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15 Attorneys for Defendants
FIRST AMERICAN FINANCIAL CORPORATION and
16 FIRST AMERICAN TITLE INSURANCE COMPANY

17 **UNITED STATES DISTRICT COURT**
18 **CENTRAL DISTRICT OF CALIFORNIA**
19

20 DENISE P. EDWARDS, individually
and on behalf of all others similarly
21 situated,

22 Plaintiffs,

23 vs.

24 FIRST AMERICAN FINANCIAL
CORPORATION and FIRST
25 AMERICAN TITLE INSURANCE
COMPANY,
26

27 Defendants.
28

No. CV07-03796 SJO (FFMX)

DEFENDANT FIRST AMERICAN
TITLE INSURANCE COMPANY'S
AMENDED ANSWER AND
AFFIRMATIVE DEFENSES TO
PLAINTIFF'S COMPLAINT

JURY TRIAL DEMANDED

1 Defendant First American Title Insurance Company (“First American Title”)
2 states as follows for its Amended Answer to Plaintiff’s Complaint.

3 **INTRODUCTION**

4 1. First American Title admits that Plaintiff seeks relief under the Real
5 Estate Settlement Procedures Act (“RESPA”), 12 U.S.C. § 2601 *et seq.* First
6 American Title states that the Ninth Circuit has certified a Tower City (Ohio) class.
7 First American Title admits the case is pled as a broader putative class action. First
8 American Title denies the remaining averments of Paragraph 1.

9 2. First American Title admits that Plaintiff seeks relief under RESPA.
10 First American Title states that the statute speaks for itself and that no response to
11 Plaintiff’s legal conclusions is required. First American Title denies the remaining
12 averments of Paragraph 2.

13 3. First American Title admits only that it is a title insurance underwriter
14 and that Defendant First American Financial Corporation (“First American
15 Financial”), the successor to the claims asserted in this case against The First
16 American Corporation, is the parent company of First American Title. First
17 American Title denies the remaining averments of Paragraph 3.

18 4. First American Title denies the averments of Paragraph 4.

19 5. First American Title denies the averments of Paragraph 5.

20 **PARTIES**

21 **The Named Plaintiff**

22 6. First American Title is without knowledge or information sufficient to
23 form a belief as to the truth of the averments in the first sentence of Paragraph 6.
24 First American Title admits the remaining averments of Paragraph 6.

25 **The Defendants**

26 7. First American Title states that First American Financial is the successor
27 to the claims asserted in this case against The First American Corporation and is a
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1 California corporation with its principal place of business in Santa Ana, California.
2 First American Title states that it is a subsidiary of First American Financial. First
3 American Title further states that First American Financial conducts no title
4 insurance operations. First American Title denies the remaining averments of
5 Paragraph 7.

6 8. First American Title admits that it is a California corporation with its
7 principal place of business in Santa Ana, California and is a subsidiary of First
8 American Financial. First American Title admits that it underwrites title insurance
9 policies issued directly and by agents throughout the country.

10 **JURISDICTION AND VENUE**

11 9. First American Title admits that this Court has subject matter
12 jurisdiction under 28 U.S.C. § 1331.

13 10. First American Title admits the averments of Paragraph 10.

14 11. First American Title denies that venue is proper in this Court because of
15 RESPA’s venue provision, 12 U.S.C. § 2614.

16 **GENERAL FACTUAL ALLEGATIONS**

17 12. First American Title admits that it is a title insurance underwriter and
18 states that it is a subsidiary of First American Financial. First American Title denies
19 the remaining averments of Paragraph 12.

20 13. First American Title denies the averments of Paragraph 13.

21 14. First American Title denies the averments in the first sentence of
22 Paragraph 14. First American Title admits it has agency agreements with title
23 agents, including some agreements with exclusive agency provisions. First
24 American Title denies the remaining averments of Paragraph 14.

25 15. First American Title denies the averments of Paragraph 15.

26 16. First American Title admits that in 1998, it purchased a 17.5%
27 ownership interest in Tower City Title Agency, Inc. (“Tower City”), for \$2 million
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1 in cash and stock. First American Title denies the remaining averments of
2 Paragraph 16.

