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11 **UNITED STATES DISTRICT COURT**

12 **SOUTHERN DISTRICT OF CALIFORNIA**

13 **IN RE: FIRST AMERICAN HOME BUYERS**
14 **PROTECTION CORPORATION CLASS**
15 **ACTION LITIGATION**

Lead Case No. 13-cv-01585 BAS (JLB)

CONSOLIDATED CLASS ACTION COMPLAINT
FOR:

- 16 **(1) TORTIOUS BREACH OF THE IMPLIED**
- 17 **COVENANT OF GOOD FAITH AND FAIR**
- 18 **DEALING;**
- 19 **(2) VIOLATION OF CALIFORNIA CIVIL**
- 20 **CODE § 1710(1)**
- 21 **(3) VIOLATION OF CALIFORNIA CIVIL**
- 22 **CODE § 1710(2)**
- 23 **(4) VIOLATION OF CALIFORNIA CIVIL**
- 24 **CODE § 1710(3)**
- 25 **(5) VIOLATION OF CALIFORNIA CIVIL**
- 26 **CODE § 1710(4);**
- 27 **(6) VIOLATION OF CALIFORNIA BUS. &**
- 28 **PROF. CODE § 17200;**
- (7) FALSE ADVERTISING;**
- (8) BREACH OF CONTRACT; AND**
- (9) DECLARATORY RELIEF.**
- (JURY TRIAL DEMANDED)**

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NATURE OF THE ACTION..... 1

JURISDICTION AND VENUE..... 3

PARTIES..... 3

CLASS ACTION ALLEGATIONS 5

SUBSTANTIVE ALLEGATIONS..... 8

 A. Background..... 8

 B. Plaintiffs’ Experiences with First American..... 9

 C. First American’s Unfair Business Practices 14

 D. First American’s Fraud 17

 E. First American’s Concealment 20

FIRST CLAIM FOR RELIEF
(Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing)
(On Behalf of Plaintiffs and the Subclass) 29

 1. First American Uses Unlicensed, Unqualified and Poorly-Paid
 Third-Party Contractors 31

 2. First American Fails to Perform any Investigation of Its Customers’ Claims..... 31

 3. First American Incentivizes Its Contractors to Refuse to Work on Expensive
 Jobs and Perform Substandard Repairs..... 32

 4. First American Keeps No Records of How Much Its Contractors
 Charge Its Customers, and Allows the Contractors to Gouge Customers On
 Allegedly Non-Covered Claims..... 34

 5. First American Delays Things in the Hopes the Problem Will Go Away 35

SECOND CLAIM FOR RELIEF
(Intentional Misrepresentation - Violation of Civil Code § 1710(1))
(On Behalf of Plaintiffs and the Class)..... 36

THIRD CLAIM FOR RELIEF
(Negligent Misrepresentation - Violation of Civil Code § 1710(2))
(On Behalf of Plaintiffs and the Class)..... 37

FOURTH CLAIM FOR RELIEF
(Fraud by Concealment – Violation of Civil Code § 1710(3))
(On Behalf of Plaintiffs and the Class)..... 37

1 **FIFTH CLAIM FOR RELIEF**
2 **(Promissory Fraud – Violation of Civil Code § 1710(4))**
3 **(On Behalf of Plaintiffs and the Class).....42**

4 **SIXTH CLAIM FOR RELIEF**
5 **(Violation of Bus. & Prof. Code § 17200)**
6 **(On Behalf of Plaintiffs and the Class).....46**

7 **SEVENTH CLAIM FOR RELIEF**
8 **(On Behalf of Plaintiffs and the Class)**
9 **(False Advertising – Violation of Bus. & Prof. Code § 17500).....48**

10 **EIGHTH CLAIM FOR RELIEF**
11 **(Breach of Contract)**
12 **(On Behalf of Plaintiffs Carrera, Hershey, Morrison, and Diaz Individually).....49**

13 **NINTH CLAIM FOR RELIEF**
14 **(Declaratory Relief Under Code of Civil Procedure § 1060)**
15 **(On Behalf of Plaintiffs Hershey, Morrison, and the Class)52**

16 **PRAYER FOR RELIEF.....53**

17 **JURY DEMAND.....54**

18

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NATURE OF THE ACTION

“First American is the Real Customer.”

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4 1. The aforementioned quote is taken directly from the “Welcome Aboard” package that
5 First American gives its third party repairmen who are dispatched to repair or replace covered
6 systems under the home protection contracts¹ sold by Defendant First American Home Buyers
7 Protection Company (“First American” or the “Company”).

8 2. First American is an insurance company and is regulated by certain provisions of the
9 California Insurance Code. The Company thus owes fiduciary or quasi-fiduciary duties to its
10 insureds. The Company indisputably has a duty of good faith and fair dealing to refrain from doing
11 anything to injure the rights of its insureds to receive the benefits of the insurance policies. To fulfill
12 its obligation, First American must give at least as much consideration to the interests of its insureds
13 as it gives to its own interests.

14 3. As demonstrated by the above quotation, First American systematically violates these
15 principles because the Company tells its third-party contractors that “First American is the real
16 customer.” Further, as demonstrated in more detail herein, First American takes other uniform and
17 concerted efforts to ensure that its third-party contractors act in First American’s best interests, but
18 not the best interests of First American’s customers. First American also uses the third-party
19 contractors to interfere with the ability of the Company’s policyholders to receive the benefits of the
20 home protection contracts.

21 4. This action is brought as a class action on behalf of a nationwide plaintiff class
22 consisting of all persons and entities who purchased or received a home protection contract from
23 First American during the period from approximately March 6, 2003 through the present. This
24 action is also brought on behalf of a Subclass of all persons and entities during the same period who
25 were listed as the insured on such policies and who made a claim or claims that were denied or were
26 covered but where the person had to pay any amount other than the service call fee.

27 _____
28 ¹ Plaintiffs also sometimes refer herein to the home protection contracts sold by Defendant as
“home warranty plans.”

1 5. First American is engaged in the business of selling home protection contracts in
2 California and throughout the United States. First American advertises that it provides its customers
3 with “relief from the hassle and expense of household systems and appliance breakdowns.” First
4 American further advertises that, “In most cases, all you pay is a \$55 trade service fee for the repair.
5 *If we can’t repair it, we’ll replace it. Imagine . . . a new air conditioner for \$55.*”

6 6. While First American advertises and promises to *replace* covered systems, it conceals
7 and fails to disclose to its customers that it has no intention of *replacing* an expensive covered
8 system if it fails during the term of the contract. Instead, it has a uniform undisclosed policy of
9 *repairing* rather than replacing covered systems.

10 7. As discussed below, First American employs third-party contractors, some of which
11 are not even licensed, to service its customers’ home warranty claims. Moreover, it ranks its third-
12 party contractors almost exclusively on average cost to First American per service call and only
13 awards significant volume to those contractors who meet First American’s extremely low target rate.
14 The target rate is so low that the contractors cannot actually replace a covered system when it fails.
15 As a result, the contractors recommend and perform repairs rather than replacements.

16 8. First American pays its contractors well below the market rate for their services.
17 Because of First American’s ranking system for its contractors, the contractors with the lowest
18 average cost per invoice get the most work from First American. As a result, the only way First
19 American’s contractors can get any work or make any money is to keep their costs to an absolute
20 minimum. First American’s contractors do so by, among other things: (1) giving First American
21 excuses or pretextual reasons to deny (in whole or part) legitimate homeowner warranty claims; (2)
22 refusing to work on expensive jobs; and (3) performing cheap band-aid repairs rather than necessary
23 but expensive replacements. In addition, First American instructs its contractors that they can make
24 up the difference between the market rate and what First American pays them by gouging customers
25 for non-covered work. As a result of these practices, First American’s customers are deprived of the
26 benefits of their home warranty contracts. Of course, First American does not disclose any of these
27 facts to its customers before they enter into their home warranty contracts.

JURISDICTION AND VENUE

1
2 9. These actions were originally filed in state court. Upon removal of the action by
3 Defendant, this Court found federal jurisdiction to exist, pursuant to the Class Action Fairness Act
4 of 2005, 28 U.S.C. § 1332(d)(2), 1453.

5 10. Venue is proper in this Court because Plaintiffs Anna Hershey and Emily Diaz live
6 in San Diego.. Moreover, a substantial portion of the transactions and wrongs complained of herein
7 occurred in this District, and Defendant has received substantial compensation in this District by
8 doing business here and engaging in numerous activities that had an effect in this District.

9 **PARTIES**

10 11. Plaintiff Nancy Carrera is a holder of a home warranty plan issued by First American
11 during the Class Period. A copy of the plan is attached to this amended complaint as **Exhibit A** and
12 is incorporated herein by reference. Plaintiff suffered actual, out-of-pocket damages and harm when
13 she acquired her First American home protection contract and when First American failed to honor
14 the terms of the home protection contract.

15 12. Plaintiff Anna Hershey is a California resident and citizen and a holder of a home
16 warranty plan issued by First American during the Class Period. A copy of the plan is attached to
17 this complaint as **Exhibit B** and is incorporated herein by reference. Plaintiff suffered actual, out-of-
18 pocket damages and harm when she acquired her First American home protection contract and when
19 First American failed to honor the terms of the home protection contract.

20 13. Plaintiff Emily Diaz is a California resident and citizen and a holder of a home
21 warranty plan issued by First American during the Class Period. A copy of the plan is attached to
22 this complaint as **Exhibit C** and are incorporated herein by reference. During the term of her home
23 warranty plans, Plaintiff made several claims that First American failed to properly adjust and
24 improperly denied as being uncovered.

25 14. Plaintiff Brent Morrison is a California resident and citizen and a holder of a home
26 warranty plan issued by First American during the Class Period. First American failed to send Mr.
27 Morrison a copy of the home warranty plan after it was purchased and therefore Mr. Morrison is
28 unable to attach a copy of the plan to the complaint. Plaintiff suffered actual, out-of-pocket damages

1 and harm when he acquired his First American home protection contract and when First American
2 failed to honor the terms of the home protection contract.

3 15. Plaintiff Karene Jullien is a California resident and citizen and a holder of a home
4 warranty plan issued by First American during the Class Period. A copy of the plan is attached to
5 this complaint as **Exhibit D** and is incorporated herein by reference. Plaintiff suffered actual, out-
6 of-pocket damages and harm when she acquired and renewed her First American home protection
7 contract.

8 16. First American is a California corporation with its principal place of business at
9 7833 Haskell Avenue, Van Nuys, California 91406. First American also maintains a consumer sales
10 office in Santa Rosa, California and a call center in North Hills, California. According to the most
11 recent examination conducted by the California Department of Insurance: “As of December 31,
12 2007, the Company was licensed to transact home protection business in all states and the District of
13 Columbia. In 2007, the Company wrote \$170 million of direct premiums. Of the direct premiums
14 written \$59.6 million (35%) was written in California, \$35.8 million (21.1%) was written in Texas,
15 \$12.8 million (7.5%) was written in Arizona and \$61.8 million (36.4%) was written in the remaining
16 states. The Company is a direct writer and during 2007 wrote approximately 412,000 home
17 warranty contracts.”

18 17. Various other individuals, partnerships, corporations, and other business entities,
19 unknown to the Plaintiffs, have participated in the violations alleged herein and have performed acts
20 and made statements in furtherance thereof.

21 18. The true names and capacities, whether individual, corporate, associate, or otherwise,
22 of defendants named in this action as DOES 1-20, inclusive, are unknown to Plaintiffs, which
23 therefore sues these defendants by such fictitious names. Plaintiffs will amend this amended
24 complaint to show their true name(s) and capacities when they have been ascertained. Plaintiffs are
25 informed and believe, and on that basis allege, that each of these fictitiously-named defendants is
26 responsible in some manner for the occurrences herein alleged, and that Plaintiffs’ injuries as herein
27 alleged were proximately caused by conduct of these fictitiously-named defendants.

1 hundreds of thousands of Class and Subclass members, geographically dispersed throughout the
2 United States, such that joinder of all class members is impracticable.

3 26. Plaintiffs' claims are typical of the claims of the Class and Subclass in that:

- 4 a) Plaintiffs are members of the Class and Subclass;
- 5 b) Plaintiffs are holders of home protection contracts issued by First American;
- 6 c) Plaintiffs were exposed to Defendant's false advertising, and relied upon such
7 advertisements;
- 8 d) Plaintiffs and all class members were damaged by the same wrongful conduct
9 of Defendants and their co-conspirators as alleged herein; and
- 10 e) The relief sought is common to the Class and Subclass.

