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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS PANKAJ PATEL AND LAKETHA WILSON

Adam M. Moskowitz, Esq.
Thomas A. Tucker Ronzetti, Esq.
Rachel Sullivan, Esq.
Robert J. Neary, Esq.
Kozyak Tropin & Throckmorton LLP
2525 Ponce de Leon Blvd., 9th Floor
Miami, Florida 33134
Tel: 305-372-1800/Fax: 305-372-3508
amm@kttlaw.com
tr@kttlaw.com
rs@kttlaw.com
rn@kttlaw.com

Additional counsel
on signature page.

Counsel for Appellants
Pankaj Patel, et al.

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-Appellees certify that the Certificate of Interested Persons and Corporate Disclosure Statement in their Initial Brief is true and correct.

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INTRODUCTION

SLS contracted with Appellants and a putative class of borrowers to force hazard insurance coverage on their properties in the event of a lapse and charge only the actual cost of coverage for its placement. It would be incredible if SLS could render all of those agreements null and void by contracting with ASIC for the purchase of portfolio force-placed insurance coverage and then having ASIC submit those commercial master group rates to state regulators for approval. The rates for ASIC's master policy are set for payment by SLS; once SLS pays the premium, that transaction is complete and the terms of SLS's contract with ASIC have been satisfied. SLS is not obliged by that contract or any other to charge its borrowers an amount equal to the premium it paid to ASIC for group coverage. Appellants raised claims below based on SLS's breach of its obligation to charge borrowers only the "cost of insurance coverage." The filed-rate doctrine thus does not apply to the unique facts of this case, thus the District Court must be reversed.

SLS and ASIC 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 Cohn has carefully considered and rejected claims based on almost identical facts in other force-placed litigation cases and is very familiar with the issues presented. *See Hamilton v. SunTrust Mortg., Inc.*, No 13-cv-60749 (S.D. Fla.); *Madavieh v. SunTrust Mortg., Inc.*, No. 13-cv-62801 (S.D. Fla.).

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 SLS and ASIC's arguments compels dismissal. Indeed, the same arguments have been reviewed and rejected by the majority of courts to have considered them, *see* D.E. 26 at 4-20; D.E. 27 at 7-20, and the same result is warranted here.

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

I. THE FILED-RATE DOCTRINE DOES NOT APPLY.

SLS and ASIC argue that the filed-rate doctrine bars all of Appellants' claims against both lender and insurer because they violate the nonjusticiability and nondiscrimination principles, and because one circuit court opinion, *Rothstein v. Balboa Insurance Co.*, 794 F.3d 256 (2d Cir. 2015), supports their argument. But SLS and ASIC mischaracterize facts and positions critical to the resolution of Appellants' claims, and fail to explain exactly *how* their resolution would in any way impede regulators' rate-setting authority, require the District Court to "unbundle" ASIC's rates, or amount to a judicial determination on the reasonableness of ASIC's rates. The Court should hold that the filed-rate doctrine does not apply and reverse.

A. Resolution of Appellants' Claims Would Not Offend Nonjusticiability.

ASIC and SLS argue that resolving Appellants' claims would require the

Court to undermine regulators' authority, thus offending the nonjusticiability principle. *See* Resp. Br. at 16, 23-27. They concede that Appellants do not directly attack ASIC's rates, yet contend that a damages award "would … result in a judicial determination of the reasonableness of the rate [which] is prohibited under the filed rate doctrine." *Id.* at 16 (quoting *Hill*, 364 F.3d at 1317). SLS and ASIC, however, *have never explained how this is so*, because they cannot. An award here would require SLS to limit charges to borrowers to its actual cost of coverage, but would not require ASIC to reduce the premium that SLS pays for its master group policy.

The claims below are straightforward: Appellants seek damages for breaches of contract, unjust enrichment, and violations of FDUTPA, RICO, and TILA against SLS for violating its mortgage agreements with them and a putative nationwide class of SLS mortgagors. *See* D.E. 1 ¶¶ 85-108, 122-166. With the exception of TILA statutory damages, damages for all claims against SLS arise directly or indirectly from its contractual breach; they are the amounts charged borrowers beyond SLS's actual "cost of insurance coverage," which is all that borrowers contract to pay under their mortgage agreements with SLS. *See id.* ¶¶ 49, 62. SLS could return these amounts to borrowers without undermining state regulators' authority simply by paying ASIC the full premium for the master policy, and charging borrowers only that portion of the amount paid to ASIC that went to actual coverage. This would remedy the contractual breach without implicating filed rates.

Appellants' claims against ASIC largely *arise from the same contractual breach*. ASIC faces claims for interfering with the mortgage contracts between SLS and its borrowers and causing SLS's breach, *see* D.E. 1 ¶¶ 117-121, and for participating in a RICO enterprise designed to facilitate and conceal it, *see id.* ¶¶ 134-56. The unjust enrichment claim against ASIC is different, but equally beyond insurance regulators' authority, as it involves damages arising from below-cost servicing subsidies that were not costs of coverage chargeable to SLS mortgagors. *See id.* ¶¶ 110-16. As with the other claims, ASIC could charge SLS the same premium for its master policy, while SLS excluded below-cost servicing subsidies from the amounts charged borrowers for "insurance coverage." *See id.* ¶¶ 49, 62.

None of Appellants' claims would require the District Court to rule on ASIC's rates, and so their claims do not violate the nonjusticiability strand of the filed-rate doctrine. Taking Appellees' conclusory contentions in turn, neither the "nature of the relief sought" (damages for charges beyond those permitted by contract), nor the "implications of the relief for the regulatory process" (there are none) triggers the doctrine.[1] *See* Resp. Br. at 13. An opinion for Appellants would not mandate that ASIC adjust its rates or change its practices. An award of damages, that is, would

[1] It is telling that classwide settlements have occurred in at least twenty-nine cases providing monetary relief, but no such resolution has been prevented due to "implications of the relief for the regulatory process." *See* Init. Br. at 30.

not "in effect, result in a judicial determination of the reasonableness of [ASIC's] rate[s]." *Id.* at 16 (quoting *Hill*, 364 F.3d at 1317); *see also id.* at 24. Resolution of the claims alleged will not indirectly "set a new rate … in the form of money damages." *See id.* at 24 (quoting *Taffet*, 967 F.2d, 1483, 1491 n.9 (11th Cir. 1992)).

