

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No.: 2:17-CV-14222-RLR

MICHELINA IAFFALDANO,

Plaintiff,

v.

SUN WEST MORTGAGE COMPANY, INC.,
a California corporation, & PROCTOR
FINCANICAL, INC., a Michigan corporation,

Defendants.

MEMORANDUM OPINION

This cause comes before the Court after a bench trial on Wednesday, January 31, 2018, and Thursday, February 1, 2018. The Court has considered the testimony and documentary evidence presented at the trial, has heard argument from counsel, has considered the record, and is otherwise duly advised in the premises. The Court makes the following findings of fact and conclusions of law.

This is a case about a reverse mortgage. Plaintiff, Michelina Iaffaldano, entered into a reverse mortgage agreement with Defendant Sun West Mortgage Company. Iaffaldano—not Sun West—was required to make all necessary insurance and tax payments in connection with her reverse mortgage. Iaffaldano failed to do so. Eventually, Sun West initiated foreclosure proceedings against Iaffaldano. At that time, Sun West sought to purchase forced-placed insurance on Iaffaldano's property—the collateral for Iaffaldano's reverse mortgage. In connection with that purchase, Sun West utilized Defendant Proctor Financial, an insurance intermediary company. Iaffaldano brought her account with Sun West current and Sun West

subsequently dismissed its foreclosure complaint. Iaffaldano remains in her home to this day. Iaffaldano's account with Sun West is current to this day. Iaffaldano has brought this case on the premise that when Sun West purchased a force-placed insurance policy, Sun West violated the Real Estate Settlement Procedures Act (Iaffaldano's Count I) ("RESPA"). Iaffaldano also contends that when Proctor procured the insurance policy at Sun West's request, Proctor tortiously interfered with Iaffaldano's business relationship with Sun West (Count II). Because Iaffaldano's claims against each Defendant are distinct from each other, the facts relevant to each claim are distinct as well. As a result, the Court has separated its findings of fact and conclusions of law, *infra*, as to each of the Defendants in this case.

I. FINDINGS OF FACT AS TO DEFENDANT SUN WEST¹

1. Iaffaldano currently resides in a property in Saint Lucie County which is subject to a reverse mortgage serviced by Sun West. *See* Joint Pretrial Stipulation, DE. 103 at § V, ¶ 1 & Pl.'s Ex. 1.

2. Under the terms of the reverse mortgage, and pursuant to the Iaffaldanos' instructions, no escrow account or set aside was created for Iaffaldano with Sun West. *See* 2018.01.31 Trial Tr., DE 157 at 11:2-6, 47:22-48:2 & 2018.02.01 Trial Tr., DE 158 at 81:23-82:20 & Sun West's Ex. 1.

3. Pursuant to the mortgage, Iaffaldano was required to maintain hazard insurance on her property. *See* Joint Pretrial Stipulation, DE. 103 at § V, ¶ 2 & Pl's Ex. 1.

¹ To the extent the underlying evidence was admitted in both of Defendants' cases, the Court's findings of fact as to Defendant Sun West apply to the Court's conclusions of law as to Defendant Proctor. Similarly, the Court's findings of fact as to Defendant Proctor apply to the Court's conclusions of law as to Defendant Sun West. The Court has separated certain facts by Defendant solely for the purpose of a more readable narrative.

4. Iaffaldano allowed her hazard insurance to lapse by failing to make payment of the required insurance premium. The policy was subsequently cancelled. *See* Sun West's Ex. 79.

5. Sun West directly advanced funds on two occasions, in 2012 and 2013, in order to assist Iaffaldano in maintaining the hazard insurance she had in place through People's Trust Insurance Company. Sun West did so subject to a Repayment Plan Agreement, wherein Iaffaldano agreed to reimburse Sun West for said funds. *See* Joint Pretrial Stipulation, DE 103 at § V, ¶ 3, 2018.01.31 Trial Tr., DE 157 at 17:1-2 & 22:10-11, 2018.02.01 Trial Tr., DE 158 at 74:4-8 & 83:19-23 & Sun West's Exs. 47-48, 50 & 79.

6. This Repayment Plan Agreement did not create an escrow account as it required Iaffaldano to pay money back to Sun West that Sun West had advanced for Iaffaldano. Sun West did not set aside any money for taxes and insurance under the Repayment Plan Agreement. *See* 2018.01.31 Trial Tr., DE 157 at 55:11-56:5 & Sun West Ex. 50.

7. Iaffaldano did not make any payments under the Repayment Plan Agreement and, thus, defaulted on both the Repayment Plan Agreement and the reverse mortgage. *See* Joint Pretrial Stipulation, DE 103 at § V, ¶ 4, 2018.01.31 Trial Tr., DE 157 at 55:16-56:5, 2018.02.01 Trial Tr., DE 158 at 74:4-8 & Sun West's Exs. 47-48, 50 & 79.

8. On December 31, 2013, Sun West instituted a foreclosure action in the circuit court for Saint Lucie County (Case No. 2014-CA-000041) due to Iaffaldano's default for failure to pay the required taxes and insurance under the reverse mortgage. *See* Joint Pretrial Stipulation, DE 103 at § V, ¶ 7 & 2018.01.31 Trial Tr., DE 157 at 59:21-24.

9. In September 2014, because of the lapse in Iaffaldano's hazard insurance and the resulting gap in coverage, Sun West, to protect its interest as well as that of the Department of Housing and Urban Development ("HUD"), obtained a force-placed insurance policy on

Iaffaldano's property through Proctor, with whom it has an exclusive business relationship to procure this type of insurance. *See* Joint Pretrial Stipulation, DE 103 at § V, ¶ 5, 2018.01.31 Trial Tr., DE 157 at 29:12-25 & 33:11-23 & Pl.'s Exs. 1 & 12. HUD requires continual hazard insurance coverage on reverse mortgages. Accordingly, Sun West's force-placed policy was effective retroactively, thus eliminating the coverage gap required by HUD. *See* Sun West's Exs. 50 & 79.

