UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 0:13-cv-60721-MORENO/OTAZO-REYES

IRA MARC FLADELL, SARAH CROUCH, and GREG OLSON, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

WELLS FARGO BANK, N.A.; WELLS FARGO INSURANCE, INC.; ASSURANT, INC.; and AMERICAN SECURITY INSURANCE COMPANY,

Defendants.
_____/

THE WELLS FARGO DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

INTRODUCTION

Plaintiffs seek certification of a national class on three federal claims—under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), Truth in Lending Act ("TILA"), and Bank Holding Company Act ("BHCA")—and certification of a Florida-only class on four state-law claims—contract, implied covenant, unjust enrichment, and fiduciary duty.[1] Plaintiffs' Motion should be denied because they (1) cannot establish commonality/predominance with respect to elements of their claims, damages, and Wells Fargo's defenses, and (2) do not adequately represent the putative national class, for whom this action is not superior.

Four federal courts—including two in Florida—have already refused to certify national classes on claims challenging similar alleged lender-placed insurance ("LPI") practices. *See Gustafson v. BAC Home Loans Servicing, LP*, 2013 WL 5911252 (C.D. Cal. Nov. 4, 2013); *Lane*

[1] *See* Plaintiffs' Motion for Class Certification (the "Motion") [D.E. 97]. The remaining state-law claims are not against Wells Fargo.

v. Wells Fargo Bank, N.A., 2013 WL 3187410 (N.D. Cal. June 21, 2013); *Gordon v. Chase Home Finance, LLC*, 2013 WL 436445 (M.D. Fla. Feb. 5, 2013) (Covington, J.); *Kunzelmann v. Wells Fargo Bank, N.A.*, 2013 WL 139913 (S.D. Fla. Jan. 10, 2013) (Middlebrooks, J.). The Court should do the same. The addition of federal claims does not change matters, as these claims add considerably to the individual issues which defeat predominance.

The Federal Claims. Plaintiffs cannot establish predominance. RICO and TILA require proof of causation, here in the form of reliance on alleged misrepresentations. No class-wide inference of reliance is possible in this case. The notices on which the RICO and TILA claims are based differed. So did borrowers' reactions to them. Many simply discarded the notices unread. Others did not buy their own insurance for a variety of reasons having nothing to do with what the notices said. Because liability cannot be established on a class-wide basis, no RICO or TILA claim should be certified. Additionally, Plaintiffs propose a legally incorrect measure of damages on their TILA and BHCA claims. The correct measure—established by circuit precedent—raises predominant individual issues barring certification of those claims.

State Filed-Rate Doctrines & Insurance Regulations. The potential application of each state's filed rate doctrine and insurance regulations defeat predominance and render any national class unmanageable. State filed-rate doctrines preclude judicial challenge to filed or approved insurance rates, and encompass the federal claims here, because those claims challenge an alleged "scheme" to artificially inflate LPI insurance premiums, and Plaintiffs seek, as damages, a refund of components of those premiums. The doctrine's application and relevant insurance regulations vary by state, precluding any attempt to resolve the doctrine's effect nationwide in a single broad stroke. Already, some courts have applied their states' doctrines to preclude LPI claims, while others, ruling only at the pleadings stage and sitting in different states, have not. As Judge Middlebrooks held, "differences between the states in their application of the filed-rate doctrine render certification of a nationwide class improper."[2]

Superiority & Adequacy. Plaintiffs' decision to forgo potentially valuable claims—so as to make national certification more likely—undermines superiority and adequacy. Plaintiffs seek national certification only on federal-law claims, which are, at best, highly dubious. If those claims are certified but fail on the merits, *res judicata* may prevent borrowers residing in 49

[2] *Kunzelmann*, 2013 WL 139913, *12.

other states from bringing the more substantial state-law claims that Plaintiffs assert only for the proposed class of Florida borrowers. That is not a superior method of adjudication, nor adequate representation of those absent borrowers.

The Putative Florida-Only, State-Law Class. The predominance of individual issues—on differences in closing documentation, borrowers' circumstances, affirmative defenses, and damages—renders certification of even the Florida-only class improper. As Judge Middlebrooks recognized in refusing to certify a Florida-only class, "liability . . . hinges on the uncommon and individualized determination of notice, knowledge, and motivation of each class member," and this "lack of commonality with respect to core elements of the . . . claims with foundational importance . . . precludes a finding of commonality."[3] Similarly, Judge Covington recognized that the claims "presented highly individualized inquiries, the answers to which are not apt to drive the resolution of the litigation."[4]

For these and the reasons described below, the Court should deny the Motion.

FACTUAL BACKGROUND

A. Lender-Placed Insurance

Borrowers' mortgages require them to maintain hazard and/or flood insurance in the amounts required by Wells Fargo Bank, N.A. ("Wells Fargo"), their loan servicer. Northagen Decl. ¶ 3. If a borrower does not, Wells Fargo buys LPI and charges the borrower for it. *Id.* During the relevant period, Wells Fargo bought LPI under a master policy with American Security Insurance Co. ("ASIC").[5] *Id.* When LPI is obtained, ASIC bills Wells Fargo the premium, in accordance with rates ASIC files with state regulators. *Id.* Wells Fargo pays the premium, charges the borrower the same premium—without markup—and then tries to collect that sum from the borrower. *Id.*

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[3] *Id.* at *4.

[4] *Gordon*, 2013 WL 436445, *6. And the Judicial Panel on Multidistrict Litigation, in refusing to centralize LPI cases against Wells Fargo (including this one), noted that because the cases "involve different originating lenders, mortgage agreements with materially different terms concerning force-placed insurance, and differing disclosures to borrowers at the time the force-placed insurance policies were placed," it was clear that "individualized discovery and legal issues . . . will be substantial." *In re Wells Fargo Bank, N.A., Mortg. Corp. Force-Placed Hazard Ins. Litig.*, 2013 WL 4041553, *2 (J.P.M.L. Aug. 7, 2013).

[5] A former vendor, QBE First Corp., is not a party to this case.

B. Borrowers' Reliance On LPI Notices Is Highly Varied

When a lapse in insurance coverage is detected, a notice is sent asking the borrower to provide proof of insurance. *Id.* ¶ 11. If the borrower does not, a temporary LPI policy, called a "binder," is issued. *Id.* If the borrower still does not provide proof of coverage, a one-year LPI policy is issued. *Id*. The binder and one-year policies also include notices. Additionally, as of 2012, Wells Fargo also sends a "mid-year" letter approximately six months after LPI is first placed, reminding that LPI has been issued and urging the borrower to obtain voluntary coverage so LPI can be cancelled. *Id.* ¶ 12.

Borrowers respond to these notices in different, highly individual ways. That is evident from an outbound-call campaign that Wells Fargo undertook to (1) understand why some borrowers fail to avoid LPI, and (2) reduce the incidence of LPI. *Id.* ¶ 16. Wells Fargo employees telephoned borrowers who had received notices yet failed to take the remedial action urged. *Id.* ¶ 17. Each borrower was called up to four times, at which point a voicemail would be left, if possible. *Id.* Wells Fargo also implemented an outbound-email campaign whereby it emailed those borrowers for which it had email addresses to remind them to obtain voluntary insurance (which campaign is ongoing). *Id.* ¶ 18. Through this laborious, borrower-by-borrower survey, Wells Fargo learned that:

- Many borrowers receive but do not open the notices.
- Many report never receiving the notices, indicating that they did not open them or otherwise disregard them.
- Many borrowers read the notices, but do not act because various specific, personal factors such as divorce, loss of employment, medical problems, etc. are so distracting that the importance of maintaining coverage—and the dangers of failing to—receive little, if any, attention.
- Some borrowers feel it is not worth their time to shop around for voluntary insurance.
- Some have no other option, such as those in certain states where disasters have occurred or those borrowers who have made too many claims within a certain period and cannot obtain voluntary coverage.
- For some borrowers, LPI is *cheaper* than voluntary insurance. A March 2011 review of the outbound-call campaign found that 14% of borrowers who spoke with Wells Fargo wanted to keep LPI.

