IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

LYDIA NELLIS and PATRICK NELLIS,
for themselves and all others similarly situated,
Plaintiffs-Appellees,

vs.

Ct. App. No. 29,295
(D. Ct. No. D-202-CV-2003-02564)

FARMERS INSURANCE COMPANY OF ARIZONA,
Defendant-Appellant.

Appeal from the Second Judicial District Court
Bernalillo County, New Mexico
The Honorable Linda M. Vanzi

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CERTIFICATE OF COMPLIANCE

The body of the attached brief exceeds the 35-page limit set forth in Rule 12-213(F)(2) NMRA. As required by Rule 12-213(G) NMRA, we certify that this brief complies with Rule 12-213(F)(3) NMRA, in that the brief is proportionately spaced and the body of the brief contains 10,968 words. This brief was prepared and the word count determined using Microsoft Office Word 2003.

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I.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal challenges the district court's $84 million judgment against Farmers Insurance Company of Arizona ("Farmers" or "Defendant") and in favor of a certified class of insureds who suffered no injury, who knowingly and voluntarily agreed to pay the monthly service charges at issue, and who received the full benefits of their bargains.

Plaintiffs Patrick and Lydia Nellis base their class action lawsuit on their novel and expansive interpretation of the term "premium" in their insurance policies and the New Mexico and Arizona Insurance Codes. They argue, and the district court agreed, that the plain meaning of "premium" encompasses not only consideration for insurance against risk, as commonly understood, but also the service charges associated with an optional payment plan that allows them to pay their insurance premium on a monthly basis (rather than up front and in full).

Critically, a separate company, Prematic Service Corporation (Nevada) ("Prematic"), offers this optional payment plan. Farmers' insureds who choose to pay their premiums on a monthly basis enter into a separate agreement with Prematic, in which the customers agree to pay Prematic a monthly service charge, and Prematic agrees to forward the premiums on behalf of its customers to Farmers. Although *Prematic* disclosed the service charge and itemized it from the premium in the Prematic Agreement and in its monthly invoices, Plaintiffs contend

that *Farmers* was required to disclose the service charges in the insurance policy. Plaintiffs essentially claim that the service charge was disclosed on the wrong piece of paper.

Plaintiffs and the class knowingly and voluntarily agreed to this arrangement, but they seek to abrogate their contractual obligations to Prematic and attempt to secure a "free" monthly payment option. They demand all of the benefits of their contract with Prematic without any of the corresponding obligations. The district court agreed and held that Farmers insureds who entered into the Prematic Agreement in New Mexico and Arizona were entitled to pay their insurance premiums monthly for *no additional charge*. The court ordered Farmers to refund *all* of the Prematic service charges, for a total judgment of $84,703,438 (plus post-judgment interest). The district court committed several reversible errors in imposing this windfall judgment:

First, the undisputed facts demonstrate that there was no breach of any contract. Farmers provided the stated insurance coverage in exchange for the quoted premium. Prematic—not Farmers—collected and retained the disputed service charge, and Prematic—not Farmers—provided monthly premium-forwarding services in exchange for this charge.

Second, the Prematic service charges are not "premium" as a matter of contract interpretation or statutory construction, and the disclosure of these charges

in the Prematic Agreement and the monthly invoices (as opposed to the declarations page of Plaintiffs' insurance policy) does not support a claim for breach of contract. Only two years ago, this Court considered—and rejected—Plaintiffs' core theory in a materially identical action, *Nakashima v. State Farm Mutual Automobile Insurance Co.*, 2007-NMCA-027, 141 N.M. 239, 153 P.3d 664. The judgment here is irreconcilable with *Nakashima*.

Third, even if this Court were to reach a different conclusion on the meaning of "premium" in this case, it still must reverse the judgment because: (a) the declarations page incorporated the Prematic Agreement and the service charges by reference; (b) Farmers substantially complied with the law because Plaintiffs received frequent and conspicuous disclosure of the Prematic service charge, and the $84 million judgment is an unjust sanction; and (c) Plaintiffs' voluntary payment of the charges with full knowledge of all relevant facts precludes them from recovering these sums as damages.

Fourth, any alleged "breach" or technical violation of the Insurance Code did not cause any harm to Plaintiffs or the class because they received the full benefit of their bargain—the convenience of paying their premium on a monthly basis rather than up front and in full.

Fifth, if this Court does not reverse the judgment in its entirety, it should, at a minimum, reverse the summary judgment ruling and remand for a trial because

the district court should not have weighed conflicting evidence and resolved factual disputes.

Sixth, separate from the legal errors in its summary judgment ruling, the district court also erred in maintaining this case as a class action given the predominance of individual issues raised by its summary judgment ruling and the irreconcilable conflict between Arizona and New Mexico laws (as interpreted by the district court).

Seventh, the district court should not have ordered *Farmers* to disgorge the full amount of *Prematic*'s service charges as "damages." This ruling allows policyholders to enjoy all of the benefits of these services at no cost, and the court should have offset the value Plaintiffs and the class received from Prematic's services to avoid unjust enrichment.

Eighth, the $84 million judgment violates due process because it is arbitrary, irrational, untethered to any actual harm to Plaintiffs and the class, and a grossly excessive sanction based on a novel, and retrospectively applied, reading of the Insurance Code.

For all of these reasons, this Court should reverse and direct the entry of a new judgment in Farmers' favor. Alternatively, Farmers respectfully requests that this Court order decertification of the class and/or reverse the judgment and remand for a trial on the merits.

II.

SUMMARY OF PROCEEDINGS

A. Summary Of The Facts.

1. The Options Available to Farmers' Insureds to Pay Their Insurance Premiums. Farmers provides automobile insurance coverage to customers in New Mexico and Arizona. As is standard in the insurance industry, Farmers quotes customers a premium for a six-month term of coverage. (R.P.837 ¶1.) That entire six-month premium is typically due in one lump sum at the beginning of each six-month coverage period. (R.P.1725.)

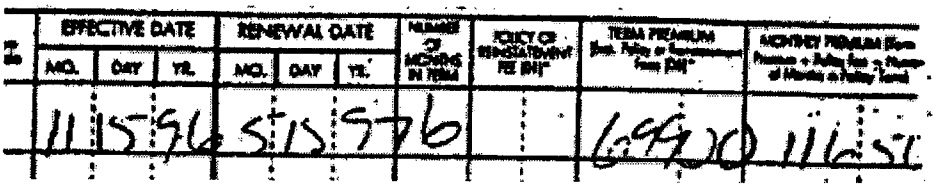
Farmers' insureds have several options to pay their six-month premiums, including: (1) pay the entire sum up front; (2) finance through a third party (*e.g.*, a credit card); or (3) choose the Prematic optional monthly payment arrangement. (R.P.1935.) This case involves the third option.

An insured who selects this option must first enter into a separate written contract with Prematic, a separate company.[1] Through this contract (the "Prematic Agreement") the insured agrees to pay Prematic a monthly service charge plus the

[1] Prematic is not an insurer. (R.P.839 ¶16.) Defendant has no ownership interest in (or contractual relationship with) Prematic. (R.P.744 ¶¶14-15.) Defendant is owned by Farmers Insurance Exchange, Truck Insurance Exchange, and Fire Insurance Exchange (which are ultimately owned by their policyholders). (*Id.*) Prematic, on the other hand, is a wholly owned subsidiary of Farmers Group, Inc. (R.P.744 ¶14), which is not a party to this action and is ultimately owned by the shareholders of Zurich Financial Services, Ltd.

insurance premium due to Farmers each month. (R.P.1935.) Directly below the amount of "Total Monthly Premium," the Prematic Agreement identifies: (a) the amount due for "1 Month's Deposit" (equal to the amount of monthly premium); (b) the amount due for the "1st Month's *Service Charge*"; and (c) the "Amount Due Now"—the total of the monthly premium, the premium deposit, and the first month's service charge.

The Prematic Agreement specifies the six-month term of a customer's Farmers' policy—the "Renewal Date" is six months from the "Effective Date"; the "Number of Months in Term" is "6"; and the Agreement itemizes the six-month "Term Premium" into six equal monthly installments, labeled "Monthly Premium":



(*Id.*) After a customer enters into the Prematic Agreement, Prematic assigns an account number that is different from the Farmers policy number.