10. Sun West's exclusive relationship with Proctor arose in 2011 and is evidenced by the parties' Service Agreement executed January 1, 2011. *See* Pl.'s Ex. 12.

11. Sun West hired a broker to secure competitive bids for force-placed insurance premiums. Sun West considered multiple bids for force-placed insurance services and ultimately selected Proctor due to its rate being significantly lower than Proctor's competitors. *See* 2018.01.31 Trial Tr., DE 157 at 65:13-66:13, 69:9-12 & Sun West's Ex. 22.

12. Under the Service Agreement, Sun West pays Proctor to provide insurance tracking services on a fee basis, and Sun West pays directly the cost of the lender-placed insurance premiums. *See* Pl.'s Ex. 12.

13. The insurance premium rates charged by Proctor are not tied in any way to the use of Proctor's insurance tracking services. Sun West has the right to cancel Proctor's insurance tracking services at any time and such a cancellation would not affect the insurance premium rates charged by Proctor. *See* 2018.01.31 Trial Tr., DE 157 at 80:12-18, 93:24-95:17 & 116:16-118:5.

14. Proctor charges Sun West the same insurance premium rate regardless of whether the property is owned by Sun West's borrower or Sun West as an REO. *See* 2018.01.31 Trial Tr., DE 157 at 112:10-13.

15. The initial lender-placed insurance master policy became effective January 1, 2011 through May 31, 2011, and has been renewed annually each subsequent year with substantially the same terms and conditions as the expiring policy. The policy and each renewal were delivered to Sun West in California. *See* 2018.01.31 Trial Tr., DE 157 at 111:13-112:9 & Sun West's Ex. 79.

16. The annual premium paid by Sun West in 2014 and 2015 for force-placed insurance on Iaffaldano's behalf was \$4,942.77. *See* Sun West's Ex. 79. Iaffaldano did not provide evidence of what a comparable voluntary policy would have cost with similar coverage in 2014 or 2015. The August 2014 letter from Brightway only mentions the cost of the premium from People's Trust, but does not state what the amounts or terms of coverage are so this voluntary policy cannot be compared to the force-placed insurance obtained by Sun West. *See* Pl.'s Ex. 5. Furthermore, the 2016 Universal Policy (the insurance Iaffaldano purchased in 2016) cannot be properly compared to the forced-placed policies because the 2016 Universal Policy provided different coverage² than the force-placed insurance obtained by Sun West.

17. Sun West did not pay Proctor any commissions. Proctor was only paid the rates detailed in the Service Agreement for loan tracking services. Sun West did not receive any monies or compensation from Proctor under the parties' relationship. *See* 2018.01.31 Trial Tr., DE 157 at 52:3-17, 69:13-19, 80:12-18 & 2018.02.01 Trial Tr., DE 158 at 77:3-10 & 81:10-13. Nor did Sun West receive any kickbacks, bonuses or other improper benefits for using Proctor's services. *See* 2018.01.31 Trial Tr., DE 157 at 52:14-17.

² The Universal Policy provided approximately \$70,000 less coverage for the dwelling and had a higher deductible as compared to the forced-place insurance policies. *See* Sun West's Ex. 88, DE 162-1

18. Proctor's force-placed insurance premium rates are not filed with the Florida Office of Insurance Regulation ("FOIR"), however, its rates, despite being obtained through surplus lines, are similar and competitive with those filed with FOIR. Rates filed with FOIR by American Security Insurance Company, a Florida admitted carrier, were only ten percent lower than Proctor's, and after various factors are applied, could have been higher than the rates charged by Proctor. *See* Proctor's Ex. 8, Pl.'s Ex. 15 & 2018.01.31 Trial Tr., DE 157 at 109:17-110:22 & 2018.02.01 Trial Tr., DE 158 at 33:10-20, 43:17-19, 45:13-15, 45:21, 51:12-13.

19. Iaffaldano's account was brought current through funds provided by the Florida Hardest-Hit Fund Elderly Mortgage Assistance program ("ELMORE"), a state-run forgivable loan program, which provided \$30,758.05 to Sun West to pay off the balance of accumulated insurance and taxes owed on the mortgage, and left \$5,931.63 in a trust account, which was later used for payments of property taxes that came due. 2018.01.31 Trial Tr., DE 157 at 47:22-48:11 & 60:18-61:5.

20. Once the account was current, Sun West subsequently dismissed the foreclosure action. *See* Joint Pretrial Stipulation, DE. 103 at § V, ¶¶ 7-9, Proctor's Ex. 10 & 2018.01.31 Trial Tr., DE 157 at 59:25-60:17 & 2018.02.01 Trial Tr., DE 158 at 5:24-6:10 & 81:23-24.

21. Iaffaldano did not personally make any payments to Sun West to cover the costs of the force-placed insurance placed on the property. *See* Proctor's Ex. 10 & 2018.02.01 Trial Tr., DE 158 at 5:24-6:10.

