No. 15-___

IN THE

# Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION, AND FIRST AMERICAN TITLE INSURANCE COMPANY,

*Petitioners*,

v.

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

Section 8(a) of the Real Estate Settlement Procedures Act of 1974 ("RESPA") provides that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding . . . that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a).

This petition presents the following questions:

1. Whether a violation of RESPA § 8(a)'s prohibition on unlawful "kickbacks" may be presumed whenever a settlement service provider enters into an exchange that includes, among other things, an agreement to refer title insurance business to that provider, without an individualized determination that the settlement service provider's payment exceeded the value of the lawful consideration received by its counterparty in exchange for the payment.

2. Whether a private purchaser of real estate settlement services has Article III standing to maintain an action under RESPA where she suffered no concrete harm from the alleged statutory violation.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioners First American Financial Corporation (as successor in interest to The First American Corporation) and First American Title Insurance Company state the following:

First American Title Insurance Company is a wholly owned subsidiary of First American Financial Corporation, a publicly traded corporation. No publicly held corporation owns 10% or more of the stock of First American Financial Corporation.

## PARTIES TO THE PROCEEDING

Petitioners are First American Financial Corporation and First American Title Insurance Company, which were appellees in the court of appeals. Respondent is Denise P. Edwards, who was appellant in the court of appeals.

## TABLE OF CONTENTS


**Page**

QUESTIONS PRESENTED .................................... i

CORPORATE DISCLOSURE STATEMENT .......... ii

PARTIES TO THE PROCEEDING ........................ iii

TABLE OF AUTHORITIES.................................... vi

INTRODUCTION .................................................... 1

OPINIONS BELOW ................................................ 2

JURISDICTION ..................................................... 2

CONSTITUTIONAL PROVISION INVOLVED ....... 2

STATUTORY PROVISIONS INVOLVED ............... 2

STATEMENT OF THE CASE ................................ 3

REASONS FOR GRANTING THE PETITION ........ 8

I. CERTIORARI IS NECESSARY TO RESOLVE WHETHER INDIVIDUALIZED PROOF OF PAYMENT FOR A REFERRAL IS NECESSARY TO SHOW A "KICKBACK" UNDER RESPA § 8(A) ........... 9

A. The Courts Of Appeals Are Divided On This Question ....................... 9

B. The Standard For Liability Under RESPA Is An Important And Recurring Issue .................................. 14

C. This Case Presents An Excellent Vehicle To Address This Question ..... 16

D. The Decision Below Is Wrong............ 16

## TABLE OF CONTENTS
(continued)

**Page**

II. AT A MINIMUM, THE COURT SHOULD HOLD THIS PETITION PENDING ITS DECISION IN *SPOKEO, INC. V. ROBINS* .......................... 20

CONCLUSION ........................................................ 22

APPENDIX A: Opinion, U.S. Court of Appeals for the Ninth Circuit (August 24, 2015) ....... 1a

APPENDIX B: Order Denying Plaintiff's Motion for Nationwide Class Certification, United States District Court Central District of California (November 30, 2012) ............................................................ 26a

APPENDIX C: Memorandum, U.S. Court of Appeals for the Ninth Circuit (June 21, 2010) ............................................................ 43a

APPENDIX D: Opinion, U.S. Court of Appeals for the Ninth Circuit (June 21, 2010) ......... 48a

APPENDIX E: Order Denying Petition for Rehearing En Banc, U.S. Court of Appeals for the Ninth Circuit (November 4, 2015) ............................................................ 56a

APPENDIX F: Class Action Complaint, United States District Court Central District of California (June 11, 2007) ....................... 58a

## TABLE OF AUTHORITIES

**Page(s)**

CASES

*Blue Chip Stamps v. Manor Drug Stores*,
421 U.S. 723 (1975) ........................................ 15, 16

*Busby v. JRHBW Realty, Inc.*,
513 F.3d 1314 (11th Cir. 2008) ...................... 11, 19

*Carter v. Welles-Bowen Realty, Inc.*,
736 F.3d 722 (6th Cir. 2013) ................................ 19

*Dura Pharms., Inc. v. Broudo*,
544 U.S. 336 (2005) .............................................. 16

*Freeman v. Quicken Loans, Inc.*,
132 S. Ct. 2034 (2012) ................................... 18, 19

*Glover v. Standard Federal Bank*,
283 F.3d 953 (8th Cir. 2002) .................... 10, 11, 12

*Heimmermann v. First Union Mortgage Corp.*,
305 F.3d 1257 (11th Cir. 2002) ............................ 11

*Howland v. First American Title Co.*,
672 F.3d 525 (7th Cir. 2012) .......................... 12, 13

*Lamie v. U.S. Trustee*,
540 U.S. 526 (2004) .............................................. 17

*Mims v. Stewart Title Guar. Co.*,
590 F.3d 298 (5th Cir. 2009) ................................ 12

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

*O'Sullivan v. Countrywide Home Loans, Inc.*,
319 F.3d 732 (5th Cir. 2003) .......................... 11, 12

*Robins v. Spokeo, Inc.*,
742 F.3d 409 (9th Cir. 2014) .......................... 21

*Schuetz v. Banc One Mortg.*,
292 F.3d 1004 (9th Cir. 2002) .......................... 13

*Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*,
552 U.S. 148 (2008) .......................... 15

STATUTES & CONSTITUTIONAL PROVISIONS

12 U.S.C. § 2601(b)(2) .......................... 17

12 U.S.C. § 2602(2) .......................... 3, 17

12 U.S.C. § 2607 .......................... *passim*

15 U.S.C. § 1681 .......................... 20

28 U.S.C. § 1254(1) .......................... 2

Fed. R. Civ. P. 23 .......................... 6, 16

U.S. Const. Art. III, § 2 .......................... *passim*

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

OTHER AUTHORITIES

Theodore Eisenberg & Geoffrey P. Miller, *Attorney's Fees and Expenses in Class Action Settlements: 1993-2008* (N.Y. Univ. Law & Econ. Research Paper Series, Working Paper No. 09-50 2009), *available at* http:ssrn.com/abstract =1497224 ........................ 15

FTC Workshop, Protecting Consumer Interests in Class Actions (Sept. 13-14, 2004), in Panel 2: Tools for Ensuring that Settlements are "Fair, Reasonable, and Adequate," 18 GEO. J. LEGAL ETHICS 1197 (2005) ............................... 15

NERA Economic Consulting, *Consumer Class Action Settlements: 2010-2013*, (July 22, 2014) ..................................................... 16

## INTRODUCTION

Respondent Denise P. Edwards seeks to bring a nationwide class action based on the allegation that First American paid "kickbacks" for referrals, in violation of RESPA § 8(a), 12 U.S.C. § 2607(a), when it purchased equity interests in 26 title agencies, and along with these interests received certain assurances for referrals of title insurance business. Respondent has not shown—and, indeed cannot show—that First American overpaid for any of these equity interests, let alone all of them. The United States Court of Appeals for the Ninth Circuit nevertheless held that an individualized analysis of each purchase was not required, and instead applied an irrebuttable presumption that an unlawful "kickback" was paid each time First American entered into an exchange involving a referral agreement.

No other circuit would have reached the same conclusion. Indeed, all of the other circuits that have addressed the standard for liability under § 8(a)—including the Fifth, Seventh, Eighth, and Eleventh Circuits—have held that a kickback exists only where the defendant overpaid for lawful consideration in each transaction involving a referral. The Ninth Circuit's contrary rule broadly allows for class treatment of many § 8(a) claims, exposing settlement service providers to potentially crippling liability. It is also clearly incorrect, as the plain language of § 8(a) prohibits only payments for referrals, and nothing else.

In any event, the Court should hold this petition pending its forthcoming decision in *Spokeo, Inc. v. Robins*, cert. granted, No. 13-1339 (oral argument

held on Nov. 2, 2015). Respondent here has not claimed any concrete harm from the alleged RESPA violation, and so *Spokeo*'s holding on Article III standing could well dispose of this case.

## OPINIONS BELOW

The opinion of the court of appeals reversing the district court's denial of class certification (Pet. App. 1a-25a) is reported at 798 F.3d 1172. The district court's unreported decision on class certification is available at Pet. App. 26a-42a.

## JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on August 24, 2015. The Ninth Circuit denied First American's petition for rehearing en banc on November 4, 2015. On January 18, 2016, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including March 3, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 2 of the U.S. Constitution provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under . . . the Laws of the United States . . .."

## STATUTORY PROVISIONS INVOLVED

The Real Estate Settlement and Procedures Act ("RESPA"), § 8(a), 12 U.S.C. § 2607(a), provides that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding . . . that business incident to or a part of a real estate settlement service

involving a federally related mortgage loan shall be referred to any person."

RESPA § 2(2), 12 U.S.C. § 2602(2), provides, "the term 'thing of value' includes any payment, advance, funds, loan, service, or other consideration."

RESPA § 8(c), 12 U.S.C. § 2607(c), provides, "Nothing in this section shall be construed as prohibiting . . . (2) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed."

## STATEMENT OF THE CASE

**A.** In September 2006, Respondent Denise P. Edwards purchased a home in Cleveland, Ohio. Pet. App. 60a, 64a. Tower City served as the title agent and conducted the closing. Pet. App. 64a. In connection with that transaction, Respondent purchased a title insurance policy issued by First American. *Id.*[1]

First American had purchased a 17.5 percent minority interest in Tower City for $2 million in 1998. Pet. App. 62a. According to the complaint, the $2 million purchase price was "significantly more than the book value of Tower City." *Id.* Respondent contended the "additional monies" paid by First American represented a "kickback" to obtain an agreement "providing that Tower City would exclusively refer all title insurance underwriting to First American Title." *Id.*

[1] First American Financial Corporation and First American Title Insurance Company are together referred to as "First American."

Respondent complained that Tower City referred her title insurance policy to First American, but did not claim to have been overcharged. *See* Pet. App. 58a-71a. Nor could she; the price for title insurance in Ohio is set at a uniform, state-regulated rate, which was disclosed to her. *See* Pet. App. 52a, 54a-55a.

Respondent sought statutory damages in "an amount equal to three times the amount of any and all payments to title agents owned in part by First American Corporation or its subsidiaries . . . for title insurance in respect of each mortgage loan transaction." Pet. App. 69a. Respondent also sought to represent a putative class of "[a]ll consumers who from June 12, 2006 to the present entered into mortgage loan transactions using the services of a title agency or similar entity owned in part by First American Corporation" and purchased "title insurance issued by First American Title Insurance Company." Pet. App. 65a. Respondent asserted that the proposed class would consist "of thousands and perhaps tens or hundreds of thousands of individuals" and that, if the litigation proceeded as a nationwide class action, it would involve "more than a million" transactions. Pet. App. 65a, 68a.

**B.** First American moved to dismiss the complaint for lack of Article III standing. In October 2007, the district court denied First American's motion. Pet. App. 49a-50a.

Respondent moved for certification of a nationwide class of all purchasers of title insurance from any of the 180 title agencies in which First American owned an interest, and for discovery related to this claim. In December 2007 and June 2008, the district

court entered orders denying Respondent's motions for class certification and nationwide discovery. Pet. App. 45a-47a.

**C.** In September 2008, the Ninth Circuit granted interlocutory review of the district court's orders denying class certification. Pet. App. 50a. The Ninth Circuit rejected First American's threshold standing challenge, holding that "[t]he injury required by Article III can exist solely by virtue of statutes creating legal rights." *Id.* at 52a. The Ninth Circuit held that respondent's Article III standing would therefore depend entirely on whether the statute "gives [her] a statutory cause of action" in the absence of any alleged overcharge. *Id.*

**D.** In a second opinion issued the same day, the Ninth Circuit reversed the district court's order denying certification of a class of individuals who used Tower City as their title agency. Pet. App. 47a. The court concluded that "a great amount of individualized proof" would not be required to show that a "referral" was made by Tower City in a single transaction. *Id.* at 46a. The court further held that Respondent's contention that Tower City "was contractually obligated to refer customers to First American Title . . . if true, would be common proof of the 'action' element of a referral." *Id.* And, § 8(a)'s "causation element"—*i.e.*, whether Tower City's actions had the effect of affirmatively influencing the consumer's selection—was met because Respondent's evidence established that Tower City title agents, rather than purchasers, chose which title insurance underwriter to use. *Id.*

The court of appeals affirmed the district court's determination that Respondent had not satisfied the

requirements of Federal Rule of Civil Procedure 23 as to the proposed nationwide class of individuals that had used any one of 179 other title agencies partially owned by First American. Pet. App. 46a-47a. But the Ninth Circuit remanded for the district court to allow Respondent additional discovery, and thereafter renew her motion for certification of a nationwide class. Pet. App. 47a.

**E.** First American petitioned for a writ of certiorari to challenge the Ninth Circuit's decision on standing, which this Court granted on June 20, 2011. On June 28, 2012, the Court dismissed the writ as improvidently granted.

**F.** In the year following remand to the district court, the parties engaged in extensive discovery. In April 2011, Edwards again moved to certify a nationwide class action of all consumers who entered into a federally-related mortgage loan transaction using one of 38 title agencies or similar entities that were partially owned by First American. Pet. App. 28a. First American opposed the motion with over 6,600 pages of the evidence adduced in discovery, including 85 separate declarations and an expert report. Pet. App. 27a.

The district court denied Respondent's nationwide class certification motion on November 30, 2012, finding that common issues did not predominate for several reasons. As relevant here, the court found that RESPA's "clear and unambiguous statutory and regulatory language mandates that for Plaintiff to prove a violation of RESPA, she must demonstrate that Defendants overpaid for their interests in the thirty-eight title agencies at issue in the proposed nationwide class." Pet. App. 33a. Be-

cause each transaction would have to be scrutinized to determine if First American overpaid for its ownership interest, individualized issues would predominate. Pet. App. 28a. The district court acknowledged that as to Tower City class members, there was a common question "whether the arrangement between Tower City and First American violated RESPA," but noted that "[t]his evidence . . . will not be dispositive or relevant as to the other thirty-seven agencies named by Plaintiff." Pet. App. 28a, 36a.

**G.** Respondent then sought and was granted leave to appeal the decision denying certification of the nationwide class to the Ninth Circuit. In a published decision, the court of appeals affirmed in part, reversed in part, and remanded for further proceedings. Pet. App. 4a-5a.