3 17. First American Title denies the averments of Paragraph 17.

4 18. First American Title denies the averments of Paragraph 18.

5 19. First American Title denies the averments of Paragraph 19.

6 20. First American Title denies the averments in the first sentence of
7 Paragraph 20. First American Title is without knowledge or information sufficient
8 to form a belief as to the truth of the averments in the second sentence of Paragraph
9 20. First American Title denies the remaining averments of Paragraph 20.

10 21. First American Title states that The First American Corporation’s Form
11 10-K speaks for itself. First American Title denies the remaining averments of
12 Paragraph 21.

13 **FACTS APPLICABLE TO NAMED PLAINTIFF**

14 22. First American Title admits the averments of Paragraph 22.

15 23. First American Title admits the averments of Paragraph 23.

16 24. First American Title states that the HUD-1 Settlement Statement speaks
17 for itself and is the best evidence of its content. First American Title denies the
18 remaining averments of Paragraph 24.

19 25. First American Title denies the averments of Paragraph 25.

20 **CLASS ACTION ALLEGATIONS**

21 26. First American Title admits that Plaintiff purports to bring this action on
22 behalf of a putative class of “[a]ll consumers who from June 12, 2006 to the present
23 entered into mortgage loan transactions using the services of a title agency or similar
24 entity owned in part by [The] First American Corporation, or its subsidiaries, in
25 which the HUD-1 Settlement Statement, or other document in the loan file, includes
26 a charge or payment for title insurance issued by First American Title Insurance
27 Company.” First American Title denies that the putative class described in
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1 Paragraph 26 is permitted under Fed. R. Civ. P. 23.

2 27. First American Title denies the averments of Paragraph 27.

3 28. First American Title denies the averments of Paragraph 28.

4 29. First American Title denies the averments of Paragraph 29 and all sub-
5 parts.

6 30. First American Title denies the averments of Paragraph 30.

7 31. First American Title denies the averments of Paragraph 31.

8 32. First American Title denies the averments of Paragraph 32.

9 33. First American Title denies the averments of Paragraph 33. First
10 American Title further states that Plaintiff abandoned her request under Fed. R. Civ.
11 P. 23(b)(2) for equitable relief on behalf of a class.

12 34. First American Title denies the averments of Paragraph 34.

13 35. First American Title denies the averments of Paragraph 35.

14 **COUNT I**

15 36. First American Title realleges and incorporates herein by reference its
16 responses to Paragraphs 1 through 35 of Plaintiff’s Complaint.

17 37. First American Title admits that it is a title insurance underwriter that
18 sold title insurance policies during the stated time period. First American Title
19 denies that it provided title insurance in a “federally related mortgage loan”
20 transaction involving Plaintiff. First American Title is without knowledge or
21 information sufficient to form a belief as to whether it provided title insurance in
22 “federally related mortgage loan” transactions involving the Tower City (Ohio) class
23 members or the putative nationwide class members because that determination
24 necessarily requires a transaction-specific analysis. First American Title denies the
25 remaining averments of Paragraph 37.

26 38. First American Title admits that Tower City issued title insurance
27 policies in connection with Plaintiff’s real estate transaction and that other title
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1 agents issue First American Title policies. The remaining averments in Paragraph
2 38 are legal conclusions to which no response is required.

3 39. First American Title denies the averments of Paragraph 39.

4 40. First American Title denies the averments of Paragraph 40.

5 41. First American Title denies the averments of Paragraph 41.

6 **DEMAND FOR JURY TRIAL**

7 42. First American Title also demands a jury trial.

8 **DEFENSES**

9 **Against Named Plaintiff**

10 1. Plaintiff lacks standing to sue under Article III of the United States
11 Constitution because she suffered no injury in fact. Plaintiff admits that she was
12 not dissatisfied with the title insurance policies or the accompanying services in
13 her real estate transaction. Plaintiff also admits that she paid the uniform rate for
14 title insurance set by Ohio law and, therefore, could not have paid a lower price for
15 title insurance underwritten by another title insurance underwriter. Accordingly,
16 Plaintiff suffered no cognizable injury and does not have standing to sue.