II. CONCLUSIONS OF LAW AS TO DEFENDANT SUN WEST

A. No Private Right of Action Exists for Iaffaldano's Claims

Under RESPA, mortgage servicers have prescribed requirements for fulfilling their financial responsibilities to borrowers, including responding to borrower's inquiries. *Thomason*

v. OneWest Bank, FSB, 596 F. App'x 736, 739 (11th Cir. 2014) (citing *Hardy v. Regions Mortg., Inc.*, 449 F.3d 1357, 1359 (11th Cir. 2006)). Currently, under established law, private rights of action are only authorized for three wrongful acts under RESPA: (1) payment of a kickback and unearned fees for real estate settlement services; (2) requiring a buyer to use a title insurer selected by the seller; and (3) the failure of a loan servicer to provide proper notice about the transfer of loan servicing rights or to respond to a qualified written request for loan information under Section 2605(e). *Librizzi v. Ocwen*, 120 F. Supp. 3d 1368, 1378-79 (S.D. Fla. 2015) (complaint did not allege facts relating to the three types of wrongful acts supporting a private right of action, such as submission of a qualified written request and the servicer's failure to respond) (citing *Dynott v. Nationstar Mortgage, LLC*, 2014 WL 1028886, at *15 (N.D. Ga. Mar. 17, 2014)). None of these acts are alleged here.

Instead, the wrongful acts alleged by Iaffaldano are that (1) Sun West failed to advance insurance premiums on her behalf through an escrow account in violation of 12 C.F.R. § 1024.17 and (2) that the force-placed rates charged to Iaffaldano were not bona fide and reasonable in violation of 12 C.F.R. § 1024.37, because the procedure for obtaining those rates violated Florida Insurance Code Section 626.916.

However, it has been expressly held that 12 C.F.R. § 1024.17, governing escrow accounts, does not create a private right of action for alleged negligence with respect to the administration and maintenance of an escrow account. *Perron v. JP Morgan Chase Bank, N.A.*, No. 1:12-CV-01853-TWP, 2014 WL 931897, at *5 (S.D. Ind. Mar. 10, 2014). Likewise, it has been held that 12 C.F.R. § 1024.37 does not create a private right of action. *Wing Kei Ho v. Bank of Am., N.A.*, No. 16-80538-CIV, 2016 WL 8679254, at *2 (S.D. Fla. June 21, 2016) (holding that 12 C.F.R. § 1024.37 does not create a private right of action). Nor can Iaffaldano

rely on Florida Insurance Code section 626.916 to support her claim as it does not create a private right of action. Iaffaldano does not dispute that a private right of action for an alleged violation of section 626.916 does not exist. *See* 2018.02.01 Trial Tr., DE 158 at 78:20-21.

A plaintiff may not plead around this bar by trying to bootstrap section 626.916 through another cause of action. *See Lemy v. Direct Gen. Fin. Co.*, 885 F. Supp. 2d 1265, 1272-73 (M.D. Fla. 2012), *aff'd*, 559 F. App'x 796 (11th Cir. 2014). In *Lemy v. Direct General Finance Company*, the court held that while certain sections of the Florida insurance code provide for a private remedy, section 626.916 is not one of those sections. The *Lemy* court further explained that “a plaintiff ‘may not evade the Florida legislature’s decision to withhold a statutory cause of action’ for a violation of the insurance code ‘by asserting common law claims based on such violations.’” *Id.* at 1273. Although the *Lemy* decision³ (and affirmance) was focused on common law claims arising under Florida law, the Court fails to see how the reasoning in *Lemy* would not apply to a federal cause of action as well. In other words, the Court fails to see how a federal RESPA claim could be premised upon an alleged violation of a *Florida* regulatory statute which contains no private right of action. The Court expressly asked counsel for Iaffaldano to provide case law for the proposition that her RESPA claim could be premised on a Florida statute which lacked a private right of action, and counsel was unable to provide any authority to the Court.

³ The *Lemy* decision was comprehensive, and addressed many points, including the following: The “judiciary ‘cannot provide a remedy’ ” for a violation of the Insurance Code “‘when the legislature has failed to do so.’ ” *Lemy*, 885 F. Supp. 2d at 1272-73 (quoting *QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass’n*, 94 So. 3d 541, 553 (Fla. 2012) (dismissing all claims based on alleged violations of the Insurance Code)). “The [OIR] may ensure that the insurers observe each section of the insurance code cited in the complaint. [Plaintiffs] may not.” *Id.* at 1273. Accordingly, absent a clear legislative directive, a claimed violation of section 626.916 cannot give rise to a private cause of action. *Patel v. Catamaran Health Sols., LLC*, No. 15-CV-61891, 2016 WL 5942475, at *5 (S.D. Fla. Jan. 14, 2016) (“Plaintiffs cannot attempt to make an end-run around ‘the Florida legislature’s decision to withhold a statutory cause of action for a violation of the insurance code.’”) (quoting *Lemy*, 885 F. Supp.2d at 1272-73).

For these reasons, Iaffaldano has not established that a private right of action exists for any of the RESPA violations she alleges have occurred, however, even if Iaffaldano could somehow bootstrap Florida's section 626.916 into her RESPA claim (which in turn relies upon 12 C.F.R. § 1024.37), her RESPA claim would still fail for the reasons set forth below.

B. Iaffaldano Cannot Establish a Violation of 12 C.F.R. § 1024.37

Insurance Code section 626.916 does not apply in this case. Iaffaldano asserts that Proctor's rates were not bona fide and reasonable under RESPA and 12 C.F.R. § 1024.37 because Proctor failed to comply with Florida Insurance Code section 626.916. Section 626.916(1)(a) states,

The full amount of insurance required must not be procurable, after a diligent effort has been made by the *producing agent* to do so, from among the insurers authorized to transact and actually writing that kind and class of insurance *in this state*, and the amount of insurance exported shall be *only the excess over the amount so procurable from authorized insurers*. Surplus lines agents must verify that a *diligent effort* has been made by requiring a properly documented statement of diligent effort from the retail or producing agent.

Fla. Stat. § 626.916(1)(a) (emphasis added).

