No. 16-16585

United States Court Of Appeals For The Eleventh Circuit

RICHARD L. **FOWLER**, et al.,

Plaintiffs and Appellants,

vs.

CALIBER HOME LOANS, INC., et al.,

Defendants and Appellees.

Appeal from a Judgment of Dismissal
United States District Court, Southern District of Florida,
Case No. 1:15-CV-24542-JG • Hon. Jonathan Goodman

Appellee's Brief

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURES STATEMENT
(Fed. R. App. P. 26.1 and 11th Cir. Rule 26.1-1)

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-2, defendant-appellee Caliber Home Loans, Inc. certifies its belief that the Certificate of Interested Persons and Corporate Disclosure Statement contained in plaintiffs-appellants' opening brief is true and correct.

STATEMENT RE ORAL ARGUMENT
(11th Cir. Rule 28-1)

Caliber desires oral argument. This appeal presents a significant question concerning the application of the filed-rate doctrine to lender-placed insurance. The Court's ruling on this appeal will impact not only the parties to this case, but also other loan servicers and insurers facing similar claims assailing lender-placed insurance premiums in both in this Circuit and nationwide. Caliber believes that oral argument will assist the Court in interpreting the proper scope of the filed-rate doctrine.

STATEMENT REGARDING JOINDER IN OTHER BRIEFS
(Fed. R. App. P. 28(i) and 11th Cir. Rule 28-1(f))

Pursuant to Fed. R. App. P. 28(i) and 11th Cir. Rule 28-1(f), defendant-appellee Caliber Home Loans, Inc. states that it joins in and adopts by reference the "Summary of Argument" and "Argument" sections of the brief of the defendants-appellees filed in *Patel v. Specialized Loan Servicing LLC*, No. 16-12100, a related appeal pending in this Court with which this appeal has been consolidated.

Caliber also joins in and adopts by reference the "Summary of Argument" and "Argument" sections of the amicus brief filed by Amicus Curiae Property Casualty Insurers Association of America in the *Patel* appeal.

Caliber also joins in and adopts by reference the brief of defendant-appellee American Security Insurance Company filed in this appeal.

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I.

STATEMENT OF JURISDICTION

Plaintiffs Richard Fowler, Glenda Keller, and Yvonne Yambo-Gonzalez alleged the district court had subject matter jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2). Fowler and Yambo-Gonzalez are citizens of Florida. D.E. 1, ¶¶ 13, 14. Keller is a citizen of Pennsylvania. *Id.*, ¶ 15. Defendant Caliber Home Loans, Inc. is a citizen of Texas and Oklahoma. *Id.*, ¶ 17. Defendant American Security Insurance Company is a citizen of Delaware and Georgia. *Id.*, ¶ 16. The complaint alleged that more than $5 million was in controversy. *Id.*, ¶ 19. The complaint alleged the action was brought on behalf of a class of more than 100 similarly situated borrowers. *Id.*, ¶¶ 18-19.

The district court also had federal question jurisdiction under 28 U.S.C. § 1331, as plaintiffs alleged claims under federal statutes: the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq*. and the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq*. D.E. 1, ¶¶ 135-169.

This Court has jurisdiction of the appeal pursuant to 28 U.S.C. § 1291. The appeal is from a final order of dismissal entered on September 13, 2016. D.E. 91. Plaintiffs filed their notice of appeal on October 13, 2016. D.E. 93.

II.

ISSUE FOR REVIEW

Did the district court correctly dismiss plaintiffs' complaint?

III.

STATEMENT OF THE CASE

A. Proceedings Below

Plaintiffs filed this putative class action against Caliber and ASIC on December 10, 2015. *See* D.E. 1. Plaintiffs alleged that the lender-placed insurance ("LPI") premiums Caliber charged them were "inflated" by "various kickbacks" ASIC paid to Caliber in exchange for the right to monitor Caliber's portfolio of loans and provide LPI. *Id.*, ¶¶ 2-3.

Caliber and ASIC moved to dismiss the complaint for failure to state a claim, asserting that all of plaintiffs' claims were barred by the filed-rate doctrine and that each claim suffered from at least one independent defect. *See* D.E. 22, 23. Plaintiffs filed written opposition to the motions. *See* D.E. 47. Caliber and ASIC filed written replies. *See* D.E. 51, 52.

On May 16, 2016, the district court held a hearing on the motions lasting approximately four hours. D.E. 73, 91 at 4. On July 8, 2016, the district court issued a 45-page order granting the defendants' motions to dismiss without leave to amend. D.E. 83. The district court found that all of plaintiffs' claims challenged LPI rates

filed with and approved by regulatory authorities, and thus the filed-rate doctrine barred plaintiffs' claims.

> Plaintiffs do not dispute that ASIC's LPI rates are regulated by the relevant states, and they were charged the exact LPI premiums required by ASIC's authorized rates. Plaintiffs' damages are allegedly being charged the components of their LPI premiums they call "kickbacks." Plaintiffs' claims require this Court to parse out the portion of the authorized LPI premiums that may be attributed to the alleged "kickbacks," and then award that portion to plaintiffs as damages. That exercise would necessarily trespass on the regulators' authority to determine ASIC's LPI rates and the components thereof, violating the nonjusticiability principle. Such damages would also have the effect of retroactively reducing plaintiffs' LPI premiums over other ASIC insureds, violating the nondiscrimination principle.

D.E. 91 at 39.

Plaintiffs moved for clarification of the district court's order, requesting it revise certain statements regarding plaintiffs' concession that the court would need to review the filed rates to calculate damages under plaintiffs' theory. D.E. 84. The district court granted that motion in part, revising its order to quote verbatim the questions and answers at the motion to dismiss hearing on the calculation of damages. D.E. 90. The district court issued an amended order dismissing plaintiffs' claims on September 13, 2016 and vacated its prior order granting the motion to dismiss. *See* D.E. 91, 92.

Plaintiffs filed a notice of appeal on October 13, 2016. *See* D.E. 93.[1]

B. Statement of Facts

1. Plaintiffs' Mortgages

Plaintiffs are borrowers with home loans serviced by Caliber. Fowler and Yambo-Gonzalez are Florida residents who own separate properties in Miami-Dade County. D.E. 1, ¶¶ 13-14, 47-48, 64-65. Keller is a Pennsylvania resident who owns real property in Lancaster, Pennsylvania. *Id.*, ¶¶ 15, 76-77.

Each plaintiff's loan was secured by a mortgage which required him or her to maintain insurance on the property. *Id.*, ¶¶ 48, 64, 77, Exs. A, B. If the borrower failed to maintain adequate insurance, the mortgages authorize the lender or its assigns to purchase and charge the borrower for insurance sufficient to protect its collateral:

> **5. Property Insurance.** If Borrower fails to maintain coverage 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 Secur-

[1] On December 19, 2016, this Court granted ASIC's motion to consolidate the appeal for the purpose of oral argument with a similar appeal pending in this Court, *Patel v. Specialized Loan Servicing LLC*, No. 16-12100.

> ity Instrument. The 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.

Id., ¶¶ 48, 64, 77, Ex. A, ¶ 5 (emphasis added), Ex. B, ¶ 5; D.E. 22-1.

Each plaintiff allowed the insurance on his or her property to lapse. D.E. 1, ¶¶ 49, 65, 78. As a result, Caliber obtained LPI polices for each plaintiff's property from ASIC. *See id.*

2. Caliber Obtains LPI on Yambo-Gonzalez's Property

Caliber's predecessor Vericrest Financial first notified Yambo-Gonzalez of a lapse in her hazard and flood insurance in June 2009. *See* D.E. no. 23-2, ¶ 7; *see also* D.E. no. 1, ¶ 49. The letter warned that the cost of any LPI policy "may be substantially higher" than any voluntary coverage and that "[a]ffiliates of Vericrest Financial, Inc. may earn commissions or income in conjunction with the placement of this coverage." *See* D.E. no. 23-2, Ex. 1. As Yambo-Gonzalez did not respond to that letter or subsequent similar letters, *see id.*, ¶ 8, Ex. 2, Caliber obtained one-year hazard and flood LPI policies from ASIC. *See id.*, Ex. 3.

Since 2010, Caliber has sent Yambo-Gonzalez letters annually reminding her of the lapse in coverage and advising it will renew the LPI hazard and flood policies for an additional one-year term if she fails to provide proof of coverage. *See id.*, Exs. 5-16; *see also* D.E. 1, ¶¶ 52, 54-56. Yambo-Gonzalez has not provided proof of cover-

age in response to any of these letters. Caliber has thus renewed the hazard and flood policies each year. D.E. 1., ¶¶ 50, 52.

3. Caliber Obtains LPI on Fowler's Property

Caliber sent Fowler a letter in May 2014 advising that it had no record of insurance on his property and requesting that he provide proof of coverage. *See* D.E. no. 23-1, Ex. 1. The letter disclosed, in boldfaced type, that the insurance Caliber would obtain "**[m]ay be more expensive than insurance you can buy yourself** …." *Id.* As Fowler did not provide proof of coverage in response to that letter or a follow-up letter, *see id.* at Ex. 2, Caliber obtained an LPI policy from ASIC in June 2014. *See id.*, Ex. 3. Caliber has since renewed the policy based on Fowler's failure to provide proof of voluntary coverage. *See* D.E. no. 1, ¶ 66.

4. Caliber Obtains LPI on Keller's Property

Caliber sent Keller a letter in March 2015 advising that it had no record of hazard insurance on her property and requesting she provide proof of coverage. *See* D.E. 1., ¶ 78, D.E. 23-3, Ex. 1. The letter contained the same disclosures warning of LPI's disadvantages that were made in the letter sent to Fowler. *Id.* Keller did not provide proof of coverage in response to that letter or a similar follow-up letter. *See id.*, Ex. 2. Caliber thus obtained an LPI policy from ASIC in May 2015. *See id.*, Ex. 3. Caliber has since renewed the policy based on Keller's failure to provide proof of voluntary coverage. D.E. 1, ¶ 66.