Id. ¶¶ 19-21, 23.

Similar variation is evident from depositions of the named plaintiffs in these and other LPI cases. Fladell read a notice; the LPI premium "jumped out at [him]," and so he "handled matters" "immediately" to "make sure [LPI] didn't happen." Esau Decl. Ex. A at 40:1-18.

Crouch called Wells Fargo when she received a notice, because she thought it mistaken, and had some twenty telephone conversations with Wells Fargo in which oral representations were made about insurance payments. Esau Decl. Ex. B at 111:2-14; 112:11-19. Olson has "always taken care of it as soon as [he] found out" that his own insurance lapsed. Esau Decl. Ex. C at 31:2-4.

After reading the notices, Danny Lane thought he was being wronged: "Looks to me like they're putting money in their pocket and they ain't even doing anything. . . . That's – that's crooked, man." Van Zandt Decl. Ex. A at 43-44. But his wife was not sure: as to the commission, she "didn't know what that meant at the time." Van Zandt Decl. Ex. B at 151-52. Based on his own research, Daniel Biddix believed that Wells Fargo was receiving "kickbacks," but chose not to obtain voluntary coverage because he was too busy. Van Zandt Decl. Ex. C at 53:23-54:15.

This variation is only compounded by differences in the notices themselves. *See* Exhibit A hereto (detailing differences in notices). Some notices disclose that Wells Fargo will be reimbursed for tracking borrowers' compliance with insurance requirements, while others do not. *Id.* Some offer to lend funds to borrowers so they can obtain voluntary coverage and avoid LPI, while others do not. *Id.* Some explain that LPI may be more expensive because it is issued without the benefit of a property inspection (and is thus riskier), while others do not address the reason for the higher premium. *Id.* Some refer to LPI's premium as a "premium," while others refer to it as the policy's "cost." *Id.*

However, with very few exceptions, the notices (1) disclose that Wells Fargo will receive a commission or compensation, (2) note that LPI is significantly more expensive than a voluntary policy, and (3) urge the borrower to avoid LPI and obtain voluntary coverage. *See* Northagen Decl. ¶ 13.

C. Many Borrowers Never Pay For LPI

Many of the borrowers who are *charged* for LPI never *pay* for it. The non-payers include borrowers in various stages of delinquency. For example, as of May 2011, 33% of borrowers with hazard LPI had loans in active foreclosure, 12% no longer owned the subject properties because the properties had been sold at foreclosure sales, and 9% were 60 days or more delinquent on their loans. Franske Decl. ¶ 10. Many borrowers avoid ever paying for LPI, fully or at all, by undergoing foreclosure or by entering into short sales, loan modifications, refinances, or other agreements compromising the lender's claims and/or fully determining the

total amounts due and owing on the account. Northagen Decl. ¶ 10. Determining which borrowers fall into which category requires, at least in part, a file-by-file manual review. *Id.* ¶¶ 9, 10; Franske Decl. ¶ 12. *See also Kunzelmann*, 2013 WL 139913, *2.

D. Sometimes LPI Costs Less Than Voluntary Insurance

Generally, LPI is more expensive than voluntary insurance because (i) it is not individually underwritten, (ii) the insurer cannot reject high-risk properties, creating an "adverse selection" problem, and (iii) higher administrative costs are incurred due to many mid-term cancellations. Franske Decl. ¶ 3; Miller Report, Van Zandt Decl. Ex. D, § 9.5. However, for some, LPI is cheaper than voluntary insurance. Franske Decl. ¶ 5; Northagen Decl. ¶ 20.

E. No Two Named Plaintiffs' Circumstances Are Alike

Crouch maintained her own voluntary coverage, but hazard LPI was placed due to human error. Franske Decl. ¶ 14. After the error was discovered, she was refunded the *entire* difference between the LPI premium and that of her prior, voluntary policy. *Id.* Fladell's hazard LPI was cancelled when he provided evidence of insurance, and he was refunded the premiums. *Id.* ¶ 15. However, he has *never paid* the flood LPI premium billed to him for his deficient coverage, and his property is the subject of a judicial foreclosure. *Id.*; Esau Decl. Ex. A at 24:25-25:2; 25:19-21. Additionally, some of his flood LPI was provided by Lloyds of London, not ASIC. Franske Decl. ¶ 15(e). Olson's voluntary hazard policy lapsed from July 18 to December 3, 2010, and LPI was issued for that period. *Id.* ¶ 16. At Olson's request, he is paying the LPI premium in monthly installments. *Id.* ¶ 16(k).

F. Wells Fargo Insurance

Wells Fargo Insurance, Inc. ("WFI") is Wells Fargo's insurance affiliate. It acts as ASIC's insurance agent, not as the borrower's broker. Under its agreement with Wells Fargo, WFI works to formulate and implement Wells Fargo's insurance requirements and systems with respect to monitoring properties for insurance and placing LPI. *Id.* ¶ 2. WFI performs a variety of additional tasks for Wells Fargo, including (i) handling complaints about LPI from borrowers and working with private insurers to resolve disputes, *id.* ¶ 19(a), (ii) working with Wells Fargo to assess and evaluate voluntary insurance and LPI on loans that have been acquired by Wells Fargo for servicing, *id.* ¶ 19(e), and (iii) working to ensure compliance with pertinent laws, regulatory requirements, and investor guidelines, *id.* ¶¶ 19(m), 19(r)-(t), 23.

WFI also performs the services detailed in its agreements with Wells Fargo and ASIC, *see* Mot. Ex. A. App'x E, including monitoring and reviewing their systems for tracking loans and placing LPI, and delivering the insurance business to the carrier. *See* Franske Decl. ¶¶ 19, 20. Until April 2012, ASIC paid WFI an 11% commission on each LPI policy placed. *Id.* ¶ 9.

ARGUMENT

"The class action 'is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2550 (2011). "'A district court must conduct a rigorous analysis of the rule 23 prerequisites before certifying a class.'" *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1266 (11th Cir. 2009).

A. NO CLASS SHOULD BE CERTIFIED ON THE FEDERAL CLAIMS

1. Individual Issues Of Causation Predominate The RICO Claim

Plaintiffs cannot establish predominance on their RICO claim. That claim is predicated on acts of mail fraud—specifically, that the LPI notices sent to borrowers (allegedly) contained misrepresentations which somehow led borrowers to acquiesce to LPI (or fail to avoid it). In order to prevail on that claim, Plaintiffs must prove causation. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992). That cannot be done on a class-wide basis.