It is not possible for Farmers' insureds to pay premiums monthly without first entering into the Prematic Agreement. (R.P.743 ¶7, 1755-56.) Only if a customer enters into the Prematic Agreement and pays a "premium deposit" to Prematic will Farmers issue a declarations page that specifies the Prematic account number, the entire six-month premium, and the word "PREMATIC" in the "Total"

section. "[I]n consideration of the premium deposit" paid to Prematic, Farmers also issues the "Monthly Payment Agreement" endorsement to its standard six-month policy, enabling the customer to pay the six-month premiums on a monthly basis. (R.P.9, 11, 28.) The insured's policy remains a six-month term for other purposes, and the amount of the monthly premium is subject to adjustment only once every six months. (R.P.28.)

The customer then receives monthly invoices directly from Prematic. (R.P.29-30.) These monthly invoices itemize the amount of "premium" due to Farmers and the separate "service charge" owed to Prematic.

2. Plaintiffs Chose the Prematic Arrangement. The Nellises are New Mexico residents who purchased automobile insurance from Farmers in 1991. (R.P.858.) For the first ten years, they chose the standard billing option and paid their six-month premiums up front and in full. (R.P.855, 1734-37.)

In November 2001, Plaintiffs contacted Kimberly Sanchez, their Farmers agent, and explained that they wanted to pay their six-month premiums on a monthly basis. (R.P.837 ¶¶1-6, 855, 1745, 1748-49.) Ms. Sanchez informed Plaintiffs of the Prematic option. She calculated the amount of the six-month premium and then calculated the amounts of the monthly premiums and service

charges. (R.P.838 ¶7, 856.)[2] Plaintiffs chose the convenience of the Prematic arrangement because, according to Mrs. Nellis, it would "fit in [her] budget better." (R.P.864.)

Plaintiffs' arrangements with Farmers and Prematic confirms the sequence detailed above:

- Plaintiffs entered into the Prematic Agreement in 2001. (R.P.855, 1743.)

- "In consideration of the premium deposit" that Plaintiffs paid to Prematic upon entering the Prematic Agreement, Farmers amended their policy with a "Monthly Payment Agreement" endorsement, which converted the standard six-month policy into a series of six automatically renewing one-month policies for payment purposes. (R.P.28.)

- The declarations page of Plaintiffs' insurance policy with Farmers displayed their Prematic account number:

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[2] The amount of monthly service charges varies with the amount of monthly premium. (*Id.*) For customers like Plaintiffs who have multiple car insurance policies or multiple lines of insurance (*e.g.*, home, automobile), Prematic allows them to bundle multiple policies together into one monthly bill and pay a discounted monthly service charge. (*Id.*; *see also* R.P.29, 855.)

POLICY NO: 16 14521-15-79
POLICY EDITION: 01
EFFECTIVE DATE: 07-31-2002
EXPIRATION DATE: 01-31-2003
EXPIRATION TIME: 12:00 NOON Standard Time
PREMATIC NO HQ00246

AGENT: Kimberly B Sanchez
AGENT NO: 16 10 323 AGENT PHONE: (505) 275-1000

(R.P.9.)

- The declarations page also identifies "PREMATIC" next to the "Total" due for the six-month policy period, rather than a dollar amount, and the "Fees" line is blank:

POLICY ACTIVITY (Submit amount due with enclosed invoice)

$	Previous Balance	
244.90	Premium	
	Fees	ANY "TOTAL" BALANCE OR CREDIT $7.00 OR LESS WILL BE APPLIED TO YOUR NEXT BILLING. BALANCES OVER $7.00 ARE DUE UPON RECEIPT.
	Payments or Credits	
PREMATIC	Total	

(*Id.*)

- From January to December 2002, Plaintiffs received monthly invoices from Prematic (not Farmers) that itemized the monthly Farmers insurance premium and the Prematic monthly service charge:

Vehicle 145211578 1999 OLDSMOBILE	Premium	11-15 to 12-14	$58.07
Vehicle 145211579 1995 GMC	Premium	11-15 to 12-14	$40.61
	Service Charge		$4.00
	Minimum Amount Due		$101.41

(R.P.29.) Plaintiffs acknowledged that there was a service charge associated with

each monthly bill they received from Prematic. (R.P.860, 840 ¶¶21, 25.)

- Plaintiffs were aware that they could have stopped paying the service charges at any time by going back to their prior payment arrangement. (R.P.860, 864.)

In 2003, Plaintiffs switched their automobile insurance from Farmers to GEICO. (R.P.863.) With GEICO, as they had with Farmers, Plaintiffs chose an optional payment plan that allowed them to pay their premiums monthly for an additional charge. (R.P.866-67.)

B. Procedural History.

1. Pleadings and Class Certification. Plaintiffs filed this action on April 10, 2003, alleging one cause of action—breach of contract—on behalf of a putative class of Farmers' insureds in New Mexico and Arizona. (R.P.1.) Plaintiffs contend that Farmers "breached" the New Mexico and Arizona insurance codes by "charging a premium (i.e. service charges) which is not specified in its policies," and that these alleged violations breached the insurance contract. (R.P.21.)

Plaintiffs moved for class certification a few months later. (R.P.218.) The district court granted the motion and certified the following class:

> All owners of individual insurance polices (including lapsed or cancelled policies) issued by Farmers Insurance Company of Arizona in New Mexico and Arizona; who have purchased such insurance on a monthly basis; and who have, within six years of the commencement of this action, paid service charges in connection with their Farmer's policy.

(R.P.634.)

2. Summary Judgment. On January 28, 2005, the district court granted Plaintiffs' motion for summary judgment and denied Farmers' cross-motion, holding that Farmers breached the insurance contract by charging undisclosed "premium"—*i.e.*, the Prematic service charges. (R.P.1035.) It concluded that the Prematic charges were "premium" because Plaintiffs and the class paid these amounts in "consideration for insurance" and Farmers "could cancel Plaintiffs' insurance for failure to pay the service charge." (R.P.1039.) The court also ruled that the reference in the declarations page to Prematic next to the "Total" line was "too subtle a reminder for this Court and, presumably, most customers" for the service charges to be incorporated by reference. (R.P.1037.)

3. Prematic's Motion to Intervene. In August 2005, Prematic moved to intervene to protect its interests in this action. (R.P.1299.) The district court denied Prematic's motion (R.P.1458), and this Court affirmed.

4. Motion for Decertification. Farmers moved to decertify the class on the basis that Plaintiffs' claim was no longer amenable to class treatment given the individualized nature of the summary judgment ruling, which hinged on class members' subjective understanding of the references to "Prematic" in their insurance policies. (R.P.1906.) Farmers also argued, as it had in opposing class certification, that the court could not apply New Mexico's definition of "premium"

to Arizona class members because there was a fundamental conflict between the laws of the two states. (R.P.1986; 1/5/05 Hearing Tr. 74-75, 81-82.) The district court denied the motion, holding that "there is no change in the facts or law that mandates decertification." (R.P.2192.)

5. Motion for Reconsideration. In *Nakashima v. State Farm Mutual Automobile Insurance Co.*, 2007-NMCA-027, 141 N.M. 239, 153 P.3d 664, this Court rejected materially identical claims for breach of contract brought by insureds who paid an additional monthly fee for the right to pay their premiums on a monthly basis. Following that decision, Farmers moved for reconsideration of the summary judgment ruling. (R.P.2254.) The district court denied the motion without a hearing, and ruled that "[b]ecause the facts of *Nakashima* and the instant case are so different, *Nakashima* cannot dictate the results in this case." (R.P.2296.)

6. Judgment and Appeal. On December 30, 2008, the district court entered judgment against Farmers in the amount of $84,703,438, plus post-judgment interest accruing at the rate of $14,465 per day since December 5, 2008. (R.P.2306.) Farmers noticed this appeal on January 28, 2009. (R.P.2308.)

III.
IV.
THE DISTRICT COURT ERRED IN DENYING FARMERS' MOTION FOR SUMMARY JUDGMENT

This Court reviews *de novo* the district court's grant of summary judgment.

