

ATTORNEY GENERAL OF THE STATE OF NEW YORK
ANTITRUST BUREAU

In the Matter of

Assurance No. 23-045

**Investigation by LETITIA JAMES,
Attorney General of the State of New York, of**

First American Financial Corporation

Respondent.

ASSURANCE OF DISCONTINUANCE

The Office of the Attorney General of the State of New York (“OAG”) has commenced several investigations pursuant to the Donnelly Act (New York General Business Law Section 340 et. seq.), Section 63(12) of the New York Executive Law, and Section 1 of the Sherman Act into the potential harm to competition caused by the use of restrictive provisions between competitors in various labor markets, including labor markets in the title insurance industry (“the OAG Investigation”). As part of its investigation of First American Financial Corporation (“First American”), the OAG has specifically considered the harm to competition caused by agreements between First American and its competitors—title insurance underwriters and title insurance agencies (“Competitors”). The OAG, among other things, reviewed documents and information produced by First American, gathered and analyzed relevant market data, and obtained documents, information, and testimony from other market participants.

This Assurance of Discontinuance (“Assurance”) contains the findings of the OAG’s investigation, and the relief agreed to by the OAG and First American (collectively, the “Parties”).

OAG's FINDINGS

1. First American is the second largest title insurance underwriter in the United States.
2. First American issues title insurance policies in two ways. First, it appoints independent title insurance agencies (“Agencies” or “Agency”) to issue First American policies. Second, it issues title insurance directly through its internal agency. Issuing title insurance directly is typically more profitable, as First American does not have to split its premium with Agencies. In New York, an agency generally earns a share of the premium of approximately 85%.
3. The labor market for employees who sell title insurance policies and services to customers—which includes both employees of Agencies and employees of the direct operations of title insurance underwriters (“Directs”) (together, “Employees”)—is a relevant antitrust market, and New York State is a relevant geographic market.
4. Directs and Agencies compete for Employees on the basis of salaries, benefits, and career opportunities. Directs and Agencies have business models that heavily rely on Employees’ business relationships. Therefore, hiring and retaining top performing Employees is critical to the competitive significance of the Directs and Agencies.
5. “No-poach Agreements” are agreements among two or more companies not to solicit, recruit or hire each other’s employees; these agreements can be written or verbal. In a well-functioning labor market, employers compete to attract the most valuable talent for their needs. No-poach Agreements reduce competition for employees and can disrupt the normal compensation-setting mechanisms that apply in labor markets, to the detriment of the affected

employees who may be deprived of competitively important information and access to better job opportunities.

6. The OAG has determined that First American entered into No-poach Agreements with Agencies and other title insurance underwriters. These agreements have been both verbal and written, and some are intended to last even after the term of any business relationship has ended. These agreements reduce competition for Employees between First American and the Agency or title insurance underwriter, including competition in New York.

7. OAG has not identified any procompetitive justification for these agreements.

8. OAG finds that First American's entry into No-poach Agreements with Agencies and title insurance underwriters is likely in violation of the Donnelly Act, Section 1 of the Sherman Act, and Section 63(12) of the New York Executive Law.

9. First American enters into this Assurance for the purpose of resolving the OAG Investigation only, and this Assurance does not create any rights for any third party. First American neither admits nor denies the OAG's findings above.

10. The OAG finds the relief and agreements contained in this Assurance appropriate and in the public interest. THEREFORE, the OAG is willing to accept this Assurance pursuant to Executive Law § 63(15), in lieu of commencing a statutory proceeding for violations of the Donnelly Act, Gen. Bus. Law § 340 et. seq., the Sherman Act, § 1 (15 U.S.C. § 1), and Executive Law § 63(12) based on the conduct described above.

IT IS HEREBY UNDERSTOOD AND AGREED, by and between the Parties:

RELIEF

11. First American shall not engage, or attempt to engage, in agreements restricting competition in the labor market with its Competitors, including but not limited to attempting to enter into, entering into, maintaining or enforcing any No-poach Agreements with any Competitor. First American shall also not agree with any Competitor to in any way refrain from, request that any Competitor in any way refrain from, or pressure any Competitor in any way to refrain from soliciting, recruiting, hiring or otherwise competing for Employees.

12. First American will not enforce No-poach Agreements in any of its existing agreements with Competitors, and will terminate any ongoing No-poach Agreements with Competitors, whether written or verbal, within thirty (30) days of this Assurance.

13. Within fourteen (14) days of execution of this Assurance, First American will, as necessary, update its standard forms for agreements with its Competitors, such as forms for agreements establishing Agency relationships (“Agency Agreements”) and agreements contracting for services with Agencies (“Service Agreements”), to remove No-poach Agreements.

14. First American will provide a copy of this Assurance to each of its officers, directors, human resources managers, and senior managers who supervise employee recruiting, solicitation, or hiring efforts, within seven (7) days.

15. First American will notify its existing appointed Agencies of the entry of this Assurance and provide them with a copy within fourteen (14) days of executing this Assurance. For a period of two years from the date of this Assurance, First American will notify any newly contracted Agency of the entry of this Assurance and provide it with a copy when entering a new Agency Agreement or Service Agreement.

16. If any officer, director, human resources manager, or senior manager who supervises employee recruiting, solicitation, or hiring efforts of First American learns of any violation or potential violation of this Assurance, First American will promptly take appropriate action to terminate or modify the activity so as to comply with this Assurance and maintain all documents related to any violation or potential violation of this Assurance.

17. Until the date when the OAG notifies First American that the OAG's Investigation is concluded, First American agrees to continue to provide full, complete and prompt cooperation with the OAG in related proceedings and actions, against any other person, corporation or entity. First American agrees to use its best efforts to secure the full and truthful cooperation of current officers, directors, employees and agents with the ongoing OAG Investigation and any related proceedings and actions.

18. For ten (10) years following the date of this Assurance, First American will promptly notify the OAG if it learns of any violation or potential violation of this Assurance known to any officer, director, human resources manager, or senior manager who supervises employee recruiting, solicitation, or hiring efforts. Descriptions of violations or potential violations of this Assurance shall include, to the extent practicable, a description of any communications constituting the violation or potential violation, including the date and place of the communication, the persons involved, and the subject matter of the communication.

19. For ten (10) years following the date of this Assurance, First American will promptly notify the OAG if it learns of any effort by a Competitor to enter into or enforce a No-poach Agreement (unless permitted by this Assurance).

20. Cooperation shall also include, but is not limited to: (a) voluntarily, and promptly, producing, without service of subpoena, to the extent permitted by law or regulation, all information, documents or other tangible evidence reasonably requested by the OAG that relates to the OAG's investigation of the title insurance industry; (b) promptly providing to the OAG an oral proffer describing all material facts that are known or subsequently learned by First American related to any No-poach Agreements; (c) working, if requested by the OAG, to ensure that the First American current officers, directors, employees and agents attend, on reasonable notice, any proceedings (including but not limited to meetings, interviews, hearings, depositions, grand jury proceedings and trials) and answer completely, candidly, and truthfully any and all inquiries relating to the subject matter of the OAG's Investigation that may be put to such persons by the OAG (or any deputies, assistants or agents), without the necessity of a subpoena.

21. If First American is found to have knowingly withheld documents or information known to relate to any No-poach Agreements with Competitors (such documents or information being known to any officer, director, human resources manager, or senior manager who supervises employee recruiting, solicitation, or hiring efforts of First American at the time of signing this Assurance), the Parties agree that it would be difficult to value the damages caused, and therefore agree that First American shall pay to the State of New York a stipulated penalty of \$1 million for each and every such No-poach Agreement, regardless of whether First American was a participant in the Agreement.

22. The cooperation set forth herein is subject to First American's right to withhold documents or testimony on the grounds of privilege, work-product or other legal doctrine, and First American does not waive any privilege, work-product or other legal doctrine applicable to disclosure of information by cooperating with the OAG Investigation.

23. Acceptance of this Assurance by the OAG is not an approval or endorsement by OAG of any of First American's policies, practices or procedures, and First American shall make no representation to the contrary.

24. The Parties agree that it would be difficult to value the damages caused by default in the performance of any obligation in this Assurance, and therefore agree that First American shall pay to the State of New York a stipulated penalty of \$50,000 per month (following the date of the default) for each and every such default in the performance of any obligation in this Assurance, occurring after the effective date of the Assurance.

25. For ten (10) years following the date of this Assurance, First American shall provide the OAG with a certification affirming its compliance with the requirements set forth in this Assurance, to be submitted to the OAG on October 1 of each year, starting on October 1, 2024. This certification shall be in writing and be signed by First American. In any case where the circumstances warrant, the OAG may require First American to file an interim certification of compliance upon thirty (30) days' notice.

26. Within five (5) business days, First American agrees that it will pay by wire transfer, payable to the State of New York, a penalty of \$4.5 million.

27. Within thirty (30) days, First American agrees that it will provide the OAG with a compliance program to meet the obligations of this Assurance, and to avoid any future violations of the antitrust laws. The OAG will have the sole discretion to approve or deny this plan.

28. Any payments and all correspondence related to this Assurance must reference Assurance No. 23-045.

MISCELLANEOUS

Subsequent Proceedings:

29. First American expressly agrees and acknowledges that the OAG may initiate a subsequent investigation, civil action, or proceeding to enforce this Assurance, for violations of the Assurance, or if the Assurance is voided pursuant to Paragraph 35 and agrees and acknowledges that in such event:

- a. any statute of limitations or other time-related defenses are tolled from and after the effective date of this Assurance;
- b. the OAG may use statements, documents, or other materials produced or provided by First American prior to or after the effective date of this Assurance;
- c. any civil action or proceeding must be adjudicated by the courts of the State of New York, and that First American irrevocably and unconditionally waives any objection based upon personal jurisdiction, inconvenient forum, or venue;
- d. evidence of a violation of this Assurance shall constitute prima facie proof of a violation of the applicable law pursuant to Executive Law § 63(15).