There was no evidence in the record that Proctor is a producing or retail agent or that a producing agent or retail agent failed to comply with this statute. Rather, the uncontroverted testimony from Michael Cox and William Hager was that Ross was the producing or retail agent in the subject transactions and Proctor was the surplus lines agent. 2018.01.31 Trial Tr., DE 157 at 89:1-14 & 2018.02.01 Trial Tr., DE 158 at 53:6-13. However, Iaffaldano provided no evidence as to whether or not Ross complied with Section 626.916. Nor did Iaffaldano offer any evidence that Proctor failed to verify Ross' conduct. Rather, the evidence offered by Iaffaldano was that Proctor did not approach certain admitted insurers in Florida; but Proctor had no such

obligation to do so under Section 626.916 as the surplus lines agent. That was the responsibility of Ross, and there is no evidence that Ross did not comply. Further, per the uncontroverted testimony of Michael Cox, the policies at issue here were not executed or delivered in Florida nor to a Florida resident—another prerequisite for section 626.916 to apply. *See* 2018.01.31 Trial Tr., DE 157 at 111:10-112:9; *see also Adolfo House Distribution Corp. v. Travelers Prop. & Cas.*, 165 F. Supp. 2d 1332, 1335 (S.D. Fla. 2001). Rather, the policies were delivered to the insured Sun West, a California entity, in California. *See* 2018.01.31 Trial Tr., DE 157 at 111:10-112:9. Counsel for Iaffaldano, when pressed by the Court, was unable to provide any case law for the proposition that an insurance policy, delivered and entered into under the circumstances of this case, falls within the scope of section 626.916. Accordingly, Iaffaldano cannot rely upon section 626.916 to support her claim.

There is no evidence that Proctor's rates were unreasonable under 12 C.F.R. § 1024.37. Iaffaldano claims that the rates charged to her by Sun West for force-placed insurance were not bona fide and reasonable. However, Iaffaldano has not presented any evidence to establish that there were any other lower available rates for force-placed insurance for her home in either 2014 or 2015. The only evidence in the record is from (1) Sun West's CEO, Pavan Agarwal, who testified that Sun West's servicing manager was instructed to find the lowest premium available, that Sun West's servicing manager obtained several bids, and that Proctor's bid was the lowest, which resulted in the selection of Proctor (*see* 2018.01.31 Trial Tr., DE 157 at 65:13-66:13, 69:9-12 and Sun West's Ex. 22); (2) Michael Cox of Proctor who testified that the premium charged by Proctor could be higher or lower than the rates filed by American Specialty Insurance Company with the Florida Insurance Commissioner (Proctor's Ex. 8) depending on certain circumstances (*See* 2018.01.31 Trial Tr. 115:20-116:11 and 2018.02.01 Trial Tr. 79:23-80:13);

and (3) Proctor's expert, William Hager, who testified that the rates charged by Proctor were bona fide, fair and reasonable in comparison to other force-placed insurers and that Proctor's rates could potentially be lower than ASIC's rates. *See* 2018.02.01 Trial Tr., DE 158 at 20:16-21:22, 33:7-20 & 51:7-19. Further, both Mr. Cox and Mr. Hager testified that even if Proctor's rates were higher than ASIC's rates, it would only be a marginal difference. *See* 2018.01.31 Trial Tr., DE 157 at 123:13-124:10 & 2018.02.01 Trial Tr., DE 158 at 44:15-21 & 51:7-19. This evidence is insufficient to meet Iaffaldano's burden of proof that Proctor's rates were not bona fide and reasonable.

Nor has Iaffaldano presented any evidence that Proctor's rates were affected by the insurance tracking services Sun West obtains from Proctor. The evidence established that Sun West and Proctor came to terms on the insurance rate premiums before Sun West ever agreed to obtain insurance tracking services. *See* 2018.01.31 Trial Tr., DE 157 at 80:12-18, 93:24-95:17 & 116:16-118:5. Further, Michael Cox testified that the insurance premium rates charged by Proctor are in no way tied to Sun West's use of Proctor's insurance tracking services. *Id.* Mr. Cox explained that Sun West could terminate the insurance tracking services at any time and that the termination would not result in any change to the insurance premium rates. *Id.* This evidence was uncontroverted.

C. RESPA and 12 C.F.R. § 1024.17 do not Apply Because There is no Evidence an Escrow Account Existed in 2014 and 2015

Iaffaldano has asserted that Sun West was obligated to advance monies to her voluntary insurance carrier, People's Trust, in 2014 and 2015 because Iaffaldano had an escrow account and, as a result, Sun West's alleged failure to disburse funds to People's Trust violated 12 C.F.R. § 1024.17. However, Iaffaldano has failed to present any evidence to establish that an escrow

account actually existed in 2014 and 2015. *See* 2018.01.31 Trial Tr., DE 157 at 11:2-6, 47:22-48:2 & 2018.02.01 Trial Tr., DE 158 at 81:23-82:20. Mr. Sydney Fernandez, testifying on behalf of Sun West, explained that Iaffaldano elected in a written disclosure form (Sun West Ex. 1) not to have Sun West set aside funds for taxes and insurance and, instead, opted to pay those fees herself. *See* 2018.01.31 Trial Tr., DE 157 at 48:17-49:4. There is no evidence that this election ever changed. Mr. Fernandez also testified, without contradiction, that Iaffaldano did not have an escrow account or a set aside for taxes and insurance. It is therefore unsurprising that Sun West did not enter into an arrangement with Iaffaldano wherein she would make payments into an escrow account—Iaffaldano simply owed Sun West a debt. Iaffaldano did not make principal payments to Sun West wherein Sun West, after receiving such payments, would deduct from the principal balance of those payments an amount payable to an insurer or taxing authority.