Self v. United Parcel Serv., Inc., 1998-NMSC-46, ¶6, 126 N.M. 396, 970 P.2d 582. While a district court's decision on a motion for reconsideration of summary judgment is reviewed for an abuse of discretion, *GCM, Inc. v. Ky. Cent. Life Ins. Co.*, 1997-NMSC-052, ¶28, 124 N.M. 186, 947 P.2d 143, once the district court assesses and rules on the merits of such a motion, this Court reviews the facts and law under the same *de novo* standard applicable to the underlying summary judgment ruling. *Selby v. Roggow*, 1999-NMCA-044, ¶10, 126 N.M. 766, 975 P.2d 379. "Where cross-motions for summary judgment are presented on the basis of a common legal issue, this Court may reverse both the grant of one party's motion and the denial of the opposing party's cross-motion and award judgment on the cross-motion." *Grisham v. Allstate Ins. Co.*, 1999-NMCA-153, ¶2, 128 N.M. 340, 992 P.2d 891.

The district court committed several legal errors that require reversal and a new judgment for Farmers: (1) Plaintiffs cannot establish any breach of contract, because Farmers provided the quoted insurance for the quoted price, and Prematic provided monthly premium-forwarding services in exchange for the agreed-to service charge; (2) Plaintiffs cannot assert a derivative "breach" of the Insurance Code as the basis for their claim; (3) Plaintiffs did not and cannot prove the necessary elements of *causation* or *harm*; and (4) Plaintiffs' voluntary payment of

the service charges with full knowledge of all relevant facts bars their claim.[3]

A. Plaintiffs Did Not And Cannot Establish A Breach Of Any Contract.

Plaintiffs assert that Farmers breached its insurance policy contracts by stating one amount of "premium" in the policy but then charging more "premium" (*i.e.*, Prematic's service charge) to policyholders who chose to pay monthly. (R.P.4 ¶21.) But as this Court held in *Nakashima*, the plain meaning of "premium" does not include monthly charges assessed pursuant to a separate agreement for the privilege of paying premium on a monthly basis. And even if the facts of this case compelled a different meaning of "premium" (which would make no sense as a matter of law, statutory construction, contract interpretation, or public policy), the judgment still would fail because Prematic—not Farmers—charged and collected the service fees (which were fully disclosed in the Prematic Agreement and Plaintiffs' monthly invoices), and these fees also were incorporated into Farmers' policies by multiple references to "Prematic."

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[3] Farmers preserved its challenge to the summary judgment order in its Motion for Summary Judgment (R.P.834) and its supporting Reply (R.P.997), its opposition to Plaintiffs' Motion (R.P.894), and its Motion for Reconsideration (R.P.2254) and its supporting Reply (R.P.2284).

1. Farmers Provided Insurance For The Stated Premium, And Prematic Provided Premium-Forwarding Services For The Stated Service Charge.

The district court erred in concluding that there was a breach of contract for the simple reason that Farmers fulfilled its promise of providing insurance to Plaintiffs and the class for the amount of "premium" stated on the policies—and not a penny more. Farmers never charged, collected, or required that insureds incur the Prematic service charges that, according to Plaintiffs, breached the insurance contract. (R.P.9, 11, 29.) Further, Prematic fulfilled its end of the bargain by providing its monthly premium-forwarding services (in exchange for the service charge) pursuant to a separate agreement that Plaintiffs acknowledge is enforceable. (R.P.1352 ("The Plaintiffs do not contend that the service fees are, by their nature, 'illegal' or 'invalid.'"); 1361 (Plaintiffs "have not asserted any claim" challenging the validity of the Prematic Agreement).)

In this case, Plaintiffs effectively seek a "free" monthly payment plan, in which they receive all of the benefits of the optional Prematic arrangement without their obligation to pay a monthly fee. But Farmers does not offer such an option. Plaintiffs cannot evade their separate commitments to pay service charges to Prematic, and this Court should reverse the judgment and order a new judgment in Farmers' favor on this ground alone.

2. Prematic's Monthly Service Charges Are Not "Premium."

At the heart of the district court's analysis of Plaintiffs' breach of contract claim is its erroneous legal conclusion that Prematic's service charges constitute additional, undisclosed insurance "premium." (R.P.1039-40.) This conclusion conflicts with the plain meaning of the term "premium," this Court's binding precedent, and persuasive authority from other jurisdictions.

a. The Plain Meaning Of "Premium" Does Not Include Monthly Service Charges.

Plaintiffs' insurance policy does not define "premium," and the district court's expansive construction conflicts with the "plain and ordinary meaning" of that term. *Nakashima*, 2007-NMCA-027, ¶110; *Davis v. Farmers Ins. Co.*, 2006-NMCA-099, ¶7, 140 N.M. 249, 142 P.3d 17 ("When a term is undefined in the policy, we may look to that term's 'usual, ordinary, and popular' meaning, such as found in a dictionary.").

The New Mexico Insurance Code defines "premium" as "the *consideration for insurance* or for an annuity by whatever name called." NMSA 1978, § 59A-18-3 (1984) (emphasis added). *See also id.* § 59A-1-5 (1984) (defining "insurance" as "a contract whereby one undertakes to pay or indemnify another as

to loss from certain specified contingencies or perils").[4] A policyholder pays "premium" to an insurance company as "consideration ... to indemnify the insured against a specified peril. The amount of premium varies in proportion to the risk assumed." 5 COUCH ON INSURANCE § 69:1, at 69-5 (3d ed. 2009). *See also* WEBSTER'S THIRD NEW INT'L DICTIONARY 1789 (2002) (defining "premium" as "the consideration paid in money or otherwise for a contract of insurance in the form of an initiation fee, an admission fee, an assessment, or a stipulated single or periodic payment according to the nature of the insurance").

Prematic's service charges do not fall within this definition of "premium." As Plaintiffs admitted, these charges were "designed to cover the additional administrative and overhead expense associated with monthly payments." (R.P.744 ¶12.) It is circular and inconsistent with the commonly understood meaning of "premium" to define this term to include separate "service charges" that insureds have chosen to pay to a separate entity for the privilege of paying their insurance premiums on a monthly basis. The service charges are not

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[4] *See also id.* § 59A-18-3 ("Any assessment, or any membership, policy, survey, inspection, service or similar fee or other charge *in consideration for* an insurance or annuity contract *or procurement thereof* is part of the premium." (emphases added)). Arizona defines "premium" as "the consideration *for insurance*, by whatever name called," Ariz. Rev. Stat. Ann. § 20-1103 (emphasis added), and its Insurance Code specifically distinguishes "premium" from installment service charges. *See id.* § 20-267(C).

"premium" because they "are not associated with any sort of transfer or risk, but, instead, cover the costs associated with a payment plan." *Nakashima*, 2007-NMCA-027, ¶20.

b. Binding Precedent From This Court Compels Reversal.

In *Nakashima*, this Court rejected a virtually identical claim brought by the same class counsel in this case. It concluded that the insurer did not breach its insurance contracts by charging a monthly fee to policyholders who elected to pay their premiums on a monthly basis. This Court reasoned that monthly service charges are *not* additional "premium," and the failure to disclose them in the insurance policies did *not* support a claim for breach of contract. 2007-NMCA-027, ¶17.

This decision rests on four independent and compelling grounds, each of which requires reversal here:

First, in this case, as in *Nakashima*, "payment of installment fees is not a prerequisite to obtaining automobile insurance coverage from [the insurer]." *Id.* ¶18. Just as in *Nakashima*, "an individual can obtain insurance coverage without paying the installment fees by paying his or her premium in a lump sum." *Id.* (R.P.743 ¶8, 744 ¶12, 837, 864.) In other words, the monthly payment arrangement is optional and "individuals are in no way obligated to pay the installment fees, aside from their own financial and/or personal preference, [and

thus] the installment fees cannot be considered consideration for the procurement of insurance and are therefore not premium." *Nakashima*, 2007-NMCA-027, ¶18.

Second, mere *references* to monthly payments in the policy do not confer a contractual right to pay monthly independent of the separate agreement to pay service charges. As in *Nakashima*, a reference in the policy to monthly payments "cannot be construed as allowing for installment payments because it *only* appears on the policy *after* a policyholder has entered into an agreement ... regarding installment payments." *Id.* ¶ 11 (emphasis added). (R.P.28.) Plaintiffs conceded that "[i]t was not possible for a Farmers' insured to pay monthly, without [first] going through Prematic." (R.P.743 ¶7.) This Court should not disregard the Prematic Agreement here, just as it was unwilling to disregard the insured's separate agreement in *Nakashima*.

