

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 16-12100

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

vs.

SPECIALIZED LOAN SERVICING, LLC, *et al.*,
Defendants-Appellees.

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

**INITIAL BRIEF OF PLAINTIFFS-APPELLANTS
PANKAJ PATEL AND LAKETHA WILSON**

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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

The Plaintiffs-Appellants submit this list, which includes the trial judge, magistrate judge, and all attorneys, associations or persons, firms, partnerships or corporations known to have an interest in the outcome of this review.

1. ABI International
2. ABIG Holding de Espana, S.L.
3. A.C.N. 080 903 957 Pty Ltd
4. A.C.N. 081 035 752 Pty Ltd
5. Administar Services Group LLC
6. ALOC Holdings ULC
7. Alpine Fiduciary Services Inc.
8. American Bankers General Agency, Inc.
9. American Bankers Insurance Company of Florida
10. American Bankers Insurance Group, Inc.
11. American Bankers Life Assurance Company of Florida
12. American Bankers Management Company, Inc.
13. American Memorial Life Insurance Company
14. American Security Insurance Company
15. Assurant Argentina Compania de Seguros Sociedad Anonima
16. Assurant BARC Reinsurance Limited

17. Assurant Chile Compania de Seguros Generales S.A.
18. Assurant Co. Ltd.
19. Assurant Consulting Company Limited
20. Assurant Danos Mexico S.A.
21. Assurant Deutschland GmbH
22. Assurant Direct Limited
23. Assurant Direta Corretora de Seguros Ltda
24. Assurant General Insurance Limited
25. Assurant Group, Limited
26. Assurant Holding Mexico, S. de R.L. de C.V.
27. Assurant Holdings France SAS
28. Assurant, Inc. (AIZ)
29. Assurant Intermediary Limited
30. Assurant International Division Limited
31. Assurant Investment Management LLC
32. Assurant Italia Agenzia di Assicurazioni s.r.l.
33. Assurant Life Limited
34. Assurant Life of Canada
35. Assurant New Ventures, Inc.
36. Assurant Payment Services, Inc.

37. Assurant Reinsurance of Turks & Caicos, Ltd.
38. Assurant Seguradora S.A.
39. Assurant Service Protection, Inc.
40. Assurant Services Argentina, S.A.
41. Assurant Services Canada Inc.
42. Assurant Services de Chile, SpA
43. Assurant Services del Peru SAC
44. Assurant Services Hong Kong Limited
45. Assurant Services Italia s.r.l.
46. Assurant Services Korea Limited
47. Assurant Services Limited
48. Assurant Services, LLC
49. Assurant Services of Puerto Rico, Inc.
50. Assurant Services (UK) Limited
51. Assurant Servicios de Mexico, S.A. de CV
52. Assurant Servicios Ltda.
53. Assurant Solutions Assistance B.V.
54. Assurant Solutions Comercio e Servicos de Equipamentos
Electronicos Ltda.
55. Assurant Solutions Holding Puerto Rico, Inc.

56. Assurant Solutions Spain, S.A.
57. Assurant Vida Mexico S.A.
58. Axios Valuation Solutions, LLC
59. Baseline Capital Limited
60. Blue Bananas, LLC
61. Broadtech, LLC
62. Burt, Franklin G.
63. Bushman, Howard M.
64. Caribbean American Life Assurance Company
65. Caribbean American Property Insurance Company
66. Carlton Fields Jordan Burt, P.A.
67. CDS International Pty Limited
68. CIS Company Secretaries Pty Ltd
69. Closed Joint Stock Company <<Computershare Registrar>> (Russia)
70. Coast to Coast Dealer Services Inc.
71. Cohn, James I.
72. Commerce Financial Printers Corp.
73. Communication Services Australia Pty Limited
74. Computershare AB Sweden
75. Computershare A/S

76. Computershare Asia Limited
77. Computershare Canada Inc
78. Computershare Clearing Pty Limited
79. Computershare Communication Services GmbH
80. Computershare Communication Services Inc
81. Computershare Communication Services Pty Limited
82. Computershare Company Nominees Limited
83. Computershare Dealing Services Pty Ltd
84. Computershare Depository Pty Limited
85. Computershare Deutschland GmbH & Co. KG
86. Computershare DR Nominees Limited
87. Computershare Finance Company Pty Limited
88. Computershare Finance Ireland Limited
89. Computershare Finance LLC
90. Computershare Financial Services, Inc.
91. Computershare Governance Services GmbH
92. Computershare Governance Services Inc.
93. Computershare Governance Services Limited (Ireland)
94. Computershare Governance Services Ltd (Canada)
95. Computershare Governance Services (UK) Limited

96. Computershare Holdings Inc.
97. Computershare Holdings LLC
98. Computershare Hong Kong Development Limited
99. Computershare Hong Kong Investor Services Limited
100. Computershare Hong Kong Nominees Limited
101. Computershare Hong Kong Trustees Limited
102. Computershare Inc.
103. Computershare International Information Consultancy Services
(Beijing) Company Ltd
104. Computershare Investments (Canada) (Holdings) ULC
105. Computershare Investments (Canada) (No.1) ULC
106. Computershare Investments (Canada) (No.2) ULC
107. Computershare Investments (Canada) (No.3) ULC
108. Computershare Investments (Canada) (No.4) ULC
109. Computershare Investments (UK) Limited
110. Computershare Investments (UK) (No.2) Limited
111. Computershare Investments (UK) (No.3) Limited
112. Computershare Investments (UK) (No.4) Limited
113. Computershare Investments (UK) (No.5) Limited
114. Computershare Investments (UK) (No.6) Limited

115. Computershare Investments (UK) (No.7) Limited
116. Computershare Investments (UK) (No.8) Limited
117. Computershare Investments (UK) (No.9) Limited
118. Computershare Investor Services (Bermuda) Limited
119. Computershare Investor Services (British Virgin Islands) Limited
120. Computershare Investor Services (Cayman) Limited
121. Computershare Investor Services (Guernsey) Limited
122. Computershare Investor Services Inc
123. Computershare Investor Services (IOM) Limited Isle of Man
124. Computershare Investor Services (Ireland) Limited
125. Computershare Investor Services (Jersey) Limited
126. Computershare Investor Services Limited (South Africa)
127. Computershare Investor Services, LLC
128. Computershare Investor Services Ltd
129. Computershare Investor Services PLC
130. Computershare Investor Services Pty Limited
131. Computershare Investor Services Pty Ltd (South Africa)
132. Computershare Italy S.r.l.
133. Computershare Limited [CPU.AX]
134. Computershare Limited (United Kingdom)

135. Computershare LLC
136. Computershare Ltd (South Africa)
137. Computershare Nominees (Channel Islands) Limited
138. Computershare Nominees NZ Limited
139. Computershare Nominees Pty Ltd
140. Computershare Offshore Services Limited
141. Computershare Outsourcing Limited
142. Computershare PEP Nominees Limited
143. Computershare Plan Co Pty Ltd
144. Computershare Plan Managers Pty Ltd
145. Computershare Registry Services Limited
146. Computershare (Russia) Limited
147. Computershare Services Canada Inc
148. Computershare Services Nominees (Ireland) Limited
149. Computershare Services Nominees Limited
150. Computershare South Africa (Pty) Ltd
151. Computershare S.p.A.
152. Computershare Systems (NZ) Limited
153. Computershare Technology Services Inc.
154. Computershare Technology Services Pty Ltd.