IV.

STANDARD OF REVIEW

This Court reviews an order granting a motion to dismiss de novo. *Solymar Investments, Ltd. v. Banco Santander S.A.,* 672 F.3d 981, 985 n. 1 (11th Cir. 2012); *Spain v. Brown & Williamson Tobacco Corp*., 363 F.3d 1183, 1187 (11th Cir. 2004).

The Court accepts the complaint's well-pleaded factual allegations as true, but not its conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Id.* (citation omitted).

"[A] district court may [also] consider an extrinsic document … on Rule 12(b)(6) review if it is (1) central to the plaintiff's claim, and (2) its authenticity is not challenged. *SFM Holdings, Ltd. v. Banc of Am. Sec., LLC,* 600 F.3d 1334, 1337 (11th Cir. 2010). In addition, a district court may consider judicially noticed documents." *U.S. ex rel. Osheroff v. Humana Inc.*, 776 F.3d 805, 811 (11th Cir. 2015).

In reviewing an order of dismissal for failure to state a claim, the Court is not limited to the reasoning given by the district court, but may affirm the dismissal on any ground that finds support in the record, even if the district court did not reach the issue or relied on different grounds or reasoning. *See Allen v. USAA Cas. Ins. Co*., 790 F.3d 1274, 1278 (11th Cir. 2015); *Williams v. Bd. of Regents of Univ. Sys. of Georgia,* 477 F.3d 1282, 1301 (11th Cir. 2007).

This Court's review is properly limited to whether the complaint alleged a plausible claim for relief without any inquiry into whether there are new facts plaintiffs could allege that might state a viable claim. As plaintiffs did not request leave to amend in the district court, they did not preserve the issue for review and have waived any error in the district court's denial of leave to amend. *See Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542 (11th Cir. 2002) (en banc); *Long v. Satz*, 181 F.3d 1275, 1279-80 (11th Cir. 1999).

V.

SUMMARY OF ARGUMENT

When plaintiffs failed to keep their properties insured as they had promised, Caliber bought LPI and charged plaintiffs the premiums it paid ASIC for that insurance. Those premiums were set under rates filed with and approved by the Florida Office of Insurance Regulation and Pennsylvania Department of Insurance.

Plaintiffs do not claim that the premiums that ASIC charged and Caliber passed on to plaintiffs exceeded the approved rates. Instead, each of plaintiffs' claims alleged that the approved rates, and hence the premiums, were "inflated" because they included commissions and "kickbacks" ASIC paid to Caliber.

The district court correctly held that the filed-rate doctrine barred these claims.

As the Second Circuit recently held in ordering dismissal of a similar LPI case, "[u]nder the filed rate doctrine, 'any "filed rate"—that is, one approved by the govern-

ing regulatory agency—is per se reasonable and unassailable in judicial proceedings brought by ratepayers.' " *Rothstein v. Balboa Ins. Co*., 794 F.3d 256, 261 (2d Cir. 2015) (citation omitted). The filed-rate doctrine applies whenever a plaintiff's claims implicate one of the doctrine's two underlying principles: (1) the nonjusticiability principle, which preserves the regulatory agency's jurisdiction and expertise in setting rates; and (2) the nondiscrimination principle, which requires that all ratepayers be charged uniform rates.

Plaintiffs' claims violate both of these underlying principles. Plaintiffs ask the courts to second-guess the reasonableness of rates approved by the ratemaking agencies, "invit[ing] judicial meddling in issues of insurance policy." *Rothstein*, 794 F.3d at 263. Plaintiffs ask the courts to set their premiums at a rate different than the filed rates, which "would operate 'like a rebate ... to give [them] a preference' over other borrowers who were charged for LPI." *Id.* Hence, all of their claims are barred by the filed-rate doctrine, as the district court correctly held.

Plaintiffs' primary argument on appeal is that the filed-rate doctrine should not apply because they did not directly pay the premiums to ASIC. Plaintiffs attempt to segregate LPI into two separate transactions: ASIC's charging premiums to Caliber, and Caliber's charging those premiums to plaintiffs. Plaintiffs contend their claims challenge only the latter transaction, which they say is not subject to the ratemaking agencies' authority.

The district court correctly rejected this argument as mischaracterizing LPI and as legally irrelevant. LPI rates are invariably passed through a servicer acting as an intermediary. Plaintiffs were charged the same rates that ASIC filed with the ratemaking agencies. The regulators approved the filed rates with the understanding that they would ultimately be passed through to borrowers. The filed-rate doctrine applies with equal force to plaintiffs' claims as they implicate the nonjusticiability and nondiscrimination principles regardless of whether the rates are passed through an intermediary.

Equally meritless is plaintiffs' argument that the filed-rate doctrine does not apply to servicers like Caliber. It would make little sense to hold the doctrine bars claims against insurers but not servicers passing through the same filed and approved rates.

Contrary to plaintiffs' argument, there is no "split" among the Circuits over whether the filed-rate doctrine bars claims like plaintiffs'. *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753 (3d Cir. 2009) is easily distinguished because the plaintiffs sued under a statute providing a unique right to trebled damages independent of whether or not there was an overcharge. There was thus "no need to parse or second guess rates." *Id.* at 764. By contrast, plaintiffs concede there is no way to calculate damages under their theory without determining the amount of the alleged "kickbacks" included in the premiums. The Court must parse or second-guess the rates—a result that impli-

cates both the doctrine's nondiscrimination and nonjusticiability principles under this Circuit's precedent.

The dismissal should also be affirmed for reasons other than the filed-rate doctrine that were raised in Caliber's motion to dismiss and are supported by the record.

Caliber could not have breached the mortgages or any implied covenant when it purchased a more expensive LPI policy as the mortgages authorized it to do just that. Nothing in plaintiffs' mortgages states they would be charged only Caliber's net cost in obtaining LPI. To the contrary, before placing LPI, Caliber disclosed in detail LPI's disadvantages, including its high cost and, where applicable, that Caliber's affiliate would receive a commission.

Plaintiffs cannot sue in unjust enrichment because express contracts, their mortgages, govern their rights, and they failed to allege any facts showing they conferred any benefit which it would be unjust for Caliber to retain.

Plaintiffs' TILA claim failed as Caliber had no duty to disclose LPI premiums as part of a finance charge after their loans were consummated. Contrary to plaintiffs' theory, the purchase of LPI did not create a new loan obligation, render the prior disclosures inaccurate, or otherwise engender any duty to issue new TILA disclosures.

Plaintiffs' RICO claims were also correctly dismissed. The supposed "scheme to defraud" was implausible on its face as Caliber repeatedly disclosed LPI's disadvantages to plaintiffs and urged them to obtain their own insurance. Plaintiffs also

failed to plead the required element of causation as they did not allege they read the notices on which the RICO claim is based or relied on them in deciding to acquiesce in LPI.

For these reasons and others detailed below, the judgment of dismissal should be affirmed.

VI.

THE FILED-RATE DOCTRINE BARS PLAINTIFFS' CLAIMS

A. Basic Principles Underlying the Filed Rate Doctrine

"The filed rate doctrine … 'forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority.' " *Hill v. BellSouth Telecommunications, Inc.*, 364 F.3d 1308, 1315 (11th Cir. 2004) (citation omitted). Put another way, "[w]here the legislature has conferred power upon an administrative agency to determine the reasonableness of a rate, the rate-payer 'can claim no rate as a legal right that is other than the filed rate ....' " *Taffet v. So. Co.*, 967 F.2d 1483, 1494 (11th Cir. 1992) (citation omitted).

"[F]ederal courts have applied the filed rate doctrine in a variety of contexts to bar recovery by those who claim injury by virtue of having paid a filed rate." *Taffet*, 967 F.2d at 1488 (citing cases). The doctrine applies to all such claims, including

federal claims like RICO or TILA.[2] The doctrine has been repeatedly applied to insurance premiums.[3]

Two important public policies support the filed rate doctrine: (1) preventing price discrimination between ratepayers so that everyone pays the same filed rate (nondiscrimination principle) and (2) preserving the regulatory agency's statutory jurisdiction and recognizing its expertise in setting rates (nonjusticiability principle). *Hill*, 364 F.3d at 1315-17.

"Based on these two principles, 'the doctrine is applied strictly to prevent a plaintiff from bringing a cause of action even in the face of apparent inequities whenever either the nondiscrimination strand or the nonjusticiability strand underlying the doctrine is implicated by the cause of action the plaintiff seeks to pursue.' " *Hill*, 364 F.3d at 1316 (quoting *Marcus v. AT&T Corp*., 138 F.3d 46, 59 (2d Cir. 1998)). "[E]ven if a claim does not directly attack the filed rate, an award of damages to the customer that would, in effect, result in a judicial determination of the reasonableness of that rate is prohibited under the filed rate doctrine." *Hill*, 364 F.3d at 1317.

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[2] *See, e.g.*, *Taffet*, 967 F.2d at 1494 (explaining doctrine "applies with equal force to preclude recovery under RICO"); *Rothstein*, 794 F.3d at 259; (explaining filed-rate doctrine bars LPI plaintiff's RICO claim); *Steven v. Union Planters Corp*., No. CIV. A. 00-CV-1695, 2000 WL 33128256, at *3 (E.D. Pa. Aug. 22, 2000) (explaining doctrine bars RESPA claim).

[3] *See In re Pennsylvania Title Ins. Antitrust Litig*., 648 F. Supp. 2d 663, 685 (E.D. Pa. 2009); *Schermer v. State Farm Fire & Cas. Co*., 702 N.W.2d 898, 907 (Minn. Ct. App. 2005); *American Bankers Ins. Co. of Fla. v. Wells*, 819 So.2d 1196, 1204 (Miss. 2001).

" '[T]he impact a civil action will have on agency procedures and rate determinations,' rather than the defendant's underlying conduct, controls whether the filed rate doctrine applies." *Taffet*, 967 F.2d at 1495 (quoting *H.J. Inc. v. Nw. Bell Tel. Co*., 954 F.2d 485, 489 (8th Cir. 1992)).