The mechanics and sequence of the Prematic arrangement do not compel a different result. In its summary judgment ruling, the district court placed considerable weight on the fact that Farmers endorsed the policy to amend the term for payment purposes to one month: "because their contract with [Farmers] is *monthly*, it is not clear why Plaintiffs are required to pay a service fee." (R.P.1083 (emphasis added).) But this "monthly" policy language cannot be examined in a vacuum without giving effect to the *entire* transaction. *See Shaeffer v. Kelton*, 95 N.M. 182, 185, 619 P.2d 1226, 1229 (1980) (In construing a contract, "[t]he

instrument must be considered as a whole; every word, phrase or part of the contract should be given meaning and significance.").

By its plain terms, Farmers issued the "Monthly Payment Agreement" endorsement "in consideration of the premium deposit" that insureds pay to Prematic. (R.P.28, 1935.) In short, the Prematic Agreement and premium deposit (which is set forth in the Prematic Agreement) are *conditions precedent* to Farmers amending the policy to a one-month term for payment purposes. If Plaintiffs had *not* entered into the Prematic Agreement and had *not* paid the "premium deposit" to Prematic, Farmers would *not* have issued the "Monthly Payment Agreement" endorsement and Plaintiffs would *not* have been able to pay monthly. (R.P.28, 1935.) Thus, the policy language "cannot be construed as allowing for installment payments" independent of the obligations in the Prematic Agreement. *Nakashima*, 2007-NMCA-027, ¶11.

Third, Farmers' cancellation policy "lends further support to [the] conclusion that installment fees are not premium," *id.* ¶19, because "the policy is not actually cancelled for failure to pay the installment fees, but for failure to pay the premium." *Id.* ¶14. Like the plaintiff in *Nakashima*, Plaintiffs here misstated the record and suggested that Farmers will cancel the policy for nonpayment of the Prematic service charges. (R.P.746 ¶29.) In *Nakashima*, when State Farm received a payment for an amount less than the total due (service charge plus

premium), it first "applie[d] the payment to the installment fee and then the remaining amount to the premium. Depending on the remaining balance owed on the premium, [the insurer] may send out a cancellation notice or it may simply indicate the shortage on the next bill." 2007-NMCA-027, ¶14. Aside from the fact that Prematic administers the payment plan, Farmers' cancellation policy is substantially the same: (1) each month, Prematic subtracted the service charge from the amount paid by the insured; (2) Prematic then forwarded the balance to Farmers to cover the monthly premium installment; and (3) only if the insured ultimately failed to pay 80% of the total premium due would Farmers issue a notice of cancellation. (R.P.901-02 ¶¶29-30.) Thus, Prematic's treatment of partial payments does not "make its installment fees part of the premium." *Nakashima*, 2007-NMCA-027, ¶14.

Fourth, the purpose of the monthly service charges is identical in both cases. As Plaintiffs admit, the Prematic service charges were not associated with the transfer of risk (the commonly understood definition of "premium," *supra* § III(A)(2)(a)), but instead were "designed to cover the additional administrative and overhead expense associated with monthly payments." (R.P.744 ¶12.)

This case is materially indistinguishable from this Court's prior decision in *Nakashima*. If anything, the facts here present an even *stronger* case for the insurer, because a separate company and nonparty—Prematic—charged and

collected the fees at issue pursuant to a separate contract. (R.P.839 ¶17.)

Plaintiffs have attempted to avoid this dispositive holding by citing *Nakashima*'s passing reference to the summary judgment ruling in this case. 2007-NMCA-027, ¶31 (noting that the "monthly payment agreement [in *Nellis*] did not mention a service fee and that there was no evidence that the plaintiff understood a fee would be charged and/or acquiesced to the fee"). But the parties' briefs in *Nakashima* either misstated, or failed to discuss, the material undisputed facts presented through this appeal. The parties also had no incentive to explain the full details of the Prematic arrangement, and this Court did not have the benefit of Farmers' participation or the complete record in this case. As a result, *Nakashima*'s description of this case was incomplete and incorrect.

Part of the confusion is attributable to the district court's narrow focus in this case on the "Monthly Payment Agreement" *endorsement* and its disregard of the Prematic Agreement in the summary judgment and reconsideration rulings. This Court may have interpreted the district court's references to "Monthly Payment Agreement" to mean the Prematic Agreement and misunderstood that this agreement contained no reference to the obligation to pay a service charge. But the district court did not consider the Prematic Agreement,[5] which not only

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[5] (R.P.1036 (citing "Endorsement Number E0022, the *Monthly Payment*

[Footnote continued on next page]

"mention[ed]" the Prematic service charge, it set forth in detail the *amount* of the charge and the *basis* for calculating it. (R.P.1935-36.)

Further, Plaintiffs' insurance agent explained the service charges before Plaintiffs entered into the Prematic Agreement and paid the "deposit" to Prematic. (R.P.856.) With that understanding, Plaintiffs entered into the Prematic Agreement that identified the full amount of premium that would be due over the six-month term of insurance, and the amount of the premium, and the service charge. (R.P.1751-59.) The declarations page of Plaintiffs' insurance policy referenced "PREMATIC" and their Prematic account number (R.P.9, 11), and Plaintiffs received monthly invoices from Prematic that separately itemized the premium and the service charge (R.P.29).[6]

Accordingly, the full record demonstrates that Plaintiffs' monthly payment

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[Footnote continued from previous page]
Agreement," but not the Prematic Agreement, and ruling that "[t]here is no mention of a service fee either in the Monthly Payment Agreement or in the Declarations Page" (emphasis added)).)

[6] Plaintiffs' self-serving deposition testimony as to their lack of knowledge of the service charges (which is refuted by every objective piece of evidence) is insufficient to create a triable question of fact. *See Cent. Mfg. v. Brett*, 492 F.3d 876, 883 (7th Cir. 2007). Nor is their subjective understanding relevant to a breach of contract claim. *Builders, Inc. v. Cabbell*, 95 N.M. 371, 374, 622 P.2d 276, 278 (Ct. App. 1980) (courts "consider the mutually expressed assent and not the secret intent of a party"). At the very least, if there were disputed issues of fact, the proper recourse would be to remand for a trial on this issue. *Self*, 1998-NMSC-046, ¶2.

arrangement with Farmers and Prematic is indistinguishable in all relevant respects from the plan at issue in *Nakashima*. Because the material facts are the same, this Court should reach the identical result here.

c. Other Jurisdictions Distinguish Service Charges From Insurance "Premium."

Several decisions from other states reinforce the conclusion that the Prematic service charges are not "premium" and that Plaintiffs' breach of contract claim fails as a result. For instance, Louisiana courts are "convinced" that a monthly service or installment charge "to cover the additional expenses arising from administering the installment plans" "need not be disclosed on the policy" because they do not fall within the plain meaning of "premium" *Blanchard v. Allstate Ins. Co.*, 774 So. 2d 1002, 1005-06 (La. Ct. App. 2000); *accord Cacamo v. Liberty Mut. Fire Ins. Co.*, 885 So. 2d 1248, 1250, 1256 (La. Ct. App. 2004) (cited in *Nakashima*, 2007-NMCA-027, ¶¶25-26). *See also Cooper v. State Farm Mutual Automobile Insurance Co.*, 190 N.W.2d 350, 351-52 (Mich. Ct. App. 1971) (A monthly "service charge for the privilege of making installment payments" was not "premium.").

The California Court of Appeal has reached the same conclusion and held that the plain meaning of "premium" does not encompass charges that were part of an "option[al]" installment payment plan. *See Interinsurance Exchange of the Auto. Club v. Superior Court (Williams)*, 56 Cal. Rptr. 3d 421, 429-30 (2007).

That court's later decision in *Troyk v. Farmers Group, Inc.*, 90 Cal. Rptr. 3d 589 (Cal. Ct. App. 2009), conflicts with both *Williams* and *Nakashima*, and it does not support the judgment here for several reasons.

First, *Troyk* is irreconcilable with this Court's decision in *Nakashima*. *Troyk* held that service charges were "premium" because, unlike the interest-based charges in *Williams*, the Prematic charges did not recoup the "time value of money." 90 Cal. Rptr. 3d at 607-08. But this distinction is irrelevant as a matter of statutory construction and public policy, and in any event it is inapplicable under New Mexico law because the fees at issue in *Nakashima*, like the Prematic charges here, did not purport to recoup the "time value of money."

