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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MARK BUSHBECK, et al.,  
  
Plaintiffs,  
  
v.  
  
CHICAGO TITLE INSURANCE CO.,  
  
Defendant.

CASE NO. C08-0755JLR  
  
ORDER ON DEFENDANT’S  
MOTION FOR SUMMARY  
JUDGMENT

This matter comes before the court on Defendant Chicago Title Insurance Company’s (“Chicago Title”) motion for summary judgment (Dkt. # 42). Having considered the submissions of the parties, and having heard oral argument, the court GRANTS in part and DENIES in part Chicago Title’s motion for summary judgment (Dkt. # 42).

**I. BACKGROUND**

In 2007, Plaintiffs Mark and Raelene Bushbeck refinanced the home which became Mrs. Bushbeck’s property when she and her ex-husband, Nicholas Styant-

1 | Browne, divorced. (*See* Fogarty Decl. (Dkt. # 43) Ex. 18 (“R. Bushbeck Dep.”) 55:25-  
2 | 56:2.) The house was collateral in two loans which had been opened by Mr. Styant-  
3 | Browne: a first mortgage and a Home Equity Line of Credit (“HELOC”), both held by  
4 | Countrywide Home Loans (“Countrywide”). (White Decl. (Dkt. # 44), Exs. 6, 7.) On the  
5 | advice of their mortgage broker, the Bushbecks retained Chicago Title’s office in  
6 | Bellevue, Washington, to perform the escrow settlement services for their refinance  
7 | transaction. (R. Bushbeck Dep. 62:23-63:22.)

8 |         When real property is refinanced, deeds of trust or liens associated with prior  
9 | mortgages or loans must be extinguished in a process called reconveyance. (Compl.  
10 | (Dkt. # 1) ¶ 13; White Decl. ¶ 6.) The documentation associated with the Styant-Browne  
11 | loans indicated that Countrywide would perform the reconveyances. With respect to the  
12 | first mortgage, (1) the deed of trust provided that, upon payoff, Countrywide would  
13 | complete the reconveyance (White Decl. Ex. 2 at 13 ¶ 23), and (2) the payoff statement  
14 | specified a reconveyance fee of \$30.00 and a county recording fee of \$32.00 (*Id.* Ex. 6 at  
15 | 1). With respect to the HELOC, (1) the deed of trust included a provision which Chicago  
16 | Title understood to mean that Countrywide would perform the reconveyance (White  
17 | Decl. Ex. 3; Loeser Decl. (Dkt. # 60) Ex. A (“White Dep.”) 45:17-46:19), and (2)  
18 | although the payoff statement did not specify a reconveyance fee, it, like the deed of  
19 | trust, included language which Chicago Title understood to mean that Countrywide  
20 | would perform the reconveyance. (White Decl. Ex. 7; White Dep. 142:18-143:1.)

21 |         On July 5, 2007, the Bushbecks signed closing documents, including a document  
22 | entitled “Borrower’s Escrow Instructions” (White Decl. Ex. 8 (“Escrow Instructions”)),

1 and an “Estimated Settlement Statement” (White Decl. Ex. 9 (“Estimated HUD-1”)). In  
2 relevant part, the Escrow Instructions state the following:

3       BORROWER herein deposits with you under these instructions the  
4 following:

5       Loan documents as required by lender.

6       Estimated Settlement Statement.

7       Amount required to close, if any.

8       Which you are instructed to deliver and/or record when you have for the  
9 account of the undersigned [\$854,750.00]

10       Subject to any charges and/or credits authorized on the closing statement  
11 executed within this closing, and when you are able to comply with the  
12 terms and conditions required by

13       WASHINGTON FEDERAL SAVINGS . . .

14       . . .

15       You are instructed to disburse deposited funds pursuant to closing  
16 statement(s) examined and approved by the parties hereto and by this  
17 reference made a part hereof. Certain items shown on the closing  
18 statements may be estimated only and the final figures may be adjusted to  
19 accommodate exact amounts required at the time of disbursement.

20 (White Decl. Ex. 8.) The Escrow Instructions also provide that Chicago Title “is acting  
21 only as an escrow holder and that it is forbidden by law from offering any advice to any  
22 party respecting the merits of this escrow transaction or the nature of the instruments  
utilized, and that it has not done so.” *Id.* In addition, the Escrow Instructions  
acknowledge that the borrowers were “requested to seek legal counsel of [their] own  
choosing at [their] own expense, if [they had] any doubt concerning any aspect of this  
transaction.” *Id.*

1 The first page of the Escrow Instructions refers to an attached exhibit, which states  
2 the following:

3 The parties hereto acknowledge that Washington Federal Savings, the  
4 lender herein, may not deposit its loan proceeds until the deed of trust in its  
5 favor has been recorded; therefore, escrow will not disburse the total  
6 consideration at the time of recording as herein set forth. Escrow holder is  
7 instructed to record all documents, including but not limited to the statutory  
8 warranty deed from the purchaser to lender, and to defer all payments and  
disbursements of funds as set forth herein until such time as escrow holder  
is in receipt of good and sufficient funds from lender for said loan proceeds.  
You are to withhold the recording of all reconveyance and/or releases until  
such time as the proceeds of this escrow are disbursed in accordance with  
these instructions.

