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NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE CALIFORNIA TITLE INSURANCE
ANTITRUST LITIGATION

No. C 08-01341 JSW

THIS DOCUMENT RELATES TO:

ALL ACTIONS

**ORDER ON MOTIONS TO
DISMISS SECOND AMENDED
CONSOLIDATED CLASS
ACTION COMPLAINT**

INTRODUCTION

Now before the Court for consideration are the Joint Motion to Dismiss Plaintiffs’ Consolidated Second Amended Class Action Complaint (the “Joint Motion”) and the Motion to Dismiss Consolidated Second Amended Class Action Complaint filed by Old Republic International Corporation (“ORI”).

The Joint Motion is filed on behalf of the following groups of defendants:

(1) the Fidelity Defendants, which consist of Fidelity National Financial, Inc. (“Fidelity National”), Fidelity National Title Insurance Company (“Fidelity Title”), Ticor Title Insurance Company (“Ticor”), Ticor Title Insurance Company of Florida (“Ticor Florida”), Chicago Title Insurance Company (“Chicago Title”); Security Union Title Insurance Company (“Security Union”), and National Title Insurance of New York, Inc. (“National Title”);

(2) the First American Defendants, which consist of First American Corporation (“First American Corp.”), First American Title Insurance Company (“First American Title”), and United General Title Insurance Company (“United General”);

1 (3) the Land America Defendants, which consist of Commonwealth Land Title
2 Insurance Company (“Commonwealth”), Lawyers Title Insurance Corporation (“Lawyers
3 Title”), and Transnation Title Insurance Company (“Transnation”);

4 (4) the Stewart Defendants, which consist of Stewart Title Guaranty Company (“Stewart
5 Guaranty”), and Stewart Title Insurance Company (“Stewart Title”); and

6 (5) the Old Republic Defendants, which consist of ORI and Old Republic National Title
7 Insurance Company (“Old Republic”).

8 Having considered the parties’ papers, relevant legal authority, and the record in this
9 case, and having had the benefit of oral argument, the Court HEREBY GRANTS IN PART
10 Defendants’ Joint Motion, and GRANTS ORI’s motion.¹

11 BACKGROUND

12 On March 11, 2008, Plaintiff Lynn Bartron filed suit against the Defendants. Thereafter,
13 the Judicial Panel on Multidistrict Litigation (“JPML”) denied a motion to transfer similar suits
14 that were pending throughout the country. Accordingly, this Court related and consolidated a
15 number of cases filed throughout California.

16 On May 21, 2009, the Court granted Defendants’ motion to dismiss Plaintiffs’ First
17 Amended Consolidated Class Action Complaint and granted Plaintiffs leave to amend (the
18 “May 21 Order”). On July 6, 2009, Plaintiffs filed the Consolidated Second Amended Class
19 Action Complaint (“SACC”) on behalf of themselves and the following class: “All persons who
20 purchased title insurance relating to the purchase or refinance of a residential property located
21 in California directly from the defendants, their subsidiaries, agents and/or affiliates, from no
22 later than March 10, 2004, through December 31, 2007 (the “Class Period”).” (SACC ¶¶ 1, 74.)

23 In the May 21 Order, the Court set forth in detail the factual allegations underlying
24 Plaintiffs’ claims. In brief, Plaintiffs allege that Defendants, groups of title insurance
25 companies, have conspired to fix title insurance prices in New York, Pennsylvania, Ohio, and
26 New Jersey through their participation in rate-setting organizations in those states. (SACC

27
28 ¹ Although ORI filed a separate motion to dismiss, the Court’s analysis herein
applies equally to ORI.

1 ¶¶ 110-138.) As a result of the agreements to fix prices in these states, Defendants “agreed,
2 either expressly or tacitly, to not compete on rates in other states,” including California, because
3 “[t]o compete on rates in other states ... could and would imperil [Defendants’] ability to
4 maintain the agreed rates they set, and the supra-competitive profits they enjoyed, both within
5 and outside of New York, New Jersey, Pennsylvania, and Ohio.” (*Id.* ¶ 139.) According to
6 Plaintiffs, Defendants also maintain supra-competitive profits by including the costs of illegal
7 kickbacks and commissions in the cost of title insurance premiums. (*Id.* ¶¶ 99-101, 159-167.)
8 Plaintiffs also support their allegations of a conspiracy by addressing certain features of the title
9 insurance industry which they claim facilitate Defendants’ ability to fix prices. (*Id.* ¶¶ 147-
10 158.)

