No. 13-55542

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DENISE P. EDWARDS, et al.,
Plaintiffs-Appellants,

v.

THE FIRST AMERICAN CORP., et al.,
Defendants-Appellees.

On Appeal from the United States District Court
For the Central District of California
Hon. S. James Otero
Case No. 2:07-cv-03796-SJO-FFM

BRIEF OF *AMICUS CURIAE* CONSUMER FINANCIAL PROTECTION BUREAU IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*

The Consumer Financial Protection Bureau (CFPB or Bureau), an agency of the United States, files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

The Bureau is the federal agency charged with "regulat[ing] the offering and provision of consumer financial products and services under Federal consumer financial law." 12 U.S.C. § 5491(a). Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, 124 Stat. 1376 (2010), the Bureau's jurisdiction extends to the Real Estate Settlement Procedures Act of 1974 (RESPA). *See* 12 U.S.C. §§ 5481(12)(M), (14). The Dodd-Frank Act transferred from the Department of Housing and Urban Development (HUD) to the Bureau the authority to enforce RESPA, *see* 12 U.S.C. §§ 2607(d); 5563-5565, and "to prescribe such rules and regulations [and] to make such interpretations . . . as may be necessary to achieve" RESPA's purposes, 12 U.S.C. § 2617. *See also* 12 U.S.C. § 5581(b)(7).

As the agency currently charged with implementing and enforcing RESPA and the regulations promulgated thereunder, the Bureau has a substantial interest in, and is in the best position to offer this Court an authoritative position on, the RESPA questions presented in this case. *See Schuetz v. Banc One Mortg. Corp.*, 292 F.3d 1004, 1012 (9th Cir. 2002) (holding that HUD's policy statements on

RESPA are entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)); *Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197, 1214 (9th Cir. 2009) ("an agency's litigation position in an amicus brief [concerning an interpretation of its regulations] is entitled to deference if there is 'no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter' ") (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)).

INTRODUCTION

In an order denying class certification, the district court in this case made two determinations about the evidence that a private plaintiff needs to offer to demonstrate a violation of RESPA's ban on paying for referrals of real estate settlement services. First, the district court held that, when a referral agreement is entered into as part of a transaction involving the sale of ownership interests, a plaintiff must show that the defendant overpaid for those ownership interests in order to prove that the defendant paid for referrals. Second, the district court held that, when a plaintiff receives multiple referrals to the same settlement provider, the plaintiff must prove that the unlawful referral was the one that influenced the plaintiff's decision to select that provider.

Neither of these holdings is consistent with the language or purpose of RESPA or its implementing regulation, Regulation X, 24 C.F.R. Part 3500. The

district court believed that proof of overpayment was required because payments for goods, services, and facilities are generally permitted by RESPA and Regulation X. That safe harbor, however, does not apply when payments are made to purchase ownership interests in an entity (which are not goods, services, or facilities), nor does it permit parties to enter into side agreements to circumvent the general ban on referral payments. The district court accordingly erred in requiring proof of overpayment in this case.

RESPA also does not require a plaintiff receiving multiple referrals to prove that the unlawful referral was the influential one. Rather, RESPA makes clear that, in a private action, both liability and the amount of damages are fixed once an unlawful referral is made. The district court's contrary view, which is based on a misreading of the definition of "referral" in Regulation X, fails to vindicate Congress's overarching goal of rooting out paid referrals from the settlement services industry.[1]

STATEMENT

A. Statutory and regulatory background

1. RESPA was enacted in 1974 to ensure that "consumers throughout the Nation . . . are protected from unnecessarily high settlement charges caused by

[1] This brief addresses the district court's interpretations of RESPA and Regulation X. The Bureau takes no position on whether, under the correct reading of the statute and regulations, class certification is warranted in this case.

certain abusive practices." 12 U.S.C. § 2601(a). Among the abusive practices that Congress sought to eliminate were "kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." *Id.* § 2601(b)(2).

Section 8 of RESPA implements this congressional policy. Section 8(a) provides that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a). RESPA does not prevent persons from referring consumers to particular providers of real estate settlement services. The statute instead bans the act of giving or receiving fees, kickbacks, or things of value for such referrals. A "thing of value" is broadly defined under RESPA to "include[] any payment, advance, funds, loan, service, or other consideration." 12 U.S.C. § 2602(2).