9 (*Id.* at 2 (“Escrow Exhibit”) (capitalization altered for readability).)

10 The Escrow Instructions incorporate by reference the Estimated HUD-1, which  
11 details the fees the Bushbecks paid into escrow in connection with their refinance.

12 (White Decl. Ex. 9.) The Estimated HUD-1 reflects that the Bushbecks paid the  
13 following fees to Chicago Title:

- 14 (1) a settlement or closing fee of \$381.15;
- 15 (2) a document preparation fee of \$163.95;
- 16 (3) a “Courier/UPS” fee of \$34.14;
- 17 (4) \$1,002.92 for title insurance; and
- 18 (5) a reconveyance fee of \$270.00.

19 (*Id.* at 2.) The last fee is at issue in this case. The \$270.00 reconveyance fee includes a  
20 \$135.00 fee for each of the two loans being paid off in the refinance transaction. (White  
21 Decl. ¶ 15.) For accounting purposes, Chicago Title breaks each \$135.00 fee into two  
22 components: a \$120.00 reconveyance processing fee and a \$15.00 tracking fee. (*See*  
White Decl. ¶ 17; White Dep. 48:23-49:1.) This breakdown is necessary because the  
tracking portion includes sales tax. (White Dep. 65:11-66:12; Loeser Decl. Ex. B at 5.)

1 At the time of the Bushbecks' refinance, Chicago Title's King County operation charged  
2 a reconveyance processing fee for every loan in a refinance transaction. (*See* Loeser  
3 Decl. Ex. B at 1-6.) Several other Chicago Title operations in Washington, however,  
4 either did not charge reconveyance fees or only charged them when the loan files  
5 indicated that the lender would not perform the reconveyance. (*See, e.g., id.* at 7-8  
6 (Pierce County); 13-14 (Clark/Cowlitz Counties); 15-16 (Whatcom County).)

7 At the closing meeting, Mr. Bushbeck questioned the Chicago Title representative  
8 about the reconveyance fee. (*See* R. Bushbeck Dep. 73:15-25, 75:1-12; Fogarty Decl.  
9 Ex. 19 ("M. Bushbeck Dep.") 41:21-42:9.) The representative told the Bushbecks that  
10 Chicago Title collected the reconveyance fee to cover the cost for Chicago Title to  
11 perform and record the reconveyances if the lender failed to complete them; and that any  
12 unused portion of the reconveyance fee would be refunded to them. (R. Bushbeck Dep.  
13 74:6-12; M. Bushbeck Dep. 25:20-26:2, 42:23-43:5, 47:1-15.) Mr. Bushbeck understood  
14 the reconveyance fee to be similar to an "insurance policy" to ensure that the  
15 reconveyances were completed. (M. Bushbeck Dep. 48:4-12.) Based on this  
16 understanding and on Chicago Title's statement that it would refund unused  
17 reconveyance fees, Mr. Bushbeck "was okay with" paying the reconveyance fee. (*Id.*  
18 25:20-26:2.) The Bushbecks understood that the reconveyance fee was a separate charge  
19 from the settlement or closing fee. (R. Bushbeck Dep. 91:17-21; M. Bushbeck Dep.  
20 57:7-23.) Although Mr. Bushbeck thought that the reconveyance fee was "excessively  
21 high," the Bushbecks did not object to the amount of the reconveyance fee. (R. Bushbeck  
22 Dep. 91:22-25; M. Bushbeck Dep. 59:1-8; 62:4-20.) Mr. Bushbeck acknowledges that

1 Chicago Title did not promise that they would receive a refund within a specific  
2 timeframe; Mrs. Bushbeck does not recall whether Chicago Title made any such promise.  
3 (R. Bushbeck Dep. 147:16-24; M. Bushbeck Dep. 82:22-83:4.)

4 The Bushbecks signed the closing documents and were given the mandatory three-  
5 day “cooling off” period to reconsider and cancel the transaction. The Bushbecks did not  
6 cancel the transaction, nor did they seek legal counsel with respect to the transaction. (R.  
7 Bushbeck Dep. 83:24-84:5, 101:24-102:4; M. Bushbeck Dep. 56:7-21.)

8 The Bushbecks’ refinance closed on July 10, 2007. After closing, Countrywide  
9 completed the reconveyances, and the reconveyances were recorded on August 6, 2007.  
10 (White Decl. Ex. 13 at 3, 6.) It is undisputed that Chicago Title did not perform or record  
11 either reconveyance; rather, Countrywide and its agents performed them. (White Dep.  
12 48:3-22, 157:17-158:6.) It is also undisputed that Chicago Title’s Reconveyance  
13 Department tracked the reconveyances to ensure that they were completed. (*See* White  
14 Decl. ¶ 22; White Dep. 49:14-21; Resp. at 9.)

15 Because they did not receive a refund of any portion of the reconveyance fee  
16 within a few months of closing, the Bushbecks believed that Chicago Title had required  
17 the full reconveyance fee. (*See* R. Bushbeck Dep. 111:2-11; M. Bushbeck Dep. 24:18-  
18 25:3.) The Bushbecks never contacted Chicago Title regarding their reconveyance fee.  
19 (R. Bushbeck Dep. 110:16-19; M. Bushbeck Dep. 78:1-13.)