155. Computershare Technology Services (UK) Limited
156. Computershare Trust Company of Canada
157. Computershare Trustees (C.I.) Limited
158. Computershare Trustees (Ireland) Limited
159. Computershare Trustees (Jersey) Limited
160. Computershare Trustees Limited
161. Computershare US
162. Computershare US Services Inc.
163. Computershare Technology Services, Inc.
164. Computershare Trust Company, N.A.
165. Computershare Verwaltungs GmbH
166. Computershare Voucher Services Limited
167. ConnectNow New Zealand Limited
168. ConnectNow Pty Ltd
169. Consumer Assist Network Association, Inc.
170. Cooperatieve Assurant Netherlands U.A.
171. CPU (NZ) Share Plans Limited
172. CPU Share Plans Pty Limited
173. CRS Custodian Pty Ltd
174. CRS Nominees Ltd

175. CWI Corporate
176. CWI Distribution
177. CWI Group
178. CWork Financial Management LLC
179. CWork Solutions, LP
180. Digital Services (UK) Ltd.
181. Eagle Rock Proxy Advisors, LLC
182. EES Capital Trustees Limited
183. EES Corporate Trustees Limited
184. EES Nominees International Limited
185. EES Services (UK) Limited
186. EES Trustees Limited
187. eMortgage Logic, LLC
188. Engel, Sarah
189. Family Considerations, Inc.
190. FamilySide, Inc.
191. FAS-Nationstar, LLC
192. FAS-OWB Utilities, LLC
193. FAS-Tenant Access Utilities, LLC
194. Federal Warranty Service Corp.

195. Field Asset Services, LLC
196. Financial Market Software Consultants Pty Ltd
197. Florida Office Corp.
198. Georgeson Inc.
199. Georgeson International Inc.
200. Georgeson S.l Spain
201. Georgeson Securities Corporation
202. Georgeson Shareholder Analytics LLC
203. Georgeson Shareholder Communications Australia Pty. Ltd.
204. Georgeson Shareholder Communications Canada Inc
205. Georgeson Shareholder Communications Limited
206. Georgeson Shareholder SAS
207. Georgeson S.r.l.
208. Global eDelivery Group Pty Ltd
209. GP Legacy Place, Inc.
210. Gravante, John III
211. Grundstücksentwicklungs Gesellschaft “Am Schönberg” GmbH
212. GSC Shareholder Services Inc
213. GTU Ops Inc.
214. Guardian Travel, Inc.

215. Harke Clasby & Bushman, LLP
216. Harke, Lance A.
217. HELOC Funding II Trust
218. HML Mortgage Services Ireland Limited
219. Homeloan Management Limited
220. Hong Kong Registrars Limited
221. Insureco Agency & Insurance Services, Inc.
222. Insureco, Inc.
223. Interfinancial Inc.
224. I.Q. Data International, Inc.
225. Istifi d S.p.A.
226. Jhavbala, Farrokh
227. John Alden Life Insurance Company
228. Karvy Computershare Private Limited
229. Karvy Computershare W.L.L
230. KB Analytics Limited
231. KCC Class Action Services LLC
232. Kozyak Tropin & Throckmorton, LLP
233. Kurtzman Carson Consultants Inc.
234. Kurtzman Carson Consultants, LLC

235. Lamb, Archie Cleveland Jr.
236. Law Offices of Archie Lamb
237. Legotla Investments (UK) Limited
238. Lifestyle Services Group Ltd.
239. LSG Espana Ltd.
240. LSG Insurance
241. Merten, W. Glenn
242. Minu Limited
243. MobileServ 5 Ltd.
244. Mortgage Systems Limited
245. Moskowitz, Adam M.
246. MS Diversified Corp.
247. MSR Robin Advances (Depositor) LLC
248. MSR Robin Advances Issuer Trust
249. National Insurance Agency
250. National Insurance Institute, LLC
251. Neary, Robert J.
252. 9167-1990 Quebec Inc.
253. NRC Investments (UK) Limited
254. Obadele Pty Ltd

255. Patel, Pankaj
256. Pathbold Limited
257. Perryman, Brian P.
258. Podhurst, Aaron S.
259. Podhurst Orseck, P.A.
260. Prieto, Peter
261. Protection Holding Cayman
262. Proxitalia S.r.l.
263. Q M Industries (N.S.W.) Pty. Ltd.
264. R&T Financial Services, Inc.
265. RCNG LLC
266. Registrar and Transfer Company
267. Registrar and Transfer Corporation – New York
268. Registrars Holding Pty Ltd
269. Registrar Nikoil Company (JSC)
270. Reliable Lloyds Insurance Company
271. Ronzetti, Thomas A. Tucker
272. Rosenthal & Company, LLC
273. Rosenthal, Stephen
274. Savings Management Limited

275. Seltzer, Hon. Barry S.
276. Sepon (Australia) Pty Limited
277. Serviceworks Management Pty Ltd
278. Settlement Recovery Group LLC
279. SG Vestia Systems Inc.
280. Sharemart NZ Ltd
281. Shipsurance Insurance Services, Inc.
282. Signal Financial Management LLC
283. Signal GP LLC
284. Signal Holdings LLC
285. Signal Northwest LLC
286. SLS Funding III LLC
287. SLS Investco LLC
288. SLS Servicer Advance Revolving Trust 1
289. Solutions Cayman
290. Solutions Holdings
291. Source One Communications Australia Pty Ltd
292. Specialized Loan Servicing, LLC
293. Specialist Mortgage Services Ireland Limited
294. Specialist Mortgage Services Limited

295. Specialized Asset Management LLC
296. Specialized Default Services LLC
297. Specialized Loan Servicing Holdings LLC
298. Specialized Title Services LLC
299. STAMS Holding Ltd.
300. STAMS Ltd.
301. Standard Guaranty Insurance Company
302. StreetLinks, LLC
303. Sullivan, Rachel
304. Sureway, Inc.
305. Switchwise Pty Ltd
306. Telecom Re, Inc.
307. The Signal LP
308. Time Insurance Company
309. Topaz Finance Limited
310. TrackSure Insurance Agency, Inc.
311. TS Holdings, Inc.
312. Union Security Insurance Company
313. Union Security Life Insurance Company of New York
314. United Service Protection Corp.

