UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Joseph J. Simons, Chairman**
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of **Fidelity National Financial, Inc.,** **a corporation** **and** **Stewart Information Services Corporation,** **a corporation.**	Docket No. 9385 **REDACTED PUBLIC VERSION**

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by the FTC Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondents Fidelity National Financial, Inc. ("Fidelity") and Stewart Information Services Corporation ("Stewart") have executed a merger agreement in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

I. NATURE OF THE CASE

1. Respondents Fidelity and Stewart are two of the four largest title insurance underwriters in the United States. Title insurance protects customers and lenders in real estate transactions from defects in the property's title. Title insurance policies issue in nearly every real estate transaction in the United States. A title insurance underwriter bears the risk underlying each one of those policies.

2. Four underwriters dominate the U.S. title insurance industry. The industry recognizes these players as the "Big 4": Fidelity, Stewart, First American Title Insurance Company ("First American"), and Old Republic National Title Insurance Company ("Old Republic"). On a national level, the Big 4 account for more than 85 percent of all title insurance

sales. The individual shares of the Big 4 vary by state. A merged Fidelity-Stewart would account for more than 43 percent of national sales on its own. No underwriter outside of the Big 4 exceeds 3.5 percent of the sales nationwide.

3. Fidelity's proposed merger with Stewart (the "Merger") is the latest in a series of transactions that have consolidated the title insurance industry, and would reduce the Big 4 to a Big 3. This increase in concentration is likely to result in anticompetitive harm. As the former Chairman of Stewart's Board of Directors observed in 2016, "The industry has shrunk considerably to just 4 companies with double digit market power. Further consolidation at the top 2 companies could lead to a duopoly . . . ."

4. The Big 4 are the only underwriters that meaningfully compete to provide title insurance for large commercial transactions. For purposes of this Complaint, large commercial transactions are commercial real estate transactions involving title insurance liability amounts greater than $20 million. Despite motivated efforts, smaller underwriters have been unable to establish themselves as viable competitors for these large commercial transactions. Post-Merger, these transactions will be vulnerable to anticompetitive effects. Competitive harm is also possible for transactions below this liability threshold.

5. The Merger also will increase concentration and reduce competition in relevant markets for title information services. Title information services refers to the provision of access to information contained in title plants—detailed information about the chain of title to individual properties, indexed to facilitate efficient title searches for underwriting purposes. Title information services are important as a standalone product and as a critical input to the provision of title insurance. Fidelity and Stewart provide title information services via title plants they own, jointly or individually. In at least fourteen relevant geographic markets, three or fewer providers of title information services will remain post-Merger and the Merger likely would result in increased prices or reduced quality for title information services.

6. Fidelity is the largest of the Big 4 underwriters. Fidelity has gained this position in large part through a series of acquisitions. In 1996, Fidelity became the fourth-largest underwriter by acquiring Nations Title. In 2000, Fidelity became the nation's largest underwriter by purchasing Chicago Title. In 2008, Fidelity became even larger by purchasing LandAmerica's title insurance brands out of bankruptcy. In at least 27 states and the District of Columbia, Fidelity holds in excess of 40% of the large commercial title insurance market and has the greatest share of large commercial transactions in 28 states and the District of Columbia.

7. Stewart is also a member of the Big 4. Stewart has earned a reputation among market participants for being more creative and flexible in providing title insurance—to the benefit of its customers—and for selling title insurance at lower prices than the other Big 4 underwriters.

8. The Merger is likely to lessen substantially competition in the provision of title insurance to large commercial customers. After the Merger, the market for title insurance underwriting for large commercial transactions will be highly concentrated in every U.S. state and the District of Columbia, with a Herfindahl-Hirschman Index ("HHI") greater than 2,500.

9. In at least 42 states and the District of Columbia, the merger is presumptively unlawful, as the Merger will result in a highly concentrated market and an increase in the HHI concentration measure of more than 200 points. For example, in Alaska, Idaho, Maryland, New Mexico, and Virginia, the Merger results in increases of more than 1,000 points and a final HHI of more than 4,000 points. Under the thresholds established by the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("HMG"), these states will experience an increase in concentration giving rise to a presumption of enhanced market power.

10. Reducing the Big 4—the "only real players on the commercial side," per one key Fidelity executive—to the Big 3 threatens significant harm to customers purchasing title insurance for large commercial transactions. By merging with one of its closest rivals, Fidelity will eliminate an important competitor, entrenching and likely increasing the effectiveness of the existing oligopoly, and eliminating valuable head-to-head competition where it remains today.