Causation for a RICO claim predicated on mail fraud requires reliance by the plaintiff or, where appropriate, a third party. *Numrich v. JPMorgan Chase Bank, N.A.*, 2012 WL 1952654, *9 (D. Or. May 30, 2012) ("[P]laintiff[s] asserting a RICO claim must show that someone, either themselves or a third party, relied on the misrepresentations and that such reliance caused plaintiffs injury."). "[A] showing of first-party reliance is not required" in every RICO mail fraud case. *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 642 (2008).[6] But, as the Supreme Court warned, "none of this is to say that a RICO plaintiff . . . can prevail without showing that *someone* relied on the defendant's misrepresentations," and "it may well be that a RICO plaintiff . . . must establish at least third-party reliance in order to prove causation." *Id.* at 658, 659. Thus, *Bridge* did not eliminate the need to prove that *someone* relied on the allegedly

[6] *Bridge's* facts illustrate how, in some situations, mail fraud on which a third party relies may directly cause the plaintiff economic injury. There, a county limited the number of tax liens it would sell each bidder—and to keep bidders from evading the limit, required them to name any agents who bid for them. Plaintiff bidder claimed the defendant mailed the county false affidavits on which the county relied in selling defendant tax liens in excess of its stated limit, thereby selling plaintiff fewer tax liens on which it earned less profit.

deceptive mailings, but instead "abrogated the Eleventh Circuit's precedent . . . only narrowly in deciding that a RICO claim may proceed on the basis of 'third-party reliance,'" where appropriate. *Braswell Wood Co., Inc. v. Waste Away Grp., Inc.*, 2010 WL 3168125, *3 n.1 (M.D. Ala. Aug. 10, 2010).

Here, Plaintiffs do not claim any third-party reliance. Wells Fargo sent the allegedly deceptive notices only to putative class member-borrowers, so no third party could have relied on the notices. Thus, to prove they were damaged "by reason of" supposed misrepresentations in those notices, Plaintiffs—and each putative class member—must individually prove that they relied on what the notices said. In similar contexts, post-*Bridge* decisions have repeatedly held the *only* way for plaintiffs to establish damage "by reason of" a pattern of mail fraud *directed at them* is to establish that they individually relied on the alleged misrepresentations to their detriment. *See Calabrese v. CSC Holdings, Inc.*, 2009 WL 425879, *12 (E.D.N.Y. Feb. 19, 2009) (discussing *Bridge*, and holding that "where the only misrepresentations at issue are those that the defendants made directly to each victim . . . , a putative plaintiff cannot establish that his injury was proximately caused by the RICO violation if he cannot allege and prove that he personally relied on the misrepresentations"); *Braswell*, 2010 WL 3168125, *3 (similar).[7]

Generally, a class cannot be certified on a claim requiring proof of reliance. *See, e.g.*, *Martinelli v. Petland, Inc.*, 274 F.R.D. 658, 662-63 (D. Ariz. 2011) (refusing to certify RICO claim, post-*Bridge*, because individual proof necessary to determine if party read misrepresentation and, if so, based a purchase decision on it); *Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1344 (11th Cir. 2006) ("[T]he reliance element of a class claim presents problems of individualized proof that preclude class certification."); *Hudson v. Delta Air Lines, Inc.*, 90 F.3d 451, 457 (11th Cir. 1996); *Ex parte Green Tree Fin. Corp.*, 723

[7] *See also Lynch v. Capital One Bank (USA), N.A.*, 2013 WL 2915734, *3 (E.D. Pa. June 14, 2013); *Bridgewater v. Double Diamond-Delaware, Inc.*, 2011 WL 1671021, *10 (N.D. Tex. Apr. 29, 2011); *Tanedo v. E. Baton Rouge Parish School Bd.*, 2011 WL 7095434, *9 (C.D. Cal. Dec. 20, 2011); *Badella v. Deniro Mkt'g LLC*, 2011 WL 5358400, *6-*7 (N.D. Cal. Nov. 4, 2011); *Dungan v. Academy At Ivy Ridge*, 2008 WL 2827713, *3 (N.D.N.Y. July 21, 2008). 1 McLaughlin on Class Actions § 5:50 (9th ed.) (discussing *Bridge*, and stating that "where the only misrepresentations alleged were made directly to the victim of the purported scheme, in order to establish proximate cause the plaintiff victim must allege and prove that he or she reasonably relied on the alleged misrepresentations").

So.2d 6, 10 (Ala. 1998) (decertifying state-law LPI fraud claim due to "individual issues as to the element of reliance upon" notices).

There is an exception where reliance can reasonably be inferred on a class-wide basis. *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004) and *In re U.S. Foodservice Inc. Pricing Litig*., 729 F.3d 108 (2d Cir. 2013) are examples of that exception, and prove the just-stated general rule. In each, *uniform* acts by class members in response to *uniform* misrepresentations allowed a class-wide inference of reliance, permitting class certification on a RICO fraud claim.

Klay held that a "jury could quite reasonably infer [on a class-wide basis] that [Humana's allegedly false] guarantees concerning physician pay—the very consideration upon which those agreements are based—go to the heart of these agreements, and that doctors based their assent [in uniformly entering into the agreements] upon them." *Klay*, 382 F.3d at 1259. *U.S. Foodservice* recognized that "plaintiffs must … demonstrate reliance on a defendant's . . . misrepresentation to establish causation under RICO" and that "[c]ertification is inappropriate where 'reliance is too individualized to admit of common proof.'" *U.S. Foodservice*, 729 F.3d at 119. Nevertheless, it held that certification was possible in that case because class members' uniform payment of uniformly inflated invoices allowed the reasonable class-wide inference that class members paid in reliance "upon the invoice's implicit representation that the invoiced amount was honestly owed." *Id.* at 120.

In this case, no similar class-wide inference of reliance is possible, for two reasons: putative class members' responses to the notices were not uniform action, but either inaction or dissimilar conduct, and the notices were not uniform. So this case falls within the general rule that reliance is too individualized to admit of common proof or allow class certification.

The deposition testimony and outbound-call campaign described in the Factual Background demonstrate that borrowers *differed significantly* in their responses to Wells Fargo's notices. Some borrowers claim they never received the notices or did not read any notices they did receive. Plainly, those borrowers could not have relied on anything in the unread notices.

Borrowers who read the notices reacted to them in different ways. Some promptly obtained private insurance—and so were not deceived into acquiescing to LPI, as Plaintiffs' RICO claim avers. Others did not buy private insurance for reasons unrelated to the notices' contents. Many were not paying their loans—33% were in foreclosure—and either did not care about insuring a home they were about to lose or could not afford to pay premiums. Others were

distracted by personal factors such as divorce, loss of employment, or medical problems. Some were simply unwilling to undertake the effort of shopping for voluntary insurance. Yet other borrowers had LPI because it was cheaper than private insurance or was available when private insurance was not. Without individual proof, there is no way to establish why any borrower failed to avoid LPI—whether in reliance on any misstatement or omission in a notice or for any of the other reasons borrowers gave in response to Wells Fargo's telephone survey.

Furthermore, the notices sent to borrowers were far from uniform. Some disclosed tracking expenses, others did not. Some referred to LPI's "cost," and others to the "premium."[8] *See Rowe v. Bankers Life & Cas. Co.*, 2012 WL 1068754, *8 (N.D. Ill. Mar. 29, 2012) (refusing to certify RICO class where plaintiff "ha[d] not identified any uniform misrepresentations or omissions made to each potential member"). Like the "Explanation of Benefits" forms that *Klay* noted could raise "substantial individualized issues," *Klay*, 382 F.3d at 1259, Wells Fargo's non-uniform notices bar any class-wide inference of reliance and preclude certification.

Finally, the notices stated that LPI would be more expensive, disclosed the commission to an affiliate, and strongly urged borrowers to avoid LPI. That many borrowers nonetheless failed to begs the question whether they read the notices. Neither *Klay* nor *U.S. Foodservice* involved similar disclosures urging recipients to seek a better deal.

