

SNR DENTON US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1 Robert F. Scoular (SBN 085293)
robert.scoular@srdenton.com
2 Andrew Z. Edelstein (SBN 218023)
andrew.edelstein@srdenton.com
3 SNR DENTON US LLP
601 South Figueroa Street, Suite 2500
4 Los Angeles, California 90017-5704
Telephone: (213) 623-9300
5 Facsimile: (213) 623-9924

6 Charles A. Newman (*Pro Hac Vice*)
charles.newman@srdenton.com
7 Michael J. Duvall (*Pro Hac Vice*)
michael.duvall@srdenton.com
8 SNR DENTON US LLP
211 North Broadway, Suite 3000
9 St. Louis, Missouri 63102
Telephone: (314) 241-1800
10 Facsimile: (314) 259-5959

11 Margo Weinstein (*Pro Hac Vice*)
margo.weinstein@srdenton.com
12 SNR DENTON US LLP
233 South Wacker Drive, Suite 7800
13 Chicago, Illinois 60606
Telephone: (312) 876-8000
14 Facsimile: (312) 876-7934

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

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

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

22 Plaintiffs,

23 vs.

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

27 Defendants.
28

No. CV07-03796 SJO (FFMx)

DEFENDANT FIRST AMERICAN
FINANCIAL CORPORATION'S
AMENDED ANSWER AND
AFFIRMATIVE DEFENSES TO
PLAINTIFF'S COMPLAINT

JURY TRIAL DEMANDED

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

3 INTRODUCTION

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

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

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

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

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

20 PARTIES

21 The Named Plaintiff

22 6. First American Financial is without knowledge or information
23 sufficient to form a belief as to the truth of the averments in the first sentence of
24 Paragraph 6. First American Financial admits the remaining averments of Paragraph
25 6.

26 The Defendants

27 7. First American Financial states that it is the successor to the claims

SNR DENTON US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

SNR DENTON US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

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

JURISDICTION AND VENUE

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

10. First American Financial admits the averments of Paragraph 10.

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

GENERAL FACTUAL ALLEGATIONS

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

13. First American Financial denies the averments of Paragraph 13.

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

SNR DENTON US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

15. First American Financial denies the averments of Paragraph 15.

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

17. First American Financial denies the averments of Paragraph 17.

18. First American Financial denies the averments of Paragraph 18.

19. First American Financial denies the averments of Paragraph 19.

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

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

FACTS APPLICABLE TO NAMED PLAINTIFF

22. First American Financial admits the averments of Paragraph 22.

23. First American Financial admits the averments of Paragraph 23.

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

25. First American Financial denies the averments of Paragraph 25.

CLASS ACTION ALLEGATIONS

26. First American Financial admits that Plaintiff purports to bring this action on behalf of 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

SNR DENTON US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1 agency or similar entity owned in part by [The] First American Corporation, or its
2 subsidiaries, in which the HUD-1 Settlement Statement, or other document in the
3 loan file, includes a charge or payment for title insurance issued by First American
4 Title Insurance Company.” First American Financial denies that the putative class
5 described in Paragraph 26 is permitted under Fed. R. Civ. P. 23.

6 27. First American Financial denies the averments of Paragraph 27.

7 28. First American Financial denies the averments of Paragraph 28.

8 29. First American Financial denies the averments of Paragraph 29 and all
9 sub-parts.

10 30. First American Financial denies the averments of Paragraph 30.

11 31. First American Financial denies the averments of Paragraph 31.

12 32. First American Financial denies the averments of Paragraph 32.

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

16 34. First American Financial denies the averments of Paragraph 34.

17 35. First American Financial denies the averments of Paragraph 35.

18 **COUNT I**

19 36. First American Financial realleges and incorporates herein by reference
20 its responses to Paragraphs 1 through 35 of Plaintiff’s Complaint.