11 27. Numerous questions of law or fact arise from Defendant's unfair and anticompetitive
12 conduct that are common to the Class and Subclass. Among the questions of law or
13 fact common to the Class are:

- 14 (a) Whether First American sold and/or issued home protection contracts to
15 Plaintiffs and the Class;
- 16 (b) Whether Defendant engaged in unfair and/or unlawful business practices
17 during the Class Period;
- 18 (c) Whether Defendant breached the implied covenant of good faith and fair
19 dealing implied in the home protection contracts;
- 20 (d) Whether Defendant committed fraud in connection with the sale of the home
21 warranty contracts;
- 22 (e) Whether Defendant committed promissory fraud in connection with the sale
23 of the home warranty contracts;
- 24 (f) Whether Defendant had a duty to disclose and omitted to disclose material
25 facts to Plaintiffs and the Class; and
- 26 (g) Whether class-wide declaratory, injunctive and restitutionary relief is
27 appropriate and, if so, the proper measure of the declaratory, injunctive, and
28 restitutionary relief.

1 28. Among the questions of law and fact common to the Subclass are:

- 2 (a) Whether Defendant owed a duty of good faith and fair dealing to Plaintiffs
3 and the Subclass;
- 4 (b) Whether Defendant performed any investigation prior to denying the claims of
5 Plaintiffs and the Class;
- 6 (c) Whether Defendant gave as much consideration to the interests of Plaintiffs
7 and the Subclass as it did to its own interests; and
- 8 (d) Whether Plaintiffs and the Subclass were harmed, and if so the proper
9 measure of damages.

10 29. These questions of law or fact are common to the Class and Subclass and
11 predominate over any other questions affecting only individual class members.

12 30. Plaintiffs will fairly and adequately represent the interests of the Class and the
13 Subclass in that:

- 14 (a) Plaintiffs are typical holders of the home warranty plans issued by First
15 American;
- 16 (b) Plaintiffs were listed as the insured on the home warranty plans issued by
17 Defendant, and made one or more claims under such policies, and their claims
18 were denied and/or they had to pay more than the service call fee for such
19 claims;
- 20 (c) Plaintiffs were harmed as a result of Defendant's unlawful, unfair and/or
21 fraudulent business practices; and
- 22 (d) Plaintiffs have no conflicts with any other member of the Class or Subclass.

23 31. Plaintiffs have retained competent counsel experienced in class action litigation.

24 32. A class action is superior to the alternatives, if any, for the fair and efficient
25 adjudication of this controversy.

26 33. Prosecution of separate actions by individual class members would create the risk of
27 inconsistent or varying adjudications, establishing incompatible standards of conduct for Defendants.

28

1 “[a]gents will also lessen the risk of costs and delays during the selling process as well as reduce
2 their after-sale liability.”

3 38. An individual who receives a home warranty plan issued by First American and
4 desires to submit a claim must either call (800) 992-3400 or visit the company’s website at
5 <http://homewarranty.firstam.com/>.

6 39. After the individual contacts First American, the Company dispatches a local service
7 technician (*e.g.* plumber, electrician, etc.) to respond to the homeowner’s problem. Each home
8 warranty plan (drafted by First American and containing identical language) uniformly states that
9 there is a “service call fee” that must be paid “when the technician arrives at your home.” The
10 homeowner is required to pay the service fee even if the Company decides that the homeowner’s
11 claim is not covered under First American’s warranty plan.

12 **B. Plaintiffs’ Experiences with First American**

13 40. In June 2009, during the Class and Subclass Period, Plaintiff Carrera made a claim
14 with First American. Plaintiff Carrera called First American to report that the upstairs of her home
15 was not cooling properly.

16 41. First American assigned a contractor who was not qualified or competent, in breach
17 of the contract which states: “When your coverage is confirmed, First American will dispatch your
18 call to a qualified contractor.” The contractor came to Plaintiff Carrera’s residence and advised her
19 that a new thermostat would help even out the air flow in Plaintiff’s home. First American’s
20 contractor installed a thermostat. However, because the thermostat was not the cause of the problem
21 with Plaintiff’s air conditioner, First American failed to properly respond to Plaintiff’s claim.

22 42. Approximately one month later, on July 7, 2009, Plaintiff Carrera’s air conditioning
23 was not functioning properly. Plaintiff again called First American, who once more sent the same
24 contractor to Plaintiff’s residence. First American’s contractor this time stated that the problem was
25 a broken tip valve on Plaintiff’s outside air conditioning unit, which the contractor replaced. Again,
26 however, this was not the cause of the problem with Plaintiff’s air conditioner, and thus First
27 American failed to properly respond to Plaintiff’s claim.

1 43. On August 2, 2009, Plaintiff Carrera called First American again because her air
2 conditioner again was not functioning. Plaintiff specifically asked First American's contractor
3 whether the problem could be related to the coil on her inside air conditioning unit. Without ever
4 checking this coil, the contractor said that nothing was wrong with the inside air conditioning unit,
5 recharged the air conditioning system, and applied a sealant to the system. The conduct of First
6 American and its contractor constituted a breach of the contract since the contract specifically covers
7 compressor coils for air conditioning units (*see e.g.*, **Exhibit A**), yet the contractor refused to even
8 inspect the coil. The conduct of First American and its contractor also constituted a breach of the
9 contract because the contract promises that the work "will be completed as soon as reasonably
10 possible" yet First American failed to complete the work that was necessary to be performed in a
11 reasonably prompt manner. Instead of performing the work that was necessary, the contractor
12 simply performed a band-aid fix.

13 44. Plaintiff Carrera's air conditioner broke again on August 16, 2009. Yet again,
14 Plaintiff called First American, who dispatched the same contractor to Plaintiff's residence. The
15 contractor arrived on August 17, 2009 while Plaintiff was away at work, and this time advised that
16 the problem with Plaintiff's air conditioner was the capacitor, which the contractor replaced.

17 45. When Plaintiff Carrera returned home on August 17, 2009, the temperature in her
18 home was approximately 98 degrees Fahrenheit and there was a pool of refrigerant on the floor near
19 her inside air conditioning unit. Plaintiff called First American and explained that she would no
20 longer accept service from the same contractor who had four times failed to correctly diagnose her
21 air conditioning system.

22 46. First American transferred Plaintiff Carrera to its Claims Solutions Department and
23 dispatched a different contractor to Plaintiff's residence. This contractor arrived on August 21,
24 2009, at which time he identified that the problem with Plaintiff's air conditioning system was
25 related to the coil on her inside air conditioning unit.

26 47. Throughout this ordeal, Plaintiff Carrera bought two window air conditioning units so
27 as to sufficiently cool areas of her home for sitting and sleeping. Plaintiff also paid two service fees
28

1 of \$100.00 each to First American's contractor. Plaintiff additionally was required to pay \$450.00
2 for the disposal of her air conditioner's compressor and evaporator coil.

3 48. While waiting for a different contractor to service her unit until August 21, 2009,
4 Plaintiff was unable to live in her house due to excessive heat as well as mold and mildew that
5 formed on Plaintiff Carrera's flooring due to the coolant leak caused by First American's contractor.
6 To date, First American has not compensated Plaintiff for this damage.

7 49. As it turns out, Plaintiff Carrera's ordeal with First American was predictable since
8 First American stacks the deck against its customers even before they purchase and/or receive a
9 home protection contract.

10 50. Plaintiff Hershey purchased several First American home warranty contracts during
11 the Class Period, and at least two such policies are currently in effect. Prior to purchasing the
12 policies, Ms. Hershey read and relied upon Defendant's advertisements and brochures alleged
13 herein. Based upon such advertisements and brochures, Ms. Hershey purchased the home protection
14 contracts. She purchased one policy for the protection of tenants in a rental property she owns in La
15 Jolla, California. She purchased a second policy for her personal residence in La Jolla, California.
16 In 2012, First American wrongfully denied a claim Ms. Hershey made on the policy covering her
17 personal residence. The contractor which First American dispatched to her home to investigate the
18 claim denied the claim on the alleged basis that he believed that the oven door had been damaged by
19 a child standing on the door. The denial on this basis was wrongful and pre-textual. Ms. Hershey
20 does not have any children living with her and no child had stood on or damaged the oven door. The
21 First American contractor denied the claim in order to avoid having to fix the oven and in order to
22 keep his "average cost per invoice" low so that he would continue to receive work from First
23 American. As a result of First American's wrongful conduct, Plaintiff Hershey has suffered
24 monetary damages since she was forced to pay out of her own pocket to have her oven fixed.

25 51. Plaintiff Karene Jullien is a California resident and citizen, and has had a First
26 American home protection contract for two years. Plaintiff purchased and/or renewed her First
27 American home protection contract based on Defendant's false and misleading advertisements and
28 brochures alleged herein. During such time, Plaintiff made a claim regarding her air conditioning

1 unit. First American failed to properly repair or replace the air conditioning unit, and instead
2 suggested a repair at a cost to Plaintiff of approximately \$2,500. As an alternative, First American
3 offered Plaintiff a *negative* cash out of \$110. When Plaintiff asked the technician that worked on the
4 air conditioning system why First American would not honor the terms of the contract, the contractor
5 indicated that it is First American's policy to push back the cost onto its client by disguising repairs
6 as "modifications," which are not covered under the contract. The contractor was also able to
7 identify a replacement unit, compatible with Plaintiff's system, in a single phone call even though a
8 First American technician told Plaintiff a compatible system no longer existed and therefore that
9 Plaintiff would have to change the system. Because of the company's dubious practices, this
10 technician no longer works with First American.

11 52. Plaintiff Brent Morrison is a California resident and citizen, and purchased a First
12 American home protection contract to cover his personal residence in 2012 and the policy is still in
13 effect. However, First American never sent Mr. Morrison a copy of the policy after it was
14 purchased. Thereafter, he made a claim under the policy pertaining to his air conditioning/heating
15 unit. First American sent a contractor to his home, who identified the problem as relating to
16 damaged and/or non-operational ductwork in the home. The contractor denied the claim on the basis
17 that the ductwork had asbestos insulation around the ductwork, and that the policy did not cover
18 removal of asbestos. Plaintiff Morrison asked First American whether it would replace the damaged
19 ductwork if he paid out of his own pocket to have the asbestos removed, and First American
20 indicated that it would do so. As a result, Plaintiff spent approximately \$700 to have the asbestos
21 removed. Plaintiff Morrison then asked First American to repair or replace the ductwork. First
22 American sent another contractor to Plaintiff's home. The contractor denied the claim again, this
23 time on the alleged basis that the ductwork appeared damaged or crushed. The denial on this basis
24 was wrongful and pre-textual. The First American contractor denied the claim in order to avoid
25 having to fix or replace the ductwork and in order to keep his "average cost per invoice" low so that
26 he would continue to receive work from First American. As a result of First American's wrongful
27 conduct, Plaintiff Morrison has suffered monetary damages since he was forced to pay out of her
28 own pocket to have the asbestos removed. Since such time, Mr. Morrison's air conditioning has not

1 worked during the summer season. Plaintiff has obtained a quote from an independent contractor to
2 fix the ductwork, and the quote was approximately \$3200 to fix the ductwork. Plaintiff does not
3 have the money to have the ductwork fixed due to the high cost associated with doing so, and since
4 Plaintiff recently spent his savings to purchase his home. Plaintiff has also suffered monetary loss
5 and damage since he was forced to purchase room air conditioners at a cost exceeding \$600 to
6 provide some relief from the heat. Plaintiff Morrison seeks declaratory relief concerning his rights
7 and Defendant's obligations under the home warranty plan, and seeks damages and restitution.