315. United Service Protection, Inc.
316. VEM Aktienbank AG
317. Voyager Group, Inc.
318. Voyager Indemnity Insurance Company
319. Voyager Service Warranties, Inc.
320. Weinshall, Matthew P.
321. WePurchit.com LLC
322. Williams, Dawn B.
323. Wilson, Laketha
324. ZAO <<Ediniy Registrator>>

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 timely. The district court entered its order dismissing the Class Action Complaint with prejudice on April 25, 2016 [D.E. 36]. Appellants Patel and Wilson timely filed their Notice of Appeal on May 2, 2016 [D.E. 37].

This appeal is from a final order. Appellants Patel and Wilson appeal the district court’s order dismissing their claims in their entirety and with prejudice. [D.E. 36.]

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 THEIR MORTGAGE AGREEMENTS?

STATEMENT OF THE CASE AND FACTS

The lender-placed or “force-placed” insurance practices challenged by Appellants below first came under scrutiny more than seven years ago. This scrutiny, by courts and consumer advocates alike, has forced mortgage lenders and servicers and their cooperating force-placed insurers to stop imposing on borrowers the precise charges at issue here. For example, in December 2013, Fannie Mae issued a servicing announcement prohibiting mortgage servicers handling its loans from including these charges in amounts passed on to borrowers for force-placed insurance and from seeking reimbursement for such charges from Fannie Mae. [*Id.*] Since that time, companies servicing Fannie Mae loans have overwhelmingly stopped including “commissions” and other illegitimate costs in the amounts charged to borrowers. There is thus little dispute that these charges are wrongful. The question for the Court is whether the filed-rate doctrine bars claims brought by homeowners who paid or still owe these charges for force-placed insurance.

The case below was just one of at least thirty putative class actions in the Southern District of Florida involving the forced-placed insurance practices of major mortgage lenders and servicers, and dozens more have been litigated nationwide.¹

¹ See, e.g., *Edwards v. Seterus, Inc.*, No. 15-cv-23107 (S.D. Fla.); *Almanzar v. Select Portfolio Servicing*, No. 14-cv-22586 (S.D. Fla.); *Wilson v. EverBank, N.A.*, No. 14-cv-22264 (S.D. Fla.); *Montoya v. PNC Bank, N.A.*, No. 14-cv-20474 (S.D. Fla.); *Persaud v. Bank of Am., N.A.*, No. 14-cv-21819 (S.D. Fla.); *Jackson v. U.S. Bank*,

Defendants have raised the filed-rate doctrine in their motions to dismiss in most of the cases litigated in the Southern District of Florida. The majority of the opinions issuing from the Southern District of Florida and district courts nationwide have rejected application of the filed-rate doctrine on a motion to dismiss. *See* pp. 12-13, 18, 20-21, *infra*.² Many of these cases ultimately settled on a nationwide claims-made basis, with the defendants returning a specific percentage of the amounts charged for force-placed insurance coverage to mortgagors who submit claims.³

Appellants' allegations in the district court were strikingly similar to those pled in other force-placed insurance litigation, as all of these class actions arise from a practice that is common among major mortgage lenders and servicers. Standard

N.A., No. 14-cv-21252 (S.D. Fla.); *Hamilton v. SunTrust Mortg., Inc.*, No. 13-cv-60749 (S.D. Fla.); *Saccoccio v. JPMorgan Chase Bank, N.A.*, No. 13-cv-21107 (S.D. Fla.); *Hall v. Bank of Am., N.A.*, No. 12-cv-22700 (S.D. Fla.); *Williams v. Wells Fargo Bank, N.A.*, No. 11-cv-21233 (S.D. Fla.); *see also, e.g., Laffan v. Santander Bank, N.A.*, No. 13-cv-4040 (E.D. Pa.); *Ellsworth v. U.S. Bank, N.A.*, No. C 12-02506 (N.D. Cal.); *Simpkins v. Wells Fargo Bank, N.A.*, No. 12-cv-00768 (S.D. Ill.).

² *See also, e.g., Longest v. Green Tree Servicing LLC*, 74 F. Supp. 3d 1289, 1299 (C.D. Cal. 2015); *Vitek v. Bank of Am., N.A.*, No. 8:13-cv-816, 2014 WL 1042397, at *3-4 (C.D. Cal. Jan. 23, 2014); *Smith v. SunTrust Mortg., Inc.*, No. 13-cv-0739, 2013 WL 5305651, at *5-6, 9 (C.D. Cal. Sept. 16, 2013). *But see* Order on Motions to Dismiss [D.E. 83], *Fowler v. Caliber Home Loans, Inc.*, No. 15-cv-24542 (S.D. Fla. July 8, 2016); *Patel v. Specialized Loan Servicing, LLC*, No. 15-cv-62600, 2016 WL 1663827 (S.D. Fla. Apr. 25, 2016); *Trevathan v. Select Portfolio Servicing, Inc.*, 142 F. Supp. 3d 1283 (S.D. Fla.) (S.D. Fla. 2015)

³ *See, e.g., Braynen v. Nationstar Mortg., LLC*, No. 14-CV-20726, 2015 WL 6872519 (S.D. Fla. Nov. 9, 2015); *Saccoccio*, 297 F.R.D. 683 (S.D. Fla. 2014). *See also, e.g., Montoya, Hamilton, Hall, Williams, supra.*

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 ¶ 7.] The lender or servicer may then charge the mortgagor for 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.* ¶¶ 7, 25, 35.] 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.* ¶¶ 49, 62 & Exs. A & B (emphasis added).]

