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 CLERK OF SUPERIOR COURT
 COUNTY OF CONTRA COSTA
 SAN PABLO, CALIFORNIA

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 14 COUNTY OF CONTRA COSTA

15 THEODORE LAYMON and AMY)
 16 LAYMON, on behalf of themselves and)
 17 all others similarly situated,)
 18)
 19)
 20)
 21)
 22)
 23)
 24)
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Plaintiffs,

vs.

J. ROCKCLIFF, INC., a California)
 corporation, JEFFREY W. SPOSITO,)
 and DOES 1-100,)
 Defendants.)

Case No. **C15-00186**

Class Action

COMPLAINT FOR:

- (1) BREACHES OF FIDUCIARY DUTIES;
- (2) AIDING AND ABETTING BREACHES OF FIDUCIARY DUTIES;
- (3) VIOLATION OF CALIFORNIA CIVIL CODE § 1710(3);
- (4) VIOLATION OF CALIFORNIA BUS. & PROF. CODE § 17200;
- (5) CONSTRUCTIVE FRAUD;
- (6) UNJUST ENRICHMENT; AND
- (7) ACCOUNTING

DEMAND FOR JURY TRIAL.

PLS LOCAL CLEER THIS
 CASE IS ASSIGNED TO
 DEPT 17
 SUMMERS ISSUED

BY FAX

1 Plaintiffs, by their undersigned attorneys, as and for their class action
2 complaint, allege upon personal knowledge with respect to themselves, and upon
3 information and belief as to all other allegations based upon, *inter alia*, the
4 investigation of counsel, as follows:

5 **NATURE OF THE ACTION**

6 1. This is a class action brought by Plaintiffs on behalf of all persons and
7 entities who, between July 1, 2007 and July 11, 2011 (the “Class Period”), employed the
8 services of J. Rockcliff, Inc. (“J. Rockcliff”) to buy or sell a residential home in
9 California in a transaction in which J. Rockcliff or any of its agents or owners received
10 any payments from any person or company related to the TransactionPoint software
11 (the “Class”).

12 2. Plaintiffs bring this action against J. Rockcliff, a California corporation
13 providing real estate services, and its managing owner and broker during the Class
14 Period – Jeffrey W. Sposito. Plaintiffs seek to recover for Defendants’ breaches of
15 fiduciary duties in accepting undisclosed payments or commissions while acting as real
16 estate agents for Plaintiffs and other members of the Class. Plaintiffs also bring claims
17 against Defendants for aiding and abetting each other’s breaches of fiduciary duties,
18 fraudulent concealment, violation of California’s unfair competition law, constructive
19 fraud, unjust enrichment, and for an accounting arising out of the above-mentioned
20 conduct.

21 3. California law prohibits any real estate agent or broker from accepting
22 any undisclosed form of payment while acting as a real estate agent for a client.
23 Acceptance by a real estate agent or broker of any undisclosed payment while acting as
24 a real estate agent for a client amounts to a breach of fiduciary duty and, if liability is
25 established, subjects the real estate agent or broker to disgorgement of the full amount
26 of commission paid by the client in the subject real estate transaction.

27 4. During the Class Period, J. Rockcliff utilized the “TransactionPoint” real
28 estate software system developed by Fidelity National Financial, Inc. (“FNF”) to

1 prepare transaction documents and order related real estate settlement services (such
2 as title insurance, escrow, natural hazard disclosure reports, and home-warranty
3 contracts) for Plaintiffs and other members of the Class. In doing so, J. Rockcliff
4 entered into sublicensing agreements with providers of real estate settlement services,
5 including but not limited to subsidiaries of FNF, to enable those providers to be listed
6 in TransactionPoint as providers of settlement services. Pursuant to these agreements,
7 Defendants received undisclosed payments from the service providers for the real
8 estate settlement services ordered through TransactionPoint.

9 5. On July 11, 2011, FNF agreed to settle charges brought against it by the
10 U.S. Department of Housing and Urban Development (“HUD”) stemming from the use
11 of the TransactionPoint software. HUD alleged that FNF paid unnamed real estate
12 brokers improper kickbacks or referral fees in violation of the Real Estate Settlement
13 Procedures Act (“RESPA”). As part of the settlement, FNF agreed to cease this practice
14 and pay HUD \$4.5 million to resolve the complaint. At no point has HUD or FNF
15 disclosed the names of the real estate brokers who received the improper payments.

16 6. Subsequently, on January 8, 2013, FNF entered into a settlement with
17 several California district attorneys to resolve an unfair competition lawsuit also
18 stemming from the use of the TransactionPoint software. The district attorneys
19 alleged that the use of TransactionPoint facilitated unlawful secret payments to
20 brokers for the referral of business to title insurers and other service providers. As
21 part of the settlement, FNF agreed to cease this practice and pay a total of \$873,588.

22 7. Plaintiffs bring this action to recover for Defendants’ breaches of
23 fiduciary duties in receiving undisclosed payments while acting as real estate agents for
24 Plaintiffs and other Class members. Plaintiffs also bring this action to recover for
25 Defendants’ aiding and abetting the breaches of fiduciary duties and other wrongful
26 conduct, which constituted unfair, fraudulent, and unlawful business practices in
27 violation of California’s unfair competition law.