8 53. Plaintiff Emily Diaz is a California resident and citizen, and made two claims
9 pursuant to her First American home protection contract during the Class Period. The first claim
10 occurred in March 2008. Plaintiff called First American to report that sewage was backing up in her
11 shower. First American sent a plumber who stated that the blockage was caused by a foreign object.
12 On that basis, First American refused to fix the problem. Plaintiff hired her own plumber who did
13 not find any foreign objects and fixed the problem by simply snaking the drain. Plaintiff Diaz's next
14 claim occurred in December 2008 and involved a leaking water heater. The plumber sent by First
15 American stated that the problem was caused by a cracked plastic spout. Plaintiff, who was on the
16 call between the plumber and First American's contractor authorization department, heard the
17 plumber tell First American that he did not know what caused the crack. First American then asked
18 the plumber a series of leading questions to see if the crack could have been caused by any reason
19 other than normal wear and tear. Since the plumber could not say with 100% certainty that the crack
20 was caused by normal wear and tear, First American denied the claim. Because Plaintiff needed the
21 leaking water heater fixed right away, she agreed to pay the plumber \$129 to replace the plastic
22 spout. After an hour, the plumber was unable to fix the spout and told Plaintiff she needed a new
23 water heater. Plaintiff called another plumber for a second opinion who stated that the first plumber
24 damaged the spout by trying to remove it with the wrong tool. The second plumber easily removed
25 and replaced the spout with a screw driver. As it turns out, First American's denials of Plaintiff's
26 claims were predictable since First American stacks the deck against its customers even before they
27 make a claim.

1 **C. First American's Unfair Business Practices**

2 54. First American does everything it can to deny homeowners the benefits promised by
3 its home warranty plans. Among other things, First American pays its contractors rates so low that
4 contractors cannot make any money if they perform the job honestly or competently. First American
5 also ranks its contracts based primarily on their average cost per invoice. The contractors with the
6 lowest average invoices get the most amount of work. Because First American allows its contractors
7 to essentially decide whether a homeowner's warranty claim is covered under the terms of the
8 warranty policy, the contractors have the ability and financial incentive to deny legitimate warranty
9 claims in whole or part, refuse to work on expensive jobs, perform substandard repairs and gouge
10 customers for "non-covered" work.

11 ***First American uses unlicensed, unqualified and poorly-paid third-party contractors***

12 55. First American does not employ its own contractors to fix homeowners' claims.
13 Instead, it hires third-party contractors under independent contractor service agreements. First
14 American selects its contractors purely on price and does nothing to ensure they are qualified. In
15 some instances, the contractors do not even have the requisite licenses. First American also selects
16 contractors who work primarily for other home warranty companies because these contractors
17 already know how the home warranty game works and are dependent on home warranty companies
18 for their livelihood. As a result, First American negotiates contractor rates well below the retail-
19 market rate which is too low to allow the contractor to properly repair or replace covered items.

20 ***First American trains its contractors to deny claims in whole or part***

21 56. Technically, First American's independent contractors do not actually deny
22 homeowner claims. Rather, First American trains its contractors to look for pre-textual reasons First
23 American can use to deny claims in whole or in part. Specifically, when a contractor arrives at a
24 home, the contractor investigates the problem and then calls First American's authorizations
25 department. The contractor provides the authorizer with one or more potential bases on which First
26 American can deny the claim. If the contractor fails to provide the authorizer with grounds for a
27 denial, the authorizer will ask the contractor a series of questions all designed to find a reason to
28 deny the claim in whole or in part. The most common reasons First American gives for denying

1 claims are improper installation, lack of maintenance, excessive rust or corrosion, wrong-sized unit
2 and pre-existing condition.

3 57. Denials based on a pre-existing condition are especially improper given that First
4 American agrees to cover the homeowner's systems and appliances without bothering to investigate
5 whether the systems and appliances are actually in good-working order. Indeed, if a homeowner
6 makes a claim within the first 30 days of the policy, First American presumes that the problem is a
7 pre-existing condition. Of course, First American has no way of knowing whether that problem
8 actually existed at the time it issued the policy. Nonetheless, First American issues the policy and
9 accepts the policy premium anyway. First American does not refund the homeowner the policy
10 premium if it denies the claim because of a supposed pre-existing condition. First American also
11 does not refund the \$55 trade-call fee that the homeowner has to pay in order to find out that his or
12 her claim is not covered.

13 ***First American incentivizes its contractors to deny claims, refuse to work on expensive jobs***
14 ***and perform substandard repairs***

15 58. First American ranks its contractors based almost exclusively on their average cost
16 per invoice. The contractors who charge First American the least amount get the most amount of
17 work. The contractors who charge more than the target average get the least amount of work. First
18 American's contractors therefore have a financial incentive to keep their average cost per invoice as
19 low as possible. As such, First American establishes financial incentives that cause its contractors to
20 use at least three improper methods to keep their average costs down:

21 (a) *First American incentivizes, encourages, and allows its contractors to*
22 *aggressively look for pre-textual reasons that First American can use to deny claims:* When First
23 American denies a claim, the contractor still gets to keep the \$55 trade-call fee and then submits a \$0
24 invoice to First American. Enough denials significantly lower the contractor's average cost per
25 invoice. Lower average invoices result in First American awarding more work to such contractors.
26 In other words, First American provides the contractors with a financial incentive to find ways for
27 First American to deny claims.
28

1 (b) *First American incentivizes the contractors to refuse to perform expensive*
2 *repairs:* If a contractor has to perform an expensive repair, his or her average cost per invoice will
3 skyrocket. To avoid this undesirable result, First American’s contractors routinely claim they are
4 unable to do the job for whatever reason. The end result is that the homeowner has to wait while
5 First American obtains a second opinion and finds someone who is willing to do the job. In some
6 cases — say a broken air conditioner in Las Vegas during July — the homeowner cannot wait very
7 long and will often give up and pay someone out of their own pocket to perform the job at retail
8 rates. Of course, the whole point of purchasing a First American home warranty is supposedly so
9 that the homeowner can obtain “relief from the hassle and expense of household system and
10 appliance breakdowns.”

11 (c) *First American incentivizes the contractors to perform band-aid fixes rather*
12 *than perform necessary replacements:* Having to replace a home system or appliance is the fastest
13 way to increase a contractor’s average cost per invoice. Thus, when a system or appliance needs to
14 be replaced, the contractor will normally try to repair it instead, even if that repair might only last a
15 few months or just weeks. When the repair inevitably fails, the homeowner has to take another day
16 off of work while the contractor tries to repair it again. In some cases, the homeowner even has to
17 pay the \$55 trade-call fee again. In some cases, it might take eight or nine repairs before First
18 American agrees to replace the system or appliance. In many cases, the homeowner simply gets fed
19 up and pays someone out of their own pocket to do the replacement.

20 ***First American encourages its contractors to gouge customers on non-covered claims***

21 59. As mentioned above, First American forces its contractors to accept incredibly low
22 rates for their services. First American tells the contractors they can make up the difference by
23 essentially gouging customers for non-covered work. Take, for example, the replacement of a water
24 heater. At the rates First American pays, the contractor loses money on the job. Of course the
25 homeowner also wants the contractor to remove and dispose of the old water heater. Removal of the
26 unit is normally not covered under the policy. Thus, First American tells the contractor he can
27 charge the homeowner whatever he or she wants for removal/disposal fees. The homeowner usually
28

1 pays the contractor what he or she is asking even if it is significantly more than what a non-home-
2 warranty contractor would charge for doing the same thing.

3 60. It is even more profitable for the contractor when First American refuses to cover the
4 item. Take the water heater example again. If First American denies the claim, the homeowner will
5 usually prefer to pay the contractor its “retail rate” rather than continue to take cold showers. Of
6 course, the homeowner could have accomplished this same result without having to pay First
7 American the policy premium in the first place.

8 ***First American delays things in the hope its customers will give up and pay out of their
own pocket to get the problem fixed***

9 61. One of First American’s favorite tactics is to delay things for so long that the
10 homeowner eventually gives up and pays out of his/her own pocket to have a reputable contractor fix
11 the problem. First American accomplishes this in a number of ways.

12 62. One way is for First American to delay dispatching a contractor to the consumer’s
13 house. Again, take the broken air conditioner in Las Vegas in July example. It may take a couple of
14 weeks before First American can find someone to do the job. The homeowner, not wanting to live in
15 110 degree heat for that long, will find someone in the Yellow Pages who can perform the job right
16 away. Of course, First American won’t reimburse the homeowner for the cost because a broken air
17 conditioner, even in Las Vegas in July, is not an “emergency” situation within the meaning of the
18 policy.

19 63. Another trick that First American likes to use is to delay ordering replacement parts
20 or appliances. In some instances, it can take months before First American finds the right part or
21 appliance. Often times, First American “accidentally” orders the wrong part, making the process
22 take even longer. Again, the homeowner eventually gives up and pays out of his or her own pocket
23 to resolve the problem.

24 **D. First American’s Fraud**

25 64. First American’s standard home warranty contract and written advertisements, which
26 are given to and/or reviewed by every member of the Class, contain numerous written
27 misrepresentations, including the following:
28

1 (a) “This contract provides coverage for unknown defects if the defect or
2 malfunction would not have been detectable to the buyer, seller, or agent through visual inspection
3 or simple mechanical test. This contract provides coverage for systems and appliances which
4 malfunction due to lack of maintenance, rust or corrosion, or chemical or sedimentary buildup.”

5 This representation is false and materially misleading because, in truth, First American:

6 (i) Routinely denies claims as “pre-existing conditions” even if those
7 claims could not have been detected at the time the contract was entered into;

8 (ii) Routinely denies claims for pre-textual reasons, including lack of
9 maintenance, rust, and corrosion, even if those things are not the cause of the malfunction;

10 (iii) Trains its employees to deny legitimate warranty claims based on pre-
11 textual reasons;

12 (iv) Financially incentivizes its contractors to deny legitimate claims
13 and/or perform substandard repairs;

14 (v) Creates economic incentives for contractors to shift the cost of repair
15 or replacement onto the consumer; and

16 (vi) Routinely delays authorizing repairs or purchasing necessary
17 equipment.

18 (b) First American tells customers that their repair/replacement costs for various
19 systems and appliances will range between \$85 and \$7,500 without a home warranty. The “Cost
20 with a First American Home Warranty” is just \$55. This representation is false and misleading
21 because:

22 (i) First American’s customers routinely have to pay more than the
23 service call fee because First American’s contractors cause First American to deny, in whole or part,
24 claims that should have been covered under the policy;

25 (ii) First American’s contractors routinely gouge customers for the “non-
26 covered” portions of warranty replacements and repairs;

27 (iii) First American’s contractors routinely upsell customers for repairs and
28 replacements that are not covered under the home warranty plan; and

1 (iv) First American has no way of knowing how much its customers have
2 to pay out of their pocket for repairs and replacements because First American does not keep track of
3 such costs.

4 (c) “Last year [2007] alone, First American responded to nearly 900,000 service
5 requests and saved homeowners over \$121 million dollars in home repair costs.” This representation
6 is false and materially misleading because, in truth, First American:

7 (i) Paid out only \$94.3 million in claims during 2007;

8 (ii) Has no way of knowing how much its customers “saved” because First
9 American does not keep track of the out of pocket expenses its customers incur for the “non-
10 covered” portions of their warranty claims. As explained above, First American’s customers
11 routinely pay more for repairs and replacements than they would have paid had they not had a home
12 warranty because First American’s contractors routinely gouge and upsell the customers.

13 (d) “As a subsidiary of First American Corporation, a Fortune 500 company, we
14 have the financial strength and stability to honor our commitment to you.” This representation is
15 false and misleading because:

16 (i) According to the California Department of Insurance’s latest “Report
17 of Examination of the First American Home Buyers Protection Corporation,” First American “is a
18 subsidiary of First American Title Insurance Company.”

19 (ii) On information and belief, First American Corporation is not a
20 guarantor or surety of First American pursuant to any agreement or contract and, therefore, has no
21 legal obligation to honor First American’s “commitment” to its customers.

22 (e) “Home sellers too can sell with confidence. Having a First American home
23 warranty as a special feature on the home will give it a competitive edge over other homes on the
24 market. Buyers will have more confidence in the home and there is usually less negotiation in
25 getting closer to the asking price.” This representation is materially false and misleading because:

26 (i) There is no evidence that having a First American home warranty
27 gives the seller a “competitive edge” or results in “less negotiating.” In fact, according to the Home
28

1 Warranty Association of California, of which First American is a member, “9 out of every 10
2 existing home sales includes a home warranty.”

3 **E. First American’s Concealment**

4 65. First American’s home protection contracts are contracts of insurance, and are subject
5 to various provisions of the California Insurance Code. For example, California Insurance Code §
6 12743(b) specifically imposes the obligations of Insurance Code §§ 330-334 and 361 on home
7 protection companies. Pursuant to these provisions, it is settled that an insurer and its insured have a
8 “special relationship” under which an insurer’s obligations are greater than those of a party to an
9 ordinary commercial contract. Among other things, these obligations provide First American with a
10 contractual and statutory duty to disclose all material facts to its insureds. Insurance Code § 332
11 provides “[e]ach party to a contract of insurance shall communicate to the other, in good faith, all the
12 facts within his knowledge which are or which he believes to be material to the contract and as to
13 which he makes no warranty, and which the other has not the means of ascertaining.”