An inference of reliance is possible only "where the behavior of plaintiffs and the members of the class cannot be explained in any way other than reliance upon the defendant's conduct." *Rowe*, 2012 WL 1068754, *10 (quotation marks and citation omitted; denying certification of RICO claim). Here, as just detailed, there are many reasonable explanations for class members' non-uniform responses to Wells Fargo's notices. So, no class-wide inference of reliance is possible. *See Alligood v. Taurus Int'l Mfg., Inc.*, 2009 WL 8387645, *6 (S.D. Ga. Mar. 4, 2009) (distinguishing *Klay*, and refusing to certify class where plaintiff "seeks to prove that each . . . class member saw, read, and relied on the warranty . . . included with the purchase of [an allegedly defective] rifle . . . simply by proving that putative class members purchased" the rifle); *Bridgewater*, 2011 WL 1671021, *12 (refusing to certify RICO class alleging fraudulent assessment of fees on property owners, due to individual issues of reliance).

[8] A substantial variation given that one of Plaintiffs' RICO theories is that the notices "misrepresented" a premium as the "cost" for LPI, when it allegedly was not the "true cost" because the premium included a commission component. *See, e.g.*, Compl. ¶ 166.

Moreover, even were a class-wide inference permissible, Wells Fargo would be entitled to introduce evidence to rebut that inference. That rebuttal evidence will be as individual as the depositions and Wells Fargo's telephone survey revealed. Wells Fargo will demand—as is its right—the opportunity to examine each putative class member to determine whether he or she detrimentally relied on anything contained in the notices. *See Dukes*, 131 S.Ct. at 2561 ("Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its … defenses to individual claims."). Individual evidence will be necessary to determine (1) what notices and representations a borrower received, (2) whether the borrower read them, (3) what the borrower understood them to mean, and (4) whether the borrower detrimentally relied on them. Predominance is wholly lacking.

This is, therefore, a case rife with "material variation in the representations made or in the degrees of reliance thereupon," which is "unsuited for treatment as a class action." *Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880, 882 (5th Cir. 1973). Accordingly, the RICO claim should not be certified.[9]

Certification of the RICO claim should also be denied because none of the named Plaintiffs are typical or adequate class representatives. None testified that the notices they received deceived them into acquiescing to LPI. Each testified that he or she had the exact opposite response to the notices, immediately seeking private insurance to avoid LPI. As the named Plaintiffs were not deceived in the way the RICO claim alleges class members were, the named Plaintiffs are atypical and inadequate representatives with respect to that claim.

2. Individual Issues Of Reliance Predominate The TILA Claim

Plaintiffs cannot establish predominance on their TILA claim. Plaintiffs seek actual damages for alleged TILA violations. Compl. at 34, 47. It is not clear from the complaint what disclosures Plaintiffs contend should have been made, nor when they should have been made. No matter; "[s]ince individual reliance is necessary to prove actual damages, a class action may not be certified on this issue." *Perrone v. Gen. Motors Acceptance Corp.*, 232 F.3d 433, 440 (5th Cir. 2000) (affirming refusal to certify TILA class); *Turner v. Beneficial Corp.*, 242 F.3d

[9] *See also Young v. Nationwide Life Ins. Co.*, 183 F.R.D. 502, 509-510 (S.D. Tex. 1998) (refusing to certify because plaintiffs failed to address reliance in their opening brief).

1023, 1028 (11th Cir. 2001) (affirming denial of certification of class for actual damages under TILA because "plaintiffs must demonstrate detrimental reliance in order to be entitled to actual damages under TILA").[10]

As discussed in the Factual Background and RICO sections, borrowers varied widely in terms of what they read, what they understood, and why they were lender-placed. Who could possibly say, on a class-wide basis, what every borrower would do if some particular item had been disclosed, or some disclosure were phrased differently—especially when many of the borrowers were already told that LPI was a bad deal? Plaintiffs have not adduced *any* evidence that reliance could be addressed on a class-wide basis, nor even mentioned the Eleventh Circuit's decision in *Turner*. The TILA claim should not be certified.

Additionally, although it is unnecessary to establish reliance to obtain *statutory* damages, certification would be improper for that purpose too. Statutory damages are limited—for the entire class—to a total of $1 million. 15 U.S.C. § 1640(a)(2)(B). Borrowers would be far better served by individual actions, rather than a class action that could, at very best, entitle them to share $1 million with hundreds of thousands of borrowers.

3. TILA Damages Cannot Be Established By Common Evidence

Plaintiffs cannot establish common proof of damages on their TILA claim. They proffer a measure of damages—the 11% commission plus tracking expenses, Mot. at 18—that the Eleventh Circuit has rejected. Damages are measured not by the value of the undisclosed or improper item, as Plaintiffs would have it, but considering what each borrower might have obtained given full disclosure: "Such proof goes beyond simply pointing to [defendant]'s undisclosed profits. Rather, it requires [plaintiffs] to show how they sustained damages because of the violations." *Owner-Operator Independent Drivers Ass'n, Inc. v. Landstar System, Inc.*, 622 F.3d 1307, 1315, 1325-26 (11th Cir. 2010) (affirming decertification of damages class in Truth in Leasing Act case alleging failure to disclose markup on product in lease transaction). "[T]he correct measure of damages is actual damages, not [defendant]'s profits from charge-

[10] *See also Stout v. J.D. Byrider*, 228 F.3d 709, 718 (6th Cir. 2000) (affirming refusal to certify TILA actual damages class because "resolution of the . . . TILA claim[] requires an individual assessment" of reliance).

backs. Thus, each class member will have to offer evidence as to his or her actual damages, offset against any counterclaims." *Id.* at 1326.[11]

Here, those borrowers for whom LPI was cheaper than voluntary coverage did not suffer damages, as they could not have done better even with full disclosure. *See id.* at 1315 (no damages where plaintiffs' behavior does not change based on disclosure of markup); *see also Perrone*, 232 F.3d at 437 (plaintiff must prove "he would have obtained a lower price"). The same is true of borrowers that were uninsurable in the private market. And for those who could get a better deal, the question is how much better. All of these determinations—did the borrower suffer any damage, and if so, how much—are highly individual. The availability and price of voluntary insurance depends on geography, a home's age and construction, climate, value, and prior claims history, to name but a few factors. The Court would have to conduct thousands upon thousands of mini trials to assess each of these complex actuarial factors for each class member. Otherwise, the class would include many borrowers who sustained no damages, and of the rest, would award inadequate damages to some and overcompensate others.

The correct measure of TILA damages is not the sum of commissions and tracking expenses, and is not susceptible to class-wide application. *Owner-Operator*, 622 F.3d 1326-27.

4. BHCA Damages Cannot Be Established By Common Evidence

Plaintiffs' BHCA anti-tying claim asserts that Wells Fargo illegally tied its "service" of "acting as an insurance agent" for LPI (the "tied service") to its service of purchasing LPI for borrowers (the "tying" service); that is, that Wells Fargo forced borrowers to pay for the former service in order to obtain the latter service. Compl. ¶¶ 154, 155.

As an initial matter, the Court should defer a ruling on certification of the BHCA claim until it determines whether the claim can survive a motion to dismiss. *Lane*, 2013 WL 3187410, *5 (because BHCA "claim raise[d] novel issues, and given the significance of certifying any nationwide class on such a claim, the motion for class certification of th[e] claim [would] be held in abeyance pending" briefing on a motion to dismiss the claim).[12]

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[11] The Truth in Lending Act and Truth in Leasing Act are interpreted similarly; *Owner-Operator* itself cited to Truth in Lending Act jurisprudence, *id.* at 1326.

[12] The claim was later dismissed with prejudice. *Lane v. Wells Fargo Bank, N.A.*, 2013 WL 5587942 (N.D. Cal. Oct. 10, 2013). *See also Cannon v. Wells Fargo Bank, N.A.*, 2013 WL 3388222, *3 (N.D. Cal. July 5, 2013) (dismissing identical claim with prejudice).