While a trust account was established in June 2016 when Sun West received ELMORE funds, that trust account was created approximately a year after Sun West force-placed coverage in 2015. *See* 2018.01.31 Trial Tr., DE 157 at 62:17-63:5. Further, when taxes and insurance came due after the establishment of that trust account, Mr. Fernandez testified, again without contradiction, that Sun West advanced those costs from the trust account. *See* 2018.01.31 Trial Tr., DE 157 at 60:18-61:5. Thus, there is no evidence in the record to establish a violation of 12 C.F.R. § 1024.17.

For all of the reasons set forth above, as to Iaffaldano's Count I against Sun West, judgment is entered in favor of Sun West and against Iaffaldano.

III. FINDINGS OF FACT AS TO DEFENDANT PROCTOR

A. Sun West and Proctor Entered into a Business Relationship in Late 2010 or early 2011.

1. Sun West is a mortgage servicer. *See* Trial Tr. vol. 1, 12:24-25.⁴

2. Proctor is an insurance intermediary. As such, Proctor was the wholesale broker for select insurance carriers, providing sales, marketing, service, administration, underwriting, and claims handling services on a commission-basis. Proctor also offers loan tracking services to lenders and mortgage services on a fee-for-service basis. Proctor is not an insurance carrier and, therefore, it does not take on the risk of loss. *See* Trial Tr. vol. 1, 33:9-12; 88:10-18; 89:2-10.

3. In 2010, Sun West sought to obtain bids from companies that could provide insurance tracking services as well as force-placed insurance for mortgaged properties it serviced. *See* Trial Tr. vol. 1, 65:7-66:13. Sun West requested that bidding companies provide the lowest possible price they could charge for these services. *See* Trial Tr. vol. 1, 65:13-16. Sun West wanted the lowest cost lender-placed insurance product available in the market for two reasons. First, Sun West benefits from the lower cost because it has to bear the cost of the premium when customers do not reimburse it for such costs. Second, Sun West's customers benefit when they repay a lower cost premium. *See* Trial Tr. vol. 1, 65:17-66:2. There is no benefit to Sun West for procuring an expensive lender-placed insurance product. *See* Trial Tr. vol. 1, 66:3-5.

4. In December 2010, Sun West's retail insurance agent, Ross Diversified, contacted Proctor to request a quotation for lender-placed insurance and tracking services. Proctor

⁴ "Trial Tr. vol. 1" refers to the Jan. 31, 2018 trial transcript, and "Trial Tr. vol. 2" refers to the Feb. 1, 2018 trial transcript.

submitted a proposal to Sun West for lender-placed insurance and loan tracking services. *See* Trial Tr. vol. 1, 88:19-90:7.

5. The retail insurance agent, Ross Diversified, served as Sun West's broker in the transaction, providing sales and service support to Sun West. Proctor served as the wholesale insurance agent for the insurer in the placement of its lender-placed insurance policies, providing sales, marketing, service, administration, underwriting, and claims handling services to the insurer. *See* Trial Tr. vol. 1, 88:19-90:7.

6. Proctor attempted to locate an insurance product in the admitted market. *See* Trial Tr. vol. 1, 84:11-14; 84:25-85:3. Proctor ultimately located an insurance product in the surplus lines market with Ironshore Europe Limited. *See* Trial Tr. vol. 1, 88:14-16.

7. Sun West determined that the policy Proctor procured provided the best rates for lender-placed insurance, and Sun West decided to enter into a business relationship with Proctor. *See* Trial Tr. vol. 1, 66:12-13; 69:9-12; 89:22-24.

8. In January of 2011, Sun West and Proctor entered into a Service Agreement. Pursuant to the terms of the Service Agreement, Sun West pays Proctor to provide insurance tracking services on a fee schedule. *See* Trial Tr. vol. 1, 80:12-18; 95:6-10. As for the lender-placed insurance, Sun West only pays for the insurance premium. *See* Trial Tr. vol. 1, 53:3-13. Proctor receives commissions from the insurance carriers it represents, not Sun West. *See* Trial Tr. vol. 1, 52:3-17; 80:12-18; 88:19-90:7. Proctor receives no kickbacks from Sun West for its lender-placed insurance services. *See* Trial Tr. vol. 1, 52:14-17.

9. Proctor's offer to provide the force-placed insurance at set rates was not tied to Proctor's offer to provide insurance tracking services. *See* Trial Tr. vol. 1, 94:14-17; 117:24-118:5. If Sun West terminates the tracking services pursuant to the terms of the Service

Agreement, the insurance premiums would not be affected in any way. *See* Trial Tr. vol. 1, 118:3-5.

10. The initial lender-placed insurance master policy (“Master Policy”) became effective January 1, 2011 through May 31, 2011, and has been renewed annually each subsequent year with substantially the same terms and conditions as the expiring policy. *See* Trial Tr. vol. 1, 80:12-18; 95:6-10. The policy and each renewal were delivered to Sun West in California. *See* Trial Tr. vol. 1, 111:13-112:9.

11. Proctor understood that it was bound to the terms of the Service Agreement with Sun West. *See* Trial Tr. vol. 1, 95:15-96:4. Sun West is bound to the terms of the Master Policy. Proctor did not have any discretion to place or exclude defaulted properties under the Master Policy. *See* Trial Tr. vol. 1, 95:15-96:4.

12. Other than for loan tracking services, Sun West did not compensate Proctor for any sales, marketing, service, administration, underwriting, or claims handling services. Sun West did not compensate or pay any commission to Proctor for the procurement of the Master Policy. Similarly, Sun West did not receive any commissions, “kickbacks,” or any other improper payments from Proctor or the insurance carrier. *See* Trial Tr. vol. 1, 52:3-17; 69:13-19; 93:16-18.