14 66. During the Class Periods, First American breached its special and statutory duties to
15 Plaintiffs and the members of the Class by failing to disclose the following facts:

16 (a) First American discourages its contractors from replacing (rather than
17 repairing) items covered under the home warranty contracts. On First American’s website, the first
18 benefit which First American stresses that its home protection contract offers is “***Protection from***
19 ***potentially huge, costly system or appliance repair and replacement bills. Just one event could***
20 ***literally wipe out your hard-earned savings.***” First American promises that: “***If First American***
21 ***determines your covered system or appliance cannot be repaired, we’ll replace it. It doesn’t matter***
22 ***how old it is, or what brand you have or even if the part is obsolete. In 2010, we spent millions of***
23 ***dollars to repair or replace covered systems and appliances nationwide, in homes just like yours.***”

24 (b) Moreover, in its uniform, standardized home protection contract, First
25 American stresses the following potential huge costs (faced by someone without a home protection
26 contract) of repairing and replacing the appliances and systems which are covered by its contracts:

27
28 ////

Average Costs for Repairs/Replacements on Major Systems & Appliances
Without a Home Warranty

<u>Items</u>	<u>Repair/Replacement Costs</u> <u>Without a Home Warranty</u>	<u>Cost with a First</u> <u>American Home Warranty</u>
Heating System	\$130 - \$3,500	\$55
Water Heater	\$115 - \$1,500	\$55
Dishwasher	\$98 - \$1,250	\$55
Air Conditioner	\$130 - \$4,000	\$55
Oven/Range	\$110 - \$2,700	\$55
Kitchen Refrigerator	\$110 - \$3,800	\$55
Plumbing	\$95 - \$7,500	\$55
Electrical System	\$85 - \$2,500	\$55

(c) First American's statements regarding these large potential costs are likely to deceive the public because First American promises to pay for these expensive *replacements* if a consumer purchases a home warranty plan, but First American fails to disclose the material fact that it tells its contractors to repair rather than replace items even where a replacement is necessary and even under situations where repairing rather than replacing an item would pose a threat to the safety of First American's customer. First American also fails to disclose that it does not pay, on average, anywhere close to these amounts for replacements. Instead, in the rare instance in which First American authorizes a replacement, it pays on average just a fraction of the amounts referenced above in its home protection contracts. During the Class Period, First American paid its contractors *as low as an average of \$130 per claim*. That average includes *both repairs and replacements* of covered systems. Moreover, First American regularly sends faxes to its contractors telling them to "keep your replacement percentage down" and telling them to keep their replacement percentage to an arbitrary, very low percentage. First American does the same thing orally by having its heads of contractor relations call the contractors and tell them the same thing. First American's Head of Contractor Relations regularly calls First American's contractors and tells them to reduce the number of replacements (versus repairs) they perform and to keep their replacement percentage below an arbitrary and extremely low threshold. The arbitrary and low replacement percentage has

1 nothing whatsoever to do with how often items covered by First American's home warranty
2 contracts actually need replacement, but instead is arbitrarily chosen by First American and with the
3 sole purpose of keeping costs to First American to an absolute minimum, without any regard
4 whatsoever to the best interests of First American's customers. Thus, First American tells its
5 contractors to refuse to perform replacements even when something cannot really be repaired. This
6 directly contradicts First American's promise to its customers that ***"If First American determines
7 your covered system or appliance cannot be repaired, we'll replace it. It doesn't matter how old it
8 is, or what brand you have or even if the part is obsolete."*** Contractors whose replacement
9 percentage is higher than what First American wants are penalized immediately by receiving either
10 no work from First American or no significant volume of work from First American.

11 (d) In addition to discouraging and penalizing its contractors for recommending
12 replacements rather than repairs, for the rare replacements that First American does authorize (*i.e.*,
13 the replacement of a heater or air conditioner), the consumer will end up paying out of their pocket,
14 above and beyond what they have already paid for the premium and service call fees, very
15 significant sums of money, equivalent if not in excess of what First American pays its contractor.
16 Thus, for example, on average, for any claim in which First American authorizes a replacement of an
17 HVAC component, if First American paid its contractor \$200, the consumer would, on average, end
18 up paying at least \$200 if not more out of his or her pocket, even though First American authorized
19 the replacement and asserted that the claim was "covered" under the home protection contract.

20 (e) First American pays its contractors significantly below retail rates, and
21 significantly below the rates at which competent contractors would agree to work if the amount
22 received from First American constituted the only amount the contractor would receive for his or her
23 work.

24 (f) While it does not pay its contractors retail rates, First American allows (and
25 indeed encourages) its contractors to charge full retail rates to First American's customers. Instead
26 of looking out for the best interests of its customers and requiring its contractors to charge First
27 American's customers fair rates for labor and materials, First American leaves its contractors free to
28 charge whatever they want to the holders of First American's home warranty plans. Not only does

1 First American adopt an outrageous and duplicitous “Hear No Evil, See No Evil, Speak No Evil”
2 mantra with respect to the rates its contractors can charge First American’s customers, but First
3 American leaves its contractors completely free to gouge its customers for bogus “non-covered”
4 items and bogus “upgrades.” First American knows that the “extra” items its contractors routinely
5 charge its customers are not legitimate and, even if warranted, are many multiples of the price that
6 any reputable contractor out of the Yellow Pages would normally charge for such labor or parts.

7 (g) First American not only does not police its own contractors with respect to
8 charges its contractors impose on First American’s customers above and beyond the coverage First
9 American agrees to provide (if any) under the home protection contracts, but First American makes
10 sure there will be no paper trail of its disloyal conduct by emphatically insisting that its contractors
11 do not provide any information whatsoever in the invoices submitted to First American about how
12 much the contractors charge First American’s customers for allegedly “non-covered” work and
13 “extras.”

14 (h) First American encourages its contractors to earn their money mostly from
15 First American’s customers, not from First American. ***For example, during the Class Periods First***
16 ***American paid its contractors an average net fee per claim as low as \$130 (including both repairs***
17 ***and replacements).*** First American never disclosed this startling low figure to its customers, and
18 instead represented to its customers that it would fully cover any necessary repair or replacement of
19 covered systems. The \$130 average amount paid by First American stands in stark contrast to the
20 ***thousands of dollars*** in potential repair/replacement costs that First American tells its customers it is
21 protecting them against (*see supra* subparagraph (b)).

22 (i) First American meticulously and methodically tracks how much it is charged
23 by its contractors, but intentionally does not keep track of how much First American’s contractors
24 charge First American’s customers for items allegedly not covered by the home protection contract.
25 First American’s intentional, conscious effort to avoid any paper trail of how much its contractors
26 gouge its customers is reflected in the training materials it sends its contractors when they enroll
27 with First American. Those materials instruct the contractors not to put anything in the invoices the
28

1 contractors submit to First American about any amounts the contractor charges the customer above
2 the service call fee.

3 (j) First American encourages a “race to the bottom” with respect to its
4 contractors. Contractors are ranked almost exclusively based on lowest cost charged to First
5 American. Contractors are free, however, to charge the homeowner whatever they want. Each
6 month, First American compiles a list of the “average cost” per call for each of its contractors. First
7 American’s head of contractor relations in each geographic area disseminate the total average cost
8 per call for each trade to First American’s contractors in such trade. First American’s head of
9 contractor relations tells the contractors that if they want to continue to receive work from First
10 American, they need to keep their average cost per call at or below this figure, and that contractors
11 will not receive any work or any significant volume of work from First American if they charge First
12 American more than this figure. Thus, even if a contractor had negotiated a flat rate with First
13 American, if the monthly “average cost” per call figure disseminated to the contractor by the head of
14 contractor relations at First American was lower than the contractor’s flat rate, the contractor would
15 have to charge First American less than his or her negotiated flat rate in order to continue to receive
16 any significant volume of calls from First American. This nefarious, carefully orchestrated policing
17 system is in place before a consumer ever obtains a home warranty plan from First American, and
18 before a contractor signs up to work for First American.

19 (k) First American pays its contractors so far below market rate that the
20 contractors cannot perform adequate or necessary repairs and replacements with respect to its
21 customers’ claims;

22 (l) First American routinely denies claims for pre-textual reasons during the first
23 year a homeowner has a warranty plan without any evidence that the problem was actually caused by
24 the reason given for the denial;

25 (m) First American financially incentivizes its contractors to fabricate bogus and
26 pre-textual reasons that First American can use to deny legitimate claims and/or refuse to replace
27 covered systems;

1 (n) First American creates economic incentives for contractors to shift the cost of
2 repair or replacement onto the consumer; and

3 (o) First American routinely delays authorizing repairs or purchasing necessary
4 equipment.

5 67. First American’s standard home protection contract, which is given to every member
6 of the class, contains the following representations:

7 (a) “From the very first day your coverage begins, your budget and home **will be**
8 **safe-guarded against costly**, unexpected expenses for repairs **and replacements** on many of your
9 home’s most critical systems and appliances.

10 (b) “From the very first day your coverage begins, *you’ll have repair service*
11 *and budget protection for costly breakdowns* that can and often do occur after the purchase of a
12 home.”

13 68. These representations were and are false and misleading because they conceal the
14 material facts noted *supra* in ¶66.

15 (a) “We’ll send one of our pre-screened, certified, service technicians to your
16 home to take care of the problem.” This representation is false and materially misleading because, in
17 truth, First American does not carefully pre-screen its contractors and makes no effort to ensure that
18 its contractors are qualified. In fact, the only requirements to be a First American contractor are: (1)
19 the contractor should be licensed; (2) the contractor has Worker’s Compensation insurance or be
20 exempt (in fact, most of First American’s contractors claim to be exempt because they are small
21 “mom and pop” businesses); and (3) the contractor fills out a short one-page online application
22 listing their name and address and what trades they cover. There is absolutely nothing about the
23 application process that addresses whether the contractor is well-qualified or has a history of
24 complaints. First American does not perform background checks of its contractors and does not
25 check their records with the Better Business Bureau.

26 FIRST AMERICAN’S WEBSITE ADVERTISING

27 69. First American’s website contains the following representations and statements:

28 (a) Statement: “Why Buy a Home Warranty?”

1 “A home warranty helps protect your investment while you enjoy your
2 home. While a home warranty cannot prevent systems and appliances from
failing, *it can save you money on costly covered repairs and replacements.*”

3 “A home warranty *offers the following benefits:*

4 ***Protection from potentially huge, costly system or appliance repair***
5 ***and replacement bills.*** Just one event could literally wipe out your hard-
6 earned savings.

7 A typical homeowner requires service at least 1 time per year—you
8 will simply pay a nominal Service Call Fee for each covered repair or
replacement.

9 As a First American customer, there are no more hassles searching the
10 Yellow Pages for a reputable contractor you can trust. Anytime a covered
11 item fails, call us to request service, 24 hours a day 365 days a year. Once
12 coverage is verified, we’ll send one of our prescreened service contractors to
your home to take care of the problem. You can feel comfortable about who’s
13 coming into your home and you can get back to enjoying the more important
things in life.

14 ***If First American determines your covered system or appliance***
15 ***cannot be repaired, we’ll replace it. It doesn’t matter how old it is, or what***
16 ***brand you have or even if the part is obsolete. In 2010, we spent millions of***
dollars to repair or replace covered systems and appliances nationwide, in
homes just like yours.”

17 Reason Statements Were Likely to Deceive the Public: First American concealed the fact
18 that it tells its contractors to repair rather than replace covered systems. First American also
19 conceals the fact that in the rare instance in which it replaces a covered system, it pays its contractors
20 on average just a fraction of the going retail rate to replace the item, leaving the contractors to make
21 their money from First American’s customer. Contractors whose replacement percentage is higher
22 than what First American wants are penalized immediately by receiving either no work from First
23 American or no significant volume of work from First American. First American’s website
24 advertisements also conceal the fact that, in addition to discouraging and penalizing its contractors
25 for recommending replacements rather than repairs, for the rare replacements that First American
26 does authorize (*i.e.*, the replacement of a heater or air conditioner), the consumer will end up paying
27 out of their pocket, above and beyond what they have already paid for the premium and service call
28 fees, very significant sums of money -- equivalent if not in excess of what First American pays its

1 contractor. Thus, for example, on average, for any claim in which First American authorizes a
2 replacement of an HVAC component, if First American paid its contractor \$200, the consumer
3 would, on average, end up paying at least \$200 if not more out of his or her pocket, even though
4 First American authorized the replacement and asserted that the claim was “covered” under the
5 home protection contract.

