No. 10-___

IN THE

Supreme Court of the United States

TAMMY FORET FREEMAN et al.,

Petitioners,

v.

QUICKEN LOANS, INC.,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 8(b) of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2607(b), provides:

> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

In this case, the Fifth Circuit joined the Fourth, Seventh, and Eighth Circuits in ruling that this provision prohibits the acceptance of unearned fees only when those fees are divided with a culpable third party, as in a kickback arrangement. It acknowledged, however, that the Third, Second, and Eleventh Circuits, as well as the Department of Housing and Urban Development, have taken the contrary view that the provision also applies to unearned fees retained by a single defendant. The question presented is:

Whether Section 8(b) of RESPA prohibits a real estate settlement services provider from charging an unearned fee only if the fee is divided between two or more parties.

PARTIES TO THE PROCEEDINGS BELOW

Pursuant to Rule 14.1(b), the parties to the proceedings below include petitioners here, and plaintiffs-appellants below, Tammy Foret Freeman and Larry Scott Freeman; Paul Smith and Irma Smith; and John J. Bennett, III, and Stacey B. Bennett, on behalf of themselves and a class of similarly situated persons.

Quicken Loans, Inc. is the sole respondent here, and was the defendant-appellee below.

Title Source, Inc., was a defendant in the district court. Although Title Source prevailed in the district court, and although petitioners did not pursue their claims against Title Source on appeal, the caption of the court of appeals' decision lists Title Source as a defendant-appellee.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Tammy Foret Freeman *et al*. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 626 F.3d 799. The district court's opinion (Pet. App. 19a-70a) is unpublished.

JURISDICTION

The court of appeals entered judgment on November 17, 2010. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 8 of the Real Estate Settlement Procedures Act, Pub. L. No. 93-533 (1974), codified at 12 U.S.C. § 2607, provides in relevant part:

> **Prohibition against kickbacks and unearned fees**
>
> (a) No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.
>
> (b) No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection

with a transaction involving a federally related mortgage loan other than for services actually performed.

STATEMENT OF THE CASE

Petitioners obtained residential mortgages from respondent Quicken Loans. At closing, Quicken charged petitioners a "loan discount fee," but it did not give them any loan discount. Petitioners filed suit, alleging that respondent violated the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2607(b), by imposing an unearned fee. The Fifth Circuit, however, held that even if Quicken did nothing to earn the fee, it did not violate the statute because in its view, RESPA "prohibits only kickbacks and referral fees." Pet. App. 15a. The court acknowledged that its decision expanded an existing three-to-three circuit conflict over whether RESPA "requires two culpable parties, a giver and a receiver of the unlawful fee." Pet. App. 6a.

I. Statutory And Regulatory Framework

A. Real Estate Settlement Procedures Act

In 1974 Congress passed the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.*, in response to the "unnecessarily high settlement charges caused by certain abusive practices" in the real estate settlement industry. *Id.* § 2601(a). The statute addresses these abuses through a series of interrelated provisions. One section of the statute imposes disclosure requirements that force mortgage service providers to itemize their bills so that consumers can see what services they are receiving for their money and make informed decisions. *Id.*

§ 2603. The statute thus requires settlement service providers to "clearly itemize all charges imposed upon the borrower . . . in connection with the settlement," using a form developed by HUD. *Id*. The standard settlement form developed by HUD, in turn, requires the disclosure of any "charge (points) for the specific interest rate chosen." DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, OMB APPROVAL NO. 2502-0265, SETTLEMENT STATEMENT (HUD-1) ¶ 802 (2010).[1]

Section 8 of the statute complements the disclosure requirements. Entitled "Prohibition against kickbacks and unearned fees," the provision has two subsections. 12 U.S.C. § 2607. The first expressly prohibits kickbacks:

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

Id. § 2607(a). Subsection (b) then addresses unearned fees:

> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally

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[1] *Available at* http://www.hud.gov/offices/hsg/rmra/res/hud1.pdf.

> related mortgage loan other than for services actually performed.

Id. § 2607(b).

B. Administrative Regulations And Policy Statements

Congress directed the Secretary of Housing and Urban Development (HUD) "to prescribe such rules and regulations, [and] to make such interpretations . . . as may be necessary to achieve the purposes of this [statute]." 12 U.S.C. § 2617(a).[2] HUD issued an initial set of regulations in 1974, which it revised in 1992, after notice and comment, to address, among other questions, the scope of Section 8. After quoting the text of Section 8(b), the regulations provided:

> A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section.

24 C.F.R. § 3500.14(c).

In 2001, the Seventh Circuit concluded that the statute was most naturally read to extend only to kickbacks, and that the regulation did not clearly provide otherwise. *Echevarria v. Chi. Title & Trust Co*., 256 F.3d 623 (7th Cir. 2001). In response, HUD

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[2] The Secretary also was required to "prepare and distribute booklets to help persons borrowing money to finance the purchase of residential real estate better to understand the nature and costs of real estate settlement services." 12 U.S.C. § 2604(a).

issued a Statement of Policy, explaining the agency's view that:

> Section 8(b) forbids the paying or accepting of any portion or percentage of a settlement service – including up to 100% – that is unearned, whether the entire charge is divided or split among more than one person or entity or is retained by a single person.[3]

In the years since it issued its Statement of Policy, HUD has consistently repeated and defended its interpretation of the statute in *amicus* briefs before the federal courts of appeals.[4]

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[3] *Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b)*, 66 Fed. Reg. 53,052, 53,058 (Oct. 18, 2001).

[4] *See* Br. for the United States as *Amicus Curiae* Supporting Reversal, *Boulware v. Crossland Mortg. Corp.*, 291 F.3d 261 (4th Cir. 2002) (No. 01-2318), 2002 WL 32351432; Br. for the United States as *Amicus Curiae* Supporting Reversal, *Krzalic v. Republic Title Co.*, 314 F.3d 875 (7th Cir. 2002) (No. 02-2285), 2002 WL 32115107; Br. for the United States as *Amicus Curiae* Supporting Affirmance, *Haug v. Bank of Am., N.A.*, 317 F.3d 832 (8th Cir. 2003) (No. 02-2458), 2002 WL 32144590; Br. for the United States as *Amicus Curiae* Supporting Reversal, *Sosa v. Chase Manhattan Mortg. Corp.*, 348 F.3d 979 (11th Cir. 2003) (No. 02-13930-DD), 2002 WL 32366238; Br. for the United States as *Amicus Curiae* Supporting Reversal, *Kruse v. Wells Fargo Home Mortg., Inc.*, 383 F.3d 49 (2d Cir. 2004) (No. 03-7665), 2003 WL 24072306; Br. for the United States as *Amicus Curiae* Supporting Reversal, *Santiago v. GMAC Mortg. Group, Inc.*, 417 F.3d 384 (3d Cir. 2005) (No. 03-4273), 2004 WL 3759909.

II. Factual Background

The Freemans, Bennetts, and Smiths all secured mortgages in Louisiana from Quicken Loans. Quicken charged the Freemans $980, and the Bennetts $1100, for a "loan discount fee" at the closing on their mortgages. Pet. App. 21a n.3, 22a n.6. In industry parlance, a "loan discount fee" is money borrowers pay to purchase "points" which reduce their interest rate. As Quicken's website explains, "[p]urchase points, also known as 'buy-down' or 'discount points,' are an up-front fee paid to the lender at closing to buy-down or lower your interest rate over the life of the loan."[5] In this case, however, Quicken charged the loan discount fee but did not provide petitioners any reduction in their interest rate. Pet. App. 2a.

The Smiths were charged a $575.00 "loan processing fee" and a duplicative $5,107.44 "loan origination" fee, Pet. App. 22a n.4, although Quicken later claimed that "the loan origination" fee was, in fact, a mislabeled "loan discount fee" like the one imposed on the Freemans and Bennetts, Pet. App. 2a-3a. However labeled, the Smiths received no loan discount or any other service in exchange for the fee. *Id.*

III. Procedural History

1. On February 19, 2008, the Freemans filed suit in state court against Quicken, alleging, as relevant

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[5] Quicken Loans Website, Mortgage Closing Costs and Fees, *available at* https://www.quickenloans.com/home-buying/learn/why/mortgage-closing-costs-and-fees.

here, violations of Section 8(b) of RESPA. Pet. App. 20a.[6] Quicken removed the case to federal court, where it was consolidated with a nearly identical suit filed by the Smiths and a putative class action filed by the Bennetts. Pet. App. 21a-22a.

Quicken moved for summary judgment, arguing, among other points, that even if it had not provided petitioners anything in exchange for the challenged fees, it had not violated Section 8 because it had retained the unearned fees itself rather than dividing them with a third party. Pet. App. 23a-24a. Quicken insisted that Section 8(b) is a narrow prohibition against kickbacks and similar fee-splitting, not a general prohibition against charging unearned fees. *Id.*

The district court agreed. It recognized that "several circuit courts have split on the issue of whether Section 8(b) provides a claim in a situation where a *single* settlement services provider retains unearned fees." Pet. App. 43a. The circuit split was further "complicat[ed]," it said, by the Statement of Policy from the Department of Housing and Urban Development construing Section 8(b) as forbidding unearned charges "whether the entire charge is divided or split among more than one person or entity

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[6] Petitioners also brought claims against the title company that conducted the closing, but those claims were ultimately dismissed, Pet. App. 70a, and petitioners do not challenge that dismissal here. Petitioners further brought state law claims premised upon the alleged RESPA violations. Pet. App. 3a, 14a & n.15. Those claims were dismissed along with petitioners' RESPA claims. Pet. App. 3a, 14a n.15.

or is retained by a single person." Pet. App. 43a-44a. After reviewing the Statement of Policy and the conflicting circuit court decisions, the district court found "the circuit decisions that have held Section 8(b) only applies to divided fees" more persuasive. Pet. App. 66a. And because it concluded that this result was required by the "plain language of Section 8(b)," it refused to defer to HUD's contrary interpretation. *Id*.

2. The Fifth Circuit affirmed. Like the district court, the Fifth Circuit acknowledged that the courts of appeals have taken "divergent positions," Pet. App. 7a, on the scope of Section 8(b) in two related contexts: "mark-ups and undivided unearned fees," Pet. App. 6a. A "markup," the court explained, occurs when "a service provider charges the borrower for services performed by a third party in excess of the cost of the services to the service provider but keeps the excess itself." Pet. App. 5a (citation omitted). An "undivided unearned fee" arises when, as in this case, "a service provider charges the borrower a fee for which no correlative service is performed." *Id*. (citation omitted).

The court of appeals explained that the "Fourth, Seventh, and Eighth Circuits have each held that RESPA § 8 is exclusively an anti-kickback provision." Pet. App. 6a (citations omitted). Accordingly, these circuits hold that "RESPA § 8(b) requires two culpable parties, a giver and a receiver of the unlawful fee, rendering mark-ups by a sole services provider not actionable." *Id.* Given this interpretation, these circuits "[p]resumably . . . would not find undivided unearned charges actionable" either. Pet. App. 6a-7a.

At the same time, the court recognized that the "Second, Third, and Eleventh Circuits have rejected the two-party requirement." Pet. App. 6a. All three circuits thus have "held that RESPA § 8(b) prohibits markups," and the Second Circuit has applied the same rule to undivided unearned fees as well. *Id*.

"With these divergent positions in mind," the Fifth Circuit "enter[ed] the interpretive fray," holding "that the language of RESPA § 8(b) is unambiguous and does not cover undivided unearned fees." Pet. App. 7a. Instead, "RESPA prohibits only kickbacks and referral fees, not unearned fees by a sole provider of settlement services." Pet. App. 15a.

First, the court examined the phrase "[n]o person shall give and no person shall accept." Pet. App. 7a. The "use of the conjunctive 'and,'" the court concluded, implies that "the provision requires two parties each committing an act," one giving and one accepting payment. *Id*. The Fifth Circuit found further support in the fact that the prior subsection, Section 8(a), used similar language while expressly prohibiting "kickbacks." Pet. App. 8a. "To be consistent with RESPA § 8(a), RESPA § 8(b) should require two culpable actors as well." *Id.*

Next, the court looked at the words "portion, split, or percentage," and found that "all three words require less than 100% or the whole of something." Pet. App. 8a-9a. The court acknowledged that "certain statutes use 'any portion' and 'any percentage' to include situations that involve the entirety of something." Pet. App. 9a (citing *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 118-19 (2d Cir. 2007) (collecting examples)). But, invoking the canon of *noscitur a sociis*, the Fifth Circuit reasoned

that Congress intended a narrower interpretation of "percentage" and "portion" in this provision because it also included the word "split," which "requires dividing a single thing among several parties." Pet. App. 9a-10a.

Finally, the court rejected petitioners' argument that the court should defer to HUD's interpretation of the statute as encompassing more than kickbacks. Pet. App. 11a-14a. "Even assuming *arguendo* that this RESPA provision is ambiguous, the HUD statement is not due *Chevron* deference because there is no indication that the HUD statement carries the force of law." Pet. App. 12a. The 2001 Statement of Policy, the court explained, "was not promulgated through traditional notice-and-comment rulemaking or any similar deliberative process and does not identify any clear methodology by which it reached its conclusion." Pet. App. 13a.[7]

3. Judge Higginbotham dissented. He explained (Pet. App. 15a) that he "would, in the main, take the path set forth in the Second Circuit's well-reasoned opinion in *Cohen*," 498 F.3d 111. In that case, the Second Circuit rejected the claim that Section 8(b) of RESPA was unambiguously limited to kickbacks. *Id.* at 113. The phrase "any portion, split, or percentage," the court concluded, could extend to

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[7] The court also noted that "Quicken cursorily contends that the loan discount fees are not settlement services, and therefore are not covered by the statute," but did not reach that question in light of its construction of Section 8(b). Pet. App. 4a n.1.

cases in which a defendant kept the entirety of an unearned charge for itself. *Id*. at 118-19.

The court in *Cohen* further rejected any reliance on the *noscitur a sociis* canon. "Whether or not any one noun" in the statutory phrase could be read to require a division of unearned fees, the Second Circuit explained, Congress's "use of the expansive modifier 'any' in conjunction with all three words" precluded the conclusion that the statute unambiguously applied only to kickbacks. *Id*. at 120. The court thus found that Section 8(b) could "plausibly be construed to demonstrate a legislative intent to sweep broadly, prohibiting all unearned fees, however structured." *Id*. At the same time, the court concluded that this permissible interpretation was not compelled by the language of the statute, resulting in an ambiguity the court resolved by deferring to HUD's Statement of Policy. *Id*. at 124-26.

While Judge Higginbotham disagreed with the Second Circuit's decision to afford *Chevron* deference to HUD's Statement of Policy, Pet. App. 15a, he adopted the same interpretation of the statute. Prohibiting unearned fees, he explained, "strikes at a core objective of RESPA: promoting transparency of costs associated with settlement." Pet. App. 17a. Although "the greatest concern may be when that fee is part of a hidden referral relationship, the damage done to borrowers is similar: they are led to believe that they are paying for something they are not." *Id*.

REASONS FOR GRANTING THE WRIT

Both the district court and the court of appeals in this case correctly recognized that the circuits are deeply divided over whether RESPA's prohibition of unearned fees merely prohibits kickbacks or also protects consumers from unearned fees that are not divided with a third party. The circuit conflict is long-standing, entrenched, and incapable of resolution except by this Court. The present division and uncertainty – regarding a law governing one of the most important financial transactions most Americans ever undertake – is intolerable for consumers, lenders, and settlement service providers alike. The Court's intervention, therefore, is required.

I. Certiorari Is Warranted To Resolve An Entrenched Circuit Conflict Over The Scope Of RESPA's Prohibition Against Unearned Fees.

The circuits are intractably divided over the scope of Section 8(b) of RESPA. The conflict has persisted for more than a decade and has only deepened over the years.

A. The Courts Of Appeals Are Divided Four to Three Over Whether RESPA Prohibits Only Kickbacks, Or Instead Reaches All Unearned Fees.

The circuit conflict arises in the context of two closely related types of charges, which the cases refer to as "markups" and "undivided unearned fees." Markups and undivided unearned fees are different from traditional kickbacks because the unearned

charge is retained by the defendant who imposed the charge and is not (as in a kickback arrangement) shared with a third party.[8] Relying on that difference, defendants maintain – and four circuits have held – that RESPA reaches only schemes in which an unearned fee is divided between two or more people. By contrast, three other circuits, and the Department of Housing and Urban Development, construe Section 8(b) to apply to all unearned fees, whether divided or not.

1. The Fourth, Fifth, Seventh, And Eighth Circuits Limit Section 8(b) To Kickbacks.

In this case, the Fifth Circuit joined the Fourth, Seventh, and Eighth Circuits in concluding that "read in its entirety, RESPA is an anti-kickback statute" and nothing more. Pet. App. 10a.

In *Boulware v. Crossland Mortgage Corp.*, 291 F.3d 261 (4th Cir. 2002), the Fourth Circuit construed Section 8(b) to "only prohibit[] overcharges when a 'portion' or 'percentage' of the overcharge is kicked back to or 'split' with a third party." *Id.* at 265.

The Seventh Circuit reached the same conclusion in *Echevarria v. Chicago Title & Trust Co.*, 256 F.3d 623 (7th Cir. 2001). There, the court of appeals construed prior circuit precedent to "compel[]

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[8] Of course, in a markup case, a third party is involved (*e.g.*, the vendor who provided the service the defendant marked up). But the unearned fee remains undivided because the third party vendor does not receive any portion of the markup, having been paid only what it earned by providing actual services.

dismissal of [a plaintiff's] RESPA claims" unless the plaintiff alleges that "a third party . . . accept[ed] unearned fees" from the defendant. *Id*. at 627. It further rejected the plaintiff's claim that an intervening amendment to the RESPA regulations in 1992 had "eliminate[d] the need to plead facts suggesting that defendants split an unearned fee with a third party." *Id*. The Seventh Circuit subsequently reaffirmed its position that "section 8(b) is an anti-kickback provision," rejecting HUD's contrary interpretation in its 2001 Statement of Policy. *Krzalic v. Republic Title Co.*, 314 F.3d 875, 877 (7th Cir. 2002); *see also Weizeorick v. ABN AMRO Mortg. Group, Inc.*, 337 F.3d 827, 830 (7th Cir. 2003) ("Our case law has consistently held that Section 8(b) is not violated unless the defendant splits a fee with a third party.").

The Eighth Circuit soon followed suit, holding that "Section 8(b) is an anti-kickback provision that unambiguously requires at least two parties to share a settlement fee in order to violate the statute." *Haug v. Bank of Am., N.A.*, 317 F.3d 832, 836 (8th Cir. 2003).

2. The Second, Third, And Eleventh Circuits Agree With HUD That Section 8(b) Applies To All Unearned Fees.

The narrow construction of RESPA adopted by the Fifth Circuit has been considered and rejected by three other circuits and the agency Congress charged with administering the statute.