Section 5 authorized Appellee Specialized Loan Servicing, LLC (“SLS”), the mortgage servicer here, to procure insurance coverage in the event of a lapse and charge Appellants the “cost of insurance,” or the amounts “disbursed” to procure coverage. [*Id.*] Section 9 further authorized SLS to “do and pay for whatever is reasonable or appropriate to protect [SLS’s] interest” in Appellants’ properties. [*Id.*]

Appellants alleged below, in a class action complaint filed on December 10, 2015 [D.E. 1], that SLS had breached these provisions of their mortgage agreements, as well as the implied covenant of good faith and fair dealing, by charging mortgagors more than SLS’s “cost of insurance” and more than was “reasonable or appropriate” to protect SLS’s interest in any mortgagor’s property. [*Id.* ¶¶ 26-47, 85-99.] They also alleged that SLS’s conduct violated the federal Truth in Lending Act, the federal Racketeering Influenced and Corrupt Organizations Act (“RICO”), and the Florida Unfair and Deceptive Trade Practices Act, because SLS did not disclose charges imposed beyond the cost of coverage, and, in the alternative to their contractual claims, that SLS was unjustly enriched by charging more than its true

cost of coverage. [*Id.* ¶¶ 100-08, 122-66.] Appellants also brought claims against ASIC, SLS's insurer, for tortiously interfering with borrowers' mortgage agreements by facilitating SLS's breaches, participating in the operation of the alleged RICO enterprise and conspiracy, the purpose of which was to charge borrowers costs beyond that of coverage, and for unjust enrichment. [*Id.* ¶¶ 109-21, 134-56.]

The alleged scheme operated as follows. SLS and ASIC agreed that ASIC would serve as SLS's exclusive provider of force-placed insurance coverage. [*Id.* ¶¶ 27, 28.] Pursuant to their arrangement, ASIC contracted to undertake various loan-servicing obligations that would otherwise belong to SLS, and SLS purchased a master insurance policy from ASIC to cover SLS's entire mortgage loan portfolio. [*Id.* ¶¶ 28, 29, 31, 37.] The master policy was a commercial insurance policy bearing the title "Mortgagee Interest Protection"; its purpose was to protect SLS's interest in mortgagors' properties, the collateral for its mortgage loans. [*Id.* ¶ 46 & n.8.]

ASIC's role in the scheme was to issue the master policy to SLS and then execute SLS's mortgage-servicing functions pursuant to the Defendant-Appellees' outsourcing agreement. ASIC was responsible for monitoring SLS's loan portfolio for lapses in voluntary coverage and, when a lapse was identified, sending a cycle of notices to mortgagors on SLS letterhead notifying them that if the lapse was not cured, SLS would force new coverage on the mortgagor's property and charge his or her escrow account for the cost of the coverage or add that cost to the balance of

borrower's mortgage loan. [*Id.* ¶¶ 29, 143, 148.] The letters also provided that an SLS affiliate would act as an insurance agent in procuring the coverage, and would receive a commission for its services in procuring the policy. [*Id.* ¶ 147.] The letters did not disclose, however, that mortgagors would be charged any amount beyond the cost of the coverage procured by SLS. [*Id.* ¶¶ 58, 59, 69.]

Appellants have alleged that SLS charged mortgagors more than the cost of the insurance 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.* ¶¶ 33-36, 49, 59, 62, 68, 69, 89, 98.] These unearned charges were levied pursuant to an undisclosed kickback scheme: once SLS 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 SLS, thereby reducing the ultimate cost of coverage. [*Id.* ¶¶ 32-44.] SLS and ASIC claimed that the payments were "commissions" or "expense reimbursements," but they were, in fact, gratuitous payments constituting an effective rebate on the cost of coverage to SLS. [*Id.*]

Although the letters to borrowers represented that an SLS affiliate might take a commission for work performed in procuring coverage for the mortgagor, a master policy was *already* in place and that affiliate, in fact, did *nothing* to earn a commission. [*Id.* ¶¶ 33, 34, 147.] Similarly, SLS took "expense reimbursements"

notwithstanding the fact that ASIC issued coverage automatically from the master policy and SLS incurred no expense from the forced placement of new coverage. [*Id.* ¶¶ 33, 34.] Appellants have also alleged that ASIC paid kickbacks to SLS in the form of amounts for riskless reinsurance issued through an SLS affiliate and subsidies for below-cost loan servicing performed by ASIC. [*Id.* ¶¶ 37-42.]

As a result, the “cost of insurance” to SLS 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.* ¶¶ 32-42, 49, 62.] 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 SLS. [*Id.*] Finally, SLS’s ultimate cost of coverage plus x exceeded “whatever [wa]s reasonable or appropriate to protect [SLS’s] interest in the Property.” [*Id.*]

Both SLS and ASIC moved to dismiss, arguing that the filed-rate doctrine barred the claims asserted because Appellants had challenged ASIC’s filed rates as excessive. [D.E. 22 at 4-7; D.E. 24 at 2-5.] Appellants responded that the filed-rate doctrine does not apply because, among other things, their claims did not challenge the reasonableness of the filed rates, but instead targeted SLS’s improper conduct in charging borrowers more than its cost of coverage in violation of the mortgage

agreements and notices mailed to borrowers, and the payment of kickbacks to SLS pursuant to side agreements. [D.E. 26 at 3-4; D.E. 27 at 1-7.]

ASIC and SLS filed their replies [D.E. 28, 29], and on April 25, 2016, without the benefit of a hearing, the District Court entered an order granting the motions to dismiss with prejudice pursuant to the filed-rate doctrine. *See Patel*, 2016 WL 1663827, at *3-5. Appellants now appeal the decision of the District Court.

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 Fed. 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 filed-rate doctrine does not bar claims by borrowers against a mortgage-loan servicer and its exclusive force-placed insurer challenging the servicer’s practice of charging borrowers more than the servicer itself pays for force-placed insurance in violation of the mortgage contracts. Rates for force-placed insurance are set for commercial master policies designed for sale to mortgage lenders and

servicers. State regulators approve the rates for commercial use, and mortgage lenders and servicers pay premiums calculated based on those filed rates. Appellants are not the customers for these commercial policies and have not challenged these rates; they have challenged instead SLS's practice of charging borrowers more than the "cost of insurance" for residential hazard coverage permitted by the terms of its standard mortgage contract. Appellants' claims focus on this breach of contract and the Appellees' concomitant misrepresentations and omissions to borrowers, without implicating ASIC's filed commercial rates. State insurance agencies do not regulate the conduct challenged, and it is therefore beyond the filed-rate doctrine's reach.