20 On May 14, 2008, the Bushbecks filed the instant class-action lawsuit. When she  
21 learned of the lawsuit, Wendy White, Vice President of Chicago Title and Escrow  
22 Manager for Chicago Title’s King County operation, pulled the Bushbecks’ file and saw

1 that Countrywide had completed the reconveyances but that no refund had been issued.  
2 (White Dep. 159:17-163:7). On June 11, 2008, Chicago Title issued refunds of the  
3 \$120.00 reconveyance processing portions of the Bushbecks' reconveyance fees because  
4 Chicago Title did not perform reconveyance processing services. (White Dep. 49:7-50:6,  
5 66:7-12; White Decl. Ex. 13.) Each refund letter stated, "Also enclosed is our check in  
6 the amount of \$120 which represents a refund of the reconveyance fee collected at  
7 closing. Because the lender processed the reconveyance we are refunding the  
8 reconveyance fee less our tracking fee." (White Decl. Ex. 13 at 2, 5.) The Bushbecks  
9 have not cashed the refund checks. (*See* M. Bushbeck Dep. 82:11-16.)

10 In March 2008, after Ms. White learned that large residential lenders were  
11 performing their own reconveyances, Chicago Title's King County operation stopped  
12 charging reconveyance processing fees on loans from these lenders. (Loeser Decl. Ex. B  
13 at 3). In June 2009, Chicago Title King County stopped charging fees for reconveyance  
14 processing altogether. (*Id.* at 4.) Chicago Title King County now charges only a \$35.00  
15 reconveyance tracking fee. (*Id.* at 4, 6.)

## 16 II. ANALYSIS

17 Summary judgment is appropriate if the evidence, when viewed in the light most  
18 favorable to the non-moving party, demonstrates that "there is no genuine issue as to any  
19 material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ.  
20 P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v. County of Los*  
21 *Angeles*, 477 F.3d 652, 658 (9th Cir. 2007). The moving party bears the initial burden of  
22 showing there is no material factual dispute and that he or she is entitled to prevail as a

1 matter of law. *Celotex*, 477 U.S. at 323. If the moving party meets his or her burden, the  
2 nonmoving party must go beyond the pleadings and identify facts which show a genuine  
3 issue for trial. *Cline v. Indus. Maint. Eng'g. & Contracting Co.*, 200 F.3d 1223, 1229  
4 (9th Cir. 2000).

5 **A. Breach of Escrow Contract**

6 Washington follows the objective manifestation theory for interpreting contracts.  
7 *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 115 P.3d 262, 267 (Wash. 2005). Under this  
8 approach, courts attempt to determine the parties' intent "by focusing on the objective  
9 manifestations of the agreement, rather than on the unexpressed subjective intent of the  
10 parties." *Id.* The subjective intent of the parties is thus generally irrelevant if the court  
11 can determine the intent from the actual words used. *Id.* Courts "give words in a  
12 contract their ordinary, usual, and popular meaning unless the entirety of the agreement  
13 clearly demonstrates a contrary intent." *Id.*

14 1. Contract Terms

15 The Bushbecks allege that Chicago Title breached the escrow contract by: (1)  
16 charging reconveyance fees in addition to the escrow services fee for no additional  
17 settlement services other than those Chicago Title was already obligated to perform; and  
18 (2) failing to disclose to the Bushbecks that they were not required to use Chicago Title  
19 for reconveyance related settlement services and that reconveyance processing was  
20 actually being performed by the prior lenders at no charge or for fees separately paid in  
21 their loan payoffs. (Compl. ¶¶ 64, 65.) In their response to Chicago Title's motion for  
22 summary judgment, the Bushbecks restate their breach of contract theory as follows:



1 (1) the Escrow Instructions obligated Chicago Title to either perform  
2 Plaintiffs' reconveyances or ensure that they occurred, (2) Chicago Title  
3 was required to follow those same Escrow Instructions because it accepted  
4 the \$350 escrow services fee, and (3) Chicago Title breached the contract  
5 by collecting . . . additional reconveyance processing fees and tracking fees  
6 for services already covered by the escrow fee.

7 (Resp. at 12-13.)

8 Chicago Title contends that summary judgment is appropriate because the Escrow  
9 Instructions are unambiguous and the Bushbecks cannot identify any term that Chicago  
10 Title breached. Chicago Title states that the Escrow Instructions directed it to disburse  
11 funds in accordance with the closing statements, including the Estimated HUD-1<sup>1</sup>; that  
12 the Estimated HUD-1 discloses both a closing fee and a separate reconveyance fee; and  
13 that the Bushbecks have not alleged that Chicago Title failed to disburse the escrow funds  
14 as instructed. In their response, the Bushbecks do not point to any specific terms of the  
15 Escrow Instructions that create the duties they assert; rather, they argue that Chicago Title  
16 has failed to show a "lack of ambiguity in the contract that is required to take this issue  
17 from the trier of fact." (Resp. at 12-13.) At oral argument, however, the Bushbecks  
18 asserted that the following passage from the Escrow Exhibit creates an obligation for  
19 Chicago Title to perform the reconveyances in exchange for the closing fee:

20  
21 You are to withhold the recording of all reconveyance and/or releases until  
22 such time as the proceeds of this escrow are disbursed in accordance with  
these instructions.