Rothstein aside, this conclusion comports with all of the appellate opinions upon which SLS and ASIC rely. In *Taffet*, utility customers *directly* challenged rates fraudulently obtained by their service providers. *See id.* at 1485. Their argument "rest[ed] on the assumption that they enjoy[ed] a legal right to have been charged a lower rate than they actually were charged[.]" *Id.* at 1488. Appellants' arguments, though, rest on a contractual right to be charged only the cost of insurance coverage paid by SLS, as confirmed in the notices mailed them. *See* D.E. 1 ¶¶ 49, 62, 85-166.

Similarly, in *Hill v. Bellsouth Telecommunications, Inc.*, 364 F.3d 1308 (11th Cir. 2004), a direct consumer of telecommunications services challenged undisclosed charges in her provider's filed rates. *See id.* at 1311-12. The court held that the doctrine applied because a ruling that the charges were unreasonable would also have condemned the carrier's filed rates as such. *See id.* at 1317. But Appellants do not challenge costs bundled in the rates used to calculate ASIC's premiums to SLS. They challenge instead the unregulated, subsequent decision to

include costs beyond that of coverage in SLS's charges to borrowers.[2] *See id.* ¶¶ 27-47, 85-166.

B. Resolution of Plaintiffs' Claims Will Not Offend Nondiscrimination.

ASIC and SLS argue that the claims alleged implicate the nondiscrimination principle because "[u]sing Plaintiffs' own nomenclature, any damages awarded to class members would be an 'effective rebate,' … giving them an impermissible preference over other [ASIC] policyholders who were charged the filed rate." Resp. Br. at 33. The "effective rebate" alleged by Appellants, however, was paid by ASIC to *SLS*. *See* D.E. 1 ¶¶ 8, 27-47, 68, 162. Appellants do not seek a rebate. They seek to recover amounts that SLS charged them in violation of their mortgage agreements. *See, e.g., id.* ¶¶ 27-47, 89. Nor do Appellants pursue any "preference over other [ASIC] policyholders." Resp. Br. at 33. They are *not* ASIC policyholders—ASIC issued a master policy to SLS, with SLS as named insured. *See id.* ¶¶ 28, 29, 31; Resp. Br. at 31. Borrowers are "additional insureds" with certificates from that policy, which affords them *only* the right to make claims.[3] *See* Resp. Br. at 31.

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[2] *Pfeil v. Sprint Nextel Corp.*, 284 F. App'x 640 (11th Cir. 2008), and *In re Olympia Holding Corp.*, 88 F.3d 952 (11th Cir. 1996), *see* Resp. Br. at 15, also involved direct challenges to filed rates. *See Pfeil*, 284 F. App'x at 641-42 (barring customer challenge to charge by telecommunications carrier); *Olympia*, 88 F.3d at 954-55 (barring claims by trustee for common carrier challenging filed tariffs as invalid).

[3] ASIC and SLS contend that borrowers' status as additional insureds disposes of any argument that ASIC's commercial rates are filed and approved for payment by the servicer. *See* Resp. Br. at 31. However, as they concede, this status confers on

As this suggests, the potential discrimination at issue would be that among the policyholders for whom ASIC's sets its rates—lenders and servicers. *See* Init. Br. at 29-30. Resolution of the claims below cannot trigger such discrimination because the ASIC's rates for its master policies are not implicated here. *See* pp. 3-4, *supra.*

C. *Alston* and *Williams* Bear Directly on Plaintiffs' Claims.

ASIC and SLS pronounce that the Court should strive to maintain uniformity among the Circuit Courts. *See* Resp. Br. at 21. Appellants agree. *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), counsel in favor of reversal; *Rothstein* is the outlier. SLS and ASIC attempt to distinguish *Alston* and *Williams*, but the distinctions they draw are without a difference.

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

SLS and ASIC contend that *Alston* is inapposite because the claims there were for violation of RESPA, *see* Resp. Br. at 34-36, but the Third Circuit's reasoning in *Alston* did not carve out a filed-rate exception for RESPA claims. The court instead relied on logic *identical* to that applied in the force-placed insurance context, and concluded that the doctrine's application depended on whether the plaintiff had

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the borrower only the right to make claims on the policy. *See id.* It does *not* afford them the ability to enforce other rights of a party to the insurance contract, nor does it empower ASIC to pursue the borrower damages in the event of nonpayment.

challenged the reasonableness of the price of settlement services or a defendant's business practices in paying illegal kickbacks. *See Alston*, 585 F.3d at 764. RESPA claims directly challenging filed rates were barred by the filed-rate doctrine; those that attacked defendants' business practices could overcome the defense. *See id.* at 764 (quoting *Kay v. Wells Fargo & Co.,* 247 F.R.D. 572, 576 (N.D. Cal. 2007)), 765 ("Plaisntiffs challenge[d] Countrywide's allegedly wrongful conduct, not the reasonableness or propriety of the rate that triggered that conduct").

SLS and ASIC attempt to distinguish *Alston* based on a footnote citing *Stevens v. Union Planters Corp.*, 2000 WL 33128256 (E.D. Pa. Aug. 22, 2000), arguing that the footnote shows that *Alston* does not apply to force-placed insurance. *See* Resp. Br. at 36. *Union Planters* and the Third Circuit's citation to it are not so significant. The plaintiffs in *Union Planters* challenged insurance rates directly—they condemned premiums as "unreasonable" and "excessive" because the insurance issued provided less coverage at a higher price than insurance secured on the open market. *See* 2000 WL 33128256, at *1-2. The court explained: "[*Union Planters*] is inapposite because the plaintiffs in that case *directly challenged the filed rate as unreasonable*." *Alston*, 585 F.3d at 764 n.13 (emphasis added). Appellants have not.