11. Stewart has shown a greater willingness to undercut the other Big 4 underwriters on price, or offer more favorable coverage terms, in order to win business. Even within this four-firm "oligopoly," Fidelity has been forced to reduce its prices in response to Stewart. Stewart also finds creative ways to mitigate or assume risk in order to compete for business and has been willing to provide coverage where Fidelity and others in the Big 4 have declined to do so unless the customers can meet additional burdensome conditions. Where the current oligopoly has already softened competition, Stewart's approach has prompted others in the Big 4 to adjust their own competitive strategies to the benefit of customers.

12. New entry or expansion by existing market participants would not be timely, likely, or sufficient to counteract the anticompetitive effects of the Merger. There are significant barriers to entry into markets for the provision of title insurance for large commercial transactions and the provision of title information services, including securing state licensure, necessary capital, a national geographic footprint, and proven experience in handling large commercial transactions. These barriers make entry or expansion difficult, and incapable of constraining the merged entity. High entry barriers also make timely and sufficient entry unlikely in the relevant markets for title information services.

13. Respondents cannot show cognizable efficiencies that would offset the likely and substantial competitive harm from the Merger.

II. JURISDICTION

14. Respondents are, and at all relevant times have been, engaged in activities in or affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

15. The Merger constitutes a merger subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

III. RESPONDENTS

16. Fidelity is a for-profit, publicly traded corporation existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business

located at 601 Riverside Avenue, Jacksonville, Florida 32204. Fidelity is the country's largest title insurance company. It underwrites title insurance under several brands, including Fidelity National Title Insurance Company, Chicago Title Insurance Company, Commonwealth Land Title Insurance Company, Alamo Title Insurance, and National Title Insurance of New York, Inc. Fidelity issues policies in all 50 states and the District of Columbia. Through a subsidiary, Fidelity also owns title plant assets throughout the United States. In 2018, Fidelity's revenues totaled $7.594 billion, of which $7.526 billion derived from title premiums, escrow, title information services, and other fees related to the provision of title insurance.

17. Stewart is a for-profit, publicly traded corporation existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 1360 Post Oak Blvd., Suite 100, Houston, Texas 77056. In the United States, Stewart provides title insurance and related services through its subsidiaries, Stewart Title Guaranty Company and Stewart Title Insurance Company. Stewart issues policies in all 50 states and the District of Columbia. Stewart and its affiliates own title plant assets throughout the United States. In 2018, Stewart's revenues totaled $1.907 billion, of which $1.837 billion came from its title-related business services, including title information services.

IV. THE ACQUISITION

18. Pursuant to a merger agreement dated March 18, 2018 ("Merger Agreement"), Fidelity seeks to acquire Stewart for 50 percent cash and 50 percent Fidelity common stock, in a transaction valued at $1.2 billion. Respondents' combined revenues from title-related business services exceed $9.3 billion.

V. INDUSTRY BACKGROUND

19. Title insurance is an insurance product that protects the policyholder from financial loss resulting from third-party claims or liens on the insured property. The owner or buyer of real estate typically purchases title insurance in conjunction with a variety of other services essential to closing a real estate transaction, and pays a one-time premium at closing.

20. There are two types of title insurance policies. A title insurance policy that protects the owner of a property is called an owner's policy; a title insurance policy that protects the mortgage lender is called a lender's policy. Typically, the owner or buyer of real estate purchases both the owner's policy and the lender's policy.

21. The vast majority of real estate transactions in the United States result in the issuance of a title insurance policy, whether the underlying property is residential or commercial in character. Residential properties include single-family homes, individual condominium units, multi-unit residential buildings with up to four units, and individual vacant residential lots. Commercial properties include everything else, including larger multi-family residential properties, such as apartment buildings.

22. Underwriters deliver title insurance through direct operations and agency operations. In direct operations, underwriters issue title insurance directly to property buyers and lenders. In agency operations, an independent title agent issues the title insurance policy on behalf of an underwriter—known as "writing on the underwriter's paper." The underwriter on

whose paper the policy is written bears the risk underlying the policy. Agents often maintain relationships with multiple underwriters, enabling them to choose which underwriter's paper to use for each individual transaction.

23. A customer typically places an order for a title insurance policy at or near the start of a real estate transaction. After receiving an order, the underwriter or its agent conducts a title search to identify potential title defects or other encumbrances on the property, such as liens, easements, usage restrictions, and transfer restrictions.

24. In many parts of the country, underwriters and their agents rely on title plants when conducting the title search. If there is no title plant for a specific county, title searchers must turn to less efficient options such as public institutions (*e.g.*, county recorder and assessor offices).

25. Once the title search is complete, the underwriter or title agent issues a title commitment listing any defects found during the title search that will be excluded or excepted from the final insurance policy unless cured before closing.