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<sup>1</sup> At oral argument, Chicago Title conceded that the line on the Estimated HUD-1  
instructing Chicago Title to disburse reconveyance fees to itself created an additional contractual  
obligation for Chicago Title to ensure that the reconveyances had been completed.

1 (White Decl. Ex. 8 at 2.)

2 The court finds, reading the Escrow Instructions and the Estimated HUD-1 as a  
3 whole, that they are unambiguous and cannot be interpreted as requiring Chicago Title to  
4 perform reconveyance services in exchange for the closing fee or to make the disclosures  
5 alleged in the Bushbecks' complaint. Preliminarily, the court notes that a settlement or  
6 closing fee typically covers those activities that are required to close the loan transaction.  
7 Because reconveyance is not required for closing, but, rather, takes place after closing, a  
8 settlement or closing fee does not, without more, cover reconveyance. *See Cornelius v.*  
9 *Fidelity Nat'l Title Co. of Wash.* (“*Cornelius II*”), No. C08-754MJP, 2010 WL 1406333,  
10 at \*3 (W.D. Wash. April 1, 2010). The Escrow Exhibit does not alter this rule. Instead,  
11 the Escrow Exhibit instructs Chicago Title to withhold the recording of the reconveyance  
12 until after it disburses the escrow proceeds. Nothing in this passage can be interpreted as  
13 requiring Chicago Title to provide reconveyance services in exchange for the closing fee  
14 rather than for the reconveyance fee disclosed on the Estimated HUD-1. Moreover, the  
15 Bushbecks testified that they were aware at closing that Chicago Title was charging  
16 separate fees for closing services and reconveyance services and that Mr. Bushbeck was  
17 “okay with” the reconveyance fee. (R. Bushbeck Dep. 91:17-21; M. Bushbeck Dep.  
18 25:20-26:2, 57:7-23.) Finally, there is no term in the Escrow Instructions or in the  
19 Estimated HUD-1 that mandates any disclosures by Chicago Title.

20 For these reasons, the court grants Chicago Title's motion for summary judgment  
21 on the Bushbecks' breach of contract claim to the extent the Bushbecks allege that  
22

1 Chicago Title was required to perform reconveyance services in exchange for the closing  
2 fee and to make the disclosures alleged in the complaint.

3 2. Duty of Good Faith and Fair Dealing

4 The Bushbecks allege, in the alternative, that if the Escrow Instructions allowed  
5 Chicago Title to charge a separate reconveyance fee, then Chicago Title breached its  
6 implied duty of good faith and fair dealing by (1) charging a reconveyance processing fee  
7 even though it knew that Countrywide would perform the reconveyances; and (2) telling  
8 the Bushbecks that it would refund any unused fees and then failing to do so. Under  
9 Washington law, “[t]here is in every contract an implied duty of good faith and fair  
10 dealing. This duty obligates the parties to cooperate with each other so that each may  
11 obtain the full benefit of performance.” *Badgett v. Security State Bank*, 807 P.2d 356,  
12 360 (Wash. 1991). The Washington Supreme Court has clarified, however, that

13 the duty of good faith does not extend to obligate a party to accept a  
14 material change in the terms of its contract. Nor does it inject substantive  
15 terms into the parties’ contract. Rather, it requires only that the parties  
16 perform in good faith the obligations imposed by their agreement.

17 *Id.* (internal citations and quotation marks omitted).

18 Chicago Title contends that the Bushbecks cannot demonstrate a breach of the  
19 duty of good faith and fair dealing because they cannot identify any contractual  
20 obligations that relate to their claim. Chicago Title relies on two recent reconveyance fee  
21 cases in this district which rejected similar claims on the ground that there could be no  
22 breach of the duty of good faith and fair dealing where the substantive obligation to  
ensure that the reconveyances were performed was not set forth in the contract:

1 | *Cornelius II*, 2010 WL 1406333, at \*4; and *McFerrin v. Old Republic Title, Ltd.*, No.  
2 | C08-5309BHS, 2009 WL 2045212, at \*6-7 (W.D. Wash. Jul. 9, 2009). There is,  
3 | however, a critical factual difference between these cases and the instant case. In  
4 | *Cornelius II* and *McFerrin*, the defendant title companies disbursed the reconveyance  
5 | fees to third-party vendors which were responsible for tracking the reconveyances; there  
6 | was no evidence that the defendants had assumed any contractual duty related to  
7 | reconveyance services. *Cornelius II*, 2010 WL 1406333, at \*1, \*3; *McFerrin*, 2009 WL  
8 | 2045212, at \*5.<sup>2</sup> Here, by contrast, Chicago Title did not use the services of a third-party  
9 | vendor. Rather, Chicago Title disbursed the reconveyance fee to itself, which, as  
10 | Chicago Title conceded at oral argument, created a contractual obligation for Chicago  
11 | Title to ensure that the reconveyances were completed. As a result, Chicago Title was  
12 | required to perform this obligation in good faith.