13. The Master Policy: (1) allows Sun West to add properties without additional underwriting; (2) includes a rate schedule based on the location of the property; (3) allows Sun West to date the start of coverage to the expiration of the borrower’s prior policy coverage to avoid any gap in coverage; (4) allows Sun West to cover properties for which no other insurance would be available because of the risk, i.e., vacant properties or properties that have already experienced a loss; (5) allows Sun West to cover properties with reverse mortgages; (6) requires

that Sun West pay the premium associated with each lender-placed policy for the policy year whether or not Sun West collects or attempts to collect the premium from the borrower; and (7) permits Sun West to backdate cancellation to the date alternative coverage was secured by the borrower with a pro-rata refund of unused premiums. *See* Trial Tr. vol. 1, 51:5-9; 58:16-18; 90:6-92:14; 95:11-95:4; 97:9-14; 114:17-115:14.

14. The ability to backdate coverage under the Master Policy protects the collateral securing the mortgage. Due to the delinquent status of Iaffaldano's voluntary insurance policy, for example, in the event of an otherwise covered loss during a period of time in which Iaffaldano's property insurance had lapsed, under the Master Policy, the insurance coverage could be backdated and a claim could be paid. *See* Trial Tr. vol. 1, 114:17-115:14.

B. The Master Policy's Premium Rates Fall within the Range of Permissible Rates Filed With, and Approved By, the Florida Office of Insurance Regulation.

15. The Court took judicial notice of the rates filed by the admitted carrier American Security Insurance Company ("ASIC"). *See* Proctor's Exhibit 8; *see also* Trial Tr. vol. 1, 103:4-103:9, (taking judicial notice of the calculation of the base rate per \$100 of insured coverage found at page 9 of Proctor Exhibit 8); 103:15-104:6 (taking judicial notice of the deductibles found at page 13 of Proctor Exhibit 8); 104:7-104:18 (taking judicial notice of the rate modification schedule found at page 15 of Proctor Exhibit 8); 104:19-105:1 (taking judicial notice of the base rates found at page 39 of Proctor Exhibit 8); 105:2-105:10 (taking judicial notice of the territory codes found at page 54 of Proctor Exhibit 8).

16. According to the documents filed with, and approved by, the Florida Office of Insurance Regulation ("FOIR"), ASIC's rates for comparable hazard insurance on Iaffaldano's property would range from \$1.03 to \$1.71 per \$100 of insured coverage. *See* Trial Tr. vol. 1,

110:6-22; Trial Tr. vol. 2, 31:16-23. In other words, ASIC's rates can vary anywhere between \$1.03 to \$1.71 per \$100 of insured coverage, depending on the source of the loan, the loan portfolio delinquency mix, the management of insurance tracking, and the functionality of automated payments and transmissions. *See* Trial Tr. vol. 1, 109:17-110:5. After adding the required FIGA tax, ASIC's rates could have been as high as approximately \$1.75 per \$100 of insured coverage. *See* Trial Tr. vol. 2, 31:24-32:24.

17. The Master Policy's premium rates for insurance coverage in Florida are between the low-end and high-end of ASIC's admitted rate range.⁵ Stated differently, had Proctor obtained lender-placed insurance coverage with ASIC or another admitted carrier, it is possible the ASIC rates could have been either higher or lower. *See* Trial Tr. vol. 1, 116:8-11. As it is possible that the rates of an admitted carrier could have been higher than those of the Master Policy, Iaffaldano's claimed damages being the difference in the insurance premiums are nonexistent.

C. Iaffaldano Failed to Maintain Hazard Insurance and Pay Her Property Taxes.

18. The Court incorporates by reference the findings of fact in Section I. Succinctly stated, Iaffaldano obtained a reverse mortgage from Sun West, she defaulted under the terms of that mortgage, Sun West initiated foreclosure proceedings, Sun West purchased forced-place insurance through Proctor during the pendency of Iaffaldano's foreclosing proceedings, and Iaffaldano eventually brought her account current with Sun West.

⁵ The Court sealed the transcript at Proctor's request, without objection, because the rates it provided are proprietary and confidential business information.

D. The Premiums Charged for the Force-Placed Insurance at Issue are Reasonable and Otherwise Comply with Applicable Rules and Regulations, and Industry Standards.

19. William D. Hager, an expert in the insurance industry,⁶ gave expert testimony pursuant to Federal Rule of Evidence 702. *See* Trial Tr. vol. 2, 13:4-9.

20. Mr. Hagar testified that forced-placed insurance policies generally have higher premiums than voluntarily-placed insurance policies, due in large part to the fact that the failure to pay insurance and property taxes is one of several indicia of neglect, which in turn means that the insurance policy bears a higher risk of loss. *See* Trial Tr. vol. 2, 34:1-22. Mr. Hager also explained the practical reality that insurers writing force-placed insurance policies do not enjoy the benefit of underwriting the risk, which is another factor supporting the higher risk of loss and consequent higher premium. *See* Trial Tr. vol. 2, 35:13-17.

21. Mr. Hagar testified that it is not uncommon in the insurance industry, because of the increased risk present, for force-placed insurance premiums to be four to ten times greater than voluntarily-placed policies. *See* Trial Tr. vol. 2, 33:7-16. Mr. Hager concluded that the rate per \$100.00 of insured value charged to Iaffaldano under the master policy was reasonable and consistent with the significantly higher risk being insured. *See* Trial Tr. vol. 2, 20:8-25; 36:13-15.