21 37. First American Financial admits that First American Title is a title
22 insurance underwriter that sold title insurance policies during the stated time period.
23 First American Financial denies that First American Title provided title insurance in
24 a “federally related mortgage loan” transaction involving Plaintiff. First American
25 Financial is without knowledge or information sufficient to form a belief as to
26 whether First American Title provided title insurance in “federally related mortgage
27 loan” transactions involving the Tower City (Ohio) class members or the putative
28

SNR DENTON US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

nationwide class members because that determination necessarily requires a transaction-specific analysis. First American Financial denies the remaining averments of Paragraph 37.

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

39. First American Financial denies the averments of Paragraph 39.

40. First American Financial denies the averments of Paragraph 40.

41. First American Financial denies the averments of Paragraph 41.

DEMAND FOR JURY TRIAL

42. First American Financial also demands a jury trial.

DEFENSES

Against Named Plaintiff

1. Plaintiff lacks standing to sue First American Financial because it did not engage in any conduct challenged by Plaintiff. First American Financial did not purchase an ownership interest in Tower City and thus did not give an alleged “thing of value” in exchange for an agreement to refer settlement service business. *See* 12 U.S.C. § 2607(a). First American Financial is not a title insurance underwriter and did not perform any settlement service in connection with Plaintiff’s transaction. *See* 12 U.S.C. § 2607(d)(2).

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

SNR DENTON US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1 Plaintiff suffered no cognizable injury and does not have standing to sue.

2 3. Plaintiff lacks standing to sue under RESPA, 12 U.S.C. § 2607(d)(2),
3 because she suffered no damages as a result of any defendant’s alleged conduct.
4 RESPA provides that a participant in a kickback scheme is liable to a person who
5 paid for “such settlement service” “involved in the violation.” Since Plaintiff was
6 not overcharged for title insurance, no settlement service was involved in the
7 alleged RESPA violation or otherwise attributable to the alleged kickback scheme.

8 4. Plaintiff’s claim is barred by RESPA’s one-year statute of limitations,
9 12 U.S.C. § 2614. RESPA measures the applicable limitations period from “the
10 date of the occurrence of the violation,” which is not synonymous with the date of
11 closing. Plaintiff claims that First American Title violated RESPA by paying an
12 alleged kickback to Tower City in 1998, but Plaintiff did not file her suit until June
13 12, 2007. Thus, Plaintiff’s claim is time barred.

14 5. Plaintiff’s claim is barred because she did not enter into a “federally
15 related mortgage loan,” as required by RESPA. *See* 12 U.S.C. § 2601(2).

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

20 7. Plaintiff’s claim is barred because RESPA does not apply to
21 transactions between an underwriter and its title agent. A title insurance
22 company’s underwriting of a title insurance policy is not a distinct settlement
23 service from a title agent issuing that policy.

24 8. Plaintiff’s claim is barred because First American Title paid fair value
25 for its ownership interest in Tower City based on market factors, including the
26 offer of a competitor. The purchase of this interest is not prohibited by RESPA.
27 *See* 12 U.S.C. § 2607(a), (c); HUD Statement of Policy 1996-2, 61 Fed. Reg.

28

SNR DENTON US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1 29,258 (June 7, 1996).

2 9. Plaintiff cannot recover from First American Financial because her
3 alleged harm is the result of actions of third parties who are not defendants to this
4 suit, including Cresthaven Development Center (“Cresthaven”), which referred her
5 to Tower City. Because any “referral” in Plaintiff’s transaction occurred between
6 Cresthaven and Tower City, not between Tower City and First American Title,
7 Plaintiff’s alleged harm was not caused by any defendant in this suit.

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

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

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

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

24 14. Plaintiff cannot recover treble damages from First American Financial
25 because that recovery would violate the Due Process Clause of the Fifth and
26 Fourteenth Amendments to the United States Constitution by exposing First
27 American Financial to grossly disproportionate damages in relation to the alleged
28

SNR DENTON US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1 conduct that was not willful or deliberate and for which First American Financial
2 did not receive fair notice that it could be prohibited.

