

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP  
Gregg A. Fisch (SBN 214486)  
Paul Berkowitz (SBN 251077)  
1901 Avenue of the Stars, Suite 1600  
Los Angeles, California 90067-6017  
Telephone: (310) 228-3700  
Facsimile: (310) 228-3701

Attorneys for Respondents  
COUNTRYWIDE FINANCIAL CORPORATION,  
COUNTRYWIDE HOME LOANS, INC., and  
BANK OF AMERICA CORPORATION

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 31

COUNTRYWIDE FINANCIAL CORPORATION;	)	Consolidated Case Nos.
COUNTRYWIDE HOME LOANS, INC.; AND	)	31-CA-072916 and 31-CA-072918
BANK OF AMERICA CORPORATION	)	
	)	
and	)	<b>DECLARATION OF GREGG A.</b>
	)	<b>FISCH IN SUPPORT OF</b>
JOSHUA D. BUCK and MARK THIERMAN,	)	<b>RESPONDENTS' MOTION FOR</b>
THIERMAN LAW FIRM	)	<b>SUMMARY JUDGMENT</b>
	)	
and	)	
	)	<i>[Filed concurrently with Motion for</i>
PAUL CULLEN, THE CULLEN LAW FIRM	)	<i>Summary Judgment and Declaration</i>
	)	<i>of Devra Lindgren]</i>
	)	
	)	
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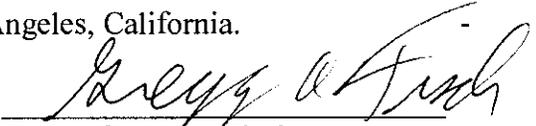


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5. On September 30, 2012, Whitaker and White initiated the arbitration process by filing their Demand for Arbitration with JAMS, The Resolution Experts ("JAMS"). To date, there has been no determination by an arbitrator (or any other authority) as to whether or not Whitaker and White can assert their employment-related claims on a class-wide or collective basis in arbitration. In fact, the parties have yet to even select an arbitrator or otherwise brief the issue as part of the arbitration process. Attached hereto as "Exhibit F" is a true and correct copy of Whitaker and White's September 30, 2012 Demand for Arbitration filed with JAMS.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 12, 2012, at Los Angeles, California.

  
\_\_\_\_\_  
Gregg A. Fisch

**EXHIBIT D**

1 Paul T. Cullen, Cal. SB# 193575  
2 Craig S. Pynes, Cal. SB# 151552  
3 **THE CULLEN LAW FIRM, APC**  
4 29229 Canwood St., Ste. 208  
5 Agoura Hills, CA 91301-1555  
6 Tel: 626-744-9125; Fax: 626 744 9436  
7 e-mail: [paul@cullenlegal.com](mailto:paul@cullenlegal.com),  
8 [craig@cullenlegal.com](mailto:craig@cullenlegal.com), [Jackie@cullenlegal.com](mailto:Jackie@cullenlegal.com)

9 Attorneys for Plaintiffs DOMINIQUE  
10 WHITAKER and JOHN WHITE  
11 *(Additional Counsel on Page 2)*

12 **UNITED STATES DISTRICT COURT**

13 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

14 DOMINIQUE WHITAKER and  
15 JOHN WHITE; on behalf of  
16 themselves, all others similarly  
17 situated, the general public and as  
18 "aggrieved employees" under the  
19 California Labor Code Private  
20 Attorneys General Act,

21 Plaintiffs,

22 v.

23 COUNTRYWIDE FINANCIAL  
24 CORPORATION, a Delaware  
25 Corporation doing business in the  
26 state of California; and BANK OF  
AMERICA CORPORATION, a  
Delaware Corporation doing  
business in the State of California,  
COUNTRYWIDE HOME LOANS,  
INC., a New York corporation, and  
DOES 1-10, inclusive,

Defendants.