Based on these allegations, Plaintiffs contend that “[D]efendants engaged in
11 concerted efforts, either by explicit agreements, or implicitly by a pattern or course of conduct,
12 to: (i) collectively set and charge supra competitive rates for title insurance; (ii) not compete
13 with each other to sell and market title insurance based on price; (iii) include agency
14 commission costs in their calculated rates; and (iv) embed within these improper commissions
15 payoffs, kickbacks, and other charges that were unrelated to the issuance of title insurance,” in
16 violation of 15 U.S.C. § 1 (the “Sherman Act claim”), California Business and Professions Code
17 §§ 16720 *et seq.* (the “Cartwright Act claim”), and California Business and Professions Code §§
18 17200 *et seq.* (the “Unfair Competition claim”). (*Id.* ¶¶ 89, 255-280.)

19 The Court shall address additional facts as necessary in the remainder of this Order.

20 ANALYSIS

21 A. Applicable Legal Standard.

22 A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) where the
23 pleadings fail to state a claim upon which relief can be granted. The complaint is construed in
24 the light most favorable to the non-moving party and all material allegations in the complaint
25 are taken to be true. *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986). However, even
26 under the liberal pleading standard of Federal Rule of Civil Procedure 8(a)(2), “a plaintiff’s
27 obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and
28 conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell*

1 *Atlantic Corporation v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Papasan v. Allain*, 478 U.S.
2 265, 286 (1986)).

3 Pursuant to *Twombly*, a plaintiff must not merely allege conduct that is conceivable but
4 must instead allege “enough facts to state a claim to relief that is plausible on its face.” *Id.* at
5 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the
6 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”
7 *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 556).
8 “The plausibility standard is not akin to a probability requirement, but it asks for more than a
9 sheer possibility that a defendant has acted unlawfully. ... When a complaint pleads facts that
10 are merely consistent with a defendant’s liability, it stops short of the line between possibility
11 and plausibility of entitlement to relief.” *Id.* (quoting *Twombly*, 550 U.S. at 556-57) (internal
12 quotation marks omitted). If the allegations are insufficient to state a claim, a court should
13 grant leave to amend, unless amendment would be futile. *See, e.g., Reddy v. Litton Indus., Inc.*,
14 912 F.2d 291, 296 (9th Cir. 1990); *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc.*,
15 911 F.2d 242, 246-47 (9th Cir. 1990).

16 **B. The Sherman Act and Cartwright Act Claims Are Dismissed, Without Leave to**
17 **Amend.**

18 Pursuant to Section 1 of the Sherman Act, “[e]very contract, combination in the form of
19 trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States ...
20 is hereby declared to be illegal.” 15 U.S.C. § 1. In order to state a claim under Section 1,
21 Plaintiffs must allege: “(1) a contract, combination or conspiracy among two or more persons or
22 distinct business entities; (2) by which the persons or entities intended to harm or restrain trade
23 or commerce among the several States...; and (3) which actually injures competition.” *Kendall*
24 *v. Visa U.S.A., Inc.*, 518 F.3d 1047 (9th Cir. 2008) (citing *Les Shockley Racing, Inc. v. National*
25 *Hot Rod Ass’n*, 884 F.2d 504, 507 (9th Cir. 1989)). Plaintiffs’ Cartwright Act claim is based on
26 the same allegations as the Sherman Act claim, and “analysis under California’s antitrust law
27 mirrors the analysis under federal law[.]” *County of Tuolumne v. Sonora Community Hosp.*,
28 236 F.3d 1148, 1160 (9th Cir. 2001) (“[A]nalysis under California’s antitrust law mirrors the

1 analysis under federal law[.]”); *see also In re Late Fee and Over Limit Fee Litigation*, 528 F.
2 Supp. 2d 953, 965 (N.D. Cal. 2007) (hereinafter “*In re Late Fee*”).