13 |         Viewing the facts in the light most favorable to the Bushbecks, the court finds that  
14 | Chicago Title’s failure to refund the unused portion of the Bushbecks’ reconveyance fee  
15 | until after they filed their lawsuit misled the Bushbecks into believing that Chicago Title  
16 | actually performed the reconveyances and required the reconveyance fee. Because  
17 | Chicago Title failed to refund the unused fees in a timely manner, the Bushbecks did not  
18 | receive the full benefit of the contract. *See Badgett*, 807 P.2d at 360. The court therefore

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21 | <sup>2</sup> Chicago Title also cites *Jankanish v. First Am. Title Ins. Co.*, No. C08-1147MJP, 2009  
22 | WL 779330, at \*2 (W.D. Wash. Mar. 23, 2009). *Jankanish* is even less persuasive than  
*Cornelius II* and *McFerrin*, as its holding related only to the failure to disclose claim. *Jankanish*,  
2009 WL 779330, at \*2.

1 denies Chicago Title’s motion for summary judgment on the Bushbecks’ claim for breach  
2 of the duty of good faith and fair dealing.

3 3. Voluntary Payment Doctrine

4 Chicago Title contends that the voluntary payment doctrine bars the Bushbecks’  
5 contract claims. The Washington Supreme Court has stated that “money voluntarily paid  
6 under a claim of right to the payment, and with full knowledge of the facts by the person  
7 making the payment, cannot be recovered back on the ground that the claim was illegal,  
8 or that there was no liability to pay in the first instance.” *Indoor Billboard/Wash., Inc. v.*  
9 *Integra Telecom of Wash.*, 170 P.3d 10, 23 (Wash. 2007). The Bushbecks argue that they  
10 did not pay the reconveyance fee voluntarily because they did not have full knowledge of  
11 the facts that (1) the deeds of trust required Countrywide to perform the reconveyances;  
12 (2) Chicago Title had no history of processing reconveyances on Countrywide loans; and  
13 (3) Chicago Title would not refund the unused reconveyance processing fees until after  
14 they filed a federal lawsuit. (*See* White Decl. Exs. 6-7; White Dep. 160:12-162:2,  
15 177:10-12; 179:13-18.) Viewing the facts in the light most favorable to the Bushbecks,  
16 the court agrees that the voluntary payment doctrine does not bar the Bushbecks’ contract  
17 claim.

18 **B. Breach of Estimated HUD-1**

19 The Bushbecks allege that Chicago Title “breached the Estimated HUD-1 by  
20 failing to accurately account for the funds disbursed and by failing to disclose that  
21 Plaintiffs were not required to use CTI for reconveyance or that lenders were doing the  
22 reconveyances for no cost or fees already paid.” (Compl. ¶ 71.) Chicago Title contends

1 that an Estimated HUD-1 is not a contract, so there can be no breach. The Bushbecks do  
2 not respond to this argument.

3 In *Cornelius v. Fidelity Nat'l Title Co.* (“*Cornelius I*”), No. C08-754MJP, 2009  
4 WL 596585, at \* 3-4 (W.D. Wash. Mar. 9, 2009), the court held that the HUD-1 was not  
5 a contract because there was no evidence of consideration given and no promise  
6 contained within the document aside from a representation that what is written is a “true  
7 and accurate statement of all receipts and disbursements made” on the escrow account.  
8 Similarly, in *Jankanish v. First Am. Title Ins. Co.*, No. C08-1147MJP, 2009 WL 779330,  
9 at \*2 (W.D. Wash. Mar. 23, 2009), the court held that the settlement statements “do not  
10 include terms and conditions, reflect no fee paid as consideration for a separate HUD-1  
11 contract, and contain no contractual promise to perform (or refrain from performing)  
12 some act.” The court agrees with the reasoning of *Cornelius I* and *Jankanish*. The court  
13 therefore grants Chicago Title’s motion for summary judgment on the Bushbecks’ claim  
14 for breach of the Estimated HUD-1.

15 **C. Violations of RESPA**

16 Section 8(b) of the Real Estate Settlement Procedures Act (“RESPA”), 12 U.S.C.  
17 § 2601 *et seq.*, provides:

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

21 12 U.S.C. § 2607(b). “The language of Section 8(b) prohibits only the practice of giving  
22 or accepting money where no service whatsoever is performed in exchange for that

1 money.” *Martinez v. Wells Fargo Home Mortgage, Inc.*, 598 F.3d 549, 554 (9th Cir.  
2 2010). “By negative implication, Section 8(b) cannot be read to prohibit charging fees,  
3 excessive or otherwise, when those fees are for services that were actually performed.”  
4 *Id.* at 554-55. A service provider violates Section 8(b) by charging the consumer a fee  
5 for which it performs no services; a plaintiff need not demonstrate that the service  
6 provider split the fee with another party in order to establish a violation of Section 8(b).  
7 *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 126 (2d Cir. 2007).<sup>3</sup>