ASIC and SLS then dismiss as irrelevant *Stevens v. Citigroup, Inc.*, 2000 WL 1848593 (E.D. Pa. Dec.15, 2000), simply because it was decided nine years before *Alston*. *See* Resp. Br. at 36-37. This argument assumes that *Union Planters* and

Citigroup are inconsistent. They are not. The court in *Citigroup* distinguished *Union Planters* on its allegations, and this difference makes Appellants' point. As the district court concluded in *Citigroup*, the plaintiff in *Union Planters* had challenged the reasonableness of insurance premiums, and thus directly challenged the filed rates. *See Citigroup*, 2000 WL 1848593, at *3. But in *Citigroup*, the same plaintiff challenged the manner in which the lender had chosen coverage, not the excessiveness of the rate. *See id. See also Gallo v. PHH Mortg. Corp.*, 916 F. Supp. 2d 537, 544-46 (D.N.J. 2012) (rejecting analogy to *Union Planters*, likening case to *Citigroup*, and concluding that challenging lawfulness of payments that PHH received pursuant to pre-arranged scheme was not barred by filed-rate doctrine).

Like the plaintiffs in *Citigroup* and *Gallo*, Appellants have challenged the exclusive arrangement by which SLS and ASIC charge borrowers more than SLS's cost of coverage, but disguise the overcharges as legitimate. *See, e.g.,* D.E. 1 ¶¶ 26-47. The challenged conduct is not overseen by any regulatory agency,[4] nor do Appellants challenge the rates that ASIC charges SLS for a master policy. *See* D.E. 1 ¶¶ 28, 31, 47. As in *Alston, Gallo*, and the opinions that have followed, *see* Init.

[4] ASIC and SLS submit that *American Security Insurance Co. v. State of Florida, Office of Insurance Regulation*, 2015 WL 10384359 (Fla Cir. Ct. Aug. 13, 2015), demonstrates that ASIC's "side agreements" are submitted to state regulators. *See* Resp. Br. at 10. That opinion, however, does not show that the agreements are *subject to regulation*; only that certain, unnamed agreements were submitted to the FLOIR in connection with ASIC's 2013 rate filing. *See id.*

Br. at 18, the filed-rate doctrine does not apply.[5]

2. *Williams* Cannot Be Distinguished.

Appellees argue *Williams* is distinct because it did not involve force-placed insurance. Resp. Br. at 38-39. *Williams* is on point. The plaintiffs in *Williams* charged the defendant electricity retail service provider and its affiliate with paying "kickbacks" or "rebates" pursuant to unregulated "side agreements" to certain large customers, but not others. *See* 681 F.3d at 792-93. The Sixth Circuit held that the filed-rate doctrine did not apply because resolution of the plaintiffs' claims would not require an assessment of any filed rate's reasonableness; the plaintiffs had alleged that the 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[.]" *Id.* at 797-98. The question in *Williams* was the lawfulness of entering into "side agreements" that had caused the plaintiffs economic harm. *See id.* at 797.

Here, as in *Williams*, Appellants' claims challenge the propriety of "rebates" or "kickbacks" paid pursuant to side agreements in order to secure an exclusive

[5] ASIC and SLS also direct the Court to *In re New Jersey Title Insurance Litigation*, 683 F.3d 451 (3d Cir. 2012). The claims in that case, however, were for antitrust violations, and the plaintiffs had "claim[ed] that the [defendant] insurers collectively fixed insurance rates in violation of the Sherman Act and the New Jersey Antitrust Act." *Id.* at 453. The plaintiffs there, like those in *Union Planters*, directly challenged rates that had been filed and approved by state regulators. *See id.*

business relationship at borrowers' expense. *See, e.g.,* D.E. 1 ¶¶ 26-47. Also as in *Williams*, the defendants are alleged to have conspired to allow SLS to ultimately pay an amount less than the actual filed rate, but the harm caused by this conduct is one step further removed. Here it is not competing servicers who actually pay the rate who are alleging an economic harm; it is SLS borrowers who are party to contracts with SLS, but not to any agreement with ASIC, and who suffered losses as a result of contractual breaches by the mortgage servicer. The reasoning of *Williams* is all the more compelling here in dictating that the filed-rate doctrine does not apply.

D. Plaintiffs Do Not Seek an "Indirect Purchaser" Exception to the Doctrine.

SLS and ASIC argue that there is no "indirect purchaser exception" to the filed-rate doctrine. *See* Resp. Br. at 27. But Appellants have not advocated for an exception, nor is one required. Exceptions are carved out when the rule in question would apply, but equity or practical considerations dictate that it should not.[6] The filed-rate doctrine does not apply here in the first instance because there has been no challenge to ASIC's filed rates.

As such, *Wah Chang v. Duke Energy Trading & Marketing, LLC*, 507 F.3d 1222 (9th Cir. 2007), is inapposite. In *Wah Chang*, a corporation brought claims against energy companies, alleging that the rate it had paid was higher than the rate

[6] "Exception" is defined to mean "something that is excluded from a rule's operation." BLACK'S LAW DICTIONARY (8th Ed. 1999).

that would have applied but for the defendants' manipulation of the market. 507 F.3d at 1224. The plaintiff purchased electricity from a retailer, who had in turn purchased it wholesale; nonetheless, the plaintiff had contracted to pay the filed rate and challenged it head-on. *See id.* at 1226. The court held: "Wah Chang cannot avoid the facts that it seeks what amounts to having the courts determine what rates the Energy Companies should have charged instead of the rates they did charge." *Id.*

Such is not the case here. SLS borrowers are *not* direct purchasers of coverage, nor did they purchase coverage through a retailer or broker. They did not contract to purchase coverage at all. *SLS* purchased *portfolio* insurance coverage from ASIC to protect *its own interest* in the collateral for its mortgage loans. *See* D.E. 1 ¶¶ 28, 29, 31, 46, 49, 62; p. 14, *infra*. Borrowers may have benefitted from the purchase—the placement of portfolio coverage allowed them to make claims on the policy—but they did not contract to pay the rate on which *SLS*'s premium was based. *See id.* ¶¶ 28, 29, 31, 49, 62. Borrowers contracted with SLS, and agreed to pay only SLS's cost of coverage: the original premium amount that SLS paid ASIC *less* the amount of any rebate or kickback passed back to SLS. *See* Init. Br. at 7.