As an initial matter, the court of appeals held that individual inquiries into each of the putative class members' transactions with First American were not "required due to the safe harbor in § 2607(c)(2)," because the equity interests in the title agencies were not "goods, services, or facilities," and thus § 8(c)(2) "cannot apply to First American's transactions as a matter of law." Pet. App. 11a, 13a-14a.

Nor, the court held, did § 8(a) require individualized inquiries to "pinpoint how much money First American paid for the referral agreement as opposed to the equity interest." Pet. App. 15a-16a. Notwithstanding evidence that the price First American had paid was reasonably related to the value of the ownership interests it obtained, the respondent could establish that § 8(a) was violated "by alleging that First American paid a lump sum of money to each

captive title agency" and that "in exchange for that money—each title agency agreed to refer First American future insurance." Pet. App. 16a. The court of appeals continued that "[a]bsent § 8(c), nothing in the statute requires Edwards to prove First American gave money to the title agencies only in consideration for the referral agreement." *Id.*

First American sought rehearing en banc, which was denied on November 4, 2015. Pet. App. 56a-57a.

## REASONS FOR GRANTING THE PETITION

The Court should grant First American's petition for a writ of certiorari. The Ninth Circuit's decision below holding that individualized findings are not necessary to show a "kickback" under RESPA § 8(a) is irreconcilable with uniform precedent from the Fifth, Seventh, Eighth, and Eleventh Circuits. These four circuits have long held that individualized proof is required, and that a court may not simply presume that a "kickback" was paid whenever an exchange with a settlement service provider involves a referral.

The standard for § 8(a) liability under RESPA is a legal issue of great importance because it determines whether class treatment of such claims is appropriate. If individualized findings are not required, settlement service providers may face enormous liability. The facts of this case make clear the effect of the Ninth Circuit's novel new rule: Respondent has alleged no concrete harm from any RESPA violation, and yet seeks damages in the amount of three times the price of the title insurance policy, on behalf of a class involving tens of thousands of individuals who purchased title insurance from any one

of 26 different title agencies. Indeed, this case is an excellent vehicle for resolving this question because the issue was developed below and is dispositive of whether the case can proceed as a nationwide class action.

This Court's review is also warranted because the Ninth Circuit's decision was incorrect. Proof of an unlawful kickback under RESPA § 8(a) requires an individualized showing that the settlement service provider's payment was for a referral and nothing else.

Lastly, and in any event, the Court should hold this case pending its decision in *Spokeo, Inc. v. Robins*, cert. granted, No. 13-1339 (oral argument held on Nov. 2, 2015). The issues in the two cases overlap significantly, and the conclusion that respondent has Article III standing must be considered in light of this Court's decision in *Spokeo*.

## I. CERTIORARI IS NECESSARY TO RESOLVE WHETHER INDIVIDUALIZED PROOF OF PAYMENT FOR A REFERRAL IS NECESSARY TO SHOW A "KICKBACK" UNDER RESPA § 8(A)

The Court should grant this petition to resolve whether a court can find an unlawful "kickback" in violation of RESPA § 8(a), absent an individualized determination that the defendant's payment exceeded the value of the lawful consideration received in exchange for that payment.

### A. The Courts Of Appeals Are Divided On This Question.

Five federal appellate courts, including the United States Court of Appeals for the Ninth Circuit in

the decision below, have addressed whether individualized proof of payment for a referral is necessary to show a violation of § 8(a). The Ninth Circuit's outlier decision is irreconcilable with the decisions of the other courts that have addressed the issue.

1. The Fifth, Seventh, Eighth, and Eleventh Circuits have all held that to demonstrate an unlawful "kickback" under RESPA § 8(a), the plaintiff must show that the defendant's payment exceeded the value of the lawful consideration received in exchange for that payment. In other words, establishing RESPA liability for "kickbacks" involves an inherently transaction-specific analysis to determine whether the defendant paid for the referral of business, or whether the price paid was reasonably related to the lawful consideration exchanged.

In *Glover v. Standard Federal Bank*, 283 F.3d 953 (8th Cir. 2002), the Eighth Circuit reversed the district court's certification of a nationwide class alleging that the defendant-lender violated § 8(a) by paying brokers a "yield spread premium"—a fee for arranging a mortgage that spreads certain settlement costs over the life of the loan, *id.* at 957, 964. The plaintiffs argued that class treatment was appropriate because if the yield spread premium is really a referral fee, the payment violated RESPA regardless of the fact that the broker may actually perform services. *Id.* at 963. The Eighth Circuit rejected that argument, holding that the court must engage in "a loan-specific inquiry" to determine whether the lender's payment is reasonably related to the legitimate services provided by the broker, such as title searches and title examinations. *Id.* at 964-65. So long as the broker provided compensable services,

and the lender's payment is reasonably related to those services, no violation of § 8(a) occurred. *Id.* at 965. This inquiry, the court explained, "must be made on a loan-by-loan basis," rendering class treatment inappropriate. *Id.* at 965-66.

The Eleventh Circuit applied *Glover*'s rule that same year to vacate the certification of a similar class claim based on yield spread premiums. *See Heimmermann v. First Union Mortgage Corp.*, 305 F.3d 1257 (11th Cir. 2002). The court held that an unlawful kickback cannot be "presumed" merely because the lender pays a broker a yield spread premium and a referral is made. *Id.* at 1263. Instead, the court ruled, RESPA is not violated so long as the broker provides lawful goods or services, and "the total compensation paid to the broker is reasonably related to the total value of the goods or services actually provided." *Id.* at 1264. This showing, the Eleventh Circuit later explained, must be established "on a case-by-case basis," rendering such cases "inappropriate for class review." *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1321 (11th Cir. 2008).

The following year, the Fifth Circuit reached the same conclusion in *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732 (5th Cir. 2003), reversing certification of a class alleging that § 8(a) was violated by the payment of reimbursement fees. *O'Sullivan* analyzed whether a law firm's payment of a "reimbursement fee" to the defendant lender in a number of transactions "constitute[d] an illegal kickback" under § 8(a). *Id.* at 738-39. The court held that under § 8(a), "individualized factfinding [was] required for each transaction" to determine, first, what lawful goods or services were provided to Coun-

trywide in that transaction, and, second, "whether the flat fee charged was reasonably related to their value." *Id*. at 744. The court concluded: "RESPA § 8 liability is established by making individual comparisons of compensation to actual services, *not* by presuming fire where there is smoke." *Id*. at 742 (emphasis added). *See also Mims v. Stewart Title Guar. Co.*, 590 F.3d 298, 307 (5th Cir. 2009) (reversing class certification for alleged overcharges for title insurance because § 8 liability requires transaction specific "inquiry into the reasonableness of the payments for goods and services.").

The Seventh Circuit expressly adopted the reasoning of *Glover* and *O'Sullivan* to reject a class claim based on title agents' alleged overcompensation of real estate attorneys for title examinations. *See Howland v. First American Title Co.*, 672 F.3d 525, 529-30 (7th Cir. 2012). *Howland* broadly asserted that "[c]lass actions are rare in RESPA Section 8 cases" because "the problem at the class certification stage is that the existence or the amount of the kickback in these cases generally requires an individual analysis of each alleged kickback to compare the services performed with the payment made." *Id*. at 526, 530. It then held that, under uniform precedent, "RESPA Section 8 requires individualized inquiries into the services and compensation provided in each transaction and whether the two were reasonably related." *Id*. at 532. The court explained that "suspicious practices do not, in and of themselves, constitute a per se violation of RESPA Section 8." *Id*. at 534. Rather, "to prove a Section 8 violation the plaintiff must establish that the payment to an

individual title agent was not reasonably related to the services he provided." *Id.*[2]

2. The Ninth Circuit's opinion in this case diverged from this monolithic precedent by rejecting the district court's conclusion that whether First American paid for referrals—or instead for an entirely legitimate ownership interest in title agencies—requires individualized inquiries as to whether there is a reasonable relationship between the sum paid by First American for the equity stakes and the value of the interests it purchased.

The court stated that whether these "transaction[s] violated RESPA § 8(a) does not require inquiry into individual issues of payment" because "RESPA does not . . . require Edwards to pinpoint how much money First American paid for the referral agreement as opposed to the equity interest." Pet. App. 15a-16a. Rather, to prove that First American paid "kickbacks" for referrals in violation of § 8(a), the plaintiff "need only prove the existence of an exchange involving a referral agreement." *Id.* at 17a. Thus, class treatment was permissible even though First American's evidence demonstrated that the consideration it paid was reasonably related to the interest in the title agency First American received in exchange. *See id.* at 20a. The Ninth Cir-

[2] Until the decision below, the Ninth Circuit too recognized that § 8(a) prohibits only "fees for referral[s]"—not all referral agreements—and that a plaintiff must put forth evidence that a fee or "kickback for referral" was in fact paid. *See, e.g.*, *Schuetz v. Banc One Mortg.*, 292 F.3d 1004 (9th Cir. 2002). For the reasons stated *infra* at 18-19, there is no credible basis to distinguish *Schuetz* from this case.

cuit's irrebuttable presumption that First American paid a "kickback" in violation of § 8(a) whenever an exchange involved a referral agreement cannot be reconciled with the rule in the Fifth, Seventh, Eighth and Eleventh Circuits that RESPA liability exists only when the defendant overpaid for a legitimate good, facility, or service.[3] As a result, this Court's review is urgently needed to ensure uniform law among the circuits.

### B. The Standard For Liability Under RESPA Is An Important And Recurring Issue.

The standard for liability under RESPA § 8(a) is an important and recurring issue that directly impacts whether such claims are amenable to class treatment. The impact of the Ninth Circuit's broad rule is exemplified in the facts of this case. Respondent has alleged no harm from First American's alleged conduct, and yet seeks to recover on behalf of a class of many thousands of individuals that obtained services from any one of 26 title agencies. If, as Respondent contends, all of these putative class members are entitled to recover three times the title in-

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[3] That these cases interpreted the scope of § 8(a) where the transaction involved a good, facility, or service, does not make them distinguishable. For the reasons described *infra* at 19, § 8(c) does not provide an exemption to § 8(a) liability where goods, facilities, and services are involved. Rather, it lists these types of lawful consideration as examples of the types of transactions that § 8(a) does not reach. Thus, the decisions of the Fifth, Seventh, Eighth, and Eleventh Circuits have equal application to cases where, as here, the lawful consideration at issue is something other than a good, facility, or service.

surance premiums they paid to First American, the threatened exposure is enormous. And, the effect of the Ninth Circuit's rule is not limited to this case. The types of arrangements that are at issue here—in which title insurers invest in title insurance agencies—are widespread across the country.

Critically, the Ninth Circuit's decision will encourage the filing of class actions that impose great costs on settlement service providers, including substantial attorneys' fees expended in discovery in unmeritorious suits and the *in terrorem* settlement value. *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorney's Fees and Expenses in Class Action Settlements: 1993-2008*, at 15 tbl.5 (N.Y. Univ. Law & Econ. Research Paper Series, Working Paper No. 09-50 2009), *available at* http:ssrn.com/abstract=1497224 (reporting average settlement for certified class actions at more than $100 million); FTC Workshop, Protecting Consumer Interests in Class Actions (Sept. 13-14, 2004), in Panel 2: Tools for Ensuring that Settlements are "Fair, Reasonable, and Adequate," 18 GEO. J. LEGAL ETHICS 1197, 1213 (2005) (stating that prospect of paying several years' worth of attorney fees to maintain a defense along with statutory damages makes class certification, "in effect, the whole case"). This Court has warned time and time again that uncontrolled class litigation threatens such liability. *See, e.g.*, *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 163 (2008) (acknowledging that "the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies" which raises the costs of doing business) (citing *Blue Chip Stamps v. Manor Drug Stores*, 421

U.S. 723, 740-41 (1975)); *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (same). This concern is particularly acute in the settlement services context as the number of class action filings against entities in the mortgage industry has risen dramatically in recent years. *See* NERA Economic Consulting, *Consumer Class Action Settlements: 2010-2013*, at 4 (July 22, 2014).

### C. This Case Presents An Excellent Vehicle To Address This Question.

This is an ideal case to address the question of whether a court can find an unlawful "kickback" in violation of RESPA § 8(a), without making an individualized determination that the defendant's payment exceeded the value of the lawful consideration received in exchange for that payment.

This question undeniably impacts whether this case may proceed as a nationwide class action. Specifically, Respondent contends that class treatment is proper because common questions of law predominate over questions affecting only individual members. Fed. R. Civ. P. 23(b)(3). Predominance exists here, however, only if § 8(a) liability can be shown without an individualized inquiry into each one of First American's transactions with the 26 title agencies in which it purchased an equity interest. Reversal of the Ninth Circuit's decision below will therefore prevent this case from going forward as a nationwide class action.

### D. The Decision Below Is Wrong.

The Ninth Circuit's rule—that a court can find an unlawful "kickback" whenever "an exchange involv[es] a referral agreement" without making an

individualized finding that payment was made for the referral alone—is incorrect. Pet. App. 15a-16a.

1. The plain language of § 8(a) prohibits only payments *for* referrals. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) ("It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."). Specifically, § 8(a) provides:

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

Neither this provision, nor any other provision of RESPA, bars settlement service providers from entering into referral agreements generally. Rather, a referral is prohibited only where it is made in exchange for a "fee, kickback, or thing of value," § 2607(a), meaning, a "payment, advance, funds, loan, service, or other consideration," § 2602(2). It follows that § 8(a) is violated only where a settlement service provider pays for a referral, as opposed to something else.

That the payment must be made for the referral—and the referral alone—comports with RESPA's purpose of eliminating "kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." § 2601(b)(2). It does nothing to advance the purpose of RESPA to presume, as

the Ninth Circuit did below, that a payment made in an exchange involving both lawful consideration and a referral agreement was a "kickback" for a referral. This is particularly true where, as here, the evidence shows that the payment was equal to the value of the lawful consideration alone.

Indeed, this Court has explained the scope of § 8(a) as covering a payment made for a referral alone. *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034 (2012), described § 8(a) as prohibiting a settlement service provider from "agree[ing] to exchange valuable tickets to a sporting event in return for a referral of business," or entering into a "'retainer' agreement pursuant to which the provider pays a monthly lump sum in exchange for the recipient's agreement to refer any business that comes his way," *id*. at 2043.