Notwithstanding the broad prohibition in § 8(a) on paying for referrals, RESPA also makes clear that certain types of "legitimate payments" relating to real estate settlement services are permissible. *See* S. Rep. No. 93-866, at 7 (1974) (Senate Report). Such permissible payments include "the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed." 12 U.S.C. § 2607(c)(2). Thus, "[r]easonable payments in return for services actually performed or goods

actually furnished are not intended to be prohibited" by the ban on referral fees and kickbacks in RESPA § 8(a). Senate Report at 7.

2. In 1976, Congress granted HUD the authority to "prescribe such rules and regulations [and] to make such interpretations . . . as may be necessary to achieve the purposes" of RESPA. Real Estate Settlement Procedures Act Amendments of 1975, Pub. L. No. 94-205 § 10, 89 Stat. 1157, 1159 (1976) (enacting 12 U.S.C. § 2617). HUD's RESPA regulations are codified in what is known as Regulation X, 24 C.F.R. Part 3500.[2]

Regulation X both reiterates the statutory prohibition on referral payments and clarifies it in various respects. The regulation makes clear, for example, that "[a]ny referral of a settlement service is not a compensable service," unless permitted by RESPA § 8 and Regulation X. 24 C.F.R. § 3500.14(b). Regulation X defines "referral" to "include[] any oral or written action directed to a person which has the effect of affirmatively influencing the selection by any person of a provider of a settlement service" for which the consumer will pay a charge. 24

[2] After the Dodd-Frank Act transferred authority to implement RESPA from HUD to the Bureau, the Bureau published a notice indicating that it would enforce HUD's prior rules and policies. 76 Fed. Reg. 43,569, 43,570-71 (July 21, 2011). The Bureau later republished HUD's RESPA regulations as CFPB Regulation X without material change. *See* 76 Fed. Reg. 78,977 (Dec. 20, 2011); 12 C.F.R. Part 1024. Because the relevant events in this case occurred prior to the enactment of the Dodd-Frank Act, this brief will refer to HUD's regulation rather than the Bureau's republished rule.

C.F.R. § 3500.14(f)(1). Regulation X also implements the statutory provision that permits payments "for goods or facilities actually furnished or for services actually performed." 24 C.F.R. § 3500.14(g)(1)(iv).

B. Prior proceedings in this case

On June 12, 2007, Plaintiff-Appellant Denise Edwards filed a class action complaint against Defendants-Appellees The First American Corporation and First American Title Insurance Company (collectively, First American). Edwards alleged that First American violated RESPA § 8 by "paying large sums of money to individual title agencies . . . in exchange for exclusive referral agreements which funnel all of the companies' business" to First American. Compl. ¶ 3.[3] In particular, Edwards alleged that First American had "paid a kickback" to Tower City Title Agency, LLC, the settlement agent that Edwards used for her real estate closing, in exchange for "an agency agreement providing that Tower City would exclusively refer all title insurance underwriting to First American Title." Compl. ¶¶ 15, 23. According to Edwards, the referral agreement between Tower City and First American was a condition of a larger transaction in which First American "agreed to 'purchase' a 17.5% minority interest in Tower City" for $2 million in cash and stock. Compl. ¶¶ 16, 20. Edwards alleged that First American had

[3] For the convenience of the Court, a copy of the complaint is attached as an addendum to this brief.

engaged in similar transactions with other title agencies, whereby First American would require the title agency in which it was acquiring an ownership interest to enter into a referral agreement with First American. Compl. ¶ 21.

Edwards sought certification of a nationwide class consisting of consumers who used the services of a title agency affiliated with First American. On December 10, 2007, the district court declined to certify that class under Rule 23(b)(3) of the Federal Rules of Civil Procedure. *Edwards v. The First Am. Corp.*, 251 F.R.D. 449 (C.D. Cal. 2007). The court concluded that Edwards's "theory of liability" required proof that "First American's payment [to the title agencies in which it acquired an ownership interest] was greater than what it received in return, an ownership interest in the title agency." *Id.* at 453. Because proof of overpayment would require "scrutiniz[ing] all 180 transactions by which First American obtained a stake in a title agency," the court found that common questions of law do not predominate for purposes of certifying a class under Rule 23(b)(3). *Id.* The district court also found "little probability" that discovery would produce evidence that a nationwide class was certifiable, although it permitted discovery on the issue whether a class consisting of Tower City customers could be certified. *Id.* at 454.