22. Mr. Hagar also compared the rate charged to Iaffaldano to the public rate filings of an admitted insurer providing force-placed insurance in the admitted market, further

⁶ Mr. Hagar has worked extensively in the insurance industry and related fields in several notable positions: Chief Deputy to the Iowa Insurance Department (1976 to 1978); General Counsel and Director of Government Relations, American Academy of Actuaries (1980 to 1983); National Association of Insurance Commissioners (NAIC) (1986-1990); Governor-Appointed Insurance Commissioner in the State of Iowa (1986-1990); President and CEO of National Council on Compensation Insurance (NCCI) (1990-1998); and Member, Florida House of Representatives (2010-present). In addition, Mr. Hagar has an undergraduate degree in mathematics education, a master's degree, and a juris doctorate. Mr. Hagar is an insurance lawyer licensed to practice law in Florida, Illinois, and Iowa. Trial Tr. vol. 2, 7:5-12:6.

reinforcing his conclusion that the premium rates for the Master Policy are reasonable. *See* Trial Tr. vol. 2, 20:16-21:22. ASIC's rates for comparable hazard insurance on Iaffaldano's property would range from \$1.03 to \$1.71 per \$100 of insured coverage. *See* Trial Tr. vol. 2, 31:16-23. After adding the required FIGA tax, ASIC's rates could have been as high as approximately \$1.75 per \$100 of insured coverage. *See* Trial Tr. vol. 2, 31:24-32:24. Mr. Hager testified that the rate Proctor procured fell comfortably within the bookends of ASIC's rate, which supported his conclusion that the Proctor rates were quite reasonable. Trial Tr. 30:14-16; 33:7-34:24.

23. Mr. Hager also opined that it was reasonable to shop for this particular insurance product in the surplus lines insurance market. As Mr. Hager explained, although public policy considerations might have favored admitted carriers decades ago, there are no longer concerns about the financial "standing" of surplus lines insurers in the marketplace *See* Trial Tr. vol. 2, 27:2-5. In fact, as Mr. Hager testified, "[t]oday the surplus lines market insurers by and large are substantially superior to the cross-section of the domestic [admitted] carriers." *See* Trial Tr. vol. 2, 27:6-8. Mr. Hager explained that each of the top 25 surplus insurers in the State of Florida, including an insurance carrier that provided the Master Policy to Sun West in the extant case, Ironshore, are all AM Best rated by an objective third party evaluator, many of which are financially more stable than the admitted carriers. *See* Trial Tr. vol. 2, 28:19-30:2.

24. Mr. Hager testified that the higher premium rates could be, at least in part, dictated by Section 626.916 of the Florida Statutes, which Mr. Hager notes requires that the premiums charged in the surplus market must be greater than the majority of the admitted carrier rates. Trial Tr. vol. 2, 33:17-20. Ultimately, Mr. Hager concluded, Proctor met its obligations and responsibilities as to the procurement of insurance at issue. *See* Trial Tr. vol. 2, 36:21-25; 37:1-3. The premiums charged for the forced placed insurance at issue are reasonable and Proctor

otherwise complied with applicable rules, regulations, and industry standards. Trial Tr. vol. 2, 36:16-37:3.

25. Iaffaldano did not retain an expert.

26. The Court finds Mr. Hager's testimony credible and, because it is uncontroverted on the record, the Court adopts his testimony and opinions in their entirety.

IV. CONCLUSIONS OF LAW AS TO DEFENDANT PROCTOR

27. On December 20, 2017, the Court adopted the Magistrate Judge's Report and Recommendation to dismiss Iaffaldano's RESPA count (Count I) against Proctor, leaving only Count II remaining against Proctor.

28. Count II is a claim for tortious interference with a business relationship. As discussed below, the Court finds in Proctor's favor as to Count II.

A. The Evidence Does Not Support a Claim for Tortious Interference Against Proctor.

29. To prevail on her claim for tortious interference with a business relationship against Proctor, Iaffaldano must establish: (1) the existence of a business relationship⁷ between her and Sun West; (2) Proctor's knowledge of her business relationship with Sun West; (3) Proctor's intentional and unjustified interference with her business relationship with Sun West; and (4) damage caused as a result of the breach of the relationship. *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So. 2d 812, 814 (Fla. 1994).

⁷ There is no authority that Iaffaldano's mortgage relationship is the type of "business relationship" implicated in tortious interference with a business relationship. The Court enters judgment in Proctor's favor on this basis alone, however, in the alternative and in the interest of addressing the greater substance of Iaffaldano's claims, the Court, enters judgment in Proctor's favor for the remaining reasons specified in this Order.

30. Here, Iaffaldano's tortious interference claim fails because the record evidence shows that Proctor did not *intentionally* or *unjustifiably* interfere with Iaffaldano's relationship with Sun West.

31. Proctor did not have the specific intent to interfere. The Court finds that Iaffaldano presented no evidence that Proctor had the requisite specific intent to interfere with Iaffaldano's relationship with Sun West. *See Fiberglass Coatings, Inc. v. Interstate Chem., Inc.*, 16 So. 3d 836, 838 (Fla. Dist. Ct. App. 2009) (holding that the third element of a tortious interference claim "requires a plaintiff to prove that the defendant manifested a specific intent to interfere with the business relationship"). The actor's intent is a necessary element of this cause of action, and conduct is not tortious "even if it has the unintended effect of deterring the third person from dealing with the other." *Florida in Gossard v. Adia Servs., Inc.*, 723 So. 2d 182, 185 n.1 (1998). As there is no evidence of an intentional and unjustified interference with Iaffaldano's relationship with Sun West, the Court enters judgment in Proctor's favor on that basis. While the Court's analysis could end here, the Court will address the remaining deficiencies in Iaffaldano's claim.