If the Court addresses certification first, it should not certify the claim, because—like the TILA claim—Plaintiffs identify the wrong measure of damages, and the correct measure is not susceptible to class-wide proof. Plaintiffs contend that damages can be established by common proof of the percentage of LPI premiums attributable to commissions and tracking. Mot. at 18. But that is *not* a proper measure of damages. Damages for a tying claim are "the difference between the price actually paid for the tied [service] and the price at which the [service] could have been obtained on the open market." *Pogue v. Int'l Industries, Inc.*, 524 F.2d 342, 344 (6th Cir. 1975).[13, 14]

Plaintiffs allege that the "tied" service is an insurance agency service. Any damage, then, is the difference between the price each borrower paid and the price each would have obtained on the open market for such a service. However, Plaintiffs offer *no* evidence demonstrating national (or even state-wide) uniformity in the price for agency services on the open market. Of course, there is no reason to believe the price is the same in New York City, Honolulu, and every place in between. Thus, calculating damages will require at least thousands of mini-trials examining the insurance markets in countless localities across the country.[15] To establish

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[13] It is proper to consider antitrust cases "as an aid to construing the Bank Holding Company Act." *Gushi Bros. Co. v. Bank of Guam*, 28 F.3d 1535, 1542 (9th Cir. 1994); *Parsons Steel, Inc. v. First Ala. Bank of Montgomery, N.A.*, 679 F.2d 242, 245 (11th Cir. 1982).

[14] In some tying cases, the Eleventh Circuit assesses damages by looking at whether the "combined" cost of the tied services exceeds the combined cost available on the open market. *See Kypta v. McDonald's Corp.*, 671 F.2d 1282, 1285-86 (11th Cir. 1982). Certification is not available under that measure either. *First*, it would still require assessment of thousands of local markets throughout the country. *Second*, it would have to individually identify all those for whom LPI was cheaper than voluntary coverage, as those borrowers would not have suffered any damage. *See id.* (noting that "as long as the overall price is competitive, then no harm has been incurred" even if plaintiff overcharged for one of the two services).

[15] It is no response that the agency services are "illusory," and thus have no value anywhere. *First*, an "illusory" service is no service at all, and does not satisfy the pleading requirements (namely, two actual, tied services) for a BHCA claim, necessitating dismissal. *Second*, WFI does perform services in connection with LPI. Franske Decl. ¶¶ 19, 20. Even if one assumes that those services are not commensurate with the commission, the value of those services—*i.e.*, the degree of incommensurability—would vary widely across the country. *Third*, even if WFI's compensation was simply "for placing the LPI business with a particular LPI provider," Mot. Ex. A at 32, Plaintiffs have not attempted to establish that states uniformly prohibit a referral fee, or that states share some uniform measure of what an agent must do to earn a commission. Indeed, in many states, an agent may collect a commission when voluntary insurance is renewed, even (footnote continued)

damages, every borrower will have to introduce evidence of the price that could be obtained for such services at the time, and in the place, that the borrower would have sought them.

Neither Plaintiffs nor their expert, Mr. Birnbaum, mention this proper measure of damages, let alone how it could be proven by class-wide evidence. Plaintiffs' contention that some portion of the premium is unjustified/excessive does not prove whether borrowers could have bought insurance agency services from providers other than WFI for less and, if so, by what amount. Plaintiffs have not sustained their burden of proving that damages may be established by common proof. *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1433-35 (2013).

Additionally, Plaintiffs fail to account for those borrowers who were charged, but never paid, for LPI. An unpaid charge—even if that charge were the measure of damages, which it is not—is not damage. A class member is damaged only if he *paid* more for LPI than was warranted. Many borrowers never pay for LPI. Some pay in part. Defaulted borrowers may eliminate or reduce their liability through foreclosure, short sale, loan modification, bankruptcy, or other means. Whether and to what extent a borrower has paid an LPI premium is an individual question requiring a lengthy review of each borrower's loan file and particular circumstances. Plaintiffs offer nothing on this count.

Like Judge Covington, the Court should not certify the BHCA claim. *See generally Gordon*, 2013 WL 436445, *6, *11 (refusing to certify BHCA claim challenging LPI practices).

B. STATE FILED-RATE DOCTRINES AND INSURANCE REGULATIONS PRECLUDE NATIONAL CERTIFICATION OF ANY CLAIM

The potential application of the filed-rate doctrines of all 50 states defeats predominance and renders the putative national class unmanageable. Though its contours vary from state to state, the filed-rate doctrine generally precludes suits challenging a rate filed with and/or approved by a state regulator. The filed-rate doctrine defeated an earlier attempt in this District to certify a national class challenging alleged LPI practices. *See Kunzelmann*, 2013 WL 139913, *12. This case is no different. Plaintiffs were, in almost all instances, charged for LPI according to premium rates—including commissions and tracking expenses—filed with state insurance regulators. Plaintiffs challenge these premiums, and seek return of the allegedly "unreasonable" portion of the premiums they were charged. That implicates state filed-rate doctrines.

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though the agent has not done any additional work. Thus, even on Plaintiffs' own skewed view of WFI's work, there is no national uniformity. Individual issues predominate.

The preclusive ambit of state filed-rate doctrines reaches federal claims like those Plaintiffs seek to certify. *See, e.g.*, *Taffet v. The Southern Co.*, 967 F.2d 1483, 1494 (11th Cir. 1992) (doctrine "applies with equal force to preclude recovery under RICO whether the rate at issue has been set by a state rate-making authority or a federal one"); *Decambaliza v. QBE Holdings, Inc.*, 2013 WL 5777294, *6-*8 (W.D. Wisc. Oct. 25, 2013) (LPI RICO claim precluded by state's filed-rate doctrine). That is especially true because the damages sought on the federal claims—commissions and tracking expenses, Mot. at 15, 18—are components of the filed rates. *See Hill v. BellSouth Telecomm., Inc.*, 364 F.3d 1308 (11th Cir. 2004) (misrepresentation claim barred by filed-rate doctrine where damages, if awarded, would have effect of refunding component of rate).

Indeed, the Motion and complaint make clear that violations of these federal statutes were part of a scheme to artificially inflate filed rates, implicating state filed-rate doctrines. *See, e.g.*, Mot. at 12 ("Plaintiffs' claims here *depend* on the common contention that Defendants conceived and implemented a scheme to manipulate and artificially inflate force-placed insurance premiums . . . .") (emphasis added); Compl. ¶ 153(c) ("WFB's [BHCA] tying arrangement results in unreasonably high commissions."); ¶ 153(f) ("WFB's exclusive purchase arrangement and kickback scheme artificially inflates the price of force-placed insurance . . . ."); ¶ 162 (RICO enterprise sought to force plaintiffs "to pay artificially inflated premiums . . . through a scheme that manipulated the premium to cover kickbacks and expenses . . . .").

Accordingly, "the filed-rate doctrine is an issue that must be addressed," on a state-by-state basis. *Kunzelmann*, 2013 WL 139913, *12. That state laws differ (or are uncertain) on application of the doctrine is beyond serious dispute. The *only* state supreme court to squarely address the issue held that LPI claims were precluded. *See Singleton v. Wells Fargo Bank, N.A.*, 2013 WL 5423917 (N.D. Miss. Sept. 26, 2013) (dismissing LPI claims pursuant to *Am. Bankers' Ins. Co. of Fla. v. Wells*, 819 So.2d 1196 (Miss. 2001)). In the absence of controlling precedent on this nuanced issue, other courts have reached divergent results.

