Court below and other courts have found otherwise. [D.E. 91 at 3 ("[T]he two federal appellate courts which have considered the issue [the Second and Third Circuits] appear to have adopted two diametrically opposed views.").]; *Burroughs* *v. PHH Mortg. Corp.*, 2016 WL 1389934, at *3 (D.N.J. Apr. 8, 2016) ("'*Rothstein* ... is in direct tension with ... *Alston*'"); *Patel v. Specialized Loan Servicing LLC*, 183 F. Supp. 3d 1238, 1242 (S.D. Fla. 2016) (acknowledging "conflict of authority as to whether the filed-rate doctrine bars borrowers' challenges to excess or inflated premiums where lenders or mortgage servicers forced placed insurance and passed the costs on to the borrowers[,]" discussing *Rothstein* and *Alston*).

Alston stands as the better-reasoned opinion:

> Beyond precedent ... 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. ... [W]hat is being challenged here ... 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.

Burroughs, 2016 WL 1389934, at *4.

ASIC and Caliber attempt to distinguish *Alston* because it involved RESPA claims, but the plaintiffs in *Alston* offered two reasons why the filed-rate doctrine did not apply, first raising RESPA and then arguing that the plaintiffs challenged only "the payment of kickbacks, not the rates they [had] paid for PMI." *Id.* at 764. The Court addressed both grounds, holding as to the latter 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; *see also Weiss v. Bank of Am. Corp.*, 153 F. Supp. 3d 831, 843 (W.D. Pa. 2015) ("Defendants contend that *Alston* is limited to its facts—namely, that it does not apply beyond the RESPA context. . . . The Court is not persuaded.").

ASIC and Caliber argue that a footnote in *Alston* referring to *Stevens v. Union Planters Corp.*, 2000 WL 33128256 (E.D. Pa. Aug. 22, 2000), shows that the Third Circuit did not intend its holding in *Alston* to apply to LPI. *See* Caliber Br. at 35; ASIC Br. at 33. But the court in *Alston* explained that "*Stevens* is inapposite because the plaintiffs in that case directly challenged the filed rate as unreasonable." 585 F.3d at 764 n.13 (emphasis added). Appellants here have not.

Stevens v. Citigroup, Inc., 2000 WL 1848593 (E.D. Pa. Dec. 15, 2000), an opinion involving the same plaintiff, mortgage, and insurance, and issued by the same judge who had issued the *Union Planters* opinion just four months earlier, supports this conclusion. There, the court distinguished *Union Planters* based on the plaintiffs' allegations:

> [D]efendants rely upon this Court's decision in ... *Union Planter's* ... 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 plaintiff's claims except his RESPA claim at this time.

2000 WL 1848593, at *3.[4]

Appellants have challenged the exclusive arrangement whereby Caliber charges borrowers more than its cost of coverage, but disguise the overcharges as legitimate. [D.E. 1 ¶¶ 31-40.] The challenged conduct is not governed by regulators, nor do Appellants challenge ASIC's rates for collateral protection insurance. As in *Citigroup*, the filed-rate doctrine does not apply.

2. *Williams* Cannot Be Distinguished.

Appellees argue that *Williams* is distinct because it did not involve "damages components bundled into the rate's structure," ASIC Br. at 34-35; *see* Caliber Br. at 37, but Appellants do not challenge components of ASIC's filed rates. Those rates are for collateral protection insurance, and would remain intact should the District Court rule on the merits. *See* p. 3, *supra*. As Appellants argued in *Patel* and in their Initial Brief here, *Williams* is on point. *See* Init. Br. at 19-21; *Patel* Init. Br. at 21-23; *Patel* Reply at 10-11.

II. PLAINTIFFS HAVE STATED VIABLE CLAIMS FOR RELIEF.

Caliber and ASIC ask this Court to review Appellants' claims under Federal

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[4] The court in *Gallo v. PHH Mortgage Corp.* 916 F. Supp. 2d 537, 545 (D.N.J. 2012), noted this distinction and found that the claims there had similarly challenged the manner in which the lender had selected the force-placed insurance at issue, rather than the insurer's filed rates.