17 2. Plaintiff lacks standing to sue under RESPA, 12 U.S.C. § 2607(d)(2),
18 because she suffered no damages as a result of First American Title’s alleged
19 conduct. RESPA provides that a participant in a kickback scheme is liable to a
20 person who paid for “such settlement service” “involved in the violation.” Since
21 Plaintiff was not overcharged for title insurance, no settlement service was
22 involved in the alleged RESPA violation or otherwise attributable to the alleged
23 kickback scheme.

24 3. Plaintiff’s claim is barred by RESPA’s one-year statute of limitations,
25 12 U.S.C. § 2614. RESPA measures the applicable limitations period from “the
26 date of the occurrence of the violation,” which is not synonymous with the date of
27 closing. Plaintiff claims that First American Title violated RESPA by paying an
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1 alleged kickback to Tower City in 1998, but Plaintiff did not file her suit until June
2 12, 2007. Thus, Plaintiff's claim is time barred.

3 4. Plaintiff's claim is barred because she did not enter into a "federally
4 related mortgage loan," as required by RESPA. *See* 12 U.S.C. § 2601(2).

5 5. Venue is not proper in this Court because under 12 U.S.C. § 2614, a
6 cause of action under RESPA must be brought where the property is located or the
7 alleged violation occurred. The property Plaintiff purchased is located in Ohio,
8 and Plaintiff claims that the RESPA violation occurred there.

9 6. Plaintiff's claim is barred because RESPA does not apply to
10 transactions between an underwriter and its title agent. A title insurance
11 company's underwriting of a title insurance policy is not a distinct settlement
12 service from a title agent issuing that policy.

13 7. Plaintiff's claim is barred because First American Title paid fair value
14 for its ownership interest in Tower City based on market factors, including the
15 offer of a competitor. The purchase of this interest is not prohibited by RESPA.
16 *See* 12 U.S.C. § 2607(a), (c); HUD Statement of Policy 1996-2, 61 Fed. Reg.
17 29,258 (June 7, 1996).

18 8. Plaintiff cannot recover from First American Title because her alleged
19 harm is the result of actions of third parties who are not defendants to this suit,
20 including Cresthaven Development Center ("Cresthaven"), which referred her to
21 Tower City. Because any "referral" in Plaintiff's transaction occurred between
22 Cresthaven and Tower City, not between Tower City and First American Title,
23 Plaintiff's alleged harm was not caused by First American Title.

24 9. Plaintiff's claim is barred by the doctrines of waiver and estoppel.
25 Prior to her purchase transaction, Plaintiff was informed in writing of the
26 relationship between First American Title and Tower City. Neither Plaintiff nor
27 anyone acting on her behalf requested title insurance issued by another
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1 underwriter. Plaintiff did not exercise her statutory right to cancel her mortgage
2 transaction after closing.

3 10. Plaintiff’s claim is barred by the doctrines of voluntary payment,
4 accord and satisfaction, and ratification. At Plaintiff’s real estate closing, she
5 received a HUD-1 Settlement Statement and other closing documents, including
6 disclosures, indicating the partial charge for title insurance underwritten by First
7 American Title.

8 11. Plaintiff’s claim is barred in whole or part because the imposition of
9 damages for all title insurance charges paid (let alone three times all title insurance
10 charges paid) would constitute an unlawful impairment of contract and render her
11 and her lender’s policies void.

12 12. Plaintiff cannot recover treble damages from First American Title
13 because that recovery would violate the Fifth Amendment to the United States
14 Constitution and similar state constitutional provisions by exposing First American
15 Title to multiple punishments and fines for the same act or conduct.

16 13. Plaintiff cannot recover treble damages from First American Title
17 because that recovery would violate the Eighth Amendment to the United States
18 Constitution by subjecting First American Title to an excessive fine that is penal in
19 nature and seeks to punish First American Title on vague standards.