2. By contrast, the Ninth Circuit held in this case that § 8(a) does not require the "transfer of money solely as a kickback." Pet. App. 16a. To support this rule that an individualized inquiry is not required, and in an effort to distinguish the uniform precedent holding otherwise, the Ninth Circuit relied on the fact that the "statutory safe harbor" in § 8(c) does not discuss the lawful consideration First American purchased in the transactions here: equity interests in title agencies. *Id*. at 15a-16a.

It is true, as the court of appeals noted, that § 8(c) does not expressly address equity interests in title agencies. Section 8(c) provides that "[n]othing in [§ 8(a)] shall be construed as prohibiting . . . payment for goods or facilities actually furnished or for services actually performed." § 2607(c). But the Ninth Circuit misinterpreted the function of § 8(c).

This provision does not, as the court held, provide a "statutory exemption" to liability for activities otherwise barred by § 8(a). Pet. App. 14a-15a. As the Eleventh Circuit explained, "everything about § 8(c) suggests that it is an interpretive gloss on § 8(a) rather than a list of exemptions bestowed upon otherwise illegal conduct." *Busby*, 513 F.3d at 1327. Because § 8(c) merely sets forth a non-exhaustive list of common transactions that do not fall within § 8(a)'s prohibition, the meaning of § 8(a) does not turn on whether the transaction at issue involved the types of lawful consideration expressly addressed in § 8(c). Rather, the meaning of § 8(a) is the same regardless of the lawful consideration at issue: an exchange involving a referral agreement is unlawful only when payment is made for the referral and the referral alone.

The Ninth Circuit's interpretation of RESPA is untenable for another reason. As this Court has recognized, § 8(a)'s prohibition on referrals "is also enforceable through criminal prosecutions," § 2607(d)(1). *Freeman*, 132 S. Ct. at 2041. *See also Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 729 (6th Cir. 2013) (Sutton, J., concurring) ("Anyone who violates the Real Estate Settlement Procedures Act's ban on referral fees commits a crime."). Under the rule below, a settlement service provider could face criminal prosecution even if, as here, the evidence shows that the payment made was sufficient only to cover the lawful consideration received in the exchange involving a referral agreement. The rule of lenity prohibits such a broad, irrebuttable presumption that an unlawful kickback was paid. *See Freeman*, 132 S. Ct. at 2041.

## II. AT A MINIMUM, THE COURT SHOULD HOLD THIS PETITION PENDING ITS DECISION IN *SPOKEO, INC. V. ROBINS.*

At a minimum, this Court should grant First American's petition and hold for resolution of the question presented in *Spokeo, Inc. v. Robins*, No. 13-1339: whether Congress may confer Article III standing on a plaintiff that has suffered no concrete harm by authorizing a private right of action based on a statutory violation. That question is plainly implicated here.

Respondent's Article III standing is premised solely on her alleged statutory injury. Specifically, Respondent has not pled that First American's alleged violation of § 8(a) increased the cost of her title insurance policy, nor could she, as all insurers in Ohio charge identical rates prescribed by a regulatory regime. *See* Pet. App. 52a, 54a-55a. Moreover, Respondent has not pled that the alleged violation affected the quality of the title insurance she received. *See id.* at 58a-71a. Nevertheless, the Ninth Circuit held that she had standing. The court reasoned that "[t]he injury required by Article III can exist solely by virtue of statutes creating legal rights." Pet. App. 52a. It further indicated that respondent's standing depended entirely on whether RESPA "gives [her] a statutory cause of action" in the absence of any alleged overcharge. *Id.*

Similarly, in *Spokeo*, the Ninth Circuit held that the plaintiff there had Article III standing to pursue a claim under the Fair Credit Reporting Act, 15 U.S.C. § 1681, absent a showing that he was injured by the alleged violation because "the violation of a statutory right is usually a sufficient injury in fact to

confer standing." *Robins v. Spokeo, Inc.*, 742 F.3d 409, 412 (9th Cir. 2014) (citing *Edwards v. First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010)), cert. granted, 135 S. Ct. 1892 (2015). The Ninth Circuit continued that where "the statutory cause of action does not require a showing of actual harm when a plaintiff sues for willful violations," actual harm is unnecessary to establish injury in fact. 742 F.3d at 412. On this ground, the court concluded that the "alleged violations of Robins's statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III." *Id*. at 413-14.

That issues in the two cases overlap is undeniable. The Ninth Circuit in *Robins* expressly relied on its earlier decision on standing in this case to conclude that the plaintiff there had Article III standing. 742 F.3d at 412. And, the petition for a writ of certiorari in *Spokeo* acknowledged that the petition raised the same issue as did the petition in *Edwards*, which this Court later dismissed. *Spokeo*, No. 13-1339, (pet. for a writ of a certiorari filed May 1, 2014). A decision in *Spokeo* that the alleged violation of a statutory right is insufficient to satisfy the injury-in-fact requirement of Article III, will eviscerate Respondent's claim of standing here. Thus, there is a significant possibility that the Court's decision in *Spokeo* will affect whether subject matter jurisdiction exists in this case. The fact that First American could challenge Respondent's standing in the district court after the decision in *Spokeo* is issued does not obviate the need to hold this petition pending that decision, as First American will incur substantial, unnecessary litigation expenses if this case proceeds in the district court as a nationwide class action.

## CONCLUSION

The petition for certiorari should be granted. In the alternative, and at a minimum, the petition should be held pending this Court's decision in *Spokeo, Inc. v. Robins*, No. 13-1339, and disposed of as appropriate in light of that decision.

MARCH 3, 2016 RESPECTFULLY SUBMITTED,

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# APPENDIX

## APPENDIX A

**FOR PUBLICATION**
**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

| DENISE P. EDWARDS, individually and on behalf of all others similarly situated, *Plaintiff -Appellant*, v. THE FIRST AMERICAN CORPORATION; FIRST AMERICAN TITLE INSURANCE COMPANY, *Defendants -Appellees*. | No. 13-55542 D.C. No. 2:07-cv-03796-SJO-FFM OPINION |
|---|---|

Appeal from the United States District Court
for the Central District of California
S. James Otero, District Judge, Presiding

Argued and Submitted
March 3, 2015—Pasadena, California

Filed August 24, 2015

Before: Michael R. Murphy,* Ronald M. Gould, and Richard C. Tallman, Circuit Judges.

Opinion by Judge Gould

* The Honorable Michael R. Murphy, Senior Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

## SUMMARY[**]

### Class Certification

The panel affirmed in part and vacated in part the district court's order denying class certification in a case in which Denise P. Edwards, seeking to represent a class of similarly-situated home buyers, alleges that First American Corporation and its wholly owned subsidiary First American Title Insurance Company, engaged in a national scheme of paying title agencies things of value in exchange for the title agencies' agreement to refer future title insurance business to First American, in violation of the Real Estate Settlement Procedures Act (RESPA).

The panel held that in determining the propriety of class certification, the district court erred in holding that the safe harbor in 12 U.S.C. § 2607(c)(2) requires Edwards to prove that First American overpaid for its ownership interests in each of the title agencies. The panel explained that the ownership interests purchased by First American are equity shares—not goods, services or facilities within the meaning of § 2607(c)(2). The panel also held that the district court abused its discretion in denying class certification on the ground that 12 U.S.C. § 2607(a) requires an individual inquiry, on each transaction, to determine whether First American's purchase prices of the ownership interests exceeded their fair market value. The panel held that cases involving illegal kickbacks in violation of § 2607(a) are not necessarily unfit for class adjudication.

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[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Applying Fed. R. Civ. P. 23(b)(3), the panel held that issues relating to the alleged common scheme predominate over individual issues. The panel wrote that Edwards need only prove the existence of an exchange involving a referral agreement, which does not require inquiry into individual facts across all 38 captive title agencies, and that the proposed class members also share common questions of fact. The panel concluded that the alleged common scheme, if true, presents a significant aspect of First American's transactions that warrant class adjudication: Whether First American paid a thing of value to get its agreement for exclusive referrals. The panel therefore vacated the district court's denial of class certification in part as to these transactions that involved the common scheme presented to First American's board of directors.

The panel disagreed with the district court's holding that influences by third parties constitute individual issues that render class adjudication improper. The panel wrote that other sources of referral do not defeat the predominant common questions of fact, i.e., whether the title agencies have contractual obligations to refer their customers to First American.

The panel held that the district court erred in determining that individual inquiries are required in connection with twelve title agencies that are affiliated business arrangements and in connection with certain agencies that are majority-owned by First American. The panel agreed with the district court that First American's transactions with newly-formed title agencies do not raise common issues sufficient for class action adjudication, and affirmed

the district court's denial of certification as to the newly-formed title agencies.

Remanding for further proceedings, the panel wrote that the remaining prerequisites of class certification, which the district court declined to address, are best addressed by the district court.

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## COUNSEL

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## OPINION

GOULD, Circuit Judge:

We must decide whether the district court abused its discretion in denying Plaintiff Denise P. Edwards's motion for class certification, in her action

against Defendants First American Corporation and its wholly owned subsidiary First American Title Insurance Company (collectively, "First American"). Edwards, seeking to represent a class of similarly-situated home buyers, alleged that First American engaged in a national scheme of paying the title agencies things of value in exchange for the title agencies' agreement to refer future title insurance business to First American, in violation of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. §§ 2601–2617. We affirm in part, vacate in part, and remand.

**I**

Edwards bought a home in Cleveland, Ohio. Edwards used Tower City Title Agency, LLC ("Tower City") as her settlement agent, and by referral of Tower City, she used First American as her title insurer. Prior to Edwards's home purchase, First American and Tower City entered into a transaction: First American acquired a 17.5% ownership interest in Tower City for $2 million and, in the same transaction, Tower City agreed to refer future title insurance business to First American. First American also entered into similar transactions with various other title agencies. In each of these transactions, First American paid the title agency a lump sum of money in exchange for (1) a minority ownership interest in the title agency and (2) the title agency's agreement to refer future title insurance business to First American.

Edwards filed a putative class action against First American, alleging that the transactions between First American and the captive title agencies violated RESPA's anti-kickback provision, 12 U.S.C. § 2607.

Edwards originally moved to certify a class of home buyers referred to First American by any of the 180 title agencies that First American partially owned. The district court declined to certify that class but ordered discovery to determine whether it should certify the Tower City class, consisting of all home buyers who were referred to First American by Tower City.

After completing discovery, Edwards moved to certify the Tower City class. The district court denied certification. We reversed and held that "there is a single, overwhelming common question of fact: whether the arrangement between Tower City and First American violated" RESPA. *Edwards v. The First Am. Corp.*, 385 F. App'x 629, 631 (9th Cir. 2010) ("*Edwards I*"). We ordered nationwide discovery on remand and gave Edwards an opportunity to renew her motion to certify a nationwide class. *Id.* After further discovery, Edwards moved to certify a nationwide class consisting of all home buyers who entered into a federally-related mortgage transaction using one of thirty-eight title agencies that sold a minority ownership interest to First American and, in the same transaction, agreed to refer future title insurance business to First American.

The district court again denied certification, now on the basis that common issues did not predominate over individual issues for the nationwide class. First, the district court concluded that individual inquiries were required to determine whether First American overpaid for its ownership interests in each title agency. Second, the district court found that common issues did not predominate over individual issues of

reliance and causation for referrals. Third, the district court concluded that transaction-specific inquiries as a result of the different types of title agencies will not require common proof related to First American's liability. Edwards appeals the district court's order denying class certification.

## II

We review the district court's determination of class certification for abuse of discretion and consider "whether the district court correctly selected and applied Rule 23's criteria." *Parra v. Bashas', Inc.*, 536 F.3d 975, 977 (9th Cir. 2008). The underlying legal questions, however, are reviewed *de novo*, and "any error of law on which a certification order rests is deemed a per se abuse of discretion." *Conn. Ret. Plans & Trust Funds v. Amgen Inc.*, 660 F.3d 1170, 1175 (9th Cir. 2011).

## III

### A

Federal Rule of Civil Procedure 23 allows a representative to litigate on behalf of a class of similarly-situated individuals who are too numerous to join the litigation. The party seeking class certification bears the burden of establishing that the proposed class meets the requirements of Rule 23. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir.), *amended by* 273 F.3d 1266 (9th Cir. 2001). To be certified, a proposed class must satisfy all requirements in Rule 23(a) and at least one of the requirements in Rule 23(b). Rule 23(a) requires that plaintiffs demonstrate (1) numerosity, (2) commonality, (3) typicality, and (4)

adequacy of representation. Fed. R. Civ. P. 23(a). Rule 23(b) lists three alternative requirements for class certification, and where, as here, plaintiffs seek class certification under subsection (b)(3), they must demonstrate the superiority of maintaining a class action and show "that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3); *see also Zinser*, 253 F.3d at 1189–92.

A court, when asked to certify a class, is merely to decide a suitable method of adjudicating the case and should not "turn class certification into a mini-trial" on the merits. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 n.8 (9th Cir. 2011). But Rule 23(a)(2) is not a pleading standard, so to the extent necessary, our determination of commonality will inevitably touch upon the merits of plaintiffs' underlying RESPA claims. *See, e.g., Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194 (2013); *Wal-Mart Stores*, 131 S. Ct. at 2551; *Stockwell v. City & Cty. of S.F.*, 749 F.3d 1107, 1111–12 (9th Cir. 2014).

In 1974, Congress passed RESPA to protect consumers from "unnecessarily high settlement charges caused by certain abusive practices." 12 U.S.C. § 2601(a). One of the consumer-protection provisions is RESPA § 8, 12 U.S.C. § 2607, which furthers Congress's goal of "eliminat[ing] . . . kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." *Id.* § 2601(b)(2); *see also Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2038 (2012). Paying kickbacks or referral fees to induce referrals of title insurance underwriting is part of the serious problem Congress

sought to remedy in RESPA. *See* S. Rep. No. 93-866 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546, 6551.

The national title insurance industry is highly concentrated, with most states dominated by two or three large title insurance companies. *See* U.S. Gov't Accountability Office, *Title Insurance: Actions Needed to Improve Oversight of the Title Industry and Better Protect Consumers* 3 (Apr. 2007). A "factor that raises questions about the existence of price competition is that title agents market to those from whom they get consumer referrals, and not to consumers themselves, creating potential conflicts of interest where the referrals could be made in the best interest of the referrer and not the consumer." *Id.* Kickbacks paid by the title insurance companies to those making referrals lead to higher costs of real estate settlement services, which are passed on to consumers without any corresponding benefits.