Second, *Troyk* involved a novel interpretation of the *California* statute, which (unlike the New Mexico and Arizona laws) does *not* define the term "premium." *See Nakashima*, 2007-NMCA-027, ¶28 (noting that "the term 'premium' is not defined in the California Code" and explaining that the California Department of Insurance "consider[ed] a definition of 'premium' quite similar to our own and concluded that if California had such a definition, installment fees would not be considered 'premium' in California").

Third, as discussed below, *Troyk* ultimately reversed the judgment based on the plaintiffs' failure to establish that the alleged hypertechnical breach of contract *caused* any harm. 90 Cal. Rptr. 3d at 629. Thus, *none* of the appellate decisions of

which undersigned counsel is presently aware have affirmed any judgments for claims that monthly service charges constitute "premium."

3. Even If Prematic's Service Charges Were "Premium," These Charges Were Incorporated By Reference Into Plaintiffs' Insurance Contract.

Even assuming Prematic's service charges were additional insurance "premium," there is no breach because these charges were incorporated into and became part of Farmers' policies. The incorporation-by-reference doctrine requires courts to construe insurance contracts as a whole, and each part "is to be accorded significance according to its place in the contract." *Manuel Lujan Ins., Inc. v. Jordan*, 100 N.M. 573, 575, 673 P.2d 1306, 1308 (1983). "Two documents are properly construed together ... when one or both documents refer to the other." *Master Builders, Inc. v. Cabbell*, 95 N.M. 371, 373, 622 P.2d 276, 278 (Ct. App. 1980). A separate document is part of an insurance policy if "parties manifested [such intent] at the time of contracting and viewed in light of the surrounding circumstances." *Id.*

The Prematic service charges were an integral part of Plaintiffs' overall insurance arrangement to pay their insurance premiums to Farmers. The declarations page of Plaintiffs' insurance policy referenced their Prematic Agreement by including "PREMATIC" next to the "Total" due and displaying their unique Prematic account number. *Supra* § II(A)(2). Farmers did not issue

the "Monthly Payment Agreement" endorsement unless and until Plaintiffs agreed to pay monthly service charges by entering into the Prematic Agreement and paying the "premium deposit" to Prematic. (R.P.838 ¶2, 839 ¶15, 1946.) Each month, Plaintiffs received an invoice from Prematic that distinguished between the amount of "Premium" due for that upcoming month and the applicable "Service Charge." (R.P.29-30, 840 ¶21.)

The Prematic Agreement was the condition precedent to the "Monthly Payment Agreement" endorsement, and the policy incorporated the Prematic Agreement and its service charges by specific references. *See, e.g., Tucker v. Cullman-Jefferson Counties Gas Dist.*, 864 So. 2d 317, 321 (Ala. 2003) (concluding that "gas bills" were part of the underlying contract between the gas company and its customers because, even though "they are not named in the [contract itself], ... the 'bills' are referred to in [the contract], ... particularly with respect to the fact that all charges are due and payable 'on or before the discount date shown on the bill'"). Accordingly, the district court erred in finding that the Prematic Agreement was not incorporated by reference into Plaintiffs' policy.

B. Plaintiffs May Not Assert A Derivative Violation Of The Insurance Code As The Basis For Their Breach Of Contract Claim.

As discussed, Farmers did not breach its insurance policies because it did not charge the service fees at issue, and the plain meaning of "premium" as used in the policies does not include the Prematic service charges. As an alternate ground for

their breach of contract claim, Plaintiffs attempt to assert a derivative violation of the New Mexico Insurance Code, which states that insurers may not "wilfully collect as premium ... any sum in excess of the premium or charge applicable thereto as specified in the policy." NMSA 1978, § 59A-16-24(B) (1984).

Plaintiffs contend that: (a) Prematic's service charges are "'premium' within the meaning of" Section 59A-16-24(B); (b) Farmers violated this statute by "charging a premium (i.e., service charge) which is not specified in its policies"; and (c) "Farmers' violation of this statutory requirement is a breach of contract." (R.P.4 ¶¶20-21.) The district court agreed, and concluded that "[i]f the charges are denominated premium, then Defendant has violated the statute." (R.P.1039.)

But Plaintiffs' claim—whether framed as a breach of contract or a derivative claim for violation of the Insurance Code—fails for all of the reasons discussed in the prior section, along with several additional grounds: (1) an alleged statutory violation is insufficient to establish breach of contract; (2) the district court's construction of the Insurance Code conflicts with binding precedent from this Court and persuasive authority from other jurisdictions construing similar laws; (3) Plaintiffs did not and cannot establish the other elements of a violation of Section 59A-16-24(B); (4) Plaintiffs cannot rely on an "alter ego" theory and hold *Farmers* liable for the alleged violation; and (5) even assuming a technical violation, Farmers substantially complied with the district court's interpretation.

1. Plaintiffs Cannot Use An Alleged Violation Of The Insurance Code As The Predicate For Their Breach Of Contract Claim.

Plaintiffs may not overcome the defects in their common law breach of contract claim by alleging a violation of Section 59A-16-24(B). As Farmers argued in its motion to dismiss, alleged statutory violations are insufficient to establish a breach of contract. (R.P.444-46.) *See Perrone v. GMAC*, 232 F.3d 433, 438 (5th Cir. 2000); *Smoot v. Physicians Life Ins. Co.*, 2004-NMCA-027, ¶14, 135 N.M. 265, 87 P.3d 545 (filed 2003).

The Insurance Code authorizes private actions to enforce violations of Section 59A-16-24(B). *See* NMSA 1978 § 59A-16-30 (1990). Plaintiffs not only failed to bring such an action, they expressly disclaimed any direct reliance on the Insurance Code as a basis for their claim. (R.P.549.) Plaintiffs later switched gears and based their summary judgment motion on the Insurance Code. (R.P.752-55.) But they cannot have it both ways, disclaiming any reliance on the Insurance Code and limiting themselves to a common-law breach of contract claim in the complaint, and then later arguing that the statutory violation entitles them to summary judgment. *See Tafoya v. Rael*, 2008-NMSC-057, ¶29, 145 N.M. 4, 193 P.3d 551 (rejecting plaintiff's summary judgment argument that presented a new theory of liability).

2. Farmers Did Not Violate The Insurance Code.

Even if Plaintiffs *could* assert a derivative claim based on an alleged

violation of Insurance Code Section 59A-16-24(B), they have failed to establish a violation here.

First, as discussed above, the plain meaning of "premium" does not include service charges associated with an optional payment plan. *Supra* § III(A)(2)(a). *See Nakashima*, 2007-NMCA-027, ¶ 20.

Second, Plaintiffs cannot claim that *Farmers* violated Section 59A-16-24(B) because *Prematic*—not Farmers—"collect[ed]" the service charges at issue. Nor can Plaintiffs argue that Prematic and Farmers are the same entity for purposes of this analysis because the district court did not make any finding of alter ego liability. Further, this finding would be inconsistent with the undisputed factual record in this case, because Prematic is a valid, separate legal entity:

- there is no common ultimate ownership between Defendant and Prematic (R.P.744 ¶¶14-16, 838 ¶11);
- Defendant ultimately is owned by the policyholders of Farmers Insurance Exchange, Truck Insurance Exchange, and Fire Insurance Exchange, and Prematic is ultimately owned by the shareholders of Zurich Financial Services, Ltd. (R.P.744 ¶15);
- there is no contractual or ownership relationship between Prematic and Defendant (R.P.899 ¶20);
- Prematic's revenues and profits do not flow to Defendant (R.P.900 ¶25); and
- Defendant does not process Prematic's billing transactions (R.P.900 ¶22).

Consequently, the district court did not find, and could not have found, any of the factors relevant to imposing alter ego liability—namely, that Prematic was a mere "instrumentality" of Defendant, Prematic exists for an "improper purpose," or Prematic was undercapitalized or otherwise did not observe corporate formalities. *See Harlow v. Fibron Corp.*, 100 N.M. 379, 382-83, 671 P.2d 40, 43-44 (Ct. App. 1983); *see also Scott v. AZL Resources, Inc.*, 107 N.M. 118, 122, 753 P.2d 897, 901 (1988) ("Some form of moral culpability attributable to the parent, such as use of the subsidiary to perpetrate a fraud, is required" for alter-ego liability.).