Applying these principles, the Second Circuit recently held the filed-rate doctrine bars claims challenging LPI premiums identical to the claims asserted here: "a claim challenging a regulator-approved rate is subject to the filed rate doctrine whether or not the rate is passed through an intermediary. The claim is therefore barred if it would undermine the regulator's rate-setting authority or operate to give the suing ratepayer a preferential rate." *Rothstein*, 794 F.3d at 259.

Multiple district court decisions in this Circuit and elsewhere have reached the same conclusion, holding claims against servicers and insurers challenging LPI premiums are barred by the filed-rate doctrine.[4]

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[4] *See, e.g., Alpert v. Nationstar Mortg. LLC*, No. C15-1164 RAJ, 2017 WL 1079916, at *4 (W.D. Wash. Mar. 22, 2017); *Patel v. Specialized Loan Servicing LLC*, 183 F. Supp. 3d 1238, 1243 (S.D. Fla. 2016); *Lyons v. Litton Loan Servicing LP*, 158 F. Supp. 3d 211, 228 (S.D.N.Y. 2016); *Clarizia v. Ocwen Fin. Corp*., No. 113CV2907ALCHBP, 2016 WL 439018, at *3 (S.D.N.Y. Feb. 2, 2016); *Trevathan v. Select Portfolio Servicing, Inc*., 142 F. Supp. 3d 1283, 1288 (S.D. Fla. 2015); *Haddock v. Countrywide Bank, NA*, No. CV146452PSGFFMX, 2015 WL 9257316, at *18–19 (C.D. Cal. Oct. 27, 2015); *Johnson v. Green Tree Servicing LLC*, No. 3:15-CV-18-MPM-SAA, 2015 WL 2452680, at *2 (N.D. Miss. May 22, 2015); *Miller v. Wells Fargo Bank, N.A*., 994 F. Supp. 2d 542, 554 (S.D.N.Y. 2014); *Decambaliza v. QBE Holdings, Inc*., No. 13-CV-286-BBC, 2013 WL 5777294, at *6-8 (W.D. Wis. Oct. 25, 2013).

B. The Filed-Rate Doctrine Under Florida and Pennsylvania Law

"[F]ederal courts sitting in diversity jurisdiction must apply substantive state law." *Bravo v. United States*, 577 F.3d 1324, 1325 (11th Cir. 2009). "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Here, Florida law governs Fowler's and Yambo-Gonzalez's claims while Pennsylvania law governs Keller's claims.[5]

"In interpreting [state] law, we look first to precedent from the [State] Supreme Court. If there is no such precedent, we adhere to decisions of [State]'s intermediate appellate courts absent some persuasive indication that the [State] Supreme Court 'would decide the issue otherwise.' " *Carlson v. FedEx Ground Package Sys., Inc.*, 787 F.3d 1313, 1318 (11th Cir. 2015) (citation omitted). "In the absence of precedents from [a state]'s intermediate appellate courts, however, we may consider the case law of other jurisdictions that have examined similar policy provisions." *State Farm Fire & Cas. Co. v. Steinberg*, 393 F.3d 1226, 1231 (11th Cir. 2004). A court

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[5] Plaintiffs' mortgages contain a choice-of-law clause stating the contracts are governed by the law of the states in which the properties are located. *See* D.E. 1, Exs. A, B, ¶ 13; D.E. 22-1, Ex. A, ¶ 13. "In diversity cases, the choice-of-law rules of the forum state determine what law governs ….' " *Interface Kanner, LLC v. JPMorgan Chase Bank, N.A.*, 704 F.3d 927, 932 (11th Cir. 2013) (citation omitted). Under Florida law, the choice-of-law provisions in borrowers' security instruments are enforceable. *See Acosta v. Campbell*, 6:04CV761ORL28DAB, 2006 WL 146208, at *9 (M.D. Fla. Jan. 18, 2006) (citing cases). Hence, Florida law governs Fowler's and Yambo-Gonzalez's claims, and Pennsylvania law governs Keller's claims.

may also "consider whatever might lend it insight, including 'relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand.' " *Guideone Elite Ins. Co. v. Old Cutler Presbyterian Church, Inc*., 420 F.3d 1317, 1326 n.5 (11th Cir. 2005).

Neither Florida's nor Pennsylvania's highest court has decided whether the filed-rate doctrine bars claims like plaintiffs'. Nor have either state's intermediate appellate courts squarely addressed the issue. Accordingly, this Court must interpret state law absent any controlling precedent.

This is not the first time this Court has interpreted the filed-rate doctrine without "binding, on-point precedent." *Hill*, 364 F.3d at 1315. In *Taffett*, 967 F.3d 1483, this Court "examine[d] the rate-making schemes in Alabama and Georgia which define the [parties'] rights …." in holding the filed-rate doctrine barred plaintiffs' claims. *Id.* at 1490. In *Hill*, 364 F.3d 1308, this Court "reach[ed] [its] conclusion based on a consideration of persuasive authority and the two broader principles underlying the doctrine: nondiscrimination and nonjusticiability."[6] Consideration of the state regulatory schemes and the doctrine's twin principles of nondiscrimination and

[6] Though *Hill* was a federal question case, its analysis of the filed-rate doctrine's application absent any binding authority is cogent and persuasive here.

nonjusticiability leads to the same conclusion here as in *Hill* and *Taffett*: plaintiffs' claims are barred by the filed-rate doctrine.

"The State of Florida heavily regulates the insurance industry." *Gilchrist v. State Farm Mut. Auto. Ins. Co*., 390 F.3d 1327, 1334 (11th Cir. 2004) (footnote omitted). The Insurance Code provides that insurers "must" file "cop[ies] of rates, rating schedules, rating manuals, premium credits or discount schedules, and surcharge schedules, and changes thereto" with the Office of Insurance Regulation. Fla. Stat. § 627.062(2)(a). "Upon receiving a rate filing, the [OIR] shall review the filing to determine if a rate is excessive ..," in light of accepted and reasonable actuarial techniques and considering 14 specified factors. Fla. Stat. § 627.062(2)(b). If the OIR finds the rate excessive, "the office shall initiate proceedings to disapprove the rate and shall so notify the insurer." Fla. Stat. § 627.062(2)(g).

Pennsylvania also heavily regulates the insurance industry with the goal of protecting "policyholders and the public from excessive, inadequate or discriminatory rates." 40 Pa. Stat. § 710-2(1). Insurers "shall file every manual of classifications, rules and rates, every rating plan and every modification of a manual of classifications, rules and rates and a rating plan which it proposes to use in this Commonwealth." *See* 40 Pa. Stat. § 710-6(a). The Insurance Commissioner may disapprove rates that "are determined to be excessive, inadequate or unfairly discriminatory." 40 Pa. Stat. § 710-7(b). The Commissioner may disapprove or suspend previously

approved rates if it subsequently determines the rates are excessive or otherwise contrary to law. 40 Pa. Stat. §§ 710-7(b), 710-11(a)-(e).

Here, as in *Taffett*, "[t]he rate-setting schemes in both [Florida] and [Pennsylvania] are incompatible with a rate-payer's cause of action to recover damages measured by the difference between the filed rate and the rate that would have been charged absent some alleged wrongdoing." *Taffet*, 967 F.2d at 1491. Each state has a detailed scheme to ensure that only reasonable rates are charged. Each state requires insurers to charge only the approved filed rate. Fla. Stat. § 626.9541(1)(o)(2); Pa. Stat. § 710-5(a). Each state's law thus bars claims challenging insurance premiums filed with and approved by the ratemaking authorities. *See, e.g., Morales v. Attorneys' Title Ins. Fund, Inc*., 983 F. Supp. 1418, 1426-27 (S.D. Fla. 1997) (filed-rate doctrine barred challenge to "reasonableness of Florida's promulgated title insurance rates"); *Petty v. Ins. Dep't*, 878 A.2d 942, 947 (Pa. Commw. Ct. 2005) (doctrine barred claims challenging health insurance rates); *Steven*, 2000 WL 33128256, at *3 (doctrine barred claims challenging LPI premiums under Pennsylvania law because "[t]he regulatory system governing the forced placed hazard insurance rates at issue is comprehensive, including filing, rate calculation, rate review, and enforcement of rules").

Analogous case law from other jurisdictions also supports the conclusion that the filed-rate doctrine precludes plaintiffs' claims. *See State Farm Fire*, 393 F.3d at

1231. In *Rothstein*, the Second Court held the filed-rate doctrine barred plaintiffs' claims under New York, New Hampshire, and Texas law. *Rothstein*, 794 F.3d at 260 n.1, 265-266. The Court found that plaintiffs' claims implicated the doctrine's non-discrimination and nonjusticiability strands, thus offending each state's regulatory scheme requiring the filing and approval of rates.

As just shown, Florida and Pennsylvania also have comprehensive regulatory schemes requiring that LPI rates be filed and approved before they may be charged to borrowers. As in *Rothstein*, plaintiffs challenge the rates filed and approved pursuant to those regulatory schemes. There is no reason to think either Florida or Pennsylvania courts would decide the filed-rate doctrine's application any differently than *Rothstein* did under New York, New Hampshire, and Texas law.[7]

In short, all available evidence suggests Florida and Pennsylvania courts would analyze the filed-rate doctrine's application to LPI under the same framework this Court followed in *Hill* and *Taffert*. *Rothstein* followed that approach and held similar claims were barred by the filed-rate doctrine. The district court correctly reached the same conclusion here, dismissing plaintiffs' claims. This Court should affirm.

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[7] Plaintiffs rely on an order from a California Insurance Commissioner stating that he lacked jurisdiction to address whether costs included in LPI rates were properly passed on to borrowers. *See* AOB at 15, 26. But plaintiffs advance no convincing reason why Pennsylvania or Florida courts would follow that order here. As just explained, Pennsylvania and Florida have detailed schemes requiring the filing and approval of LPI premiums. The ratemaking agencies thus have comprehensive authority over costs included in LPI premiums, as *Rothstein* correctly held.