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JURISDICTION AND VENUE

1 8. The Court has jurisdiction over this action under California Constitution,
2 Article VI, § 10, because this case is a cause not given by statute to other trial courts.
3 This action is not removable to federal court. The amount in controversy as to the
4 named Plaintiffs does not exceed \$75,000, exclusive of interest and costs and all
5 parties are California citizens.

6 9. This Court has jurisdiction over Defendants because Defendant J.
7 Rockcliff is headquartered in Danville, California, and because Defendants conduct
8 business in and maintain operations in this County. Moreover, Defendants maintain
9 sufficient minimum contacts with California to render jurisdiction by this Court
10 permissible under traditional notions of fair play and substantial justice.

11 10. Venue is proper in this Court because the events and conduct at issue
12 took place in substantial part and have effect in this County, and because J. Rockcliff's
13 headquarters are located at 4115 Blackhawk Plaza Circle, Suite 200, Danville,
14 California 94506.

PARTIES

A. Plaintiffs

16 11. Plaintiffs Theodore and Amy Laymon are California residents and are
17 married. In 2008, Plaintiffs employed the services of J. Rockcliff to sell a residential
18 home located at 5377 Hillflower Drive, Livermore, California 94551. Plaintiffs paid
19 Defendant J. Rockcliff a substantial commission for acting as Plaintiffs' real estate
20 agent and broker in the transaction. As part of the transaction, J. Rockcliff
21 recommended that Plaintiffs use, and Plaintiffs used, real estate settlement services
22 from various third parties who were participants in TransactionPoint, including but
23 not limited to Fidelity National Title Co., Fidelity National Home Warranty Co. and
24 JCP Geologists. Upon information and belief, J. Rockcliff and/or its owners received
25 profits and payments relating to TransactionPoint from third parties as part of such
26 transaction, which Defendants never disclosed to Plaintiffs.
27
28

1 **B. Defendants**

2 12. Defendant J. Rockcliff is a California corporation doing business as a real
3 estate broker licensed with the California Bureau of Real Estate. Its principal place of
4 business is located at 4115 Blackhawk Plaza Circle, Suite 200, Danville, California
5 94506. During the Class Period, J. Rockcliff acted as a real estate broker for Plaintiffs
6 and the Class members. Upon information and belief, and unbeknownst to Plaintiffs
7 and the Class members, J. Rockcliff and/or its owners received undisclosed
8 commissions or kickbacks from real estate settlement service providers and/or third
9 parties while acting as a real estate agent for Plaintiffs and the Class members.

10 J. Rockcliff is a citizen of California.

11 13. Defendant Jeffrey W. Sposito is a licensed California real estate broker.
12 He is a California citizen and lists his address with the California Bureau of Real Estate
13 as 45 Brightwood Circle, Danville, California 94506. During the Class Period, Sposito
14 was an officer of J. Rockcliff and did business under the name of J. Rockcliff, Inc.
15 and/or J. Rockcliff Realtors. Sposito is sometimes referred to herein as the "Individual
16 Defendant."

17 **C. Doe Defendants**

18 14. Various other individuals, partnerships, corporations, and other business
19 entities, unknown to Plaintiffs, have participated in the violations alleged herein and
20 have performed acts and made statements in furtherance thereof. Because the true
21 names and capacities of these defendants are unknown to Plaintiffs, Plaintiffs sue
22 these defendants as Doe Defendants 1-100. Plaintiffs will amend the complaint to
23 show the true names and capacities of these defendants when they have been
24 ascertained.

25 15. Plaintiffs are informed and believe, and on that basis allege, that each of
26 the fictitiously-named defendants is responsible in some manner for the occurrences
27 herein alleged, and that Plaintiffs' injuries as here alleged were proximately caused by
28 the conduct of these fictitiously-named defendants.

DEFENDANTS' FIDUCIARY DUTIES

1
2 16. A real estate broker and agent is a fiduciary that has an obligation to
3 disclose all material information about a real estate transaction to his or her clients,
4 including any compensation the agent is receiving. In any transaction on behalf of his
5 principal, the agent is bound to exercise utmost good faith and honesty.

6 17. The law, thus, imposes on real estate agents and brokers an obligation of
7 undivided service and loyalty. This relationship not only imposes a duty of acting in
8 the highest good faith toward the principal but precludes the agent or broker from
9 obtaining *any* advantage over the principal in any transaction by virtue of the fiduciary
10 relationship. The agent or broker is charged with the duty of fullest disclosure of all
11 material facts concerning the transaction that might affect the principal's decision.