)CASE NO.: CV09-5898CAS(PJWx)  
)  
)CLASS ACTION: Rule 23 Plaintiff Class  
)Assigned to Honorable Christina A. Snyder,  
)Courtroom 5, 2<sup>nd</sup> Floor  
)  
)THIRD AMENDED CLASS,  
)COLLECTIVE, AND PRIVATE  
)ATTORNEY GENERAL ACTION  
)COMPLAINT FOR:  
)1. Overtime Wages (Lab. Code 510 and  
) 1194 and IWC Wage Order 4-2001;  
)2. Waiting Time Penalties (Lab. Code 203);  
)3. Failure to Provide Accurate Itemized  
) Wage Statement (Lab. Code 226);  
)4. Failure to Pay Minimum Wages (Lab.  
) Code 1194);  
)5. Failure to Pay Minimum and Overtime  
) Wages and 29 U.S.C. § 29 USC § 206(a);  
)6. Violations of the California Business &  
) Professions Code Section 17200 et seq.  
)7. Failure To Provide Meal And Rest  
) Periods

1 **ADDITIONAL COUNSEL FOR PLAINTIFF:**

2  
3 Mark R. Thierman Cal SB# 72913  
4 **THIERMAN LAW FIRM, PC**  
5 7287 Lakeside Drive  
6 Reno, Nevada 89511  
7 Tel: (775) 284-1500  
8 e-mail: [laborlawyer@pacbell.net](mailto:laborlawyer@pacbell.net)

9 Shaun Setareh Cal SB#204514  
10 **LAW OFFICES OF SHAUN SETAREH**  
11 9454 Wilshire Blvd, Penthouse Suite #3  
12 Beverly Hills, California 90212  
13 Tel: (310) 888-7771  
14 e-mail: [setarehlaw@sbcglobal.net](mailto:setarehlaw@sbcglobal.net)  
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1 Come now Plaintiffs Dominique Whitaker and John White (“Plaintiffs”)  
2 on behalf of themselves, all others similarly situated, the general public and all  
3 aggrieved employees and allege:  
4

5 **JURISDICTION AND VENUE**

6 1. The United States District Court for the Central District of  
7 California has jurisdiction over this case by virtue of original jurisdiction  
8 pursuant to 29 U.S.C. §§ 206 and 216(b) as well as 28 U.S.C. §1331. This Court  
9 also has supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over the claims  
10 alleged herein arising under the California Labor Code §§ 203, 510, 1194, 2699  
11 and California Business & Professions Code § 17200 and the Industrial Welfare  
12 Commission Wage Order 4-2001 (hereinafter “IWC Wage Order 4-2001”).  
13  
14

15 2. Venue is proper in the Central District of California under 28  
16 U.S.C. §1391(a)(2), because a substantial part of the events or omissions giving  
17 rise to the claims herein occurred in this District, including, but not limited to  
18 wage and hour violations that occurred at Defendants’ facilities within the  
19 County of Los Angeles. Venue is also proper here, because, as Plaintiffs are  
20 informed and believe and thereon allege, at least one of the Defendants is  
21 domiciled in the State of California having the bulk of its operation here, and it  
22 operates facilities where it employed Plaintiffs to work in a county within the  
23 Central District of California, i.e. in Los Angeles County.  
24  
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1 the Foley Matter into this action by way of the First Amended Complaint, four  
2 years prior to the filing of the Foley Matter.

3  
4 9. These employees were paid on an hourly basis, and they seek  
5 damages, penalties and restitution for unpaid wages from Defendants for the  
6 Relevant Time Period, because Defendants have:

- 7 a. Failed to pay Plaintiffs and all others similarly situated minimum  
8 and/or overtime wages for all hours worked in violation of both state  
9 and federal law;  
10  
11 b. Failed to provide Plaintiffs and all others similarly situated proper  
12 meal and rest periods;  
13  
14 c. Failed to furnish Plaintiffs and all others similarly situated accurate  
15 itemized wage statements;  
16  
17 d. Failed to timely pay Plaintiffs and all others similarly situated all  
18 wages due them at the time of their termination from employment;  
19  
20 e. Subjected Plaintiffs and all others similarly situated to unfair business  
21 practices within the meaning of B&PC §§ 17200 et seq.