E. "Other Considerations" Do Not Compel Application of the Doctrine.

None of SLS and ASIC's four "other considerations," Resp. Br. at 29-31, explains how Appellants' claims threaten ASIC's filed rates. First, SLS and ASIC contend that definitions of "premium" in the Florida Statutes support their argument

that Appellants have challenged the filed rates, *see id.* at 29, but the definitions serve only to establish SLS's role as ratepayer. Section 627.041(2) defines "premium" as "the consideration paid or to be paid to an insurer for the issuance and delivery of any binder or policy of insurance." Fla. Stat. § 627.041(2). Here, *SLS* paid ASIC for the issuance of a master policy to cover its interests in exchange for the policy premium. *See* D.E. 1 ¶¶ 28, 29, 31. Borrowers contracted separately with SLS to pay it only for the "cost of insurance coverage." *See id.* ¶¶ 49, 62.

SLS and ASIC also rely upon section 627.403, which defines "premium" as "the consideration for insurance, by whatever name called." Fla. Stat. § 627.403. The statute then elaborates that any "'assessment,' or any 'membership,' 'policy,' 'survey,' 'inspection,' 'service,' or similar fee or charge *in consideration for an insurance contract* is deemed part of the premium." *Id.* This again supports the construction that the amount that SLS paid to ASIC in consideration for the master policy—the "insurance contract" in question—was the policy premium.

Nomenclature aside, *nothing* in the Florida Statutes subjects the terms of borrowers' mortgage contracts to the jurisdiction of state insurance regulators, and nothing there forbids SLS from charging borrowers less than what it pays to ASIC. SLS, that is, could charge borrowers only its actual cost of coverage, and still pay ASIC the full premium amount based on the filed and approved rate.

Second, citing the Florida Office of Insurance Regulation ("FLOIR") website,

SLS and ASIC contend that because the FLOIR is aware that borrowers pay SLS amounts for coverage, the filed-rate doctrine must apply to Appellants' claims. *See* Resp. Br. at 30. But the fact of FLOIR's awareness does compel the conclusion that regulators approve rates for payment by borrowers. And, overlooking the procedural posture of a motion to dismiss, the cited FLOIR webpage does not support this conclusion. It states: "[l]ender-placed … insurance is coverage that *a mortgage lender or bank purchases for property it owns to protect its interests* when the homeowner fails to purchase this coverage," and then proceeds to acknowledge that the borrower may ultimately bear the cost. *See* FLOIR, "Lender-Placed Insurance Coverage," http://www.floir.com/Sections/PandC/lenderplacedincoverage.aspx (emphasis added). As support, the FLOIR then cites as its source section 624.6085, Florida Statutes, which belies their position altogether:

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

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

This definition of lender-placed insurance supports *Appellants'* arguments that the filed-rate doctrine does *not* apply. The Florida Insurance Code recognizes

lender-placed insurance as *commercial coverage* designed to protect the lender, which is also the "primary beneficiary *and policyholder*" of the insurance.[7] *See id*; *compare* D.E. 1 ¶ 46. Lender-placed insurance is not the same as "voluntary" homeowner's coverage—it is designed to protect the lender's, not the homeowner's, interests. *See* Fla. Stat. § 624.6085. As such, the commercial rates for lender-placed insurance are set for payment *by the lender*. *See id.*; Init. Br. at 8-9.

Third, SLS and ASIC argue that borrowers' mortgage agreements dictate that the doctrine must apply. *See* Resp. Br. at 30. However, the language they cite does not speak to the premium amount for commercial insurance based on ASIC's filed rates. It instead demonstrates that the borrower agreed to pay only SLS's cost of coverage ("Lender may obtain *insurance coverage* … at Borrower's expense" and "acknowledges that the *cost of the insurance coverage* … might significantly exceed the cost of insurance that Borrower could have obtained"). *See id.*

Appellees' argument that the "net cost" of coverage includes the kickbacks that Appellants complain of does not affect this analysis. Although SLS disclosed that the cost of coverage might significantly exceed that of insurance purchased on the open market, it did *not* disclose that borrowers would be charged amounts

[7] Notably, PCI also concedes in its Amicus Curiae Brief that "LPI is a commercial insurance product that can only be obtained by a lender or servicer through, in most states, a 'master group property insurance policy.'" Amicus Curiae Br. at 6.

beyond the cost of coverage that were not "costs of insurance" or insurance-related expenses, but instead illegal kickbacks.[8] *See, e.g.,* D.E. 1 ¶¶ 26, 45, 58, 59, 69.

Fourth, ASIC and SLS argue that forced coverage is "dual interest," protecting both lender and borrower, *see* Resp. Br. at 31, but it is purchased to protect the lender's interest in its collateral, *see* p. 14, *supra*; borrowers are named as additional insureds only to allow them to file claims, *see* p. 6 n.3, *supra*.

The Court should reverse the decision of the District Court.

II. PLAINTIFFS HAVE STATED VIABLE CLAIMS FOR RELIEF.

ASIC and SLS ask this Court to review the sufficiency of the Appellants' claims under Federal Rule of Civil Procedure 12(b)(6), although the District Court did not. *See* Resp. Br. at 39-57. This Court has discretion to do so, but "the better course is to leave these issues for appropriate factual and legal development by the district court." *Frazile v. EMC Mortg. Corp.*, 382 F. App'x 833, 839 (11th Cir. 2010)

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[8] Appellees' misplace their reliance on *Anapoell v. American Express Business Finance Corp.*, 2009 WL 766532 (10th Cir. Mar. 24, 2009), and *Feaz v. Wells Fargo Bank, N.A.*, 745 F.3d 1098 (11th Cir. 2014). *Feaz* has been widely distinguished. *See* Section 20-21 & n.10, *infra*. The Tenth Circuit in *Anapoell* affirmed the district court's decision to allow the plaintiff to amend because he had twice failed to allege ultimate facts to support the conclusion that coverage had been forced in breach of his mortgage contract. *See* 2009 WL 766532 (plaintiff's "current allegations, which do not contain any detail concerning his claim, [we]re simply too vague and conclusory to satisfy his pleading burden"). And, like the plaintiffs in *Feaz*, the plaintiff in *Anapoell* based his claims on charges that "on their face, [we]re related to obtaining insurance[,]" or had been described in conclusory terms. *Anapoell v. Am. Express Bus. Fin. Corp.*, 2008 U.S. Dist. LEXIS 118959, at *3-4 (D. Utah May 28, 2008).