Section 8(a) of RESPA aims to eliminate these unlawful kickbacks. It prohibits any exchange of a thing of value pursuant to real estate referrals:

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

12 U.S.C. § 2607(a). RESPA defines a "thing of value" broadly to include "any payment, advance, funds, loan, service, or other consideration." *Id.* § 2602(2). Courts commonly find a violation of § 2607(a) when (1) a payment or thing of value was exchanged, (2)

pursuant to an agreement to refer settlement business, and (3) there was an actual referral. *See Galiano v. Fid. Nat'l Title Ins. Co.*, 684 F.3d 309, 314 (2d Cir. 2012); *see also Egerer v. Woodland Realty, Inc.*, 556 F.3d 415, 427 (6th Cir. 2009); *Culpepper v. Irwin Mortg. Corp.*, 491 F.3d 1260, 1265 (11th Cir. 2007). Notwithstanding the general prohibition of exchanging any thing of value for a referral, a statutory safe harbor exempts a payment from RESPA violation if the payment—despite being made simultaneously with a referral—was "for goods or facilities actually furnished or for services actually performed." *See id.* § 2607(c)(2).

Congress gave the Department of Housing and Urban Development ("HUD") authority to regulate under RESPA, and HUD promulgated the corresponding regulations known as Regulation X. *See* Pub. L. No. 94-205 § 10, 89 Stat. 1157, 1159 (1976). The Dodd-Frank Wall Street Reform and Consumer Protection Act transferred the regulatory authority of RESPA from HUD to the Consumer Financial Protection Bureau ("CFPB"), and CFPB later republished Regulation X without material changes. *See* 76 Fed. Reg. 78,977 (Dec. 20, 2011); 12 C.F.R. § 1024.[1]

Under Regulation X, a "referral" includes "any oral or written action directed to a person which has the effect of affirmatively influencing the selection by any person of a provider of a settlement service for which the home buyer will pay a charge"; and an exchange of a "thing of value" is used as synonymous with a

[1] Because this case arose when HUD was the regulatory agency, citations to Regulation X will still be to 24 C.F.R. § 3500.

payment and does not require a transfer of money.[2] 24 C.F.R. § 3500.14(d), (f)(1). Regulation X further explains the safe harbor in § 2607(c)(2). *See Id.* § 3500.14(g)(2) ("If the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods actually performed or provided.").

**B**

We first address whether individual inquiries on each of the transactions are required due to the safe harbor in § 2607(c)(2) and 24 C.F.R. § 3500.14(g)(2). The district court held that the statute and the regulation require Edwards to prove that First American overpaid for its ownership interests in each of the title agencies, and these individual inquiries render class action improper.

CFPB submitted an amicus brief interpreting RESPA and its own Regulation X. CFPB contends that § 2607(c)(2) does not apply to the transactions here because First American's payment for ownership interests is not a payment for goods, facilities, or services. CFPB urges us to give deference to its interpretation.

As a threshold matter, we must consider the proper level of deference to be given to the agency interpretation. Our analytical framework depends on whether the agency is interpreting the statute or the regulation. An agency's interpretation of an ambiguous statute is entitled to *Chevron* deference

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[2] Here, we use the terms "thing of value" and payment interchangeably.

when the interpretation is promulgated in the exercise of the agency's formal rule-making authority. *See Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). An agency's interpretation of its own ambiguous regulation is generally entitled to *Auer* deference. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (holding that an agency's interpretation of its own ambiguous regulation is controlling unless "plainly erroneous or inconsistent with the regulation") (internal citation omitted).

Here, CFPB is interpreting the statute, not the regulation. An agency's interpretation of the statute—when presented in an amicus brief—is not promulgated in the exercise of its formal rule-making authority, so no *Chevron* deference is warranted. *See United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); *Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 826 (9th Cir. 2012) (en banc). Even if the terms "goods," "services," and "facilities" also appear in the regulation, *see* 24 C.F.R. § 3500.14(g)(1)(iv), CFPB is in fact interpreting Congress's words in the statute, so we give no deference to CFPB's interpretation. *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 210 (2011). In addition, because the statutory terms at issue are not ambiguous, no deference is merited. *See Chevron*, 467 U.S. at 842–43; *United States v. Able Time, Inc.*, 545 F.3d 824, 835–36 (9th Cir. 2008).

We nevertheless agree with CFPB's interpretation, which is consistent with the language of the statute. Neither RESPA nor Regulation X defines "goods," "facilities," or "services," see 12 U.S.C. § 2602; 24 C.F.R. § 3500.2, so we begin with the statutory text

and "end[] there as well if the text is unambiguous." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009). Here, the meanings of "goods," "facilities," and "services" are plain. "Goods" are "tangible movable personal property having intrinsic value excluding money"; a "facility" is "something (as a hospital, machinery, plumbing) that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end"; and "service" is "the performance of work commanded or paid for by another." *See Webster's Third New International Dictionary* (1993); *see also American Heritage Dictionary* (defining "goods" as "product that is bought and sold" or "portable personal property"; "facility" as "[a] building, room, array of equipment, or a number of such things, designed to serve a particular function"; and "service" as "[w]ork that is done for others as an occupation or business" or "[a]n act or a variety of work done for others, especially for pay").

The ownership interests purchased by First American are equity shares, not goods, services, or facilities. First American contends that two of the thirty-eight transactions at issue also contained acquisitions of facilities, such as a title plant[3] and buildings. This misses the point. The purchase of ownership interests—which are not goods, services, or facilities—disqualified First American's transactions from the exemption under § 2607(c)(2), regardless of whether the acquisitions may have also

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[3] A title plant, according to First American, is "title records assembled and maintained for the purpose of issuing title insurance."

included facilities. We conclude that § 2607(c)(2) cannot apply to First American's transactions as a matter of law, so the district court erred in relying on § 2607(c)(2) to determine the propriety of class certification.

**C**

We next address whether individual inquiries are required because of § 2607(a). The district court interpreted the "thing of value"[4] in § 2607(a), as applied to the transactions at issue, to be the amount that First American overpaid for its ownership interests in each of the captive title agencies. The district court relied on decisions of our circuit, as well as those of other circuits, to conclude that the determination of kickback amount requires individual comparisons between the payment and the services provided. *See, e.g., Lane v. Residential Funding Corp.*, 323 F.3d 739, 745 (9th Cir. 2003); *Bjustrom v. Trust One Mortg. Corp.*, 322 F.3d 1201, 1208 (9th Cir. 2003); *Schuetz v. Banc One Mortg. Corp.*, 292 F.3d 1004, 1014 (9th Cir. 2002); *see also Howland v. First Am. Title Ins. Co.*, 672 F.3d 525,

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[4] CFPB, in its amicus brief, offers its own interpretation of the phrase "thing of value" under Regulation X. 24 C.F.R. § 3500.14(d). As a general rule, an agency's interpretation of its own ambiguous regulation, even if presented in an amicus brief, is controlling unless "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (internal citation omitted). But no *Auer* deference is due when the regulation at issue is unambiguous. *See Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000); *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1225 (9th Cir. 2009). Here, the regulation's definition of a "thing of value" is unambiguous, *see* 24 C.F.R. § 3500.14(d), so we decline to give *Auer* deference and interpret the regulation in accordance with its plain meaning.

530 (7th Cir. 2012); *Glover v. Standard Fed. Bank*, 283 F.3d 953, 963–64 (8th Cir. 2002). As a result, it concluded that an individual inquiry on each transaction will be required to determine whether First American's purchase prices of the ownership interests exceeded their fair market value.

The cases relied on by the district court are inapplicable here, because they interpreted the statutory exemption under § 2607(c)(2), which we have concluded does not apply to First American's transactions. *See Lane*, 323 F.3d at 742; *Schuetz*, 292 F.3d 1012. Also, these cases adopted and applied HUD's two-prong test interpreting § 2607(c)(2): first, there must be actual performance of compensable services; and second, the total compensation must be reasonably related to the goods or services provided. *See*, *e.g.*, *Schuetz*, 292 F.3d at 1012 (explaining that the HUD two-part test reflects the statutory safe harbor in § 8(c)). But the two-prong HUD test is also inapplicable here, because no services were provided by the title agencies to First American. We hold that the district court abused its discretion in denying class certification based on an erroneous interpretation of § 2607(a), *Conn. Ret. Plans*, 660 F.3d at 1175, and that cases alleging illegal kickbacks in violation of § 2607(a) are not necessarily unfit for class adjudication.

But the question remains: Are there individual issues here that could predominate over common issues such that class action certification is inappropriate? *See* Fed. R. Civ. P. 23(b)(3). We hold that the answer to this question is no. RESPA does not—as the district court held—require Edwards to pinpoint how much money First American paid for

the referral agreement as opposed to the equity interest. Rather, she can state a claim under RESPA § 8(a) by alleging that First American paid a lump sum of money to each captive title agency(the thing of value), and—in exchange for that money—each title agency agreed to refer First American future insurance (business agreement).

Absent § 8(c), nothing in the statute requires Edwards to prove First American gave money to the title agencies only in consideration for the referral agreement. The statute merely prohibits the exchange of a "thing of value" for a referral agreement. 12 U.S.C. § 2607(a). It and the regulation define "thing of value" broadly to include a wide variety of considerations, and an exchange of a thing of value need not involve a transfer of money solely as a kickback. *See* 12 U.S.C. § 2602; 24 C.F.R. § 3500.14(d). Here, Edwards alleges that First American paid the title agency a lump sum of money; in return, First American obtained two items: the title agency's equity interest and the title agency's agreement to refer future title insurance business. Whether this transaction violates RESPA § 8(a) does not require inquiry into individual issues of payment.

This conclusion comports with our understanding of contract law. There is a "presumption that when parties enter into a contract, each and every term and condition is in consideration of all the others, unless otherwise stated." *Am. Sav. Bank, F.A. v. United States*, 519 F.3d 1316, 1324 (Fed. Cir. 2008) (quoting *Stone Forest Indus., Inc. v. United States*, 973 F.2d 1548, 1552 (Fed. Cir. 1992)). Although the contract terms were silent on how much of First American's monetary consideration was attributed to

the referrals, the law does not require every term of the contract to have a separately stated consideration. *Sarnoff v. Am. Home Products Corp.*, 798 F.2d 1075, 1080 (7th Cir. 1986), *superseded on other grounds by Gardynski-Leschuck v. Ford Motor Co.*, 142 F.3d 955, 958 (7th Cir. 1998). The undivided monetary consideration paid by First American must be treated in law as consideration for both the equity interests and referrals. *See Restatement (Second) of Contracts* § 80, cmt. a (Am. Law Inst. 1981) ("A single performance or return promise may thus furnish consideration for any number of promises."); 3 *Williston on Contracts* § 7:51 (4th ed.) (discussing that one consideration may support several promises). An example clarifies: Assume that if one buys a bottle of water and a bottle of soda from a grocery store, and pays $5 in total, the payment is for both the water and the soda, and value is being given for both. We decline to conclude that in this assumed case, value has been given for only one and not for the other. In other words, Edwards need only prove the existence of an exchange involving a referral agreement. Such proof does not require inquiry into individual facts across all thirty-eight captive title agencies.

Moving on to the commonality inquiry under Rule 23(a)(2), [5] we ask whether the proposed class members share a common question of law or fact, the answer to which "will resolve an issue that is central to the validity of each one of the [class members']

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[5] The district court did not address the commonality issue under Rule 23(a)(2) but seemed to have concluded that there was a common issue.

claims." *Wal-Mart*, 131 S. Ct. at 2551. We have previously held that there was an overwhelming common question of fact concerning the Tower City class. *Edwards I*, 385 F. App'x. at 631. There is also a common question of fact concerning some of the transactions here: whether First American's pattern of conducts in entering into similar transactions with the title agencies violates RESPA.[6]

The district court erred in concluding that the common issue does not predominate over individual issues for the proposed class members. "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). Common issues predominate over individual issues when the common issues "represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication." 7AA Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1778 (3d ed. 1998). Here, Edwards contends that First American utilized a nationwide scheme of buying minority interests in the title agencies in order to secure remittance streams from the agencies' future referrals. Edwards points to evidence showing this common scheme, including several memoranda submitted to First American's board of directors asking for approval of these transactions (referred to by the parties as the "Smoking Gun Memos"). Some

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[6] We hold in Part V that First American's transactions with the newly-formed title agencies do not share common issues of fact with the transactions with the preexisting title agencies. *See infra* Part V.

of these Smoking Gun Memos described First American's common strategy to purchase certain title agencies' minority interests to secure their exclusive agreement to provide future referrals, and other Smoking Gun Memos revealed that the primary motivation underlying these transactions was not to gain returns from the ownership interests but to lock up remittance streams from future referrals. For example, in the documentation for the purchase of a minority interest in Doral Title, LLC, First American presented to its board a justification reciting in part, "[b]uying a minority interest now will ensure that we capture the Company's u/w remittance streams." Similarly, in connection with purchase of a minority interest in Equity Land Title LLC, First American told its board that "the u/w remittance stream is the primary source of our economic returns for this investment." Pointing in the same direction, on purchase of minority share of Equity Title Insurance Agency, Inc., First American presented to its board that "[a]s a condition to closing the proposed transaction, [First American] and Equity will execute an exclusive agency agreement." Besides the Smoking Gun Memos, Edwards also points to the standard contract terms that First American imposed on the captive title agencies to prohibit the agencies from issuing policies for First American's competitors, subject to limited exceptions.