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

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

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

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

21 1. One or more Tower City (Ohio) class members lack standing to sue
22 First American Financial because it did not engage in any conduct challenged by
23 Plaintiff. First American Financial did not purchase an ownership interest in
24 Tower City and thus did not give an alleged “thing of value” in exchange for an
25 agreement to refer settlement service business. *See* 12 U.S.C. § 2607(a). First
26 American Financial is not a title insurance underwriter and did not perform any
27 settlement service in connection with the Tower City (Ohio) class members’
28

SNR DENTON US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

transactions. *See* 12 U.S.C. § 2607(d)(2).

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

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

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

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

SNR DENTON US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

class members' claims are time barred.

6. One or more Tower City (Ohio) class members' claims are barred because they did not enter into "federally related mortgage loans," as required by RESPA. *See* 12 U.S.C. § 2601(2).

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

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

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

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

11. One or more Tower City (Ohio) class members' claims are barred because Tower City did not "refer" title insurance business to First American Title pursuant to an exclusive agency agreement with First American Title after the limited exclusivity clause was removed in November 2006. Because these Tower

SNR DENTON US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

City (Ohio) class members’ purchases of title insurance could not have been pursuant to any alleged kickback scheme or agreement to refer title insurance business, they could not recover under RESPA.

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

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

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

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

16. One or more Tower City (Ohio) class members cannot recover treble damages from First American Financial because that recovery would violate the

SNR DENTON US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1 Eighth Amendment to the United States Constitution by subjecting First American
2 Financial to an excessive fine that is penal in nature and seeks to punish First
3 American Financial on vague standards.

4 17. One or more Tower City (Ohio) class members' claims for treble
5 damages violate the Due Process Clause of the Fifth and Fourteenth Amendments
6 to the United States Constitution in the absence of an order bifurcating
7 adjudication of those claims from adjudication of liability.

8 18. One or more Tower City (Ohio) class members cannot recover treble
9 damages from First American Financial because that recovery would violate the
10 Due Process Clause of the Fifth and Fourteenth Amendments to the United States
11 Constitution by exposing First American Financial to grossly disproportionate
12 damages in relation to the alleged conduct that was not willful or deliberate and for
13 which First American Financial did not receive fair notice that it could be
14 prohibited.

15 19. One or more Tower City (Ohio) class members cannot recover "three
16 times the amount of any and all payments to title agents . . . including but not
17 limited to Tower City" because RESPA measures damages as "three times the
18 amount of any charge paid for such settlement service," *i.e.*, the "settlement
19 service involved in the violation." 12 U.S.C. § 2607(d)(2). Plaintiff claims that
20 Tower City "referred" settlement service business in the form of title insurance
21 underwriting to First American Title. Under Plaintiff's claim, the only settlement
22 service "involved in the violation" would be the underwriting referred to First
23 American Title, which would not include the services provided by Tower City for
24 which Tower City (Ohio) class members paid.

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

28

1 **Against Putative Nationwide Class Members**

2 It is impossible to know the identity of all persons encompassed by Plaintiff's
3 putative nationwide class definition and all of the applicable defenses to those
4 persons' claims governed by Fed. R. Civ. P. 8. Accordingly, on information and
5 belief, each of the following defenses could be applicable to certain putative
6 nationwide class members, depending on information available later.

7 1. One or more putative nationwide class members lack standing to sue
8 First American Financial because it did not engage in any conduct challenged by
9 Plaintiff. First American Financial is not a title insurance underwriter and does not
10 perform settlement services. *See* 12 U.S.C. § 2607(d)(2).

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

19 3. One or more putative nationwide class members lack standing to sue
20 under RESPA, 12 U.S.C. § 2607(d)(2), because they suffered no damages as a
21 result of any defendant's alleged conduct. RESPA provides that a participant in a
22 kickback scheme is liable to a person who paid for "such settlement service"
23 "involved in the violation." Those putative nationwide class members who were
24 not overcharged for title insurance suffered no damages and lack statutory
25 standing to sue.