(citation omitted). *See also, e.g., McArthur v. Firestone*, 817 F.2d 1548, 1552 (11th Cir. 1987) (declining to affirm district court dismissal on other grounds). This is particularly so because Appellants retain the right to amend at least once under Federal Rule of Civil Procedure 15, Appellees' arguments would not dispose of all claims as a matter of law, and remand would afford Appellants the opportunity to refine their claims below before appellate review. Nevertheless, Appellants address SLS and ASIC's arguments for dismissal below.

A. SLS Is Bound by Appellants' Mortgage Agreements.

SLS's argues that it cannot be held liable for express or implied breaches of contract because it is a loan servicer not party to Appellants' original mortgage agreements. "[A] servicer can stand in the shoes of the party to the contract to the extent that rights are assigned." *Ellsworth v. U.S. Bank, N.A.*, 30 F. Supp. 3d 886, 913 (N.D. Cal. 2014). Appellants alleged below that SLS stood in the original mortgagees' shoes with regard to all relevant contractual rights and obligations relating to force-placed insurance. As a servicer, SLS assumed the right to purchase a master policy, outsource loan servicing functions, force coverage in the event of a lapse, *see* D.E. 1 ¶ 28, deduct payments from escrow or otherwise add amounts due to the balance of Appellants' mortgage loans, *see id.* ¶ 35, collect kickbacks or rebates on amounts paid for forced coverage, *see id.* ¶ 32, and mail notices relating to forced coverage to borrowers, *see id.* ¶ 37, among other things. Having been

assigned these rights, SLS is liable under the agreements for charging borrowers amounts beyond what the agreements authorize. *See Perryman v. Litton Loan Servicing, LP*, 2014 WL 4954674, at *13 (N.D. Cal. Oct. 1, 2014).

SLS argues here that the court in *Perryman* held that the plaintiffs there had "sufficiently alleged that the defendant-servicer 'stood in the shoes of the party to the contract[,]" Resp. Br. at 43, but the same holds true here. As in *Perryman*:

> [I]t is somewhat *im*plausible that the servicers acquired the rights to enforce the lender's rights under the deed of trust without becoming parties to the contract. But the Court need not decide the question now; whether or not [the loan servicers] have become parties to the deed of trust is "a fact issue." *Ellsworth,* 2014 WL 1218833, at *20. Plaintiff must produce evidence to prove [the servicers] are parties to the contract, but there is nothing implausible about the allegation.

2014 WL 4954674, at *13 (emphasis in original).

So too, here, it would be implausible to infer that SLS assumed the right to enforce the force-placed insurance provisions in Appellants' mortgages without also assuming the corresponding liabilities. *See id.* On remand, discovery will reveal the extent of the assignment between Appellants' mortgagees and SLS.

B. SLS Is a Creditor Subject to the Truth in Lending Act.

SLS argues that servicers are exempt from TILA liability unless they are creditors or a creditor's assignee. *See* Resp. Br. at 39. It is a fair inference from the Complaint's allegations that SLS is a creditor's assignee. *See* Section II.A, *supra*.

Appellants explain in their papers below that the unauthorized kickbacks at

issue must be disclosed as "finance charges" under TILA. *See* D.E. 26 at 10-13. SLS and ASIC nevertheless contend 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* Resp. Br. at 41. 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. *See* D.E. 1 ¶¶ 27-47.

C. Appellants Have Stated Claims for Tortious Interference Against ASIC.

ASIC argues for dismissal of Appellants' tortious interference claims because ASIC was privileged to interfere with their contracts with SLS. *See* Resp. Br. at 43-46. Under Florida law, however, this is an affirmative defense and does not present a basis for dismissal. *Lakeland Reg'l Med. Ctr., Inc. v. Astellas US LLC*, 2011 WL 3035226, at *11 (M.D. Fla. Jul. 25, 2011) (internal citations omitted).

The Court should also reject ASIC's privilege defense on its merits. A privilege is voided where a defendant acts with improper means or malice. *See, e.g., Johnson Enters. of Jacksonville, Inc. v. FPL Grp., Inc.*, 162 F.3d 1290, 1321 (11th Cir. 1998) (citations omitted). Appellants have alleged that ASIC intentionally interfered with borrowers' mortgage loans in bad faith. *See* D.E. 1 ¶ 34, 118-121.

The same allegations dispose of ASIC's argument that it was privileged because it had an economic or beneficial interest in the borrower-servicer relationship. *See* Resp. Br. at 44. Such a privilege "does not afford an absolute shield to liability[,]" because "even for 'non-strangers' to a contract, the privilege to interfere is a valid defense only to the extent the interference was done in good faith." *CSDS Aircraft Sales & Leasing, Inc. v. Lloyd Aereo Boliviano Airlines*, 2011 WL 1559823, at *5 (S.D. Fla. Apr. 22, 2011) (citing *Morsani v. Major League Baseball*, 663 So. 2d 653, 657 (Fla. 2d DCA 1995)). "[P]arties are disqualified from asserting the privilege if they act maliciously or with conspiratorial motives … because 'the privilege does not encompass the purposeful causing of a breach of contract.'" *Id.* (quoting *Making Ends Meet v. Cusick*, 719 So. 2d 926, 928 (Fla. 3d DCA 1998)).[9]

Finally, ASIC argues that the kickbacks alleged in the Complaint are not "improper in any event[,]" citing *Feaz* as primary support. *See* Resp. Br. at 45. *Feaz*, however, involved claims for forced *flood* insurance brought under Alabama law, and numerous courts have distinguished it and *Cohen v. American Security*

[9] ASIC cites *Gunder's Auto Center v. State Farm Mutual Automobile Insurance Co.*, 422 F. App'x 819 (11th Cir. 2011), for the proposition that "the alleged 'improper means' to negate justification cannot be the same alleged 'interference' that forms the claim's basis[,]" Resp. Br. at 45, but misstates that opinion's holding. The plaintiff in *Gunder's* raised an "improper means" argument for the first time on appeal. *See* 422 F. App'x at 822. The plaintiff also cited *only* statements already determined to be non-slanderous as "improper means." *See id.* at 822-23.