12 18. A real estate licensee who "claim[s] or tak[es] ... any secret or
13 undisclosed amount of compensation, commission, or profit or [fails] to reveal to the
14 employer of [such] licensee the full amount of the licensee's compensation,
15 commission, or profit under any agreement authorizing or employing [such] licensee
16 to do any acts for which a license is required" is subject to discipline by the Real Estate
17 Commissioner. CAL. BUS. & PROF. CODE § 10176(g). Such a licensee also violates his or
18 her fiduciary duties toward the employer and will not be allowed to retain the
19 undisclosed profit: "[A] real estate licensee, *while acting in his or her capacity as*
20 *such*, must not receive any benefit from the transaction of his or her agency other than
21 that which is known and accepted by the principal. The agent will not be permitted to
22 retain *anything* that might otherwise derive from participation in the transaction
23 unless the agent *fully* discloses the nature *and amount* of the benefit and receives the
24 approval of the principal. *It is totally immaterial that the transaction is otherwise*
25 *fair to the principal, or that the principal receives exactly the price wanted for the*
26 *property*" See 2 Miller & Starr, CAL. REAL ESTATE §3:32 at p. 177 (3d ed. 2000)
27 (emphases added). "[T]he principal's right to recover does not depend upon any
28 deceit of the agent, but is based upon the duties incident to the agency relationship and

1 upon the fact that all profits resulting from that relationship belong to the principal.”
2 *Crogan v. Metz*, 47 Cal. 2d 398, 404-05 (1956).

3 19. A real estate licensee is also subject to discipline by the Real Estate
4 Commissioner for “[m]aking any substantial misrepresentation.” CAL. BUS. & PROF.
5 CODE § 10176(a). Failure of a real estate licensee “who acts as an agent for either party
6 in a transaction for the sale ... of real property ... and who receives compensation, or
7 who anticipates receiving compensation, from a lender in connection with the securing
8 of financing for the transaction, ... to disclose to both parties, prior to the closing of the
9 transaction, the form, amount and source of compensation received or expected”
10 amounts to “misrepresentation” for purposes of California Business & Professions
11 Code § 10176(a). *See* 10 CAL. CODE REG. § 2904.

12 20. By receiving and/or conspiring to receive undisclosed payments while
13 acting as real estate agents for Plaintiffs and other Class members, Defendants violated
14 their fiduciary duties owed to Plaintiffs and other Class members and committed
15 constructive fraud.

16 **Control, Authority, and Conspiracy**

17 21. At all relevant times during the Class Period, J. Rockcliff was the
18 employer of Individual Defendant Sposito. During the Class Period, J. Rockcliff acted
19 as a real estate broker for Plaintiffs and the Class and, thus, breached its fiduciary
20 duties when it failed to disclose the unlawful commissions or kickbacks received by it
21 and/or its owners from real estate settlement services providers. J. Rockcliff is also
22 liable to Plaintiffs and the Class under the doctrine of *respondeat superior* because
23 J. Rockcliff either had knowledge of the Individual Defendant’s breaches of fiduciary
24 duties and/or such knowledge can be imputed to J. Rockcliff from its close relationship
25 with the Individual Defendant. Moreover, J. Rockcliff is liable even if the Individual
26 Defendant was acting for his own purposes because J. Rockcliff placed the Individual
27 Defendant in the position to harm Plaintiffs and the other Class members, and
28 Plaintiffs and the other Class members relied upon the Individual Defendant’s

1 apparent authority to make the representations. J. Rockcliff either approved or
2 ratified the Individual Defendant's actions.

3 22. At all relevant times, J. Rockcliff and the Individual Defendant acted
4 jointly in receiving the unlawful commissions or kickbacks and in concealing that
5 practice from Plaintiffs and the other Class members. J. Rockcliff and the Individual
6 Defendant agreed to the fraudulent, unfair, and unlawful scheme alleged herein and, at
7 all relevant times, concurred in the tortious scheme with knowledge of its unlawful
8 purpose.

9 23. Defendant J. Rockcliff and the Individual Defendant, together with Doe
10 Defendants 1 through 100, conspired to receive the undisclosed commissions or
11 kickbacks and to conceal that material information from Plaintiffs and the Class.
12 Defendants are therefore jointly liable for each other's breaches of fiduciary duties.

13 24. The Individual Defendant, as an owner, managing agent and officer of
14 J. Rockcliff, directly ordered or authorized J. Rockcliff to engage in the tortious
15 conduct alleged herein.

16 **SUBSTANTIVE ALLEGATIONS**

17 **A. Background on the TransactionPoint Software**

18 25. TransactionPoint was a proprietary, web-based software platform
19 developed by FNF in 2002 and designed to automate online ordering and document
20 retrieval in real estate transactions. TransactionPoint assisted brokers in preparing
21 transaction documents and ordering related real estate settlement services, such as
22 escrow, title insurance, home-warranty contracts, and natural-hazard disclosure
23 services. At all relevant times, FNF was the owner and licensor, through various
24 related entities and successors, of the TransactionPoint software.

25 26. During the Class Period, FNF marketed and licensed TransactionPoint to
26 real estate brokers as a marketing tool and revenue stream. Among other things,
27 TransactionPoint allowed real estate brokers to order real estate settlement services,
28 including title insurance, escrow services, mortgages, home-inspection services,

1 natural hazard disclosure reports, home-warranty contracts, and other real estate
2 settlement services, from third-party vendors of such real estate settlement services.