26 4. One or more putative nationwide class members are not authorized to
27 sue under RESPA, 12 U.S.C. § 2607(d)(2), because they did not pay for title
28

SNR DENTON US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1 insurance. RESPA authorizes private plaintiffs to sue only if they were “charged
2 for the settlement service involved in the violation.” *Id.* If a putative nationwide
3 class member actually did not pay for title insurance, then there is no claim under
4 RESPA.

5 5. One or more putative nationwide class members’ claims are barred by
6 RESPA’s one-year statute of limitations, 12 U.S.C. § 2614. RESPA measures the
7 applicable limitations period from “the date of the occurrence of the violation,”
8 which is not synonymous with the date of closing. The claims of putative
9 nationwide class members whose title agencies entered into purchase agreements
10 with First American Financial prior to June 12, 2006 are time barred.

11 6. One or more putative nationwide class members’ claims are barred
12 because they did not enter into “federally related mortgage loans,” as required by
13 RESPA. *See* 12 U.S.C. § 2601(2).

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

19 8. One or more putative nationwide class members’ claims are barred
20 because RESPA does not apply to transactions between an underwriter and its title
21 agent. A title insurance company’s underwriting of a title insurance policy is not a
22 distinct settlement service from a title agent issuing that policy.

23 9. One or more putative nationwide class members’ claims are barred
24 because First American Financial paid fair value for its ownership interests in the
25 title agents that issued title insurance policies in the putative nationwide class
26 members’ transactions. Plaintiff claims that First American Financial overpaid for
27 ownership interests and that these overpayments constituted prohibited “things of
28

SNR DENTON US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1 value” in exchange for the referral of settlement service business. However, First
2 American Financial paid fair market value for their ownership interests in title
3 agencies, based on market factors and First American Financial’s valuation
4 analysis. RESPA expressly permits payments for bona fide goods or services
5 rendered. *See* 12 U.S.C. § 2607(a), (c); HUD Statement of Policy 1996-2, 61 Fed.
6 Reg. 29,258 (June 7, 1996).

7 10. One or more putative nationwide class members’ claims are barred
8 because the title agents that issued title insurance policies in their transactions
9 were, at the time of the title insurance transactions, lawfully controlled by First
10 American Financial. For these putative nationwide class members’ transactions,
11 the title agents could not make a referral to First American Title, and any alleged
12 payment of a “thing of value” preceding a title insurance transaction could not
13 cause a referral by an agent.

14 11. One or more putative nationwide class members’ claims are barred
15 because the title agents that issued title insurance policies in their transactions
16 were not purchased in part by First American Financial but instead were purchased
17 previously by another entity. Thus, putative nationwide class members who
18 purchased title insurance from these title agencies could not establish a kickback
19 prohibited by RESPA.

20 12. One or more putative nationwide class members’ claims are barred
21 because the title agents that issued title insurance policies in their transactions
22 were not purchased in part by First American Financial but instead were formed as
23 joint ventures or other means through which First American Financial did not pay
24 any thing of value to the title agent. Thus, putative nationwide class members who
25 purchased title insurance from these title agencies could not establish a kickback
26 prohibited by RESPA.

27 13. One or more putative nationwide class members’ claims are barred

28

1 because the title agents that issued title insurance policies in their transactions
2 were Affiliated Business Arrangements within the meaning of RESPA, 12 U.S.C.
3 § 2607(c)(4) and § 2602(7), and therefore lawfully received payments from First
4 American Financial.

5 14. One or more putative nationwide class members' claims are barred
6 because the title agents that issued title insurance policies in their transactions did
7 not enter into exclusive agency agreements with First American Title or did not
8 operate exclusively on behalf of First American Title.