In *Sosa v. Chase Manhattan Mortgage Corp.*, 348 F.3d 979 (11th Cir. 2003), the Eleventh Circuit read Section 8 to prohibit markups. It recognized that

other courts, including the district court in the case before it, had construed Section 8(b) to "requir[e] two culpable parties to split an unearned fee." *Id.* at 982 (citing decisions of the Fourth and Seventh Circuits). Nonetheless, the Eleventh Circuit determined that those courts' reasoning "does not withstand scrutiny." *Id.* The "assertion that the language 'no person shall give and no person shall accept' means that both a giver and an acceptor are required for a violation of subsection 8(b) rests on a misunderstanding of English grammar." *Id.* "The 'and' in subsection 8(b)," the court explained, "operates to create two separate prohibitions," not a requirement that an unearned fee must be split to be actionable. *Id.*[9]

The Third Circuit reached the same conclusion in *Santiago v. GMAC Mortgage Group, Inc.*, 417 F.3d 384 (3d Cir. 2005). The assertion "that Section 8(b) applies only to kickbacks," the court explained, "is belied by the use of the term 'kickback' in Section 8(a) and not in Section 8(b)." *Id*. at 389. Moreover, a reading of Section 8(b) that allows a cause of action for markups is consistent with the title of Section 8 that prohibits both kickbacks and unearned fees." *Id*. (citing 12 U.S.C. § 2607 (entitled "Prohibition against kickbacks and unearned fees")). And as a practical matter, the court noted, the economic harm to the consumer is the same whether the defendant retains an unearned charge for itself or passes it on as a kickback to a third party. *Id*. at 388-89.

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[9] The court ultimately affirmed the district court's dismissal on other grounds. *Id.* at 983-84.

The Second Circuit has likewise considered and rejected the claim that Section 8(b) is limited to kickbacks. *Kruse v. Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49 (2d Cir. 2004), surveyed the conflicting circuit precedent, and concluded that the "words of the statute do not seem to compel either reading." *Id*. at 58. The court resolved the ambiguity by deferring to HUD's interpretation of the statute as prohibiting unearned fees whether split with another party or not. *Id*. at 58-62. Three years later, the Second Circuit reaffirmed that conclusion, holding that a lender violated Section 8(b) by charging a consumer a $225 "post-closing fee" for which it performed no actual services. *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 113 (2d Cir. 2007).

District courts in other circuits have adopted conflicting interpretations of Section 8(b). *Compare Bushbeck v. Chi. Title Ins. Co.*, 632 F. Supp. 2d 1036, 1042 (W.D. Wash. 2008) ("Relying on the reasoning in *Cohen*, the court determines that the Bushbecks need not have alleged a split of the unearned fee and allows the claim to proceed.") *and Maganallez v. Hilltop Lending Corp.*, 505 F. Supp. 2d 594, 605 (N.D. Cal. 2007) ("Section 8(b) prohibits mark-ups.") *with Morales v. Countrywide Home Loans, Inc.*, 531 F. Supp. 2d 1225, 1228 (C.D. Cal. 2008) ("While such repricing or mark-ups could be actionable for other reasons (e.g. fraud), it is not a violation of RESPA."); *Morrison v. Brookstone Mortg. Co., Inc.*, No. 2:03-CV-729, 2006 WL 2850522, at *7 (S.D. Ohio Sept. 29, 2006) (same); *and Welch v. Centex Home Equity Co., LLC*, 262 F. Supp. 2d 1263, 1270 (D. Kan. 2003) (same).

B. The Scope Of RESPA's Prohibition On Unearned Fees Is A Question Of Recurring Importance.

As the breadth and duration of the circuit conflict reflect, the scope of RESPA Section 8(b) is a frequently litigated question in the lower courts. *See supra* 13-16. This is not surprising, given the millions of real estate transactions that take place every year. *See* U.S. HOUSING MARKET CONDITIONS THIRD QUARTER 2010, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (Nov. 2010) (more than four million homes sold during the third quarter of 2010 alone).[10] Whether RESPA narrowly prohibits only kickbacks or more broadly applies to unearned fees thus predictably determines the lawfulness of millions of dollars in fees imposed on homebuyers annually, affecting the cost – and perhaps even the volume – of transactions in one of the most important segments of the nation's economy.

The disparate application of RESPA undermines Congress's intent to establish uniform legal rules governing real estate closings "throughout the Nation." 12 U.S.C. § 2601(a). At present, the legal rules governing closing fees in South Carolina are irreconcilable with the rules applicable across the border in Georgia. Within the State of California, one set of rules applies in Los Angeles, and another in San Francisco. *Compare Morales v. Countrywide Home Loans, Inc.*, 531 F. Supp. 2d 1225, 1228 (C.D.

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[10] *Available at* http://www.huduser.org/portal/periodicals/ushmc/fall10/summary.pdf.

Cal. 2008) *with Maganallez v. Hilltop Lending Corp.*, 505 F. Supp. 2d 594, 605 (N.D. Cal. 2007).

Elsewhere, in the absence of binding precedent, customers, lenders, and title companies are left to guess as to what rules will ultimately be found to apply to them, unable to rely with confidence even on HUD's official Statement of Policy. As a result, national companies like Quicken are subject to conflicting rules and substantial uncertainty, while consumers enjoy uneven protections from a statute Congress enacted for the benefit of all Americans.

C. The Circuit Conflict Is Well Considered, Entrenched, And Incapable Of Resolution Except By This Court.

The time has come for this Court to intervene. The open disagreement among the circuits has now persisted for over a decade, growing only deeper and more intractable. Each court to decide the question has carefully considered the preceding cases, openly adopting or rejecting their reasoning.[11] Nine years ago, HUD attempted to resolve the growing conflict

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[11] *See Krzalic*, 314 F.3d at 877 (considering, but declining to follow, HUD's Policy Statement); *Boulware*, 291 F.3d at 266 (following Seventh Circuit precedent); *Haug*, 317 F.3d at 836 (following precedent from Fourth and Seventh Circuits); *Sosa*, 348 F.3d at 982-83 (describing, then rejecting, decisions from the Fourth and Seventh Circuits); *Kruse*, 383 F.3d at 57-58 (discussing, and disagreeing with, conflicting decisions of the Fourth, Seventh, Eighth, and Eleventh Circuits); *Cohen*, 498 F.3d at 119 (same); *Santiago*, 417 F.3d at 388 (describing and adopting the positions of the Eleventh Circuit and HUD Policy Statement, while expressly rejecting the views of the Fourth, Seventh, and Eighth Circuits).

by issuing its Statement of Policy. But that only prompted even greater division – four circuits now hold that RESPA's text is unambiguously restricted to kickbacks, two circuits read the text to unambiguously say precisely the opposite, and one has found the statute ambiguous and deferred to HUD.

In these circumstances, further percolation would be pointless. The question presented has been thoroughly ventilated and is now ripe for this Court's review.

II. The Decision Below Is Wrong.

Certiorari is also warranted because the decision below is wrong, conflicting with the text and purposes of RESPA, as well as the reasonable interpretation of the agency Congress charged with the statute's administration.

A. Both The Text And Purposes Of RESPA Establish That The Statute Applies To All Unearned Fees.

The plain text of Section 8(b) encompasses petitioners' claims. Quicken "accept[ed]" from petitioners a "portion, split, or percentage" (*i.e.*, one hundred percent) of a "charge made . . . for the rendering of a real estate settlement service" (*i.e.*, the loan discount fee) in a covered real estate settlement. 12 U.S.C. § 2607(b). The loan discount fee moreover was not for "services actually performed," *id.*, given that Quicken did not provide petitioners with any

discount on their interest rate or any other service in exchange for the fee.[12]

The only reason the Fifth Circuit gave for nonetheless dismissing petitioners' claim was the fact that Quicken retained the entirety of the unearned fee for itself, rather than splitting it with a third party. Pet. App. 7a. Thus, the court of appeals would have found a violation if Quicken had given even a penny of the unearned charges to petitioners' mortgage brokers. But contrary to the court of appeals' decision, nothing in the text or purposes of the statute gives that penny any legal significance.

1. The Fifth Circuit claimed that "[t]he definitions of all three words ['portion,' 'split,' and 'percentage'] require less than 100% or the whole of something." Pet. App. 9a. But one hundred percent is obviously a "percentage," and, as the Fifth Circuit

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[12] Quicken argued in its reply brief at summary judgment, Pet. App. 35a-36a, 64a, and "cursorily" in its brief to the Fifth Circuit, Pet. App. 4a n.1, that the loan discount fee was not a charge for a "settlement service" within the meaning of the statute. However, the courts below did not reach that assertion, assuming for the purpose of their decisions that the fee fell within the scope of RESPA. Pet. App. 4a n.1. The correctness of that assumption, accordingly, is not before this Court. In any event, even if Quicken has preserved the argument, it lacks merit. Congress included the "funding of loans" within the definition of "settlement services," 12 U.S.C. § 2602(3), and HUD requires disclosure of loan discount fees on the Uniform Settlement Statement Congress required it to issue to enforce the statute. *See* DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, OMB APPROVAL NO. 2502-0265, SETTLEMENT STATEMENT (HUD-1) (2010), *available at* http://www.hud.gov/offices/hsg/rmra/res/hud1.pdf; 12 U.S.C. § 2603(a).

admitted, the U.S. Code contains numerous uses of the phrases "any portion of" or "any percentage of" that plainly encompass (as the terms suggest) *any* portion or percentage, up to and including one hundred percent. *See* Pet. App. 9a; *see also Cohen*, 498 F.3d at 118-19 (collecting examples). By prohibiting defendants from accepting "*any* portion, split, or percentage" of its unearned charge, 12 U.S.C. § 2607(b) (emphasis added), Congress textually precluded the court of appeals' narrow construction of those terms. *See Citizens' Bank v. Parker*, 192 U.S. 73, 81 (1904) ("The word *any* excludes selection or distinction."); *see also, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 528-29 (2007); *United States v. Gonzales*, 520 U.S. 1, 5 (1997); *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 739 (1995) (Thomas, J., dissenting) (finding it "difficult to imagine what broader terms Congress could have used" than the word "any").

The Fifth Circuit nonetheless relied on the *noscitur a sociis* canon to conclude that the phrase "portion, split, or percentage" could have no broader meaning than the word "split" standing alone. Pet. App. 9a-10a. But this Court has previously rejected that misuse of the canon, making clear that it does not require reducing a string of words to their least common denominator or ignoring the natural meaning of the individual statutory terms. *See, e.g.*, *S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. 370, 379 (2006) (noting that a party's *noscitur* argument "seems to assume that pairing a broad statutory term with a narrow one shrinks the broad one, but there is no such general usage"); *Russell Motor Car Co. v. United States*, 261

U.S. 514, 519 (1923) ("That a word may be known by the company it keeps is, however, not an invariable rule, for the word may have a character of its own not to be submerged by its association."); *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 586 (1995) (Thomas, J., dissenting) ("*Noscitur a sociis*, however, does not require us to construe *every* term in a series narrowly because of the meaning given to just one of the terms."). Indeed, accepting the Fifth Circuit's construction would render the terms "portion" and "percentage" surplusage. *Cf. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 702 (1995) (holding that the lower court erred in "employ[ing] *noscitur a sociis* to give 'harm' essentially the same function as other words in the definition, thereby denying it independent meaning").

Second, the court of appeals concluded that by providing that "[n]o person shall give *and* no person shall accept" unearned fees, 12 U.S.C. § 2607(b) (emphasis added), "the provision requires two parties each committing an act." Pet. App. 7a-8a. But that inference is unsupported – a law providing that "no person shall advertise and no person shall maintain a gaming house" is most naturally understood to prohibit maintaining a gambling establishment, even if it is never advertised.[13]

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[13] In any event, markups and other unearned fees, no less than kickbacks, involve two parties – the defendant who imposes the charge and the consumer who pays it. Some courts have argued that "[i]t would be irrational to conclude that Congress intended consumers to be potentially liable under RESPA for paying unearned fees." *Boulware*, 291 F.3d at 265.

Third, the court of appeals believed the broader context of Section 8 as a whole supported its interpretation of Section 8(b) because Section 8(a) uses similar language while expressly proscribing kickbacks. Pet. App. 8a. "To be consistent with RESPA § 8(a)," the court reasoned, "RESPA § 8(b) should require two culpable actors as well." Pet. App. 8a. To the contrary, the statute's structure compels the opposite conclusion. Having expressly forbidden kickbacks in Section 8(a), Congress must have intended Section 8(b) to serve an independent function. That function is identified in the title of Section 8 – "Prohibition against kickbacks *and* unearned fees" (emphasis added).[14] Section 8(a) expressly prohibits "kickbacks," leaving "unearned fees" to Section 8(b). The Fifth Circuit's contrary conclusion renders Section 8(b) largely surplusage.

2. The court of appeals likewise failed in its efforts to square its narrow interpretation of the text with the basic purposes of the statute. Pet. App. 10a-11a.

In enacting RESPA, Congress sought to "reform[]" the real estate settlement process so as to "protect[] [consumers] from unnecessarily high

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But, as the Eleventh Circuit has explained, "a consumer could not be liable as the giver of an unearned portion of a fee because a consumer will always intend to pay the fee for services that are actually rendered." *Sosa*, 348 F.3d at 982.

[14] The subtitle of Section 8(b) in the U.S. Code – "Splitting charges" – was not included in the bill passed by Congress, but rather added during the statute's codification. *See Cohen*, 498 F.3d at 121 n.7. Accordingly, the subtitle sheds no light on the meaning of the provision.

settlement charges caused by certain abusive practices that have developed in some areas of the country." 12 U.S.C. § 2601(a). To be sure, one such practice was kickbacks, *id*. § 2601(b)(2), but charging fees for services never actually performed is a deceitful, "abusive practice[]" as well, one that – as this case demonstrates – also dramatically increases settlement costs. Nor did the court of appeals even attempt to explain why Congress would intend to subject a defendant to a fine and imprisonment for splitting a $25 unearned charge, yet leave entirely unregulated a $1,000 charge for a service never provided, so long as the defendant keeps all the money for itself.

Forbidding lenders and settlement companies from padding their bills with phony line item charges also directly furthers the Act's central aim of promoting "more effective advance disclosure to home buyers and sellers of settlement costs." 12 U.S.C. § 2601(b)(1). To that end, the Act required HUD to develop, and settlement companies to use, a uniform settlement statement that "conspicuously and clearly itemize[s] all charges imposed upon the borrower." *Id.* § 2603(a). Such disclosure facilitates comparison shopping and, thus, price competition among banks and settlement companies. Section 8(b), in turn, ensures the accuracy of the disclosures by requiring that the amounts listed on the disclosure form correspond to services actually provided.

B. Any Ambiguity Should Be Resolved By Deferring To HUD's Reasonable Construction Of The Statute.

The court of appeals further erred in disregarding HUD's authoritative construction of the statute. *See* Pet. App. 11a-14a.

1. "When Congress has 'explicitly left a gap for an agency to fill,'" the agency's resolution of the statutory ambiguity "is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (quoting *Chevron U.S.A. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)). This *Chevron* deference applies "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226-27.

When it enacted RESPA, Congress authorized HUD "to prescribe such rules and regulations" and "to make such interpretations" as "may be necessary to achieve the purposes of" the statute. 12 U.S.C. § 2617(a). Since 1976, HUD has consistently exercised its delegated lawmaking authority to construe RESPA to forbid all unearned fees, without qualification. Within two years of the statute's enactment, and contemporaneous with the promulgation of the initial RESPA regulations, HUD issued the first edition of its RESPA consumer information booklet, as required by Congress. 12 U.S.C. § 2604(a). The booklet explained that it is "illegal to charge or accept a fee or part of a fee where

no service has actually been performed." 41 Fed. Reg. 20,280, 20,289 (May 17, 1976). The booklet said nothing to limit this rule to kickbacks or split fees.

In 1992, HUD undertook a revision of its RESPA regulations. Consistent with its original construction of the Act, the revised notice-and-comment regulations created a broad, unqualified rule that by its terms encompassed all forms of unearned fees, whether divided or not: "A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates [RESPA Section 8(b)]." 57 Fed. Reg. 49,600, 49,611 (Nov. 2, 1992) (amending 24 C.F.R. § 3500.14(c)).

In a 1996 proposed rulemaking addressing another section of RESPA, HUD reiterated that "no person is allowed to receive 'any portion' of charges for settlement services, except for services actually performed" and noted that "two persons are not required for [Section 8(b)] to be violated." 61 Fed. Reg. 29,238, 29,249 (June 7, 1996).

Despite HUD's repeated determination and categorical pronouncements that Section 8(b) prohibits all unearned charges, in 2001 the Seventh Circuit decided that HUD's position was ambiguous as to whether Section 8(b) extended beyond kickbacks. *Echevarria v. Chi. Title and Trust Co.*, 256 F.3d 623 (7th Cir. 2001). HUD responded by invoking its delegated lawmaking authority under 12 U.S.C. § 2617(a) to issue its Statement of Policy 2001-1 as "a formal pronouncement of its interpretation of the relevant statutory and regulatory provisions." 66 Fed. Reg. 53,052 (2001). HUD explained that in its view, "Section 8(b) forbids the paying or accepting of

any portion or percentage of a settlement service – including up to 100% – that is unearned, whether the entire charge is divided or split among more than one person or entity or is retained by a single person." *Id.* at 53,058. HUD has subsequently repeated that position in numerous *amicus* briefs filed in the courts of appeals. *See supra* 5 n.4.

2. The Fifth Circuit did not dispute that Quicken's charges in this case would violate RESPA as construed by HUD in its 2001 Statement of Policy. Instead, it declined to defer to HUD's considered interpretation on the ground that it was not issued pursuant to notice-and-comment rulemaking and "there is no indication that the HUD statement carries the force of law." Pet. App. 12a. But the fact that an agency "reached its interpretation through means less formal than 'notice and comment' rulemaking does not automatically deprive that interpretation of the judicial deference otherwise its due." *Barnhart v. Walton*, 535 U.S. 212, 221 (2002); *see also Mead*, 533 U.S. at 231 ("[T]he want of [notice and comment] procedure[s] . . . does not decide the case."). And in this case, Congress expressly authorized HUD to exercise its lawmaking authority *either* through "rules and regulations" *or* through "such interpretations . . . as may be necessary to achieve the purposes of this chapter." 12 U.S.C. § 2617(a).

HUD's decision to exercise its delegated power through an interpretation rather than a rulemaking is thus within the scope of its statutory discretion. And under this Court's decisions, the resulting official interpretation of the statute is entitled to full *Chevron* deference. First, there can be no question

that HUD's interpretation is a product of the agency's demonstrated expertise regarding the mortgage loan market. *Cf. Barnhart*, 535 U.S. at 222 (explaining that "the related expertise of the Agency" is a relevant factor in deciding whether to defer under *Chevron*). In addition, the Statement reflects the "careful consideration the Agency has given the question over a long period of time." *Barnhart*, 535 U.S. at 222; *see Kruse*, 383 F.3d at 61 (noting that the Statement was the "culmination of HUD's reflections on the meaning of section 8(b) . . . over a period of years"). As shown above, for the past thirty-five years HUD has repeatedly interpreted Section 8(b) to encompass violations by a single actor. By the time HUD issued its Statement of Policy in 2001, the correctness of its position had been examined by multiple courts, whose decisions the agency considered before reaffirming its view of the statute. *See* 66 Fed. Reg. at 53,053 (noting division on question among the courts); *id*. at 53,058 (discussing recent court cases).[15]

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[15] At the very least, the Statement of Policy's interpretation of HUD's RESPA regulations is entitled to deference under *Auer v. Robbins*, 519 U.S. 452, 462 (1997). *See* 66 Fed. Reg. at 53,057-59 (explaining that Policy Statement is an interpretation of 24 C.F.R. § 3500.14). And there should be no dispute that the notice-and-comment regulations, as interpreted by the agency, qualify for *Chevron* deference. *See Mead*, 533 U.S. at 230.