C. The District Court Did Not Abuse Its Discretion In Taking Judicial Notice Of The Filed Rates

Judicially noticeable documents showed that ASIC filed its LPI rates with the Florida Office of Insurance Regulation and Pennsylvania Department of Insurance and that those regulators approved ASIC's filed rates. *See* D.E. 23-1.

In a footnote, plaintiffs tersely suggest that the district court erred in taking judicial notice of ASIC's filed rates, contending the rates are "irrelevant" to their claims. *See* A.O.B. 16 n. 3. But plaintiffs have forfeited this argument by failing to support it. "A passing reference to an issue in a brief is not enough, and the failure to make arguments and cite authorities in support of an issue waives it." *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1319 (11th Cir. 2012) (citing cases); *see also Singh v. U.S. Att'y Gen.*, 561 F.3d 1275, 1278 (11th Cir. 2009) (per curiam).

Waiver aside, plaintiffs cannot show the district court abused its discretion in taking judicial notice of ASIC's publicly filed rates. *See Boyd v. Georgia*, 512 F. App'x 915, 916 (11th Cir. 2013) (citing *United States v. Marizal*, 421 F.2d 836, 837 (5th Cir. 1970)). Indeed, "Plaintiffs agree[d] [below] that the Court may take judicial notice of ASIC's rate filings." D.E. 91 at 7. Their counsel explained that "[f]or judicial notice, the Court has wide discretion to take judicial notice of many publically available items. And, of course, it is not reversible error whether you do or you don't." D.E. 74 at 46.

Plaintiffs had it right the first time. "Courts may take judicial notice of publicly filed documents … at the Rule 12(b)(6) stage." *U.S. ex rel. Osheroff v. Humana Inc.*, 776 F.3d 805, 815 n. 4 (11th Cir. 2015) (citing Fed. R. Evid. 201(b)(2).) Plaintiffs do not dispute the authenticity of the rate filings ASIC lodged with its motion. *See* D.E. 74 at 50-51. The filed rates are plainly relevant to plaintiffs' claims that the premiums they were assessed are "inflated" and excessive, as several courts have found in taking judicial notice of LPI rates in similar cases. *See, e.g., Patel*, 183 F. Supp. 3d at 1241; *Trevathan*, 142 F. Supp. 3d at 1287-88.

Also, on at least four different occasions, this Court has rejected at the pleading stage claims barred by the filed-rate doctrine. *See Pfeil v. Sprint Nextel Corp.*, 284 F. App'x 640, 643 (11th Cir. 2008); *Hill*, 364 F.3d at 1317; *In re Olympia Holding Corp.*, 88 F.3d 952, 962 (11th Cir. 1996); *Taffet*, 967 F.2d at 1495. In affirming or ordering dismissal of those cases, this Court necessarily considered the existence of the publicly filed rates. The district court did not abuse its discretion in judicially noticing and considering ASIC's publicly filed rates in this case.

D. Plaintiffs' Claims Implicate Both The Nonjusticiability And Nondiscrimination Principles

The district court correctly held the filed-rate doctrine applies because plaintiffs' claims implicate both the doctrine's nonjusticiability and nondiscrimination principles. *See* D.E. 91 at 35-38.

1. Plaintiffs' Claims Implicate The Nonjusticiabiltiy Principle

"The purpose of the nonjusticiability principle underlying the filed rate doctrine is to preserve the [regulatory agency's] primary jurisdiction over determinations regarding the reasonableness of rates charged by regulated carriers. [Citation.] This principle 'prevents more than judicial rate-setting; it precludes any judicial action which undermines agency rate-making authority.' " *Hill*, 364 F.3d at 1317 (quoting *Marcus*, 138 F.3d at 61).

Plaintiffs' claims run afoul of the nonjusticiability principle, as *Rothstein*, 794 F.3d 256, held in a similar case. In *Rothstein*, the plaintiffs alleged "they were fraudulently overbilled because the rates they were charged" by their servicer for LPI "did not reflect secret rebates and kickbacks that [the servicer] received from [the insurer.]" *Id.* at 259. The Second Circuit held such claims "plainly" would undermine the authority of the ratemaking agencies in violation of nonjusticiability principle.

> Plainly, Plaintiffs' claims would undermine the rate-making authority of the state insurance regulators who approved Balboa's LPI rates. The theory behind the claims is that Plaintiffs were overbilled when they were charged the full LPI rates (which were approved by regulators), instead of lower rates net of the value of loan tracking services provided by Newport. That theory can succeed only if the arrangement with Newport should have been treated as part and parcel of the LPI transaction and reflected in the LPI rates. But, under the nonjusticiability principle, it is squarely for the regulators to say what should or should not be included in a filed rate.

Rothstein, 794 F.3d at 262 (footnote omitted).

Rothstein is persuasive here. Plaintiffs allege that the approved LPI premiums are "inflated" and illegal because the premiums include commissions, tracking expenses, and various "kickbacks." D.E. no. 1, ¶¶ 2-3, 31-40. They seek damages or a refund of the amount by which those components increased the LPI premium. *Id.*, ¶¶ 103, 121, 129, 134, 162-163, 169. They concede that there is no way to calculate those damages "without determining the amount of the commissions, tracking expenses, or other allegedly inflated, or unearned portions, of the LPI premium." *See* D.E. no. 91 at 15. "But under the nonjusticiability principle, it is squarely for the regulators …" to determine whether these items were properly included in the filed rates. *Rothstein*, 794 F.3d at 262

Attempting to avoid the doctrine's bar, plaintiffs assert that they do not challenge the rates themselves, but instead seek damages based on Caliber's alleged breach of contract. AOB 16, 22. But as already pointed out, "a claim may be barred even if it can be characterized as challenging something other than the rate itself." *Rothstein*, 794 F.3d at 262; *Lyons*, 158 F. Supp. 3d at 227-28 . A "judgment awarding damages in such a case would not directly set a new rate; in effect, however, the judgment would do so indirectly—in the form of money damages." *Taffet*, 967 F.2d at 1491 n. 9. That is precisely what the filed-rate doctrine forbids.

In similar LPI cases, other courts have agreed.[8] Regardless of the spin put on plaintiffs' allegations, "[t]he alleged kickbacks and other costs were included in the amount of the premium approved by the regulatory agency." *Singleton v. Wells Fargo Bank, N.A.*, No. 2:12CV216-NBB-SAA, 2013 WL 5423917, at *2 (N.D. Miss. Sept. 26, 2013). Thus, "[i]n order to calculate the amount of the alleged kickbacks, it would be necessary for this court to determine a reasonable rate and subtract it from the premium." *Decambaliza*, 2013 WL 5777294, at *7. That would require the trier of fact to second-guess the legality of the rates a regulator has already deemed reasonable—a result the filed-rate doctrine precludes. *See id.*

2. Plaintiffs' Claims Implicate The Nondiscrimination Principle

"The purpose of the nondiscrimination principle underlying the filed rate doctrine is to ensure that all … customers are charged the same rate for their service—the rate filed with and approved by the [regulatory agency]. The filed rate doctrine prevents carriers from negotiating a lower rate with some customers and then charging others the rate filed with the [regulatory agency]." *Hill*, 364 F.3d at 1316.

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[8] *See Trevathan*, 142 F. Supp. 3d at 1287 ("[A] claim is barred if an award of damages to the plaintiff would result in judicial [determination of] reasonableness of the rate even if the claim does not directly attack the filed rate."); *Miller*, 994 F. Supp. 2d at 554 (holding filed-rate doctrine applied and rejecting argument that plaintiff was "not challenging the premium rates themselves, but rather 'Defendants' manipulation of the force-placed insurance market, and the kickbacks that Defendants receive by virtue of their manipulations.' ");

As *Rothstein* held, "Plaintiffs' claims also offend the nondiscrimination principle, under which challenges to filed rates are barred if 'allowing individual ratepayers to attack the filed rate would undermine the ... scheme of uniform rate regulation.' " *Rothstein*, 794 F.3d at 263 (citation omitted). "Any damages recovered by these Plaintiffs would operate 'like a rebate ... to give [them] a preference' over other borrowers who were charged for LPI." *Id.* (citing *Keogh v. Chicago & N.W. Ry. Co*., 260 U.S. 156, 163, 43 S. Ct. 47, 49, 67 L. Ed. 183 (1922)).

Plaintiffs advance no convincing argument to the contrary. They cannot avoid the nondiscrimination principle simply by characterizing their claims as not directly challenging the filed rates. "The nondiscrimination principle, like the principle of nonjusticiability, applies even to claims that purport to seek relief other than a lower rate." *Rothstein*, 794 F.3d at 263.

Nor is the problem "obviated simply because Plaintiffs have brought their claims on behalf of a putative class." *Id.* (citing *Sun City Taxpayers' Ass'n v. Citizens Utils. Co*., 45 F.3d 58, 62 (2d Cir. 1995); *see also Hill*, 364 F.3d at 1316-17 (holding nondiscrimination principle implicated in putative class action). As the district court found, "if the Court ordered a refund of portions of the authorized LPI premiums to plaintiffs, then they would effectively pay a lower premium than other LPI insureds of ASIC who are not represented in this case, thereby violating the nondiscrimination principle." D.E. 91 at 41-42.

Also, "ASIC had only one set of filed rates which were applied to all its LPI insureds regardless of the servicer." D.E. 91 at 42 n. 19. Thus, an award of refunds to Caliber borrowers "would effectively order a lower LPI rate for ASIC's insureds who were Caliber customers than for customers of other servicers." *Id.*

The district court correctly held plaintiffs' claims violate the nondiscrimination principle.

E. The Filed-Rate Doctrine Applies Equally To Rates That Are Passed Through An Intermediary

In their opening brief, plaintiffs pay short shrift to the filed-rate doctrine's non-justiciability and nondiscrimination principles. Instead, plaintiffs argue that the filed-rate doctrine is inapplicable because they did not pay the filed rates directly to ASIC. *See* A.O.B. 11-17, 25-27. According to plaintiffs, LPI is not an "A-to-B-to-C" transaction," as *Rothstein* held, but rather two separate transactions of " 'A-to-B' " and then " 'B-to-C.' " AOB 10, 25-26. Plaintiffs claim they challenge only the latter transaction, which they say is not subject to regulatory review.