8 The Bushbecks’ Estimated HUD-1 includes a charge for reconveyance fees of  
9 \$270.00—\$135.00 per loan—payable to Chicago Title. Chicago Title divides each  
10 \$135.00 reconveyance fee into a \$15.00 tracking fee plus a \$120.00 processing fee.  
11 Although Chicago Title contends that this breakdown is only for internal accounting  
12 purposes, the Bushbecks cite a number of examples in which Chicago Title, its  
13 representatives, and its attorneys have described the reconveyance fee as consisting of a  
14 tracking component and a processing component. (*See* White Decl. Ex. 13; White Dep.  
15 48:23-49:1; Mot. for J. on the Pleadings Hr’g Tr. (Dkt. # 64) 13:1-5, Nov. 11, 2008; *see*

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16  
17 <sup>3</sup> The Ninth Circuit has not addressed whether a party can violate Section 8(b) of RESPA  
18 by charging an unearned fee which is not divided or split with another party. In a prior order,  
19 this court followed the Second Circuit’s reasoning in *Cohen* and denied Chicago Title’s motion  
20 to dismiss the Bushbecks’ RESPA claim on the basis that the Bushbecks had not alleged a split  
21 of the unearned fee. *Bushbeck v. Chicago Title Ins. Co.*, 632 F. Supp. 2d 1036, 1041-42 (W.D.  
22 Wash. 2008). *See also* *Santiago v. GMAC Mortgage Group, Inc.*, 417 F.3d 384, 389 (3d Cir.  
2005) (holding that a single party can violate Section 8(b) by marking up the charge of another  
settlement service provider and retaining the unearned portion of the fee); *Sosa v. Chase  
Manhattan Mortgage Corp.*, 348 F.3d 979, 983 (11th Cir. 2003) (same). Other circuits hold that  
a plaintiff must allege an illegal split of a fee with a third party in order to establish a RESPA  
violation. *See* *Haug v. Bank of Am., N.A.*, 317 F.3d 832, 836 (8th Cir. 2003); *Boulevard v.  
Crossland Mortgage Corp.*, 391 F.3d 261, 265 (4th Cir. 2002); *Echevarria v. Chicago Title &  
Trust Co.*, 256 F.3d 623, 627 (7th Cir. 2001).

1 | also Pls. Resp. to Def. Not. of Supp. Auth. (Dkt. # 67) at 2 (listing additional examples).)

2 | The parties agree that Chicago Title performed tracking services but did not perform any  
3 | processing services. (See White Dep. 48:3-22, 49:14-21, 157:19-158:6; White Decl. ¶  
4 | 22; Resp. at 9.)

5 |         The issue, then, is whether the court, in reviewing the Bushbecks' RESPA claim,  
6 | should view Chicago Title's reconveyance fee as (1) a unitary \$270.00 fee for which the  
7 | service of reconveyance tracking was performed, or (2) a \$15.00 tracking fee per loan for  
8 | which a service was performed plus a separate \$120.00 processing fee per loan for which  
9 | no service was performed. If the reconveyance fee is a unitary fee, then the fee was  
10 | charged for "services actually performed," and there is no RESPA violation. If, however,  
11 | the reconveyance fee is comprised of separate tracking and processing fees, then, viewing  
12 | the facts in the light most favorable to the Bushbecks, Chicago Title may have violated  
13 | RESPA by collecting a \$120.00 processing fee per loan for which it performed no  
14 | services. The parties have not directed the court to any law addressing the scenario in  
15 | which a charge is allegedly comprised of one fee for which the provider performed  
16 | services and a second fee for which it did not perform services.<sup>4</sup>

17 |         Chicago Title insists that the court can look no deeper than the \$270.00 charge  
18 | disclosed on the Estimated HUD-1 in determining whether services were performed in  
19 | exchange for a fee. Chicago Title's interpretation does not, however, find support in the

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21 |         <sup>4</sup> In *Cohen*, the plaintiff alleged that the defendant violated Section 8(b) by charging her a  
22 | "post-closing" fee of \$225.00 for which it had provided no services. *Cohen*, 498 F.3d at 113-14.  
The court found that a party can violate Section 8(b) by charging a fee for which no work is  
done, and reversed the district court's dismissal of the plaintiff's RESPA claim. *Id.* at 126.



1 language of Section 8(b). Section 8(b) specifies that “[n]o person shall give and no  
2 person shall accept any *portion, split, or percentage* of any charge . . . other than for  
3 services actually performed.” 12 U.S.C. § 2607(b) (emphasis added). This language  
4 contemplates that the court will scrutinize the charge disclosed on the HUD-1 to  
5 determine whether the defendant accepted any portion, split, or percentage of that charge  
6 but performed no services in return. Interpreting Section 8(b) to prohibit a court from  
7 looking deeper than the HUD-1 would render the “portion, split, or percentage” language  
8 meaningless. *See Sosa v. Chase Manhattan Mortgage Corp.*, 348 F.3d 979, 983 (11th  
9 Cir. 2003) (noting that a service provider could be culpable as an “acceptor” by accepting  
10 an entire fee, knowing that part of it was not for services actually performed). In  
11 addition, a service provider can violate Section 8(b) by splitting a fee with a third party  
12 who performs no service, or by marking-up a third-party vendor’s fees and keeping the  
13 excess without performing any additional services. *See Kruse v. Wells Fargo Home*  
14 *Mortgage, Inc.*, 383 F.3d 49, 61-62 (2d Cir. 2004). Evaluating a Section 8(b) claim based  
15 on these theories requires a court to look beyond the charge disclosed on the HUD-1 to  
16 determine how it was actually divided and used. Chicago Title does not explain why a  
17 Section 8(b) claim premised on a service provider’s collection of an unearned fee should  
18 be treated differently. The court therefore holds that Section 8(b)’s prohibition against  
19 “accept[ing] any *portion, split, or percentage* of any charge . . . other than for services  
20 actually performed” is not limited to cases where the service provider performs no  
21 services for the entire charge disclosed on the HUD-1, but extends to any portion of the  
22 charge for which the service provider does not perform services.