III. The Courts Of Appeals' Disagreement Over Whether HUD's Statement Of Policy Qualifies For *Chevron* Deference Provides An Additional Reason To Grant Review.

The dispute in this case over the deference owed to HUD's Statement of Policy presents this Court an opportunity to resolve a broader circuit conflict over the *Chevron* status of not only this particular policy statement, but also similar informal agency interpretations issued in a variety of settings.

1. Three courts of appeals – the Ninth, Eleventh, and Second Circuits – have held that HUD's Statement of Policy, although not issued pursuant to notice-and-comment rulemaking, qualifies for *Chevron* deference. *See Kruse v. Wells Fargo Home Mortg., Inc.*, 383 F.3d. 49, 61 (2d Cir. 2004) (giving *Chevron* deference to Statement's construction of Section 8(b)); *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 126 (2d Cir. 2007) (same); *Heimmermann v. First Union Mortg. Corp.*, 305 F.3d 1257, 1261 (11th Cir. 2002) (giving *Chevron* deference to Statement's treatment of yield spread premiums); *Schuetz v. Banc One Mortg. Corp.*, 292 F.3d 1004, 1006 (9th Cir. 2002) (same).

On the other hand, the Fifth Circuit in this case rejected the Second Circuit's *Chevron* analysis, adopting instead the Seventh Circuit's view that HUD's Statement of Policy was too informal to carry the force of law. *See* Pet. App. 12a & n.10; *Krzalic v. Republic Title Co.*, 314 F.3d 875, 881 (7th Cir. 2002).

2. As Justice Scalia has observed, the circuit split over the deference due to this particular Statement of Policy reflects a broader "confusion in

the lower courts" regarding the appropriate level of deference owed informal agency interpretations in the aftermath of the Court's decision in *Mead*. *See Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2479 & n.* (2009) (Scalia, J., concurring).

"Following *Mead*," one court has explained, "the continuum of agency deference has been fraught with ambiguity . . . . Our decisions understandably have been conflicted as to whether *Chevron* deference applies in [various] situations." *United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1235 (9th Cir. 2005) (citations omitted); *see also Doe v. Leavitt*, 552 F.3d 75, 79 (1st Cir. 2009) ("In the aftermath of the Court's opinion in [*Mead*], the level of deference owing to informal agency interpretations is freighted with uncertainty."); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 219-21 (2006) (discussing inconsistencies among courts of appeals);[16] Richard J.

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[16] *Compare Am. Wildlands v. Browner*, 260 F.3d 1192, 1998 (10th Cir. 2001) (granting *Chevron* deference to the EPA's interpretation of Clean Air Act as expressed in an approval of a state air quality plan) *with Hall v. EPA*, 273 F.3d 1146, 1155-56 (9th Cir. 2001) (denying *Chevron* deference to administrative decision to approve similar state plan); *compare Gilliliand v. E.J. Bartells Co., Inc.*, 270 F.3d 1259, 1262 (9th Cir. 2001) (extending *Chevron* deference to the litigating positions of the Director of the Office of Workers' Compensation Programs interpreting the Longshore and Harbor Workers' Compensation Act) *with Day v. James Marine, Inc.*, 518 F.3d 411, 418 (6th Cir. 2008) (rejecting *Chevron* deference for the Director's litigating positions); *compare Am. Fed. of Govt. Employees, AFL-CIO, Local 446 v. Nicholson*, 475 F.3d 341, 353-354 (D.C. Cir. 2007) (applying *Chevron* deference to informal adjudication by

Pierce, Jr., ADMINISTRATIVE LAW TREATISE § 3.5 (4th ed. Supp. 2004) (calling the Court's precedents "confusing").

Indeed, courts do not even agree about the appropriate factors to consider in deciding whether to afford informal interpretations *Chevron* deference:

> Some courts concentrate on whether an interpretation binds more than the parties at hand; some broaden this analysis to ask whether, in addition to binding effect, the interpretation reflects public participation; some limit their focus to whether an agency interpretation reflects careful consideration; and some expand this focus, weighing careful consideration along with agency expertise and statutory complexity.

Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1459 (2005).

Rather than leave the lower courts adrift, this Court should grant certiorari in this case to provide

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Department of Veterans Affairs) *with Am. Fed. of Govt. Employees, AFL-CIO, Local 2152 v. Principi*, 464 F.3d 1049, 1057 (9th Cir. 2006) (rejecting *Chevron* deference for a similar informal adjudication); c*ompare Gutnik v. Gonzales*, 469 F.3d 683, 689-93 (7th Cir. 2006) (deferring, under *Chevron*, to single-member decisions of the Board of Immigration Appeals) *with Rotimi v. Gonzales*, 473 F.3d 55, 57-58 (2d Cir. 2007) (declining to give *Chevron* deference to single-member decisions of the Board).

much-needed guidance on this important and recurring question.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Harvard Supreme Court Litigation Clinic

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-30902

TAMMY FORET FREEMAN; LARRY SCOTT FREEMAN, Plaintiffs - Appellants

v.

QUICKEN LOANS, INC.; TITLE SOURCE, INC., Defendants - Appellants

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PAUL SMITH; IRMA SMITH, Plaintiffs - Appellants

v.

QUICKEN LOANS, INC; TITLE SOURCE, INC., Defendants - Appellees

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JOHN J. BENNETT, III; STACEY B. BENNETT, individually and on behalf of all others similarly situated, Plaintiffs - Appellants

v.

QUICKEN LOANS, INC; TITLE SOURCE, INC., Defendants - Appellees

On Appeal from the United States District Court
for the Eastern District of Louisiana

FILED November 17, 2010

Before JONES, Chief Judge, and HIGGINBOTHAM, and ELROD, Circuit Judges

Edith H. Jones, Chief Judge:

This appeal concerns whether section 8(b) of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607(b), prohibits lenders and others from charging "unearned, undivided" fees to borrowers at the closing of a mortgage transaction. The district court granted summary judgment to Quicken Loans, finding such charges permissible. We affirm, holding that RESPA § 8(b) requires that the challenged fee be split with another party in order to be actionable.

I. BACKGROUND

The Freemans, Bennetts, and Smiths each obtained a mortgage from Quicken Loans in 2007. At the closing of their mortgage transactions, Quicken charged the Freemans and Bennetts each a "loan discount fee" and charged the Smiths a "loan origination fee" as well as a "loan processing fee"—although Quicken contends the loan origination fee was misstated and was actually a loan discount fee similar to those charged to the Freemans and Bennetts. The Freemans and Bennetts contend that a loan discount fee may only be charged when there is a corresponding interest rate reduction and that otherwise it is an unearned fee for settlement services in violation of RESPA. As Quicken allegedly did not decrease the interest rate for either the Freemans' or Bennetts' loan, the couples argue the fee was unlawful. The Smiths allege that the loan origination fee was

duplicative of the loan processing fee, and thus an unearned fee for settlement services, or alternatively, that it was an unlawful loan discount fee akin to the fees charged to the Freemans and Bennetts.

Each couple filed suit separately in state court, seeking class treatment and alleging violations of RESPA and state law. Quicken removed the cases to federal court where they were consolidated. Quicken then moved for summary judgment, claiming that the couples' claims were not actionable under RESPA § 8(b) as the fees were not split with another party, and contending that as a result the state law claims failed. The district court agreed and granted summary judgment.

The couples appeal the district court's interpretation of RESPA. They concede their state law claims are contingent on the RESPA claim, but argue that because they should succeed on their RESPA claim, their state claims also survive.

II. STANDARD OF REVIEW

This court reviews a district court's grant of summary judgment de novo applying the same standard as the district court. *DePree v. Saunders*, 588 F.3d 282, 286 (5th Cir. 2009). The court examines the evidence in the light most favorable to the nonmoving party, and summary judgment is appropriate if there is no genuine issue as to any material fact. *Id.* The essential facts are not disputed; on appeal the sole question is the interpretation of RESPA, which we review *de novo*.

III. DISCUSSION

The Appellants characterize Quicken's charges in the form of loan discount and loan origination fees as "undivided unearned" fees. RESPA § 8(b) states that:

> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

12 U.S.C. § 2607(b). Appellants contend that the loan discount fees are charges for a real estate settlement service and that, as there was no interest rate reduction, the charges did not represent "services actually performed." Quicken counters that RESPA does not prohibit undivided unearned fees by a sole provider; to fall under the statute, fees must be divided between two parties such that they resemble a kickback or bribe.[1]

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[1] Alternatively, Quicken cursorily contends that the loan discount fees are not for settlement services, and therefore are not covered by the statute. *See Wooten v. Quicken Loans, Inc.*, No. 07-00478-CG-C, 2008 WL 687379, at *5 (S.D.Ala. Mar. 10, 2008) (exempting "the substantive terms of a loan" from the scope of "settlement services"). Our disposition of the case on the remaining language of RESPA § 8(b) makes it unnecessary to reach this argument.

A.

RESPA § 8(b) has been the subject of several lawsuits to determine its scope. Additionally, in 2001, HUD, the agency responsible for enforcing RESPA, issued a statement of policy that identified four types of overcharge schemes that this provision could potentially cover:

1. Fee splitting, where two or more persons split a fee, any portion of which is unearned;

2. Mark-ups, where a service provider charges the borrower for services performed by a third party in excess of the cost of the services to the service provider but keeps the excess itself;

3. Undivided unearned fees, where a service provider charges the borrower a fee for which no correlative service is performed; and

4. Overcharges, where a service provider charges a borrower for services actually performed but in excess of the service's reasonable value.

Statement of Policy 2001-1, 66 Fed. Reg. 53,052 (Oct. 18, 2001). HUD proceeded to assert that RESPA § 8(b) prohibits all four types of transactions. *Id.* All circuits agree that the statute plainly prohibits fee splitting. *See, e.g.*, *Krzalic v. Republic Title Co.*, 314 F.3d 875 (7th Cir. 2002). Similarly, every circuit addressing the issue has rejected the contention that simple

overcharges are actionable under the statute. *See Martinez v. Wells Fargo Home Mortgage Inc.*, 598 F.3d 549, 553-54 (9th Cir. 2010) (noting the Second, Third and Eleventh Circuits have all specifically held overcharges are not actionable and joining their conclusion); *Patino v. Lawyers Title Ins. Corp.*, No. 3:6-CV-1479-B, 2007 WL 4687748, at *3 (N.D. Tex. Jan. 11, 2007) (unpublished) (collecting cases).

The circuits disagree on the remaining two types of fees: mark-ups and undivided unearned fees. The Fourth,[2] Seventh,[3] and Eighth[4] Circuits have each held that RESPA § 8 is exclusively an anti-kickback provision. Accordingly, RESPA § 8(b) requires two culpable parties, a giver and a receiver of the unlawful fee, rendering mark-ups by a sole services provider not actionable. The Second,[5] Third,[6] and Eleventh[7] Circuits have rejected the two-party requirement and held that RESPA § 8(b) prohibits mark-ups. Only the Second Circuit has explicitly addressed whether RESPA § 8(b) prohibits a sole provider's undivided unearned charges and found that it did. *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111 (2d Cir. 2007).[8] Presumably, the

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[2] *Boulware v. Crossland Mortgage Corp.*, 291 F.3d 261 (4th Cir. 2002).

[3] *Krzalic*, 314 F.3d at 879.

[4] *Haug v. Bank of America*, 317 F.3d 832 (8th Cir. 2003).

[5] *Kruse v. Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49 (2d Cir. 2004).

[6] *Santiago v. GMAC Mortgage Group, Inc.*, 417 F.3d 384 (3d Cir. 2005).

[7] *Sosa v. Chase Manhattan Mortgage Corp.*, 348 F.3d 979 (11th Cir. 2003).

[8] The Third Circuit recently passed up an opportunity to evaluate whether a provider could charge fees for work it did not perform. *Tubbs v. N. Am. Title Agency, Inc.*, No. 09-2757, 2010

three circuits that require two culpable actors would not find undivided unearned charges actionable.

B.

With these divergent positions in mind, we enter the interpretive fray. "If the intent of Congress is clear, . . . the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. v. Natural Res. Def. Council, Inc.* 467 U.S. 837, 842-43, 104 S. Ct. 2778 (1984).

We hold that the language of RESPA § 8(b) is unambiguous and does not cover undivided unearned fees. First, the language "No person shall give and no person shall accept" is not ambiguous as to whether a sole actor's undivided fees are covered. The term "and" normally means that both of the listed conditions must be satisfied. "The use of the conjunctive 'and' indicates that Congress was clearly aiming at an exchange or transaction, not a unilateral act." *Boulware*, 291 F.3d at 266. Thus, the provision requires two parties each committing an act: one party gives a "portion, split, or percentage," and another party receives a "portion, split, or percentage." *See id.* at 265 ("Therefore, § 8(b) only prohibits overcharges when a 'portion' or 'percentage' of the overcharge is kicked back to or 'split' with a third party."); *Mercado v. Calumet Federal Sav. & Loan Ass'n*, 763 F.2d 269, 270 (7th Cir. 1985) ("The statute requires at least two parties to share fees."). This is not a prohibition on the undivided

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WL 3044067 (3d Cir. August 5, 2010) (unpublished). The dissent in *Tubbs* argued that remand was unnecessary, despite error by the district court, because the allegations failed to state a claim. *Id.* at *2 (Hardiman, J., dissenting).

fees of a sole provider like those charged to the Appellants.

Second, RESPA § 8(b) must be read in conjunction with its companion provision, RESPA § 8(a). RESPA § 8(a) uses language identical to RESPA § 8(b):

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

12 U.S.C. § 2607(a) (emphasis added). That "no person shall give and no person shall accept" a kickback clearly requires two culpable actors. "A term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf v. United States*, 510 U.S. 135, 143, 114 S. Ct. 655 (1994); *see also National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 501, 118 S. Ct. 927 (1998) (identifying "the established canon of construction that similar language contained within the same section of a statute must be accorded a consistent meaning"). To be consistent with RESPA § 8(a), RESPA § 8(b) should require two culpable actors as well.

Third, RESPA § 8(b)'s language "any portion, split or percentage" requires that two parties share something. *See Boulware*, 291 F.3d at 265 ("By using the language 'portion, split, or percentage,' Congress was clearly aiming at a sharing arrangement rather

than a unilateral overcharge."). The definitions of all three words require less than 100% or the whole of something. Webster's defines "portion" as "an individual's part or share of something" or "a part of a whole." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1768 (2002). "Split" means "a product of division by or as if by splitting," or "a share (as of booty, winnings, profits)." *Id.* at 2202. "Percentage" means a "part of a whole expressed in hundredths." *Id.* at 1675.

The Appellants note, citing the Second Circuit, that certain statutes use "any portion" and "any percentage" to include situations that involve the entirety of something. *Cohen*, 498 F.3d at 118-19 (citing anti-embezzlement statutes). But this is the exception, not the rule, and there are several reasons not to apply that interpretation here. None of the statutes cited by *Cohen* uses all three terms: portions, split and percentage. Using all three terms collectively emphasizes that Congress intended "part of a whole." "The traditional canon of construction, *noscitur a sociis*, dictates that words grouped in a list should be given related meaning." *Dole v. Steelworkers*, 494 U.S. 26, 36, 110 S. Ct. 929 (1990) (internal quotations and citations omitted). Under the doctrine of *noscitur a sociis*, the court "avoid[s] ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575, 115 S. Ct. 1061 (1995) (internal citations and quotations omitted). A court stretches the definition of "portion, split or percentage" to its breaking point to mean 100% of a charge. Further, none of the other statutes uses "split." While portion or

percentage may be ambiguous in some limited cases, "split" requires dividing a single thing among several parties.

Finally, when read in its entirety, RESPA is an anti-kickback statute, not an anti-price gouging statute. Congress stated RESPA's purpose in 12 U.S.C. § 2601(b). It explicitly and exclusively prohibits kickback and referral fees:

> (b) It is the purpose of this chapter to effect certain changes in the settlement process for residential real estate that will result—
>
> (1) in more effective advance disclosure to home buyers and sellers of settlement costs;
>
> (2) *in the elimination of kickbacks or referral fees* that tend to increase unnecessarily the costs of certain settlement services;
>
> (3) in a reduction in the amounts home buyers are required to place in escrow accounts established to insure the payment of real estate taxes and insurance; and
>
> (4) in significant reform and modernization of local record keeping of land title information.

12 U.S.C. § 2601(b) (emphasis added). Section 2601's purpose statement does not discuss, mention, or even hint about a general prohibition on overcharges or unearned fees or other forms of price abuse. If

Congress meant to ban other forms of price abuse, such as undivided unearned fees or unearned fees generally, then surely it would not have used such limited language. Unearned fees are not kickbacks, and RESPA does not cover them.[9]

C.

The Appellants attempt to rehabilitate their argument by urging us to follow HUD's 2001 policy statement. They assert that this policy statement is entitled to *Chevron* deference and, accordingly, the

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[9] There is no reason to recite legislative history given the clarity of the statutory text. Nonetheless, if we must look to the legislative history, the Senate Report that details Congress's intent, S. REP. NO. 93-866 (1974), *reprinted* in 1974 U.S.C.C.A.N. 6545, supports this interpretation. When discussing RESPA § 8, the Senate Report begins by saying that:

> Section [8] is intended to *prohibit all kickback or referral fee arrangements* whereby any payment is made or 'thing of value' furnished for the referral of real estate settlement business. The section also prohibits a person or company that renders a settlement service from giving or rebating any portion of the charge to any other person except in return for services actually performed. Reasonable payments in return for services actually performed or goods actually furnished are not intended to be prohibited.

Id. at 6551. (emphasis added). Just as in § 2601(b), nothing can be fairly read to cover undivided fees. The description clearly and only covers the classic kickback situation where one party refers a client to another party in exchange for a fee.