Courts rejecting application of the filed-rate doctrine in the force-placed insurance context have followed the same logic adopted by the Third Circuit in *Alston v. Countrywide Financial Corp.*, 585 F.3d 753 (2009). In *Alston*, the plaintiffs had challenged a kickback scheme like the one described by Appellants here. Although *Alston* involved alleged violations of the Real Estate Settlement Procedures Act ("RESPA"), the Third Circuit did not limit its holding to RESPA claims; it concluded generally that "[i]t [wa]s absolutely clear that the filed rate doctrine simply d[id] not apply ... [because] Plaintiffs [had] challenged Countrywide's allegedly wrongful conduct, not the reasonableness or propriety of the rate that triggered that conduct." *Id.* at 765. The Sixth Circuit has also held that the doctrine does not bar claims challenging kickbacks or rebates paid pursuant to

side agreements, but not the reasonableness of any filed rate. *See Williams v. Duke Energy Int'l, Inc.*, 681 F.3d 788 (6th Cir. 2012).

By contrast, the Second Circuit affirmed dismissal of borrowers' claims in *Rothstein v. Balboa Insurance Co.*, 794 F.3d 256 (2015), based on the filed-rate doctrine. The *Rothstein* court analyzed the imposition of force-placed insurance charges as an "A-to-B-to-C" transaction – where "A" is the insurer, "B" is the mortgage service purchasing the insurance, and "C" is the borrower – thereby extending the filed-rate doctrine to noncustomers. Such an analysis is flawed first and foremost because the contract pursuant to which the servicer purchases a master policy from the insurer is separate and distinct from borrowers' mortgage agreements, and application of the doctrine would leave borrowers with no recourse against their mortgage servicer for breaches of the provisions of their mortgages, which do not concern any filed rate. Borrowers, that is, are not the ratepayers in force-placed insurance transactions.

The *Rothstein* Court also misapplied the nonjusticiability and nondiscrimination principles underlying the filed-rate doctrine. Appellants' claims do not offend the nonjusticiability principle because disposition of their claims will not require the court to trespass on the authority reserved for state regulators. Appellants do not challenge the reasonableness of the rates that SLS pays for a master policy; they instead challenge SLS's imposition of charges beyond those

authorized by their mortgage contracts, which allow only charges for “the cost of the insurance coverage.” Further, the kickbacks that Appellants have challenged were paid pursuant to servicing agreements between SLS and ASIC; these agreements are not subject to regulatory approval and thus do not trigger the filed-rate doctrine.

Appellants’ claims do not run afoul of the nondiscrimination principle because they are not the ratepayers for whom ASIC’s filed rates are set and approved; SLS is the ratepayer, as are other mortgage servicers. Thus, the nondiscrimination principle in this case would prevent the Court from issuing an opinion that gave one mortgage servicer a preferred rate over another. Here, regardless of the result, the rate SLS pays would remain the same. Only the amounts paid by mortgagors pursuant to their contracts with SLS would be reduced.

The Court should reverse the district court’s dismissal and remand this case for further proceedings.

ARGUMENT

THE FILED-RATE DOCTRINE DOES NOT BAR APPELLANTS’ CLAIMS AGAINST SLS AND ASIC FOR CHARGING MORE FOR LENDER-PLACED INSURANCE THAN WAS AUTHORIZED BY THEIR MORTGAGE CONTRACTS.

A. The Filed-Rate Doctrine Does Not Apply on the Facts Alleged Below.

The filed-rate doctrine does not apply to claims challenging SLS’s practice of charging mortgagors more than its actual cost of coverage for force-placed insurance, nor does it apply to those challenging ASIC’s facilitation of SLS’s

contractual breaches and participation in a scheme designed to funnel unearned profits to SLS. As the more persuasive authority has reasoned, the filed-rate doctrine does not apply because (1) the plaintiffs have not challenged the reasonableness of the insurer's rates, but instead the manner in which the lender selects the insurer and the payment of kickbacks to the lenders;⁴ (2) it is mortgage lenders, not borrowers, who are the "ratepayers" for whom force-placed insurance rates have been approved;⁵ and (3) the side agreements pursuant to which insurers pay lenders

⁴ See, e.g., *Wilson v. EverBank, N.A.*, 77 F. Supp. 3d 1202, 1233-34 (S.D. Fla. 2015) (plaintiffs had challenged defendants' manipulation of force-placed insurance market to charge borrowers for unearned fees unrelated to procurement of insurance); *Leghorn v. Wells Fargo Bank, N.A.*, 950 F. Supp. 2d 1093, 1115-16 (N.D. Cal. 2013) (claims did not challenge rates, but lender's decision to purchase coverage from particular insurer and the defendants' manipulation of the force-placed insurance market) *Gallo v. PHH Mortg. Corp.*, 916 F. Supp. 2d 537, 545-46 (D.N.J. 2012) (plaintiff had not challenged rate, but "the lawfulness and purpose of payments that PHH Mortgage received in the form of commissions, kickbacks, reinsurance premiums, or other financial benefits" and "the manner in which their mortgagees/loan servicers chose the specific force-placed insurance at issue"); *Abels v. JPMorgan Chase Bank, N.A.*, 678 F. Supp. 2d 1273, 1277 (S.D. Fla. 2009) (plaintiffs had not challenged rate, but defendant bank's choice of insurers).

⁵ See, e.g., *Wilson*, 77 F. Supp. 3d at 1234 (plaintiffs not ratepayers to whom commercial rates applied); *Perryman v. Litton Loan Servicing, LP*, No. 14-cv-02261, 2014 WL 4954674, at *9 (N.D. Cal. Oct. 1, 2014) ("It is for this reason that courts in this district held that the filed-rate doctrine does not bar claims brought by homeowners, because 'they are not the ratepayers.'") (quoting *Ellsworth v. U.S. Bank, N.A.*, 30 F. Supp. 3d 886 (N.D. Cal. 2014)); *Jackson v. U.S. Bank, N.A.*, 44 F. Supp. 3d 1210, 1217 (S.D. Fla. 2014) ("The [filed-rate] doctrine is also inapplicable here because Plaintiffs are not ratepayers.") (citation omitted).

kickbacks are not subject to regulatory approval.⁶

On these facts, this Court’s jurisprudence also advises against application of the doctrine, which operates between the carrier and its customer – here, the mortgage servicer. “The filed rate doctrine dictates that the rates a carrier charges its customers, once filed with and approved by [government regulators], become ‘the law’ and exclusively govern the rights and liabilities of the carrier to the customer[.]” *Hill v. Bellsouth Telecomms., Inc.*, 364 F.3d 1308, 1315 (11th Cir. 2004) (citation omitted); *see also Evanns v. AT&T Corp.*, 229 F.3d 837, 840 (9th Cir. 2000) (“Under the doctrine, once a carrier’s tariff is approved ... the terms of the federal tariff are considered to be ‘the law’ and to therefore ‘conclusively and exclusively enumerate the rights and liabilities’ *as between the carrier and the customer.*”) (emphasis added). Notably, the *customer* is charged with notice of the filed rate and its terms, *Pfeil v. Sprint Nextel Corp.*, 284 Fed. App’x 640, 642 (11th Cir. 2008), having voluntarily entered into an arrangement governed by the filed rate.