3 27. FNF encouraged and facilitated real estate brokers to generate revenue
4 by marketing so-called “sublicense agreements” related to TransactionPoint to third-
5 party vendors for payment of a specified fee, termed a “sublicense fee,” per order
6 received for title insurance, escrow services, mortgages, home-inspection services,
7 natural hazard disclosure reports, home-warranty contracts and other real estate
8 settlement services. Many of these third party vendors were affiliated or wholly-owned
9 Fidelity companies, such as Chicago Title, Disclosure Source, Fidelity National Home
10 Warranty Company, etc. (“Fidelity Companies”), but FNF also allowed real estate
11 agents to use TransactionPoint from third party vendors unaffiliated with FNF.

12 28. Real estate agents placed orders for real estate settlement services with
13 preferred vendors who agreed to pay the sublicensing fee to the real estate agent’s
14 broker. FNF’s own subsidiaries, such as Chicago Title Insurance Company, Fidelity
15 National Title Insurance Company, Ticor Title Insurance Company, Security Union
16 Title Insurance Corporation, Lawyers Title Insurance Corporation, Fidelity National
17 Title Company, Disclosure Source, and Fidelity National Home Warranty Company,
18 entered into sublicensing agreements with real estate brokers throughout California
19 and paid the aforementioned sublicensing fees to become preferred vendors.

20 29. Between approximately 2003 and 2011, the Fidelity Companies and other
21 third party vendors, as providers of real estate settlement services, entered into “Real
22 Estate Service Provider Access Agreements” with real estate brokers whereby each
23 such company agreed to pay a specified sublicense fee to the broker for the use of
24 TransactionPoint for each title order, escrow order, mortgage, home-inspection
25 service, natural hazard disclosure report, home-warranty contract, and other real
26 estate settlement service on a California property it received from brokers via the
27 TransactionPoint software.

28

1 **B. Governmental Actions Against FNF and the Fidelity Companies**

2 30. On July 11, 2011, FNF agreed to settle the allegations brought against it
3 by HUD relating to the TransactionPoint software, in which HUD alleged that the
4 Fidelity Companies paid real estate brokers improper kickbacks or referral fees in
5 violation of RESPA. HUD claimed FNF and the Fidelity Companies engaged in a
6 widespread and years-long campaign to pay real estate brokers kickbacks for the
7 referral of real estate settlement services. As part of the settlement, FNF agreed to
8 cease this practice and pay HUD \$4.5 million to resolve HUD's allegations.

9 31. On January 8, 2013, FNF entered into a settlement with various
10 California district attorneys to resolve an unfair competition lawsuit stemming from
11 FNF's use of the TransactionPoint software. In the complaint, the district attorneys
12 alleged that FNF's operation of TransactionPoint facilitated unlawful secret payments
13 to the brokers for the referral of business to providers of real estate settlement services.

14 32. At no point did HUD or the California district attorneys disclose the
15 identity of J. Rockcliff or any other real estate broker who had received kickbacks from
16 third parties such as the Fidelity Companies. Plaintiffs only learned recently that
17 J. Rockcliff was one of the brokers who received such kickbacks. At all relevant times,
18 Defendants J. Rockcliff and the Individual Defendant actively and fraudulently
19 concealed from Plaintiffs and the public their receipt of secret payments from FNF, the
20 Fidelity Companies, and/or other third parties. Further, Defendants have never
21 admitted to receiving the secret payments and have never disclosed the secret
22 payments to Plaintiffs or any other Class member.

23 **C. Defendants' Wrongful Conduct**

24 33. Defendant J. Rockcliff is a real estate brokerage firm incorporated and
25 operating in California under the name of J. Rockcliff, Inc. and doing business as J.
26 Rockcliff Realtors. Defendant Sposito was the managing broker and/or owner of J.
27 Rockcliff during the Class Period and currently. During the Class Period, Defendants
28 acted as real estate agents and brokers for Plaintiffs and other Class members during

1 the purchase or sale of their residential homes in California. Unbeknownst to Plaintiffs
2 and the other Class members, Defendants received undisclosed payments or kickbacks
3 from real estate settlement service providers, including but not limited to FNF and/or
4 its subsidiaries, while acting as real estate agents for Plaintiffs and the Class members.

5 34. During the Class Period, Olivia Sethney, FNF's Vice President of
6 Transaction Management Services, made a presentation to Defendant J. Rockcliff
7 regarding FNF's proprietary, web-based TransactionPoint software.

8 35. During the Class Period, Defendant J. Rockcliff entered into "Application
9 Service Provider Agreements" with FNF ("ASP Agreements"), which provided
10 Defendants with access to the TransactionPoint software. Defendant Sposito signed
11 the ASP Agreements on behalf of J. Rockcliff on or about July 1, 2007. Ms. Sethney
12 signed the ASP Agreements on behalf of FNF.

13 36. During the Class Period, FNF and Defendant J. Rockcliff entered into a
14 non-disclosure agreement with regard to the ASP Agreements.

15 37. Following the execution of the ASP Agreements, Defendant J. Rockcliff
16 entered into sublicensing agreements with providers of real estate settlement services,
17 including but not limited to the Fidelity Companies, which allowed those providers to
18 be listed in the TransactionPoint software as providers of settlement services. The
19 providers of real estate settlement services (including the Fidelity Companies), or other
20 third parties acting on their behalf, paid sublicensing fees to Defendant J. Rockcliff
21 and/or its owners for each real estate settlement service Defendants ordered from
22 those providers through TransactionPoint.