Further, all of the examples listed in the Senate Report reference charges divided among multiple parties. *Id.* If Congress meant to prohibit other forms of price gouging, such as unearned fees generally, then the Senate Report would have listed at least one example that does not involve a referral. That Congress did not list such examples strongly implies that RESPA § 8(b) did not cover such other actions.

court must adopt HUD's interpretation that RESPA § 8(b) covers undivided unearned fees. The Second Circuit adopted this rationale in *Cohen*. 498 F.3d at 115 (*citing Kruse*, 383 F.3d at 57).[10]

We are unpersuaded. When the statutory provision is clear on its face, there is no need to look to any regulatory interpretation, such as the HUD 2001 statement. *Chevron*, 467 U.S. at 842-43. If the statute is ambiguous, the court is only required to defer to an agency's interpretation that "reasonably effectuate[s] Congress's intent." *Texas v. United States*, 497 F.3d 491, 506 (5th Cir. 2007). Otherwise, an agency interpretation lacks the "force of law" and will not receive *Chevron* deference, but instead will be granted Skidmore deference and given "respect proportional to its 'power to persuade.'" *United States v. Mead Corp.*, 533 U.S. 218, 235, 121 S. Ct. 2164 (2001). Even assuming *arguendo* that this RESPA provision is ambiguous, the HUD statement is not due *Chevron* deference because there is no indication that the HUD statement carries the force of law. *See Krzalic*, 314 F.3d at 882 (Easterbrook, J., concurring) (stating that regulatory interpretations that do not follow rule-making guidelines under the APA are entitled to *Skidmore* deference only). "Interpretations such as those in opinion letters–like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of

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[10] Other circuits have avoided the issue of whether the HUD statement is entitled to *Chevron* deference. *See Santiago*, 417 F.3d at 389 n.4 ("because we would find HUD's interpretation to be persuasive under *Skidmore*, we would not need to reach whether *Chevron* deference is warranted."); *Krzalic*, 314 F.3d at 879; *Sosa*, 348 F.3d at 984.

law–do not warrant *Chevron*-style deference." *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655 (2000). Where the agency has not used a deliberative process such as notice-and-comment rulemaking, or where the process by which the agency reached its interpretation is unclear, the court cannot presume Congress intended to grant the interpretation the force of law. For example, the Fifth Circuit has denied *Chevron* deference to IRS revenue rulings,[11] the CMS Medicaid Manual,[12] FTC interpretive rules,[13] and litigation briefs.[14] Unlike other HUD regulations interpreting RESPA, the HUD Statement of Policy was not promulgated through traditional notice-and-comment rulemaking or any similar deliberative process and does not identify any clear methodology by which it reached its conclusion. Accordingly, the HUD statement is not due *Chevron* deference.

Even under *Skidmore* deference, the HUD statement is unpersuasive. The discussion of RESPA § 8(b) is perfunctory and conclusory. It expresses disagreement with the Seventh Circuit's interpretation of RESPA § 8(b) in *Echevarria v. Chicago Title & Trust Co.*, 256 F.3d 623 (7th Cir. 2001) but provides no concrete reasoning for its conclusion. 66 Fed. Reg. at 53,053. HUD claims to have a "long-standing interpretation" that RESPA covers undivided unearned fees but offers no clear evidence for this point. *Id.* at 53,058. It asserts that a fee need not be

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[11] *Kornman & Assocs*, 527 F.3d 443 (5th Cir. 2008).

[12] *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581 (5th Cir. 2004).

[13] *Walton v. Rose Mobile Homes*, 298 F.3d 470 (5th Cir. 2002)

[14] *Pool Co. v. Cooper*, 274 F.3d 173, 177 n.3 (5th Cir. 2001).

split because of the disjunctive word "or," but offers no discussion, just a conclusory statement. *Id.* It does not address any legislative history or alternate interpretation. Because we are interpreting a statute, HUD must provide some manner of statutory interpretation that would bolster its position. HUD failed to do so.

D.

Finally, the Appellants argue that RESPA should ban undivided unearned fees because this type of pricing scheme puts consumers in the same economic position as a kickback. The Third Circuit found this "same economic position" argument persuasive when analyzing whether RESPA § 8(b) prohibited markups. *Santiago*, 417 F.3d at 388-89.

This is not so much an argument as a quarrel with Congress. By its terms, RESPA does not regulate economic outcomes; it only bans certain predatory methods. Congress did not mean to criminalize the charging of fees for settlement services, however they are characterized, as long as they are disclosed and not within RESPA § 8(a) or (b). 12 U.S.C. § 2607(d) (imposing criminal penalties and potential imprisonment for any violations of RESPA § 8(b)).[15]

[15] Our disposition of the RESPA claim necessarily requires rejection of Appellants' dependent state law claims.

IV. CONCLUSION

Because the statutory text is clear, RESPA prohibits only kickbacks and referral fees, not unearned fees by a sole provider of settlement services. The charges imposed by Quicken on Appellants for loan discount fees and a loan processing fee are not prohibited by RESPA § 8(b).

The judgment of the district court is **AFFIRMED**.

HIGGINBOTHAM, Circuit Judge, dissenting:

I respectfully dissent. I would, in the main, take the path set forth in the Second Circuit's well-reasoned opinion in *Cohen v. JP Morgan Chase & Company*[1] and hold that unearned undivided loan discount fees violate § 8(b) of the Real Estate Settlement Procedures Act ("RESPA").[2]

The lone aspect of *Cohen* I would not adopt is its decision to give *Chevron* deference[3] to the interpretation of RESPA § 8(b) articulated by the Department of Housing and Urban Development ("HUD") in its Statement of Policy 2001-1.[4] This Court is only required to grant *Chevron* deference to an agency's interpretation of an ambiguous statute if the

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1 498 F.3d 111, 114-26 (2d Cir. 2007).

2 12 U.S.C. § 2607(b).

3 *See generally Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

4 Statement of Policy 2001-1, 66 Fed. Reg. 53,052 (Oct. 18, 2001).

interpretation has "the force of law,"[5] a description generally reserved for interpretations that are the product of "a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force,"[6] such as traditional notice-and-comment rulemaking. The HUD Statement of Policy was not promulgated through traditional notice-and-comment rulemaking, and I am not persuaded that the process through which it was promulgated was sufficiently considered to merit *Chevron* deference. I share the Seventh Circuit's concern over the Statement of Policy's lack of analysis, which expresses disagreement with that court's decision in *Echevarria v. Chicago Title & Trust Company*[7] but gives no reason for that disagreement "except that HUD has always regarded such fees as forbidden by the statute, though previously it had failed to make this clear. No evidence or interpretive methodology is mentioned; no abuse pointed to that might justify the contorted interpretation urged by HUD."[8] As Judge Posner explained, "something more formal, more deliberative, than a simple announcement" was needed to invoke *Chevron* deference and "[a] simple announcement is all we have here."[9] While I agree with the Second Circuit that the policy statement is more than a simple

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[5] *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

[6] *Id.* at 229.

[7] 256 F.3d 623 (7th Cir. 2001).

[8] *Krzalic v. Republic Title Co.*, 314 F.3d 875, 881 (7th Cir. 2002) (citations omitted), *cert. denied*, 539 U.S. 958 (2003).

[9] *See Krzalic*, 314 F.3d at 881 (citing *Barnhart*, 535 U.S. at 212, and *Mead Corp.*, 533 U.S. at 229–31).

announcement,[10] without a more formalized process through which the Agency's views might be challenged and sharpened—such as what occurs in a formal adjudication or notice-and-comment rulemaking—I would not conclude that the Statement of Policy warrants deference under *Chevron*. Per *Skidmore*,[11] I would give HUD's interpretation only such respect as is proportional to its power to persuade.

This concern aside, I would adopt the approach and conclusions of Judge Raggi's fine opinion in *Cohen*. The statutory phrase "any portion, split, or percentage of any charge . . . other than for services actually performed" is ambiguous with respect to Congress's intent to prohibit unearned undivided fees. Prohibiting such fees strikes at a core objective of RESPA: promoting transparency of costs associated with settlement. RESPA is aimed at reducing abuses by those in the mortgage industry through charging borrowers fees for work not actually performed. While the greatest concern may be when that fee is part of a hidden referral relationship, the damage done to borrowers is similar: they are led to believe they are paying for something they are not. Following *Cohen* would not lead us down the path to a rate-setting regime. The task of the court is very different when determining whether any service was provided as opposed to whether the price charged is a reasonable one. When the fee is entirely unearned, the court is not forced to determine the reasonableness of a fee—a task

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[10] *See Kruse v. Wells Fargo Home Mortg., Inc.*, 383 F.3d 49, 59-61 (2d Cir. 2004).

[11] *See Mead*, 553 U.S. at 234-35 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

for which courts are not well suited—because the reasonable fee for nothing is nothing.

Accordingly, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT,

E.D. LOUISIANA

Tammy Foret FREEMAN Et Al

v.

QUICKEN LOANS, INC. Et Al.

Civil Action Nos. 08-1626, 08-1627, 08-4744. Aug. 10, 2009.

ORDER AND REASONS

CARL J. BARBIER, District Judge.

Before the Court are Defendant Quicken Loans, Inc.'s ("Quicken") and Title Source, Inc.'s ("Title Source")[1] **Motions for Summary Judgment (Rec.**

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[1] Title Source also does business under the name TSI Appraisal Services, and the TSI Appraisal Services d/b/a designation appears in some of the HUD-1 Settlement Statements referenced in the parties' briefing. The HUD-1 Settlement Statement is intended to give borrowers a statement of actual settlement costs in connection with their federally related mortgage loans. See HUD RESPA Settlement Costs and Helpful Information, June, 1997 *available at* http://www.hud.gov/offices/hsg/ramh/res/sc3sectd.cfm. The HUD-1 Settlement Statement is required to "conspicuously and clearly itemize all charges imposed upon the borrower and all charges imposed upon the seller in connection with the settlement" of a federally related mortgage loan. See 12 U.S.C. § 2603(a).

Docs. 29 & 31), which seek dismissal of the claims of Plaintiffs Paul Smith and Irma Smith ("the Smiths"); Tammy Foret and Larry Scott Freeman ("the Freemans"); and John J. and Stacey B. Bennett ("the Bennetts"), as well as the putative class of persons in Louisiana similarly situated to the Bennetts (collectively "the Plaintiffs"). The Plaintiffs have asserted claims under the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq.,* and Louisiana law arising out of mortgage and loan transactions executed in 2007. Specifically, the Plaintiffs' claims relate to various loan discount and/or origination fees, loan processing fees, and appraisal fees charged in connection with the mortgage loans.

These motions were originally set with oral argument for April 1, 2009, but oral argument was cancelled due to a conflict with the Court's trial docket. After review of the record, the memoranda of counsel, and the applicable law, the Court finds that these motions should be granted, and the Plaintiff's claims should be dismissed for failure to state a claim, for the reasons that follow.

PROCEDURAL HISTORY AND BACKGROUND FACTS

The Freemans originally filed suit in the 32nd Judicial District Court for the Parish of Terrebonne ("32nd JDC") on February 19, 2008 against Quicken and Title Source, alleging that both entities charged unearned and/or nominal or duplicative fees in violation of RESPA in connection with the Freemans' mortgage loan closing. In particular, the Freemans alleged that Quicken charged a loan discount fee with

no concomitant interest rate reduction.[2] In addition, the Freemans allege that Title Source charged an appraisal fee[3] that was either split with Quicken, unearned and/or duplicative, and/or was excessive in relation to the services rendered, all in violation of RESPA. Finally, the Freemans allege that these unearned/split/excessive fees constituted breaches of the mortgage and note agreements entered between Quicken and the Freemans, and seek damages for the breaches under Louisiana law. Finally, and in the alternative, the Freemans allege that they are entitled to recoupment of the fees under a theory of "payment of a thing not owed" or unjust enrichment as a matter of Louisiana law. Quicken and Title Source removed the Freemans' suit to this Court on April 11, 2008 based on federal question jurisdiction in light of the RESPA claims.

The Smiths filed a virtually identical complaint in the 32nd JDC, alleging RESPA violations against Quicken and Title Source in connection with loan and appraisal fees in the context of mortgage loans. The slight difference between the Smiths' complaint and the Freemans' complaint is that the Smiths allege RESPA violations in connection with loan *origination* and loan *processing* fees (as opposed to loan *discount*

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[2] Specifically, the Freemans were charged a one point loan discount fee of $980, which fee was listed on line 802 of the Freemans HUD-1 Settlement Statement.

[3] Specifically, the Freemans were charged $300 for an appraisal of their residence by a local real estate appraiser, as well as an additional $80 fee with only a reference to "TSI Appraisal Services" on the HUD-1 Settlement Statement.

fees as alleged in the Freemans' complaint).[4] However, the Smiths allege the same basis for relief under RESPA with respect to the appraisal fee charged by Title Source.[5] Likewise, the Smiths allege the same Louisiana law theories of breach of contract, payment of a thing not owed, and unjust enrichment as alleged in the Freeman complaint. The Smiths' complaint was also removed to this Court on April 11, 2008 and was consolidated with the Freemans' action on August 8, 2008 (Rec.Doc.8).

Finally, the Bennetts filed a putative class action in the 32nd JDC alleging claims identical to those alleged in the Freeman complaint on their own behalf and on behalf of all other Louisiana borrowers who transacted mortgage loans with Quicken and Title Source.[6] The putative class action was removed to the Eastern District on October 31, 2008 and eventually transferred to this Court for consolidation with the Freeman and Smith actions on November 25, 2008 (Rec.Doc.9).

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[4] Specifically, the Smiths were charged $5,107.44 (or 2.875% of their total loan amount of $177,650.00), apparently as a loan origination fee, as well as a $575.00 loan processing fee. However, as pointed out by Quicken and Title Source, despite the fact that the $5,107.44 was listed as a loan *origination* fee on the Smiths' HUD-1 Settlement Statement, the amount was actually a loan *discount* fee (see note 7 below).

[5] As with the Freemans, the Smiths' HUD-1 Settlement Statement included a $300 fee for an appraisal by a local real estate appraiser, as well as an $80 fee with a reference to "TSI Appraisal Services" on the HUD-1 Settlement Statement.

[6] The Bennetts were charged a loan discount fee of $1,100, which was listed on line 802 of their HUD-1 Settlement Statement. Additionally, the Bennetts were charged the same $300 and $80 appraisal fees as the Freemans and Smiths.

In connection with the present motions, Quicken and Title Source filed a motion to stay all class certification proceedings and class-related discovery in the Bennett putative class action pending the resolution of these dispositive motions (Rec.Doc.26). The Court granted this motion by order of March 3, 2009 (Rec.Doc.36).

THE PARTIES' ARGUMENTS

A. Quicken & Title Source's Arguments in Support

Quicken and Title Source assert essentially the same arguments in support of their motions for summary judgment on all the Plaintiffs' claims.[7]

First, Quicken and Title Source argue that Plaintiffs' claims under Section 8(b) of RESPA fail as a

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[7] While Quicken and Title Source filed separate memoranda in support of their motions as to the Freeman/Bennett claims and the Smith claims, as well as separate reply memoranda, the arguments in each set of briefs are virtually identical, and in large part verbatim, duplicates of each other. The only difference between the two sets of briefing concerns the fact that the Smiths were charged loan *origination* and *processing* fees, whereas the Freemans and Bennetts were charges loan *discount* fees.

However, Quicken and Title Source indicate that although the HUD-1 Settlement Statement lists the fee paid by the Smiths as a loan *origination* fee, the fee charged was in fact a loan *discount* fee as evidenced by the disclosures provided to the Smiths prior to the loan closing and as indicated on the Closing Instructions to the closing agent. Accordingly, Quicken and Title Source take the position that all the Plaintiffs' claims concern solely (1) loan *discount* fees and (2) appraisal fees charged in connection with their mortgage loans.

matter of law because neither the loan discount nor the appraisal fees were split or otherwise shared. The pertinent part of Section 8(b) provides as follows:

> (b) Splitting charges
>
> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

12 U.S.C. § 2607(b).[8] Under the plain language of Section 8, Quicken and Title Source argue that only fee *splitting* is prohibited under RESPAthat is, situations in which a single charge is split between two parties, only one of which performed the services on which the charge was based. See *Williams v. Saxon Mortg. Servs., Inc.,* 2007 WL 1845642 (S.D.Ala. July 23, 2007); *Haug v. Bank of Am.,* 317 F.3d 832, 836 (8th Cir.2003; *Boulware v. Crossland Mortg. Corp.,* 291 F.3d 261, 266 (4th Cir.2002). Quicken and Title Source assert that summary judgment is proper because the loan discount fees charged to the Plaintiffs were paid to and retained solely by Quicken, and that the appraisal fees were paid to and retained solely by Title Source.

Relatedly, Quicken and Title Source cite numerous cases that have held that RESPA is not a rate-setting

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[8] Quicken and Title Source note that "Section 8" is the common reference to Section 12 U.S.C. § 2607(b), because § 2607(b) was the codification of Section 8 of the RESPA.

or price-control statute. See, e.g., *Morrisette v. Novastar Home Mortg., Inc.,* 484 F.Supp.2d 1227, 1229-1230 (S.D.Ala.2007); *Santiago v. GMAC Mortg. Group, Inc.,* 417 F.3d 384, 387 (3d Cir.2005); *Kruse v. Wells Fargo Home Mortg., Inc.,* 383 F.3d 49, 56 (2d Cir.2004); *Krzalic v. Republic Title Co.,* 314 F.3d 875 (7th Cir.2002), cert. denied, 539 U.S. 958, 123 S.Ct. 2641, 156 L.Ed.2d 656 (2003). Quicken and Title Source contend that these cases reaffirm their position that Section 8(b) is only applicable when the challenged fees are split or shared.

Further, Quicken and Title Source contend that the Plaintiffs have not alleged any specific contractual provisions that were breached in connection with their loans. First, Title Source argues that the Plaintiffs have not alleged any facts identifying any written or oral contract with Title Source. Next, Quicken argues that the various notes and related mortgage agreements are the only controlling contracts in this case. As such, the loan discount and appraisal fees were conditions of and prerequisites to the loans received by the Plaintiffs. Further, Quicken contends that the Plaintiffs have not and cannot point out any terms of the notes and mortgage agreements that Quicken breached in connection with their loans. Thus, Quicken argues that summary judgment on the Plaintiffs' contract claims is appropriate.

Additionally, Quicken and Title Source argue that the Plaintiffs' claims based on the theory of "payment of a thing not owed" are subject to summary dismissal. Very simply, Quicken and Title Source assert that both the loan discount and appraisal fees *were in fact owed* as conditions to and prerequisites of Quicken's

extension of credit to the Plaintiffs, as well as in compensation for appraisal services rendered by Title Source.

Finally, Quicken and Title Source argue that the Louisiana Credit Agreement Statute ("LCAS"), La.Rev.Stat. Ann. § 6:1122, bars the Plaintiffs' claims because those claims are not based on any alleged agreement *contained in the written note and mortgage documents.* See *Jesco Constr. Corp. v. NationsBank Corp.,* 830 So.2d 989, 990-92 (holding that "[t]he Louisiana Credit Agreement Statute precludes all actions for damages arising from oral credit agreements, regardless of the legal theory of recovery asserted," and, thus, the statute barred all of plaintiffs' claims, including those for breach of contract, detrimental reliance, negligent misrepresentation, unfair trade practices, breach of the duty of good faith and fair dealing, promissory and equitable estoppel, and breach of fiduciary duty); see also *King v. Parish Nat'l Bank,* 2004-0337 (La.10/19/04); 885 So.2d 540, 542-48. Quicken and Title Source assert that the Plaintiffs' claims are "exactly what the [CAS] is intended to prevent-a claim by a borrower disputing the terms of the loan that is not based on any written contractual provision."