9 15. One or more putative nationwide class members' claims are barred
10 because the title agents that issued title insurance policies in their transactions did
11 not "refer" title insurance business to First American Title but rather issued a First
12 American Title policy because of other factors, such as the requirement of a
13 lender, mortgage broker, or borrower, the quality of First American Title's policies
14 or services, or the price of First American Title's policies.

15 16. One or more of the putative nationwide class members cannot recover
16 from First American Financial because their alleged harm is the result of actions of
17 third parties who are not defendants to this suit, including parties who referred
18 these putative nationwide class members to their title agents or to First American
19 Title. Because any "referral" in these transactions did not occur between the title
20 agents and First American Title, these putative class members' alleged harm was
21 not caused by First American Financial.

22 17. One or more putative nationwide class members' claims are barred in
23 whole or part because the imposition of damages for all title insurance charges
24 paid (let alone three times all title insurance charges paid) would constitute an
25 unlawful impairment of contract and render those putative nationwide class
26 members' policies void.

27 18. One or more putative nationwide class members cannot recover treble
28

SNR DENTON US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1 damages from First American Financial because that recovery would violate the
2 Fifth Amendment to the United States Constitution and similar state constitutional
3 provisions by exposing First American Financial to multiple punishments and
4 fines for the same act or conduct.

5 19. One or more putative nationwide class members cannot recover treble
6 damages from First American Financial because that recovery would violate the
7 Eighth Amendment to the United States Constitution by subjecting First American
8 Financial to an excessive fine that is penal in nature and seeks to punish First
9 American Financial on vague standards.

10 20. One or more putative nationwide class members' claims for treble
11 damages violate the Due Process Clause of the Fifth and Fourteenth Amendments
12 to the United States Constitution in the absence of an order bifurcating
13 adjudication of those claims from adjudication of liability.

14 21. One or more putative nationwide class members cannot recover treble
15 damages from First American Financial because that recovery would violate the
16 Due Process Clause of the Fifth and Fourteenth Amendments to the United States
17 Constitution by exposing First American Financial to grossly disproportionate
18 damages in relation to the alleged conduct that was not willful or deliberate and for
19 which First American Financial did not receive fair notice that it could be
20 prohibited.

21 22. One or more putative nationwide class members cannot recover "three
22 time the amount of any and all payments to title agents" because RESPA measures
23 damages as "three times the amount of any charge paid for such settlement
24 service," *i.e.*, the "settlement service involved in the violation." 12 U.S.C.
25 § 2607(d)(2). Plaintiff claims that title agents "referred" settlement service
26 business in the form of title insurance underwriting to First American Financial.
27 Under Plaintiff's claim, the only settlement service "involved in the violation"

28

1 would be the underwriting referred to First American Financial, which would not
2 include the services provided by title agents for which putative nationwide class
3 members paid.

4 23. First American Financial reserves the right to raise additional
5 affirmative and other defenses that may be established during discovery and by the
6 evidence in this case.

7 **DEMAND FOR RELIEF**

8 WHEREFORE, First American Financial prays for judgment against Plaintiff,
9 the putative nationwide class, and the Tower City (Ohio) class as follows:

- 10 1. That the Court decline to certify the putative nationwide class;
- 11 2, That Plaintiff and the members of the putative classes take nothing by the
12 Complaint;
- 13 3. That the Complaint be dismissed with prejudice;
- 14 4. For costs of suit incurred herein; and
- 15 5. For such other and further relief as the Court deems just and proper.

17 Dated: February 23, 2011

18 ROBERT F. SCOULAR
19 ANDREW Z. EDELSTEIN
20 CHARLES A. NEWMAN
21 MICHAEL J. DUVALL
22 MARGO WEINSTEIN
23 SNR DENTON US LLP

24 By /s/Robert F. Scoular
25 ROBERT F. SCOULAR

26 Attorneys for Defendants
27 FIRST AMERICAN FINANCIAL
28 CORPORATION and FIRST AMERICAN
TITLE INSURANCE COMPANY

30355478

SNR DENTON US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300