6 (b) Statement: “Last year alone, we spent over \$125 million for our customers on
7 home repairs and replacements.”

8 Reason Statement Was Likely to Deceive the Public. First American concealed the
9 fact that it tells its contractors to repair rather than replace covered systems. First American also
10 conceals the fact that in the rare instance in which it replaces a covered system, it pays its contractors
11 on average just a fraction of the going retail rate to replace the item, leaving the contractors to make
12 their money from First American’s customer. This statement is also highly misleading and likely to
13 deceive for the same reasons noted *supra* in ¶ 66.

14 (c) Statement: “Providing the Best Service.”

15 “First American is very selective when it comes to choosing
16 contractors to represent them. Before placing a contractor into our network a
17 thorough screening process must be followed and all requirements filled.
18 Screening a vendor includes state license verification, an internet search and
19 detailed reference verification. Successful candidates are allowed into the
20 network on a ‘probationary basis.’ A short time after the probationary period
21 a customer survey is performed to ensure the contractor meets our customer
22 satisfaction standards.”

21 Reason Statement Was Likely to Deceive the Public. This representation is false and
22 materially misleading because, in truth, First American makes no effort to carefully pre-screen its
23 contractors or to ensure that its contractors are qualified. In fact, the only requirements to be a First
24 American contractor are: (1) the contractor should be licensed; (2) the contractor has liability and
25 Worker’s Compensation insurance or be exempt (in fact, most of First American’s contractors claim
26 to be exempt because they are small “mom and pop” businesses); and (3) the contractor fills out a
27 short one-page online application listing their name and address and what trades they cover. There
28 is absolutely nothing about the application process that addresses whether the contractor is well-

1 qualified or has a history of complaints. First American does not perform background checks of its
2 contractors and instead states on its website that it only performs an “Internet search” of its
3 contractors. First American also does not check its contractors’ records with the Better Business
4 Bureau. Moreover, the representation that First American puts its contractors through a “detailed
5 reference verification” is false. The application form to become a First American contractor does
6 not even contain a field for references.

7 (d) “A First American Home Warranty is a residential service contract that
8 provides repair ***and replacement coverage*** for many of the home’s most essential systems and
9 appliances. With a home warranty, sellers, buyers and agents can all be protected against costly
10 breakdowns before, during, and after the sale of the home.”

11 (e) “Additionally, home buyers can move in with confidence knowing that their
12 budget and new home is ***protected against unexpected mechanical failures.***”

13 (f) First American promises its customers that it will provide: “[p]rotection from
14 ***potentially huge, costly system or appliance repair and replacement bills. Just one event could***
15 ***literally wipe out your hard-earned savings.***” First American promises that: “***If First American***
16 ***determines your covered system or appliance cannot be repaired, we’ll replace it. It doesn’t***
17 ***matter how old it is, or what brand you have or even if the part is obsolete. In 2010, we spent***
18 ***millions of dollars to repair or replace covered systems and appliances nationwide, in homes just***
19 ***like yours.***”

20 Reason Statements Were Likely to Deceive the Public. The statements in sub-paragraphs (d)
21 – (f) above are false and likely to deceive the public because they omit the material fact that First
22 American tells its contractors to repair rather than replace items even where a replacement is
23 necessary and even under situations where repairing rather than replacing an item would pose a
24 threat to the safety of First American’s customer. They also conceal the material facts noted *supra*
25 in ¶ 66.

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FIRST CLAIM FOR RELIEF

(Tortious Breach of the Implied Covenant of Good Faith

and Fair Dealing)

(On Behalf of Plaintiffs and the Subclass)

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3
4
5 70. Plaintiffs re-allege and incorporate by reference each and every allegation above as if
6 fully set forth herein.

7 71. The home protection contracts entered into by Plaintiffs and the Subclass, on the one
8 hand, and First American, on the other hand, were insurance contracts.

9 72. A covenant of good faith and fair dealing is implied in every insurance contract. The
10 implied promise requires each contracting party to refrain from doing anything to injure the right of
11 the other to receive the agreement's benefits. To fulfill its implied obligation, an insurer must give at
12 least as much consideration to the interests of the insured as it gives to its own interests. When the
13 insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to
14 liability in tort.

15 73. An insurer cannot reasonably and in good faith deny payments to its insured without
16 fully investigating the grounds for its denial.

17 74. The California Supreme Court has emphasized that, in order to protect the interests of
18 its insured, it is “essential that an insurer *fully* inquire into *possible* bases that *might* support the
19 insured's claim.”

20 75. The insurer’s duty to give as much consideration to the insured’s interests as it does
21 to its own obligates it to investigate a claim thoroughly. An insurer must fully inquire into the bases
22 for the claim; indeed, it cannot reasonably and in good faith deny benefits to its insured without
23 *thoroughly* investigating the foundation for its denial.

24 76. Defendant breached its duty of good faith and fair dealing and wrongfully denied
25 Plaintiffs and the Subclass the benefit of the bargain under the home warranty plans. Defendant
26 tortiously breached the implied covenant of good faith and fair dealing in its contracts with Plaintiffs
27 and the Subclass because: (1) First American performed no investigation whatsoever of the claims of
28 Plaintiffs and the Subclass; (2) First American failed to pay its contractors/repairmen a sufficient

1 amount to allow them to properly repair and/or replace covered systems, and also provided its third
2 party contractors/repairmen strong economic incentives to refuse to properly repair and/or replace
3 covered systems; and (3) First American promised *replacement* coverage under the home protection
4 contracts, yet took active and concealed steps to discourage its contractors from replacing covered
5 items.

6 FAILURE TO PERFORM ANY INVESTIGATION

7 77. First American does not employ a single employee for the purpose of investigating its
8 customers' claims. Instead, First American simply sends independent contractors who are plumbers,
9 pool and spa laborers, electricians, and HVAC repairmen to respond to claims made by First
10 American's customers. Those laborers are not claims adjusters and receive no training whatsoever
11 from First American regarding claims adjusting or the investigation of claims.

12 78. Moreover, First American categorically denies that its third party repairmen perform
13 any claims adjusting or claims investigative work whatsoever. According to First American, the
14 repairmen simply repair or replace (or do not repair or replace) covered systems based on what a
15 First American employee tells them to do over the phone. The First American employee, again, has
16 not seen the insured's home and has received absolutely no report or recommendation from any
17 person regarding the claim (since, again, the repairmen perform absolutely no claims investigative
18 work, according to First American). Thus, First American does absolutely nothing to investigate its
19 insureds' claims. Further, First American does absolutely nothing to inquire into the possible bases
20 that might support its insureds' claims.

21 79. Every First American home protection contract contains an express contractual
22 provision in paragraph nine (9) stating that: "The Company will determine whether a covered
23 system or appliance will be repaired or replaced." First American systematically and uniformly
24 makes that determination without performing any investigation into the claim.

25 FIRST AMERICAN USES THIRD PARTY REPAIRMEN TO INTERFERE WITH THE ABILITY
26 OF ITS INSUREDS TO RECEIVE THE BENEFITS OF THE HOME PROTECTION
27 CONTRACTS

1 80. First American does everything it can to deny homeowners the benefits promised by
2 its home warranty plans. The following are just a few of the tactics First American uses to achieve
3 this end:

4 **1. First American Uses Unlicensed, Unqualified and Poorly-Paid Third-Party**
5 **Contractors**

6 81. First American does not employ its own contractors to fix homeowners' claims.
7 Instead, it hires third-party contractors under independent contractor service agreements. First
8 American selects its contractors purely on price and does nothing to ensure they are qualified. In
9 some instances, the contractors do not even have the requisite licenses. First American also selects
10 contractors who work primarily for other home warranty companies because these contractors
11 already know how the home warranty game works and are dependent on home warranty companies
12 for their livelihood. As a result, First American negotiates contractor rates well below the retail-
13 market rate which is too low to allow the contractor to properly repair or replace covered items.

14 **2. First American Fails to Perform any Investigation of Its Customers'**
15 **Claims**

16 82. First American does not employ a single individual to investigate its insureds' claims.
17 When one of its insureds files a claim under one of First American's standardized home protection
18 contracts, First American dispatches a plumber, pool repairman, HVAC contractor, or electrician to
19 the insured's home. According to First American, these repairmen perform absolutely no claims
20 investigative or claims adjusting work. The repairmen receive no training from First American and
21 are not licensed claims adjusters. Moreover, First American never sends any of its own employees
22 to the insured's home and never makes any investigation whatsoever into the claim.

23 83. The sum total of what First American does before it denies in whole or part a claim is
24 to have one of its employees talk to the repairman and then decide whether or not the claim is
25 covered under the First American home protection contract.

26 84. Thus, First American's independent contractors/repairmen do not deny homeowner
27 claims. Rather, First American trains its contractors to look for pre-textual reasons First American
28 can use to deny claims in whole or in part. Specifically, when a contractor arrives at a home, the
contractor investigates the problem and then calls First American's authorizations department. The

1 contractor provides the authorizer with one or more potential bases on which First American can
2 deny the claim. If the contractor fails to provide the authorizer with grounds for a denial, the
3 authorizer will ask the contractor a series of questions all designed to find a reason to deny the claim
4 in whole or in part. The most common reasons First American gives for denying claims are
5 improper installation, lack of maintenance, excessive rust or corrosion, wrong-sized unit and pre-
6 existing condition.

7 85. Denials based on a pre-existing condition are especially improper given that First
8 American agrees to cover the homeowner's systems and appliances without bothering to investigate
9 whether the systems and appliances are actually in good-working order. Indeed, if a homeowner
10 makes a claim within the first 30 days of the policy, First American presumes that the problem is a
11 pre-existing condition. Of course, First American has no way of knowing whether that problem
12 actually existed at the time it issued the policy. Nonetheless, First American issues the policy and
13 accepts the policy premium anyway. First American does not refund the homeowner the policy
14 premium if it denies the claim because of a supposed pre-existing condition. First American also
15 does not refund the \$55 trade-call fee that the homeowner has to pay in order to find out that his or
16 her claim is not covered.

17 **3. First American Incentivizes Its Contractors to Refuse to Work on**
18 **Expensive Jobs and Perform Substandard Repairs**

19 86. First American ranks its contractors based almost exclusively on their average cost
20 per invoice. The contractors who charge First American the least amount get the most amount of
21 work. The contractors who charge more than the target average get the least amount of work. First
22 American's contractors therefore have a financial incentive to keep their average cost per invoice as
23 low as possible. As such, First American establishes financial incentives that cause its contractors to
24 use at least three improper methods to keep their average costs down:

25 (a) *First American incentivizes, encourages, and allows its contractors to*
26 *aggressively look for pre-textual reasons that First American can use to deny claims:* When First
27 American denies a claim, the contractor still gets to keep the \$55 trade-call fee and then submits a
28 \$0 invoice to First American. Enough denials significantly lower the contractor's average cost per

1 invoice. Lower average invoices result in First American awarding more work to such contractors.
2 In other words, First American provides the contractors with a financial incentive to find ways for
3 First American to deny claims.

4 (b) *First American incentivizes the contractors to refuse to perform expensive*
5 *repairs:* If a contractor has to perform an expensive repair, his or her average cost per invoice will
6 skyrocket. To avoid this undesirable result, First American’s contractors routinely claim they are
7 unable to do the job for whatever reason. The end result is that the homeowner has to wait while
8 First American obtains a second opinion and finds someone who is willing to do the job. In some
9 cases — say a broken air conditioner in Las Vegas during July — the homeowner cannot wait very
10 long and will often give up and pay someone out of their own pocket to perform the job at retail
11 rates. Of course, the whole point of purchasing a First American home warranty is supposedly so
12 that the homeowner can obtain “relief from the hassle and expense of household system and
13 appliance breakdowns.”