As for the Plaintiffs' unjust enrichment claims, Quicken and Title Source argue that the Plaintiffs have failed to present any evidence on two essential elements of an unjust enrichment cause of action. See *Finova Capital Corp. v. IT Corp.,* 774 So.2d 1129, 1132 (La.App. 2 Cir. 12/15/00) (describing the five elements of an unjust enrichment claim: 1) there must be an enrichment; (2) there must be an impoverishment; (3)

there must be a connection between the enrichment and the resulting impoverishment; (4) there must be an absence of "justification" or "cause" for the enrichment and impoverishment; and (5) there must be no other remedy at law available to the plaintiff). Specifically, Quicken contends that the Plaintiffs have not shown an absence of justification or cause for the discount fees, which were disclosed as a component of the pricing of the Plaintiffs' loans to allow comparisons of the costs of Quicken's loan and those of other lenders. Further, Title Source argues that the appraisal fee was charged in return for its efforts in locating and contacting appraisers, scheduling appointments, reviewing appraiser reports, etc. in connection with the Plaintiffs' mortgage loans from Quicken. See Eisenshtadt Affidavit, Rec. Doc. 29-7. As such, Quicken and Title Source argue that the loan documents provide the legal cause for payment of the fees, and thus an unjust enrichment claim is inappropriate as a matter of law. Furthermore, Quicken and Title Source point out that the Plaintiffs have other remedies at law, as evidenced by their RESPA, breach of contract, and "payment of a thing not owed" claims in all three petitions at issue.

B. The Plaintiffs' Opposition

The Plaintiffs have filed a joint opposition memorandum in response to Quicken and Title Source's motions. First of all, the Plaintiffs point out that Quicken makes no argument that the Plaintiffs were *actually given a loan discount in return for the fees paid.* The Plaintiffs suggest that this amounts to an admission that the Plaintiffs *did not receive a corresponding discount for the fee paid.* Next, the

Plaintiffs note that despite Quicken and Title Source's argument that courts have consistently interpreted claims under Section 8(b) as requiring some fee splitting arrangement, both the Second and Eleventh Circuits have held that a single service provider can violate Section 8(b). See *Cohen v. JP Morgan Chase & Co., Inc.,* 498 F.3d 111, 113 (2nd Cir.2007) (holding that single lender can violate Section 8(b) by imposing charge for which no services were provided based on language of statute and *Chevron* deference to HUD statement of policy); *Sosa v. Chase Manhattan Mortg. Corp.,* 348 F.3d 979, 981 (11th Cir.2003) (holding that Section 8(b) can be violated by single settlement service provider). The Plaintiffs also note that Quicken failed to mention that the fee-splitting issue under Section 8(b) is again before the Eleventh Circuit in a case in which Quicken is itself a named defendant. *Wooten et al v. Quicken Loans, Inc.,* Appeal No. 08-11245 (11th Cir.2008). Furthermore, the Plaintiffs note that HUD has issued a statement of policy reaffirming its "long standing" position that *any unearned fees* are improper under RESPA. Real Estate Settlement Procedures Act Statement of Policy 2001-1, 66 Fed.Reg. 53,053, 53,053 (Oct. 18, 2001) (hereinafter "the 2001 HUD SOP"). Based on the 2001 HUD SOP and the disagreement among the circuits regarding the requirement of a fee-splitting arrangement under Section 8(b), the Plaintiffs argue that Quicken's motion must be denied as it relates to Plaintiffs' claims based on the loan discount fees.

As for the Plaintiffs' claims regarding the appraisal fees, Plaintiffs contend that they have in fact alleged that the $80 appraisal services fee *may have been* split between Quicken and Title Source. The

Plaintiffs have attached the Affiliated Business Arrangement Disclosures that they all received in connection with their loans from Quicken. See Rec. Docs. 38-12-14. These disclosures indicate that Quicken and Title Source are owned by the same company (Rock Holdings, Inc.) and that Quicken has a business relationship with Title Source that may provide a benefit to Quicken as a lender. In addition, the disclosures note that Quicken and Title Source operate at the same address in Livonia, Michigan. The Plaintiffs argue that these disclosures alone present an issue of material fact as to whether the appraisal fee was split between Quicken and Title Source that precludes summary judgment. See *Szezubelek v. Cendant Mortg. Corp.*. 215 F.R.D. 107 (D.N.J.2003) ("Whether the 'appraisal management services' performed by [appraisal service company] was bona fide, as Defendants argue, or a mere duplication of work, the position urged by Plaintiffs, creates a genuine issue of material fact making summary judgment inappropriate.").

Finally, the Plaintiffs distinguish the cases cited by Quicken and Title Source for the proposition that RESPA is not a price-control statute by noting that their claims do not assert mere overcharges by Quicken and Title Source, but rather involve claims for charges that do not correspond to any services rendered.

The Smiths specifically address their opposition to Quicken and Title Source's motion, given the fact that they were charged a loan *origination* fee according to their HUD-1 Settlement Statement, as opposed to a loan *discount* fee as was charged to the other

Plaintiffs. First, the Smiths argue that if the amount charged was a loan *origination* fee, which Quicken's website describes as essentially an administrative fee for compiling ans packaging loan documents, then the fee violated RESPA because no work, or merely nominal or duplicative work, was performed in connection with the loan *origination* and loan *processing* fees. However, if the *origination* fee was in fact charged as a *discount* fee-which fact the Smiths assert has only recently been disclosed in a *footnote* to Quicken's memoranda in support of its present motion *nearly two years* after the Smiths' loan was closed-then Quicken has essentially admitted a per se RESPA violation because the HUD-1 Settlement Statement incorrectly identified the basis for the $5,107 .44 fee. Finally, even if the fee was a *discount* fee, the Smiths' argue that their case is essentially the same as the Freemans' and Bennetts' case in that the alleged discount fee did not result in any reduction in interest rate on their loan. As such, regardless of whether the fee was an *origination* or *discount* fee, the Smiths argue that there is a material question of fact as to whether the fee was proper under Section 8(b) of the RESPA.

Based on the validity of their RESPA claims as outlined above, the Plaintiffs argue that their Louisiana contract claims are also viable. Despite Quicken's argument that the Plaintiffs have not alleged the breach of any provisions of the governing note and mortgage documents, the Plaintiffs cite the "Loan Charges" section, which appears in both the notes and mortgages executed by the Plaintiffs. This section provides in pertinent part that the "[l]ender may not charge fees that are expressly prohibited by ...

Applicable Law," which is defined as "all controlling applicable federal, state and local statutes, regulations ... and administrative rules and orders ... as well as all final, non-appealable judicial opinions." See Rec. Docs. 38-4, -6, & -8. Based on this provision, the Plaintiffs contend that because RESPA governed their notes and mortgages, the violations of RESPA alleged in their complaints constituted a breach of the "Loan Charges" section of those contracts. As such, the Plaintiffs assert that they have, in fact, alleged the breach of express provisions of the notes and mortgages via their allegations of RESPA violations.

Relatedly, the Plaintiffs reiterate that Quicken has essentially admitted in its briefing that no reduction in interest rates was provided in return for the discount fee charged. Further, the Plaintiffs contend that various documents provided by Quicken reveal that no interest rate discount was ever contemplated in return for the discount fees. Specifically, the Plaintiffs point out that line 802 of the Bennett and Freeman HUD-1 Settlement Statements indicate that they paid discount points, but the corresponding entry for "bought down rate" on the Underwriting Analysis Reports for their loans was zero. See Rec. Docs. 38-9 & -10, -23 & -32. The same is true for the Smiths' HUD-1 Settlement Statement and analysis reports, assuming that their origination fee was in fact a discount fee. See Rec. Doc. 38-33. Additionally, this same zero "bought down rate" appears in the Uniform Underwriting and Transmittal Summaries that Quicken completed in an apparent effort to sell the Plaintiffs loans. See Rec. Docs. 38-39 & -40. Further, the Plaintiffs argue that they did not have the option to decline these discount fees. Rather, the Plaintiffs

assert that the fees were charged as an unspecified and undisclosed component of the loan pricing, and/or were misrepresented or unlisted on their HUD-1 Statements, all in violation of RESPA. Either way, Plaintiffs argue that the discount fees violate RESPA, whether they were improper charges for a non-rendered discount service, or misrepresentations of proper pricing components in the guise of discount fees.

As for their contract claims against Title Source, Plaintiffs dispute Title Source's argument that they have not identified any binding contract between the Plaintiffs and Title Source. Rather, the Plaintiffs contend that the business relationship between Quicken and Title Source, as well as the fact that the Plaintiffs were *required* to use Title Source (d/b/a TSI Appraisal Services, Inc.) under the terms of the Quicken mortgage contract, imputes the contractual privity between the Plaintiffs and Quicken to Title Source.

The Plaintiffs also assert that they have established a claim for payment of a thing not owed under Louisiana law. Specifically, the Plaintiffs argue that the present record indicates that Quicken and Title Source charged loan discount, origination, processing, and/or appraisal fees for services that were never provided.

Additionally, the Plaintiffs assert that their unjust enrichment claim should not be dismissed on summary judgment because no legal cause or justification exists for the fees charged by Quicken and Title Source and because unjust enrichment may eventually be their

only basis for a claim. The Plaintiffs reiterate that Quicken has essentially admitted that the discount fees did not correspond to any actual interest rate discount, and has instead asserted that the discount fee was a built-in component of loan pricing. As noted earlier, the Plaintiffs argue that the discount fees were either unearned, or misrepresented on their HUD-1 Settlement Statements in violation of RESPA. Further, the Plaintiffs assert that loan discount points can *only* be reasonably construed under industry, HUD, and Quicken's own definitions as *optional* charges to reduce interest rates, and cannot be characterized as built-in, predetermined components of loan pricing. As such, Plaintiffs contend that their unjust enrichment claims should not be subject to summary judgment.

Finally, the Plaintiffs contend that the CAS does not preclude their claims because none of their claims are based on *oral* agreements, and the CAS applies solely to bar claims based on oral credit agreements. See *Jenco Constr. Corp v. NationsBank Corp.,* 830 So.2d 989, 990-92 ("[T]he [CAS] precludes all actions for damages arising from oral credit agreements.").

C. Quicken and Title Source's Reply

In reply, Quicken and Title Source have filed two essentially identical briefs in further support of their motions for summary judgment on the Freeman/Bennett and Smith claims. As an initial matter, Quicken and Title Source argue that the Plaintiffs have not presented any competent summary judgment evidence to refute the assertions in the various affidavits submitted in support of the present

motions. Specifically, Quicken argues that the Smiths have not presented any evidence, other than their bare reference to their HUD-1 Settlement Statement, which admittedly incorrectly refers to the loan *discount* fee as a loan *origination* fee, to refute the affidavit of Michael Lyon that the charge was in fact a discount fee. Furthermore, Quicken and Title Source argue that none of the Plaintiffs have refuted the Lyon Affidavit's assertion that the loan discount fees were not split. While the Plaintiffs refer to certain documents that *may* reveal a splitting of certain portions of the discount fee,[9] Quicken and Title Source argue that this is pure speculation. In addition, to the extent that the Plaintiffs request additional discovery on this issue,[10] this request is improper under Rule 56(f) of the Federal Rules of Civil Procedure. Finally, Quicken argues that the Plaintiffs have failed to present any summary judgment evidence to refute the Lyon Affidavit's assertion that the discount fees were conditions of and prerequisites to their loans.

As for the appraisal fees, Title Source argues that the Plaintiffs have failed to present any summary judgment evidence to refute the affidavits submitted by Quicken and Title Source that the appraisal fees were not split. Further, Title Source contends that the

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[9] See Rec. Docs. 38-20, -24, -32, which reference a "premium" that the Plaintiffs allege *may* refer to a portion of the loan discount fee that *may* have been split with a third-party transferee to whom their loans were sold immediately after closing. See Rec. Doc. 38-1, Statement of Contested/Uncontested Facts for Freeman and Bennett Plaintiffs, at ¶¶ 4 & 12.

[10] This request appears in paragraphs 4 and 12 of the Plaintiffs' Statement of Uncontested Material Facts. See Rec. Doc. 38-1, ¶¶ 4, 12.

Plaintiffs' reliance on the business relationship between Quicken and Title Source as a basis for its argument that the appraisal fees were split is not *evidence* to defeat summary judgment. Likewise, Title Source argues that the Plaintiffs have not presented any competent evidence to refute the Eisenshtadt Affidavit that appraisal services were actually rendered in return for the appraisal fee. Finally, Title Source disputes the Plaintiffs' argument for contractual privity with Title Source by way of their contract with Quicken. Title Source argues that, despite the Plaintiffs' unsupported speculations, it is a completely separate corporate entity from Quicken, and thus the Plaintiffs' strained privity of contract argument fails because it improperly attempts to pierce the corporate veil of Title Source.

Quicken also responds to the Plaintiffs' argument regarding the circuit split with respect to whether Section 8(b) of RESPA allows for claims in non-fee splitting situations. First, Quicken contends that the Plaintiffs misconstrue the loan discount fee (and the processing fee in the Smiths' case) as an unearned *settlement* service governed by RESPA. In this context, Quicken notes the Plaintiffs' reliance on *Wooten,* a case currently pending before the Eleventh Circuit in which Quicken is a defendant. The district court in *Wooten* dismissed the plaintiffs' claims under Section 8(b) of the RESPA based on loan discount fees charged by Quicken in connection with the plaintiffs' mortgage loans. 2008 WL 687379 (S.D.Ala. Mar.10, 2008). The *Wooten* court found that the loan discount fees were not settlement services as defined by RESPA, and thus could not form the basis of a Section 8(b) violation. Thus, Quicken argues that the

Plaintiffs' RESPA claims based on their loan discount fees fail under *Wooten* because loan discount fees are not fees for settlement service under RESPA.

Nonetheless, Quicken goes on to argue that even if loan discount fees are fees for settlement services subject to RESPA constraints, Plaintiffs are incorrect in their assertion that "discount points" may only be charged in connection with an actual interest rate reduction. To the contrary, Quicken points out that its website indicates that discount points are only "generally" linked to interest rates, and further notes that the Sixth Circuit has held that the term "loan discount" has several differing definitions. *Vandenbroeck v. Commopoint Mortg. Co.,* 210 F.3d 696, 702 (6th Cir.2000) abrogated on other grounds by *Bridge v. Phoenix Bond & Indem. Co.,* 553 U.S. 639, ---, 128 S.Ct. 2131, 2137, 170 L.Ed.2d 1012 (2008).

Finally, Quicken argues that Plaintiffs have misconstrued the holdings of the *Sosa* and *Cohen* decisions. Quicken contends that courts have characterized claims under Section 8(b) for only four types of settlement fees: (1) split fees; (2) markups; (3) overcharges; and (4) undivided, unearned fees. Quicken notes that the Plaintiffs have only asserted claims that the loan discount and appraisal fees were split, and/or that the loan discount fees were unearned fees charged by and paid to Quicken.

Quicken argues that the Plaintiffs' reliance on the Eleventh Circuit's opinion in *Sosa* is inappropriate because that case concerned a *markup* claim, not a split or unearned fee claim. *Sosa,* 348 F.3d at 983. Further, Quicken notes that the *Sosa* court affirmed

the dismissal of the plaintiff's markup claims for failure to allege that the lender did not render *any services at all* corresponding with the alleged markup. *Id.* Thus, because *Sosa* did not address the situation in which a lender charges an entirely unearned fee, Quicken argues that *Sosa* is irrelevant on the question of whether the "portion, split, or percentage" language of Section 8(b) applies to an entirely unearned fee retained solely by a lender.

Likewise, Quicken argues that the Plaintiffs' reliance on the Second Circuit's decision in *Cohen* is misplaced. First, Quicken acknowledges that the *Cohen* decision did recognize a Section 8(b) claim for allegedly unearned settlement service fees retained by a lender. However, Quicken asserts that the Plaintiffs in this case cannot establish that Quicken did not provide any services in connection with the loan discount fees charged. Furthermore, Quicken argues that the *Cohen* decision was improperly decided and should not be followed. Quicken notes that the *Cohen* decision relied on the 2001 HUD SOP to determine whether the "portion, split, or percentage" language of Section 8(b) allows for claims based on an allegedly unearned, unsplit fee. The *Cohen* court initially noted that the language of Section 8(b), as well as its legislative history, contemplates only claims based on fee splitting in the context of federally related mortgage loan settlements. 498 F.3d at 122-23. Nonetheless, the *Cohen* court found that the language of Section 8(b) was ambiguous and thus subject to HUD's agency interpretation for clarification. *Id.* at 120. Quicken argues that the *Cohen* court improperly deferred to the 2001 HUD SOP and utilized unreliable principles of statutory interpretation to conclude that

Section 8(b) applies to unearned fees that are not split. Quicken argues that the *Cohen* court improperly applied the principles of *Chevron* deference to an agency's interpretation of a statute, because the 2001 HUD SOP created ambiguity in RESPA where none existed. Quicken further notes that several other courts have rejected the interpretation of the 2001 HUD SOP and held that Section 8(b) only allows claims in the context of fee splitting. See *Santiago,* 417 F.3d 387; *Kruse,* 383 F.3d at 57; *Krzalic,* 314 F.3d at 881; *Boulware v. Crossland Mortgage Corp.,* 291 F.3d 267.

In the end, Quicken argues that the allegedly unearned fees were simply an amount retained as loan-related fees and the lender's income on the loan. To the extent that the 2001 HUD SOP attempts to expand RESPA's reach beyond the realm of fee splitting protections and into the area of price regulation and control, Quicken argues that the agency's interpretation is inconsistent with the congressional purposes in enacting RESPA, and thus should not be accorded any deference. Further, Quicken argues that *Cohen* is ultimately inapplicable because the Plaintiffs cannot show that the discount fees were unearned. Rather, as proven in the affidavits submitted by Quicken, the discount fees were prerequisites to the Plaintiffs' receiving their loans on the terms and at the specified rates that they agreed to. Additionally, these affidavits prove that the discount fees were not split with any other party. Finally, Quicken argues that the discount fees can only be characterized, if they are at all inappropriate, as overcharges, which courts have consistently held are not actionable under Section 8(b). See *Patino v.*

Lawyers Title Ins. Corp., 2007 WL 4687748, *3 (N.D.Tex. Jan.11, 2007) (collecting cases). Thus, Plaintiffs' claims are inappropriate under any of the viable Section 8(b) grounds.