26. Customers prefer title insurance policies with fewer exceptions. As the real estate transaction progresses, the customer may seek to convince an underwriter that an excepted risk should be covered by the title insurance policy. In such situations, the underwriter may have to spend additional resources working with the customer to understand the peculiarities of the specific transaction.

27. Alternatively, an underwriter may be willing to accept additional risk for a fee by allowing the customer to purchase an endorsement that provides coverage for a specified issue. Underwriters may vary in the conditions they impose on the insured before agreeing to issue a given endorsement.

28. An escrow officer or closer—often an employee of the underwriter or its agent—conducts the closing in most real estate transactions. Upon closing, the escrow officer transfers the funds from the buyer to the seller. At this time, the buyer pays the title insurance premium. The underwriter then issues the final title insurance policy, either directly to the customer or through an agent.

29. When an underwriter issues the title insurance policy directly, it retains the entire title insurance premium and any additional fees (*e.g.*, fees for endorsements). When an agent issues the title insurance policy on behalf of an underwriter, the agent receives the entire premium and additional fees. The agent then must remit a contractually established or negotiated portion of this revenue to the underwriter. The division between the agent's retained revenue and the amount remitted to the underwriter is referred to as the "split."

30. Each state and the District of Columbia independently regulates the provision of title insurance. State regulators impose various restrictions on title insurance providers, including licensing rules and regulations governing title insurance premiums and related fees.

31. In general, state regulation of title insurance premiums falls into one of three categories:

a. Promulgated Rate: In three states (New Mexico, Florida, and Texas), certain aspects of price and insurance coverages are set by the state. However, in no promulgated-rate state is every aspect of price, quality, and service determined by the state. For example, state regulations in New Mexico and Florida permit underwriters to file a rate below the promulgated rate for approval by the state regulator. Promulgated rate regimes do not establish requirements on many important non-price aspects of title insurance underwriting, including the level of service or the particular underwriting standards and conditions that an underwriter may offer for any given transaction.

b. Filed Rate: In filed-rate states, title insurance underwriters file rate manuals for approval by a state regulator. The rate manual establishes the underwriter's title insurance prices for transactions within each filed-rate state. These rate filings are publicly available and accessible by competitors. Some filed-rate states permit competing underwriters to file rates collectively through a rating bureau rather than requiring each underwriter to submit an individual rate filing. In these rating bureau states, underwriters may elect to file separate rates with lower prices if they so choose, subject to state regulatory approval of the individual rate filing.

c. Negotiable Rate: In negotiable-rate states, title insurance underwriters determine their prices or coverage on a transaction-by-transaction basis. Such transaction-by-transaction negotiation also occurs for large commercial transactions in many filed-rate states where state regulations permit underwriters to include negotiability provisions in their filed rates. Respondents' rate filings in many states allow them to negotiate rates for transactions over a particular liability threshold. Thus, in these states, underwriters may negotiate on a transaction-by-transaction basis for many or all large commercial transactions.

VI. RELEVANT PRODUCT MARKETS

A. Title Insurance Underwriting for Large Commercial Transactions

32. Title insurance underwriting for large commercial transactions is a relevant product market. The industry recognizes that large commercial transactions have distinct requirements from other commercial transactions and that the set of available suppliers for these transactions is limited. Each of the Big 4 has a dedicated commercial division that focuses specifically on servicing these transactions. While the industry is not always consistent in what constitutes a large commercial transaction, for purposes of this complaint, a large commercial transaction is a transaction resulting in a policy with a liability amount in excess of $20 million.

33. There is no substitute for title insurance. Most real estate transactions in the United States involve financing from a lender, and most lenders require title insurance. Owners and lenders cannot switch to any other product for the purpose of ensuring marketable title, priority of liens, and the ability to sell the loan on the secondary market.

34. Commercial real estate transactions involve the sale or financing of non-residential real property—essentially, any properties other than single-family homes, individual condominium units, and multi-family residential buildings with four or fewer units. In commercial transactions, property buyers or their counsel typically choose the title insurance underwriter subject to lender approval.

35. Each large commercial transaction requires an individual title insurance order with transaction-specific negotiation over a variety of terms. The negotiated terms may include price, scope of coverage, service levels, and ancillary fees and services. This transaction-by-transaction negotiation occurs regardless of whether a customer solicits multiple bids for a given large commercial transaction. These individual negotiations allow suppliers to tailor specific price and non-price terms for each large commercial transaction.

36. Underwriters receive information about the nature of the property and the liability amount as part of the title insurance order. As a result, underwriters can distinguish large commercial transactions from other transactions.