22 10. The central allegation to this complaint is that Plaintiffs and all  
23 others similarly situated, who are or were employed by Defendants during the  
24 Relevant Time Period were required to boot up their computers and connect to  
25 Defendants' telephone system prior to clocking in each day. Defendants  
26

1 similarly required Plaintiffs and all others similarly situated to shut their  
2 computers down and disconnect from Defendants' telephone system after  
3 clocking out each day. This off the clock time worked by Plaintiffs and all  
4 others similarly situated, was systematic and continuous.  
5

6 11. As a result of time Plaintiffs and all others similarly situated worked  
7 for Defendants off the clock without compensation, this time was not computed  
8 in calculating the correct amount of overtime worked by Plaintiffs and all others  
9 similarly situated.  
10

11 12. As a result of time Plaintiffs and all others similarly situated worked  
12 for Defendants off the clock without compensation, Plaintiffs and all others  
13 similarly situated were not compensated for this time at the minimum wage.  
14

15 13. As a result of time Plaintiffs and all others similarly situated worked  
16 for Defendants off the clock without compensation, Plaintiffs and all others  
17 similarly situated also were not provided the full complement of time to which  
18 they were entitled for meal and rest breaks; nevertheless, Plaintiffs and all others  
19 similarly situated were not provided an additional hour of premium pay for each  
20 such failure to provide a meal and/or rest period.  
21

22 14. As a result of the time Plaintiffs and all others similarly situated  
23 worked for Defendants off the clock without compensation, the total number of  
24 hours worked by Plaintiffs and all others similarly situated was not included in  
25  
26

1 their paystubs, nor was all pay due to the Plaintiffs and all others similarly  
2 situated, including, but not limited to premium pay for non-provision of meal  
3 and rest breaks.  
4

5 15. Defendants did not include the bonus pay and commission pay into  
6 the base rate of Plaintiffs and all others similarly situated for purposes of  
7 calculating their overtime wages. As such, Defendants did not pay Plaintiffs and  
8 all others similarly situated the correct overtime rate for overtime hours worked.  
9

10 16. Countrywide failed to pay all wages due to Plaintiffs and all others  
11 similarly situated whose employment terminated with Countrywide at the time  
12 of their termination of employment with Countrywide in violation of California  
13 Labor Code Section 203.  
14

15 17. Plaintiffs and all others similarly situated are or were employed by  
16 Countrywide, in the State of California within the one year preceding the filing  
17 of this Complaint and were subject to Countrywide's illegal practices of failing  
18 to provide an accurate itemized wage statement indicating the total number of  
19 hours worked to Plaintiffs and all others similarly situated with their wages.  
20

21 18. Plaintiffs do not know the true names of Defendants DOES 1  
22 through 10, inclusive, and therefore, sue them by those fictitious names.  
23  
24  
25  
26

1 19. Plaintiffs bring this action on their own behalf, on behalf of the  
2 class of all persons similarly situated, the general public and all aggrieved  
3 employees employed by Defendants.  
4

5 20. California Labor Code § 2699(a), also known as the California  
6 Labor Code Private Attorneys General Act of 2004, states:

7 Notwithstanding any other provision of law, any provision  
8 of this code that provides for a civil penalty to be assessed and  
9 collected by the Labor and Workforce Development Agency or any  
10 of its departments, divisions, commissions, boards, agencies, or  
11 employees, for a violation of this code, may, as an alternative, be  
12 recovered through a civil action brought by an aggrieved employee  
on behalf of himself or herself and other current or former employees  
pursuant to the procedures specified in Section 2699.3.

13 21. Plaintiffs are “aggrieved employees” as that term is defined in the  
14 California Labor Code Private Attorneys General Act of 2004 because they are  
15 persons who were employed by the alleged violator and against whom one or  
16 more of the alleged violations was committed.  
17

18 22. Plaintiff Dominique Whitaker has met all of the notice requirements  
19 set forth in California Labor Code § 2699.3 necessary to commence a civil  
20 action.  
21

22 **CLASS ACTION ALLEGATIONS**

23 23. Pursuant to Fed.R.Civ.P. Rule 23(a)(1)-(4), 23(b)(2), and 23(b)(3),  
24 this action is brought and may be properly maintained as a class action. This  
25  
26

1 action satisfies the ascertainability, numerosity, commonality, typicality,  
2 adequacy, predominance, and superiority requirements of those provisions.