As a final note, Quicken argues that, to the extent the Plaintiffs base their claims on the alleged misrepresentation of the loan discount fees in the HUD-1 Settlement Statements, no private right of action exists under RESPA for an inaccurate settlement statement. Further, Quicken argues that because Plaintiffs' breach of contract claims regarding the discount fees are admittedly dependent on the validity of their RESPA claims, the breach of contract claims should be dismissed. Likewise, Title Source argues that because Plaintiffs' breach of contract claims regarding the appraisal fees are based solely on the theory that Quicken and Title Source are the same entity, those claims should also be dismissed. Finally, Quicken and Title Source argue that the Plaintiffs' "payment of a thing not owed" and unjust enrichment claims fail because the discount and appraisal fees *were* in fact owed and justified, either as prerequisites of the loan (e.g. the discount fee) or in return for appraisal services rendered. Furthermore, Quicken again argues that the CAS bars plaintiffs' claims on these grounds, because Plaintiffs have failed to cite any *written* agreement in which Quicken agreed to lower their interest rate in return for the discount fees.

DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir.1994) (citing Fed. R. Civ. Proc. 56(c)). The moving party bears the initial burden of demonstrating to the court that there is an absence of genuine factual issues. *Id.* Once the moving party meets that burden, the non-moving party must go beyond the pleadings and designate facts showing that there is a genuine issue of material fact in dispute. *Id.* "A factual dispute is 'genuine' where a reasonable jury could return a verdict for the non-moving party. If the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, then there is no genuine issue for trial and summary judgment is proper." *Weber v. Roadway Exp., Inc.,* 199 F.3d 270, 272 (5th Cir.2000) (citations omitted). The non-moving party's burden "is not satisfied with 'some metaphysical doubt as to the material facts,' by 'conclusory allegations,' by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence. [The courts] resolve factual controversies in favor of the nonmoving party, but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts. *[The courts] do not, however, in the absence of any proof, assume that the nonmoving party could or would prove the necessary*

facts." Little, 37 F.3d 1075 (emphasis in original) (citations omitted).

B. Section 8(b) of RESPA and the Circuit Split

The Plaintiffs have asserted claims under Section 8(b) of RESPA, which in turn form the foundation of their Louisiana state law contractual claims. As such, the applicability vel non of Section 8(b) to the Plaintiffs' claims is the crux of this matter.

Section 8(b) of RESPA, entitled "Splitting Charges," provides that "[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed." 12 U.S.C. § 2607(b). The term "settlement service" includes:

> **any service provided in connection with a real estate settlement** including, but not limited to, the following: title searches, title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus inspections, services rendered by a real estate agent or broker, the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding

> of loans), and the handling of the processing, and closing or settlement

12 U.S.C.A. § 2602(3) (emphasis added).

When RESPA was first enacted in 1974, Congress specifically indicated several problems that the act was intended to address in the context of the real estate settlement process. One of these general problems was the "[a]busive and unreasonable practices within the real estate settlement process that increase settlement costs to home buyers without providing any real benefits to them." S.Rep. No. 93-866 as reprinted in 1974 U.S.C.C.A.N. 6546, 6547 (hereinafter "RESPA Senate Report"). To solve this problem, Congress enacted Section 8(b)

> to prohibit all kickback or referral fee arrangements whereby any payment is made or 'thing of value' furnished for the referral of real estate settlement business. The section also prohibits a person or company that renders a settlement service from giving or rebating any portion of the charge to any other person except in return for services actually performed.

Id. In fact, the general statement of purpose for RESPA indicates that the act was broadly intended to protect consumers "from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country." 12 U.S.C. § 2607(a). Despite the fact that Section 8(b) speaks primarily in terms of situations in which two or more parties split or share a fee, whether unearned or only

partially earned, several circuit courts have split on the issue of whether Section 8(b) provides a claim in a situation where a *single* settlement services provider retains unearned fees. The circuit split hinges on two pieces of language from Section 8(b): (1) "[n]o person shall give and no person shall accept"; and (2) "any portion, split, or percentage of any charge." 12 U.S.C. § 2607(b).

Complicating this circuit split is the 2001 HUD SOP, which identifies four types of settlement service fees that, according to the agency, give rise to Section 8(b) violations:

> (1) For **two or more** persons to **split** a fee for settlement services, any portion of which is unearned; or (2) for **one** settlement service provider to **mark-up** the cost of the services performed or goods provided by another settlement service provider without providing additional actual, necessary, and distinct services, goods, or facilities to justify the additional charge; or (3) for **one** settlement service provider to charge the consumer a fee where **no, nominal, or duplicative work** is done, or the fee is in **excess of the reasonable value of goods** or facilities provided or the services actually performed.

2001 HUD SOP 66 Fed.Reg. 53,053, 53,059 (emphasis added). The 2001 HUD SOP goes on to state that "[i]n HUD's view, Section 8(b) forbids the paying or accepting of any portion or percentage of a settlement service-including up to 100%-that is unearned, **whether the entire charge is divided or split**

among more than one person or entity or is retained by a single person." *Id.* (emphasis added).

The 2001 HUD SOP was issued in response to the Seventh Circuit's ruling in *Echevarria v. Chicago Title and Trust* Co.,256 F.3d 623, 627 (7th Cir.2001), which held that Section 8(b) claims must include an allegation of some splitting or sharing of the challenged charges notwithstanding the language of HUD's so-called "Regulation X" and other agency materials. *See Id.* at 53,052. Regulation X, codified at 24 C.F.R. § 3500.14, provides in pertinent part that "[a] charge by ***a person*** **for which no or nominal services are performed** or for which duplicative fees are charged is an unearned fee and violates this [Section 8(b)]." (emphasis added). Thus, Regulation X suggests that a *single entity* can violate RESPA by charging for unperformed or underperformed settlement services. Notwithstanding this provision, the *Echevarria* court noted that the numerous other references to splitting or sharing of fees in Regulation X resulted in ambiguity in the regulation that would not justify overruling of prior Seventh Circuit precedent requiring an allegation of fee splitting for a Section 8(b) claim. *Echevarria,* 256 F.3d at 628. As such, "[a]bsent a formal commitment by HUD to an opposing position, [the *Echevarria* court] decline[d] to overrule [its] established RESPA § 8(b) case law." *Id.* at 630. The 2001 HUD SOP was HUD's attempt at a "formal commitment" to its position that even undivided fees are actionable under Section 8(b). It should be noted, however, that even after the issuance of the 2001 HUD SOP and the continued effectiveness of Regulation X, several courts have determined that

Section 8(b) is simply unambiguous on its face in requiring a split of the challenged fee, and thus the agency interpretations to the contrary are not entitled to any deference under *Chevron* principles. See, e.g., *Haug,* 317 F.3d at 839; *Boulware,* 291 F.3d at 267; *Krzalic,* 314 F.3d at 881.

As is apparent, the 2001 HUD SOP clearly contemplates the possibility of *unilateral* Section 8(b) violations by a settlement services provider, notwithstanding the statutory language suggesting that only multi-party sharing or splitting of fees is governed by Section 8(b). Regardless, courts have derived and analyzed in light of the 2001 HUD SOP the following four distinct categories of fees that may give rise to Section 8(b) violations:

> (1) ***Unearned Split Fees***-These are fees charged by a settlement service provider to a borrower for services performed by a third-party, which are then split between the service provider and the third-party. "The statutory language describes a situation in which A charges B (the borrower) a fee of some sort, collects it, and then either splits it with C or gives C a portion or percentage (other than 50 percent-the situation that the statutory term "split" most naturally describes) of it." *Krzalic v. Republic Title Co.,* 314 F.3d 875, 881 (7th Cir.2002). This is the most basic and clearly contemplated type of prohibited fee scenario contemplated by Section 8(b). However, a claim for fee-splitting under Section 8(b) "must allege that the defendant shared an unearned fee with a third party to the real estate transaction." *Weizeorick v. ABN AMRO Mortg. Group, Inc.,* 337

F.3d 827, 831 (7th Cir.2003). In other words, if the settlement service provider charges an excessive fee for third-party services, but simply retains the overage itself without sharing or splitting that overage with the third-party who rendered the services, no Section 8(b) violation has occurred. This latter scenario would simply constitute an overcharge (see below), and "[t]hose Circuits that have addressed the issue ... universally hold that a bare allegation that a settlement service provider overcharged for its services is insufficient to make out a [Section] 8(b) violation." *Patino v. Lawyers Title Ins. Corp.,* 2007 WL 4687748, *3 (N.D.Tex. Jan.11, 2007) (collecting cases). **The Plaintiffs' have alleged that Quicken and Title Source improperly split the appraisal services fee in this case.**

(2) ***Markups***-Markups are fees charged to a borrower and retained by a settlement service provider for third-party services in excess of the value of those services. The Fourth, Seventh, and Eighth Circuits have held that the text of section 8(b) clearly and unambiguously *does not prohibit* mark-ups based on the "no person shall give and no person shall receive" language of Section 8(b). See *Boulware,* 291 F.3d at 266 (4th Cir.); *Krzalic,* 314 F.3d at 881 (7th Cir.); *Haug,* 317 F.3d at 836. Specifically, these courts have held that Section 8(b) requires both a giver "and" a receiver, and thus applying Section 8(b) to mark-ups would have absurd results because the giver of the marked up fee-the borrower-would be equally culpable under the language of Section 8(b) as the acceptor of the

marked up fee-the lender/settlement service provider. See, e.g., *Boulware,* 291 F.3d at 266.

However, the Second and Eleventh Circuits have held that mark-ups may be actionable under Section 8(b) against a sole lender/settlement service provider who retains the overage of a marked-up fee, *but only if* the plaintiff alleges that the lender/settlement service provider retained the overage without performing *any services whatsoever* to justify its retention. *See Kruse v. Wells Fargo Home Mortg., Inc.,* 383 F.3d 49, 55-57 (2d Cir.2004); *Sosa,* 348 F.3d at 982-83 (11th Cir.). While the Fourth, Seventh, and Eighth Circuits foresaw absurd results if Section 8(b) were held *not* to require at least two actors, the *Sosa* court found just the opposite that "[e]xtending liability only if there were both a culpable giver and acceptor of an unearned fee would lead to irrational results." *Sosa,* 348 F.3d at 983. Specifically, one provider could decide to give a kickback to another, who then refused to accept the kickback. *Id.* Under the other circuits' position, this would not result in a Section 8(b) violation because there was not both a giver and an acceptor. *Id.* The Plaintiffs in this case have not alleged any RESPA violations for marked up settlement service charges, but an understanding of the circuit-split on the issue of mark-ups under Section 8(b) is essential to the analysis in this case.

(3) ***Unearned, Undivided Fees***[11]-These are fees charged to the borrower by a single lender/service provider for which no correlative service is performed. The only court to address this very specific type of fee in the context of Section 8(b) was the Second Circuit in *Cohen v. JP Morgan Chase & Co., Inc .,* which is discussed at length below. 498 F.3d 111 (2d Cir.2007). The *Cohen* court, relying on the 2001 HUD SOP and the conclusion in *Kruse* that Section 8(b) does allow claims against single settlement service providers, held that "RESPA [Section] 8(b) ... prohibit[s] 'one service provider' from charging the consumer a fee for which 'no ... work is done." *Id.* at 126. **The Plaintiffs have alleged in this case that Quicken improperly retained the loan discount fees and/or loan origination and processing fees (viz. The Smiths) as unearned, undivided fees.**

(4) ***Overcharges***-These are charges "in excess of the reasonable value" of the actual services provided that are nonetheless retained by a single lender/settlement service provider. As noted above, every court to address Section 8(b) claims for overcharges has held that RESPA does not allow such claims. Specifically, RESPA is not intended to function as a price-fixing statute that dictates the "reasonable" value of loan settlement services. *Kingsberry v. Chicago Title Ins. Co.* 586 F.Supp.2d

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[11] This category is derived from the language in the 2001 HUD SOP indicating that a Section 8(b) violation will arise where **"one** settlement service provider [charges] the consumer a fee where **no, nominal, or duplicative work** is done."

1242, 1247 (W.D.Wash.2008) ("Congress did not intend to use RESPA as a means of fixing [the] rates for real estate settlement charges[.]") (citations omitted). In other words, "nothing in [the statutory] language authorizes courts to divide a 'charge' into what they or some other person or entity deems to be its 'reasonable' and 'unreasonable' components." *Kruse,* 383 F.3d at 56. Rather, "[w]hatever its size, such a fee is 'for' the services rendered by the institution and received by the borrower." *Id.* The Plaintiffs in this case have not asserted claims based on alleged overcharges. See Rec. Doc. 38, p. 11.

i) The Circuits that have Allowed Section 8(b) Claims for Undivided Fees

As noted above, the Second and Eleventh Circuits have held that Section 8(b) does provide a cause of action when a single settlement service provider retains unearned fees in connection with a federally related mortgage loan.

a) *Cohen v. JP Morgan Chase & Co., Inc.* (2d Cir.2007)

In *Cohen v. JP Morgan Chase & Co., Inc.,* the court held that the plaintiff could maintain a Section 8(b) action based on a $225 "post-closing" fee that was allegedly retained by the home mortgage refinancing lender without any corresponding services rendered. 498 F.3d 111, 113 (2d Cir.2007). The district court in *Cohen* had dismissed the plaintiff's case for failure to state a claim based on the lack of any allegation that the challenged fee was split between the lender and

any other party, as well as the district court's finding that the fee at issues was analogous to a non-actionable overcharge under the Second Circuit's decision in *Kruse v. Wells Fargo Home Mortg., Inc.,* 383 F.3d 49, 55-57 (2d Cir.2004). The *Cohen* court's analysis proceeded under the principles of *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), and its progeny.

Initially, the *Cohen* court distinguished the fees in *Kruse* from those at issue in *Cohen.* Specifically, the *Cohen* court noted that the *Kruse* decision only invalidated claims under Section 8(b) based on *overcharge* fees. *Id.* at 114. Thus, because the plaintiff's claims in *Cohen* were not based on an *overcharge* as in *Kruse,* but were rather based on *unearned, undivided* charges, the *Cohen* court held that the district court's reliance on *Kruse* in its dismissal of the plaintiff's claims was inappropriate. The *Cohen* court cited the 2001 HUD SOP as the basis for its distinction of the *Kruse* case, noting that the 2001 HUD SOP indicates that a claim based on an unearned, undivided fee will lie under Section 8(b). *Id.* (quoting the 2001 HUD SOP, 66 Fed.Reg. 53,053, 53,059). The *Cohen* court noted that while the *Kruse* case held that the 2001 HUD SOP was contrary to the plain meaning of Section 8(b) with respect to *overcharge* fees, it left open the question as to whether the agency's statement correctly interpreted Section 8(b) with respect to *unearned, undivided* fees. *Id.* at 115.

The *Cohen* court went on to note that while *Kruse* rejected the 2001 HUD SOP's position regarding

overcharge fees, it also accepted another crucial aspect of the 2001 HUD SOP. Specifically, the *Kruse* court held that Section 8(b) was ambiguous with respect to its coverage of claims based on *marked-up* fees. *Id* . (citing *Kruse,* 383 F.3d at 58). Accordingly, the *Kruse* court accepted the 2001 HUD SOP's policy statement that essentially allows for a claim based on settlement service fee markups, even when the markups are retained solely by the lender and are not split with third-party service providers whose service charges were marked up by the lender. See *Kruse,* 383 F.3d at 61-62. The *Cohen* court noted that this ruling in the *Kruse* decision was based on a finding of ambiguity in Section 8(b)'s use of the phrase "[n]o person shall give **and** no person shall accept," which the Fourth, Seventh, and Eighth Circuits had held to be unambiguous in requiring both a culpable giver *and* acceptor of a challenged fee. *Cohen,* 498 F.3d at 115 n. 3. In other words, the *Kruse* court held contrary to those other circuits that a single service provider may be liable under Section 8(b) for marking up settlement service fees even when the markup is not shared with a third-party. In addition, the *Cohen* court noted that *Kruse* relied on the Eleventh Circuit's ruling in *Sosa* to support its opinion that a Section 8(b) claim may lie against a sole service provider who charges and retains a marked up fee. *Id.* Thus, despite the difference in the types of fees addressed by the *Kruse* court, the *Cohen* court followed the *Kruse* court's precedent that Section 8(b) *can* apply to individual settlement service providers, as indicated in the 2001 HUD SOP, due to the ambiguity of the statute.

Based on this precedent that a single service provider can be liable for Section 8(b) violations, the

Cohen court addressed whether a single service provider could be liable under Section 8(b) for charging fees for which no services were provided. Initially, the *Cohen* court found that the "any portion, split, or percentage of any charge" language of Section 8(b) is ambiguous as to whether its restrictions apply to undivided, unearned fees. *Id* . at 117. The court recognized that "[b]ecause the words 'portion,' 'split,' and 'percentage' are commonly understood to reference things that have been divided and that are less than a whole, their use together in RESPA § 8(b) could plausibly be understood to signal a legislative intent to prohibit unearned fees *only when reflected in divided charges.*" *Id.* at 117. However, the *Cohen* court went on to note that the *context* of Section 8(b) supports a conclusion that even undivided, unearned fees should be regulated under the statute. First, the court noted that use of the word "any" generally indicates Congress's intent that the statute sweep broadly. *Id.* at 117-118. Next, the *Cohen* court noted that while the Fourth, Seventh, and Eighth Circuits have all held that division of the challenged fee is necessary for a Section 8(b) claim, those holdings were in the context of the phrase "[n]o person shall give and no person shall accept", which those courts held to require at least two actors for a Section 8(b) violation. *Id.* at 119. The Second Circuit in *Kruse,* however, rejected this requirement of a culpable giver and acceptor, which itself contemplates division of the challenged charge. *Id.* In the end, the *Cohen* court held that "Congress's serial reference to *'any* portion, split, or percentage of any charge' in § 8(b) can plausibly be construed to demonstrate a legislative intent to sweep broadly,

prohibiting all unearned fees, however structured." *Id.* at 120 (emphasis in original).