20 14. Plaintiff’s claim for treble damages violates the Due Process Clause of
21 the Fifth and Fourteenth Amendments to the United States Constitution in the
22 absence of an order bifurcating adjudication of that claim from adjudication of
23 liability.

24 15. Plaintiff cannot recover treble damages from First American Title
25 because that recovery would violate the Due Process Clause of the Fifth and
26 Fourteenth Amendments to the United States Constitution by exposing First
27 American Title to grossly disproportionate damages in relation to the alleged
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1 conduct that was not willful or deliberate and for which First American Title did
2 not receive fair notice that it could be prohibited.

3 16. Plaintiff cannot recover “three times the amount of any and all
4 payments to title agents . . . including but not limited to Tower City” because
5 RESPA measures damages as “three times the amount of any charge paid for such
6 settlement service,” *i.e.*, the “settlement service involved in the violation.” 12
7 U.S.C. § 2607(d)(2). Plaintiff claims that Tower City “referred” settlement service
8 business in the form of title insurance underwriting to First American Title. If
9 Plaintiff is correct, then the only settlement service “involved in the violation” is
10 the underwriting referred to First American Title, which would not include the
11 services provided by Tower City for which Plaintiff paid.

12 17. First American Title reserves the right to raise additional affirmative
13 and other defenses that may be established during discovery and by the evidence
14 in this case.

15 **Against Tower City (Ohio) Class Members**

16 It is impossible at this time to know the identity of all persons included in the
17 Tower City (Ohio) class certified by the Ninth Circuit and all of the applicable
18 defenses to those persons’ claims governed by Fed. R. Civ. P. 8. Accordingly, on
19 information and belief, each of the following defenses could be applicable to certain
20 class members.

21 1. One or more Tower City (Ohio) class members lack standing to sue
22 under Article III of the United States Constitution because they suffered no injury
23 in fact. There are no claims based on dissatisfaction with title insurance policies
24 or accompanying services, and certain putative class members paid the uniform
25 rate for title insurance set by Ohio law (and therefore could not have paid a lower
26 price for title insurance underwritten by another title insurance underwriter).
27 Therefore, they suffered no cognizable injury and do not have standing to sue.
28

1 2. One or more Tower City (Ohio) class members lack standing to sue
2 under RESPA, 12 U.S.C. § 2607(d)(2), because they suffered no damages as a
3 result of First American Title’s alleged conduct. RESPA provides that a
4 participant in a kickback scheme is liable to a person who paid for “such
5 settlement service” “involved in the violation.” Those Tower City (Ohio) class
6 members who were not overcharged for title insurance suffered no damages and
7 lack statutory standing to sue.

8 3. One or more Tower City (Ohio) class members are not authorized to
9 sue under RESPA, 12 U.S.C. § 2607(d)(2), because they did not pay for title
10 insurance. RESPA authorizes private plaintiffs to sue only if they were “charged
11 for the settlement service involved in the violation.” *Id.* If a Tower City (Ohio)
12 class member actually did not pay for title insurance, then there is no claim under
13 RESPA.

14 4. The Tower City (Ohio) class members’ claims are barred by RESPA’s
15 one-year statute of limitations, 12 U.S.C. § 2614. RESPA measures the applicable
16 limitations period from “the date of the occurrence of the violation,” which is not
17 synonymous with the date of closing. Plaintiff claims that First American Title
18 violated RESPA by paying an alleged kickback to Tower City in 1998, but
19 Plaintiff did not file her suit until June 12, 2007. Thus, the Tower City (Ohio)
20 class members’ claims are time barred.

21 5. One or more Tower City (Ohio) class members’ claims are barred
22 because they did not enter into “federally related mortgage loans,” as required by
23 RESPA. *See* 12 U.S.C. § 2601(2).

24 6. One or more Tower City (Ohio) class members’ claims are barred
25 because their real estate transactions involved commercial or agricultural property,
26 vacant land, residential buildings of more than four families, or property of 25 or
27 more acres, thereby excluding their transactions from the scope of RESPA. *See* 12
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1 U.S.C. § 2606(a)(1); 24 C.F.R. 3500.5(b)(1), (4).