3  
4 24. Plaintiffs bring this suit as a class action pursuant to Fed.R.Civ.P.  
5 Rule 23, on behalf of the Class of individuals which are defined as follows:

6 **The California Class:** All Account Managers and Customer Service  
7 Representatives in Defendants' Home Retention Division (a.k.a.  
8 collections) and Customer Service Division (and/or Customer Service  
9 Operations) as well as all Customer Service Tele Reps (and/or similarly  
10 titled, hourly paid call center employees) who worked in the State of  
11 California for any of the Defendants within the Relevant Time Period,  
12 which is four years preceding the filing of the original Complaint herein,  
and to the extent additional parties and/or claims are added to this matter  
by the consolidation of the Foley Matter into this action, four years prior  
to the filing of the Foley Matter.

13 Plaintiffs further seek to establish one (1) subclass, i.e. the **California**  
14 **Former Employee Subclass** : All Account Managers and Customer  
15 Service Representatives in Defendants' Home Retention Division (a.k.a.  
16 collections) and Customer Service Division (and/or Customer Service  
17 Operations) as well as all Customer Service Tele Reps (and/or similarly  
18 titled hourly paid call center employees) who worked for any of the  
19 Defendants in the State of California within the Relevant Time Period,  
20 which is three years preceding the filing of the original Complaint herein  
(and to the extent additional parties and/or claims are added to this matter  
by the consolidation of the Foley Matter into this action, four years prior  
to the filing of the Foley Matter).

21 25. Numerosity: Plaintiffs are informed and believe and based on such  
22 information and belief allege that, in conformity with Rule 23(a)(1), the potential  
23 membership in each of the class and subclass is so numerous that joinder of all  
24 members is impractical. While the exact number of members in each of the  
25  
26

1 classes is presently unknown to Plaintiffs, Plaintiffs estimate membership in the  
2 Class to exceed 700 and the Subclass to exceed 250. The exact number and  
3 specific identities of the members of the Class, including the former employee  
4 subclass, may be readily ascertained through inspection of Defendants' business  
5 records.  
6

7       26. Questions of Law or Fact Common to the Class: Plaintiffs are  
8 informed and believe and based on such information and belief allege that  
9 numerous questions of law and/or fact are common to all members of the Class  
10 and Subclass (and that these common questions predominate over any individual  
11 issues), including, without limitation:  
12

13           a. Whether the members of the Class received the legal minimum  
14 wage or agreed rate under California law for all hours during which  
15 they were subject to Defendants' control;  
16

17           b. Whether Defendants failed to timely furnish accurate itemized  
18 statements to the members of the Class in conformity with Labor  
19 Code § 226(a) and, if not, whether liability for the same accrues under  
20 Labor Code § 226(e) and (g);  
21

22           c. Whether the members of the former employee subclass are  
23 entitled to penalties pursuant to Labor Code § 203;  
24

25           d. The correct statute of limitations for the claims of the members  
26 of the Class;

- 1 e. Whether Defendants' conduct constitutes unfair competition
- 2 and/or business practices within the meaning of B&PC §17200 et
- 3 seq.;
- 4 f. Whether the members of the Class are entitled to compensatory
- 5 damages, and if so, the means of measuring such damages;
- 6 g. Whether the members of the Class are entitled to restitution;
- 7 h. Whether Defendants are liable for pre-judgment interest;
- 8 i. Whether Defendants are liable for attorneys' fees and costs;
- 9 j. Whether Defendants failed to pay members of the Class all
- 10 wages due, including minimum wages, overtime wages and accrued
- 11 vacation wages;
- 12 k. Whether Defendants failed to maintain accurate records of work
- 13 performed by members of the Class;
- 14 l. Whether Defendants failed to timely pay all wages due to
- 15 members of the Class, who are former employees of Defendants, upon
- 16 termination of the class members' employment;
- 17 m. Whether the members of the Class are entitled to seek recovery
- 18 of compensation pursuant to Labor Code §558 and, if so, for what
- 19 time period(s);
- 20 n. Whether the members of the Class were provided meal and rest
- 21 breaks in conformity with California law, and, if not, whether
- 22 members of the Class were properly compensated for Defendants'
- 23 failure to provide said meal and rest breaks.
- 24
- 25
- 26