The filed rates in this case, once approved by state regulators, do *not* govern the “rights and liabilities” of ASIC, the insurer, with respect to SLS’s borrowers;

⁶ *See, e.g., Jackson*, 44 F. Supp. 3d at 1217 (“U.S. Bank is not subject to administrative oversight by state insurance commissions”); *Simpkins v. Wells Fargo Bank, N.A.*, No. 12-cv-00768, 2013 WL 4510166, at *13-14 (S.D. Ill. Aug. 26, 2013) (“Defendants ... have not given this Court any authority to demonstrate that ‘such pre-arranged side agreements are ... filed with, approved by, or regulated and monitored in some way by a governing regulatory agency[.]’”) (citation omitted).

they instead govern ASIC's relationship with SLS, the party (and direct customer) who negotiated the terms of coverage. ASIC does not issue individual policies to SLS borrowers. It issues a master policy to SLS to cover the lender's entire portfolio of mortgage loans for a period of years. [D.E. 1 ¶¶ 27, 30, 44.] The master policy is a *commercial* policy between lender and insurer and is filed and approved as such. The terms are negotiated and rates set *for payment by the lender before* any borrower's coverage has lapsed. [*Id.* ¶¶ 27-34, 44.] ASIC charges SLS a premium based on the commercial rate, and later "kicks back" a portion to SLS, thus giving SLS a gratuitous rebate on the cost of coverage. [*Id.* ¶¶ 30-46.]

Once a borrower's lapse occurs, which may be months or years after the master policy has issued and rates are set, coverage is forced on the borrower's home from SLS's master policy. [*Id.* ¶ 28.] The borrower's mortgage contract, which controls the rights and liabilities of SLS and its borrowers, authorizes SLS to charge the borrower *only* amounts expended for "the cost of insurance coverage." [*Id.* ¶¶ 48, 64.] Borrowers, however, are charged more than the cost of coverage because SLS does not give them the benefit of kickbacks that it received. [*Id.* ¶¶ 3, 6, 30-46.] Just because the amount SLS charged borrowers rose to the full level of the approved rate does not somehow immunize SLS from violating the terms and spirit of its contractual obligation to its borrowers to charge no more than the "cost" of the insurance coverage.

In fact, SLS is the ratepayer here. The filed-rate doctrine would preclude *SLS* from challenging ASIC's approved rates. *See, e.g., Hill*, 364 F.3d at 1315 (“[C]ustomers are ... charged with notice of the terms and rates set out in th[e] filed tariff and may not bring an action against a carrier that would invalidate, alter or add to the terms of the filed tariff.”) (emphasis added). As explained by the court in *Wilson*, commercial-line rates for force-placed insurance are approved for payment by lenders and servicers, not mortgagors; thus, *SLS* is the ratepayer with respect to the filed-rate doctrine. *See 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.”).

This critical distinction is reflected in Appellants' Complaint, which raises no challenge to ASIC's filed rates.⁷ Appellants have challenged SLS's act of charging borrowers more than its actual cost of coverage, in violation of the express terms of their mortgages. [D.E. 1 ¶¶ 33-36, 49, 59, 62, 68, 69, 89, 98.] Extending the filed-rate doctrine to these facts would stretch its application beyond its original limits; it

⁷ 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 Patel*, 2016 WL 2016 WL 1663827, at *2. Appellants' claims do not implicate the rates that ASIC files in connection with its commercial policies, thus the rate filings submitted by ASIC (which bear the title “Mortgagee Interest Protection”), are irrelevant to the claims asserted. *See, e.g., Couch v. Broward Cty.*, No. 11-62126-CIV, 2012 WL 2007148, at *1 (S.D. Fla. June 5, 2012) (declining to take judicial notice of irrelevant documents) (citations omitted).

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 SLS's conduct is not reviewed by state regulators, the filed-rate doctrine does not bar claims addressing it. *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.").

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, nor has it applied the doctrine to preclude claims by anyone other than a direct ratepayer. *See, e.g., Pfeil*, 284 Fed. App'x 640 (barring customer challenge to charge by telecommunications carrier); *Hill*, 364 F.3d 1308 (same); *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). "The characterization of the plaintiff's claim is therefore critical to whether the filed rate doctrine will apply." *Florida Mun. Power Agency v. Fla. Power & Light Co.*, 64 F.3d 614, 616 (11th Cir. 1995).

The Court’s resolution of the question presented will be limited to the factual predicate presented by Appellants’ claims. Still, a decision affirming the district court’s dismissal would extend the filed-rate doctrine beyond the carrier-customer relationship, and apply the terms of their contract—the tariff itself—to a transaction between the customer (SLS) and a non-ratepayer (the mortgagor), and to agreements not subject to regulatory review. The Court should reverse the decision below.

B. The Court Should Follow *Alston* and *Williams*; *Rothstein* Fails to Persuade.

The Third Circuit applied the filed-rate doctrine to a just end in *Alston v. Countrywide Financial Corp.*, 585 F.3d 753 (3d Cir. 2009), 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 accepted kickbacks from a private mortgage insurer through a Countrywide affiliate using a sham reinsurance scheme. *See Alston*, 585 F.3d at 757. Like SLS here, Countrywide had “accepted a portion of the PMI [private mortgage insurance] premiums but provided no services in return[,]” which resulted in overcharges to the plaintiffs for PMI. *Id.* The defendants raised the filed-rate doctrine because the rates used to calculate 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 held that it was “absolutely clear that the filed-rate doctrine simply d[id] not apply ... [because] Plaintiffs [had] challenge[d] Countrywide’s allegedly wrongful conduct, not the reasonableness or propriety of the rate that triggered that conduct.” *Id.* at 765.