Insurance Co., 735 F.3d 601 (7th Cir. 2013), on the same allegations raised here.[10]

D. APPELLANTS HAVE STATED FEDERAL RICO CLAIMS.

1. Appellants Have Alleged a Scheme to Defraud.

ASIC and SLS argue that Appellants have not pled a plausible scheme to defraud by grossly mischaracterizing the allegations of the Complaint. They posit: "If the scheme's aim was to lure unsuspecting borrowers into allowing their voluntary insurance to lapse so servicers could charge inflated LPI premiums … then the Defendants are abysmal schemers." Resp. Br. at 48. This is not, nor was it ever, Appellants' position on their RICO claims. Appellants have alleged consistently that ASIC and SLS entered into an exclusive relationship and devised a scheme to charge borrowers whose coverage had already lapsed more than SLS's cost of insurance coverage, in violation on their mortgage agreements and contrary to the cycle of notices mailed to SLS borrowers. *See id.* ¶¶ 27-47, 137, 143, 144, 147, 148. Appellants do not challenge the price or amount of forced coverage *per se* or relative to voluntary coverage, contend that they were induced into allowing their coverage to lapse, or attack the premiums paid to ASIC by SLS.[11] *See, e.g., id.* ¶¶ 27-47.

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[10] *See, e.g., Longest v. Green Tree Servicing LLC*, 74 F. Supp. 3d 1289, 1297 (C.D. Cal. 2015); *Almanzar v. Select Portfolio Servicing, Inc.*, 2015 WL 1359150, at *3 (S.D. Fla. Mar. 24, 2015); *Circeo-Loudon v. Green Tree Servicing, LLC*, 2015 WL 1914798, at *2-3 (S.D. Fla. Apr. 27, 2015); *Montoya*, 94 F. Supp. 3d at 1318; *Hamilton*, 6 F. Supp. 3d at 1308.

[11] For these reasons, PCI's Amicus Brief is wholly irrelevant. PCI touts the importance of lender-placed insurance and filed rates, but Appellants do not attack

SLS and ASIC's warnings, therefore, that force-placed insurance "would be a poor deal" have no relevance to Appellants' claims. No borrower was *ever* warned that they would be charged amounts beyond the cost of insurance coverage. *See id.* ¶¶ 26, 45, 58, 59, 69, 140, 146. And Appellees' representations that portions of the amounts charged borrowers might be used to pay commissions to SLS affiliates or reimburse certain expenses, *see* Resp. Br. at 49, were misleading at best. ASIC did not pay any SLS affiliate a commission to purchase coverage; a master policy was already in place, coverage issued automatically, and no work was performed. *See id.* ¶¶ 5, 33-34. Nor did ASIC cover any legitimate expenses. *See id.* ¶¶ 37-39. The amounts kicked back to SLS were gratuitous and unearned. *See id.* ¶ 5.

Caliber relies on *Wilson v Everbank, N.A.*, 77 F. Supp. 3d 1202 (S.D. Fla. 2015), and *Robinson v. Standard Mortgage Corp.*, 2016 WL 3167680 (E.D. La. June 7, 2016), but those opinions stand in the minority against those in *Almanzar*, 2015 WL 1359150; *Jackson v. U.S. Bank, N.A.*, 44 F. Supp. 3d 1210, 1217-18 (S.D. Fla. 2014), *Circeo-Loudon*, 2015 WL 1914798, at *3 (S.D. Fla. Apr. 27, 2015); *Montoya v. PNC Bank, N.A.*, 94 F. Supp. 3d 1293, 1306-11 (S.D. Fla. 2015), and authority from other districts. *See, e.g., Rose v. Friendly Fin. Corp.*, 2016 WL 98597, at *12

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the need for forced coverage, nor do they challenge lender-placed insurance as "overpriced" or overregulated. They simply challenge SLS's practice of charging mortgagors amounts unrelated to coverage, and ASIC's role in Appellees' scheme to disguise the same charges as legitimate. *See* D.E. 1 ¶¶ 5, 6, 26-47.

(S.D. Ohio Jan. 8, 2016) (misrepresentations that legitimate commissions were paid sufficed to support mail and wire fraud); *Cannon v. Wells Fargo Bank, N.A.*, 2014 WL 324556, at *2-3 (N.D. Cal. Jan. 29, 2014) (plaintiffs allegations stated mail and wire fraud claim).[12] As the court in *Perryman* 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, in ways that tend to indicate Defendants were not trying to induce her to default on her coverage obligations. 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 (citing *Cannon*, 2014 WL 324556, at *2-3).

ASIC and SLS cite several opinions to support the argument that their notices to borrowers were not deceptive, but others have found to the contrary, *see, e.g., Perryman, supra*, and based on the allegations here, that argument fails. *See* p. 22, *supra*. Appellants have distinguished *Cohen*, *Feaz*, *Weinberger*, and *Gustafson* in their papers below, *see* D.E. 26 at 6-7, 14-15, and the remaining authority is

[12] *See also, e.g., Gorsuch v. OneWest Bank, FSB*, 2015 WL 2384110, at *5 (N.D. Ohio May 19, 2015); *Santos v. Carrington Mortg. Servs. LLC*, 2015 WL 4162443, at *9-12 (D.N.J. July 8, 2015); *DiGiacomo v. Statebridge Co., LLC*, 2015 WL 3904594, at *12-13 (D.N.J. June 25, 2015).

inapposite as well. The complaint in *Morris v. Green Tree Servicing, LLC* included limited allegations of kickbacks to the servicer, but lacked ultimate facts to support mail and wire fraud. *See* First Amended Complaint [D.E. 6], *Morris*, No. 2:14-cv-01998 (D. Nev. Dec. 2, 2014). Similarly, in *Meyer v. One West Bank, F.S.B.*, 91 F. Supp. 3d 1177 (C.D. Cal. 2015), the plaintiffs failed to allege any specific misrepresentation in support of their RICO claims, which focused primarily on honest services rather than mail and wire fraud. *See Meyer*, 91 F. Supp. 3d at 1183-84; Complaint [D.E. 1] ¶¶ 71-89, *Meyer*, No. 14-cv-05996 (C.D. Cal. May 15, 2014).