14 (c) *First American incentivizes the contractors to perform band-aid repairs*
15 *rather than perform necessary replacements.* While First American’s standardized and uniform
16 home protection contracts all promise that First American will replace a covered system if it cannot
17 be repaired, First American never has any intention of replacing expensive covered systems. It uses
18 its contractors to ensure that it will not have to do so. Having to **replace** a home system or appliance
19 is the fastest way to increase a contractor’s average cost per invoice. Thus, when a system or
20 appliance needs to be replaced, the contractor will normally try to repair it instead, even if that repair
21 might only last a few months or just weeks. When the repair inevitably fails, the homeowner has to
22 take another day off of work while the contractor tries to repair it again. In some cases, the
23 homeowner even has to pay the trade-call fee again. In some cases, it might take eight or nine
24 repairs before First American agrees to replace the system or appliance. In many cases, the
25 homeowner simply gets fed up and pays someone out of their own pocket to do the replacement.

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4. **First American Keeps No Records of How Much Its Contractors Charge Its Customers, and Allows the Contractors to Gouge Customers On Allegedly Non-Covered Claims**

87. During the Subclass Period, First American sent its contractors an identical, written “Welcome Aboard” package at the time the contractor was hired to work for First American. The package clearly and conspicuously stated that “*First American is the real customer.*”

88. First American forces its contractors to accept incredibly low rates for their services. First American tells the contractors they can make up the difference by essentially gouging customers for non-covered work. Take, for example, the replacement of a water heater. At the rates First American pays, the contractor loses money on the job. Of course the homeowner also wants the contractor to remove and dispose of the old water heater. Removal of the unit is normally not covered under the policy. Thus, First American tells the contractor he can charge the homeowner whatever he or she wants for removal/disposal fees. The homeowner usually pays what the contractor what he or she is asking even if it is significantly more than what a non-home-warranty contractor would charge for doing the same thing.

89. Tellingly, First American keeps meticulous track of how much its contractors charge it, but keeps absolutely no records of how much its contractors charge its insureds. The reason is simple: because it encourages its contractors to make their “real” money from First American’s own customers, not from First American, Defendant does not want any paper trail as to how badly its contractors are gouging its own customers.

90. This is also a blatant conflict of interest. Contractors who charge First American the least get the most work from First American. Thus, First American provides strong financial incentives for its contractors to refuse to provide proper repairs and/or replacements of covered systems. First American’s economic interests are served, but not those of the insured. First American, as an insurer, owes a fiduciary or quasi-fiduciary duty to its insureds, but it acts as a faithless fiduciary.

91. It is even more profitable for the contractor when First American refuses to cover the item. Take the water heater example again. If First American denies the claim, the homeowner will usually prefer to pay the contractor its “retail rate” rather than continue to take cold showers. Of

1 course, the homeowner could have accomplished this same result without having to pay First
2 American the policy premium in the first place.

3 **5. First American Delays Things in the Hopes the Problem Will Go Away**

4 92. One of First American’s favorite tactics is to delay things for so long that the
5 homeowner eventually gives up and pays out of his/her own pocket to have a reputable contractor fix
6 the problem. First American accomplishes this in a number of ways.

7 93. One way is for First American to delay dispatching a contractor to the consumer’s
8 house. Again, take the broken air conditioner in Las Vegas in July example. It may take a couple of
9 weeks before First American can find someone to do the job. The homeowner, not wanting to live in
10 110 degree heat for that long, will find someone in the Yellow Pages who can perform the job right
11 away. Of course, First American won’t reimburse the homeowner for the cost because a broken air
12 conditioner, even in Las Vegas in July, is not an “emergency” situation within the meaning of the
13 policy.

14 94. Another trick that First American likes to use is to delay ordering replacement parts
15 or appliances. In some instances, it can take months before First American finds the right part or
16 appliance. Often times, First American “accidentally” orders the wrong part, making the process
17 take even longer. Again, the homeowner eventually gives up and resolves the problem on his or her
18 own.

19 95. In addition, First American discourages and penalizes its contractors from performing
20 replacements (rather than repairs) of items covered under the home warranty contracts. As a result,
21 First American takes intentional and concerted steps to interfere with the ability of Plaintiffs and the
22 Subclass to receive the benefits of the home protection contracts. Even though the contracts promise
23 that First American will replace a covered item if it cannot be repaired, First American tells its
24 contractors when it hires them, before a claim is ever filed, to repair rather than replace covered
25 items and to keep their “replacement ratio” to an arbitrary and unreasonably low percentage.
26 Further, First American penalizes contractors who refuse to heed its dictates by refusing to award
27 future work to such contractors and by giving them negative reviews and ratings.

1 Class of property or legal rights or otherwise causing injury. Defendant's conduct was malicious so
2 as to justify an award of exemplary and punitive damages.

3 **THIRD CLAIM FOR RELIEF**

4 **(Negligent Misrepresentation - Violation of Civil Code § 1710(2))**

5 **(On Behalf of Plaintiffs and the Class)**

6 103. Plaintiff repeats and realleges the allegations contained above as if fully stated herein.

7 104. Defendant made the uniform and identical written representations alleged in ¶ 64 to
8 Plaintiff and each member of the Class. As discussed in ¶ 64, these representations are in fact false.
9 When Defendant made these representations, it had no reasonable grounds for believing them to be
10 true. Nonetheless, Defendant made these representations in order to induce them to act in reliance
11 on these representations by purchasing home warranty plans, or with the expectation that they would
12 so act. Plaintiff and each member of the Class, reviewed these false representations before entering
13 into their home warranty plans and relied on these false representations in deciding to purchase a
14 home warranty plan from Defendant.

15 105. At the time Defendant made the false representation discussed above, Plaintiff and
16 the members of the Class were ignorant of the true facts. Had they known the true facts, Plaintiff
17 and the members of the Class would not have entered into home warranty contracts with Defendant.

18 106. As a proximate result of Defendant's fraudulent conduct, Plaintiff and members of
19 the Class have been damaged in an amount in excess of this Court's jurisdiction, the exact amount to
20 be proven at trial.

21 **FOURTH CLAIM FOR RELIEF**

22 **(Fraud by Concealment – Violation of Civil Code § 1710(3))**

23 **(On Behalf of Plaintiffs and the Class)**

24 107. Plaintiffs repeat and re-allege the allegations contained above, except those
25 contained in the Claims for Relief, as if fully stated herein.

26 108. First American, as a party to the home warranty plans/insurance contracts, had a
27 duty under Insurance Code Section 332 to communicate to each Class Member all material facts
28 within First American's knowledge which the Class Members had no means of ascertaining.

1 109. During the Class Period, the following material facts were within First American's
2 knowledge:

3 (a) First American discourages and penalizes its contractors from recommending
4 replacements (rather than repairs) of items covered under the home warranty contracts. First
5 American promises its customers that it will provide: "***Protection from potentially huge, costly***
6 ***system or appliance repair and replacement bills. Just one event could literally wipe out your***
7 ***hard-earned savings.***" First American promises that: "***If First American determines your covered***
8 ***system or appliance cannot be repaired, we'll replace it. It doesn't matter how old it is, or what***
9 ***brand you have or even if the part is obsolete. In 2010, we spent millions of dollars to repair or***
10 ***replace covered systems and appliances nationwide, in homes just like yours.***" However, First
11 American fails to disclose the material fact that it tells its contractors to repair rather than replace
12 items even where a replacement is necessary and even under situations where repairing rather than
13 replacing an item would pose a threat to the safety of First American's customer. First American
14 regularly sends faxes to its contractors telling them to "keep your replacement percentage down" and
15 telling them to keep their replacement percentage to an arbitrary, very low percentage. First
16 American does the same thing orally by having its heads of contractor relations call the contractors
17 and tell them the same thing. For example, First American's Head of Contractor Relations regularly
18 calls First American's contractors and tells them to reduce the number of replacements (versus
19 repairs) they perform and to keep their replacement percentage below an arbitrary and extremely low
20 threshold. The arbitrary and low replacement percentage has nothing whatsoever to do with how
21 often items covered by First American's home warranty contracts actually need replacement, but
22 instead is arbitrarily chosen by First American and with the sole purpose of keeping costs to First
23 American to an absolute minimum, without any regard whatsoever to the best interests of First
24 American's customers. Thus, First American tells its contractors to refuse to perform replacements
25 even when something cannot really be repaired. This directly contradicts First American's promise
26 to its customers that the policy provides for replacement of covered systems. Contractors whose
27 replacement percentage is higher than what First American wants are penalized immediately by
28 receiving either no work from First American or no significant volume of work from First American.

1 (b) In addition to discouraging and penalizing its contractors for recommending
2 replacements rather than repairs, for the rare expensive replacements that First American does
3 authorize (*i.e.*, the replacement of a heater or air conditioner), the consumer will end up paying out
4 of their pocket, above and beyond what they have already paid for the premium and service call fees,
5 very significant sums – equal to or in excess of what First American pays its contractor. Thus, for
6 example, on average, for any claim in which First American authorizes a replacement of an HVAC
7 component, if First American paid its contractor \$200, the consumer would, on average, end up
8 paying at least \$200 out of their pocket, even though First American authorized the replacement and
9 asserted that the claim was “covered” under the home warranty contract.

10 (c) First American pays its contractors significantly below retail rates, and
11 significantly below the rates at which competent contractors would agree to work if the amount
12 received from First American constituted the only amount the contractor would receive for his or her
13 work.

14 (d) While it does not pay its contractors retail rates, First American allows (and
15 indeed encourages) its contractors to charge full retail rates to First American’s customers. Instead
16 of looking out for the best interests of its customers and requiring its contractors to charge First
17 American’s customers fair rates for labor and materials, First American leaves its contractors free to
18 charge whatever they want to the holders of First American’s home warranty plans. Not only does
19 First American adopt an outrageous and duplicitous “Hear No Evil, See No Evil, Speak No Evil”
20 mantra with respect to the retail rates its contractors can charge First American’s customers, but First
21 American leaves its contractors completely free to gouge its customers for bogus “non-covered”
22 items and bogus “upgrades.” First American knows that the “extra” items its contractors routinely
23 charge its customers are not legitimate and, even if warranted, are many multiples of the price that
24 any reputable contractor out of the Yellow Pages would normally charge for any extras.

25 (e) First American not only does not police its own contractors with respect to
26 charges its contractors impose on First American’s customers above and beyond the coverage First
27 American agrees to provide (if any) under the home warranty plans, but First American makes sure
28 there will be no paper trail of its disloyal conduct by emphatically insisting that its contractors do not

1 provide any information whatsoever in the invoices submitted to First American about how much the
2 contractors charge First American's customers for allegedly "non-covered" work and "extras."

3 (f) First American encourages its contractors to earn their money mostly from
4 First American's customers, not from First American. For example, *during the Class Period, First*
5 *American paid its contractors an average net fee per claim as low as \$130 for both repairs and*
6 *replacements of covered systems*. First American never disclosed this startling low figure to its
7 customers, and instead allowed its customers to believe that it would fully cover any necessary repair
8 or replacement of covered systems.

9 (g) First American meticulously and methodically tracks how much it is charged
10 by its contractors, but intentionally does not keep track of how much First American's contractors
11 charge First American's customers for items allegedly not covered by the home warranty plan. First
12 American's intentional, conscious effort to avoid any paper trail of how much its contractors gouge
13 its customers is reflected in the training materials it sends its contractors when they enroll with First
14 American.

15 (h) First American encourages a "race to the bottom" with respect to its
16 contractors. Contractors are ranked almost exclusively based on lowest cost charged to First
17 American. Contractors are free, however, to charge the homeowner whatever they want. Each
18 month, First American compiles a list of the "average cost" per call for each of its contractors. First
19 American's head of contractor relations in each geographic area (for example, Gino Rolley in
20 Northern California) disseminate the total average cost per call for each trade to First American's
21 contractors in such trade. First American's head of contractor relations tells the contractors that if
22 they want to continue to receive work from First American, they need to keep their average cost per
23 call at or below this figure, and that contractors will not receive any work or any significant volume
24 of work from First American if they charge First American more than this figure. Thus, even if a
25 contractor had negotiated a flat rate with First American, if the monthly "average cost" per call
26 figure disseminated to the contractor by the head of contractor relations at First American was lower
27 than the contractor's flat rate, the contractor would have to charge First American less than his or her
28 negotiated flat rate in order to continue to receive any significant volume of calls from First

1 American. This nefarious, carefully orchestrated policing system is in place before a consumer ever
2 obtains a home warranty plan from First American, and before a contractor signs up to work for First
3 American.

4 110. During the Class Period, First American intentionally concealed such material facts
5 from Plaintiffs and the Class with the intent to defraud Plaintiffs and the Class. Defendant knew
6 that Plaintiffs and the Class would not have purchased and/or renewed their home warranty
7 contracts had they been aware of the concealed facts, and thus concealed the facts in order to
8 wrongfully induce Plaintiffs and the Class into purchasing and/or renewing the contracts.