1           27.   Typicality: Plaintiffs are informed and believe and based on such  
2 information and belief allege that Plaintiffs' claims are typical of the claims of all  
3 members of the Class whom they seek to represent. Defendants treated both  
4 Plaintiffs and all members of the Class in a virtually identical manner with respect  
5 to the violations of law asserted herein. These violations of law arise out of  
6 Defendants' common course of conduct in *inter alia* (a) requiring members of the  
7 Class to work hours for which they were not properly compensated (in terms of  
8 basic minimum wages and/or agreed rates), (b) receive inaccurate wage statements,  
9 and (c) endure patently unfair business practices within the meaning of B&PC §  
10 17200, et seq.  
11

12           28.   Adequacy: Plaintiffs are informed and believe and based on such  
13 information and belief allege that Plaintiffs will fairly and adequately protect the  
14 interests of the members of the Class they seek to represent. Plaintiffs are adequate  
15 representatives of the Class because they are members of not just the Class, but the  
16 subclass as well, and their interests do not conflict with the interests of the  
17 members of the Class they seek to represent. Plaintiffs have retained counsel  
18 competent and experienced in the prosecution of complex class actions, and  
19 Plaintiffs and their counsel intend to prosecute this action vigorously for the  
20 benefit of the Class. The interests of the Class members will be fairly an  
21 adequately protected by Plaintiffs and their counsel.  
22

23           29.   Superiority: Plaintiffs are informed and believe and based on such  
24 information and belief allege that this action is properly brought as a class action,  
25  
26

1 not only because the prerequisites of Rule 23 and common law related thereto are  
2 satisfied (as outlined above), but also because of the following:

3 a. The prosecution of separate actions by or against individual  
4 members of the Class would create risk of inconsistent or varying  
5 adjudications with respect to individual members of the Class which  
6 would establish incompatible standards of conduct for the party  
7 opposing the Class;  
8

9 b. Adjudications with respect to individuals members of the Class  
10 would, as a practical matter, be dispositive of the interests of the other  
11 members not parties to the adjudications or substantially impair or  
12 impede their ability to protect their interests;  
13

14 c. Defendants have acted or refused to act on grounds generally  
15 applicable to all members of the Class, making declaratory relief  
16 appropriate with respect to all of the Class;  
17

18 d. Questions of law or fact common to the members of the Class  
19 predominate over any questions affecting only individual members;  
20  
21 and,

22 e. Class action treatment is superior to other available methods for  
23 the fair and efficient adjudication of the controversy.  
24

25 ///

1 **COLLECTIVE ACTION ALLEGATIONS**

2 30. Plaintiffs hereby incorporate each and every allegation contained  
3 above and reallege said allegations as if fully set forth herein.

4 31. Plaintiffs further bring this suit as a Collective Action under the Fair  
5 Labor and Standards Act, 29 U.S.C. § 201, et seq., (“FLSA”) on behalf of all  
6 persons who were, are, or will be employed by Defendants as:  
7

8 Account Managers and Customer Service Representatives in Defendants’  
9 Home Retention Division (a.k.a. collections) and Customer Service  
10 Division (and/or Customer Service Operations) as well as all Customer  
11 Service Tele Reps (and/or similarly titled, hourly paid call center  
12 employees) who worked within the Relevant Time Period (which under  
the FLSA is three years preceding the filing of the original Complaint  
herein) in the United States for any of the Defendants.

13 32. Plaintiffs allege that during the Relevant Time Period, they are and  
14 were:

- 15 (A.) individuals who resided in the County of Los Angeles and the  
16 State of California;  
17 (B.) employed as "Customer Service Tele-Rep" and/or an “Account  
18 Manager” for defendants in the State of California within the  
19 three years preceding the filing of the complaint herein;  
20 (C.) worked more than 40 hours in any given week;  
21 (D.) did not receive overtime compensation for all hours worked  
22 over 40 hours in any given week;  
23 (E.) worked regular hours for which they received no pay  
24 whatsoever;  
25  
26

1 (F.) are members of the Collective Class as defined in paragraph 31  
2 in this Complaint; and,

3 (G.) have signed a consent to sue filed in this Court.