30. If a court of competent jurisdiction determines that First American has violated the Assurance, First American shall pay to the OAG the reasonable cost, if any, of obtaining such determination and of enforcing this Assurance, including, without limitation, legal fees, expenses, and court costs.

Effects of Assurance:

31. All terms and conditions of this Assurance shall continue in full force and effect on any successor, assignee, or transferee of First American. First American shall include in any such successor, assignment or transfer agreement a provision that binds the successor, assignee or transferee to the terms of the Assurance. First American may not assign, delegate, or otherwise transfer any of its rights or obligations under this Assurance without the prior written consent of the OAG.

32. Nothing contained herein shall be construed as to deprive any person of any private right under the law.

33. Any failure by the OAG to insist upon the strict performance by First American of any of the provisions of this Assurance shall not be deemed a waiver of any of the provisions hereof, and the OAG, notwithstanding that failure, shall have the right thereafter to insist upon the strict performance of any and all of the provisions of this Assurance to be performed by First American.

Communications:

34. All notices, reports, requests, and other communications pursuant to this Assurance must reference Assurance No. 23-045, and shall be in writing and shall, unless expressly provided otherwise herein, be given by hand delivery; express courier; or electronic mail at an address designated in writing by the recipient, followed by postage prepaid mail, and shall be addressed as follows: If to First American, to Lisa Cornehl, Chief Legal Officer of First American Financial Corporation. If to the OAG, to the persons holding the titles of Bureau Chief, Antitrust Bureau, Deputy Bureau Chief, Antitrust Bureau, and Senior Enforcement Counsel, Antitrust Bureau.

Representations and Warranties:

35. The OAG has agreed to the terms of this Assurance based on, among other things, the representations made to the OAG by First American and their counsel and the OAG's own factual investigation as set forth in the Findings. First American represents and warrants that neither it nor its counsel has made any material representations to the OAG that are inaccurate or misleading. If any material representations by First American or their counsel are later found to be inaccurate or misleading, this Assurance is voidable by the OAG in its sole discretion.

36. No representations, inducement, promise, understanding, condition, or warranty not set forth in this Assurance has been made to or relied upon by First American in agreeing to this Assurance.

37. First American represents and warrants, through the signatures below, that the terms and conditions of this Assurance are duly approved. First American further represents and warrants that Lisa Cornehl, as the signatory to this Assurance, is a duly authorized officer acting on behalf of First American.

General Principles:

38. Unless a term limit for compliance is otherwise specified within this Assurance, First American's obligations under this Assurance are enduring. Nothing in this Assurance shall relieve First American of other obligations imposed by any applicable state or federal law or regulation or other applicable law.

39. First American shall not in any manner discriminate or retaliate against any of their employees, including but not limited to employees who cooperated or are perceived to have cooperated with the investigation of this matter or any future investigation related to enforcing this Assurance.

40. First American agrees not to take any action or to make or permit to be made any public statement denying, directly or indirectly, any finding in this Assurance or creating the impression that this Assurance is without legal or factual basis. Nothing in this paragraph affects First American's right to take legal or factual positions in litigation or other proceedings in which the OAG is not a party.

41. Nothing contained herein shall be construed to limit the remedies available to the OAG in the event that First American violates this Assurance after its effective date.

42. This Assurance may not be amended except by an instrument in writing signed on behalf of the OAG and First American.

43. In the event that any one or more of the provisions contained in this Assurance shall for any reason be held by a court of competent jurisdiction to be invalid, illegal, or unenforceable in any respect, in the sole discretion of the OAG, such invalidity, illegality, or unenforceability shall not affect any other provision of this Assurance.

44. First American acknowledges that it has entered this Assurance freely and voluntarily and upon due deliberation with the advice of counsel.

45. This Assurance shall be governed by the laws of the State of New York without regard to any conflict of laws principles.

46. The Assurance and all its terms shall be construed as if mutually drafted with no presumption of any type against any party that may be found to have been the drafter.

47. This Assurance may be executed in multiple counterparts by the OAG and First American. All counterparts so executed shall constitute one agreement binding upon the OAG and First American, notwithstanding that the OAG and First American are not signatories to the original or the same counterpart. Each counterpart shall be deemed an original to this Assurance, all of which shall constitute one agreement to be valid as of the effective date of this Assurance. For purposes of this Assurance, copies of signatures shall be treated the same as originals. Documents executed, scanned and transmitted electronically and electronic signatures shall be deemed original signatures for purposes of this Assurance and all matters related thereto, with such scanned and electronic signatures having the same legal effect as original signatures.

48. The effective date of this Assurance shall be October 23, 2023.

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