3 In its May 21 Order, the Court concluded that Plaintiffs’ allegations regarding
4 Defendants’ participation in various rate setting organizations, their motive to conspire, and the
5 characteristics of the title insurance market were insufficient to state a claim that Defendants
6 conspired to fix prices in California. Defendants again contend that Plaintiffs have failed to
7 meet their burden under *Twombly* to “nudge their claims across the line from conceivable to
8 plausible.” *Twombly*, 550 U.S. at 570. The Court agrees.

9 In *Twombly*, the Supreme Court held that:

10 stating [a Section 1] claim requires a complaint with enough factual matter
11 (taken as true) to suggest that an agreement was made. Asking for
12 plausible grounds to infer an agreement does not impose a probability
13 requirement at the pleading stage; it simply calls for enough fact to raise a
14 reasonable expectation that discovery will reveal evidence of illegal
15 agreement. ... It makes sense to say, therefore, that an allegation of parallel
16 conduct and a bare assertion of conspiracy will not suffice. Without more,
17 parallel conduct does not suggest conspiracy, and a conclusory allegation
18 of agreement at some unidentified point does not supply facts to show
19 illegality. Hence, when allegations of parallel conduct are set out in order
20 to make a § 1 claim, *they must be placed in a context that raises a
21 suggestion of a preceding agreement, not merely parallel conduct that
22 could just as well be independent action.*

23 *Twombly*, 550 U.S. at 556-57 (emphasis added); *see also Kendall*, 518 F.3d at 1047 (“claimants
24 must plead not just ultimate facts (such as a conspiracy), but evidentiary facts which, if true,”
25 will prove the elements of a Section 1 claim).

26 In order to support their claims that the Defendants agreed to fix prices within
27 California, Plaintiffs have added allegations regarding Defendants’ participation in the
28 California Land Title Association (“CTLA”) and the American Land Title Association
29 (“ALTA”). (SACC ¶¶ 140-146.) The CTLA, however, is not a rate setting organization and, as
30 this Court previously noted, courts have concluded that participation in the same trade
31 organizations is insufficient to establish a conspiracy. *See, e.g., In re Digital Music Antitrust
32 Litig.*, 592 F. Supp. 2d 435, 441 (S.D.N.Y. 2008); *In re LTL Shipping Servs. Antitrust Litig.*,
33 2009 WL 323219 (N.D. Ga. Jan. 28, 2009); *cf. In re Citric Acid Litig.*, 996 F. Supp. 951, 958-
34 959 (N.D. Cal. 1998) (concluding on summary judgment that no inference of conspiracy could

1 be raised from participation at meetings between defendants), *aff'd*, 191 F.3d 1090, 1103 (9th
2 Cir. 1999). Thus, participation in the CTLA may have provided Defendants the opportunity to
3 discuss setting rates in California, but opportunity, without more, is not a plausible basis to
4 suggest a conspiracy. *See, e.g., In re Late Fee*, 528 F. Supp. 2d at 963-64 (citing *Twombly*, 550
5 U.S. 567 n.12); *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1023
6 (N.D. Cal. 2007) (“*In re Graphics Processing I*”).

7 Plaintiffs have added allegations about when the rate-setting organizations and CTLA
8 held meetings and allegations about which of the Defendants’ representatives may have
9 attended those meetings. However, there still are no factual allegations about communications
10 between the Defendants that could be construed as invitations to conspire or responsive actions
11 by the other Defendants. Thus, the Court finds this case to be distinguishable from *In re TFT-*
12 *LCD (Flat Panel) Antitrust Litig.*, 599 F. Supp. 2d 1179 (N.D. Cal. 2009) (hereinafter “*In re*
13 *TFT-LCD II*”) and *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F. Supp.
14 2d 896, 901 (N.D. Cal. 2008) (“*In re SRAM*”). In those cases, the plaintiffs alleged facts
15 regarding particular communications between the defendants, including public statements
16 regarding pricing as well as allegations that the defendants communicated with one another
17 about pricing by telephone calls, e-mails and instant messages. *See In re TFT-LCD II*, 599 F.
18 Supp. 2d at 1184; *In re SRAM*, 580 F. Supp. 2d at 902. Similarly, there are no allegations that
19 link the timing of the rate-setting organization and CTLA meetings to the release of information
20 regarding the prices at which title insurance premiums were set in California.