Next, the *Cohen* court considered the structure, purpose, and history of Section 8(b) in an attempt to clarify its ambiguity. Initially, as a matter of structure, the court noted that Section 8 is generally entitled "Prohibition against kickbacks and unearned fees," while Section 8(b) is specifically entitled "Splitting charges." *Id.* at 121. Despite the fact that these titles suggest a division requirement, the *Cohen* court held that the structure of Section 8 does not clarify the ambiguity in the phrase "any portion, split, or percentage of any charge." *Id.* In terms of the purpose of Section 8, the *Cohen* court noted that the purpose statement of RESPA does not specifically address undivided fees, and in fact only addresses "kickbacks or referral fees." *Id.* at 122 (citing 12 U.S.C. § 2601(b)). Nonetheless, the court also pointed out that the purpose statement also provides an overall goal of protecting consumers from "abusive practices" that result in "unnecessarily high settlement charges," which further underlines the ambiguity in Section 8(b) on the issue of undivided fees. *Id.* (citing 12 U.S.C. § 2601(a)). Finally, the *Cohen* court pointed out that the RESPA Senate Report, which it described as the "most authoritative[ ]" statement of the act's legislative history, refers exclusively to examples of divided fee scenarios, but nonetheless does not indicate that Congress *conclusively or directly considered and rejected* a provision prohibiting claims for undivided fees. *Id.*

As a result of the remaining ambiguity of the statute after these initial *Chevron* inquiries, and given

Congress's grant of "broad authority" to HUD to administer RESPA, the *Cohen* court moved on to the second *Chevron* step of considering whether the 2001 HUD SOP reasonably construes Section 8(b) to apply to undivided, unearned fees. *Id.* at 124. First, the court noted that HUD has, since the first 1976 edition of its consumer information booklet, consistently indicated that it is illegal "to charge or accept a fee or part of a fee where no service has actually been performed." *Id.* at 125 (citations omitted). As such, and based on its finding that the 2001 HUD SOP is reasonable in its conclusion that an unearned, undivided fee is actionable under Section 8(b), the *Cohen* court reversed the Rule 12(b)(6) dismissal of the plaintiff's claims under RESPA, as well as her state law claims, which were contingent on the alleged RESPA violations. *Id.*

b) *Sosa v. Chase Manhattan Mortgage Corp.* (11th Cir.2003)

The Eleventh Circuit in *Sosa* addressed the district court's dismissal under Rule 12(b)(6) of the plaintiff's Section 8(b) 39 claims based on a $50 fee for courier services. 348 F.3d at 981. The plaintiff alleged that the defendant mortgage lender paid part of the $50 fee to a courier services for work performed, but retained the rest of the fee although it did not make any deliveries itself. *Id.* The *Sosa* court initially considered the history of Section 8, noting that the RESPA Senate Report indicated an intent to curtail kickbacks as well as fees for which no services were provided. *Id.* The court then discussed the structure of Section 8, noting that Section 8(a), which prohibits referral fee arrangements, and 8(b), which "attempts

to close any loopholes" by precluding fees except for services actually performed, combine to "create a broad prohibition against fees that serve solely to increase the cost of settlements to consumers." *Id.* at 982. Based on these factors, the *Sosa* court rejected the district court's conclusion that Section 8(b) can only be violated when two culpable parties split an unearned fee, rejecting the Fourth and Seventh Circuit's holdings in *Boulware* and *Krzalic. Id.* at 982. The *Sosa* court held that the phrase "[n]o person shall give and no person shall receive" allows for *either* a giver *or* a receiver of unearned settlement service fees to be liable under Section 8(b). *Id.* Further, the court rejected the conclusion that allowing an action against a single entity under Section 8(b) would cause the absurd result that a borrower could be liable under the act. The *Sosa* court held that a borrower/consumer will *always,* absent some connivance, pay settlement service fees with the intent that those fees actually be used for the service charged. *Id.* In this case, although the acceptor might be liable for accepting an unearned fee, the borrower/giver of the fee would not be liable because he or she would not have given the fee for unearned services. *Id.* Finally, as noted above, the *Sosa* court found just the opposite-that requiring two culpable parties for a Section 8(b) violation could produce the absurd result that if a service provider offered a prohibited unearned fee, but the offeree refused to accept the fee, then the service provider could not be liable because there were not two culpable parties. *Id.*

However, despite its disagreement with the district court's conclusion as to whether a single party can violate Section 8(b), the *Sosa* court nonetheless

upheld the dismissal of the plaintiff's claims. "What [was] missing [was] an allegation that the portion of the charge that [the lender] retained was accepted 'other than for services actually performed,' i.e., that [the lender] performed *no services* that would justify its retention of a portion of the fee." *Id.* at 983. In other words, because the lender had "benefitted the [plaintiff] by arranging for third party contractors to perform the deliveries," which in itself constituted some service rendered, its retention of the extra portion of the $50 fee was not entirely unearned. *Id.* at 984.

c) *Santiago v.GMAC Mortgage Grp.* (3rd Cir.2005)

Finally, the Third Circuit in *Santiago* addressed the plaintiff's claims under Section 8(b) based on alleged mark-ups of tax services and flood certification fees charged by the defendant lender for third-party services, as well as an alleged overcharge for a "funding fee." 417 F.3d at 385. The district court dismissed the plaintiff's claims under Rule 12(b)(6), finding that Section 8(b) only applies to kickbacks and referrals. *Id.* The *Santiago* court upheld the dismissal of the overcharge claims, finding that Section 8(b) plainly does not provide a cause of action for overcharges. *Id.* at 387.

However, as to the mark-up claims, the *Santiago* court held that the language "[n]o person shall give and no person shall receive" is ambiguous in terms of whether an undivided, unearned mark-up may be actionable under Section 8(b). *Id.* at 388-89. However, the court found that the context of Section 8(b)

supports an action against a service provider who unilaterally marks up the costs of third-party services and retains the extra portion of the fee. *Id.* at 389. Specifically, the *Santiago* court noted that the title of Section 8 as a whole is "Prohibitions against kickbacks and unearned fees"; the title of Section 8(a), which prohibits acceptance of "any fee, kickback, or thing of value," is "Business referrals"; and the title of Section 8(b), which prohibits the acceptance of "any portion, split, or percentage of any charge," is "Splitting charges." *Id.* (citing Section 8). Given this context, the *Santiago* court held that if Section 8(b) were applied only to multiple party kickback scenarios, that would render Section 8(a), which specifically applies to kickbacks, redundant. *Id.* As such, the court held that "a reading of Section 8(b) that allows a cause of action for [unilateral] markups is consistent with the title of Section 8 that prohibits both kickbacks and unearned fees." *Id.* Accordingly, the *Santiago* court remanded the case for further proceedings to determine whether the alleged markups charged by the lender defendants were truly nominal, or whether they were charged for some additional services performed by the lenders. *Id.*

ii) The Circuits that have not Allowed Claims for Undivided Fees

The Court's discussion thus far has already indicated the position and to some extent the analysis of those circuit courts that have-unlike the *Cohen, Sosa,* and *Santiago* courts-*rejected* the applicability of Section 8(b) to claims based on undivided fees. However, a brief review of these cases and their holdings will more clearly delineate the circuit split as it exists after the 2001 HUD SOP.

The first appellate court to conclude that Section 8(b) violations require some form of divided or shared fee was the Fourth Circuit in *Boulware.* The plaintiff in *Boulware* alleged that she was charged $65 for a credit report during her loan closing, but that the credit report only cost $15 or less to obtain, and the defendant lender retained the extra $50 without performing any additional services (i.e. a mark-up fee).[12] 291 F.3d at 264. The district court dismissed her claims and putative class claims under Rule 12(b)(6), as well as the Seventh Circuit's decision in *Echevarria. Id.* The *Boulware* court characterized the plaintiffs' action as "claims that [Section] 8(b) ... is a broad price control statute prohibiting any overcharge for credit reports." *Id.* at 263. However, the *Boulware* court held that "[t] he plain language of [Section] 8(b) makes clear that it does not apply to every overcharge for a real estate settlement service and ... is not a broad price-control provision." *Id.* at 265. Further, the court held that "[b]y using the language 'portion, split, or percentage,' Congress was clearly aiming at a sharing arrangement rather than a unilateral overcharge." *Id.* Thus, "the presence of an overcharge alone, without any portion of the overcharge being kicked back to or split with a third party, is not sufficient to fall within the purview of [Section] 8(b)." *Id.* at n. 3. Finally, the *Boulware* court refused to give any deference to the 2001 HUD SOP or Regulation X in the face of the

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[12] Despite the fact that the *Boulware* court spoke in terms of "overcharge" claims, the plaintiff's allegations were actually for an improper mark-up as described above, because the plaintiff did not allege that the credit reporting agency or any other third party received any payment from the defendant lender beyond that owed for the services actually performed. *Id.*

unambiguous language of the statute. *Id.* at 267. Likewise, and in response to the plaintiffs' legislative history/intent argument, the *Boulware* court held that "[n]othing in § 2601 [the RESPA statement of purpose] indicates that [Section] 8 was intended to eliminate all settlement service overcharges," and that instead RESPA was meant only to "prohibit all kickback and referral fee arrangements." *Id.* at 268.

The next circuit opinion to address the applicability of Section 8(b) to undivided fees was the Seventh Circuit's decision in *Krzalic,* which was authored by Judge Posner. The putative class plaintiffs in *Krzalic* alleged that the closing agent in the purchase of their homes charged a $50 fee for mortgage recording, but only paid the county record $36, with the extra $14 retained as a charge other than for services actually performed in violation of Section 8(b) (i.e. mark-up fees). 314 F.3d at 877. Initially, the *Krzalic* court cited *Boulware* as well as its own earlier decision in *Echevarria,* which held that a Section 8(b) violation requires some kickback or two-party fee splitting scheme, and noted that the plaintiffs had not alleged any such divided fee. *Id.* Next, the *Krzalic* court noted that in response to *Echevarria,* HUD issued the 2001 HUD SOP, which purportedly clarified the agency's previously ambiguous position, disagreed with the *Echevarria* court's conclusion, and expressly provided HUD's view that Section 8(b) violations are not "limited to situations where at least two persons split or share an unearned fee." *Id.* (citing the 2001 HUD SOP). Despite the clarification in the 2001 HUD SOP, the *Krzalic* court reaffirmed its holding in *Echevarria* that the plain language of Section 8(b) requires that the

challenged fee be split by at least two parties. *Id.* at 879-880. As such, the *Krzalic* court refused to give any deference to the 2001 HUD SOP, both because the agency statement was unreasonable in the face of Section 8(b)'s unambiguous language and because the 2001 HUD SOP was not the result of any formal notice and comment rulemaking sufficient to trigger *Chevron* deference.

Finally, the Eighth Circuit next took up the issue in *Haug,* which involved putative class claims under Section 8(b) based on settlement service charges for credit reports and other loan services that exceeded the defendant lenders' actual costs for those services. 317 F.3d at 834. The district court denied the defendants' motion to dismiss for failure to state a claim, and the defendants took an interlocutory appeal. *Id.* at 835. The *Haug* court held that Section 8(b) "is an anti-kickback provision that unambiguously requires at least two parties to share a settlement fee in order to violate the statute." *Id.* at 836 (citing *Boulware* and *Echevarria*). Also, the *Haug* court held that "[b]ecause the plain language of Section 8(b) unambiguously requires the giving or receiving of an unearned portion of a settlement fee," the 2001 HUD SOP should not be afforded any deference with respect to its conclusions contrary to the plain language of the statute. *Id.* at 838.

iii) The Fifth Circuit's Lone Statement on Section 8(b)

The Fifth Circuit has not directly addressed the circuit-split outlined above, but has hinted at a position on the issue. In *Knighton v. Merscorp Inc.,* the

Fifth Circuit addressed the district court's dismissal of an MDL based on the plaintiffs' claims that a small fee charged by mortgage lenders, which was then paid to the defendants, violated Section 8(b). 304 Fed. Appx. 285, 286 (5th Cir.2008). The defendants in *Knighton* acted as the permanent mortgagee of record in public land records for multiple loans, which allowed for rights to the various loans to be bought and sold without requiring changes to the land records. *Id.* Amongst other RESPA claims, the plaintiffs alleged that the fee paid to the defendants violated Section 8(b) because the services the defendant company performed as permanent mortgagee in exchange for the fee did not benefit the borrower. *Id.* at 288. The Fifth Circuit considered three separate questions in determining whether dismissal of the plaintiffs' Section 8(b) claims was proper: "(1) was the ... fee a settlement service; (2) **does Section 2607(b) apply to undivided fees;** and (3) were services actually performed?" *Id.* (emphasis added). The *Knighton* court held with respect to the first question that "what [Section 8(b)] prohibits is charging a fee for a settlement service that is not performed." *Id.* With respect to the third question, the court held that "[t]he statute clearly states that the charges cannot be paid other than for services actually performed, but nothing in it implies that the services must benefit the borrower." *Id.* Further, the Fifth Circuit argued that the fee at issue could be construed to benefit borrowers in that the fee facilitates securitization of mortgage loans, which in turn allows more borrowers to obtain such loans. *Id.* Finally, as to the second question, which constitutes the heart of the circuit split, the Fifth Circuit noted that "[t]he statutory language

refers to a split fee or the payment of a percentage of a fee [but] **does not mention undivided fees.**" *Id.* Nonetheless, the *Knighton* court recognized that the *Cohen* court had approved application of Section 8(b) to undivided fees, but in the end refused to analyze the issue on its own. *Id.* Rather, "because the fee was paid in exchange for a service that was actually performed," the *Knighton* court upheld the dismissal.

Furthermore, district courts in the Fifth Circuit have found the reasoning of *Boulware, Haug,* and *Echevarria* persuasive on the issue of whether Section 8(b) requires an allegation of division of the challenged fee. See, e.g., *Patino v. Lawyers Title Ins. Corp.,* 2007 WL 4687748, *5 (N.D.Tex. Jan.11, 2007); *Mims v. Stewart Title Guar.* Co.,521 F.Supp.2d 568, 572 (N.D.Tex.2007). Nonetheless, these courts allowed plaintiffs' claims to proceed beyond Rule 12(b)(6) dismissal due to allegations that the challenged fees had in fact been split.

iv) Pending Appeal Before the 11th Circuit in *Wooten v. Quicken Loans, Inc.*

As noted by the parties, the Southern District of Alabama addressed claims identical to those alleged against Quicken in this case with respect to loan discount fees. Specifically, the plaintiffs in *Wooten* alleged that they entered into loans for which they paid discount fees, or points, without any corresponding discount in their interest rates. 2008 WL 687379 at * 1. In *Wooten,* Quicken filed a motion dismiss under Rule 12(b)(6) based on its arguments that (1) the plaintiffs did not allege any split of the discount fee and (2) loan discount fees are not

"settlement services" within the ambit of Section 8(b). *Id.* The plaintiffs argued that the Eleventh Circuit's ruling in Sosa held that a single party can violate Section 8(b). *Id.* Further, the plaintiffs argued that the definition of settlement services under RESPA was amended in 1992 to include loan discount fees. *Id.* at *5.

The *Wooten* court first addressed the issue of whether a single party can violate Section 8(b). The court held that "*Sosa* [does not stand] for the proposition that an unsplit fee, like the one involved ... in the instant case, can violate section 8(b) of RESPA." *Id.* at *3. First, the *Wooten* court noted that Section 8(b) is entitled "Splitting charges," which "clearly contemplates two actors and the division of a fee and does not regulate the amount that one provider may charge." *Id.* (citing *Boulware* and *Haug*). Furthermore, the court distinguished the fees at issue in *Sosa* from the discount fees charged by Quicken. Specifically, the *Wooten* court noted that *Sosa* involved an alleged fee mark-up, in which the lender marked up the charge for third-party services and retained the mark-up itself. *Id.* at *2. While the *Wooten* court recognized the statement in *Sosa* that a single service provider can violate Section 8(b) by marking up third-party fees, the court also noted that a mark-up scenario *still requires a two-party splitting of fees,* even if only one party (i.e. the lender) is reaping any excess benefit from the mark-up. *Id.* In contrast, the plaintiffs' claims in *Wooten* alleged merely that Quicken and Quicken alone charged an improper fee without rendering any services. *Id.* at 4. The *Wooten* court noted the array of cases that have held that "RESPA is not a price-control act and does not forbid lenders from receiving

excessive charges for the services they provide." *Id.* at 3 (citations omitted). As such, the *Wooten* court held that the plaintiffs' claims that they allegedly received their loans at a higher rate than they should have was not actionable under Section 8(b). *Id.* at 4. Finally, the *Wooten* court rejected the plaintiffs' arguments under the 2001 HUD SOP, noting that "[t]his policy statement has been rejected by a number of courts as contrary to the plain language of Section 8(b)." *Id.* (citing *Santiago, Kruse, Krzalic,* and *Boulware*).

Furthermore, even if an unsplit fee were actionable, the *Wooten* court held that the loan discount fees at the basis of the plaintiffs' claims do not constitute "settlement services" under RESPA. *Id.* Quoting the RESPA definition of "settlement services," the *Wooten* court noted that every example in the definition refers to *actual services* as opposed to an *agreement* to lower interest rates. *Id.* The *Wooten* court also rejected the plaintiffs' argument that the 1992 RESPA amendments, which were enacted in part to expressly include loan origination as a settlement services under RESPA, also cover loan discount fees. *Id.* at *5. The court found that the inclusion of loan origination as a settlement service did not change the definition's requirement that only *service,* not the substantive terms of a loan such as interest rate, are governed by RESPA. *Id.*

As of this date, the *Wooten* decision remains pending on appeal to the Eleventh Circuit in *Wooten et al v. Quicken Loans, Inc.,* Appeal no. 08-11245 (11th Cir.2008).

C. The Plaintiffs' Claims

As an initial matter, the Plaintiffs in this case allege RESPA violations with respect to two, possibly three, types of fees charged by Quicken and/or Title Source:

> (1) **unearned, undivided loan discount fees** charged by Quicken, for which the Plaintiffs allege they received no corresponding services or value;
>
> (2) **split appraisal fees,** which the Plaintiffs allege were charged by and improperly split between Quicken and Title Source;
>
> (3) with respect to the Smiths, **unearned, undivided loan origination** and **loan processing fees,** which the Smiths allege were charged by Quicken for no, nominal, or duplicative work. The Smiths base their claims on the description of the challenged fees in their HUD-1 Settlement Statement. However, as noted earlier, Quicken has presented affidavit testimony that the origination and processing fees listed in the Smiths statement were in fact loan discount fees. Either way, the Smiths allege that the fees were unearned, undivided fees charged in violation of Section 8(b).

Furthermore, and as noted earlier, the Plaintiffs' state law contract claims are contingent on the validity of their RESPA claims. As such, the Court will address the propriety of summary judgment as to the

Plaintiffs' RESPA claims for each of the three alleged fee types.

(1) Loan Discount Fee Claims

The Plaintiffs' claims based on the allegedly unearned, undivided loan discount fees charged by Quicken come in the teeth of the circuit split discussed above. As an initial matter, the Court finds the circuit decisions that have held that Section 8(b) only applies to divided fees to be correct in terms of the plain language of the statute. In other words, the Court agrees that the plain language of Section 8(b) of RESPA *requires* an allegation that the challenged fees have been split in some fashion. Given this finding, the contrary provisions of Regulation X and the 2001 HUD SOP are not entitled to any deference under the principles of *Chevron. Chevron* requires that a court must determine "whether Congress has directly spoken to the precise question at issue," for if congressional intent is clear, both "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). As a result, this Court finds the reasoning of the circuit decisions that have *rejected* claims for unearned and/or undivided fees-*Boulware, Echevarria, Krzalic,* and *Haug*-to be the more well-reasoned decisions on this issue, and agrees with the other district courts in this circuit-*Patino* and *Mims*-that have sided with those decisions in denying claims under Section 8(b) based on undivided fees. Additionally, the Court takes counsel from the Fifth Circuit's acknowledgment in *Knighton* that "the statutory language [of Section 8(b)] refers to

a split fee or the payment of a percentage of a fee **[but] does not mention undivided fees.**" *Knighton,* 304 Fed. Appx. at 288. Accordingly, the Plaintiffs claims based on the loan discount fees charged by Quicken should be dismissed on summary judgment because Quicken is entitled to judgment as a matter of law.