Appellees argued below that *Alston* is inapposite, because it involved PMI and because the plaintiffs’ claims were for violation of RESPA. But the kickback schemes in *Alston* and here are sufficiently similar for the analogy to this case to hold. *See, e.g., Burroughs v. PHH Mortg. Corp.*, No. 15-cv-6122, 2016 WL 1389934, at *4 (D.N.J. Apr. 8, 2016) (relying on *Alston* in force-placed insurance case and finding it to be “more sound” than *Rothstein*); *Gallo*, 916 F. Supp. 2d at 544 (finding *Alston* persuasive despite factual distinctions); *Laffan v. Santander Bank, N.A.*, No. 13-cv-4040, 2014 WL 2693158, at *4 (E.D. Pa. June 12, 2014) (“[T]he Third Circuit made clear in *Alston* that “the filed rate doctrine simply does not apply” in circumstances where, as here, a plaintiff challenges the defendant’s allegedly wrongful conduct, not the reasonableness of the rate.”); *Xi Chen Lauren v. PNC Bank, N.A.*, No. 2:13-CV-762, 2013 WL 5565511, at *5 (W.D. Pa. Oct. 8, 2013) (“In *Alston*, the Court ... recognized the distinction between wrongful conduct and rate challenges and held that wrongful conduct claims were not barred[.]”).

Opinions attempting to distinguish *Alston* are unpersuasive. The District Court, for example, sought to distinguish *Alston* on the ground that it involved claims

for violation of RESPA, which creates a “unique statutory cause of action.” *Patel*, 2016 WL 1663827, at *4. But the Third Circuit’s reasoning in *Alston* did not focus on RESPA alone—the plaintiffs in *Alston* raised *two* arguments as why the doctrine did not apply: (1) they had challenged the payment of kickbacks, not the filed rates, and the kickbacks were not subject to regulatory review; and (2) they had challenged only the commission of conduct proscribed by statute. *See id.* at 764. The Third Circuit accepted *both* contentions, holding not only that applying the doctrine would run contrary to Congressional intent, but also that the plaintiffs simply 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.”).

Appellees have attempted to distinguish *Alston* based on a footnote citing *Stevens v. Union Planters Corp.*, No. 00-cv-1695, 2000 WL 33128256 (E.D. Pa. Aug. 22, 2000), an opinion applying the filed-rate doctrine in a case involving force-placed insurance. [D.E. 28 at 2 n.2; D.E. 29 at 3.] Appellees read the footnote to mean that the Third Circuit would have applied the doctrine had *Alston* involved force-placed insurance, rather than PMI. But the holding in *Stevens* was not as broad as Appellees would like. As the Third Circuit in *Alston* explained: “*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 do not challenge

ASIC's rates; *Union Planters* carries no weight.

This conclusion finds support in *Stevens v. Citigroup, Inc.*, No. 00-cv-3815, 2000 WL 1848593 (E.D. Pa. Dec.15, 2000), an opinion involving the same plaintiff, mortgage, and hazard insurance as *Union Planters*, and issued by the same judge just four months later. The Court in *Citigroup* distinguished *Union Planters* based on the focus of 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 *3.⁸

The more persuasive opinions addressing the doctrine's application to similarly pled claims have adopted this reasoning. *See, e.g., Santos v. Carrington Mortg. Servs., LLC*, No. 2:15-cv-864, 2015 WL 4162443, at *2-3 (D.N.J. July 8, 2015) (doctrine did not apply because plaintiff had "challenge[d] Defendants' conduct, not the reasonableness or propriety of the rate itself"); *DiGiacomo v. Statebridge Co., LLC*, No. 14-cv-6694, 2015 WL 3904594, at *7 (D.N.J. June 25,

⁸ The court in *Gallo* noted this distinction and found that the plaintiffs' claims in that case had similarly challenged the manner in which the lender had selected the coverage at issue, rather than the filed rates. *See Gallo*, 916 F. Supp. 2d at 545.

2015) (“In imposing a rate that regulators deem reasonable, Defendants may nonetheless engage in conduct that violates ... [consumer fraud] or RICO statutes or Defendants’ contractual and fiduciary obligations.”); *Almanzar*, 2015 WL 1359150, at *2; *Perryman*, 2014 WL 4954674, at *6-9 (doctrine inapplicable where plaintiff did “not dispute reasonableness of rates charged for insurance[,]” but “the amount of the rate which can be passed on to her under the terms of her contract”).

The majority view finds further support in the Sixth Circuit’s opinion in *Williams v. Duke Energy International, Inc.*, 681 F.3d 788 (6th Cir. 2012). The Sixth Circuit held that the filed-rate doctrine did not apply to claims brought by Ohio businesses and individuals against an electricity retail service provider, alleging that the service provider had violated the federal RICO statute, the Robinson-Patman Act, and Ohio state statutory and common law by paying “unlawful and substantial rebates to certain large customers ... in exchange for the withdrawal by said customers of objections to a rate-stabilization plan that [the service provider] was attempting to have approved by the [Public Utilities Commission of Ohio (PUCO)].” *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 rejected this logic, 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:

Plaintiffs allege that Defendants paid substantial sums of money to certain large customers in exchange for the withdrawal by the large customers of their objections to Defendants' proposed RSP. ... 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. Applying that reasoning here, where ASIC is alleged to have paid kickbacks to SLS pursuant to outsourcing and other agreements, the filed-rate doctrine does not bar Appellants' claims.

Creating a circuit split last year, the Second Circuit in *Rothstein v. Balboa Insurance Co.*, 794 F.3d 256 (2d Cir. 2015), 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 paid by the lender had simply been “passed through an intermediary,” and because resolution of the claims in the plaintiffs’ favor would have undermined regulators’ authority and given plaintiffs, characterized by the court 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 ¶ 46.] Regulators approved the rates attached to these policies for this purpose, with the lender in mind as the customer purchasing the policy. *See, e.g., Wilson*, 77 F. Supp. 3d at 1234 (lender is ratepayer); *Jackson*, 44 F. Supp. 3d at 1217 (same). Appellants were not the “ratepayers” for whom the commercial rates were approved, nor do they ask the Court to adjust those rates, which were paid in full by SLS. *See id.*

Nor have Appellants challenged these commercial rates. They have instead challenged Appellees’ practice of providing SLS a discount on the cost of coverage, and then charging borrowers the pre-discounted amount in violation of their mortgage agreements and state and federal statutes. [D.E. 1 ¶¶ 27-47.] None of this conduct is 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, and

as elaborated in Section C below, judicial oversight of Appellant's claims would not offend the nonjusticiability rationale underlying the filed-rate doctrine.

In addition, this case does not present the straightforward "A-to-B-to-C" transaction that the *Rothstein* Court described. In fact, there are *two* separate and distinct transactions: in the first, ASIC sells a master policy to SLS at a commercial rate to cover its entire loan portfolio; in the second, after the borrower's own coverage has lapsed, SLS charges the borrower an amount *that is purportedly SLS's cost of coverage*. [D.E. 1 ¶¶ 28-31; 35.] Appellants' claims arise from this second transaction, and only that aspect of it which, facilitated by ASIC, strays from SLS's promise to charge borrowers no more than the cost of coverage.

