**S252035**

SUPREME COURT
FILED

# IN THE SUPREME COURT OF CALIFORNIA

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**MANNY VILLANUEVA, et al.,**
*Plaintiffs and Appellants,*

v.

**FIDELITY NATIONAL TITLE COMPANY,**
*Defendant and Appellant.*

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After A Decision of the Court of Appeal
Sixth Appellate District
Case No. H041870
(Santa Clara County Super. Ct. No. 1-10-CV173356)

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## AMICUS CALIFORNIA LAND TITLE ASSOCIATION'S MOTION FOR JUDICIAL NOTICE; DECLARATION OF SUSAN M. WALKER; PROPOSED ORDER

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Service on the Attorney General and District Attorney required by Bus. & Prof. Code § 17209 and Cal. Rules of Court, Rule 8.29

RONALD D. KENT (SBN 100717)
ronald.kent@dentons.com
JOEL D. SIEGEL (SBN 155581)
joel.siegel@dentons.com
SONIA R. MARTIN (SBN 191148)
sonia.martin@dentons.com
SUSAN M. WALKER (SBN 130748)
susan.walker@dentons.com
DENTONS US LLP
601 South Figueroa Street, Suite 2500
Los Angeles, California 90017-5704
Telephone: (213) 623-9300
Facsimile: (213) 623-9924

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RONALD D. KENT (SBN 100717)
ronald.kent@dentons.com
JOEL D. SIEGEL (SBN 155581)
joel.siegel@dentons.com
SONIA R. MARTIN (SBN 191148)
sonia.martin@dentons.com
SUSAN M. WALKER (SBN 130748)
susan.walker@dentons.com
DENTONS US LLP
601 South Figueroa Street, Suite 2500
Los Angeles, California 90017-5704
Telephone: (213) 623-9300
Facsimile: (213) 623-9924

Proposed amicus California Land Title Association ("CLTA") moves the Court pursuant to California Rules of Court 8.520(g) and 8.252(a), and Evidence Code sections 452 (c) and (d) and 459, to take judicial notice of the following matters further described below in connection with CLTA's concurrently submitted Application To Submit Amicus Brief and Amicus Brief in support of respondent Fidelity National Title Company. The authenticity of the documents attached as **Exhibits A through X** is established by the attached Declaration of Susan M. Walker ("Walker Dec.").

Evidence Code section 459(a) provides this Court "may take judicial notice of any matter specified in Section 452." Cal. Evid. Code § 459(a). Section 452(c) provides for judicial notice of "[o]fficial acts … of judicial departments … of any state of the United States (*id.*, § 452(c)), and section 452(d) provides for judicial notice of the records of "any court of this state." *Id.*, § 452(d).

CLTA requests that the Court take judicial notice of the Final Statement of Decision and Judgment entered in the trial court in this case on November 10, 2014 ("*Villanueva* SOD"), a copy of which is attached as **Exhibit A** to the attached Declaration of Susan M. Walker ("Walker Dec."). CLTA cites to the *Villanueva* SOD to illustrate points discussed in its Amicus Brief.

CLTA also requests that the Court take judicial notice of petitioner Manny Villanueva's ("Villanueva") briefs filed in the Court of Appeal in this case to show that Villanueva has made arguments in this Court that Villanueva never made in the Court of Appeal. Rather, his new counsel in this case—Steven J. "Bernie" Bernheim ("Bernheim")—now raises in this Court arguments that are outside of the scope of the two narrow questions for briefing and argument for which this Court ordered review.

As reflected on this Court's docket in this case, the Court of Appeal record in the consolidated Case Nos. H041870 and H042504 was imported electronically to this Court on October 18, 2018, and paper copies of the Court of Appeal record in this case were delivered to this Court on October 23, 2018. Accordingly, CLTA has not further burdened the Court's file by attaching additional copies to this Motion For Judicial Notice of the following briefs three briefs that Villanueva filed in the Court of Appeal: Villanueva's Appellant's Amended Opening Brief filed on January 12, 2016 in Case No. H041870; Villanueva's Combined Appellant's Reply Brief and Cross-Respondent's Opening Brief filed on February 22, 2016 in Case No. H041870; and Villanueva's Combined Appellant's Reply Brief and Cross-Respondent's Opening Brief filed on May 13, 2016 in Case No. H042504.

Finally, CLTA also requests that the Court take judicial notice of the court records from five other so-called "unfiled" rate cases in which

Villanueva's new counsel (Bernheim) represents plaintiffs Patrick Kirk ("Kirk"), Elizabeth Wilmot ("Wilmot"), Jason Munro ("Munro"), Wendy Kaufman ("Kaufman"), Jeffrey Sjobring ("Sjobring") and James Muehling ("Muehling"). Copies of the subject records are attached as **Exhibits B through X** to the Walker Dec. CLTA requests judicial notice of these court records not for any precedential value, but rather to illustrate the backdrop and historic context for the "unfiled" rate theory advanced by Villanueva in this Court. *See, e.g., Williams v. Chino Valley Independent Fire Dist.*, 61 Cal.4th 97, 113 (2015) (noting, without objection, that the plaintiff "references an unpublished case" simply to demonstrate as background for the issue under review).

While the court records attached as **Exhibits B through X** were not submitted in the trial court in this case, they are relevant to this case and the issues on review, because they complete the backdrop and historic context for the "unfiled" rate theory advance by Villanueva in this Court. Indeed, Villanueva himself seeks judicial notice in this Court of a document that he contends was submitted in co-plaintiffs Wilmot's and Munro's case, which Villanueva acknowledges was not submitted in the trial court in this case. *See* Villanueva's Motion For Judicial Notice at page 3, Ex. A (Letter from Department of Insurance to Los Angeles Superior Court, dated October 22, 2010, in *Wilmot-Munro v. First American Title*, Case No. BC370141).

Further, it plainly is no coincidence that Kirk, Wilmot, Kaufman and Sjobring submitted amicus letters in support of Villanueva in this Court, given Bernheim's representation of them in their cases. *See* Kirk's amicus letter filed in this Court on November 13, 2018, which attached, among other things, a portion of the Statement of Decision entered on May 12, 2014 in Kirk's case ("*Kirk* SOD"), and Wilmot, Kaufman and Sjobring joint amicus letter filed in this Court on November 16, 2018. The court records attached as **Exhibits B through X** demonstrate that, contrary to what those amicus letters suggest, it is unlikely that any other case asserting the "unfiled" rate legal theory will ever be brought. Indeed, since the above cases were filed more than a decade ago, neither Bernheim nor apparently any other counsel has filed any other "unfiled" rate case, save this case and one other—which the plaintiff (Muehling), represented by Bernheim, voluntarily dismissed in 2014 when the defendants' pending summary judgment motion showed the challenged charge was in fact for a service within those defendants' filed schedule of fees.

CLTA thus respectfully requests that the Court take judicial notice of the following court records:

1. *Villanueva* SOD, a conformed copy of which is attached as **Exhibit A** to the Walker Dec. Bernheim was not counsel for Villanueva in the trial court or Court of Appeal.

2. Villanueva's three briefs filed in the Court of Appeal in this case: Villanueva's Appellant's Amended Opening Brief, Case No. H041870, filed on January 11, 2016; Villanueva's Combined Appellant's Reply Brief and Cross-Respondent's Opening Brief, Case No. H041870, filed February 22, 2016; and Villanueva's Combined Appellant's Reply Brief and Cross-Respondent's Opening Brief, Case No. H042504, filed May 13, 2016. As noted above, copies of these three briefs are in the Court of Appeal record in the consolidated Cases Nos. H041870 and H042504 that the Court's docket in this case (Case No. S252035) shows were transmitted electronically to this Court on October 18, 2018 and delivered in hard copy to this Court on October 23, 2018.

3. *Kirk* SOD, Los Angeles Superior Court Case No. BC372797, a conformed copy of which is attached as **Exhibit B** to the Walker Dec.

4. Opinion by then Presiding Justice Paul Turner, filed June 22, 2016, in *Kirk v. First American Title Co.*, Case No. B257508, California Court of Appeal, Second Appellate District, Division Five, affirming the *Kirk* SOD, a conformed copy of which is attached as **Exhibit C** to the Walker Dec.[1]

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[1] A copy of this unpublished opinion is also available at *Kirk v. First American Title Co.*, 2016 Cal. App. Unpub. LEXIS 4668 (June 22, 2016), *review denied*, Case No. S236137, 2016 Cal. LEXIS 7701 (September 14, 2016).

5. An excerpt from the docket in the California Court of Appeals, Second Appellate District, Division Five for *Kirk v. First American Title Co.*, Case No. B257508, a copy of which is attached as **Exhibit D** to the Walker Dec. This excerpt shows that Bernheim was counsel of record for Kirk in Case No. B257508.

6. Order entered on February 25, 2014 by the Court of Appeal, Second District Court of Appeal, Division Three, in *Jones v. Superior Court; Patrick Kirk, et al., Real Parties In Interest*, Case No. B253605, denying on the merits Commissioner Dave Jones' Petition For A Writ of Mandate, after reviewing an evidential record, and Order entered on March 19, 2014 by this Court, en banc, denying review in *Jones v. Superior Court; Patrick Kirk et al., Real Parties In Interest*, Case No. S216987, conformed copies of which, respectively, are attached as **Exhibits E and F** to the Walker Dec.[2] These rulings are addressed in the *Kirk* SOD and are relevant to the backdrop of this case. Attached as **Exhibits G and H** to the Walker Dec., respectively, are excerpts from the Court of Appeal docket for Case No. B253605 and the Court's docket for Case No. S216987, which show that Bernheim was counsel of record for Kirk in Case No. B253605 and Case No. S216987.

[2] A copy of this Court's Order entered on March 19, 2014 in Case No. S216987 also is available at *Jones v. Superior Court*, 2014 Cal. LEXIS 2052 (March 19, 2014)

7. Wilmot's Notice of Appeal filed on April 11, 2018 in Los Angeles Superior Court Case No. BC370141 ("Wilmot's Notice"), a conformed copy of which is attached as **Exhibit I** to the Walker Dec.; and an excerpt from the docket of the Court of Appeal, Second District, Division Five for Case No. B289375, a copy of which is attached as **Exhibit J** to the Walker Dec. **Exhibit J** shows Wilmot's Notice was assigned Case No. B289375 and that Bernheim is counsel of record for Wilmot in Case No. B289375. Included in Wilmot's Notice (**Exhibit I**) as Exhibit A is a conformed copy of the order filed on February 16, 2018 denying class certification in Wilmot's Case No. BC370141 ("Order Denying Certification in Case No. BC370141"), which recounts that Wilmot asserts the "unfiled" rate theory with respect to a "loan tie-in" escrow service fee that she claims was not included in the defendant regulated title entity's filed rates for "concurrent junior mortgage" services and/or "document preparation" services.[3] As discussed above, Villanueva also has requested this Court to take judicial notice of a document in the *Wilmot* case. *See* Villanueva's Motion For Judicial Notice at page 3, Ex. A.

8. Munro's Notice of Appeal filed on February 15, 2019 in Los Angeles Superior Court Case No. BC370141 ("Munro's Notice"), a

[3] A copy of the Order Denying Class Certification in Case No. BC370141 also is available at *First Am. Title Cases v. First Am. Title Co.*, 2018 Cal. Super. LEXIS 2992 (February 16, 2018).

conformed copy of which is attached as **Exhibit K** to the Walker Dec.; an order entered October 23, 2018 in Case No. BC370141 denying Munro's motion for leave to file a Fourth Amended Complaint ("Order Denying Leave To Amend"), a conformed copy of which is attached as **Exhibit L** to the Walker Dec.; and an excerpt from the docket of the Court of Appeal, Second District, Division Five for Case No. B295805, a copy of which is attached as **Exhibit M** to the Walker Dec. **Exhibit M** shows that Munro's Notice appealing from the Order Denying Leave To Amend was assigned Case No. B295805 and that Bernheim is counsel of record for Munro in Case No. B295805.

9. Kaufman's Notice of Appeal filed on November 2, 2018 in Los Angeles Superior Court Case No. BC382826 ("Kaufman's Notice"), a conformed copy of which is attached as **Exhibit N** to the Walker Dec.; and an excerpt from the docket of the Court of Appeal, Second District, Division Five Case No. B293701, a copy of which is attached as **Exhibit O** to the Walker Dec. **Exhibit O** shows that Kaufman's Notice was assigned Case No. B293701 and that Bernheim is counsel of record for Kaufman in Case No. B293701. Included in Kaufman's Notice (**Exhibit N**) as Exhibit B is a conformed copy of the order entered on August 29, 2018 in Case No. BC382826 that granted judgment on the pleadings for the defendants based on Insurance Code Section 12414.26's immunity ("Order Granting Judgment On The Pleadings in Case No. BC382826"). It recounts that

Kaufman asserts in Case No. BC382826 that she was charged a filed rate for one type of title policy but should have been charged a different filed rate for a different type of title policy.[4]

10. Sjobring's Notice of Appeal filed on November 2, 2018 in Los Angeles Superior Court Case No. BC329482 ("Sjobring's Notice"), a conformed copy of which is attached as **Exhibit P** to the Walker Dec.; and an excerpt from the docket for Court of Appeal, Second District, Division Five for Case No. B293732, copy of which is attached as **Exhibit Q** to the Walker Dec. **Exhibit Q** shows that Sjobring's Notice was assigned Case No. B293732 and that Bernheim is counsel of record for Sjobring in Case No. B293732. Included in the Sjobring Notice **(Exhibit P)** as Exhibit B is a conformed copy of the order entered on August 29, 2018 in Case No. BC329482 that granted judgment on the pleadings for the defendants based on Insurance Code Section 12414.26's immunity. It recounts that Sjobring asserts in Case No. BC329482 that he was charged a filed rate for one type of title policy but should have been charged a different filed rate for a different type of title policy.[5]

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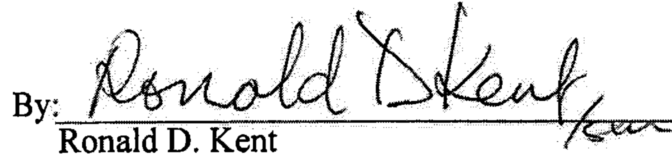
[4] A copy of the Order Granting Judgment On The Pleadings in Case No. BC382826 also is available at *First Am. Title Cases v. First Am. Title Ins. Co.*, 2018 Cal. Super. LEXIS 2989 (August 29, 2018).
[5] A copy of the Order Granting Judgment On The Pleadings in Case No. BC329482 also is available at *First Am. Title Cases v. First Am. Title Ins. Co.*, 2018 Cal. Super. LEXIS 2989 (August 29, 2018).

11. Muehling's Complaint filed in 2014 in *Muehling v. First American Title Co.*, Alameda County Superior Court No. RG12659372 ("Muehling Action"), a conformed copy of which is attached as **Exhibit R** to the Walker Dec.; First American Title Company's Notice of Motion and Motion for Summary Judgment, or in the Alternative, Summary Adjudication filed on August 26, 2014 in the Muehling Action, a conformed copy of which is attached as **Exhibit S** to the Walker Dec.; Declaration of Taras Kick In Support of [Muehling's] Request for Dismissal of the Muehling Action filed on September 11, 2014, a copy of which is as **Exhibit T** to the Walker Dec.; and Order entered on September 16, 2014 dismissing Muehling Action, a conformed copy of which is attached as **Exhibit U** to the Walker Dec. As reflected on the face of those records, Bernheim was counsel for Muehling in the Muehling Action.

12. Minute Order entered April 5, 2013 in JCCP Case No. 4751 consolidating Wilmot's and Muehling's cases under JCCP Case No. 4751, a conformed copy of which is attached as **Exhibit V** to the Walker Dec.; Order entered in JCCP Case No. 4751 on July 30, 2014 coordinating Kirk's case as an add-on case under JCCP Case No. 4751, a conformed copy of which is attached as **Exhibit W** to the Walker Dec.; and Order entered in JCCP Case No. 4751 on December 6, 2016 coordinating Sjobring's and Kaufman's cases as add-on cases under JCCP Case No. 4751, a conformed copy of which is attached as **Exhibit X** to the Walker Dec.

Dated: December 13, 2019 Respectfully submitted,

DENTONS US LLP
RONALD D. KENT
JOEL D. SIEGEL
SONIA R. MARTIN
SUSAN M. WALKER

By: 
Ronald D. Kent

Attorneys for CALIFORNIA LAND TITLE ASSOCIATION



US_Active\110960899\V-1

## DECLARATION OF SUSAN M. WALKER

I, Susan M. Walker, declare as follows:

1. I am an attorney admitted to practice before the courts of the State of California, and I am counsel for proposed amicus California Land Title Association ("CLTA"). I am and have been at all relevant times a partner at Dentons US LLP ("Dentons"), formerly known as SNR Denton. I have personal knowledge of the facts stated below, and I could competently testify to them if called as a witness.

2. I submit this declaration in support of CLTA's attached Motion For Judicial Notice.

3. Attached as **Exhibit A** is a conformed copy of petitioner Manny Villanueva's ("Villanueva") Final Statement of Decision and Judgment entered in the trial court in this case on November 10, 2014 ("*Villanueva* SOD") with document numbers AA001388 through AA001424, which I obtained from Villanueva's Appendix filed in the Court of Appeal in Case No. H041870.

4. Attached as **Exhibit B** is a conformed copy of the Statement of Decision filed on May 12, 2014 in Los Angeles Superior Court Case No. BC372797, captioned *Patrick Kirk v. First American Title Co., et al.* (the "*Kirk* SOD"). Dentons is counsel of record for First American Title Co. ("First American") in Case Nos. BC372797, and Bernheim is counsel of record for Kirk in Case Nos. BC372797. Kirk filed Case No. BC372797 on June 15, 2007.

5. Attached as **Exhibit C** is a conformed copy of the opinion by Presiding Justice Paul Turner, filed June 22, 2016, in *Kirk v. First*

*American Title Co.*, Case No. B257508, California Court of Appeal, Second Appellate District, Division Five (affirming the *Kirk* SOD).

6. Attached as **Exhibit D** is an excerpt from the docket of the California Court of Appeal, Second Appellate District, Division Five for Case No. B257508, which my office printed from the Court of Appeal's website at courts.ca.gov/2dca.htm on December 12, 2019. Dentons was counsel of record for First American and Bernheim was counsel of record for Kirk in Case No. B257508, as shown in **Exhibit D**.

7. Attached as **Exhibit E** is a conformed copy of an Order entered on February 25, 2014 by the Court of Appeal, Second District Court of Appeal, Division Three, in *Jones v. Superior Court; Patrick Kirk et al., Real Parties In Interest*, Case No. B253605, denying on the merits Commissioner Dave Jones' Petition For A Writ of Mandate, after reviewing an evidential record. Dentons was counsel of record for First American in Case No. B253605, and Bernheim was counsel of record for Kirk in Case No. B253605, as shown in the excerpt of the docket in the Court of Appeal, Second District Court of Appeal, Division Three for Case No. B253605, that my office printed from the Court of Appeal's website at courts.ca.gov/2dca.htm on December 12, 2019, which is attached as **Exhibit F**.

8. Attached as **Exhibit G** is a conformed copy of an Order entered on March 19, 2014 by this Court, en banc, denying review in *Jones v. Superior Court; Patrick Kirk et al. Real Parties In Interest,* Case No. S216987. Dentons was counsel of record for First American in Case No. S216987, and Bernheim was counsel of record for Kirk in Case No. Case No. S216987, as shown in the excerpt from the Court's docket for Case No.

S216987, that my office printed from the Court's website at courts.ca.gov/supremecourt.htm on December 12, 2019, which is attached as **Exhibit H**.

9. Attached as **Exhibit I** is a conformed copy of Elizabeth Wilmot's ("Wilmot") Notice of Appeal filed on April 11, 2018 in Los Angeles Superior Court Case No. BC370141, captioned *Wilmot, et. al. v. First American Title Ins. Co.* ("Wilmot's Notice"). Dentons is counsel of record for First American and Bernheim is counsel of record for Wilmot in Case No. BC370141. Included in Wilmot's Notice (**Exhibit I**) as Exhibit A is a conformed copy of the order filed on February 16, 2018 denying class certification in Case No. BC370141. Wilmot and co-plaintiff Jason Munro ("Munro") filed Case No. BC370141 on April 26, 2007.

10. Attached as **Exhibit J** is an excerpt from the docket of the Court of Appeal, Second District, Division Five for Case No. B289375, captioned *Wilmot v. First American Title Co.*, which my office printed from the Court of Appeal's website at courts.ca.gov/2dca.htm on December 12, 2019, which shows that Wilmot's Notice was assigned Case No. B289375 and that Dentons is counsel of record for First American and Bernheim is counsel of record for Wilmot in Case No. B289375.

11. Attached as **Exhibit K** is a conformed copy of Jason Munro's ("Munro") Notice of Appeal filed on February 15, 2019 ("Munro's Notice") in Los Angeles Superior Court Case No. BC370141, captioned *Wilmot et al. v. First American Title Co.*, in which Munro is a co-plaintiff. Dentons is counsel of record for First American and Bernheim is counsel of record for Munro in Case No. BC370141. Munro and co-plaintiff Wilmot filed Case No. BC370141 on April 26, 2007.

12. Attached as **Exhibit L** is a conformed copy of an order entered on October 23, 2018 in Los Angeles Superior Court Case No. BC370141, captioned *Wilmot, et al. v. First American Title Ins. Co.*, in which Munro is a co-plaintiff, that denied Munro's motion to file a Fourth Amended Complaint, from which Munro's Notice states that Munro has appealed.

13. Attached as **Exhibit M** is an excerpt from the docket of the Court of Appeal, Second District, Division Five for Case No. 295805, captioned *Munro v. First American Title Co.*, which my office printed from the Court of Appeal's website at courts.ca.gov/2dca.htm on December 12, 2019, which reflects that Munro's Notice was assigned Case No. B295805 and that Dentons is counsel of record for First American and Bernheim is counsel for Munro in Case No. B295805.

14. Attached as **Exhibit N** is a conformed copy of Jon Pickett's and Wendy Kaufman's ("Kaufman") Notice of Appeal ("Kaufman's Notice") filed on November 2, 2018 in Los Angeles Superior Court Case No. BC382826, captioned *Pickett/Kaufman v. First American Title Ins. Co.* ("Kaufman Action") Dentons is counsel of record for First American and Bernheim is counsel of record for Kaufman in Case No. BC382826. Kaufman and co-plaintiff Jon Pickett filed Case No. BC382826 on December 7, 2007. Included in Kaufman's Notice (**Exhibit N**) as Exhibit B is a conformed copy of the order filed on August 29, 2018 in Case No. BC382826 that granted judgment on the pleadings for defendants.

15. Attached as **Exhibit O** is an excerpt from the docket of the Court of Appeal, Second District, Division Five for Case No. B293701, captioned *Pickett et al. v. First American Title Ins. Co.*, which my office

printed from the Court of Appeal's website at courts.ca.gov/2dca.htm on December 12, 2019. **Exhibit O** shows that Kaufman's Notice was assigned Case No. B293701 and that Dentons is counsel of record for First American and Bernheim is counsel of record for Kaufman in Case No. B293701.

16. Attached as **Exhibit P** is a conformed copy of Jeffrey Sjobring's ("Sjobring") Notice of Appeal ("Sjobring's Notice") filed on November 2, 2018 in Los Angeles Superior Court Case No. BC329482, captioned *Jeffrey Albring Sjobring v. First American Title Ins. Co., et al.* Dentons is counsel of record for First American in Case No. BC329482, and Bernheim is counsel of record for Sjobring in Case No. BC329482. Sjobring filed Case No. BC329482 on February 25, 2005. Included in the Sjobring Notice **(Exhibit P)** as Exhibit B is a conformed copy of the order entered on August 29, 2018 in Case No. BC329482 that granted judgment on the pleadings for the defendants.

17. Attached as **Exhibit Q** is an excerpt from the docket of the Court of Appeal, Second District, Division Five for Case No. B293732, captioned *Sjobring v. First American Title Ins. Co.*, which my office printed from the Court of Appeal's website at courts.ca.gov/2dca.htm on December 12, 2019. **Exhibit Q** shows that Sjobring's Notice was assigned Case No. B293732 and that Dentons is counsel of record for First American and Bernheim is counsel of record for Sjobring in Case No. B293732.

18. Attached as **Exhibit R** is a conformed copy of the Complaint filed in 2014 in *Muehling v. First American Title Co.*, Alameda County Superior Court No. RG12659372 ("Muehling Action"). Bernheim was counsel of record for plaintiff James Muehling ("Muehling") in the Muehling Action, as shown on the face of **Exhibit R.**

19. Attached as **Exhibit S** is a conformed copy of First American Title's Notice of Motion and Motion for Summary Judgment, or in the Alternative, Summary Adjudication filed on August 26, 2014 in the Muehling Action. Dentons was counsel of record for First American in the Muehling Action, as shown on the face of **Exhibit S.**

20. Attached as **Exhibit T** is a copy of the Declaration of Taras Kick In Support of Request for Dismissal of the Muehling Action filed on September 11, 2014 in the Muehling Action ("Taras Dec."). Taras Kick was co-counsel for Muehling in the Muehling Action, as shown on the face of **Exhibits R and T**. Muehling served the Taras Dec. on First American in the Muehling Action.

21. Attached as **Exhibit U** is a conformed copy of an Order entered on September 16, 2014 dismissing Muehling Action.

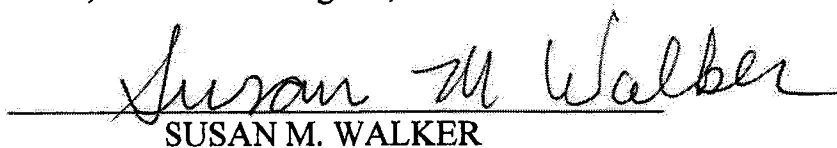
22. Attached as **Exhibit V** is a minute order entered on April 5, 2013 in JCCP Case No. 4751 ("Minute Order") consolidating Wilmot's and Muehling's cases under JCCP Case No. 4751. Dentons is counsel for First American in JCCP Case No. 4751, as reflected in **Exhibit V**.

23. Attached as **Exhibit W** is a conformed copy of an Order entered in JCCP Case No. 4751 on July 30, 2014 coordinating Kirk's case as an add-on case under JCCP Case No. 4751.

24. Attached as **Exhibit X** is a conformed copy of an Order entered in JCCP Case No. 4751 on December 6, 2016 coordinating Kaufman's case and Sjobring's case as add-on cases under JCCP Case No. 4751.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 13, 2019 at Los Angeles, California.



SUSAN M. WALKER

FILED
NOV 10 2014
DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
BY Ingrid Stewart DEPUTY

**SUPERIOR COURT OF CALIFORNIA**

**COUNTY OF SANTA CLARA**

| MANNY VILLANUEVA, individually and on behalf of all others similarly situated,<br><br>Plaintiff,<br><br>vs.<br><br>FIDELITY NATIONAL TITLE COMPANY, and DOES 1-100,<br><br>Defendants. | **Case No. 1-10-CV-173356**<br><br>**FINAL STATEMENT OF DECISION AND JUDGMENT** |
|---|---|

This is a class action by plaintiff Manny E. Villanueva ("Mr. Villanueva" or "Plaintiff"), individually and on behalf of a certified class (collectively "Plaintiffs") against defendant Fidelity National Title Company ("Fidelity" or "FNTC"). The case came on for a bench trial on April 15-17, 21-24 and May 5-8, 12-15 in Department 1, the Honorable Peter H. Kirwan presiding. Having considered the testimony, evidence, and arguments of counsel, the Court issues the following Statement of Decision.

## I. Relevant Factual and Procedural History

Fidelity is a subsidiary of Fidelity National Financial ("FNF"), which operates Fidelity and its other subsidiaries through the Fidelity National Title Group ("FNTG"). Fidelity is an

"underwritten title company" underwritten by Fidelity National Title Insurance Company ("FNTIC").

In May 2006, Fidelity handled an escrow transaction in connection with Mr. Villanueva and his wife Sonia Villanueva's refinance of their home in Santa Clara County. The Villanuevas' escrow transaction was a refinance involving (1) the payoff of a first mortgage with Countrywide Home Loan and a second mortgage with Chase Home Finance; (2) a new loan from First Federal Bank; and (3) a cash payment to the Villanuevas. The transaction was handled through a mortgage broker, UMG Mortgage, which arranged for FNTIC to provide title insurance and for Fidelity to provide escrow services.[1]

The applicable charges for the Villanuevas' transaction are set forth in Fidelity's rate manual titled "Escrow Fees and Charges for the State of California, effective May 22, 2006.[2] Part I of the manual, "General Rules," states that "[t]he fees and charges provided in this schedule of fees and charges are for 1) Escrow Services and 2) miscellaneous services whether or not deemed to be services under 1) herein."[3] The Escrow Rate table applicable to residential property transactions in Santa Clara provides that for refinance escrows up to $1,000,000, "the charge shall be...$250.00".[4] The filing further states that:

> For the purposes of this section only, "Refinance Escrow Services" shall include the following services: (a) ordering demands and making payoffs on up to two (2) previous loans by either check or wire transfer; (b) disburse balance of proceeds, by either check or wire transfer, to up to 4 payees; and (c) company-performed in office document signing of one set of loan documents; and (d) standard in-house courier services. Refinance Escrow services do not include notary fees, third-

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[1] Joint Exhibits ("JX") 222, 228. Joint Exhibits are marked as "JX"; Plaintiffs' Exhibits as "PX"; and Fidelity's Exhibits as "DX".
[2] JX 204.
[3] JX204 at FNTC_VILL000742.
[4] JX204 at FNTC_VILL000754.

party or out-of-office signing services, lender payoff and demand fees, recording fees, transfer tax and other governmental fees or charges.[5]

In addition to the flat $250 fee for escrow services, Fidelity filed fees for "Refinance Related Services – In excess of escrow services included in the above referenced paragraphs[,]" including "Document Preparation" at "$75/document[.]"[6]

Fidelity charged the Villanuevas for the following fees: $11.20 for "Overnight Delivery Fee cal o", $15 for "Outside Courier/Special Messenger tvc"; and $50 "Draw Deed".[7]

On May 28, 2010, Mr. Villanueva filed this action alleging that Fidelity charged customers fees for escrow services that are not included in the rates Fidelity filed with the CDI. The original Complaint asserted seven causes of action for: (1) violation of the unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.; (2) fraud; (3) negligent misrepresentation; (4) negligence; (5) unjust enrichment; (6) money had and received; and (7) breach of fiduciary duty.

On May 6, 2011, the Court sustained Fidelity's demurrer with leave to amend the causes of action for fraud, negligent misrepresentation, and negligence. Mr. Villanueva filed a First Amended Complaint ("FAC"), electing not to amend the negligence claim. On November 18, 2011, the Court sustained Defendants' demurrer to the fraud and negligent misrepresentation claims with leave to amend, but Mr. Villanueva elected not to amend.

On February 13, 2013, the Court certified a class of "[a]ll persons for whom [Fidelity] performed residential escrow services in a transaction that occurred in California, and who were charged for courier, overnight, messenger, or other delivery services and/or draw deed fees in connection with that transaction, during the period May 28, 2006 through September 30, 2012."

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[5] *Ibid.*
[6] *Ibid.*
[7] JX223 [HUD-1 Final Closing Statement]; JX220 [Fee Ticket]; JX219 [Daily Recording Sheet]; JX240 [Cal-O delivery slip]; JX243 [FedEx shipment slip]; JX241 [Cal O activity report]; JX242 [Cal O invoice]; JX244 [FedEx invoice]; JX245 [Tri-Valley Courier invoice]; PX78 [Daily Recording Sheet].

1 On July 25, 2013, the Court granted Fidelity's motion for summary adjudication of the
2 request for punitive damages, but otherwise denied Fidelity's motion for summary judgment or
3 alternatively summary adjudication of issues.

4 On November 8, 2013, the Court granted with leave to amend Fidelity's motion for
5 judgment on the pleadings as to Plaintiffs' claims for breach of fiduciary duty, unjust enrichment
6 and money had and received, but Plaintiffs elected not to amend. On February 21, 2014, the
7 Court denied Fidelity's motion for judgment on the pleadings on Plaintiffs' UCL claim, leaving
8 that one claim remaining for the bench trial before the Court. The Court also denied Plaintiff's
9 motion to bifurcate the issue of class liability from issues relating to the relief to be awarded.

10 Following the conclusion of trial, the parties submitted written closing statements
11 pursuant to a May 19, 2014 Order, and, after the June 27, 2014 oral closing arguments, the
12 matter was submitted for decision. On July 31, 2014, the parties submitted proposed statements
13 of decision pursuant to a June 27, 2014 Order and the Clerk's Notice of July 9, 2014.

14 On September 9, 2014, the Court granted Fidelity's motion to decertify Plaintiffs' class
15 based on Delivery Theory No. 2. The Court also ruled on Plaintiffs' motion for an order
16 requiring Fidelity to provide notice to class members who did not receive notice during the
17 original notice period due to a mistake by Fidelity. Instead of ordering notice, the Court held
18 that these individuals shall be excluded from the class.[8]

19 **II. SUMMARY OF PLAINTIFFS' UCL CLAIM AND FIDELITY'S POSITION**

20 Plaintiffs allege two alternative delivery fee theories referred to as Delivery Theory No. 1
21 (the "unfiled rate" claim) and Delivery Theory No. 2 (the "double charge" claim). Plaintiffs also
22 allege that Fidelity unlawfully charged for unfiled "draw deed" fees.

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27 [8] This exclusion order pertains to approximately 24,500 transactions in which a draw deed was
28 charged, but the subfolder of draw deed data for these transactions was not provided by Fidelity's IT department to Fidelity's counsel. (See Decl. Jonathan E. Gertler ¶¶ 4-5, docket no. 489; Ord. Aft. Hrg. on Sept. 5, 2014 at pp. 12-13, docket no. 526.)

a. **Delivery Theory No. 1 (The "Unfiled Rate" Claim)**

Plaintiffs contend California Insurance Code section 12401.1 requires Fidelity to file rates for third party delivery fees with the California Department of Insurance ("CDI") and that Fidelity was prohibited under section 12401.7 from charging the class approximately $13.1 million in third party delivery fees because Fidelity did not file delivery fee rates.[9] Even if Fidelity was not required to file delivery fee rates under section 12401.1, Plaintiffs alternatively contend Fidelity violated Insurance Code section 12414.27 by "charging" for third party delivery services without rates effective under Insurance Code Article 5.5 or "as otherwise authorized by [Article 5.5]." Thus, whether or not rate filing is required by the rate regulation statutes (Article 5.5), Plaintiffs claim it is illegal to "charge" for delivery fees if the rates are not filed.

Fidelity argues that Article 5.5 (§§ 12401.1, 12340.7, 12340.3, subd. (c)) does not require Fidelity to file rates for "Pass Through" delivery fees—where "Pass Through" is a well-accepted industry term meaning Fidelity collects from a customer and passes through to a third party service provider, the exact amount of the provider's charge, without imposing any additional fee or "mark up" for itself. Fidelity contends the Insurance Code only requires Fidelity to file "its…rates" for the "services it performs" and where Fidelity collects Pass Throughs for a third party's service, Fidelity does not charge the fee or perform the service and, therefore, it has no delivery "rate" to file. For these reasons, Fidelity contends its collection of Pass Through delivery fees does not violate any provision of the Insurance Code, including section 12414.27. Fidelity asserts section 12414.27 is not a prohibitory statute but, even if it were, Fidelity would not violate the statute by collecting delivery fees passed through to the third party vendor performing and charging for the service.

Plaintiffs dispute that Fidelity only collects Pass Through delivery fees charged by vendors, claiming that the third party delivery charges are "marked up" by virtue of fees paid by certain vendors to a Fidelity affiliate pursuant to agreements by which escrow customers receive discounted delivery rates. Plaintiffs contend the Insurance Code requires Fidelity to include in

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[9] All statutory references are to the California Insurance Code unless otherwise indicated.

its rate manuals some form of "statement" like "as charged by vendor" providing notice that Pass Through delivery fees will be collected.

Fidelity contends the Pass Through nature of delivery fees it collects is not altered by marketing fees three vendors paid to an affiliate, not Fidelity, and no Insurance Code provision requires filing a "Pass Through Statement" when Article 5.5 does not require rate filing.

b. **Delivery Theory No. 2 (The "Double Charge" Claim)**

Plaintiffs alternatively contend that language "disburse" or "make payoffs" by check in Fidelity's itemized list of services provided in filed bundled escrow rates should be interpreted to include the delivery fees charged by third party vendors like FedEx to deliver envelopes containing those checks. Thus, Plaintiffs contend that Fidelity's additional charge for overnight and/or courier delivery fees was an unlawful double charge.

Fidelity contends that the challenged language in its bundled escrow rates cannot reasonably be interpreted to include the cost of such third party deliveries both because Fidelity expressly includes the cost of "up to two overnight deliveries" as a separately itemized service in the bundled rate when it is included, and because the language "disburse" and "make payoffs" is neither intended nor reasonably understood to include the cost of third party delivery charges.

c. **The "Draw Deed" Theory**

The "Draw Deed" Theory is asserted by a subset of Plaintiffs (the "Draw Deed Plaintiffs") who contends Fidelity cannot lawfully charge its filed rate for "document preparation" for preparing a deed if the HUD-1 closing statement describes the charges as "draw deed" instead of "document preparation". A subset of the Draw Deed Plaintiffs with sale transactions between May 28, 2006 and February 2, 2008 (the "Gap Period Plaintiffs") alternatively contends Fidelity's failure to have a "document preparation" filed rate for their sale transactions makes such charges unlawful even if Fidelity's filed rate for "document preparation" authorized the draw deed charges in all other instances. Plaintiffs seek restitution of approximately $10.7 million under the Draw Deed Theory, including $1.8 million by the Gap Period Plaintiffs.

1 Fidelity contends it may lawfully charge its filed rate for "document preparation" when it
2 prepares a deed, that "draw deed" is simply another way to describe on a HUD-1 the charge for
3 Fidelity's preparation of a deed, and that no statute, regulation or rule requires Fidelity to use the
4 exact filed rate language to describe a charge on the HUD-1. Fidelity further contends that its
5 charges to the Gap Period Plaintiffs for preparing deeds was authorized by Insurance Code
6 §12401.8, since Fidelity included in its rate manual a statement required by that statute, it
7 obtained the advanced written agreement of customers to pay the charge, and the charge was a
8 reasonable amount for the service provided.

9 **d. Restitution and Injunctive Relief**

10 Plaintiffs contend that they have suffered an injury in fact and lost money as a result of
11 the alleged Insurance Code violations entitling them to restitution and injunctive relief. The
12 amount of restitution sought by Plaintiffs is $13,115,370 for the delivery fees and $10,670,982
13 for the draw deed fees.

14 Fidelity contends that even if Plaintiffs proved an Insurance Code violation, they would
15 not be entitled to restitution or an injunction both as a matter of law and equity because class
16 members received the benefit of their bargain and would have paid exactly the same fees
17 regardless of whether Fidelity included in its rate manual a "statement" giving notice that it was
18 collecting and passing through third party delivery charges, and regardless of whether it used
19 "document preparation" as the description for all deed preparation charges on HUD-1s or had an
20 identical separate filed rate for "deed preparation" in its rate manual.

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22 **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO LIABILITY**

23 "The UCL prohibits, and provides civil remedies for, unfair competition, which it defines
24 as 'any unlawful, unfair or fraudulent business act or practice.' [Citation.] Its purpose 'is to
25 protect both consumers and competitors by promoting fair competition in commercial markets
26 for goods and services,' [Citations.]" (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310,
27 320.) The UCL applies to "anything that can properly be called a business practice and that at
28 the same time is forbidden by law." (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254,
1266.)

1 The statutes relevant to Plaintiffs' UCL claim are found in the California Insurance Code.
2 The Legislature's stated "purpose of [Article 5.5 – Rate Filing and Regulation] is to promote the
3 public welfare by regulating rates for the business of title insurance as herein provided to the end
4 that they shall not be excessive, inadequate or unfairly discriminatory. It is the express intent of
5 this article to permit and encourage competition between persons or entities engaged in the
6 business of title insurance on a sound financial basis, and nothing in this article is intended to
7 give the commissioner power to fix and determine a rate level by classification or otherwise."
8 (Ins. Code, § 12401.)

9 Section 12401.1 states in relevant part: "Every title insurer, underwritten title company,
10 and controlled escrow company shall file with the commissioner its schedules of rates, all
11 regularly issued forms of title policies to which such rates apply, and every modification thereof
12 which it proposes to use in this state."

13 The term "rates" is defined in section 12340.7 as follows: "Except as provided in Section
14 12401.8,[10] and excluding miscellaneous charges, 'rate' or 'rates' means the charge or charges,
15 whether denominated premium or otherwise, made to the public by a title insurer, an
16 underwritten title company or a controlled escrow company, for all services it performs in
17 transacting the business of title insurance. As used in this section miscellaneous charges means
18 conveyancing fees, notary fees, inspection fees, tax service contract fees and such other fees as
19 the commissioner by regulation may prescribe."

20 Section 12401.7 prohibits a title insurer, underwritten title company or controlled escrow
21 company from "us[ing] any rate in the business of title insurance prior to its effective date nor
22 prior to the filing with respect to such rate having been publicly displayed and made readily
23 available to the public for a period of no less than 30 days in each office of the title insurer,
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25 [10] Section 12401.8 provides, "Charges in excess of those set forth in a rate filing which has
26 become effective may be made when such filing includes a statement that such charges may be
made in the event unusual insurance risks are assumed or unusual services performed in the
27 transaction of the business of title insurance; provided, that such charges are reasonably
commensurate with the risks assumed or the costs of the services performed and provided further
28 that each person or entity obligated to pay all or any part of such charges consents thereto in
writing in advance."

1 underwritten title company, or controlled escrow company in the county to which such rate
2 applies, and no rate increase shall apply to title policies or services which have been contracted
3 for prior to such effective date."

4 Section 12414.27 prohibits a title insurer, underwritten title company or controlled
5 escrow company from "charg[ing] for any title policy or service in connection with the business
6 of title insurance, except in accordance with rate filings which have become effective pursuant to
7 Article 5.5 (commencing with Section 12401) of this chapter or as otherwise authorized by such
8 article[.]"

9 **a. Delivery Theory No. 1**

10 Section 12414.27 contains an affirmative prohibition. Read together with the definition
11 of the "business of title insurance" in section 12340.3 subdivision (c), section 12414.27 provides
12 in relevant part that: "no ... underwritten title company ... shall charge ... for ... any service in
13 connection with" "[t]he performance by ... an underwritten title company ... of any service ...
14 including ... the handling of any escrow," "except in accordance with rate filings ...."[11] Tracking
15 the elements of the statute, this Court makes the following findings:

16 **Fidelity is an underwritten title company.** Fidelity so admits: "[w]e are an
17 underwritten title company. We sell title policies underwritten by a title insurer."[12]

18 **The service of delivery was a service "in connection with" the performance by**
19 **Fidelity of the handling of the class members' escrow.** Fidelity admits that "there is no
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[11] The full text of section 12414.27 is as follows: "Commencing 120 days following January 1, 1974, no title insurer, underwritten title company or controlled escrow company shall charge for any title policy or service in connection with the business of title insurance, except in accordance with rate filings which have become effective pursuant to Article 5.5 (commencing with Section 12401) of this chapter or as otherwise authorized by such article; provided, however, where a rate is on file with the commissioner and in effect immediately prior to such date, such rate shall continue in effect until a new rate filing is thereafter made and becomes effective in the manner provided in Article 5.5 (commencing with Section 12401) of this chapter." Section 12340.3 subdivision (c), in turn, defines the "business of title insurance" to include "[t]he performance by a title insurer, an underwritten title company or a controlled escrow company of any service in conjunction with the issuance or contemplated issuance of a title policy including but not limited to the handling of any escrow ...."
[12] Tr. 04/15 PM 71:24, 107:2-4.

question that Fidelity ... provides the FedEx or other overnight service in connection with" its performance of the handling of the escrow.[13] This finding is also supported by the manner in which Fidelity lists delivery fees on its customers' closing statements ("HUD-1" forms): they are listed in the 1100 series as "escrow and title charges",[14] in contrast to non-escrow charges such as pest inspector fees (listed in the 1300 series), the realtor's commission (listed in the 700 series), items payable in connection with the loan (listed in the 800 series), items required by the lender to be paid in advance (listed in the 900 series), and reserves deposited with the lender (listed in the 1000 series). In addition, Fidelity's SIMON and NGS escrow software systems both list delivery fees as "Escrow Charges."[15]

**The charge for the service of delivery was not in accordance with Fidelity's rate filings.** Throughout the class period, Fidelity's rate filings did not include any charge for delivery service. Fidelity so admits: "we've never filed any rates for delivery ...."[16]

**The charge for the service of delivery was a "charge" within the meaning of section 12414.27's prohibition.** Although Fidelity is correct that section 12414.27's prohibition is limited to a charge by a title insurer, underwritten title company, or a controlled escrow company, and therefore does not extend to "fees from banks, from lenders" which the underwritten title company causes to be paid from the escrow account,[17] this Court finds that the

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[13] Tr. (Fidelity's Counsel) 25:16-18); *see* Person Most Qualified ("PMQ") (Barber) Dep. 52:23-53:17 (Fidelity "uses an overnight delivery service as part of the escrow service"); *see* PMQ (Ryan) Dep. 69:4-11 ("the escrow will use Federal Express or a messenger or a wire to accomplish the delivery of the funds or documents that it's required to deliver at the end of an escrow".)

[14] JX 223; Tr. (Tyler) 1575:4-1576:1; PMQ (Ryan) Dep. 171:6-23.

[15] JX 282, p. 20 (listing "Express Mail" and "Courier Fees" on its "Escrow Charges" menu); JX 283, p. 20 (listing "Overnight Delivery Fee" and "Outside Courier/Special Msg." on the "Escrow Charges" menu).

[16] Tr. (Tyler) 1621:27-28; see PX 130 (PMQ Report) p. 4, p. 7 ("no rate has ever been filed for third party delivery services"); PMQ (Barber) Dep. 49:4-11, 49:16-19, 52:23-53:12; Tyler Dep. Feb. 118:15-17, 126:9-17; Tr. (Tyler) 1423:18-21; Fidelity's rate manuals: JX 204 (05/22/06); PX 85 (06/01/06); PX 86 (06/09/06); PX 87 (02/02/08); PX 88 (08/20/08); PX 89 (05/23/09); PX 90 (10/27/09); PX 91 (06/17/10); PX 92 (07/29/10); PX 93 (04/02/12); PX 94 (08/15/12).

[17] Tr. 06/27/14 at 44:7-11.

charge for the service of delivery was a "charge" by Fidelity within the meaning of section 12414.27's prohibition. This is true for two reasons.

First, **delivery service is an escrow service**. Unlike the financial service of making a loan, delivery service is an escrow service. Fidelity appears to admit as much: "FNTC has never argued, as Plaintiffs contend, that 'escrow does not involve delivery.'"[18] California Financial Code section 17003 subdivision (a) defines "escrow" to include "deliver[y] by that third person [i.e., by the escrow agent] to a grantee, grantor, promisee, promisor, obligee, obligor, bailee, bailor, or any agent or employee of any of the latter." Insurance Code section 12413.1 subdivision (f) uses the same definition. Fidelity's former National Escrow Administrator, Janice Oates, agreed with section 17003 subdivision (a)'s definition and admitted "we do deliver ... as part of the escrow."[19] The California Supreme Court itself likewise defines "escrow" to include "deliver[y]." (See *Summit Fin'l Holdings v. Cont'l Lawyers Title* (2002) 27 Cal.4th 705, 711.) This tenet is so fundamental that even Black's Law Dictionary defines "escrow" to mean that "the third party [i.e., the escrow agent] is to hand over the document or property to the promisee."[20]

The industry custom is consistent with California law. The delivery of escrow funds and documents is a necessary and integral part of escrow, meaning that an escrow holder necessarily undertakes the obligation of delivering escrow funds and documents even if this obligation is accomplished by using third-party vendors. Escrow expert Charles Hansen explained that the process of escrow was invented specifically to create an intermediary that could be trusted to get the money and documents in the hands of the persons entitled to them,[21] and that an escrow holder must "get the money to where you've been instructed to get it. And that mission has not been completed until the funds have been out of the account."[22] Escrow expert Nancy Hastings confirmed that escrow holders "cannot fulfill their duties ... without insuring that all documents

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[18] Def. Closing Br. ("D.C.") 14:11-12.
[19] Oates Dep. at 138:2-138:19, 142:2-24.
[20] PX 66.
[21] Tr. 612:13-613:13.
[22] Tr. 620:24-621:3.

1 and funds necessary to close the transaction are delivered to the parties who require them."[23]
2 Consistently, the custom and practice in the escrow industry is that the escrow holder is
3 "ultimately responsible" for paying the third-party delivery vendor's fee.[24]

4 The testimony was unanimous that delivery is a core part of an escrow holder's function.
5 Fidelity's escrow expert Anita Rubeck testified that the "escrow function" includes "handling
6 final delivery of all items to the proper parties."[25] Fidelity's National Escrow Administrator,
7 Lisa Tyler, testified that "one of the core things that an escrow does" is to deliver escrow
8 documents and disburse escrow funds "to the rightful owners."[26] Her predecessor, Janice Oates,
9 testified that the "duty" of an escrow is to get the escrow money and documents to the intended
10 recipients,[27] and that an escrow is required to "deliver the appropriate funds ... and documents ...
11 to the principals, agents, and lenders".[28] Fidelity's standard form escrow instructions expressly
12 instruct Fidelity to "deliver and/or record" the documents and funds held in the escrow at
13 closing.[29] As Ms. Rubeck explained: "The escrow holder understands from this section that
14 they are being authorized to deliver and/or record the documents."[30]

15 Fidelity could not, in short, do its job without delivering or outsourcing the delivery. The
16 charge to the class members for the delivery of escrow documents and funds are, therefore,
17 properly viewed as Fidelity's "charge" for the cost of providing escrow services.

18 Second, **<u>the charge for the delivery service was a charge by Fidelity</u>**. The evidence at
19 trial showed that the cost of third-party delivery vendors is an expense that Fidelity incurs in
20 order to carry out its function as an escrow holder, and that the delivery fees charged to the class
21 members were charges *by Fidelity*. It is Fidelity (and/or its parent FNF), not the class members,
22 who entered into the contracts with the overnight delivery companies ("ODCs").[31] Fidelity was
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24 [23] Tr. 383:26-384:5.
[24] *Id.* 455:17-18.
25 [25] Tr. 1395:11-22.
[26] Tr. 1606:2-7.
26 [27] Oates Dep. 143:13-19.
27 [28] *Id.* 147:18-149:1.
[29] PX 218.
28 [30] Tr. 1383:16-21.
[31] E.g., PX 50; see also Tr. (Tyler) 1566:17-1567:14.

1 directly obligated to pay the ODCs, and the ODCs invoiced Fidelity, not the class members.[32]
2 The class members "paid to" Fidelity the charges.[33] The money was "taken out of the escrow
3 account" and "put in [Fidelity's own] operating account."[34] That operating account is "FNTC's
4 business account" used to cover *FNTC*'s expenses[35]: "operating accounts are the company's
5 money that we use to pay our business expenses".[36] The money taken from the escrow account
6 and placed into Fidelity's own operating account was retained for up to a month until Fidelity
7 received the invoices from the vendors and paid them "from [FNTC's] operating account," *i.e.*,
8 its own funds.[37]

9 The charge was not a "pass-through" charge. The evidence shows that Fidelity's parent,
10 FNF, was paid back a specified portion of the charges by each of its primary delivery vendors,
11 not passing this rebate on to any of the class members.[38] The ODC contracts "increase[d] the
12 profit to [FNF]" because it "negotiated to receive from the overnight providers a percentage of
13 the gross volume business," including a percentage of gross volume from FNTC's escrow
14 purchase of overnight services as well."[39] So, for example, "every time" Fidelity shipped a
15 package via Fed Ex, the shipment "roll[ed] into" the agreement, meaning that "the calculation of
16 that revenue goes into the calculation of the marketing fee."[40]
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[32] PX 82, PX 83; Tr. (Tyler) 1553:4-13, 1555:15-56:1.
[33] Tr. (Tyler) 1658:10.
[34] *Id.* at 1557:14-19; PMQ (Barber) Depo. 68:7-18.
[35] Tr. (Tyler) 1557:20-22.
[36] Tyler Feb. Dep. 80:1-6.
[37] Tr. (Tyler) 1492:28-1493:5, 1557:14-19, 1570:12-1571:2; PMQ (Barber) Dep. 68:7-18; Tr. (Cassidy) 1806:27-1807:3.
[38] Mizes Dep. 45:7-15, 37:24-38:7, 38:16-39:24.
[39] Wolff Dep. 46:23-47:15, 47:11-15, 48:7-14; see Mizes Dep. 45:7-15.
[40] Mizes Dep. 39:11-15, 35:12-24. These facts also refute Fidelity's "bailee" argument, which was based on the assertions that: (i) it was the class members, not Fidelity, who had the contractual relationship with the ODCs, with Fidelity merely acting as the agent of the consumer as an undisclosed principal (Dkt. 404 (Fidelity's Opp. to MIL #10) at 3:1-12); and (ii) the delivery fees do not represent " 'costs FNTC incurred in delivering documents on behalf of class members' " (*id.* at 3:14-23). Trial showed these assertions to be unsupported. Instead, (i) the contracts with FNF/Fidelity and the ODCs were entered years before Plaintiff became an escrow customer, not for his benefit, (ii) the customer did not select or have any relationship with the vendors, and (iii) Fidelity and its affiliates independently benefited from the delivery

Fidelity's principal argument – that section 12414.27 is merely co-extensive with section 12401.07 and therefore does not cover a "charge" unless it is a "rate" as defined in section 12340.7 – violates the rules governing statutory interpretation. The plain language of section 12414.27 broadly prohibits a charge for "any" service that does not match the rate filings, without any qualification that the charge be a "rate" or that the charge be for a service performed by the underwritten title company instead of a third party.[41] Pursuant to the plain language, to trigger section 12414.27, the "service" charged need only be "in connection with" Fidelity's performance of the "service" of the "handling of the escrow," and the only "service" Fidelity itself must perform is the "service" of the "handling of the escrow": "no ... underwritten title company ... shall [1] charge for any ... service in connection with" [2] "[t]he performance by ... an underwritten title company ... of any service ... including ... the handling of any escrow." This plain meaning interpretation "controls." (*Holland v. Assessment Appeals Bd. No. 1* (2014) 58 Cal.4th 482, 490; see *People v. McCullough* (2013) 56 Cal.4th 589, 592.) In contrast, Fidelity's interpretation would require re-writing section 12414.27's prohibition by inserting "it

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arrangements, using the volume to negotiate lesser corporate rates for itself and to obtain "marketing fees." Fidelity's bailee argument is flawed also because the escrow holder is instructed to make delivery *by* FedEx, not *to* FedEx. (*See* Tr. (Hansen) 683:2-13, 725:13-726:15 [explaining that unlike a true bailee, to whom delivery of the document is the purpose and end point of the transaction, delivery to FedEx and other vendors is only a step in Fidelity's fulfillment of its obligation to deliver the document to the payee entitled to receive it].) Furthermore, the cost of delivery would be covered even if the "delivery" were "to" a "bailee." This is because a bailment, by definition, does not occur until a contract is entered with FedEx. (E.g., *Windeler v. Scheers Jewelers* (1970) 8 Cal.App.3d 844, 850.) Absent a contract, FedEx does not have the legal status of "bailee." (*H.S. Crocker Co. v. McFaddin* (1957) 148 Cal.App.2d 639, 644, 647.) Therefore, to make delivery "*to*" a bailee requires Fidelity to enter into a contract with the bailee and promise to pay the bailee the contractual consideration for the delivery.

[41] The use of the word "any" service demonstrates a legislative intent that this prohibition be broadly construed to cover all such services charged. (*Ennabe v. Manoso* (2014) 58 Cal.4th 697, 714 ["[u]se of the term 'any' to modify the words 'transaction' and 'consideration' demonstrates the Legislature intended the law to have a broad sweep and thus include both indirect as well as direct transactions"]; *Sterling Park v. City of Palo Alto* (2013) 57 Cal.4th 1193, 1203 ["The words 'any … other exactions' must have some meaning to broaden the statute's reach beyond merely a specific definition of fees"]; *Pineda v. Williams-Sonoma* (2011) 51 Cal.4th 524, 533 ["any" suggests intent of a broad construction]; *Ladd v. Cty. of San Mateo* (1996) 12 Cal.4th 913, 920 [same].)

1 performs directly" after the word "service" or by inserting "any rate" after the word "charge,"
2 something this Court may not do. (*In re D.B.* (2014) 58 Cal.4th 941, 948 ["we must follow [the
3 statutory language's] plain meaning whatever may be thought of the wisdom, expediency, or
4 policy of the act, even if it appears probable that a different object was in the mind of the
5 legislature"]; *In re A.M.* (2014) 225 Cal.App.4th 1075, 1083.)
6 The plain language of section 12414.27 is broader and more specific than section
7 12401.7. While section 12414.27 prohibits all charges for any service other than in accordance
8 with rate filings, section 12401.07 prohibits only the use of "rates" prior to the rate filings
9 becoming effective. And, because section 12414.27 is more particular to the conduct at issue –
10 specifically governing the charging for services, whereas section 12401.7 is more general,
11 governing when the rate filings become effective (e.g., requiring that rate filings first be publicly
12 displayed for 30 days) – section 12414.27 trumps section 12401.7. "[The] rule of statutory
13 construction [is] that a special statute dealing expressly with a particular subject controls and
14 takes priority over a general statute." (*Sterling Part v. City of Palo Alto* (2013) 57 Cal.4th 1193,
15 1199-1200.) Moreover, section 12414.27's use of the word "service" instead of "rates"
16 evidences, by negative implication, that the Legislature intended the prohibition of section
17 12414.27 to be broader than the prohibition of section 12401.07 limited to "rates." "It is a settled
18 principle of statutory interpretation that if a statute contains a provision regarding one subject
19 [e.g., the provision regarding "rates" in section 12401.07's prohibition], that provision's
20 omission in the same or another statute regarding a related subject [e.g., the omission of "rates"
21 in section 12414.27's prohibition] is evidence of a different legislative intent." (See *People v.*
22 *Arriaga* (2014) 58 Cal.4th 950, 960.) "It is a well recognized principle of statutory construction
23 that when a term is used in one place and that same term has been excluded in another place, the
24 term should not be implied where it has been excluded." (*Bisno v. Kahn* (2014) 225 Cal.App.4th
25 1087, 1102.) The use of the word "rates" in section 12340.7 and section 12401.7 shows that the
26 Legislature knew how to use that limiting language when it so intended, and elected not to do so.
27 (*People v. Murphy* (2001) 25 Cal.4th 136, 159; *In re Jennings* (2004) 34 Cal.4th 254, 273.)
28 "This Court cannot disregard the plain language ... and rewrite the provision to narrow its scope

.... If the Legislature intended such a condition, the Legislature could have easily included it in the statute." (*People v. Sheehy* (2014) 225 Cal.App.4th 445, 451].)[42]

A plain language reading of section 12414.27 is consistent with the statutory structure. Contrary to Fidelity's suggestion, there is no anomaly in section 12414.27, governing the "charg[ing] of rates," being placed in Article 6.9 with other sections pertaining to activities after rate filings become effective, such as section 12414.21, authorizing the CDI to examine rates after they have already become effective, i.e., "used." Fidelity's suggestion that the Legislature intended to divvy the sections with prohibitions grouped together in Article 5.5 is inaccurate. Section 12414.27 is not the only provision in Article 6.9 containing an affirmative prohibition. For example, section 12414.24 prohibits willfully withholding information or giving false or misleading information which will affect rates, section 12414.28 requires that title policies be subscribed by the title insurer's president or vice president, and section 12414.30 requires certain statements in a preliminary title report.

A plain language reading of section 12414.27, governing the "charg[ing]" for services, does not render the rate filing requirements of Article 5.5 a nullity. Each provision retains its

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[42] The Court is likewise unpersuaded by Fidelitys' argument that section 12414.27 should be interpreted as merely a grace period for section 12401.7's prohibition. (D.C. 5:30.) On its face, section 12414.27's plain language contains an affirmative prohibition plus a grace period, not only a grace period. Fidelity's contrary interpretation renders this affirmative prohibition surplusage, contrary to fundamental rules of construction. (See *People v. Leiva* (2013) 56 Cal.4th 498, 506.) Plus, the scope of section 12414.27 (charge for any service) is broader than the scope of section 12401.7 (use of any unfiled rate prior to the rate filings effective date), and section 12414.27 does not even mention section 12401.7. That the legislative history states that section 12414.27 contains a grace period does not mean it is only a grace period, and, in any event, legislative history may not be used to narrow the scope of a broadly worded statute. (*E.g.*, *Los Angeles Unified Sch. Dist. v. Garcia* (2013) 58 Cal.4th 175, 776-78.) Had the Legislature intended only a grace period, it would have placed it directly in section 12401.7 or rewritten section 12414.27 to delete its affirmative prohibition and to insert an express reference to section 12401.7. Fidelity's "grace period" argument is also belied by the fact that section 12414.27 is cited in 1 Cal. Jur. 3d Abstractors and Title Insurers § 25, n.4 for the substantive proposition that "no charges may be made" for title insurance policies or services except in accordance with rate filings.

1 purpose.[43] Other companies include charges for services that are not rates, such as recording
2 fees and notary public fees.[44] Fidelity's statement during closing argument, that "title companies
3 uniformly do not include Pass Through Statements for recording fees" (D.C. 9:3-4), is
4 inconsistent with a number of other companies' rate filings,[45] as well as its own rate filings that,
5 during the class period, did include such a statement for recording fees: "plus applicable
6 recording fees."[46]
7

8 [43] Section 12401 states the purpose of Article 5.5 and prohibits the CDI from setting a rate;
9 section 12401.1 mandates the filing of a schedule of rates and mandates that the rate filing set forth an effective date; section 12401.2 mandates establishment of classifications to determine
10 rates; section 12401.3 prohibits rates from being excessive, inadequate, or unfairly discriminatory; section 12401.4 sets forth a savings clause for certain concerts of action in the
11 setting of rates (exchange of information and experience data); section 12401.5 authorizes the
12 CDI to make regulations to require reporting of financial data and to make statistical plans; section 12401.6 sets forth a savings clause for certain concerts of action in the setting of rates
13 (among entities under the same management and control); section 12401.7 sets forth certain conditions precedent for the use of rates (passage of the effective date of the rate filing and
14 public display for 30 days of the rate filing; section 12401.71 sets forth conditions precedent for
15 the use of a reduced rate (passage of the effective date of the reduced rate and public display of the reduced rate; section 12401.8 sets forth conditions precedent for charges in excess of a rate
16 filing (including in the rate filing a statement that charges for unusual services may be made);
17 and section 12401.9 sets forth formatting requirements for rate filings and requiring copies to be made available to the public if requested.
18 [44] *Id.* 4:9-10; Tr. 04/15 (Fidelity's Counsel) at 27:22-25 (other companies included in rate filings "inspection fees, notary fees, conveyance fees and tax service contract fees").
19 [45] E.g., PX 2, p. 20, PX 6, p. 46, PX 10, p. 3, PX 11, p. 5.
20 [46] E.g., JX 204, p. 11. A plain reading of section 12414.27 does not render meaningless the exclusion of "miscellaneous charges" in section 12340.7's definition of "rates." Section
21 12414.27 prohibits charges except "in accordance with rate filings" or "as otherwise authorized by [Article 5.5.]" It is at least arguable that charging for the enumerated "miscellaneous
22 charges" is "otherwise authorized by" Article 5.5 (although it should be noted section 12340.7 is
23 not found in Article 5.5 but instead in Article 1 of Part 6, Chapter 1 of the Insurance Code). Further, if "miscellaneous charges" are not "otherwise authorized" by Article 5.5, and therefore
24 can only be charged "in accordance with rate filings" the exclusion still would not be meaningless. The "miscellaneous charges" exclusion for the definition of "rates" serves
25 purposes unrelated to the prohibitions in sections 12401.7 and 12414.27. It saves the CDI
26 resources: (a) by not requiring it to hear complaints about recording fees or notary public fees (section 12414.13 limits the administrative remedy to persons "aggrieved by any <u>rate</u> charged");
27 (b) otherwise spent examining such charges, e.g., examining them for "past and prospective loss experience," "reasonable margin for profit," "past and prospective expenses," etc. (section
28 12401.3 mandates that "<u>[r]ates</u> shall not be excessive or inadequate … nor unfairly discriminatory"); and (c) by not being required to examine them if they are reduced (section

1 Because the language of section 12414.27 is unambiguous it is not necessary for the
2 Court to look to extraneous sources such as the CDI. However, as discussed further below, the
3 Court finds that the CDI's interpretation supports Plaintiff's position and that the inference
4 Fidelity attempts to draw from the CDI's Legal Opinion[47] – that the CDI does not interpret
5 section 12414.27 to prohibit charges that are not "rates" because its Legal Opinion did not so
6 reason (D.C. 6:30-7:2) – is erroneous. It is more reasonable to infer that the CDI elected to not
7 address the issue because it concluded a delivery fee is a "rate."[48]
8 In light of the foregoing, the rule of lenity does not apply. The statutory language is
9 clear. In any event, ambiguity alone is insufficient to trigger the rule: "It would be inappropriate
10 to automatically conclude that, because a statute is ambiguous in some respect, we are not to
11 attempt to construe its meaning and effect." (*People v. Cornett* (2012) 53 Cal.4th 1261, 1271-
12 72.) Instead, the rule of lenity applies only if there is an "egregious" ambiguity that requires the
13 court to "do no more than guess what the legislative body intended." (*People v. Manzo* (2012)
14 53 Cal.4th 880, 889; *People v. Nuckles* (2013) 56 Cal.4th 601, 611.) The statute contains no
15 such ambiguity.
16
17
18
19 12401.71 mandates that the CDI shall review "reduced rates" to determine if they are inadequate).
20 [47] PX 68
21 [48] Had the CDI reached the issue, it is likely it would have concluded that section12414.27 prohibits unfiled charges even if the charge is not a "rate." Mr. Buggage, who the CDI designated as its PMQ to testify about its administrative interpretation (PX 132; Tr. (Buggage)
22 1156:26-1157:1) testified (without impeachment from his PMQ deposition) that the
23 "miscellaneous charges" exclusion for the definition of "rates" does not constitute an exception from section 12414.27's prohibition. Fidelity did its best to try to elicit contrary testimony,
24 asking Mr. Buggage this six times. But, each time, he rejected Fidelity's contrary suggestion. (Tr. 1167:17-21 ["Q. ... do you understand the miscellaneous charges to be an exclusion to what
25 is required to be filed? A. No."], 1167:22:23 ["Q. No? A. No."], 1168:10-17 ["Q. ...
26 miscellaneous charges are an exception from what is required to be filed? A. No."], 1168:18-26 ["miscellaneous charges is not an exclusion from the rate filing requirement"], 1171:6-12 ["[w]e
27 don't require them to actually give a rate for [recording fee]. Just a statement saying that this is going to be passed through ... [w]hich they regularly do"], 1171:25-1172:3 [the CDI has never
28 had to tell companies to include a filed charge for recording fees "because they all do. They all put a statement in there. All of them"].)