2 7. Venue is not proper in this Court because under 12 U.S.C. § 2614, a
3 cause of action under RESPA must be brought where the property is located or the
4 alleged violation occurred. On information and belief, the properties purchased by
5 the Tower City (Ohio) class members are located in Ohio, and Plaintiff claims that
6 the RESPA violations occurred there.

7 8. One or more Tower City (Ohio) class members' claims are barred
8 because RESPA does not apply to transactions between an underwriter and its title
9 agent. A title insurance company's underwriting of a title insurance policy is not a
10 distinct settlement service from a title agent issuing that policy.

11 9. One or more Tower City (Ohio) class members' claims are barred
12 because First American Title paid fair value for its ownership interest in Tower
13 City based on market factors, including the offer of a competitor. The purchase of
14 this interest is not prohibited by RESPA. *See* 12 U.S.C. § 2607(a), (c); HUD
15 Statement of Policy 1996-2, 61 Fed. Reg. 29,258 (June 7, 1996).

16 10. One or more Tower City (Ohio) class members' claims are barred
17 because Tower City did not "refer" title insurance business to First American Title
18 pursuant to an exclusive agency agreement with First American Title after the
19 limited exclusivity clause was removed in November 2006. Because these Tower
20 City (Ohio) class members' purchases of title insurance could not have been
21 pursuant to any alleged kickback scheme or agreement to refer title insurance
22 business, they could not recover under RESPA.

23 11. One or more Tower City (Ohio) class members' claims are barred
24 because Tower City did not "refer" title insurance business to First American Title
25 pursuant to an exclusive agency agreement with First American Title but rather did
26 so based on other factors, such as the requirement of a lender, mortgage broker, or
27 borrower or the quality of First American Title's policies or services.

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12. One or more of the Tower City (Ohio) class members cannot recover from First American Title because their alleged harm is the result of actions of third parties who are not defendants to this suit, including parties who referred these Tower City (Ohio) class members to Tower City or to First American Title. Because any “referral” in these transactions did not occur between Tower City and First American Title, these putative class members’ alleged harm was not caused by First American Title.

13. One or more Tower City (Ohio) class members’ claims are barred by the doctrines of waiver and estoppel. Prior to their real estate transactions, many Tower City (Ohio) class members were informed of the relationship between First American Title and Tower City, including in written disclosures. Many of these Tower City (Ohio) class members (or anyone acting on their behalf) did not request title insurance issued by another underwriter, nor did many of these Tower City (Ohio) class members exercise their statutory right to cancel their mortgage transactions after closing.

14. One or more Tower City (Ohio) class members’ claims are barred by the doctrines of voluntary payment, accord and satisfaction, and ratification. At their closings, many Tower City (Ohio) class members received a HUD-1 Settlement Statement and other closing documents, including written disclosures, indicating the partial charge for title insurance underwritten by First American Title.

15. First American Title has reached a settlement of a claim asserted under the policy of title insurance with one or more of the Tower City (Ohio) class members or their lenders. The resolution of these claims included releases of all claims asserted or that could have been asserted involving the issuance of First American Title policies. Therefore, the defenses of accord and satisfaction, settlement, and release bar one or more Tower City (Ohio) class members from

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1 recovery.

2 16. One or more Tower City (Ohio) class members' claims are subject to
3 arbitration under the terms of those Tower City (Ohio) class members' or their
4 lenders' policies, which require that all claims arising out of the parties' title
5 insurance transaction be resolved in arbitration.

6 17. One or more Tower City (Ohio) class members' claims are barred in
7 whole or part because the imposition of damages for all title insurance charges
8 paid (let alone three times all title insurance charges paid) would constitute an
9 unlawful impairment of contract and render those Tower City class members'
10 policies void.

11 18. One or more Tower City (Ohio) class members cannot recover treble
12 damages from First American Title because that recovery would violate the Fifth
13 Amendment to the United States Constitution and similar state constitutional
14 provisions by exposing First American Title to multiple punishments and fines for
15 the same act or conduct.