21 Furthermore, the conspiracy is alleged to have begun in 2004, yet Plaintiffs allege facts
22 suggesting that the cost of Defendants’ title insurance premiums has remained stable since
23 1998, before the alleged conspiracy began. Thus, there are no factual allegations suggestion a
24 unusual or unprecedented change in behavior changed following the agreement to enter into the
25 conspiracy. *See, e.g., In re TFT-LCD (Flat Panel) Antitrust Litigation*, 586 F. Supp. 2d 1109,
26 1115-16 (N.D. Cal. 2008); *In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d
27 1085, 1094-95 (N.D. Cal. 2007).

28

1 In addition to the new allegations regarding Defendants’ participation in CLTA and
2 ALTA, Plaintiffs once again rely on “plus factors” to support their claim of a conspiracy, *e.g.*,
3 that the title insurance market is highly concentrated and that Defendants’ prices have remained
4 stable although costs have declined and title insurance policies are homogenous. However,
5 “parallel behavior in a concentrated market is insufficient to suggest a conspiracy because it is a
6 ‘common reaction of firms in a concentrated market’ to ‘recogniz[e] their shared economic
7 interests’ and to reach similar ‘price and output decisions’ independently.” *In re Late Fee*, 528
8 F. Supp. 2d at 964 (quoting *Twombly*, 550 U.S. at 553-54) (brackets as in *Twombly*); *see also id.*
9 (noting that if defendants costs are similar, that fact could “explain why the defendants’ prices
10 would naturally be similar without the need for any agreement); *In re Graphics Processing I*,
11 527 F. Supp. 2d at 1022 (“competitive market forces will tend to drive the prices of like goods
12 to the same level, so like prices on like products are not, standing alone, sufficient to implicate
13 price fixing.”).

14 Further, although Plaintiffs include allegations regarding violations found by the
15 Department of Housing and Urban Development (“HUD”), the California Department of
16 Insurance, and other states, those allegations relate primarily to the use of kickbacks and
17 commissions, rather than alleged antitrust violations. (*See* SACC ¶¶ 170-218.) Thus, once
18 again there are no allegations that Defendants have admitted to conspiring in one market, which
19 might allow the Court to infer a conspiracy in another market. *See, e.g., In re SRAM*, 580 F.
20 Supp. 2d at 903 (noting that allegations that the same actors were involved in a conspiracy in
21 DRAM market and had entered guilty pleas in connection with that conspiracy, with other
22 allegations, supported inference of conspiracy in SRAM market).

23 For all of these reasons, and looking at the allegations as a whole, the Court concludes
24 that the allegations regarding the rate setting organizations, the CTLA, and the ATLA, taken
25 together with the “plus factors” identified by Plaintiffs do not “nudge their claims across the
26 line from conceivable to plausible.” *Twombly*, 550 U.S. at 570. Rather, an equally plausible
27 inference is that the Defendants engaged in conscious parallelism, which is not in itself
28 unlawful. *Twombly*, 550 U.S. at 566; *In re Graphics Processing I*, 527 F. Supp. 2d at 1023 n.6.

1 Therefore, the Court concludes Plaintiffs have failed to allege facts sufficient to state their
2 Sherman Act and Cartwright Act claims.

3 At the hearing on these motions, the Court gave Plaintiffs the opportunity to set forth
4 what additional facts, if any, they would seek to include in an amended complaint. Plaintiffs
5 did not provide the Court with any specifics and, as such, the Court concludes that giving
6 Plaintiffs leave to amend would be futile.²

7 **C. The Section 17200 Claim Is Dismissed, In Part.**

8 Pursuant Section 17200, “there are three varieties of unfair competition: practices which
9 are unlawful, unfair or fraudulent.” *Daugherty v. American Honda Motor Co., Inc.*, 144 Cal.
10 App. 4th 824, 837 (2006); *see also Albillo v. Intermodal Container Services, Inc.*, 114 Cal. App.
11 4th 190, 206 (2003) (to state a UCL claim, a “plaintiff must establish that the practice is either
12 unlawful (i.e., is forbidden by law), unfair (i.e., harm to victim outweighs any benefit) or
13 fraudulent (i.e., is likely to deceive members of the public”). Defendants jointly move to
14 dismiss the Section 17200 Claim on the basis that: (1) Plaintiffs lack standing to pursue this
15 claim against Defendants from whom they did not purchase title insurance; (2) Plaintiffs have
16 not alleged facts sufficient to state a claim under Section 17200; and (3) California Insurance
17 Code § 12414.26 bars the Section 17200 Claim.