We emphasize that at this stage of the litigation we are making no conclusions on whether the evidence cited above—including the Smoking Gun Memos and the alleged standard contract terms imposed by First American—resolves the merits of Edward's underlying RESPA claims. Our focus now

is to decide whether the issues relating to the alleged common scheme predominate over individual issues for the proposed class, so that the case should be certified for class adjudication. *See Stockwell*, 749 F.3d at 1111–12 (holding that a common contention need not be one that will prevail on the merits) (internal citation and quotation omitted). We cite First American's alleged practices not as bearing on the merits but as bearing on First American's common scheme—as alleged in the complaint—that predominates over individual issues for certain class members. This common scheme, if true, presents a significant aspect of First American's transactions that warrant class adjudication: Whether First American paid a thing of value to get its agreement for exclusive referrals. We vacate the district court's denial of class certification in part as to these transactions that involved the common scheme presented to First American's board of directors.[7]

**IV**

First American showed that on some occasions someone other than the captive title agencies—such as lenders, mortgage brokers, realtors, and other title agencies— affirmatively influenced the home buyers'

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[7] We do not hold that common issues predominate over individual issues on claims of the entire proposed class relating to all thirty-eight title agencies. As explained in Part V, we affirm in part the denial of certification as to the newly-formed agencies. *See infra* Part V. As to the preexisting title agencies, we remand for the district court to decide in the first instance which of these title agencies' transactions with First American fit into the common scheme, including the transactions approved by First American's board of directors pursuant to the "Smoking Gun Memos."

choice of First American as their title insurance underwriter. The district court held that the third parties' influences constituted individual issues that render class adjudication improper. We disagree. Other sources of referral do not defeat the predominant common question of fact, i.e., whether the title agencies have contractual obligations to refer their customers to First American.

For a referral to violate RESPA, it need not be the exclusive or even the primary reason that influenced a home buyer's choice of a real estate service provider. *See* 24 C.F.R. § 3500.14(f)(1) (defining a referral as "any oral or written action directed to a person which has the effect of *affirmatively influencing* the selection" of a real estate service provider") (emphasis added); *see also* 12 U.S.C. § 2607(d)(2) (imposing joint and several liability on all of those who affirmatively influenced the selection of a title insurance provider). Here, Edwards contends that First American used standard, written contracts to impose an obligation on the captive title agencies to refer future title insurance business, subject to some limited exceptions. If this is true, the title agencies' contractual obligations affected the entire class of home buyers as a result of First American's standard terms. *See* Fed. R. Civ. P. 23(b)(3) advisory committee note ("[A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action . . . ."). Even if other service providers may have also influenced the home buyers' decision to choose First American, there remains a predominant, common question of whether the title agencies' contractual

obligations affirmatively influenced the home buyer's choice of First American.

## V

The district court denied certification on the additional ground that the different types of title agencies will require individual, case-by-case proof on First American's liability. First American contends that in the proposed class, there are three unique types of title agencies, so that separate inquiries on each type will be required.

First, First American contends that its transactions with twelve of the thirty-eight title agencies are affiliated business arrangements ("ABA") that are exempt from RESPA violations under § 2607(c)(4). An ABA exemption under § 2607(c)(4) permits a person who owns an interest in a settlement service provider to refer customers to the settlement service provider if (1) it disclosed the affiliated relationship; (2) it does not require the person referred to use any particular service provider; and (3) the only thing of value received from the arrangement is a return on the ownership interest. *See* 12 U.S.C. § 2607(c)(4). The district court concluded that class adjudication was improper because it had to take evidence to determine if each of the twelve agencies fits the ABA exemption.

When defendants opposing class certification raise a legal defense that may defeat commonality, the district court cannot assume its validity but should make a threshold determination on the legal merits. The district court need not take evidence to determine the legal merits of defendants' defense, because otherwise it would defeat the purpose of

class certification. But if an alleged defense is invalid as a matter of law, the defense will not give rise to individual issues and thus cannot be a valid basis for denying class certification.

First American's defense on the basis of § 2607(c)(4) is invalid as a matter of law. Section 2607(c)(4) exempts a transaction from a RESPA violation when a person who partially owns a settlement service provider refers business to the service provider, and the owner receives nothing other than a return of the service provider's shares. But here, First American—the partial owner of the title agencies—did not refer business to the title agencies. To the contrary, the service provider (i.e., the title agencies) referred business to the partial owner (i.e., First American). In addition, in these transactions, First American did not receive any payments from the title agencies as a return on its ownership interests. No individual inquiries on the twelve title agencies' ABA status will be required, because § 2607(c)(4) cannot apply to these transactions as a matter of law.

Second, First American contends that certain agencies are majority-owned by First American, and First American cannot refer business to itself. First American cites the Supreme Court's decision in *Freeman*, 132 S. Ct. at 2043–44, which held that to establish a violation of § 2607(b), a plaintiff must demonstrate that a charge for settlement services was divided between at least two persons. But Freeman is inapplicable here: First American and its majority-owned title agencies are not the same person, but separate legal entities. No separate inquiries are necessary merely because First

American is the majority owner of certain captive title agencies.

Third, the district court concluded that First American's transactions with the newly-formed title agencies do not raise common issues sufficient for class action adjudication. We agree and affirm the district court's denial of certification as to the newly-formed title agencies. First American contends that twelve of the thirty-eight title agencies were not preexisting when First American decided to purchase their ownership interests. Instead, First American and third party investors formed and invested in these title agencies, and the investors' ownership interests were proportional to their capital investments.

Edwards alleges in the complaint that First American engaged in a nationwide scheme of securing referral agreements by offering to purchase ownership interests of various title agencies. However, First American's transactions with these newly-formed agencies represent a different set of facts from the nationwide scheme alleged in the complaint. We conclude that these transactions do not share common questions of fact between First American and the transactions with the preexisting title agencies and thus do not require common proof to resolve the validity of each of the class members' claims. *Wal-Mart*, 131 S. Ct. at 2551.

## VI

Having concluded that common issues did not predominate over individual issues for the proposed class, the district court declined to address the remaining prerequisites of class certification,

including whether a class action is a superior method of adjudication, whether Edwards and her counsel are adequate, and whether the putative class is ascertainable. Edwards urges us to consider these questions in the first instance on appeal and certify the proposed class.

We decline to do so. Although we have concluded that common issues predominate over individual issues for a sub class of home buyers referred by the title agencies that were subject to First American's common scheme, the remaining prerequisites of class certification are best addressed by the district court, which is "in the best position to consider the most fair and efficient procedure for conducting any given litigation." *Stockwell*, 749 F.3d at 1116–17 (internal citation omitted).

We affirm the district court's denial of class certification in part as to the newly-formed title agencies, vacate the district court's denial of class certification in part as to the remaining title agencies, and remand for further proceedings.

Each party shall bear its own costs on appeal.

**AFFIRMED IN PART, VACATED IN PART, AND REMANDED.**

## APPENDIX B

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**
**CIVIL MINUTES - GENERAL**

| **CASE NO.:** | **CV 07-03796 SJO (FFMx)** | **DATE: November 30, 2012** |
|---|---|---|
| **TITLE:** | **Denise P. Edwards v. The First American Corporation, et al.** | |

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**PRESENT: THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE**

| Victor Paul Cruz<br>Courtroom Clerk | Not Present<br>Court Reporter |
|---|---|
| **COUNSEL PRESENT FOR PLAINTIFF:** | **COUNSEL PRESENT FOR DEFENDANTS:** |
| Not Present | Not Present |

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**PROCEEDINGS (in chambers): ORDER DENYING PLAINTIFF'S MOTION FOR NATIONWIDE CLASS CERTIFICATION** [Docket No. 240]

S. JAMES OTERO, District Judge.

This matter is before the Court on Plaintiff Denise P. Edwards's ("Plaintiff") Motion for Nationwide Class Certification ("Motion"), filed on April 20, 2011.

Defendants First American Financial Corporation ("FAFC") and First American Title Insurance Company ("FATIC") (collectively, "Defendants") filed their Memorandum in Opposition to Plaintiff's Motion ("Opposition") on April 25, 2012, to which Plaintiff filed her Reply Brief in Support of Motion ("Reply") on May 2, 2011 (ECF No. 277). Following a stay of the case, Plaintiff filed a Supplemental Brief in Support of Plaintiff's Motion ("Supplemental Motion") on October 15, 2012, and Defendant filed a Supplemental Brief in Opposition to Plaintiff's Motion ("Supplemental Opposition") on October 22, 2012. The Court found this matter suitable for disposition without oral argument and vacated the hearing set for November 5, 2012. *See* Fed. R. Civ. P. 78(b). For the following reasons, the Court **DENIES** Plaintiff's Motion.

## I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff purchased a home in Ohio. Her title agency, Tower City Title Agency, LLC ("Tower City"), referred her to FATIC for title insurance. (Compl.¶¶ 20, 25.) Plaintiff believes this referral was unlawful under the Real Estate Settlement Procedures Act ("RESPA"), which prohibits the exchange of "a thing of value" for title insurance referrals. 12 U.S.C. § 2607. Specifically, Plaintiff claims that FATIC purchased 17.5% of Tower City at an inflated price; in exchange, Tower City agreed to refer all future Ohio title insurance business "exclusively" to FATIC. (Compl.¶¶ 15–16.) Further, Plaintiff alleges that FATIC purchased a minority interest in numerous other title agencies in exchange for referrals in violation of RESPA. (Compl.¶¶ 3, 21.)

Originally, Plaintiff moved to certify a class of customers referred to FATIC by any of the nearly 200 title agencies partially owned by FATIC. (Order Den. Pl.'s Mot. for Class Certification ("Class Certification Order I") 2, Dec. 10, 2007, ECF No. 74.) This Court found that this class was not maintainable under any provision of Rule 23(b). However, the Court granted Plaintiff leave to file a second motion for certification limited to customers of Tower City. (Class Certification Order I 5–6.) When Plaintiff brought her motion for certification of a Tower City class, this Court again denied the motion, holding that common questions of law or fact did not predominate over individualized issues and a class action was not superior under Federal Rule of Civil Procedure ("FRCP") 23(b)(3). (*See generally* Order Den. Pl.'s. Second Mot. for Class Certification ("Class Certification Order II"), June 6, 2008, ECF No. 126.) The Ninth Circuit, however, reversed this Court's ruling in a Memorandum Disposition and ordered certification of the Tower City class because "[w]ith respect to liability, there is a single, overwhelming common question of fact: whether the arrangement between Tower City and First American violated [RESPA]." (Mot. Ex. A ("Mem. Disposition"), at 3, June 21, 2010, ECF No. 370.) The Ninth Circuit also ordered that Plaintiff be allowed to conduct nationwide discovery to determine whether certification of a nationwide class is also appropriate. (Mem. Disposition 2.)

Plaintiff thereafter filed the instant Motion on April 20, 2011.[1] The Court stayed the case after the Supreme Court granted certiorari. (Mins. Granting Stay, July 1, 2011, ECF No. 324.) The Supreme Court,

however, then dismissed the writ of certiorari as improvidently granted. (Notice of Decision Ex. A, July 5, 2012, ECF No. 332.) The Court thus reopened the case and now considers the pending motions.[1]

## II. *DISCUSSION*

Plaintiff now seeks to certify the following proposed Class to pursue the RESPA claim against Defendants:

> All consumers who on or after June 12, 2006 entered into a federally-related mortgage loan transaction using one of [thirty-eight] [2] title agencies or similar entities that were partially-owned by Defendants First American Corporation and/or First American Title Insurance Company ... or its predecessors, successors, affiliates, or subsidiaries (collectively "FAC") during the time of such partial ownership, where (a) FAC purchased its ownership interest as part of the same transaction in which FAC obtained an agreement to refer title insurance business; (b) such a referral agreement was in effect; and (c) there is a record of a charge for title insurance

[1] Defendants have filed motions (1) for a judgment on the pleadings; (2) to decertify the Tower City class; and (3) to compel arbitration of the Tower City class members' claims. Defendants' Motion for a Judgment on the Pleadings has already been denied. (See Mins. of Status Conference, Sept. 24, 2012, ECF No. 344.) Defendants' other motions will be considered in a separate order.

[2] Plaintiff originally named forty-two title agencies but removed four of these after discovering they did not fit the proposed class definition. (Reply Exs. A, B, ECF No. 277.)

> issued by FATIC in the consumer's mortgage loan transaction[.]

(Mot. 2.) Plaintiff seeks to certify this class under FRCP 23(b) (3).

**A. *Legal Standard***

To be certified, a proposed class must satisfy the requirements of Rule 23(a) of the FRCP, and must meet at least one requirement of Rule 23(b). *See* Fed. R. Civ. P. 23; *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 623 (1997). Rule 23(a) requires that the party moving for class certification show: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. Fed. R. Civ. P. 23(a); *see Stanton v. Boeing Co.,* 327 F.3d 938, 953 (9th Cir. 2003). Rule 23(b) requires showing that questions of law or fact common to the class "predominate" over questions affecting the individual members, and that, on balance, a class action is superior to other methods available for adjudication. *See* Fed. R. Civ. P. 23(b). In addition to the express requirements of Rule 23, "there are implied prerequisites to class certification that the class must be sufficiently definite and ascertainable." *Galvan v. KDI Distrib. Inc.,* No. SACV 08–0999–JVS (ANx), 2011 WL 5116585, at *3 (C.D. Cal. Oct. 25, 2011).

A party seeking to certify a class may not merely rest on the pleadings. Rather—"[a] party seeking class certification must affirmatively demonstrate [ ] compliance with the Rule—that is, [the party] must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Wal–Mart Stores, Inc. v. Dukes,* —— U.S. ——, 131 S. Ct. 2541, 2551 (2011). "[A]ctual, not presumed,

conformance with Rule 23(a) remains ... indispensable." *Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 160 (1982). The trial court is expected to engage in a "rigorous analysis" to determine whether the prerequisites of Rule 23(a) have been satisfied. *Dukes,* 131 S. Ct. at 2251 (quoting *Falcon,* 457 U.S. at 161). This rigorous analysis will often "overlap with the merits of the plaintiff's underlying claim. That cannot be helped." *Wal–Mart,* 131 S. Ct. at 2251.

**B. *Analysis***

Defendants contend that certification of a nationwide class is inappropriate because (1) common issues do not predominate; (2) a class action is not a superior method for adjudicating this case; (3) Plaintiff and her counsel are not adequate; and (4) the putative class is not ascertainable. (*See generally* Opp'n; Supplemental Opp'n.) Because the Court finds that common issues do not predominate as required by FRCP 23(b)(3), the Court declines to address Defendants' remaining arguments.