After discovery, the district court declined to certify a Tower City class because the court again found that common issues did not predominate under Rule

23(b)(3). *Edwards v. The First Am. Corp.*, 251 F.R.D. 454, 458 (C.D. Cal. 2008). Among other things, the court found that "[t]o obtain damages under RESPA, a class member must have been 'referred' to [First American] by Tower City." *Id.* Citing the definition of "referral" set forth 24 C.F.R. § 3500.14(f)(1), the district court stated that whether a referral occurred presents a "significant individualized issue" because it would "require proof at trial concerning each class member and whether that class member was affirmatively influenced by Tower City's actions." *Id.*

This Court reviewed and reversed in part the district court's class-certification decisions. *Edwards v. The First Am. Corp.*, 385 Fed. Appx. 629 (9th Cir. 2010) (*Edwards I*).[4] The Court affirmed the district court's rejection of a nationwide class, holding that Edwards had failed to show that such a class was certifiable "on the present record." *Id.* at 631. The Court concluded, however, that the district court should have allowed Edwards to "conduct nationwide discovery," after which, this Court held, she "may renew her motion for certification of a nationwide class." *Id.* The Court reversed outright the district court's denial of the

[4] On the same day, this Court affirmed the district court's decision that Edwards had Article III standing to pursue her claim notwithstanding the absence of an allegation that she paid more for her title insurance because of the alleged RESPA violation. *Edwards v. The First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010) (*Edwards II*), *cert. dismissed*, 132 S. Ct. 2536 (2012).

Tower City class. The Court held that, "[w]ith respect to liability, there is a single, overwhelming common question of fact: whether the arrangement between Tower City and First American violated [RESPA]." *Id.* The Court also held that "[t]o show a 'referral' was made by Tower City would not require a great amount of individualized proof." *Id.* Rather, because "Plaintiffs contend that Tower City was contractually obligated to refer customers to First America Title," proof of that obligation "would be common proof of the 'action' element of a referral." *Id.* The Court noted that the "reliance or causation element requires a more individualized determination." *Id.* The Court concluded, however, that "the requirement that the Plaintiff prove reliance or causation will not, by itself, defeat class certification" in the context of statements "made to a class of similarly situated individuals." *Id.*

C. The district court's decision under review

On remand, the district court permitted further discovery as required by *Edwards I*. In the decision currently on appeal, the district court again denied Edwards's request to certify a nationwide class (albeit a smaller class than Edwards had previously requested) based solely on the court's conclusion that "common issues do not predominate as required by [Rule] 23(b)(3)." Excerpts of Record (E.R.) 3. In reaching that conclusion, the district court addressed certain

aspects of "the merits of the plaintiff's underlying [RESPA] claim." *Id.* (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2251 (2011)).

First, the court, citing the "clear and unambiguous" language of RESPA and Regulation X, held that, to prove a RESPA violation, Edwards "must demonstrate that Defendants overpaid for their interests in the thirty-eight title agencies at issue in the proposed nationwide class." E.R. 5 (citing 12 U.S.C. §§ 2607(a), 2607(c); 24 C.F.R. §§ 3500.14(g)(1)(iv), (g)(2)). The court stated that, "[w]ithout such proof, Plaintiff cannot demonstrate that Defendants gave the title agencies 'any thing of value' in exchange for the referrals, as required under RESPA." *Id.* According to the district court, because "each transaction by which Defendants acquired an interest in the title agencies would need to be scrutinized to determine if Defendants overpaid for their ownership interest," the court would have to engage in "individualized mini-trials" which "would not uncover proof common to the proposed nationwide class as a whole." *Id*. at 7.

Second, the district court concluded that "the proposed nationwide class would require case-by-case analysis of each class member's claim to determine whether a referral occurred under RESPA." E.R. 7. The court stated that a "'referral' under RESPA is defined as 'any oral or written action directed to a person which has the effect of affirmatively influencing the selection by any person of a provider of' title insurance." *Id.* (quoting 24 C.F.R. § 3500.14(f)(1)).