37. Property owners and lenders seeking title insurance for large commercial transactions cannot use arbitrage to defeat a price increase. Each title insurance policy, though it shares a common form and many similar terms with other policies, is a unique product resulting from significant research into title defects for a specific property (or set of properties). Title insurance policies guarantee the transfer of title in the underwritten transaction only; a new policy must issue for subsequent transactions involving the same property.

38. Large commercial transactions are susceptible to harm due to a number of distinct requirements, or strong customer preferences, that limit the underwriter options for these transactions to the Big 4. In order to provide title insurance for large commercial transactions, underwriters must meet several key requirements, including, but not limited to:

a. Financial strength: Customers purchasing title insurance for large commercial transactions require an underwriter that has sufficient surplus to make the policyholder whole in the event of a catastrophic title defect. Most states, and many policyholders, limit the liability an underwriter may assume based on the underwriter's balance sheet.

b. Commercial expertise: For large commercial transactions, customers have a strong preference for underwriters with significant, demonstrated expertise who can handle any possible issue that may arise. Likewise, customers prefer to have defects identified and adequately resolved prior to closing, rather than having to file a claim after suffering financial loss because of an inexperienced underwriter.

c. National footprint: Customers with large commercial transactions often engage in frequent transactions across the United States. These customers strongly prefer to develop a relationship with an underwriter with a national footprint, allowing them to turn to a single point of contact to coordinate procurement of title insurance wherever they may need it. A single point of contact results in a more efficient title procurement process for customers, as the underwriter can develop familiarity with the customer's business and real estate processes, and can also provide pricing, coverage, and service benefits.

B. Title Information Services

39. Title information services refers to providing access to title plant information, whether by direct access to title plants via ownership or subscription, or indirect access to information contained in title plants (*e.g.*, search services). Typically, title plants are specific to a single county because the information contained in most title plants comes from county records. In some metropolitan areas, however, a single title plant may cover multiple counties.

40. Title information services customers require property information covering the county in which the property at issue is located, and title information services providers usually provide access to title plants on a county-by-county basis. Title information services customers cannot substitute title information services products that do not cover the relevant county for ones that do.

41. Relevant product markets for title information services include, but are not limited to, title information services covering the following counties or county-equivalents:

a. Santa Cruz County, Arizona;

b. Marin County, California;

c. Monterey and Santa Cruz Counties, California;

d. San Mateo County, California;

e. Sonoma County, California;

f. Fremont County, Colorado;

g. Gunnison County, Colorado;

h. Cook County, Illinois;

i. Cascade County, Montana;

j. Bernalillo, Sandoval, and Valencia Counties, New Mexico;

k. Clackamas, Multnomah, and Washington Counties, Oregon;

l. Harris County, Texas;

m. Hays County, Texas; and

n. Cowlitz County, Washington.

42. There is no substitute for the provision of title information services covering these counties or county-equivalent areas. In each case, county recorders and other public sources for information pertaining to real estate are insufficient substitutes for title plants because of the reduction in accuracy or increase in cost associated with using public records in place of a title plant.

VII. RELEVANT GEOGRAPHIC MARKETS

A. Title Insurance Underwriting for Large Commercial Transactions

43. Each U.S. state and the District of Columbia constitutes a separate geographic market for title insurance underwriting for large commercial transactions. For purposes of this complaint, the relevant geographic markets are the 42 individual states and the District of Columbia where the merger is presumptively anticompetitive, and the three states in which the merger potentially raises significant competitive concerns. A full list of these states can be found in Appendix A.

44. Most large commercial transactions occur within a single state. A customer seeking to purchase title insurance for a property in a specific state or territory must purchase title insurance from a title insurance underwriter (or the title insurance underwriter's agent) who is licensed to sell title insurance in that state. Each state imposes and enforces its own distinct set of licensing and operational requirements, including risk limits, price regulation, and coverage rules. In the event of a price increase for title insurance in an individual state, customers cannot turn to an underwriter that is licensed in a different state or territory.

45. In addition, the impact of certain defects of title varies based upon state law. As a result, it is not practicable for a customer seeking title insurance in one state to turn to a title insurer who lacks expertise in that state to purchase title insurance.

46. Large commercial transactions that involve the simultaneous issuance of separate title insurance policies in multiple states still require an underwriter capable of issuing separate policies in every separate state involved. An underwriter cannot underwrite the entire transaction unless it is able to issue policies in each individual state, and the underwriter must still comply with each state's individual pricing requirements when preparing the portfolio of policies.

47. To the extent that such multi-state transactions are analyzed in a geographic market that is larger than individual states, the harm caused by the Merger would be magnified by the broader market. Only the Big 4 have the personnel, scope of operations, broad and deep licensure, and financial surplus necessary to service most such multi-state transactions.