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**Fidelity's charges for delivery service do not fall within the "otherwise authorized" exception of section 12414.27.** This exception refers to the two sections in Article 5.5 that expressly authorize charging other than in accordance with rate filings which have become effective: (i) section 12401.71(a) – a "new" rate "may" be used if it results in a reduction from an existing rate and certain prerequisites are satisfied; and (ii) section 12401.8 – charges in excess of the rate filing "may be made" for "unusual services," provided certain prerequisites are satisfied. Neither of these apply. And, although section 12401.7 is in Article 5.5, it does not authorize anything. Instead, section 12401.7 prohibits the use of a rate prior to its effective date and the rate filing being publicly displayed for 30 days.

Even under Fidelity's interpretation of section 12414.27 as covering only charges that are "rates," the charge violated section 12414.27 because Fidelity's charge for delivery service was a "rate." Section 12340.7 defines "rates" as follows: "Except as provided in Section 12401.8, and excluding miscellaneous charges, 'rate' or 'rates' means the charge or charges, whether denominated premium or otherwise, made to the public by a title insurer, an underwritten title company or a controlled escrow company, for all services it performs in transacting the business of title insurance. As used in this section miscellaneous charges means conveyancing fees, notary fees, inspection fees, tax service contract fees and such other fees as the commissioner by regulation may prescribe."

The exclusion for "miscellaneous charges" from the definition of "rates" proves that Fidelity's interpretation – that "rates" are limited to charges for services "it" as opposed to a third-party performs – is erroneous. This is because "miscellaneous charges" is expressly defined to include "conveyancing fees" and "notary fees" – both charges for services only a third-party performs.[49] If "rates" did not include services performed by a third-party, then there would have been no need to include "conveyancing fees" and "notary fees" in the exclusion for "miscellaneous charges" because they would have already been excluded from the definition of

[49] While Fidelity told this Court in opening that it performs notary services (Tr. 87:15-18), trial showed the opposite: Fidelity is "not a notary public" (*id.* 1622:9-11); it is not Fidelity who performs the notary service but instead those employees "in their capacity of a notary public" (*id.* 1622:17-26; see Tr. 1469:1-8).

"rates." Fidelity's interpretation therefore makes the words "conveyancing fees" and "notary fees" surplusage, contrary to the canons of statutory construction. (See *Leiva, supra*, 56 Cal.4th at p. 506; *People v. Castillolopez* (2014) 225 Cal.App.4th 638, 653.) Because an underwritten title company never performs the service of "conveyancing" or "notary," "miscellaneous charges" are – contrary to Fidelity's assertion[50] – not a subset of services an underwritten title company performs. Services Fidelity personally performs and services a third-party personally performs are both sub-sets of "rates."

The charge for delivery service is not within the "miscellaneous charges" exclusion. While listing certain fees performed by third parties (e.g., conveyancing fees and notary fees), the exclusion limits itself to only those itemized fees. Under the canon of construction *expressio unius est exclusio alterius*, the expression of some things in the statute "necessarily means exclusion of other things not expressed." (*People v. Superior Court (Martinez)* (2014) 225 Cal.App.4th 979, 995.) The Legislature expressly closed the "miscellaneous charges" door to any fee other than that which the CDI "by regulation may prescribe." (Ins. Code, § 12340.7.) The CDI has never prescribed by regulation that delivery service is a "miscellaneous charge": "[t]he Commissioner has not prescribed by regulation additional fees or charges as miscellaneous charges."[51] Only the CDI's adoption of an APA-complaint regulation can unlock the "miscellaneous charges" exclusion. As discussed below, the CDI did the opposite, publishing its Legal Opinion that unfiled delivery fees may not be charged.[52]

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[50] D.C. 5:24-26, 11:18-19.

[51] PX 68.

[52] Fidelity's attempt to characterizing delivery fees as "pass throughs" – a term nowhere mentioned in the Insurance Code (but instead coined by the CDI in its 2007 regulation to specify certain financial reporting requirements) – is unavailing. The "miscellaneous charges" exclusion is limited to specifically itemized services; the exclusion is not a general exclusion for "pass-throughs" or third-party services generally, marked up or not marked up. (Ins. Code §12340.7.) Likewise, section 12414.27's prohibition contains no exception for pass-through charges. Also, as a matter of fact, Fidelity's charge for delivery service is not a "pass through," a term that "means that the amount for a particular item by a party to the transaction is the exact amount received by a service provider other than the reporting company." (DX 790 [Cal. Code Regs., tit. 10, § 2356.9, subd. (c)(9)].) As discussed above, FedEx, UPS, and OnTrac did not actually receive the "exact amount" because a portion of the delivery fee was contractually earmarked for

1 The legislative history is consistent with the conclusion that Fidelity's charge for delivery
2 service is a "rate." Before the 1973 legislation, only title insurers were required to file rates.[53]
3 The 1973 legislation amended the statute to regulate all three different entities. This change
4 created a drafting problem: how do you draft a single "rate" definition in section 12340.7 for the
5 three different types of entities covered by the new statute (title insurers, underwritten title
6 companies, and controlled escrow companies) for three different types of "services" all part of
7 the "business of title insurance" (the service of issuing title policies, the service of title searches,
8 and the service of "escrow")? The phrase "for all services it performs in transacting the business
9 of title insurance" was the solution. So, a title insurer must file the types of "rates" "for all
10 services it performs" (i.e., all charges for performing the service of issuing title policies), an
11 underwritten title company must file the types of rates "for all services it performs" (i.e., all
12 charges for performing the service of "escrow," e.g., delivery service), and a controlled escrow
13 company must file the types of "rates" "for all services it performs" (i.e., all charges for
14 performing the service of "escrow," e.g., delivery service). Thus, the pronoun "it" was not
15 intended to create an outsourcing exception, a proposition finding no support in the legislative
16 history. Consistently, prior to the 1973 amendment, when only title insurers filed rates, rates
17 were not limited to services only title insurers performed but instead extended to "fees for
18 services ***adopted by*** title insurers and made available to the public[.]"[54] "In resolving many
19 complex legal issues, as Justice Oliver Wendell Holmes, Jr., observed, 'a page of history is worth
20 a volume of logic.'" (*People v. Williams* (2013) 57 Cal.4th 776, 790; *see People v. Jeffers*
21 (1987) 43 Cal.3d 984, 993 ["the historical circumstances of [an] enactment may be considered in
22 determining the intent of the Legislature"].)
23
24

25 and then paid to Fidelity's parent. (Wolff Dep. at 46:23-47:15, 48:7-14.) Furthermore, the 2007
26 regulation provided that "pass through" costs are not to be reported as income/expense, while delivery fees, in contrast, are to be reported as income/expense, with no distinction between
27 delivery fees marked up or not. (DX 790, p. 122; Tr. (Cassidy) 1815:4-19.)
28 [53] PX 113, p. 161 [Senate Floor Statement, Sept. 16, 1973].
[54] Dkt. No. 441 [Fidelity's RJN, Ex. 4 (Legislative Counsel's Digest – legislative history of pre-1973 §12041], emphasis added.

1 The statute's purpose supports the conclusion that Fidelity's charge for delivery service is
2 a "rate." This Court "must adopt the construction" "most likely to promote rather than defeat the
3 legislative purpose and to avoid absurd consequences" (*In re J.W.* (2002) 29 Cal.4th 200, 213),
4 i.e., "adopt the construction that best effectuates the purpose of the law" (*People v. Johnson*
5 (2013) 57 Cal. 4th 250, 260). Section 12401 expresses that:

6 The purpose of this article is to promote the public welfare by regulating rates for the
7 business of title insurance as herein provided to the end that they shall not be excessive,
8 inadequate or unfairly discriminatory. It is the express intent of this article to permit and
9 encourage competition between persons or entities engaged in the business of title
10 insurance on a sound financial basis, and nothing in this article is intended to give the
11 commissioner the power to fix and determine a rate level by classification or otherwise.

12 Interpreting "rates" to include a charge for delivery service, regardless whether or not the
13 service is out-sourced to a third-party, best effectuates the statute's purpose of "permit[ting] and
14 encourag[ing] competition." (Ins. Code, § 12401.) The CDI, with its agency expertise and
15 experience, so concludes:

16 Maximum information about title rates benefits consumers and is necessary for
17 meaningful competition in the title industry. The requirement that title insurers,
18 underwritten title companies and controlled escrow companies include third-party courier
19 fees in rate filings furthers the Legislature's intent to "promote the public welfare" by
20 making costs transparent and ensuring meaningful competition in the title insurance
21 industry.[55]

22

23 [55] PX 68. Requiring disclosure allows competitors to know the total charge Fidelity was
24 imposing in the escrow and thereby compare their total escrow charge to determine whether or
25 not it is competitive. (Tr. (Buggage) 1264:5-10 ["escrow companies maintain information
26 regarding the rates of their competitors"].) Fidelity itself looks to competitors' rates to determine
27 if its total charge is "competitive" and "to help ensure Fidelity is complying with the Insurance
28 Code." (Partington Dep. 91:12-92:6.) Disclosure sets a level-playing field, enabling customers
to comparison-shop by knowing the charges to be imposed; as Mr. Buggage explained: "the
whole purpose of getting the insurance companies to file their rates is so the public knows what
they're paying and what they're paying for. So we wanted the insurance companies to file the
rates so the insured could have a chance to review the rates when they receive a quote and know

Including a charge in rate filings also furthers the statute's purpose by foreclosing "unfairly discriminatory" (Ins. Code, § 12401) deals favoring certain preferred customers, preventing, for example, Fidelity from not charging one of what it calls the "three B's" (i.e., "builders, bankers and brokers") for delivery service but instead charging an ordinary consumer. Not including such a charge in a rate filing conversely allows for such discriminatory treatment.[56] This is not a hollow concern. Fidelity considers its true customers to be the "three B's," who are able to steer large quantities of business to Fidelity,[57] and the three B's sometimes object to add-on fees charged in addition to the escrow fee.[58] Fidelity's interpretation, in contrast, creates a loophole: it could outsource "escrow" services to third-parties or independent escrow companies, not file a rate for those services, but still charge them.[59]

The CDI interprets the Insurance Code to mean that an underwritten title company "must ... include in rate filings with the Commissioner amounts charged to customers for the services of third party couriers, messengers, overnight or other delivery services, such as Federal Express, UPS and DHL, to be allowed to charge, or pass on charges to, customers for such services."[60] The CDI unequivocally concluded that such delivery fees "Are Part of Rates" and "Are Not Excluded From Rate Filing Requirements."[61]

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what they are being charged for. That's the whole purpose." (Tr. 1252:7-26.) Other provisions also express that one of its purposes is to inform the public of the charges. Section 12401.7 prohibits the use of any rate "prior to the filing with respect to such rate having been publicly displayed and made readily available to the public ...." (Ins. Code, § 12401.7.) And, section 12401.9 mandates that the schedule of rates "be kept at all times available to the public and prominently displayed in a public place in each office of ... underwritten title company ..." and be furnished "to the public" upon request. (Ins. Code, § 12401.9.)

[56] PMQ (Ryan) Depo. at 213:22-215:4.

[57] Tr. (Tyler) 1460:27-1461:11.

[58] *Id.* 1460:19-26.

[59] An interpretation that creates a "loophole" undermining the statute's purpose must be rejected, as all the following cases so hold: *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 816; *Brewer Corp. v. Point Ctr. Fin'l* (2014) 223 Cal.App.4th 831, 843-844; *Roy v. Sup. Ct.* (2011) 198 Cal.App.4th 1337, 1353-1354; *Farmer Bros. v. Franchise Tax Bd.* (2003) 108 Cal.App.4th 976.

[60] PX 68 (formal legal opinion letter dated Nov. 7, 2013, issued pursuant to Ins. Code § 12921.9), p. 1.

[61] *Id.*, p. 2.

1 Although this Court would reach the same result it reaches with or without the CDI's
2 interpretation, the agency's interpretation is entitled to deference in this case.[62] First, this CDI
3 interpretation is entitled to greater deference than normal because it is both interpretative and
4 quasi-legislative. This is because the Legislature expressly delegated to the CDI law-making
5 power: the power to decide, by regulation, whether or not to narrow section 12340.7's definition
6 of "rates" by adding to the list of "miscellaneous charges." The CDI's decision to not narrow the
7 definition of "rates" to exclude delivery fees is thus entitled to particular deference. (*See*
8 *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 799-800; *Moore v. Cal. State Bd.* (1992)
9 2 Cal.4th 999, 1013-1014.) Second, great deference to this CDI's interpretation is warranted also
10 because it is long-standing and consistent. It spans the entire time since overnight delivery
11 services became commonly used in escrow transactions in California sometime in the 1990s.[63]
12 In 1999, the CDI set forth its interpretation in a letter to Fidelity, directing it to "[p]lease provide
13 fees for wire transfers, courier services, and express mail services."[64] As Fidelity understood,
14 this 1999 letter "set[] forth the California Department of Insurance's position on whether title
15 companies have to file rates for messenger and overnight courier services"[65] and "was a
16 requirement" "[t]hat if fees were going to be charged for a courier or express mail service,
17
18

19 [62] "'An agency interpretation of the meaning and legal effect of a statute is entitled to
20 consideration and respect by the courts ....'" (*Holland v. Assessment Appeals Bd. No. 1* (2014) 58 Cal.4th 482, 490 [giving deference to agency's interpretation set forth in "informal advice
21 letter"] [quoting *Yamaha Corp. v. SBE* (1998) 19 Cal.4th 1, 7].) "'Confronted with an ambiguous statutory provision, we generally will defer to a permissible interpretation espoused
22 by the agency entrusted with its implementation.'" (*In re Vicks* (2013) 56 Cal.4th 274, 286 n. 8;
23 see *Sky River v. Kern Cty.* (2013) 214 Cal.App.4th 720, 735-36 [giving deference to agency interpretation set forth in "assessor's handbook"]; *First Bank v. East West Bank* (2011) 199
24 Cal.App.4th 1309, 1315 [affirming summary judgment based on deposition testimony of agency employees as to administrative interpretation]; *Auerbach v. L.A. Cty. Assessment Appeals Bd.*
25 *No. 2* (2008) 167 Cal.App.4th 1428, 144 [giving deference to agency interpretation set forth in
26 "opinion letters"]; *Truta v. Avis Rent A Car System, Inc.* (1987) 193 Cal.App.3d 802, 814-15 [giving deference to CDI's interpretation in a letter opinion].)
27 [63] Tr. (Buggage) 420:7-10; see *id.* 996:25-26.
28 [64] JX 247; see Tr. (Buggage) 1155:11-21, 1162:6-1163:16 [the CDI's position was based on "the entire Insurance Code"].
[65] PMQ (Ryan) Dep. 91:9-19.

Fidelity was being instructed to file a rate for those".[66] The CDI never withdrew the letter and continues to request and expect compliance.[67] The CDI's interpretation was reaffirmed in its 2007 regulation, in which the CDI defined the items specified in "miscellaneous charges" as including services performed by only third-parties (Cal. Code Regs., tit. 10, §§ 2355.3, subd. (f), 2355.3, subd. (s)), necessarily meaning that "rates" includes services performed by third-parties. The CDI has never adopted an inconsistent position.[68] The CDI has never communicated to Fidelity an inconsistent position.[69] The CDI never gave Fidelity an exception to not file a charge for delivery fees.[70] The CDI's acceptance of Fidelity's rate filings cannot constitute approval of Fidelity's unfiled charges not included therein.[71] Further, the CDI lacks statutory authority to approve title and escrow rates. (Ins. Code, §§ 12401, 12401.7; PX 113 (legislative history of SB 1293); Dkt No. 466 (RJN ISO Opp to Nonsuit re § 12414.26) [detailing the legislative history

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[66] *Id.* at 125:14-21. Similar letters were sent to others companies in the industry. (Tr. (Buggage) at 1254:14-21, 1130:26-1131:7, 1252:7-26; see *id.* at 912:27-913:5, 914:9-19, 923:3-7.) Most complied with the CDI's request by filing revised rate filings that included delivery fees, some with a charge of "as per vendor's charge" and others with a charge "in specific dollar amounts." (*Id.* at 923:12-20, 920:20-921:5, 924:25-925:1, 927:15-24.) After 1999, "[m]ost companies" included delivery fees in their rate filings (*id.* at 1257:7-13; Exs. 2-20, 22-24, 25-47), including First American (PX 2), one of Fidelity's largest competitors (Tr. (Tyler) 1463:20-1464:1). Such "[f]ailure of any interested party to challenge the [agency's] construction over many years is a factor entitled to much weight." (*California Motors Exp. v. SBE* (1955) 133 Cal.App.2d 237, 240.)

[67] Tr. 1234:5-8.

[68] Tr. (Buggage) 906:14-21, 958:2-15, 959:13-19. Fidelity misconstrues Mr. Buggage's statement that the CDI treats delivery fees like "miscellaneous charges." (D.C. 7:25-26.) What he said was: delivery fees are like "miscellaneous charges" in that the filed charge does not need to be a dollar amount ("because they may not know the specific rate for it") but "the company needs to put in the filing [a statement] that they will be charged these fees." (Tr. 1168:27-1169:13.) Likewise, Fidelity's argument that the CDI does not require a "rate" for a pass-through because it requires only a "statement" and not an amount is without merit. Section 12340.7 defines "rate" as a "charge" without limiting it to a "charge" with a specified dollar figure. And, in any event, a statement that delivery fees will be "as charged by vendor" is stating an "amount" albeit without a specified dollar figure, *i.e.*, equal to the amount charged by the third-party vendor.

[69] PMQ (Ryan) Dep. 92:6-14, 92:16-24; Oates Dep. 156:20-157:4, 157:13-158:14, 174:12-24; 224:16-23; Tr. (Tyler) 1588, 10-13, 1592:14-22, 1634:17-1636:14; Tyler March Dep. at 51:13-16.

[70] Tr. (Buggage) 903:1-5, 890:1-8, 901:14-20, 956:15-20, 1132:15-1133:4.

[71] *Id.* at 904:27-905:3, 888:14-28.

1 showing that the Legislature considered and declined to adopt a proposed prior approval
2 scheme].)[72]
3 In conclusion, the Court finds that Fidelity violated the law by charging for the service of
4 delivery because the rate filings did not include a charge for the service of delivery.
5
**b. Delivery Theory No. 2**
6 In light of the ruling above on Delivery Theory No. 1, the Court need not reach the merits
7 of Plaintiffs' alternative Delivery Theory No. 2.
8
**c. Draw Deed Theory**
9 Plaintiffs allege that Fidelity violated section 12414.27 by charging the class members for
10 the service of drawing a deed because its rate filing did not include a charge for this service. The
11 Court makes the following findings in connection with the Draw Deed Theory:
12
13 **i. During the Gap Period**
14 From May 28, 2006 until February 2, 2008, Fidelity's rate filings for sale/resale
15 transactions (as contrasted with refinance transactions) did not include a rate for either the
16

17 [72] Neither the regulation proposed and abandoned in 2000 (Stip., Tr. 1759:18-1760:4) nor the AG lawsuit/ settlement (which focused on markups [PX 288, ¶¶ 25B, 27C; PX 290]) prevented
18 or excused Fidelity's charging of unfiled delivery fees. Contrary to Fidelity's closing argument, nobody testified as Fidelity asserts that the CDI "agreed FNTC would submit a new manual after
19 the new regulations came out." (D.C. 10:8-10). Fidelity's PMQ admitted that the CDI told Fidelity in 1999 that it had to file delivery fees and that the CDI never communicated a different
20 position to Fidelity . (PMQ (Ryan) Dep. 89:24-92:24, Tr. 1592:21-22.) And, Fidelity admits
21 that nothing in the 2002 settlement with the AG barred it from filing a charge. (Tr. (Tyler) 1577:26-1578:2, 1632:5-1633:3.) Thus, nothing prevented Fidelity from including in its rate
22 filings a statement that delivery fees would be charged "as charged by vendor" or "at the rate of the third party." In fact, during the class period, Fidelity included such charges for services
23 performed by third parties, e.g., "charged as applicable" for the charge for notary public service
24 (JX 204, p. 7) and "plus applicable recording fees" for conveyancing fees. (JX 204, p. 11.) Moreover, at all times during the class period, Fidelity knew in advance what the charge was
25 going to be because it had negotiated flat rates with the ODCs. "FNTC escrow transactions
26 utilize a fixed price for deliveries performed by Fed, UPS, and OnTrac/California Overnight." (Dkt. No. 426 (Fidelity's Obj. re Mizes Depo., in Order On Deposition Designations (Steve
27 Mizes) entered 05/07/14, Exh. A, p. 1, n. 1); Tr. (Fidelity's counsel) 22:21-28.) Indeed, Fidelity now includes in its rate filing the statement that: "Third party fees and charges will be separately
28 charged at the rate of the third party." (PX 61, p. 5; DX 565.)

1 service of drawing a deed or document preparation.[73] During this almost 20-month time period,
2 Fidelity charged $1,800,973 in draw deed fees.[74] These charges did not fall within the exception
3 of section 12401.8 for "unusual" services. Because section 12401.8 is an exception to section
4 12414.27's prohibition and operates to excuse the otherwise unlawful conduct of charging an
5 unfiled fee, it is an affirmative defense that Fidelity must prove. (See *Meacham v. Knolls Atomic*
6 *Power Lab.* (2008) 554 U.S. 84, 91-92; *City of Brentwood v. Central Valley Regional Water*
7 *Quality Control Bd.* (2004) 123 Cal.App.4th 714; *Amaral v. Cintas Corp. No. 2* (2008) 163
8 Cal.App.4th 1157, 1190.) Fidelity did not prove this exception for at least two independent
9 reasons.

10 First, during the class period, neither drawing a deed nor document preparation was an
11 "unusual" service within the meaning of section 12401.8. Fidelity's National Escrow
12 Administrator testified that: (i) 95% of sales transactions involve a deed,[75] and (ii) 90% of
13 escrow transactions handled by Fidelity involve document preparation.[76] Expert Hastings
14 testified that escrows prepare a deed "in every sale transaction"[77] and that it is not "unusual" for
15 an escrow to draw a deed.[78] Something that happens 95% or 90% of the time is not uncommon
16 or out of the ordinary, and does not fit within Fidelity's own definition of "unusual" as not
17 "standard course."[79]

18 Second, even if the service of drawing a deed were an "unusual" service, Fidelity
19 presented no evidence that it obtained the class members' consent to these charges "in writing in
20 advance," as required by section 12401.8. Fidelity's rate filings during the class period required
21 the following documentation of charges for "unusual services":

22 > Each office must maintain a business record for each transaction in which excess charges
23 > are made which includes the following information: (1) Nature of special condition or

24
25 [73] PX Exh. 85; Stipulation, Tr. 1901:16-24; Tr. (Tyler) 1594:3-6, 1595:9-14, 1596:5-11, 1600:12-14.
26 [74] Tr. (Kriegler) 509:25-510:19.
[75] Tr. 1595:15-23.
27 [76] *Id.* 1599:9-18.
[77] Tr. 479:9-14.
28 [78] *Id.* 479:15-21.
[79] D.C. 22:18-20.

escrow liability; (2) order number and policy form; (3) underwriting rules applied; (4) applicable rating plans; (5) costs incurred; (6) excess service fees charged; (7) identify each party or entity to pay all or portion of excess service fees or costs; and (8) obtain the consent in writing in advance of each party or entity to be charged.[80]

If the draw deed fees were charged as "unusual charges," then under Fidelity's rate manual, Fidelity would have this detailed documentation to substantiate that. Fidelity did not present any documents or even testimony that such records were prepared. Moreover, during a portion of the class period, a regulation later repealed required specific disclosure in 12 point font that, among other things, informed the customer that "You are not required to accept the excess charge." (Cal. Code Regs., tit. 10, § 2359.5, subd. (a)(2), (d).) Fidelity failed to present any document satisfying this disclosure requirement, either.

Thus, the Court finds that the charging for drawing a deed was unlawful during the Gap Period.

**ii. Outside the Gap Period**

The Borrower's Escrow Instructions in the Villanueva transaction, in accordance with First Federal's condition of closing, instructed Fidelity to prepare a Grant Deed changing the order of vesting.[81] Fidelity followed industry custom and practice by charging for the preparation of documents, including deeds, separate from its escrow fee.[82] In their discretion, and consistent with industry custom and practice, Fidelity's escrow officers described the charge for deed preparation on a HUD-1 either as "document preparation" or "draw deed"—both of which adequately describe deed preparation.[83] The CDI does not regulate how HUD-1s are completed and has no regulations regarding how services performed by an underwritten title company are described on a HUD-1.[84]

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[80] See, e.g., JX 204, p. 2; PX 91, p. 1.
[81] JX 236; Tr. 175:3-175:8; 211:4-15; 212:3-212:17; JX 218 at G.P. 5 and at p. 1; JX 217.
[82] Tr. 464:12-465:8; 710:27-712:6; 1340:27-1344:12; 1597:22-28.
[83] Tr. 1499:19-1500:26; 1342:24-1343:14; 465:15-21.
[84] Baum Dep. 33:18-34:4; 94:5-101:17; Tr. 1238:27-1239:3.

In the Villanueva transaction, due to human error, Fidelity inadvertently listed two charges for preparing the Grant Deed, instead of one, and at different rates (i.e., a $75 Santa Clara County rate described as "Document preparation" and a $50 rate then in effect for multiple other counties as "Draw Deed").[85] Fidelity sought to refund the mistaken second charge per company policy.[86] There is no evidence that such an individualized error occurred in any other class transaction. While the evidence showed instances where, in a single transaction, Fidelity charged "document preparation $50" for preparing a document (e.g., a power of attorney) and "draw deed $50" for preparing a document (i.e., a deed),[87] and the filed rate was $50,[88] both the Villanueva price differential and undercharge of $50 relative to a $75 filed rate are atypical of the class. Other than during the Gap Period, data for fees labeled "draw deed" and the filed rate for "document preparation" correlated at 97.7%, with some charges inexplicably higher or lower.[89] Even in the atypical 2.3% of transactions, a review of each file is necessary to determined what actually occurred and why.[90] However, this statistical evidence substantiates Fidelity's testimony that its regular practice was to charge the "document preparation" rate whether the charge's HUD-1 label was "document preparation" or "draw deed." Fidelity's identical accounting for both charge descriptions also substantiates that both were for the same service.[91]

Thus, Plaintiffs failed to prove a UCL violation based on the Draw Deed Theory outside the Gap Period. All of the evidence demonstrated the document preparation filed rate, as charged, unambiguously includes preparing a variety of legal documents, including deeds, as understood by Fidelity, the CDI, the industry, and an entire class of consumers who authorized Fidelity to prepare instruments for their transactions. Mr. Buggage reviewed and accepted the

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[85] Tr. 1512:22-1513:10; 1518:20-1519:23; JX 204 pp. 17, 20; JX 223.
[86] Tr. 1520:1-8; 1521:10-13; 1432:15-17.
[87] See, e.g., DX 533 at p. 8, Lines 1105, 1113; Tr. 1356:3-21.
[88] DX. 533, p. 5.
[89] Tr. 1869:6-20; Stipulation, 1901:16-26.
[90] Tr. 1866:21-1867:9.
[91] Tr. 1350:9-22; 1773:5:20.

1 "document preparation" rate in each relevant Fidelity rate manual,[92] and found the rate
2 unambiguous, interpreting it to cover the service of preparing legal documents, including
3 deeds—as did Mr. Villanueva.[93] Fidelity was authorized under Article 5.5 to use the document
4 preparation rate, i.e., to charge that rate, in the manner interpreted and accepted by the CDI.[94]
5 The evidence showed the Insurance Code does not regulate the HUD-1 description of a charge
6 and the CDI considers charges lawful if a covered service is actually performed for the rate
7 filed.[95] Fidelity is entitled to charge an authorized filed rate so long as it performs the service
8 covered by the filed rate—regardless of how the HUD-1 describes the charge.[96]
9 Plaintiffs presented two "escrow experts" who disavowed interpreting rates.[97] Yet, like
10 Fidelity's expert, they confirmed "preparing" a deed means the same thing as "drawing" a deed
11 and it is customary to charge "document preparation" fees for preparing recordable documents,
12 including deeds, because it involves "additional work" that "isn't in your standard course of an
13 escrow."[98] Plaintiffs rely on Ms. Hastings' speculative opinion that Fidelity's drop down menus
14 are "strange" because they offer the option to describe a document preparation charge as
15 "document preparation" or " draw deed." But, substantial credible testimony explained the
16 options are common in the industry, as Ms. Hastings previously experienced.[99]
17 Thus, the Court finds that Fidelity did not violate the law by charging for the service of
18 drawing a deed outside the Gap Period.
19 **d. Statutory Immunity**
20 Insurance Code section 12414.26 does not immunize Fidelity from suit for its unlawful
21 charges. Section 12414.26 confers immunity for an "act done, action taken, or agreement made
22 pursuant to the authority conferred by Article 5.5 ...." Section 12414.26 does not apply because
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24
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[92] Tr. 891:12-22; 1135:14-1137:5.
[93] Tr. 1186:17-1188:13; Tr. 174:20-175:8.
[94] Tr. 1148:24-1149:10; 1139:26-1140:1.
[95] Baum Dep. 79:19-80:8; 89:19-91:5; Tr. 1238:27-1239:3.
[96] Baum Dep. 55:22-56:20; 91:25-92:13.
[97] Tr. 405:7-10; 633:2-5.
[98] Tr. 464:12-465:8; 465:15-21; 710:27-712:6; 1340:27-1344:12; 1597:22-28.
[99] Tr. 1516:12-1518:9; 1354:6-1355:16; 467:27-468:22. Ryan Dep., 174:4-175:4.

1 Article 5.5 did not authorize the unlawful charges. Nothing in Article 5.5 authorizes the
2 charging for a service other than in accordance with rate filings. No evidence at trial persuades
3 the Court to depart from this conclusion reached when it denied Fidelity's motion for nonsuit.

4 ## IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO REMEDIES

5 "Any person who engages, has engaged, or proposes to engage in unfair competition may
6 be enjoined in any court of competent jurisdiction. The court may make such orders or
7 judgments, including the appointment of a receiver, as may be necessary to prevent the use or
8 employment by any person of any practice which constitutes unfair competition, as defined in
9 this chapter, or as may be necessary to restore to any person in interest any money or property,
10 real or personal, which may have been acquired by means of such unfair competition." (Bus. &
11 Prof. Code, § 17203.)

12 "Injunctions are 'the primary form of relief available under the UCL to protect consumers
13 from unfair business practices,' while restitution is a type of 'ancillary relief.' [Citation.]"
14 (*Kwikset, supra,* 51 Cal.4th at p. 337.)

15

### 16 a. Restitution

Although Plaintiffs have established legal violations by Fidelity, they failed to prove an
17 entitlement to restitution. First, even if an unlawful act occurred during the transaction, Plaintiffs
18 received the benefit of their bargain. (See *Medina v. Safe-Guard Prods., Int'l* (2008) 164
19 Cal.App.4th 105, 115; *Peterson v. Cellco P'ship* (2008) 164 Cal.App.4th 1583, 1591-1592.)
20 Plaintiffs do not contend the delivery and draw deed services were unwanted, unsatisfactory, or
21 unfairly priced, and all of these services and rates were disclosed up-front and agreed to by
22 Plaintiffs. (See *Peterson, supra,* 164 Cal.App.4th at p. 1592; *Medina, supra,* 164 Cal.App.4th at
23 p. 115; *Hall v. Time Inc.* (2008) 158 Cal.App.4th 847, 855 [no injury where allegations
24 demonstrated plaintiff wanted and paid for book]; *Bower v. AT&T Mobility, LLC* (2011) 196
25 Cal.App.4th 1545, 1554-1555 [no injury where plaintiff failed to allege could have gotten a
26 better price elsewhere].)
27
28

The record in this case shows that the Villanuevas authorized and instructed that the payoff check could be delivered by FedEx;[100] that third-party vendors delivered Plaintiff's payoff check on his prior home loan and delivered closing documents and a mortgage broker fee pursuant to the escrow instructions;[101] that Mr. Villanueva admits he was told a deed was required for his transaction and he expected Fidelity to prepare a deed;[102] that Mr. Villanueva does not contend the delivery services or deed preparation services for his transaction were unsatisfactory;[103] that draw deed and delivery fees were disclosed and approved by the Villanuevas in the estimated closing statement, which was part of the escrow instructions;[104] and that Mr. Villanueva admitted he benefited from Fidelity's service of preparing a deed for his transaction.[105] The Villanuevas paid the same amounts for deed preparation that they would have paid (a) had the HUD-1s stated the verbatim filed rate language "document preparation $75" or (b) had the filed rate stated "document preparation (e.g., deeds) $75" or "draw deed $75."[106]

Class members benefited from the low delivery fees charged by third party vendors for their services. For example, for the Villanueva FedEx delivery, FedEx's retail rate was $20.75, its rate for Fidelity escrow customers was a low $11.50, and other escrow holders would have charged at least $15 or $20.[107] Other comparisons show customers paid more for overnight deliveries in transactions with other title companies than in a Fidelity transaction.[108] Furthermore, class members benefited from paying third party vendors to perform overnight

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[100] Hastings at 425:27-426:5; Exh. 218 at Gen. Prov. ¶ 5; Borrower's Escrow Instr., Addt'l Instr. ¶ 4;
[101] JX 339 RFA 10-13.
[102] JX 342 RFA 79.
[103] JX 342 RFA 72, 78.
[104] JX 218, p. 3; JX 342 RFA 84-85.
[105] JX 342 RFA 76, 81.
[106] Tr. 1499:19-1500:26.
[107] Tr. 1668:23-1669:7; 1662:13-16; 1492:4-14; PX 36 at p. 5 (Integrated Title $20); PX 41 at p. 11 (MIS Title Co. $15); PX 43 at p. 7 (North Bay Title Co. $20).
[108] Cf. PX 32 at p. 5 (American Coast $30) with JX 271A at p. 9 (for Fidelity customers, FedEx $12.50; UPS $12.45, OnTrac $4.10); cf. PX 11 at p. 8 (Cal-Sierra $20-$25) with JX 271A at p. 21 (for Fidelity customers, FedEx $13.25, UPS $13.25, OnTrac $5.95).

1 deliveries of payoff checks for them because they cut off accruing interest more quickly than
2 with regular mail and the savings typically exceeded the cost of the delivery.[109] Even Mr.
3 Villanueva benefited from his wife's payment of a FedEx overnight delivery charge where
4 interest on his Chase loan accrued at $38.87 per day.[110]

5 Second, Plaintiffs failed to show that alleged omissions in Fidelity's filed rates caused
6 any injury. (See *Hall, supra,* 158 Cal.App.4th at p. 855 [Section 17204's "as a result of"
7 language imposes a causation requirement]; *Troyk v. Farmers Group, Inc.* (2008) 168
8 Cal.App.4th 1337, 1348-1349.) The Villanuevas did not review any of Fidelity's filed rate
9 manuals prior to closing or before this action and, thus, did not rely upon or form any
10 expectations based on those manuals.[111] No evidence was introduced suggesting that any class
11 member ever reviewed or relied upon Fidelity's filed rates.[112] There is no causation here where
12 Plaintiffs never reviewed the filed rates, upfront disclosure broke any "causal chain," and
13 Plaintiffs would be in the same position whether or not Fidelity included Plaintiffs' desired
14 language in its rate manuals. (See *Daro v. Superior Court* (2007) 151 Cal.App.4th 1079, 1099
15 ["causal connection is broken when a complaining party would suffer the same harm whether or
16 not a defendant complied with the law"]; *Dean v. United of Omaha Life Ins. Co.* (C.D. Cal. Aug.
17 24, 2007), No. CV 05-6067-GHK(FMOx), 2007 U.S. Dist. LEXIS 99294, at *49-50 [any
18 deficiency in Insurance Code-required disclosure "harmless" where plaintiff did not read it];
19 *Withers v. eHarmony, Inc.* (C.D. Cal. Mar. 4, 2011), No. CV 09-2266-GHK(RCx) 2011 U.S.
20 Dist. LEXIS 155543, at *8 ("[g]iven that [the p]laintiff never reviewed the terms and conditions,
21 he [could not] establish that had the information been included he would have been aware of it
22 and behaved differently"); *Plotkin v. Sajahtera, Inc.* (2003) 106 Cal.App.4th 953, 965-966
23 [knowledge of the truth breaks the causal chain]; *Wayne v. Staples, Inc.* (2006) 135 Cal.App.4th
24 466, 484 [up front disclosure renders an act not deceptive].) Indeed, when Fidelity amended its
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26
27 [109] Tr. 1339:2-1340:15.
28 [110] *Id.*; Tr. 198:4-15.
[111] Tr. 153:25-154:1.
[112] Accord FAC 17 (alleging no class member read rates).

rate filings to address Plaintiffs' critiques, the impact on consumers was zero.[113] Thus, even under Plaintiffs' view of a "compliant" rate manual, Plaintiffs' payments and the services provided would be the same such that there can be no causation.

Plaintiffs rely on *Medrazo v. Honda of North Hollywood* (2012) 205 Cal.App.4th 1 for the position that in an action based on the "unlawful prong" of the UCL, the only thing that matters for restitution is that the plaintiff paid an "unlawful" fee. The Court declines to apply *Medrazo* for the same reason numerous courts have criticized it: *Medrazo* dealt with an unlawful prong claim based on statutes prohibiting certain misrepresentations but it did not discuss the California Supreme Court's finding in *Kwikset, supra*, 51 Cal. 4th 310, that actual reliance is required for such claims. (See, e.g., *Pratt v. Whole Foods Market Cal., Inc.* (N.D. Cal., Mar. 31, 2014), No. 5:12-CV-05652-EJD, 2014 WL 1324288, at *8 ("plaintiff cannot…simply point[] to a regulation or code provision that was violated [and] summarily claim[] that the product is illegal to sell[.]"); *Victor v. R.C. Bigelow, Inc.* (N.D. Cal., Mar. 14, 2014), No. 13-CV-02976-WHO, 2014 WL 1028881 at *7 ("to the extent that Medrazo [] hold[s] that a claim under the 'unlawful' prong grounded in fraud does not require reliance, I disagree with them, as have many other courts."); *Leonhart v. Nature's Path Foods, Inc.* (N.D. Cal., Mar. 31, 2014), No. 5:13-CV-0492-EJD, 2014 WL 1338161, at *8 (Medrazo inapposite; "actual reliance must be pled in order to satisfy the requirements of the UCL."); *Kane v. Chobani, Inc.* (N.D. Cal. 2014) 973 F.Supp.2d 1120, 1131 (substantively same).

Finally, Business and Professions Code Section 17203 does not mandate restitutionary or injunctive relief when an unfair business practice has been shown. Rather, it provides that the court may make such orders or judgments as may be necessary to prevent the use or employment of any practice that constitutes unfair competition or to restore money or property. That is a broad grant of equitable power. (See *Cortez v. Purolator Air Filtration Products Co. (2000) 23 Cal.4$^{th}$ 163)*. As noted above, the Court does not find that restitution is an appropriate equitable remedy in the instant case as the class members benefited from the low delivery fees negotiated by Fidelity and as demonstrated by the Villanueva transaction, the fees were disclosed and

[113] DX 772 at p. 5.

approved in the estimated closing statement, which was part of the escrow instructions. Moreover, the Court finds that it was Fidelity's parent company, FNF, who benefited from negotiating the contracts with the overnight delivery couriers. Ordering restitution in this scenario would likely put Plaintiffs in a better position than they expected to receive. For these reasons, the Court finds that restitution is not an appropriate equitable remedy under the facts of the present case.

**b. Injunctive Relief**

Although Plaintiffs are not entitled to restitution, the Court finds it appropriate to enjoin Fidelity from charging for the service of delivery unless its rate filing includes the charge or a statement that the rate will be the amount charged by the third party vendor for delivery fees. Although Fidelity's most recent rate filings include a charge for delivery fees,[114] the UCL authorizes injunctive relief against "[a]ny person who...*has engaged*...in unfair competition... ." (Bus. & Prof. Code, § 17203, emphasis added.) "[A] trial court may issue an injunction where a person has committed a *past* unlawful practice. [Citation.]" (*Brockey v. Moore* (2003) 107 Cal.App.4th 86, 103, original italics.)

Several factors make injunctive relief appropriate in this case. First, the Court finds that Fidelity's recent inclusion of a charge for delivery service was a tactical decision made in anticipation of an approaching trial instead of genuine reform. The Court does not find credible the testimony of Mr. Partington that Fidelity included the charge because it became aware, through the deposition testimony of the CDI's PMQ (Mr. Buggage), that the CDI's position is that the charges must be included in the rate filing in order to be charged.[115] That deposition occurred on November 30, 2011, almost two years before the rate filing in August 2013 that included the charge for delivery service. Moreover, Fidelity has known since at least 1999 that this was the CDI's position;[116] yet, for 14 years, Fidelity elected to not comply. "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and

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[114] DX. 565, p. 5.
[115] Partington Dep. 96:18-97:17.
[116] JX 247.

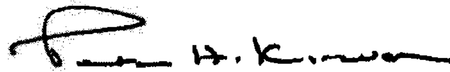
1 reform, especially when abandonment seems timed to anticipate suit." (*U.S. v. Oregon State*
2 *Medical Soc.* (1952) 343 U.S. 326, 333; see *E.E.O.C. v. Goodyear Aerospace* (9th Cir. 1987)
3 813 F.2d 1539, 1544 [a defendant "that takes curative actions only after it has been sued fails to
4 provide sufficient assurances that it will not repeat the violation to justify denying an
5 injunction"].)

6 Second, without an injunction, there is nothing preventing Fidelity from filing a revised
7 rate filing that does not include a charge for delivery service. (See *Dept. of Agriculture v. Tide*
8 *Oil* (1969) 269 Cal.App.2d 145, 150 ["a permanent injunction may be issued where a guilty party
9 retains the means of continuing his transgressions, even though he testifies that he no longer
10 intends to do so"]; *California Service Station v. Union Oil* (1991) 232 Cal.App.3d 44, 57
11 [affirming injunction where defendant stated at trial that it did not intend to violate the law and
12 that it will pursue a lawful policy in the future].) Here, Fidelity has filed charges for delivery
13 fees in the past (1999) and then withdrawn them,[117] and FNF affirmatively deleted them from the
14 rate filings of companies it later acquired.[118] The rate manuals of Lawyers Title, United Capital
15 Title, and Chicago Title from before and after their acquisitions by FNF[119] demonstrate that each
16 of those companies had filed charges for delivery service prior to being purchased by FNF.

17 The deposition testimony of the CDI's PMQ, Mr. Buggage does not appear to be
18 sufficient to restrain Fidelity from returning to past practices. Fidelity has made it clear that it
19 does not feel bound by the CDI's statements or instructions absent an APA-compliant
20 regulation.[120] Ms. Tyler, Fidelity's National Escrow Administrator, testified that, "If our
21 regulator required us to file a rate for delivery services I would argue that it's not a service that
22 our company provides."[121] Fidelity's defiance, however, is silent: "Q. Have you ever argued
23 that to your regulator? A. No, I have not."[122] The position of Fidelity and its "family of title
24

25 [117] PX 84; PX 130 at p.5.
26 [118] PX 130 at pp. 7-8 ("[t]he policy and practice has for all such acquisitions [by the FNF family] not to include such a rate ..."); Tr. 1582:12-28.
27 [119] PX 4, 5, 6, 7, 15, 48, 129.
[120] Tr. 04/15 PM (Fidelity's Opening) 79:7-80:21, 94:7-9.
28 [121] Tr. 1586:17-26.
[122] Tr. 1586:27-28; see Tr. (Buggage) 956:25-957:3-23.

1 and escrow companies" continues to be that "the California Insurance Code does not require the
2 filing of rates for third party delivery services ...."[123] Fidelity still insists that: "we would never
3 file a rate for a service we do not perform."[124]
4
5 Judgment shall be entered accordingly.
6
7
8 Dated: 11/10/14



Honorable Peter H. Kirwan
Judge of the Superior Court

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[123] PX 130 at p. 5; see PMQ (Barber) Dep. 99:16-20 (FNTC's "policy is ... that third-party fees do not need to be filed").
[124] Tr. (Tyler) 1633:3-5.

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Superior Court of California
County of Los Angeles

MAY 12 2014

Sherri R. Carter, Executive Officer/Clerk
By Ronna Stonebraker, Deputy

# SUPERIOR COURT OF THE STATE OF CALIFORNIA
# FOR THE COUNTY OF LOS ANGELES

| | |
|---|---|
| PATRICK KIRK,<br><br>Plaintiff,<br><br>vs.<br>FIRST AMERICAN TITLE CO., et al.,<br>Defendants. | Case No: BC 372797<br><br>Statement of Decision<br><br>Department F46 |

This case is a class action under the Unfair Competition Law (UCL). Plaintiff, on behalf of a class, challenged the filed rates charged for relatively small services performed by Defendant First American Title Company (FATCO) in connection with over 600,000 transactions involving the purchase, sale, or refinance of properties in California between 2003 and 2007.

Most of Plaintiff's theories challenging the rates are blocked by a statutory immunity from UCL claims related to ratemaking activity. The Court finds, however, that FATCO's failure to follow its rates justifies an award of restitution.

1 The case proceeded to trial in this department on December 5, 2013. Oral
2 proceedings were completed on January 16, 2014. After final argument, the matter was
3 submitted on February 3, 2014. [1]

4 I. INTRODUCTION AND PROCEDURAL HISTORY.

5 A brief summary of the procedural history is necessary to understand the persisting
6 portions of the case.

7 Plaintiff Patrick Kirk filed the instant class action on June 15, 2007. In the
8 operative Second Amended Complaint (SAC), filed November 19, 2008, Plaintiff Kirk, on
9 behalf of himself and others, whom he alleged were similarly situated, sued First
10 American Title Insurance Company, First American Title Company, and First American
11 Corporation.

12 Mr. Kirk's alleged damages arise from a residential real estate transaction that
13 occurred on February 25, 2004. In that transaction, Mr. Kirk sold his house to Jefferey
14 Sjobring who filed an earlier class action against the same defendants. Acting at the
15 request of Mr. Sjobring and his lawyer, Steven Bernheim, Mr. Kirk provided a statement
16 to assist in that class litigation. Thereafter, Mr. Sjobring informed Mr. Kirk that "First
17 American had defrauded Mr. Sjobring." Mr. Kirk then retained Mr. Bernheim's law firm
18 to bring this case individually, and as a class action, based on alleged overcharges to him
19 in connection with the February 25, 2004, real estate transaction.

20 At the time of trial, the only remaining defendant was First American Title
21 Company, which the parties colloquially referred to as "FATCO." FATCO is the wholly
22 owned subsidiary of First American Title Insurance Company, a title insurance company,
23

24 [1] When resting its case, FATCO reserved its right to present further documents that it
25 sought from the Department of Insurance at trial. The Court's ruling on this trial
26 subpoena, which ordered the production of additional documents, was stayed by the
27 Second District Court of Appeal. The stay was later lifted, and the court permitted
28 FATCO to introduce documents produced pursuant to the subpoena, as well as other
documents made relevant by their production. Plaintiff was also permitted to introduce
documents included in this late production by the Department of Insurance, as well as an
explanatory declaration by Steven Bernheim. [1]

1 which had previously been a defendant but has now been fully dismissed. First American
2 Title Insurance Company, the parent insurer, will be referred to as FATIC.[2]
3 Because it is owned by FATIC, FATCO is a "controlled escrow company," as defined
4 in California Insurance Code section 12340.6, subdivision (a), and therefore, regulated,
5 along with its parent insurance company, by the title insurance provisions of the
6 California Insurance Code, the California Department of Insurance (DOI), and the
7 Commissioner of Insurance (the "Insurance Commissioner").
8 The Second Amended Complaint alleged individual and class claims for Breach of
9 Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing, Negligence,
10 Fraud and Deceit, Unjust Enrichment/Restitution, violation of the Unfair Competition
11 Law (Business & Professions Code section 17200, et seq.), Negligent Misrepresentation,
12 violation of the Consumer Legal Remedies Act (CLRA) (Civil Code section 1750, et seq.),
13 and Constructive Fraud.
14 After demurrers, motions for summary judgment and summary adjudication, and
15 voluntary dismissals, only Plaintiff's Sixth Cause of Action, violation of the Unfair
16 Competition Law, remained for trial. The fraud claim, which apparently motivated Mr.
17 Kirk to retain a lawyer and bring a case, had been dismissed as the result of a motion for
18 summary adjudication. Mr. Kirk did not appear at trial.[3]
19 The Unfair Competition Law under which Mr. Kirk sues provides as follows:
20 As used in this chapter, unfair competition shall mean and include any
unlawful, unfair or fraudulent business act or practice and unfair,
21 deceptive, untrue or misleading advertising and any act prohibited by
Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the
22 Business and Professions Code.
23 (Bus. & Prof. Code § 17200.)
24
25
26

[2] FATIC was dismissed from the case by summary adjudication because there was no evidence that the charges at issue here were imposed by FATIC. Nevertheless, it is FATIC's rates which are at issue here.
[3] Excerpts of Mr. Kirk's deposition admitted at trial indicate he had no contact with FATCO during the transaction and no notion that he had been overcharged, apart from what he was told by his counsel three years after the transaction occurred.

The allegations of the Sixth Cause of Action are vague generalizations about conduct alleged to be "unlawful, unfair and fraudulent," as well as "deceptive, untrue or misleading." Plaintiff's counsel made no attempt to prove many of these allegations at trial. At trial, Plaintiff's counsel conceded they sought only to prove that FATCO's conduct was "unlawful" within the meaning of this statute. To succeed under this "prong" of the statute, a plaintiff must "borrow" a law from another statute and prove that the defendant violated it. (See *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143.)

To understand Plaintiff's allegations regarding an unlawful business practice, some background regarding the role of FATCO in typical residential real estate transactions is necessary. In addition to facilitating the title search and arranging for the title insurance policy issued through its parent, FATCO also operates as an escrow company, contracting directly with buyers and sellers to close their transactions. But throughout California, and particularly in Southern California, there are many well-established local escrow companies that are independent from title companies, and customers often prefer to use these independent escrows.[4] Residential customers will typically contract with these independent escrow companies for escrow services relating to the closing of their purchase and sale, or refinance transactions. These companies provide the personal service customers want, but they do not typically have the financial wherewithal to make lenders comfortable with the risk of a loss related to the millions of dollars that they would be transferring and holding as part of a normal slate of residential transactions. As a result, lenders will deposit their funds with the escrow arm of the title company, which will act as a clearinghouse in the transaction. The title company will pay off prior liens, and then transfer the funds to the escrow at closing. For this service, the title company's escrow arm, FATCO in this case, charges a sub-escrow fee, as well as fees for wire, messenger, overnight delivery, or other services that are provided. In many of these transactions,

[4] This practice is especially predominant in the counties of Imperial, Los Angeles, Riverside, San Bernardino, and San Diego.

FATIC may issue a title policy. The independent escrow company imposes the charges resulting from FATCO or FATCO's services on the parties to the escrow.

Nearly all of these charges are borne by the individual persons who are buying, selling, or refinancing in the transaction. Often, the ultimate customer, like Mr. Kirk, has no contact with the title company in connection with the sub-escrow arrangement.

Because of its status as a controlled escrow company, FATCO's escrow rates have been filed with the DOI by FATIC, its parent. It is unclear when FATIC or other title insurers began including a rate for the sub-escrow service in their rate filings. In 1999, the Insurance Commissioner asked FATIC to file a rate for even smaller services, such as wire transfer, messenger, and overnight delivery. FATIC and many other title insurers complied.

It is FATIC's filed rates for sub-escrow service, wire transfer service, messenger service, and overnight delivery service that are at issue in this case.

At trial, Plaintiff sought to prove mainly that FATIC's filed rate for sub-escrow services, "a minimum charge of $60 per order," was ambiguous. Allegations that this rate was ambiguous are contained within paragraphs 38–42 of the SAC. Plaintiff also sought to prove that FATIC's filed rates for overnight mail service, special messenger service, and wire transfer service were ambiguous. This theory, apparently conceived by Plaintiff's counsel only after the litigation was filed, could not be found in the SAC. Nevertheless, FATCO did not object, based on the pleadings, to this theory being explored at trial.

The evidence at trial could potentially come within the allegations of paragraph 106 of the SAC, which claims that First American and other defendants were "overcharging plaintiff for title insurance and services, and violating the above referenced statutes . . . ."

Plaintiff contends that ambiguities in the filed rates must be construed in the ultimate consumer's favor, according to rules of construction devised by Plaintiff's counsel. These rules are derived from rules of construction in cases involving public utilities and common carriers. Plaintiff further contends that the DOI would have applied these rules of construction, and therefore, the Court should do so in this UCL action. It is Mr. Kirk's

contention that any amount in excess of what would be charged under these rules of construction is an illegal overcharge in violation of the rates.

As the law establishing the illegality, Plaintiff relied upon the rates themselves, which both sides concede to have the force of a law, as the law allegedly violated. Plaintiff's claim is that the rules of interpretation constitute a common law in effect and are violated by any charge in excess of his construction of the rates.

Plaintiff's trial brief further illuminates that Plaintiff's counsel also seeks to derive the alleged illegality from Section 12414.27 of the Insurance Code, which states:

> Commencing 120 days following January 1, 1974, no title insurer, underwritten title company or controlled escrow company shall charge for any title policy or service in connection with the business of title insurance, except in accordance with rate filings which have become effective pursuant to Article 5.5 (commencing with Section 12401) of this chapter or as otherwise authorized by such article; provided, however, where a rate is on file with the commissioner and in effect immediately prior to such date, such rate shall continue in effect until a new rate filing is thereafter made and becomes effective in the manner provided in Article 5.5 (commencing with Section 12401) of this chapter.

(Ins. Code § 12414.27.) In this regard, Plaintiff sought to prove at trial that by disregarding the possibility of a construction of the rates that could reduce the amount charged, FATCO violated Insurance Code section 12414.27's requirement that all charges be made in accordance with the rates.

With respect to the Sixth Cause of Action, the Court, by order of November 30, 2012, certified two classes and two subclasses:

1. <u>Sub-escrow Fee Class</u>: All persons who were charged more than $60 by FATCO as a subescrow fee in California prior to October 8, 2007; this includes a subclass of:

    <u>Subclass 1</u>: All persons who were charged more than $60 by FATCO as a subescrow fee in California prior to October 8, 2007 and who were not issued a FATIC owners policy in the same transaction;

2. <u>Disbursement Fee Filed Rate Class</u>: All persons who were charged more than FATCO's filed rate for a wire transfer, overnight or messenger fee in a California real estate transaction; this includes a subclass of:

    <u>Subclass 2</u>: All persons who were charged by FATCO more than FATCO's filed rate for a wire transfer, overnight or messenger fee in a California real estate transaction, and

who were not issued a FATIC owners policy in the same transaction.

(See Nov. 30, 2012 Class Cert. Order, p. 4.) Subclass 1 will be referred to as the "Sub-escrow Subclass." Subclass 2 will be referred to as the "Disbursement Fee Subclass."

Notice has been given to most of the 640,806 persons who have been identified as potential class and sub-class members through records contained in First American's FAST System database.

"FAST" is short for First American Software Technology. The FAST system is a proprietary system that First American companies use nationwide to generate HUD-1 Settlement statements, title commitments, and title policies issued in connection with direct escrow transactions. FAST was not designed for the sub-escrow transactions peculiar to California. Nevertheless, FAST is used by First American companies to open and process such transactions, and was the principal source of data regarding the sub-escrow transactions in this case.

Only the claims of the subclasses went to trial on December 5, 2013. This resulted from the outcome of a motion filed by FATCO not long before trial, to stay the case pending arbitration. Apparently, the FATIC owner's policy, which was issued to many class members, contains an arbitration clause that may be broad enough to include the claims in this action. FATCO moved to stay the action based upon these arbitration clauses. Although the Court denied this motion, FATCO has appealed. As a result of this appeal, "the case is stayed as to 272,037 class members who are parties to arbitration agreements with First American Title Insurance Company."[5] The Court decided that the claims of the subclasses could nevertheless proceed to trial, and assigned the matter to this department. Based on a mathematical calculation derived from the parties' stipulation of fact, the Court calculates that the claims of 368,769 subclass members went to trial.

The Sixth Cause of Action requests that the Court order FATCO "to disgorge the profits" it has obtained. As the Supreme Court of California has held, "disgorgement of

[5] Stipulation Re Authenticity of Records, filed December 9, 2013.

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money obtained through an unfair business practice is an available remedy in a representative action only to the extent that it constitutes restitution." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1145.) According to the calculations of Plaintiff's expert, the amount of the alleged overcharges, together with prejudgment interest, is in excess of $34 million, when all the charges to all of the class members are combined. Plaintiff sought the full amount at this trial, even though the claims of 272,037 class members did not go to trial. The Court has determined to decide only the claims that went to trial, the claims of the subclasses.

The SAC also seeks an injunction "to correct the wrongful business practices alleged in this complaint." On September 6, 2007, more than a year before this Second Amended Complaint was filed, FATIC filed an amendment to its Schedule of Fees. (Plaintiff's Exh. 8.) Plaintiff acknowledges that this amendment eliminated the claimed ambiguities on which the Sixth Cause of Action is now based. As a result, Plaintiff did not seek an injunction at trial. This amended schedule of fees also defines the class. It went into effect on October 8, 2007, which is the end of the class period.

At trial, the parties presented nearly all of the evidence that had been presented in connection with the motion for summary judgment. For example, Plaintiff offered into evidence the declarations of the Defendant's personnel and experts, which were reviewed by the Court at summary judgment. The Court considered additional evidence as well. All told, the Court heard or read the testimony of 33 witnesses and considered 300 exhibits. While, the questions to be resolved by the trial are in many ways similar to those before the Court at summary judgment, the purposes of the Court's inquiry at trial are fundamentally different. At summary judgment, the Court's principal aim is to identify the existence of possible issues of fact. At trial, the Court must decide those issues. At trial, the Court must assess the credibility of testimony, even if offered through the same declarations or depositions. Finally, the Court must determine the weight to be given to the evidence; and, resolve the issues.

## II. HISTORICAL TREATMENT OF THE RATES AT ISSUE.

As framed by Plaintiff, this case directly concerns the interpretation of FATIC's Rates for Sub-escrow service and for various supplementary services, including wire, messenger, and overnight delivery.

In 1973, the Legislature passed, and Governor Reagan signed, legislation adding section 12401 et seq. to the Insurance Code for the purpose of regulating the rates of title insurance. A legislative analysis provided by the Department of Insurance dated August 27, 1973, reflects a legislative intent to put title insurers on the same regulatory footing as property and casualty insurers were at that time:

> Present law exempts title insurance from the rate regulation provisions of the Insurance Code. It requires only that the rates which are used by title insurers be filed with the Insurance Commissioner.
>
> This bill makes title insurance subject to the same rate regulation provisions applicable to property and casualty insurers with the exception that title insurers rates are to be filed with the Insurance Commissioner, whereas property and casualty rates generally are not required to be filed.

(Plaintiff's Request for Judicial Notice dated Jan. 31, 2014, at p. 174 of 229.)

### A. The Sub-escrow Rate.

Although the provisions of the Insurance Code regulating title insurance rates were enacted in 1973, the earliest FATIC sub-escrow rate shown at trial was effective ten years later on May 5, 1983. In such early filings, FATIC defined the rate as a "minimum charge of $40 per order" for what was then called "Limited Escrow Service." (Exh. 1001, at p. 63.) FATIC filed rates for sub-escrow service with similar "minimum" wording on numerous occasions thereafter, until 2007.

At first, there was no language in the rate to indicate how the minimum charge might be exceeded. A version of the rate listing January 17, 1994, as its effective date is the first the Court found that stated the fee "may be adjusted upward or downward pursuant to the provisions of section A-16 of this schedule." (Exh. 1101.)

At the time of Mr. Kirk's transaction in 2004, the rate provided as follows:

J-24 LIMITED ESCROW SERVICE (SUB ESCROW)

In connection with an order for title insurance the Company may provide limited escrow service in support of a primary escrow agent for *a minimum charge of $60 per order.*
Services available under this sub-section are limited to:
a. The receipt of funds and written instructions from the escrow holder and from any lender whose loan will be insured.
b. The disbursement of such funds for the elimination of any matters affecting title, but only to the extent authorized under such instructions.
This limited escrow service does not include obtaining payoff demand statements or the disbursement of funds to parties other than the escrow holder for any purpose except elimination of matters affecting title to the land to be insured.
*The fee charged pursuant to this sub-section may be adjusted upward or downward pursuant to the provisions of section A-16 of this schedule.*

(Exh. 1004, italics added.)

Mr. James Dufficy, FATIC's regulatory counsel between 1998 and 2005, testified that this formulation of the sub-escrow fee was included in at least eight filings with the Department of Insurance during his tenure. According to Mr. Dufficy, the DOI expressed concern regarding the factors being used to vary the sub-escrow charge "pursuant to the provisions of section A-16 of this schedule." In response to this concern, FATIC clarified these factors by revising the language of A-16 in a manner specifically requested by the Department of Insurance. At the time of Mr. Kirk's transaction, A-16 thus stated:

A-16 FEES NOT SCHEDULED
Where title, escrow and/or any other services are requested in circumstances for which no charge has been specifically contemplated in this schedule, a charge should be made which is consistent with the general pricing procedures set forth herein. Special consideration may be given to various classifications of services or divisions thereof, based upon factors including but not limited to, size of the particular transaction or transactions involved, expenses, risk, volume, geographical considerations, single point of entry, centralized service, required technology, competitive environment, and any other reasonable considerations.

(See Exh. 1004.) Some of this language appears to have been derived from Insurance Code section 12401.3, thus substantiating Mr. Dufficy's testimony that it was requested by the Department of Insurance.

On April 22, 1998, Ed Lin, an Associate Insurance Rate Analyst, wrote a letter to First American indicating this change to the language of A-16 had been approved. This letter, like others sent by the Department at the time, stated, "This approval shall continue to have full force and effect until such time as a subsequent change for the

1 referenced lines or programs may be approved or ordered by the Insurance
2 Commissioner." (Exh. 1230.)

3 **B. The Rate for Escrow Related Services.**

4 Plaintiff also challenges the rate for Escrow Related Services. The evidence
5 indicated that rates for such minor services were not submitted by FATIC or other carriers
6 prior to 1999, when the DOI specifically requested them. Prior to that time, it appears
7 that both the DOI and the insurers treated such fees as miscellaneous fees, not subject to
8 rate regulation. However, on August 31, 1999, Ed Lin, as Associate Insurance Rate
9 Analyst at the DOI, wrote to FATIC, stating "Since messenger, wire transfer and express
10 mail services are not considered miscellaneous per the definition provided in Section
11 12340.7, these rates need to be filed." (Exh. 1107.) Although not all insurers filed such
12 rates at that time, FATIC did. (Exh. 1112.) The rates, as initially submitted in 1999,
13 were unchanged at the time of Mr. Kirk's transaction. The rates were as follows:

14 J-32 ESCROW RELATED SERVICES
15 Overnight mail service $15.00
Special messenger service $25.00
Wire transfer service $15.00.

16 (Exh. 1112.) Following the policy of the Department at that time, these rates were
17 approved by letter on October 25, 1999. (Exh. 1114.)

18 **C. DOI "Approval" or "Acceptance" of the Rates.**

19 Colloquially, title insurance is referred to as a "file and use" line of business. The
20 statutory language, while enabling the DOI's regulation of the rates, does not provide for
21 review and pre-approval of the rates by the Department before they go into effect. The
22 statutes require the filing of the rates, and then permit the rates to be used after being
23 posted for 30 days.

24 The parties have submitted legislative history of the 1973 statutes indicating that
25 pre-approval had been included in the original draft of the legislation, but was later
26 removed. Each side attributes some significance to the change. The Court can infer from

it only that the Legislature intended that rates be regulated, but did not require as part of the statute that the rates be approved before going into effect.[6]

Nevertheless, the evidence at trial showed that in the early 1990's, the Rate Regulation Bureau of the DOI began affirmatively reviewing rate filings for statutory compliance prior to their effective date. The title insurance companies were required to submit substantiating information along with the proposed rates. If the rate analyst had an issue with the submitted information, the analyst would return it and request more information, or a revision of the rate. Over the years, some representatives of FATIC have disputed the DOI's legal authority to engage in such pre-approval. In practice, however, First American, and the industry at large, cooperated in this review, and did not use title insurance rates without an approval or acceptance from the DOI. The rate regulation review performed by the DOI prior to the effective date encompassed statutory compliance of the rates for ambiguity and as to whether they were excessive, inadequate, or discriminatory. (See Ins. Code § 12401.) If the reviewers in the DOI's Rate Regulation Bureau had an issue with the language of any rate filing, they were to record that issue in the DOI's Integrated Database, or IDB. As a matter of common practice, any issue with the rate filings was resolved prior to acceptance or approval of the filings.[7]

The Rate Regulation Bureau modeled its review after the pre-approval process used for automobile insurance rates implemented after Proposition 103. The review of title insurance rates did not usually involve mathematical analysis because computation of the rate was usually not at issue under the title insurance statutes.

The DOI did intend that insurers would rely upon its approval in their use of the rates going forward. In this regard, DOI issued letters of approval for the rates, both to document the DOI's action and to give the insurance company proof that the file had been

[6] With the passage of Proposition 103 in 1988, automotive insurance rates became the subject of a statutory pre-approval process. The parties are in agreement that the changes applicable to automobile insurance, and indeed the entire series of changes in the Insurance Code brought about by Proposition 103, had no effect on the law governing involving title insurance.

[7] "If the issue cannot be resolved, the filing is usually withdrawn or rejected. We do not accept filing with unresolved issues." (Exhibit 1261.)

1 reviewed. Although Mr. Barker testified that the use of the word "approval" for this
2 process was an "inadvertent" practice, the weight of the more credible evidence was that
3 the word came from an intentional decision by the DOI to use the same language that it
4 used in approving automobile insurance rates. Later, in approximately the mid-2000's,[8]
5 the title of the letter was changed to a letter of "acceptance," rather than "approval."
6 Nevertheless, the DOI continues to review title insurance rates for statutory compliance
7 prior to the rates becoming effective, even today.

8 Pursuant to this process, the language in FATIC's J-24 rate calling for a "minimum"
9 fee for sub-escrow service was approved or accepted each time it was submitted. Neither
10 the IDB, nor any correspondence between First American and the DOI, indicates an
11 objection to any of the filings of these rates. The disbursement fees were likewise
12 approved or accepted.

13 In order to show that the Department had not objected to any of its filings of the
14 rates at issue here, Defendant FATCO subpoenaed the IDB in discovery. On December
15 30, 2011, Darrell Woo, the Custodian of Records of the DOI, confirmed that the IDB may
16 contain recordings of the filed rates that are at issue in this litigation. He went on to
17 state, "However, because they are resolved, none could be considered ambiguous, unlawful
18 or problematic." (Exh. 1032.) Later, as an alternative to production of the IDB, Mr. Woo
19 signed a statement stating that "[t]he DOI's rate analysts review all title insurers' rate
20 filings for acceptability in terms of statutory compliance. If anything is found to be non-
21 compliant, ambiguous, unfair, illegal and/or deceptive at the time of review, such issues
22 and the resolution of such issues should be recorded in the IDB." (Exh. 1037 A.) Both the
23 DOI and Plaintiff's counsel have asserted that this language was drafted by Defendant's
24 counsel and unfairly pressed upon Mr. Woo, who is a licensed and experienced attorney,
25 for signature. The evidence at trial showed that the concept behind the language was
26 suggested in the December 30, 2011 email from Mr. Woo, and that the final language was
reviewed and approved by Ken Allen of the DOI, with whom Mr. Woo consulted as the

[8] No witness gave an exact date for this change.