Plaintiffs are wrong. Their argument mischaracterizes LPI and is legally irrelevant. The Second Circuit squarely rejected the same argument in *Rothstein.*

> The distinction between an "A–to–B" transaction and an "A–to–B–to–C" transaction is especially immaterial in the LPI context because LPI travels invariably "A–to–B–to–C." The purpose of LPI is to enforce the borrower's contractual obligation to maintain adequate hazard insurance; the lender acts on the borrower's behalf and in the borrower's place to "force place" a transaction that the borrower

> should have entered. [Citations.] There are three participants in the transaction (insurer, lender, borrower), but the lender is a go-between that connects the insurer (the party selling insurance) to the borrower (the party actually paying for it). Thus LPI is an A–to–B–to–C transaction that implements a two-party transaction between the insurer and the borrower.

Rothstein, 794 F.3d at 265.

LPI invariably travels "A–to–B–to–C." There is only one premium for each placement. Caliber merely acts as a go-between. It pays ASIC and charges plaintiffs the same premiums, calculated at rates that ASIC filed with the regulators.

The district court correctly found that plaintiffs' contrary argument is nothing more than semantics. As the complaint's factual allegations reveal, plaintiffs themselves recognize they were required to pay the same premiums ASIC charged Caliber.

> Plaintiffs argue that they are not "rate-payers" because Caliber initially pays for LPI and passes along the LPI charges to plaintiffs. Plaintiffs offer no coherent factual or legal support for their position. The CAC throughout alleges that Plaintiffs and putative class members were charged or paid for LPI coverage. The CAC avoids the word "premium" and instead uses "charge" to describe amounts charged for LPI, but semantics do not change the fact that **Plaintiffs were in fact charged the very LPI premiums**. Plaintiffs' mortgages expressly permit their lenders to "obtain insurance coverage, at . . . Borrower's expense."

D.E. 91 at 43-44 (footnote and citations omitted).

The district court was correct. Plaintiffs' mortgages expressly contemplate that the lender may purchase LPI at the "borrower's expense." *See* D.E. 1, ¶¶ 48, 64, 77.

Plaintiffs repeatedly complain that the premiums Caliber charged them for the LPI it purchased on their behalf were inflated or excessive. *Id.*, ¶¶ 2-3, 31-40, 103, 121, 129, 134, 162-163, 169. "[T]here is no dispute that the Plaintiffs were in fact charged the very same premiums which the applicable state regulators approved in connection with ASIC's filed rates." D.E. 91 at 15.

Nor is there any dispute that the regulators understood the filed and approved LPI rates would ultimately be passed on to borrowers. *See Rothstein*, 794 F.3d at 266 (finding there was "no question that … insurance regulators were well aware that approved LPI rates would be fully borne by borrowers."). "[T]he certificates of insurance issued to Plaintiffs, which were approved by the regulators, expressly state that 'the lender is authorized to advance all funds to be recovered from the borrower for the insurance afforded[.]' " D.E. 93 at 44 (citing D.E. 74, p. 51; 23-1 Ex. 3, p. 34 of 101; 23-3, Ex. 3, p. 33 of 62). Also, the OIR's "website expressly states that homeowners may be responsible for paying the LPI rates." D.E. no. 93 at 44 (citing D.E. 74 at 47-48, 50). As plaintiffs, themselves, conceded below, "anybody would understand that these rates eventually are going to be passed on to the homeowner." D.E. 74 at 50-51. Plaintiffs are the ratepayers even though they paid the premiums to Caliber rather than to ASIC directly.

Plaintiffs' supposed distinction is also legally irrelevant. They effectively concede that the filed-rate doctrine would bar their claims if they had purchased insurance

from ASIC directly. They adduce no compelling reason why the doctrine should not apply merely because an intermediary buys the insurance and passes the rates through to plaintiffs.

"The filed rate doctrine is not limited to transactions in which the ratepayer deals directly with the rate filer. The doctrine operates notwithstanding an intermediary that passes along the rate." *Rothstein*, 794 F.3d at 264. The Second Circuit has "attributed no significance" to the fact that a filed rate was paid through an intermediary. *Id.* (citing *Simon v. KeySpan Corp*., 694 F.3d 196, 198 (2d Cir. 2012)). "[I]t [was] enough that [a plaintiff] sued the rate filer and sought to challenge the filed rate." *Rothstein*, 794 F.3d at 264.

The Ninth Circuit reached the same conclusion in *Wah Chang v. Duke Energy Trading & Mktg., LLC,* 507 F.3d 1222, 1226 (9th Cir. 2007). There, a retail electricity customer brought claims against energy companies seeking to recover the difference between the rate it was charged and a fair rate. The plaintiff argued its claims were not barred by the filed-rate doctrine "because it did not directly purchase wholesale power." *Id.* at 1226. The Ninth Circuit rejected the plaintiff's argument as "an aesthetic distinction at best." *Id.* Even though the rates were paid through an intermediary, adjudicating the plaintiff's claims "would inevitably drag the courts into a determination of what rate would be fair and proper." *Id.* That is precisely what the filed-rate doctrine forbids.

Plaintiffs attempt to distinguish *Wah Chang* and *Simon* "because each purchaser —both the wholesaler and the retailer—were purchasing a commodity at a price set based on an approved rate." AOB 25-26. But as already shown, the purchase of LPI is no different. The premiums plaintiffs were charged for LPI were also set based on an approved rate. The regulators understood that the LPI premiums initially paid by Caliber would ultimately be passed on to borrowers. "The distinction between an 'A-to-B' transaction and an 'A-to-B-to-C' transaction is especially immaterial in the LPI context because LPI travels invariably 'A-to-B-to-C.' " *Rothstein*, 794 F.3d at 265. For that reason, a number of recent decisions have rejected plaintiffs' attempt to parse LPI into two separate transactions. *See e.g., Patel*, 183 F. Supp. 3d at 1244; *Trevathan*, 142 F. Supp. 3d at 1288; *Lyons*, 158 F. Supp. 3d at 229.

"Nor is there some evident reason why the doctrine should be limited to direct transactions between the ratepayer and the rate filer. The principles of nonjusticiability and nondiscrimination have undiminished force even when the rate has passed through an intermediary." *Rothstein*, 794 F.3d at 264.

Plaintiffs advance no convincing contrary argument. Rehashing their central theme, plaintiffs argue their claims do not offend the nonjusticiability principle because "ASIC's rates would not require adjustment should the Court reverse the opinion below …." AOB 28.

As already shown, however, the filed rate doctrine is not limited to claims that directly attack the filed rates. "[A]n award of damages to the customer that would, in effect, result in a judicial determination of the reasonableness of that rate is prohibited under the filed rate doctrine." *Hill*, 364 F.3d at 1317. Caliber charged plaintiffs the exact same premiums it paid ASIC for LPI. An award determining the alleged commissions or "kickbacks" were not properly charged to plaintiffs would necessarily result in a judicial determination of the reasonableness of the rates.

Plaintiffs also assert their claims do not offend the nondiscrimination principle since they "will not result in Caliber paying a lower rate than other similarly situated lenders because the master policy's commercial rates are not implicated." AOB at 30. But that argument, too, is based on the mistaken assumption that plaintiffs are not the ratepayers. As the district court correctly found, awarding the damages plaintiffs seek would result in borrowers not represented in this litigation paying higher rates for LPI than plaintiffs. D.E. 91 at 42. "That concern is just as valid when the ratepayer deals with an intermediary." *Rothstein*, 794 F.3d at 265.

Finally, plaintiffs relatedly contend that the filed-rate doctrine does not apply because LPI is "commercial line" insurance, covering lenders or servicers, as opposed to insurance sold directly to individual consumers. *See* AOB 26-28. But this is merely another way of saying the filed-rate doctrine does not apply because the pre-

mium is passed through an intermediary. Hence, this argument fails for the reasons just stated. *Lyons*, 158 F. Supp. 3d at 229.

Plaintiffs also fail to explain why this supposed distinction impacts the filed-rate doctrine's application. LPI policies are dual-interest, naming the lender as the primary insured but also providing protection to the borrower. " '[T]he nonjusticiability principle is implicated regardless of whether a commercial or personal line of insurance is involved because, in either scenario, the Court 'cannot examine the amount charged for reimbursement to Plaintiffs without considering the reasonableness of the filed [rate].' " *Patel*, 183 F. Supp. 3d at 1244 (quoting *Lyons*, 158 F. Supp. 3d at 229). "Whether Plaintiffs or [Caliber] are the primary insured, the essential quality of the transaction remains unchanged, and so too does the application of the filed rate doctrine to Plaintiffs' claims." *Lyons*, 158 F. Supp. 3d at 229.

F. The Filed-Rate Doctrine Applies Equally To Loan Servicers

Plaintiffs also briefly argue that the filed-rate doctrine does not apply to loan servicers like Caliber because they are not directly regulated by the ratemaking authorities. *See* AOB at 16-17.

As already shown, however, plaintiffs' claims against Caliber implicate both strands of the filed-rate doctrine. "If the Court were to inquire into the reasonableness of the amount charged by [Caliber] to the Plaintiffs, the Court would necessarily have to inquire into the reasonableness of the filed rates charged by the insurer[] to [Cali-

ber]." *Lyons*, 158 F. Supp. 3d at 226. "It would make little sense to apply the filed rate doctrine to bar claims by plaintiffs against insurer-defendants challenging rates, but to allow claims by plaintiffs against the intermediary loan servicing defendants challenging the very same rates." *Id*. Allowing such claims to proceed "would contravene the purposes of the filed-rate doctrine …" *Trevathan*, 142 F. Supp. 3d at 1288.

For that reason, many courts have held the filed-rate doctrine applies equally to loan servicers.[9] Plaintiffs advance no convincing reason why this Court should apply a different rule.