23 38. Defendants never disclosed the payment of the sublicensing fees to their
24 clients, including Plaintiffs and the other Class members. Nor did Defendants ever
25 request or receive the informed written consent of Plaintiffs or any Class member to
26 receive such payments.

27 39. Defendants breached their fiduciary duties to Plaintiffs and the Class and
28 committed constructive fraud because the information Defendants concealed from

1 Plaintiffs and the Class was material. Real estate settlement service providers are
2 selected by parties prior to the time that they enter into a real estate purchase or sale
3 contract. The selection of real estate service providers is material because real estate
4 settlement services are important and material services associated with a real estate
5 transaction, and levels of competency and service vary widely among competing
6 companies.

7 40. Real estate agents representing the buyer and seller frequently suggest
8 competing real estate settlement service providers in offers and counteroffers on behalf
9 of their principals, prior to entering into and signing real estate contracts. Consumers
10 being represented by such real estate agents rely on their real estate agent's
11 recommendation as to the best companies to provide the real estate settlement
12 services, since most consumers have limited information about the companies
13 providing such services and real estate agents are intimately familiar with such
14 companies.

15 41. Consumers also rely on their real estate brokers to recommend real
16 estate service providers based on quality, service, and professionalism. During the
17 Class Period, Plaintiffs and the Class relied on the recommendations of Defendants
18 regarding the selection of real estate settlement service providers and assumed that
19 Defendants were making objective recommendations based on the best interests of
20 Plaintiffs and the Class.

21 42. During the Class Period, however, Defendants recommended real estate
22 settlement service providers to Plaintiffs and the Class based on the fact that
23 Defendants were receiving secret and undisclosed kickbacks and payments from FNF,
24 the Fidelity Companies, and/or other third parties, and not because the Fidelity
25 Companies provided the best services or were the best fit for the real estate
26 transactions entered into by Plaintiffs and the Class. Defendants' receipt of
27 undisclosed and secret compensation from third parties such as FNF and the Fidelity
28 Companies was a highly material fact that should have been disclosed to Plaintiffs and

1 the Class, since any reasonable consumer, had they been advised of such
2 compensation, would have considered such information material in deciding whether
3 to follow their broker's recommendation. Had consumers been properly advised about
4 compensation their broker was receiving from a real estate settlement service provider,
5 they would naturally question whether the broker was recommending the service
6 provider due to the payments received by the broker instead of the merits and
7 qualifications of the service provider.

8 43. Defendants' receipt of undisclosed payments or kickbacks would have
9 been material to Plaintiffs and other Class members' decision to retain them.
10 Defendants' intentional conduct and their failure to disclose such conduct amounted to
11 oppression, fraud, or malice and were done with the intention of (a) benefitting
12 themselves; and (b) depriving Plaintiffs and members of the Class of legal rights or
13 otherwise causing injury. Defendants intentionally failed to disclose the payments
14 they received from third parties such as FNF and/or the Fidelity Companies in the
15 HUD-1 statements provided to Plaintiffs and other Class members at the close of
16 escrow in order to conceal the payments, which Defendants knew were unlawful.
17 Defendants' conduct was malicious so as to justify an award of exemplary and punitive
18 damages.

19 **D. Equitable Tolling**

20 44. During the relevant period, Plaintiffs did not discover and could not have
21 discovered, through the exercise of due diligence, Defendants' breaches of their
22 fiduciary duties or their violations of California law because Defendants did not
23 disclose, and actively concealed, their receipt of undisclosed, unlawful profits and
24 payments from third parties.

25 45. Plaintiffs were unaware of and had no knowledge of Defendants' business
26 arrangements and agreements with FNF, including the ASP Agreements and the
27 non-disclosure agreement. Similarly, Plaintiffs were unaware of and had no
28 knowledge of Defendants' sublicensing agreements with preferred vendors, including

1 with Fidelity Companies.

2 46. Plaintiffs could not have discovered Defendants' breaches of fiduciary
3 duties and violations of law prior to filing suit because Defendants made absolutely no
4 disclosure of the payments from real estate settlement service providers in the escrow
5 documents, HUD-1 statements, or any other real estate settlement documents. Thus,
6 none of the documents provided to Plaintiffs made any disclosure of any payment of
7 kickbacks or other things of value to Defendants from FNF, Fidelity Companies,
8 and/or other preferred vendors for the referral of real estate settlement services.

9 47. Moreover, Defendants not only failed to disclose any information
10 whatsoever that would have allowed Plaintiffs, exercising due diligence, to discover the
11 unlawful commissions, but Defendants also intentionally concealed and attempted to
12 disguise the illegal kickbacks received to avoid detection by consumers.

13 **CLASS ACTION ALLEGATIONS**

14 48. Plaintiffs bring this action as a class action on behalf of themselves and
15 all other persons and entities who, between July 1, 2007 and July 11, 2011, employed
16 the services of J. Rockcliff to buy or sell a residential home in California in a
17 transaction in which J. Rockcliff or any of its agents or owners received any payments
18 from any person or company related to the TransactionPoint software. Excluded from
19 the Class are Defendants, their co-conspirators, and any person, firm, trust,
20 corporation, or other entity related to or affiliated with Defendants.