**1. *Common Issues Do Not Predominate for the Nationwide Class***

There are numerous individualized issues of law and fact that preclude certification of a nationwide class. In ordering the certification of the Tower City class, the Ninth Circuit held that individualized questions of law and fact predominated because (1) the contractual arrangement requiring Tower City to refer customers to FATIC constituted common proof "of the 'action' element of a referral;" and (2) Defendants' evidence that third parties other than the title agent selected the title insurance

underwriter "from time to time" was insufficient to demonstrate that the question of whether class members were in fact referred to Defendants by Tower City was too individualized an inquiry to defeat class certification. (Mem. Disposition 4–5.) These holdings do not apply to Plaintiff's proposed nationwide class certification, despite Plaintiff's arguments to the contrary.[3] Moreover, the proposed nationwide class introduces new individualized issues that are not applicable to the Tower City class.

**a. *Whether FATIC Overpaid for its Interest in Each Title Agency***

RESPA provides in relevant part that:

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally regulated mortgage loan shall be

[3] Plaintiff contends that Defendants' argument that there is no common proof of a "referral" under RESPA because of (1) exceptions in the exclusive referral agreements and (2) the fact that parties other than title agents referred class members to title insurance underwriters was "expressly rejected" by the Ninth Circuit "when it directed certification of the Tower City Class." (Reply 7.) To the contrary, while the Ninth Circuit held that Defendants' arguments with respect to these issues did not bar certification of the Tower City class, it did not consider these arguments in relation to the proposed nationwide class, nor did the Ninth Circuit have before it the evidence now provided by Defendants after nationwide discovery. *See Leslie Salt Co. v. United States*, 55 F.3d 1388, 1393 (9th Cir. 1995) ("[T]he court may reconsider previously decided questions in cases in which ... new evidence has surfaced ....")

referred to any person.

12 U.S.C. § 2607(a). Furthermore, 12 U.S.C. § 2607(c)(2) provides that "[n]othing in this section shall be construed as prohibiting ... the payment to any person of ... compensation or other payment for goods or facilities actually furnished or for services actually performed ...."12 U.S.C. § 2607(c)(2). This statutory language is clarified by regulations promulgated by the U.S. Department of Housing and Urban Development ("HUD"), the agency charged with enforcing RESPA. HUD's regulations state that a "payment for goods or facilities actually furnished or for services actually performed" are permissible under § 2607(a). 24 C.F.R. § 3500.14(g)(1)(iv). On the other hand, "[i]f the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods actually performed or provided." 24 C.F.R. § 3500.14(g)(2). This clear and unambiguous statutory and regulatory language mandates that for Plaintiff to prove a violation of RESPA, she must demonstrate that Defendants overpaid for their interests in the thirty-eight title agencies at issue in the proposed nationwide class. Without such proof, Plaintiff cannot demonstrate that Defendants gave the title agencies "any thing of value" in exchange for the referrals, as required under RESPA.

This reading of RESPA is borne out by the analyses of a multitude of courts confronted with similar violations of RESPA. Thus, it has been observed that "RESPA Section 8 kickback cases ... are generally not a good fit for class action treatment" because "the existence or the amount of the kickback in these cases generally requires an individual

analysis of each alleged kickback to compare the services performed with the payment made." *Howland v. First Am. Title Ins. Co.,* 672 F.3d 525, 530 (7th Cir. 2012); *see also Schuetz v. Banc One Mortg. Corp.,* 292 F.3d 1004, 1014 (9th Cir. 2002) (denying class certification because whether a prohibited referral occurred under RESPA depended upon the value of the services provided in each individual case); *Lane v. Residential Funding Corp.,* 323 F.3d 739, 746 (9th Cir. 2003) (confirming the analysis in *Schuetz* ); *Bjustrom v. Trust One Mortg. Corp.,* 322 F.3d 1201, 1209 (9th Cir. 2003) (vacating class certification partly because plaintiff "offered no evidence to prove that" the services performed were not worth what was paid); *O'Sullivan v. Countrywide Home Loans, Inc.,* 319 F.3d 732, 740 (5th Cir. 2003); *Glover v. Standard Fed. Bank,* 283 F.3d 953, 963–64 (8th Cir. 2003). The proposed nationwide class is no exception.

Plaintiff urges the Court to disregard the plain language of RESPA, RESPA's implementing regulations, these courts' analyses, this Court's own prior holdings, and her own Complaint by arguing that proof regarding whether First American Corporation ("FAC", the predecessor in interest to FAFC) overpaid for its ownership interests in the thirty-eight title agencies at issue is unnecessary to her new theory of liability. (Mot. 16; Reply 1–3.) Plaintiff argues that her new theory of liability, "whether Defendants' payment for less than 100% interests in title companies in exchange for, *inter alia,* guaranteed referral of title insurance business is a prohibited kickback under [RESPA]," is the same as that adopted by the Ninth Circuit when it ordered

the certification of the Tower City class. (Reply 3.) The Court does not agree. Rather, the Ninth Circuit explicitly held that this Court did not abuse its discretion in denying certification of a nationwide class, and thus this Court's prior holding that "Edwards' theory of liability requires that First American's payment was greater than what it received in return, an ownership interest in the agency" remains undisturbed. (Class Certification Order I 4–5.) Indeed, the Ninth Circuit denied Plaintiff's petition for rehearing, in which Plaintiff requested that the panel clarify its opinion so as to foreclose this Court's finding that nationwide class certification is inappropriate because of the need to perform individual valuations of each title agency at issue. *See generally* Appellant's Limited Mot. for Clarification, Correction and/or Panel Reh'g, *Edwards v. First Am. Title Ins.,* No. 08–56538 (9th Cir. Apr. 9, 2009), ECF No. 66. Thus, the Ninth Circuit's holding that there is a single common question as to whether the arrangement between Tower City and FAC violated RESPA is limited to the members of the Tower City class. That is, a necessary element of Plaintiff's case against Defendants with respect to the Tower City class will be proof that FAC overpaid for its interest in Tower City in exchange for putting in place an exclusive referral arrangement, as set forth in Plaintiff's own Complaint. (Compl. ¶¶ 15–16 ("The [exclusive referral agreement] was designed to secure increased market share ... by paying ... Tower City additional monies to refer insurance underwriting exclusively to [FATIC].")) Evidence as to whether Defendants did in fact overpay for their interest in Tower City will

constitute common proof for the "common question of fact" of "whether the arrangement between Tower City and First American" violated RESPA. (Mem. Disposition 3); *see also Wal–Mart,* 131 S. Ct. at 2551 ("What matters to class certification ... is ... the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.") (internal quotation marks omitted). This evidence, however, will not be dispositive or relevant as to the other thirty-seven agencies named by Plaintiff.

Plaintiff also argues that evidence regarding whether Defendants overpaid for their ownership interests in each of the thirty-eight title agencies is unnecessary because this Court is bound to accept Plaintiff's theory of liability for the purpose of class certification, no matter how erroneous it may be. Plaintiff relies heavily on *United Steel Workers v. ConocoPhillips Co.,* 593 F.3d 802 (9th Cir. 2010), for this proposition. There, the Ninth Circuit reversed a district court's denial of class certification because the district court declined to certify a class "based on the *possibility* that plaintiffs would not prevail on the merits of their ... theory." *Id.* at 808. *United Steel Workers,* however, is distinguishable because there the district court held that because "there could be **no assurances** that plaintiffs would prevail on their ... theory[,]" the district court would likely be forced to conduct "individualized trials on each of the class member's ... claims ...." *Id.* (emphasis added). By contrast, here not only are there "no assurances" that Plaintiff will prevail on her theory, but Plaintiff's legal theory is clearly contravened by the language of RESPA, its implementing regulations, and Ninth

Circuit precedent. Certifying a class on Plaintiff's theory of liability would therefore be an exercise in futility and a waste of both the Court and the parties' resources. *See Wal–Mart,* 131 S. Ct. at 2551 (reasoning that the "rigorous analysis" that a court must engage in when determining whether to certify a class may "entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped.").

Plaintiff further contends that, even if they are required to demonstrate that Defendants overpaid for their interests in the title agencies, common issues and proof predominate because "Defendants' own documents confirm that the 'standard valuation' calculation for these title company acquisitions included valuing the future remittance stream to be generated by the Exclusive Referral Agreement to be executed as part of the transaction." (Mot. 17.) This Court has already heard and rejected this argument, and that same reasoning is still applicable:

> Even if Defendants based their payment on something other than the value of the company purchased, they did not necessarily overpay for their share of the company. It is very well possible that Defendants' calculated payment (even if based on the potential for new business) fell below the value of the ownership stake received in return. Should Edwards prove at trial that Defendants overpaid for Tower City, that proof is insufficient to show that Defendants overpaid for all of the companies they purchased. Accordingly, each of the nearly 200 transactions in which Defendants allegedly overpaid would still have to be scrutinized.

(Order Den. Pl.'s Mot. to Alter Ct.'s Order Den. Class Certification, Apr. 3, 2008, ECF No. 96.) The fact that Plaintiff's proposed nationwide class now only encompasses thirty-eight title insurance agencies does not alter this analysis. Indeed, Defendants have now produced an expert, Bruce Strombom, Ph.D., who, after conducting an analysis of each of the transactions between FATIC and the title agencies, believes that Defendants did not use a standard value calculation and that "FATIC did not pay a thing of value that could have represented a kickback in any of these transactions." (Opp'n 7; Expert Report of Bruce A. Strombom ¶ 21, Def.'s App. ("DA") 6439.) Thus, each transaction by which Defendants acquired an interest in the title agencies would need to be scrutinized to determine if Defendants overpaid for their ownership interest. These individualized mini-trials would not uncover proof common to the proposed nationwide class as a whole. As such, nationwide class certification is not appropriate.

**b. *Whether a Referral Occurred Under RESPA***

A "referral" under RESPA is defined as "any oral or written action directed to a person which has the effect of affirmatively influencing the selection by any person of a provider of" title insurance. 24 C.F.R. § 3500.14(f)(1). With respect to a nationwide class, Defendants have produced evidence demonstrating that the proposed nationwide class would require case-by-case analysis of each class member's claim to determine whether a referral occurred under RESPA.

Defendants have introduced significant evidence demonstrating that, for many of the putative class members, parties other than Defendants or title

agents with whom Defendants had a referral agreement in place "affirmatively influenc[ed] the selection" of the class member's title insurance provider. Specifically, Defendants have provided declarations from title agents, closing attorneys, and others at many of the title agencies at issue, all of which state that persons other than the title agencies influenced putative class members' choice of title insurance provider. For example, Accurate Title Group LLC is a "lender-focused" title agency, meaning that the lender, and not the title agent, typically selected the insurance underwriter. (Decl. of Paul M. Dolan ¶¶ 8, 10, DA 0003–04.) By way of further example, real estate broker Craig Mincy stated that he recommends or selects FATIC title insurance for approximately fifty percent of his clients, and that lenders have required a FATIC title agency in another twenty percent of transactions. (Decl. of Craig Mincy ¶¶ 5, 6, DA 0844.) Similar evidence abounds. This evidence is far more substantial than that which was before the Ninth Circuit, which held that a single affidavit that provided that third parties influenced the selection of title insurance "from time to time" was insufficient to demonstrate that common issues did not predominate with respect to the reliance or causation element of a referral under RESPA. Indeed, this evidence demonstrates that it was quite common for third parties such as lenders, mortgage brokers, realtors, builders, and attorneys to affirmatively influence the selection of FATIC as the title insurance underwriter. Thus, asking the question "Did the referral agreements result in the class members choosing FATIC as their title insurance underwriter" would

**not** yield a common answer with respect to the proposed nationwide class. *See Wal–Mart* 131 S. Ct. at 2551 ("What matters to class certification ... is ... the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.") (internal quotation marks omitted).

This evidence shows that the Court would be forced to take evidence on who precisely influenced the class members to choose FATIC as their title insurance underwriter on an individualized basis, as otherwise liability could not be established under RESPA. The Court therefore concludes that Plaintiff has failed to establish predominance with respect to the proposed nationwide class. *See Gardner v. First Am. Title Ins. Co.,* No. CIV.00–2176, 2003 WL 221844, at *7 (D. Minn. Jan. 27, 2003).

**c. *Separate Inquiries are Necessary to Adjudicate Agency and Transaction–Specific Issues***

Defendants' evidence also shows that many of the title agencies varied from the Tower City paradigm in material ways, necessitating adjudication of individualized issues. For example, Defendants contend that twelve of the title agencies were Affiliated Business Arrangements ("ABAs") under RESPA, excluding them from liability. An ABA is a real estate settlement service provider in which a person (such as a realtor) in a position to refer settlement services has an ownership interest. 12 U.S.C. § 2602(7). ABAs are subject to a safe harbor provision under 12 U.S.C. § 2607(c)(4)(C). To meet

this exception, an ABA must meet a four-part test.[4] Thus, the Court would need to take evidence to determine if each of these twelve agencies fit the ABA exception as Defendants contend. Moreover, Defendants would be entitled to produce evidence that each purported ABA made the necessary disclosures to the proposed class members to qualify for the safe harbor provision. Such transaction-specific inquiries would be unmanageable in the context of the larger class action, and in any case these inquiries would not result in "common proof" as required by *Wal–Mart.*

Other title agencies were majority-owned or controlled by Defendants, unlike Tower City. Defendants thus argue that no referral could take place under RESPA with respect to these title agencies because "FATIC cannot 'refer' to itself." (Mot. 13.) Plaintiffs, on the other hand, argue that Defendants' position is contrary to existing precedent. (Reply 5 n. 5.) The Court would therefore be required to determine whether the class members who used these title agencies were in fact unlawfully "referred" to FATIC. Again, this inquiry would not be relevant to the class members who utilized the other twenty-

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[4] First, the ABA must be a "bona fide provider" of settlement services. *See* HUD Statement of Policy 1996–2, Regarding Sham Controlled Business Arrangements, 61 Fed. Reg. 29,258 (June 7, 1996). Second, the affiliated business arrangement must disclose the nature of its relationship with the referring agent to the person being referred. 12 U.S.C. § 2607(c). Third, the affiliated business arrangement must not require the person being referred use any particular provider of settlement services. *Id.* Finally, the person referring business to the affiliated business arrangement must receive payments only in the form of a return on investment. *Id.*

four title agencies at issue.

Finally, Defendants contend that RESPA does not apply to the thirteen title agencies that were newly formed at the time a referral agreement was put into effect. (Opp'n 11.) The resolution of this issue would also not yield common proof for the proposed nationwide class.