G. Plaintiffs' Cases Are Distinguishable

Unable to distinguish *Rothstein* and its progeny, plaintiffs assert that there is a "conflict" in the Circuits over whether the filed-rate doctrine bars their claims and urge the Court to follow "better reasoned" decisions. AOB at 17-21. Plaintiffs are wrong. There is no actual conflict between the Circuits over whether the filed-rate doctrine bars claims like plaintiffs'. The cases on which plaintiffs rely are factually distinguishable, as the district court correctly found.

Plaintiffs' primary case, *Alston*, 585 F.3d 753, is easily distinguished. There, the plaintiffs alleged the defendant received "kickbacks" for private mortgage insur-

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[9] *See, e.g., Patel*, 2016 WL 1663827, at *2; *Trevathan*, 142 F. Supp. 3d at 1288; *Lyons*, 158 F. Supp. 3d at 226; *Clarizia*, 2016 WL 439018, at *3; *Johnson*, 2015 WL 2452680, at *2; *Miller*, 994 F. Supp. 2d at 554; *Decambaliza*, 2013 WL 5777294, at *8; *Singleton*, 2013 WL 5423917, at *2

ance ("PMI") in violation of 12 U.S.C. § 2607 of the Real Estate Settlement Procedures Act. *Id.* at 764. After holding that RESPA's anti-kickback provision expressly provided a private right of action regardless of whether there was an overcharge for the PMI, *id.* at 759-762, the court "briefly" analyzed whether the claims were barred by the filed-rate doctrine. *Id.* at 764.

Alston held that the doctrine did not apply, reasoning that plaintiffs "challenge[d] only the commission of conduct proscribed by statute, such that the existence of a filed rate, or pecuniary harm, is irrelevant." *Id.* at 764. Also, because RESPA "damages are fixed at three times the total charge paid by the consumer in exchange for a settlement service, and not merely any overcharge," *Alston* found there was "no need to parse or second guess rates." *Id.* The Third Circuit thus did not analyze whether plaintiffs' claims implicated the nondiscrimination or nonjusticiability principle.

In this case, unlike *Alston*, no statute independently prohibits ASIC from paying commissions on LPI policies, nor does any statute entitle plaintiffs to damages independent of the alleged overcharge. As plaintiffs concede, none of their claims permits them to recover the entire LPI premium assessed. *See* D.E. 91 at 15 (citing D.E. 74 at 107-08). Instead, they seek damages in the amount of the alleged overcharge—the "inflated" portion of the premium consisting of commissions and other impermissible costs. Adjudicating those claims would implicate both strands of the filed-rate doc-

trine for the reasons already stated. *See, e.g., Patel*, 183 F. Supp. 3d at 1243 (distinguishing *Alston* because "Plaintiffs do not bring their inflated-premium claims under any such unique statutory right"); *Schilke v. Wachovia Mortg., FSB*, 758 F. Supp. 2d 549, 560 (N.D. Ill. 2010), *aff'd on other grounds sub nom. Cohen v. Am. Sec. Ins. Co*., 735 F.3d 601 (7th Cir. 2013) (same).

Alston, itself, recognized that claims like plaintiffs' are subject to the filed-rate doctrine. It distinguished an earlier LPI case, *Steven*, 2000 WL 33128256, at *3, "because the plaintiffs in that case directly challenged the filed rate as unreasonable." *Alston*, 585 F.3d at 764 n.13. *Steven*, 2000 WL 33128256, held the plaintiffs' claims challenging the reasonableness of forced-placed hazard insurance premiums were barred by the filed-rate doctrine. *Id* at *2-3. That rule remains valid, even in the Third Circuit, after *Alston*. *Id.*; *see also Lombardi v. Allstate Ins. Co*., No. CIV.A. 8-949, 2011 WL 294506, at *7 n. 8 (W.D. Pa. Jan. 27, 2011) (distinguishing *Alston* and holding doctrine bars challenge to "excessive" premiums).[10]

Two later Third Circuit decisions confirm this point. In *In re New Jersey Title Ins. Litig*., 683 F.3d 451 (3d Cir. 2012), the plaintiffs alleged that title insurers charged

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[10] Plaintiffs cite a few decisions of district courts in the Third Circuit which considered themselves bound by *Alston* and followed it. *See, e.g., Burroughs v. PHH Mortg. Corp.*, No. 15-6122 (NLH/KMW), 2016 WL 1389934, at *4 (D.N.J. Apr. 8, 2016); *Xi Chen Lauren v. PNC Bank, N.A*., No. 2:13-CV-762, 2013 WL 5565511, at *5 (W.D. Pa. Oct. 8, 2013); *Gallo v. PHH Mortgage Corp.,* 916 F. Supp. 2d 537, 544 (D.N.J. 2012). This Court is not bound by *Alston*. It need not to follow that decision even were it on all fours with this case.

excessive premiums including "kickbacks" and other impermissible costs. *Id.* at 453-54. Without citing *Alston*, the Third Circuit analyzed whether the claims implicated the filed-rate doctrine's nonjusticiability and nondiscrimination strands, following the framework of the Second Court's decision in *Marcus*, 138 F.3d 46. *See In re New Jersey Title Ins. Litig*., 683 F.3d at 455-56. The Third Circuit ultimately held plaintiffs' claims violated the nonjusticiability principle because they "would require the District Court to determine the reasonable rate absent the alleged conspiracy—'a function that ... regulatory agencies are more competent to perform…' " *Id.* at 457 (citing *Marcus*, 138 F.3d at 58).

Similarly, in *McCray v. Fid. Nat. Title Ins. Co*., 682 F.3d 229, 235 (3d Cir. 2012), the plaintiffs alleged that defendant title insurers had engaged in improper price-fixing in violation of the Sherman Act. Again following *Marcus*, 138 F.3d 46 and without mentioning *Alston*, the Third Circuit affirmed the dismissal of the complaint because plaintiffs' claims implicated the doctrine's nonjusticiability strand. *McCray*, 682 F.3d at 242.

As the district court correctly found, "[i]t is apparent from *N.J. Title Ins. Litig*. [and *McCray*] that when the Third Circuit faces a true filed-rate issue, it undertakes a detailed analysis of nonjusticiability and nondiscrimination exactly like the Second Circuit did in *Rothstein*." D.E. 91 at 32. *Alston* did not raise a true filed-rate issue. There was "no need to parse or second guess rates." *Alston*, 585 F.3d at 764. There is

no actual conflict between the Circuits on whether the filed-rate doctrine applies to a case like this one. *Alston* is limited to its unique facts.

Williams v. Duke Energy Int'l, Inc., 681 F.3d 788 (6th Cir. 2012), which plaintiffs also cite, is even further afield. In *Williams*, plaintiffs alleged that a utility entered into improper "side agreements" granting rebates to certain large customers in exchange for those customers' withdrawing their objections to approval of a rating plan. *Id.*, at 792-793. The Sixth Court held the filed-rate doctrine was inapplicable because the "indirect rebates" were "made outside of the rate scheme." *Id.* at 797.

By contrast, plaintiffs do not challenge any payments outside the filed and approved rates. They "concede that the 'unearned' commission, about which [they] complain[], is part of the rate filed by the insurance carrier in each state…." *Kunzelmann v. Wells Fargo Bank, N.A.*, No. 9:11-CV-81373-DMM, 2013 WL 139913, at *12 (S.D. Fla. Jan. 10, 2013). They also concede there is no way to calculate damages without determining the amount of the alleged "kickbacks" included in the filed rates. D.E. 91 at 15 (citing D.E. 74 at 105). Plaintiffs' claims thus directly implicate the filed-rate doctrine for the reasons already stated. *See Hill*, 364 F.3d at 1316-17; *Taffet*, 967 F.2d at 1491-94.

Finally, plaintiffs cite several district court decisions which they contend reflect the "majority" rule that the filed-rate doctrine does not bar their claims. *See* A.O.B. 1-2. Most of plaintiffs' cases, however, were issued before *Rothstein* was decided and

are of questionable validity. *Jackson v. U.S. Bank, N.A.*, 44 F. Supp. 3d 1210, 1217 (S.D. Fla. 2014) and *Wilson v. EverBank, N.A.*, 77 F. Supp. 3d 1202, 1234 (S.D. Fla. 2015) for example, relied on the *Rothstein* district court's decision which the Second Circuit overruled. Their analysis is thus unpersuasive here. *See Trevathan*, 142 F. Supp. 3d at 1288 (rejecting plaintiffs' reliance on pre-*Rothstein* authority); *Lyons*, 2016 WL 415165, at *13 (same).

Since *Rothstein* was decided, a growing number of courts have found the filed-rate doctrine does bar claims like plaintiffs'. *See Alpert*, 2017 WL 1079916, at *3. That emerging trend is correct and should be followed here for the reasons already stated.

H. The Amicus Curiae's Arguments Are Unconvincing

Amicus curiae United Policyholders argues that the filed-rate doctrine does not bar Fowler's and Yambo-Gonzalez's claims because ASIC agreed in an October 2013 consent order with the OIR not to include the alleged "kickbacks" in its filed rates in Florida. *Amicus Curiae* Brief at 3-4. This argument is both procedurally improper and substantively without merit.

"[W]ithout 'exceptional circumstances, amici curiae may not expand the scope of an appeal to implicate issues not presented by the parties to the district court.' " *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1257 (11th Cir. 2017) (citation omitted). Plaintiffs have never argued, either in the district court or this Court, that

ASIC's consent order renders the filed-rate doctrine inapplicable. The amicus identifies no exceptional circumstance that would warrant allowing it to interject this new issue into this appeal. Accordingly, the Court should decline to consider the amicus's new argument for the first time on appeal.

Even were the Court to reach the amicus's argument, it lacks merit. If the amicus is correct that the alleged "kickbacks" are "not included in the force-placed insurance rates filed in Florida …," *see Amicus Curiae* Brief at 10, plaintiffs' claims that Caliber improperly charged them "inflated" premiums including "kickbacks" are false. That is a problem for plaintiffs, not Caliber or ASIC.