32. Proctor did not unjustifiably interfere with Iaffaldano's relationship. Analysis of the justification element in a tortious interference claim requires an examination of Proctor's conduct, its motive, and the interests it sought to advance. *See Sec. Title Guarantee Corp. v. McDill Columbus Corp.*, 543 So. 2d 852, 855 (Fla. Dist. Ct. App. 1989). "Actions do not constitute an intentional and unjustified interference if they were taken in lawful protection of a legitimate interest and not solely out of malice." *Christian Tennant Custom Homes, Inc. v. EBSCO Gulf Coast Dev., Inc.*, 2017 WL 4102458, at *8 (S.D. Fla. Sept. 15, 2017). Put simply,

Proctor's "activities to promote [its] own financial, and contractual interests are entirely non-actionable." *Ethyl Corp. v. Balter*, 386 So. 2d 1220, 1225 (Fla. Dist. Ct. App. 1980).

33. The insurance industry is an extremely competitive market, Trial Tr. vol. 1, 96:11-14, and "competition for business is not per se an actionable interference even though it is intentional." *See Wackenhut Corp. v. Maimone*, 389 So. 2d 656, 657-58 (Fla. Dist. Ct. App. 1980). Proctor competes in the industry by providing affordable rates and quality services. Trial Tr. vol. 1, 96:15-22. Proctor did not tortiously interfere, but instead provided a service that benefited and aided the continuity of the relationship between Sun West and Iaffaldano. The Court finds that Proctor was justified to enter into the Service Agreement with Sun West, whereby Sun West could obtain lender-placed insurance and tracking services for mortgaged properties.

34. Moreover, the Court agrees with Mr. Hagar that Proctor acted appropriately as a wholesale broker when it entered into the Service Agreement with Sun West to provide lender-placed insurance and tracking services. Here, Proctor merely submitted an offer in response to Sun West's invitation to provide lender-placed insurance and tracking services, and that is not actionable under Florida law. *See Marquez v. PanAmerican Bank*, 389 So. 2d 656, 658 (Fla. Dist. Ct. App. 2006) (holding that the defendant's submission of an offer pursuant to an invitation was not an actionable or unjustified interference as a matter of law).

35. Once the parties entered into the service agreement, Proctor was bound to its terms, and did not have discretion to place or exclude qualified properties from the Master Policy. *See* Trial Tr. vol. 1, 95:15-96:4.

36. There was no evidence adduced during trial that Sun West breached its agreement with Iaffaldano. In fact, Iaffaldano was Sun West's customer until approximately January 2017,

when after years of delinquency, Iaffaldano's reverse mortgage reached a 90% loan to maximum claim ratio and HUD required Sun West to transfer to the loan to HUD. *See* Trial Tr. vol. 1, 10:2-8.

37. Sun West had a contractual right under the reverse mortgage with Iaffaldano to issue force-placed insurance in order to protect the collateral if Iaffaldano did not maintain continuous insurance coverage. Sun West invoked this right after having twice advanced funds to continue her voluntary insurance prior to instituting foreclosure proceedings. *See* Joint Pretrial Stipulation, DE 132 at § V, ¶ 2 and Sun West's Exhibit 79; *see also* Trial Tr. vol. 1, 56:6-18. That was Sun West's decision to make under the terms of the mortgage agreement.

38. The Court finds that the greatest interference with Sun West was Iaffaldano's own failure to comply with the terms of her mortgage agreement; specifically, Iaffaldano did not pay taxes and insurance even though the terms of her reverse mortgage required her to do so. Sun West advanced funds to pay for taxes and insurance on behalf of Iaffaldano who agreed to pay back the advanced funds, only to default under that agreement as well.

39. The Court also rejects Iaffaldano's theory of liability premised on the notion that the lender-placed insurance premiums charged to Iaffaldano were unreasonable for the reasons explained by Mr. Hager, whose opinions the Court finds credible and accepts in their entirety.⁸

Accordingly, for all of the reasons set forth above, as to Iaffaldano's Count II against Proctor, judgment is entered in favor of Proctor and against Iaffaldano.

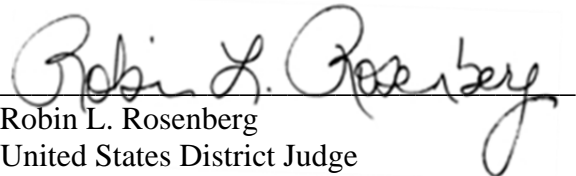
IV. RULING

For all of the foregoing reasons, Iaffaldano has failed to prove her claims by a

⁸ At trial, Iaffaldano raised several objections against Mr. Hager's testimony on the grounds that his testimony was outside the scope of his expert report. The Court overrules those objections.

preponderance of the evidence and Iaffaldano's claims fail as a matter of law. Judgment shall be entered by separate order in favor of both Defendants, and Iaffaldano shall take nothing from this action. Defendant's Motion to Seal References to Rates [DE 161] is **GRANTED** insofar as Iaffaldano is ordered to file only redacted copies referencing such rates in the court file.⁹ Defendants shall submit proposed final judgments to the Court in Microsoft Word format within two (2) business days of the date of rendition of this Order. The Defendants' pending motions for judgment on partial findings [DE 145, 146] are **DENIED AS MOOT**. The Clerk of the Court is directed to **CLOSE THIS CASE**.

DONE AND ORDERED in Chambers, Fort Pierce, Florida, this 20th day of February, 2018.


Robin L. Rosenberg
United States District Judge

Copies furnished to all counsel of record.

⁹ To the extent any Defendants seeks additional relief in connection with the Motion to Seal, such request is denied without prejudice for the Motion to be renewed, if necessary, in light of the updated status of the court file and evidentiary record.