Rule of Civil Procedure 12(b)(6), although the District Court did not. Appellants oppose this request as set forth in the Reply Brief in *Patel*, and further address Caliber's and ASIC's arguments for dismissal below.

A. Caliber's Mortgage Agreements Did Not Authorize Its Conduct.

Caliber argues that it cannot be held liable for express or implied breaches of contract because its mortgage agreements explained that "LPI would be obtained for Caliber's protection[,]" and Appellants were warned that Caliber's cost of coverage might be high. Caliber Br. at 40-41. The mortgage agreements did *not* warn, however, that Caliber would charge borrowers more than "the cost of the insurance coverage." [D.E. 1 ¶¶ 48, 64, 77 & Exs. A & B.] This is the contractual breach that Appellants challenge and for which they have stated claims—*not* Caliber's contractual right to purchase coverage at a high cost.

Calber relies on this Court's opinion in *Feaz v. Wells Fargo Bank, N.A.*, 745 F.3d 1098, 1110-11 (11th Cir. 2014), and the Seventh Circuit's in *Cohen v. American Security Insurance Co.*, 735 F.3d 601 (7th Cir. 2013), but both are inapposite, as described in Appellants' response to Caliber's motion to dismiss. [D.E. 47 at 25-30.] The vast majority of district courts to have considered the issue agree. [*Id.* at 25-26 (listing cases distinguishing *Cohen* and *Feaz*)]; *see also, e.g., Edwards v. Green Tree Servicing, LLC*, 2015 WL 6777463, at *3 (N.D. Fla. Oct. 22, 2015) (noting that Florida district courts have distinguished *Cohen* and *Feaz*);

Martorella v. Deutsche Bank Nat'l Trust Co., 161 F. Supp. 3d 1209, 1222 (S.D. Fla. 2015) (rejecting *Cohen*'s and *Feaz*'s application and denying defendants summary judgment).

Significantly, in *Cohen*, the mortgagor executed documents *pre-closing* warning that the lender might charge her "processing fees" and "commissions" in connection with forced placement, and that the cost might equal two to five times that of voluntary insurance. *See id.* Appellants, however, did not execute any such documents pre-closing. Here, warnings against forced coverage came *post-closing*, in notices mailed to Appellants once their voluntary coverage had lapsed and long after they had executed their mortgage agreements. [D.E. 1 ¶¶ 28, 153, 156, 158, 160.] These after-the-fact warnings do not insulate Caliber from liability for contractual breach.

In *Feaz*, the plaintiff brought contractual claims against ASIC challenging the forced placement of excess *flood* insurance in purported violation of the National Housing Act and the National Flood Insurance Act, raising the question of whether the lender had breached the mortgage contract by requiring borrowers to obtain flood insurance in excess of the amount required by the Federal Housing Administration. *See Feaz*, 745 F.3d at 1100-01, 1104-10. The court invoked *Cohen* only with reference to the plaintiff's breach of fiduciary duty claims, which were governed by Alabama law, and because they were extracontractual, allowed for consideration of the notices mailed to the plaintiff warning against the forced placement of flood coverage. *See id.* at 1110-11. Here, by contrast, notices warning against forced placement were not incorporated into Appellants' mortgage contracts pre-closing. Such notices are not, therefore, relevant to Appellants' claims for contractual breach.

For these reasons, as well as those articulated in Appellants' motion to dismiss response below [D.E. 47 at 25-33], Appellants have stated claims for breaches of contract and the implied covenant of good faith and fair dealing.

B. Appellants Have Stated Unjust Enrichment Claims.

Caliber argues that Appellants have not pled unjust enrichment because an express contract governs their claims' subject matter and no party has disputed the existence or validity of that contract. *See* Caliber Br. at 42-43. Appellants, however, have pled in the alternative. [D.E. 1 at 33 n.10.] "[I]t is not upon the allegation of the existence of a contract, but upon a showing that an express contract exists that the unjust enrichment count fails." *Martorella*, 931 F. Supp. 2d at 1228 (citation omitted). "Until an express contract is proven, a motion to dismiss a claim for unjust enrichment on these grounds is premature." *Id.*; *see Samana Inc. v. Lucena*, 156 F. Supp. 3d 1373, 1374 (S.D. Fla. 2016) (same); *Powers v. Lycoming Engines*, 2007 WL 2702705, at *3 (E.D. Pa. Sept. 12, 2007) (plaintiffs permitted to plead unjust enrichment as alternative to breach of contract). *See also Lass v. Bank* *of Am., N.A.*, 695 F.3d 129, 140 (1st Cir. 2012) ("[t]he mortgage does not explicitly address commissions or … the Bank's entitlement to profit from its force placement of insurance"); *Casey v. Citibank, N.A.*, 915 F. Supp. 2d 255, 264-65 (N.D.N.Y. 2013 (dismissal premature because plaintiffs alleged unjust enrichment resulting from payment of kickbacks, but kickbacks or "commissions" were not mentioned in mortgage contract).