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.

C. Plaintiffs' Claims Offend Neither the Nonjusticiability nor the Nondiscrimination Principle of the Filed-Rate Doctrine.

The purpose of the filed-rate doctrine is “to ensure that rates are both reasonable and nondiscriminatory.” *Security Sys., Inc. v. K-Mart Corp.*, 114 S. Ct. 1702, 511 U.S. 431, 435 (1994) (citation omitted). Courts have distilled this purpose into two underlying principles: the nonjusticiability principle, which protects the ratemaking authority of federal and state regulators from judicial intervention, and the nondiscrimination principle, which seeks to prevent litigation from becoming a means for ratepayers to secure preferential rates. *See Hill*, 364 F.3d at 1316-17.

Analysis of these two principles also instructs against application of the doctrine to Appellants' claims. 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.

Appellants' claims implicate neither principle. Nonjusticiability remains untouched because a decision in Appellants' favor would not trespass on insurance regulators' authority to set and approve rates for force-placed insurance. *See, e.g., Burroughs*, 2016 WL 1389934, at *4. State insurance regulators determine the reasonableness of filed *commercial* rates for master policies, which are paid by SLS to cover its entire portfolio of loans. [D.E. 1 ¶¶ 28, 46.] SLS is the ratepayer, and

Appellants have not challenged these rates, but instead the gratuitous kickbacks paid pursuant to servicing agreements between SLS and ASIC. [*Id.* ¶¶ 32-42, 47.] These agreements are not subject to regulatory approval; 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 kickbacks passed to SLS are not disclosed to borrowers, and are not rendered legitimate simply because the total amount charged borrowers for coverage is the same as the premium amount paid by SLS. The notices mailed to borrowers disclose that “commissions” may be paid to an SLS affiliate in connection with the procurement of new coverage, [D.E. 1 ¶ 147], but these notices describe *actual* commissions presumably earned by the affiliate for work performed. Appellants have complained of gratuitous kickbacks or rebates that Defendants *labelled* as commissions and expense reimbursements to lend their scheme of legitimacy and avoid judicial review; these gratuitous charges were *not* disclosed to or approved by

state regulators for inclusion in ASIC's filed rates, thus a judicial decision ordering their recovery would not impact the ratemaking process.

This type of word play was addressed by the court in *In re Managed Care Litigation*, 150 F. Supp. 2d 1330 (S.D. Fla. 2001), where the plaintiffs' claims turned on alternate definitions of "medical necessity," and the defendants asserted that their plans were reviewed by state authorities and the specific alleged misconduct alleged, which depended on a tortured definition of "medical necessity," was authorized by state law. *See id.* at 1345. The court reasoned:

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

*Id.*⁹

The court in *Managed Care* held that discovery was required to resolve the

⁹ In *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004), this Court reviewed the order on class certification in *Managed Care*. The panel in *Klay*, led by Judge Tjoflat, focused "not [on] whether managed care is wrong, but [on] whether particular managed care companies failed to live up to their agreements[,] and found that "[t]he plaintiffs [we]re seeking nothing more than the compensatory damages to which they [we]re contractually entitled, and the treble damages to which they are statutorily entitled." 382 F.3d at 1274.

plaintiffs' claims. Here, the district court dismissed plaintiffs' claims without allowing discovery on the true nature of the kickbacks paid to SLS, i.e. whether they were gratuitous as alleged, or earned by an SLS affiliate for procuring a master policy in the first instance, as SLS has claimed. [D.E. 24 at 7 n.2; D.E. 26 at 8 n.2.] At a minimum, discovery was warranted to determine the true nature of the charges that SLS passed on to its borrowers. *See, e.g., Montoya v. PNC Bank, N.A.*, No. 14-cv-20474, 2014 WL 4248208, at *6 (S.D. Fla. Aug. 27, 2014) (declining to “look under the proverbial hood of Plaintiffs’ allegations and frame them in a way Plaintiffs have not[,]” and rejecting filed-rate doctrine on motion to dismiss).

Because SLS 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 amount that ASIC charges to SLS for its master policy. Should the court ultimately find that SLS breached its contracts with its mortgagors, or is liable for nondisclosure, ASIC will not need to adjust its rates at all; it will remain free to charge *SLS* a premium based on the same filed and approved *commercial* rates. SLS, however, will only be allowed to charge the borrower its true cost of coverage.

This point is better illustrated imagining a kickback amounting to 100% of the commercial premium calculated based on ASIC’s filed rate. If the filed-rate doctrine applied here, it would preclude borrowers from recovering their economic losses

even if SLS had received a 100% discount on forced coverage, ultimately paying ASIC nothing, but still charged borrowers the full value of the commercial premium it had initially owed. In this scenario, SLS's "cost of insurance" and the amount ultimately "disbursed," would be zero; deducting thousands of dollars from a borrower's escrow account for coverage would constitute a clear breach of contract. A judicial opinion finding a breach would not impede on the provenance of state regulators because it would not pass on the reasonableness of ASIC's filed rates, or involve analysis of the rates at all. The court would only be called upon to analyze the relevant provisions of the mortgage contract, and the propriety of the payments paid to SLS pursuant to side agreements. These transactions are not subject to governmental oversight. *See, e.g., Jackson*, 44 F. Supp. 3d at 1217 ("U.S. Bank is not subject to ... oversight by state insurance commissions; as a result, its authority to regulate and approve insurers' rates does not touch Plaintiffs' claims[.]"). The same holds true regardless of the percentage kickback that ASIC pays to SLS.

Similarly, Appellants' claims do not 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 SLS paying a lower rate than other similarly situated *lenders* because the master policy's commercial rates are not implicated. The rates among 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”). In concluding that Appellants’ claims would transgress the nondiscrimination principle, the District Court focused on the wrong ratepayer.

Appellees have willingly “discriminated” among mortgagors when paying settlement funds only to those who submit claims in force-placed insurance settlements, which are not submitted for regulatory review. *See, e.g., Saccoccio*, 297 F.R.D. 683; *see supra* n.2. They do so because returning these charges to mortgagors does not affect ASIC’s commercial rates or the premiums paid by servicers, but instead only the side agreements that provide for the gratuitous kickbacks and SLS’s transactions with its borrowers. *See, e.g., Burroughs*, 2016 WL 1389934, at *4.

Appellants’ claims do not offend the nonjusticiability or the nondiscrimination principle underlying the filed-rate doctrine. The district court thus erred in granting Defendants-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 7,908 words in the brief.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 13, 2016, 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.

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