21 49. This action is properly maintainable as a class action.

22 50. The Class is so numerous that joinder of all members is impracticable.
23 Based on a review of publicly-available documents, Plaintiffs believe there are at least
24 hundreds, if not thousands, of Class members.

25 51. Questions of law and fact predominate as to all members of the Class,
26 including:

- 27 (i) Whether Defendants acted as real estate agents and brokers for
28 Class members;

- 1 (ii) Whether Defendant J. Rockcliff entered into agreements with FNF
- 2 and/or other third parties relating to the TransactionPoint
- 3 software;
- 4 (iii) Whether Defendants received payments from third parties such as
- 5 FNF or any of the Fidelity Companies related to their use of the
- 6 TransactionPoint software;
- 7 (iv) Whether Defendants breached their fiduciary duties owed to
- 8 Plaintiffs and the Class, aided and abetted such breaches, and
- 9 committed constructive fraud;
- 10 (v) Whether Defendants' conduct amounted to unfair, fraudulent, and
- 11 unlawful conduct in violation of California's unfair competition
- 12 law;
- 13 (vi) Whether an accounting should be ordered; and
- 14 (vii) The appropriate measures of damages and/or restitution.

15 52. Plaintiffs are committed to prosecuting this action and have retained
16 competent counsel experienced in litigation of this nature. Plaintiffs' claims are typical
17 of the claims of the other Class members and Plaintiffs have no interests antagonistic
18 to the interests of other members of the Class. Plaintiffs will fairly and adequately
19 protect the interests of the Class.

20 53. The prosecution of separate actions by individual members of the Class
21 would create the risk of inconsistent or varying adjudications that would establish
22 incompatible standards of conduct for Defendants, or adjudications that would, as a
23 practical matter, be dispositive of the interests of individual members of the Class who
24 are not parties to the adjudications or would substantially impair or impede those
25 non-party Class members' ability to protect their interests.

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CAUSES OF ACTION

COUNT I
Breaches of Fiduciary Duties
(Against All Defendants)

54. Plaintiffs incorporate by reference and re-allege each and every preceding paragraph as if fully set forth herein.

55. As real estate brokers and agents, Defendants owed fiduciary duties of the utmost good faith, honesty, and loyalty to Plaintiffs and the other Class members. Pursuant to those duties, Defendants had an obligation to disclose to Plaintiffs and the other Class members all material information concerning the real estate transactions in which Defendants were acting as brokers and agents, including any compensation Defendants were receiving from any third parties.

56. By accepting undisclosed payments while serving as real estate brokers and agents for Plaintiffs and other Class members, Defendants breached their fiduciary duties of the utmost good faith, honesty, and loyalty owed to Plaintiffs and other Class members. Defendants violated their fiduciary duties by putting their personal interests ahead of the interests of their clients.

57. Defendants never disclosed the payment of the sublicensing fees to Plaintiffs and the other Class members, and Plaintiffs and the Class members were not aware that Defendants were paid undisclosed payments or kickbacks from third parties while acting as real estate brokers for Plaintiffs and the Class members.

58. Plaintiffs and the Class members have been damaged.

COUNT II
Aiding and Abetting Breaches of Fiduciary Duties
(Against All Defendants)

59. Plaintiffs incorporate and re-allege each and every allegation set forth above as if fully set forth herein.

60. Defendants knowingly aided and abetted each other's breaches of fiduciary duties in receiving the unlawful secret profits or kickbacks and not disclosing those payments to Plaintiffs and the other Class members and, thus, are liable for

1 aiding and abetting breaches of fiduciary duties.

2 61. All Defendants benefitted from their aiding and abetting. Specifically,
3 Defendants benefitted by receiving part or whole of the commissions paid by Plaintiffs
4 and the other Class members, by receiving the undisclosed payments from third
5 parties and/or by receiving increased compensation as a result of the wrongdoing.

6 62. As a result of Defendants' wrongful conduct, Plaintiffs and the Class
7 members have been damaged.

8 **COUNT III**
9 **Violation of California Civil Code § 1710(3)**
10 **(Against All Defendants)**

11 63. Plaintiffs incorporate and re-allege each and every allegation set forth
12 above as if fully set forth herein.

13 64. Defendants owed fiduciary duties to their clients, including Plaintiffs and
14 the other Class members. As fiduciaries, Defendants were obligated to disclose to
15 Plaintiffs and the other Class members all information Defendants possessed that was
16 material to Plaintiffs' and the other Class members' interests.

17 65. During the Class Period, the following material facts were within
18 Defendants' knowledge:

- 19 (i) the existence of the ASP Agreements between J. Rockcliff and FNF,
20 which provided Defendants with access to TransactionPoint;
21 (ii) the existence of sublicensing agreements between Defendants and
22 providers of real estate settlement services, including but not limited to
23 the Fidelity Companies, which allowed those providers to be listed in the
24 TransactionPoint software in exchange for sublicensing fees paid to
25 Defendants of real estate settlement services ordered through
26 TransactionPoint; and
27 (iii) the payment of undisclosed sublicensing fees and/or other payments to
28 Defendants from providers of real estate settlement services or other
third parties in transactions in which Defendants were acting as the

1 broker for Plaintiffs and other Class members.