18 **1. Plaintiffs Have Established That They Have Standing Against the Title**
19 **Insurers from Whom They Purchased Insurance.**

20 Proposition 64, which was approved by California voters on November 2, 2004,
21 amended Section 17200 to limit the standing of private plaintiffs to those persons who “suffered
22 injury in fact and ha[ve] lost money as a result of such unfair competition.” *Laster v. T-Mobile*
23 *USA, Inc.*, 407 F. Supp. 2d 1181, 1193 (S.D. Cal. 2005) (quoting Cal. Bus. & Prof. Code §
24 17204). Thus, to establish standing under Section 17200, Plaintiffs must be able to show that
25 Defendants caused them injury. *See Hall v. Time Inc.*, 158 Cal. App. 4th 847, 855 (2008).

26 ² Because the Court has concluded that Plaintiffs have not alleged sufficient
27 facts to support allegations of a conspiracy, the Court has not reached the parent
28 corporations’ separate argument that there are insufficient facts alleged to hold them liable
under the Sherman Act or the Cartwright Act either directly or on Plaintiffs’ alternative
theories of agency or alter-ego liability. The Court does address that argument in the context
of the Section 17200 Claim.

1 At the hearing on these motions, Plaintiffs conceded, with one caveat, that if the Court
2 concluded they had not alleged sufficient facts to state a claim demonstrating a conspiracy that
3 they would have standing to pursue the Section 17200 Claim only against those defendants
4 from whom they purchased title insurance. According to the SACC, the named Plaintiffs
5 purchased title insurance from Fidelity Title, Commonwealth, Old Republic, First American
6 Title, and Chicago Title. Thus, to the extent Plaintiffs have set forth sufficient facts to state a
7 claim under Section 17200, Plaintiffs do have standing to pursue their Section 17200 claims
8 against these Defendants.³ Because none of the Plaintiffs allege that they purchased title
9 insurance from Ticor, Ticor Florida, Security Union, National Title, United General, Lawyers
10 Title, Transnation, Stewart Guaranty, or Stewart Title, Plaintiffs do not have standing to pursue
11 Section 17200 claims against these Defendants, and the Section 17200 Claim is DISMISSED as
12 to these Defendants.

13 At the hearing, Plaintiffs asserted that they could amend their claims to include persons
14 who purchased title insurance from Ticor, Ticor Florida, Security Union, National Title, United
15 General, Lawyers Title, Transnation, Stewart Guaranty, or Stewart Title. Accordingly, if
16 Plaintiffs choose to pursue this action and wish to name additional Plaintiffs, they are given
17 leave to file an amended complaint to do so.

18 Plaintiffs' caveat to their concession on standing is that they can pursue claims against
19 Fidelity National, ORI and First American. In support of this argument, Plaintiffs rely on *Troyk*
20 *v. Farmers Group, Inc.*, 171 Cal. App. 4th 1305 (2009), in which the court concluded a parent
21 corporation could be liable for restitution under Section 17200 on a theory that it received a
22 benefit from the plaintiffs. Specifically, Plaintiffs rely on the *Troyk* court's statement that to the
23 extent the parent's subsidiary earned profits from the alleged unlawful payments, the parent's
24 "net worth increased and the value of [its] stock investment in [the subsidiary] likewise
25 increased, thereby benefitting" the parent. *Id.* at 1340. However, the court's decision did not
26

27 ³ Defendants argue that Plaintiffs have not alleged facts establishing that the
28 Defendants caused their injuries and, thus, cannot meet the standing requirements of Section
17200. The Court addresses, and rejects, this argument in its discussion of the merits of
Plaintiffs' Section 17200 Claim.