B. Title Information Services

48. The relevant geographic markets for title information services may be as narrow as the individual counties covered by the relevant title plants or may be as broad as the entire world. Title information services are provided digitally in many counties, such that customers may turn to a supplier located anywhere in the world provided the supplier's title plant offers the appropriate geographic coverage. Where title plants are maintained in analog form, however,

customers must be able to access the relevant information efficiently for manual review; thus, they require local providers.

VIII. MARKET PARTICIPANTS

49. The Big 4 are the only practical alternatives for the vast majority of customers for title insurance for large commercial transactions. Marketplace outcomes reflect these drastic differences between the Big 4 and all other underwriters. From 2015 to 2018, the Big 4 underwrote transactions accounting for approximately 98 percent of all title insurance revenues for large commercial transactions nationwide. Over the same time period, the Big 4 accounted for at least 98 percent of title insurance revenues for large commercial transactions in 45 of the 50 individual states, as well as the District of Columbia.

50. The Big 4 are the only practical alternatives for customers with large commercial transactions because they are the only underwriters with sufficient financial strength to bear the risk associated with such transactions.

51. The primary measure of a title insurance underwriter's financial strength is its surplus. Surplus refers to the pool of assets each underwriter dedicates to cover potential claims above its statutorily-required reserves. Surplus is a key determinant of the maximum amount of liability that an underwriter may insure in any particular transaction, typically referred to as the underwriter's "single risk limit." States, underwriters themselves, and sometimes customers impose single risk limits on each underwriter.

52. Surplus levels are "critical to winning business" in the commercial segment, according to a Stewart strategic planning document. Each of the Big 4 has a surplus greater than $500 million. Fidelity has the largest with $1.79 billion in surplus. Stewart is third-largest with $631 million in surplus. Outside the Big 4, only one underwriter exceeds $100 million in surplus; the rest are below $65 million. Consistent with these surplus amounts, the Big 4 have considerably larger single risk limits than other title insurance underwriters.

53. In order to insure a transaction that exceeds its single risk limit, the insurer must use coinsurance or reinsurance. With reinsurance, a lead underwriter cedes risk above a specified threshold to a reinsurer, which charges the underwriter an additional premium. Customers for large commercial transactions often prefer not to purchase title insurance from a smaller insurer that is dependent on reinsurance to cover potential claims. Reinsurance adds to the complexity and risk of the transaction by adding an extra layer of insurance, which may complicate the customer's ability to recover in the event of a claim. Moreover, the reinsurance premium adds additional cost that may ultimately pass through to the customer or render a bidder uncompetitive against a larger insurer that is less dependent upon reinsurance.

54. With coinsurance, multiple underwriters enter into direct relationships with the policyholder and each underwriter becomes liable for an agreed upon portion of the risk. Customers for large commercial transactions often prefer not to purchase a coinsured title insurance product because the product may have more administrative complications, a higher price, or both.

55. In addition, lenders often require their borrowers to use the Big 4 for title insurance for their large commercial transactions.

56. Market participants in the relevant markets for title information services vary by the county of coverage but include title insurance underwriters, title agents, and data companies.

IX. MARKET CONCENTRATION AND THE MERGER'S PRESUMPTIVE ILLEGALITY

A. Title Insurance Underwriting for Large Commercial Transactions

57. Post-Merger, the combined entity would have a large share in most states and the District of Columbia. In many states, Fidelity and Stewart's combined market share for large commercial transactions is greater than 50 percent; in most states, the combined market share is greater than 40 percent. The Merger would greatly increase concentration in already highly concentrated markets and is presumptively unlawful.

58. The HMG and courts use HHIs to measure concentration. HHIs are calculated by totaling the squares of the market shares of every firm in the relevant market pre- and post-merger. The HMG presume a transaction is likely to create or enhance market power—and is presumptively illegal—when the post-merger HHI exceeds 2,500 and the merger increases the HHI by more than 200 points. In at least 42 states and the District of Columbia, the Merger leads to concentration levels and changes in concentration that make the Merger presumptively unlawful.

59. In three states, the HHI increases by between 100 and 200 points and results in a highly concentrated market. Under the HMG, a merger that results in an increase of this level potentially raises significant competitive concerns and warrants scrutiny. In five states, the market is already highly concentrated and the merger will not result in an HHI increase of 100 or above.

60. In most state-level markets, the Merger also will result in a large increase in concentration. For example, in Alaska, Idaho, Maryland, New Mexico, and Virginia, the Merger results in a final HHI of more than 4,000 points and increases of more than 1,000 points. This change is concentration is four times the level that leads with a presumption of illegality. In Arizona, Arkansas, California, the District of Columbia, Florida, Illinois, Maine, Massachusetts, and North Carolina, the Merger results in a final HHI of more than 4,000 points and increases of more than 200 points. In Georgia, Mississippi, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, and Texas, the Merger results in a final HHI of more than 3,500 points and increases of more than 650 points. In each of these markets, among others, the Merger is presumptively unlawful.