16 19. One or more Tower City (Ohio) class members cannot recover treble
17 damages from First American Title because that recovery would violate the Eighth
18 Amendment to the United States Constitution by subjecting First American Title
19 to an excessive fine that is penal in nature and seeks to punish First American Title
20 on vague standards.

21 20. One or more Tower City (Ohio) class members' claims for treble
22 damages violate the Due Process Clause of the Fifth and Fourteenth Amendments
23 to the United States Constitution in the absence of an order bifurcating
24 adjudication of those claims from adjudication of liability.

25 21. One or more Tower City (Ohio) class members cannot recover treble
26 damages from First American Title because that recovery would violate the Due
27 Process Clause of the Fifth and Fourteenth Amendments to the United States
28

1 Constitution by exposing First American Title to grossly disproportionate damages
2 in relation to the alleged conduct that was not willful or deliberate and for which
3 First American Title did not receive fair notice that it could be prohibited.

4 22. One or more Tower City (Ohio) class members cannot recover “three
5 times the amount of any and all payments to title agents . . . including but not
6 limited to Tower City” because RESPA measures damages as “three times the
7 amount of any charge paid for such settlement service,” *i.e.*, the “settlement
8 service involved in the violation.” 12 U.S.C. § 2607(d)(2). Plaintiff claims that
9 Tower City “referred” settlement service business in the form of title insurance
10 underwriting to First American Title. Under Plaintiff’s claim, the only settlement
11 service “involved in the violation” would be the underwriting referred to First
12 American Title, which would not include the services provided by Tower City for
13 which Tower City (Ohio) class members paid.

14 23. First American Title reserves the right to raise additional affirmative
15 and other defenses that may be established during discovery and by the evidence
16 in this case.

17 **Against Putative Nationwide Class Members**

18 It is impossible to know the identity of all persons encompassed by Plaintiff’s
19 putative nationwide class definition and all of the applicable defenses to those
20 persons’ claims governed by Fed. R. Civ. P. 8. Accordingly, on information and
21 belief, each of the following defenses could be applicable to certain putative
22 nationwide class members, depending on information available later:

23 1. One or more putative nationwide class members lack standing to sue
24 under Article III of the United States Constitution because they suffered no injury
25 in fact. There are no claims based on dissatisfaction with title insurance policies
26 or accompanying services, and certain putative nationwide class members paid the
27 uniform rate for title insurance set by state law or a state’s rating bureau (and
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1 therefore could not have paid a lower price for title insurance underwritten by
2 another title insurance underwriter). Therefore, they suffered no cognizable injury
3 and do not have standing to sue.

4 2. One or more putative nationwide class members lack standing to sue
5 under RESPA, 12 U.S.C. § 2607(d)(2), because they suffered no damages as a
6 result of First American Title's alleged conduct. RESPA provides that a
7 participant in a kickback scheme is liable to a person who paid for "such
8 settlement service" "involved in the violation." Those putative nationwide class
9 members who were not overcharged for title insurance suffered no damages and
10 lack statutory standing to sue.

11 3. One or more putative nationwide class members are not authorized to
12 sue under RESPA, 12 U.S.C. § 2607(d)(2), because they did not pay for title
13 insurance. RESPA authorizes private plaintiffs to sue only if they were "charged
14 for the settlement service involved in the violation." *Id.* If a putative nationwide
15 class member actually did not pay for title insurance, then there is no claim under
16 RESPA.

17 4. One or more putative nationwide class members' claims are barred by
18 RESPA's one-year statute of limitations, 12 U.S.C. § 2614. RESPA measures the
19 applicable limitations period from "the date of the occurrence of the violation,"
20 which is not synonymous with the date of closing. The claims of putative
21 nationwide class members whose title agencies entered into purchase agreements
22 with First American Title prior to June 12, 2006 are time barred.

23 5. One or more putative nationwide class members' claims are barred
24 because they did not enter into "federally related mortgage loans," as required by
25 RESPA. *See* 12 U.S.C. § 2601(2).