4 33. All claims involving the Collective Class have been brought and may  
5 properly be maintained as a collective action under 29 U.S.C. § 216, because there  
6 is a well defined community of interest in the litigation and the proposed  
7 Collective Class is easily ascertainable by examination of the employment records  
8 that Defendant is required to maintain by law, including but not limited to,  
9 employee time clock reports and payroll records.  
10

11 **INDIVIDUAL CAUSES OF ACTION**

12 **FIRST CAUSE OF ACTION**

13 **(Failure To Pay Overtime In Violation of California Labor Code § 510 and**  
14 **1194 and IWC Wage Order 4-2001)**

15 **(By Plaintiffs and the California Class against Defendants)**

16 34. Plaintiffs hereby incorporate each and every allegation contained  
17 above, and reallege said allegations as if fully set forth herein.

18 35. California Labor Code § 510 states:

19 (a) Eight hours of labor constitutes a day's work. Any  
20 work in excess of eight hours in one workday and any  
21 work in excess of 40 hours in any one workweek and the  
22 first eight hours worked on the seventh day of work in  
23 any one workweek shall be compensated at the rate of no  
24 less than one and one-half times the regular rate of pay  
25 for an employee. Any work in excess of 12 hours in one  
26 day shall be compensated at the rate of no less than twice  
the regular rate of pay for an employee. In addition, any  
work in excess of eight hours on any seventh day of a  
workweek shall be compensated at the rate of no less

1 than twice the regular rate of pay of an employee.  
2 Nothing in this section requires an employer to combine  
3 more than one rate of overtime compensation in order to  
4 calculate the amount to be paid to an employee for any  
5 hour of overtime work. The requirements of this section  
do not apply to the payment of overtime compensation to  
an employee working pursuant to any of the following:

6 (1) An alternative workweek schedule adopted pursuant  
to Section 511.

7 (2) An alternative workweek schedule adopted pursuant  
to a collective bargaining agreement pursuant to Section  
8 514.

9 (3) An alternative workweek schedule to which this  
chapter is inapplicable pursuant to Section 554.

10 (b) Time spent commuting to and from the first place at  
11 which an employee's presence is required by the  
12 employer shall not be considered to be a part of a day's  
13 work, when the employee commutes in a vehicle that is  
14 owned, leased, or subsidized by the employer and is used  
for the purpose of ridesharing, as defined in Section 522  
of the Vehicle Code.

15 (c) This section does not affect, change, or limit an  
employer's liability under the workers' compensation law.

16 36. California Labor Code § 1194(a) states:

17  
18 Notwithstanding any agreement to work for a lesser  
19 wage, any employee receiving less than the legal  
20 minimum wage or the legal overtime compensation  
21 applicable to the employee is entitled to recover in a civil  
22 action the unpaid balance of the full amount of this  
23 minimum wage or overtime compensation, including  
24 interest thereon, reasonable attorney's fees, and costs of  
25 suit.

26 37. The Industrial Wage Commission Wage Order No. 4-2001(3) states  
in pertinent part as follows:

(A) Daily Overtime - General Provisions

1 (1) The following overtime provisions are applicable to  
2 employees 18 years of age or over and to employees 16  
3 or 17 years of age who are not required by law to attend  
4 school and are not otherwise prohibited by law from  
5 engaging in the subject work. Such employees shall not  
6 be employed more than eight (8) hours in any workday or  
7 more than 40 hours in any workweek unless the  
8 employee receives one and one-half (1 ½) times such  
9 employee's regular rate of pay for all hours worked over  
10 40 hours in the workweek. Eight (8) hours of labor  
11 constitutes a day's work. Employment beyond eight (8)  
12 hours in any workday or more than six (6) days in any  
13 workweek is permissible provided the employee is  
14 compensated for such overtime at not less than:  
15 (a) One and one-half (1 ½) times the employee's regular  
16 rate of pay for all hours worked in excess of eight (8)  
17 hours up to and including 12 hours in any workday, and  
18 for the first eight (8) hours worked on the seventh (7th)  
19 consecutive day of work in a workweek;

20 38. At all times relevant, Defendants have failed to pay Plaintiffs and  
21 the members of the putative Class overtime for all of the hours they have worked  
22 over eight (8) per day and/or 40 per week in violation of the California Labor  
23 Code, and the IWC. Plaintiffs and the members of the putative Class were not  
24 employed in an executive, administrative or professional capacity, nor were they  
25 employed pursuant to a validly enacted alternative workweek.