61. In at least 30 states and the District of Columbia, the parties are two of the three largest title insurers for large commercial transactions.

B. Title Information Services

62. The Merger is presumptively unlawful in no fewer than fourteen relevant title information services markets. Each of these markets will be highly concentrated after the Merger and will experience a large increase in concentration.

63. Post-Merger, three or fewer independent title plant providers will remain for title information services covering at least the following six counties:

a. Fremont County, Colorado;

b. Gunnison County, Colorado;

c. Cook County, Illinois;

d. Santa Cruz County, Arizona;

e. Cascade County, Montana; and

f. Cowlitz County, Washington.

64. In eight other markets, by acquiring Stewart, Fidelity will gain control of at least [redacted] of the ownership interests in certain joint title plants offering title information services. This ownership stake will confer to Fidelity control over joint plant operations, allowing Fidelity to increase prices for, or diminish access to, the information contained in these title plants. For example, the Merger will reduce the number of relevant owners, and grant Fidelity an increased share in excess of [redacted], of the joint title plant that provides title information services covering Bernalillo, Sandoval, and Valencia Counties, New Mexico. No other provider offers comparable title information services in these counties.

X. ANTICOMPETITIVE EFFECTS

A. Anticompetitive Harm in Markets for Title Insurance Underwriting for Large Commercial Transactions

65. The Merger likely will result in anticompetitive harm to customers seeking title insurance for large commercial transactions in 45 states and the District of Columbia. The forms this harm may take, as well as the mechanisms by which it is likely to occur, vary by state and state regulatory regime.

66. The Merger will eliminate significant head-to-head competition between Fidelity and Stewart for individual large commercial transactions. Today, this competition between Respondents benefits purchasers of title insurance. In addition, the elimination of Stewart as an independent competitor will increase the ability and incentive of the remaining underwriters to pursue tacitly a more cooperative strategy to the detriment of customers with large commercial transactions.

67. Absent competition from an independent Stewart, Fidelity will not need to compete as aggressively on price, coverage, underwriting requirements, or service as it does today. Respondents are close competitors for many large commercial transactions. In at least 31 U.S. states and the District of Columbia, it combines two of the top three competitors in the market. Fidelity and Stewart compete to establish and maintain their relationships with large commercial customers through dedicated corporate divisions focused on commercial business. When customers seek bids for large commercial transactions, they often request bids from both Fidelity and Stewart, two of only four available underwriting options.

68. Current competition between Respondents provides price and non-price benefits in many large commercial transactions across state regulatory regimes. In all states, Respondents compete directly on important non-price factors such as service and the scope and terms of coverage. In states where underwriters can negotiate prices on a transaction-by-transaction basis, customers leverage Respondents against one another to receive better pricing and more favorable coverage terms. For example, in Virginia, where rates are negotiable for large commercial transactions, a Fidelity executive observed, "Stewart Title [is] dropping their prices to grab market share in a shrinking CRE market. Looks like we will need to do the same." In promulgated-rate states, Respondents compete with one another on price where permissible by maximizing allowable discounts among other things.

69. In states where underwriters file their rates with state regulators, the presence of Stewart as a competitor puts downward pressure on prices and enhances competition on non-price factors such as service and the scope and terms of coverage.

a. In a recommendation to raise rates in [redacted], a Stewart executive noted that "a rate increase by Stewart would make it more likely that the Fidelity companies would ultimately find it necessary to also increase their rates."

b. In a discussion of rate setting strategy in Michigan, Stewart noted that [redacted] in order to retain current business and still grow commercial revenue.

c. Reacting to the announcement of a new entrant filing a discounted rate to undercut the New York rating bureau rate, a Fidelity executive observed: [redacted] The executive later clarified that an [redacted]. No such reaction by either Big 4 company occurred, and the discounting entrant has since ceased operations.

70. In states where rates are filed, Fidelity and [redacted] analyze the rates of each of the Big 4 with the primary goal of ensuring that their rates are similar to each other's.

71. Among the Big 4, Stewart has shown itself willing to prioritize its own short-term gains. Each transaction differs, but as a general matter and consistent with its industry reputation, Stewart is willing to, among other things:

a. offer its customers the lowest possible price in a variety of direct and indirect ways, including bidding with low prices, reducing fees for ancillary services, [redacted]

b. invest its own time and resources (in the form of employee hours) in finding ways to insure certain risks, require less mitigation of a particular risk, or determine that for a particular customer a particular risk is not material; and

c. [redacted]

72. Stewart's attempts to win customers lead to reduced costs for the customer or a better product (*e.g.*, more complete coverage) without an equivalent increase in price. Stewart's actions in this regard have led others in the Big 4 to reconsider their price and quality offerings.