One, applying Wisconsin's law, dismissed similar LPI claims, including a RICO claim. *Decambaliza*, 2013 WL 5777294, *6-*8. Another, applying Georgia law, certified the question to the Georgia Supreme Court, and expressed skepticism over plaintiff's claim that the doctrine would not apply. *Roberts v. Wells Fargo Bank, N.A.*, 2013 WL 1233268, *12-13 n.9 (S.D. Ga. Mar. 27, 2013). One held a Florida borrower's claims precluded, *Curtis v. Cenlar FSB*, 2013

WL 5995582 (S.D.N.Y. Nov. 12, 2013), though another did not, *Abels v. JPMorgan Chase Bank, N.A.*, 678 F. Supp. 2d 1273, 1277 (S.D. Fla. 2009). Others have also held the doctrine inapplicable, though all in the context of dismissal motions. *See Kunzelmann*, 2013 WL 139913, *11 (noting that consideration at dismissal stage was different, owing to lack of factual record).[16]

State laws differ as well on the propriety of commissions and whether tracking expenses are properly part of an LPI premium. *See* N.M. Admin. Code §§ 13.18.3.7.L, 13.18.3.13.F, 13.18.3.16.H (permitting LPI insurers to pay up to 30% commission); *Gibson v. World Sav. & Loan Ass'n*, 103 Cal. App. 4th 1291, 1295 (Cal. App. 2002) (criticizing inclusion of tracking expenses); *Mellon Bank, N.A. v. Foster*, 1990 WL 10007676, *4 (W.D. Pa. May 31, 1990) (noting harm if all borrowers are billed for tracking, rather than just those who lapse). Indeed, two states recently *approved* rate filings which include the very tracking expenses challenged here.[17] It is thus erroneous to claim categorically, as Plaintiffs do, that that commissions or tracking expenses are "impermissible" components of LPI premiums. Mot. at 2.

In an effort to circumvent filed-rate doctrines, Plaintiffs and their expert assert that LPI charges to borrowers "are not, in fact, insurance premiums, and are not subject to state insurance rate regulation." Mot. at 4.[18] That categorical statement is wrong. Wells Fargo charges each borrower the *exact* amount billed by the insurer—*i.e.*, the filed LPI premium—without markup. And *that amount* is subject to state insurance regulation. Moreover, whether, and in whose hands, a rate is subject to regulation is a matter of law—potentially different in each state—not a matter for expert pronouncement on a national basis.

There is another problem: Plaintiffs can only reach these broad conclusions by ignoring relevant precedent. As noted above, a number of courts have already dismissed LPI claims—including against banks—under state filed-rate doctrines. As one court wrote:

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[16] Even if the filed-rate doctrine did not apply directly to preclude claims, "the Court would still need to look at the filed rates in each jurisdiction and the components of those filed rates to determine what charges were reasonable and/or appropriate," rendering national certification improper. *Gustafson*, 2013 WL 5911252, *13 (denying certification of LPI claims).

[17] *See* Mot. Ex. B, at 10 ¶ 10; Consent Order, Florida Office of Insurance Regulation, at ¶ 5(E), http://www.floir.com/siteDocuments/AmericanSecurity141841-13-CO.pdf.

[18] Yet Plaintiffs' expert has already stated, on another occasion, that "[t]he responsibility comes down to *regulators* to do their job and say rates need to be reasonable and not excessive." *Kunzelmann*, 2013 WL 139913, *12 (emphasis added; citing article).

> The crux of plaintiff's claims against the non-insurer defendants is that they conspired with the insurer defendants to have her pay excessive premiums so that they could share in the illicit profits. Although the Commissioner of Insurance does not regulate mortgage lenders, it does regulate the premium rate ultimately charged to plaintiff. Try as she might, plaintiff cannot avoid the fact that she is asking this court to determine what rate the insurance company defendants should have charged instead of the rates they did charge.

Decambaliza, 2013 WL 5777294, *8. *See also Roussin v. AARP, Inc.*, 664 F. Supp. 2d 412, 419 (S.D.N.Y. 2009), *aff'd* 379 F. Appx. 30 (2d Cir. 2010) (collecting cases, and holding that doctrine applied to non-regulated entities that utilized approved rate). An expert's contrary "experience" does not permit Plaintiffs to ignore precedent or variation in state law.

It is one thing to determine one state's current law on a motion to dismiss a particular borrower's claim. It is another to predict how each of the 50 states would deal with the issue—on a fuller record—especially in light of the many different approaches to the filed-rate doctrine. As Judge Middlebrooks held, "the close regulation of [LPI] by the states, the application of the filed-rate doctrine, and the necessity to examine the ratemaking determinations of various states in determining the reasonableness of the commission structure at issue would render the class unmanageable." *Kunzelmann*, 2013 WL 139913, *6. So too here.

C. Abandonment Of State-Law Claims On Behalf Of The Putative National Class Defeats Adequacy And Superiority

Plaintiffs cannot establish adequacy or superiority with respect to the putative national class. Plaintiffs do not seek to pursue *any* state-law claims on behalf of that class. Only Florida borrowers, through the Florida class, would preserve state-law claims, if certification is granted. Borrowers in all other states would have only the federal claims. Given that strategic decision, however, permitting any federal claim to proceed would prejudice putative class members across the country. If any claim could possibly fit the allegations—and Wells Fargo believes none does—it would be a state-law claim, not a federal claim. The federal claims require proof of additional elements and have met with—at best—mixed results even on motions to dismiss. These dubious claims' prospects will only diminish on the merits, when the Court's consideration is not limited to the complaint's allegations. Yet these are the *only* claims Plaintiffs seek to pursue for borrowers in every state other than Florida.[19]

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[19] It also appears that Plaintiffs have abandoned all claims insofar as they seek relief for alleged "backdating," "excess insurance," or overlap with a "standard mortgage clause" or (footnote continued)

Why should putative class members in 49 states be forced to abandon a simple contract claim in favor of an anti-tying claim that two courts have already dismissed with prejudice, a TILA claim requiring a misrepresentation and reliance, or a RICO claim requiring a misrepresentation, reliance, and a racketeering enterprise? To permit federal claims to proceed would be to deprive these putative class members of their most viable claims, which could be barred by *res judicata* once the federal claims are adjudicated. *See Kunzelmann*, 2013 WL 139913, *6 (noting that plaintiff's "[e]fforts to shoehorn his claim in a transparent attempt to surmount obstacles to class certification undermine any determination of adequacy").

Abandoning state-law claims for all but Florida borrowers (so as to make national certification more likely) achieves—if successful—an "essentially cosmetic" benefit, "purchased at the price of presenting putative class members with significant risks of being told later that they had impermissibly split a single cause of action." *Feinstein v. Firestone Tire and Rubber Co.*, 535 F. Supp. 595, 606 (S.D.N.Y. 1982). *See generally In re STEC Inc. Sec. Litig.*, 2012 WL 6965372, *8 (C.D. Cal. March 7, 2012) (plaintiff inadequate where it does not pursue claim in favor of another requiring reliance); *Pearl v. Allied Corp.*, 102 F.R.D. 921, 924-25 (E.D. Pa. 1984) (class representative inadequate because "effort to certify a class" involved "abandoning some of the claims of . . . fellow class members").[20]

Plaintiffs are not adequately representing borrowers in every state other than Florida, and this action is an inferior way for them to litigate. To avoid prejudicing these borrowers, the Court should not certify the putative national class, so that each borrower may proceed individually, preserving the more valuable state-law claims.[21] Any borrower can benefit from the availability of attorneys' fees and statutory damages on their federal claims, ensuring that borrowers can prosecute claims. *See Boca Raton Community Hospital, Inc. v. Tenet Healthcare Corp.*, 238 F.R.D. 679, 700 (S.D. Fla. 2006) ("[E]ven small individual claims under RICO can

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"lender's loss payable endorsement." While there are stray references to these items in the complaint, Plaintiffs do not address how they could be adjudicated on a class-wide basis, and Mr. Birnbaum does not mention, let alone address, the measure of damages for them.