9 111. Plaintiffs and the Class were unaware of these concealed facts, and had no means of
10 ascertaining such concealed facts. Moreover, these concealed facts were highly material to
11 Plaintiffs and the Class, and Plaintiffs and the Class would not have purchased or renewed their
12 First American home protection contracts had First American disclosed the true facts. The
13 replacement coverage promised by the contracts was highly material to Plaintiffs. Had First
14 American disclosed the true facts about its practices concerning repair versus replacement of
15 covered systems, Plaintiffs would not have purchased or renewed their First American home
16 warranty plans.

17 112. Moreover, First American fails to disclose the fact that, due to the wrongful business
18 practices it employs with respect to its contractors, consumers face significant delays in getting any
19 covered item repaired or replaced. This fact is highly material because one of the main reasons
20 consumers buy First American home protection contracts is to ***avoid the delays and hassles*** of
21 having to do everything themselves (*i.e.*, find a contractor in the Yellow Pages, call the contractor,
22 pay full retail rates for the work, *etc.*). But, because First American trains and instructs its
23 contractors to engage in delays and multiple calls to a consumer's house to fix any issue, consumers
24 are plagued with the very delays and hassles they paid First American to avoid. Because of the
25 materiality and importance of this issue, First American had a duty to disclose to Plaintiffs and other
26 class members First American's practices regarding delays and multiple service calls for the same
27 problem.

1 113. First American's practice of failing to conduct any independent investigation of
2 consumer's claims by a person properly trained in claims-handling practices is also a highly
3 material fact that must be disclosed to consumers. There can be no more fundamental duty of an
4 insurance company than to conduct an independent and objective investigation into an insured's
5 claim, giving the insured the benefit of the doubt and resolving any doubts in favor of providing
6 coverage. Such an investigation must be performed by someone trained in fair claims handling
7 practices. At First American, however, the company completely delegates this critical task to
8 contractors who have absolutely no claims handling training and are biased, prejudiced in favor of
9 denial of claims, and actually incentivized by First American to deny claims, repair rather than
10 replace covered items, and to resolve any doubt in favor of First American and denial of coverage.
11 First American has a duty to disclose these concealed facts because the information is highly
12 material to a consumer's choice of insurance companies. No consumer would purchase insurance
13 from a company which flouts the fundamental duty of a fair investigation of claims.

14 114. As a result of Defendant's concealment of these material facts, Plaintiffs and the
15 Class have been injured.

16 **FIFTH CLAIM FOR RELIEF**

17 **(Promissory Fraud – Violation of Civil Code § 1710(4))**

18 **(On Behalf of Plaintiffs and the Class)**

19 115. Plaintiffs repeat and re-allege the allegations contained above, except those
20 contained in the Claims for Relief, as if fully stated herein.

21 116. The home warranty plans issued to Class Members during the Class Period
22 contained an obligation on the part of First American to repair or replace covered systems that failed
23 due to normal wear and tear. The contractual term stated:

24 The Company will determine whether a covered system or appliance will be repaired
25 or replaced. When replacing any appliance, the Company will not consider any
26 failures that do not contribute to the appliance's primary function including, without
27 limitation, TVs or radios in the kitchen refrigerator. The Company will replace with
28 equipment of similar features, efficiency, and capacity but is not responsible for
matching brand, dimensions, or color.

1 117. Moreover, First American promised potential customers that its policies, if
2 purchased, provide: ***“Protection from potentially huge, costly system or appliance repair and
3 replacement bills. Just one event could literally wipe out your hard-earned savings.”*** First
4 American promises that: ***“If First American determines your covered system or appliance cannot
5 be repaired, we’ll replace it. It doesn’t matter how old it is, or what brand you have or even if the
6 part is obsolete. In 2010, we spent millions of dollars to repair or replace covered systems and
7 appliances nationwide, in homes just like yours.”***

8 118. In addition, First American’s uniform home protection contracts and brochures
9 promise that, with a First American home warranty, ***the insured will only pay the service call fee to
10 have any covered system repaired or replaced. See Exhibit E.***

11 119. First American’s standardized written home protection contracts and brochures also
12 state: ***“From the very first day your coverage begins, you’ll have repair service and budget
13 protection for costly breakdowns that can and often do occur after the purchase of a home.” See
14 Exhibit E.***

15 120. First American never had any intention of complying with its promise under the
16 home warranty plans to replace items covered under the home warranty plan if they could not be
17 repaired. First American is a member of a trade association of home protection companies. In one
18 of the trade association’s memos, it was candidly stated that:

19 ***“Given the average price for a policy, how reasonable would it be to believe the
20 company would replace anything in the house that might break?”***

21 121. Moreover, First American never had any intention of honoring its promise that its
22 insureds would only have to pay the service call fee to have a covered system repaired or replaced.
23 Instead, as alleged herein, First American provides strong economic incentives for its contractors to
24 improperly charge its insureds significant amounts above the service call fee, and, in fact, for any
25 covered claim where First American actually authorized replacement of a covered system, class
26 members were forced to pay significantly in excess of the service call fee to First American’s
27 contractors to obtain the replacement.

1 122. Thus, during the Class Period, First American engaged in, and continues to engage
2 in, promissory fraud. It promises that it will replace covered systems if they cannot be repaired, but
3 has no intention of doing so at the time it issues the home warranty contracts. It also has no
4 intention of honoring the promise that its insureds will only have to pay \$55 out of their pocket to
5 obtain the replacements.

6 123. The promises were made by Defendant with the intent to induce Plaintiffs and
7 members of the Class to purchase and/or agree to accept home warranty contracts issued by
8 Defendant.

9 124. The aforementioned promises and misrepresentations were contained in the home
10 warranty plans and advertisements disseminated by First American during the Class Period.

11 125. For every home warranty plan sold by First American during the Class Period, First
12 American was obligated to send a copy of the home warranty plan to the consumer who was
13 covered under the policy. Plaintiffs were exposed to Defendant's advertisements and received a
14 copy of First American's home protection contract (attached hereto as Exhibits A-D) and relied on
15 the promise that First American would replace covered items if they could not be repaired, and that
16 if Plaintiffs filed a claim, all they would have to pay was the low service call fee.

17 126. At the time these promises were made, Plaintiffs and the members of the Class were
18 ignorant of Defendant's true intention not to perform and could not, in the exercise of reasonable
19 diligence, have discovered Defendant's secret intention. In reliance on Defendant's promises,
20 Plaintiffs and each member of the Class purchased or received home warranty contracts with
21 Defendant. Had Plaintiffs or the members of the Class known Defendant's actual intention, they
22 would not have taken such actions.

23 127. At the time Defendant made the promises, it had no intention of performing the
24 promises, as evidenced by the following conduct:

25 (a) First American pays its contractors so far below market rate that they cannot
26 perform adequate or necessary replacements on expensive items and still make a profit;

27 (b) First American instructs its contractors to repair rather than replace items even
28 when a replacement is necessary;

1 (c) First American establishes arbitrary and extremely low “replacement
2 percentage ratios” and then tells contractors to stay below this figure if they want to keep getting
3 work from First American; such ratios have nothing to do with how often an appliance or covered
4 system can be expected to fail and instead are chosen by First American with only one aim –
5 maximizing First American’s profit.

6 (d) First American encourages a “race to the bottom” with respect to its
7 contractors. Contractors are ranked almost exclusively based on the lowest average cost charged to
8 First American. Contractors are free, however, to charge the homeowner whatever they want. Each
9 month, First American compiles a list of the “average cost” per call for each of its contractors. First
10 American’s head of contractor relations in each geographic area disseminates the total average cost
11 per call for each trade to First American’s contractors in such trade. First American’s head of
12 contractor relations tells the contractors that if they want to continue to receive work from First
13 American, they need to keep their average cost per call at or below this figure, and that contractors
14 will not receive any work or any significant volume of work from First American if they charge First
15 American more than this figure. Thus, even if a contractor had negotiated a flat rate with First
16 American, if the monthly “average cost” per call figure disseminated to the contractor by the head of
17 contractor relations at First American was lower than the contractor’s flat rate, the contractor would
18 have to charge First American less than his or her negotiated flat rate in order to continue to receive
19 any significant volume of calls from First American. This nefarious, carefully orchestrated policing
20 system is in place before a consumer ever purchases or obtains a home warranty plan from First
21 American, and before a contractor signs up to work for First American;

22 (e) First American financially incentivizes contractors to recommend denial of
23 legitimate claims, refuse to work on expensive claims, and or/perform substandard repairs;

24 (f) First American creates economic incentives for contractors to shift the
25 majority of costs onto the consumer. ***First American knows at the time it issues its home warranty***
26 ***plans that the average amount its insureds pay for allegedly “covered” claims significantly***
27 ***exceeds the service call fee.***

1 (g) First American hires unqualified contractors. The application to become a
2 First American contractor (or “preferred service vendor” as they are sometimes called) does not
3 contain any requirement whatsoever that the contractor demonstrate competency or satisfactory
4 customer service or a good rating with the Better Business Bureau. Instead, the sole requirements
5 are that the contractor must have a license, carry general liability and worker’s compensation
6 insurance (or a waiver thereof), and fill out a one-page online form; and

7 (h) First American routinely stalls or delays authorizing replacements or
8 purchasing the necessary appliance or parts for the replacement.

9 128. As a proximate result of Defendant’s fraudulent conduct, the named Plaintiffs have
10 been damaged.

11 129. Defendant’s conduct was done with the intention of depriving Plaintiffs and
12 members of the Class of property or legal rights or otherwise causing injury. Defendant’s conduct
13 was malicious so as to justify an award of exemplary and punitive damages.

14 **SIXTH CLAIM FOR RELIEF**

15 **(Violation of Bus. & Prof. Code § 17200)**

16 **(On Behalf of Plaintiffs and the Class)**

17 130. Plaintiffs repeat and re-allege the allegations contained above, except those contained
18 in the Claims for Relief, as if fully stated herein.

19 131. The Unfair Trade Practices Act defines unfair competition to include any “unfair,”
20 “unlawful,” or “fraudulent” business act or practice. CAL. BUS. & PROF. CODE § 17200. Unfair
21 competition also includes “unfair, deceptive, untrue or misleading advertising.” *Id.* The Act also
22 provides for injunctive relief for violations. *Id.* § 17203.

23 132. This cause of action is brought on behalf of Plaintiffs, members of the Class, and
24 members of the general public pursuant to California Business & Professions Code § 17200 *et seq.*
25 Under Business & Professions Code § 17200 *et seq.*, Plaintiffs are entitled to enjoin Defendant’s
26 wrongful practices by reason of Defendant’s unlawful, unfair, and/or deceptive acts and practices.

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28 //

1 133. As a direct and proximate result of the acts and practices alleged above, members of
2 the Class and the general public who purchased home warranty plans from Defendants have been
3 injured.

4 134. Defendant’s unlawful, unfair, and fraudulent business acts and practices, as described
5 above, present a continuing threat to members of the Class and of the general public, in that
6 Defendants are continuing, and will continue, unless enjoined, to commit violations of Business &
7 Professions Code § 17200. This Court is empowered to, and should, grant preliminary and
8 permanent injunctive relief against such acts and practices.

9 135. Defendant’s conduct is “unlawful” because Defendant committed false or untrue
10 advertising in violation of Cal. Bus. & Prof. Code Section 17500 and because Defendant violated
11 Civil Code Section 1710(1)-(4).

12 136. As alleged herein, Defendants’ conduct constitutes a breach of contract. Defendants
13 breached the contracts by not complying with the written terms of the contracts.

14 137. As alleged herein, Defendants’ conduct also constitutes a violation of the implied
15 covenant of good faith and fair dealing, which is an essential element of the contracts entered into
16 between Plaintiffs and Defendant. The implied covenant of good faith and fair dealing obligated
17 Defendants to refrain from doing anything to injure the right of Plaintiffs and the Class to receive the
18 benefits under the contracts. Defendants violated this implied covenant through their conduct, as
19 alleged *supra*.

20 138. As alleged herein, Defendants’ conduct also violated Cal. Ins. Code § 332.