In light of the multiplicity of disparate individualized issues that would need to be adjudicated to determine Defendants' potential liability to the proposed nationwide class, the Court finds that common issues of fact and law do not predominate as required by FRCP 23(b)(3). In sum, the proposed class is no exception to the generally recognized trend that for the "vast majority of RESPA [cases], class action treatment was deemed inappropriate ...." *Hyderi v. Washington Mut. Bank, FA,* 235 F.R.D. 390, 399 (N.D. Ill. 2006) (collecting cases denying certification of RESPA class actions).

**III. *RULING***

For the foregoing reasons, Plaintiff's Motion for Nationwide Class Certification is **DENIED.**

IT IS SO ORDERED.

## APPENDIX C

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | |
|---|---|
| DENISE P. EDWARDS, individually and on behalf of all others similarly situated,<br>*Plaintiff-Appellant,*<br>v.<br>THE FIRST AMERICAN CORPORATION; FIRST AMERICAN TITLE INSURANCE COMPANY,<br>*Defendants-Appellees.* | Nos. 08-56536<br>08-56538<br>D.C. No. CV-07-03796-SJO-FFM<br>MEMORANDUM |

Appeals from the United States District Court
for the Central District of California
James Otero, District Judge, Presiding

Argued and Submitted
February 4, 2010—Pasadena, California

Filed June 21, 2010

Before: Betty B. Fletcher, Harry Pregerson, and
Susan P. Graber, Circuit Judges.

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**COUNSEL**

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**MEMORANDUM***

Plaintiff Denise P. Edwards appeals with respect to the denials of her two motions for class certification and her motion for nationwide discovery in her suit against Defendants The First American Corporation and its wholly owned subsidiary, First American Title Insurance Company (collectively, "Defendants"). The complaint alleged a national scheme by which Defendants paid millions of dollars to individual title companies and received written exclusive referral agreements in return. In an opinion filed this date, we addressed Defendants'

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

motion to dismiss. Here, we address Plaintiff's appeal.

We review for abuse of discretion the district court's determination of class certification. *Staton v. Boeing Co.,* 327 F.3d 938, 953 (9th Cir. 2003). We also review for abuse of discretion whether or not discovery is permitted in a class action. *Kamm v. Cal. City Dev. Co.,* 509 F.2d 205, 210 (9th Cir. 1975).

1. The district court did not abuse its discretion in denying the nationwide class. The party seeking certification bears the burden of showing that each of the four requirements of Federal Rule of Civil Procedure 23(a) and at least one requirement of Rule 23(b) have been met. *Zinser v. Accufix Research Inst., Inc.,* 253 F.3d 1180, 1186 (9th Cir.), *amended by* 273 F.3d 1266 (9th Cir. 2001). Plaintiff failed to meet that burden on the present record.

2. The district court abused its discretion in denying nationwide discovery. Plaintiff must be given "an opportunity to present evidence as to whether a class action [is] maintainable," and such an opportunity requires "enough discovery to obtain the material." *Doninger v. Pac. Nw. Bell, Inc.* 564 F.2d 1304, 1313 (9th Cir. 1977). We hold that Plaintiff should be allowed to conduct nationwide discovery and, following that discovery, Plaintiff may renew her motion for certification of a nationwide class.

3. The district court abused its discretion in denying the Tower City (Ohio) class. With respect to liability, there is a single, overwhelming common question of fact: whether the arrangement between Tower City and First American violated the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2607 ("RESPA"). The district court erred when it

held that individualized issues predominated because individualized proof would be necessary to determine whether Tower City had referred each class member to First American Title, who was in the class, and what damages each class member suffered. The second two factors clearly do not defeat class certification; every class action requires identification of class members, and most require individual proof of loss. *See Yokoyama v. Midland Nat'l Life Ins. Co.,* 594 F.3d 1087, 1094 (9th Cir. 2010) ("[T]he amount of damages is invariably an individual question and does not defeat class action treatment." (internal quotation marks omitted)).

To show that a "referral" was made by Tower City would not require a great amount of individualized proof. A "referral" is "any oral or written action directed to a person which has the effect of affirmatively influencing the selection by any person of a provider of" title insurance. 24 C.F.R. 3500.14(f). Plaintiffs contend that Tower City was contractually obligated to refer customers to First American Title, which, if true, would be common proof of the "action" element of a referral.

The reliance or causation element requires a more individualized determination, but when misrepresentations are made to a class of similarly situated individuals, the requirement that the Plaintiff prove reliance or causation will not, by itself, defeat class certification. *See* Fed. R. Civ. P. 23(b)(3) advisory committee's note ("[A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action ... [unless] there [is] material variation in the representations made or in the kinds or

degrees of reliance by the persons to whom they were addressed."). Evidence submitted by Plaintiff demonstrates that title agents, in this case Tower City, rather than purchasers, choose which title insurance underwriter to use. Indeed, RESPA was motivated by the fact that "reverse competition" is widespread in the title insurance market. In support of their contention that title agents do not always pick the title insurance underwriter, Defendants point to an affidavit stating that, "[f]rom time to time," banks and other lenders involved in a real estate purchase, not the title agent, pick the title insurance underwriter. This statement is plainly insufficient to show that class members are not similarly situated.

Because individualized questions of law and fact do not predominate, the district court's denial of Plaintiff's motion to certify the Tower City class was an abuse of discretion.

AFFIRMED in part; REVERSED in part and REMANDED. The parties shall bear their own costs on appeal.

## APPENDIX D

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | |
|---|---|
| DENISE P. EDWARDS, individually and on behalf of all others similarly situated,<br>*Plaintiff-Appellant,*<br>v.<br>THE FIRST AMERICAN CORPORATION; FIRST AMERICAN TITLE INSURANCE COMPANY,<br>*Defendants-Appellees.* | Nos. 08-56536<br>08-56538<br>D.C. No. CV-07-03796-SJO-FFM<br>OPINION |

Appeals from the United States District Court
for the Central District of California
James Otero, District Judge, Presiding

Argued and Submitted
February 4, 2010—Pasadena, California

Filed June 21, 2010

Before: Betty B. Fletcher, Harry Pregerson, and
Susan P. Graber, Circuit Judges.

Opinion by Judge Graber

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Richard M. Zuckerman, New York, New York, and Charles A. Newman, St. Louis, Missouri, for the defendants-appellees.

Gregory W. Happ, Medina, Ohio, and Mary Dryovage, Law Offices of Mary Dryovage, San Francisco, California, for amicus curiae.

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**OPINION**

GRABER, Circuit Judge:

Plaintiff Denise P. Edwards filed a complaint against Defendants The First American Corporation ("First American") and its wholly owned subsidiary, First American Title Insurance Company ("First American Title") (collectively, "Defendants"). The complaint alleged a violation of the Real Estate Settlement Procedures Act of 1974 ("RESPA"), 12 U.S.C. § 2607. According to Plaintiff, First American improperly paid millions of dollars to individual title companies and in exchange those title companies entered into exclusive referral agreements with First American. Plaintiff moved for class certification, and certain discovery, which the district court denied. Plaintiff's appeal from those rulings is addressed separately in a memorandum disposition filed this date. At the same time as Plaintiff filed her motions, Defendants moved to dismiss the complaint for lack of standing. The district court denied the

motion, and Defendants brought this appeal. We have jurisdiction pursuant to 28 U.S.C. § 1292(b). *See also* 28 U.S.C. § 1292(e); Fed. R. Civ. P. 23(f). For the reasons that follow, we affirm.

First American is a publicly traded holding company that owns, in addition to First American Title, several other companies in the field of real estate-related information services. First American Title is a title insurance underwriter that issues title insurance policies to real estate owners and lenders in 47 states and the District of Columbia. Defendants assert that First American has an ownership interest in a small proportion of the thousands of title insurance agencies that are authorized to sell First American Title policies. Plaintiff contends that, in exchange for First American's purchase of a minority interest, many of these title agencies enter into "exclusive" agency agreements with First American Title, pursuant to which the agencies agreed to sell First American Title's title insurance policies generally. Defendants assert that few First American Title "exclusive" agency agreements are completely exclusive. Plaintiff claims that these agreements are actually exclusive and thus illegal under the anti-kickback provisions of RESPA.

According to Plaintiff's allegations, she was affected by one such exclusive agency agreement between First American and Tower City. In 1998, First American paid Tower City $2 million in cash and securities. According to Plaintiff's allegations, in exchange, First American received a 17.5% minority interest in Tower City, and Tower City entered into a "Captive Title Insurance Agreement" that required it

to refer all future title insurance business "exclusively" to First American Title. Plaintiff further alleges that Tower City had agreements with and regularly referred business to at least three other title insurers prior to 1998, but then began referring customers exclusively to First American after they entered into the Captive Title Insurance Agreement.

Plaintiff, a resident of Cleveland, Ohio, bought a home in Cleveland in September 2006. Tower City was the settlement agent and conducted the closing at its office in Highland Heights, Ohio. At or before settlement, Plaintiff received a "HUD-1 Settlement Statement" showing, on line 1108, that she would pay $455.43 and the seller would pay $273.42 for title insurance. Plaintiff claims that her title insurance was referred to First American pursuant to an exclusive agency agreement, which Plaintiff alleges was illegal under RESPA.

Plaintiff filed a complaint in district court. Defendants responded by filing a motion to dismiss for lack of subject matter jurisdiction. Specifically, Defendants claimed that Plaintiff lacked both Article III standing and statutory standing under RESPA. The district court denied Defendants' motion, holding that RESPA gave Plaintiff certain rights, the violation of which conferred standing. We review de novo. *Mortensen v. County of Sacramento*, 368 F.3d 1082, 1086 (9th Cir. 2004).

There are three requirements for Article III standing—injury, causation, and redressability. *Fulfillment Servs. Inc. v. UPS*, 528 F.3d 614, 618 (9th Cir. 2008). The parties disagree about the injury component only. Defendants argue that Plaintiff has not suffered a concrete injury in fact because she has

not alleged that the charge for title insurance was higher than it would have been without the exclusivity agreement. Plaintiff does not and cannot make this allegation because Ohio law mandates that all title insurers charge the same price. Ohio Rev. Code Ann. §§ 3935.04, 3935.07 (West 2010). Nonetheless, Plaintiff counters that the damages provision in RESPA gives rise to a statutory cause of action whether or not an overcharge occurred. We agree with Plaintiff.

"The injury required by Article III can exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Fulfillment Servs.*, 528 F.3d at 618-19 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). "Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth*, 422 U.S. at 500. Thus, we must look to the text of RESPA to determine whether it prohibited Defendants' conduct; if it did, then Plaintiff has demonstrated an injury sufficient to satisfy Article III.

It is well settled in this court that "statutory interpretation begins with the plain language of the statute." *United States v. Chaney*, 581 F.3d 1123, 1126 (9th Cir. 2009) (brackets and internal quotation marks omitted). "The preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what it says there. Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *Satterfield v.*

*Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009) (brackets and internal quotation marks omitted).

RESPA prohibits the payment of "any fee, kickback, or thing of value" in exchange for business referrals and also forbids that a "portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service" be paid for services that are not actually rendered to the customer. 12 U.S.C. § 2607(a), (b). Whenever a violation of these prohibitions occurs, the statute provides that the defendants are liable to the "person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of *any charge paid* for such settlement service." *Id.* § 2607(d)(2) (emphasis added).

These RESPA provisions are clear. A person who is charged for a settlement service involved in a violation is entitled to three times the amount of *any* charge paid. The use of the term "any" demonstrates that charges are neither restricted to a particular type of charge, such as an overcharge, nor limited to a specific part of the settlement service. Further, the term "overcharge" does not exist anywhere within the text of the statute.

Because the statutory text does not limit liability to instances in which a plaintiff is overcharged, we hold that Plaintiff has established an injury sufficient to satisfy Article III. The legislative history of RESPA supports our holding. As first enacted in 1974, RESPA entitled purchasers to damages "in an amount equal to three times the value or amount of the fee or thing of value" that changed hands. Pub. L. No. 93-533, § 8(D)(2), 88 Stat. 1724 (1974) (amended

1983). This provision failed to account for "controlled business arrangements" like the alleged agreement between Tower City and First American Title, whereby an entity could provide a referral *without* the direct payment of a referral fee. A 1982 House Committee Report noted that these practices could result in harm beyond an increase in the cost of settlement services:

> [T]he advice of the person making the referral may lose its impartiality and may not be based on his professional evaluation of the quality of service provided if the referror or his associates have a financial interest in the company being recommended. [Because the settlement industry] almost exclusively rel[ies] on referrals . . . the growth of controlled business arrangements effectively reduce[s] the kind of healthy competition generated by independent settlement service providers.

H.R. Rep. No. 97-532, at 52 (1982).

Acting on this concern, Congress exempted controlled business arrangements from liability only in limited circumstances, 12 U.S.C. § 2607(c)(4), and eliminated the "thing of value" phrasing in the damages provision, replacing it with "any charge paid" for the settlement service, *id.* § 2607(d)(2). Calculating the penalty with reference to the entire amount of the settlement service appears to address instances in which no direct referral fee has been paid. Indeed, these no-fee situations were the impetus behind Congress' enactment of the 1983 amendment. *See* H.R. Rep. No. 98-123, at 77 (1983) (expecting that RESPA violators "involved in controlled business arrangements . . . shall be . . .

liable . . . in the amount of three times the amount of the charge paid for the settlement service").

Because RESPA gives Plaintiff a statutory cause of action, we hold that Plaintiff has standing to pursue her claims against Defendants. Our holding places us in agreement with two of our sister circuits. In *Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979, 989 (6th Cir. 2009), the Sixth Circuit held that a plaintiff has standing to sue a settlement service provider under RESPA, even if that plaintiff was not overcharged for settlement services. The court came to that conclusion after looking at the text of RESPA and then examining its legislative history and the overall intent of RESPA. *Id.* at 986-88. The Third Circuit held similarly in *Alston v. Countrywide Financial Corp.*, 585 F.3d 753, 755 (3d Cir. 2009), stating that Congress created a private right of action without requiring an overcharge allegation.

AFFIRMED in part; REVERSED in part and REMANDED. The parties shall bear their own costs on appeal.