[20] Moreover, "[t]he ability to opt out of the class is insufficient to protect the rights of putative class members who would want to seek remedies other than those chosen by the [class] representatives." *Small v. Lorillard Tobacco Co.*, 679 N.Y.S.2d 593, 601-02 (N.Y. App. 1998).

[21] *Krueger v. Wyeth, Inc.*, 2008 WL 481956, *3 (S.D. Cal. Feb. 19, 2008) ("[C]ourts agree that the existence of claim splitting constitutes a compelling reason to deny class certification").

be feasible given the possibility of the award of treble damages and attorneys' fees to successful plaintiffs.") (internal quotation marks and citation omitted).[22]

D. The Florida Class Should Not Be Certified

As described above, no class should be certified on the federal claims—national or state-wide—because individual issues predominate with respect to causation (in the form of reliance), and damages. Perhaps recognizing as much, Plaintiffs seek certification of a Florida-only class on their state-law claims. Because individual issues predominate even for a Florida state-law class, the Court should—like Judge Middlebrooks—refuse to certify that class.

1. The Contract And Implied Covenant Claims Should Not Be Certified Because Plaintiffs Have Not Established Uniformity Of Closing Documentation

Plaintiffs seek certification of claims involving different mortgage contracts used by different lenders (Wells Fargo services loans originated by many other lenders, Northagen Decl. ¶ 2). Yet Plaintiffs do not even attempt to establish uniformity in closing documentation. Judge Covington refused to certify an LPI class where, like here, "Plaintiffs have not demonstrated the existence of a common contract . . . ." *Gordon*, 2013 WL 436445, *5, *8-*9. So did the court in *Gustafson*. 2013 WL 5911252, *10 ("[T]he mortgage contracts at issue here contain numerous material variations of the provision that serves as the basis for plaintiffs' breach of contract claim.").[23] The Court should do the same.

Plaintiff Fladell provides a useful illustration of this problem. At the time he executed his mortgage, he signed a "Notice of Fire/Hazard Insurance Requirements." Northagen Decl. Ex. Z. It stated that in the event the lender obtained LPI, it "may assess a processing fee and [its] affiliated insurance agent could collect a commission from the insurer. The cost for such insurance could be at least two to five times greater and provide [Fladell] with less protection than insurance [he] could purchase directly from an insurer." *Id.* ¶ 9. By signing the notice, Fladell acknowledged that he had "read and underst[ood] these requirements" and that he "consent[ed] to" them. *Id.* at 2. Fladell, and those like him, may be in a very different position

[22] 12 U.S.C. § 1975 (same for BHCA); 15 U.S.C. § 1640 (statutory damages and attorneys' fees for TILA).

[23] *See also id.* (noting that some contracts permit lender to do what is "reasonable," others what is "necessary," and that while plaintiffs claimed the terms "mean the same thing, they offer little to no support for this proposition").

than borrowers who did not sign this notice. *See Cohen v. Am. Sec. Ins. Co.*, --- F.3d ----, 2013 WL 5890642 (7th Cir. Nov. 4, 2013) (affirming dismissal of LPI claims given same notice).

2. The Unjust Enrichment And Fiduciary Duty Claims Cannot Be Litigated On Behalf Of A Class

Individual issues predominate the unjust enrichment claim. The Eleventh Circuit has noted that "common questions will rarely, if ever, predominate an unjust enrichment claim, the resolution of which turns on individualized facts." *Vega*, 564 F.3d at 1274. And as Judge Middlebrooks has held, this is not "that rare case." *Kunzelmann*, 2013 WL 139913, *6. Instead, Plaintiffs' claim "requires examination of the particular circumstances of an individual case." *Id.*

Similarly, individual issues predominate the fiduciary duty claim. Generally, there is no fiduciary duty arising from a mortgage escrow account. *See McLean v. GMAC Mortg. Corp.*, 2008 WL 1956285, *18 (S.D. Fla. May 2, 2008); *Sussman v. Weintraub*, 2007 WL 908280, *4 (S.D. Fla. Mar. 22, 2007).[24] If Plaintiffs can overcome that rule, it could be only with individual evidence. As Judge Covington noted in denying certification, "any particular plaintiff's breach of fiduciary duty claim will rise or fall depending upon the circumstances of such plaintiff's relationship with the Defendant." *Gordon*, 2013 WL 436445, *10.

3. Affirmative Defenses Raise Highly Individual Issues

It is Plaintiffs' burden to prove that affirmative defenses can be resolved through class-wide proof. *See, e.g.*, *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 321-24 (4th Cir. 2006) (affirming denial of certification where resolution of defendant's statute of limitations defense would involve individual inquiry into when class members became aware of their claims). Even with regard to "the alleged breach of a form contract . . . [t]he risk of voluminous and individualized extrinsic proof runs particularly high where a defendant raises substantial affirmative defenses to breach." *Sacred Heart Health Systems, Inc. v. Humana Military Healthcare Services, Inc.*, 601 F.3d 1159, 1176-77 (11th Cir. 2010).

Plaintiffs have not met their burden; they do not discuss affirmative defenses, much less show how they may be resolved by common, class-wide proof. Nor could Plaintiffs meet their burden, as Wells Fargo's affirmative defenses raise individual issues defeating commonality and

[24] *See generally Telfair v. First Union Mortg. Corp.*, 216 F.3d 1333, 1340-42 (11th Cir. 2000) (under Georgia law, no fiduciary duty by virtue of escrow account used to pay for LPI).

predominance. *See Kunzelmann*, 2013 WL 139913, *11 ("Potential defenses . . . would also have to be evaluated on . . . [an] individual-by-individual basis.").

Waiver, estoppel, consent, mitigation. Whether a borrower purposefully acquiesced to LPI, and whether a borrower mitigated his damages (if any) by obtaining voluntary insurance (and if so, how quickly), present individual issues that cannot be resolved in a single mass trial. For instance, the notice that Fladell signed—in which he agreed to the commissions—raises issues with respect to whether Fladell and similarly situated borrowers consented to the commissions they seek to recover. And deposition testimony raises a similar issues for other borrowers. Daniel Biddix believed, based on his own research, that Wells Fargo was receiving "kickbacks," but chose not to obtain voluntary coverage because he was too busy. Van Zandt Decl. Ex. C at 53:23-54:15. Beverly Lane testified that she acquiesced to LPI because it was more convenient and allowed her to pay for insurance in monthly installments, and, incredibly, still had LPI nearly ten months after filing suit. *See* Van Zandt Decl. Ex. B at 22:14-23:14, 122:6-21, 42:6-17.

Voluntary payment. The voluntary payment doctrine may bar the claims of putative class members who paid the LPI premiums. It is no response that the doctrine is inapplicable because no borrower "knew" of the alleged "kickback." Many notices disclosed that a commission would be paid and that LPI would be inferior to voluntary coverage; and deposition testimony makes clear that some borrowers suspected wrongdoing. This may be sufficient to implicate the voluntary payment doctrine, though the issue would vary from borrower to borrower. *See generally Kunzelmann*, 2013 WL 139913, *5.

Set-off, recoupment. Many putative class members have defaulted on their loans and owe Wells Fargo for unpaid amounts. Determining which borrowers owe what and whether Wells Fargo is entitled to a set-off are individual inquires inappropriate for class-wide treatment. *See DWFII Corp. v. State Farm. Mut. Auto. Ins. Co.*, 469 F. App'x 762, 765 (11th Cir. 2012) (denial of certification proper where claims subject to set-off defense); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 438 (4th Cir. 2003) (certification erroneous where defenses, including setoff, "would require individualized inquiry in at least some cases").