73. Stewart's behavior in this regard is consistent with pressure that Stewart has faced from activist shareholders to increase profitability. As one Stewart executive recognized, Stewart's "investors are going to want to know how we plan to change the dynamic," and Stewart needed [redacted]

74. Post-Merger, Fidelity will impose on Stewart the same uniform pricing rules and underwriting standards that it maintains for the other brands within the Fidelity family. Even though Fidelity may maintain the Stewart brand, Fidelity will prevent Stewart from competing with Fidelity on price and non-price aspects of competition in the manner that Stewart does today. Fidelity executives' ordinary course statements during the pendency of the Merger confirm that post-Merger, Stewart no longer will provide the same competitive pressure on price and non-price factors:

a. After reporting Stewart's lower prices on a transaction in Massachusetts, a Fidelity executive wrote to his manager, "I trust that when Stewart joins the family, they too will get some pricing constraints." Fidelity's [redacted] Manager [redacted] "They will."

b. [redacted] Fidelity's [redacted] observed that Stewart "better enjoy the stupidity while [it] can" with respect to its flexible underwriting approach on a transaction in Alaska.

c. [redacted] also expressed doubt that Fidelity should match Stewart's lower rates for a transaction in Alabama, noting that "if the deal goes through we will control the rates Stewart files."

B. Anticompetitive Harm in Markets for Title Information Services

75. The Merger also is likely to cause anticompetitive effects by combining Respondents' title information services assets.

76. As a result of the Merger, Fidelity will have greater incentive and ability to increase prices or reduce access to its combined title plants covering no fewer than fourteen counties or county-equivalent areas. In each such area, the Merger reduces the number of remaining competitively significant players to three or fewer. Post-Merger, Fidelity would be able to increase prices or reduce access to title information services either unilaterally or in coordination with competing providers.

77. Respondents' title plant assets are close substitutes in at least six counties throughout the United States. The Merger eliminates significant direct, head-to-head competition between Fidelity and Stewart for title information services covering these counties.

78. In at least eight counties or county-equivalent areas, Respondents own overlapping interests in joint title plants that, when combined, will result in Fidelity controlling a [redacted] stake in the plant. In these counties, the Merger will increase the incentive and ability of the joint plant owners to raise prices or reduce output for title information services. For example, in Bernalillo, Sandoval, and Valencia Counties, New Mexico, Fidelity will increase its ownership stake to control [redacted] of a single joint plant offering subscription access to third-party title companies. Post-Merger, at most three joint owners will remain in the plant. With control of Stewart's ownership share, Fidelity will need the agreement of one additional joint plant owner to increase subscription fees.

XI. LACK OF COUNTERVAILING FACTORS

A. Barriers to Entry and Expansion

79. No other firm is likely to replace the loss of competition from the Merger. Respondents cannot show, post-Merger, that any firm is likely to replace the competition provided by Stewart.

80. Respondents cannot demonstrate that new entry or expansion by existing firms would be timely, likely, or sufficient to offset the anticompetitive effects of the Merger. A firm seeking to enter or expand in the market for title insurance underwriting for large commercial transactions would face significant barriers to entry.

81. Past failed efforts to enter and expand confirm that no insurer will be able to replicate Stewart's competitive significance. No entrant or failed entrant has come close to achieving the scale and competitive significance of the Big 4 for at least the past decade.

82. A firm looking to enter or expand into a particular state or territory must satisfy regulatory requirements in order to underwrite title insurance. It can take years for a new underwriter to acquire the necessary state licenses, especially since some states require an underwriter to be "seasoned"—that is, to operate profitably in other states—for several years prior to licensure. New entry to these states therefore would not be timely. Even assuming entry

would occur, this delay would allow the anticompetitive effects of the transaction to accrue for several years.

83. Once licensed, an insurer must still clear significant additional hurdles to become operational in each state. In order to replicate Stewart's operational presence, a new entrant would need to establish a national network of commercial services offices, local direct offices, and agency operations in every state and the District of Columbia.

84. In addition, to participate in the relevant underwriting markets, an entrant must procure title information services. Title information services are essential to underwriting title insurance. Some states explicitly require title plant access or ownership as a condition of licensure. For example, Oregon requires title companies to own a title plant in every county in which they sell title insurance. The costs and time required to construct title plants or otherwise procure access to title information services can be significant. The Merger's likely effects in markets for title information services may increase this barrier to entry where Respondents own overlapping title plant assets.