The amicus's argument is not only unhelpful to plaintiffs, but also completely irrelevant given the procedural posture of the appeal. On appeal from an order granting a motion to dismiss, the Court must assume the complaint's factual allegations are true. *Saunders v. Duke*, 766 F.3d 1262, 1266 (11th Cir. 2014). As stated above, plaintiffs allege that Caliber assessed them "inflated" premiums *including* various "kickbacks." D.E. no. 1, ¶¶ 2-3, 31-40, 103, 121, 129, 134, 162-163, 169. Assuming those allegations are true, even though the amicus contends they are not, plaintiffs' claims are barred by the filed-rate doctrine for the reasons already stated.

VII.

THE DISMISSAL SHOULD BE AFFIRMED ON OTHER GROUNDS AS WELL

The judgment dismissing plaintiffs' claims should be affirmed on the following additional grounds that were raised in Caliber's motion to dismiss and are supported by the record.

A. Plaintiffs Alleged No Claim For Breach Of Contract Or Breach Of The Implied Covenant

Plaintiffs' first count alleged that Caliber breached their mortgage by charging excessive LPI premiums and receiving commissions or "kickbacks" from ASIC for obtaining the policies. *See* D.E. no. 1, ¶¶ 102-104. Plaintiffs' second count rehashed the same allegations as a claim for breach of the implied covenant of good faith and fair dealing. *Id.*, ¶¶ 106-112.

This Court previously affirmed the dismissal of similar claims in *Feaz v. Wells Fargo Bank, N.A.*, 745 F.3d 1098, 1110–11 (11th Cir. 2014). Following the Seventh Circuit's holding in *Cohen v. Am. Sec. Ins. Co.*, 735 F.3d 601 (7th Cir. 2013), this Court held use of the pejorative label "kickback" was neither accurate nor sufficient to state a claim for relief.

> We agree with the Seventh Circuit that simply calling a commission a kickback doesn't make it one. The defining characteristic of a kickback is divided loyalties. But [the lender] was not acting on behalf of [the borrower] or representing her interests. The loan agreement makes it

> clear that the insurance requirement is for *the lender's* protection.

Feaz, 745 F.3d at 1111 (*citing Cohen*, 735 F.3d at 611).

Plaintiffs alleged no facts that would warrant a different result here. Plaintiffs' mortgages also "make it clear" that LPI would be obtained for Caliber's protection. Hence, as in *Feaz* and *Cohen*, Caliber "was not acting on behalf of [plaintiffs] or representing [their] interests." *Feaz*, 745 F.3d at 1111. Caliber "was not subject to divided loyalties; rather, it was subject to an undivided loyalty to itself, and it made this clear from the start. The commission for the lender-placed insurance was not a kickback in any meaningful sense." *Cohen*, 735 F.3d at 611-12. Plaintiffs' conclusory "kickback" allegations are thus insufficient to state any claim for relief. *Id.*; *see also Feaz,* 745 F.3d at 1111; *Alpert*, 2017 WL 1079916, at *4 n. 4; *Cannon v. Wells Fargo Bank, N.A.,* 926 F. Supp. 2d 152, 176 (D. D.C. 2013).

Plaintiffs' claims "also fail[] … because [Caliber] disclosed that [plaintiffs] would incur higher costs if it force-placed the insurance for [them]." *Feaz,* 745 F.3d at 1110-11; *Cohen*, 735 F.3d at 604. Nothing in plaintiffs' mortgages states they would be charged only Caliber's net cost in obtaining LPI. *See Feaz*, 745 F.3d 1110-11 (affirming dismissal of claims that lender improperly charged for LPI including "a commission, a 'kickback,' or 'other compensation'—any amount above the net cost … of obtaining the force-placed flood insurance.. "). To the contrary, "[j]ust like in *Cohen*, Plaintiffs' agreements and 'related notices' 'specifically contemplate'—and

'warned [the plaintiffs] accordingly'—that the lender would receive a benefit or income 'when lender-placed insurance becomes necessary.' " *Montoya v. PNC Bank, N.A.*, No. 14-20474-CIV, 2014 WL 4248208, at *10–11 (S.D. Fla. Aug. 27, 2014) (*citing Cohen,* 735 F.3d at 612).

The notices Caliber sent to plaintiffs "gave [them] ample opportunity to avoid the higher-cost force-placed insurance and warned [them] about the cost." *Feaz,* 745 F.3d at 1110 (dismissing implied covenant claim). Plaintiffs thus cannot now complain that Caliber breached the contract or implied covenant by obtaining an LPI policy for which its affiliate received a commission.[11]

B. Plaintiffs Alleged No Claim For Unjust Enrichment

Plaintiffs' third count attempted to refashion the same allegations underlying their express contract claims into a claim for unjust enrichment. *See* D.E. 1, ¶¶ 113-121. The "kickback" allegations are not viable for the reasons just stated. *See Cohen*, 735 F.3d at 615 (affirming dismissal of unjust enrichment claim).

Plaintiffs also cannot sue Caliber in quasi-contract because an express contract governs the subject matter of their claims. Courts applying Florida and Pennsylvania

[11] *See Cohen*, 735 F.3d at 612; *Feaz,* 745 F.3d at 1110; *Johnson*, 2015 WL 2452680, at *3; *Kolbe v. BAC Home Loans Servicing, LP*, 738 F.3d 432, 454 (1st Cir. 2013) (affirming dismissal of similar implied covenant claim in LPI case and finding servicer's "disclosure and warning hardly support a claim of abusive self-dealing"); *Gen. Motors Acceptance Corp. v. Baymon*, 732 So. 2d 262, 269 (Miss. 1999) (holding creditor did not breach implied covenant in purchasing LPI where it "repeatedly notified [the borrower] that she was violating her agreement and gave her several opportunities to remedy her breach.").

law "have held that a plaintiff cannot pursue a quasi-contract claim for unjust enrichment if an express contract exists concerning the same subject matter." *Gordon v. Chase Home Fin., LLC*, No. 8:11-CV-2001-T-33EAJ, 2012 WL 750608, at *4 (M.D. Fla. Mar. 7, 2012); (citations omitted).; *Montanez v. HSBC Mortgage Corp. (USA)*, 876 F. Supp. 2d 504, 515 (E.D. Pa. 2012) (citation omitted). Though federal law may in some circumstances permit alternative pleading, "unjust enrichment may only be pleaded in the alternative where one of the parties asserts that the contract governing the dispute is invalid." *Central Magnetic Imaging Open MRI of Plantation, Ltd. v. State Farm Mut. Automobile Ins. Co.,* 789 F. Supp. 2d 1311, 1317 (S.D. Fla. 2011); *Alhassid v. Bank of Am., N.A.*, 60 F. Supp. 3d 1302, 1322 (S.D. Fla. 2014); *Morris v. Wells Fargo Bank N.A.*, No. 2:11CV474, 2012 WL 3929805, at *9 (W.D. Pa. Sept. 7, 2012).

There is no dispute here over the existence of a valid express contract, plaintiffs' mortgages. Plaintiffs alleged that Caliber breached their mortgages. *See* D.E. 1, ¶¶ 102-105. They thus cannot recover in unjust enrichment or assert it as an alternative claim.

Finally, plaintiffs' unjust enrichment claims were correctly dismissed because they did not allege they made any "direct payment" to Caliber as required by Florida and Pennsylvania law. *Virgilio v. The Ryland Group*, 680 F.3d 1329, 1337 (11th Cir. 2012); *Pittsburgh Baseball, Inc. v. Stadium Auth. of City of Pittsburgh*, 157 Pa.

Cmwlth. 478, 486, 630 A.2d 505, 510 (1993). Here, the supposedly unearned commissions and "kickbacks" were paid by ASIC, not plaintiffs. *See* D.E. 1, ¶¶ 3, 25, 153(d), 158. Plaintiffs did not allege they conferred any other direct benefit on Caliber. Accordingly, plaintiffs' unjust enrichment claim was correctly dismissed for that additional reason. *Kunzelmann*, 2013 WL 139913, at *5–6; *CMR D.N. Corp. v. City of Philadelphia*, 829 F. Supp. 2d 290, 306 (E.D. Pa. 2011), *aff'd*, 703 F.3d 612 (3d Cir. 2013).

C. Plaintiffs Alleged No TILA Claim

Plaintiffs' sixth count alleged Caliber violated the Truth in Lending Act by failing to issue new TILA disclosures after buying LPI on their properties. *See* D.E. 1, ¶¶ 135-146. For closed-end loans such as plaintiffs', a creditor's obligation to make disclosures generally ends at consummation of the loan. 12 C.F.R. § 226.17(b). Plaintiffs' TILA claim was correctly dismissed as it alleged no facts suggesting Caliber was required to issue new TILA disclosures after the loans were consummated.

"First, Plaintiffs' argument that the LPI changed the terms of their mortgage agreements is unpersuasive." *Montoya*, 2014 WL 4248208, at *16. As plaintiffs themselves conceded, *see* D.E. 1, ¶¶ 5, 48, 64, 102, the mortgages expressly authorize Caliber "to purchase LPI for Plaintiffs' properties and charge Plaintiffs for the LPI premiums." *Montoya*, 2014 WL 4248208, at *16. Therefore, Caliber's exercise of its existing contractual rights did not create any new duty to disclose. *See id.*; *Alpert*,

2017 WL 1079916, at *5; *Lane v. Wells Fargo Bank N.A.*, No. C 12-04026 WHA, 2013 WL 269133, at *15 (N.D. Cal. Jan. 24, 2013); *McKenzie v. Wells Fargo Home Mortg., Inc.,* 2012 WL 5372120, at *24 (N.D. Cal. Oct. 30, 2012).