1 Chicago Title contends that Section 8(b) does not authorize courts “to divide a  
2 ‘charge’ into what they or some other person or entity deems to be its ‘reasonable’ and  
3 ‘unreasonable’ components.” *Kruse*, 383 F.3d at 56 & n.4 (invalidating a Department of  
4 Housing and Urban Development (“HUD”) interpretation of Section 8(b) that stated that  
5 a service provider violates RESPA by charging a fee that exceeds the reasonable value of  
6 goods or services, and noting that Congress provided no guidelines for determining a  
7 reasonable charge). Here, however, the court has not been asked to determine whether a  
8 charge was reasonable or to decide what portion of a charge was unreasonable. Rather,  
9 the court is being asked to determine whether a portion of a charge, as determined and  
10 described by the service provider itself, was collected other than for services actually  
11 provided.

12 Chicago Title cites several cases which it contends support its position that a court  
13 cannot parse a settlement service fee into component parts even where that parsing is  
14 based on public information. In each of the three cited cases, the defendant charged the  
15 plaintiff a fee for title insurance which exceeded the publicly-filed rates required under  
16 Alabama state law. *Hazewood v. Foundation Fin. Group, LLC*, 551 F.3d 1223, 1224-25  
17 (11th Cir. 2008); *Morissette v. NovaStar Home Mortgage, Inc.*, 484 F. Supp. 2d 1227,  
18 1228-29 (S.D. Ala. 2007), *aff’d*, 284 F. App’x 729 (11th Cir. 2008); *Williams v. Saxon*  
19 *Mortgage Servs., Inc.*, No. 06-0799-WS-B, 2007 WL 1845642, at \*1 (S.D. Ala. Jun. 25,  
20 2007). In each case, the plaintiffs argued that because state law prohibited a title  
21 insurance company from charging more than the publicly-filed rate, the portion of the  
22 title insurance fee which was invalid under state law was a fee for which no services were

1 actually performed in violation of RESPA. In all three cases, the courts disagreed,  
2 holding that, because the defendants actually provided title insurance, the excess over the  
3 publicly-filed rate constituted a permissible overcharge rather than a fee for which no  
4 services were performed. *Hazewood*, 551 F.3d at 1225-27; *Morissette*, 484 F. Supp. at  
5 1230; *Williams*, 2007 WL 1845642, at \*4; *see also Arthur v. Ticor Title Ins. Co. of Fla.*,  
6 569 F.3d 154, 159 (4th Cir. 2009) (noting that RESPA is not a mechanism for enforcing  
7 state law). Thus, these cases are inapposite, as they involved allegations that the  
8 defendants charged too much for a service that was actually performed, rather than an  
9 allegation that the defendant collected a fee for which it performed no services.

10 Finally, Chicago Title contends that summary judgment is appropriate because  
11 RESPA does not apply to “conditional holdback fees.” The court disagrees. Whether the  
12 reconveyance fee was a “conditional holdback fee” is a question of fact, and the  
13 Bushbecks have presented evidence that Chicago Title retained the processing fees  
14 despite providing no reconveyance processing services and refunded the processing fee  
15 only in response to the Bushbecks’ lawsuit. (White Dep. 159:17-163:8.)

16 Because Section 8(b) prohibits a settlement service provider from “accept[ing]  
17 any portion, split, or percentage of any charge . . . other than for services actually  
18 performed,” and because the evidence, viewed in the light most favorable to the  
19 Bushbecks, establishes that Chicago Title charged reconveyance processing fees for  
20 which it performed no services, the court, on the record before it, denies Chicago Title’s  
21 motion for summary judgment on the Bushbecks’ RESPA claim.  
22

1 **D. Breach of Fiduciary and Agency Duties**

2 In the escrow context, an “escrow agent’s duties and limitations are defined . . . by  
3 his instructions.” *Denaxas v. Sandstone Court of Bellevue, LLC*, 63 P.3d 125, 129  
4 (Wash. 2003) (quoting *Nat’l Bank of Wash. v. Equity Investors*, 506 P.2d 20, 35 (Wash.  
5 1973)). “The tasks in the instructions must be undertaken with ‘ordinary skill and  
6 diligence, and due or reasonable care.’” *Id.* “In addition, the escrow agent, as fiduciary  
7 to all parties to the escrow ‘must conduct the affairs with which [it] is entrusted with  
8 scrupulous honesty, skill, and diligence.’” *Id.*

9 Chicago Title contends that the economic loss doctrine bars the Bushbecks’ claims  
10 for breach of fiduciary and agency duties. The Washington Supreme Court has stated  
11 that “the purpose of the economic loss rule is to bar recovery for alleged breach of tort  
12 duties where a contractual relationship exists and the losses are economic losses.”  
13 *Alejandre v. Bull*, 153 P.3d 864, 868 (Wash. 2007). Accordingly, the doctrine “prohibits  
14 plaintiffs from recovering in tort economic losses to which their entitlement flows only  
15 from contract because tort law is not intended to compensate parties for losses suffered as  
16 a result of a breach of duties assumed only by agreement.” *Id.* (internal citation and  
17 quotation marks omitted).