In fact, in rejecting Prematic's attempt to intervene, the trial court (implicitly) and this Court (explicitly) determined that Prematic had no interest in, and its rights were unaffected by, this litigation. *Nellis v. Farmers Ins. Co.*, No. 26,394, Mem. Op. at 12 (N.M. Ct. App. June 29, 2006) ("The district court did not make any 'finding' that Prematic and Farmers are the same legal entity or that the two companies are in privity."). Plaintiffs cannot have their cake (precluding Prematic's intervention in this lawsuit on the basis that they do not challenge the separate transaction with Prematic) and eat it too (by holding Farmers vicariously "liable" for Prematic's conduct in charging and collecting the agreed-to service fees). And even if the court had treated Farmers and Prematic as the same entity and held that "Farmers" collected the service charges, that would necessarily mean

that Plaintiffs had contracted separately with "Farmers" to pay the disputed service charges.

Third, Plaintiffs also failed to introduce evidence that the purported statutory violation was "willful." *See* NMSA 1978, § 59A-16-24(B) ("No person shall *wilfully* collect as premium ...."). At the time of the summary judgment ruling, there was no published appellate authority from *any* jurisdiction holding that service fees associated with monthly payment plans are actually additional "premium." In fact, the existing authorities uniformly supported Farmers' position. Accordingly, Plaintiffs cannot establish a "willful" violation of Section 59A-16-24(B). *Cf. Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 51 (2007) (concluding there was no willfulness where "[defendant's] reading of the statute, albeit erroneous, was not objectively unreasonable.... While we disagree with [defendant's] analysis, we recognize that its reading has a foundation in the statutory text [and] ... no court of appeals had spoken on the issue, and no authoritative guidance has yet come from the [agency].").

3. At A Minimum, Farmers Substantially Complied With The District Court's Interpretation Of Section 59A-16-24(B).

Even if Plaintiffs were able to establish a technical breach of Section 59A-16-24(B), Farmers *substantially* complied with the district court's interpretation. The doctrine of substantial compliance excuses technical noncompliance if the defendant satisfied the policy of the statute, the plaintiff received the full

protections thereunder, and strict compliance would yield unjust results. *See, e.g.*, *Green Valley Mobile Home Park v. Mulvaney*, 1996-NMSC-037, ¶¶11-13, 121 N.M. 817, 918 P.2d 1317.

This is a paradigmatic case for the application of this doctrine. Plaintiffs allege a hyper-technical violation of Section 59A-16-24(B)—the service charge was disclosed on the wrong piece of paper. But to the extent Section 59A-16-24(B) reflects a policy favoring disclosure, and even accepting a broad definition of "premium" that encompasses the Prematic service charges (contrary to *Nakashima*), Plaintiffs and class members received *more* conspicuous and *more* frequent disclosure—a separately itemized charge in the Prematic Agreement and the monthly invoices—than their interpretation requires.

Under Plaintiffs' reading (which the district court endorsed), an insurer would comply with Section 59A-16-24(B) if it: (a) disclosed the service charge *anywhere* in the "policy" (which can be dozens of pages long), because the statute does not specify where, when, or how the "premium" must appear in the policy; (b) provided *less* frequent disclosure, because insurers typically issue declarations pages semi-annually;[7] and (c) combined the "service charges" and the "premium" as one lump sum (because if service charges *are* "premium," then there is no

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[7] Plaintiffs received *twelve* monthly bills from Prematic and only *two* declarations pages from Farmers.

reason to itemize them). This interpretation *undermines* the purpose of Section 59A-16-24(B). *See Nakashima*, 2007-NMCA-027, ¶29 ("We fail to see how policyholders could be more protected under our Insurance Code if insurers were required to embed the installment fees in the premium stated on the policy."). Moreover, an $84 million penalty against Farmers for noncompliance is precisely the type of unjust result that the doctrine of substantial compliance is designed to avoid. *Mulvaney*, 1996-NMSC-037, ¶¶11-13.

C. Plaintiffs Did Not And Cannot Establish The Necessary Elements Of Causation Or Harm.

Even if this Court were inclined to revisit *Nakashima* and hold that Prematic's service charges were "premium," the judgment still would have to be reversed because Plaintiffs cannot establish necessary elements of their claim for breach of contract—specifically, *causation* or *harm*. *See, e.g., Paiz v. State Farm Fire & Cas. Co.*, 118 N.M. 203, 212, 880 P.2d 300, 309 (1994), *holding limited on other grounds by Sloan v. State Farm Mutual Auto. Insurance Co.*, 2004-NMSC-004, 135 N.M. 106, 85 P.3d 230.[8] Plaintiffs failed to present any evidence that Farmers' alleged failure to disclose Prematic's service charges on its policies—as opposed to the reference to "PREMATIC" and Plaintiffs' Prematic account

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[8] Farmers raised the issues of causation and harm in its Brief on Damages. (R.P.1822.)

number in the declarations page, the disclosures in the Prematic Agreement, and an itemization of the "service charges" and "premium" in the dozens of monthly Prematic invoices—caused them any harm.

Plaintiffs also do not and cannot claim that they would have done anything differently had Farmers disclosed the service charges in its policies. This failure forecloses Plaintiffs' ability to establish causation. In *Sheldon v. American States Preferred Insurance*, 95 P.3d 391 (Wash. Ct. App. 2004), for example, the plaintiff (like the Nellises) claimed breach of contract based on the defendant's failure to identify the installment service charge as "premium" in the insurance policy. *Id.* at 392-93. The court concluded that the plaintiff's contention was "debatable" because the service charges covered the costs of an optional monthly payment plan (and did not pay "for the procurement of insurance"), but it ultimately determined that not "even the possibility of" harm or injury could flow from a fully disclosed and agreed-to service charge. *Id.* at 393 n.11, 394. Likewise, the court in *Troyk* concluded that the plaintiff had not established causation to support his breach of contract claim, given his failure to demonstrate "that he or the other class members would not have paid the monthly service charges had they been disclosed in the policy documents." 90 Cal. Rptr. 3d at 589, 627 (Cal. Ct. App. 2009).

The uncontroverted evidence in this case also demonstrates the *absence* of causation or harm. Plaintiffs and the class entered into a separate agreement with

Prematic that contemplated the service charges, and their monthly invoices disclosed these charges. Plaintiffs admitted that they knew they could stop paying monthly at any time and still obtain the same insurance coverage from Farmers. (R.P.860, 864.) They did not demonstrate that they "would not have paid the monthly service charges had they been disclosed in the policy documents." *Troyk*, 90 Cal. Rptr. 3d at 627. In fact, Plaintiffs *continue* to pay monthly installment charges to this day in their arrangement with GEICO. (R.P.863, 866-67.)

In short, Plaintiffs received exactly what they agreed to and paid for—the privilege of making monthly payments of their Farmers' premium in exchange for a service charge to Prematic.

D. The Voluntary Payment Doctrine Bars Plaintiffs' Claim.

In addition to all of these defects in the judgment, Plaintiffs are barred from recovering as damages the payments that they made voluntarily and with full knowledge of the facts. *Apex Lines, Inc. v. Lopez*, 112 N.M. 309, 311, 815 P.2d 162, 164 (Ct. App. 1991). There is no reasonable dispute that Plaintiffs' selection of the Prematic payment plan was fully informed and voluntary. They could have avoided any service charges by paying for insurance in a lump sum every six months, as they did for the first ten years they were insured through Farmers.

(R.P.837 ¶¶3-6.)[9]

Mr. Nellis acknowledges that his agent told him about "Prematic." (R.P.859 ("Q: How did you find out about Prematic? A: Prematic? That was mentioned to us by the agent."); *see also* R.P.839 ¶15.) Plaintiffs' agent also "calculated the premium and the *monthly service fee* and explained both of these amounts to" the Nellises. (R.P.838 ¶7 (emphasis added).) While Mr. Nellis was initially "unhappy about [the] service fees," he agreed to pay them after his agent clarified that they were a necessary component of the Prematic arrangement. (R.P.1748-49.)

Plaintiffs also received monthly invoices from Prematic that itemized the service charges. (R.P.29-30, 840 ¶21.) They never questioned these monthly invoices, and they chose to pay them for several months because they valued the flexibility and convenience of being able to make monthly premium payments. (R.P.840 ¶¶21-27.) Plaintiffs admitted that they knew Prematic's service charges were not listed on their insurance policy. (R.P.867.) They also conceded that they could have changed their arrangement at any time to avoid the service charges. (R.P.840 ¶¶24-26.) Plaintiffs' informed, voluntary payment of the Prematic service charges precludes their attempt to recover these charges here.