1 rest solely on that fact, which would be true of any parent-subsidary relationship. Rather, the
2 *Troyk* court also relied on the fact that the facts demonstrated that “a substantial portion of the
3 service charges paid to [the subsidiary] were indirectly received” by the parent, because the
4 subsidiary used the parent’s personnel and equipment to perform its functions and paid the
5 parent for those services. *Id.* Finally, the court also concluded that there was sufficient
6 evidence to establish that the parent and the subsidiary acted as alter-egos or agents of one
7 another, thus further justifying the award of restitution. *Id.* at 1340-41.

8 Plaintiffs allege that Fidelity National and Fidelity Title and First American and First
9 American Title share common corporate headquarters but do not make the same allegations as
10 to ORI and Old Republic. (*See* SACC ¶¶ 30-31, 41-42, 61-62.) Plaintiffs also allege that
11 Fidelity National and Fidelity Title have overlapping officers and on this basis allege that
12 Fidelity National is responsible for the daily operations of its title insurance subsidiaries. (*Id.*
13 ¶ 68.) With the exception of Plaintiffs’ allegation that a report prepared for the California
14 Department of Insurance stated that “title insurance companies within an insurance group are
15 under common management and do not represent independent decision centers,” there are no
16 other factual allegations regarding the parent corporations exercise of control over their
17 subsidiaries. The Court finds that the facts alleged, without more, are insufficient to establish
18 that an agency or alter-ego relationship exists between the parent corporations and their
19 subsidiaries because Plaintiffs have not alleged facts sufficient to establish that the parent
20 corporations are exerting the requisite amount of control over their subsidiaries. *See, e.g.,*
21 *Troyk*, 171 Cal. App. 4th at 1341-42 (factors to consider to determine if alter-ego relationship
22 exists include commingling of funds and assets, identical equitable ownership, use of the same
23 offices and employees, disregard of corporate formalities, identical directors and officers, and
24 use of one as a mere shell as a conduit for the affairs of the other); *Palomares v. Bear Stearns*
25 *Residential Mortgage Corp.*, 2008 WL 686683 at *5 (S.D. Cal. Mar. 13, 2008) (granting motion
26 to dismiss where plaintiff failed to allege facts demonstrating requisite control over agent by
27 principal).

28

1 Accordingly, the claims against Fidelity National, First American, and ORI also are
2 dismissed. This ruling, however, is without prejudice. At the hearing Plaintiffs asserted that
3 they could allege additional facts to establish that the parent corporations could be held liable
4 on these theories of liability. Accordingly, if Plaintiffs can allege such facts in good faith, they
5 are granted leave to amend. If they cannot allege such facts at this time but later discover facts
6 tending to show that the parent corporations are liable, they may move to file an amended
7 complaint to reassert claims against these Defendants.

8 **2. Plaintiffs Have Alleged Facts Sufficient to State a Section 17200 Claim.**

9 Plaintiffs' Section 17200 claim is based, in part, on the alleged price fixing conspiracy.
10 (SACC ¶¶ 272, 276.a, 276.d.) For the reasons set forth above, Plaintiffs have failed to state a
11 Section 17200 claim based on those facts. *See In re Late Fee*, 528 F. Supp. 2d at 965; *Apple*
12 *Inc. v. Pystar Corp.*, 586 F. Supp. 2d 1190, 1204 (N.D. Cal. 2008) (citing *Chavez v. Whirlpool*
13 *Corp.*, 93 Cal. App. 4th 363, 375 (2001)).

14 Plaintiffs also premise the Section 17200 claim on the allegedly illegal rebates,
15 kickbacks and commissions, and they allege this conduct allowed the Defendants to charge
16 them more for title insurance than they would absent the alleged rebates, kickbacks and
17 commissions. (Am. Compl. ¶ 276.d.) Plaintiffs also allege that this conduct violated, *inter alia*,
18 California Insurance Code § 12404, which provides that “[i]t is unlawful for any title insurer ...
19 to pay, directly or indirectly, any commission, compensation, or other consideration to any
20 person as an inducement for the placement or referral of title business. Actual placement or
21 referral of title business is not a precondition to a violation of this section, whether the violation
22 is or is not a per se violation pursuant to subdivision (c).”