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**APPENDIX E**

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| DENISE P. EDWARDS, individually and on behalf of all others similarly situated,<br>Plaintiff - Appellant,<br>v.<br>THE FIRST AMERICAN CORPORATION; FIRST AMERICAN TITLE INSURANCE COMPANY,<br>Defendants - Appellees. | No. 13-55542<br>D.C. No. 2:07-cv-03796-SJO-FFM Central District of California, Los Angeles<br><br>ORDER |
|---|---|

FILED: November 4, 2015

Before: MURPHY,* GOULD, and TALLMAN, Circuit Judges.

Judges Gould and Tallman voted to deny Appellees' Petition for Rehearing En Banc, and Judge Murphy has so recommended.

The full court has been advised of Appellees' Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35.

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* The Honorable Michael R. Murphy, Senior Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

Appellees' Petition for Rehearing En Banc is DENIED.

## APPENDIX F

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[Additional Counsel Listed on Signature page]

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
THE CENTRAL DISTRICT OF CALIFORNIA

| | | |
|---|---|---|
| DENISE P. EDWARDS, individually and on behalf of all others similarly situated<br>Plaintiffs,<br>v.<br>THE FIRST | ) ) ) ) ) ) ) ) ) | CASE NO. CV07-03795 SJO (FFMX)<br><br>CLASS ACTION COMPLAINT<br><br>DEMAND FOR JURY |

| | | |
|---|---|---|
| AMERICAN CORPORATION, FIRST AMERICAN TITLE INSURANCE COMPANY | ) ) ) ) ) | TRIAL |
| Defendants. | ) ) | |

PLAINTIFF Denise P. Edwards on behalf of herself and a class of all others similarly situated alleges as follows:

**INTRODUCTION**

1. This is a class action by consumers seeking relief from the predatory practices of a title insurer that violate the Real Estate Settlement Procedures Act of 1974, as amended, 12 U.S.C. §§ 2601 *et seq.* ("RESPA").

2. Plaintiffs seek redress for defendants' wholesale, purposeful violations of RESPA. That statute flatly prohibits both giving and accepting any "thing of value" in return for referrals of title insurance business. Congress enacted RESPA in 1974 to ensure consumers were "protected from unnecessarily high settlement charges" that resulted from "abusive practices" such as "kickbacks and referral fees" used by title insurers and others.

3. Defendants First American Title Insurance and The First American Corporation are among the largest title insurance underwriters in the United States and its corporate parent. They rely largely on title agents to obtain business. Despite the law's prohibitions, they have embarked on a nationwide policy aimed at enlarging their market share by

paying large sums of money to individual title agencies (in at least one case, $2 million or more) in exchange for exclusive referral agreements which funnel all of the companies' business to defendants, and are not disclosed to consumers. Defendants have thus created undisclosed "Captive Title Insurance Arrangements," which are prohibited by RESPA precisely because of their potential for harm to consumers.

4. Plaintiffs are a class of consumers who purchased title insurance through a title agency (a) owned, in part, by First American and (b) operated under exclusive agency agreement.

5. Defendants' exclusive (and secret) referral agreements have thus injured all members of the proposed plaintiff class in precisely the same way: by denying them critical information about the cost of title insurance, in a way calculated — to quote Congress's words from 1974 — "to increase unnecessarily the costs" of title insurance. Plaintiffs therefore request appropriate relief, including the fees illegally received by Defendants, trebled in accordance with federal law.

## PARTIES

### *The Named Plaintiff*

6. Denise P. Edwards is a resident of Ohio, and is employed by United Cerebral Palsy. Ms. Edwards purchased her home at 1136 East 170th Street, Cleveland, OH 44110 on or about September 29, 2006.

### *The Defendants*

7. The First American Corporation ("First American") is a California corporation, with its principal office in Santa Ana, California. First

American Corporation operates across the country in approximately 2,100 offices, employing nearly 35,000 people. First American owns a number of subsidiaries, including co-Defendant First American Title Insurance Company.

8. First American Title Insurance Company ("First American Title") is also a California corporation, wholly-owned by First American Corporation, also with its principal place of business in Santa Ana, California. First American Title issues title insurance policies directly and through agents across the country.

## JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction under RESPA pursuant to 28 U.S.C. § 1331.

10. This Court has personal jurisdiction over Defendants because each Defendant systematically and continually does business within the judicial district, and the principal place of business for each Defendant is within the judicial district.

11. Venue is appropriate in this Court because all Defendants reside in this judicial district. 28 U.S.C. §§ 1391(b) and (c).

## GENERAL FACTUAL ALLEGATIONS

12. At all times relevant to this Complaint, First American Title has been in the business of issuing title insurance, and has been a wholly-owned subsidiary of First American Corporation.

13. First American Title obtains a substantial portion of its title insurance business through referrals from title agents.

14. It is the standard and typical practice of title agents to refer their clients to title insurance issuer with respect to the settlement of real estate transactions. Accordingly, at all times relevant to this Complaint, First American Corporation and First American Title had in place a program to identify and contract with title agencies to act as exclusive referring agents to First American Title.

15. In 1998, for example, First American Corporation paid a kickback to Tower City Title Agency, LLC in Cleveland, Ohio ("Tower City") in order to obtain an agency agreement providing that Tower City would exclusively refer all title insurance underwriting to First American Title. This Captive Title Insurance Arrangement was designed to secure increased market share of title insurance business for First American Title by paying the owners of Tower City additional monies to refer title insurance underwriting exclusively to First American Title.

16. In order to give the kickback the appearance of legitimacy, First American Corporation agreed to "purchase" a 17.5% minority interest in Tower City. The purchase price for the minority interest, $2 million ($500,000 in cash, and First American Corporation stock then valued at $1.5 million) was significantly more than the book value of Tower City. First American made the payment without any significant investigation into the value of Tower City. Subsequently, in 2004, First American made an additional cash payment of $804,825 to Tower City.

17. Although First American Corporation became, on paper, a 17.5% minority owner in Tower City in 1998, neither Tower City, First American Corporation, nor First American Title ever disclosed

the nature of their business relationship to consumers using the services of Tower City with respect to mortgage loan transactions. Instead, Tower City referred insurance underwriting exclusively to First American Title and deprived the consumer of opportunities required by federal law, such as the opportunity to compare prices on the open market.

18. Moreover, although ostensibly a part owner in Tower City, First American Corporation has received only nominal profit distributions from Tower City. Indeed, the other owners of Tower City have simply used Tower City's operating account to pay personal expenses, such as private school tuitions, medical bills and other personal items, thereby reducing or eliminating what would have been profits to First American Corporation without any objection from First American Corporation.

19. As further evidence that First American's plan was simply to pay a kickback, First American does not exercise its right to appoint one member to the Tower City board of directors, nor does it review Tower City's annual financials.

20. As part of the "purchase agreement," Tower City was required to enter into an exclusive agency agreement with First American Corporation's wholly-owned subsidiary, First American Title. Prior to the kickback from First American Corporation, Tower City referred substantial title insurance business to other title insurance underwriters such as Stewart Title Guaranty Company, Old Republic National Title Insurance Company, and United General Title Insurance Company. Since the kickback, Tower City

has referred virtually all of its title insurance business to First American Title.

21. Upon information and belief, First American's Captive Title Insurance Arrangement with Tower City has been repeated in similar fashion through the "purchase" of ownership interests in dozens of other title agencies throughout the country. According to First American's most recent 10-K, in 2006 alone First American bought equity interests in eleven companies and purchased the minority interests remaining in four companies already included in the company's consolidated financials. Also in 2006, First American made 34 additional acquisitions in the title insurance industry.

**FACTS APPLICABLE TO NAMED PLAINTIFF**

22. On or about September 29, 2006, Ms. Edwards settled on the purchase of her home at 1136 East 170th Street, Cleveland, Ohio 44110.

23. Tower City Title Agency, LLC was the settlement agent and conducted the closing at its office located at 6151 Wilson Mills Road in Highland Heights, Ohio.

24. Lines 1109 and 1110 of the HUD-1 Settlement Statement show premiums for title insurance, both lender's and owner's coverage, totaling $728.85. Ms. Edwards paid $455.43 of the premium and the seller, Mark Watson, paid the remaining $273.42, as shown on Line 1108 of the HUD-1.

25. Pursuant to the Captive Title Insurance Arrangement, Tower City Title Agency, LLC referred the title insurance to First American Title, which issued both the lender and owner policies.

## CLASS ACTION ALLEGATIONS

26. The named Plaintiff brings this action on behalf of herself and all other similarly situated individuals pursuant to *Fed. R. Civ. P.* 23. The class of victims consists of:

> All consumers who from June 12, 2006 to the present entered into mortgage loan transactions using the services of a title agency or similar entity owned in part by First American Corporation, or its subsidiaries, in which the HUD-1 Settlement Statement, or other document in the loan file, includes a charge or payment for title insurance issued by First American Title Insurance Company.
>
> Excluded from the class action are those individuals who now or have ever been executives of Defendants.

27. The class, as defined above, is identifiable. The Named Plaintiff is a member of the class.

28. The class consists, upon information and belief, of thousands and perhaps tens or hundreds of thousands of individuals, and is thus so numerous that joinder of all members is clearly impracticable.

29. There are questions of law and fact which are not only common to the class, but which predominate over any questions affecting only individual class members. The predominating questions include, but are not limited to:

> (a) Whether title agents or similar entities partially owned by First American Corporation or its subsidiaries received illegal referral fees or kickbacks in respect of the title

insurance issued by First American Title Insurance Company;

(c) Whether First American Corporation's payments to title agents or similar entities for partial ownership interests in the title agents or similar entities for exclusive title insurance referrals to First American Title violated RESPA;

(d) Whether Tower City, or any of the other title agencies owned in part by Defendants, referred title insurance business to First American Title Insurance Company;

(e) Whether title insurance is a settlement service under RESPA;

(f) Whether the Defendants or any of them have entered into similar arrangements with title agents not herein above identified, for the purpose of receiving exclusive referrals in exchange for the payment of illegal fees or kickbacks; and,

(g) Whether the title agents that were purchased in part by Defendants, are affiliates of Defendants.

30. The claims of the Named Plaintiff are typical of the claims of each member of the class, within the meaning of *Fed. R. Civ. P.* 23(a)(3), and are based on and arise out of identical facts constituting the wrongful conduct of Defendants.

31. Plaintiff is committed to pursuing this action and has retained competent counsel experienced in class action litigation. Plaintiffs will fairly and adequately represent the interests of the members of the class, within the meaning of *Fed. R. Civ. P.* 23(a)(4).

32. The prosecution of separate actions by individual members of the class would create a risk of establishing incompatible standards of conduct for Defendants, within the meaning of *Fed. R. Civ. P.* 23(b)(l)(A).

33. Defendants' actions are generally applicable to the class as a whole, and Plaintiff seeks equitable remedies with respect to the class as a whole within the meaning of *Fed R. Civ. P.* 23(b)(2).

34. Common questions of law and fact enumerated above predominate over questions affecting only individual members of the class, and a class action is the superior method for fair and efficient adjudication of the controversy, within the meaning of *Fed. R. Civ. P.* 23(b)(3).

35. The class is manageable and, following certification, each member of class who can be located through the information which is readily available from their mortgage transaction, shall receive individual notice through the United States mails.

**COUNT I**

**VIOLATION OF THE REAL ESTATE SETTLEMENT PROCEDURES ACT, 12 U.S.C. §2607**

**(All Defendants)**

36. Plaintiffs reallege and incorporate by reference the allegations set out in Paragraphs 1 through 35 and further allege:

37. Throughout the class period, the Defendant First American Title Insurance Company provided title insurance in respect of residential real estate transactions, including "federally related mortgage

loans" as that phrase is defined by RESPA at 12 U.S.C. § 2602(1) and at 24 C.F.R. § 3500.2(3), to the named Plaintiff and other consumers. Upon information and belief, the Defendants provided title insurance for more than a million mortgage loans during the class period.

38. At all times during the class period, title agencies owned in part by First American Corporation, including but not limited to Tower City Title Insurance Agency, LLC, contracted with the named Plaintiff and other class members and, as such provided to the Plaintiff and other Class members real estate "settlement services" as that phrase is defined by RESPA at 12 U.S.C. § 2602(3) and 24 C.F.R. § 3500.2(16), including title insurance.

39. Based upon the foregoing facts, the Defendants each violated RESPA with respect to Plaintiff and the class by giving, paying or receiving fees, kickbacks or other things of value to or from title agencies or similar entities owned in part by First American Corporation, including but not limited to Tower City Title Agency, LLC, pursuant to agreements or understandings that business incident to or a part of a real estate settlement or closing services involving "federally related mortgage loans" would be referred to First American Title.

40. The more than $2 million in payments to Tower City Title Agency, LLC and similar payments to other title agents or similar entities by First American Corporation or its subsidiaries were separate from any division of title insurance premiums that are permitted under § 8(c) of RESPA, 12 U.S.C. § 2607(c).

41. The more than $2 million in payments to Tower City Title Agency, LLC and similar payments to other title agents or similar entities by First American Corporation constituted violations of § 8(a) of RESPA, 12 U.S.C. § 2607(a), which prohibits the payment of referral fees or kickbacks in connection with the origination of federally-related mortgage loans.

WHEREFORE, Plaintiffs pray that the Court:

A. Pursuant to 12 U.S.C. § 2607(d)(2), award Plaintiff and the class members an amount equal to three times the amount of any and all payments to title agents owned in part by First American Corporation or its subsidiaries, including but not limited to Tower City Title Agency, LLC, for title insurance in respect of each mortgage loan transaction, as well as any and all other amounts or damages allowed to be recovered by RESPA;

B. Certify this case as a Plaintiff Class action pursuant to *Fed. R. Civ. P.* 23(b)(l), (2) and/or (3);

C. Permanently enjoin and restrain the Defendants and their agents, employees, representatives and all persons acting on their behalf from charging and/or collecting any fees attributable to title insurance referred by Tower City Title Agency, LLC or any other title agent owned in part by First American Insurance Corporation or its subsidiaries;

D. Award pre-judgment interest;

E. Award Plaintiffs their reasonable costs and attorney's fees; and

F. Award Plaintiffs such other and further relief as the Court deems just and proper.

**DEMAND FOR JURY TRIAL**

42. Plaintiffs demand a jury trial as to all triable issues.

DATED: Respectfully submitted,

June 11, 2007 LAW OFFICES OF JAMES W. SPERTUS

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