The court stated that First American had put forward evidence that "it was quite common for third parties such as lenders, mortgage brokers, realtors, builders, and attorneys to affirmatively influence the selection of [First American] as the title insurance underwriter." *Id*. at 8. The court concluded, therefore, that it "would be forced to take evidence on who precisely influenced the class members to choose [First American] as their title insurance underwriter on an individualized basis, as otherwise liability could not be established under RESPA." *Id.*[5]

SUMMARY OF THE ARGUMENT

I. RESPA prohibits the giving or accepting of a "fee, kickback, or thing of value pursuant to any agreement or understanding" that real estate settlement services "shall be referred." 12 U.S.C. § 2607(a). At the same time, RESPA creates a safe harbor that permits "payments for goods or facilities actually furnished or services actually performed." 12 U.S.C. § 2607(c)(2); 24 C.F.R. § 3500.14(g)(2). Relying on these two provisions and the corresponding

[5] The district court also found that "many of the title agencies varied from the Tower City paradigm in material ways, necessitating adjudication of individualized issues." E.R. 8. The court explained that First American had claimed exemptions from RESPA § 8(a) for various title agencies based on (1) their status as "affiliated business arrangements" (*see* 12 U.S.C. § 2607(c)(4)); (2) First American's controlling or majority interest in certain title agencies; or (3) the fact that certain title agencies were "newly formed at the time a referral agreement was put into effect." E.R. 9. Because the district court did not purport to interpret RESPA in this portion of its opinion, this brief does not address the merits of First American's alleged exemptions.

provisions of Regulation X, the district court concluded that Edwards must show that First American overpaid for its ownership interests in the title agencies to prove that the referral agreements at issue violated RESPA. That was error.

The safe harbor does not apply to the facts alleged in this case. As the plain language makes clear, the safe harbor applies when payments are made for "goods," "services," or "facilities" actually provided—typically in the context of particular real estate settlements. That accommodation does not extend to the transfer of just any "thing of value" between two parties, such as ownership interests in title agencies. Nor does the limited safe harbor for certain types of *payments* permit the party making the payment to enter into side *agreements* that violate the ban on paid referrals. Liability in this case, therefore, does not necessarily turn on whether First American paid a reasonable price for its ownership interests in the title agencies, but rather on whether First American paid a "thing of value" to ensure that settlement business "shall be referred." 12 U.S.C. § 2607(a).

Under RESPA and Regulation X, the term "thing of value" is broadly defined. It includes not only any payments made in a transaction, but also the value of the transaction itself. Here, First American allegedly required execution of referral agreements as a condition to its purchase of ownership interests in the title agencies. Because the sale and purchase of those ownership interests

presumably provided value to the parties, those transactions can be considered "things of value" for purposes of RESPA § 8(a) without regard to whether the price paid for the ownership interests was fair.

II. Under the plain terms of RESPA § 8(d)(2), a person who violates the ban on paid referrals is liable to the "persons charged for the settlement service involved in the violation." 12 U.S.C. § 2607(d)(2). The district court nonetheless held that class members who received multiple referrals to the same settlement provider cannot recover unless they prove not only that they were given a tainted referral, but also that the unlawful referral was the one that influenced their decision to select that provider. That interpretation finds no support in the statutory text, and it is inconsistent with Congress's goal of eliminating pay-for-referral schemes in the real estate settlement market. The district court apparently believed that proof of influence was required by Regulation X's definition of "referral." But that definition merely *includes* as referrals any statements that have the effect of influencing consumer choices; it does not *exclude* explicit referrals from the definition simply because a plaintiff has not provided proof of such influence. If an explicit referral is made, it is a "referral" for purposes of RESPA regardless of the level of influence it has on a consumer in an individual case.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT EDWARDS WAS REQUIRED TO SHOW THAT FIRST AMERICAN "OVERPAID" FOR ITS OWNERSHIP INTERESTS IN THE TITLE AGENCIES TO PROVE THAT FIRST AMERICAN VIOLATED RESPA

The district court held that "clear and unambiguous" language in RESPA and Regulation X required Edwards to show that First American "overpaid" for its ownership interests in the title agencies in order to prove that referral agreements between First American and those title agencies violated RESPA § 8(a). In reaching that conclusion, the district court mistakenly invoked the safe harbor in RESPA § 8(c)(2) and the corresponding provision of Regulation X, which permit payments for goods, facilities, and services actually provided. Those provisions do not permit referral *agreements*; they authorize certain types of *payments*, and only when those payments are not for referrals of real estate services. Because First American has allegedly entered into written referral agreements, those agreements are subject to RESPA § 8(a) and may be unlawful if any "thing of value" was given in exchange for them. That standard may be met if, as alleged, the referral agreements were a condition to First American's purchase of ownership interests in the title agencies.

A. The safe harbor provisions in RESPA and Regulation X permitting payments for goods, facilities, and services do not apply to referral agreements

RESPA § 8(c)(2) provides that § 8(a)'s prohibition on paid referrals does not forbid "payments for goods or facilities actually furnished or services actually performed." 12 U.S.C. § 2607(c)(2); *see also* 24 C.F.R. § 3500.14(g)(1)(iv). In this case, Edwards alleged that First American acquired ownership interests in the title agencies as part of the same transaction in which it entered into referral agreements with those title agencies, and that one of those agreements led Tower City to make an unlawful referral to Edwards. Contrary to the district court's view, the safe harbor provisions in RESPA and Regulation X do not apply to these alleged facts. As the plain language makes clear, those provisions apply only where there is a payment for "goods," "facilities," or "services." They were designed primarily to ensure that providers of settlement services could make "legitimate payments" to each other for goods, facilities, or services actually provided or rendered in connection with the settlement of real estate transactions without violating the ban on paid referrals in § 8(a). *See* Senate Report at 6-7. This accommodation, however, does not extend to *any* transfer of a thing of value

between parties who might refer settlement services to each other.[6] Nor could it without undermining RESPA § 8(a), given the ease with which a party could disguise referral payments by coupling them with the purchase of any asset or service of variable or indeterminate value. In this case, First American's purchases of ownership interests in the title agencies did not involve payments for "goods," "services," or "facilities." Therefore, the safe-harbor provisions on which the district court relied do not apply in this case.

Moreover, the safe-harbor provisions provide only that a payment made to purchase goods, services, or facilities will not be deemed to be a payment for a referral. The safe-harbor provisions do *not* permit the parties to such a transaction to enter into a side agreement for the referral of settlement services. For instance, under the safe-harbor provisions, a title insurer can hire an independent appraiser and pay a bona fide fee for his or her services. The title insurer and the appraiser, however, may not, under the rubric of the safe harbor, enter into an agreement that all future business will be referred to the appraiser, regardless of whether the appraiser's services are reasonably priced. Such an agreement would not

[6] *See* HUD Policy Statement 1999-1, 64 Fed. Reg. 10,080, 10,085 (Mar. 1, 1999) ("while a broker may be compensated for goods or facilities actually furnished or services actually performed, the loan itself, which is arranged by the mortgage broker, cannot be regarded as a 'good' that the broker may sell to the lender and the lender may pay for based upon the loan's yield relation to market value, reasonable or otherwise.").

constitute "payment . . . for services actually performed" under RESPA § 8(c)(2) and 24 C.F.R. § 3500.14(g)(1)(iv) because, in general, "[a]ny referral of a settlement service is not a compensable service."[7] *See* 24 C.F.R. § 3500.14(b). Because this case concerns the lawfulness of alleged referral agreements between First American and the title agencies, it falls outside of the scope of the safe harbor.

The district court also believed that its "reading of RESPA is borne out by the analysis of a multitude of courts confronted with similar violations of RESPA."[8] None of the cases the district court cited, however, involved attempts to treat the purchase of ownership interests as goods, facilities, or services; rather,

[7] 24 C.F.R. § 3500.14(g)(1) permits payments for referrals in the context of "cooperative brokerage and referral arrangements or agreements between real estate agents and real estate brokers" or an "employer's payment to its own employees for any referral activities." 24 C.F.R. § 3500.14(g)(1)(v) & (vii). In addition, as mentioned above, RESPA permits a return on ownership interests or franchise relationships if certain conditions are met. *See* 12 U.S.C. § 2607(c)(4); 24 C.F.R. § 3500.15.

[8] E.R. 5 (citing *Howland v. First Am. Title Ins. Co.*, 672 F.3d 525, 530 (7th Cir. 2012); *Schuetz v. Banc One Morgt. Corp.*, 292 F.3d 1004, 1014 (9th Cir. 2002); *Lane v. Residential Funding Corp.*, 323 F.3d 739, 746 (9th Cir. 2003); *Bjustrom v. Trust One Mortg. Corp.*, 322 F.3d 1201, 1209 (9th Cir. 2003); *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 740 (5th Cir. 2003); and *Glover v. Standard Fed. Bank*, 283 F.3d 953, 963-964 (8th Cir. 2003)).

they all involved payments for settlement-related goods and services.[9] Moreover, in none of these cases were the payments conditioned on the execution of an agreement for the referral of future business, as is alleged here. Accordingly, these cases do not support the district court's reliance on RESPA § 8(c)(2) and 24 C.F.R. §§ 3500.14(g)(1)(iv) and (2) in this case.