2 66. During the Class Period, Defendants intentionally concealed such
3 material facts from Plaintiffs and the Class with the intent to defraud Plaintiffs and the
4 Class.

5 67. Plaintiffs and other members of the Class were unaware of these
6 concealed facts, and had no means of ascertaining such concealed facts. Moreover,
7 these concealed facts were highly material to Plaintiffs and other members of the Class
8 because disclosure of the payments would have been material to the decisions made by
9 Plaintiffs and other Class members as to which real estate settlement service providers
10 to utilize in their real estate transactions.

11 68. As a result of Defendants' concealment of these material facts, Plaintiffs
12 and other members of the Class have been injured.

13 **COUNT IV**
14 **Violation of California Bus. & Prof. Code § 17200**
15 **(Against All Defendants)**

16 69. Plaintiffs incorporate and re-allege each and every allegation set forth
17 above as if fully set forth herein.

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

22 71. This cause of action is brought on behalf of Plaintiffs, members of the
23 Class, and members of the general public pursuant to Business & Professions Code
24 § 17200 *et seq.* Under Business & Professions Code § 17200 *et seq.*, Plaintiffs and the
25 Class are entitled to obtain restitution for the monies paid to Defendants by reason of
26 Defendants' unlawful, unfair, and/or deceptive acts and practices.

27 72. During the Class Period, Plaintiffs and the Class employed Defendants to
28 serve as their real estate brokers. During the Class Period, Plaintiffs and other Class
members paid Defendants substantial commissions for serving as their real estate

1 brokers in residential real estate transactions.

2 73. As a direct and proximate result of the acts and practices alleged above,
3 members of the Class and the general public who employed Defendants' services have
4 been injured. This Court is empowered to, and should, order restitution to all persons
5 from whom Defendants unfairly, deceptively, and/or unlawfully took money.

6 74. As alleged herein, Defendants' conduct constituted an "unfair" business
7 practice under § 17200 because it amounts to a conduct that is "immoral, unethical,
8 oppressive, unscrupulous or substantially injurious to consumers." Real estate brokers
9 and agents are fiduciaries and have an obligation to disclose all material information
10 about a real estate transaction to their clients, including any and all compensation the
11 agent is receiving. Consumers trust their real estate brokers because, as fiduciaries,
12 the brokers are obligated by law to look out for their best interests. A practice whereby
13 the real estate agent receives undisclosed commissions or kickbacks for referring a
14 particular provider of real estate settlement services and then conceals such conduct
15 from its clients is undoubtedly "immoral, unethical, oppressive, unscrupulous or
16 substantially injurious" to those clients.

17 75. As alleged herein, Defendants' conduct also constituted a "fraudulent"
18 business practice under § 17200 because Defendants' receipt of undisclosed payments
19 was "likely to deceive" Plaintiffs and the Class. Disclosure of the commissions paid to
20 Defendants by providers of real estate settlement services would be highly material to
21 Plaintiffs and the other Class members because it would cause them to wonder
22 whether Defendants were recommending the particular provider of real estate
23 settlement services based on an objective evaluation by Defendants or merely because
24 Defendants were being paid a kickback. The failure to disclose such payments was,
25 therefore, "likely to mislead" Plaintiffs and the Class.

26 76. As alleged herein, Defendants' conduct also constituted an "unlawful"
27 business practice under § 17200 for the following reasons:

28 (i) By receiving undisclosed payments while acting as real estate brokers for

1 Plaintiffs and other Class members, Defendants breached the fiduciary
2 duties of utmost good faith, honesty, and loyalty owed to Plaintiffs and
3 other Class members.

4 (ii) Defendants also violated Cal. Bus. & Prof. Code § 10176(g), which
5 prohibits real estate agents from: “[t]he claiming or taking by a licensee
6 of any secret or undisclosed amount of compensation, commission, or
7 profit or the failure of a licensee to reveal to the employer of the licensee
8 the full amount of the licensee's compensation, commission, or profit
9 under any agreement authorizing or employing the licensee to do any
10 acts for which a license is required under this chapter for compensation
11 or commission prior to or coincident with the signing of an agreement
12 evidencing the meeting of the minds of the contracting parties, regardless
13 of the form of the agreement, whether evidenced by documents in an
14 escrow or by any other or different procedure.”

15 (iii) Defendants also violated Cal. Bus. & Prof. Code § 10176(a), which
16 prohibits the “[m]aking [of] any substantial misrepresentation.” “It shall
17 constitute misrepresentation under Section 10176(a) . . . for a real estate
18 licensee who acts as an agent for either party in a transaction for the sale
19 . . . of real property . . . and who receives compensation, or who
20 anticipates receiving compensation, from a lender in connection with the
21 securing of financing for the transaction, to fail to disclose to both
22 parties, prior to the closing of the transaction, the form, amount and
23 source of compensation received or expected.” 10 CAL. CODE REG.
24 § 2904.