(2) Split Appraisal Fees

The Plaintiffs' claims based on the appraisal fees allegedly split between Quicken and Title Source are not, at least on their face, implicated in the circuit split.[13] Rather, these claims simply allege that Quicken charged an appraisal fee for services provided by Title Source, in excess of the actual costs of those services, which it then split with Title Source. However, both Quicken and Title Source have presented affidavits in support of their motion for summary judgement [sic] that plainly show that the appraisal fees were not split

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[13] To the extent that the Plaintiffs' complaint may be read to include a claim that Title Source unilaterally retained the appraisal fee without providing any services in return for that fee, the Plaintiffs have not addressed that claim in response to Quicken and Title Source's motions for summary judgment, and thus the claim has apparently been abandoned. Regardless, the Eisenshtadt Affidavit unequivocally proves that Title Source did in fact render some appraisal services in return for the fee charged, and the Plaintiffs have not refuted that fact. As such, to the extent that Plaintiffs have alleged that the appraisal fee was an unearned, undivided fee retained by Title Source, that claim has either been abandoned, or should be dismissed on summary judgment. "Crudely put, Section 8(b) addresses the practice of being paid *at all* for doing *nothing,* not the practice of being paid *too much* for doing *something." Morrisette v. NovaStar Home Mortg., Inc.,* 484 F.Supp.2d 1227, 1230 (S.D.Ala.2007).

between Quicken and Title Source. In response to this unequivocal summary judgment evidence, the Plaintiffs have simply presented evidence of a business relationship between Quicken and Title Source that they argue somehow *suggests* the appraisal fees were in fact split. This merely oblique suggestion of a possible business relationship between Quicken and Title Source does not refute the direct summary judgment evidence that indicates the appraisal fees were not shared between Quicken and Title Source.

Finally, to the extent the Plaintiffs seek additional time to conduct discovery on the issue of whether the appraisal fee may have been split between Quicken and Title Source, the request is governed by Rule 56(f) of the Federal Rules of Civil Procedure. This rule provides that "[i]f a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition," the court may deny the motion, continue the motion to allow further discovery, or issue any other just order. Fed. R. Civ. Proc. 56(f). While the Plaintiffs have requested additional discovery in their Statement of Material Facts, they have not done so by affidavit in accordance with Rule 56(f). Further, the request in the Statement of Contested facts does not "demonstrate how postponement and additional discovery will allow [them] to defeat summary judgment," especially in light of the unequivocal affidavit testimony on this issue submitted by Quicken and Title Source. See *Stearns Airport Equip. Co. v. FMC Corp.,* 1710 F.3d 518, 534-35 (5th Cir.1999). As such, the Plaintiffs' request for additional discovery should be denied, and Quicken and Title Source's motion for summary

judgment should be granted as to the Plaintiffs' claims based on the appraisal fees.

(3) The Smiths' Origination/Processing Fees

Whether the fees charged to the Smiths were loan origination and processing fees, or were in fact loan discount fees, may in and of itself constitute a question of fact.[14] Nonetheless, and regardless of whether the fee was a loan origination and processing fee or a discount fee as with the Freemans and Bennetts, the Smiths' claim is based on an allegation that the fee was an unearned, undivided fee charged by Quicken in violation of Section 8(b). Thus, whether the fee was an origination and processing fee or a discount fee, the same analysis discussed above with respect to the Plaintiffs' claims regarding unearned, undivided loan discount fees charged by Quicken applies, and Quicken's motion for summary judgment On these claims should be granted.

D. The Plaintiffs' Louisiana Contract Claims

In light of the discussion above, and given the invalidity of the Plaintiffs' Section 8(b) claims, Plaintiffs' claims against Quicken and Title Source for breach of contract fail along with their RESPA claims,

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[14] Specifically, the Smiths' HUD-1 Settlement Statement lists the $5,107.44 fee that they are currently challenging as a loan origination fee. However, in support of its summary judgment motion, Quicken presents an affidavit indicating that the $5,107.44 fee was in fact a loan discount fee.

and thus Quicken and Title Source's motions regarding those claims should be granted.

E. The Plaintiffs' Claims for Payment of a Thing Not Owed and Unjust Enrichment

As for the Plaintiffs' quasi-contractual claims under Louisiana law, the Court again finds that the failure of Plaintiffs' claims under Section 8(b) of RESPA requires the dismissal of any Louisiana claims for unjust enrichment and payment of a thing not owed. Accordingly,

IT IS ORDERED that Quicken and Title Source's **Motions for Summary Judgment (Rec. Docs. 29 & 31)** are hereby **GRANTED.**

IT IS FURTHER ORDERED in light of the above ruling that Plaintiffs' claims are hereby **DISMISSED WITH PREJUDICE.**

APPENDIX C

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 3500

Real Estate Settlement Procedures Act

Statement of Policy 2001–1:

Clarification of Statement of Policy

1999–1 Regarding Lender Payments to

Mortgage Brokers, and Guidance

Concerning Unearned Fees Under

Section 8(b)

* * *

Part C. Section 8(b) Unearned Fees

A. Background

RESPA was enacted in 1974 to provide consumers "greater and more timely information on the nature of the costs of the [real estate] settlement process" and to protect consumers from "unnecessarily high settlement charges caused by certain abusive practices * * *" 12 U.S.C. 2601.

Since RESPA was enacted, HUD has interpreted Section 8(b) as prohibiting any person from giving or

accepting any unearned fees, i.e., charges or payments for real estate settlement services other than for goods or facilities provided or services performed. Payments that are unearned fees for settlement services occur in, but are not limited to, cases where: (1) Two or more persons split a fee for settlement services, any portion of which is unearned; or (2) one settlement service provider marks-up the cost of the services performed or goods provided by another settlement service provider without providing additional actual, necessary, and distinct services, goods, or facilities to justify the additional charge; or (3) one settlement service provider charges the consumer a fee where no, nominal, or duplicative work is done, or the fee is in excess of the reasonable value of goods or facilities provided or the services actually performed.

In the first situation, two settlement service providers split or share a fee charged to a consumer and at least part, if not all, of at least one provider's share of the fee is unearned. In the second situation, a settlement service provider charges a fee to a consumer for another provider's services that is higher than the actual price of such services, and keeps the difference without performing any actual, necessary, and distinct services to justify the additional charge. In the third situation, one settlement service provider charges a fee to a consumer where no work is done or the fee exceeds the reasonable value of the services performed by that provider, and for this reason the fee or any portion thereof for which services are not performed is unearned.

HUD regards all of these situations as legally indistinguishable, in that they involve payments for

settlement services where all or a portion of the fees are unearned and, thus, are violative of the statute. HUD, therefore, specifically interprets Section 8(b) as not being limited to situations where at least two persons split or share an unearned fee for the provision to be violated.

As already indicated in this Statement of Policy, meaningful disclosure of all charges and fees is essential under RESPA. Such disclosures help protect consumers from paying unearned or duplicate fees. However, as noted above, in the 1999 Statement of Policy the Department reiterated "its long-standing view that disclosure alone does not make illegal fees legal under RESPA." 64 FR 10087.

B. HUD's Guidance and Regulations

HUD guidance and regulations have consistently interpreted Section 8 as prohibiting all unearned fees. In 1976, HUD issued a Settlement Costs Booklet that provided that "[i] t is also illegal to charge or accept a fee or part of a fee where no service has actually been performed." 41 FR 20289 (May 17, 1976). Between 1976 and 1992, HUD indicated in informal opinions that unearned fees occur where there are excessive fees charged, regardless of the number of settlement service providers involved.[1]

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[1] *See* e.g., Old Informal Opinion (6), August 16, 1976 and Old Informal Opinion (65), April 4, 1980; Barron and Berenson, *Federal Regulation of Real Estate and Mortgage Lending*, (4th Ed.1998). On November 2, 1992 (57 F.R. 49600), when HUD issued revisions to its RESPA regulations, it withdrew all of its informal counsel opinions and staff interpretations issued before that date. The 1992 rule provided, however, that courts and

In the preamble to HUD's 1992 final rule revising Regulation X (57 FR 49600 (November 2, 1992)), HUD stated: "Section 8 of RESPA (12 U.S.C. 2607) prohibits kickbacks for referral of business incident to or part of a settlement service and also prohibits the splitting of a charge for a settlement service, other than for services actually performed (i.e., no payment of unearned fees)." 57 FR 49600 (November 2, 1992).

HUD's regulations, published on November 2, 1992, implement Section 8(b). Section 3500.14(c)[2] provides:

> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a settlement service in connection with a transaction involving a federally-related mortgage loan other than for services actually

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administrative agencies could use HUD's previous opinions to determine the validity of conduct occurring under the previous version of Regulation X. See 24 CFR 3500.4(c).

[2] The heading to 24 CFR 3500.14 is titled "Prohibition against kickbacks and unearned fees." However, the heading of subsection (c) is titled "split of charges," and the preamble to the November 1992 rule states "[s]ection 8 of RESPA (12 U.S.C. 2607) prohibits kickbacks for referral of business incident to or part of a settlement service and also prohibits the splitting of a charge for a settlement service, other than for services actually performed (i.e., no payment of unearned fees)." 57 FR 49600 (November 2, 1992). The rule headings and preamble text are a generalized description of Section 8 that is more developed in the actual regulation text. As discussed in Section D of this Statement of Policy, HUD believes that the actual text of the rules, as amended in 1992, makes clear that Section 8(b)'s prohibitions against unearned fees apply even when only one settlement service provider is involved.

> performed. A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this Section. The source of the payment does not determine whether or not a service is compensable. Nor may the prohibitions of this part be avoided by creating an arrangement wherein the purchaser of services splits the fee.

24 CFR 3500.14(g)(2) states in part:

> The Department may investigate high prices to see if they are the result of a referral fee or a split of a fee. If the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods actually performed or provided. These facts may be used as evidence of a violation of Section 8 and may serve as a basis for a RESPA investigation. High prices standing alone are not proof of a RESPA violation.

24 CFR 3500.14(g)(3) provides in part:

> When a person in a position to refer settlement service business * * * receives a payment for providing additional settlement services as part of a real estate transaction, such payment must be for services that are actual, necessary and distinct from the primary services provided by such person.

In Appendix B to the HUD RESPA regulations, HUD provides illustrations of the requirements of RESPA. Comment 3 states in part:

> The payment of a commission or portion of the * * * premium * * * or receipt of a portion of the payment * * * where no substantial services are being performed * * * is a violation of Section 8 of RESPA. It makes no difference whether the payment comes from [the settlement service provider] or the purchaser. The amount of the payment must bear a reasonable relationship to the services rendered. Here [the real estate broker in the example] is being compensated for a referral of business to [the title company].

In 1996, in the preamble to the final rule on the Withdrawal of Employer/ Employee and Computer Loan Origination Systems Exemptions[3] (61 FR 29238 (June 7, 1996)), HUD reiterated its interpretation of Section 8(b) of RESPA as follows:

> HUD believes that Section 8(b) of the statute and the legislative history make clear that no person is allowed to receive 'any portion' of charges for settlement services, except for services actually performed. The provisions of Section 8(b) could apply in a number of situations: (1) where one settlement service provider receives an unearned fee from

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[3] This final rule was delayed by legislation, but the Department implemented portions of the final rule that were not affected by the legislative delay on November 15, 1996. 61 FR 58472 (November 15, 1996).

> another provider; (2) where one settlement service provider charges the consumer for third-party services and retains an unearned fee from the payment received; or (3) where one settlement service provider accepts a portion of a charge (including 100% of the charge) for other than services actually performed. The interpretation urged [by the commenters to the proposed rule published on July 21, 1994], that a single settlement service provider can charge unearned or excessive fees so long as the fees are not shared with another, is an unnecessarily restrictive interpretation of a statute designed to reduce unnecessary costs to consumers. The Secretary, charged by statute with interpreting RESPA, interprets Section 8(b) to mean that two persons are not required for the provision to be violated. 61 FR 29249.

The latest revision to the Settlement Costs Booklet for consumers, issued in 1997, also provides "[i]t is also illegal for anyone to accept a fee or part of a fee for services if that person has not actually performed settlement services for the fee." 62 FR 31998 (June 11, 1997).

Further, HUD has provided information to the public and the mortgage industry in the "Frequently Asked Questions" section of its RESPA Web site, located at <*http://www.hud.gov/fha/sfh/res/resindus.html*>. Question 25 states:

> Can a lender collect from the borrower an appraisal fee of $200, listing the fee as such on

> the HUD–1, yet pay an independent appraiser $175 and collect the $25 difference?

The answer reads:

> No, the lender may only collect $175 as the actual charge. It is a violation of Section 8(b) for any person to accept a split of a fee where services are not performed.

In 1999, by letter submitted at the request of the Superior Court of California, Los Angeles County, in the case of *Brown v. Washington Mutual Bank* (Case No. BC192874), HUD provided the following response to a specific question posed by the court on lender "markups" of another settlement service provider's fees:

> A lender that purchases third party vendor services for purposes of closing a federally related mortgage loan may not, under RESPA, mark up the third party vendor fees for purposes of making a profit. HUD has consistently advised that where lenders or others charge consumers marked-up prices for services performed by the third party providers without performing additional services, such charges constitute "splits of fees" or "unearned fees" in violation of Section 8(b) of RESPA.

HUD noted in its letter to the court that the response reflected the Department's long-standing position.

C. Recent Cases

Notwithstanding HUD's regulations and other guidance, the Court of Appeals for the Seventh Circuit held, in *Echevarria v. Chicago Title and Trust Co.*, 256 F.3d 623 (7th Cir. 2001), that Section 8(b) was not violated where a title company, without performing any additional services, charged the plaintiffs more money than was required by the recorder's office to record a deed and the title company then retained the difference. The court reasoned that plaintiffs "failed to plead facts tending to show that Chicago Title illegally shared fees with the Cook County Recorder. The Cook County Recorder received no more than its regular recording fees and it did not give to or arrange for Chicago Title to receive an unearned portion of these fees. The County Recorder has not engaged in the third party involvement necessary to state a claim under [RESPA § 8(b)]." Id. at 626. The court in essence concluded that unearned fees must be passed from one settlement provider to another in order for such fees to violate Section 8(b).

Earlier, in *Willis v. Quality Mortgage USA, Inc.*, 5 F. Supp. 2d 1306 (M.D. Ala. 1998), cited by the Seventh Circuit in support of its conclusion, the district court concluded that 24 CFR 3500.14(c), "[w]hen read as a whole," prohibits payments for which no services are performed "only if those payments are split with another party." Id. at 1309. The *Willis* court held that there must be a split of a charge between a settlement service provider and a third party to establish a violation Section 8(b). The court also concluded that 24 CFR 3500.14(g)(3) only applied when there was a payment from a lender to a

broker, or vice versa. The payment from a borrower to a mortgage lender could not be the basis for a violation of 24 CFR 3500.14(g)(3) and Section 8(b).

HUD was not a party to the cases and disagrees with these judicial interpretations of Section 8(b) which it regards as inconsistent with HUD's regulations and HUD's long-standing interpretations of Section 8(b).

D. Unearned Fees Under Section 8(b)

This Statement of Policy reaffirms HUD's existing, long-standing interpretation of Section 8(b) of RESPA. Sections 8(a) and (b) of RESPA contain distinct prohibitions. Section 8(a) prohibits the giving or acceptance of any payment pursuant to an agreement or understanding for the referral of settlement service business involving a federally related mortgage loan; it is intended to eliminate kickbacks or compensated referral arrangements among settlement service providers. Section 8(b) prohibits the giving or accepting of any portion, split, or percentage of any charge other than for goods or facilities provided or services performed; it is intended to eliminate unearned fees. Such fees are contrary to the Congressional finding when enacting RESPA that consumers need protection from unnecessarily high settlement charges. 12 U.S.C. 2601(a).

It is HUD's position that Section 8(b) proscribes the acceptance of any portion or part of a charge other than for services actually performed. Inasmuch as Section 8(b)'s proscription against "any portion, split, or percentage" of an unearned charge for settlement

services is written in the disjunctive, the prohibition is not limited to a split. In HUD's view, Section 8(b) forbids the paying or accepting of any portion or percentage of a settlement service— including up to 100%—that is unearned, whether the entire charge is divided or split among more than one person or entity or is retained by a single person. Simply put, given that Section 8(b) proscribes unearned portions or percentages as well as splits, HUD does not regard the provision as restricting only fee splitting among settlement service providers. Further, since Section 8(b) on its face prohibits the giving or accepting of an unearned fee by any person, and 24 CFR 3500.14(c) speaks of a charge by "a person," it is also incorrect to conclude that the Section 8(b) proscription covers only payments or charges among settlement service providers.[4]

A settlement service provider may not levy an additional charge upon a borrower for another settlement service provider's services without providing additional services that are bona fide and justify the increased charge. Accordingly, a settlement service provider may not mark-up the cost of another provider's services without providing additional settlement services; such payment must be for services that are actual, necessary and distinct services provided to justify the charge. 24 CFR 3500.14(g)(3).[5]

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[4] HUD is, of course, unlikely to direct any enforcement actions against consumers for the payment of unearned fees, because a consumer's intent is to make payment for services, not an unearned fee.

[5] HUD notes that some lenders have charged an additional fee merely for "reviewing" another settlement service provider's services. HUD does not regard such "review" as

The HUD regulation implementing Section 8(b) states: "[a] charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this Section." 24 CFR 3500.14 (c).

The regulations also make clear that a charge by a single service provider where little or no services are performed is an unearned fee that is prohibited by the statute. 24 CFR 3000.14(c). A single service provider is also prohibited from charging a duplicative fee. Further, a single service provider cannot serve in two capacities, e.g., a title agent and closing attorney, and be paid twice for the same service. The fee the service provider would be receiving in this case is duplicative under 24 CFR 3000.14(c) and not necessary and distinct under 24 CFR 3000.14(g)(3). Clearly, in all of these instances, the source of the payment—whether from consumers, other settlement service providers, or other third parties—is not relevant in determining whether the fee is earned or unearned because ultimately, all settlement payments come directly or indirectly from the consumer. See 24 CFR 3500.14(c). Therefore, a single settlement service provider violates Section 8(b) whenever it receives an unearned fee.

A single service provider also may be liable under Section 8(b) when it charges a fee that exceeds the reasonable value of goods, facilities, or services provided. HUD's regulations as noted state: "If the payment of a thing of value bears no relationship to the goods or services provided, then the excess is not

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constituting an actual, necessary, or distinct additional service permissible under HUD's regulations.

for services or goods actually performed or provided." 24 CFR 3500.14(g)(2). Section 8(c)(2) only allows "the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or services actually performed," i.e., permitting only that compensation which is reasonably related to the goods or facilities provided or services performed. Compensation that is unreasonable is unearned under Section 8(b) and is not bona fide under Section 8(c)(2).

The Secretary, therefore, interprets Section 8(b) of RESPA to prohibit all unearned fees, including, but not limited to, cases where: (1) Two or more persons split a fee for settlement services, any portion of which is unearned; or (2) one settlement service provider marks-up the cost of the services performed or goods provided by another settlement service provider without providing additional actual, necessary, and distinct services, goods, or facilities to justify the additional charge; or (3) one service provider charges the consumer a fee where no, nominal, or duplicative work is done, or the fee is in excess of the reasonable value of goods or facilities provided or the services actually performed.