Second, plaintiffs' assertion that the purchase of LPI created a new credit obligation requiring new TILA disclosures is also unpersuasive. *See* D.E. 1 ¶¶ 139-140. After origination, new disclosures are required for closed-end transactions only in the event of a refinancing, assumption, or an interest rate change under a variable rate obligation. 12 C.F.R. § 226.20. But, "new disclosures are not required when the new obligation is attributable to the borrower's failure to fulfill a prior commitment to maintain insurance on the property and the lender provides insurance coverage at the borrower's expense." *Gordon v. Chase Home Fin., LLC*, 8:11-CV-2001-T-33EAJ, 2013 WL 256743, at *8 (M.D. Fla. Jan. 23, 2013). So Caliber's purchase of LPI did not constitute a new obligation or create any new duty to disclose. *See Alpert*, 2017 WL 1079916, at *5; *Lane*, 2013 WL 269133, at *14-15; 12 C.F.R. § 226.20(a)(4).

Third, plaintiffs' argument that buying LPI rendered the original TILA disclosures inaccurate is also unconvincing. "The Federal Reserve Board's Official Staff Interpretation directly addresses the lender-placed insurance scenario …" and states that the purchase of LPI " 'does not make the original disclosures inaccurate.' " *Montoya*, 2014 WL 4248208, at *16; *see also* 12 C.F.R. pt. 226, supp. I, subpt. C, cmt. 17(e); *Trevathan*, 142 F. Supp. 3d at 1291.

Finally, "[e]ven if TILA required ongoing notices …, [Caliber's purchase of LPI] would still be subject to the exemption provided by 12 C.F.R. § 226.4(d)(2)." *Arnett v. Bank of Am., N.A.*, 874 F. Supp. 2d 1021, 1038-39 (D. Or. 2012) . Reg. Z exempts insurance premiums from the "finance charge" disclosure if the insurance coverage may be obtained from an insurer of the borrower's choice. 12 C.F.R. § 226.4(d)(2). Plaintiffs' mortgages allowed them to obtain coverage from insurers of their choice. *See* D.E. 1, Exs. A, B. Caliber's letters to plaintiffs warning of the placement of LPI reiterated that they were free to obtain coverage from insurers of their choice. *See* D.E. 23-1, Exs. 1-5, D.E. 23-2, Exs. 1-16, D.E. 23-3, Exs. 1-3. The premiums thus were not required to be disclosed as part of the finance charge even assuming there were any obligation to make post-origination disclosures.[12]

D. Plaintiffs Alleged No RICO Claim

Plaintiffs' seventh and eighth counts attempted to allege a violation of RICO under 18 U.S.C. § 1962(c) and conspiracy to violate RICO under 18 U.S.C. § 1962(d). D.E. 1, ¶¶ 147-169. Plaintiffs premised their RICO claims on alleged violations of the mail and wire fraud statutes. *See id.* Both claims were fatally flawed.

[12] *See, e.g., Trevathan,* 142 F. Supp. 3d at 1291; *Gorsuch v. Fin. Freedom,* 3:14 CV 152, 2014 WL 4675453, at *4 (N.D. Ohio Sept. 18, 2014); *Hayes v. Wells Fargo Home Mortgage*, CIV.A. 06-1791, 2006 WL 3193743, at *7 (E.D. La. Oct. 31, 2006).

1. Plaintiffs Allege No Violation Of 18 U.S.C. § 1962(c)

To state a RICO claim under 18 U.S.C. § 1962(c), a plaintiff "must satisfy four elements of [pleading and] proof: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277, 1282 (11th Cir. 2006). A civil RICO plaintiff must also plead and prove (5) injury to "business or property" (6) "by reason" of the substantive RICO violation. *Id.* at 1282-83; 18 U.S.C. § 1964(c).

Each of these elements must be alleged with particularity sufficient to satisfy Fed. R. Civ. P. 9(b) standards. *See Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1292 (11th Cir. 2010). Plaintiffs fell far short of pleading their RICO claim with sufficient particularity.

(a) Plaintiffs Alleged No Plausible Scheme To Defraud

"Where, as here, the defendants' alleged predicate 'pattern of racketeering' activity is based on mail and wire fraud, the plaintiffs must allege the existence of a scheme to defraud and that the defendants 'intentionally participate[d] in a scheme to defraud another of money or property and use[d] the mails or wires in furtherance of that scheme.' " *Wilson v. EverBank, N.A.*, No. 14-CIV-22264, 2015 WL 1600549, at *2 (S.D. Fla. Apr. 9, 2015) (*quoting Am. Dental Ass'n*, 605 F.3d at 1290). "[A]s the words 'deceit' and 'scheme' imply, the [plaintiff must plead] that the defendant's

actions would have deceived a reasonably prudent person ...." *Pelletier v. Zweifel*, 921 F.3d 1465, 1499 (11th Cir. 1991).

Plaintiffs did not allege a plausible scheme to defraud. Plaintiffs based their mail fraud claims on the letters Caliber sent them warning of LPI's disadvantages and urging them to obtain their own insurance. D.E. 1, ¶¶ 54-55, 68-70. But as several courts have held in dismissing similar claims, plaintiffs fail to allege "how letters that warn of an imminent bad deal and urge one to seek better could possibly be calculated to deceive anyone." *Wilson*, 2015 WL 1600549, at *3 (citing *Weinberger v. Mellon Mortg. Co.*, 1998 WL 599192, at *5 (E.D. Pa. Sept. 10, 1998)); *see also Circeo-Loudon v. Green Tree Servicing, LLC,* No. 14-21384, 2014 WL 4219587, at *3 (S.D. Fla. Aug. 25, 2014); *Gustafson v. BAC Home Loans Servicing, LP*, 2012 WL 7071488, at *7 (C.D. Cal. Dec. 26, 2012).

The same is true here. Caliber expressly and repeatedly warned of LPI's disadvantages, including that it was likely to be more expensive and provide less coverage than insurance plaintiffs could obtain voluntarily. Caliber also urged plaintiffs to obtain their own insurance and avoid LPI. *See* D.E. 23-1, Exs. 1-5, D.E. 23-2, Exs. 1-16, D.E. 23-3, Exs. 1-3. A schemer seeking to lure borrowers into paying supposedly "inflated" LPI premiums would not repeatedly tell borrowers that LPI premiums are more expensive and urge them to obtain their own insurance. Plaintiffs' supposed scheme to defraud is inherently implausible.

Plaintiffs argued below that Caliber's disclosures were insufficient because they did not also state that the alleged commissions were "unearned" or "illegal." *See* D.E. 1, ¶¶ 54-56, 69-70, 81-83, D.E. 74 at 126:11-130:12. As *Gustafson*, 2012 WL 7071488, at *7 held in a similar case, plaintiffs' argument is circular. Caliber does not agree that any commissions were "unearned" or "illegal" and would have no reason to label them as such. The notices clearly revealed the gist of plaintiffs' complaint; namely, that LPI was more expensive and that Caliber's affiliate would receive a commission on some policies. Plaintiffs failed to allege with the required particularly that omission of the words "unearned" or "illegal" amounts to a plausible scheme to defraud. *See Robinson v. Standard Mortg. Corp.*, 191 F. Supp. 3d 630, 640–41 (E.D. La. 2016); *Wilson*, 2015 WL 1600549 at *3-5; *Gustafson,* 2012 WL 7071488, at *7; *Meyer v. OneWest Bank, FSB,* 91 F. Supp. 3d 1177, 1183-85 (C.D. Cal. 2015); *Morris v. Green Tree Servicing, LLC,* 2015 WL 4113212, at *12-13 (D. Nev. July 8, 2015).

(b) Plaintiffs Did Not Allege Causation

Plaintiffs' RICO claims also failed for lack of allegations that would "establish a proximate-causal, 'direct relation' between the injury and injurious conduct at issue.' " *Simpson v. Sanderson Farms, Inc*., 744 F.3d 702, 712 (11th Cir. 2014) (citations omitted).

Plaintiffs did not adequately allege proximate cause. The complaint nowhere states that plaintiffs ever "read[] the letters and notices that they claim constitute the

deceptive RICO predicate acts." *Wilson*, 2015 WL 1600549, at *6. Nor do plaintiffs otherwise allege any facts showing that but for the notices, they would not have paid the LPI premiums. The cause of plaintiffs' purported injuries, if any, is the placement of LPI allegedly including "kickbacks," not any misrepresentation or omission in the letters. Their RICO claims were correctly dismissed for that reason as well. *See Robinson*, 191 F. Supp. 3d at 645–46; *Wilson*, 2015 WL 1600549, at *6; *Circeo-Loudon*, 2014 WL 4219587, at *3.

2. Plaintiffs Alleged No Violation Of 18 U.S.C. § 1962(d)

Plaintiffs' claim for conspiracy to violate RICO under 18 U.S.C. § 1962(d) (*see* D.E. 1 ¶¶ 164-169) is derivative of their claim for violation of 18 U.S.C. § 1962(c). Because plaintiffs failed to allege any substantive violation of RICO, their claim for conspiracy to violate RICO was correctly dismissed as well. *See Douglas Asphalt Co. v. QORE, Inc.*, 657 F.3d 1146, 1152-53 (11th Cir. 2011).

VIII.

CONCLUSION

For the reasons stated above, the judgment of dismissal should be affirmed.

DATED: April 19, 2017

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STATEMENT OF RELATED CASES

Patel v. Specialized Loan Servicing LLC, No. 16-12100 is a prior appeal pending before this Court raising similar issues. This Court already consolidated this case with *Patel* for purposes of oral argument.

Dated: April 19, 2017

/s/Erik Kemp
Erik Kemp

CERTIFICATE OF COMPLIANCE
With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

[Fed. R. App. P. 32(a)(7)(B)]

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 12, 247 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word for Windows 2010, in Times New Roman, 14 point type.

Dated: April 19, 2017

/s/Erik Kemp
Erik Kemp

PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is One Embarcadero Center, Suite 2600, San Francisco, CA 94111.

On April 19, 2017, I served true copies of the following document(s):

APPELLEE'S BRIEF

on the interested parties in this action as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 19, 2017, at San Francisco, California.

/s/ Erik Kemp
Erik Kemp

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