23 Plaintiffs allege that Defendants have paid such commissions, compensation, or
24 consideration for the placement or referral of title business. (SACC ¶¶ 159-167.) Thus,
25 Plaintiffs have alleged facts demonstrating unlawful conduct, and the Court need not determine
26 whether Plaintiffs also allege facts demonstrating that Defendants' conduct was unfair or
27 fraudulent or whether it violates the other laws identified in the SACC.

28

1 Defendants also argue that Plaintiffs have failed to allege facts demonstrating the
2 alleged kickbacks caused them harm. The Court disagrees. Plaintiffs set forth the facts
3 regarding the alleged kickbacks and commissions and contend that the Defendants improperly
4 included the costs of kickbacks into the title insurance premium rates, thereby inflating those
5 rates. Plaintiffs further allege that but for the improper kickbacks they would have paid less for
6 title insurance. Accordingly, Plaintiffs have set forth facts sufficient to state a Section 17200
7 claim on this basis. *See Somerville v. Stryker*, 2009 WL 2901591 at *3 (N.D. Cal. Sept. 4,
8 2009); *see also Blaylock v. First American Title Ins. Co.*, 504 F. Supp. 2d 1091, 1105-06 (W.D.
9 Wash. 2007).⁴

10 **3. The Insurance Code Does Not Preclude the Remainder of the Section 17200**
11 **Claim.**

12 Defendants also contend that Insurance Code § 12414.26 bars Plaintiffs' Section 17200
13 Claim. That section provides, in pertinent part, that "[n]o act done, action taken, or agreement
14 made pursuant to the authority conferred by Article 5.5 ... or Article 5.7 ... of this chapter shall
15 constitute a violation of ... any other law of this state...." Cal. Ins. Code § 12414.26. The
16 California Supreme Court has concluded that, with the exception of rate setting, this provision
17 of the Insurance Code does not displace claims under Section 17200. *Quelimane Company, Inc.*
18 *v. Stewart Title Guaranty Co.*, 19 Cal. 4th 26, 33 (1998).

19 According to Defendants, Plaintiffs' Section 17200 Claim is barred because it pertains
20 to rate setting. The Court disagrees. Rather, Plaintiffs are challenging Defendants' conduct
21 regarding the illegal kickbacks and commissions, rather than the method by which rates are set
22 or the amount of those rates. The Court finds guidance in *SCIF v. Superior Court*, 24 Cal. 4th
23 930 (2001), in which the California Supreme Court construed Insurance Code § 11758, a
24 provision that is identical to section 12414.26. In that case, the plaintiff alleged that SCIF had
25 misallocated and misreported information, which then allowed SCIF to collect inflated
26 premiums from its insureds. The Supreme Court concluded that the plaintiff's allegations

27
28 ⁴ Defendants rely on a subsequent opinion in the *Blaylock* case in which the court granted summary judgment for lack of standing. In light of the procedural posture of this case, the Court finds that opinion inapposite.

1 related to SCIF's misconduct and did not "challenge the method by which the rate or premium
2 charged was set," and, therefore, SCIF's conduct was not immunized by statute. The Court
3 finds the facts in *SCIF* to be analogous to Plaintiffs' allegations in this case and concludes that,
4 based on those factual allegations, Plaintiffs' Section 17200 claim, as it remains, is not barred
5 by Insurance Code § 12414.26.

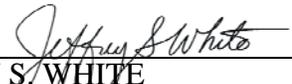
6 **CONCLUSION**

7 For the foregoing reasons, Defendants' motions to dismiss are GRANTED IN PART
8 AND DENIED IN PART. Plaintiffs' Sherman Act and Cartwright Act Claims are DISMISSED
9 WITH PREJUDICE as to each of the named Defendants. Plaintiff's Section 17200 Claim is
10 DISMISSED to the extent it relies on the alleged antitrust violations but remains pending as to
11 Fidelity Title, Commonwealth, Old Republic, First American Title, and Chicago Title.

12 If Plaintiffs choose to file an amended complaint on the terms set forth in this Order,
13 they must do so by no later than November 25, 2009.

14 **IT IS SO ORDERED.**

15 Dated: November 6, 2009



JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE