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7 **United States District Court**
8 **Central District of California**
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10 MELISSA HENSON and KEITH
11 TURNER on behalf of themselves and
12 others similarly situated,
13 **Plaintiffs,**
14 v.
15 FIDELITY NATIONAL FINANCIAL
16 INC.,
17 **Defendant.**

Case No. 2:14-cv-01240-ODW(RZx)

**ORDER DENYING DEFENDANT'S
MOTION FOR JUDGMENT ON
THE PLEADINGS [29]**

18 **I. INTRODUCTION**

19 This Court has previously been called upon to solemnly interpret considerable
20 issues of federal law with far-reaching implications. This is not one of those cases.
21 Instead, the Court must confront a surprisingly unsettled issue in the often-perplexing
22 Real Estate Settlement Procedures Act (“RESPA”): what Congress meant when it
23 precluded liability “for services actually performed,” including what the word
24 “services” means. *See* 12 U.S.C. § 2607(c)(2).

25 Plaintiffs Melissa Henson and Keith Turner contend that Defendant Fidelity
26 National Financial Inc. violated RESPA when it received “marketing” fees from UPS,
27 Federal Express, and OnTrac in exchange for referring overnight delivery business to
28 the carriers via Fidelity’s escrow subsidiaries. Fidelity moved to dismiss Plaintiffs

1 Melissa Henson and Keith Turner’s putative class-action Complaint, and the Court
2 granted in part that Motion—thus eliminating Henson from the action as well as
3 Turner’s claim under 12 U.S.C. § 2607(b).

4 After answering, Fidelity moved for judgment on the pleadings, arguing that the
5 Court’s previous findings regarding Fidelity’s provision of actual services in exchange
6 for its marketing fees apply equally to Turner’s sole remaining claim under § 2607(a).
7 But the Court finds that a genuine dispute of fact presented on the face of the
8 pleadings precludes judgment in Fidelity’s favor and thus **DENIES** the Motion for
9 Judgment on the Pleadings.¹ (ECF No. 29.)

10 II. FACTUAL BACKGROUND

11 The Court and parties are readily familiar with this case’s facts, as the Court
12 just recently granted in part Fidelity’s Motion to Dismiss. (ECF No. 26.) The Court
13 therefore includes only a brief factual background here and incorporates the summary
14 set forth in its previous Order.

15 Fidelity is the controlling parent of various escrow subsidiaries. (Compl. ¶ 13.)
16 These escrow subsidiaries use UPS, FedEx, and OnTrac (the “Delivery Companies”)
17 to handle overnight deliveries in connection with processing and closing federally
18 related mortgage loans. (*Id.*) The subsidiaries charge escrow customers for these
19 delivery services during closing of real-estate transactions. (*Id.*)

20 Turner alleges that Fidelity had separate, written “master” agreements with each
21 of the Delivery Companies by which Fidelity—through a subsidiary called EC
22 Purchasing—accepted kickbacks in exchange for referring delivery services to the
23 companies. (*Id.* ¶ 14; Mizes Decl. ¶ 11.) Fidelity characterizes these payments as
24 “marketing” fees from the Delivery Companies, which it receives in relation to the
25 volume of business that Fidelity and its escrow subsidiaries transact with the carriers.
26 (Compl. ¶ 15; Mizes Decl. ¶ 12.) Fidelity’s compliance department has repeatedly

27 ¹ After carefully considering the papers filed with respect to this Motion, the Court deems the matter
28 appropriate for decision without oral argument. Fed. R. Civ. P. 78; L.R. 7-15.

1 instructed its escrow subsidiaries to use the Delivery Companies for overnight
2 delivery services. (Compl. ¶ 17.) But Turner contends that Fidelity exercises such
3 control over the subsidiaries that they did not need “marketing” services to ensure that
4 they complied with the master agreements. (*Id.* ¶ 18.)

5 On September 11, 2012, Turner refinanced his house in Los Angeles,
6 California, with a federally related mortgage loan. (*Id.* ¶ 24.) Lawyers Title, another
7 Fidelity subsidiary, handled the escrow. (*Id.*) Lawyers Title’s “Final Settlement
8 Statement (HUD-1)” included a charge for overnight deliveries through FedEx and
9 OnTrac.

10 On September 9, 2013, Henson and Turner filed this putative class action
11 against Fidelity, alleging that Fidelity received kickbacks and fee splits in violation of
12 RESPA. (ECF No. 1.) Fidelity subsequently moved to dismiss the Complaint for
13 failure to state a claim. The Court granted in part that Motion, eliminating Henson
14 from the action as well as Turner’s claim under 12 U.S.C. § 2607(b).

15 On April 11, 2014, Fidelity moved for judgment on the pleadings. Turner
16 timely opposed. That Motion is now before the Court for decision.

17 **III. LEGAL STANDARD**

18 A motion for judgment on the pleadings is “functionally identical” to a Rule
19 12(b) motion to dismiss; the only major difference is that a Rule 12(c) motion is
20 properly brought “after the pleadings are closed and within such time as not to delay
21 the trial.” *Mag Instrument, Inc. v. JS Prods., Inc.*, 595 F. Supp. 2d 1102, 1106–07
22 (C.D. Cal. 2008) (citing *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th
23 Cir. 1989)). The allegations of the nonmoving party are accepted as true, denials of
24 these allegations by the moving party are assumed to be false, and all inferences
25 reasonably drawn from those facts must be construed in favor of the responding party.
26 *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir.
27 1989). But conclusory allegations and unwarranted inferences are insufficient to
28 defeat a motion for judgment on the pleadings. *In re Syntex Corp. Sec. Litig.*, 95 F.3d

1 922, 926 (9th Cir. 1996). A court should grant judgment on the pleadings when, even
2 if all material facts in the pleading under attack are true, the moving party is entitled to
3 judgment as a matter of law. *Hal Roach Studios*, 896 F.2d at 1550.

4 **IV. DISCUSSION**

5 Fidelity moves for judgment on the pleadings, arguing that its subsidiary EC
6 Purchasing performed “actual services” in exchange for the “marketing” fee it
7 received from the Delivery Companies, thus precluding any RESPA liability under
8 § 2607(c)(2). But the Court finds that a factual dispute on the face of the pleadings
9 regarding whether EC Purchasing performed bona fide services in exchange for this
10 fee precludes judgment in Fidelity’s favor at this stage.

11 **A. Statutory interpretation**

12 Fidelity’s Motion requires the Court to break open its statutory-interpretation
13 toolbox to construe the definition and scope of the term “for services actually
14 performed” within § 2607(c)(2). The Court finds that the term means “settlement
15 services” and contains no qualitative requirement.

16 *1. Definition of “services” in § 2607(c)(2)*

17 After the Court’s previous Order, Turner’s only remaining claim is for violation
18 of § 2607(a). That section provides that “[n]o person shall give and no person shall
19 accept any fee, kickback, or thing of value pursuant to any agreement or
20 understanding, oral or otherwise, that business incident to or a part of a real estate
21 settlement service involving a federally related mortgage loan shall be referred to any
22 person.” 12 U.S.C. § 2607(a). But the section goes on to exempt certain payments as
23 permissible under RESPA. Section 2607(c) states that “[n]othing in this section shall
24 be construed as prohibiting . . . (2) the payment to any person of a bona fide salary or
25 compensation or other payment for goods or facilities actually furnished or *for*
26 *services actually performed*” *Id.* (c)(2) (emphasis added).

27 When interpreting a statute, a court must first start with the statute’s plain
28 language. *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). If the

1 language is unambiguous, the court may look no further; a court may consult extrinsic
2 materials such as legislative history only if the language is unclear. *Id.*; *Heppner v.*
3 *Alyeska Pipeline Serv. Co.*, 665 F.2d 868, 871 (9th Cir. 1981). A court may clarify a
4 word’s meaning by considering surrounding words and phrases under the maxim of
5 *noscitur a sociis*. *United States v. Stevens*, 559 U.S. 460, 474 (2010). There is also a
6 presumption that Congress used a given term to mean the same thing throughout a
7 statute. *Barber v. Thomas*, 560 U.S. 474, 483–84 (2010).

8 Fidelity contends that the term “for services actually performed” means the
9 same thing in § 2607(c)(2) as it does in § 2607(b). Fidelity points out that the Court
10 previously found that “Fidelity did in fact provide services by promoting the Delivery
11 Companies to its escrow subsidiaries via internal compliance memoranda.” (ECF
12 No. 26, at 15.) Defendant therefore seeks to incorporate this finding of nonliability
13 into Turner’s claim under § 2607(a).

14 Turner agrees that while § 2607(c)(2) does not define the term “settlement
15 services,” it is clear that is what Congress meant when it used the word “services”
16 standing alone.

17 The Court concurs. Congress did not specifically use the phrase “settlement
18 services” in § 2607(c)(2) when it stated that RESPA does not prohibit payment “for
19 services actually performed.” But it would be curious for Congress to use the word
20 “services” in a broader sense than it used with “settlement services.” Congress
21 specifically defined “settlement services” as “any service provided in connection with
22 a real estate settlement.” 12 U.S.C. § 2602(3). Congress would have vitiated
23 RESPA’s purposes by permitting kickbacks as long as the recipient performed any
24 service—even if the service bore no relationship to a real-estate settlement. The Court
25 therefore interprets § 2607(c)(2) as exempting payments “for [settlement] services
26 actually performed.” *See Cohen v. J.P. Morgan Chase & Co.*, 608 F. Supp. 2d 330,
27 344–45 (E.D.N.Y. 2009) (interpreting the word “services” in § 2607(b) to mean
28 “settlement services”).

1 2. *Scope of “settlement services”*

2 In his Opposition, Turner invites the Court on a tour of RESPA’s legislative
3 history in an attempt to interpret the term “services” in the phrase “settlement
4 services.” Turner argues that the Department of Housing and Urban Development
5 (“HUD”) has interpreted services to mean services that are actual, necessary,
6 substantial (i.e., not nominal), and distinct (not duplicative). *See* Real Estate
7 Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of
8 Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance
9 Concerning Unearned Fees Under Section 8(b), 66 FR 53052-01, 53059 (Oct. 18,
10 2001).

11 But Fidelity points out that “[o]f course, that laundry list of qualifiers appears
12 nowhere in the statute.” (Reply 4.) Fidelity also argues that since Congress used the
13 term “services” alone in § 2607(c)(2) but used the full term “settlement services”
14 elsewhere, Congress expressed its intent to bar RESPA liability so long as a payment
15 recipient performs some service in exchange for the fee. *See Russello v. United*
16 *States*, 464 U.S. 16, 23 (“[W]here Congress includes particular language in one
17 section of a statute but omits it in another section of the same Act, it is generally
18 presumed that Congress acts intentionally and purposely in the disparate inclusion or
19 exclusion.” (internal quotation marks omitted)).

20 The United States Supreme Court has determined that courts must engage in a
21 two-pronged inquiry in deciding whether to defer to an agency’s statutory
22 interpretation. If Congress has directly spoken on an issue in a statute, the court must
23 give effect to Congress’s language without resort to the agency’s interpretation.
24 *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).
25 But if the statute is silent or ambiguous with respect to a specific issue, the court must
26 determine whether the agency’s interpretation is a permissible construction of the
27 statute. *Id.* at 843. An agency’s interpretation receives controlling weight unless it is
28 arbitrary, capricious, or manifestly contrary to the statute. *Id.* at 843–44.

1 As previously noted, Congress specifically defined the term “settlement
2 services” to mean “any service provided in connection with a real estate settlement.”
3 12 U.S.C. § 2602(3). The Regulation accords with this definition. 24 C.F.R. § 3500.2
4 (“Settlement service means any service provided in connection with a prospective or
5 actual settlement . . .”). Both RESPA and its regulations provide nonexhaustive lists
6 of settlement services such as originating a federally related mortgage, attorney
7 services, preparation of documents, and mortgage insurance. *Id.*; *see also* 12 U.S.C.
8 § 2602(3). But neither limits what can constitute a settlement service so long as the
9 service performed is “provided in connection with a real estate settlement.” *Id.*

10 HUD’s interpretation that a service must be “actual, necessary and distinct”
11 generally comports with the actual legal definition of “settlement services.” For
12 example, payment for services in connection with a real-estate settlement is only
13 permissible if the service is “actually performed.” *Id.* But it is unclear what HUD
14 means by “necessary.” To the extent that HUD sought to restrict the settlement-
15 service definition beyond RESPA’s plain text, the Court may not defer to that
16 interpretation.

17 Turner is not correct that HUD interpreted “services” to mean “substantial.”
18 The Regulations provide that a “charge by a person for which no or *nominal* services
19 are performed or for which duplicative fees are charged is an unearned fee and
20 violates this section.” 24 C.F.R. § 3500.14(c) (emphasis added). But not nominal
21 does not necessarily mean substantial. *Compare* Merriam-Webster’s Collegiate
22 Dictionary 786 (10th ed. 1993) (defining “nominal” as “trifling, insignificant”), *with*
23 *id.* at 1170 (defining “substantial” as “considerable in quantity”). Rather, the services
24 must only be something more than trifling or insignificant, i.e., the services must be
25 genuine, real, and actually performed in connection with a real-estate settlement. In
26 fact, as the Court previously interpreted, the “services” element is more of an on/off
27 switch: a payment recipient bears no liability as long as it actually performed some
28 bona fide services in exchange for the benefit.

1 The Court declines Turner’s invitation to delve into RESPA’s undoubtedly
2 labyrinthine legislative history to muster up support for his notion that the services
3 must be “substantial.” *See, e.g.,* S. Rep. No. 93-866, *reprinted in* 1974
4 U.S.C.C.A.N. 6546, 6551. Given the extensive definitions and examples provided by
5 Congress, the term “settlement services” is not ambiguous—thus precluding resort to
6 drafting materials.

7 The Court also finds Fidelity’s reading of “services” unpersuasive. The Court
8 recognizes that Congress used two different terms—“settlement services” and
9 “services”—in various parts of RESPA. But one must not blindly follow statutory-
10 construction canons into the realm of absurdity. To think that Congress sought to
11 create a liability safe harbor so long as a recipient of some otherwise illegal benefit
12 performed any service—even one not related to a real-estate settlement—in exchange
13 for the fee would lead to illogical results. For example, this would mean that EC
14 Purchasing could have insulated itself from liability so long as it did anything for the
15 Delivery Companies, such as picking up their board members’ dry cleaning. If that
16 were the case, RESPA’s prohibition against kickbacks would quickly erode into
17 nothingness.

18 **B. Whether Fidelity performed actual services**

19 Fidelity argues that the Court’s previous finding that Fidelity, through EC
20 Purchasing, had performed actual services for its marketing fee—such as promoting
21 the Delivery Companies to Fidelity’s subsidiaries—should apply equally to
22 § 2607(c)(2)’s exemption. This would preclude Turner’s last remaining claim for
23 violation of § 2607(a). Fidelity cites several cases that are factually similar to this
24 action, in which the courts found that locating, engaging, and arranging services of
25 third parties suffices to constitute services actually performed. *Friedman v. Mkt. St.*
26 *Mortg. Corp.*, 520 F.3d 1289, 1296 (11th Cir. 2008); *Sosa v. Chase Manhattan Mortg.*
27 *Corp.*, 348 F.3d 979, 983–84 (11th Cir. 2003) (“Moreover, even if Chase could not be
28 credited with the actual delivery, Chase benefitted the borrowers by arranging for

1 third party contractors to perform the deliveries. Under these circumstances, we find
2 it impossible to say that Chase performed no services for which its retention of a
3 portion of the fees at issue was justified.”); *Morales v. Countrywide Home Loans,*
4 *Inc.*, 531 F. Supp. 2d 1225, 1228 (C.D. Cal. 2008) (interpreting the phrase “other than
5 services actually performed”).

6 But Turner contends that Fidelity and EC Purchasing did not perform “delivery
7 services,” because insuring delivery services of third-party vendors and negotiating
8 discount rates are not settlement services within RESPA’s meaning. Turner points out
9 that Fidelity only argues that Turner “benefitted” from its services, but § 2607(c)(2)
10 requires that the payment be “for” services rendered. Additionally, Turner asserts that
11 there is no temporal proximity between Turner’s September 2012 transaction and EC
12 Purchasing’s negotiation of discounted overnight fees at some untold point in the past
13 for EC Purchasing’s 130,000 members. Finally, Turner argues that the courts in
14 *Friedman*, *Sosa*, and *Morales* wrongly decided those cases, so this Court should not
15 follow their holdings.

16 After reviewing the parties’ submissions, the Court notes that the parties have
17 engaged in a shell game with respect to § 2607(c)(2)’s services-actually-performed
18 inquiry. Despite their being three different parties involved with varied benefits
19 flowing to each, they invoke disparate relationships between any two of them
20 whenever convenient to their RESPA arguments notwithstanding which parties are
21 actually relevant under the particular RESPA provision.

22 Section 2607(a) provides that “[n]o person shall give and no person shall
23 accept” any thing of value in exchange for referring real-estate settlement business.
24 The plain text of the statute suggests that two parties are relevant: the person who
25 gives the thing of value and the person who accepts it. There is no textual
26 requirement that a benefit somehow flow to the real-estate buyer for the recipient to
27 legally receive a payment. So, in this case, Fidelity/EC Purchasing and the Delivery
28 Companies are the relevant parties—not Turner. It is therefore also legally irrelevant

1 whether Turner received a benefit from EC Purchasing—such as the insurance for the
2 deliveries that the company allegedly provides and which the parties hotly dispute.

3 Section 2607(c)(2) exempts from RESPA liability payments “for services
4 actually performed.” Either the giver or recipient of the “thing of value” can invoke
5 this complete defense since Congress did not limit it only to a particular individual in
6 a certain position vis-à-vis the real-estate settlement. Therefore, the crucial inquiry is
7 whether the alleged kickback was really given “for services actually performed.”

8 The purported kickback at issue here is the “marketing” fee EC Purchasing—
9 and thus ostensibly Fidelity—received periodically from the Delivery Companies in
10 exchange for EC Purchasing/Fidelity promoting the Delivery Companies to Fidelity’s
11 escrow subsidiaries. If EC Purchasing performed no actual services for this fee, that
12 would be a violation of § 2607(a).

13 Turner has presented an interesting argument. One may easily characterize EC
14 Purchasing’s acts of promoting the Delivery Companies to Fidelity’s escrow
15 subsidiaries as actual services—thus earning its “marketing fee” and removing itself
16 from RESPA liability. But, looking at it another way, promoting services and
17 receiving a fee is just a prohibited kickback by another name. Indeed, in any *quid pro*
18 *quo* kickback, a person necessarily gets a fee (the *quid*) for (*pro*) promoting or
19 encouraging another to use the item, service, or other thing at issue (the *quo*).

20 Essentially, whether marketing and promotion are just euphemisms for
21 prohibited referrals is a dispute of fact raised on the pleadings that necessarily
22 precludes judgment in Fidelity’s favor at this point. *See Gen. Conference Corp. of*
23 *Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church*, 887 F.2d
24 228, 230 (9th Cir. 1989).

25 The Court also finds *Friedman*, *Sosa*, and *Morales* readily distinguishable from
26 this case. In all of those cases, the issue was whether the defendant was liable under
27 RESPA for receiving some fee in connection with a real-estate settlement. All three
28 courts found that the defendants bore no liability, because they performed some

1 settlement services in exchange for the fee. *Friedman*, 520 F.3d at 1296 (noting that
2 Market Street Mortgage Corporation “perform[ed] the service of locating and
3 arranging for a third party contractor to perform tax monitoring services”); *Sosa*, 348
4 F.3d at 983–84 (“Through its agents, therefore, Chase performed the deliveries that
5 were the subject of the [messenger] charges.”); *Morales*, 531 F. Supp. 2d at 1228
6 (finding that Countrywide Home Loans bore no RESPA liability in a markup
7 situation).

8 But here, Fidelity did not perform the overnight delivery that is the basis for the
9 fee appearing on Turner’s settlement statement. From what the Court can glean from
10 the pleadings, Fidelity simply acted as a passive intermediary with respect to the
11 delivery charge, passing the charge from the buyer on to FedEx and OnTrac. The
12 dispute focuses on the marketing fee Fidelity/EC Purchasing received later on in time.
13 The Court therefore cannot simply match up something Fidelity did at closing with the
14 overnight-delivery fee and find no liability per § 2607(c)(2)

15 **C. HUD-1 settlement statement**

16 The Court also finds Turner’s argument that the EC Purchasing’s services are
17 somehow invalid because they did not appear on his HUD-1 settlement statement
18 unavailing. The Regulations provide that the “settlement agent shall state the actual
19 charges paid by the borrower and seller on the HUD–1, or by the borrower on the
20 HUD–1A. The settlement agent must separately itemize each third party charge paid
21 by the borrower and seller.” 24 C.F.R. § 3500.8(b)(1).

22 Noticeably absent is any basis for somehow rendering a service uncompensable
23 simply because they do not appear, or appear inaccurately, on the settlement
24 statement. HUD seems to have aimed the Regulation at providing a borrower with the
25 most accurate information possible concerning the charges she or her lender is to pay
26 at closing. But it does not follow that HUD also sought to invalidate those charges
27 that contravened its disclosure requirements; indeed, such a result would find little
28 basis in the statute it sought to implement. *See* 12 U.S.C. § 2603(a) (requiring a

1 settlement statement but not invalidating any omitted charges). Further, Turner
2 misreads the disclosure requirement. They only apply to “all charges imposed upon
3 the borrower and all charges imposed upon the seller in connection with the
4 settlement”—a marketing fee received by EC Purchasing is not a “charge” but rather a
5 benefit received. There is therefore no requirement that any services performed by EC
6 Purchasing have appeared on Turner’s HUD-1 statement.

7 **V. CONCLUSION**

8 For the reasons discussed above, the Court **DENIES** Fidelity’s Motion for
9 Judgment on the Pleadings. (ECF No. 29.)

10 **IT IS SO ORDERED.**

11
12 April 29, 2014

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16 **OTIS D. WRIGHT, II**
17 **UNITED STATES DISTRICT JUDGE**
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