85. In order to replicate Stewart's competitive significance in the relevant markets, an insurer must do more than clear these barriers in a single state—they must clear them in substantially all states. Thus, an additional barrier to entry facing a firm looking to enter or expand is the need to have a national footprint and the ability to provide a single point-of-contact who can access that footprint.

86. Even if an underwriter could establish or expand its operations and licenses to replicate Stewart in a timely manner, additional barriers to entry remain, including capital requirements. An underwriter's surplus determines its ability to compete for large commercial transactions; no other underwriter comes close to Stewart's surplus outside of the Big 4.

87. It is extremely unlikely that any fringe competitor or new entrant would be able to develop surplus on par with Stewart. Outside of the Big 4, the next largest underwriters in terms of surplus are approximately one-sixth and one-tenth the size of Stewart. Growing surplus through business operations would take considerable time, and securing cash from investors is unlikely, given the relatively low rate of return that one would expect from an investment in a title insurer.

88. Demonstrated expertise underwriting large commercial transactions is also a barrier to entry. Customers prefer using those underwriters that have the indisputable expertise to underwrite (and address any arising claims) in a timely manner. Given the amount of money at issue in large commercial transactions, customers place increased importance on the underwriter's expertise. The Big 4 have a strong incumbency advantage from their historical experience underwriting large commercial transactions. It is highly unlikely, therefore, that any entry in the near term could be sufficient to prevent the anticompetitive effects flowing from the Merger.

89. In order to enter or expand, an underwriter must recruit and hire competent and experienced salespeople, underwriters, and title officers. Hiring enough employees to enter or expand on a sufficient scale to constrain the merged firm would take a significant amount of time

and effort, particularly in light of non-competition agreements and retention bonuses that the Big 4 have employed with respect to their key personnel.

90. A firm seeking to enter or expand in the market for title information services also would face significant barriers to entry associated with constructing a title plant. An entrant would need to collect, compile, and index historical property records for each property located in a geographic area. This process is time-consuming and expensive. As a result, entry or expansion in title information services is unlikely and would be neither timely nor sufficient to replace the competition lost as a result of the Merger.

B. Efficiencies

91. Respondents cannot demonstrate cognizable merger-specific efficiencies that would be sufficient to rebut the strong presumption and evidence of the Merger's likely significant anticompetitive effects.

XII. VIOLATION

Count I – Illegal Agreement

92. The allegations of Paragraphs 1 through 91 above are incorporated by reference as though fully set forth.

93. The Merger Agreement constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

Count II – Illegal Acquisition

94. The allegations of Paragraphs 1 through 93 above are incorporated by reference as though fully set forth.

95. The Merger, if consummated, may substantially lessen competition in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and is an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondents that the fourth day of February, 2020, at 10:00 a.m., is hereby fixed as the time, and the Federal Trade Commission headquarters offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place, when and where an evidentiary hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act and the Clayton Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted. If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions, and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after the Respondents file their answers. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, in Washington, D.C. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (but in any event no later than five (5) days after the Respondents file their answers). Rule 3.31(b) obligates counsel for each party, within five (5) days of receiving the Respondents' answers, to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Merger challenged in this proceeding violates Section 5 of the Federal Trade Commission Act, as amended, and/or Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. If the Merger is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant markets, with the ability to offer such products and services as Fidelity and Stewart were offering and planning to offer prior to the Merger.

2. A prohibition against any transaction between Fidelity and Stewart that combines their businesses in the relevant markets, except as may be approved by the Commission.

3. A requirement that, for a period of time, Fidelity and Stewart provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant markets with any other company operating in the relevant markets

4. A requirement to file periodic compliance reports with the Commission.

5. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to restore Stewart as a viable, independent competitor in the relevant markets.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Acting Secretary and its official seal to be hereto affixed, at Washington, D.C., this fifth day of September 2019.

By the Commission, Chairman Simons recused and Commissioner Wilson dissenting.

April Tabor
Acting Secretary

SEAL:

APPENDIX A

States in Which the Merger is Presumptively Unlawful

Alabama
Alaska
Arizona
Arkansas
California
Colorado
Connecticut
Delaware
District of Columbia
Florida
Georgia
Idaho
Illinois
Indiana
Kansas
Kentucky
Maine
Maryland
Massachusetts
Michigan
Minnesota
Mississippi
Missouri
Montana
Nebraska
Nevada
New Hampshire
New Jersey
New Mexico
New York
North Carolina
Ohio
Oklahoma
Oregon
Pennsylvania
Rhode Island
South Carolina
Tennessee
Texas
Utah
Virginia
West Virginia
Wyoming

States in Which the Merger Warrants Scrutiny

Louisiana
Washington
Wisconsin