Caliber argues that Appellants' unjust enrichment claims fail because Appellants have not alleged a direct payment to Caliber, relying primarily on *Virgilio v. Ryland Grp.*, 680 F.3d 1329 (11th Cir. 2012). *See* Caliber Br. at 43-44. Appellants' payments to Caliber, however, *were* direct—Caliber deducted the alleged overcharges from Appellants' escrow accounts without intervention by any third party. [D.E. 1 ¶ 34.] Courts have consistently found a direct payment to exist pre- and post-*Virgilio* under these circumstances, *see, e.g., Longest v. Green Tree Servicing, LLC*, 308 F.R.D. 310, 330 (C.D. Cal. 2015), and have also upheld claims against force-placed insurers. *See also* D.E. 47 at 34-36 (citing additional cases distinguishing *Virgilio*); *Hamilton v. SunTrust Mortg. Inc.*, 6 F. Supp. 3d 1312, 1317 (S.D. Fla. 2014).

Appellants have stated claims for unjust enrichment.

C. Caliber Violated Its Duty to Disclose Under TILA.

Caliber argues that TILA does not require it to disclose the charges of which

Appellants complain, Caliber Br. at 44-45, but, as Appellants explain in their papers below, the unauthorized kickbacks at issue must be disclosed as "finance charges" under TILA. [D.E. 47 at 37-40.] Caliber nevertheless contends that charges arising from loan defaults are excluded from TILA's reach because an Official Staff Interpretation suggests lender-placed coverage is excluded from the definition of "finance charge" that triggers TILA's disclosure requirements. *See* Caliber Br. at 45. But that exception and the larger rule apply only to "premiums or other charges for insurance" imposed on borrowers. *See* 12 C.FR. § 226.4(b)(7), (b)(8); 12 C.F.R. pt. 226, sup. I, subpt. A, cmt. 4(b)(7), 4(b)(8). The charges at issue here are not alleged to be premiums or insurance-related charges, but instead gratuitous kickbacks unrelated to the provision of coverage. [D.E. 1 ¶ 33.]

This Court should uphold Appellants' TILA claims, keeping in mind that TILA aims "to assure meaningful disclosure of credit terms." 15 U.S.C. § 1601(a). "As a remedial statute, TILA must be construed liberally in favor of the consumer." *Bragg v. Bill Heard Chevrolet, Inc.*, 374 F.3d 1060, 1065 (11th Cir. 2004).

D. Appellants Have Stated Claims for Tortious Interference.

ASIC seeks dismissal of Appellants' tortious interference claims because ASIC was privileged to interfere with their contracts with Caliber. *See* ASIC Br. at 50. As Appellants argued below and in *Patel*, however, ASIC's privilege or justification defense is an affirmative defense that does not support dismissal and fails on the merits. [D.E. 47 at 36-37]; *Patel* Reply at 19-20.

ASIC also argues that its conduct was proper because it was authorized by the notices mailed borrowers, but nothing in those notices alerted borrowers that they would be charged more than Caliber's cost of coverage. [D.E. 23-3 at 15-17.] These charges are not, in fact, authorized by Appellants' mortgages, which permit Caliber only to obtain coverage and advise only that "the cost of the insurance coverage" might exceed the cost in an open market. [*Id.* ¶¶ 48, 64, 77 & Exs. A & B.] The notices may have warned of LPI's "high cost"; they did not, however, warn that the cost would include charges beyond what Appellants had contracted to pay. *See, e.g., Wilson v. Everbank, N.A.*, 77 F. Supp. 3d 1202, 1232 (S.D. Fla. 2015) (notices did not warn that LPI charges covered kickbacks from insurer to lender) (citing *Hamilton,* 6 F.Supp.3d at 1311); *Williams v. Wells Fargo Bank N.A.*, 2011 WL 4368980, at *12 (S.D. Fla. Sept. 19, 2011) (allegations that force-placed insurer had acted in bad faith by charging "unwarranted" fees and "paying/receiving *improper* commissions and kickbacks" stated tortious interference claim).

ASIC relies on *Cohen*, *Feaz*, and *Kolbe v. BAC Home Loans Servicing, LP*, 738 F.3d 432 (1st Cir. 2013), but none of these opinions insulates ASIC from liability. Appellants have already distinguished *Cohen* and *Feaz* here, below, and in the *Patel* appeal. [D.E. 47 at 25-30]; *Patel* Reply at 20-21, 25.

The First Circuit in *Kolbe* did not consider whether lenders are authorized to charge borrowers more than the lender's actual cost of coverage for LPI without disclosing the nature and purpose of the charges imposed. *Kolbe*, like *Feaz*, involved claims challenging forced flood insurance, and the question of the borrower's obligation to provide coverage beyond the federally required minimum. *See* 738 F.3d at 436. The plaintiff also claimed that the lender had engaged in self-dealing by collecting commissions and premiums on flood coverage that the borrower was not contractually bound in the first instance to obtain. *See id.* at 454. In that context, and recognizing that the plaintiff in *Kolbe* had obtained his own coverage and therefore lacked standing to claim self-dealing against the lender, the First Circuit declined to hold that the lender's warning to avoid forced coverage would not support a charge of "abusive self-dealing." *Id.*

Here, by contrast, Appellants have alleged that they paid more than Caliber was contractually authorized to charge them for coverage, and warnings that the coverage might be expensive are entirely beside the point because Appellants do not claim that the coverage was too expensive *per se*.

E. Appellants Have Stated Federal RICO Claims.

1. Appellants have alleged a scheme to defraud.

ASIC and Caliber argue that Appellants have not pled a scheme to defraud because borrowers "w[ere] warned of [LPI's] high cost, implored *not* to purchase the product, informed that doing so would *not* be in their best interest, and advised to purchase a different product." ASIC Br. at 39 (emphasis in original); *see also* Caliber Br. at 47-49. These "warnings," however, do not address Appellants' claims. Appellants do not allege that the price of coverage was too high *per se* or challenge the nature or amount of coverage provided. They challenge misleading representations and omissions that they would be charged "the cost of the insurance coverage" forced, when in fact, they were charged gratuitous amounts in excess of Caliber's cost of coverage. [D.E. 1 ¶¶ 31-35.] Advice to procure voluntary insurance should not insulate Appellees from liability for their misleading statements. *See, e.g., Williams v. Wells Fargo Bank, N.A.*, 280 F.R.D 665, 674 (S.D. Fla. 2012) (warnings about high cost of LPI did not alert plaintiffs that LPI charges were inflated as result of defendants' practices).

This is particularly so because—as both Caliber and ASIC knew at the time—many borrowers upon whom coverage is forced have no option to procure voluntary coverage. Appellees' "warnings" to these homeowners were not warnings at all—they were ineffective disclaimers designed to shield Appellees from liability and lull borrowers into believing that the charges imposed were legitimate. [D.E. 1 ¶ 157.] Such letters support allegations of a fraudulent RICO scheme. *See, e.g., U.S. v. Hill*, 643 F.3d 807, 859 (11th Cir. 2011) ("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"); *Cannon*, 2014 WL

324556, at *3 ("non-disclosure of the kickbacks may be a basis for the scheme to defraud."); *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[.]").

No borrower was *ever* warned that they would be charged amounts beyond the cost of insurance coverage. [D.E. 1 ¶¶ 25, 43, 57-59, 71-73, 81-83.] And Appellees' representations that portions of the amounts charged borrowers might be used to pay commissions to Caliber affiliates or reimburse certain expenses were misleading at best. ASIC did not pay any Caliber affiliate a commission to purchase coverage; a master policy was already in place, coverage issued automatically, and no work was performed. [*Id.* ¶¶ 3, 31-33.] Nor did ASIC cover any legitimate expenses. [*Id.* ¶¶ 36-38.] The amounts kicked back to Caliber were gratuitous and unearned. [*Id.* ¶ 3, 31-33.]