Contrary to ASIC and SLS's characterization, *see* Resp. at 51, the notices were "insufficient" because they represented that borrowers would be charged only costs of coverage and a "commission" for work performed by an SLS affiliate when, in fact, they were charged amounts beyond the cost of coverage and no work was performed. *See* D.E. 1 ¶¶ 29, 143, 144, 147, 148. The notices also failed to disclose these gratuitous charges or any aspect of ASIC and SLS's scheme. *See id.* ¶¶ 26, 45, 58, 59, 69, 140, 146. Appellants have pled mail and wire fraud.[13]

[13] ASIC and SLS cite *Hazewood v. Foundation Financial Group*, 551 F.3d 1223 (11th Cir. 2008), for the proposition that "allegations of 'unearned' commissions, 'illusory' insurance-related services, or 'kickbacks' are 'conclusory characterization[s]' that 'will not prevent dismissal[,]" but their quote is cobbled together from separate parts of the opinion, and refers specifically to the plaintiff's claims there, which were not supported by ultimate facts, and were contradicted by allegations that "unearned" amounts were, in fact earned. *See* 551 F.3d at 1225-26.

2. Appellants Have Alleged Proximate Causation.

ASIC and SLS contend that Appellants have not pled RICO causation because they have not alleged a direct relation between the SLS's and ASIC's misleading acts and their own injuries. *See* Resp. Br. at 52. Once again, the flaw in SLS and ASIC's argument lies with their mischaracterization of Appellants' claims. The injury alleged is not the issuance of coverage, nor do Appellants contend that they are owed the entire amount charged them. Appellants allege that they were charged amounts beyond the cost of coverage, and their economic losses are the amounts they were charged less the amount SLS ultimately paid ASIC. *See* D.E. 1 ¶¶ 26-47.

ASIC and SLS rely on *Cohen*'s pronouncement that "[l]osing an opportunity to breach a contract cannot constitute a cognizable fraud harm[,]" Resp. Br. at 53, but a refusal to pay these amounts would *not* constitute breach of contract. Once the charges were levied in breach SLS's obligations, further performance was excused. *See, e.g., Hamilton v. SunTrust Mortg., Inc.*, 6 F. Supp. 3d 1300, 1309 (S.D. Fla. 2014) (citation omitted); *Chatlos v. Morse Auto Rentals*, 183 So. 2d 854, 855 (Fla. 3d DCA 1966) ("Having breached the contract … the defendant was not in a position to successfully maintain an action for breach of contract.").

SLS and ASIC next argue that RICO requires reliance. *See* Resp. Br. at 54. But the Supreme Court was clear in *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008), that "a plaintiff asserting a RICO claim predicated on mail fraud

need not show, *either as an element of its claim or as a prerequisite to establishing proximate causation*, that it relied on the defendant's alleged misrepresentations." 553 U.S. at 661 (emphasis added). *See also, e.g., U.S. v. Graham*, 477 F. App'x 818, 824 (2d Cir. 2012) ("As the Supreme Court has made clear, '[t]he common-law requirement[] of 'justifiable reliance' . . . plainly ha[s] no place in the federal fraud statutes.' … This is because the fraud statutes criminalize the 'scheme to defraud,' rather than the completed fraud.'") (citations omitted). Thus, RICO does not "require all … plaintiffs to demonstrate reasonable reliance on a defendant's misrepresentations[.]" *In re ClassicStar Mare Lease Litig.*, 727 F.3d 473, 487 n.3 (6th Cir. 2013) (citation omitted). "A plaintiff need only show use of the mail in furtherance of a scheme to defraud and an injury proximately caused by the scheme." *Wallace v. Midwest Fin. & Mortg. Servs., Inc.*, 714 F.3d 414, 420 (6th Cir. 2013).

SLS and ASIC rely on *Ray v. Spirit Airlines, Inc.*, No. 15-13792, 2016 WL 4578347 (11th Cir. Sept. 2, 2016), but *Spirit Airlines* was materially different. In that case, airline passengers alleged that they had purchased tickets based on the misrepresentations and omissions suggesting that a "passenger usage fee" was a tax rather than an airline fee. 2016 WL 4578347, at *1. The Court rejected their RICO claim because they had failed to "allege a direct link—or, indeed, any link at all—between Spirit's presentation of its Passenger Usage Fee and the plaintiffs' decision to purchase tickets on Spirit's website." *Id.* at *6. Indeed, the plaintiffs had "not

even allege[d] that [they] would not have purchased their tickets from the Spirit website had they known that the [fee] was not authorized or collected by the government." *Id.* As such, it "strain[ed] credulity" to insist that a passenger purchasing a $129.00 ticket would not have done so had she known that an $8.99 fee was imposed by the airline and not the government. *See id.*

The allegations here are different. Appellants alleged that they would not have paid or would have contested amounts beyond the cost of coverage had they known the facts. *See* D.E. 1 ¶¶ 146, 149, 150. Appellants were charged thousands of dollars for coverage, *see id.* ¶¶ 55, 66, with overcharges based on "commissions" alone likely comprising more than 10% of the total. *See, e.g., Montoya v. PNC Bank, N.A.*, 2016 WL 1529902, at *11 (S.D. Fla. Apr. 13, 2016) (12.5% made available to class members by settlement was "roughly the full amount of the "commission" or kickback paid by borrowers subject to other lenders' force-placed insurance schemes with Assurant[, ASIC's parent]") (citations omitted). It is entirely plausible that Plaintiffs would have contested these charges to recover the funds impermissibly deducted from their escrow accounts. *See, e.g., Perryman*, 2014 WL 4954674, at *15 ("[Plaintiff] could conceivably have declined to enter into the deed of trust had she known that the types of LPI penalties she ran the risk of incurring were attributable … to the … manipulation of the market for insurance"); *Cannon*, 2014 WL 324556, at *2-3 ("it is plausible that Plaintiffs would not have paid, or would

have contested the premiums …, if Defendants had disclosed that the premiums included unearned kickbacks rather than commissions").