21 139. As alleged herein, Defendants’ conduct also violated California’s Unfair Insurance
22 Practices Act (“UIPA”), including Cal. Ins. Code §§ 790.03 and 790.034, including but not limited
23 to 790.03(h)(3) and 790.03 and 10 C.C.R. § 2695.7(d):

24 (a) As alleged above, Defendant failed to adopt and implement reasonable
25 standards for the prompt investigation and processing of claims arising under the home warranty
26 plans sold by Defendant to Plaintiffs and the Class, thus violating Cal. Ins. Code § 790.03(h)(3).
27 Defendant’s failure to adopt and implement reasonable standards for the prompt investigation and
28

1 processing of claims under the home warranty plans they sold was knowingly committed and
2 performed with such frequency as to constitute a general business practice.

3 (b) Defendant's conduct as alleged in this complaint further violates Cal. Ins.
4 Code § 790.03 because Defendant failed to "conduct and diligently pursue a thorough, fair and
5 objective investigation," as required by 10 C.C.R. § 2695.7(d). Among other things, as alleged
6 above, Defendant trained and incentivized third-party contractors to deny legitimate claims. In
7 addition, because Defendant did not pursue any investigation on its own, but instead improperly
8 delegated investigation of all claims submitted by Plaintiffs and the Class to third-party contractors,
9 Defendant failed to conduct and diligently pursue a thorough, fair, and objective investigation with
10 regard to every submitted claim.

11 140. Defendant's conduct also is "unfair" due to the conduct alleged herein.

12 141. Defendant's conduct also violates Bus. & Prof. Code Section 17200 because
13 Defendant's conduct, as alleged herein, is "fraudulent."

14 142. Plaintiffs, on behalf of themselves and the Class, seek restitution of all money and
15 property obtained which Defendant obtained or may have obtained from Plaintiffs and the Class as a
16 result of its unfair business practices.

17 **SEVENTH CLAIM FOR RELIEF**

18 **(On Behalf of Plaintiffs and the Class)**

19 **(False Advertising – Violation of Bus. & Prof. Code § 17500)**

20 143. Plaintiffs repeat and re-allege the allegations contained above, except those contained
21 in the Claims for Relief, as if fully stated herein.

22 144. During the Class Period, Defendant, acting directly or indirectly with intent to induce
23 Plaintiffs, the Class, and the members of the public to purchase its home protection contracts, in
24 violation of Cal. Bus. & Prof. Code Section 17500, made or disseminated or caused to be made or
25 disseminated the untrue or misleading statements alleged in the Complaint. Examples of
26 Defendant's false advertisements are attached hereto as Exhibit E.

1 145. The statements and representations made by Defendant were untrue or misleading,
2 and were known, or by the exercise of reasonable care should have been known, to be untrue or
3 misleading.

4 146. Defendant made or disseminated or caused to be made such statements as part of a
5 plan or scheme with the intent not to sell its services, as so advertised.

6 147. Plaintiffs actually saw and relied upon one or more of Defendant's advertisements,
7 representations, and statements, and suffered actual injury and harm as a result of Defendant's
8 violation of Cal. Bus. & Prof. Code Section 17500.

9 **EIGHTH CLAIM FOR RELIEF**

10 **(Breach of Contract)**

11 **(On Behalf of Plaintiffs Carrera, Hershey, Morrison, and Diaz Individually)**

12 148. Plaintiffs repeat and re-allege the allegations contained above, except those contained
13 in the Claims for Relief, as if fully stated herein.

14 149. Defendant entered into contracts with Plaintiffs under which Defendant issued home
15 protection contracts to Plaintiffs. True and correct copies of the contracts are attached hereto as
16 **Exhibits A-D** and incorporated herein by reference. Under the terms of those contracts, Defendant
17 was required to provide the coverage promised in the contracts.

18 150. Plaintiffs complied with all their obligations under the contracts.

19 151. Plaintiffs have been deprived of the benefits of their contracts with Defendant.

20 152. Defendant materially breached its contracts with Plaintiffs by failing to honor the
21 terms of the contracts when Plaintiffs made claims under the contracts, as alleged herein. Defendant
22 also breached the contracts by taking actions to deprive Plaintiffs of the benefits of the contracts.

23 153. For Plaintiff Carrera, Defendant breached the contractual term which states: "This
24 contract provides coverage for systems and appliances which malfunction due to lack of
25 maintenance, rust or corrosion, or chemical or sedimentary build-up. Coverage is provided for
26 malfunctions which occur and are reported to First American Home Buyers Protection (Company)
27 during the term of this contract." Defendant further breached the contract term which specifically
28 included Plaintiff's central air conditioning unit as a covered system/appliance. Under the heading

1 of “Additional Coverage for Buyer” the contract includes “Central Air Conditioning (Ducted)” as a
2 covered item, and states that all the following items are covered: “Refrigeration System (includes
3 heat pump), Condensing Unit, Thermostats, Compressor, Motors, Freon lines, Coils, Liquid and
4 suction line dryers, Fuses, breakers, disconnect boxes and wiring, Valves (includes thermostatic
5 expansion valves), Air handling unit, Evaporative Cooler, pump, casing, motor, belts and pulleys,
6 Float-assembly, and Built-in Electric Wall Units.” Pursuant to the terms of the contract, Plaintiff’s
7 central air conditioning unit, including the compressor coil and other items, were covered, and yet
8 First American failed to properly repair or replace Plaintiff’s air conditioning unit and failed to
9 compensate Plaintiff when she had to have items repaired at her own expense due to Defendant’s
10 breaches of the contract.

11 154. For Plaintiff Carrera, Defendant also breached the contract term which states:
12 “Obligor: First American Home Buyer’s Protection Corporation will fulfill all the obligations and
13 direct the performance of all the duties under this Home Protection Contract.” First American failed
14 to fulfill the obligation to perform a good-faith investigation of Plaintiff’s claim, and instead
15 improperly delegated this critical task to one or more contractors who had no training in claims
16 adjusting and claims investigation.

17 155. For Plaintiff Carrera, First American also breached the contract’s terms regarding
18 customer service. Under the heading “Customer Service,” the contract states: “When your coverage
19 is confirmed, First American will dispatch your call to a qualified contractor. All calls for covered
20 services will be initiated within 72 hours of the request for the service by the contract holder and will
21 be completed as soon as reasonably possible.” First American breached these provisions because the
22 contractor it dispatched to respond to Plaintiff’s covered air conditioner claim was incompetent and
23 unqualified, and because First American failed to complete the requisite repair work to the air
24 conditioner as soon as reasonably possible. First American initially refused to have the contractor
25 perform the necessary work and then significantly delayed the necessary work, forcing Plaintiff to
26 spend a significant amount of her time calling First American to attempt to remedy the situation. A
27 significant delay in the completion of work resulted, during which time Plaintiff experienced
28 excessive and unsafe heat in her home, forcing her to purchase room air conditioners to cool her

1 home while First American initially wrongfully refused to effectuate the necessary repairs and then
2 later wrongfully delayed having necessary repairs completed. First American further breached the
3 contract because its breach caused Plaintiff to incur significant out-of-pocket sums and yet has
4 refused to reimburse Plaintiff for such sums.

5 156. For Plaintiff Carrera, First American further breached the contractual term concerning
6 Customer Service which states that Plaintiff is only obligated to pay one service call fee if multiple
7 visits are necessary to make a necessary repair. The contract states: “The customer pays the \$100
8 service call fee for each separate trade call. Trade call means each visit by an approved contractor,
9 unless multiple visits are required to remedy the same problem.” First American breached this
10 provision of the contract because Plaintiff was charged and paid at least two separate trade call fees
11 even though multiple visits by First American approved contractors were required to remedy the
12 same problem to Plaintiff’s air conditioning unit.

13 157. For Plaintiff Carrera, First American further breached the contract because Plaintiff
14 was required to pay \$450.00 to the contractor, allegedly for the disposal of her air conditioner’s
15 compressor and evaporator coil. The \$450 charge was not really for a disposal fee, but instead was a
16 charge which First American allowed the contractor to charge Plaintiff to subsidize the contractor
17 due to the fact that First American did not pay the contractor a sufficient amount to allow the
18 contractor to make the necessary repair. A \$450 charge for disposal of an air conditioner
19 compressor and/or evaporator coil is not customary or necessary, and First American did nothing to
20 ensure that such charge by its contractor was reasonable and necessary. Instead of honoring its
21 contract, First American only protected its own bottom line by ensuring that the contractor charged
22 as little as possible to First American, and then left the contractor free to make up the difference by
23 gouging Plaintiff a bogus and/or excessive “haul away” fee.

24 158. For Plaintiff Hershey, Defendant breached the contractual term which states: “This
25 contract provides coverage for covered systems and appliances which malfunction due to lack of
26 maintenance, rust, corrosion and chemical or sedimentary build-up. Coverage is only provided for
27 malfunctions which occur and are reported to First American Home Buyers Protection (Company)
28 during the term of this contract.” Defendant further breached the contractual clause which

1 specifically states that Plaintiff's oven was covered under the policy. The clause is included under
2 "Basic Contract Coverage" and states that the following is covered: "Oven/Range/Cooktop: All
3 parts and components, except: Not covered: Door glass, lights, meat probe assemblies and magnetic
4 induction units." Pursuant to the terms of the contract, "all parts and components" of Plaintiff's
5 oven were covered, yet First American refused to repair or replace Plaintiff's oven which
6 malfunctioned during the contract term. Plaintiff's oven door malfunctioned, and it is specifically
7 included in the contract coverage and is not part of the exclusions listed in the contract.

8 159. As a result of Defendant's breach of contract, Plaintiffs suffered damages. Plaintiffs
9 seek all damages incurred as a result of Defendant's breaches.

10 **NINTH CLAIM FOR RELIEF**

11 **(Declaratory Relief Under Code of Civil Procedure § 1060)**

12 **(On Behalf of Plaintiffs Hershey, Morrison, and the Class)**

13 160. Plaintiffs repeat and re-allege the allegations contained above as if fully stated herein.

14 161. Plaintiffs Hershey and Morrison are interested persons under written home protection
15 contracts between Plaintiffs and Defendant. The home protection contracts are contracts between
16 Plaintiffs and Defendant.

17 162. An actual controversy exists between Plaintiffs and Defendant regarding the home
18 protection contracts.

19 163. Plaintiffs request a declaration of their rights under the contracts and Defendant's
20 obligations under the contracts, including a determination of questions of construction or validity
21 arising under the contracts.

22 164. Plaintiffs were added as named plaintiffs in this action in response to an order of the
23 Court dated July 24, 2012, granting leave to amend the complaint so as to add a new class
24 representative or representatives who had current home protection contracts with Defendant.
25 Plaintiffs Hershey and Morrison were subsequently added as plaintiffs in the Second Amended Class
26 Action Complaint and at such time had current home protection contracts with Defendant.

27 165. Thereafter, solely to attempt to defeat the standing of Plaintiffs Hershey and Morrison
28 to bring this claim for declaratory relief for their benefit and for the benefit of other class members,

1 Defendant unilaterally canceled the home protection contracts of Plaintiffs Hershey and Morrison.
2 Defendant's conduct in canceling such contracts is wrongful and an intentional effort to flaunt the
3 Court's July 24, 2012 order. Defendant's conduct also violates the terms of the home protection
4 contracts themselves, which state that the contracts are not cancelable except for non-payment of
5 fees or fraud.

6 **PRAYER FOR RELIEF**

7 WHEREFORE, Plaintiffs demand judgment against Defendant as follows:

8 A. A declaration that this action is a proper class action under FED. R. CIV. P. 23 on
9 behalf of the Class and Subclass as defined herein, and an order directing that reasonable notice of
10 this action be given to each member of the Class and Subclass;

11 B. A declaration that Defendant's conduct alleged herein constitutes a breach of the
12 implied covenant of good faith and fair dealing, violations of Civil Code Section 1710, violation of
13 Business & Professions Code § 17500, and violation of Business & Professions Code § 17200;

14 C. An injunction enjoining, preliminarily and permanently, Defendant from continuing
15 the unlawful conduct alleged herein;

16 D. An award for Plaintiffs and the Class and Subclass for the costs of this suit (including
17 expert fees), and reasonable attorneys' fees, as provided by law;

18 E. Restitution for Plaintiffs and the Class and Subclass on the class claims;

19 F. Actual damages for Plaintiffs on their individual claims; and

20 G. An award for such other and further relief as the nature of this case may require or as
21 this Court deems just, equitable, and proper.

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JURY DEMAND

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Plaintiffs demand a jury trial of all triable issues.

Dated: October 9, 2014

/s/ Francis A. Bottini, Jr.
Francis A. Bottini, Jr.

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