1 subject matter expert of the DOI, before it was signed by Mr. Woo. This was further
2 confirmed by the documents produced after the initial conclusion of oral proceedings,
3 which showed that the language of Mr. Woo's declaration had been reviewed extensively
4 with knowledgeable personnel who believed it accurately reflected the DOI's processes,
5 and its historical treatment of FATIC's rates.

6 The evidence at trial also showed that the DOI cooperated with Plaintiff's counsel to
7 suppress this historical information about its review, and approval or acceptance of
8 FATIC's rates, and to minimize any notion that the DOI's actions in approving and
9 accepting title insurance rates could be relied upon by the insurer filing the rates.

10 After Mr. Woo's statement was filed in the litigation, Plaintiff's counsel Steven
11 Bernheim complained directly to the Insurance Commissioner. Immediately thereafter,
12 various representatives of the Insurance Commissioner began to lobby FATCO's attorneys
13 for the withdrawal of the statement on the grounds that Mr. Woo, who normally has
14 authorization to perform his function as the DOI's custodian of records, was not
15 authorized to make the statement.

16 FATCO eventually agreed to withdraw Mr. Woo's statement in connection with the
17 summary judgment motion, but when discovery showed the statements had been approved
18 by knowledgeable DOI personnel, it was again offered at trial and received in evidence.
19 The weight of the evidence at trial confirmed that the statement in the Woo declaration
20 regarding the DOI's review of title insurance filings was true.

21 This was not the end of Mr. Bernheim's efforts to discourage testimony from DOI
22 representatives when he viewed it as unfavorable to his case, nor the end of the DOI's
23 cooperation in these efforts. When Dwayne Buggage, a rate analyst who had previously
24 agreed with FATIC's interpretation of one of its rates, was designated as the person most
25 knowledgeable to testify at a deposition. Mr. Bernheim staged a scene at the deposition.
26 thereby preventing it from going forward. As part of this scene. Mr. Bernheim made a
show of phoning the Insurance Commissioner directly to complain of the designation of
Mr. Buggage. When the deposition resumed at a later date. Mr. Buggage had been

1 replaced as the designated witness by a witness who Mr. Bernheim viewed as more
2 favorable to his case.
3 Current employees of the DOI could not help but be aware of the history of Mr.
4 Bernheim's contacts with the Insurance Commissioner, and were therefore aware that any
5 testimony unfavorable to Mr. Bernheim's case would be reported promptly and directly to
6 their ultimate boss, the Insurance Commissioner, who would respond in a manner
7 designed to assist Mr. Bernheim. Mr. Barker, no longer an employee of the DOI, also
8 appeared to be influenced by his contact with Mr. Berheim. The changes in Mr. Barker's
9 testimony between his first deposition and his testimony at trial showed that the more
10 exposure he had to Mr. Bernheim, the more his testimony matched Mr. Bernheim's theory
11 of the case.
12 In view of this history and the demeanor of these witnesses, the Court reluctantly
13 concluded that much of the testimony of present and former DOI representatives
14 attempting to minimize the history of the DOI's review, acceptance, or approval of the
15 rates at issue was not credible. Likewise, the testimony of these representatives that the
16 DOI would have interpreted the rates in conformity to the theories of Plaintiff's lawyers
17 was likewise not credible, especially in view of the written record showing
18 contemporaneous approval or acceptance of the rates by the DOI. Through Richard Baum
19 and Douglas Barker, Plaintiff presented evidence that the DOI had a policy to interpret
20 any ambiguity in any rate in favor of a consumer and against the insurance company.
21 There was no evidence that this policy was ever formulated in a regulation or other official
22 policy statement of the DOI.
23 The Court also looked with some skepticism on the testimony of Milo Pearson, who
24 established the Rate Regulation Division of the DOI, because his consulting rate with
25 defense counsel seemed unduly high. Nevertheless, his testimony regarding the historical
26 treatment of the rates filed by title insurers was confirmed by contemporaneous

documents, and the very existence of the IDB.[9] On the stand, Mr. Pearson appeared to be carefully qualifying his statements to be sure he not overstating his recollection. The DOI's historical treatment of the rates was also confirmed by Sherwood Girion, formerly Chief of the Rate Regulation Branch of the DOI, who did not charge a consulting fee. Although he presently works for another title insurance company (which presumably would not appreciate the filing of a litigation like this one), his testimony appeared, to the Court, to be credible and unbiased.

**D. DOI's 2006 Market Conduct Examination and FATIC's Settlement with the DOI.**

In late 2006, a considerable time after Mr. Kirk's transaction, the DOI took action that FATIC interpreted as a demand to state its rates more clearly, and to follow them more closely.

On December 29, 2006, Jerome Tu, a Senior Insurance Rate Analyst for the Department of Insurance, finalized a Market Conduct Examination of FATIC. The Market Conduct Evaluation covered many subjects, but it included an allegation that FATIC "[c]harged a $125 sub-escrow fee even though the minimum filed sub-escrow fee was $60." (Exh. 12, at p. 21.) The document was dated "as of October 26, 2004," but the consensus of the testimony was that it was delivered in late 2006.

It appears that FATIC knew of this Market Conduct Examination at least a short time before it was finalized, because on December 27, 2006, the Chairman of FATIC signed a stipulation between FATIC and the DOI in which FATIC agreed "to submit . . . responses" to the Market Conduct Evaluation.[10] (Exh. 44.) The stipulation recites that this commitment (and the other promises contained in the stipulation) "resolves fully . . . all matters arising out of the Comprehensive Market Conduct Examination dated 'as of October 26, 2004.'" (*Id.*) As part of the stipulation, FATIC agreed to pay $50,500 in costs and fees, and a penalty of $9,949,500 to the DOI. The company's response to the allegation regarding its sub-escrow fee is set forth in the Market Conduct Examination as

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[9] At least some of the IDB was produced for trial after the Court issued an order in aid of a previous discovery order to the DOI

[10] The stipulation also covered other practices under review by the DOI at the time.

conveyed to the Insurance Commissioner a few days later. The response did not admit or dispute the allegation regarding the sub-escrow rate. Rather it stated that "FATIC is in the process of creating an amended rate schedule that is clear and can be consistently applied, with the end of the second quarter of 2007 as the target date for completion." (Exh. 12, at p. 24.) The stipulation provides that it "does not constitute an admission of liability or wrongdoing by FIRST AMERICAN." (Exh. 44, at ¶ 17.)

On September 6, 2007, FATIC submitted an amendment to its schedule of fees, which it represented as a "total rewrite" of its rate schedule. (Exh. 8, at p. 1.) FATIC stated that it hoped the amendments would "eliminate ambiguity and . . . minimize the potential for inconsistent interpretation in determining the rate applicable for a particular transaction." (*Ibid.*)

As of September 6, 2007, the rate for sub-escrow services was "adjusted upward to $125 and the word 'minimum' [was] removed from the rate description, eliminating discretionary fluctuations in the pricing." (*Id.* at p. 3.) Section A-16, which had guided the fluctuations in the sub-escrow rate, was removed from the rate schedule.

Likewise, as of September 6, 2007, the schedule of escrow related fees was greatly expanded and provided as follows:

D-10 <u>ESCROW RELATED SERVICES</u>

The following fees apply each time the Escrow Related Service is provided, except as provided in Sections D-1, D-2, D-3, D-4, D-5, E-1, E-2, F-2 and G-3:

| | |
|---|---|
| Coordination for signings outside of originating escrow office | $150 |
| Document preparation fee | $50 |
| Electronic document download fee | $50 |
| Fee per check to pay credit card or other debt not secured by the real property involved in the escrow | $10 |
| Checks returned due to insufficient funds fee | $15 |
| Interest bearing account set-up fee | $50 |
| Loan tie-in/assumption fee | $150 |
| Overnight mail service fee | $15 |
| Release of obligation fee | $45 |
| Special messenger service fee | $25 |
| Tax withholding processing fee | $45 |
| Trustee reconveyance fee | $45 |
| Wire transfer service fee | $15 |

(*Id.* at p. 26.) At the time FATIC amended this rate for escrow related services, its previous formulation of the rate had not been subject to any claim of ambiguity by the

DOI, by any consumer or insurer, or even by Mr. Kirk, who had already filed his complaint in this matter. Mr. Dufficy of FATIC testified that the word "each" was not inserted to clear up any existing ambiguity, but to distinguish and clarify the individual rate for a service from the bundled rates for the services that now appeared in other portions of the amended schedule.

Sherwood Girion, who was Mr. Tu's supervisor at the time of the report, stated that a response to a Market Conduct Examination was negotiated. FATIC had an obvious motivation to please the Insurance Commissioner regardless of its real position on the interpretation of the rates. Mr. Girion related that the DOI had no policy or regulation at that time prohibiting minimum sub-escrow rates, and indeed this is borne out by the fact that the DOI has continued to accept "minimum" sub-escrow rates filed by other carriers after the date of its stipulation with FATIC and up until today.

## III. STANDING OF CLASS REPRESENTATIVE.

The Court's order of October 30, 2013, on the Motion for Summary Judgment reflects that the question of Plaintiff Kirk's standing to bring this class action is a matter of fact to be resolved at trial.

At summary judgment, the Court observed certain facts that were undisputed. Plaintiff Kirk sold his house to Jeffrey Sjobring on February 25, 2004. The parties used Prestige Escrow, Inc., an independent escrow company (IEC), for escrow services in connection with the sale. FATCO provided sub-escrow services in connection with the closing. FATCO processed two wire transfers (one from the lender and another to Prestige), for which FATCO charged $25. FATCO also charged $100 for sub-escrow service, $15 for an overnight delivery to pay off Kirk's mortgage, and $20 for a messenger delivery.

At summary judgment, the Court observed a "vehement" dispute about whether FATCO charged Kirk or whether it charged Prestige for the sub-escrow and other services it performed in connection with the transaction. In this regard, FATCO is handcuffed by its own admissions in discovery. FATCO admitted in a request for admission during

discovery that FATCO "charged Patrick Kirk for overnight delivery fees." Likewise, FATCO stated in its initial response to Kirk's Special Interrogatory 34 that "Defendant charged Plaintiff a rate consistent with the filed rate and consistent with the market rate for sub-escrow fees." When FATCO supplemented its response to Kirk's Special Interrogatory 34, it stated that "Plaintiff incurred a sub-escrow fee because he chose to use Prestige Escrow . . . to handle escrow," but further stated that "[t]he charges in Plaintiff's transaction were imposed by Defendant" FATCO. Clifford Morgan, FATIC's senior vice president of underwriting, made various admissions at his deposition that Mr. Kirk had been charged the sub-escrow services.

On the other hand, there was no evidence at trial or summary judgment that Mr. Kirk had any direct dealings with FATCO. Mr. Kirk himself did not recall any dealings with FATCO. The escrow file and FATCO's records indicate that the charges for the sub-escrow services and the related disbursements are recorded in the FAST system. When FATCO is acting as the escrow agent in a transaction, it records the charges; allocates them either to the buyer, seller, or refinancing party; and ultimately informs the parties of the charges. In an ordinary escrow transaction, FATCO will be in a direct contractual relationship with these parties, and the FAST system will prepare a HUD-1 form assigning the charges to the proper party.

In the case of a sub-escrow, the same fields are being used, but because FATCO does not have direct dealings with the parties, it does not know upon whom the charges will ultimately be imposed. FATCO witnesses testified that the charges are assigned randomly to either the buyer or seller to fit in the fields of the FAST database used in direct escrow transactions.

In a sub-escrow transaction, FATCO will invoice the escrow company handling the transaction. FATCO will also advise the escrow company of the charges through a Payoff Proof Sheet. FATCO will obtain payment through the final disbursement of funds or will pay itself directly by deducting its charges from the funds deposited by the lender in the transaction. Both the Payoff Proof Sheet and the Invoice listing charges are addressed to

the escrow company. Ultimately, it is the escrow company that assigns the charges to the proper party by means of a HUD-1 form, and obtains the parties' agreement to the charges. The charges may be assigned to the buyer, the seller, the refinancing party, or a third party who has agreed to pay the charges.

When looking at the transaction from the point of view of contractual law, it appears that the charges were made by FATCO to Prestige Escrow. As a practical matter, however, the charges made by FATCO were ultimately paid by Mr. Kirk and Mr. Sjobring, the buyer and seller in the escrow. Observers not concerned with privity of contract, including some employed by FATCO and FATIC, concluded that FATCO "charged" these ultimate consumers. Some of these statements may just reflect the ethos of a successful company broadly defining its customers, and seeking to serve persons involved in a transaction even though they may lack privity of contract or other direct legal relationship. In any event, the admissions made in discovery were made with the advice of counsel, and must stand at this late date in the litigation. Thus, the Court finds that Mr. Kirk was charged for the services of FATCO for which the HUD-1 says he paid.

In fact, standing to assert a UCL cause of action does not require privity of contract, or that the charges be imposed directly by the Defendant upon the Plaintiff. All that is required is that the Plaintiff suffered injury in fact and lost money as the result of the alleged unlawful business practice. (*Medrazo v. Honda of N. Hollywood* (2012) 205 Cal.App.4th 1, 12.) Thus, what is really of concern here is whether Mr. Kirk ultimately bore the cost of a potentially illegal overcharge.

The evidence at trial showed that Mr. Kirk was charged $100 for sub-escrow services. The evidence is that he paid this amount. If Plaintiff's theory of interpretation of the sub-escrow rate is correct, Plaintiff paid $40 too much. The evidence at trial showed that Mr. Kirk paid $25[11] for a wire transfer fee from funds deposited by the lender. If the theory of Plaintiff's counsel is correct, he paid $10 too much. Thus, Mr. Kirk was directly

[11] The HUD-1 reflects that Kirk was charged an additional $70 for wire transfers. These charges were apparently imposed by Prestige Escrow.

1 and sufficiently affected by the claimed unlawful practices to have standing under the
2 UCL.

3 **IV. PLAINTIFF'S THEORIES REGARDING THE INTERPRETATION OF THE RATE ARE LARGELY PREVENTED BY THE IMMUNITY SET FORTH IN CALIFORNIA INSURANCE CODE SECTION 12414.26.**

5 As the Court gained a greater understanding of the issues presented at trial, it
6 became clear that in order to find in favor of Plaintiff's principal theory, the Court
7 necessarily must construe the two rates filed by the title insurer that is FATCO's parent
8 company. In closing argument, Plaintiff showed the Court a PowerPoint slide in large
9 point type stating, "This Court is asked to interpret FATCO's filed rates." To do as
10 Plaintiff asks, the Court would need to assess the language of the rates under the law,
11 determine the position the Department of Insurance should have reached in interpreting
12 the rates, and rewrite the allegedly offending rates accordingly.

13 Plaintiff also asks the Court to apply the rates as construed by the Plaintiff to the
14 transactions of the named plaintiff, and to the extent possible, to the transactions
15 involving the class. Again this would require the Court to regulate the "use" of the rate, a
16 function the legislature intended for the Insurance Commissioner.

17 **A. The Immunity in General.**

18 The Insurance Code provisions at issue here show that the legislature did not create
19 a private right of action for individuals to bring a challenge to title insurance rates. The
20 legislature also sought to prohibit such a claim in Insurance Code section 12414.26:

21 > No act done, action taken, or agreement made pursuant to the authority conferred by Article 5.5 (commencing with Section 12401) or Article 5.7 (commencing with Section 12402) of this chapter shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this state heretofore or hereafter enacted which does not specifically refer to insurance.

24 Rather, the legislature determined that a consumer should bring such a challenge
25 directly to the Insurance Commissioner, who would hear such a claim, by a hearing
26 subject to judicial review. (Ins. Code §§ 12414.13 to .19.)

The Court believes the legislature was referencing general antitrust and consumer
protection laws, such as the UCL when it referred to laws that did "not specifically refer

to insurance." In view of the similar immunities for other lines of insurance, which spring from the McBride-Grunsky Insurance Regulatory Act of 1947, the Court believes Insurance Code section 12414.26 was intended to create a wide immunity, including claims under the UCL. As noted by the Second District Court of Appeal with respect to an analogous provision:

> The McBride–Grunsky Act did more than immunize insurers from antitrust laws. It enacted the entirety of chapter 9 of part 2 of division 1 of the Insurance Code, governing "Rates and Rating and Other Organizations." It enacted provisions permitting rating organizations (Ins.Code, 907 fmr. §§ 1854–1854.4); permitting insurers to act in concert (Ins.Code, fmr. § 1853); indicating the limited circumstances in which rates would be considered excessive or inadequate (Ins.Code, fmr. § 1852); and similar provisions.
>
> The McBride–Grunsky Act also enacted Insurance Code section 1858, which provided (and still provides) an administrative remedy before the commissioner for an insured aggrieved by an insurer's rates or rating system. Insurance Code sections 1860.1 and 1860.2 rendered that administrative remedy the *exclusive* remedy for violations of the McBride–Grunsky Act. (Karlin v. Zalta [(1984)] 154 Cal.App.3d [953,] 972, 201 Cal.Rptr. 379.) Thus, while the initial motivation behind Insurance Code section 1860.1 may have been exemption from antitrust laws in particular, it was recognized that the language of the exemption was, in fact, broader. Deputy Attorney General Harold Haas wrote Governor Warren, prior to its enactment, explaining, "The exemption is a very broad one. . . . If other business regulations such as the Fair Trade Act are applicable to insurance, the exemption applies to them also." (Deputy Attorney General Harold Haas, Interdepartmental Communication to Governor Earl Warren, June 11, 1947, p. 3.)

(*MacKay v. Superior Court* (2010) 188 Cal.App.4th 1427, 1444–1445, footnote omitted.)[12] Thus, the legislature intended to exempt insurers from laws of general application with respect to the regulatory functions placed under the jurisdiction of the Insurance Commissioner.

The real question in determining the scope of this immunity then, is to determine what the legislature meant when it referred to acts "done, action taken, or agreement made pursuant to the authority conferred by Article 5.5 (commencing with Section 12401)."

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[12] In final closing argument, Plaintiff contended that the immunity of Insurance Code section 12414.26 should apply only to concerted action, citing *State Compensation Ins. Fund v. Superior Court* (2001) 24 Cal.4th 930. *State Compensation Ins. Fund* interpreted the similarly worded immunity under Insurance Code section 11758, but did so in the context of the statement of purpose and terms of the workers' compensation insurance statutes, which are different from the statutes at issue here. Here, the plain meaning of the statute dictates a larger scope of immunity.

While there are similar statutes in the Insurance Code, they refer to different scopes of activity to define the immunity. An examination of the clear language of the title insurance statutes indicates the legislature intended a broad immunity related to the filing, making, and use of rates by title insurers and their controlled companies. The evidence at trial also showed that the legislature set up an adequate procedure as an alternative for UCL liability. The limited case authority on the immunity confirms this intent.

**B. The Clear Language of the Statute.**

Statutory construction begins with an examination of the plain meaning of the statute:

> The fundamental objective of statutory construction is to ascertain the Legislature's intent and to give effect to the purpose of the statute. (Code Civ. Proc., § 1859.) If the language of the statute is unambiguous, the plain meaning governs. (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272 [105 Cal.Rptr.2d 457, 19 P.3d 1196].)

(*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1146.) The words of the statute will be given their plain, commonsense meaning in an attempt to effectuate the purpose of the legislature. (*In re Marquez* (2003) 30 Cal.4th 14, 19–20.)

As set forth above, the scope of the immunity contained in Insurance Code section 12414.26 is defined by the scope of activity undertaken and regulated in Article 5.5 of the Insurance Code. A review of Article 5.5 shows it encompasses not just the act of filing the rate, but also the activities at issue in this case, the making and use of the rate.[13]

The 1973 legislation at issue here was intended "to promote the public welfare by regulating rates for the business of title insurance as herein provided to the end that they shall not be excessive, inadequate or unfairly discriminatory." (Ins. Code § 12401.) Title insurers, underwritten title companies, and controlled escrow companies (such as FATCO) are required to file their rates and copies of the title policies "to which such rates apply." (Ins. Code § 12401.1.)

[13] Article 5.7, on Advisory Organizations, does not appear to be at issue in this case.

There is also a sentence contained in Insurance Code section 12401.1, which is the source for Plaintiff's claims of "ambiguity" and non-compliance in this case:

> Every schedule of rates filed by a title insurer shall set forth the entire charge to the public for each type of title policy included within such schedule and shall include without separate statement thereof that portion of the charge, if any, which is based upon work performed by an underwritten title company; there shall be no separate filing by an underwritten title company for such work.

(*Ibid.*) By its terms, this statute requires that the "entire charge" be stated only for "each type of title policy," and does not appear to apply to every type of charge that could possibly be made by a title insurer or a controlled escrow company. From this language, it is apparent the legislature was mainly concerned with a statement of the total price of the title insurance policy, and not with ancillary services, such as those at issue here. Indeed, this language illuminates why the legislature saw a need for the insurance commissioner to regulate controlled escrow companies or underwritten title companies at all: to avoid confusing consumers or regulators by the splitting of the charge for the title insurance policy between related companies.[14]

Article 5.5, does not just involve the filing of a rate. It also explicitly governs additional activities, including the "making and use of rates." Thus, Insurance Code section 12401.3 sets forth detailed standards that shall apply "to the making and use of rates . . . ." These standards (that rates shall not be "excessive," "inadequate," or "unfairly discriminatory"), along with the "total charge" standard in Insurance Code section 12401, are the very standards by which the Plaintiff and his witnesses ask the Court to construe the rates at issue here.

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[14] Indeed, it can be questioned whether the legislature intended that the rates at issue in this case, which involve minor support services, were intended to be regulated at all. With the exception of the sub-escrow rate, which could arguably be considered an escrow rate, the rates at issue are the type of miscellaneous charges that the legislature intended would be excluded from regulation. (See Ins. Code § 12340.7.) The legislature left it up to the Insurance Commissioner to enact regulations [illegible] these miscellaneous charges. The Insurance Commissioner has instead sought to regulate [illegible]

Other parts of Article 5.5 also refer to the "use" of the rates by the title insurer. (See Ins. Code § 12401.7 [entitled "Use of rates; filing; effective date; increase"]; see also Ins. Code § 12401.71 [governing the use of a new rate].) It is difficult to envision any more common "use" for a rate than to apply it to make a charge to a customer. Even so, Article 5.5 explicitly intends to regulate charging rates, as it does in setting forth an authority for charges in excess of filed rates. (Ins. Code § 12401.8.)

Though the legislature intended title insurance to be regulated by the Insurance Commissioner, and not through UCL cases such as this one, the legislature did not leave consumers without remedy. In Article 6.5, the legislature set forth a procedure to be followed by "[a]ny person aggrieved by any rate *charged*, rating plan or rating system followed or adopted by a title insurer, underwritten title company, or controlled escrow company." (Ins. Code § 12414.13, italics added.) The process begins by a request for review of "the manner in which the rate, plan, system, or rule has been applied with respect to insurance or services afforded . . . ." (*Ibid.*) Ultimately, the Insurance Commission is to review the grievance under "the requirements and standards of Article 5.5." (Ins. Code § 12414.14.) The Insurance Commissioner's decision is to be reviewed by the courts under Insurance Code section 12414.19. Apart from any complaints of consumers or competitors that might be brought to the Commissioner through this process, the Commissioner has an ongoing duty to audit in order "to ascertain whether such person or entity and every rate and rating system used in the business of title insurance complies with the requirements and standards." (Ins. Code § 12414.21.) Plaintiff's witness, Douglas Barker, testified that the Commissioner could order a premium refund, and did so where appropriate. (12/13/2013 RT at 11:16–21.)

Plaintiff's counsel has attempted to escape the immunity provisions by asserting that they are claiming a violation of Insurance Code section 12414.27. which they say is outside the scope of Article 5.5. It is true that this section occurs outside of Article 5.5. Nevertheless, it is also plain from a review of the entire 1973 enactment that this supplementary provision was not meant to erode the scope of immunity from UCL

lawsuits set forth in the previous section of the statute. Section 12414.27 occurs in Article 6.9, which is meant to govern "[t]he administration and enforcement of Article 5.5." (Ins. Code § 12414.29.) It merely repeats, more specifically, the general terms of Insurance Code section 12401.7, which does occur in Article 5.5 and states:

> No title insurer, underwritten title company or controlled escrow company shall use any rate in the business of title insurance prior to its effective date nor prior to the filing with respect to such rate having been publicly displayed and made readily available to the public for a period of no less than 30 days in each office of the title insurer, underwritten title company, or controlled escrow company in the county to which such rate applies, and no rate increase shall apply to title policies or services which have been contracted for prior to such effective date.

(Ins. Code § 12401.7.) A comparison of the two statutes shows that activities within the scope of section 12414.27 are also within the scope of the broader language of section 12401.7. All the legislature appears to have intended by section 12414.27 was additional specificity to assist in the administration of Article 5.5 by providing a transition rule to cover the effective date of the statute on January 1, 1974.

**C. Decisional Law.**

The Court's holding regarding the scope of immunity is also supported by its reading of the decisional law construing Insurance Code section 12414.26, as well as similar Insurance Code provisions.

Plaintiff relies upon *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26. In that case, the Supreme Court of California did not apply the immunity stated in Insurance Code section 12414.26 to halt, at the pleading stage, a complaint alleging a conspiracy to deny title insurance on titles derived from tax deeds. Clearly that case did not involve a direct attack on the making and use of a rate. Rather, it was premised on conduct outside the scope of the ratemaking statutes. The Court noted that the immunity did protect "activities related to rate setting" from UCL liability.[15]

[15] "We conclude that the Insurance Code does not displace the UCL except as to title insurance company activities related to rate setting." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 33.)

The case law regarding the other immunities in the Insurance Code shows that those immunities extend to the making and use of rates. For example, in *Walker v. Allstate Indemnity Co.* (2000), which sought disgorgement of auto insurance premiums, the Court noted that "[w]hatever else the amended McBride Act does, it definitely confers authority upon the commissioner to approve rates. Moreover an insurer's actions of collecting premiums consistent with an approved rate is certainly done pursuant to the authority conferred on the commissioner by the amended McBride Act." (77 Cal.App.4th 750, 756–757.) Likewise, in *Karlin v. Zalta* (1984) 154 Cal.App.3d 953, 979, a case involving malpractice insurance, the Court observed, "We are of the view, therefore, that a ratemaking or a rate using activity which implicates an insured together with an insurer is governed by the provisions of the McBride Act."

Both sides have argued that the Second District's decision in *MacKay v. Superior Court* (2010) 188 Cal.App.4th 1427 supports their case. In the Court's view, *MacKay* is not directly on point, because the immunity provision governing title insurance is broader than the immunity provision contained in the automobile liability provisions of the code being considered in that case. Moreover, the title insurance immunity was not narrowed under Proposition 103 in the way that the automobile immunity was narrowed.

In *MacKay*, the Court was construing Insurance Code section 1860.1, an analogous immunity provision applicable to automobile and other lines of insurance governed by Chapter 9 of the Insurance Code. While this provision states an immunity with words similar to those in Insurance Code section 12414.26, the immunity is given with reference to a different set of activities. Moreover, the *MacKay* court was wrestling with Insurance Code section 1861.03, a contradictory provision enacted as part of Proposition 103, which seemed to repeal the immunity without actually doing so. In an attempt to give meaning to both provisions, the Court gave a narrowed construction to Insurance Code section 1861.01. Even so, the Court found that "Insurance Code section 1860.1 exempts from other California laws acts done and actions taken pursuant to the ratemaking authority

conferred by the ratemaking chapter, *including the charging of a preapproved rate*." (188 Cal.App.4th at p. 1443, italics in original.)

Plaintiff distinguishes *MacKay* by stating that the rates in this case were not pre-approved by the Insurance Commissioner in the same way as automobile insurance rates. The first problem with this argument is a factual one. Here, within the context of its regulatory power, the DOI accepted FATIC's rate filings as statutorily compliant for an extended period of time. The process is functionally the same as what the court in *MacKay* recognized as a safe harbor. The Court is persuaded that the Insurance Commissioner intended that FATIC could rely upon this approval, at least until it received the Market Conduct Examination in December 2006. While the processes and the documentation followed by the DOI are different here in light of the different statutory schemes governing the two lines of insurance, in each case the DOI was exercising its statutory duty to regulate the rates under the statutes as drafted.

Beginning in December 2006, the DOI appears to have taken a different regulatory track, requiring a remake of the rates. Rather than argue, FATIC complied. The DOI, and even the Plaintiff's attorneys, recognize the new filing as statutorily compliant under the DOI's new viewpoints. Nevertheless, Plaintiff seeks to retroactively to collect a large award of restitution based on the DOI's apparent change of position in 2006. The DOI, which collected a very substantial penalty related to this and other FATCO conduct under dispute, did not see such a penalty, or a refund of any kind to consumers, as being necessary as a result of the remaking of the rates in 2006.

To this Court, it does not follow that the immunity set forth in Insurance Code section 12414.26 would be limited to the charging of a pre-approved rate. Rather, in the context of title insurance, it covers all activities regarding the making and use of a rate as set forth in Division 2, Part 6, Chapter 1, Article 5.5 of the Insurance Code. To read *MacKay* as Plaintiff reads it, to disallow any UCL immunity where there is no statutorily authorized pre-approval of the rate, would mean there can be no immunity at all related to the making and use of a title insurance rate. This construction of the statute would

completely invalidate the immunity of Insurance Code section 12414.26, which was originally intended to provide a broad immunity from UCL claims for rate filing, rate making, and rate using activities.

There is no indication that the voters intended to alter the scope of the title insurance immunity as the result of Proposition 103, or to affect the title insurance business in any way whatsoever. Insurance Code section 1861.03, with which the *MacKay* court struggled, was placed by the voters in Division 1, Part 2, Chapter 9 of the Insurance Code, entitled "Rates and Rating and Other Organizations." At the opening of this chapter, section 1851 provides that "[t]he provisions of this chapter shall apply to all insurance on risks or on operations in this state, except: . . . (d) Title insurance." The rating provisions governing title insurance appear in an entirely separate part of the Code, Division 2, Part 6, Chapter 1.

Thus, the decisional law interpreting the Insurance Code confirms the conclusion reached by examining the language of the statute: There is a broad immunity for title insurance rate filing, rate making, and rate using activities.

**D. The Evidence at Trial Shows the Claim Is Principally Directed at Activity Within the Scope of Division 2, Part 6, Chapter 1, Article 5.5 of the Insurance Code.**

As Plaintiff has cast this case, it is principally about ratemaking, including both the construction and interpretation of rates, and the application of the rates as interpreted by Plaintiff. Even the cases cited by Plaintiff's counsel as the standard for the Court's decision demonstrate how this case is equivalent to ratemaking cases. In *Transmix Corp. v. Southern Pacific Co.* (1960) 187 Cal.App.2d 257, the parties sought construction of a rate rule governing intrastate shipping. Both sides in that case called experts on "the theory and practice of rate making." Then, each of these experts "gave his views of the tariffs, how he thought the tariffs should be interpreted, what he thought the tariffs meant and each gave his reasons for his particular viewpoint." (*Id.* at p. 262.)

It was just such a ratemaking case that Plaintiffs sought to put on here. After arguing in the complaint that "[r]esolution of the issues in this lawsuit do not require the specific, technical expertise of the Department of Insurance" (SAC ¶ 18 (i)), Plaintiff's

counsel proffered their main witness Richard Baum, a former Deputy Commissioner, as a "rate expert" who was to give his opinion about the interpretation of the rates. Likewise, Defendant's other liability witness, Douglas Barker, a former DOI rate analyst, testified that the wording of FATIC's rates was "inappropriate" from his standpoint as a rate analyst for the DOI.[16]

*1. Evidence regarding the interpretation of the sub-escrow rate.*

Plaintiff's counsel sought to prove that the J-24 Rate, which set a charge of "minimum $60" for sub-escrow services, was ambiguous, and to interpret it as a flat rate of $60, instead of as a minimum.

The J-24 rate for sub-escrow services is not ambiguous from the standpoint of the words themselves. An ordinary person reading the rate would clearly understand that a minimum of $60 would be charged, and that the actual price could be higher based upon the various factors set forth in section A-16 of the rating schedule.

From a different point of view, however, the rate is ambiguous. That is, because the upper limit of the charge is not specified, the final charge to the escrow cannot be determined to the exact dollar just by reading the rate manual. Several FATCO and FATIC executives admitted that, when considered in this light, the rate was ambiguous. Indeed, when the question is phrased in that light, "ambiguity" cannot be gainsaid.

To conclude that the rate is ambiguous in this way, however, requires a specialized regulatory reading of the rate, and a specialized regulatory meaning of ambiguity. It is derived from the point of view articulated by Plaintiff's witnesses, present or former employees of the DOI, who testified that a rate for sub-escrow and other subsidiary services must comply with the requirement of Insurance Code section 12401.1, which requires that "[e]very schedule of rates filed by a title insurer shall set forth the entire charge to the public for each type of title policy . . . ." These witnesses also testified that

[16] Plaintiff's counsel, several times, tried to steer Mr. Barker into phrasing his testimony in terms of a violation of Insurance Code section 12414.27, only to have Mr. Barker clarify he was talking about the filing of an inappropriate rate, an activity that is within the scope of Division 2, Part 6, Chapter 1, Article 5.5.

the DOI would construe this filing as ambiguous, and require it to be rewritten as a flat rate of $60.[17]

Thus, to decide this issue in Plaintiff's favor, the Court would need to find that the language of the J-24 violated the "entire charge" language of Insurance Code section 12401.1, and to credit the testimony of DOI representatives and former employees who testified that this is the correct interpretation of Article 5.5.

The Court believes that the DOI's interpretation of Insurance Code section 12401.1 is incorrect, and that the testimony to this effect was not credible, at least in regard to the DOI's historical position. In the end, however, the Court has concluded this is not a matter the Court should be deciding in a UCL action. As the Court noted in connection with the summary judgment motion, "the Court would lack jurisdiction to determine that the 'minimum charge' filed rate violates section 12401.1 under the clear terms of section 12414.26." (See the opinion of the Court dated October 30, 2013, p. 12.) Undertaking to reconcile the rate with the statutory standards set forth in Division 2, Part 6, Chapter 1, Article 5.5 of the Insurance Code, is not distinguishable from exercising the regulatory oversight over the formulation of the rate that was intended for the Insurance Commissioner.

Finally, viewed in light of the regulatory history, FATIC's decision to amend the rates is not a conclusive admission that the rates were ambiguous or statutorily non-compliant. The changes were made to settle a series of allegations by the Insurance Commissioner,[18] some unrelated to the rates, and for other reasons.

*2. Interpretation of the disbursement "service" rate.*

[17] At least as it pertains to the viewpoint of the DOI prior to December 2006, the Court found this testimony to lack credibility. The DOI routinely approved such language. Even the finding of the Market Conduct Examination filed in December 2006 does not seem consistent with the DOI's actions contemporaneously and thereafter accepting such rates from other insurers.

[18] The reference to this evidence for proof of FATCO's liability herein is also contrary to the policy of Evidence Code section 1152, subdivision (a).

Plaintiff's counsel argues that the escrow services rates are ambiguous because they do not specify whether the charge is to be imposed each time a service is performed, or that all wire services, for example, will be performed for a single charge.

No consumer or regulator ever complained of an ambiguity in this regard. It is apparently an alternative developed in the abstract by Plaintiff's counsel after the filing of the SAC, and in light of the testimony of several FATIC executives who appeared unable to refute the alleged ambiguity at their depositions. In support of its contention, Plaintiff's counsel also submits interrogatory answers wherein FATCO admitted that in 76,342 transactions involving multiple discrete wire transfers, FATCO charged a fee of $15, the fee for one wire transfer.

Plaintiff has taken heart by the reference to this interpretation as "plausible" by the Court in its summary adjudication opinion. At trial, Plaintiff argued that the mere fact it had advanced a plausible interpretation was sufficient for victory because the Insurance Department would require that any plausible ambiguity be construed in the consumer's favor.

Defendant, and the Court in connection with the summary adjudication motion, believed that it would be more appropriate to consider the meaning of this provision under the rules applicable to insurance contracts generally. These rules permit the introduction of extrinsic evidence to explain the ambiguity before construing it against the insurer. (See *Bank of the W. v. Superior Court* (1992) 2 Cal.4th 1254, 1265 ["While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply." (Citations)].)

If considered under the rules of *Bank of the West*, the Court would have construed the language of these rates to apply to a single delivery of service for numerous reasons.

First, as the Court indicated at summary judgment, FATCO's reading of this provision is a perfectly reasonable reading of the term "service." The plain language of the filing itself, which uses the singular word "service," implies that the charge was always intended to be for each single service.

Second, Defendant presented evidence that the rate was always meant to charge for each delivery of the service. A rate analyst, who reviewed such filings during the relevant time period, stated that he would interpret the rate as applying to each service delivered. (Buggage 1/14/14 RT at 10:4–15.) There was evidence at trial, some sponsored by Plaintiff, that FATIC and FATCO tried to educate their personnel in the application of the disbursement fees, and that these fees were to be charged for each delivery of the service. Defendant's explanation for the failure to charge for multiple deliveries of service was that in the hubbub of the overwhelming number of transactions during the real estate boom between 2004 and 2007, not all services were charged.

Third, Defendant also presented evidence surveying the normal charges for such services in the market place. This evidence tended to show that an ordinary consumer in the marketplace in which these services were delivered would not expect to pay such a low price for multiple deliveries of these services. Rather, the prices were about what an ordinary person in the marketplace would expect to pay for a single delivery of the service.

Fourth, although Plaintiff's counsel presented evidence of former rate analysts from the DOI, who viewed the formulation of such rates as ambiguous and who testified that the DOI would have construed such rates in the manner that Plaintiff's counsel advocates, such evidence was not credible, at least with respect to the retrospective period for which the Plaintiff seeks to hold FATCO responsible. There was no evidence that the DOI ever took such a position, and indeed its contemporaneous approval of the rates indicates that the DOI would not have viewed this language as ambiguous or otherwise not compliant with the statute during the class period. Even the exhaustive Market Conduct examination of December 2006 did not criticize multiple charges for multiple services delivered pursuant to this rate.

While the Court believes the Defendant's interpretation of the rate to be correct under rules applicable to insurance contracts generally, the Court believes that to decide whether to interpret the rates under rules governing public utility rates or under the normal rules applicable to insurance contracts is a question the statute meant to be

addressed initially within the regulatory function, and only afterwards to be subject to judicial review. Once again, for the Court to retrospectively revise these rates by requiring that all services be bundled within a single rate would be to invade the regulatory process meant for the DOI. The statutory scheme seems to prevent it from being raised in the theoretical way it is raised in this UCL action.

* * *

Plaintiff has argued that he is not changing or altering the rates, but simply applying them. This is a distinction without a difference. Plaintiff wishes to apply *his interpretation* of the rates retroactively. To apply Plaintiff's construction of the rates requires the Court to "make" the rates by interpreting them in view of the statutory language contained in Division 2, Part 6, Chapter 1, Article 5.5.

At summary judgment, the Court noted, "It may be that at trial Defendants are able to persuasively argue that the statutes and the rate are irreconcilable[,] in which case the Court would lack jurisdiction to grant relief pursuant to Insurance Code section 12414.26."[19] For the most part, that is what occurred at trial. As stated below, however, the Court does find some of FATCO's conduct, as proven at trial, to be outside the scope of the immunity, because it appears to be unlawful without reference to the re-making of the rate advocated by Plaintiff.

## V. DEFENDANT FATCO FAILED TO CONSISTENTLY APPLY ITS OWN INTERPRETATION OF THE RATES.

Although the re-making of the rate Plaintiff advocates is not appropriate under the Insurance Code, there was one sense in which the evidence at trial showed that FATCO

[19] Some elements of the analysis of this Court after trial are inconsistent with the analysis applied at summary judgment. (See the opinion of the Court dated October 30, 2013.) This Court has considered whether it is bound by law of the case to the detailed legal rulings on the summary judgment motion, and has concluded that law of the case does not apply to the legal analysis of prior decisions on the trial court level. (See 9 Witkin, Cal. Proc. 5th, Appeal, § 460, at p. 517; see also *Summers v. City of Cathedral City* (1990) 225 Cal.App.3d 1047.) The Court has read and considered the detailed and carefully considered ruling on summary judgment, yet respectfully disagrees with some aspects of the analysis, as stated herein. The Court has had the benefit of considerable additional extrinsic evidence regarding the application of the rates as well as considerable additional history regarding the insurance statutes at issue.

failed to apply the rates—even as FATCO interpreted them. While it is a close question as to whether even this conduct is actionable under the UCL, the Court believes that the conduct shown at trial is outside the scope of the immunity. To reach this conclusion, the Court did not need to, nor did it, credit the Plaintiff's interpretation of the rates, or rewrite them in the Plaintiff's favor.

The disorganized approach to the charging of the rates appears within the allegations of the SAC, which broadly alleges unlawful overcharges for these fees. The theory was explored at trial. The parties agree that the rates themselves have the force of law and that FATCO was obligated to follow the filed rates. The evidence showed that FATCO was inconsistent to the point of being haphazard. While following up on such activity is within the DOI's jurisdiction, it is a strain to say that this is an activity within Division 2, Part 6, Chapter 1, Article 5.5, which envisioned following and charging the rates, not failing to do so.

The Insurance Code envisions the DOI regulating the rates, and handling any consumer complaints about "the rate charged . . . ." But what of the situation where the rate is ignored, or applied so haphazardly that the consumer is not really being charged the rate at all? In this narrow way, the Court believes there could be liability under the UCL outside of the Insurance Code's statutory framework.

In this case, with respect to the sub-escrow rate, the evidence showed that FATCO did not consistently follow its own interpretation of the rates. This failure to apply the rates caused loss to the subclasses, and that restitution can be calculated.

As FATIC's and FATCO's higher level executives saw it, the sub-escrow rate was a minimum of $60, and the local county managers were to meet to conduct pricing reviews adjusting the rate according to the factors in A-16 of the Schedule of Fees.

But the FATCO witnesses at the county level were unable to substantiate that an orderly and meaningful adjustment pursuant to A-16 ever occurred. Witnesses at the field level appeared to have been uninformed regarding the rates. Tellingly, FATCO could not produce documents showing when the A-16 Adjustments were made, what factors were

1 considered, or even what the sub-escrow rate was at any particular time in any particular
2 county. While FATCO argued that such documents would not have been preserved given
3 the time period, the Court found FATCO's witnesses unpersuasive on the question of
4 whether such documents ever existed. Such documents constituted evidence that should
5 have been within preservation directives applicable to this case when it was filed in 2007.
6 The court believes the best interpretation of the evidence to be that few such documents
7 even existed. A proper application of A-16 factors also probably did not happen.

8 Even more problematic, the rate actually applied was not consistent across the
9 applicable counties at any point in time, as shown by exhibits 31 and 32. Although some
10 counties were more consistent than others, the rates charged for sub-escrow services
11 varied widely within individual counties. The end result is that the rate did not vary
12 according to the rational process envisioned in the wording of the rate, or as envisioned at
13 the higher levels of the company.

14 As discussed more fully below, the fact that the FAST data shows a single delivery
15 of a single service in each transaction makes the calculation of a restitution remedy
16 possible with respect to the sub-escrow class.

17 There was evidence that the application of the disbursement fees was likewise
18 irregular. Nevertheless, in many cases, Disbursement Fee Subclass members did not
19 suffer a loss by this inconsistency, because they were charged less than they should have
20 been charged as the result of a failure to log all applicable charges. In many cases, the
21 FAST Data regarding these services is complicated by the inclusion of multiple charges,
22 including charges for potentially unregulated miscellaneous services, within these
23 portions of the database.

24 With one exception, the evidence presented at trial was insufficient for the Court to
25 conclude that the members of the Disbursement Fee Subclass suffered a loss requiring
restitution as the result of the failure to apply the rate. That exception was stated in
Defendant's Supplemental Response to Special Interrogatory No. 45, which states, in
relevant part:

> Though it is not possible to conclusively determine the number of responsive transactions without a file-by-file review, the FAST data indicates that the following number of transactions may have been charged a wire transfer fee in excess of $15 for a single transfer:
> 2003, 3,545.
> 2004, 4,407.
> 2005, 9,971.
> 2006, 8,419.
> 2007, 6,464.

(Exh. 144.) While perhaps not conclusive, this evidence is sufficient to establish by a preponderance of the evidence that these customers were overcharged by a failure to follow even FATCO's interpretation of the rate.

## VI. RESTITUTION.

Throughout the litigation, FATCO has maintained that the loss must be proven as to each class member. Plaintiff has insisted that the FATCO's FAST database has enough information to calculate a class-wide damage award that is accurate to establish damages by a preponderance of the evidence.

While Defendant's argument has some support in the federal cases it cites, this Court cannot square it with the Supreme Court of California's holding in the tobacco case class actions:

> Accordingly, to hold that the absent class members on whose behalf a private UCL action is prosecuted must show on an individualized basis that they have "lost money or property as a result of the unfair competition" (§ 17204) would conflict with the language in section 17203 authorizing broader relief—the "may have been acquired" language—and implicitly overrule a fundamental holding in our previous decisions.

(*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 320, citations omitted.)

While FATCO presented evidence that the FAST database does not accurately identify the party who ultimately paid the sub-escrow charge, the Court finds that it is sufficiently accurate to calculate restitution to the sub-escrow subclass.

Where FATCO was acting only as a sub-escrow, it might not have direct knowledge of the party upon whom a sub-escrow charge should be imposed. Nevertheless, approximately 60% of these transactions were refinances in which there was only one party upon whom to impose the charges.[20] As to the remaining transactions, the evidence

[20] While this estimate is based only on testimony, FATCO could have offered a more precise number at trial.

shows that in the vast majority of cases the sub-escrow charge was imposed on one party or the other in the transaction. (See Slide 224 of Plaintiff's Closing Argument.) Both parties are identified in the FAST database, and so there is an ability to allow the party suffering the excess charge to claim it after proper notice to all parties concerned.[21]

The Supreme Court of California has noted that the Court has broad equitable discretion in fashioning an award in a UCL case.

> The court's discretion is very broad. Section 17203 does not mandate restitutionary . . . relief when an unfair business practice has been shown. Rather, it provides that the court "*may* make such orders or judgments as may be necessary to prevent the use or employment of any practice which constitutes unfair competition or as may be necessary to restore money or property."

(*Cortez v. Purolator Air Filtration Prods. Co.* (2000) 23 Cal.4th 163, 180–181, italics in original, citations omitted.) Thus, the Court has "very broad" discretion to choose the method or amount of restitution to be awarded, or whether it is necessary or appropriate to order restitution at all.

FATCO has insisted throughout that restitution must be limited to "[t]he difference between what the plaintiff paid and the value of what the plaintiff received." (*In re Vioxx Class Cases* (2009) 180 Cal.App.4th 116, 131, citation omitted.) While the Court agrees with Plaintiff that this is not the only way in which restitution could be calculated in this case, the Court chooses it as the method by which restitution will be calculated, based on the equities.

Among other equitable factors, the Court is considering that Defendant ended the offending practice at approximately the same time that the litigation was filed, and therefore there was no need to invoke the UCL "to prevent the use or employment by any person of any practice which constitutes unfair competition. . . ." (See Bus. & Prof. Code § 17203.) FATIC took extensive action in 2007 to more elaborately describe its rates in its Schedule of Fees, and paid a fine to the regulatory agency in charge of overseeing its activities. It also undertook steps to ensure that that the Schedule of Fees was more

[21] While in some cases the charges could have been borne by the direct escrow itself, the evidence indicated that this was a very small percentage of the transactions at issue.

regularly and properly followed by its subsidiaries such as FATCO. Although it extracted a sizable monetary penalty in 2007, the Department of Insurance did not at that time view it as necessary to require FATIC to pay more money to prevent a continued course of conduct, and subsequent events show that judgment to be correct.

As reflected in the history of the DOI's approach to these smaller charges, Defendant was faced with an evolving regulatory approach, and an inconsistent set of regulatory communications from the DOI. In the face of these communications, FATIC changed its approach to match the regulatory direction it was receiving in 2006.

Here, the ultimate consumers do not have a statutory interest in receiving services at below market prices. The evidence showed that the stricter approach called for by the Department of Insurance in 2006 resulted in the sub-escrow price being raised to $125 for all FATCO transactions. While this provided a clearer price, it also had the consequence of raising the price to a level higher than it would have been in many counties, presumably to ensure that FATCO recovered its costs in all counties. The DOI found this more statutorily compliant than an approach that would have allowed title insurers to meet local competition for these disbursement type services. This history strongly suggests that earlier compliance with the regulatory direction would have resulted in higher, not lower, costs to consumers during the relevant time period.

For these and other reasons, many of which are noted herein, the Court deems it appropriate to limit restitution to the amount paid in excess of the value of the service delivered.

The testimony regarding the fair market value of the sub-escrow service during the class period shows that the value of the services was $100. (1/14/2014 Trial Testimony at 59:26–60:2.) Examination of the FAST data (Exhibits 31, 32) shows numerous charges in excess of $100. The same testimony established the fair market value of the wire service delivered at $15. Exhibit 144 establishes the existence of numerous transactions charging in excess of $15.

1 The Court finds that restitution should be awarded to the sub-class members who
2 paid more than $100 for sub-escrow services, and to those members of the Disbursement
3 Subclass identified in Exhibit 144.
4 The Court believes it is appropriate to enter a separate judgment for the subclasses'
5 claims, and to allow the rest of the claims in the case to be determined by trial after the
6 current appeal of the arbitration motion.
7 Based on the calculations submitted by both parties,[22] the Court awards restitution
8 in the amount of $1,066,039 to the sub-class members who paid more than $100 for sub-
9 escrow services within the class period.
10 Defense expert Bruce Strombom asserts that the members of the Disbursement
11 Subclass identified in exhibit 144 should exclude transactions where the data from exhibit
12 32 indicates "0" wire transfers but a wire fee was charged. Defendant's Supplemental
13 Response to Special Interrogatory No. 45 admits that 32,806 "transactions may have been
14 charged a wire transfer fee in excess of $15 for a single transfer." (Exh. 144.) Dr.
15 Strombom's numbers cannot be reconciled with this response. The Court thus concludes
16 that Defendant has previously interpreted its own data to admit that 1 wire transfer was
17 sent in the transactions where exhibit 32 reflects a "0". Therefore, the Court awards
18 restitution in the amount of $406,314 to the members of the Disbursement Subclass who
19 paid more than $15 for a single wire transfer.
20 Based on the Court's analysis, it appears that named plaintiff Patrick Kirk will not
21 qualify for an award of restitution because he did not pay in excess of $100 for his sub-
22 escrow service and did not pay FATCO in excess of $15 for a single wire transfer. The
23 Court does not believe that this failure to obtain an award of restitution that will benefit
24 him personally renders him an inappropriate representative of the class at this time.[23]
25
26

[22] Both parties' experts made almost identical adjustments to the class damage calculations based on the Court's intent to limit the damage award to the subclass claims.
[23] The Court does not here reexamine whether Mr. Kirk is an appropriate representative of the class generally.

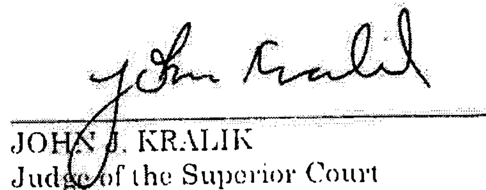
An award of interest appears to be within the Court's equitable power to provide redress under the UCL. The Court finds that an award of pre-trial interest is justified by the equities in this case. While some of the delay in bringing this matter to trial arose from the vast array of unsuccessful theories postulated by the Plaintiff, a portion of the delay can be attributed to the Defendant's resistance to discovery, such that an award of interest is equitable. The Court directs that the award will bear simple interest at the rate of 7% from October 8, 2007. The Court chooses this date because it is consistent with the equitable considerations that went into choosing the measure of restitution.

The Court intends to retain jurisdiction to make such orders as are necessary to ensure payment of restitution to class members to the greatest extent possible, and to determine the case as to the claims that are stayed. Pursuant to Civil Procedure Code section 384, subdivision (b), the parties shall report the amount of restitution paid to class members on September 30, 2014.

## VII. CONCLUSION.

This is the Court's statement of decision. If an objection has been made to the court's previous tentative statement of decision, and there has been no corresponding change in this statement, the objection is overruled.

Dated: May 12, 2014



JOHN J. KRALIK
Judge of the Superior Court

Filed 6/22/16

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

COURT OF APPEAL – SECOND DIST.
FILED
Jun 22, 2016
JOSEPH A. LANE, Clerk
dlee Deputy Clerk

PATRICK KIRK,

Plaintiff and Appellant,

v.

FIRST AMERICAN TITLE COMPANY,

Defendant and Respondent.

B257508

(Los Angeles County
Super. Ct. No. BC372797)

APPEAL from a judgment of the Superior Court of Los Angeles County, John J. Kralik, Judge. Affirmed.

The Kick Law Firm, Taras Kick, James Strenio and Thomas Segal; The Bernheim Law Firm, Steven J. Bernheim and Nazo S. Semerjian for Plaintiff and Appellant.

Mayer Brown, John Nadolenco, Andrew Z. Edelstein, Archis A. Parasharami and Craig W. Canetti for Defendant and Respondent.

## I. INTRODUCTION

Plaintiff, Patrick Kirk, individually and as a class representative, and defendant, First American Title Company, appeal from a judgment following a bench trial for violation of the Unfair Competition Law. The parties also appeal the cost order. This action concerns defendant, an underwritten title company, and the sub-escrow and disbursement fees charged related to title insurance and real property sale. Defendant's filed rate for sub-escrow fees was a minimum $60 with upward increases based on certain listed factors. Defendant's filed rate for the disbursement fees was: overnight mail service for $15; special messenger service for $25; and wire transfer service for $15. The trial court found defendant had immunity from plaintiff's ambiguity theory of liability under Insurance Code section 12414.26. However, the trial court also found defendant violated Insurance Code section 12414.27 by failing to charge its own filed rates.

In plaintiff's appeal from the judgment, plaintiff contends the trial court erred by finding defendant had immunity from plaintiff's ambiguity theory. Plaintiff contended defendant's ambiguous rates should be interpreted in the class's favor--sub-escrow fees should be $60 only and the disbursement fees should be per transaction. Plaintiff also contends the trial court erred by calculating the restitution for the sub-escrow fees as the difference between the charged fee and the value of the sub-escrow fee. The trial court ruled the value of a sub-escrow fee was $100 during the class period. Plaintiff contends the value of the sub-escrow fee was the minimum amount of $60. Plaintiff also contends the trial court erred by calculating prejudgment interest from the date the class period closed instead of from the date each overcharge occurred.

In defendant's appeal from the judgment, defendant asserts that it should have immunity from any liability under Insurance Code section 12414.26. Defendant contends the trial court erred by finding liability for failing to charge its own filed rates. Alternatively, defendant contends the trial court erred in its calculation of the restitution for the sub-escrow fees. Defendant asserts the value of the sub-escrow fee was $125.

The trial court awarded costs to plaintiff under the discretionary, rather than the mandatory, language of Code of Civil Procedure section 1032, subdivision (a)(4). The trial court apportioned costs for plaintiff at 25 percent of the allowed costs. In plaintiff's appeal from the cost order, he asserts the class was not subject to the Code of Civil Procedure section 1032, subdivision (a)(4) discretionary language. Defendant also appeals from the cost order. Defendant asserts the trial court abused its discretion by awarding any costs to plaintiff.

We affirm the judgment and cost order.

## II. BACKGROUND

### A. Factual Background Prior to Plaintiff's Complaint

On February 25, 2004, plaintiff sold real property in Los Angeles, California to Jeffrey Sjobring. Plaintiff and Mr. Sjobring retained an independent escrow company named Prestige Escrow, Inc., to close the transaction. Defendant provided sub-escrow services related to the transaction. Defendant invoiced Prestige Escrow for the following services: $100 for sub-escrow fees; $25 for two wire transfers; $15 for overnight delivery; and $20 for messenger delivery. Plaintiff paid these charges. Defendant is a wholly-owned subsidiary of First American Title Insurance Company. Defendant is classified as an underwritten title company under the Insurance Code. (Ins. Code, § 12340.5; see 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 353, p. 414 ["[A]n underwritten title company only searches and prepares abstracts on which the insurer writes policies."].)

### B. Defendant's Filed Rate Schedule

Pertinent to this action, First American Title Insurance Company filed the following rate schedule with the Department of Insurance (insurance department).

Regarding its sub-escrow fees, defendant's parent company filed the following in section J-24: "In connection with an order for title insurance the Company may provide limited escrow service in support of a primary escrow agent for a minimum charge of $60 per order. . . . [¶] . . . [¶] The fee charged pursuant to this sub-section may be adjusted upward or downward pursuant to the provisions of section A-16 of this schedule." Section A-16 of the fee schedule provides: "Where title, escrow and/or any other services are requested in circumstances for which no charge has been specifically contemplated in this schedule, a charge should be made which is consistent with the general pricing procedures set forth herein. Special consideration may be given to various classifications of services or divisions thereof, based upon factors including but not limited to, size of the particular transaction or transactions involved, expenses, risk, volume, geographical considerations, single point of entry, centralized service, required technology, competitive environment, and any other reasonable considerations." Defendant's parent company also filed the following rates for escrow related services (disbursement services) at section J-32: overnight mail service, $15; special messenger service, $25; and wire transfer service, $15.

On September 6, 2007, First American Title Insurance Company filed another rate schedule with the insurance department which superseded its previous schedule. First American Title Insurance Company filed this new schedule in response to a comprehensive market conduct examination by the insurance department. This new schedule became effective October 8, 2007.

C. Plaintiff's Complaint and Certified Class

Plaintiff filed his complaint on June 15, 2007. Plaintiff filed his second amended complaint on November 17, 2008. Plaintiff asserts claims for: fraud and constructive fraud; contract breach; breach of the implied covenant of good faith and fair dealing (implied covenant breach); negligence; negligent misrepresentation; unjust enrichment; violation of the Consumer Legal Remedies Act; and unfair competition in violation of

Business and Professions Code section 17200 (Unfair Competition Law). Plaintiff alleges defendant charged the class members more than the filed rate for the sub-escrow and disbursement services.

On March 14, 2012, plaintiff moved for class certification. The trial court granted plaintiff's motion. The trial court certified classes for four causes of action: fraud and deceit; unjust enrichment; Unfair Competition Law violation; and the Consumer Legal Remedies Act violation. Plaintiff would later dismiss the causes of action for violation of the Consumer Legal Remedies Act, fraud and unjust enrichment. Thus, the class's sole remaining cause of action was for violation of the Unfair Competition Law.

The matter proceeded to trial solely on a class claim for violation of the Unfair Competition Law. There were two certified opt-out classes with a certified subclass for each. The sub-escrow fee class was composed of customer who were charged more than $60 for a sub-escrow fee in California prior to October 8, 2007. The sub-escrow fee subclass did not receive an owner policy in the same transaction. As noted, October 8, 2007,was when the new rate schedule took effect. The disbursement fee class was composed of people who were charged more than defendant's filed rate for a wire transfer, overnight or messenger fee in California real estate transactions. The disbursement fee subclass included all people who were charged but did not receive an owner policy in the same transaction. The class time period was from June 15, 2003, to October 7, 2007.

### D. Defendant's Summary Judgment and Adjudication Motion

Defendant moved for summary adjudication for plaintiff's individual claims of contract breach, implied covenant breach, negligent misrepresentation and constructive fraud. Defendant's motion was granted for these individual claims. The trial court also granted summary judgment in favor of defendant's parent entity, First American Title Insurance Company. However, the trial court denied the summary judgment motion as to

the Unfair Competition Law cause of action directed at defendant. The trial court found defendant had not met its burden of persuasion.

### E. Procedural History Prior to Trial

Defendant moved to compel arbitration against the class members who had received an owner policy. Defendant asserted the owner policy contained an arbitration agreement which applied to the cause of action. The trial court denied defendant's motion. Defendant subsequently appealed the denial order. In an unpublished opinion, we affirmed the denial of defendant's motion to compel arbitration. (*Kirk v. First American Title Ins. Co.* (Apr. 7, 2015, B252238) [nonpub. opn.].)

Defendant's appeal stayed the case as to some class members. The subclasses proceeded to trial during the appeal of the arbitration dispute. The trial court calculated that the claims of 368,769 out of 640,806 class members went to trial. The trial commenced on December 5, 2013, and completed on January 16, 2014.

### F. Parties' Arguments Following Trial

Both parties filed closing briefs. Plaintiff contended defendant violated the Unfair Competition Law by engaging in unlawful conduct, namely violating Insurance Code section 12414.27. Insurance Code section 12414.27 provides in pertinent part, "Commencing 120 days following January 1, 1974, no title insurer, underwritten title company or controlled escrow company shall charge for any title policy or service in connection with the business of title insurance, except in accordance with rate filings which have become effective pursuant to [Division 2, Part 6, Chapter 1 of the Insurance Code] Article 5.5 (commencing with Section 12401) of this chapter or as otherwise authorized by such article . . . ."

Plaintiff argued the "minimum charge" in section J-24 of defendant's submitted rate schedule was ambiguous because it was impossible to determine the amount of the

charge for a sub-escrow fee. Plaintiff contended that because there was ambiguity, the construction should be against the rate filer, defendant. Plaintiff asserted defendant could only charge $60 for a sub-escrow fee.

Plaintiff asserted the escrow related service fees, the disbursement fees, in section J-32 were ambiguous because they did not specify whether the charge was per transaction or per usage. Construing the ambiguity in favor of the consumer, plaintiff asserted that defendant was required to charge per transaction, not per usage. Plaintiff contended the restitution should be calculated based on the difference between the rate actually charged and the filed rate. And plaintiff asserted this calculation should be construed in the consumers' favor. Plaintiff also argued the fair market value was not relevant to calculating restitution.

Defendant asserted its filed rates fell within the safe harbor provisions of Insurance Code section 12414.26. Insurance Code section 12414.26 provides, "No act done, action taken, or agreement made pursuant to the authority conferred by Article 5.5 (commencing with Section 12401) . . . of this chapter shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this state heretofore or hereafter enacted which does not specifically refer to insurance." (See *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 267 ["[T]he Legislature . . . included specific provisions exempting specified classes of insurance from other laws. (E.g., §[] . . . 12414.26 [title insurance].)"].) Defendant argued: the insurance department engaged in de facto approval of its filed rate schedule; it would be inequitable to hold it liable for rates that were essentially approved by the insurance department; its rates were unambiguous; the sub-escrow fee was a minimum $60 charge which may be adjusted upward based on section A-16 of the schedule and the disbursement fee applied on a per use basis.

G. Statement of Decision and Judgment

On May 12, 2014, the trial court issued its final statement of decision. The trial court found the civil liability immunity under Insurance Code section 12414.26 applied to

immunize defendant from plaintiff's ambiguity theory of liability. The trial court reasoned that article 5.5 of the Insurance Code involved the making and use of rates. In this regard, the trial court relied on Insurance Code section 12401.3. The trial court found: defendant's application of a charged rate fell within the "use" of a rate under article 5.5 of the Insurance Code; and plaintiff's ambiguity argument was a challenge to defendant's charge of its filed rate. The trial court reasoned, "To apply Plaintiff's construction of the rates requires the Court to 'make' the rates by interpreting them in view of the statutory language contained in Division 2, Part 6, Chapter 1, Article 5.5 [of the Insurance Code]."

However, the trial court found defendant had violated Insurance Code section 12414.27 by applying unfiled charges. The trial court noted plaintiff had alleged generally in his second amended complaint that defendant had overcharged beyond its filed rates in violation of Insurance Code section 12414.27. The trial court found defendant had inconsistently followed its own filed rates to the point of haphazardness. For example, John Hollenbeck, an executive vice president for First American Title Insurance Company, testified that the sub-escrow rate was a minimum $60. James J. Dufficy was defendant's former regulatory counsel during the relevant class period. Mr. Dufficy also testified the sub-escrow rate was a minimum $60. Mr. Hollenbeck and Mr. Dufficy testified the local county managers for defendant could adjust the rate upward by applying section A-16 of the rate schedule. However, defendant could not substantiate that any adjustments actually used section A-16. Christopher Clemens, defendant's Riverside County manager, testified that the sub-escrow rate for his county had increased above $60 two or three times. Mr. Clemens testified that he could not remember any documents indicating the sub-escrow rate was increased using section A-16 factors. The trial court found the rates charged for sub-escrow services varied widely even within a county. In 2003, for example, defendant's Riverside County office charged sub-escrow fees ranging from $20 to $296.

As for the disbursement fees, the trial court found one situation in which an overcharge occurred during the class period when applying the per usage rate.

Defendant's supplemental response to special interrogatory No. 45 states in relevant part: "Though it is not possible to conclusively determine the number of responsive transactions without a file-by-file review, the [First American System Technology] data indicates that the following number of transactions *may* have been charged a wire transfer fee in excess of $15 for a single transfer: [¶] 2003, 3,545. [¶] 2004, 4,407. [¶] 2005, 9,971. [¶] 2006, 8,419. [¶] 2007, 6,464."

The trial court calculated restitution as follows. For the sub-escrow fees, the trial court decided the proper restitution for the subclass was the difference between the amount charged and the fair market value. The trial court cited testimony from Dr. Bruce Strombom who holds a Ph.D. in economics. He testified for defendant regarding the value of wire, messenger, overnight and sub-escrow services. Dr. Strombom testified: "[F]or firms that had an explicit dollar amount for [sub-]escrow fees, the rates ranged from $100 to $125 . . . . So for all of those firms, the filed rates are equal to or greater than the rate that was charged in the [plaintiff] transaction of $100." He also testified, "[E]ven using the minimum amount for those firms, my conclusion would not really be affected because it would still indicate that $100 fee [charged to plaintiff] was commensurate with the fair market rates." The trial court decided $100 was the appropriate fair market value to apply. The trial court similarly found the fair market value for wire transfer services was $15.

The trial court ordered restitution for sub-escrow subclass members who had paid more than $100 for sub-escrow services in the amount of $1,066,039, based on numbers submitted by the parties. The number of prevailing sub-escrow fee subclass members was 37,626. For the disbursement fee subclass members who paid more than $15 for a single wire transfer, the trial court ordered restitution in the amount of $406,314. The number of prevailing disbursement fee subclass members was 32,806. The trial court determined interest would be calculated from October 8, 2007 citing equitable factors. The trial court found the remaining subclass members, including plaintiff, were not entitled to recovery. Judgment was entered on May 12, 2014.

## H. Costs

Plaintiff submitted his cost memorandum, asserting entitlement to recovery of all costs as the prevailing party. The trial court disagreed. Code of Civil Procedure section 1032, subdivision (a)(4) provides: "'Prevailing party' includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. When any party recovers other than monetary relief and in situations other than as specified, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties on the same or adverse sides pursuant to rules adopted under Section 1034."

The trial court ruled none of the four enumerated situations in Code of Civil Procedure section 1032, subdivision (a)(4) applied. Applying the discretionary portion, the trial court ruled plaintiff was the prevailing party. But the trial court found plaintiff was not entirely successful. Relying on equitable considerations, the trial court limited plaintiff's awarded costs based on the following analysis. The trial involved 368,789 subclass members. As noted, the trial court found 37,626 sub-escrow fee subclass members and 32,806 disbursement fee subclass members were entitled to restitution. Assuming no overlap, 70,432 of the 368,789 subclass members received relief. This represented 11 percent of total class members and 19 percent of the claims that proceeded to trial. The trial court, rounding in favor of plaintiff, estimated his level of success at 25 percent. Of the over $1 million in allowable costs sought by plaintiff, the trial court awarded him $265,501.

## III. DISCUSSION

### A. Unfair Competition Law

Business and Professions Code section 17200 provides in pertinent part, "[U]nfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice . . . ." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 (*Cel-Tech*); *Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 717.) Our Supreme Court held, "By proscribing 'any unlawful' business practice, 'section 17200 "borrows" violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable. [Citations.]" (*Cel-Tech, supra,* 20 Cal.4th at p. 180; *Smith v. State Farm Mutual Automobile Ins. Co.*, supra, 93 Cal.App.4th at p. 718.) Here, as noted, plaintiff asserted defendant violated Insurance Code section 12414.27. Injunctive relief and restitution are authorized remedies. (Bus. & Prof. Code, § 17203; *Smith v. State Farm Mutual Automobile Ins. Co., supra,* 93 Cal.App.4th at p. 717.) Plaintiff did not seek injunctive relief because the alleged unlawful conduct ceased on October 8, 2007. In evaluating plaintiff's unfair competition claims, we review questions of law and statutory interpretation de novo. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432; *Crocker Nat. Bank v. City & County of San Francisco* (1989 49 Cal.3d 881, 888; *In re Marriage of Schofield* (1998) 62 Cal.App.4th 131, 137.) We review the trial court's resolution of disputed factual findings for substantial evidence. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.)

B. Insurance Code Section 12414.26 Applies to Plaintiff's Ambiguity Theory for the Disbursement Fees Claim

We first address the applicability of Insurance Code section 12414.26 to plaintiff's ambiguity theory for the disbursement fees claim. As noted, Insurance Code section 12414.26 provides civil liability immunity under these circumstances, "No act done, action taken, or agreement made pursuant to the authority conferred by Article 5.5 (commencing with Section 12401) . . . of this chapter shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this state heretofore or hereafter enacted which does not specifically refer to insurance." Plaintiff asserts the trial court erred by finding immunity under Insurance Code section 12414.26 applied to the disbursement fees claim. (Plaintiff also asserted the trial court erred regarding Insurance Code section 12414.26 applying to the sub-escrow fees. However, plaintiff chose not to raise that issue on appeal because of the trial court's finding that defendant failed to follow its own rate.) Plaintiff contends he was not challenging the rates being filed, but rather the interpretation of the rates.

Article 5.5 of the Insurance Code describes rate filing and regulation. (Ins. Code, § 12401, et seq.) Several sections of article 5.5 of the Insurance Code describe how a company like defendant files rates. Insurance Code section 12401 provides in pertinent part, "The purpose of this article is to promote the public welfare by regulating rates for the business of title insurance as herein provided to the end that they shall not be excessive, inadequate or unfairly discriminatory." Insurance Code section 12401.1 provides: "Every title insurer, underwritten title company, and controlled escrow company shall file with the commissioner its schedules of rates, all regularly issued forms of title policies to which such rates apply, and every modification thereof which it proposes to use in this state. Every schedule of rates filed by a title insurer shall set forth the entire charge to the public for each type of title policy included within such schedule and shall include without separate statement thereof that portion of the charge, if any, which is based upon work performed by an underwritten title company; there shall be no

separate filing by an underwritten title company for such work. Every filing shall set forth its effective date, which shall be not earlier than the 30th day following its receipt by the commissioner, and shall indicate the character and extent of the coverages and services contemplated." Insurance Code section 12401.7 provides in pertinent part, "No title insurer, underwritten title company or controlled escrow company shall use any rate in the business of title insurance prior to its effective date . . . ." There is no requirement for prior approval of title insurance rates by the insurance commissioner. (See Ins. Code, §§ 1861.01, subd. (c) ["Commencing November 8, 1989, insurance rates . . . must be approved by the commissioner prior to their use."], 1851 ["The provisions of this chapter [regarding rate approval] shall apply to all insurance on risks or on operations in this state, except: [¶] . . . [¶] (d) Title insurance."].)

Plaintiff's ambiguity theory for the disbursement fees claim is barred by the Insurance Code section 12414.26 civil immunity. Our Supreme Court has held, "Article 5.5 applies only to rate regulation . . . ." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 44; see 13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity,§ 112, p. 418 ["[Insurance Code, Section 12414.26] is expressly limited to title insurance company activities related to rate setting."].) The previously cited sections of the Insurance Code govern how defendant is to file its title insurance rates. Namely, defendant must merely file its rate schedule with the insurance commissioner 30 days prior to the charge becoming effective. (Ins. Code, §§ 12401, 12401.1, 12401.7.) It is undisputed defendant properly filed the disbursement rate at issue under article 5.5 of the Insurance Code with the insurance department.

The gravamen of plaintiff's ambiguity theory is that defendant's rates are improper. Plaintiff asserted the disbursement fees were ambiguous and should be charged per sub-escrow transaction. Plaintiff is seeking to apply his interpretation of the rate as the correct one. That interpretation of the rates under plaintiff's ambiguity theory would be a challenge to the rate as filed by defendant. Insurance Code section 12414.26 immunizes defendant from civil liability on this ground. We note that customers facing an ambiguous rate are not without a remedy. Insurance Code sections 12414.13 and

12414.14 provide that customers under these circumstances can file a complaint with the insurance commissioner. The insurance commissioner's ruling is ultimately subject to judicial review. (*Ibid.*, § 12414.19.)

### C. Defendant's Violation of Insurance Code section 12414.27

As noted, Insurance Code section 12414.27 provides in pertinent part, "[N]o title insurer, underwritten title company or controlled escrow company shall charge for any title policy or service in connection with the business of title insurance, except in accordance with rate filings which have become effective pursuant to Article 5.5 (commencing with Section 12401) of this chapter or as otherwise authorized by such article . . . ." To evaluate whether defendant violated Insurance Code section 12414.27, we first determine what the rate filing was during the class period. As asserted by defendant, the sub-escrow fee was a minimum $60 with increases determined by applying the factors in section A-16 of the rate schedule. The disbursement fees as asserted by defendant were: $15 per overnight mail use; $25 per special messenger use; and $15 per wire transfer use. The trial court used defendant's interpretation when it construed the filed rate's language. Because this is the application of law to undisputed evidence, we conduct our own independent review. Based on our own independent review, we find the trial court's construction of the filed rate was not error. (Civ. Code, § 3542 ["Interpretation must be reasonable."]; see *Universal Pictures Corp. v. Superior Ct.* (1935) 9 Cal.App.2d 490, 493-494.)

The trial court found defendant violated Insurance Code section 12414.27 by failing to properly apply its own rates. Whether defendant failed to properly apply its own rates involves resolution of a disputed fact. Substantial evidence supports the trial court's finding. Defendant could not identify any documents which indicated the sub-escrow rate was increased using section A-16 of the rate schedule. Evidence was also presented indicating sub-escrow fees varied in the same county in the same year. This supports the trial court's conclusion that sub-escrow rate increases were done in a

haphazard manner such that the section A-16 factors were not actually applied. As for the disbursement service for wire transfer fees, defendant's response to a special interrogatory indicated 32,806 subclass members were charged more than $15 for one wire transfer.

Defendant contends that under the Insurance Code section 12414.26 civil immunity plaintiff is entirely barred from pursuing his unfair competition claim. Defendant argues the insurance department has exclusive authority to regulate "unfairly discriminatory" rates. Defendant contends the trial court's finding that it had inconsistently applied its rate was the equivalent of applying its rate in an "unfairly discriminatory" manner.

We disagree that these principles apply in this aspect of our case. It is undisputed the insurance department has exclusive authority to regulate rates that are "unfairly discriminatory." (Ins. Code, §§ 12401, 12414.13, 12414.29.) However, the trial court did not find defendant's rate was "unfairly discriminatory." Rather, the trial court ruled defendant applied its rate so inconsistently as to not be applying the filed rate at all. As noted, substantial evidence supported the trial court's finding. There is a difference between denying a challenge as to what the filed rate is and examining whether the amount charged was in accordance with the filed rate. The Insurance Code section 12414.26 limited immunity would apply when there is a challenge to defendant's filed rate. However, defendant is not permitted to charge more than its filed rate under Insurance Code section 12414.27. Additionally, Insurance Code section 12414.27 is beyond the scope of Insurance Code section 12414.26. Thus, defendant violated the Unfair Competition Law by charging the subclass members beyond its filed rate in violation of Insurance Code section 12414.27. We need not address the parties' remaining arguments concerning liability.

D. Restitution and Sub-Escrow Fees

Plaintiff asserts the trial court erred in its calculation of restitution regarding the sub-escrow fees. Plaintiff contends the trial court incorrectly determined restitution should be calculated as the difference between the amount charged and the fair market value of $100. Plaintiff asserts restitution should be the difference between the charged amount and $60, the minimum rate filed by defendant. Defendant alternatively asserts the fair market value should be calculated as $125.

Business and Professions Code section 17203 provides in pertinent part: "Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." The Court of Appeal has held: "While the 'may have been acquired' language of Business and Professions Code section 17203 is so broad as to allow restitution without individual proof of injury, it is not so broad as to allow recovery without any evidentiary support. (*Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, 697.) The difference between what the plaintiff paid and the value of what the plaintiff received is a proper measure of restitution. (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 174.)" (*In re Vioxx Class Cases* (2009) 180 Cal.App.4th 116, 131 (*Vioxx*).) The Court of Appeal also has held: "*Vioxx* does not purport to set forth the exclusive measure of restitution *potentially* available in a[n Unfair Competition Law] case. It remains, however, that plaintiffs had the burden of proving entitlement to an alternative measure of restitution proper under all the circumstances." (*In re Tobacco Cases II* (2015) 240 Cal.App.4th 779, 792.)

Restitution under the Unfair Competition Law is an equitable remedy. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1144; *Cortez v. Purolator*

*Air Filtration Products Co.*, *supra*, 23 Cal.4th at p. 173.) Because a trial court has broad discretion when fashioning its equitable remedy, we review for an abuse of discretion. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773; *Thayer v. Wells Fargo Bank, N.A.* (2001) 92 Cal.App.4th 819, 833.) Our Supreme Court has held: "The court's discretion is very broad. [Business and Professions Code] [s]ection 17203 does not mandate restitutionary or injunctive relief when an unfair business practice has been shown. Rather, it provides that the court '*may* make such orders or judgments . . . as may be necessary to prevent the use or employment . . . of any practice which constitutes unfair competition . . . or as may be necessary to restore . . . money or property.' (*Ibid.*) That is, as our cases confirm, a grant of broad equitable power. A court cannot properly exercise an equitable power without consideration of the equities on both sides of a dispute." (*Cortez v. Purolator Air Filtration Products Co.*, *supra*, 23 Cal.4th at p. 180; accord, *Zhang v. Superior Court* (2013) 57 Cal.4th 364, 371.)

Plaintiff contends the trial court's equitable analysis cannot justify the restitution calculation. We disagree. Here, the trial court weighed the equities. The trial court noted defendant filed a new rate schedule in response to an examination by the insurance department which ended the offending practice. Defendant's parent company also paid a fine to the insurance department regarding its prior filed rate schedule. Mr. Dufficy testified that around April 22, 1998, section A-16 of the schedule was revised to the one at issue specifically at the insurance department's request. Based upon these equities, the trial court calculated restitution utilizing the *Vioxx* method—the difference between what plaintiff and the class members paid and the value of what they received. The trial court had considerably broad discretion to fashion an equitable remedy. (*Zhang v. Superior Court*, *supra*, 57 Cal.4th at p. 371; *Cortez v. Purolator Air Filtration Products Co.*, *supra*, 23 Cal.4th at p. 180.) Plaintiff has not demonstrated how the trial court abused its discretion by using this method.

Plaintiff asserts $60 is the applicable sub-escrow fee rate. We disagree. As previously discussed, the trial court determined the sub-escrow fee was $60, which could be increased using factors in section A-16 of the rate schedule. There is no dispute the

sub-escrow fee could vary. Thus, the trial court, without abusing its discretion, could calculate the value of the sub-escrow fee to determine the value of what plaintiff received. The fair market value of the sub-escrow fee would reflect the value of what plaintiff received. (*In re Tobacco Cases II, supra*, 240 Cal.App.4th at p. 791; *Vioxx, supra*, 180 Cal.App.4th at p. 131.) Substantial evidence supports the trial court's finding that the fair market value for the sub-escrow fee was $100. As noted, Dr. Strombom testified that companies similar to defendant who published their rates had charged from $100 to $125 for a sub-escrow fee. Dr. Strombom further testified plaintiff being charged $100 for the sub-escrow fee was commensurate with the market rates at the time.

Defendant's argument that the fair market value figure should have been $125 also fails. Dr. Strombom testified to a range of $100 to $125 for sub-escrow fees during the class period. Nothing prohibits the trial court from choosing the lower end of that range to determine the value of what plaintiff received. (See *Vioxx*, 180 Cal.App.4th at p. 131 ["When the plaintiff seeks to value the product received by means of the market price of another, comparable product, that measure cannot be awarded without evidence that the proposed comparator is actually a product of comparable value to what was received."]; Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2015) ¶ 16:12 ["In *nonjury* trials . . . it is the judge's duty to *weigh* the evidence, *determine credibility* of witnesses, and *decide questions of fact*, as well as issues of law."].) Accordingly, the trial court did not abuse its discretion by determining the restitution for the sub-escrow subclass members should be the difference between what was paid and $100.

One last comment is in order concerning the Unfair Competition Law and the Insurance Code section 12414.26 immunity. Because of that immunity, no trial court may assess the fair market value of a service and order a title company to change that amount in place of a filed rate. But once a trial court concludes the filed rate was not charged, causing detriment to the customers, fair market value calculations may be appropriate in fashioning a restitution remedy. The Unfair Competition Law authorizes use of fair market value calculations in imposing a restitution remedy. (*In re Tobacco*

*Cases II*, *supra*, 240 Cal.App.4th at p. 791; *Vioxx*, *supra*, 180 Cal.App.4th at p. 131.) We are merely allowing, in a filed rates case where a violation of the Unfair Competition Law has occurred, the use of fair market value principles *when calculating restitution*. In doing so, we harmonize the Unfair Competition Law restitution remedy with the Insurance Code section 12414.26 immunity. And in doing so, we give effect to the liberal construction afforded remedial statutes such as the Unfair Competition law. (*Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 530 ["'[C]ivil statutes for the protection of the public are, generally, broadly construed in favor of that protective purpose.'"]; *Korea Supply Co. v. Lockheed Martin Corp.*, *supra*, 29 Cal.4th at p. 1143 [referring to remedial provisions of Unfair Competition Law].)

E. Interest

Plaintiff argues the court should have calculated prejudgment interest from the date of the overcharge, not October 7, 2007. Plaintiff contends the trial court's equitable rationale was erroneous. The trial court may grant prejudgment interest based on equitable considerations in an Unfair Competition Law cause of action. (*Rodriguez v. RWA Trucking Co., Inc.* (2013) 238 Cal.App.4th 1375, 1410; *M & F Fishing, Inc. v. Sea-Pac Ins. Managers, Inc.* (2012) 202 Cal.App.4th 1509, 1539.) As we stated previously, we do not find the trial court abused its discretion regarding its equitable remedy. Likewise no abuse of discretion occurred when the trial court chose to calculate prejudgment interest beginning after the class period ended. Plaintiff also cites Civil Code section 3287 to contend legal interest begins on the date defendant imposed the unlawful charge. Civil Code section 3287 does not apply because it is limited to interest on damages. (*Rodriguez v. RWA Trucking Co., Inc.*, *supra*, 238 Cal.App.4th at pp. 1409-1410; *M & F Fishing, Inc. v. Sea-Pac Ins. Managers, Inc.*, *supra*, 202 Cal.App.4th at p. 1538.)

F. Costs

Plaintiff contends that the subclass is the prevailing party under Code of Civil Procedure section 1032, subdivision (a)(4). Under this theory of costs, every subclass member, whether litigating or not, is considered one plaintiff. According to plaintiff, the subclass is entitled to recover all of its costs.

Code of Civil Procedure section 1032, subdivision (a)(4) provides in pertinent part: "'Prevailing party' includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. When any party recovers other than monetary relief and in situations other than as specified, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs . . . ." (See *Chinn v. KMR Property Management* (2008) 166 Cal.App.4th 175, 188.) We will refer to the first portion as the mandatory prong and the second portion as the discretionary prong.

We apply the following standard of review: "Generally, a trial court's determination of costs is reviewed for abuse of discretion. [Citation.] However, where 'the determination of whether costs should be awarded is an issue of law on undisputed facts, we exercise de novo review.' [Citation.]" (*MacQuiddy v. Mercedes-Benz USA, LLC* (2015) 233 Cal.App.4th 1036, 1050; accord, *Sharif v. Mehusa, Inc.* (2015) 241 Cal.App.4th 185, 191; *City of Long Beach v. Stevedoring Services of America* (2007) 157 Cal.App.4th 672, 678.) Plaintiff asserts the class is the "prevailing party" because it received a net monetary recovery.

The following sets forth the nature of a class action: "A class action is a representative action in which the class representatives assume a fiduciary responsibility to prosecute the action on behalf of the absent parties. [Citation.] The representative parties not only make the decision to bring the case in the first place, but even after class certification and notice, they are the ones responsible for trying the case, appearing in

court, and working with class counsel on behalf of absent members. The structure of the class action does not allow absent class members to become active parties, since 'to the extent the absent class members are compelled to participate in the trial of the lawsuit, the effectiveness of the class action device is destroyed.' [Citation.] The very purpose of the class action is to 'relieve the absent members of the burden of participating in the action.' [Citation.] [Fn. omitted.]" (*Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1434; see *Luckey v. Superior Court* (2014) 228 Cal.App.4th 81, 99 ["What is clear . . . is that absent class members in a *postcertification* class -- those who have received notice and elected not to appear or opt out -- are not 'parties litigant.'"].)

As found by the trial court and supported by substantial evidence, plaintiff personally did not receive a net monetary recovery as a sub-escrow fee or disbursement fee subclass member. We must determine whether the subclasses as a whole were a "prevailing party" under the mandatory prong of Code of Civil Procedure section 1032, subdivision (a)(4). The trial court relied upon *Earley v. Superior Court*, *supra*, 79 Cal.App.4th at page 1434, footnote 11, in which the Court of Appeal held, "Absent class members may be 'parties' for certain purposes, but for other purposes they are not." The trial court concluded in its cost order: "The Court does not believe that the legislature had class actions in mind at all when it sought to define four simple situations in which a party would prevail, and be entitled to costs as of right. By nature, class actions are less susceptible to evaluation by a simple up or down rule of the kind articulated in the first prong of [Code of Civil Procedure section 1032, subdivision (a)(4)] . . . . [A] class action will often require specialized consideration as to the identity of the prevailing party, and an allocation of costs between the parties will often be appropriate in the interest of justice." Having conducted our own independent review, we agree with the trial court. None of the situations in the mandatory prong of Code of Civil Procedure section 1032, subdivision (a)(4) apply to plaintiff.

In support of his position, plaintiff relies on *Collins v. City of Los Angeles* (2012) 205 Cal.App.4th 140, 154-155 and *Beasley v. Wells Fargo* (1991) 235 Cal.App.3d 1407, 1413-1418. These cases are inapposite. They involve Code of Civil Procedure section

1021.5 and the discretionary award of attorney's fees. (*Collins v. City of Los Angeles*, *supra*, 205 Cal.App.4th at p. 153; *Beasley v. Wells Fargo*, *supra*, 235 Cal.App.3d at p. 1413.)

Plaintiff also contends that *Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 392-405 (*Acree*) is dispositive. In *Acree*, the class plaintiffs prevailed against the defendant in a jury trial for contract breach. (*Id.* at p. 392.) The trial court awarded costs for a class action to the plaintiffs as the prevailing party. (*Acree*, *supra*, 92 Cal.App.4th at p. 392.) The defendant asserted it could recover costs on an individual basis because it had prevailed against most of the class members and three of the four named plaintiffs. (*Id.* at p. 405.) The Court of Appeal affirmed the trial court's award of costs. (*Ibid.*) *Acree* is silent as to whether the trial court awarded costs to the class as a prevailing party by reason of party with a net monetary recovery. Additionally, one of the representative plaintiffs in *Acree* actually had a monetary recovery. (*Ibid.*) Plaintiff did not have a monetary recovery here. Accordingly, we find none of the enumerated situations in the mandatory prong of Code of Civil Procedure section 1032, subdivision (a)(4) apply.

Finally, we address the trial court's decision to find plaintiff the prevailing party under the discretionary prong of Code of Civil Procedure section 1032, subdivision (a)(4) and to apportion costs. Defendant contends that it had actually prevailed substantially in this action because the representative plaintiff and over 80 percent of the subclass members would receive nothing. Defendant asserts costs should not be awarded to plaintiff at all. The trial court did not abuse its discretion. As noted, the trial court determined plaintiff had successfully represented 19 percent of the subclass members against defendant. The trial court found plaintiff's success was 25 percent and apportioned the costs accordingly. The trial court's decision does not exceed the bounds of reason. (*Lincoln v. Schurgin* (1995) 39 Cal.App.4th 100, 105-106; *Texas Commerce Bank v. Garamendi* (1994) 28 Cal.App.4th 1234, 1249.) We need not address the parties' remaining arguments.

## IV. DISPOSITION

The judgment and cost order are affirmed. The parties are to bear their own appellate costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

BAKER, J.

KUMAR, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

# Appellate Courts Case Information

## 2nd Appellate District

*Court data last updated: 12/12/2019 04:28 PM*

## Parties and Attorneys

**Kirk v. First American Title Company - E-BRIEF CASE**
**Division 5**
**Case Number B257508**

| Party | Attorney |
| --- | --- |
| Patrick Kirk : Plaintiff and Appellant | Thomas Alistair Segal<br>The Kick Law Firm<br>201 Wilshire Blvd.<br>Suite 350<br>Santa Monica, CA 90401<br>Steven J. Bernheim<br>The Bernheim Law Firm<br>13211 Mulholland Drive<br>Encino, CA 90210<br>Jeffrey I. Ehrlich<br>The Ehrlich Law Firm<br>16130 Ventura Blvd., Suite 610<br>Encino, CA 91436<br>Michael Bidart<br>Shernoff Bidart Echeverria Bentley LLP<br>600 S. Indian Hill Blvd.<br>Claremont, CA 91711 |

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|---|---|
| First American Title Company : Defendant and Respondent | Sonia Renee Martin<br>Dentons US LLP<br>525 Market St 26FL<br>San Francisco, CA 94105-2708<br>John Nadolenco<br>Mayer Brown LLP<br>350 S. Grand Avenue<br>25th Floor<br>Los Angeles, CA 90071-1503<br>Ronald D. Kent<br>Dentons US LLP<br>601 S. Figueroa Street<br>Suite 2500<br>Los Angeles, CA 90017-5704<br>Andrew Z. Edelstein<br>Mayer Brown, LLP<br>350 S. Grand Ave.<br>25th FL<br>Los Angeles, CA 90071-1503<br>Archis A. Parasharami<br>Mayer Brown LLP<br>1999 K Street, N.W.<br>Washington, DC 20006-1101<br>Craig W. Canetti<br>Mayer Brown LLP<br>1999 K Street, N.W.<br>Washington, DC 20006-1101 |
| Calfiornia Land Title Association : Other | Craig Calvin Page<br>California Land Title Assn<br>P O Box 13968<br>Sacramento, CA 95853-3968 |
| American Land Title Association : Other | Steven Gottheim<br>1800 M Street, NW,<br>Suite 300S<br>Washington, DC 20036-5828 |
| Fidelity National Title Group : Other | Michael James Gleason<br>Hahn Loeser & Parks LLP<br>1 America Plz<br>600 W Broadway Ste 1500<br>San Diego, CA 92101 |

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

| | |
|---|---|
| DAVE JONES, as Insurance Commissioner, etc.,<br><br>Petitioner,<br><br>v.<br><br>THE SUPERIOR COURT OF LOS ANGELES COUNTY,<br><br>Respondent;<br><br>PATRICK KIRK et al.,<br><br>Real Parties in Interest. | B253605<br><br>(Los Angeles County Super. Ct. No. BC372797)<br><br>ORDER |

COURT OF APPEAL - SECOND DIST.
FILED
FEB 25 2014
JOSEPH ... Clerk
V. GARY Deputy Clerk

BY THE COURT:

Having reviewed the petition for writ of mandate and the supplemental briefs, we determined the trial court acted properly in reviewing the subject documents in camera and in finding the documents were not privileged and/or any privilege was waived as to the subject documents. Accordingly, the stay issued by this court on January 10, 2014, is lifted. The petition is denied.

# Appellate Courts Case Information

## 2nd Appellate District

Change court ▼

*Court data last updated: 12/12/2019 01:27 PM*

## Parties and Attorneys

**Jones v. Superior Court of Los Angeles County et al.**
**Division 3**
**Case Number B253605**

| Party | Attorney |
|---|---|
| Dave Jones : Petitioner | Brian David Wesley<br>Office of the Attorney General<br>300 South Spring Street<br>Room 1702<br>Los Angeles, CA 90013 |
| Superior Court of Los Angeles County : Respondent | Frederick Bennett<br>Superior Court of Los Angeles County<br>111 North Hill Street, Room 546<br>Los Angeles, CA 90012 |
| Patrick Kirk : Real Party in Interest | Steven J. Bernheim<br>The Bernheim Law Firm<br>13211 Mulholland Drive<br>Encino, CA 90210<br>Taras Kick<br>The Kick Law Firm<br>201 Wilshire Blvd.<br>Suite 350<br>Santa Monica, CA 90401<br>Brian S. Kabateck<br>Kabateck Brown & Kellner, LLP<br>644 S. Figueroa Street<br>Los Angeles, CA 90017<br>Nazo Sevag Semerdjian<br>The Semerdjian Law Firm<br>898 San Pablo Way<br>Duarte, CA 91010 |

| | |
|---|---|
| First American Title Insurance Company : Real Party in Interest | Ronald D. Kent<br>Dentons US LLP<br>601 S. Figueroa Street<br>Suite 1500<br>Los Angeles, CA 90017-5704<br>Sonia Renee Martin<br>Dentons US LLP<br>525 Market St 26FL<br>San Francisco, CA 94105-2708<br>Charles A. Newman<br>SNR Denter US LLP<br>211 North Broadway Ste 2000<br>St. Louis, MO 63102-2741 |
| First American Title Company : Real Party in Interest | Ronald D. Kent<br>Dentons US LLP<br>601 S. Figueroa Street<br>Suite 1500<br>Los Angeles, CA 90017-5704<br>Sonia Renee Martin<br>Dentons US LLP<br>525 Market St 26FL<br>San Francisco, CA 94105-2708 |

Hon. Lee Smalley Edmon : Respondent
Los Angeles Superior Court
600 Commonwealth Ave., Central West
Los Angeles, CA 90005

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Court of Appeal, Second Appellate District, Division Three - No. B253605

**S216987**

# IN THE SUPREME COURT OF CALIFORNIA

**En Banc**

---

DAVE JONES, as Insurance Commissioner, etc., Petitioner,

v.

SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;

PATRICK KIRK et al., Real Parties in Interest.

---

The petition for review and application for stay are denied.

SUPREME COURT
FILED

MAR 19 2014

Frank A. McGuire Clerk

Deputy

CANTIL-SAKAUYE

*Chief Justice*

# Appellate Courts Case Information

## Supreme Court

Change court

*Court data last updated: 12/12/2019 01:27 PM*

## Parties and Attorneys

**JONES v. S.C. (KIRK)**
**Division SF**
**Case Number S216987**

| Party | Attorney |
|---|---|
| Dave Jones : Petitioner | Brian David Wesley<br>Office of the Attorney General<br>300 South Spring Street<br>Room 1702<br>Los Angeles, CA 90013 |
| Superior Court of Los Angeles County : Respondent | Frederick Bennett<br>Superior Court of Los Angeles County<br>111 North Hill Street, Room 546<br>Los Angeles, CA 90012 |
| Patrick Kirk : Real Party in Interest | Steven J. Bernheim<br>The Bernheim Law Firm<br>13211 Mulholland Drive<br>Encino, CA 90210<br>Taras Kick<br>The Kick Law Firm<br>201 Wilshire Boulevard<br>Suite 350<br>Santa Monica, CA 90401<br>Brian S. Kabateck<br>Kabateck Brown & Kellner, LLP<br>644 South Figueroa Street<br>Los Angeles, CA 90017<br>Nazo Sevag Semerdjian<br>The Semerdjian Law Firm<br>898 San Pablo Way<br>Duarte, CA 91010 |

| | |
|---|---|
| First American Title Insurance Company : Real Party in Interest | Ronald D. Kent<br>Dentons US LLP<br>601 South Figueroa Street<br>Suite 1500<br>Los Angeles, CA 90017-5704<br>Sonia Renee Martin<br>Dentons US LLP<br>525 Market Street 26th Floor<br>San Francisco, CA 94105-2708<br>Charles A. Newman<br>SNR Denter US LLP<br>211 North Broadway Suite 2000<br>St. Louis, MO 63102-2741 |
| First American Title Company : Real Party in Interest | Ronald D. Kent<br>Dentons US LLP<br>601 South Figueroa Street<br>Suite 1500<br>Los Angeles, CA 90017-5704<br>Sonia Renee Martin<br>Dentons US LLP<br>525 Market Street, 26th Floor<br>San Francisco, CA 94105-2708 |

Hon. Lee Smalley Edmon : Non-Title Respondent
Los Angeles Superior Court
600 Commonwealth Avenue, Central West
Los Angeles, CA 90005

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MICHAEL J. BIDART #60582
STEVEN MESSNER #259606
**SHERNOFF BIDART ECHEVERRIA LLP**
600 South Indian Hill Boulevard
Claremont, California 91711
Phone: (909) 621-4935

RICHARD H. FRIEDMAN #221622
**FRIEDMAN RUBIN**
1126 Highland Avenue
Bremerton, Washington 98337
Phone: (360) 782-4300

Attorneys for Plaintiffs

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County of Los Angeles

APR 1 1 2018

Sherri R. Carter, Executive Officer/Clerk
Deputy

SHERNOFF BIDART ECHEVERRIA LLP
LAWYERS FOR INSURANCE POLICYHOLDERS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

| | |
|---|---|
| FIRST AMERICAN TITLE COMPANY CASES<br><br>*Wilmot v. First American Title Ins. Co.*<br>(Los Angeles County Superior Court No. BC370141) | Case No.: BC370141<br>Hon. Maren E. Nelson - Dept. 307<br><br><u>CLASS ACTION</u><br><br>**NOTICE OF APPEAL** |

TO ALL PARTIES HEREIN AND TO THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that plaintiff Elizabeth Wilmot appeals from the Superior Court's February 16, 2018 Order Denying Class Certification as to the *Wilmot* Proposed "Loan Tie-In" Class ("Order"), which is reflected in the order attached hereto as Exhibit A and in the Court's interim ruling on plaintiff Wilmot's evidentiary objections, attached hereto as Exhibit B.

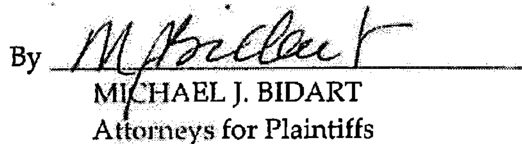
The Order is appealable because it denies certification of "an entire class," namely, the proposed "Loan Tie-In" Class, which is the only proposed class that plaintiff Wilmot sought or seeks to represent in this action. *See Linder v. Thrifty Oil Co.*, 23 Cal.4th 429, 435 (2000); *Daar v. Yellow Cab Co.*, 67 Cal.2d 695, 699 (1967). As to plaintiff Wilmot, only individual claims remain. *See In re Baycol Cases I and II*, 51 Cal.4th 751, 754 (2011).

Put another way, the Order is appealable because it constitutes a final determination of plaintiff Wilmot's rights in one of her capacities, namely, her capacity as a proposed class representative of the "Loan Tie-In" Class, as distinct from her individual capacity. *See Greyhound Lines, Inc. v. Department of the Cal. Highway Patrol*, 213 Cal.App.4th 1129, 1135 (2013); *First Security Bank v. Paquet*, 98 Cal.App.4th 468, 474 (2002); Eisenberg, *Cal. Practice Guide: Civil Appeals and Writs* ¶¶2:91, 2:92 (Rutter Group 2017).

The Order is appealable by plaintiff Wilmot even though another plaintiff (Jason Munro) asserts claims in the same action on behalf of himself and a different proposed class, of which Wilmot is not a member.[1] As the Supreme

---

[1] *See* Third Amended Complaint, filed Aug. 4, 2010, ¶23 (proposed "Inducements" (aka "kickbacks") class allegations asserted only by plaintiff Munro); Defendants' Partial Opposition to Motion to Consolidate Actions, filed July 18, 2008, at 6:12-13, 6:17 (acknowledging that while plaintiff Munro alleges unlawful "kickbacks" by home builders and developers, and seeks to represent a proposed "kickback" class, plaintiff Wilmot does neither); *see also* Request for

1 Court has explained, in multi-party cases, such as this one, "it better serves the
2 interests of justice to afford prompt appellate review to a party whose rights or
3 liabilities have been definitively adjudicated than to require him [or her] to await
4 the final outcome of trial proceedings which are of no further concern to him [or
5 her]." *Justus v. Atchison,* 19 Cal.3d 564, 568 (1977).[2] The Supreme Court
6 recognized the same principle in *Baycol,* and explained that "'to hold the person
7 [whose rights have been finally disposed of] bound to wait until the final
8 judgment against the other party before taking an appeal from the judgment
9 against the first party already rendered is wholly unreasonable and finds no
10 warrant in any provision of the [Code of Civil Procedure].'" *Baycol,* 51 Cal.4th at
11 759 (quoting *Rocca v. Steinmetz,* 189 Cal. 426, 428 (1922)) (alterations in original).
12 As between plaintiff Wilmot and all defendants, the Order has definitively
13 adjudicated the proposed class claims, leaving only plaintiff Wilmot's individual
14 claims to be adjudicated. *See Baycol,* 51 Cal.4th at 754, 759. The claims of plaintiff
15 Munro, and the proposed class he seeks to represent, are of no concern to
16 plaintiff Wilmot, who is not a member of that proposed class. As to plaintiff
17 Wilmot, therefore, the Order falls squarely within the definition of an appealable
18 order under *Linder, Daar* and *Baycol.*
19
20 Date: April 11, 2018 SHERNOFF BIDART ECHEVERRIA LLP
21
22 By 
23 MICHAEL J. BIDART
Attorneys for Plaintiffs
24
25

26 Court's Approval of Voluntary Dismissal Without Prejudice of Putative Classes
27 2, 4, and 5 Pursuant to Rule of Court 3.770(a), filed April 2, 2018.
28 [2] *Disapproved on other grounds, Ochoa v. Superior Court,* 39 Cal.3d 159, 171
(1985).



SHERNOFF BIDART ECHEVERRIA LLP
LAWYERS FOR INSURANCE POLICYHOLDERS

# EXHIBIT A

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FILED
LOS ANGELES SUPERIOR COURT
FEB 16 2018
BY Deputy
NANCY NAVARRO

10 **SUPERIOR COURT OF CALIFORNIA**

11 **COUNTY OF LOS ANGELES**

12

| | |
|---|---|
| FIRST AMERICAN TITLE CASES | JCCP 4751 |
| *Sjobring v. First American Title Co.* BC329482 | ORDER DENYING CLASS CERTIFICATION AS TO THE *WILMOT* PROPOSED "LOAN TIE-IN" CLASS (BC370141) |
| *Wilmot v. First American Title Ins. Co.* BC370141 | Date: November 27, 2017<br>Time: 2:30 p.m.<br>Dept.: 307 |
| *Kirk v. First American Title Co.* BC372797 | |
| *Kaufman v. First American Title Co.* BC382826 | |

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## I. FACTUAL AND PROCEDURAL HISTORY

### A. Background

This is one of several related cases brought against Defendant First American Title Company (FATCO). FATCO is an underwritten title company owned by First American Title Insurance Company (FATIC). As such, FATCO is subject to oversight by the California Department of Insurance (CDI) and must comply with certain provisions of the California Insurance Code, including section 12414.27. That section provides: "Commencing 120 days following January 1, 1974, no title insurer, underwritten title company or controlled escrow company shall charge for any title policy or service in connection with the business of title insurance, except in accordance with rate filings which have become effective pursuant to Article 5.5 (commencing with Section 12401) of this chapter or as otherwise authorized by such article; provided, however, where a rate is on file with the commissioner and in effect immediately prior to such date, such rate shall continue in effect until a new rate filing is thereafter made and becomes effective in the manner provided in Article 5.5 (commencing with Section 12401) of this chapter." In contrast, independent escrow companies (IEC) are not subject to CDI oversight and are not required to file their rates with it. See Cal. Fin. Code §§ 17000-17703.

This action was filed in 2007. As is discussed in more detail below, Plaintiffs Elizabeth Wilmot (Wilmot) and Jason Munro (Munro) allege that FATCO charged "loan tie in fees" for certain escrows without having filed rates with the CDI for those fees, in violation of section 12414.27. The term "loan tie-in fee" refers to a number of different fees that may be charged when an escrow company is charged with the responsibility of serving as an intermediary between a borrower and a lender.

Before the Court is Wilmot's motion for class certification.[1] The hearing originally took place August 30, 2017, at which time the Court requested further briefing on Wilmot's adequacy as a class representative, ascertainability, and manageability. That briefing was provided and on November 27, 2017 the Court heard additional oral argument and took the matter under submission. Having considered the pleadings submitted, the admissible evidence,[2] and the argument of counsel, the Court now finds certification is not appropriate for the reasons set forth below.

**B. The Allegations of the Wilmot Complaint**

The Third Amended Complaint in *Wilmot* sets forth the following causes of action:

1. Breach of Contract
2. Breach of Implied Covenant of Good Faith and Fair Dealing
3. Breach of Fiduciary Duty
4. Negligence
5. Fraud and Deceit
6. Constructive Fraud
7. Unjust Enrichment
8. Violation of the Consumer Legal Remedies Act
9. Unfair Competition
10. Negligent Misrepresentation.

[1] Munro does not seek to act as a class representative here but alleges he will seek to certify a separate class of persons in this action based on the theory that FATCO offered unlawful inducements to new homebuilders to use its services. The Court expresses no views as to whether such a motion is proper.

[2] Plaintiff's objections to evidence are overruled in their entirety, as more fully reflected in the order signed and filed August 30, 2017. All requests for judicial notice are granted.

1 Defendants' demurrer to the Second Amended Complaint was sustained without
2 leave to amend as to Breach of Contract, Breach of Implied Covenant of Good Faith and
3 Fair Dealing, and Negligence. (Exhibit F to Siegel Declaration.) Wilmot nevertheless
4 included them in her Third Amended Complaint. The Court permitted her to leave them
5 as "place holders" so that the facts alleged therein would be retained. (Exhibit G to Siegel
6 Declaration; Transcript of hearing on demurrer to Third Amended Complaint, at 36:13 –
7 37:9.) Defendant FATIC's demurrer to the Third Amended Complaint was sustained
8 without leave to amend. Defendant FATCO's demurrer was sustained without leave to
9 amend as to the Negligent Misrepresentation cause of action and was otherwise
10 overruled. FATCO's amended answer to the Third Amended Complaint was filed
11 December 19, 2016. Thus, the causes of action that remain are for Breach of Fiduciary
12 Duty, Fraud and Deceit, Constructive Fraud, Unjust Enrichment, Violation of the
13 Consumer Legal Remedies Act, and Unfair Competition.
14
15 **C. Background Facts**
16 The evidence before the Court is to the effect that persons using FATCO for
17 escrow services in a residential transaction received a "HUD-1" settlement statement.
18 Settlement statements are generated by a propriety system known as "FAST." FATCO
19 was required by federal law to prepare a HUD-1 settlement statement for each escrow,
20 itemizing all charges. (12 U.S.C. §2603(a).) FATCO maintains a database of all such
21 records in the FAST system. (2004 letter to shareholders; Messenger Declaration, Exhibit
22 20.) The FAST system contains information documenting each loan tie-in fee charged.
23 (Deposition of Lisa Rowlands at 125:16-126:1; Messenger Declaration, Exhibit 18.
24 Deposition of John Hollenbeck at 80:25-81:4; Messenger Declaration, Exhibit 17.
25 Deposition of Clifford Morgan at 290:18-25, 291:1-8, Messenger Declaration, Exhibit 3.

1 Morgan Declaration, Exhibit 4; Messenger Declaration, Exhibit 16. FATCO' response to
2 Special Interrogatory No. 5, Messenger Declaration, Exhibit 23.) According to FATCO's
3 interrogatory responses it charged loan tie-in fees in approximately 119,150 transactions
4 during the proposed class period. (Messenger Declaration, Exhibit 12, Defendant's
5 response to Special Interrogatory 13.)

6 The HUD-1 statements reflect when customers are charged "loan tie-in" fees.
7 However, the descriptor "loan tie-in" relates to a variety of fees charged when an escrow
8 company served as the intermediary between a borrower and a lender and processed loan
9 documents in addition to providing traditional escrow services. The term was used to
10 cover services provided for which FATCO *did* have filed rates, as well as for services
11 provided for which FATCO *did not* have a filed rate.

12 The unrefuted testimony of Kathy Stephens, a senior escrow advisor employed by
13 FATCO, was to the effect that during the class period the decision to charge a particular
14 fee in a particular escrow was made on a transaction specific basis by individual escrow
15 officers and/or the parties. Since approximately 2003, escrow-related fees have been
16 entered in the FAST computer system by individual escrow officers and/or assistants, and
17 those entries are used to generate the HUD-1 settlement statements. Ms. Stevens
18 testified: "Fees that are entered into the FAST system are subject to edit and freeform
19 typing by the person typing the entry. The terminology used to refer to fees for escrow
20 related services may vary depending on the person who is making the particular fee entry
21 into the computer system. I am aware of no coordinated practice or training in place prior
22 to 2007 that mandated escrow officers to use certain verbiage or reference specific rate
23 manual sections when entering fee descriptions into FAST. Individual escrow officers
24 often used terminology that would be familiar to the lenders, borrowers, buyers and/or
25 sellers who would be reviewing HUD-1 Settlement Statements and/or Settlement

Statements." (Stephens Declaration, ¶¶ 4, 5.) Stephens identified various fees that were labeled "Loan Tie-In Fees" but were in fact fees approved by the CDI, including document preparation fees; electronic download document fees; and concurrent junior mortgage escrow fees. According to Stephens, escrow personnel often use the term "loan tie-in" to refer to such charges. (Ibid.)

Wilmot's expert, Gordon Rausser, Ph.D., analyzed the HUD-1 statements at issue and concluded that in 44.10% of the transactions at issue there was a label of both a loan tie-in fee and a document preparation fee. In 43.87% of the transactions at issue there was both a "loan tie-in fee" and an electronic document download fee. In 6.68% of transactions a junior or second mortgage fee was identified as well as a loan tie-in fee. (Rausser Supp. Dec. dated November 20, 2017 at ¶¶ 23-29.) Rausser also opines that the because both types of fees (filed and unfiled) were often charged, loan tie-in fees were charged in addition to, rather than as a substitute for, filed rates. (Id. at ¶ 33.)

**D. The Related Cases**

The facts and history of certain related cases bears on the issues here.

*Sjobring v. First American Title Co.* was filed February 25, 2005. Sjobring alleged that he purchased a home in 2004 and his lender directed him to purchase title insurance through FATIC. His lawsuit alleges violation of Insurance Code §12404(a), which prohibits title insurers to pay any commission or consideration as an inducement for the referral of business. A limited class was certified in that action but it has not yet been brought to trial. A motion is pending seeking its dismissal.

This action was the next filed, on April 26, 2007, by the same counsel who filed *Sjobring*. As noted above, it alleges FATCO charged an unfiled $125 "loan tie in fee" for an escrow it handled for Wilmot, in violation of California Insurance Code §12414.27. The other named plaintiff in this action, Jason Munro, was also charged a $125 loan tie-in

1 fee but in addition was charged a messenger fee. Munro seeks to represent a separate
2 class of persons but has not filed a motion for class certification.
3 *Kirk v. First American Title Company* was filed shortly after this action, on June
4 15, 2007, by the same counsel who represented *Sjobring*. It involves the same real estate
5 transaction as is alleged in *Sjobring*. (Kirk sold his real property to Sjobring.) In
6 summary, Kirk alleged that he was overcharged for the title insurance policy FATIC
7 issued to him and that it sold him a more expensive policy without telling him less
8 expensive policies were available. He also alleged that FATCO charged him $100 as a
9 sub-escrow fee and $25 for a wire-transfer fee, although FATCO's filing with the CDI
10 provided for a $60 sub-escrow fee and $25 for a wire-transfer fee. The *Kirk* action was
11 narrowed through motion practice and tried in late 2013 and early 2014 on the only
12 remaining cause of action, violation of the Unfair Competition Law, and only on behalf
13 of those class members who did not have an arbitration agreement with FATCO. The
14 action was tried only as to class members who were charged more than $60 as a
15 subescrow fee. An award of restitution to Kirk and the class was ordered. It is contended
16 that *Kirk* class members are included in the class sought to be certified here.
17 *Kaufman v. First American Title* was filed December 22, 2007 by the same
18 counsel. Kaufman alleged that she and the putative class members were charged more
19 for title insurance and/or title-related fees than the amounts provided for in the rates
20 Defendants filed with the CDI in violation of Insurance Code, §12414.27 for a one-year
21 period. That class was also recently certified. The case has not yet been tried.
22 *Muehling v. First American Title Company* (*Muehling*), was filed in 2012 in
23 Alameda County as a class action by the same counsel. Muehling alleged that he and the
24 class members, like those here, had been charged an unfiled "loan tie-in fee" in
25 connection with an escrow closing on November 21, 2006. On August 26, 2014, and

prior to class certification, FATCO moved for summary judgment in *Muehling*. The motion was accompanied by evidence that the complained of fee, labeled as a "loan tie-in" fee on Muehling's HUD-1 closing statement, had in fact been filed with the CDI for transactions after April 18, 2005. Muehling dismissed his complaint. That dismissal was accompanied by a declaration from his counsel, representing that although he and Wilmot were charged the "identical [loan tie-in] fee at issue" there were issues as to whether Muehling was representative of the class.

## II. LEGAL STANDARD

A class action is authorized "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . ." Cal. Code Civ. Proc., § 382.

"The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives." *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021 (*Brinker*); *Dailey v. Sears, Roebuck and Co.* (2013) 214 Cal.App.4th 974, 988.

These requirements are commonly articulated in terms of four primary requirements:

"Numerosity" – The proposed class is numerous in size See *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 934;

"Ascertainability" - It is possible to ascertain who is a member of the class by resort to common, objective characteristics *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 915 (*Hicks*) because "the right of each individual to recover

1 [is] not [] based on a separate set of facts applicable only to him." *Vasquez v. Superior*
2 *Court* (1971) 4 Cal.3d 800, 809;

3 "Community of Common Interest" – Common questions of law or fact
4 predominate and class representatives have claims or defenses typical of the class and can
5 adequately represent the class; *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462,
6 470; and

7 "Superiority" – Proceeding with the case as a class action is superior to other
8 methods of adjudication. *Fireside Bank v. Superior Court* (2007) 40 Cal. 4th 1069, 1089.

9

10 **III. ANALYSIS**

11 **A. The Class is Theoretically Ascertainable**

12 The primary purpose of the ascertainability requirement is to provide notice to all
13 potential class members. *Hicks* at 914. In this regard it is important to note that
14 judgments in class actions have preclusive res judicata effects that bind absent class
15 members. *Id.* If class members are to receive individualized monetary damages, due
16 process requires notice and an opportunity to opt out. *Carter v. City of Los Angeles*
17 (2014) 224 Cal.App.4th 808, 823,quoting *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S.
18 338, 360], 824 ("[T]he takeaway from *Wal-Mart* is that the due process clause requires
19 notice and opt-out rights to class members unless 'the relief sought must perforce affect
20 the entire class at once ....'".) "A class representative has the burden to define an
21 ascertainable class." *Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 918 (*Sevidal*).

22 Wilmot seeks to certify the following class:

23

24 "All persons in California residential transactions who in a FATCO escrow paid
25 all or part of a loan tie-in fee from January 1, 2003 to April 1, 2007, inclusive."

Wilmot contends that the class can be easily identified by computerized review of the HUD-1 statements.

FATCO argues the class definition is overly inclusive, and will give notice to those who were are not charged an unfiled fee, including people such as former plaintiff Muehling, whose "loan tie-in fee" was actually a Junior Concurrent Mortgage fee and was simply mislabeled on his HUD-1 and that it also includes *Kirk* class members.

FATCO notes that when faced with summary judgment based on evidence that he was charged a *filed* rate, Muehling dismissed his complaint. Nevertheless, he falls within the class definition above. According to FATCO this is not the only kind of mislabeling that potentially occurred; the descriptor "loan tie-in" could have been used to cover items for which FATCO *did* have filed rates, such as electronic document download or document preparation, as described by Ms. Stevens.

Wilmot replies that overbreadth is not a grounds for denying certification. The Court concurs. If class members were charged properly filed rates or if they include *Kirk* class members who are barred from further recovery, they can be excluded if liability is established as to particular charges made to class members for which there was not a filed rate. *See Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 333 ("[A] class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery ..."); *Nicodemus v. Saint Francis Memorial Hospital* (2016) 3 Cal.App.5th 1200, 1214 (If class definition is overly inclusive those not entitled to recover can be eliminated from the class after liability is established).

The numerosity requirement has been met. However, as discussed more fully below, the overbreadth problem identified by FATCO gives rise to manageability

problems sufficient to convince the Court that the use of the class device here is not appropriate.

**B. A Well -Defined Community of Interest Is Not Shown As to All Claims**

The question to be resolved on a motion for class certification is whether the "theory of recovery advanced by the plaintiff is likely to prove amenable to class treatment." (*Alberts v. Aurora Behavioral Health Care* (2015) 241 Cal.App.4th 388, 407.) This requires determining whether there are questions common to the class that suggest liability can be determined on a classwide basis. In addition, courts are to examine the allegations and declarations, and to consider whether the resolution in a class action would be desirable and feasible. (*Brinker* at 1021-1022.)

All of the claims asserted by Wilmot are based on the theory that all of the fees charged as "loan tie-in fees" were improperly charged because they were not filed with the CDI. Wilmot asserts that all class members share a common question regarding whether FATCO was permitted to charge "a" loan tie-in fee before it filed a rate with the California Department of Insurance. She argues the issue is very narrow and well-defined: "was FATCO permitted to charge for the unfiled loan tie-in fee? If it was, then every class member will lose on this issue. But if it was not, every class member will win on this issue." (Motion at 9:12-15.)

**(1) Use of the Label "Loan Tie In Fee" Is Not Dispositive of Liability**

Despite this very clear-cut sounding statement, the issues are significantly more complex. All of the claims require a determination as to whether the charge denominated "loan tie-in fee" was a filed rate or not. Wilmot's analysis of the commonality issue assumes that all of the fees labeled "loan tie-in fees" were improper fees that were required to be, and had not been, filed with the CDI. Whether FATCO was permitted to charge for a particular loan tie-in fee, however, will not be resolved by simply looking at

the HUD-1 statements because the term was used to refer *both* to filed and unfiled fees. Each of the fees labeled as a "loan tie-in fee" and charged to each class member will need to be examined to determine whether it was a properly filed fee or not. This common question in the abstract ("Was FATCO permitted to charge for the unfiled loan tie-in fee?") requires an inquiry into the reasons the fee was charged and examination of the rates in question at the time of the charge to determine whether the fee was properly filed with the CDI or not. The analysis by Rausser makes clear that in over half the transactions in question the use of the term "loan tie-in fee" is *not* accompanied by any other fee. Thus, manual analysis of those files would be required to determine whether a party is or is not in the class and for whom there may be liability.

Given the thousands of escrows at issue, the "common question" is not shown to be amenable to a common answer. For this reason alone common issues do not predominate. *Cf. Hale v. Sharp Healthcare* (2014) 232 Cal.App.4th 50 (Class properly decertified where manual review of thousands of files necessary to determine who was in the class).

**(2) Because Materiality Varies There Is No Presumption of Reliance**

Complicating the inquiry is that the claims asserted include claims for fraud and deceit and constructive fraud. Reliance is an element of the fraud, constructive fraud, and CLRA claims. *See Cohen v. DirectTV, Inc.* (2009) 178 Cal. App. 4th 966, 981; CACI 1907. The breach of fiduciary duty, unjust enrichment, CLRA, and UCL claims derive from the fraud claim.

Wilmot's allegation is that the First American Defendants "misrepresented that they were legally authorized to charge $125 for a loan tie-in fee. This misrepresentation was made to plaintiff Wilmot on or about January 30, 2004, at the time plaintiff Wilmot's transaction was consummated. . . . Defendants communicated their false and fraudulent

representations regarding the loan tie-in fee to plaintiffs . . . through closing documents including, but not limited to, the documents attached hereto as Exhibits 1, 2, 6 and 7." (TAC, ¶59.) Further, Wilmot alleges that "Defendants misrepresented, omitted, concealed, and/or failed to disclose the above matters with knowledge that such conduct would deceive plaintiffs and members of the class, and with the intent that they be so deceived. Plaintiffs and members of the class actually and justifiably relied on defendants' misrepresentations, omissions, concealment, and/or failure to disclose." (Id. at ¶63.) As a result of such fraud, plaintiffs and members of the class were damaged. (Id. at ¶64.)

Wilmot's theory is that the fraud and misrepresentation cases can be uniformly tried because the HUD-1 statements all contain the same *implied* misrepresentation (i.e. that the fees charged were properly filed) and that there is a legal presumption of reliance on same by all class members. She relies upon *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355 and *Steroid Hormone Product Cases* (2010) 181 Cal.App.4th 145 (*Steroid Hormone*).

In *Occidental Land* purchasers of real property in a planned development were required to read and sign a Final Subdivision Public Report that represented property owners would be assessed $12.99 per lot for maintenance of the common areas and facilities. The actual cost was $40 per lot, something the defendant concealed until some time later. In upholding an order certifying the class the *Occidental Land* court explained that, "an inference of reliance arises if a material false representation was made to persons whose acts thereafter were consistent with reliance upon the representation." Id. at 363, citing *Vasquez v. Superior Court* (1971) 4 Cal.3d 800 (*Vasquez*).

Before a presumption can arise under *Vasquez, Occidental Land,* and their progeny, including *Steriod Hormone*, it must be shown that the alleged misrepresentation was material. " 'A misrepresentation of fact is material if it induced the plaintiff to alter his position to his detriment. [Citation.] Stated in terms of reliance, materiality means that without the misrepresentation, the plaintiff would not have acted as he did. [Citation.]" *Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 668 citing *Lacher v. Superior Court* (1991) 230 Cal.App.3d 1038, 1049. Or, as the *Steroid Hormone* court stated: "Materiality of the alleged misrepresentation generally is judged by a 'reasonable man' standard. In other words, a misrepresentation is deemed material 'if "'a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question.'" In *Vasquez* materiality was shown by the fact that the consumers were required to verify that they had read the statements in question. In *Steroid Hormone* defendants allegedly sold a product that was illegal to possesss or own, which the Court found was a material fact because a reasonable person would not knowingly commit a criminal act. *Steroid Hormone* at 157.

There is no similar common ***material*** statement or omission shown here. Plaintiffs' theory is that the class members impliedly were told in the HUD-1 statement that the loan-tie in fee was *properly* charged and that this fact was material. The evidence is that loan tie-in fees are charged by both escrow companies regulated by the DIC and IEC who are not so regulated. Thus, for the fact to be material it would be required to be shown that individual class members used FATCO (a regulated escrow company) as opposed to an IEC, who could have charged the same (or greater) fee and that the fact of regulation was a reason the consumer elected to use FATCO for his or her escrow.

The evidence before the Court is to the effect that home purchasers choose a particular escrow agent for a variety of reasons: their realtor recommends the agent; the seller prefers the agent; and the like. Here, the unrefuted evidence is that plaintiff Wilmot used FATCO because it was the seller's preferred escrow company but that her realtor (her cousin) would have preferred an unregulated IEC. (Ex. P at 112:10-117:22; 115:17-116:5; 101:16-20; 74-77.) Plaintiff Munro's seller selected FATCO to handle the escrow although Munro (an insurance agent) preferred using an IEC because they referred business to him (Ex. C, Munro Depo. At 141: 1-142: 13.) There is no showing that Wilmot or Munro or any other class member chose FATCO as an escrow agent because it was regulated by the CDI with filed loan tie-in fees as opposed to an escrow company that charged the same (or higher) fees but was not regulated by the CDI. In short, the evidence does not establish that the claimed omission was material as to all class members. As such, there is no presumption of reliance. Individual inquiries would be required as to the fraud and misrepresentation claims, as well as the breach of fiduciary duty, unjust enrichment, UCL and CLRA claims based on fraud. The class cannot be certified as to those claims. *Cf. In re Vioxx Class Cases* (2009) 180 Cal.App.4th 116, 134 (Class certification properly denied as to CRLA claim where cardiovascular risks of drug not material for all patients).

Looked at alternatively, even if Wilmot could establish a presumption of reliance, the presumption is rebuttable. FATCO has a right to show that as to any particular class member there was no reliance, either because they did not read the HUD-1 statement (and thus were not exposed to the omission) or because they did not attach any importance to the fact that the charged rate was or was not filed with the CDI. While Wilmot argues that defendants have no right to assert such a defense in a class action on an individual basis, the Court disagrees. The procedures in class actions cannot be used

1 to deprive any party of their due process rights. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S.
2 at 360. As the Court in *Hale* observed: "[W]hile courts should be procedurally
3 innovative in managing class actions, procedural innovation must conform to the
4 substantive rights of the parties, including defendant's right to litigate its affirmative
5 defenses." *Hale v. Sharp Healthcare, supra*, 232 Cal. App. 4th at 66.

6 **(3) The UCL Claim Cannot Go Forward Based on "Unlawful" or**
7 **"Unfair" Claims**

8 Wilmot argues that, at a minimum, her UCL claim is based on a theory that the
9 loan tie in fees charged were "unlawful," entitling the proposed class to restitution
10 without a further showing. She cites *In re Tobacco II Cases* (2009) 46 Cal. 4th 298, 320
11 (*Tobacco II*) and *Steroid Hormone* at 154-155. FATCO argues that this is not the law
12 and that Wilmot must show both that she has standing to bring a UCL claim and that all
13 class members suffered injury as a result of violation of the law, citing *Jenkins v.*
14 *JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, disapproved on other grounds
15 in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919. Otherwise, it argues,
16 the plaintiff class will obtain restitution for services that the class members required,
17 resulting in a windfall to class members.

18 Plaintiff's arguments conflate two different concepts standing and the right to
19 restitution. *Tobacco II* addressed the question of *standing* under the UCL. Since the
20 passage of Proposition 64 in 2004, the named class representative (Wilmot) has been
21 required to show that she suffered injury in fact and lost money or property "as a result
22 of" the unlawful or unfair act. Individual class members are not subject to such a
23 standing requirement. *Tobacco II* at 306; *Cohen v DIRECTV, Inc.* (2009) 178 Cal. App.
24 4th 966, 981.
25

The Supreme Court's decisions in *Clayworth v. Pfizer, Inc.* (2010) 49 Cal.4th 758 (*Clayworth*) and *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 336-337 (*Kwikset*) make clear that standing and the right to restitution are two different concepts with two different statutory requirements. Standing is governed by Business and Professions Code § 17204 and requires that an action under the UCL be brought "by a person who has suffered injury in fact and has lost money or property *as a result* of the unfair competition." (Emphasis added). *Kwikset* described that the standing requirement is two-fold. The *economic injury* prong of the standing requirements under Business and Professions Code section 17204 requires a showing that the named plaintiff "personally suffered" an economic injury. This can be done in "innumerable ways" because "[n]either the text of Proposition 64 nor the ballot arguments in support of it purport to define or limit the concept of 'lost money or property … .' " *Kwikset* at p. 323. The *Kwikset* court further held a plaintiff can satisfy the *causation* prong of the standing requirements under Business and Professions Code section 17204—i.e., show the "plaintiff's economic injury [occurred] 'as a result of' the unfair competition …"—by showing a " 'causal connection' " between the economic injury and the alleged unfair conduct. *Kwikset* p. 326.

Restitution is a potential *remedy* to the class governed by section 17203. The primary remedy under the UCL is injunctive relief. *Tobacco II* at 319. The statute, however, also permits the court to restore any interest in "money or property, real or personal, which *may have been acquired by means* of such unfair competition." (Emphasis added). "A restitution order against a defendant thus requires both that money or property have been lost by a plaintiff, on the one hand, and that it have been acquired by a defendant, on the other." *Kwikset* at 336-337.

FATCO argues that a plaintiff fails to satisfy the causation prong of the statute as he or she would have suffered "the same harm whether or not a defendant complied with the law," citing *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 521-522, and *Daro v. Superior Court* (2007) 151 Cal.App.4th 1079, 1099. In addition, it argues that she is not entitled to restitution on her own behalf or on behalf of the class because money or property was not acquired by it "by means of" a violation of the law or an unfair practice. FATCO posits that in either situation the Court must construct an "alternate reality" to determine what "would have happened" to determine whether plaintiff was harmed by the unlawful practice. *Cf. Kemply v. CashCall, Inc.* (N.D.Cal. March 16, 2016) 2016 U.S.Dist.LEXIS 34844. It argues that because IEC also charged "loan tie-in fees" Wilmot would have paid the fees in any event and thus plaintiff did not suffer injury "as a result" of the use of unfiled charges. It further contends that it did not acquire the class' money "by means of" unfair competition for the same reasons.

FATCO's standing arguments are misplaced. There is no evidence as to what amount would have paid had Wilmot used an IEC. As to the arguments regarding restitution, it is sufficient to note that contrary to Wilmot's argument, a restitutionary remedy does not necessarily follow from the finding of a violation of the law.[3] The

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[3] Plaintiff relies on language in *Steroid Hormone* at 154 for this proposition ("While a named plaintiff in a UCL class action now must show that he or she suffered injury in fact and lost money or property as a result of the unfair competition, once the named plaintiff meets that burden, no further individualized proof of injury or causation is required to impose restitution liability against the defendant in favor of absent class members.") The quoted language refers to establishing *liability* and should not be read to mean that restitution must be ordered. Such is but one available remedy, as *Kwikset* and *Clayworth*, decided after *Steroid Hormone*, make clear.

statute requires the defendant to have acquired money through an unlawful means. The "which may have been acquired standard" is "substantially less stringent than a reliance or 'but for' causation test." *Sevidal* at 924. The UCL "requires only that the plaintiff must once have had an ownership interest in the money or property acquired by the defendant *through* unlawful means." *Shersher v. Superior Court* (2007) 154 Cal. App. 4th 1491, 1500, emphasis added.

Nonetheless, a UCL class is not appropriate. As described above, determining who (if anyone) was charged an illegal or unfair rate will require determining what services were rendered for each member of the class and whether the rate was on file for same. Rausser opines that for the vast majority of customers there was a charge of both a "loan tie in fee" and some other arguably permitted fee, suggesting that the loan tie in fee had to be an unfiled fee. While this may be a fair inference of the data, First American would be permitted to refute it. Plaintiff does not show how this can be done on a classwide basis. In short, the same kind of manageability problem is raised by the UCL claim as in other causes of action, to wit, that the label "loan tie-in fee" does not, by definition make it an improper fee.

**C. The Adequacy and Typicality of the Class Representative and Counsel**

"The adequacy inquiry . . . serves to uncover conflicts of interest between named parties and the class they seek to represent. . . . To assure "adequate" representation, the class representative's personal claim must not be inconsistent with the claims of other members of the class. Similarly, the purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Johnson v. GlaxoSmithKline, Inc.* (2008) 166 Cal.App.4$^{th}$ 1497, 1509, internal quotes and citations omitted.

"Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought. The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct. Several courts have held that class certification is inappropriate where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation." *Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502, internal quotes and citations omitted.

FATCO argues that Wilmot is subject to a unique defense, i.e. that her claims are time-barred. Wilmot's real estate transaction closed January 30, 2004. (Third Amended Complaint, ¶59, and Exhibit 1.) Her lawsuit was filed April 26, 2007. The only claim with a four year statute of limitations is the UCL claim. Cal. Bus. & Prof. Code § 17208. The CLRA claim has a three year statute. Cal. Civ. Code §1783. A three year period applies to the fraud, constructive fraud, breach of fiduciary duty and unjust enrichment claim (to the extent the latter is predicated on fraud or constructive fraud). Cal. Civ. Code § 338.

Apparently recognizing this problem Wilmot relies on the doctrine of "delayed discovery." "In order to rely on the discovery rule for delayed accrual of a cause of action, '[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence.' (*McKelvey v. Boeing North American, Inc.* (1999) 74 Cal.App.4th 151, 160.)" *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 808.

The operative complaint alleges that at a social event in March, 2007, Wilmot met an attorney employed by The Bernheim Law Firm who told her he was working on a case

1 against First American; Wilmot thought she remembered that this was the name of the
2 company involved in her refinance, a fact she verified when she got home; she then
3 called The Bernheim Law Firm and came to learn of the wrongdoing alleged in this
4 complaint. Wilmot also alleges her inability to have made earlier discovery despite
5 reasonable diligence: Plaintiffs had no reason to believe that First American was charging
6 fees not authorized under the law; Defendants did not disclose that the law precluded
7 them from charging a loan tie-in fee; instead, by including the fees on the HUD-1, First
8 American represented to Plaintiffs and the class that it was entitled to charge for the fee;
9 Defendants intended that plaintiffs and class members rely on their misrepresentations.
10 Wilmot also alleges that FATCO distributed brochures called "About Your Escrow"
11 (Exhibit 3 to Third Amended Complaint) that misrepresent that their escrow fees are not
12 regulated by the state.

13 Wilmot's supplemental brief asserts that the statute of limitations is manageable
14 because FATCO has the burden of proving that there are class members who had
15 knowledge sufficient to trigger the statute of limitations and who therefore should have
16 filed earlier, and that even if this has to be tried it is subject to common proof. Generally,
17 the statute of limitations is an affirmative defense whose burden belongs to the defendant.
18 But where, as here, a pleading shows on its face that claims are time barred, it the
19 plaintiff's burden to "plead and prove" delayed discovery. Here, Wilmot has pled and
20 now will be required to prove delayed discovery as to her claim.

21 This raises problems as to both Wilmot's typicality and adequacy as a class
22 representative, and it raises issues as to manageability. Assuming that Wilmot
23 successfully proved delayed discovery, her proof would be individual. It would not
24 suffice as to other class members whose claims are barred but for successful proof of
25 delayed discovery. Plaintiff concedes that 6,553 transactions closed before April 25.

1 2003. Those customers are potentially time-barred as to all causes of action (5.6% of the
2 class)(See Rausser Supp. Dec. dated November 20, 2017 at ¶14). In addition, 31,837
3 (27.25%) of the transactions in question closed between April 25, 2003 and April 24,
4 2004. This means that nearly one third of the class (32.85%) are subject to individualized
5 inquiry regarding whether their claims (other than the UCL claim) are time-barred.

6 Plaintiff provides no feasible method of dealing with this issue. As FATCO points
7 out, these class members will relay different facts about when and how they discovered
8 their claims, and about whether they saw and/or relief on the About Your Escrow
9 brochure. Such individualized inquiry presents a manageability issue that dictates against
10 certification.

11 **D. Superiority of Class Action/Manageability**

12 Plaintiff argues that the Court should presume the case is manageable as a class
13 action and grant certification unless it is "clearly established" and "without dispute" that
14 there are issues of manageability, citing *Reyes v. Board of supervisors* (1987) 196 Cal.
15 App. 3d 1263, 1275. It is sufficient to note that the jurisprudence regarding class actions
16 has developed significantly since *Reyes* was decided and that our Supreme Court
17 instructed in 2014 that: "Trial courts must pay careful attention to manageability when
18 deciding whether to certify a class action. In considering whether a class action is a
19 superior device for resolving a controversy, the manageability of individual issues is just
20 as important as the existence of common questions uniting the proposed class. If the
21 court makes a reasoned, informed decision about manageability at the certification stage,
22 the litigants can plan accordingly and the court will have less need to intervene later to
23 control the proceedings." *Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1,
24 29.
25

1 To summarize, a class action trial would not be manageable here for four reasons.
2 First, although the class can be ascertained, a manual search of thousands of files would
3 be required to do so accurately. Second, as to no cause of action can liability be
4 established simply because class members were charged a fee labeled on the HUD-1 as
5 "loan tie-in fee." The reasons the fees were charged must be examined. Third, many of
6 the causes of action require a showing of reliance, an individualized inquiry. Finally,
7 Wilmot and many of the class members will be subject to individual inquiry to determine
8 whether their claims (other than the UCL claim) are time barred. The Court should not
9 here attempt to determine liability on a classwide basis in these circumstances.

10

11 **V. ORDER**

12

For the reasons stated above, the motion is DENIED.

13

14

15

16 Dated: 2/16/18

MAREN E. NELSON
17 Judge of the Superior Court

18

19

20

21 Documents Considered:

22 **Filed May 30, 2017**
Notice of Motion and Motion for Plaintiff Elizabeth Wilmot for Certification of a "Loan
23 Tie-In" Class (redacted/under seal and unredacted)
Declaration of Elizabeth Wilmot
24 Declaration of Steven Messner (redacted/under seal and unredacted)
Declaration of Michael Bidart
25 Declaration of Richard H. Friedman

Plaintiff's Request for Judicial Notice

**Filed July 14, 2017**
Defendant's Opposition to Plaintiff's Motion for Class Certification
Declaration of James Dufficy
Declaration of Kathy Stephens
Declaration of Linda Golden
Declaration of Jean O'Neill
Request for Judicial Notice

**Filed August 15, 2017**
Plaintiff Wilmot's Reply in Support of Class Certification of "Loan Tie-In" Class
Declaration of Steven Messner (redacted/under seal and unredacted)
Declaration of Dennis Aigner
Request for Judicial Notice in Support of Reply

**Filed September 29, 2017**
Plaintiff Wilmot's Supplemental Brief in Support of Class Certification

**Filed October 30, 2017**
Defendant's Supplemental Brief in Support of Opposition to Plaintiff's Motion

**Filed November 20, 2017**
Wilmot's Reply to Defendant's Response to Supplemental Brief in Support of Motion
Declaration of Steven Messner
Supplemental Reply Declaration of Gordon Rausser, Ph.D. (redacted/under seal and unredacted)

**Filed November 21, 2017**
Corrected Wilmot's Reply to Defendant's Response to Supplemental Brief
Notice of Errata re Wilmot's Reply to Defendant's Response to Supplemental Brief
Notice of Errata re Amended Supplemental Declaration of Gordon Rausser, Ph.D.
Amended Supplemental Reply Declaration of Gordon Rausser, Ph.D. (redacted and unredacted)

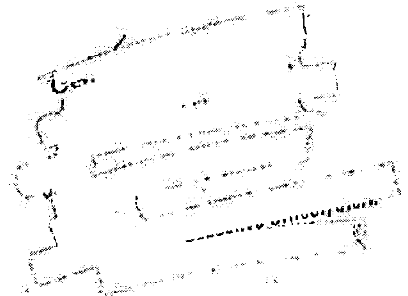
# EXHIBIT B

DENTONS US LLP
Ronald D. Kent (SBN 100717)
Joel D. Siegel (SBN 155581)
Paul M. Kakuske (SBN 190911)
Judith Shophet Sidkoff (SBN 267048)
601 South Figueroa Street, Suite 2500
Los Angeles, California 90017-5704
Tel: (213) 623-9300 / Fax: (213) 623-9924

DENTONS US LLP
Sonia R. Martin (SBN 191148)
One Market Plaza
Spear Tower, 24th Floor
San Francisco, California 94105-1101
Tel: (415) 267-4000 / Fax: (415) 267-4198

DENTONS US LLP
Elizabeth T. Ferrick (*Pro Hac Vice*)
211 North Broadway, Suite 3000
St. Louis, Missouri 63102
Tel: (314) 241-1800 / Fax: (314) 259-5959

Attorneys for Defendants
First American Title Company and
First American Title Insurance Company



FILED
LOS ANGELES SUPERIOR COURT
AUG 30 2017
BY N. Navarro Deputy
NANCY NAVARRO

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

| | |
|---|---|
| FIRST AMERICAN TITLE COMPANY CASES<br><br>*Wilmot v. First American Title Ins. Co.* (Los Angeles County Superior Court No. BC370141)<br><br>*Kirk v. First American Title Co.* (Los Angeles County Superior Court No. BC372797)<br><br>*Sjobring v. First American Title Co.* (Los Angeles County Superior Court No. BC329482)<br><br>*Kaufman v. First American Title Co.* (Los Angeles County Superior Court No. BC382826) | JCCP Case No. 4751<br><br>Hon. Maren E. Nelson<br><br>~~DEFENDANT'S RESPONSE TO PLAINTIFF WILMOT'S MOTION TO STRIKE AND EVIDENCE OBJECTIONS; DECLARATION OF JOEL D. SIEGEL IN SUPPORT THEREOF~~ RULINGS ON OBJECTIONS<br><br>Date: August 30, 2017<br>Time: 2:30 p.m.<br>Dept.: 307<br><br>Rulings on objections<br><br>Maren E. Nelson<br>8/30/17 |

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

Defendant First American Title Company ("First American") files these responses to Plaintiff Elizabeth Wilmot's Objections to the following evidence submitted in support of First American's Opposition to Plaintiff's Motion for Class Certification: (1) the 2017 Declaration of Kathy Stephens; (2) the Declaration of James Dufficy; and (3) the 2011 Declaration of Jean O'Neill.

Plaintiff's motions to strike these declarations are duplicative of the arguments and grounds advanced in each of the individual objections to the same material; accordingly, First American incorporates its responses to the individual objections in opposition to the respective motions to strike the declarations of Kathy Stephens, James Dufficy, and Jean O'Neill.

## OBJECTIONS TO DECLARATION OF KATHY STEPHENS

### Objection No. 1

**Material objected to:** Stephens Declaration Paragraph 5, lines 8-12. "I am aware of no coordinated practice or training in place prior to 2007 that mandated escrow officers to use certain verbiage or reference specific rate manual sections when entering fee descriptions in FAST Individual escrow officers often used terminology that would be familiar to the lenders, borrowers, buyers and/or sellers who would be reviewing HUD-1 Settlement Statements and/or Settlement Statements."

**Grounds for objection:** Irrelevant. (Cal. Evid. Code §§ 210, 350, 351.) Lacks of [sic] foundation. (Cal. Evid. Code § 702.) Inadmissible speculation. (Cal. Evid. Code § 403(a)(3).)

**Defendant's Response:** Ms. Stephens has personal knowledge of the material objected to from her extensive experience training escrow officers for First American Title Insurance Company ("FA Title Ins."). She has been a Senior Escrow Advisor since 2012, and sets the governance of escrow transactions for escrow staff. (Stephens Dec. ¶¶ 2-3; Declaration of Joel D. Siegel, attached hereto ("Siegel Dec.") ¶ 7 & Ex. F (Stephens Depo. at 46:7-47:7).) She previously worked as an FA Title Ins. California Training Manager, in which capacity she trained personnel on escrow practices and procedures, including applicable fees to charge. (Stephens Dec. ¶ 3.; Stephens Depo. at 40:11-22, 48:21-50:6.) She also served as both an FA Title Ins. Escrow Manager and Regional Escrow Manager for Central California; her responsibilities included developing title and escrow processes

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

1 and conducting training on escrow operations. (Stephens Dec. at ¶ 2-3.) Thus, her testimony is not
2 lacking in foundation or speculative.
3 Cal. Evid. Code § 403(a)(3) is inapplicable because Ms. Stephens' testimony is not based on a
4 preliminary fact that is the authenticity of a writing.
5 The material objected to is relevant because it relates to the various loan tie-in and other
6 escrow services provided by First American escrow officers, how those services are entered and
7 denominated in the FAST system, and the limitations of the FAST system for ascertaining liability
8 and/or damages. Plaintiff's objection to Ms. Stephens' use of the term "often" to describe the
9 frequency with which escrow officers used certain terminology in the FAST system, if accepted, at
10 best goes to the weight of her testimony and not its admissibility.
11 Court's Ruling on Objection 1: Sustained: ________ Overruled: ✓
12 **Objection No. 2**
13 **Material objected to:** Stephens Declaration Paragraph 6, lines 17-24. "As a result, in
14 transactions in which a borrower is obtaining a loan, First American often must provide lenders with
15 fee quotes, send lenders copies of contracts and preliminary reports, review and comply with lenders'
16 instructions and conditions, facilitate the signing of loan documents, package and send loan
17 documents to lenders, provide lenders with additional documents required for funding, e.g., estimated
18 HUD-1 settlement statements or draft Closing Disclosures, coordinate the funding of loans with
19 lenders, balance lenders' wired funds with estimated charges, abstract deeds of trust for recording,
20 and/or order loan title insurance policies as instructed by lenders."
21 **Grounds for objection:** Lack of foundation. (Cal. Evid. Code § 702.) Inadmissible
22 speculation. (Cal. Evid. Code § 403(a)(3).)
23 **Defendant's Response:** Plaintiff does not challenge the relevancy of this Paragraph of Ms.
24 Stephen's Declaration, only that it purportedly lacks foundation and violates Evidence Code Section
25 403 ("Determination of foundational and other preliminary facts . . ."). But Ms. Stephens has
26 personal knowledge of the material objected to from her extensive experience training escrow
27 officers for First American Title Insurance Company ("FA Title Ins."). She has been a Senior
28 Escrow Advisor since 2012, and sets the governance of escrow transactions for escrow staff.

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

(Stephens Dec. ¶¶ 2-3; Siegel Dec. ¶ 7 & Ex. G (Stephens Depo. at 46:7-47:7).) She previously worked as an FA Title Ins. California Training Manager, in which capacity she trained personnel on escrow practices and procedures, including applicable fees to charge. (Stephens Dec. ¶ 3.; Stephens Depo. at 40:11-22, 48:21-50:6.) She also served as both an FA Title Ins. Escrow Manager and Regional Escrow Manager for Central California; her responsibilities included developing title and escrow processes and conducting training on escrow operations. (Stephens Dec. ¶¶ 2-3.) Thus, her testimony is not lacking in foundation or speculative.

Cal. Evid. Code § 403(a)(3) is inapplicable because Ms. Stephens' testimony is not based on a preliminary fact that is the authenticity of a writing.

Plaintiff's objection to Ms. Stephens' use of the term "often" to describe the frequency with which First American must provide various services to lenders, if accepted, at best goes to the weight of her testimony and not its admissibility.

Court's Ruling on Objection 2: Sustained: ________ Overruled: ✓

**Objection No. 3**

**Material objected to:** Stephens Declaration Paragraph 7: "Escrow personnel often use the term 'loan tie-in' to refer to such charges."

**Grounds for objection:** Lack of foundation. (Cal. Evid. Code § 702.) Inadmissible speculation. (Cal. Evid. Code § 403(a)(3).)

**Defendant's Response:** Plaintiff does not challenge the relevancy of this Paragraph of Ms. Stephen's Declaration, only that it purportedly lacks foundation and violates Evidence Code Section 403 ("Determination of foundational and other preliminary facts . . ."). But Ms. Stephens has personal knowledge of the material objected to from her extensive experience training escrow officers for First American Title Insurance Company ("FA Title Ins."). She has been a Senior Escrow Advisor since 2012, and sets the governance of escrow transactions for escrow staff. (Stephens Dec. ¶¶ 2-3; Siegel Dec. ¶ 7 & Ex. F (Stephens Depo. at 46:7-47:7).) She previously worked as an FA Title Ins. California Training Manager, in which capacity she trained personnel on escrow practices and procedures, including applicable fees to charge. (Stephens Dec. ¶ 3.; Siegel Dec. ¶ 7 & Ex. F (Stephens Depo. at 40:11-22, 48:21-50:6).) She also served as both an FA Title Ins.

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Escrow Manager and Regional Escrow Manager for Central California; her responsibilities included developing title and escrow processes and conducting training on escrow operations. (Stephens Dec. at ¶ 2-3.) Thus, her testimony is not lacking in foundation or speculative.

Cal. Evid. Code § 403(a)(3) is inapplicable because Ms. Stephens' testimony is not based on a preliminary fact that is the authenticity of a writing.

Plaintiff's objection to Ms. Stephens' use of the term "often" to describe the frequency with which escrow personnel used the term "loan tie-in" to refer to such charges, if accepted, at best goes to the weight of her testimony and not its admissibility.

Court's Ruling on Objection 3: Sustained: ________ Overruled: ✓

## OBJECTIONS TO DECLARATION OF JAMES DUFFICY

### Objection No. 4

**Material objected to:** Dufficy declaration Paragraph 3: "California escrow companies began to charge a loan tie-in fee in a limited number of transactions in the 1990s. This fee covered the added cost incurred by escrow companies for processing paperwork related to the conveyance of title to real property that had historically been done by lenders."

**Grounds for objection:** Lack of personal knowledge. (Cal. Evid. Code § 702(a).) Lack of foundation. (Cal. Evid. Code § 702.) Hearsay. (Cal. Evid. Code § 1200.)

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1 **Defendant's Response:** Plaintiff does not challenge the relevancy of Mr. Dufficy's
2 testimony, only that it purportedly lacks foundation and constitutes hearsay. But Mr. Dufficy has
3 personal knowledge of the material objected to from over 14 years of experience working for FA Tit.
4 Ins., from 1994 to 2008, a period encompassing plaintiff's proposed class period (January 1, 2003 to
5 April 1, 2007). (Dufficy Dec. ¶ 1.) Mr. Dufficy was also FA Tit. Ins.'s Regulatory Counsel for eight
6 years, from 1997 to 2005. (Dufficy Dec. ¶ 1.) As part of his job responsibilities he regularly
7 communicated with the CDI on behalf of FA Title Ins., and often negotiated resolutions and
8 settlements with CDI when disputes arose. (*Id.* ¶ 2.) Mr. Dufficy confirmed at his deposition that his
9 job responsibilities included assisting and advising escrow officers with issues elevated to counsel,
10 and overseeing a division that performed escrow services. Thus, despite Plaintiff's protests, Mr.
11 Dufficy has testified to extensive experience with escrow companies and escrow practices. (Siegel
12 Dec. ¶ 8 & Ex. G (Dufficy Depo. at 12:4-13; 21:8-15).) He was also designated First American's
13 Person Most Qualified to testify regarding First American's rate "filings with the [CDI] from January
14 1, 1995 through the present, relating to whether and how much [First American] can charge for
15 escrow related services" and has testified at length about loan tie-in fees and attendant escrow fees
16 and services. Moreover, Plaintiff quotes from Mr. Dufficy's 2007 deposition testimony, but
17 conveniently deletes the remainder of his deposition answer, reflecting his personal knowledge and
18 understanding of how "miscellaneous charges" were treated in First American's rate filings at that
19 time. (*See* Pf.'s Objections, Ex. 15 (11/9/07 Dufficy Depo. at 84:12-15) ("My job didn't involve rate
20 filings, but it was my understanding that miscellaneous charge was excluded . . .").) That 2007
21 deposition testimony does not contradict the foundation set forth in Mr. Dufficy's declaration.
22 His testimony is not hearsay because he is not offering statements made by someone else, but
23 describing escrow company practices of which he is personally familiar.
24 Court's Ruling on Objection 4: Sustained: ________ Overruled: ✓________
25 **Objection No. 5**
26 **Material objected to:** Dufficy declaration Paragraph 4: "This work included reviewing
27 lender instructions, reviewing lender paperwork with buyers, obtaining verifications (e.g., of
28 borrower employment), itemizing costs in a specific way, providing additional certified copies of

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1 deeds of trust, expedited processing to lock-in a specific mortgage rate, providing proof of escrow
2 license and insurance, and ensuring that the property was duly insured to the lender's specification
3 (e.g., owner had property and flood insurance), and other tasks formerly handled by lenders."

4 **Grounds for objection:** Lack of personal knowledge. (Cal. Evid. Code § 702(a).) Lack of
5 foundation. (Cal. Evid. Code § 702.) Hearsay. (Cal. Evid. Code § 1200.)

6 **Defendant's Response:** Plaintiff does not challenge the relevancy of Mr. Dufficy's
7 testimony, only that it purportedly lacks foundation and constitutes hearsay. But Mr. Dufficy has
8 personal knowledge of the material objected to from over 14 years of experience working for FA Tit.
9 Ins., from 1994 to 2008, a period encompassing plaintiff's proposed class period (January 1, 2003 to
10 April 1, 2007). (Dufficy Dec. ¶ 1.) Mr. Dufficy was also FA Tit. Ins.'s Regulatory Counsel for eight
11 years, from 1997 to 2005. (Dufficy Dec. ¶ 1.) As part of his job responsibilities he regularly
12 communicated with the CDI on behalf of FA Title Ins., and often negotiated resolutions and
13 settlements with CDI when disputes arose. (*Id.* ¶ 2.) Mr. Dufficy confirmed at his deposition that his
14 job responsibilities included assisting and advising escrow officers with issues elevated to counsel,
15 and overseeing a division that performed escrow services. Thus, despite Plaintiff's protests, Mr.
16 Dufficy has testified to extensive experience with escrow companies and escrow practices. (Siegel
17 Dec. ¶ 8 & Ex. G (Dufficy Depo. at 12:4-13; 21:8-15).) He was also designated First American's
18 Person Most Qualified to testify regarding First American's rate "filings with the [CDI] from January
19 1, 1995 through the present, relating to whether and how much [First American] can charge for
20 escrow related services" and has testified at length about loan tie-in fees and attendant escrow fees
21 and services. Moreover, Plaintiff quotes from Mr. Dufficy's 2007 deposition testimony, but
22 conveniently deletes the remainder of his deposition answer, reflecting his personal knowledge and
23 understanding of how "miscellaneous charges" were treated in First American's rate filings at that
24 time. (*See* Pf.'s Objections, Ex. 15 (11/9/07 Dufficy Depo. at 84:12-15) ("My job didn't involve rate
25 filings, but it was my understanding that miscellaneous charge was excluded . . .").) That 2007
26 deposition testimony does not contradict the foundation set forth in Mr. Dufficy's declaration.
27
28

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His testimony is not hearsay because he is not offering statements made by someone else, but describing escrow company practices of which he is personally familiar.

Court's Ruling on Objection 5: Sustained: ________ Overruled: ✓

**Objection No. 6**

**Material objected to:** Dufficy declaration Paragraph 5: "Throughout the 1990s, there was no uniform practice of lenders as to whether they would avail themselves of loan tie-in services provided by escrow companies."

**Grounds for objection:** Lack of personal knowledge. (Cal. Evid. Code § 702(a).) Lack of foundation. (Cal. Evid. Code § 702.) Hearsay. (Cal. Evid. Code § 1200.)

**Defendant's Response:** Plaintiff does not challenge the relevancy of Mr. Dufficy's testimony, only that it purportedly lacks foundation and constitutes hearsay. But Mr. Dufficy has personal knowledge of the material objected to from over 14 years of experience working for FA Tit. Ins., from 1994 to 2008, a period encompassing plaintiff's proposed class period (January 1, 2003 to April 1, 2007). (Dufficy Dec. ¶ 1.) Mr. Dufficy was also FA Tit. Ins.'s Regulatory Counsel for eight years, from 1997 to 2005. (Dufficy Dec. ¶ 1.) As part of his job responsibilities he regularly communicated with the CDI on behalf of FA Title Ins., and often negotiated resolutions and settlements with CDI when disputes arose. (*Id.* ¶ 2.) Mr. Dufficy confirmed at his deposition that his job responsibilities included assisting and advising escrow officers with issues elevated to counsel, and overseeing a division that performed escrow services. Thus, despite Plaintiff's protests, Mr. Dufficy has testified to extensive experience with escrow companies and escrow practices. (Siegel Dec. ¶ 8 & Ex. G (Dufficy Depo. at 12:4-13; 21:8-15).) He was also designated First American's Person Most Qualified to testify regarding First American's rate "filings with the [CDI] from January 1, 1995 through the present, relating to whether and how much [First American] can charge for escrow related services" and has testified at length about loan tie-in fees and attendant escrow fees and services. Moreover, Plaintiff quotes from Mr. Dufficy's 2007 deposition testimony, but conveniently deletes the remainder of his deposition answer, reflecting his personal knowledge and understanding of how "miscellaneous charges" were treated in First American's rate filings at that




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1 time. (*See* Pf.'s Objections, Ex. 15 (11/9/07 Dufficy Depo. at 84:12-15) ("My job didn't involve rate
2 filings, but it was my understanding that miscellaneous charge was excluded . . .").) That 2007
3 deposition testimony does not contradict the foundation set forth in Mr. Dufficy's declaration.
4 His testimony is not hearsay because he is not offering statements made by someone else, but
5 describing escrow company practices of which he is personally familiar.
6 Court's Ruling on Objection 6: Sustained: ________ Overruled: ✓________
7 **Objection No. 7**
8 **Material objected to:** Dufficy declaration Paragraph 6: "Throughout the 2000s, lenders
9 continued to delegate more and more services which they had traditionally provided onto escrow
10 companies in California in more and more transactions."
11 **Grounds for objection:** Lack of personal knowledge. (Cal. Evid. Code § 702(a).) Lack of
12 foundation. (Cal. Evid. Code § 702.) Hearsay. (Cal. Evid. Code § 1200.)
13 **Defendant's Response:** Plaintiff does not challenge the relevancy of Mr. Dufficy's
14 testimony, only that it purportedly lacks foundation and constitutes hearsay. But Mr. Dufficy has
15 personal knowledge of the material objected to from over 14 years of experience working for FA Tit.
16 Ins., from 1994 to 2008, a period encompassing plaintiff's proposed class period (January 1, 2003 to
17 April 1, 2007). (Dufficy Dec. ¶ 1.) Mr. Dufficy was also FA Tit. Ins.'s Regulatory Counsel for eight
18 years; from 1997 to 2005. (Dufficy Dec. ¶ 1.) As part of his job responsibilities he regularly
19 communicated with the CDI on behalf of FA Title Ins., and often negotiated resolutions and
20 settlements with CDI when disputes arose. (*Id.* ¶ 2.) Mr. Dufficy confirmed at his deposition that his
21 job responsibilities included assisting and advising escrow officers with issues elevated to counsel,
22 and overseeing a division that performed escrow services. Thus, despite Plaintiff's protests, Mr.
23 Dufficy has testified to extensive experience with escrow companies and escrow practices. (Siegel
24 Dec. ¶ 8 & Ex. G (Dufficy Depo. at 12:4-13; 21:8-15).) He was also designated First American's
25 Person Most Qualified to testify regarding First American's rate "filings with the [CDI] from January
26 1, 1995 through the present, relating to whether and how much [First American] can charge for
27 escrow related services" and has testified at length about loan tie-in fees and attendant escrow fees
28 and services. Moreover, Plaintiff quotes from Mr. Dufficy's 2007 deposition testimony, but

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1 conveniently deletes the remainder of his deposition answer, reflecting his personal knowledge and
2 understanding of how "miscellaneous charges" were treated in First American's rate filings at that
3 time. (*See* Pf.'s Objections, Ex. 15 (11/9/07 Dufficy Depo. at 84:12-15) ("My job didn't involve rate
4 filings, but it was my understanding that miscellaneous charge was excluded . . .").) That 2007
5 deposition testimony does not contradict the foundation set forth in Mr. Dufficy's declaration.

6 His testimony is not hearsay because he is not offering statements made by someone else, but
7 describing escrow company practices of which he is personally familiar.

8 Court's Ruling on Objection 7: Sustained: ________ Overruled: ✓

9 **Objection No. 8**

10 **Material objected to:** Dufficy declaration Paragraph 7: "Escrow companies responded by
11 charging various fees for processing this additional paperwork and related work. There was no
12 uniform name for such fees. One such name was a "loan tie-in, fee. Other fees for such work, or part
13 of such work, included a "document processing fee," a "concurrent junior mortgage escrow fee," and
14 a "document download fee." With the exception of the loan tie-in fee, all of these fees were included
15 in FA Title Ins. Co. 's Schedule of Fees, effective April 18, 2005."

16 **Grounds for objection**: Lack of personal knowledge. (Cal. Evid. Code § 702(a).) Lack of
17 foundation. (Cal. Evid. Code § 702.) Hearsay. (Cal. Evid. Code § 1200.)

18 **Defendant's Response:** Plaintiff does not challenge the relevancy of Mr. Dufficy's
19 testimony, only that it purportedly lacks foundation and constitutes hearsay. But Mr. Dufficy has
20 personal knowledge of the material objected to from over 14 years of experience working for FA Tit.
21 Ins., from 1994 to 2008, a period encompassing plaintiff's proposed class period (January 1, 2003 to
22 April 1, 2007). (Dufficy Dec. ¶ 1.) Mr. Dufficy was also FA Tit. Ins.'s Regulatory Counsel for eight
23 years, from 1997 to 2005. (Dufficy Dec. ¶ 1.) As part of his job responsibilities he regularly
24 communicated with the CDI on behalf of FA Title Ins., and often negotiated resolutions and
25 settlements with CDI when disputes arose. (*Id.* ¶ 2.) Mr. Dufficy confirmed at his deposition that his
26 job responsibilities included assisting and advising escrow officers with issues elevated to counsel,
27 and overseeing a division that performed escrow services. Thus, despite Plaintiff's protests, Mr.
28 Dufficy has testified to extensive experience with escrow companies and escrow practices. (Siegel

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Dec. ¶ 8 & Ex. G (Dufficy Depo. at 12:4-13; 21:8-15).) He was also designated First American's Person Most Qualified to testify regarding First American's rate "filings with the [CDI] from January 1, 1995 through the present, relating to whether and how much [First American] can charge for escrow related services" and has testified at length about loan tie-in fees and attendant escrow fees and services. Moreover, Plaintiff quotes from Mr. Dufficy's 2007 deposition testimony, but conveniently deletes the remainder of his deposition answer, reflecting his personal knowledge and understanding of how "miscellaneous charges" were treated in First American's rate filings at that time. (*See* Pf.'s Objections, Ex. 15 (11/9/07 Dufficy Depo. at 84:12-15) ("My job didn't involve rate filings, but it was my understanding that miscellaneous charge was excluded . . .").) That 2007 deposition testimony does not contradict the foundation set forth in Mr. Dufficy's declaration.

His testimony is not hearsay because he is not offering statements made by someone else, but describing escrow company practices of which he is personally familiar.

Court's Ruling on Objection 8: Sustained: ________ Overruled: ___✓___

**Objection No. 9**

**Material objected to:** Dufficy declaration Paragraph 8: "The CDI conducted a Market Conduct Exam of FA Title Ins. Co. "as of October 26, 2004" (the "2004 MCE") and on December 29, 2006 it issued a confidential report providing its findings related to the 2004 MCE (the "2006 Report"). A true and correct copy of the relevant portion of the 2006 Report, redacted to protect confidentiality, is attached hereto as Exhibit A."

**Grounds for objection:** Lack of personal knowledge. (Cal. Evid. Code § 702(a).) Lack of foundation. (Cal. Evid. Code § 702.) Hearsay. (Cal. Evid. Code § 1200.)

**Defendant's Response:** Incredibly, Plaintiff objects, on foundational grounds, to a paragraph from Mr. Dufficy's declaration that in effect merely references to and quotes from the 2006 Report that is attached as Exhibit A to his Declaration. But the authenticity of that 2006 Report (and thus the foundation for Mr. Dufficy's testimony) cannot be seriously disputed. In fact, at Plaintiff Counsel's request, that Report was admitted into evidence in the related *Kirk* Action (*see* Siegel Dec., Ex. A (12/11/13 Kirk Trial Tr. at 38:2-6) & Ex. B (12/27/13 *Kirk* Trial Tr. at 167:11-21)), and has been introduced at multiple depositions, without objection to the document's authenticity. (*See, e.g.*,

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1 Siegel Dec. ¶ 5 & Ex. D (6/3/11 Barker Depo. at 62:5-10).) Mr. Dufficy's Declaration further
2 authenticates the 2006 Report, based on his personal knowledge and experience (*see* First American's
3 responses to Plaintiff's Objections Nos. 4 to 8, *supra*) and is not hearsay. This objection is baseless.
4 Court's Ruling on Objection 9: Sustained: ________ Overruled: ✓

5 **Objection No. 10**

6 **Material objected to:** Dufficy declaration Paragraph 9: "The 2006 Report concluded that
7 FA Title Ins. Co. 'incorrectly applied its filed title and escrow rates' by charging an 'unified loan tie-
8 in fee' on certain escrow transactions. *See* 2006 Report at 21."

9 **Grounds for objection:** Lack of personal knowledge. (Cal. Evid. Code § 702(a).) Lack of
10 foundation. (Cal. Evid. Code § 702.) Hearsay. (Cal. Evid. Code § 1200.)

11 **Defendant's Response**: Incredibly, Plaintiff objects, on foundational grounds, to a paragraph
12 from Mr. Dufficy's declaration that in effect merely references to and quotes from the 2006 Report
13 that is attached as Exhibit A to his Declaration. But the authenticity of that 2006 Report (and thus the
14 foundation for Mr. Dufficy's testimony) cannot be seriously disputed. In fact, at Plaintiff Counsel's
15 request, that Report was admitted into evidence in the related *Kirk* Action (*see* Siegel Dec., Ex. A
16 (12/11/13 *Kirk* Trial Tr. at 38:2-6) & Ex. B (12/27/13 *Kirk* Trial Tr. at 167:11-21), and has been
17 introduced at multiple depositions, without objection to the document's authenticity. (*See, e.g.*,
18 Siegel Dec. ¶ 5 & Ex. D (6/3/11 Barker Depo. at 62:5-10).) Mr. Dufficy's Declaration further
19 authenticates the 2006 Report, based on his personal knowledge and experience (*see* First American's
20 responses to Plaintiff's Objections Nos. 4 to 8, *supra*) and is not hearsay. This objection is baseless.
21 Court's Ruling on Objection 10: Sustained: ________ Overruled: ✓

22 **Objection No. 11**

23 **Material objected to:** Dufficy declaration Paragraph 10: "Contemporaneous with the 2006
24 Report, FA Title Ins. Co. reached a settlement with the CDI by which it resolved the CDI's allegation
25 regarding loan tie-in fees, as well as numerous other allegations. A true and correct copy of the
26 'Stipulation and Waiver' memorializing this settlement is attached hereto as Exhibit B."

27 **Grounds for objection:** Lack of personal knowledge. (Cal. Evid. Code § 702(a).) Lack of
28 foundation. (Cal. Evid. Code § 702.) Hearsay. (Cal. Evid. Code § 1200.)

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1 **Defendant's Response:** Incredibly, Plaintiff objects, on foundational grounds, to a paragraph
2 from Mr. Dufficy's declaration that in effect merely references to and quotes from the "Stipulation
3 and Waiver" that is attached as Exhibit B to his Declaration. But the authenticity of that Stipulation
4 and Waiver (and thus the foundation for Mr. Dufficy's testimony) cannot be seriously disputed. In
5 fact, at Plaintiff Counsel's request, that document was admitted into evidence in the related *Kirk*
6 Action (*See* Siegel Dec., Ex. A (12/11/13 *Kirk* Trial Tr. at 59:1-7)), and has been introduced at
7 multiple depositions, without objection to the document's authenticity. (*See, e.g.*, Siegel Dec. ¶ 4 &
8 Ex. C (10/4/10 Kemp Depo. at 55:5-56:14).) Mr. Dufficy's Declaration further authenticates the
9 Stipulation and Waiver, based on his personal knowledge and experience (*see* First American's
10 responses to Plaintiff's Objections Nos. 4 to 8, *supra*) and is not hearsay. This objection is baseless.
11 Court's Ruling on Objection 11: Sustained: ________ Overruled: ✓
12 **Objection No. 12**
13 **Material objected to:** Paragraph 11: "Pursuant to the Stipulation and Waiver, FA Title Ins.
14 Co. agreed to pay $10,000,000. The Stipulation and Waiver 'resolve[ d] fully all matters arising out
15 of the [2004 MCE],' including the allegation that FA Title Ins. Co. 'incorrectly applied its filed title
16 and escrow rates' in that it charged an 'unfiled loan tie-in fee' on certain escrow transactions."
17 **Grounds for objection:** Lack of personal knowledge. (Cal. Evid. Code § 702(a).) Lack of
18 foundation. (Cal. Evid. Code § 702.) Hearsay. (Cal. Evid. Code § 1200.)
19 **Defendant's Response:** Incredibly, Plaintiff objects, on foundational grounds, to a paragraph
20 from Mr. Dufficy's declaration that in effect merely references to and quotes from the "Stipulation
21 and Waiver" that is attached as Exhibit B to his Declaration. But the authenticity of that Stipulation
22 and Waiver (and thus the foundation for Mr. Dufficy's testimony) cannot be seriously disputed. In
23 fact, at Plaintiff Counsel's request, that document was admitted into evidence in the related *Kirk*
24 Action (*See* Siegel Dec., Ex. A (12/11/13 *Kirk* Trial Tr. at 59:1-7)), and has been introduced at
25 multiple depositions, without objection to the document's authenticity. (*See, e.g.*, Siegel Dec. ¶ 4 &
26 Ex. C (10/4/10 Kemp Depo. at 55:5-56:14).) Mr. Dufficy's Declaration further authenticates the
27 Stipulation and Waiver, based on his personal knowledge and experience (*see* First American's
28 responses to Plaintiff's Objections Nos. 4 to 8, *supra*) and is not hearsay. This objection is baseless.

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Court's Ruling on Objection 12: Sustained: ________ Overruled: ✓

**Objection No. 13**

**Material objected to:** Paragraph 12: "Additionally, as part of its settlement negotiations with the CDI, FA Title Ins. Co. agreed to file an amended Schedule of Fees to include, and which did include, a loan tie-in fee."

**Grounds for objection:** Lack of personal knowledge. (Cal. Evid. Code § 702(a).) Lack 7 of foundation. (Cal. Evid. Code § 702.) Hearsay. (Cal. Evid. Code § 1200.)

**Defendant's Response:** Incredibly, Plaintiff objects, on foundational grounds, to a passage from Mr. Dufficy's declaration for the proposition that First American "agreed to file an amended Schedule of Fees to include, and which did include, a loan tie-in fee." But the authenticity of that 2007 Schedule of Fees, which did include a loan tie-in fee, cannot be seriously disputed. In fact, as part of her moving papers, Plaintiff submitted the pertinent excerpt from that Schedule of Fees that FA Title Ins. agreed to file and did file with CDI in February 2007 (*see* Declaration of Steven Messner In Support of Wilmot's Motion for Class Certification, ¶ 9 & Ex. 8, at p.80 (J-32 / Escrow Related Services).) Mr. Dufficy's Declaration only further authenticates that rate filing, based on his personal knowledge and experience (*see* First American's responses to Plaintiff's Objections Nos. 4 to 8, *supra*) and is not hearsay. This objection is baseless.

Court's Ruling on Objection 13: Sustained: ________ Overruled: ✓

**Objection No. 14**

**Material objected to:** Paragraph 14: "In FA Title Ins. Co.'s negotiations with the CDI, the CDI indicated that the loan tie-in rate should be filed, and FA Title Ins. Co. agreed to do so. At no time did the CDI take the position that the work underlying the loan tie-in fee had not been performed."

**Grounds for objection:** Lack of personal knowledge. (Cal. Evid. Code § 702(a).) Lack of foundation. (Cal. Evid. Code § 702.) Hearsay. (Cal. Evid. Code § 1200.)

**Defendant's Response:** Incredibly, Plaintiff objects, on foundational grounds, to a passage from Mr. Dufficy's declaration for the proposition that First American "agreed" to file an amended Schedule of Fees to include, and which did include, a loan tie-in fee. But the authenticity of that

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1 2007 Schedule of Fees, which did include a loan tie-in fee, cannot be seriously disputed. In fact, as
2 part of her moving papers, Plaintiff submitted the pertinent excerpt from that Schedule of Fees that
3 FA Title Ins. agreed to file and did file with CDI in February 2007 (*see* Declaration of Steven
4 Messner In Support of Wilmot's Motion for Class Certification, ¶ 9 & Ex. 8, at p.80 (J-32 / Escrow
5 Related Services).) Mr. Dufficy's Declaration only further authenticates that rate filing, based on his
6 personal knowledge and experience (*see* First American's responses to Plaintiff's Objections Nos. 4
7 to 8, *supra*) and is not hearsay. This objection is baseless.

8 Court's Ruling on Objection 14: Sustained: _________ Overruled: ___✓___

9

10 **OBJECTIONS TO 2011 DECLARATION OF JEAN O'NEILL**

11 **Objection No. 15**

12 **Material objected to:** O'Neill Declaration Paragraph 4: "Based on my review of the escrow
13 file, I could have and would have charged a concurrent junior escrow fee under section J-38 had this
14 transaction occurred in 2005 after the rates for these fees also [had] been filed. This is because,
15 among other reasons, the transaction involved two mortgages, the second in junior position, and
16 much of the work underlying the 'loan tie-in' charged could and would have fallen under that
17 section."

18 **Grounds for objection:** Inadmissible speculation. (Cal. Evid. Code § a03(a)(3).) Lack of
19 personal knowledge. (Cal. Evid. Code § 702(a).) Lack of foundation. (Cal. Evid. Code § 702.)
20 Hearsay. (Cal. Evid. Code § 1200.)

21 **Defendant's Response:** Ms. O'Neill has personal knowledge of the material objected to
22 from over 20 years of experience as an Escrow Officer for First American, the escrow officer for
23 Wilmot's 2004 purchase of real property and in the post-April 2005 timeframe that is the subject of
24 the disputed testimony, and from her review of records maintained by First American. (Siegel Dec.,
25 ¶ 6 & Ex. E (O'Neill Depo. at 11:2-4, 17:23-18:1); O'Neill Dec. ¶¶ 1-2.) Ms. O'Neill confirmed
26 during her deposition that she was personally involved with and oversaw the individual escrow
27 transaction for Wilmot. (Siegel Dec. ¶ 6 & Ex. E (O'Neill Depo. at 19:11-22).) Thus, her testimony
28 is not lacking in foundation or speculative. Her testimony is relevant as an example of how fees

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1 charged to certain putative class members during the post-April 2005 timeframe were pursuant to
2 separately filed rates, notwithstanding a "loan tie in" label.

3 Court's Ruling on Objection 15: Sustained: ________ Overruled: ✓

4 **Objection No. 16**

5 **Material objected to:** O'Neill Declaration Paragraph 4: "In addition, from my review of the
6 escrow file, an electronic download fee under section J-32, as amended in 2005, may also have been
7 called for. However, I could not determine this from the records I had available to me from this 2003
8 transaction and I cannot recall now in 2011 whether the work performed in that escrow and included
9 in the loan tie-in fee included that. I would have to search further."

10 **Grounds for objection:** Inadmissible speculation. (Cal. Evid. Code § 403(a)(3).) Lack of
11 personal knowledge. (Cal. Evid. Code § 702(a).) Lack of foundation. (Cal. Evid. Code § 702.)
12 Hearsay. (Cal. Evid. Code § 1200.)

13 **Defendant's Response:** Ms. O'Neill has personal knowledge of the material objected to
14 from over 20 years of experience as an Escrow Officer for First American, as the escrow officer for
15 Wilmot's purchase of real property, and from her review of records maintained by First American.
16 (Siegel Dec. ¶ 6 & Ex. E (O'Neill Depo. at 11:2-4, 17:23-18:1); O'Neill Dec. ¶¶ 1-2.) Ms. O'Neill
17 confirmed during her deposition that she was the person most qualified on the individual escrow
18 transaction for Wilmot. (Siegel Dec. ¶ 6 & Ex. E (O'Neill Depo. at 19:11-22).) Thus, her testimony
19 is not lacking in foundation or speculative. Her testimony is relevant as an example of how fees
20 charged to certain putative class members may have been pursuant to separately filed rates,
21 notwithstanding a "loan tie in" label. Cal. Evid. Code § 1200 is inapplicable because Ms. O'Neill's
22 statement was not made by anyone other than Ms. O'Neill.

23 Plaintiff contends that Ms. O'Neill's declaration is "speculative" because she states that she
24 could not determine, based on her review of the Wilmot escrow file, whether an "electronic
25 download" may "have also been called for." (O'Neill Dec. ¶ 5.) But that is the very point of her
26 Declaration -- that any attempt to ascertain whether an electronic download fee might have applied in
27 any given transaction would entail much greater work and research than merely relying on a "loan tie
28

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

in" label found in FAST, rendering liability and/or damages undeterminable, and thus rendering certification inappropriate.

Court's Ruling on Objection 16: Sustained: ________ Overruled: ✓

Dated: August __, 2017

DENTONS US LLP

By: ________
JOEL D. SIEGEL
Attorneys for Defendants
First American Title Company and First American Title Insurance Company

Dated: 8/30/17

MAREN E. NELSON

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

Re: *Wilmot v. First American Title Ins. Company*
Case No.: BC370141

**PROOF OF SERVICE**

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 600 South Indian Hill Boulevard, Claremont, California 91711.

On **April 11, 2018,** I served the foregoing documents described as NOTICE OF APPEAL on the interested parties in this action by placing __ the original XX a true copy thereof enclosed in sealed envelopes addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

[XX] **VIA ELECTRONIC SERVICE VIA CASE ANYWHERE** through electronic transmission to all parties appearing on the electronic service list.

[XX] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[] (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **April 11, 2018,** at Claremont, California.

Erika Castro

Re: *Wilmot v. First American Title Ins. Company*
Case No.: BC370141

**SERVICE LIST**

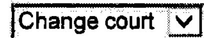
| | |
|---|---|
| Ronald D. Kent, Esq.<br>Joel D. Siegel, Esq.<br>Dentons US LLP<br>601 South Figueroa Street, Suite 2500<br>Los Angeles, California 90017<br>Telephone: (213) 623-9300<br>FAX: (213) 623-9924 | Attorneys for Defendant,<br>First American Title Company |
| Sonia Martin, Esq.<br>Dentons US LLP<br>525 Market Street, 26th Floor<br>San Francisco, CA 94105<br>(415) 882-5000 | Attorneys for Defendant<br>First American Title Company |
| Steven J. Bernheim, Esq.<br>The Bernheim Law Firm<br>11611 Dona Alicia Place<br>Studio City, California 91604<br>Telephone: (818) 760-7341<br>Email: b@thebernheimlawfirm.com | Attorneys for Plaintiffs |
| Taras Kick, Esq.<br>The Kick Law Firm, APC<br>201 Wilshire Boulevard, Suite 350<br>Santa Monica, California 90401<br>Telephone: (310) 395-2988<br>FAX: (310) 395-2088 | Attorneys for Plaintiffs |
| Richard H. Friedman, Esq.<br>Friedman Rubin<br>1126 Highland Avenue<br>Bremerton, Washington 98337<br>(360) 782-4300 | Attorneys for Plaintiffs |
| Nazo S. Semerdjian, Esq.<br>The Semerdjian Law Firm<br>898 San Pablo Way<br>Duarte, California 91010<br>(626) 215-5161 | Attorneys for Plaintiffs |

Brian Kabateck, Esq.
Richard L. Kellner, Esq.
Kabateck Brown Kellner LLP
644 S. Figueroa Street
Los Angeles, CA 90017
(213) 217-5000

Attorneys for Plaintiffs

# Appellate Courts Case Information

## 2nd Appellate District




*Court data last updated: 12/12/2019 09:26 AM*

## Parties and Attorneys

**Wilmot v. First American Title Company**
**Division 5**
**Case Number B289375**

| Party | Attorney |
|---|---|
| Elizabeth Wilmot : Plaintiff and Appellant | Michael Bidart<br>Shernoff Bidart Echeverria LLP<br>600 S. Indian Hill Blvd.<br>Claremont, CA 91711<br>Richard Henry Friedman<br>Friedman Rubin & White<br>1126 Highland Ave<br>Bremerton, WA 98337<br>Jeffrey Isaac Ehrlich<br>The Ehrlich Law Firm<br>237 West Fourth Street<br>Second Floor<br>Claremont, CA 91711 |
| First American Title Company : Defendant and Respondent | Ronald D. Kent<br>Dentons US LLP<br>601 S. Figueroa Street<br>Suite 2500<br>Los Angeles, CA 90017-5704<br>Sonia Renee Martin<br>Dentons US LLP<br>525 Market St 26FL<br>San Francisco, CA 94105-2708 |
| Bussiness & Professional code statute 17209 : Overview party | Consumer Law Section<br>Office of the Attorney General-Appellate Coordinator<br>300 South Spring Street<br>North Tower, 5th Floor<br>Los Angeles, CA 90013<br>Contact Name: Consumer Law Section |

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FEB 15 2019

Sherri R. Carter, Executive Officer/Clerk
By: E. Garcia, Deputy

1 MICHAEL J. BIDART #60582
2 STEVEN MESSNER #259606
**SHERNOFF BIDART ECHEVERRIA LLP**
3 600 South Indian Hill Boulevard
4 Claremont, California 91711
Phone: (909) 621-4935
5
6 RICHARD H. FRIEDMAN #221622
7 **FRIEDMAN RUBIN**
1126 Highland Avenue
8 Bremerton, Washington 98337
9 Phone: (360) 782-4300
10 Attorneys for Plaintiffs
11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13
14 IN AND FOR THE COUNTY OF LOS ANGELES
15

| 16 FIRST AMERICAN TITLE COMPANY CASES<br>17<br>18 *Wilmot/Munro v. First American Title Co., et al.*<br>19 (Los Angeles County Superior Court No.<br>20 BC370141) | Case No.: BC 370141 / JCCP4751<br><br>Hon. Maren E. Nelson – Dept. SSC17<br><br>**NOTICE OF APPEAL** |
|---|---|

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SHERNOFF BIDART ECHEVERRIA LLP LAWYERS FOR INSURANCE POLICYHOLDERS

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1 TO ALL PARTIES HEREIN AND TO THEIR ATTORNEYS OF RECORD:

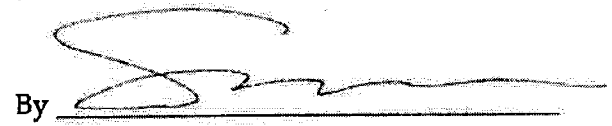
2 NOTICE IS HEREBY GIVEN that plaintiff, Jason Munro, appeals to the Court of
3 Appeal of the State of California for the Second Appellate District, from the order dated
4 December 11, 2018, dismissing the ninth cause of action of his third-amended complaint
5 (which was the sole cause of action remaining in the case at the time of dismissal) with
6 prejudice, and from all prior orders encompassed within the judgment of dismissal,
7 including without limitation the order dated October 23, 2018, denying Plaintiffs'
8 Motion for Leave to File a Fourth Amended Complaint. Notice of entry of the order
9 dismissing the ninth cause of action was served on January 9, 2019.

10

11

12 Date: February 15, 2019 SHERNOFF BIDART ECHEVERRIA LLP

13



14 By ____________________

15 STEVEN MESSNER

16 Attorneys for Plaintiffs

17 18 19 20 21 22 23 24 25 26 27 28

SHERNOFF BIDART ECHEVERRIA LLP
LAWYERS FOR INSURANCE POLICYHOLDERS

Re: *Kirk v. First American Title Company*
Case No.: JCCP 4751

**PROOF OF SERVICE**

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 600 South Indian Hill Boulevard, Claremont, California 91711.

On **February 15, 2019,** I served the foregoing documents described as **NOTICE OF APPEAL** on the interested parties in this action by placing __ the original XX a true copy thereof enclosed in sealed envelopes addressed as follows:

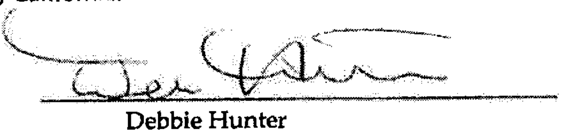
PLEASE SEE ATTACHED SERVICE LIST

[XX] **VIA ELECTRONIC SERVICE VIA CASE ANYWHERE** through electronic transmission to all parties appearing on the electronic service list.

[XX] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[] (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **February 15, 2019,** at Claremont, California.



Debbie Hunter



SHERNOFF BIDART ECHEVERRIA LLP
LAWYERS FOR INSURANCE POLICYHOLDERS

Re: *Kirk v. First American Title Company*
Case No.: JCCP4751

**SERVICE LIST**

| | |
|---|---|
| Ronald D. Kent, Esq.<br>Joel D. Siegel, Esq.<br>Dentons US LLP<br>601 South Figueroa Street, Suite 2500<br>Los Angeles, California 90017<br>Telephone: (213) 623-9300<br>FAX: (213) 623-9924 | Attorneys for Defendant,<br>First American Title Company |
| Sonia Martin, Esq.<br>Dentons US LLP<br>525 Market Street, 26th Floor<br>San Francisco, CA 94105<br>(415) 882-5000 | Attorneys for Defendant<br>First American Title Company |
| Steven J. Bernheim, Esq.<br>The Bernheim Law Firm<br>11611 Dona Alicia Place<br>Studio City, California 91604<br>Telephone: (818) 760-7341<br>Email: BernieBernheim@Gmail.com | Attorneys for Plaintiffs |
| Taras Kick, Esq.<br>The Kick Law Firm, APC<br>815 Moraga Drive<br>Los Angeles, CA 90049<br>Telephone: (310) 395-2988<br>FAX: (310) 395-2088 | Attorneys for Plaintiffs |
| Richard H. Friedman, Esq.<br>Friedman Rubin<br>1126 Highland Avenue<br>Bremerton, Washington 98337<br>(360) 782-4300 | Attorneys for Plaintiffs |
| Nazo S. Semerdjian, Esq.<br>The Semerdjian Law Firm<br>898 San Pablo Way<br>Duarte, California 91010<br>(626) 215-5161 | Attorneys for Plaintiffs |

SHERNOFF BIDART ECHEVERRIA LLP
LAWYERS FOR INSURANCE POLICYHOLDERS

FILED
LOS ANGELES SUPERIOR COURT
OCT 23 2018
CLERK
BY [signature] Deputy
NANCY NAVARRO

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

FIRST AMERICAN TITLE COMPANY CASES

This document concerns

*Wilmot, et al. v. First American Title Ins. Co.* BC370141

Case No.: BC370141
JCCP 4751

ORDER DENYING PLAINTIFFS' MOTION FOR LEAVE TO FILE A FOURTH AMENDED COMPLAINT AND GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO SEVER CLAIMS

Date: September 21, 2018
Time: 9:00 a.m.
Dept.: SSC 17

**I. INTRODUCTION**

Plaintiffs Elizabeth Wilmot (Wilmot) and Jason Munro (Munro) filed this action against Defendants First American Title Company and First American Title Insurance Company (First American) on April 2, 2007. It was coordinated for purposes of discovery with other actions against First American stemming from real estate transactions in which First American provided title insurance and/or escrow services. It has been actively

1 litigated for portions of the intervening 11 years. During a significant portion of the time it
2 also has been stayed.

3 The operative complaint is the Third Amended Complaint (TAC), filed on or about
4 August 4, 2010. Following various demurrers the remaining causes of action are for
5 Breach of Fiduciary Duty, Fraud and Deceit, Constructive Fraud, Unjust Enrichment,
6 Violation of the Consumer Legal Remedies Act, and Unfair Competition. Essentially,
7 Wilmot and Munro allege that First American charged them a $125 "loan tie-in" fee at a
8 time when it did not have the right to do so because it had not filed for such a rate with the
9 Department of Insurance. As set forth in the operative TAC, they sought to represent those
10 who were charged a loan tie-in fee prior to April 2, 2007. TAC, ¶7. Wilmot and Munro are
11 both members of this class. TAC, ¶8. Certification of Wilmot's proposed class was denied
12 on February 16, 2018, including denying certification of a claim under the UCL. That
13 order is the subject of a pending appeal. First American has filed a motion to dismiss the
14 appeal, which has not yet been ruled upon.

15 The TAC also alleges First American provided inducements to builders and
16 developers in exchange for business referrals related to the purchases of new construction.
17 The federal Real Estate Settlement Procedures Act of 1974, 12 U.S.C. §§ 2601-2617
18 (RESPA), makes it illegal for any person to give or receive any fee or kickback pursuant to
19 an agreement or understanding that business incident to a real estate settlement service will
20 be referred to any person. This allegation has been in all of the complaints filed by Munro
21 since the original Complaint was filed in 2007. Exhibit A to First American's Request for
22 Judicial Notice at ¶80. It forms the basis for the UCL cause of action brought by Munro, it
23 being alleged that the claimed violations of RESPA are the predicate acts giving rise to the
24 UCL claim. TAC, ¶¶ 7, 8. No class has been certified with respect to this claim nor has
25 there been any request to do so.

26 Munro now seeks leave to file a Fourth Amended Complaint adding a statutory
27 cause of action for violation of RESPA. Wilmot and Munro also seek an order severing
28 the claims of the two plaintiffs and staying Wilmot's claims. The matters were briefed and

oral argument conducted on September 21, 2018. The Court asked for further limited briefing on one question and asked that Munro produce certain orders that he represented constituted orders regarding the production of documents relevant to the RESPA claims. The briefing was concluded and the orders requested to be filed were received on October 5, 2018,[1] at which time the matter stood submitted.

Having considered the arguments of counsel and the admissible evidence, the Court concludes that leave to amend is properly denied here, as at this stage in the proceedings, First American would be prejudiced by allowing the amendment. The motion for leave to amend is therefore denied.

The motion to sever, to the extent it seeks a stay of trial of both Wilmot and Munro's individual claims, is granted. For the reasons that follow it is otherwise denied.

**II. MOTION FOR LEAVE TO AMEND**

**A. Legal Standard**

Courts may, in the furtherance of justice and on any terms as may be proper, allow a party to amend a pleading. Cal. Code Civ. Pro. §437(a)(1). Judicial policy favors amendment. *Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939. However, leave to amend is properly denied when an unreasonable delay in seeking amendment prejudices the defendant. *Record v. Reason* (1999) 73 Cal. App. 4th 472, 486–487 (Leave to amend properly denied where plaintiff was aware of the circumstances supporting the amendment when he filed his original complaint three years previously).

A motion for leave to amend must be accompanied by a supporting declaration stating why the amendment is necessary and proper, when the facts giving rise to the amended allegations were discovered, and the reason why the request for amendment was not made earlier. Cal. Rules of Court, Rule 3.1324 (b). Implicit in this rule is the rule that parties must not delay in seeking to amend. However, delay alone is an insufficient basis

[1] Munro was given leave to file certain orders. He did so, accompanied by a six page single-spaced letter brief, to which First American objected. The Exhibits to the letter are considered. The content is not.

for denying leave to amend; the delay must be prejudicial. *Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 564, 564.

**B. The Amendment Is Not Timely and Prejudices First American**

The only declaration originally offered in support of this motion was that of Mr. Semerjian, which authenticated various documents and described the history of the case and various discovery taken on the RESPA issues, but which provided no explanation as to when the facts giving rise to the amended allegations were discovered and the reason why the request for amendment was not made earlier. Cal. Rules of Court, Rule 3.1324 (b). On Reply Mr. Friedman offers that "at the beginning of this case, plaintiffs' counsel believed that the existing state causes of action would provide Jason Munro's inducements class with the highest recovery, including restitution and compensatory and punitive damages.... After a review of all of the factual information obtained in discovery, extensive legal research, and many hours of consultation with experts, we recently reached the conclusion that there was no viable class -- wide damages theory available under the existing non-RESPA state causes of action, and that the stand - alone RESPA cause of action provides an efficient, straightforward damages theory, readily susceptible to class treatment." Friedman Declaration, ¶ 2.

First American objects to this declaration as untimely. In this it is correct. All papers offered in support of a motion must be filed 16 court days prior to the hearing. Cal. Code Civ. Pro. §1005(b). "The general rule of motion practice ... is that new evidence is not permitted with reply papers." *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537.

Further, even if the Friedman Declaration were considered, counsel of record at the time this action was filed were The Bernheim Law Firm and Kick Law Firm, APC. Exhibit A to First American's Request for Judicial Notice at page 1. Neither provides an explanation as to why the RESPA claim was not asserted in the original complaint or why amendment was not earlier sought. Mr. Friedman likewise does not show *when the facts giving rise to the amended allegations were discovered* and the reasons why the request for amendment was not made earlier, as required by Cal. Rules of Court, Rule 3.1324(b).

1 Rather, he opines that amendment is sought because present counsel "recently reached the
2 conclusion that there was no viable class-wide damages theory available under the existing
3 non-RESPA state causes of action, and that a standalone RESPA cause of action provides
4 an efficient, straightforward damages theory, readily susceptible to class treatment."
5 Friedman Declaration, ¶2. Put another way, it is not new facts Munro has discovered that
6 give rise to their request to amend, but the conclusion by new counsel that a new legal
7 theory would be more beneficial to Munro and the class he seeks to represent. At oral
8 argument Munro's counsel noted that this characterization was "absolutely correct. There
9 are no new facts that are being alleged in connection with the independent RESPA theory
10 of recovery. It is merely a new legal theory that allows the recovery of penalties."
11 Transcript of September 21, 2018 at page 2, lines 21-25.

12 There is no showing Munro could not have put forth his RESPA claim, which is
13 also a basis for his UCL claim, when this action was filed in 2007. The gist of the RESPA
14 claim is that First American offered improper inducements, including certain settlement
15 services such as completion of paperwork required by the Department of Real Estate in
16 connection with the sale by home builders to buyers of new homes, in exchange for
17 referrals of business from home builders. The "discounts" included an allegedly lower rate
18 for title insurance than was permitted by the rates filed by First American with the
19 Department of Insurance. TAC ¶23; Proposed 4th AC at ¶¶106-111.

20 The differences in remedies between a UCL claim and a RESPA claims were shown
21 in 2007 by a review of the applicable statues. Specifically, since 2004 under the UCL
22 plaintiff must show that he suffered "injury in fact." Cal. Bus. & Prof. Code § 17204; *In re*
23 *Tobacco II Cases* (2009) 46 Cal. 4th 298, 320. The primary remedy under the UCL is
24 injunctive relief. Restitution is an additional potential remedy to the class governed by
25 Cal. Bus. & Prof. Code §17203. *Id.* at 319. In contrast, a RESPA claim based on improper
26 referral fees or kickbacks (12 U.S.C. § 2607(a)) has as a remedy a penalty (characterized
27 in the case law as "damages") equal to three times the amount of any improper settlement
28

1 service charges. *In re Carter* (6th Cir. 2009) 553 F.3d 979, 984-985; 988-989: 12 U.S.C. §
2 2607(d)(2).
3 Munro admits he had knowledge of the facts underlying his RESPA claim at the
4 inception of this litigation. Motion at 1:8-15. A review of the pleadings confirms this is so.
5 The original complaint was filed April 26, 2007 and contains RESPA allegations at ¶¶ 79-
6 80 as a predicate violation supporting a UCL claim. The same is true of each successive
7 pleading: First Amended Complaint, ¶¶92-94; Second Amended Complaint, ¶91; Third
8 Amended Complaint, ¶97.
9 Leave to amend is properly denied where there has been delay and prejudice is
10 shown. *See Payton v. CSI Electrical Contractors, Inc.* (Sep. 28, 2018, No. B284065)
11 ___Cal.App.5th___ [2018 Cal. App. LEXIS 879]; *Melican v. Regents of University of Cal.*
12 (2007) 151 Cal. App. 4th 168, 176 (*Melican*) (patently unfair to allow amendment where no
13 explanation for unreasonable delay); *Huff v. Wilkins* (2006) 138 Cal. App. 4th 732, 746;
14 *Atkinson v. Elk Corp* (2003) 109 Cal. App. 4th 739, 751; *Record v. Reason* (1999) 73 Cal.
15 App. 4th 472, 486-487; *Del Mar Beach Club Owners Ass'n. v. Imperial Contracting Co.*
16 (1979) 123 Cal. App. 3d 898, 914-915 and FN 4 (trial court is entitled to be skeptical of
17 long-deferred presentation of proposed amendment).
18 Munro argues vigorously that amendment is to be liberally granted, citing *Atkinson*
19 *v. Elk Corp.* (2003) 109 Cal. App. 4th 739 (*Atkinson*) and *Mesler v. Bragg Management*
20 (1985) 39 Cal. 3d 290, 296-297 (*Mesler*). In particular he contends that an amendment
21 setting forth a new theory of recovery must be permitted so long as it is based in the same
22 set of facts, citing *Amaral v. Cintas* (2008) 163 Cal. App. 4th 1157, 1199-1200 (*Amaral*).
23 *Atkinson* specifically notes that amendment may be denied on a showing of
24 prejudice. *Atkinson* at 761. *Mesler* stands for the unremarkable proposition, consistent
25 with case law both before and after its pronouncement, that amendment prior to trial is
26 generally permitted to allow an alter ego allegation where discovery has been taken
27 supporting the alter ego allegation and there is no "unfair surprise" by reason of the
28 amendment. *Mesler* at 296-297.

1 *Amaral* is distinguishable. In *Amaral* plaintiffs sought penalties under Labor Code
2 section 203. With the passage of the Private Attorneys General Act, under Labor Code §
3 2698 et. seq. (PAGA), plaintiffs amended their complaint to seek additional penalties.
4 Defendants did not contest the propriety of the amendment or its timeliness but argued that
5 the PAGA statute could not be applied retroactively. In concluding there was no improper
6 retroactive effect, the Court of Appeal reasoned that plaintiffs were simply bringing claims
7 for penalties that could have been brought by the Labor Commissioner in the first instance,
8 "did not increase Cintas' liability in any way," *Amaral* at 1197, and related back to the
9 filing of the original complaint because they were based on "same claims and same
10 injuries." *Id.* at 1200. Here, in contrast, Munro seeks to amend more than ten years after
11 the conduct in question, not based on any new facts, and based on a statute that was in
12 effect at the time he filed his action.

13 First American has shown it will suffer prejudice in two related ways if amendment
14 is permitted at this stage in the proceedings and Munro seeks class certification of the
15 proposed "inducement" class.[2] First, the facts necessary to defend the RESPA claim and
16 to defend the UCL claim differ because of the differences in remedies in the two claims.
17 Under the UCL restitution is the only monetary damage remedy available. First American
18 argues that it focused its defensive efforts on determining whether restitution could be
19 recovered under the UCL if the underlying RESPA claim were proven, rather than on
20 defending against the facts supporting the RESPA claim itself. It would be prejudicial to
21 First American to now permit Munro to shift gears, after years of litigation and expense
22 related to defending the UCL claim based on RESPA violations, to now go forward on the
23 underlying claims. *Payton v. CSI Electrical Contractors, Inc.* (Sep. 28, 2018, No.
24 B284065) ___Cal.App.5th___ [2018 Cal. App. LEXIS 879, *30] ("Prejudice can include
25 the time and expense associated with opposing a legal theory that a plaintiff belatedly
26

27 [2] No view is expressed as to whether such a motion properly could be brought at this stage of the
28 proceedings.

1 seeks to change."), citing *Melican* at 176 (Where defendant defeated summary judgment
2 on one theory of the case Court acted within its discretion to disallow amendment to allege
3 new claim).
4 Second, and relatedly, very little discovery has been done regarding the RESPA
5 claim itself in terms of testimonial evidence. Although Munro's supplemental filing shows
6 that *documents* were sought and/or ordered produced in 2010 regarding the facts
7 underlying the RESPA claims (See Exhibits 1, 3, 5, 6, 8, 9, 17, 19 to Letter Brief) and
8 depositions were taken of First American personnel as to the pricing of title policies
9 offered at a "bulk rate" to builders and those involved in Munro's transaction (*Id.* at 13, 14,
10 15, 16), very little has been done by way of deposition to explain those documents,
11 including depositions of the third party builders themselves, other than those related to
12 Munro's claims. This includes depositions related to some 641 subdivisions.
13 RESPA requires a showing of an "agreement or understanding." The claims relate
14 to conduct in 2003. As First American demonstrated, even when third parties were
15 deposed in 2008 as to Munro's individual claims, they had little or no recollection of the
16 transaction. Sidkoff Declaration, Exhibit F. Notwithstanding that many documents were
17 produced, First American represents that significant depositions were not taken on the
18 underlying issues. Requiring First American now to locate witnesses and seek their
19 recollections, fifteen years later, so that it may defend the underlying RESPA claim, is
20 prejudicial.
21 First American alternatively argues that amendment would be futile as the proposed
22 claim is time barred. Private RESPA claims have a one year statute of limitations. 12
23 U.S.C. § 2614. Such claims may be tolled by the doctrine of "delayed discovery." See e.g.
24 *Gerhart v. Beazer Homes Holding Corp* (E.D. Cal. 2009) 2009 U.S. Dist. LEXIS 24297,
25 *25, citing *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383 (*Norgart*). In such circumstances
26 the plaintiff must plead facts to show "(1) the time and manner of discovery and (2) the
27 inability to have made earlier discovery despite reasonable diligence." *Fox v. Ethicon*
28

1 *Endo-Surgery, Inc.* (2005) 35 Cal. 4th 797, 808, quoting *McKelvey v. Boeing North*
2 *American, Inc.* (1999) 74 Cal.App.4th 151, 160.
3 Munro contends that issues related to the statute of limitations are "merits
4 arguments" that should be ignored at this time and dealt with by subsequent motion.
5 Plaintiffs' Reply at 10: 22-23. Leave to amend, however, is properly denied where
6 amendment would be futile. *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134
7 Cal.App.4th 365, 374; *IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 653, citing
8 *Edwards v. Superior Court* (2001) 93 Cal.App.4th 172, 180. Thus, the statute of
9 limitations is an argument that is properly raised on a motion to amend.
10 The alleged wrongful conduct (violation of RESPA) occurred in April, 2003.
11 Exhibit 2 to the proposed Fourth Amended Complaint. It was known at the time the
12 original complaint was filed in 2007. Exhibit A to First American's Request for Judicial
13 Notice at ¶¶ 80-82. Specifically, the original complaint alleged, on information and belief,
14 that Munro was referred to First American by third parties who received unlawful
15 inducements from First American. *Id.* at ¶33. First American argues that the proposed
16 pleading seeks to assert a claim that would have been time barred even when this
17 complaint was first filed in April, 2007 and that, in any event, the claim does not relate
18 back to the filing of the original Complaint as it is based on a different damage theory.
19 *See Norgart* at 408-409.
20 The Court declines to reach this argument at this time for the following reason. At
21 oral argument, Munro argued that the TAC and the proposed 4th AC both allege that Munro
22 did not learn of the facts giving rise to his Complaint until 2007 and learned of them only
23 after consulting with counsel in 2007 (TAC at ¶¶ 234-27). He also alleged that First
24 American is estopped, waived, and forfeited their statute of limitations defense (*Id.* at ¶ 29)
25 and argued that his pleading has been already deemed sufficient to withstand demurrer to
26 the causes of action alleged in the Second Amended Complaint. See Ex. 8 to TAC at page
27 6, line 1-page 8, line 15. First American does not dispute this.
28

1 Even if delayed discovery were shown, the relation back doctrine does not apply
2 when a new form of injury is alleged. *Norgart* at 408-409. However, the TAC and
3 proposed FAC allege estoppel, waiver, and forfeiture of the state of limitations defense.
4 The factual basis for those allegations is not shown. Same would be more properly
5 challenged by a motion for summary judgment if the amendment were permitted. Such
6 amendment, however, is improper in any event due to the delay and resulting prejudice
7 shown by First American and is denied on that basis.

8 **III. MOTION TO SEVER**

9 **A. Legal Standard**

10 Cal. Code Civ. Pro. §379.5 provides that "[w]hen parties have been joined under
11 Section 378 or 379, the court may make such orders as may appear just to prevent any
12 party from being embarrassed, delayed, or put to undue expense, and may order separate
13 trials or make such other order as the interests of justice may require.

14 Cal. Code Civ. Pro. §1048(b) provides: "The court, in furtherance of convenience or
15 to avoid prejudice, or when separate trials will be conducive to expedition and economy,
16 may order a separate trial of any cause of action, including a cause of action asserted in a
17 cross-complaint, or of any separate issue or of any number of causes of action or issues,
18 preserving the right of trial by jury required by the Constitution or a statute of this state or
19 of the United States."

20 Cal. Code Civ. Pro. §598 permits trial courts to make an order that the trial of any
21 issue or any part thereof precede the trial of any other issue or any part thereof in the case.

22 **B. A Stay of the Trial Is Appropriate**

23 The exact relief sought by Plaintiffs' motion to sever is unclear. Wilmot and Munro
24 originally both pled that they were charged $125 for a "loan tie-in fee" and that this charge
25 gave rise to multiple causes of action, including a *single* UCL claim. Wilmot's several
26 causes of action remain viable as to her individual claims. She is appealing denial of class
27 certification. First American moved to dismiss the appeal, which motion remains pending.
28

1 Munro presently has only an individual UCL claim. That claim, like Wilmot's,
2 alleges, in a single cause of action, that the loan tie-in and messenger fees they were
3 charged, First American's failure to disclose the claimed inducements, and the providing of
4 the inducements, all constituted fraudulent, unfair and illegal conduct. As to the "illegal"
5 prong, Munro alleges that the inducements violated the Consumer Legal Remedies Act, the
6 False Advertising Law, the California Insurance Code, the California Penal Code, and
7 RESPA. FAC ¶¶ 21, 97. He further contends that the $125 loan tie-in fee was charged to
8 offset the "discount" (inducement) given to Munro's home builder. Exhibit A to Kakuske
9 Declaration.
10 To the extent Wilmot and Munro argue that trial of their individual claims is not
11 appropriate until the issue of class certification is resolved by the Court of Appeal (either
12 by way of a ruling on the pending motion or on the merits), the Court concurs, although
13 not entirely for the reasons articulated by moving parties.
14 A stay is mandated by Cal. Code of Civ. Pro. §916(a). This is so because if it is
15 determined that a class should have been certified and Wilmot's individual case is tried in
16 the interim and Wilmot does not prevail, the class, and Munro (who is a member of the
17 alleged loan tie-in class), will have been deprived of a representative. Alternatively, if it is
18 determined that a class should have been certified and Wilmot prevailed on her individual
19 claim in the interim, absent class members would not be bound by any judgment as no
20 notice will have been given to them. *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797,
21 803. Thus, this is a matter embraced by the appeal, at least peripherally.
22 As to Wilmot's request to "sever," the Court is unclear as to the relief sought.
23 Although various conduct is alleged to be "illegal," Munro and Wilmot plead the *same*
24 UCL claim and the same injury ($125 fee). Plaintiffs' Reply argues that Munro is not
25 pursuing any claims related to loan tie-in charges and his June 20, 2018 dismissal of all
26 counts except the UCL should have made that clear. It did not; the dismissal of all causes
27 of action except the UCL in no way clarified that Munro sought to dismiss one theory of
28 recovery *within* the UCL cause of action. Munro indicates that he will dismiss his UCL

1 cause of action in order to clarify. Reply at 1:15-19. Munro may do so if he wishes but in
2 so doing this motion will essentially be moot as he will no longer be a party. In the interim,
3 any "severance" is unwarranted given that the Wilmot and Munro UCL claims are
4 intertwined.

5 **IV. CONCLUSION**

6 Plaintiffs' motion for leave to file an amended complaint is denied for the reasons
7 articulated above. The proposed new RESPA cause of action could have been pled many
8 years ago. To proceed with it now, absent a showing as to why it could not have been
9 earlier pled, and in light of the demonstrated prejudice to First American, would be
10 improper.

11 Plaintiffs' motion to "separate" Wilmot and Munro is denied on the basis that
12 Munro's loan tie-in claim is inextricably intertwined with his inducement claim within the
13 sole remaining cause of action under the UCL. To the extent the motion may be construed
14 as a motion to stay trial of both Wilmot and Munro's individual claims pending appeal, it
15 is granted.

16 All future dates in this action are vacated pending appeal, except the October 30,
17 2018 conference regarding discovery directed to the Department of Insurance.

18

19

20 Dated: October 1, 2018

21 MAREN E. NELSON
JUDGE OF THE SUPERIOR COURT

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# Appellate Courts Case Information

## 2nd Appellate District

Change court ▾

*Court data last updated: 12/12/2019 08:26 AM*

## Parties and Attorneys

**Munro v. First American Title Co. et al.**
**Division 5**
**Case Number B295805**

| Party | Attorney |
|---|---|
| Jason Munro : Plaintiff and Appellant | Michael Bidart<br>Shernoff Bidart Echeverria LLP<br>600 S. Indian Hill Blvd.<br>Claremont, CA 91711<br>Richard Henry Friedman<br>Friedman & Rubin<br>1126 Highland Ave<br>Bremerton, WA 98337<br>Steven Patrick Messner<br>Shernoff Bidart Darras & Echeverria LLP<br>600 S Indian Hill Blvd<br>Claremont, CA 91711<br>Jeffrey Isaac Ehrlich<br>The Ehrlich Law Firm<br>237 West Fourth Street<br>Second Floor<br>Claremont, CA 91711<br>Steven J. Bernheim<br>The Bernheim Law Firm<br>11611 Dona Alicia Place<br>Studio City, CA 91604 |

| | |
|---|---|
| First American Title Co. : Defendant and Respondent | Ronald D. Kent<br>Dentons US LLP<br>601 S. Figueroa Street<br>Suite 2500<br>Los Angeles, CA 90017-5704<br>Sonia Renee Martin<br>Dentons US LLP<br>One Market Plaza Spear Street Tower<br>26th Floor<br>San Francisco, CA 94105<br>Joel D. Siegel<br>SLR Denton US LLP<br>601 S. Figueroa St., Suite 2500<br>Los Angeles, CA 90017-5704<br>Susan M. Walker<br>Dentons US LLP<br>601 South Figueroa Street<br>Suite 2500<br>Los Angeles, CA 90017-5704 |

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County of Los Angeles

NOV 02 2018

Sherri R. Carter, Executive Officer/Clerk
By: E. Garcia, Deputy

1 MICHAEL J. BIDART #60582
2 STEVEN MESSNER #259606
SHERNOFF BIDART ECHEVERRIA LLP
3 600 South Indian Hill Boulevard
4 Claremont, California 91711
Phone: (909) 621-4935
5
6 RICHARD H. FRIEDMAN #221622
7 FRIEDMAN RUBIN
1126 Highland Avenue
8 Bremerton, Washington 98337
9 Phone: (360) 782-4300
10 Attorneys for Plaintiffs

SHERNOFF BIDART ECHEVERRIA LLP — LAWYERS FOR INSURANCE POLICYHOLDERS

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 IN AND FOR THE COUNTY OF LOS ANGELES

| 14 FIRST AMERICAN TITLE COMPANY<br>15 CASES<br>16<br>17 *Pickett/Kaufman v. First American Title Ins. Co.*<br>18 (Los Angeles County Superior Court No.<br>19 BC382826)<br>20 | Case No.: BC382826<br>Hon. Maren E. Nelson - Dept. 307<br><br>**CLASS ACTION**<br><br>**NOTICE OF APPEAL** |
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SHERNOFF BIDART ECHEVERRIA LLP
LAWYERS FOR INSURANCE POLICYHOLDERS

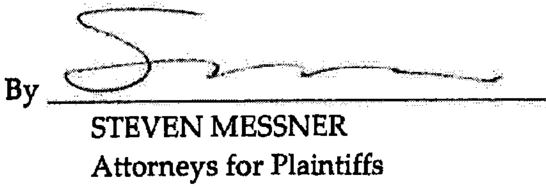
TO ALL PARTIES HEREIN AND TO THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that plaintiffs, Jon Pickett and Wendy Kaufman, appeal to the Court of Appeal of the State of California for the Second Appellate District, from the Judgment of Dismissal entered on September 19, 2018. Notice of entry of Judgment of Dismissal was served by First American Title Insurance Company on September 27, 2018, a copy of which is attached hereto as Exhibit A.

NOTICE IS FURTHER GIVEN that plaintiffs, also appeal to the Court of Appeal of the State of California for the Second Appellate District, from the Superior Court's August 29, 2018, Order Granting Defendants' Motion for Judgment on the Pleadings entered on August 29, 2018, a copy of which is attached hereto as Exhibit B.

Date: November 1, 2018

SHERNOFF BIDART ECHEVERRIA LLP



By ______________________
STEVEN MESSNER
Attorneys for Plaintiffs

# EXHIBIT A

1 DENTONS US LLP
Ronald D. Kent (SBN 100717)
2 Joel D. Siegel (SBN 155581)
Paul M. Kakuske (SBN 190911)
3 Judith Shophet Sidkoff (SBN 267048)
601 South Figueroa Street, Suite 2500
4 Los Angeles, California 90017-5704
Tel: (213) 623-9300 / Fax: (213) 623-9924
5
DENTONS US LLP
6 Sonia R. Martin (SBN 191148)
One Market Plaza
7 Spear Tower, 24th Floor
San Francisco, California 94105-1101
8 Tel: (415) 267-4000 / Fax: (415) 267-4198

9 Attorneys for Defendants
First American Title Company and
10 First American Title Insurance Company

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

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 COUNTY OF LOS ANGELES

13

| | |
|---|---|
| 14 JON PICKETT AND WENDY KAUFMAN,<br>15 Plaintiffs,<br>16 vs.<br>17 FIRST AMERICAN TITLE INSURANCE COMPANY, et al.,<br>18 Defendants.<br>19 | No. BC382826<br>Hon. Maren E. Nelson<br>Dept. SSC 17<br>**NOTICE OF ENTRY OF JUDGMENT OF DISMISSAL** |

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TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on September 19, 2018, the Court entered the "Judgment of Dismissal," a copy of which is attached hereto as **Exhibit A.**

Dated: September 27, 2018

DENTONS US LLP

By: ______________________
PAUL M. KAKUSKE

Attorneys for Defendant
First American Title Company and First American Title Insurance Company

109120939

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

# EXHIBIT A

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County of Los Angeles

SEP 19 2018

Sherri R. Carter, Executive Officer/Clerk
By: Berta Jauregui, Deputy

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

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

JON PICKETT AND WENDY KAUFMAN,

Plaintiffs,

v.

FIRST AMERICAN TITLE INSURANCE COMPANY, et al.

Defendants.

Case No. BC382826

Hon. Maren E. Nelson
Dept. SSC 17

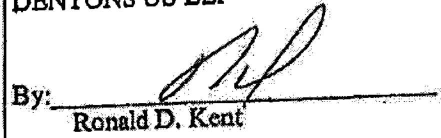
~~[PROPOSED]~~ JUDGMENT OF DISMISSAL

RECEIVED
LOS ANGELES SUPERIOR COURT

SEP 17 2018

I. LOVO

COPY

1 On August 29, 2018 the Court granted, without leave to amend, the motion for judgment on
2 the pleadings filed by defendants First American Title Insurance Co. and First American Title Co.
3 (collectively "First American"). Accordingly,
4 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:
5 1. The Second Amended Complaint is dismissed with prejudice. Plaintiff Wendy
6 Kaufman shall take nothing as against First American.
7 2. First American shall recover costs in the sum of $__________ to be determined.
8 By approving the form of judgment, plaintiff Kaufman is not waiving her right to argue, as part of
9 any subsequent motion to strike and/or tax costs, that costs must be separately determined and
10 awarded as between defendant First American Title Co. and defendant First American Title Insurance
11 Co.
12 3. Pursuant to California Rule of Court 3.545(d), the Court retains jurisdiction to hear and
13 determine any ancillary proceedings, including but not limited to any motion to strike or tax costs.
14 MAREN E. NELSON
15 Dated: September 19, 2018 ______________________
Maren E. Nelson
16 Judge of the Superior Court
17
18 APPROVED AS TO FORM:
19 DENTONS US LLP
20

21 By: ______________________
Ronald D. Kent
22 Date: September 12, 2018
23
24 SHERNOFF BIDART ECHEVERRIA LLP
25

26 By: ______________________
Steven Messner
27 Date: September 14, 2018
28

DENTONS US LLP
601 South Figueroa Street, Suite 2500
Los Angeles, California 90017-5704
(213) 623-9300

1
**PROOF OF SERVICE**
**(VIA CASE ANYWHERE)**

2

**FIRST AMERICAN TITLE COMPANY CASES, JCCP Case No. 4751:**
3 *Kaufman v. First American Title Insurance Co., et al.*, Case No. BC382826

4 I am employed in the County of Los Angeles, State of California, I am over the age of 18 and not a party to the within action. My business address is Suite 2500, 601 South
5 Figueroa Street, Los Angeles, California 90017-5704.

6 On September 27, 2018, I served true copies of the document/s described as **NOTICE OF ENTRY OF JUDGMENT OF DISMISSAL** on the interested parties in this action:

7

**SEE ATTACHED SERVICE LIST**

8

9 ☐ **BY MAIL:** I enclosed the document/s in a sealed envelope/s or package/s addressed to the person/s at the address/es in the Service List and placed it/them for collection
10 and mailing, following ordinary business practices. I am readily familiar with the practice of Dentons US LLP for collecting and processing correspondence for mailing: on that same day,
11 it is deposited in the ordinary course of business with the United States Postal Service with postage fully prepaid.

12 ☐ **BY NEXT BUSINESS DAY DELIVERY:** I enclosed said document/s in an envelope/s or package/s provided by ☐ Federal Express / ☐ USPS addressed to the person/s
13 at the address/es in the Service List. I placed it/them for collection and next business day delivery at an office or a regularly utilized drop box of the carrier or delivered it/them to a
14 courier or driver authorized by the carrier to receive same.

15 ☒ **VIA ELECTRONIC SERVICE:** Pursuant to California Rules of Court Nos. 2.250, 2.253, 2.261 and the Code of Civil Procedure, and the Court's Order of April 11, 2013,
16 I uploaded the document/s without error to ☒ CaseAnywhere.com / ☐ Dentons US LLP Secure File Transfer selecting the proper functions to serve the party/ies listed.

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18 ☐ **BY E-MAIL:** The document/s was/were transmitted via e-mail or electronic transmission to the person/s at the e-mail address/es in the Service List.

19 ☐ **BY HAND DELIVERY:** I enclosed the document/s in a sealed envelope/s or package/s addressed to the person/s at the address/es in the Service List and engaged USA
20 Legal Network to deliver it/them by hand to the office/s of the addressee/s.

21 I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 27, 2018, at Los Angeles, California.

22

23

24 Audrey Rosenbaum

25

26

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DENTONS US LLP
2000 MCKINNEY AVENUE, SUITE 1900
DALLAS, TEXAS 75201-1858
(214) 259-0900

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**SERVICE LIST**
**(VIA CASE ANYWHERE)**

**FIRST AMERICAN TITLE COMPANY CASES, JCCP Case No. 4751:**
***Kaufman v. First American Title Insurance Co., et al.*, Case No. BC382826**

| | |
|---|---|
| Michael J. Bidart - #060582<br>Steven M. Schuetze - #143778<br>Steven P. Messner - #259606<br>Kristin E. Hobbs - #277843<br>Shernoff Bidart Echeverria Bentley LLP<br>600 South Indian Hill Boulevard<br>Claremont, CA 91711-5444 | *Counsel for Plaintiffs*<br>T: 909 621 4935 / F: 909 621 2806<br>E: mbidart/sschuetze/smessner/khobbs<br>@shernoff.com |
| Taras P. Kick - #143379<br>G. James Strenio - #177624<br>The Kick Law Firm, APC<br>201 Wilshire Boulevard, Suite 350<br>Santa Monica, CA 90401-1252 | *Counsel for Plaintiffs*<br>T: 310 395 2988 / F: 310 395 2088<br>E: taras/james@kicklawfirm.com |
| Steven J. Bernheim - #143319<br>The Bernheim Law Firm<br>11611 Doña Alicia Place<br>Studio City, CA 91604-4231 | *Counsel for Plaintiffs*<br>T: 818 423 2136 / F: 310 300 1351<br>E: berniebernheim@gmail.com |
| Richard H. Friedman - #221622<br>Richard Dykstra – *Pro Hac Vice*<br>Friedman \| Rubin<br>1126 Highland Avenue<br>Bremerton, WA 98337-1828 | *Counsel for Plaintiffs*<br>T: 360 782 4300 / F: 360 782 4358<br>E: info@friedmanrubin.com |
| Nazo S. Semerdjian - #223536<br>The Semerjian Law Firm<br>898 San Pablo Way<br>Duarte, CA 91010-2335 | *Counsel for Plaintiffs*<br>T: 626 215 5161<br>E: nazosemerdjian@gmail.com |

DENTONS US LLP
2000 MCKINNEY AVENUE, SUITE 1900
DALLAS, TEXAS 75201-1858
(214) 259-0900

# EXHIBIT B

FILED
LOS ANGELES SUPERIOR COURT
AUG 29 2018
[illegible] CLERK
BY [illegible] Deputy
NANCY NAVARRO

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF LOS ANGELES
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| FIRST AMERICAN TITLE CASES<br><br>*Wilmot v. First American Title Ins. Co.* (BC370141)<br><br>*Kirk v. First American Title Co.* (BC372797)<br><br>*Sjobring v. First American Title Co.* (BC329482)<br><br>*Kaufman v. First American Title Co.* (BC382826) | Case No.: JCCP 4751<br>*Sjobring v. First American Title Co.* (BC329482)<br><br>*Kaufman v. First American Title Co.* (BC382826)<br><br>ORDER GRANTING DEFENDANTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS<br><br>Date: July 23, 2018<br>Time: 1:45 p.m.<br>Dept.: SSC 17 |

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23 **I. INTRODUCTION**

24 *Sjobring* and *Kaufman* are two of four related class actions, above captioned,
25 against First American Corporation (FAC), First American Title Company (FATCO), and
26 First American Title Insurance Company (FATIC) (collectively, First American). Counsel
27 for Plaintiffs in the cases overlap.
28

1 A petition for coordination was granted as to the four cases pursuant to Cal. Rule of
2 Court, Rule 3.521 but they have not been consolidated. No orders were issued finding that
3 a ruling in one of the cases is binding in the others.
4 One case (*Kirk*) was tried to the bench. The judgment was appealed by Kirk and
5 First American and affirmed in an unpublished opinion.
6 Before the Court are motions for judgment on the pleadings in *Sjobring* and
7 *Kaufman*. Both motions argue that Insurance Code Section 12414.26 precludes these
8 actions. The motion in *Sjobring* was originally calendared for May 31, 2018. At that time
9 the Court heard oral argument and continued the hearing to July 23, 2018, to be heard with
10 the motion in *Kaufman*, indicating that the issue to be taken up in both cases is whether
11 Insurance Code §12414.26 precludes the actions as now framed by the pleadings and the
12 motions for class certification.
13 Considering those matters of which judicial notice may properly be taken, the cases
14 as framed challenge the propriety of First American's "use" of a filed rate where more than
15 one rate could be applicable. Resolving the issue involves rate setting and regulation. For
16 this reason, and as explained further below, the actions are precluded by Section 12414.26
17 and the statutory scheme of which it is a part. The Court therefore now GRANTS the
18 motions.
19
20 **II. THE ALLEGATIONS OF THE COMPLAINTS AND THE CLASSES AS**
21 **CERTIFIED**
22 To understand why these actions are precluded there must be an understanding of
23 both the allegations of the complaints and certain facts of which the Court takes judicial
24 notice.
25 **A. *Sjobring***
26 The facts in *Sjobring* and *Kirk* overlap. The operative *Sjobring* Fourth Amended
27 Complaint (4thAC) alleges that plaintiff Jeffrey Albert Sjobring (Sjobring) purchased a
28 home in February 2004 from Patrick Kirk (Kirk), who is the named plaintiff in *Kirk*.

1 FATIC provided title insurance in the transaction. It issued an "Eagle Owners policy" to
2 Sjobring, for which Kirk paid. Sjobring's lender was issued a lender's policy by FATIC
3 for which Sjobring paid.[1] Sjobring paid $563.00 for the lender's policy. He argues that
4 both the owner's and lender's policies are "Extended Coverage" policies. *Id.* at ¶45. Based
5 on that characterization he alleges that he was overcharged for the lender's policy, arguing
6 Section C-1-b of Defendants' filed rates applied to the pricing of the type of policy his
7 lender was issued because it was issued concurrently with an "Extended Coverage"
8 owners' policy. This filed rate was $125. Alternatively, he argues FATIC could have
9 issued a "Standard Coverage" lender's policy but deleted "regional exceptions" in the
10 policy.[2] He argues that such a policy would have been charged at a filed rate known as the
11 "C-5 rate," yielding a premium of $290, which is $273 less than what Defendants charged
12 him. *Id.* at ¶¶ 49, 50.
13 The claims that survived demurrer are the second and eighth causes of action for
14 Fraud and Negligent Misrepresentation; the demurrer did not specifically challenge the 5th
15 cause of action for Unfair Competition. Sjobring's Request for Judicial Notice filed April
16 26, 2018, Exhibits 2, 3. The 4th AC contains a variety of allegations and arguments in
17 which it is contended that the Superior Court, rather than the California Department of
18 Insurance (CDI), has jurisdiction over this matter (4th AC ¶ 32), and includes a specific
19 allegation that "there is no 'safe harbor' for the misconduct alleged here." *Id.* at ¶ 32 (d).
20 The pleading asserts that this court has jurisdiction because the action seeks
21 restitution/disgorgement of monies wrongfully taken from class members by First
22

23 [1] An owner's policy is a title policy that insures the buyer's interest in a property and provides
24 coverage to the owner of real property. A lender's policy is a title policy that insures the lender's (usually a bank or financial institution) interest in the property, in title, and its lien position.
25

26 [2] "Regional exceptions" refers to a subset of exceptions from coverage. Examples include
27 easements not shown by public records, interests in the land not shown by public record that could be asserted by persons in possession of the land, unpatented mining claims that may or may not be
28 shown by public records, and water rights that may or may not be shown by public records.

1 American's "failure to properly apply its filed rates." *Id.* at ¶ 32 (b). It is alleged that
2 Section 12414.26 does not apply because "Plaintiffs simply allege" Sjobring and class
3 members were charged more for the loan policies than permitted by Defendants' filed
4 rates, and that the charges were not authorized by Article 5.5 because they were rates not in
5 conformity with the filed rates. *Id.* at page 9, lines 18-27. Sjobring further contends First
6 American *misrepresented* that the 1992 ALTA concurrent loan policy without regional
7 exceptions cost $563, which was false because the filed rate was $125; even if the policy
8 were determined to be "Standard Coverage" the rate would be $290 under Section C-5 of
9 the filed rates. *Id.* at ¶80. He alleges in the alternative that if the loan policy is determined
10 to be "Standard Coverage" then First American *concealed* a $0 pricing structure under
11 section C-1(a)(2) of the filed rates. *Id* at ¶ 82.

12 The Court takes judicial notice pursuant to Evidence Code § 452(d) of the fact that
13 in July, 2017, the Court granted certification of two classes in *Sjobring*, including, as to
14 Class Two, a class that specifically seeks a determination that the C-5 rate applied to the
15 policies as issued.

16 **B. *Kaufman***

17 *Kaufman* stems from a separate real estate transaction. The operative complaint is
18 the Second Amended Complaint (SAC). Plaintiff Wendy Kaufman (Kaufman) alleges she
19 purchased a home in late 2006. In connection with the purchase of her home she paid
20 premiums for both owner's and lender's title insurance policies. SAC, ¶46. Kaufman
21 contends she was overcharged for her lender's policy. According to Kaufman, under
22 section C-1(a)(2) of First American's filed rates there was no charge for a loan policy that
23 was sold concurrently with a "Standard" coverage owner's policy, and under C-1(b)(2)
24 where an "Extended" loan policy was sold concurrently with an "Extended" owner's
25 policy the correct charge was $125.00. *Id.* at ¶50. Kaufman contends that although the
26 Eagle Loan Policy issued to her lender was defined as "Standard Coverage" she was
27 nevertheless charged $710. *Id.* at ¶¶ 52, 54. The SAC also alleges alternatively that there
28

1 was another less-expensive pricing structure that could have been applied in Schedule E of
2 First American's Schedule of Fees. *Id.* at ¶56.
3 Jurisdiction is alleged to be with this Court because Kaufman seeks
4 restitution/disgorgement of funds wrongfully taken (SAC, ¶40); she alleges the litigation is
5 not precluded because First American calculated charges by not applying its filed rates
6 properly (*Id.* at ¶42). As in *Sjobring*, the allegation is that First American's schedule of
7 fees is materially misleading. *Id.* at ¶57. "Plaintiff is not contending that the rates
8 defendants have filed with the CDI are improper. Rather, plaintiff contends that First
9 American failed to apply rates correctly." *Id.* at ¶61.
10 Based on these and other facts, Kaufman alleges claims for Breach of Contract,
11 Breach of the Implied Covenant of Good Faith and Fair Dealing, Fraud and Deceit, Unjust
12 Enrichment, and Unfair Competition.
13 FATCO and FATIC's joint answer raises affirmative defenses of Safe Harbor/
14 Immunity (6th Additional Defense), in which they allege that the challenged rates and acts
15 complained of were known to and accepted and approved by the CDI. It is further
16 contended that a scrivener's error/mistake (14th Additional Defense) occurred when the
17 rates were filed. It contends that the rate argued for by Kaufman would permit her (and the
18 certified class) to obtain loan policies for no charge, a rate it views as inadequate. The
19 Court takes judicial notice of the fact that this is the defense asserted, but does not accept
20 the facts alleged as supporting the defense to be true.
21 Judicial notice is further taken that in September, 2017, a class was certified in
22 *Kaufman* as to the claims for Breach of Contract, Breach of the Implied Covenant, and
23 UCL and as to all persons who paid for an Eagle loan title policy in a residential real estate
24 transaction in California that was issued concurrently with an owner's policy during the
25 period October 2, 2006 to October 2, 2007, where the aggregate liability of the loan
26 policies did not exceed the liability of the owner's policy.
27 //
28 //

1 **III. THE ADDITIONAL JUDICIALLY NOTICEABLE FACTS**

2 In addition to the matters pled and the Court's rulings on class certification, all
3 parties request the Court take judicial notice of certain documents and the facts contained
4 therein. Objections were also filed.

5 **A. *Sjobring* Motion**

6 First American's Requests for Judicial Notice as to Exhibit A (Statement of
7 Decision in *Kirk*) and Exhibit C (*Kirk* Opinion) are proper pursuant to Evidence Code
8 §452(d), as to the findings of fact and conclusions of law contained in the *Kirk* Statement
9 of Decision. In addition, judicial notice is properly taken as to the existence of the
10 appellate opinion affirming that ruling. *Day v. Sharp* (1975) 50 Cal. App. 3d 904, 914.
11 Judicial Notice of Exhibit B and Sjobring's Exhibit 1 (Sjobring's administrative complaint
12 with the CDI) is proper pursuant to Evidence Code §452(h) and in light of the fact that
13 both parties ask the Court to take judicial notice of these documents, albeit for different
14 reasons. Judicial notice of the fact of the existence of Exhibits D and E, official acts of the
15 CDI, is properly taken under Evidence Code § 452(c) and *Stevens v. Superior Court* (1999)
16 75 Cal. App. 4th 594, 608. Judicial notice of the legal positions and concessions made by
17 Sjobring and Kaufman to secure class certification, including Exhibits K and O to
18 FATCO's July 11, 2018 Supplemental Request for Judicial Notice, are properly taken
19 under Evidence Code §452(d) and (h). Judicial notice of this Court's orders granting class
20 certification are likewise proper. *Id.* at Exhibit P. The balance of the exhibits of which
21 judicial notice is requested to be taken by First American in *Sjobring* are irrelevant to the
22 issues presented by the motion and the request is thus moot.

23 All of Sjobring's requests, other than Exhibits 1- 3 and 14, are irrelevant to the
24 disposition of this motion and thus moot. No objection was raised as to Exhibits 2, 3, and
25 14.

26 **B. *Kaufman* Motion**

27 Kaufman objects to the court taking judicial notice of Exhibits D, E, F, tendered by
28 First American. Based on the disposition below Exhibits D and E are irrelevant to any

issue before the Court. This renders any objections moot. Judicial notice is properly taken as to Exhibit F for the limited purpose of showing that there was correspondence between CDI and First American on the subject of the claimed error and not for the truth of the matters therein. First American's unopposed supplemental request for judicial notice of Exhibits K and M is granted. All other requests for judicial notice by First American are moot given the disposition herein.

First American objects to Kaufman's request for judicial notice as to Exhibits 1 and 5. Kaufman contends that these constitute proper evidence of legislative intent respecting the scope of Insurance Code section 12414.26.

Exhibit 1 relates to legislation enacted in 1947, which Kaufman argues is the genesis of Section 12414.26. While the document may shed light on the genesis of immunity provisions generally in the Insurance Code it does not bear specifically on the Legislature's intent with respect to Section 12414.26. Moreover, there is no showing that any member of the legislature saw this document in connection with the enactment of Section 12414.26 in 1973. As such, while it may be of historical interest, it is not the proper subject of judicial notice as to the Legislature's intent in enacting Section 12414.26. "[A]s a general rule in order to be cognizable, legislative history must shed light on the collegial view of the Legislature *as a whole.*" *Kaufman & Broad Communities Inc. v. Performance Plastering Inc.* (2005)133 Cal. App. 4$^{th}$ 26, 30, emphasis in original (*Kaufman & Broad*).

First American objects to Kaufman's request for judicial notice of Exhibit 3 as her brief does not cite or rely on this document and it therefore cannot be relevant. Exhibit 3 (Legislative Analysis of Section 12414.26) is a proper subject of judicial notice. *Kaufman & Broad* at 31. The Court takes judicial notice of this exhibit and of Exhibits 4 and 8, to which no objection was made.

Exhibit 5 (Letter from California Land Title Association to Gov. Reagan) is not the proper subject of judicial notice as to legislative intent. *Kaufman & Broad* at 38 (Letters to Governor urging signing of bill not the proper subject of judicial notice).

1 First American objects to Exhibit 28 (Deposition of Dwayne Buggage). To the
2 extent Kaufman cites this testimony for the truth of the matters asserted it is hearsay.
3 However, it is properly before the Court for purposes of establishing that Kaufman's
4 theory of liability implicates rate interpretation.
5 In light of the disposition below the balance of the documents Kaufman asks the
6 Court to judicially notice are irrelevant and her requests are thus moot.
7 On its own motion, the Court takes judicial notice of the fact that in *Kaufman*
8 plaintiffs seek to exclude all evidence/argument offered to show that the Insurance
9 Commissioner/CDI authorized, ratified, approved or permitted the charges at issue. See
10 Joint Report filed August 21, 2018 at page 1, lines 13-18. Evid. Code § 452(d)(1). In
11 taking judicial notice of this fact and of Exhibit F the Court expresses no view as to the
12 whether the facts support First American's defense.
13 **IV. THE MOTIONS ARE PROCEDURALLY PROPER**
14 Sjobring advances several procedural arguments, which are incorporated into
15 Kaufman's opposition. They are rejected for the reasons set forth below.
16 **A. Cal. Code of Civ. Pro. Section 1008 Is Not Applicable**
17 Demurrers were filed in both *Sjobring* and *Kaufman*. In *Sjobring* First American
18 argued that the ten causes of action pled were barred by Insurance Code Section 12414.26.
19 The judge then presiding (Hon. Anthony Mohr) rejected this argument, noting that the
20 Complaint ***pled*** that the policies that were issued were extended coverage policies and that
21 because Plaintiff alleged he was charged the wrong premium, rather than the computation
22 of that premium, Defendants' actions were not immunized. Sjobring RJN, Exhibit 3.
23 Much has happened since the demurrers were heard. First, in November 2012,
24 Sjobring filed a complaint with the CDI pursuant to Ins. Code §12414.13, charging a
25 violation of Article 5.5 of the Insurance Code. Exhibit B to Defendant's RJN and Exhibit
26 1 to Sjobring's RJN.
27 Second, Sjobring filed his motion for class certification. In arguing for class
28 certification, Sjobring advanced the theory that common questions predominated over

1 individual issues because the issue to be tried was one of rate interpretation. That
2 argument was accepted. As to Class 1 the common question is whether the Eagle Owner's
3 policy is an extended or standard coverage policy and as to Class 2 the common question is
4 whether the C-5 rate should have been applied to the policies as issued. It has thus become
5 apparent that, notwithstanding some of the language in the 4th AC, what must be resolved
6 is whether the policies are or are not "extended" policies for purposes of the rate filing and
7 based thereon whether the proper rate was charged. Defendants' Supplemental RJN,
8 Exhibit P. So framed, the issue is a legal one Judge Mohr did not address on demurrer: If
9 the Court must characterize a policy and determine which filed rate should have been
10 charged, is not the Court thereby engaging in ratemaking and rate regulation, which is
11 precluded by the statutory scheme?

12 Similarly in *Kaufman* a motion for class certification was granted, discussed *infra*,
13 which makes clear that ratemaking is implicated.

14 In short, these are not improper motions for reconsideration of the demurrer ruling.
15 Instead, the Court is called upon to determine a question of law in light of the cases as they
16 are now framed by their common questions.

17 **B. A Common Law Motion for JOP Is Proper**

18 California recognizes two forms of motions for judgment on the pleadings.
19 Statutory motions may be brought pursuant to Cal. Code Civ. Pro. §438 (c)(1)(B), which
20 provides that a defendant may move for judgment on the pleadings if either (i) the court
21 has no jurisdiction of the subject of the cause of action alleged in the complaint, or (ii) the
22 complaint does not state facts sufficient to constitute a cause of action against that
23 defendant. Subsection (g)(1) allows for a motion for judgment on the pleadings even
24 where a prior demurrer on the same grounds was overruled so long as "there has been a
25 material change in applicable case law or statute since the ruling on the demurrer."

26 First American argues that the judgment and resulting appellate opinion in *Kirk* and
27 this Court's orders regarding class certification constitute a "change in the law" which
28 permits the filing of this motion under Cal. Code of Civ. Pro. §438. This argument fails.

There may be changes in the procedural status of the cases but the law has not changed since the demurrer was heard. First American therefore cannot rely on Cal. Code of Civ. Pro. § 438 to bring this motion.

Cal. Code Civ. Pro. §438 became effective in 1994. Prior to that time motions for judgment on the pleadings were allowed under the common law. Although not entirely free from doubt, nonstatutory (common law) motions survive enactment of section 438. Weil & Brown explain that:

> "CCP § 438 imposes major limitations on the motion; e.g., it does not lie on grounds previously raised by demurrer unless there has been a material change in the law (see ¶ 7:305). It also imposes time limits (see ¶ 7:280). However, these limitations may be meaningless because a nonstatutory motion for judgment on the pleadings apparently survives without such limitations:
>
> — "A motion for judgment on the pleadings may be made at any time either prior to the trial or at the trial itself." [*Stoops v. Abbassi* (2002) 100 CA4th 644, 650, 122 CR2d 747, 752 (citing pre-CCP § 438 case of *Ion Equip. Corp. v. Nelson* (1980) 110 CA3d 868, 877, 168 CR 361, 365); see also *Smiley v. Citibank (South Dakota) N.A.* (1995) 11 C4th 138, 145, 44 CR2d 441, 445, fn. 2— "common law motion for judgment on the pleadings" upheld despite the fact CCP § 438 had been enacted during course of proceedings; and *Saltarelli & Steponovich v. Douglas* (1995) 40 CA4th 1, 5, 46 CR2d 683, 686—treating defective motion for summary judgment as "nonstatutory motion for judgment on the pleadings"]
>
> Comment: Case authority for the nonstatutory motion is rather thin. None of the cited cases expressly deal with this issue; they simply assume its existence. But these cases reach a practical result. A court should be able to decide there is no valid cause of action at any time.

1 There is no point in forcing a case to go to trial because the motion
2 was made too late or otherwise failed CCP § 438 requirements."
3 Weil & Brown, The Rutter Group California Practice Guide: Civil
4 Procedure Before Trial, §7:277.

5 The procedures and case law regarding "nonstatutory" motions are properly invoked
6 here. Sjobring and Kaufman do not address this authority in their oppositions. Given the
7 importance of the legal issues raised and the procedural developments in the cases since
8 the demurrers were heard, the motion is properly brought as a common law motion.

9 **C. A Motion for Summary Judgment Is Not Required**

10 Sjobring argues that a motion for summary judgment is required to be brought by
11 First American in order to address the issues herein. No authority is cited for this
12 proposition other than Judge Mohr's observation that such a motion *could* be brought. The
13 issue these motions raise is a legal one only. Whether raised by motion for judgment on
14 the pleadings or summary judgment, the result is the same.

15 **D. The Court May Consider The Issue Under the Rules of Court and Those**
16 **Applicable to JOP Motions Generally**

17 At oral argument counsel for Sjobring and Kaufman argued that because these
18 motions are brought as motions for judgment on the pleadings, the Court could not
19 consider FATCO's defense based on a "scrivener's error" or any matters other than what is
20 pled by plaintiffs. As an initial matter, a motion for judgment on the pleadings may
21 consider both the pleading *and* all matters judicially noticeable. *People ex rel. Harris v.*
22 *Pac Anchor Transportation, Inc.* (2014) 59 Cal.4th 772. This includes taking judicial
23 notice of the positions taken by Sjobring and Kaufman on class certification and the
24 Court's prior rulings certifying the classes in *Sjobring* and *Kaufman.*

25 This is particularly important here. In both cases Plaintiffs have raised in their
26 pleading the issue of whether the conduct is precluded by Section 12414.26. The parties
27 have framed the issues to be tried and the Court has certified the classes accordingly. Trial
28 dates are set. The Court also is aware that a three week trial resulted in a ruling that

Section 12414.26 precluded liability as to certain of the claims tried in *Kirk*. See FATCO's Requests for Judicial Notice Exhibit A (Statement of Decision in *Kirk*) and Exhibit C (*Kirk* Opinion).

It is apparent that the facts and circumstances in *Kirk* and *Sjobring* are related. While the facts in *Kaufman* are different, the legal issue related to the effect of Insurance Code Section 12414.26 is the same in the three cases. No order has been entered coordinating the determination of these issues. As the parties recognize, this is a JCCP proceeding. As such, the Court is empowered to provide a method and schedule for submission of preliminary legal questions that might serve to expedite the disposition of the coordinated actions. Cal. Rules of Court, Rule 3.541(a)(5). The Court exercises its discretion in this case to consider the issue presented under that authority and to rule on the legal issue presented by the motions as framed by the pleadings and subsequent developments that are judicially noticed, so as to expedite disposition of these cases. See *McGhan Medical Corp. v. Superior Court* (1992) 11 Cal.App.4th 804, 812 ("[I]t is the intent of the Judicial Council to vest in the coordinating judge whatever great breadth of discretion may be necessary and appropriate to ease the transition through the judicial system of the logjam of cases which gives rise to coordination.")

## V. THE CLAIMS ARE PRELUDED BY THE STATUTORY SCHEME AND APPLICABLE CASE LAW

### A. The Claims Involve the Proper Use of Rates and Implicate Ratemaking

Insurance Code §12414.26 provides: "No act done, action taken, or agreement made pursuant to the authority conferred by Article 5.5 (commencing with Section 12401) . . . of this chapter shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this state heretofore or hereafter enacted which does not specifically refer to insurance." Sjobring and Kaufman argue that their complaints arise under Section 12414.27 of the Insurance Code and do not challenge "an act done, action done, or agreement made pursuant to the authority conferred by Article 5.5." Further, they argue that First American confuses "immunity" with "jurisdiction." They emphasize that only

1 the Legislature can confer "immunity" by statute. *Krumme v. Mercury Insurance Co.* (2004) 123 Cal. App. 4th 924, FN 5 (*Krumme*).

There is some confusion of terminology. First American characterizes section 12414.26 as a "safe harbor," referencing the concept that if the Legislature has considered a situation and concluded no action should lie, courts may not override that determination. See *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal. 4th 163, 182; *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal. App. 4th 968 FN 5 (*Donabedian*). Kaufman characterizes this as a grant of "immunity." See *State Comp. Insurance Fund v. Superior Court* (2001) 24 Cal. 4th 930 (*SCIF*)(characterizing Section 11758 as not granting "immunity" from claims for an insurer's conduct in reporting data in the workers' compensation context). Neither term appears in the statute and the similar statute (Section 1860.1 applicable to property and casualty insurance) has been said *not* to grant "immunity" but to limit plaintiffs to an administrative remedy (with judicial review). See *MacKay v. Superior Court* (2010) 188 Cal.App.4th 1427 FN 19 (*MacKay*).

Whether viewed as a limit on its jurisdiction ("a safe harbor") or an "immunity," the Court must read Section 12414.26 as part of the statutory scheme as a whole. As discussed below, the gravamen of Plaintiffs' theory in both cases is that the rates were improperly used as to the policies at issue. This amounts to a challenge to the "use" of a rate and implicates "ratemaking," a function that, under the statutory scheme, falls initially to the CDI.

The Insurance Code, at Part 6, Article 5.5, governs "Rate Filing and Regulation" applicable to title insurers and the CDI, which regulates title insurance in California. Several sections of article 5.5 describe how a company like First American files rates. Title companies are required to file their rates and copies of the title policies "*to which such rates apply.*" Ins. Code §12401.1, emphasis added. Section 12401.3 then details the standards that apply to the "*making and use* of rates pertaining to all the business of title insurance," including a standard that rates shall not be "excessive or *inadequate.*" Ins.

Code § 12401.3, emphasis added. Section 12401.7 provides that rates may be used thirty days after filing unless the CDI intervenes.

The Legislature has provided that a consumer aggrieved by "any rate charged" may proceed under Article 6.5 (sections 12414.13-12414.19). A consumer unsatisfied with the action of the CDI may proceed by writ. *Id.* at Section 12414.19.[3]

Finally, section 12414.29 provides that "[t]he administration and enforcement of Article 5.5 (commencing with section 2401) and Article 5.7 (commencing with section 12402) of this chapter shall be governed solely by the provisions of this chapter."

The case law interpreting the statutory scheme and Section 12414.26, as well as similar provisions in the Insurance Code applicable to other types of insurance, compels the conclusion that on the facts of these cases, Plaintiffs are seeking by civil litigation to challenge directly the "use" of a filed rate and seek to engage in rate regulation. This they cannot do. See *Quelimane Co. v. Stewart Title Guaranty Co. (Quelimane)* (1998) 19 Cal. 4th 26, 44 (Article 5.5 applies to "rate regulation"); 13 Witkin, Summary of Cal. Law (11th Ed. 2017) Equity, § 120, page 419 ("[Insurance Code , Section 12414.26] is expressly limited to title insurance activities related to rate setting."); *Krumme* at 937, citing *Spielholz v. Superior Court* (2001), 86 Cal. App. 4th 1366, 1374-1375 ("[A] claim that directly challenges a rate and seeks a remedy to limit or control the rate prospectively or retrospectively, is an attempt to regulate rates."); *Cf. Walker v. Allstate Indemnity Co.* (2000) 77 Cal. App. 4th 750, 756 (*Walker*)("If section 1860.1 has any meaning whatsoever . . . , the section must bar claims based upon an insurer's charging a rate that has been approved by the commissioner"); *MacKay* at 1443 ("The ratemaking chapter [applicable to

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[3] Kaufman argues that restitution is not available in an action in front of the CDI, citing Insurance Code section 12414.13, *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 274, *Stevens v Superior Court* (1999) 75 Cal. App. 4th 594, and Exhibit 16. As to Exhibit 16 judicial notice is denied. The document is an inadmissible hearsay expression of opinion by a CDI staff attorney to which First American properly objected. Other provisions of the Insurance Code, not at issue in *Manufacturers Life* and *Stevens* (Insurance Code section 12414.18, incorporating Government Code §11519(d)), may afford restitutionary relief in a CDI proceeding. If such relief is not available, Plaintiffs' remedy lies with the Legislature.

property and casualty insurance] confers on the DOI the exclusive authority to approve insurance rating plans. An insurer charging a preapproved rate is doing an act or taking an action pursuant to the authority conferred by the chapter.").

It is for this reason that Plaintiffs' reliance on *Donabedian* is misplaced. That case involved only an "as applied" challenge to a rate that was not disputed and not a determination of which rate was applicable in the first instance. The same is true of *King v. Nat'l Gen. Ins. Co.* (N.D.Cal. 2015) 129 F. Supp. 3d 925, which challenged the application of an approved rate. See *MacKay* at 1449-1450 ("Cases which apparently reached a different result when the underlying conduct was *not* the charging of an approved rate are distinguishable on this basis.").

Nor is Plaintiffs' reliance on section 12414.27 helpful. That section provides, in pertinent part, that no title insurer shall charge a rate for a title policy or service "except in accordance with rate filings that have become effective pursuant to Article 5.5." Plaintiffs do not contend that First American charged a rate that was not filed and become effective. Instead, they contend that a different filed rate should have been charged.

The Court recognizes that there is no published case directly on point as to whether a party alleging rate *ambiguity* may bring a direct action or must challenge the rate under Article 6.5. It is also recognized that there is a factual dispute between the parties as to *whether* First American in fact charged a rate that it filed with respect to the policies at issue. However, resolution of that factual issue requires the Court to interpret the policies and the rates. Under the statutory scheme this is the exclusive function of the CDI in the first instance, subject to review by the Court.

If the statute were interpreted as Plaintiffs' suggest the Court would be required to ignore Article 6.5 (sections 12414.13-12414.19) and the case law to the effect that the "use" of rates and "rate making" is within the exclusive jurisdiction of the CDI in the first instance. This the Court cannot do.

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1 **1. Sjobring's Claims Necessitate Rate Interpretation and Regulation**

2 Sjobring's claims arise from an alleged ambiguity in First American's rate filings.
3 In Opposition to this motion, Sjobring explains that because certain "Definitions" filed by
4 First American in 1995 with the CDI do not expressly include the policy form for which
5 Sjobring paid (and which were not amended until 2006 to expressly cover that form), his
6 interpretation of the form of policy (whether "Standard or "Extended") and the resulting
7 rate(s)) should control. He argues why the policy at issue should be considered an
8 Extended Coverage policy rather than a Standard Coverage policy and details the
9 "definitions" contained in the filings made by First American with the CDI, including the
10 "definitions" filed in 1995 and 2006. He also explains why his characterization of the
11 policy is correct and which of the filed rates should have been charged. Sjobring
12 Opposition at page 6:16-11:11. First American takes a different point of view, arguing that
13 it charged the filed rate applicable to the policy at issue. First American Reply at page 8:1-
14 10:23.

15 Sjobring's pleading makes clear that he seeks to use this action to engage in rate
16 regulation by seeking to characterize the policies at issue and then determining which of
17 several filed rates applied to the policy. See 4th AC at ¶¶ 32(d), 48, 80 and pages 8:12-13
18 and 9:24-27. Likewise, in connection with the class certification motion and in determining
19 that common questions predominated, the Court noted that as to Class 1 there is a common
20 question as to whether the Eagle Owner's Policy is an "Extended Coverage" or a "Standard
21 Coverage" policy. With regard to Class 2 Sjobring agreed to narrow the issue to *whether*
22 the C-5 rate should have been applied to the policies as issued. This concession was in
23 response to Defendants' argument that individual questions regarding whether specific
24 lenders would have accepted an alternative policy with the C-5 pricing precluded
25 certification. As the Court noted in granting certification, "This in effect narrows the
26 question to one of rate interpretation, as is the case with Class 1." *Sjobring* Class
27 Certification Order at 14:1-5. The Court further noted establishing liability is "largely a
28

1 question of interpretation of the applications of the policies to the applicable rates." *Id.* at
2 15:27-28.

3 Moreover, Sjobring invoked the procedures for challenging the rates he was
4 charged and expressly alleged that the CDI had jurisdiction to hear the matter. Sjobring
5 RJN Exhibit 1. Although First American disputed the authority of the CDI to act (Exhibit
6 14 to Sjobring's Supplemental Request for Judicial Notice filed May 10, 2018), the CDI
7 brought a formal accusation based on Sjobring's complaint (Exhibit D to First American's
8 Request for Judicial Notice). The CDI and First American ultimately settled that
9 proceeding. *Id.* at Exhibit E. The settlement, however, did not resolve the question before
10 this Court, i.e. the nature of the policy or its proper rate and did not address the "C-5" issue
11 raised by Class II in *Sjobring*. The Court is unaware of any writ relief being sought.

12 In short, in asserting that First American used the wrong filed rate and asking the
13 Court to determine that his rate is the correct one, Sjobring asks the Court to determine the
14 proper "use" of a rate and to engage in rate regulation. This is the function of the CDI, at
15 least initially.

16 **2. Kaufman's Claim Necessitates Rate Interpretation and Regulation**

17 Kaufman's claim derives from the fact that in a 2006 rate filing First American
18 listed the form of loan policy issued to Kaufman's lender as "Standard Coverage." First
19 American argues that this was a "scrivener's error," and that the correct rate at all times
20 was for policies that provided "Extended Coverage" and that this was recognized by the
21 CDI. Exhibit F to First American's Request for Judicial Notice. It argues that Kaufman's
22 interpretation would permit her to obtain valuable coverage for no cost. Kaufman disputes
23 this.

24 Kaufman did not invoke the jurisdiction of the CDI and does not explain why the
25 procedures in Article 6.5 do not apply here.

26 In granting Kaufman's motion for class certification the Court identified as
27 classwide questions the following:
28

1 (1) Did Defendants apply the rate correctly for the first concurrent Eagle Loan
2 policyholders during the class period?; (2) Were Defendants permitted to charge an
3 additional premium for a first concurrent Eagle Loan policy during the class period,
4 contrary to Defendants' filed rate with the CDI?; (3) Did Defendants violate
5 Insurance Code §12412.27 by charging a rate that was not filed with the CDI?; and
6 (4) Was there a scrivener 's error in the filed rate by Defendants, and if so what
7 effect, if any, does it have on Defendants' liability under the Code?
8 *Kaufman* Class Certification Order at 11:15-21.

9 In making these determinations the Court is called upon to determine whether the
10 policy sold to Kaufman was a "Standard" or "Extended" policy and to determine what
11 effect, if any, the claimed scrivener's error has on the proper rate to be charged, including
12 whether the rate as posted would be considered inadequate under section 12401.3 and
13 Article 5.5.[4] Put another way, the parties each ask the Court to determine that her/their
14 position as to the effect of the claimed scrivener's error is correct.

15 In addition, as noted, *supra*, the SAC alleges that alternatively, there was another
16 less-expensive pricing structure that could have been applied (SAC ¶56). In either event,
17 Kaufman's claims implicate the "*making and use*" of a rate under Section 12401.3.
18 Kaufman's reliance on testimony from CDI rate analyst Dwayne Buggage in her motion
19 for class certification, her anticipated reliance on the testimony of other CDI employees at
20 trial, and her request to exclude testimony regarding the CDI's involvement in the issue,
21 emphasizes this point. Kaufinan Opposition at 1:13-18, citing Exhibit 28; First American's
22 Supplemental Request for Judicial Notice, Exhibits K and M.

23 //
24 //
25

26 [4] Kaufman argues that the CDI has only enacted one rate examination regulation since this statute
27 was enacted and has not sought to determine whether a rate was inadequate. These facts do not
bear on what the CDI is empowered to do.
28

1 **B. The Statutory Language Is Not Limited to Concerted Action**

2 Kaufman argues that the statute prohibits only a civil action based on "an act done, 3 action taken or agreement made *pursuant to the authority*" of Articles 5.5 and 5.7 4 (emphasis added) and that this is language of limitation intended to protect only 5 "concerted" action by insurers. This reading derives from language in *SCIF* at 939-940, 6 interpreting similar statutory language respecting workers' compensation insurers.

7 The issue in *SCIF* was whether a worker's compensation insurer was immune from 8 civil liability under Insurance Code §11758 for allegedly misallocating an insured 9 employer's expenses and then reporting that misinformation to a rate-making organization, 10 resulting in higher premiums for its insured. The language in Section 11758 is duplicative 11 of Section 12414.29 (and Section 1860.1).

12 In *SCIF* the Court noted that the workers' compensation statute "refers to an 'act 13 done, action taken or agreement made *pursuant to the authority* conferred by this article . . 14 . .' (Italics added.) It does not refer to an 'act done, action taken or agreement made 15 pursuant to this article.' As relevant here, what is authorized by article 3 is 'cooperation 16 between insurers, rating organizations and advisory organizations in ratemaking and other 17 related matters to the end that the purposes of this chapter may be complied with and 18 carried into effect.' (§ 11750)." *Id.* at 936. From this language and the legislative history, 19 the Court concluded that the insurer was not immune from liability for misreporting data to 20 a rate making organization.

21 Here, and unlike in the context of workers' compensation insurance considered in 22 *SCIF*, Plaintiffs point to no express provision equivalent to Section 11750 that applies to 23 title insurers defining the "authority conferred" by Articles 5.5 or 5.7.

24 Moreover, the Court in *SCIF* was not called upon to decide whether either 25 "concerted" or "unilateral" action was protected by the statutory section but only to 26 determine whether the unilateral conduct at issue (misreporting employer's expenses) was 27 protected activity under Section 11758. There is other language in *SCIF* to the effect that 28 other kinds of unilateral action (the reporting of information for purposes of setting rates)

would be within Section 11758's protections. *Id.* at 936. *SCIF* thus does not assist Plaintiffs.

Further, an "act done" or "action taken" can be a unilateral activity by a carrier. The Court would be required to disregard those words to reach the conclusion that only concerted activity otherwise amounting to an anti-trust violation is protected. The Court would also have to disregard the fact that the Legislature knows what "concerted action" is, as it expressly states that "nothing in this article shall be construed to prohibit concert of action between entities under the same general management and control." Ins. Code §12401.6. Had it wanted to limit Section 12414.26 to "concerted action" it could have used that term rather than the more inclusive terms "act done" or "action taken." Cf. *Walker* at 757 (An insurer charging a preapproved rate is doing an act or taking an action pursuant to the authority conferred by the chapter.).[5]

**C. The Statute Is Not Limited To Affirmative or Statutory Claims**

Kaufman argues that "immunity" under Section 12414.26 is limited to affirmative "acts" and that omissions cannot form the basis for an "immunity." The short answer to this argument is that the claims asserted in *Sjobring* and *Kaufman* are for fraud and breach of contract, involve affirmative acts, and were certified on that basis, as Plaintiffs' counsel conceded at oral argument.

Kaufman also argues that because the statute refers to civil proceedings "under any other law...enacted" only statutory claims (i.e. statutory claims based on the anti-trust laws) are precluded. Under this interpretation Plaintiffs' claims under Business and Professions Code §17200 (a statutory claim) would be prohibited but claims based upon

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[5] Plaintiffs argue that the CDI does not "pre-approve" title insurance rates. The trial court in *Kirk* found to the contrary and expressly found that testimony by CDI employees to the contrary was not credible. Exhibit A to First American's request for Judicial Notice, page 12, line 3-page 15, line 15. Moreover, the act of filing the rate and receiving no objection thereto and thereafter charging the rate filed is an act "authorized" by Chapter 5.5.

the common law would not.[6] This cannot be what the Legislature intended. If that were so then claims of common law monopolization could be stated against insurers but claims based on the Sherman Act or the Cartwright Act against insurers, based on the same facts, would be barred. That is an outcome inconsistent with Plaintiffs' proffered interpretation of the legislative intent of the statute. Cf. *California School Employees Assn. v. Governing Board* (1994) 8 Cal. 4th 333 (Court interpreting a statute literally shall not produce an absurd result contrary to legislative intent); *Walker* (Demurrer based on Section 1861.01 immunity was afforded to both statutory and common law causes of action).

Alternatively, Kaufman contends that Section 12414.26 precludes a civil action only for those acts that constitute the "grounds for . . . civil proceedings" and that First American's defense of a scrivener's error is not a "ground" for her proceeding. This argument is not persuasive. The asserted "grounds" for this proceeding are that First American should have applied a rate it did not. The Second Amended Complaint also *pleads* that "at best, the rate structure First American drafted and filed, and which was in effect during the class period, contained ambiguities" and that First American should have construed the rate structure in favor of the consumer. SAC ¶ 42. Thus, even under Kaufman's reading of the statute, her claim is barred.

**D. The Legislative History Does Not Assist Plaintiffs**

The case law lays out legislative history that Kaufman argues is of importance here. As explained in *McKay*, language comparable to that in Section 12414.26 first entered the

---

[6] On August 22, 2018, while this motion was pending, counsel for Sjobring and Kaufman filed a document entitled "Notice of Waiver of Equitable Theory of Recovery Under UCL, In Sjobring and Kaufman." The document indicates that class counsel and the class representatives have determined to proceed to trial exclusively on common law theories of recovery and have made a decision not to pursue "equitable relief" under the UCL. The document indicates this decision was made, in part, to advance the argument that "common law" claims are not grounded in any statutory claim and are therefore outside the scope of any immunity afforded defendants under Section 12414.26. See Declaration of Steven Bernheim at ¶¶ 8 and 9, dated August 21, 2018. The filing of this document has no effect on this motion for the reasons above stated. The document does not purport to dismiss the UCL claim in either case. Further, no Request for Dismissal (CIV-110) as to any cause of action or claim was filed in either case.

1 Insurance Code in 1947 as part of the McBride-Grunsky Insurance Regulatory Act of
2 1947. That act was California's response to *United States v. South-Eastern Underwriters*
3 *Ass'n* (1944) 322 U.S. 533, finding insurers liable for violations of the federal anti-trust
4 laws and the subsequently enacted McCarran-Ferguson Act (15 U.S.C. §1011 et seq.)
5 which imposed a moratorium on federal antitrust litigation respecting insurance companies
6 until 1948. Thus, as *MacKay* explained, the initial code section containing the language
7 parallel to that in Section 12414.26 (Insurance Code §1860.1 applicable to property and
8 casualty carriers) was enacted in order to immunize insurers from antitrust laws. *MacKay*
9 at 1444, citing *Donabedian*. However, as *McKay* further explained: "[T]he McBride-
10 Grunsky Act did more than immunize insurers from antitrust laws. It enacted the entirety
11 of Chapter 9 of Part 2 of Division One of the Insurance Code, governing 'rates and rating
12 and other organizations.' It also enacted Insurance Code §1858 which provides an
13 administrative remedy before the Commissioner for an insured aggrieved by an insurer's
14 rates or rating system." *Id.* at 1444-1445. Thus, as *McKay* explains," while the initial
15 *motivation* behind Insurance Code section 1860.1 may have been an exemption from
16 antitrust laws in particular, it was recognized that the language of the exemption was, in
17 fact, broader." *Id.* at 1445, emphasis added.
18 Kaufman argues that the impetus for Section 12414.26 was anti-trust litigation
19 brought against title insurance carriers. See Kaufman RFN Exhibit 8. The admissible
20 evidence of legislative history shows that Section 12414.26 was enacted in 1974 with
21 language equivalent to that of Insurance Code §§11758 (applicable to workers'
22 compensation carriers) and 1860.1 (applicable to property and casualty insurance) after
23 several title insurers were sued for anti-trust violations. However, there is no evidence
24 before the Court that at the time Section 12414.26 was enacted the Legislature intended the
25 language it used to be limited to statutory anti-trust claims. The stated purpose of the
26 Legislation as a whole was "to provide rate regulation for an industry in which there is
27 none" (Kaufman RJN Exhibit 3) and specifically to regulate rates so that they are not
28

"excessive, inadequate, or unfairly discriminatory," and to "encourage competition...on a sound financial basis." Ins. Code § 12401.

Title insurance, unlike workers compensation insurance or property or casualty insurance, does not insure against future events. *Quelimane* at 41. It involves a single premium. It insures against "defects in the title or against liens or encumbrances that may affect title at the time when the policy is issued." *Elysian Invest. Group, LLC v. Stewart Title Guar. Co.* (2002) 105 Cal. App. 4th 315, 320; Ins. Code §§ 104, 12340.1. Importantly, there is no argument or suggestion that *title insurance companies* in 1974 used rating organizations to set title insurance rates or otherwise shared actuarial information for that purpose, which was the original impetus for the provision enacted with respect to property and casualty insurance in 1947 or that enacted with respect to workers' compensation insurance in 1951. *SCIF* at 939-940.

To be sure, the legislation respecting title insurance permits, in Article 5.5, consideration of past and prospective loss experience in determining whether rates are excessive or inadequate (Ins. Code §12401.3) as well as the exchange of information and experience data between title insurers and the *Insurance Commissioner* for the purposes of evaluating individual rate filings (Ins. Code §§ 12401.4, 12401.5). The legislation also permits the establishment of an advisory organization and membership therein (Article 5.7) and permits the *Insurance Commissioner* to employ the services of the "advisory organization" to assist him in his duties. Section 12401.5. The legislation also permits the *Insurance Commissioner* to gather data annually for the purposes of evaluating individual rate filings. Section 12401.5. However, there is no citation to any legislative history to the effect that Section 12414.26 was designed solely to provide antitrust immunity or to permit title insurance *carriers* to report data to a ratings agency so as to set rates.

To summarize, whatever may have been the historical origins of the language used in Section 12414.26, the interpretation for which Sjobring and Kaufman argue is not supported by its legislative history. These actions seek to impose liability based upon the use of a filed rate and call upon the Court both to characterize the type of policies filed and

1 to determine what rate should have been charged as to each. This is a challenge to the use
2 of a rate and rate regulation precluded by Section 12414.26 and the statutory scheme as a
3 whole.

4 **E. Plaintiffs' Reliance on Section 12414.27 and Both Parties' Reliance on the**
5 ***Kirk* Appellate Opinion Is Misplaced**

6 Plaintiffs argue both that they are not bound by the *Kirk* trial court order or the
7 unpublished decision affirming same and that First American is bound under the doctrine
8 of collateral estoppel. They then contend that under those opinions their action can
9 proceed under Section 12414.27

10 Essentially, Plaintiffs seek to invoke the doctrine of offensive, nonmutual collateral
11 estoppel. See *Parklane Hosiery Co. v. Shore* (1979) 439 U.S. 322. Assuming, *arguendo*,
12 that the doctrine is applicable in state court, its elements require, at a minimum, that the
13 issue adjudicated in the prior proceeding be the same as in this proceeding. This is black
14 letter law respecting both issue and claim preclusion. See *DKN Holdings LLC v. Faeber*
15 (2015) 61 Cal 4th 813. That showing is not made. In that part of the Statement of Decision
16 favorable to Kirk the trial court determined that as to certain charges FATCO did not
17 consistently apply its *own interpretation* of certain sub-escrow services and that it thus was
18 liable under section 12414.27. Exhibit A to First American's Request for Judicial Notice
19 at 34:19-37:7. This was affirmed by the Court of Appeal. *Id.* at Ex. C, pages14-15. There
20 is no issue in either of these cases as to whether First American disregarded its own
21 interpretation of the proper charges for sub-escrow fees (or any other fees). The issue in
22 both cases is whether Plaintiffs' interpretation of the rate is the correct one. Thus,
23 Plaintiffs' reliance on *Kirk* and the unpublished opinion of the Court of Appeal therein is
24 misplaced.

25 To the extent First American relies on the unpublished opinion of the Court of
26 Appeal in *Kirk* (to argue the effect of Section 12414.26 on this action) it also errs. Cal.
27 Rule of Court, Rule 8.1115(a).
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**VI. ORDER**

*Sjobring* and *Kaufman* as now understood challenge the use of a filed rate and require the Court to engage in rate setting, rate regulation, and a determination of the proper "use" of rates. As the Court understands the statutory scheme and the case law a civil action on this basis is precluded prior to an action brought under Section 6.5 of the Insurance Code. Sjobring has proffered a Fifth Amended Complaint to be filed in the event this motion is granted. Exhibit A to Opposition. It, however, continues to challenge the use of a rate and continues to require that the type of policy at issue be adjudicated. (See proposed Fifth Amended Complaint at ¶¶ 43-50; 62-70.) Kaufman tenders no such pleading and does not assert any ability to amend so as to comply with the statute. Accordingly, the motions for judgment on the pleadings are GRANTED, without leave to amend.

Counsel for First American shall prepare and lodge judgments of dismissal. The Clerk is requested to vacate all pre-trial and trial dates on calendar.

Dated: 8/27/14

MAREN E. NELSON
JUDGE OF THE SUPERIOR COURT

Documents Considered

**JOP RE SJOBRING**

**Filed December 19, 2017 by First American**

Defendant's Notice of Motion and Motion for Judgment on the Pleadings
(Redacted and Unredacted/Conditionally Under Seal)
Defendants' Request for Judicial Notice
(Redacted versions of Exhibit H and J and unredacted/conditionally under seal versions)
Declaration of Judith Sidkoff in Support of Lodgment of Exhibits H and J

**Filed April 26, 2018 by Sjobring**

Plaintiff Jeffrey Sjobring's Opposition to Motion for Judgment on the Pleadings
Request for Judicial Notice and Declaration of Counsel in Support of Opposition to Motion for Judgment on the Pleadings
Objections to First American's Request for Judicial Notice

**Filed May 10, 2017 by Sjobring**

Supplemental Request for Judicial Notice in Support of Opposition to Motion for Judgment on the Pleadings

**Filed May 17, 2017 by First American**

Reply in Support of Defendants' Motion for Judgment on the Pleadings
Defendants' Response to Plaintiff's Objections to Defendants' Request for Judicial Notice
Defendants' Objections to Plaintiff's Request for Judicial Notice
Defendants' Supplemental Request for Judicial Notice

**JOP RE KAUFMAN**

**Filed May 7, 2018 by First American**

Defendants' Notice of Motion and Motion for Judgment on the Pleadings (*Pickett/Kaufman*); Memorandum of Points and Authorities; Declaration of Paul M. Kakuske
Defendants' Request for Judicial Notice

**Filed June 28, 2018 by Kaufman**

Plaintiff Wendy Kaufman's Opposition to Motion for Judgment on the Pleadings
Plaintiff Wendy Kaufman's Objections to Defendants' Request for Judicial Notice
Plaintiffs Wendy Kaufman and Jeffrey Sjobring's Request for Judicial Notice

**Filed July 11, 2018 by Defendants**

Reply in Support of Defendants' Motion for Judgment on the Pleadings (Kaufman)
Supplemental Request for Judicial Notice
Defendants' Objections to Plaintiff's Request for Judicial Notice in Support of Opposition to Defendant's Motion for Judgment on the Pleadings

Defendants' Response to Plaintiff's Objections to Defendants' Request for Judicial Notice

**Filed August 21, 2018 by All Parties**
Joint Report

**BOTH CASES**

**Lodged July 31, 2018**
Reporter's Transcript of the July 23, 2018 Hearing

**Filed August 22, 2018**
Notice of Waiver of Equitable Theory of Recovery Under UCL filed August 2, 2018

Re: *Pickett/Kaufman v. First American Title Ins. Company*
Case No.: BC382826

**PROOF OF SERVICE**

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 600 South Indian Hill Boulevard, Claremont, California 91711.

On **November 2, 2018,** I served the foregoing documents described as NOTICE OF APPEAL on the interested parties in this action by placing __ the original XX a true copy thereof enclosed in sealed envelopes addressed as follows:

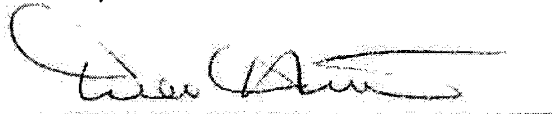
PLEASE SEE ATTACHED SERVICE LIST

[XX] **VIA ELECTRONIC SERVICE VIA CASE ANYWHERE** through electronic transmission to all parties appearing on the electronic service list.

[XX] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[] (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **November 2, 2018,** at Claremont, California.



Debbie Hunter

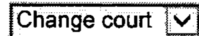
Re: *Pickett/Kaufman v. First American Title Ins. Company*
Case No.: BC382826

**SERVICE LIST**

| | |
|---|---|
| Ronald D. Kent, Esq.<br>Joel D. Siegel, Esq.<br>Dentons US LLP<br>601 South Figueroa Street, Suite 2500<br>Los Angeles, California 90017<br>Telephone: (213) 623-9300<br>FAX: (213) 623-9924 | Attorneys for Defendant,<br>First American Title Company |
| Sonia Martin, Esq.<br>Dentons US LLP<br>525 Market Street, 26th Floor<br>San Francisco, CA 94105<br>(415) 882-5000 | Attorneys for Defendant<br>First American Title Company |
| Steven J. Bernheim, Esq.<br>The Bernheim Law Firm<br>11611 Dona Alicia Place<br>Studio City, California 91604<br>Telephone: (818) 760-7341<br>Email: BernieBernheim@Gmail.com | Attorneys for Plaintiffs |
| Taras Kick, Esq.<br>The Kick Law Firm, APC<br>815 Moraga Drive<br>Los Angeles, CA 90049<br>Telephone: (310) 395-2988<br>FAX: (310) 395-2088 | Attorneys for Plaintiffs |
| Richard H. Friedman, Esq.<br>Friedman Rubin<br>1126 Highland Avenue<br>Bremerton, Washington 98337<br>(360) 782-4300 | Attorneys for Plaintiffs |
| Nazo S. Semerdjian, Esq.<br>The Semerdjian Law Firm<br>898 San Pablo Way<br>Duarte, California 91010<br>(626) 215-5161 | Attorneys for Plaintiffs |

# Appellate Courts Case Information

## 2nd Appellate District




*Court data last updated: 12/12/2019 09:26 AM*

## Parties and Attorneys

**Pickett et al. v. First American Title Insurance Company**
**Division p**
**Case Number B293701**

| Party | Attorney |
|---|---|
| Jon Pickett : Plaintiff and Appellant | Steven Patrick Messner<br>Shernoff Bidart Darras & Echeverria LLP<br>600 S Indian Hill Blvd<br>Claremont, CA 91711<br>Richard Henry Friedman<br>Friedman Rubin & White<br>1126 Highland Ave<br>Bremerton, WA 98337<br>Steven J. Bernheim<br>The Bernheim Law Firm<br>11611 Dona Alicia Place<br>Studio City, CA 91604 |
| Wendy Kaufman : Plaintiff and Appellant | Steven Patrick Messner<br>Shernoff Bidart Darras & Echeverria LLP<br>600 S Indian Hill Blvd<br>Claremont, CA 91711<br>Richard Henry Friedman<br>Friedman Rubin & White<br>1126 Highland Ave<br>Bremerton, WA 98337<br>Steven J. Bernheim<br>The Bernheim Law Firm<br>11611 Dona Alicia Place<br>Studio City, CA 91604 |

| | |
|---|---|
| First American Title Insurance Company : Defendant and Respondent | Ronald D. Kent<br>Dentons US LLP<br>601 S. Figueroa Street<br>Suite 2500<br>Los Angeles, CA 90017-5704<br>Sonia Renee Martin<br>Dentons US LLP<br>One Market Plaza Spear Street Tower<br>26th Floor<br>San Francisco, CA 94105 |

**Click here** to request automatic e-mail notifications about this case.



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County of Los Angeles

NOV 02 2018

Sherri R. Carter, Executive Officer/Clerk
By: E. Garcia, Deputy

MICHAEL J. BIDART #60582
STEVEN MESSNER #259606
**SHERNOFF BIDART ECHEVERRIA LLP**
600 South Indian Hill Boulevard
Claremont, California 91711
Phone: (909) 621-4935

RICHARD H. FRIEDMAN #221622
**FRIEDMAN RUBIN**
1126 Highland Avenue
Bremerton, Washington 98337
Phone: (360) 782-4300

Attorneys for Plaintiffs

SHERNOFF BIDART ECHEVERRIA LLP
LAWYERS FOR INSURANCE POLICYHOLDERS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

| | |
|---|---|
| FIRST AMERICAN TITLE COMPANY CASES<br><br>*Sjobring v. First American Title Ins. Co.* (Los Angeles County Superior Court No. BC329482) | Case No.: BC329482<br>Hon. Maren E. Nelson - Dept. 307<br><br><u>CLASS ACTION</u><br><br>**NOTICE OF APPEAL** |

$775
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45114

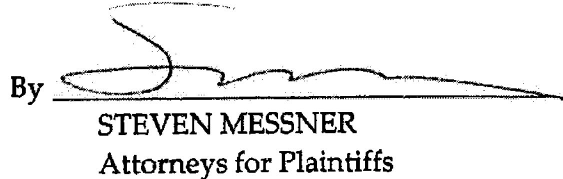
TO ALL PARTIES HEREIN AND TO THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that plaintiff, Jeffrey Albert Sjobring, appeals to the Court of Appeal of the State of California for the Second Appellate District, from the Judgment of Dismissal entered on September 19, 2018. Notice of entry of Judgment of Dismissal was served by First American Title Insurance Company on September 27, 2018, a copy of which is attached hereto as Exhibit A.

NOTICE IS FURTHER GIVEN that plaintiff, also appeals to the Court of Appeal of the State of California for the Second Appellate District, from the Superior Court's August 29, 2018, Order Granting Defendants' Motion for Judgment on the Pleadings entered on August 29, 2018, a copy of which is attached hereto as Exhibit B.

Date: November 1, 2018

SHERNOFF BIDART ECHEVERRIA LLP

By 

STEVEN MESSNER
Attorneys for Plaintiffs

SHERNOFF BIDART ECHEVERRIA LLP
LAWYERS FOR INSURANCE POLICYHOLDERS

# EXHIBIT A

DENTONS US LLP
Ronald D. Kent (SBN 100717)
Joel D. Siegel (SBN 155581)
Paul M. Kakuske (SBN 190911)
Judith Shophet Sidkoff (SBN 267048)
601 South Figueroa Street, Suite 2500
Los Angeles, California 90017-5704
Tel: (213) 623-9300 / Fax: (213) 623-9924

DENTONS US LLP
Sonia R. Martin (SBN 191148)
One Market Plaza
Spear Tower, 24th Floor
San Francisco, California 94105-1101
Tel: (415) 267-4000 / Fax: (415) 267-4198

Attorneys for Defendants
First American Title Company and
First American Title Insurance Company

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

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

| | |
|---|---|
| JEFFREY ALBERT SJOBRING,<br>Plaintiff,<br>vs.<br>FIRST AMERICAN TITLE INSURANCE COMPANY, et al.,<br>Defendants. | No. BC329482<br>Hon. Maren E. Nelson<br>Dept. SSC 17<br>**NOTICE OF ENTRY OF JUDGMENT OF DISMISSAL** |

1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on September 19, 2018, the Court entered the "Judgment

3 of Dismissal," a copy of which is attached hereto as **Exhibit A**.

4 Dated: September 27, 2018 DENTONS US LLP

5

6 By:

PAUL M. KAKUSKE

7

8 Attorneys for Defendant
First American Title Company and First
American Title Insurance Company

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

# EXHIBIT A

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Superior Court of California
County of Los Angeles

SEP 19 2018

Sherri R. Carter, Executive Officer/Clerk
By: Berta Jauregui, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JEFFREY ALBERT SJOBRING,
Plaintiff,
v.
FIRST AMERICAN TITLE CO., et al.
Defendants.

Case No. BC329482

Hon. Maren E. Nelson
Dept. SSC 17

~~[PROPOSED]~~ JUDGMENT OF DISMISSAL

RECEIVED
LOS ANGELES SUPERIOR COURT
SEP 17 2018
I. LOVO

COPY

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

On August 29, 2018 the Court granted, without leave to amend, the motion for judgment on the pleadings filed by defendants First American Title Insurance Co. and First American Title Co. (collectively "First American"). Accordingly,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. In light of the Court's August 29, 2018 order granting First American's motion for judgment on the pleadings, First American's February 22, 2011 contingent Cross-Complaint against Plaintiff/Cross-Defendant Jeffrey Sjobring and Third-Party Defendants Patrick Kirk and Gloria Kirk is dismissed as moot.

2. The Fourth Amended Complaint is dismissed with prejudice. Plaintiff Jeffrey Sjobring shall take nothing as against First American.

3. First American shall recover costs in the sum of $__________ to be determined. By approving the form of judgment, plaintiff Sjobring is not waiving his right to argue, as part of any subsequent motion to strike and/or tax costs, that costs must be separately determined and awarded as between defendant First American Title Co. and defendant First American Title Insurance Co.

4. Pursuant to California Rule of Court 3.545(d), the Court retains jurisdiction to hear and determine any ancillary proceedings, including but not limited to any motion to strike or tax costs.

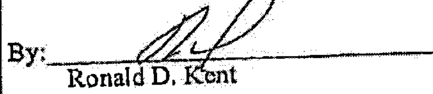
MAREN E. NELSON

Dated: September 19, 2018

________________________
Maren E. Nelson
Judge of the Superior Court

APPROVED AS TO FORM:

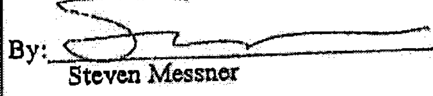
DENTONS US LLP



By: ____________________
Ronald D. Kent

Date: September 17, 2018

SHERNOFF BIDART ECHEVERRIA LLP



By: ____________________
Steven Messner

Date: September 17, 2018

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

1 **PROOF OF SERVICE**
**(VIA CASE ANYWHERE)**

2 **FIRST AMERICAN TITLE COMPANY CASES, JCCP Case No. 4751:**
3 ***Sjobring v. First American Title Insurance Co., et al.*, Case No. BC329482**

4 I am employed in the County of Los Angeles, State of California, I am over the age of
5 18 and not a party to the within action. My business address is Suite 2500, 601 South Figueroa Street, Los Angeles, California 90017-5704.

6 On September 27, 2018, I served true copies of the document/s described as **NOTICE OF ENTRY OF JUDGMENT OF DISMISSAL** on the interested parties in this action:

7 **SEE ATTACHED SERVICE LIST**

8 ☐ **BY MAIL:** I enclosed the document/s in a sealed envelope/s or package/s
9 addressed to the person/s at the address/es in the Service List and placed it/them for collection and mailing, following ordinary business practices. I am readily familiar with the practice of
10 Dentons US LLP for collecting and processing correspondence for mailing: on that same day, it is deposited in the ordinary course of business with the United States Postal Service with
11 postage fully prepaid.

12 ☐ **BY NEXT BUSINESS DAY DELIVERY:** I enclosed said document/s in an envelope/s or package/s provided by ☐ Federal Express / ☐ USPS addressed to the person/s
13 at the address/es in the Service List. I placed it/them for collection and next business day delivery at an office or a regularly utilized drop box of the carrier or delivered it/them to a
14 courier or driver authorized by the carrier to receive same.

15 ☒ **VIA ELECTRONIC SERVICE:** Pursuant to California Rules of Court Nos. 2.250, 2.253, 2.261 and the Code of Civil Procedure, and the Court's Order of April 11, 2013,
16 I uploaded the document/s without error to ☒ CaseAnywhere.com / ☐ Dentons US LLP Secure File Transfer selecting the proper functions to serve the party/ies listed.

17 ☐ **BY E-MAIL:** The document/s was/were transmitted via e-mail or electronic
18 transmission to the person/s at the e-mail address/es in the Service List.

19 ☐ **BY HAND DELIVERY:** I enclosed the document/s in a sealed envelope/s or package/s addressed to the person/s at the address/es in the Service List and engaged USA
20 Legal Network to deliver it/them by hand to the office/s of the addressee/s.

21 I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 27, 2018, at Los Angeles, California.

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24 ______________________________
Audrey Rosenbaum

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DENTONS US LLP
2000 McKINNEY AVENUE, SUITE 1900
DALLAS, TEXAS 75201-1858
(214) 259-0900

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**SERVICE LIST**
**(VIA CASE ANYWHERE)**

**FIRST AMERICAN TITLE COMPANY CASES, JCCP Case No. 4751:**
***Sjobring v. First American Title Insurance Co., et al.*, Case No. BC329482**

Michael J. Bidart - #060582
Steven M. Schuetze - #143778
Steven P. Messner - #259606
Kristin E. Hobbs - #277843
Shernoff Bidart Echeverria Bentley LLP
600 South Indian Hill Boulevard
Claremont, CA 91711-5444

*Counsel for Plaintiffs*
T: 909 621 4935 / F: 909 621 2806
E: mbidart/sschuetze/smessner/khobbs @shernoff.com

Taras P. Kick - #143379
G. James Strenio - #177624
The Kick Law Firm, APC
201 Wilshire Boulevard, Suite 350
Santa Monica, CA 90401-1252

*Counsel for Plaintiffs*
T: 310 395 2988 / F: 310 395 2088
E: taras/james@kicklawfirm.com

Steven J. Bernheim - #143319
The Bernheim Law Firm
11611 Doña Alicia Place
Studio City, CA 91604-4231

*Counsel for Plaintiffs*
T: 818 423 2136 / F: 310 300 1351
E: berniebernheim@gmail.com

Richard H. Friedman - #221622
Richard Dykstra – *Pro Hac Vice*
Friedman | Rubin
1126 Highland Avenue
Bremerton, WA 98337-1828

*Counsel for Plaintiffs*
T: 360 782 4300 / F: 360 782 4358
E: info@friedmanrubin.com

Nazo S. Semerdjian - #223536
The Semerjian Law Firm
898 San Pablo Way
Duarte, CA 91010-2335

*Counsel for Plaintiffs*
T: 626 215 5161
E: nazosemerdjian@gmail.com

# EXHIBIT B

FILED
LOS ANGELES SUPERIOR COURT
AUG 29 2018
Sherri R. Carter, Executive Officer/Clerk
BY N. Navarro, Deputy
NANCY NAVARRO

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

| | |
|---|---|
| FIRST AMERICAN TITLE CASES<br><br>*Wilmot v. First American Title Ins. Co.* (BC370141)<br><br>*Kirk v. First American Title Co.* (BC372797)<br><br>*Sjobring v. First American Title Co.* (BC329482)<br><br>*Kaufman v. First American Title Co.* (BC382826) | Case No.: JCCP 4751<br>*Sjobring v. First American Title Co.* (BC329482)<br><br>*Kaufman v. First American Title Co.* (BC382826)<br><br>ORDER GRANTING DEFENDANTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS<br><br>Date: July 23, 2018<br>Time: 1:45 p.m.<br>Dept.: SSC 17 |

## I. INTRODUCTION

*Sjobring* and *Kaufman* are two of four related class actions, above captioned, against First American Corporation (FAC), First American Title Company (FATCO), and First American Title Insurance Company (FATIC) (collectively, First American). Counsel for Plaintiffs in the cases overlap.

A petition for coordination was granted as to the four cases pursuant to Cal. Rule of Court, Rule 3.521 but they have not been consolidated. No orders were issued finding that a ruling in one of the cases is binding in the others.

One case (*Kirk*) was tried to the bench. The judgment was appealed by Kirk and First American and affirmed in an unpublished opinion.

Before the Court are motions for judgment on the pleadings in *Sjobring* and *Kaufman*. Both motions argue that Insurance Code Section 12414.26 precludes these actions. The motion in *Sjobring* was originally calendared for May 31, 2018. At that time the Court heard oral argument and continued the hearing to July 23, 2018, to be heard with the motion in *Kaufman*, indicating that the issue to be taken up in both cases is whether Insurance Code §12414.26 precludes the actions as now framed by the pleadings and the motions for class certification.

Considering those matters of which judicial notice may properly be taken, the cases as framed challenge the propriety of First American's "use" of a filed rate where more than one rate could be applicable. Resolving the issue involves rate setting and regulation. For this reason, and as explained further below, the actions are precluded by Section 12414.26 and the statutory scheme of which it is a part. The Court therefore now GRANTS the motions.

## II. THE ALLEGATIONS OF THE COMPLAINTS AND THE CLASSES AS CERTIFIED

To understand why these actions are precluded there must be an understanding of both the allegations of the complaints and certain facts of which the Court takes judicial notice.

### A. *Sjobring*

The facts in *Sjobring* and *Kirk* overlap. The operative *Sjobring* Fourth Amended Complaint (4[th]AC) alleges that plaintiff Jeffrey Albert Sjobring (Sjobring) purchased a home in February 2004 from Patrick Kirk (Kirk), who is the named plaintiff in *Kirk*.

FATIC provided title insurance in the transaction. It issued an "Eagle Owners policy" to Sjobring, for which Kirk paid. Sjobring's lender was issued a lender's policy by FATIC for which Sjobring paid.[1] Sjobring paid $563.00 for the lender's policy. He argues that both the owner's and lender's policies are "Extended Coverage" policies. *Id.* at ¶45. Based on that characterization he alleges that he was overcharged for the lender's policy, arguing Section C-1-b of Defendants' filed rates applied to the pricing of the type of policy his lender was issued because it was issued concurrently with an "Extended Coverage" owners' policy. This filed rate was $125. Alternatively, he argues FATIC could have issued a "Standard Coverage" lender's policy but deleted "regional exceptions" in the policy.[2] He argues that such a policy would have been charged at a filed rate known as the "C-5 rate," yielding a premium of $290, which is $273 less than what Defendants charged him. *Id.* at ¶¶ 49, 50.

The claims that survived demurrer are the second and eighth causes of action for Fraud and Negligent Misrepresentation; the demurrer did not specifically challenge the 5th cause of action for Unfair Competition. Sjobring's Request for Judicial Notice filed April 26, 2018, Exhibits 2, 3. The 4th AC contains a variety of allegations and arguments in which it is contended that the Superior Court, rather than the California Department of Insurance (CDI), has jurisdiction over this matter (4th AC ¶ 32), and includes a specific allegation that "there is no 'safe harbor' for the misconduct alleged here." *Id.* at ¶ 32 (d). The pleading asserts that this court has jurisdiction because the action seeks restitution/disgorgement of monies wrongfully taken from class members by First

[1] An owner's policy is a title policy that insures the buyer's interest in a property and provides coverage to the owner of real property. A lender's policy is a title policy that insures the lender's (usually a bank or financial institution) interest in the property, in title, and its lien position.

[2] "Regional exceptions" refers to a subset of exceptions from coverage. Examples include easements not shown by public records, interests in the land not shown by public record that could be asserted by persons in possession of the land, unpatented mining claims that may or may not be shown by public records, and water rights that may or may not be shown by public records.

American's "failure to properly apply its filed rates." *Id.* at ¶ 32 (b). It is alleged that Section 12414.26 does not apply because "Plaintiffs simply allege" Sjobring and class members were charged more for the loan policies than permitted by Defendants' filed rates, and that the charges were not authorized by Article 5.5 because they were rates not in conformity with the filed rates. *Id.* at page 9, lines 18-27. Sjobring further contends First American *misrepresented* that the 1992 ALTA concurrent loan policy without regional exceptions cost $563, which was false because the filed rate was $125; even if the policy were determined to be "Standard Coverage" the rate would be $290 under Section C-5 of the filed rates. *Id.* at ¶80. He alleges in the alternative that if the loan policy is determined to be "Standard Coverage" then First American *concealed* a $0 pricing structure under section C-1(a)(2) of the filed rates. *Id* at ¶ 82.

The Court takes judicial notice pursuant to Evidence Code § 452(d) of the fact that in July, 2017, the Court granted certification of two classes in *Sjobring*, including, as to Class Two, a class that specifically seeks a determination that the C-5 rate applied to the policies as issued.

**B. *Kaufman***

*Kaufman* stems from a separate real estate transaction. The operative complaint is the Second Amended Complaint (SAC). Plaintiff Wendy Kaufman (Kaufman) alleges she purchased a home in late 2006. In connection with the purchase of her home she paid premiums for both owner's and lender's title insurance policies. SAC, ¶46. Kaufman contends she was overcharged for her lender's policy. According to Kaufman, under section C-1(a)(2) of First American's filed rates there was no charge for a loan policy that was sold concurrently with a "Standard" coverage owner's policy, and under C-1(b)(2) where an "Extended" loan policy was sold concurrently with an "Extended" owner's policy the correct charge was $125.00. *Id.* at ¶50. Kaufman contends that although the Eagle Loan Policy issued to her lender was defined as "Standard Coverage" she was nevertheless charged $710. *Id.* at ¶¶ 52, 54. The SAC also alleges alternatively that there

1 was another less-expensive pricing structure that could have been applied in Schedule E of
2 First American's Schedule of Fees. *Id.* at ¶56.
3 Jurisdiction is alleged to be with this Court because Kaufman seeks
4 restitution/disgorgement of funds wrongfully taken (SAC, ¶40); she alleges the litigation is
5 not precluded because First American calculated charges by not applying its filed rates
6 properly (*Id.* at ¶42). As in *Sjobring*, the allegation is that First American's schedule of
7 fees is materially misleading. *Id.* at ¶57. "Plaintiff is not contending that the rates
8 defendants have filed with the CDI are improper. Rather, plaintiff contends that First
9 American failed to apply rates correctly." *Id.* at ¶61.
10 Based on these and other facts, Kaufman alleges claims for Breach of Contract,
11 Breach of the Implied Covenant of Good Faith and Fair Dealing, Fraud and Deceit, Unjust
12 Enrichment, and Unfair Competition.
13 FATCO and FATIC's joint answer raises affirmative defenses of Safe Harbor/
14 Immunity (6th Additional Defense), in which they allege that the challenged rates and acts
15 complained of were known to and accepted and approved by the CDI. It is further
16 contended that a scrivener's error/mistake (14th Additional Defense) occurred when the
17 rates were filed. It contends that the rate argued for by Kaufman would permit her (and the
18 certified class) to obtain loan policies for no charge, a rate it views as inadequate. The
19 Court takes judicial notice of the fact that this is the defense asserted, but does not accept
20 the facts alleged as supporting the defense to be true.
21 Judicial notice is further taken that in September, 2017, a class was certified in
22 *Kaufman* as to the claims for Breach of Contract, Breach of the Implied Covenant, and
23 UCL and as to all persons who paid for an Eagle loan title policy in a residential real estate
24 transaction in California that was issued concurrently with an owner's policy during the
25 period October 2, 2006 to October 2, 2007, where the aggregate liability of the loan
26 policies did not exceed the liability of the owner's policy.
27 //
28 //

1 **III. THE ADDITIONAL JUDICIALLY NOTICEABLE FACTS**

2 In addition to the matters pled and the Court's rulings on class certification, all
3 parties request the Court take judicial notice of certain documents and the facts contained
4 therein. Objections were also filed.

5 **A. *Sjobring* Motion**

6 First American's Requests for Judicial Notice as to Exhibit A (Statement of
7 Decision in *Kirk*) and Exhibit C (*Kirk* Opinion) are proper pursuant to Evidence Code
8 §452(d), as to the findings of fact and conclusions of law contained in the *Kirk* Statement
9 of Decision. In addition, judicial notice is properly taken as to the existence of the
10 appellate opinion affirming that ruling. *Day v. Sharp* (1975) 50 Cal. App. 3d 904, 914.
11 Judicial Notice of Exhibit B and Sjobring's Exhibit 1 (Sjobring's administrative complaint
12 with the CDI) is proper pursuant to Evidence Code §452(h) and in light of the fact that
13 both parties ask the Court to take judicial notice of these documents, albeit for different
14 reasons. Judicial notice of the fact of the existence of Exhibits D and E, official acts of the
15 CDI, is properly taken under Evidence Code § 452(c) and *Stevens v. Superior Court* (1999)
16 75 Cal. App. 4th 594, 608. Judicial notice of the legal positions and concessions made by
17 Sjobring and Kaufman to secure class certification, including Exhibits K and O to
18 FATCO's July 11, 2018 Supplemental Request for Judicial Notice, are properly taken
19 under Evidence Code §452(d) and (h). Judicial notice of this Court's orders granting class
20 certification are likewise proper. *Id.* at Exhibit P. The balance of the exhibits of which
21 judicial notice is requested to be taken by First American in *Sjobring* are irrelevant to the
22 issues presented by the motion and the request is thus moot.

23 All of Sjobring's requests, other than Exhibits 1- 3 and 14, are irrelevant to the
24 disposition of this motion and thus moot. No objection was raised as to Exhibits 2, 3, and
25 14.

26 **B. *Kaufman* Motion**

27 Kaufman objects to the court taking judicial notice of Exhibits D, E, F, tendered by
28 First American. Based on the disposition below Exhibits D and E are irrelevant to any

1 issue before the Court. This renders any objections moot. Judicial notice is properly taken
2 as to Exhibit F for the limited purpose of showing that there was correspondence between
3 CDI and First American on the subject of the claimed error and not for the truth of the
4 matters therein. First American's unopposed supplemental request for judicial notice of
5 Exhibits K and M is granted. All other requests for judicial notice by First American are
6 moot given the disposition herein.
7 First American objects to Kaufman's request for judicial notice as to Exhibits 1 and
8 5. Kaufman contends that these constitute proper evidence of legislative intent respecting
9 the scope of Insurance Code section 12414.26.
10 Exhibit 1 relates to legislation enacted in 1947, which Kaufman argues is the
11 genesis of Section 12414.26. While the document may shed light on the genesis of
12 immunity provisions generally in the Insurance Code it does not bear specifically on the
13 Legislature's intent with respect to Section 12414.26. Moreover, there is no showing that
14 any member of the legislature saw this document in connection with the enactment of
15 Section 12414.26 in 1973. As such, while it may be of historical interest, it is not the
16 proper subject of judicial notice as to the Legislature's intent in enacting Section 12414.26.
17 "[A]s a general rule in order to be cognizable, legislative history must shed light on the
18 collegial view of the Legislature *as a whole.*" *Kaufman & Broad Communities Inc. v.*
19 *Performance Plastering Inc.* (2005)133 Cal. App. 4th 26, 30, emphasis in original
20 (*Kaufman & Broad*).
21 First American objects to Kaufman's request for judicial notice of Exhibit 3 as her
22 brief does not cite or rely on this document and it therefore cannot be relevant. Exhibit 3
23 (Legislative Analysis of Section 12414.26) is a proper subject of judicial notice. *Kaufman*
24 *& Broad* at 31. The Court takes judicial notice of this exhibit and of Exhibits 4 and 8, to
25 which no objection was made.
26 Exhibit 5 (Letter from California Land Title Association to Gov. Reagan) is not the
27 proper subject of judicial notice as to legislative intent. *Kaufman & Broad* at 38 (Letters to
28 Governor urging signing of bill not the proper subject of judicial notice).

1 First American objects to Exhibit 28 (Deposition of Dwayne Buggage). To the
2 extent Kaufman cites this testimony for the truth of the matters asserted it is hearsay.
3 However, it is properly before the Court for purposes of establishing that Kaufman's
4 theory of liability implicates rate interpretation.
5 In light of the disposition below the balance of the documents Kaufman asks the
6 Court to judicially notice are irrelevant and her requests are thus moot.
7 On its own motion, the Court takes judicial notice of the fact that in *Kaufman*
8 plaintiffs seek to exclude all evidence/argument offered to show that the Insurance
9 Commissioner/CDI authorized, ratified, approved or permitted the charges at issue. See
10 Joint Report filed August 21, 2018 at page 1, lines 13-18. Evid. Code § 452(d)(1). In
11 taking judicial notice of this fact and of Exhibit F the Court expresses no view as to the
12 whether the facts support First American's defense.

13 **IV. THE MOTIONS ARE PROCEDURALLY PROPER**

14 Sjobring advances several procedural arguments, which are incorporated into
15 Kaufman's opposition. They are rejected for the reasons set forth below.

16 **A. Cal. Code of Civ. Pro. Section 1008 Is Not Applicable**

17 Demurrers were filed in both *Sjobring* and *Kaufman*. In *Sjobring* First American
18 argued that the ten causes of action pled were barred by Insurance Code Section 12414.26.
19 The judge then presiding (Hon. Anthony Mohr) rejected this argument, noting that the
20 Complaint ***pled*** that the policies that were issued were extended coverage policies and that
21 because Plaintiff alleged he was charged the wrong premium, rather than the computation
22 of that premium, Defendants' actions were not immunized. Sjobring RJN, Exhibit 3.
23 Much has happened since the demurrers were heard. First, in November 2012,
24 Sjobring filed a complaint with the CDI pursuant to Ins. Code §12414.13, charging a
25 violation of Article 5.5 of the Insurance Code. Exhibit B to Defendant's RJN and Exhibit
26 1 to Sjobring's RJN.
27 Second, Sjobring filed his motion for class certification. In arguing for class
28 certification, Sjobring advanced the theory that common questions predominated over

individual issues because the issue to be tried was one of rate interpretation. That argument was accepted. As to Class 1 the common question is whether the Eagle Owner's policy is an extended or standard coverage policy and as to Class 2 the common question is whether the C-5 rate should have been applied to the policies as issued. It has thus become apparent that, notwithstanding some of the language in the 4th AC, what must be resolved is whether the policies are or are not "extended" policies for purposes of the rate filing and based thereon whether the proper rate was charged. Defendants' Supplemental RJN, Exhibit P. So framed, the issue is a legal one Judge Mohr did not address on demurrer: If the Court must characterize a policy and determine which filed rate should have been charged, is not the Court thereby engaging in ratemaking and rate regulation, which is precluded by the statutory scheme?

Similarly in *Kaufman* a motion for class certification was granted, discussed *infra*, which makes clear that ratemaking is implicated.

In short, these are not improper motions for reconsideration of the demurrer ruling. Instead, the Court is called upon to determine a question of law in light of the cases as they are now framed by their common questions.

**B. A Common Law Motion for JOP Is Proper**

California recognizes two forms of motions for judgment on the pleadings. Statutory motions may be brought pursuant to Cal. Code Civ. Pro. §438 (c)(1)(B), which provides that a defendant may move for judgment on the pleadings if either (i) the court has no jurisdiction of the subject of the cause of action alleged in the complaint, or (ii) the complaint does not state facts sufficient to constitute a cause of action against that defendant. Subsection (g)(1) allows for a motion for judgment on the pleadings even where a prior demurrer on the same grounds was overruled so long as "there has been a material change in applicable case law or statute since the ruling on the demurrer."

First American argues that the judgment and resulting appellate opinion in *Kirk* and this Court's orders regarding class certification constitute a "change in the law" which permits the filing of this motion under Cal. Code of Civ. Pro. §438. This argument fails.

1 There may be changes in the procedural status of the cases but the law has not changed
2 since the demurrer was heard. First American therefore cannot rely on Cal. Code of Civ.
3 Pro. § 438 to bring this motion.

4 Cal. Code Civ. Pro. §438 became effective in 1994. Prior to that time motions for
5 judgment on the pleadings were allowed under the common law. Although not entirely
6 free from doubt, nonstatutory (common law) motions survive enactment of section 438.
7 Weil & Brown explain that:

8 "CCP § 438 imposes major limitations on the motion; e.g., it does not lie on
9 grounds previously raised by demurrer unless there has been a material change in
10 the law (see ¶ 7:305). It also imposes time limits (see ¶ 7:280). However, these
11 limitations may be meaningless because a nonstatutory motion for judgment on the
12 pleadings apparently survives without such limitations:
13 — "A motion for judgment on the pleadings may be made at any
14 time either prior to the trial or at the trial itself." [*Stoops v. Abbassi*
15 (2002) 100 CA4th 644, 650, 122 CR2d 747, 752 (citing pre-CCP §
16 438 case of *Ion Equip. Corp. v. Nelson* (1980) 110 CA3d 868, 877,
17 168 CR 361, 365); see also *Smiley v. Citibank (South Dakota) N.A.*
18 (1995) 11 C4th 138, 145, 44 CR2d 441, 445, fn. 2—"common law
19 motion for judgment on the pleadings" upheld despite the
20 fact CCP § 438 had been enacted during course of proceedings; and
21 *Saltarelli & Steponovich v. Douglas* (1995) 40 CA4th 1, 5, 46 CR2d
22 683, 686—treating defective motion for summary judgment as
23 "nonstatutory motion for judgment on the pleadings"]
24 Comment: Case authority for the nonstatutory motion is rather thin.
25 None of the cited cases expressly deal with this issue; they simply
26 assume its existence. But these cases reach a practical result. A court
27 should be able to decide there is no valid cause of action at any time.
28

1 There is no point in forcing a case to go to trial because the motion
2 was made too late or otherwise failed CCP § 438 requirements."
3 Weil & Brown, The Rutter Group California Practice Guide: Civil
4 Procedure Before Trial, §7:277.

5 The procedures and case law regarding "nonstatutory" motions are properly invoked
6 here. Sjobring and Kaufman do not address this authority in their oppositions. Given the
7 importance of the legal issues raised and the procedural developments in the cases since
8 the demurrers were heard, the motion is properly brought as a common law motion.

9 **C. A Motion for Summary Judgment Is Not Required**

10 Sjobring argues that a motion for summary judgment is required to be brought by
11 First American in order to address the issues herein. No authority is cited for this
12 proposition other than Judge Mohr's observation that such a motion *could* be brought. The
13 issue these motions raise is a legal one only. Whether raised by motion for judgment on
14 the pleadings or summary judgment, the result is the same.

15 **D. The Court May Consider The Issue Under the Rules of Court and Those**
16 **Applicable to JOP Motions Generally**

17 At oral argument counsel for Sjobring and Kaufman argued that because these
18 motions are brought as motions for judgment on the pleadings, the Court could not
19 consider FATCO's defense based on a "scrivener's error" or any matters other than what is
20 pled by plaintiffs. As an initial matter, a motion for judgment on the pleadings may
21 consider both the pleading *and* all matters judicially noticeable. *People ex rel. Harris v.*
22 *Pac Anchor Transportation, Inc.* (2014) 59 Cal.4th 772. This includes taking judicial
23 notice of the positions taken by Sjobring and Kaufman on class certification and the
24 Court's prior rulings certifying the classes in *Sjobring* and *Kaufman.*

25 This is particularly important here. In both cases Plaintiffs have raised in their
26 pleading the issue of whether the conduct is precluded by Section 12414.26. The parties
27 have framed the issues to be tried and the Court has certified the classes accordingly. Trial
28 dates are set. The Court also is aware that a three week trial resulted in a ruling that

Section 12414.26 precluded liability as to certain of the claims tried in *Kirk*. See FATCO's Requests for Judicial Notice Exhibit A (Statement of Decision in *Kirk*) and Exhibit C (*Kirk* Opinion).

It is apparent that the facts and circumstances in *Kirk* and *Sjobring* are related. While the facts in *Kaufman* are different, the legal issue related to the effect of Insurance Code Section 12414.26 is the same in the three cases. No order has been entered coordinating the determination of these issues. As the parties recognize, this is a JCCP proceeding. As such, the Court is empowered to provide a method and schedule for submission of preliminary legal questions that might serve to expedite the disposition of the coordinated actions. Cal. Rules of Court, Rule 3.541(a)(5). The Court exercises its discretion in this case to consider the issue presented under that authority and to rule on the legal issue presented by the motions as framed by the pleadings and subsequent developments that are judicially noticed, so as to expedite disposition of these cases. See *McGhan Medical Corp. v. Superior Court* (1992) 11 Cal.App.4th 804, 812 ("[I]t is the intent of the Judicial Council to vest in the coordinating judge whatever great breadth of discretion may be necessary and appropriate to ease the transition through the judicial system of the logjam of cases which gives rise to coordination.")

**V. THE CLAIMS ARE PRELUDED BY THE STATUTORY SCHEME AND APPLICABLE CASE LAW**

**A. The Claims Involve the Proper Use of Rates and Implicate Ratemaking**

Insurance Code §12414.26 provides: "No act done, action taken, or agreement made pursuant to the authority conferred by Article 5.5 (commencing with Section 12401) . . . of this chapter shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this state heretofore or hereafter enacted which does not specifically refer to insurance." Sjobring and Kaufman argue that their complaints arise under Section 12414.27 of the Insurance Code and do not challenge "an act done, action done, or agreement made pursuant to the authority conferred by Article 5.5." Further, they argue that First American confuses "immunity" with "jurisdiction." They emphasize that only

1 the Legislature can confer "immunity" by statute. *Krumme v. Mercury Insurance Co.*
2 (2004) 123 Cal. App. 4th 924, FN 5 (*Krumme*).
3 There is some confusion of terminology. First American characterizes section
4 12414.26 as a "safe harbor," referencing the concept that if the Legislature has considered
5 a situation and concluded no action should lie, courts may not override that determination.
6 See *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.
7 4th 163, 182; *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal. App. 4th 968 FN 5
8 (*Donabedian*). Kaufman characterizes this as a grant of "immunity." See *State Comp.*
9 *Insurance Fund v. Superior Court* (2001) 24 Cal. 4th 930 (*SCIF*)(characterizing Section
10 11758 as not granting "immunity" from claims for an insurer's conduct in reporting data in
11 the workers' compensation context). Neither term appears in the statute and the similar
12 statute (Section 1860.1 applicable to property and casualty insurance) has been said *not* to
13 grant "immunity" but to limit plaintiffs to an administrative remedy (with judicial review).
14 See *MacKay v. Superior Court* (2010) 188 Cal.App.4th 1427 FN 19 (*MacKay*).
15 Whether viewed as a limit on its jurisdiction ("a safe harbor") or an "immunity,"
16 the Court must read Section 12414.26 as part of the statutory scheme as a whole. As
17 discussed below, the gravamen of Plaintiffs' theory in both cases is that the rates were
18 improperly used as to the policies at issue. This amounts to a challenge to the "use" of a
19 rate and implicates "ratemaking," a function that, under the statutory scheme, falls initially
20 to the CDI.
21 The Insurance Code, at Part 6, Article 5.5, governs "Rate Filing and Regulation"
22 applicable to title insurers and the CDI, which regulates title insurance in California.
23 Several sections of article 5.5 describe how a company like First American files rates.
24 Title companies are required to file their rates and copies of the title policies "*to which*
25 *such rates apply.*" Ins. Code §12401.1, emphasis added. Section 12401.3 then details the
26 standards that apply to the "*making and use* of rates pertaining to all the business of title
27 insurance," including a standard that rates shall not be "excessive or *inadequate.*" Ins.
28

Code § 12401.3, emphasis added. Section 12401.7 provides that rates may be used thirty days after filing unless the CDI intervenes.

The Legislature has provided that a consumer aggrieved by "any rate charged" may proceed under Article 6.5 (sections 12414.13-12414.19). A consumer unsatisfied with the action of the CDI may proceed by writ. *Id.* at Section 12414.19.[3]

Finally, section 12414.29 provides that "[t]he administration and enforcement of Article 5.5 (commencing with section 2401) and Article 5.7 (commencing with section 12402) of this chapter shall be governed solely by the provisions of this chapter."

The case law interpreting the statutory scheme and Section 12414.26, as well as similar provisions in the Insurance Code applicable to other types of insurance, compels the conclusion that on the facts of these cases, Plaintiffs are seeking by civil litigation to challenge directly the "use" of a filed rate and seek to engage in rate regulation. This they cannot do. See *Quelimane Co. v. Stewart Title Guaranty Co. (Quelimane)* (1998) 19 Cal. 4th 26, 44 (Article 5.5 applies to "rate regulation"); 13 Witkin, Summary of Cal. Law (11th Ed. 2017) Equity, § 120, page 419 ("[Insurance Code , Section 12414.26] is expressly limited to title insurance activities related to rate setting."); *Krumme* at 937, citing *Spielholz v. Superior Court* (2001), 86 Cal. App. 4th 1366, 1374-1375 ("[A] claim that directly challenges a rate and seeks a remedy to limit or control the rate prospectively or retrospectively, is an attempt to regulate rates."); *Cf. Walker v. Allstate Indemnity Co.* (2000) 77 Cal. App. 4th 750, 756 (*Walker*)("If section 1860.1 has any meaning whatsoever ..., the section must bar claims based upon an insurer's charging a rate that has been approved by the commissioner"); *MacKay* at 1443 ("The ratemaking chapter [applicable to

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[3] Kaufman argues that restitution is not available in an action in front of the CDI, citing Insurance Code section 12414.13, *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 274, *Stevens v Superior Court* (1999) 75 Cal. App. 4th 594, and Exhibit 16. As to Exhibit 16 judicial notice is denied. The document is an inadmissible hearsay expression of opinion by a CDI staff attorney to which First American properly objected. Other provisions of the Insurance Code, not at issue in *Manufacturers Life* and *Stevens* (Insurance Code section 12414.18, incorporating Government Code §11519(d)), may afford restitutionary relief in a CDI proceeding. If such relief is not available, Plaintiffs' remedy lies with the Legislature.

property and casualty insurance] confers on the DOI the exclusive authority to approve insurance rating plans. An insurer charging a preapproved rate is doing an act or taking an action pursuant to the authority conferred by the chapter.").

It is for this reason that Plaintiffs' reliance on *Donabedian* is misplaced. That case involved only an "as applied" challenge to a rate that was not disputed and not a determination of which rate was applicable in the first instance. The same is true of *King v. Nat'l Gen. Ins. Co.* (N.D.Cal. 2015) 129 F. Supp. 3d 925, which challenged the application of an approved rate. See *MacKay* at 1449-1450 ("Cases which apparently reached a different result when the underlying conduct was *not* the charging of an approved rate are distinguishable on this basis.").

Nor is Plaintiffs' reliance on section 12414.27 helpful. That section provides, in pertinent part, that no title insurer shall charge a rate for a title policy or service "except in accordance with rate filings that have become effective pursuant to Article 5.5." Plaintiffs do not contend that First American charged a rate that was not filed and become effective. Instead, they contend that a different filed rate should have been charged.

The Court recognizes that there is no published case directly on point as to whether a party alleging rate *ambiguity* may bring a direct action or must challenge the rate under Article 6.5. It is also recognized that there is a factual dispute between the parties as to *whether* First American in fact charged a rate that it filed with respect to the policies at issue. However, resolution of that factual issue requires the Court to interpret the policies and the rates. Under the statutory scheme this is the exclusive function of the CDI in the first instance, subject to review by the Court.

If the statute were interpreted as Plaintiffs' suggest the Court would be required to ignore Article 6.5 (sections 12414.13-12414.19) and the case law to the effect that the "use" of rates and "rate making" is within the exclusive jurisdiction of the CDI in the first instance. This the Court cannot do.

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**1. Sjobring's Claims Necessitate Rate Interpretation and Regulation**

Sjobring's claims arise from an alleged ambiguity in First American's rate filings. In Opposition to this motion, Sjobring explains that because certain "Definitions" filed by First American in 1995 with the CDI do not expressly include the policy form for which Sjobring paid (and which were not amended until 2006 to expressly cover that form), his interpretation of the form of policy (whether "Standard or "Extended") and the resulting rate(s)) should control. He argues why the policy at issue should be considered an Extended Coverage policy rather than a Standard Coverage policy and details the "definitions" contained in the filings made by First American with the CDI, including the "definitions" filed in 1995 and 2006. He also explains why his characterization of the policy is correct and which of the filed rates should have been charged. Sjobring Opposition at page 6:16-11:11. First American takes a different point of view, arguing that it charged the filed rate applicable to the policy at issue. First American Reply at page 8:1-10:23.

Sjobring's pleading makes clear that he seeks to use this action to engage in rate regulation by seeking to characterize the policies at issue and then determining which of several filed rates applied to the policy. See 4th AC at ¶¶ 32(d), 48, 80 and pages 8:12-13 and 9:24-27. Likewise, in connection with the class certification motion and in determining that common questions predominated, the Court noted that as to Class 1 there is a common question as to whether the Eagle Owner's Policy is an "Extended Coverage" or a "Standard Coverage" policy. With regard to Class 2 Sjobring agreed to narrow the issue to *whether* the C-5 rate should have been applied to the policies as issued. This concession was in response to Defendants' argument that individual questions regarding whether specific lenders would have accepted an alternative policy with the C-5 pricing precluded certification. As the Court noted in granting certification, "This in effect narrows the question to one of rate interpretation, as is the case with Class 1." *Sjobring* Class Certification Order at 14:1-5. The Court further noted establishing liability is "largely a

question of interpretation of the applications of the policies to the applicable rates." *Id.* at 15:27-28.

Moreover, Sjobring invoked the procedures for challenging the rates he was charged and expressly alleged that the CDI had jurisdiction to hear the matter. Sjobring RJN Exhibit 1. Although First American disputed the authority of the CDI to act (Exhibit 14 to Sjobring's Supplemental Request for Judicial Notice filed May 10, 2018), the CDI brought a formal accusation based on Sjobring's complaint (Exhibit D to First American's Request for Judicial Notice). The CDI and First American ultimately settled that proceeding. *Id.* at Exhibit E. The settlement, however, did not resolve the question before this Court, i.e. the nature of the policy or its proper rate and did not address the "C-5" issue raised by Class II in *Sjobring*. The Court is unaware of any writ relief being sought.

In short, in asserting that First American used the wrong filed rate and asking the Court to determine that his rate is the correct one, Sjobring asks the Court to determine the proper "use" of a rate and to engage in rate regulation. This is the function of the CDI, at least initially.

**2. Kaufman's Claim Necessitates Rate Interpretation and Regulation**

Kaufman's claim derives from the fact that in a 2006 rate filing First American listed the form of loan policy issued to Kaufman's lender as "Standard Coverage." First American argues that this was a "scrivener's error," and that the correct rate at all times was for policies that provided "Extended Coverage" and that this was recognized by the CDI. Exhibit F to First American's Request for Judicial Notice. It argues that Kaufman's interpretation would permit her to obtain valuable coverage for no cost. Kaufman disputes this.

Kaufman did not invoke the jurisdiction of the CDI and does not explain why the procedures in Article 6.5 do not apply here.

In granting Kaufman's motion for class certification the Court identified as classwide questions the following:

1 (1) Did Defendants apply the rate correctly for the first concurrent Eagle Loan
2 policyholders during the class period?; (2) Were Defendants permitted to charge an
3 additional premium for a first concurrent Eagle Loan policy during the class period,
4 contrary to Defendants' filed rate with the CDI?; (3) Did Defendants violate
5 Insurance Code §12412.27 by charging a rate that was not filed with the CDI?; and
6 (4) Was there a scrivener 's error in the filed rate by Defendants, and if so what
7 effect, if any, does it have on Defendants' liability under the Code?
8 *Kaufman* Class Certification Order at 11:15-21.
9 In making these determinations the Court is called upon to determine whether the
10 policy sold to Kaufman was a "Standard" or "Extended" policy and to determine what
11 effect, if any, the claimed scrivener's error has on the proper rate to be charged, including
12 whether the rate as posted would be considered inadequate under section 12401.3 and
13 Article 5.5.[4] Put another way, the parties each ask the Court to determine that her/their
14 position as to the effect of the claimed scrivener's error is correct.
15 In addition, as noted, *supra*, the SAC alleges that alternatively, there was another
16 less-expensive pricing structure that could have been applied (SAC ¶56). In either event,
17 Kaufman's claims implicate the "*making and use*" of a rate under Section 12401.3.
18 Kaufman's reliance on testimony from CDI rate analyst Dwayne Buggage in her motion
19 for class certification, her anticipated reliance on the testimony of other CDI employees at
20 trial, and her request to exclude testimony regarding the CDI's involvement in the issue,
21 emphasizes this point. Kaufman Opposition at 1:13-18, citing Exhibit 28; First American's
22 Supplemental Request for Judicial Notice, Exhibits K and M.
23 //
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26 [4] Kaufman argues that the CDI has only enacted one rate examination regulation since this statute
27 was enacted and has not sought to determine whether a rate was inadequate. These facts do not bear on what the CDI is empowered to do.
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1 **B. The Statutory Language Is Not Limited to Concerted Action**

2 Kaufman argues that the statute prohibits only a civil action based on "an act done,
3 action taken or agreement made *pursuant to the authority*" of Articles 5.5 and 5.7
4 (emphasis added) and that this is language of limitation intended to protect only
5 "concerted" action by insurers. This reading derives from language in *SCIF* at 939-940,
6 interpreting similar statutory language respecting workers' compensation insurers.

7 The issue in *SCIF* was whether a worker's compensation insurer was immune from
8 civil liability under Insurance Code §11758 for allegedly misallocating an insured
9 employer's expenses and then reporting that misinformation to a rate-making organization,
10 resulting in higher premiums for its insured. The language in Section 11758 is duplicative
11 of Section 12414.29 (and Section 1860.1).

12 In *SCIF* the Court noted that the workers' compensation statute "refers to an 'act
13 done, action taken or agreement made *pursuant to the authority* conferred by this article . .
14 . .' (Italics added.) It does not refer to an 'act done, action taken or agreement made
15 pursuant to this article.' As relevant here, what is authorized by article 3 is 'cooperation
16 between insurers, rating organizations and advisory organizations in ratemaking and other
17 related matters to the end that the purposes of this chapter may be complied with and
18 carried into effect.' (§ 11750)." *Id.* at 936. From this language and the legislative history,
19 the Court concluded that the insurer was not immune from liability for misreporting data to
20 a rate making organization.

21 Here, and unlike in the context of workers' compensation insurance considered in
22 *SCIF*, Plaintiffs point to no express provision equivalent to Section 11750 that applies to
23 title insurers defining the "authority conferred" by Articles 5.5 or 5.7.

24 Moreover, the Court in *SCIF* was not called upon to decide whether either
25 "concerted" or "unilateral" action was protected by the statutory section but only to
26 determine whether the unilateral conduct at issue (misreporting employer's expenses) was
27 protected activity under Section 11758. There is other language in *SCIF* to the effect that
28 other kinds of unilateral action (the reporting of information for purposes of setting rates)

would be within Section 11758's protections. *Id.* at 936. *SCIF* thus does not assist Plaintiffs.

Further, an "act done" or "action taken" can be a unilateral activity by a carrier. The Court would be required to disregard those words to reach the conclusion that only concerted activity otherwise amounting to an anti-trust violation is protected. The Court would also have to disregard the fact that the Legislature knows what "concerted action" is, as it expressly states that "nothing in this article shall be construed to prohibit concert of action between entities under the same general management and control." Ins. Code §12401.6. Had it wanted to limit Section 12414.26 to "concerted action" it could have used that term rather than the more inclusive terms "act done" or "action taken." Cf. *Walker* at 757 (An insurer charging a preapproved rate is doing an act or taking an action pursuant to the authority conferred by the chapter.).[5]

**C. The Statute Is Not Limited To Affirmative or Statutory Claims**

Kaufman argues that "immunity" under Section 12414.26 is limited to affirmative "acts" and that omissions cannot form the basis for an "immunity." The short answer to this argument is that the claims asserted in *Sjobring* and *Kaufman* are for fraud and breach of contract, involve affirmative acts, and were certified on that basis, as Plaintiffs' counsel conceded at oral argument.

Kaufman also argues that because the statute refers to civil proceedings "under any other law...enacted" only statutory claims (i.e. statutory claims based on the anti-trust laws) are precluded. Under this interpretation Plaintiffs' claims under Business and Professions Code §17200 (a statutory claim) would be prohibited but claims based upon

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[5] Plaintiffs argue that the CDI does not "pre-approve" title insurance rates. The trial court in *Kirk* found to the contrary and expressly found that testimony by CDI employees to the contrary was not credible. Exhibit A to First American's request for Judicial Notice, page 12, line 3-page 15, line 15. Moreover, the act of filing the rate and receiving no objection thereto and thereafter charging the rate filed is an act "authorized" by Chapter 5.5.

1 the common law would not.[6] This cannot be what the Legislature intended. If that were so
2 then claims of common law monopolization could be stated against insurers but claims
3 based on the Sherman Act or the Cartwright Act against insurers, based on the same facts,
4 would be barred. That is an outcome inconsistent with Plaintiffs' proffered interpretation
5 of the legislative intent of the statute. Cf. *California School Employees Assn. v. Governing*
6 *Board* (1994) 8 Cal. 4th 333 (Court interpreting a statute literally shall not produce an
7 absurd result contrary to legislative intent); *Walker* (Demurrer based on Section 1861.01
8 immunity was afforded to both statutory and common law causes of action).

9 Alternatively, Kaufman contends that Section 12414.26 precludes a civil action only
10 for those acts that constitute the "grounds for . . . civil proceedings" and that First
11 American's defense of a scrivener's error is not a "ground" for her proceeding. This
12 argument is not persuasive. The asserted "grounds" for this proceeding are that First
13 American should have applied a rate it did not. The Second Amended Complaint also
14 *pleads* that "at best, the rate structure First American drafted and filed, and which was in
15 effect during the class period, contained ambiguities" and that First American should have
16 construed the rate structure in favor of the consumer. SAC ¶ 42. Thus, even under
17 Kaufman's reading of the statute, her claim is barred.

18 **D. The Legislative History Does Not Assist Plaintiffs**

19 The case law lays out legislative history that Kaufman argues is of importance here.
20 As explained in *McKay*, language comparable to that in Section 12414.26 first entered the
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[6] On August 22, 2018, while this motion was pending, counsel for Sjobring and Kaufman filed a
23 document entitled "Notice of Waiver of Equitable Theory of Recovery Under UCL, In Sjobring
24 and Kaufman." The document indicates that class counsel and the class representatives have
determined to proceed to trial exclusively on common law theories of recovery and have made a
25 decision not to pursue "equitable relief" under the UCL. The document indicates this decision was
made, in part, to advance the argument that "common law" claims are not grounded in any
26 statutory claim and are therefore outside the scope of any immunity afforded defendants under
27 Section 12414.26. See Declaration of Steven Bernheim at ¶¶ 8 and 9, dated August 21, 2018. The
filing of this document has no effect on this motion for the reasons above stated. The document
28 does not purport to dismiss the UCL claim in either case. Further, no Request for Dismissal (CIV-
110) as to any cause of action or claim was filed in either case.

1 Insurance Code in 1947 as part of the McBride-Grunsky Insurance Regulatory Act of
2 1947. That act was California's response to *United States v. South-Eastern Underwriters*
3 *Ass'n* (1944) 322 U.S. 533, finding insurers liable for violations of the federal anti-trust
4 laws and the subsequently enacted McCarran-Ferguson Act (15 U.S.C. §1011 et seq.)
5 which imposed a moratorium on federal antitrust litigation respecting insurance companies
6 until 1948. Thus, as *MacKay* explained, the initial code section containing the language
7 parallel to that in Section 12414.26 (Insurance Code §1860.1 applicable to property and
8 casualty carriers) was enacted in order to immunize insurers from antitrust laws. *MacKay*
9 at 1444, citing *Donabedian.* However, as *McKay* further explained: "[T]he McBride-
10 Grunsky Act did more than immunize insurers from antitrust laws. It enacted the entirety
11 of Chapter 9 of Part 2 of Division One of the Insurance Code, governing 'rates and rating
12 and other organizations.' It also enacted Insurance Code §1858 which provides an
13 administrative remedy before the Commissioner for an insured aggrieved by an insurer's
14 rates or rating system." *Id.* at 1444-1445. Thus, as *McKay* explains," while the initial
15 *motivation* behind Insurance Code section 1860.1 may have been an exemption from
16 antitrust laws in particular, it was recognized that the language of the exemption was, in
17 fact, broader." *Id.* at 1445, emphasis added.
18 Kaufman argues that the impetus for Section 12414.26 was anti-trust litigation
19 brought against title insurance carriers. See Kaufman RFN Exhibit 8. The admissible
20 evidence of legislative history shows that Section 12414.26 was enacted in 1974 with
21 language equivalent to that of Insurance Code §§11758 (applicable to workers'
22 compensation carriers) and 1860.1 (applicable to property and casualty insurance) after
23 several title insurers were sued for anti-trust violations. However, there is no evidence
24 before the Court that at the time Section 12414.26 was enacted the Legislature intended the
25 language it used to be limited to statutory anti-trust claims. The stated purpose of the
26 Legislation as a whole was "to provide rate regulation for an industry in which there is
27 none" (Kaufman RJN Exhibit 3) and specifically to regulate rates so that they are not
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1 "excessive, inadequate, or unfairly discriminatory," and to "encourage competition...on a
2 sound financial basis." Ins. Code § 12401.

3 Title insurance, unlike workers compensation insurance or property or casualty
4 insurance, does not insure against future events. *Quelimane* at 41. It involves a single
5 premium. It insures against "defects in the title or against liens or encumbrances that may
6 affect title at the time when the policy is issued." *Elysian Invest. Group, LLC v. Stewart*
7 *Title Guar. Co.* (2002) 105 Cal. App. 4th 315, 320; Ins. Code §§ 104, 12340.1.
8 Importantly, there is no argument or suggestion that *title insurance companies* in 1974
9 used rating organizations to set title insurance rates or otherwise shared actuarial
10 information for that purpose, which was the original impetus for the provision enacted with
11 respect to property and casualty insurance in 1947 or that enacted with respect to workers'
12 compensation insurance in 1951. *SCIF* at 939-940.

13 To be sure, the legislation respecting title insurance permits, in Article 5.5,
14 consideration of past and prospective loss experience in determining whether rates are
15 excessive or inadequate (Ins. Code §12401.3) as well as the exchange of information and
16 experience data between title insurers and the *Insurance Commissioner* for the purposes of
17 evaluating individual rate filings (Ins. Code §§ 12401.4, 12401.5). The legislation also
18 permits the establishment of an advisory organization and membership therein (Article 5.7)
19 and permits the *Insurance Commissioner* to employ the services of the "advisory
20 organization" to assist him in his duties. Section 12401.5. The legislation also permits the
21 *Insurance Commissioner* to gather data annually for the purposes of evaluating individual
22 rate filings. Section 12401.5. However, there is no citation to any legislative history to the
23 effect that Section 12414.26 was designed solely to provide antitrust immunity or to permit
24 title insurance *carriers* to report data to a ratings agency so as to set rates.

25 To summarize, whatever may have been the historical origins of the language used
26 in Section 12414.26, the interpretation for which Sjobring and Kaufman argue is not
27 supported by its legislative history. These actions seek to impose liability based upon the
28 use of a filed rate and call upon the Court both to characterize the type of policies filed and

1 to determine what rate should have been charged as to each. This is a challenge to the use
2 of a rate and rate regulation precluded by Section 12414.26 and the statutory scheme as a
3 whole.

4 **E. Plaintiffs' Reliance on Section 12414.27 and Both Parties' Reliance on the**
5 ***Kirk* Appellate Opinion Is Misplaced**

6 Plaintiffs argue both that they are not bound by the *Kirk* trial court order or the
7 unpublished decision affirming same and that First American is bound under the doctrine
8 of collateral estoppel. They then contend that under those opinions their action can
9 proceed under Section 12414.27

10 Essentially, Plaintiffs seek to invoke the doctrine of offensive, nonmutual collateral
11 estoppel. See *Parklane Hosiery Co. v. Shore* (1979) 439 U.S. 322. Assuming, *arguendo*,
12 that the doctrine is applicable in state court, its elements require, at a minimum, that the
13 issue adjudicated in the prior proceeding be the same as in this proceeding. This is black
14 letter law respecting both issue and claim preclusion. See *DKN Holdings LLC v. Faeber*
15 (2015) 61 Cal 4th 813. That showing is not made. In that part of the Statement of Decision
16 favorable to Kirk the trial court determined that as to certain charges FATCO did not
17 consistently apply its *own interpretation* of certain sub-escrow services and that it thus was
18 liable under section 12414.27. Exhibit A to First American's Request for Judicial Notice
19 at 34:19-37:7. This was affirmed by the Court of Appeal. *Id.* at Ex. C, pages14-15. There
20 is no issue in either of these cases as to whether First American disregarded its own
21 interpretation of the proper charges for sub-escrow fees (or any other fees). The issue in
22 both cases is whether Plaintiffs' interpretation of the rate is the correct one. Thus,
23 Plaintiffs' reliance on *Kirk* and the unpublished opinion of the Court of Appeal therein is
24 misplaced.

25 To the extent First American relies on the unpublished opinion of the Court of
26 Appeal in *Kirk* (to argue the effect of Section 12414.26 on this action) it also errs. Cal.
27 Rule of Court, Rule 8.1115(a).
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**VI. ORDER**

*Sjobring* and *Kaufman* as now understood challenge the use of a filed rate and require the Court to engage in rate setting, rate regulation, and a determination of the proper "use" of rates. As the Court understands the statutory scheme and the case law a civil action on this basis is precluded prior to an action brought under Section 6.5 of the Insurance Code. Sjobring has proffered a Fifth Amended Complaint to be filed in the event this motion is granted. Exhibit A to Opposition. It, however, continues to challenge the use of a rate and continues to require that the type of policy at issue be adjudicated. (See proposed Fifth Amended Complaint at ¶¶ 43-50; 62-70.) Kaufman tenders no such pleading and does not assert any ability to amend so as to comply with the statute. Accordingly, the motions for judgment on the pleadings are GRANTED, without leave to amend.

Counsel for First American shall prepare and lodge judgments of dismissal. The Clerk is requested to vacate all pre-trial and trial dates on calendar.

Dated: 8/21/14

Maren E. Nelson
MAREN E. NELSON
JUDGE OF THE SUPERIOR COURT

Documents Considered

**JOP RE SJOBRING**

**Filed December 19, 2017 by First American**
Defendant's Notice of Motion and Motion for Judgment on the Pleadings
(Redacted and Unredacted/Conditionally Under Seal)
Defendants' Request for Judicial Notice
(Redacted versions of Exhibit H and J and unredacted/conditionally under seal versions)
Declaration of Judith Sidkoff in Support of Lodgment of Exhibits H and J

**Filed April 26, 2018 by Sjobring**
Plaintiff Jeffrey Sjobring's Opposition to Motion for Judgment on the Pleadings
Request for Judicial Notice and Declaration of Counsel in Support of Opposition to Motion for Judgment on the Pleadings
Objections to First American's Request for Judicial Notice

**Filed May 10, 2017 by Sjobring**
Supplemental Request for Judicial Notice in Support of Opposition to Motion for Judgment on the Pleadings

**Filed May 17, 2017 by First American**
Reply in Support of Defendants' Motion for Judgment on the Pleadings
Defendants' Response to Plaintiff's Objections to Defendants' Request for Judicial Notice
Defendants' Objections to Plaintiff's Request for Judicial Notice
Defendants' Supplemental Request for Judicial Notice

**JOP RE KAUFMAN**

**Filed May 7, 2018 by First American**
Defendants' Notice of Motion and Motion for Judgment on the Pleadings (*Pickett/Kaufman*); Memorandum of Points and Authorities; Declaration of Paul M. Kakuske
Defendants' Request for Judicial Notice

**Filed June 28, 2018 by Kaufman**
Plaintiff Wendy Kaufman's Opposition to Motion for Judgment on the Pleadings
Plaintiff Wendy Kaufman's Objections to Defendants' Request for Judicial Notice
Plaintiffs Wendy Kaufman and Jeffrey Sjobring's Request for Judicial Notice

**Filed July 11, 2018 by Defendants**
Reply in Support of Defendants' Motion for Judgment on the Pleadings (Kaufman)
Supplemental Request for Judicial Notice
Defendants' Objections to Plaintiff's Request for Judicial Notice in Support of Opposition to Defendant's Motion for Judgment on the Pleadings

Defendants' Response to Plaintiff's Objections to Defendants' Request for Judicial Notice

**Filed August 21, 2018 by All Parties**
Joint Report

**BOTH CASES**

**Lodged July 31, 2018**
Reporter's Transcript of the July 23, 2018 Hearing

**Filed August 22, 2018**
Notice of Waiver of Equitable Theory of Recovery Under UCL filed August 2, 2018

Re: Sjobring *v. First American Title Ins. Company*
Case No.: BC329482

**PROOF OF SERVICE**

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 600 South Indian Hill Boulevard, Claremont, California 91711.

On **November 2, 2018**, I served the foregoing documents described as NOTICE OF APPEAL on the interested parties in this action by placing __ the original XX a true copy thereof enclosed in sealed envelopes addressed as follows:

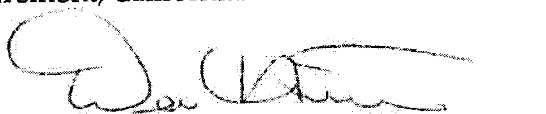
PLEASE SEE ATTACHED SERVICE LIST

[XX] **VIA ELECTRONIC SERVICE VIA CASE ANYWHERE** through electronic transmission to all parties appearing on the electronic service list.

[XX] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[] (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **November 2, 2018,** at Claremont, California.



Debbie Hunter

Re: Sjobring *v. First American Title Ins. Company*
Case No.: BC329482

## SERVICE LIST

| | |
|---|---|
| Ronald D. Kent, Esq.<br>Joel D. Siegel, Esq.<br>Dentons US LLP<br>601 South Figueroa Street, Suite 2500<br>Los Angeles, California 90017<br>Telephone: (213) 623-9300<br>FAX: (213) 623-9924 | Attorneys for Defendant,<br>First American Title Company |
| Sonia Martin, Esq.<br>Dentons US LLP<br>525 Market Street, 26th Floor<br>San Francisco, CA 94105<br>(415) 882-5000 | Attorneys for Defendant<br>First American Title Company |
| Steven J. Bernheim, Esq.<br>The Bernheim Law Firm<br>11611 Dona Alicia Place<br>Studio City, California 91604<br>Telephone: (818) 760-7341<br>Email: BernieBernheim@Gmail.com | Attorneys for Plaintiffs |
| Taras Kick, Esq.<br>The Kick Law Firm, APC<br>815 Moraga Drive<br>Los Angeles, CA 90049<br>Telephone: (310) 395-2988<br>FAX: (310) 395-2088 | Attorneys for Plaintiffs |
| Richard H. Friedman, Esq.<br>Friedman Rubin<br>1126 Highland Avenue<br>Bremerton, Washington 98337<br>(360) 782-4300 | Attorneys for Plaintiffs |
| Nazo S. Semerdjian, Esq.<br>The Semerdjian Law Firm<br>898 San Pablo Way<br>Duarte, California 91010<br>(626) 215-5161 | Attorneys for Plaintiffs |

# Appellate Courts Case Information

## 2nd Appellate District

Change court ▼

*Court data last updated: 12/12/2019 08:26 AM*

## Parties and Attorneys

**Sjobring v. First American Title Insurance Co.**
**Division p**
**Case Number B293732**

| Party | Attorney |
|---|---|
| Jeffrey Albert Sjobring : Plaintiff and Appellant | Michael Bidart<br>Shernoff Bidart Echeverria LLP<br>600 S. Indian Hill Blvd.<br>Claremont, CA 91711<br>Richard Henry Friedman<br>Friedman Rubin & White<br>1126 Highland Ave<br>Bremerton, WA 98337<br>Steven J. Bernheim<br>The Bernheim Law Firm<br>11611 Dona Alicia Place<br>Studio City, CA 91604 |
| First American Title Insurance Co. : Defendant and Respondent | Ronald D. Kent<br>Dentons US LLP<br>601 S. Figueroa Street<br>Suite 2500<br>Los Angeles, CA 90017-5704<br>Sonia Renee Martin<br>Dentons US LLP<br>525 Market Street<br>26th Floor<br>San Francisco, CA 94105 |

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# Appellate Courts Case Information

## 2nd Appellate District

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*Court data last updated: 12/12/2019 08:26 AM*

## Trial Court

**Sjobring v. First American Title Insurance Co.**
**Division p**
**Case Number B293732**

| | |
|---|---|
| **Trial Court Name:** | Los Angeles County Superior Court |
| **County:** | Los Angeles |
| **Trial Court Case Number:** | BC329482 |
| **Trial Court Judge:** | Nelson, Maren |
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By

THE KICK LAW FIRM, APC
Taras Kick (SBN 143379)
Thomas Segal (SBN 222791)
201 Wilshire Boulevard, Suite 350
Santa Monica, CA 90401
(310) 395-2988 (phone)
(310) 395-2088 (facsimile)

THE BERNHEIM LAW FIRM
Steven Jay "Bernie" Bernheim (SBN 143319)
13211 Mulholland Drive
Beverly Hills, California 90210
(818) 906-2545 (phone)
(818) 906-8418 (facsimile)

THE SEMERJIAN LAW FIRM
Nazo S. Semerjian (SBN 223536)
898 San Pablo Way
Duarte, California 91010
(626) 215-5161 (phone)

Attorneys for Plaintiff James Muehling
and the Putative Class

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF ALAMEDA**

| | |
|---|---|
| JAMES MUEHLING, on behalf of himself and all others similarly situated and the general public,<br><br>Plaintiff,<br><br>vs.<br><br>FIRST AMERICAN TITLE COMPANY, a California corporation,<br><br>Defendant. | CASE NO. RG12659372<br><br>**PROVISIONALLY DESIGNATED COMPLEX**<br><br>**Action Filed:**<br><br>**CLASS ACTION**<br><br>**COMPLAINT FOR:**<br><br>**(1) Breach of Contract;**<br>**(2) Breach of Fiduciary Duty;**<br>**(3) Unjust Enrichment / Restitution;**<br>**(4) Violations of Consumer Legal Remedies Act; and**<br>**(5) Violations of Unfair Competition Laws**<br><br>**[Request for Jury Trial]** |

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1 Individual and representative plaintiff James Muehling, on behalf of himself and all
2 others similarly situated (collectively "Plaintiff"), alleges on information and belief as
3 follows:

4 **PARTIES**

5 1. **Plaintiff.** Plaintiff Muehling at all relevant times was an individual resident of
6 the State of California, and a resident of Alameda County.

7 2. **Defendant First American Title Company.** Defendant First American Title
8 Company ("FATCO") is, and at all relevant times was, a corporation organized and existing
9 under the laws of the State of California, and headquartered in California.

10 **CLASS ALLEGATIONS**

11 3. Plaintiff brings this action on his own behalf and on behalf of all persons
12 similarly situated, pursuant to Code of Civil Procedure section 382 and Civil Code section
13 1781. The class that Plaintiff represents is comprised of all persons who were parties to
14 FATCO escrows in residential transactions to whom FATCO charged an unfiled escrow fee
15 (other than a "statutorily excepted charge"). The "statutorily excepted charges" are limited to
16 (and only include) conveyancing fees, notary fees, inspection fees and tax service contract
17 fees.

18 4. Excluded from the class are FATCO and its officers, directors or employees
19 and their immediate family members; any entity in which FATCO has a controlling interest;
20 affiliates, legal representatives, attorneys, heirs or assigns of FATCO and their immediate
21 family members; plaintiff's attorneys and their staff; and, any federal, state or local
22 governmental entity, and any judge, justice, or judicial officer presiding over this matter, and
23 the members of their immediate families and judicial staffs.

24 5. The number of class members identified is so numerous that joinder of all
25 members is impracticable. The number of class members is indeterminate at the present
26 time, but it is larger than can be addressed by joinder.

27 6. Members of the class are ascertainable from FATCO's records and/or records
28 of third parties accessible through discovery. As an escrow, FATCO maintains records of the

1 charges in each escrow transaction. Further, under federal law, FATCO must prepare a
2 HUD-1 settlement statement which accurately lists for each transaction all charges, who
3 made the charges, and who was charged. 12 U.S.C. § 2603.

4 7. There are common issues of law and fact among the plaintiff class which
5 predominate over any questions affecting only individual members.

6 8. The claims of Plaintiff are typical of those of the plaintiff class, and he will
7 fairly and adequately represent the interest of the class.

8 9. There is no plain, speedy or adequate remedy other than by maintenance of this
9 class action because damage to each member of the class is relatively small, making it
10 economically unfeasible to pursue remedies other than by way of a class action. Disposition
11 of the claims of class members in a class action rather than individual actions will benefit the
12 parties and the Court.

13 **FACTUAL BACKGROUND**

14 10. Plaintiff Muehling refinanced his home in California located at 3909 Stevenson
15 Boulevard #506, Fremont, CA 94538, in a transaction that closed on November 21, 2006.

16 11. FATCO (a controlled escrow company) acted as Plaintiff's escrow.

17 12. In order to lawfully charge class members for escrow services, FATCO was
18 and is statutorily required to file with the California Department of Insurance those escrow
19 charges 30 days before charging them (with the exception of the "statutorily excepted
20 charges" defined in paragraph 3). Insurance Code section 12414.27; 10 Cal. Code Regs.
21 section 2556.1. FATCO failed to comply with this statutory requirement for the unfiled
22 escrow fees charged to plaintiff and to class members. Such unfiled escrow fees include, but
23 are not limited to, "document preparation" fees, "electronic document processing" fees,
24 "electronic download" fees, "email" fees, and "loan tie-in" fees.

25 13. Plaintiff Muehling was charged one of these unfiled escrow fees, specifically a
26 loan tie-in fee in the amount of $100.

27 14. Plaintiff is informed and believes, and on that basis alleges, that:

28

1 a. FATCO itself knew that it was unlawful to charge class members these
2 unfiled escrow fees, including the unfiled loan tie-in fee charged to Plaintiff Muehling. In a
3 top level memorandum, FATCO admitted internally that: "If we do not have a rate filed for a
4 particular thing we are doing in most or all transactions we cannot make a charge until we
5 have a rate filed for such and it becomes effective under the Insurance Code. An *example* is
6 loan tie-in fees. We do not have a rate filed for that at this time so that fee cannot be
7 charged." (See Exhibit 1.) FATCO further admitted: "[O]ur offices must stop using these
8 rates immediately. They may only charge the filed rate for our services." *Ibid.*
9 b. As their escrow, FATCO was the fiduciary of Plaintiff and the class
10 members. Despite being their fiduciary, FATCO never disclosed to Plaintiff or any other
11 class member the material fact that FATCO was not lawfully entitled to charge these unfiled
12 escrow fees. FATCO represented to Plaintiff Muehling and all class members that these
13 unfiled escrow fees were legitimate. It did so by listing the fees on the HUD-1 settlement
14 statement that FATCO prepared and gave to Muehling and the class members.
15 ***AMERICAN PIPE* TOLLING**
16 15. Under the decision of the U.S. Supreme Court in *American Pipe and Constr.*
17 *Co. v. Utah* (1974) 414 U.S. 538, the filing of a class action tolls the statute of limitations for
18 the absent class members.
19 16. A class action encompassing the allegations made here was filed on April 26,
20 2007, in the Superior Court for the State of California, County of Los Angeles. That action is
21 *Wilmot v. First American Title Company*, Case No. BC370141.
22 17. The class pled in that action includes "all persons...who were charged
23 for...escrow services and/or fees related to escrow more than the amounts allowed by First
24 American's filings with the California Department of Insurance." Any statutes of limitations
25 on the claims herein were tolled by the filing of the *Wilmot* complaint.
26 **RELIANCE / DELAYED DISCOVERY / ESTOPPEL**
27 18. Plaintiff and the class members did not discover, and could not reasonably have
28 discovered, FATCO's omissions, misrepresentations, and other misconduct alleged herein

1 until a date within the statute of limitations for each and every cause of action alleged herein.
2 Plaintiff and the class members were ignorant of the true facts, and actually and reasonably
3 relied on FATCO's failure to disclose, misrepresentations, and other misconduct alleged
4 herein. As a matter of business practice, FATCO, as a controlled escrow company, owed a
5 heightened duty, i.e. that of a fiduciary, to its customers, including to plaintiff and the class.
6 As its customers' fiduciary, FATCO invited its customers to place their trust and confidence
7 in FATCO. Plaintiff and the class members did place their trust and confidence in FATCO
8 and assumed and expected that their fiduciary would comply with the law and not charge any
9 fee not authorized under the law. Plaintiff and the class members justifiably relied on their
10 fiduciary, FATCO, to charge only fees authorized under the law.
11 19. Plaintiff Muehling did not discover the facts relating to the overcharging and
12 other misconduct herein alleged until in or about November 2012, when he consulted
13 professionals regarding his real estate transaction.
14 20. Plaintiff could not have reasonably discovered FATCO's misconduct earlier
15 because, among other things, Plaintiff had no reason to believe that his fiduciary, FATCO,
16 was charging unfiled escrow fees not authorized under the law. FATCO, his fiduciary, did
17 not disclose that the law precluded his fiduciary from charging unfiled escrow fees, including
18 the unfiled loan tie-in fee. Instead, by including the unfiled escrow fees on the HUD-1,
19 FATCO represented to plaintiff and the class members that it was entitled to charge for these
20 unfiled escrow fees.
21 21. FATCO knew the true facts regarding its failure to file rates for these escrow
22 fees with the CDI. FATCO knew the true fact that it therefore was not lawfully entitled to
23 charge these unfiled escrow fees, including the unfiled loan tie-in fee. FATCO intended that
24 Plaintiff and class members act in reliance on their omissions, misrepresentations and
25 misconduct alleged herein. Plaintiff and the class members were ignorant of the true facts,
26 and actually and reasonably relied on FATCO's misrepresentations, failure to disclose and
27 other misconduct alleged herein, to their detriment. Had Plaintiff and the class members
28 known the true facts, they would not have paid the unfiled escrow fees.

1 22. By its conduct, FATCO has waived, forfeited, and/or is estopped from
2 asserting the statute of limitations and other affirmative or jurisdictional defenses to this
3 action.

4 **VENUE**

5 23. Venue as to defendant FATCO is proper in this judicial district pursuant to
6 Business & Professions Code section 17203, and Code of Civil Procedure sections 395(a)
7 and 395.5. Plaintiff's property related to which the subject unlawful escrow fee was charged
8 is located in the County of Alameda. FATCO either maintains an office, transacts business,
9 has an agent, or is found in the County of Alameda, and is within the jurisdiction of this
10 Court for purposes of service of process. The unlawful acts alleged herein had a direct effect
11 on the consumers within the State of California, including those within the County of
12 Alameda. Additionally, the trade and commerce described herein is carried out in whole or
13 in part in the State of California and within the County of Alameda. Over fifty percent of the
14 plaintiff class are residents of the State of California.

15 **JURISDICTION**

16 24. **Jurisdiction is proper in this Court.** The claims alleged here are originally
17 cognizable in the courts. See, e.g., *Jonathan Neil & Assoc. v. Jones* (2004) 33 Cal.4th 917,
18 933.

19 25. **Federal jurisdiction does not exist.** The amount in controversy as to the
20 representative plaintiff does not exceed $75,000.00, including interest and any pro rata award
21 of attorneys' fees and costs. The damages, attorneys' fees and costs of individual class
22 members may not be aggregated to meet the federal jurisdictional amount. FATCO is a
23 citizen of the State of California. The class is limited to California.

24 26. **The CDI does not have exclusive jurisdiction (no safe harbor exists), the**
25 **primary jurisdiction doctrine does not apply, and the administrative exhaustion**
26 **doctrine does not apply**, because among other reasons:

27 a. This lawsuit does not concern "rate-making" / "rate-setting", i.e., the
28 process of *establishing* rates, *amending* rates, *changing* rates, *lowering* rates or *raising* rates.

This lawsuit does not *challenge* FATCO's rates. It does not contend that FATCO's rates are too high. It does not seek to *reduce* FATCO's rates. The class representative and the class are not seeking a rate inconsistent with the filed rate. And, this lawsuit does not allege "rate fixing," i.e., this lawsuit does not allege "concerted action" or other antitrust conduct by multiple title insurers. It does not allege that FATCO acted in concert with any one, or more, of its competitors to achieve any goal whatsoever, including but not limited to rate fixing or restricting competition.

b. Accordingly, there is no "safe harbor" for the misconduct complained of here. Here, FATCO charged escrow fees without having filed a rate for these fees, making it unlawful for FATCO to charge these fees.

c. Nowhere did the Legislature explicitly prohibit liability for such misconduct. Nowhere did the Legislature specifically permit any of these practices. Nothing in the Insurance Code creates a "safe harbor" from liability for such misconduct. *Cel-Tech v. Los Angeles Cellular* (1999) 20 Cal.4th 163, 183-184 (to be a safe harbor, "another provision must actually 'bar' the action or clearly permit the conduct"); *Aron v. U-Haul* (2006) 143 Cal.App.4th 796, 804 (courts "may not create 'implied safe harbor(s)'"); *McKell v. Wash. Mut.* (2006) 142 Cal.App.4th 1457, 1474 (the statute must "specifically permit[]" the challenged practice); *Krumme v. Mercury* (2004) 123 Cal.App. 4th 924, 940 n.5 (the statute "must explicitly prohibit" liability).

d. Insurance Code section 12414.29 does not create a safe harbor. In *Quelimane v. Stewart Title* (1998) 19 Cal.4th 26, 45, the California Supreme Court held that Section 12414.29 preempts only *local regulation*:

> "First American argues, however, that UCL actions against title insurers are precluded by the last sentence of section 12414.29... We disagree. ***First American's argument ignores the remainder of the sentence – 'notwithstanding any local regulation or ordinance' – which makes it clear that the legislative purpose was to preempt local regulation, not***

*to exempt title insurers from other state laws governing unfair business practices.*"

e. Insurance Code section 12414.26 also does not create a safe harbor. In *Quelimane*, the California Supreme Court rejected the contention to the contrary: "the court [below] held that Insurance Code sections 12414.26 and 12414.29 precluded plaintiff's action. ***We do not agree.***" *Id.* at 44. The California Supreme Court explained that the exclusive jurisdiction of Section 12414.26 is "restrict[ed] to *rate-making* related activities;" it does not extend to charging an unfiled rate. In *State Compensation Insurance Fund v. Superior Court* (2001) 24 Cal.4th 930, 938, the California Supreme Court held that the twin statute applicable to workers compensation, Insurance Code section 11758, did not immunize the defendant from class action liability, since the action "does not challenge the method by which the rate or premium charged was set." Here, no rate or premium was set for the unfiled escrow fees, so plaintiff (obviously) "does not challenge the method by which the rate or premium charged was set." Moreover, Section 12414.26 – like its twin, Sections 11758 – applies only to "concerted activity otherwise barred by the antitrust laws, ***and not to the individual misconduct of an insurer...***" *SCIF, supra,* 24 Cal.4th at 938. Here, no concerted activity is involved. Only the individual misconduct of a single company, FATCO, is involved.

f. The type of relief sought here is not available through administrative remedies from the CDI. This lawsuit seeks *class* relief for damages caused to the class members by FATCO's *past* and continuing wrongful conduct (i.e., charging unfiled escrow fees). This lawsuit seeks class relief in the form of damages, restitution, and disgorgement of monies wrongfully taken from class members when FATCO charged unfiled escrow fees for services. This lawsuit does not seek a fine or an administrative penalty. The CDI is not authorized to award damages. The CDI is not authorized to afford relief in equity. The CDI is not authorized to afford class relief.

g. Additionally, the administrative complaint procedure (Insurance Code Section 12414.13) is permissive, not mandatory. "May" means "may"; it does not mean

1 "shall." See, e.g., *Sierra Club v. San Joaquin* (1999) 21 Cal.4th 489, 499; *Woodbury v.*
2 *Brown-Dempsey* (2003) 108 Cal.App.4th 421, 423.

3 **FIRST CAUSE OF ACTION**

4 **(Breach of Contract)**

5 27. Plaintiff realleges and incorporates by reference the allegations contained in the
6 preceding paragraphs of this complaint, as though fully set forth herein.

7 28. **The contract.** Plaintiff and the class members entered into a contract with
8 FATCO, whereby FATCO promised to provide escrow services. The contracts were implied
9 in fact contracts.

10 29. The agreement was implied by conduct inferred from the conduct, situation, or
11 mutual relation of the parties, wherein FATCO promised to and did act as the escrow
12 company, and Plaintiff and the class members paid FATCO for escrow services. "There is
13 no difference between an express and implied contract... While an implied in fact contract
14 may be inferred from the conduct, situation or mutual relation of the parties, the very heart of
15 this kind of agreement is an intent to promise." *Division of Labor Law Enforcement v.*
16 *Transpacific Transportation Co.* (1977) 69 Cal.App.3d 268, 275; see Civil Code section
17 1621.

18 30. **Material terms of contract.** All applicable laws in existence when the
19 contract was made necessarily entered into the contract and formed a part of it, without any
20 stipulation to that effect, as if they were expressly referred to and incorporated. *McKell v.*
21 *Washington Mutual* (2006) 142 Cal.App.4th 1457, 1489. In California, "legally prescribed rates
22 become part of the parties' contract." *Gardner v. Basich Bros.* (1955) 44 Cal.2d 191, 195.
23 Thus, a material term incorporated into the contract by operation of law was that FATCO
24 would charge plaintiff and the class members only those fees allowed under California law
25 and FATCO's filed rates, including necessarily the promise to not charge unfiled escrow fees
26 (such as the unfiled loan tie-in fee). The material terms of the contract also included the
27 implied covenant of good faith and fair dealing, whereby FATCO covenanted that it would,
28 in good faith and in the exercise of fair dealing, deal with plaintiff and each class member

fairly and honestly and do nothing to impair, interfere with, hinder, or potentially injure plaintiff's and the class members' rights and benefits under the contract.

31. **Breach of contract.** FATCO breached the terms of the contract, including the implied covenant of good faith and fair dealing, by charging plaintiff for an unfiled escrow fee (the loan tie-in fee) even though the contract obligated FATCO to not charge this fee (because FATCO had not filed a rate for the loan tie-in service).

32. **Plaintiff's and the class members' performance.** Plaintiff and the class paid consideration in the form of escrow fees, and have faithfully performed all obligations required to be performed by them under the terms of the contracts, except to the extent performance may have been excused by FATCO's conduct.

33. **Damages.** As a direct, proximate, consequential, and legal result of FATCO's breach(es) of the contract, including but not limited to the covenant of good faith and fair dealing implied in the contract, plaintiff and the class have been, and continue to be, damaged in an amount in excess of the jurisdictional limits of this Court, including but not limited to loss of money by payment of unlawful fees, consequential damages including interest on monies plaintiffs and the class could and should have had, but which they did not have as a result of FATCO's breach(es) of contract, and other fees, expenses and costs to be proven at trial. Plaintiff and the class have also sustained other economic losses as a direct, proximate and legal result of FATCO's conduct, in an amount to be proven at trial.

**SECOND CAUSE OF ACTION**

**(Breach of Fiduciary Duty)**

34. Plaintiff realleges and incorporates by reference the allegations contained in the preceding paragraphs of this complaint, as though fully set forth herein.

35. FATCO as escrow agent owed plaintiff and the class a fiduciary duty which required FATCO to, among other things:

a. Exercise reasonable care and diligence in carrying out the escrow instructions;

1 b. Disclose knowledge acquired in the course of the agency with respect to
2 material facts which might affect the decision of plaintiff and the class as to their pending
3 transactions; and
4 c. Act in the utmost good faith and in the best interests of plaintiff and the
5 class.
6 36. FATCO breached its fiduciary duty owed to plaintiff and the class by failing to
7 disclose the following facts, among others that may be identified in the course of discovery:
8 a. FATCO knew in the course of its agency, but failed to disclose to
9 plaintiff and the class, the material fact that FATCO had not filed certain escrow fees which
10 FATCO was required to file with the CDI, and therefore its filed rate for these services was
11 effectively $0. As FATCO admitted on February 7, 2007 in a top-level executive
12 memorandum: "If we do not have a rate filed for a particular thing we are doing in most or all
13 transactions we cannot make a charge until we have a rate filed for such and it becomes
14 effective under the Insurance Code. An example is loan tie-in fees. We do not have a rate
15 filed for that at this time so that fee cannot be charged." (See Exhibit 1.)
16 b. FATCO knew in the course of its agency, but failed to disclose to
17 plaintiff and the class, the material facts that: (i) FATCO could not lawfully charge more than
18 $0 for the unfiled escrow fees, and (ii) did charge for them.
19 37. Plaintiff and the class did not have knowledge of these material facts. Had
20 plaintiff and the class known these material facts which FATCO failed to disclose, they
21 would not have paid the unlawful, unfiled escrow fees.
22 38. FATCO's breaches of fiduciary duty proximately, directly and legally caused
23 plaintiff and the class to be damaged in an amount according to proof.
24 39. FATCO's conduct and actions alleged herein were despicable, and were done
25 maliciously, oppressively and fraudulently, with the intent to wrongfully deprive plaintiff and
26 class members of monies, and to cause them injury, and with a willful and conscious
27 disregard of plaintiff's and class members' rights. The officers, directors and managing
28

1 agents of FATCO were personally involved in the decision-making process with respect to
2 the misconduct alleged herein and to be proven at trial.
3 40. The conduct alleged herein was engaged in by representatives of FATCO, and
4 officers, directors and/or managing agents of FATCO authorized and/or ratified each and
5 every act on which plaintiff's allegations of punitive damages herein are based. On that
6 basis, pursuant to Civil Code section 3294, plaintiff and the class are entitled to an award of
7 exemplary and punitive damages in an amount adequate to make an example of, and to
8 punish and deter, FATCO.

9 **THIRD CAUSE OF ACTION**

10 **(Unjust Enrichment / Restitution)**

11 41. Plaintiff realleges and incorporates by reference the allegations contained in the
12 preceding paragraphs of this complaint, as though fully set forth herein.
13 42. FATCO benefitted from and has been unjustly enriched at the expense and to
14 the detriment of plaintiff and members of the class by wrongfully collecting money for
15 unfiled escrow fees to which FATCO, in equity, is not entitled. FATCO has unjustly
16 retained and failed to refund to plaintiff and members of the class the amounts wrongfully
17 collected from them and, under the circumstances, has been unjustly enriched.
18 43. Plaintiff and members of the class are entitled to recover from FATCO all
19 amounts wrongfully collected and improperly retained by FATCO, plus interest thereon.
20 44. As a direct and proximate result of FATCO's unjust enrichment, plaintiff and
21 members of the class have suffered injury and seek damages in the amount necessary to
22 restore them to the positions they would be in had FATCO not been unjustly enriched.

23 **FOURTH CAUSE OF ACTION**

24 **(Violations of Consumer Legal Remedies Act)**

25 45. Plaintiff realleges and incorporates by reference the allegations contained in the
26 preceding paragraphs of this complaint, as though fully set forth herein.
27 46. FATCO's conduct alleged herein constitute unfair methods of competition
28 and/or unfair or deceptive acts or practices undertaken by FATCO in a transaction intended

1 to result or which results in the sale or lease of goods or services to consumers within the
2 meaning of the California Legal Remedies Act, Civil Code sections 1750, et seq.
3 47. FATCO's conduct includes the following unfair or deceptive acts or practices
4 that have been intentionally, knowingly, and unlawfully perpetrated upon Plaintiff and
5 members of the class by defendant:
6 a. In violation of Civil Code section 1770(a)(2), FATCO misrepresented
7 that it was approved to charge plaintiff and class members unfiled escrow fees.
8 b. In violation of Civil Code section 1770(a)(5), FATCO represented in the
9 Settlement Statements that goods or services have sponsorship, approval, characteristics,
10 ingredients, uses, benefits, or quantities which they do not have. Specifically, FATCO
11 represented that the subject unfiled escrow fees were approved by the CDI, when in fact
12 these fees were unfiled.
13 c. In violation of Civil Code section 1770(a)(14), FATCO represented that
14 plaintiff's and the class members' escrow transactions conferred or involved rights, remedies
15 or obligations which they did not have or involve, or which are prohibited by law.
16 Specifically, by setting forth unfiled escrow fees in the HUD-1 Final Settlement Statements,
17 FATCO represented that the escrow transactions involved obligations which are prohibited
18 by law. Plaintiff and the class members were not obligated to pay unfiled escrow fees.
19 d. In violation of Civil Code section 1770(a)(19), FATCO inserted an
20 unconscionable provision in the contracts, namely the obligation to pay unfiled escrow fees
21 when, in fact, the implied terms of the contracts precluded FATCO from imposing those
22 charges, and California law prohibits those charges.
23 48. The escrow services at issue here are *not and never were insurance.*
24 49. The misleading HUD-1 Settlement Statements prepared by FATCO are *not and*
25 *never were insurance.* Rather, at all relevant times, preparation of the misleading settlement
26 statements was an *escrow* service.
27 50. As a result of the use or employment by FATCO of the above-alleged methods,
28 acts, and/or practices, plaintiff and the class suffered damage within the meaning of Civil

1 Code section 1780(a). Pursuant to Civil Code section 1782(a), plaintiff will serve FATCO
2 with notice of alleged violations of the CLRA by certified mail return receipt requested and
3 will amend to seek damages under the CLRA.

4 **FIFTH CAUSE OF ACTION**

5 **(Violations of Unfair Competition Laws)**

6 51. Plaintiff realleges and incorporates by reference the allegations contained in the
7 preceding paragraphs of this complaint, as though fully set forth herein.

8 52. Business & Professions Code sections 17200, et seq., the Unfair Competition
9 Law, prohibits any unfair competition, including any unlawful, unfair or fraudulent business
10 act or practice, and unfair, deceptive, untrue or misleading advertising, and any other act
11 prohibited by Business & Professions Code sections 17500, et seq. (the False Advertising
12 Law). Business & Professions Code section17500 provides that it is unlawful for any person,
13 firm, corporation, or association, or any employee thereof to intentionally directly, or
14 indirectly perform services, professional or otherwise, or to induce the public to enter into
15 any obligation relating thereto, to make or disseminate in any manner any statement which is
16 untrue or misleading, or which, by the exercise of reasonable care should be known to be
17 untrue or misleading.

18 53. FATCO has engaged in fraudulent, unfair, and/or unlawful business acts and
19 practices within the meaning of the UCL. These acts and practices were:

20 a. **Unlawful:** FATCO's charging of unfiled escrow fees violated
21 California law. 10 Cal. Code Regs. section 2556.1 provided that "no...controlled escrow
22 company shall charge for any...services...except in accordance with rate filings which have
23 become effective." Insurance Code section 12414.27 likewise prohibits FATCO from
24 charging unfiled escrow fees.

25 b. **Unfair:** The above-alleged acts and practices and each of them are also
26 unfair within the meaning of the UCL. The gravity of the harm to the plaintiff and the class
27 members outweighs any purported utility of the affirmative and negative misrepresentations
28 and the charging in contravention of the law and the spirit of and public policy underlying the

1 applicable law. The above-alleged acts and practices also offend established public policy
2 and/or are immoral, unethical, oppressive, unscrupulous or substantially injurious to the
3 plaintiff and the class members.

4 c. **And/Or Fraudulent:** When FATCO charged unfiled escrow fees to
5 plaintiff and to class members, FATCO failed to disclose the material fact that it was not
6 lawfully entitled to charge these fees. Instead, FATCO, by charging the unfiled escrow fees
7 and by listing them as fees on the HUD-1, represented that these were legitimate fees that
8 FATCO was allowed to charge. These representations were likely to deceive and mislead
9 plaintiff and the class (and in fact did deceive and mislead plaintiff and the class), by leaving
10 them with the impression that FATCO was entitled to charge unfiled escrow fees.

11 54. By engaging in each of the above described acts and practices, FATCO has
12 committed one or more acts of unfair competition within the meaning of Business &
13 Professions Code sections 17200, et seq. As a result of each of these acts and practices by
14 FATCO, plaintiff and the class members have lost money or property. Plaintiff is informed
15 and believes and thereon alleges that FATCO continues to charge unfiled escrow fees.

16 55. Plaintiff, on behalf of himself and on behalf of the class, seeks an order of this
17 Court awarding restitution, disgorgement of illicit profits, injunctive relief and all other relief
18 allowed under Business & Professions Code sections 17200, et seq., plus interest, and
19 attorney's fees and costs pursuant to, *inter alia*, Code of Civil Procedure section 1021.5.

20 **PRAYER**

21 WHEREFORE, plaintiff and members of the class pray for judgment as follows:

22 1. For general, special and consequential damages according to proof;
23 2. For monetary damages pursuant to the Consumer Legal Remedies Act;
24 3. For punitive and exemplary damages;
25 4. For punitive damages pursuant to the Consumer Legal Remedies Act;
26 5. For restitution;
27 6. For injunctive relief, including but not limited to a preliminary and permanent
28 injunction prohibiting FATCO from engaging in the wrongful conduct alleged;

1 7. For any and all other relief available under Business and Professions Code
2 sections 17200 and 17500, et seq., including but not limited to disgorgement of
3 profits received through FATCO's unfair, unlawful and/or fraudulent business
4 practices;
5 8. For attorney's fees and costs pursuant to Code of Civil Procedure section
6 1021.5, the common fund and substantial benefit doctrines and any other
7 applicable law;
8 9. For attorney's fees and costs pursuant to the Consumer Legal Remedies Act;
9 10. For equitable entitlement to attorney's fees and costs from the common fund;
10 11. For pre-judgment interest on the sums owing under the contract; and
11 12. For such other and further relief as the Court deems just and proper.
12
13 DATED: December 11, 2012

THE KICK LAW FIRM, APC
THE BERNHEIM LAW FIRM

By: T. Kick /TAS

Taras Kick
Steven Jay "Bernie" Bernheim
Nazo S. Semerjian
Thomas Segal
Attorneys for Plaintiff and Class
Representative, JAMES MUEHLING

14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

1 **DEMAND FOR JURY TRIAL**
2
3 Plaintiff hereby demands trial by jury in this action.
4
5 DATED: December 11, 2012

THE KICK LAW FIRM, APC
THE BERNHEIM LAW FIRM

6
7 By: T. Kick /TAS

8 Taras Kick
Steven Jay "Bernie" Bernheim
9 Thomas Segal
Nazo S. Semerjian
10 Attorneys for Plaintiff and Class
Representative, JAMES MUEHLING

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# Exhibit B

Ronald D. Kent (SBN 100717)
Joel D. Siegel (SBN 155581)
Michael J. Duvall (SBN 276994)
DENTONS US LLP
601 South Figueroa Street, Suite 2500
Los Angeles, California 90017-5704
Telephone: (213) 623-9300
Facsimile: (213) 623-9924

Sonia Martin (SBN 191148)
DENTONS US LLP
525 Market Street, 26th Floor
San Francisco, CA 94105-2708
Telephone: (415) 882-5000
Facsimile: (415) 882-0300

Attorneys for Defendant
FIRST AMERICAN TITLE COMPANY

CONFORMED COPY
ORIGINAL FILED
Superior Court of California
County of Los Angeles

AUG 26 2014

Sherri R. Carter, Executive Officer/Clerk
By: Kandece Bennett, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

FIRST AMERICAN TITLE COMPANY CASES

JAMES MUEHLING, on behalf of himself and all others similarly situated and the general public,

Plaintiff,

vs.

FIRST AMERICAN TITLE COMPANY, a California corporation,

Defendant.

Judicial Council Coordinated Proceeding No. JCCP 4751

Assigned to Hon. Amy D. Hogue

DEFENDANT FIRST AMERICAN TITLE COMPANY'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION

Date: November 13, 2014
Time: 1:45 p.m.
Dept.: 307

Date Filed: December 11, 2012
Trial Date: April 14, 2015



COPY

1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE on November 13, 2014, at 1:45 p.m. or as soon thereafter as the
4 matter may be heard, in Department 307 of the above-referenced Court, Defendant First American
5 Title Company ("First American") will and hereby does move, pursuant to Section 437c of the
6 California Code of Civil Procedure, for summary judgment, or in the alternative, summary
7 adjudication in its favor against Plaintiff James Muehling ("Plaintiff").

8 The basis for the summary judgment motion is that undisputed facts establish that First
9 American is entitled to judgment against Plaintiff on his Complaint. The alternative motion seeks
10 summary adjudication against Plaintiff on each of his remaining causes of action:

11 (1) Breach of Fiduciary Duty: Plaintiff cannot prove that First American breached any
12 alleged fiduciary duty because rate filings with the California Department of Insurance ("CDI")
13 permitted First American to charge $100 for the escrow related services at issue in his Complaint.

14 (2) Violation of the Unfair Competition Law: Plaintiff cannot prove a violation of
15 California's Unfair Competition Law ("UCL"), Business & Professions Code section 17200, *et*
16 *seq.*, because rate filings with the CDI permitted First American to charge $100 for the escrow
17 related services at issue in his Complaint.

18 This motion is based on this notice, the accompanying separate statement of undisputed
19 material facts, supporting memorandum, declarations, and exhibits listed in the index of evidence,
20 all matters of record in this case, and any additional evidence and argument allowed by the Court.

21 Respectfully submitted,

22 Dated: August 26, 2014 DENTONS US LLP

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24

25 By________________________

26 Sonia Martin

27 Attorneys for Defendant
FIRST AMERICAN TITLE COMPANY

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

Plaintiff's lawsuit is premised on the allegation that First American charged him a $100 fee for escrow related services that was not permitted by rate filings made with the California Department of Insurance ("CDI"). (Plaintiff's Complaint, ¶¶ 12-13, 36(a)-(b), 53(a)-(c), *citing* Ins. Code § 12414.27.) The undisputed evidence, however, proves he is blatantly wrong.

It is undisputed that First American provided services associated with closing a junior mortgage concurrently with the first mortgage in Plaintiff's residential refinance transaction. It is also undisputed that rate filings with the CDI allowed First American to charge $100 "[f]or escrow services rendered in connection with . . . residential transactions involving a junior mortgage closing concurrently with a first mortgage transaction on the same property and handled by the same office . . . " First American properly charged Plaintiff for those services and, as was common in the industry at the time, described that charge as a $100 "loan tie-in fee" on his Estimated HUD-1 Settlement Statement, which he approved in writing and prior to closing.

Because the $100 charge at issue in Plaintiff's Complaint was in accordance with First American's rate filings, he cannot prove a breach of fiduciary duty or a UCL violation. Accordingly, First American respectfully requests that the Court enter summary judgment or, alternatively, summary adjudication in its favor on Plaintiff's two remaining causes of action.[1]

### II. BACKGROUND

Plaintiff James Muehling refinanced his single-family residential condominium home, described as 3909 Stevenson Blvd. Apt. 506, Fremont, California, 94538 (the "Property"), in a transaction that closed on November 21, 2006. (SUF, 5, 15.) (Declaration of Sonia Martin ("Martin Dec."), Ex. B, Deposition of James Muehling ("Muehling Dep."), 120:8-9, 168:10-20; 169: 1-2, Ex. 11.); Declaration of Lynn Lawrence ("Lawrence Dec."), ¶¶ 2, 4, Ex. A.) First

[1] By Order dated April 11, 2014, the Court sustained First American's demurrers to Plaintiff's other causes of action. (*See*, Court Order of April 11, 2014.)

1 American Title Lenders Advantage[2] provided escrow services for that transaction, which involved
2 processing concurrently closing loans: a first mortgage in the amount of $276,250 and a "junior"
3 mortgage home equity line of credit in the amount of $32,500. (SUF, 6, 16.) (Martin Dec., Ex. B,
4 Muehling Dep., 142:17-25, 143:1-11, 145:18-25, 146:11-14; Lawrence Dec., ¶ 3.) Both loans
5 related to the Property, closed concurrently in the same transaction, and escrow services for both
6 loans were handled in the same escrow office. (SUF, 7, 17.) (Lawrence Dec., ¶ 3; Martin Dec,
7 Ex. B, Muehling Dep., 162:5-8.)

8 The Insurance Code regulates title insurance companies and their controlled escrow
9 companies and underwritten title companies.[3] Ins. Code §§ 12401.1. At the time of Plaintiff's
10 transaction, First American Title Insurance Company had filed rates with the CDI (the "Schedule
11 of Fees"). (SUF, 3, 13.) (Declaration of James Dufficy ("Dufficy Dec."), ¶2, Ex.A.) Section J-38
12 of that schedule sets forth a $100 rate for "Concurrent Junior Mortgage Escrow" services:

13 J-38 **CONCURRENT JUNIOR MORTGAGE ESCROW**

14 For escrow services rendered in connection with one-to-four
15 family residential transactions involving a junior mortgage closing concurrent with a first mortgage transaction on the same property and handled by the same office, the rate shall be $100.
16

17 (*Id.*) (SUF, 3, 13.) (Dufficy Dec., ¶ 2, Ex. A; Martin Dec., Ex. A, Dufficy Dep., 56:22-25, 57:1-
18 5.)[4] Given the nature of the services involved, fees charged pursuant to Section J-38 were
19 commonly referred to as "loan tie-in" fees. (SUF, 4, 9, 14, 19.) (Martin Dec., Ex. A, Dufficy
20

21 [2] First American Title Lenders Advantage was an operating division of First American Title
22 Insurance Company and/or one of its affiliates. (SUF, 2, 12.) (Martin Dec., Ex. A, Dufficy Dep., 121:6-25.)

23 [3] First American Title Company ("FATCO") is an underwritten title company and a wholly
24 owned subsidiary of First American Title Insurance Company. (SUF, 1, 11.) (Martin Dec., Ex. A, Dufficy Dep., 17:5-7.)

25 [4] *See also* Rate A-17 "Minimum Charges" providing, "The charges set forth herein are minimum
26 charges. Additional fees may be charged when appropriate, based on the nature of the work involved or the risk to be assumed, with the charge approved by the customer in advance. . ."
27 (Martin Dec., Ex. A, Dufficy Dep., 52: 7-15, and *see*, Dufficy Dep., Ex. 8 at p. 7.) *And see*, Rate A-16 "Fees Not Scheduled." (*Id.*)
28

1 Dep., 56:22-25; 57:1-5; 58:21-25; Martin Dec., Ex. C, Deposition of Lynn Lawrence ("Lawrence
2 Dep."), 44:3-10; 45:14-15, 77: 21-23; 78:4-11, 79:18-21, 85:1-11, 87:7-14, 88:10-18, 90:15-17,
3 90: 21-25; Lawrence Dec., ¶¶ 4-5.) In fact, First American's designated Person Most Qualified to
4 testify regarding rate filings effective at the time of the Muehling refinance transaction testified
5 that a loan tie-in fee and a concurrent junior mortgage escrow fee "are the same thing in a
6 refinance transaction." (Martin Dec., Ex. B, Dufficy Dep. 58:21-25 ("I'm not claiming; I'm
7 telling you that [that a loan tie-in fee and a concurrent junior mortgage escrow fee] are the same
8 thing in a refinance transaction.")
9 Consistent with the above, Mr. Muehling was charged $100 for the services First American
10 provided in connection with concurrent closing his second "junior" home equity loan along with
11 his first mortgage transaction. (SUF, 8, 18.) (Lawrence Dec., ¶ 4; Martin Dec. Ex. A., Dufficy
12 Dep., 120:15-25, 122:1-25, 128:24-25, 129:1-2; Martin Dec., Ex. B., Muehling Dep., 162:5-11,
13 12-24; Martin Dec., Ex. C, Lawrence Dep., 34:12-15; 39:4-15; 41:15-25; 44:3-10, 45:14-15, Ex.
14 3.) Those services included reviewing a second set of lender instructions, complying with
15 conditions associated with the second mortgage lender, reviewing a second loan package,
16 confirming the second loan package was properly signed, returning the second package to the
17 lender, adjusting the HUD-1 Settlement Statement for additional lender fees related to the second
18 mortgage, and arranging for the recording of a second deed of trust. (Lawrence Dec., ¶ 4.) The
19 charge for those services was described in Plaintiff's HUD-1 Settlement Statement as a "loan tie-
20 in fee," which was an industry term commonly used to refer to such services. (SUF, 9, 19.)
21 (Lawrence Dec., ¶ 4, Ex. A; Martin Dec., Ex. C, Lawrence Dep., 34:12-15; 39:4-15; 41:15-25,
22 44:3-10; 45:14-15, 77: 21-23; 78:4-11, 79:18-21, 85:1-11, 87:7-14, 88:10-18, 90:15-17, 90: 21-25;
23 Ex. 3; Muehling Dep., 168:14-20, Ex. 11.) Plaintiff approved the estimated HUD-1 Settlement
24 Statement in writing in advance of closing. (Martin Dec., Ex. B, Muehling Dep., 167:18-25;
25 168:1-9; 170:15-25; 171:1-6, Ex. 10.)
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## III. ARGUMENT

Plaintiff's remaining causes of action for breach of fiduciary duty and violation of the UCL are both premised on the allegation that he was charged a "loan tie-in" fee that was not "on file" with the CDI, and therefore could not be charged by First American. (Complaint, ¶¶ 12-13, 36(a)-(b), 53(a)-(c); *and see*, Martin Dec., Ex. B, 189: 8-25; 190: 1-25; 191:1; 192: 19-25; 194: 17-25 195: 1-25; 196:1-25; 197:1.) The undisputed evidence, however, establishes that the charge was authorized by the Schedule of Fees, and specifically by Section J-38.

Contrary to Plaintiff's contention, the Insurance Code permits First American to charge for *services* in accordance with its rate filings, regardless of the term used by an escrow officer to describe those services. Insurance Code section 12414.27 provides that:

> [N]o title insurer, underwritten title company, or controlled escrow company shall charge for any title policy or *service* in connection with the business of title insurance, except in accordance with rate filings which have become effective pursuant to Article 5.5. . . ."

(emphasis added.) Likewise, Section 12340.7 defines a "rate" as "the charge or charges . . . made to the public by a title insurer . . . or a controlled escrow company, *for all services it performs* in transacting the business of title insurance." (Emphasis added.) The focus of both statutes is on the *service* provided by the escrow company, not the words used to describe that service.

Here, Plaintiff was charged $100 for the service of processing and closing his junior home equity loan concurrently with his first mortgage. (SUF, 8, 18.) (Lawrence Dec., ¶ 4; Martin Dec. Ex. A., Dufficy Dep., 120:15-25, 122:1-25, 128:24-25, 129:1-2; Martin Dec., Ex. B., Muehling Dep., 162:5-11, 12-24; Martin Dec., Ex. C, Lawrence Dep., 41:15-25, 44:3-10, 45:14-15.) That charge was specifically permitted by Section J-38 of the Schedule of Fees, which applied to the "services rendered in connection with . . . residential transactions involving a junior mortgage closing concurrently with a first mortgage transaction on the same property and handled by the same office . . . " (SUF 4, 14.) (Dufficy Dec., ¶ 2, Ex. A, p. 81A; Lawrence Dec., ¶ 5.) Plaintiff does not dispute that he received such services, or that First American was allowed to charge for services that were set forth in a rate filing. (SUF, 10, 20.) (Martin Dec., Ex. B, Muehling Dep., at

142:20-25; 143:1-11; 162:5-11; 162:12-24; 166:19-25; 167:18-25; 168:1-9; 170:15-25; 171:1-6, Ex. 10.) Hence, regardless of the particular label assigned to the fee by the escrow officer who handled Plaintiff's transaction, there is no question that First American was permitted to charge Plaintiff $100 for those services.

Because the undisputed evidence demonstrates that First American charged Plaintiff $100 for the escrow related services at issue, in accordance with rate filings, he cannot prove that First American breached any alleged fiduciary relationship or engaged in conduct that violated the UCL, as alleged in his Complaint. (Complaint, ¶¶ 12-13, 36(a)-(b), 53(a)-(c).); *See City of Atascadero v. Merril Lynch*, 68 Cal. App. 4th 445, 483 (1998) (breach of fiduciary duty claim requires proof of a breach of the fiduciary relationship); *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 322 (2011) (UCL claim fails without proof of "an unfair, unlawful, or fraudulent business practice"). Accordingly, summary judgment should be granted for First American.

## IV. CONCLUSION

The undisputed evidence establishes that First American properly charged Plaintiff $100 for concurrently processing and closing a junior loan in his refinance transaction. Because the rate for that service was provided for in the Schedule of Fees, Plaintiff cannot establish that First American charged any "unfiled fee" – the premise of his remaining causes of action. Accordingly, First American respectfully requests that this Court enter summary judgment in its favor.

Respectfully submitted,

Dated: August 26, 2014

DENTONS US LLP

By____________________
Sonia Martin

Attorneys for Defendant
FIRST AMERICAN TITLE COMPANY

Taras Kick (State Bar No. 143379)
Thomas Segal (State Bar No. 222791)
**THE KICK LAW FIRM, APC**
201 Wilshire Boulevard
Santa Monica, California 90401
Telephone: (310) 395-2988
Facsimile: (310) 395-2088

Bernie Bernheim, Esq. (State Bar No. 143319)
**THE BERNHEIM LAW FIRM**
13211 Mulholland Drive
Beverly Hills, California 90210
Telephone: (818) 995-8530
Facsimile: (818) 995-7401

Nazo S. Semerjian (State Bar No. 223536)
**THE SEMERJIAN LAW FIRM**
898 San Pablo Way
Duarte, California 91010
Telephone: (626) 215-5161

Brian Kabateck, Esq. (State Bar No. 152054)
Joshua Haffner, Esq. (State Bar No. 188652)
Evan Zucker, Esq. (State Bar No. 266702)
**KABATECK BROWN KELLNER LLP**
644 S Figueroa St, Los Angeles, CA 90017
Telephone: (213) 217-5000
Facsimile (213) 217-5010

Counsel for Plaintiff James Muehling
And the Putative Class

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF LOS ANGELES**

| | |
|---|---|
| JAMES MUEHLING, a California resident, on behalf of himself and all others similarly situated and the general public,<br><br>Plaintiff,<br><br>vs.<br><br>FIRST AMERICAN TITLE COMPANY, a California Corporation<br>Defendants | CLASS ACTION<br><br>JCCP 4751<br><br>**DECLARATION OF TARAS KICK IN SUPPORT OF REQUEST FOR DISMISSAL** |

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**DECLARATION OF TARAS KICK**

I, Taras Kick, declare as follows:

1. I am an attorney at law duly licensed to practice before all courts of the State of California and an attorney with The Kick Law Firm, APC, co-counsel of record for Plaintiff in this action. The following is based on my personal knowledge, and, if called as a witness, I could and would testify competently thereto.

2. Neither Plaintiff nor any counsel is receiving any compensation in connection with the requested dismissal.

3. It is Plaintiff's preference the Court stay this matter rather than dismiss it. There is an appeal pending by First American in the related *Wilmot* matter in which the proposed class representative was charged the identical fee at issue which First American charged Mr. Muehling in this case, and the proposed class representative in *Wilmot* has standing for this matter as well. However, that *Wilmot* case is stayed as a result of First American appealing the Honorable Lee Smalley Edmon's denial of First American's motion which attempted to compel binding arbitration in *Wilmot*. First American's pending motion for summary judgment raises issues in which it will argue about whether Mr. Muehling is a typical representative of the class. The class representative in that stayed *Wilmot* case does not have this issue, and could therefore serve as the plaintiff in this matter. This also would save on costs of notice and avoid other inefficiencies such as potential dispositive rulings from the appellate court in favor of plaintiff in *Wilmot* and *Kirk* (*Kirk* is also on appeal and also stayed as a result of First American refusing to accept Judge Edmon's ruling denying its motion to compel binding arbitration), which favorably affect the putative class members in this *Muehling* case. While counsel would prefer this *Muehling* case be stayed until the appeals in the *Wilmot* and *Kirk* cases regarding the binding arbitration denials are resolved, if this Court is unwilling to stay this case, counsel believes it is in the best interest of the

class to dismiss this action at this time. If the case is dismissed, the claims asserted herein may be reasserted at a later date with a different class representative.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct. Executed this 10th day of September 2014 at Santa Monica, California.

Taras Kick

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THE KICK LAW FIRM, APC
Taras Kick (State Bar No. 143379)
Thomas Segal (State Bar No. 222791)
G. James Strenio (State Bar. No. 177624)
201 Wilshire Boulevard
Santa Monica, California 90401
Telephone: (310) 395-2988

THE BERNHEIM LAW FIRM
Bernie Bernheim, Esq. (State Bar No. 143319)
Nazo S. Semerjian (State Bar No. 223536)
13211 Mulholland Drive
Beverly Hills, California 90210
Telephone: (818) 995-8530

KABATECK BROWN KELLNER LLP
Brian Kabateck, Esq. (State Bar No. 152054)
Joshua Haffner, Esq. (State Bar No. 188652)
Evan Zucker, Esq. (State Bar No. 266702)
644 S Figueroa St,
Los Angeles, CA 90017
Telephone: (213) 217-5000

Attorneys for Class Representative,
JAMES MUEHLING,
on behalf of all similarly situated and the general public

ORIGINAL FILED

SEP 16 2014

Sherri R. Carter, Executive Officer/Clerk
By: Nancy Navarro, Deputy

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

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|---|---|
| JAMES MUEHLING, a California resident, on behalf of himself and all others similarly situated and the general public,<br><br>Plaintiff,<br><br>vs.<br><br>FIRST AMERICAN TITLE COMPANY, a California Corporation,<br><br>Defendants. | CLASS ACTION<br><br>JCCP 4751<br><br>PLAINTIFF'S ~~[PROPOSED]~~] ORDER DISMISSING CASE |

1 GOOD CAUSE APPEARING IT IS HEREBY ORDERED THAT:

2 This case, *Muehling v. First American Title Company*, RG 12659372, is dismissed

3 without prejudice.

4 AMY D. HOGUE, JUDGE

5 DATED: SEP 1 6 2014

Honorable Amy Hogue

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# SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

| | |
|---|---|
| DATE: 04/05/13 | DEPT. 324 |
| HONORABLE EMILIE H. ELIAS JUDGE | A. MORALES DEPUTY CLERK |
| HONORABLE JUDGE PRO TEM | ELECTRONIC RECORDING MONITO |
| 3 M. CARRILLO, C.A. Deputy Sheriff | G. R. DAVIDSON, No. 12823 Reporter |

| | | | |
|---|---|---|---|
| 1:45 pm | JCCP4751<br><br>Coordination Proceedings Specia Title Rule (3.550)<br><br>First American Title Company Cases | Plaintiff Counsel<br><br>Defendant Counsel | JOSHUA H. HAFFNER (X)<br>STEVEN J. BERNHEIM (X)<br>NAZO S. SEMERDJIAN (X)<br>TARAS KICK (X)<br><br>RONALD D. KENT (X)<br>SONIA MARTIN (X) |

**NATURE OF PROCEEDINGS:**

HEARING ON PETITION FOR COORDINATION

By Order of the Chair of the Judicial Council this Court was assigned as the Coordination Motion Judge for the purpose of hearing the coordination petition and, upon granting the petition, to make a recommendation on the appropriate court site for assignment of a coordination trial judge.

The Order Appointing Court Approved Reporter as Official Reporter Pro Tempore is signed and filed this date.

Matter is called for hearing.

The Court having reviewed and considered the petition and all filings in response to the petition, finds the cases subject to the petition are complex cases within the meaning of California Rule of Court, Rule 3.400, and that this is an appropriate matter for coordination pursuant to Code of Civil Procedure sections 404 and 404.1 and California Rules of Court, Rules 3.501, et seq.

The Court recommends that Judge Lee Edmond be assigned from the Complex Litigation Panel of the Los Angeles Superior Court. The Court designates the Second Appellate District as the designated district of the Court of Appeal to hear appeals in the coordinated proceedings.



MINUTES ENTERED
04/05/13
COUNTY CLERK

## SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 04/05/13 DEPT. 324

HONORABLE EMILIE H. ELIAS JUDGE A. MORALES DEPUTY CLERK

HONORABLE JUDGE PRO TEM ELECTRONIC RECORDING MONITOR

3

M. CARRILLO, C.A. Deputy Sheriff G. R. DAVIDSON, No. 12823 Reporter

1:45 pm JCCP4751

Coordination Proceedings Specia
Title Rule (3.550)

First American Title Company
Cases

Plaintiff Counsel: JOSHUA H. HAFFNER (X)
STEVEN J. BERNHEIM (X)
NAZO S. SEMERDJIAN (X)

Defendant Counsel: TARAS KICK (X)

RONALD D. KENT (X)
SONIA MARTIN (X)

**NATURE OF PROCEEDINGS:**

All coordinated cases shall be stayed pending the assignment of a Coordination Trial Judge.

Actions subject to this order include the following cases:

1) Muehling v. First American Title Company
   Case No. RG12659372

2) Wilmot v. First American Title Company
   Case No. BC370141

Counsel for the defendant is to give notice to all parties in the included actions.

CLERK'S CERTIFICATE OF MAILING

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the
Minute Order
upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in Los Angeles,
California, one copy of the original filed/entered herein in a separate sealed envelope to each address



MINUTES ENTERED
04/05/13
COUNTY CLERK

## SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 04/05/13 DEPT. 324

HONORABLE EMILIE H. ELIAS JUDGE A. MORALES DEPUTY CLERK

HONORABLE JUDGE PRO TEM ELECTRONIC RECORDING MONITOR

3

M. CARRILLO, C.A. Deputy Sheriff G. R. DAVIDSON, No. 12823 Reporter

1:45 pm JCCP4751

Coordination Proceedings Specia
Title Rule (3.550)

First American Title Company
Cases

Plaintiff Counsel JOSHUA H. HAFFNER (X)
STEVEN J. BERNHEIM (X)
NAZO S. SEMERDJIAN (X)

Defendant Counsel TARAS KICK (X)

RONALD D. KENT (X)
SONIA MARTIN (X)

**NATURE OF PROCEEDINGS:**

as shown below with the postage thereon fully prepaid,
in accordance with standard court practices.

Dated: 4/5/13

John A. Clarke, Executive Officer/Clerk

By: ______________________
A. Morales, Deputy Clerk

SNR DENTON US LLP
Sonia Martin
525 Market Street, 26th Floor
San Francisco, CA 94105-2708

CHAIR, JUDICIAL COUNCIL OF CALIFORNIA
Administrative Office of the Courts
Attn: Court Operations Special Services Office
(Civil Case Coordination)
455 Golden Gate Avenue, 5th Floor
San Francisco, CA 94102-3688



MINUTES ENTERED
04/05/13
COUNTY CLERK

# SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

| | | |
|---|---|---|
| DATE: 04/05/13 | | DEPT. 324 |
| HONORABLE EMILIE H. ELIAS | JUDGE | A. MORALES DEPUTY CLERK |
| HONORABLE 3 | JUDGE PRO TEM | ELECTRONIC RECORDING MONITOI |
| M. CARRILLO, C.A. | Deputy Sheriff | G. R. DAVIDSON, No. 12823 Reporter |

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| 1:45 pm | JCCP4751<br><br>Coordination Proceedings Specia<br>Title Rule (3.550)<br><br>First American Title Company<br>Cases | Plaintiff Counsel<br><br>Defendant Counsel | JOSHUA H. HAFFNER (X)<br>STEVEN J. BERNHEIM (X)<br>NAZO S. SEMERDJIAN (X)<br>TARAS KICK (X)<br><br>RONALD D. KENT (X)<br>SONIA MARTIN (X) |

**NATURE OF PROCEEDINGS:**

JOHN CLARKE, EXECUTIVE OFFICER
C/O Daenna Arellano
Los Angeles Superior Court
600 S. Commonwealth Avenue, Room 314
Los Angeles, CA 90005



MINUTES ENTERED
04/05/13
COUNTY CLERK

FILED
LOS ANGELES SUPERIOR COURT

JUL 30 2014

SHERRI R. CARTER, EXECUTIVE OFFICER/CLERK
BY [signature], Deputy
NANCY NAVARRO

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

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| In re FIRST AMERICAN TITLE CO. CASES | Case No.: JCCP4751<br><br>ORDER GRANTING PETITION TO ADD ON *KIRK V. FIRST AMERICAN TITLE CO.* (BC372792) |

The Court has read and considered Plaintiff's petition to add-on the case of *Kirk v. First American Title Co.* (BC372797) into this judicially coordinated proceeding. Plaintiff filed this add-on petition on June 3, 2014 and electronically served the document that same day via the CaseAnywhere website. Pursuant to California Rules of Court, Rule 3.544(b), any notice of opposition to add-on the *Kirk* action to this coordinated proceeding was due no later than June 16, 2014.[1] Defendant having failed to file a timely notice of opposition (a notice of opposition was untimely filed on June 17, 2104), the petition is GRANTED WITHOUT HEARING. (Cal. Rules of Ct., Rule 3.544(d) ["If no party has filed a notice of opposition within [10 days], the

[1] Rule 3.544(b) provides: "[w]ithin 10 days after the service of a request [to add on], any party may serve and submit a notice of opposition to the request." Because the add-on petition was served electronically, the 10-day deadline to file a notice of opposition began to run on June 5, 2014, two court days after Plaintiff electronically served the document (Code Civ. Proc. §1010.6(a)(4).) Because June 15, 2015 was a Sunday, any notice of opposition was due no later than June 16, 2014. (Code Civ. Proc. §12a(a).)

coordination trial judge may enter an order granting or denying the request without hearing].) *Kirk v. First American Title Co.* (case no. B372792) is ordered coordinated with Judicial Council Coordinated Proceeding 4751. The August 12, 2014 hearing date on the petition is VACATED.

As the petitioning party, Plaintiff is directed to give notice pursuant to California Rules of Court, Rule 3.529. However, given the advanced procedural posture of this case and the other coordinated cases, the Court exercises its discretion to LIFT THE AUTOMATIC STAY in the *Kirk* action otherwise provided by Rule 3.529. (Cal. R. Ct., Rule 3.529(b) ["When an order granting coordination is filed in an included action, all further proceedings in that action are automatically stayed, except as directed by the coordination trial judge"].)

The Court notes, however, that nothing in this order coordinating the *Kirk* action affects the Court's recent order transferring Plaintiff's motion for attorneys' fees to the Honorable John Kralik, who is was the trial judge in the recent trial of one of the subclasses in the *Kirk* case and is in the best position to decide that motion. As the coordination trial judge, this Court has and exercises the authority to "specify the court in which any ancillary proceedings will be heard and determined" after judgment. (Cal. R. Ct., Rule 3.545(d).) As stated in the Court's recent minute order on the matter, Judge Kralik shall hear all ancillary post trial matters concerning the completed trial and judgment, including Plaintiffs' motion for attorneys' fees. Nor does this order in any way preclude the Court from transferring the remaining portion *Kirk* action to Judge Kralik for trial upon remittitur from the Court of Appeal, should the Court and Judge Kralik deem transfer the most appropriate and efficient result at some later date when the Court regains jurisdiction over that subclass. (Cal. R. Ct., Rule 3.543 ["The coordination trial judge may order any coordinated action or severable claim in that action transferred from the court in which it is pending to another court for a specified purpose or for all purposes."].)

Dated: 7-30-14

AMY D. HOGUE
JUDGE OF THE SUPERIOR COURT

Ronald D. Kent (SBN 100717)
Joel D. Siegel (SBN 155581)
Paul M. Kakuske (SBN 190911)
Judith Sidkoff (SBN 267048)
DENTONS US LLP
601 South Figueroa Street, Suite 2500
Los Angeles, California 90017-5704
Telephone: (213) 623-9300
Facsimile: (213) 623-9924

Sonia R. Martin (SBN 191148)
One Market Plaza, Spear Tower, 24th Floor
San Francisco, CA 94105-1101
Telephone: (415) 267-4000
Facsimile: (415) 267-4198

Attorneys for Defendants
FIRST AMERICAN TITLE COMPANY and
FIRST AMERICAN TITLE INSURANCE COMPANY

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Superior Court of California
County of Los Angeles

DEC 06 2016

Sherri R. Carter, Executive Officer/Clerk
By: Nancy Navarro, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

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| FIRST AMERICAN TITLE COMPANY CASES<br><br>*Wilmot v. First American Title Ins. Co.* (Los Angeles County Superior Court No. BC370141)<br><br>*Kirk v. First American Title Co.* (Los Angeles County Superior Court No. BC372797) | JCCP Case No. 4751<br><br>~~[PROPOSED]~~ ORDER COORDINGATING *SJOBRING* (BC329482) AND *KAUFMAN* (BC382826) AS "ADD ON" ACTIONS<br><br>Hon. Maren E. Nelson<br>Dept. 307 |
| JEFFREY ALBERT SJOBRING, individually and on behalf of all others similarly situated,<br><br>Plaintiff,<br>vs.<br><br>FIRST AMERICAN TITLE INSURANCE COMPANY and FIRST AMERICAN TITLE COMPANY,<br>Defendants. | Case No. BC329482<br>(Related to Case Nos. BC370141, BC372797, and BC382826) |

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| WENDY KAUFMAN, individually, on behalf of herself and all others similarly situated,<br>Plaintiffs,<br>vs.<br>FIRST AMERICAN TITLE INSURANCE COMPANY & FIRST AMERICAN TITLE COMPANY,<br>Defendants. | Case No. BC 382826<br>(Related to Case Nos. BC329482, BC370141 & BC372797) |

At the June 23, 2015 Status Conference, then-presiding Coordination Trial Judge Amy D. Hogue ordered that "all matters presently and in the future are coordinated" as "add on" actions with JCCP No. 4751. (Tr. June 23, 2015, at 14:22-16:1.) The Court further instructed the parties to submit a proposed order to facilitate the processing of the *Sjobring* and *Kaufman* actions as "add on" actions. (*Id.*)

In furtherance of Judge Hogue's directive, the following actions are ORDERED coordinated with *First American Title Company Cases* (JCCP No. 4751) as "add on" actions:

(1) *Sjobring v. First American Title Ins. Co.*, *et al.*, Los Angeles Superior Court No. BC329482.

(2) *Kaufman v. First American Title Ins. Co., et al.*, Los Angeles Superior Court No. BC382826.

Defendant First American Title Company is directed to serve and file a copy of this order in the manner set forth in California Rules of Court 3.544(d) and 3.529(a). Given the procedural posture of the *Sjobring* and *Kaufman* cases and the other coordinated cases, the Court exercises its discretion to lift the automatic stay in the *Sjobring* and *Kaufman* actions that is otherwise provided by Rule 3.544(d) ("[A]n order granting [a] request [to coordinate an add-on case] automatically stays all further proceedings in the add-on case under rule 3.529.")

SO ORDERED.

DATED: DEC 0 6 2016 ~~2016~~

MAREN E. NELSON
Judge of the Superior Court

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

**PROPOSED ORDER**

For good cause shown, amicus California Land Title Association's Motion For Judicial Notice is granted. The Court takes judicial notice of the matters described in the Motion.

Dated: ____________ ______________________________
CHIEF JUSTICE

## PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California, I am over the age of 18 and not a party to the within action. My business address is 601 South Figueroa Street, Suite 2500, Los Angeles, CA 90017.

On December 13, 2019, I served the foregoing **AMICUS CALIFORNIA LAND TITLE ASSOCIATION'S MOTION FOR JUDICIAL NOTICE; DECLARATION OF SUSAN M. WALKER; PROPOSED ORDER** on each interested party in this action, as follows:

See Attached Service List

[ X ] **(VIA MAIL)** I placed a true copy of the foregoing document in a sealed envelope addressed to each party as set forth above. I placed each such envelope, with postage thereon fully prepaid, for collection and mailing at Los Angeles, California 90017. I am readily familiar with 's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day in the ordinary course of business.

[ ] **(VIA PDF FORMAT)** I caused each such document to be transmitted by PDF Format via e-mail to the parties listed above via the 2nd District Court of Appeals' eService.

[ ] **(VIA FACSIMILE)** I caused a true copy of the foregoing document to be served by facsimile transmission to each interested party at the respective facsimile numbers listed. A transmission report was properly issued by the sending facsimile machine for each interested party.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on December 13, 2019, at Los Angeles, California.

JoAn Mack



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## SERVICE LIST

| | |
|---|---|
| Steven A Goldfarb<br>Michael J. Gleason<br>Hahn Loeser & Parks LLP<br>600 West Broadway, Suite 1500<br>San Diego, CA 92101 | Attorneys for Defendant<br>/Appellant<br>Fidelity National Title Company |
| Clerk<br>Santa Clara County Superior Court<br>191 North First Street<br>San Jose, CA 95113 | Trial Court |
| Clerk<br>Sixth District Court of Appeal<br>333 West Santa Clara Street, Suite<br>1060<br>San Jose, CA 95113 | Court of Appeal |
| Jeffrey F. Rosen<br>District Attorney<br>County of Santa Clara<br>70 West Hedding Street<br>West Wing<br>San Jose, CA 95110 | District Attorney |
| Michael J. Bidart<br>Shernoff Bidart Echeverria LLP<br>600 South Indian Hill Boulevard<br>Claremont, CA 91711 | Attorneys for Plaintiff /<br>Appellant<br>Manny Villanueva |
| Richard H. Friedman<br>Friedman Rubin<br>1126 Highland Avenue<br>Bremerton, WA 98337 | Attorneys for Plaintiff /<br>Appellant<br>Manny Villanueva |

| | |
|---|---|
| Steven J. Bernheim<br>Nazo S. Semerdjian<br>The Bernheim Law Firm<br>11611 Dona Alicia Place<br>Studio City, CA 91604 | Attorneys for Plaintiff / Appellant<br>Manny Villanueva |
| Julia Partridge<br>Ben Feuer<br>California Appellate Law Group<br>96 Jessie Street<br>San Francisco, CA 83926 | Attorneys for Defendant / Appellant<br>Fidelity National Title Company |
| Appellate Coordinator<br>Office of the Attorney General<br>Consumer Law Section<br>300 S. Spring Street<br>Los Angeles, CA 90013-1230<br><br>**Electronically, at https://oag.ca.gov/services-info/17209-brief/add** | |