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[9] Farmers raised the voluntary payment doctrine in its Motion for Summary Judgment (R.P.849-51), but the district court did not address this argument.

E. At The Very Least, The District Court Should Not Have Granted Summary Judgment To Plaintiffs And The Class.

While the foregoing arguments establish that Farmers was entitled to judgment in its favor, at the very least the district court should not have granted summary judgment to Plaintiffs and the class. As the party opposing Plaintiffs' motion, Farmers was "entitled to have all reasonable inferences construed in [its] favor." *Hewitt-Robins, Inc. v. Lea County Sand & Gravel, Inc.*, 70 N.M. 144, 148, 371 P.2d 795, 797 (1962). But the district court impermissibly resolved these disputes *against* Farmers instead of submitting them to a jury.

First, the district court erroneously held that *Farmers* breached its insurance policies by "charg[ing]" Plaintiffs more "premium" in the form of *Prematic*'s service charges. (R.P.1035.) But it is undisputed that *Prematic*, not Farmers, charged and collected these amounts. *Supra* § III(A)(1). As Farmers argued extensively in the district court, Prematic is a valid, separate legal entity. *Supra* § III(B)(2). At the very least, the district court was not allowed to "weigh th[is] evidence" of corporate separateness and instead should have construed it in the light most favorable to Farmers. *Gonzales v. Gackle Drilling Co.*, 70 N.M. 131, 136-37, 371 P.2d 605, 609 (1962).

Second, the district court should not have concluded as a matter of law that *Plaintiffs and the entire class* were unaware of Prematic's service charges. Farmers presented undisputed evidence that its insurance agents: (a) informed

customers of their options for paying Farmers' six-month premium, including the Prematic option; (b) explained the Prematic option and calculated the amount of monthly premium and the amount of the monthly service charge that would be due; and (c) required insureds who selected the Prematic option to enter into a separate Prematic Agreement that explicitly disclosed the separate amounts of the monthly premiums and service charges. (R.P.837-38 ¶¶2-7, 1742.) Even if the district court was unable to rule in Farmers' favor on the basis of these undisputed facts, it should not have resolved competing inferences *against* Farmers and granted summary judgment to Plaintiffs and the approximately 120,000 class members on the basis that all of them were unaware of the service charges. *See Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 2, 126 N.M. 396, 970 P.2d 582.

Third, in deciding that Prematic's service charges were not "incorporated by reference" into Plaintiffs' and the class members' insurance policies, *supra* § III(A)(3), the district court concluded erroneously that the reference to "Prematic" in Farmers' policies was "a little too subtle a 'reminder' for this Court and, presumably, most customers." (R.P.1037.) The district court was required to "view the facts in a light most favorable to [Farmers] ... and draw all reasonable inferences in support of a trial." *Ocana v. Am. Furniture Co.*, 2004-NMSC-018, ¶12, 135 N.M. 539, 91 P.3d 58 (internal quotation marks & citation omitted). The court also failed to consider *all* of the evidence, because it focused only on the

reference to Prematic next to the "Total" line, and ignored the specific reference to each class member's unique Prematic account number at the top of the declarations page. (R.P.29-30.)

V.

PLAINTIFFS' CLAIM IS NOT AMENABLE TO CLASS TREATMENT

This Court reviews *de novo* whether, in certifying a class, the trial court used the correct legal standard under Rule 1-023 NMRA. *Armijo v. Wal-Mart Stores, Inc.*, 2007-NMCA-120, ¶17, 142 N.M. 557, 169 P.3d 129. The trial court's application of that standard to the facts of the case is reviewed for an abuse of discretion. *Brooks v. Norwest Corp.*, 2004-NMCA-134, ¶7, 136 N.M. 599, 103 P.3d 39.[10]

The district court's order certifying a class of Farmers' policyholders in New Mexico and Arizona who pay their premiums monthly through Prematic, along with its later refusal to decertify that class, ignored several individual issues that predominated over any common issues and an irreconcilable conflict between the laws of both states. In deciding whether to maintain a class action, the court was required to engage in a "rigorous analysis" of whether Rule 1-023's requirements

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[10] Farmers preserved its challenge to the rulings on class certification by the issues raised, evidence presented, and arguments made in connection with its opposition to Plaintiffs' motion for class certification and Farmers' motion to decertify. (R.P.418, 1906, 1986.)

had been met. *Ferrell v. Allstate Ins. Co.*, 2008-NMSC-042, ¶8, 144 N.M. 405, 188 P.3d 1156 (internal quotation marks & citation omitted). This analysis required the court to probe beyond the pleadings "to assess what kind of proof will be necessary to decide the issues." *Id.* This analysis compels a reversal of the class certification order.

A. Given The Predominance Of Individual Issues, Certifying A Class In This Case Violates Due Process And Rule 1-023(B)(3).

The trial court certified a multi-state class under Rule 1-023(B)(3). (R.P.633.) This Rule requires that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Rule 1-023(B)(3). In determining whether common or individual questions predominate under Rule 1-023(B)(3), courts must ask "whether the individual questions in a case are so overwhelming as to destroy the utility of the class action." *Brooks*, 2004-NMCA-134, ¶31 (internal quotation marks & citation omitted). When a determination of the merits would require "individualized proof" as to each class member, individual issues likely predominate and class certification is not appropriate. *Id.* ¶ 38. As the New Mexico Supreme Court explained recently, courts cannot "'sacrific[e] procedural fairness'" in certifying class actions under Rule 1-023(B). *Ferrell*, 2008-NMSC-042, ¶10.

The Due Process Clause also prevents courts from using the class procedure to "abridge, enlarge or modify any substantive right" by creating liability where it might not otherwise exist in an individual action. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (internal quotation marks & citation omitted); *see also In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002) ("Tempting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected.").

Applying these principles here, the district court failed to conduct a rigorous inquiry and it ignored at least three aspects of Plaintiffs' claim that required individualized proof.

First, the district court's own summary judgment ruling demonstrates that determining whether the Prematic service charges were incorporated by reference into the class members' insurance policies is an inherently individualized inquiry. In that ruling, the district court "presum[ed]" that the reference to "Prematic" next to the "Total" line in class members' declarations pages was "too subtle a 'reminder' for ... *most customers*." (R.P.1037 (emphasis added).) But the elements of each class member's claim "cannot be presumed, and defendants have the right to raise individual defenses against each class member." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 191-92 (3d Cir. 2001). *See also Berry v. Fed. Kemper Life Assurance Co.*, 2004-NMCA-116, ¶ 65, 136

N.M. 454, 99 P.3d 1166 ("Parties to a[n] [insurance] contract should always have the opportunity to prove where their minds actually met."), *overruled on other grounds by Ferrell v. Allstate Ins. Co.*, 2007-NMCA-017, 141 N.M. 72, 150 P.3d 1022 (filed 2006).

Second, while the district court ignored the named plaintiffs' failure to establish *harm* resulting from the alleged breach (*supra* § III(C)), it compounded that error by presuming harm as to the entire class and failing to make this determination on an individualized basis. *Newton*, 259 F.3d at 191-92 ("[A]ctual injury cannot be presumed [in a class action].").

Third, Plaintiffs suffered no injury given that they continued to pay for their insurance on a monthly basis—plus a service charge—even though they admittedly knew they could stop paying monthly at any time and still obtain the same insurance coverage from Farmers—*without* a service charge—by paying in full. *Supra* § III(C). The district court erred by not only disregarding this evidence, but by presuming that approximately 120,000 class members could prove that they would not have entered into the Prematic Agreement had the service charges been disclosed on the policy itself. *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007); *Amchem Prods.*, 521 U.S. at 613.

These individualized liability issues overwhelm the economies of time, effort, and expense associated with a class action, and the district court erred in

certifying the class pursuant to Rule 1-023(B).

B. The District Court Erred In Maintaining This Case As A Multi-State Class Action Due To The Conflict Between New Mexico And Arizona Law.