25 (iv) Defendants’ conduct was also unlawful because it violated Cal. Bus. &
26 Prof. Code § 10176(i), which prohibits “[a]ny other conduct, whether of
27 the same or a different character than specified in this section, which
28 constitutes fraud or dishonest dealing.”

1 (v) Defendants' conduct was also unlawful because it violated California Civil
2 Code § 1710(3), as set forth *supra* in Count III.

3 77. Plaintiffs and the Class were injured and lost money or property as a
4 result of Defendants' violations of Business & Professions Code § 17200.

5 **COUNT V**
6 **Constructive Fraud**
7 **(Against All Defendants)**

8 78. Plaintiffs incorporate and re-allege each and every allegation set forth
9 above as if fully set forth herein.

10 79. At all relevant times Defendants were fiduciaries of Plaintiffs and the
11 Class.

12 80. During the Class Period, in violation of their fiduciary duties, Defendants
13 received unlawful and undisclosed payments or kickbacks from third parties.

14 81. In failing to disclose the unlawful payments or kickbacks received,
15 Defendants acted with intent to deceive Plaintiffs and the Class. Moreover, because
16 Defendants' failure to disclose the unlawful payments or kickbacks amounted to a
17 failure to disclose a material fact and a breach of their fiduciary duties owed to
18 Plaintiffs and the Class, the fraud is presumed from the fiduciary relationship and
19 Defendants' failure to disclose. Thus, there is no need to plead or prove a
20 representation or the falsity of representation, nor is there a need to plead or prove any
21 intent to defraud or to conceal a material fact.

22 82. The fiduciary relationship between Defendants and Plaintiffs and the
23 Class gives rise to a rebuttable presumption of reliance by Plaintiffs and the Class.
24 Defendants have the duty to prove that Plaintiffs and the Class did not rely on
25 Defendants' nondisclosure of their receipt of unlawful commissions or kickbacks.

26 83. As a result of Defendants' nondisclosure, Plaintiffs and the Class have
27 been injured.

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COUNT VI
Unjust Enrichment
(Against All Defendants)

84. Plaintiffs incorporate and re-allege each and every allegation set forth above as if fully set forth herein.

85. By their wrongful acts and omissions, Defendants were unjustly enriched at the expense of, and to the detriment of, Plaintiffs and the Class.

86. During the Relevant Period, Defendants received unlawful and undisclosed commissions or kickbacks from third party providers of real estate settlement services, and/or received increased compensation from serving as officers and managing brokers of Defendant J. Rockcliff. Defendants' fiduciary duties, however, precluded them from receiving any undisclosed compensation while acting as real estate agents for Plaintiffs and the other Class members.

87. Plaintiffs and the Class seek an order from this Court mandating disgorgement of the secret payments as well as the entire commissions received by Defendants from Plaintiffs and each Class member for Defendants' services in each respective real estate transaction.

COUNT VII
Accounting
(Against All Defendants)

88. Plaintiffs incorporate and re-allege each and every allegation set forth above as if fully set forth herein.

89. At all relevant times Defendants were fiduciaries to Plaintiffs and the Class.

90. During the Class Period, Defendants obtained secret profits while acting as fiduciaries to Plaintiffs and the Class in real estate transactions.

91. At no time did Defendants disclose such secret profits to Plaintiffs and the Class or obtain informal consent from Plaintiffs or any other Class member authorizing Defendants to retain such secret profits.

92. Plaintiffs and the Class seek accounting from Defendants to identify all

1 secret profits or payments received from third parties during the Class Period while
2 acting as real estate agents for Plaintiffs and the Class.

3 93. Plaintiffs and the Class seek a constructive trust over all the secret profits
4 and compensation received by Defendants during the Class Period while acting as real
5 estate agents for Plaintiffs and the Class.

6 **PRAYER FOR RELIEF**

7 WHEREFORE, Plaintiffs demand judgment against Defendants as follows:

8 A. A declaration that this action is properly maintainable as a class action;

9 B. A declaration that Defendants' conduct alleged herein constitutes
10 breaches of fiduciary duties and a violation of California Bus. & Prof. Code § 17200;

11 C. An award of damages for breaches of fiduciary duties and for aiding and
12 abetting breaches of fiduciary duties;

13 D. An award of damages for violation of California Civil Code § 1710(3) and
14 an award of restitution for violation of California Bus. & Prof. Code § 17200;

15 E. An award of punitive damages;

16 F. An accounting for all the compensation received by Defendants from
17 Plaintiffs and the Class or any third parties during the Class Period while providing
18 real estate services to Plaintiffs and other Class members, and a constructive trust to be
19 imposed on all such compensation received during the Class Period;

20 G. An award to Plaintiffs of the costs and disbursements of this action,
21 including reasonable attorneys' and experts' fees; and

22 H. An award of such other and further relief as the nature of this case may
23 require or as this Court deems just and proper.

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DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury of all triable issues.

Dated: January 28, 2015

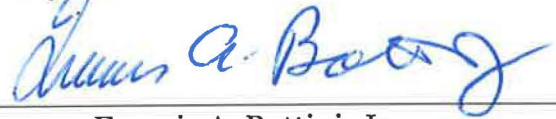
Respectfully submitted,

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