18 Here, the Bushbecks allege that Chicago Title breached its duty to act with  
19 “scrupulous honesty, skill, and diligence” when it charged a reconveyance processing fee  
20 even though (1) the deeds of trust required Countrywide to perform the reconveyances;  
21 (2) Chicago Title had instructed Countrywide to perform the reconveyances; and (3)  
22 Chicago Title understood that Countrywide would in fact perform the reconveyances.

1 This claim is duplicative of the Bushbecks' contract claim based on the breach of the  
2 duty of good faith and fair dealing.<sup>5</sup> The court therefore holds that the economic loss  
3 doctrine bars the Bushbecks' claims for breach of fiduciary and agency duties, and grants  
4 summary judgment on these claims to Chicago Title.

5 **E. Violations of the Washington Consumer Protection Act ("CPA")**

6 To establish a violation of the CPA, chapter 19.86 RCW, a plaintiff must  
7 demonstrate: "(1) [an] unfair or deceptive act or practice; (2) occurring in trade or  
8 commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or  
9 property; (5) causation." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*,  
10 719 P.2d 531, 532 (Wash. 1986). To prove an unfair or deceptive act, the plaintiff need  
11 not show that the defendant intended to deceive, but only that the alleged act had the  
12 capacity to deceive a substantial portion of the public. *Id.* at 535. Although the CPA  
13 does not define the term "deceptive," Washington courts have held that "implicit in that  
14 term is 'the understanding that the actor *misrepresented* something of material  
15 importance.'" *Stephens v. Omni Ins. Co.*, 159 P.3d 10, 18-19 (Wash. Ct. App. 2007)  
16 (quoting *Hiner v. Bridgestone/Firestone, Inc.*, 959 P.2d 1158, 1163 (Wash. Ct. App.  
17 1998), *rev'd on other grounds*, 978 P.2d 505 (Wash. 1999)). In addition, "[a] loss of use  
18 of property which is causally related to an unfair or deceptive act or practice is sufficient  
19 injury to constitute the fourth element of a Consumer Protection Act violation." *Id.* at 25  
20 (quoting *Mason v. Mortgage Am., Inc.*, 792 P.2d 142, 148 (Wash. 1990)).

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21  
22 <sup>5</sup> At oral argument, counsel for the Bushbecks stated that the claims for breach of contract  
and breach of fiduciary duty were "pled and argued in the alternative."

1 Chicago Title argues that there can be no unfair or deceptive act where a fee was  
2 disclosed “up front” during a transaction; that the Bushbecks cannot show harm because  
3 they received a refund; and that it acted in good faith under an arguable interpretation of  
4 the law. Preliminarily, the court takes a dim view of Chicago Title’s contention that, by  
5 issuing a refund in reaction to the Bushbecks’ lawsuit (*see* White Dep. 159:17-163:8), it  
6 eliminated its liability under the CPA. Moreover, as explained above, the Bushbecks  
7 have presented evidence supporting their allegations that Chicago Title committed unfair  
8 or deceptive acts and acted in bad faith when it collected the reconveyance processing  
9 fees despite knowing that Countrywide would perform the reconveyances, promised that  
10 it would refund the fees if they were not used, and then failed to refund the unused fees  
11 until after the Bushbecks filed their lawsuit. Thus, viewing the facts in the light most  
12 favorable to the Bushbecks, the court holds (1) that Chicago Title’s practice of collecting  
13 reconveyance processing fees that it knew it would not use and then failing to refund the  
14 unused reconveyance processing fee may constitute an unfair or deceptive act that caused  
15 injury under the CPA, and (2) that the Bushbecks have established a genuine issue of  
16 material fact regarding whether Chicago Title acted in good faith. The court therefore  
17 denies Chicago Title’s motion for summary judgment on the Bushbecks’ CPA claims.<sup>6</sup>

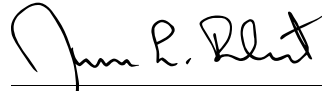
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20 <sup>6</sup> The Bushbecks also argue that Chicago Title committed a per se violation of the CPA  
21 by violating the Washington Insurance Code (“WIC”). “A per se unfair trade practice exists  
22 in trade or commerce has been violated.” *Hangman Ridge*, 719 P.2d at 535. Although the WIC  
states that the business of insurance is one “affected by the public interest,” RCW 48.01.030, the  
Bushbecks have not identified any statute declaring that Chicago Title’s alleged actions in this  
case constitute per se unfair or deceptive practices.

1 **III. CONCLUSION**

2 For the foregoing reasons, the court GRANTS in part and DENIES in part  
3 Chicago Title's motion for summary judgment (Dkt. # 42).

4 Dated this 1st day of June, 2010.

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8 JAMES L. ROBART  
9 United States District Judge  
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