B. Edwards can show that First American gave a "thing of value" for the referral agreements without regard to whether First American overpaid for its ownership interests in the title agencies

Because the safe-harbor provisions do not apply in this case, First American's liability turns solely on whether it gave any "fee, kickback, or thing of value pursuant to any agreement or understanding" that real estate settlement services "shall be referred." 12 U.S.C. § 2607(a). The district court apparently believed that the only "thing of value" that could have been given here is the

[9] *See Schuetz*, 292 F.3d at 1014 ("there is substantial evidence that Schuetz's mortgage broker provided her a host of compensable goods, facilities, and services"); *Bjustrom*, 322 F.3d at 1203 ("the mortgage broker performs a variety of functions, providing legitimate goods, facilities and services, in order to 'package' loan applications for funding"); *Lane*, 323 F.3d at 745 ("discounts that are reasonably related to the value of compensable services performed by a settlement provider for a referring party are simply not discounts *for* referrals"); *Howland*, 672 F.3d at 526-527 (discussing payments made to attorneys "to conduct a title examination and determine insurability"); *O'Sullivan*, 319 F.3d at 741 ("Plaintiffs concede Countrywide performed some services in furtherance of document preparation"); *Glover*, 283 F.3d at 965 ("the preliminary and closing papers in each transaction identify and quantify services performed, facilities used and goods supplied").

amount (if any) by which First American's payment to each title agency exceeded the reasonable value of the ownership interests it received in return. That conclusion was incorrect.

The term "thing of value" is "broadly defined." 24 C.F.R. § 3500.14(d). It "includes any payment, advance, funds, loan, service, or other consideration." 12 U.S.C. § 2602(2). The payment of a thing of value, moreover, "does not require [the] transfer of money." 24 C.F.R. § 3500.14(d). Under Regulation X, for example, the mere "opportunity to participate in a money-making program" is a "thing of value" for purposes of RESPA § 8(a). *Id.*

The district court's decision is inconsistent with the broad definition of "thing of value" in RESPA and Regulation X. Although a "thing of value" can include any amount First American allegedly paid for the referral agreements (whether by overpaying for ownership interests in the title agencies or otherwise), that term is capacious enough to encompass the value of the transaction to the parties. For instance, Edwards contends that First American's purchase of ownership interests in Tower City was conditioned on Tower City "entering into an exclusive agency agreement with" First American. Compl. ¶ 20. Thus, by allegedly committing to refer future settlement business to First American, Tower City obtained the "opportunity to participate" (24 C.F.R. § 3500.14(d)) in a transaction in which it raised a substantial amount of capital by selling ownership

interests to First American. That opportunity is a thing of value under RESPA.[10] Likewise, First American's agreement to purchase interests in Tower City can constitute "consideration" for Tower City's commitment to refer settlement business. Such consideration is also a thing of value under RESPA. *See* 12 U.S.C. § 2602(2). The district court's narrow focus on whether First American overpaid for its ownership interests in the title agencies incorrectly ignores these other possibilities.

II. RESPA MAY BE VIOLATED EVEN WHERE A CONSUMER RECEIVES REFERRALS FROM MULTIPLE SOURCES

It is a violation of RESPA § 8(a) to "give" or "accept" payments "pursuant to an agreement or understanding" that settlement services "shall be referred." 12 U.S.C. § 2607(a). In addition to proving these elements, a private plaintiff must demonstrate that he or she received an unlawful referral in order to show "liab[ility] to the person or persons charged for the settlement service involved." 12 U.S.C. § 2607(d)(2). The district court, however, went one step further. The court held that class members who received multiple referrals to First American must prove that the unlawful referral was the one that "influenced [them] to choose

[10] If First American had offered Tower City a "put option" in exchange for a referral agreement, the put would certainly be a "thing of value" for purposes of RESPA § 8(a), even if the option price were reasonable. The actual transaction described in Edwards's complaint is economically analogous to a put option exercised at the time the referral agreement was entered into.

[First American]." E.R. 8. This additional hurdle finds no support in RESPA or Regulation X.

RESPA § 8(d)(2) states that "[a]ny person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service." 12 U.S.C. § 2607(d)(2). Accordingly, the statute's plain terms make those who violate RESPA § 8 liable to "persons charged for the settlement service involved in the violation." *Id.* In upholding Edwards's standing in *Edwards II*, this Court observed that this "statutory text does not limit liability to instances in which a plaintiff is overcharged," but "entitled" consumers who receive tainted referrals to "three times the amount of *any* charge paid." *Edwards II*, 610 F.3d at 517. In the same vein, nothing in the statutory text limits liability to instances in which the unlawful referral is the only referral that the consumer received or the one that "precisely influenced" (E.R. 8) the consumer's selection of settlement-service provider. Rather, to recover the statutory remedy under 12 U.S.C. § 2607(d)(2), proof that the consumer received an unlawful referral will suffice.

The policy considerations identified in *Edwards II*, moreover, apply equally in this context. As this Court noted, Congress believed that compensated referrals "could result in harm beyond an increase in the cost of settlement services." 610

F.3d at 517. RESPA kickback schemes compromise "the advice of the person making the referral"; such advice "lose[s] its impartiality" and may be based not on a "professional evaluation of the quality of service provided" but rather on the referring party's "financial interest in the company being recommended." *Id.* (quoting H.R. Rep. No. 97-532, at 52 (1982)). Because of the importance of referrals in the real estate settlement industry, tainted referrals harm "the kind of healthy competition generated by independent settlement providers." *Id*. at 518 (quoting H.R. Rep. No. 97-532, at 52); *see also Edwards I*, 385 Fed. Appx. at 631 ("RESPA was motivated by the fact that 'reverse competition' is widespread in the title insurance market."). For these reasons, this Court explained in *Edwards II*, Congress did not limit private remedies to only those consumers who could demonstrate economic injury from the tainted referral. 610 F.3d at 518. There is likewise no reason to conclude that Congress intended to limit private remedies to only those consumers who can provide evidence that the tainted referral was the influential one.

The district court nonetheless believed that it had to "take evidence on who precisely influenced the class members" to choose First American based on its reading of the definition of "referral" in Regulation X. *See* E.R. 7. Regulation X defines "referral" to "*include[]* any oral or written action directed to a person which has the effect of affirmatively influencing the selection" of a provider of

settlement services. 24 C.F.R. § 3500.14(f)(1) (emphasis added). The district court ignored the word "includes" in the definition, however, and viewed "affirmative[] influenc[e]" as an element of a violation that must always be proved.[11] E.R. 7. That was error. "[I]in terms of statutory construction, use of the word 'includes' does not connote limitation." *In re Yochum*, 89 F.3d 661, 668 (9th Cir. 1996). So too in the case of Regulation X's definition of "referral." The term "affirmatively influences" in the definition captures situations in which no explicit referral is made, but other means, such as "non-neutral displays of information," are used to "favor[] one settlement service provider over others." HUD Policy Statement 1996-1, 61 Fed. Reg. 29,255, 29,258 (June 7, 1996).[12] By contrast,

[11] The district court may have relied on *Edwards I*, which also did not use the word "includes" in quoting Regulation X's definition of "referral," and which spoke of the "reliance or causation element" of a referral. 385 Fed. Appx. at 631. That discussion, however, occurred in the context of reversing the district court's prior determination that the Tower City class should not be certified because proving a "referral" would require "individualized proof." *Id.*; *see also Edwards*, 251 F.R.D. at 458. This Court in *Edwards I* therefore may not have had occasion to consider squarely whether the district court's interpretation of 24 C.F.R. § 3500.14(f)(1) was correct.

[12] For example, "if one lender always appears at the top of any listing of mortgage products and there is no real difference in interest rates and charges. . ., then this may be a non-neutral presentation of information which affirmatively influences the selection of a settlement service provider." HUD Policy Statement 1996-1, 61 Fed. Reg. at 29,258.

when an explicit referral is made, it is a "referral" for purposes of RESPA regardless of the level of influence it has on a consumer in an individual case.[13]

CONCLUSION

For the foregoing reasons, this Court should evaluate the district court's decision on Edwards's motion for class certification in light of the interpretations of RESPA and Regulation X set forth above.