As the court in *Perryman v. Litton Loan Servicing, LP* held:

> The Court … can plausibly infer a scheme to defraud…. In addition to representing the charges as the "cost" of obtaining substitute coverage in the deed of trust, Defendants sent other communications through the mail which could be reasonably construed as continuing to represent to Plaintiff that the charges she ran the risk of incurring would be attributable to the Defendants' actual costs of obtaining substitute insurance. It appears that some of those communications did specifically warn Perryman that choosing not to get her own insurance

> would be a bad deal for her.... But it still could be the case that the overall intent of the Defendants' representations were calculated to misrepresent the nature of the costs the lenders would pass along to lenders under the LPI clause.

2014 WL 4954674, at *15 (N.D. Cal. Oct. 1 2014) (citation omitted); *see also Patel* Reply at 22-23.

Appellants have pled a scheme to defraud.

2. The McCarran-Ferguson Act ("MFA") does not bar Appellants' RICO claims.

The MFA "precludes application of a federal statute in face of state law enacted . . . for the purpose of regulating the business of insurance," if the federal measure does not "specifically relat[e] to the business of insurance," and would "invalidate, impair, or supersede" the state's law. *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999) (quoting 15 U.S.C. § 1012(b)). The MFA does not bar the Florida Appellants' RICO claims because the wrongful conduct alleged does not touch on the "business of insurance," and the federal RICO statute does not "invalidate, impair, or supersede" Florida insurance law.

The MFA does not reverse-preempt the Florida Appellants' RICO claims because those claims do not touch on the business of insurance. The Florida Appellants do not challenge, for example, ASIC's pricing determinations or the rates that it sets for LPI that it sells to Caliber. *See Montoya*, 94 F. Supp. 3d at 1315 ("Plaintiffs ... take no issue with ASIC's activities typical of the 'business of insurance'—they do not challenge the rates, the cost of the insurance *per se,* or the amounts or type of coverage provided, nor do they take issue with the master policy[.]"); *Jackson v. U.S. Bank, N.A.*, 44 F. Supp. 3d 1210, 1218 (S.D. Fla. 2015) ("Plaintiffs' claims do not involve the 'business of insurance,' but instead, the lender's loan servicing obligations[.]"); *see also Burroughs*, 2016 WL 1389934, at *5; *Bowe v. Pub. Storage*, 106 F. Supp. 3d 1252, 1268 (S.D. Fla. 2015). Appellants' claims instead address ASIC's participation in a larger scheme whereby borrowers are charged gratuitous amounts by their *lender*. ASIC is charged with paying Caliber bribes to maintain its exclusive relationship with Caliber, offering Caliber below-cost administrative services (which are outsourced to ASIC but properly performed by Caliber), and sending misleading notices to borrowers on Caliber letterhead *purporting to be Caliber*. [D.E. 1 ¶¶ 3, 4, 26-40, 36-38, 156, 158.]

In assessing whether conduct constitutes the "business of insurance," courts examine whether the practice: (1) has the effect of transferring or spreading a policyholder's risk; (2) is an integral part of the policy relationship between insurer and insured; and (3) is limited to entities within the insurance industry. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S 205, 211-21 (1979) ("the legislative history of the [MFA] strongly suggests that Congress understood the business of insurance to be the underwriting and spreading of risk[.]"). None of these elements is satisfied here. *See Montoya*, 94 F. Supp. 3d at 1316.

First, the charges that Appellants challenge – those *in excess* of the cost of coverage – had nothing to do with spreading risk; they were imposed to line Appellees' pockets and to secure their exclusive relationship. [D.E. 1 ¶¶ 3, 4, 26-40.]

Second, Appellants did not purchase coverage; Caliber is the named insured that purchased coverage from ASIC. *See* p. 4, *supra*. The MFA's focus is:

> [t]he relationship ***between insurer and insured***, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance.'" . . . Whatever the exact scope of the statutory term, it is clear where the focus was … on the ***relationship between the insurance company and the policyholder***. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance."