26 6. One or more putative nationwide class members' claims are barred
27 because their real estate transactions involved commercial or agricultural property,
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1 vacant land, residential buildings of more than four families, or property of 25 or
2 more acres, thereby excluding their transactions from the scope of RESPA. *See* 12
3 U.S.C. § 2606(a)(1); 24 C.F.R. 3500.5(b)(1), (4).

4 7. One or more putative nationwide class members' claims are barred
5 because RESPA does not apply to transactions between an underwriter and its title
6 agent. A title insurance company's underwriting of a title insurance policy is not a
7 distinct settlement service from a title agent issuing that policy.

8 8. One or more putative nationwide class members' claims are barred
9 because First American Title paid fair value for its ownership interests in the title
10 agents that issued title insurance policies in the putative nationwide class
11 members' transactions. Plaintiff claims that First American Title overpaid for
12 ownership interests and that these overpayments constituted prohibited "things of
13 value" in exchange for the referral of settlement service business. However, First
14 American Title paid fair market value for their ownership interests in title
15 agencies, based on market factors and First American Title's valuation analysis.
16 RESPA expressly permits payments for bona fide goods or services rendered. *See*
17 12 U.S.C. § 2607(a), (c); HUD Statement of Policy 1996-2, 61 Fed. Reg. 29,258
18 (June 7, 1996).

19 9. One or more putative nationwide class members' claims are barred
20 because the title agents that issued title insurance policies in their transactions
21 were, at the time of the title insurance transactions, lawfully controlled by First
22 American Title. For these putative nationwide class members' transactions, the
23 title agents could not make a referral to First American Title, and any alleged
24 payment of a "thing of value" preceding a title insurance transaction could not
25 cause a referral by an agent.

26 10. One or more putative nationwide class members' claims are barred
27 because the title agents that issued title insurance policies in their transactions
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1 were not purchased in part by First American Title but instead were purchased
2 previously by another entity. Thus, putative nationwide class members who
3 purchased title insurance from these title agencies could not establish a kickback
4 prohibited by RESPA.

5 11. One or more putative nationwide class members' claims are barred
6 because the title agents that issued title insurance policies in their transactions
7 were not purchased in part by First American Title but instead were formed as
8 joint ventures or other means through which First American Title did not pay any
9 thing of value to the title agent. Thus, putative nationwide class members who
10 purchased title insurance from these title agencies could not establish a kickback
11 prohibited by RESPA.

12 12. One or more putative nationwide class members' claims are barred
13 because the title agents that issued title insurance policies in their transactions
14 were Affiliated Business Arrangements within the meaning of RESPA, 12 U.S.C.
15 § 2607(c)(4) and § 2602(7), and therefore lawfully received payments from First
16 American Title.

17 13. One or more putative nationwide class members' claims are barred
18 because the title agents that issued title insurance policies in their transactions did
19 not enter into exclusive agency agreements with First American Title or did not
20 operate exclusively on behalf of First American Title.

21 14. One or more putative nationwide class members' claims are barred
22 because the title agents that issued title insurance policies in their transactions did
23 not "refer" title insurance business to First American Title but rather issued a First
24 American Title policy based on other factors, such as the requirement of a lender,
25 mortgage broker, or borrower, the quality of First American Title's policies or
26 services, or the price of First American Title's policies.

27 15. One or more of the putative nationwide class members cannot recover
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1 from First American Title because their alleged harm is the result of actions of
2 third parties who are not defendants to this suit, including parties who referred
3 these putative nationwide class members to their title agents or to First American
4 Title. Because any “referral” in these transactions did not occur between the title
5 agents and First American Title, these putative class members’ alleged harm was
6 not caused by First American Title.

7 16. One or more putative nationwide class members’ claims are barred by
8 the doctrines of waiver and estoppel. Prior to their real estate transactions, many
9 putative nationwide class members were informed of the relationship between
10 First American Title and their title agents, including in written disclosures. Many
11 of these putative nationwide class members (or anyone acting on their behalf) did
12 not request title insurance issued by another underwriter nor did many of these
13 putative nationwide class members exercise their statutory right to cancel their
14 mortgage transactions after closing.