[13] RESPA's definition of "affiliated business arrangement" (ABA) confirms that a referral does not necessarily require proof of an affirmative influence. An ABA is defined as an arrangement in which one person has an affiliate or ownership relationship in a settlement services provider and "either of such persons directly or indirectly *refers* such business to that provider *or affirmatively influences* the selection of that provider." 12 U.S.C. § 2602(7) (emphasis added). Thus, under that definition, if an explicit referral occurs, there is no need to consider any question of whether the consumer has been affirmatively influenced.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rules of Appellate Procedure 29(d) and 32(a)(7) in that it contains 5779 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirement of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

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ADDENDUM

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UNITED STATES DISTRICT COURT

THE CENTRAL DISTRICT OF CALIFORNIA

DENISE P. EDWARDS, individually and on behalf of all others similarly situated Plaintiffs, v. THE FIRST AMERICAN CORPORATION, FIRST AMERICAN TITLE INSURANCE COMPANY Defendants.	CASE NO. CV07-03795 SJO (FFMx) CLASS ACTION COMPLAINT DEMAND FOR JURY TRIAL

Exhibit 2

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

INTRODUCTION

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

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

3. Defendants First American Title Insurance and The First American Corporation are among the largest title insurance underwriters in the United States and its corporate parent. They rely largely on title agents to obtain business. Despite the law's prohibitions, they have embarked on a nationwide policy aimed at enlarging their market share by paying large sums of money to individual title agencies (in at least one case, $2 million or more) in exchange for exclusive referral agreements which funnel all of the companies' business to defendants, and are not disclosed to consumers. Defendants have thus created undisclosed "Captive Title Insurance Arrangements," which are prohibited by RESPA precisely because of their potential for harm to consumers.

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

5. Defendants' exclusive (and secret) referral agreements have thus injured all members of the proposed plaintiff class in precisely the same way: by denying them critical information about the cost of title insurance, in a way

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calculated – to quote Congress's words from 1974 – "to increase unnecessarily the costs" of title insurance. Plaintiffs therefore request appropriate relief, including the fees illegally received by Defendants, trebled in accordance with federal law.

PARTIES

The Named Plaintiff

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

The Defendants

7. The First American Corporation ("First American") is a California corporation, with its principal office in Santa Ana, California. First American Corporation operates across the country in approximately 2,100 offices, employing nearly 35,000 people. First American owns a number of subsidiaries, including co-Defendant First American Title Insurance Company.

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

JURISDICTION AND VENUE

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

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

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

GENERAL FACTUAL ALLEGATIONS

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

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

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

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

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

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Subsequently, in 2004, First American made an additional cash payment of $804,825 to Tower City.

17. Although First American Corporation became, on paper, a 17.5% minority owner in Tower City in 1998, neither Tower City, First American Corporation, nor First American Title ever disclosed the nature of their business relationship to consumers using the services of Tower City with respect to mortgage loan transactions. Instead, Tower City referred insurance underwriting exclusively to First American Title and deprived the consumer of opportunities required by federal law, such as the opportunity to compare prices on the open market.

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

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

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

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

FACTS APPLICABLE TO NAMED PLAINTIFF

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

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

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

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

CLASS ACTION ALLEGATIONS

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

> All consumers who from June 12, 2006 to the present entered into mortgage loan transactions using the services of a title agency or similar entity owned in part by First American Corporation, or its

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subsidiaries, in which the HUD-1 Settlement Statement, or other document in the loan file, includes a charge or payment for title insurance issued by First American Title Insurance Company.

Excluded from the class are those individuals who now or have ever been executives of Defendants.

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

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

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

(a) Whether title agents or similar entities partially owned by First American Corporation or its subsidiaries received illegal referral fees or kickbacks in respect of the title insurance issued by First American Title Insurance Company;

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

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

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

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

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

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

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

32. The prosecution of separate actions by individual members of the class would create a risk of establishing incompatible standards of conduct for Defendants, within the meaning of *Fed. R. Civ. P.* 23(b)(1)(A).

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

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

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

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COUNT I

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

(All Defendants)

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

37. Throughout the class period, the Defendant First American Title Insurance Company provided title insurance in respect of residential real estate transactions, including "federally related mortgage loans" as that phrase is defined by RESPA at 12 U.S.C. § 2602(l) and at 24 C.F.R. § 3500.2(3), to the named Plaintiff and other consumers. Upon information and belief, the Defendants provided title insurance for more than a million mortgage loans during the class period.

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

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

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

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

WHEREFORE, Plaintiffs pray that the Court:

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

B. Certify this case as a Plaintiff Class action pursuant to *Fed. R. Civ. P.* 23(b)(1), (2) and/or (3);

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

D. Award pre-judgment interest;

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

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

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DEMAND FOR JURY TRIAL

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

DATED: June 11, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2013, I filed and served the foregoing with the Court's appellate CM-ECF system.

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