Finally, citing *Spirit Airlines*, SLS and ASIC argue that Appellants were required to allege reliance by someone, *see* Resp. Br. at 54, but the Supreme Court must be taken at its word: reliance is not required *either* as an element of a RICO claim "*or as a prerequisite to establishing proximate causation*." *Bridge*, 553 U.S. at 661 (emphasis added). The plaintiff in *Bridge* could show third-party causation, still, the Court's holding remains: "[u]sing the mails to execute or attempt to execute a scheme to defraud is … a predicate act of racketeering under RICO, *even if no one relied on any misrepresentation*." *Id.* at 648 (citation omitted); *see also id.* at 649 ("It thus seems plain … that no showing of reliance is required to establish that a person has violated § 1962(c)[.]") (citation omitted). The Court conceded that "in most cases," but-for causation would require some form of reliance, *see id.* at 658, but by its concession, also admitted that in some cases, it would not.

In this case, amounts were deducted from borrowers' escrow accounts for where no affirmative decision to purchase coverage was made. *See* D.E. 1 ¶¶ 7, 35. The misrepresentations and omissions in SLS and ASIC's notice letters and elsewhere—including Appellees' concealment of their fraud generally—lent their scheme an air of legitimacy and lulled borrowers into believing that the charges imposed were permissible. *See id.* ¶¶ 34, 145. *See, e.g., United States 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, thereby allowing the scheme to go undetected."); *Cannon*, 2014 WL 324556, at *3 ("Defendants' non-disclosure of the kickbacks may be a basis for the scheme to defraud."). Because Appellants were "lulled" into this belief, they did not contest the charges, the charges were deducted automatically from their escrow accounts, *see* D.E. 1 ¶¶ 5, 35 57, 145, 146, 149, 150, and they were thus "injured by reason of" defendants' scheme. *See* 18 U.S.C. § 1964(c). Appellants have stated RICO claims under Sections 1964(c) and 1964(d).

E. PLAINTIFFS HAVE STATED FDUTPA CLAIMS.

SLS contends that Appellants cannot state FDUTPA claims because, as with RICO, they have not pled causation or damages. *See* Resp. Br. at 56. But FDUTPA and RICO are not the same: "[A] plaintiff need not prove reliance on the allegedly false statement to recover damages under FDUTPA, but rather … must simply prove that an objective reasonable person would have been deceived." *Fitzpatrick v. Gen. Mills, Inc.*, 635 F.3d 1279, 1283 (11th Cir. 2011). Appellants have met this standard, alleging that SLS and ASIC represented that borrowers would pay only costs of coverage, but charged them more. *See, e.g.,* D.E. 1 ¶¶ 26-47, 157-166.

F. PLAINTIFFS HAVE STATED UNJUST ENRICHMENT CLAIMS.

SLS and ASIC argue that Appellants cannot plead unjust enrichment because

they have an adequate remedy at law—their other claims for relief, which Appellees contend arise from the same "wrong." *See* Resp. Br. at 56-57. Most of Appellants' claims, however, arise from SLS's alleged contractual breach. *See* pp. 3-4, *supra*. SLS and ASIC argue that SLS cannot be liable for breach as a servicer, *see* Resp. Br. at 42; thus, Appellants bring unjust enrichment claims in the alternative to their contractual claims. *See* D.E. 1 at 30 n.9; Fed. R. Civ. P. 8 (d)(2).

Appellants' remaining claims do not arise from the same "wrong" as their unjust enrichment claims. While the unjust enrichment claims involve allegations that Appellees charged borrowers more than allowed by contract, their statutory claims, for example, also arise from Appellees' failure to disclose both the charges and the nature of their scheme. *See* D.E. 1 ¶¶ 122-166. To be sure, SLS would be liable under TILA even if the undisclosed amounts were not found to be wrongful; nondisclosure itself amounts to a TILA violation. *See, e .g., Charles v. Krauss Co.*, 572 F.2d 544, 546 (5th Cir. 1978) (basis of TILA liability "failure to disclose information required to be disclosed; there is no requirement that the plaintiff himself be deceived in order to sue in the public interest") (citation omitted).

CONCLUSION

The Court should reverse and remand for further proceedings.

Respectfully submitted,

s/ Rachel Sullivan
Adam M. Moskowitz
Thomas A. Tucker Ronzetti
Rachel Sullivan
Robert J. Neary
KOZYAK TROPIN &
THROCKMORTON LLP
2525 Ponce de Leon Blvd., 9th Floor
Coral Gables, FL 33134
Tel.: 305-372-1800
Fax: 305-372-3508
amm@kttlaw.com
tr@kttlaw.com
rs@kttlaw.com
rn@kttlaw.com

Stephen F. Rosenthal
Aaron S. Podhurst
Peter Prieto
Matthew P. Weinshall
PODHURST ORSECK, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
Tel.: 305-358-2800
Fax: 305-358-2382
srosenthal@podhurst.com

Lance A. Harke
Howard M. Bushman
HARKE CLASBY & BUSHMAN LLP
9699 NE Second Avenue
Miami Shores, Florida 33138
Tel.: 305-536-8220
Fax: 305-536-8229
lharke@harkeclasby.com
hbushman@harkeclasby.com

Counsel for Plaintiffs-Appellants

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 7,049 words in the brief.

s/ Rachel Sullivan

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 19, 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.

s/ Rachel Sullivan

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