15 17. One or more putative nationwide class members’ claims are barred by
16 the doctrines of voluntary payment, accord and satisfaction, and ratification. At
17 their closings, many putative nationwide class members received a HUD-1
18 Settlement Statement and other closing documents, including written disclosures,
19 indicating the partial charge for title insurance underwritten by First American
20 Title.

21 18. First American Title has reached a settlement of a claim asserted under
22 the policy of title insurance with one or more of the putative nationwide class
23 members or their lenders. The resolution of these claims included releases of all
24 claims asserted or that could have been asserted involving the issuance of First
25 American Title policies. Therefore, the defenses of accord and satisfaction,
26 settlement, and release bar one or more putative nationwide class members from
27 recovery.
28

1 19. One or more putative nationwide class members' claims are subject to
2 arbitration under the terms of those putative nationwide class members' or their
3 lenders' policies, which require that all claims arising out of the parties' title
4 insurance transaction be resolved in arbitration.

5 20. One or more putative nationwide class members' claims are subject to
6 arbitration under the terms of those class members' title agents' agency
7 agreements with First American Title, which require that all claims arising out of
8 the parties' principal-agent relationship be resolved in arbitration and extend to
9 claims arising out of title insurance transactions involving the title agents.

10 21. One or more putative nationwide class members' claims are barred in
11 whole or part because the imposition of damages for all title insurance charges
12 paid (let alone three times all title insurance charges paid) would constitute an
13 unlawful impairment of contract and render those putative nationwide class
14 members' policies void.

15 22. One or more putative nationwide class members cannot recover treble
16 damages from First American Title because that recovery would violate the Fifth
17 Amendment to the United States Constitution and similar state constitutional
18 provisions by exposing First American Title to multiple punishments and fines for
19 the same act or conduct.

20 23. One or more putative nationwide class members cannot recover treble
21 damages from First American Title because that recovery would violate the Eighth
22 Amendment to the United States Constitution by subjecting First American Title
23 to an excessive fine that is penal in nature and seeks to punish First American Title
24 on vague standards.

25 24. One or more putative nationwide class members' claims for treble
26 damages violate the Due Process Clause of the Fifth and Fourteenth Amendments
27 to the United States Constitution in the absence of an order bifurcating
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1 adjudication of those claims from adjudication of liability.

2 25. One or more putative nationwide class members cannot recover treble
3 damages from First American Title because that recovery would violate the Due
4 Process Clause of the Fifth and Fourteenth Amendments to the United States
5 Constitution by exposing First American Title to grossly disproportionate damages
6 in relation to the alleged conduct that was not willful or deliberate and for which
7 First American Title did not receive fair notice that it could be prohibited.

8 26. One or more putative nationwide class members cannot recover “three
9 time the amount of any and all payments to title agents” because RESPA measures
10 damages as “three times the amount of any charge paid for such settlement
11 service,” *i.e.*, the “settlement service involved in the violation.” 12 U.S.C.
12 § 2607(d)(2). Plaintiff claims that title agents “referred” settlement service
13 business in the form of title insurance underwriting to First American Title. Under
14 Plaintiff’s claim, the only settlement service “involved in the violation” would be
15 the underwriting referred to First American Title, which would not include the
16 services provided by title agents for which putative nationwide class members
17 paid.

18 27. First American Title reserves the right to raise additional affirmative
19 and other defenses that may be established during discovery and by the evidence
20 in this case.

21 **DEMAND FOR RELIEF**

22 WHEREFORE, First American Title prays for judgment against Plaintiff, the
23 putative nationwide class, and the Tower City (Ohio) class as follows:

- 24 1. That the Court decline to certify the putative nationwide class;
25 2, That Plaintiff and the members of the putative classes take nothing by the
26 Complaint;
27 3. That the Complaint be dismissed with prejudice;
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- 4. For costs of suit incurred herein; and
- 5. For such other and further relief as the Court deems just and proper.

Dated: February 23, 2011

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