S.E.C. v. Nat'l Sec., Inc., 393 U.S. 453, 460 (1969) (emphasis added). Because Caliber purchased the coverage, and Appellants do not bring claims under a policy of insurance, the MFA does not apply. *See Moore v. Fidelity Fin. Servs.*, 884 F. Supp. 288, 291–92 (N.D. Ill. 1995) (rejecting MFA's application in LPI action because plaintiff had not purchased policy).

Third, the practices challenged are not limited to entities within the insurance industry. Appellants' claims could just as easily have been based upon allegations of unauthorized procurement of non-insurance services or products that increased the amount Caliber deducted from Appellants' escrow accounts. *See id.* at 292.

As such, allowing the Florida Appellants' RICO claims would not "displace administration of Florida law into federal court." ASIC Br. at 48-50. Appellants do not challenge ASIC's rates or any line item in its rate filings. A judgment for Appellants would *not* tread on the FLOIR's toes with respect to oversight of ASIC's rate filings or the premiums charged lenders for collateral protection insurance. *See* pp. 5-7, *supra*. Appellants instead seek review of Caliber's authority to charge borrowers more than its cost of coverage, and ASIC's support of Caliber's practices.[5, 6]

3. Appellants have alleged proximate causation.

ASIC and Caliber contend that Appellants have not pled RICO causation because they allege no direct relation between Caliber's and ASIC's misleading acts and their injuries. *See* Caliber Br. at 49-50; ASIC Br. at 39-40. Caliber contends that Appellants' claims fail because they do not allege that they read the notices in

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[5] Because the RICO claims do not touch on the business of insurance, the Court need not reach the question of whether RICO's application would "invalidate, impair, or supersede" Florida insurance law. Even were this not the case, however, reverse-preemption would not apply pursuant to *Humana*. *See Montoya*, 94 F. Supp. 3d at 1315-16; *Cannon*, 2014 WL 324556, at *6-7. Were the Court to reach this argument—which it should not—it should follow *Montoya* and *Cannon*.

[6] ASIC argues that RICO's application would conflict with the Consent Order, but the Consent Order does not have the force of law. It "is a compromise settlement, and is not an admission of liability, wrongdoing, or violation of law and *no court, nor [the FLOIR], has made any factual findings or legal conclusions.* The violations alleged in this Consent Order and any criticisms of practices have not undergone a formal administrative or judicial process." Consent Order at 5 (emphasis added).

question, *see* Caliber Br. at 49-50, but this argument presumes that reliance is required to state a RICO claim. It is not. As explained in *Patel* and the District Court, the federal RICO statute requires only evidence that a claimant was "injured by reason of a violation" of the statute, *see* 18 U.S.C. § 1964(c); thus, "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." *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 661 (2008), (emphasis added). *Patel* Reply at 25-26; D.E. 47 at 17-18.

As also explained below, [D.E. 47 at 17-18], RICO pleading does not require a plaintiff to allege an injury caused by the mailing on which a mail and wire fraud predicate rests. *See, e.g., Schmuck v. U.S.*, 489 U.S. 705, 711 (1989) ("[A] mailing that is 'incident to an essential part of the scheme,'... satisfies the mailing element of the mail fraud offense."); *U.S. v. Hasson*, 333 F.3d 1264, 1272 (11th Cir. 2003) ("To violate the wire fraud statute, it is not necessary that the transmitted information include any misrepresentation.") (citation omitted). This disposes of Caliber's second argument that Appellants were injured by excessive charges rather than misrepresentations and omissions in notice letters.[7] *See* Caliber Br. at 50.

[7] Caliber cites *Circeo-Loudon v. Green Tree Servicing, LLC*, 2014 WL 4219587 (S.D. Fla. Aug. 25, 2014), but the district court there reversed its opinion in a

Plaintiffs have stated claims for violations of the RICO statute.

CONCLUSION

The Court should reverse and remand for further proceedings.

Respectfully submitted,

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subsequent order on an amended complaint, which upheld the RICO claims. *See* 2015 WL 1914798, at *3.

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 6,487 words in the brief.

/s/ Rachel Sullivan

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 26, 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

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