4. Plaintiffs Have Not Shown Common Proof Of Damages

Plaintiffs propose measuring damages as the 11% commission, as well as an *unspecified* percentage of the premium attributable to "tracking expenses." Mot. at 18. Mr. Birnbaum

claims that he can specify a percentage "through a review of normal business records of Assurant." Mr. Birnbaum gives no clue as to how he can perform this task. He does not identify (even by type) the records he will use. "We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough." *Watts v. Allstate Indem. Co.*, 2013 WL 210059, *12 (E.D. Cal. Jan. 17, 2013).

In any event, Mr. Birnbaum's methodology could not be the proper measure of damages even on the state-law claims, as it only accounts for how much borrowers were supposedly *overcharged* for LPI, not how much they *overpaid* for it. An *unpaid* overcharge is not damage. As already stated, many borrowers never pay their LPI premiums in full or at all. Some have compromised or settled claims through short sales, foreclosures, bankruptcies, loan modifications, or other agreements. Plaintiffs offer no method for culling those putative class members from the remainder. In fact, whether and to what extent a borrower has paid an LPI premium is an individual question requiring a lengthy review of each borrower's loan file:

> Only a portion of LPI premiums actually get paid by borrowers. Of the borrowers subject to LPI, at any given time approximately 20% have homes in active foreclosure, 16% are in post-foreclosure status, and 40% are 60 days or more delinquent on their loans. Many of these borrowers subsequently enter into some sort of short sale, foreclosure, loan modification, bankruptcy, refinance, payoff, settlement agreement, government-sponsored program, or other agreement whereby the parties compromise their claims . . . and/or finally determine the total amounts due and owing on the account. The number of borrowers in each of these categories changes almost daily, and determining which borrowers fall into which category requires, at least in part, a file-by-file manual review.

Kunzelmann, 2013 WL 139913, *2 (record citations omitted).[25] Plaintiffs also fail to account for putative class members who were charged LPI premiums that were *lower* than the premiums they would have paid for voluntary insurance. A borrower who breached his mortgage by failing to maintain required insurance and, as a result, pays less for LPI, has not been damaged.

Determining whether a borrower was damaged and, if so, by what amount, would require an individual assessment accounting for many factors. It cannot be done on a class-wide basis.

[25] *See also id.* at *4 (borrowers who pay for LPI "differ[] from" those "who are more than 60 days in arrears on their mortgage, in foreclosure, or post-foreclosure proceedings.").

5. *Williams* Should Not Guide The Court

Plaintiffs rely primarily on *Williams v. Wells Fargo Bank, N.A.*, 280 F.R.D. 665 (S.D. Fla. 2012), which certified a Florida-only class for unjust enrichment and implied covenant claims (*Williams* did not involve any federal claims; as explained above, those claims cannot be certified at all, on a national or state basis). Respectfully, *Williams* committed two errors.

First, *Williams* simply assumed—unjustifiably—that because Plaintiffs had alleged a "common scheme," certification was proper. *See id.* at 672. But the presence of a "common scheme" is just one of the many issues that the factfinder will have to consider. It says nothing about whether there are common answers to many other critical questions—such as the applicability of affirmative defenses or whether a particular borrower was damaged by the "scheme," and, if so, in what measure. *Williams* simply treated one aspect of the allegations—an alleged "common scheme"—as if that by itself would be determinative of every issue, so that all other elements, defenses, and damages concerns became irrelevant.

The inquiry cannot begin and end at that one issue. *See, e.g.*, *St. of Ala. v. Blue Bird Body Co.*, 573 F.2d 309 (5th Cir. 1978) (reversing certification where court improperly weighed allegations of common conspiracy more heavily than individual questions of impact and causation); *Gustafson*, 2013 WL 5911252, *10 (plaintiffs "fail to show how these [purportedly common] facts and questions meet the commonality or predominance requirements in the context of their [LPI] claims"); *Gordon*, 2013 WL 436445, *9 (no predominance despite allegation of "uniform policy" involving LPI).

Second, *Williams* believed—incorrectly—that individual issues could be "moot[ed]" by constructing an unwieldy class definition excluding six categories of borrowers: those with foreclosure judgments; those who have entered into short sales, deeds-in-lieu of foreclosure, or loan modifications; those who have filed LPI insurance claims which were paid; and those whose LPI premiums were cancelled in full. *Williams*, 280 F.R.D. at 675-76. But individual issues cannot magically be defined out of existence. After all, they do not actually disappear. Initially, the parties must make these fact-intensive, individual determinations. And if they disagree, a jury, or the Court, must adjudicate the individual disputes. *See Kunzelmann*, 2013 WL 139913, *9 ("I question whether [a borrower who has not paid] has conferred a direct benefit on the defendant . . . [S]houldn't the trier of fact consider these individual circumstances . . . ?").

Williams does not appreciate the difficulty in that task. As Judge Middlebrooks noted, "[t]he number of borrowers in each of these categories changes almost daily, and determining which borrowers fall into which category requires, at least in part, a file-by-file manual review." *Kunzelmann*, 2013 WL 139913, *2. That undermines manageability. And Plaintiffs have not even sought a class as narrowly defined as that certified in *Williams*.

Moreover, *Williams* does not address other individual issues, including those highlighted in *Kunzelmann*, *Gustafson*, and *Gordon*. *Williams* does not discuss differences in closing documentation; for instance, there is no mention of the notice Fladell and some other borrowers signed consenting to a commission—the same notice at issue in *Cohen*, where the Seventh Circuit affirmed dismissal of "kickback" claims. Nor does *Williams* account for borrowers who breached their mortgages by failing to maintain insurance and—because LPI was cheaper in some cases—paid less for LPI, and were thus not damaged. And *Williams* does not explain how defenses such as waiver or the voluntary payment doctrine can be adjudicated on a class-wide basis, particularly where some borrowers were aware of the commission, while others may not have been. These are not issues that can be "defined away," as they are determinations to be made by a jury, and go to the merits.

Williams' disregard for the individual issues in this case is inconsistent with the facts and law, and with *Kunzelmann*, *Gustafson*, and *Gordon*.[26] It is telling that Judge Middlebrooks did not adhere to *Williams*, and refused to certify a Florida class. The Court should do the same. There are just too many individual facts which would bear on the claims, defenses, and damages. Here, as in *Kunzelmann*, "liability . . . hinges on the uncommon and individual determination of notice, knowledge, and motivation of each class member." 2013 WL 139913, *4. The claims "present[] highly individualized inquiries, the answers to which are not apt to drive the resolution of the litigation." *Gordon*, 2013 WL 436445, *6. This "lack of commonality with respect to core elements of the . . . claims with foundational importance . . . precludes a finding of commonality." *Kunzelmann*, 2013 WL 139913, *4. No Florida class should be certified.

CONCLUSION

For the foregoing reasons, the Court should deny the Motion in its entirety.

[26] The same can be said of *Lane*, which improperly certified a California-only class on state-law claims. *See* 2013 WL 3187410. Notably, however, *Lane* at least recognized material differences in the mortgages, and certified a class only on one form of mortgage.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December 2013, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, which will provide electronic service and notification to counsel for the parties, including the recipients on the attached service list.

/s/ David B. Esau
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Fladell, et al. v. Wells Fargo Bank, N.A., et al.
Case No. 13-60721-CIV-MORENO/OTAZO-REYES
United States District Court, Southern District of Florida

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