A multi-state action such as this one, which includes claims by policyholders who reside in New Mexico and Arizona, "present[s] particular challenges for district courts" and often precludes class certification. *Ferrell v. Allstate Ins. Co.*, 2008-NMSC-042, ¶ 12, 144 N.M. 405, 188 P.3d 1156. Plaintiffs concede, as they must, that due process requires New Mexico courts to apply Arizona law to the claims of the Arizona class members if the substantive laws of each state conflict, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (R.P.563), and they bore the burden of demonstrating that the laws of the multiple states do not conflict. *Ferrell*, 2008-NMSC-042, ¶14.

As discussed above, *Nakashima* demonstrates that a fair reading of New Mexico and Arizona law does not support the judgment. *Supra* §§ III(A), (B). If this Court disagrees, however, then it must reverse the certification order because the district court's construction of New Mexico law creates an irreconcilable conflict between New Mexico and Arizona law.

Arizona's Insurance Code expressly authorizes a service fee—*separate from "premium"*—that is "reasonably related to the administrative expenses of the monthly premium payment plan." Ariz. Rev. Stat. Ann. § 20-267(C); *see also id.*

§ 20-267(A) (requiring that a "monthly *premium* payment plan" be made available to insureds (emphasis added)); *id.* § 20-465(B) ("An insurer ... may charge and receive a fee for services *not customarily provided in the transaction of insurance*" if certain conditions are met, including "[t]he amount of the service charge is reasonably related to the cost of the service performed" (emphases added)).

Consistent with the plain language of these statutes, Christina Urias, Arizona's current Director of Insurance, determined that Prematic's monthly payment plan complied with Arizona law. (R.P.2004.) Director Urias also reviewed the district court's summary judgment order and concluded that it "is cause for concern for a number of reasons," including the application of "New Mexico law, not Arizona law, to members of a class of insureds, 70% of which are Arizona residents," and the "far reaching financial and practical implications on Farmers of Arizona and the administration of insurance in Arizona generally." (*Id.*) She continued:

> Although the court's opinion does not cite to a single Arizona statute or case, it suggests by implication that Farmers' conduct in this matter is in violation of Arizona law. As you know, the Department ... initially questioned whether Farmers should have filed Prematic's service charges associated with Farmers monthly premium billings. The Department concluded that Prematic was not an insurance company or producer ... and, therefore, specifically found that Farmers' business practices regarding Prematic's service charges did not violate Arizona law.

(*Id.*)[11]

Arizona's Insurance Code and executive policy demonstrate the patent and irreconcilable conflict between Arizona law and the district court's interpretation of New Mexico law on the meaning of "premium" in the context of monthly payment plans. Accordingly, if this Court affirms the district court's summary judgment ruling, it should reverse the class certification order and the judgment in favor of Arizona class members, who represent the large majority (approximately 70%) of the class. (R.P.2004.)

VI.

THE DISTRICT COURT ERRED IN AWARDING THE FULL AMOUNT OF THE PREMATIC SERVICE CHARGES AS "DAMAGES"

Even if this Court affirms the judgment on the breach of contract claim (notwithstanding the legal defects identified in Section III) and affirms the classwide resolution of these issues (despite the problems discussed in Section IV), this Court still should reverse the judgment because there is no basis for awarding the full amount of Prematic's service charges as "damages" against Farmers. As a preliminary matter, because *Prematic* collected and retained these service charges

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[11] Arizona appellate courts accord great deference to agency interpretations of statutes. *See Bentivegna v. Powers Steel & Wire Prods., Inc.*, 81 P.3d 1040, 1045-46 (Ariz. Ct. App. 2003).

(R.P.839 ¶19, 900 ¶25), there was no basis for forcing *Farmers* to disgorge them.

Further, the judgment is grossly disproportionate to any perceived "wrong" because Plaintiffs and the class received exactly what they wanted and paid for, and they may not use this action to obtain a "free" monthly payment plan.[12] In any breach-of-contract suit, the plaintiffs may recover only "the damages *caused by* the breaching party's performance." *Paiz v. State Farm Fire & Cas. Co.*, 118 N.M. 203, 212, 880 P.2d 300, 309 (1994) (emphasis added). Here, even if Farmers had "breached" its insurance contracts by failing to disclose Prematic's charges in its policies, Plaintiffs and class members remained contractually obligated to pay those charges to Prematic. (R.P.1758-59.) The judgment entered below violates the principle that damages may not place parties in a *better* position than they would have occupied had the breaching party performed as promised. *Paiz*, 118 N.M. at 212, 880 P.2d at 309.

At the very least, to avoid unjust enrichment, the district court should have offset the amount of damages it awarded by the amount of value that Plaintiffs and

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[12] This Court reviews *de novo* the district court's determination as to the proper measure of damages. *See McNeill v. Burlington Res. Oil & Gas Co.*, 2008-NMSC-022, ¶121, 143 N.M. 740, 182 P.3d 121. Farmers preserved these arguments by the issues raised, evidence presented, and arguments made in connection with its Brief Regarding The Remaining Issues To Be Resolved At Trial (R.P.1660), its Brief Responding To Plaintiffs' Memorandum Regarding Farmers' Right To A Set-Off (R.P.1724), and its Brief Regarding Damages (R.P.1882).

class members received from the optional benefit of being able to pay for their insurance on a monthly basis. *See, e.g., Famiglietta v. Ivie-Miller Enters., Inc.*, 1998-NMCA-155, ¶21, 126 N.M. 69, 966 P.2d 777 (noting that a "party in breach is entitled to restitution for benefits he has conferred by way of part performance in excess of loss caused by the breach").

VII.
THE JUDGMENT VIOLATES DUE PROCESS

Finally, the $84 million judgment in this case violates the Due Process Clauses of the Fourteenth Amendment to the United States Constitution and Article 2, Section 18 of the New Mexico Constitution.[13]

The judgment is arbitrary and capricious, as it is entirely disconnected from any rational benchmark, such as the amount of harm suffered by the class (which is none), a statutory penalty established by the Legislature, or any other measure. *See, e.g., Philip Morris USA v. Williams*, 549 U.S. 346, 351 (2007); *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 417-18 (2003).

Whether characterized as compensatory or punitive, the judgment violates basic due process principles of fair notice. *See generally BMW of N. Am., Inc. v.*

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[13] The Court should consider these due process arguments because they present issues "of great import to the consumers of the insurance industry in this state" and elsewhere, including Arizona. *See generally Azar v. Prudential Ins. Co. of Am.*, 2003-NMCA-062, ¶29, 133 N.M. 669, 68 P.3d 909.

Gore, 517 U.S. 559, 574 (1996). Farmers could not have predicted the district court's interpretation of the New Mexico and Arizona insurance statutes or the fact that its noncompliance with this reading would have yielded such a large monetary sanction. The court's application of these statutes to Farmers' and Prematic's business practices also represents an unconstitutional retrospective application of a new rule of law. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 265-66 (1994).

Further, because Plaintiffs and the class received the full benefit of their bargain, the $84 million judgment cannot be seen as being compensatory or restorative, but only as punitive—and also grossly excessive, disproportionate, and unconstitutional. *See Austin v. United States*, 509 U.S. 602, 621 (1993); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966). Farmers' alleged technical violation of the Insurance Code was not sufficiently "reprehensible" to justify a breathtaking, $84 million sanction, the award is unrelated to the purported (but absent) "harm" suffered by Plaintiffs and the class, and the amount of the judgment vastly exceeds any comparative sanctions authorized or imposed on any insurer for similar conduct. *State Farm*, 538 U.S. at 419, 424-28; *BMW*, 517 U.S. at 575-85.

VIII.
CONCLUSION

Farmers respectfully requests that this Court reverse the judgment of the district court and all associated orders and direct the entry of judgment in its favor.

In the alternative, Farmers requests that this Court reverse the judgment, order that the class be decertified, and/or remand for a trial on the merits.

Respectfully submitted,

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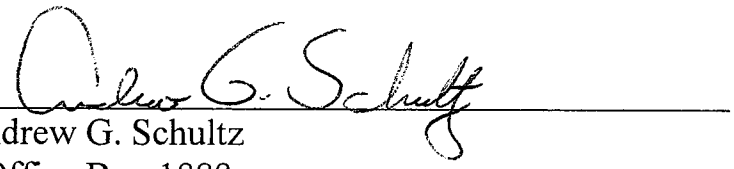
By: 
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I certify that a copy of the foregoing was served by first-class mail to the following counsel of record this 24th day of August, 2009.

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