26 39. Additionally, for the overtime hours for which Countrywide did  
compensate Plaintiffs and all others similarly situated, the overtime rate did not  
include the bonus pay and commission into the base pay for purposes of  
calculating overtime wages.



1 44. California Labor Code § 203 states:

2 If an employer willfully fails to pay, without  
3 abatement or reduction, in accordance with Sections 201,  
4 201.5, 202, and 205.5, any wages of an employee who is  
5 discharged or who quits, the wages of the employee shall  
6 continue as a penalty from the due date thereof at the  
7 same rate until paid or until an action therefor is  
8 commenced; but the wages shall not continue for more  
9 than 30 days. An employee who secretes or absents  
10 himself or herself to avoid payment to him or her, or who  
11 refuses to receive the payment when fully tendered to  
12 him or her, including any penalty then accrued under this  
13 section, is not entitled to any benefit under this section  
14 for the time during which he or she so avoids payment.

15 Suit may be filed for these penalties at any time  
16 before the expiration of the statute of limitations on an  
17 action for the wages from which the penalties arise.

18 45. Defendants willfully and intentionally failed to pay Plaintiffs and  
19 the members of the Class who are former employees of the Defendants all of the  
20 wages they were due by the deadlines imposed under California Labor Code §§  
21 201 and 202, including minimum wages, overtime wages, premium wages for  
22 non-provision of meal and rest breaks, and accrued vacation pay. Accordingly,  
23 Plaintiffs and the putative members of the Class who are former employees of  
24 the Defendants seek waiting time penalties of up to 30 days pay.

25 ///

26 ///

///



1 due for non-provision of meal and rest breaks, (2) total hours actually worked by  
2 the employee, and/or (3) net wages actually earned.

3  
4 49. Plaintiff and Class Members have suffered actionable legal injuries as  
5 a result of said violations, such as (a) the risk that will not be paid overtime for all  
6 hours actually worked, (b) confusion over whether they received all wages owed  
7 them, (c) difficulty and expense involved in reconstructing pay records to compute  
8 all pay actually due and owing, and/or (d) the need to make mathematical  
9 computations to analyze whether the wages paid in fact compensated them for all  
10 hours worked.  
11

12  
13 50. Defendants knowingly and intentionally failed to provide Plaintiffs  
14 and the putative members of the Class with accurate itemized wage statements as  
15 required by California Labor Code § 226(a)(2).

16  
17 51. California Labor Code § 226(e) provides that if an employer  
18 knowingly and intentionally fails to provide a wage statement without the required  
19 information, the employee is entitled to recover the greater of all actual damages  
20 or \$50 for the initial violation and \$100 for each subsequent violation, up to a total  
21 of \$4,000, plus costs and attorneys' fees.

22  
23 52. Accordingly, Plaintiffs and all members of the Class are entitled to  
24 the maximum amount of damages, costs and attorneys' fees allowed by California  
25 Labor Code § 226(e) for the relevant time period set forth herein.  
26



1 to the minimum wage for that workday, except when the  
2 employee resides at the place of employment.

3 (D) The provisions of this section shall not apply to  
4 apprentices regularly indentured under the State Division  
5 of Apprenticeship Standards.

6 56. At all times relevant, Defendants have failed to pay Plaintiffs and the  
7 putative members of the Class minimum wage for all of the hours they have  
8 worked in violation of the California Labor Code.

9 57. In particular, Defendants' compensation scheme fails to properly pay  
10 Plaintiffs and the members of the Class for many work activities, including  
11 requiring Plaintiffs and putative members of the Class to boot up their computer  
12 systems and connect to Defendants' telephone system prior to clocking in each  
13 day and shutting down their computer systems and disconnecting from  
14 Defendants' telephone system after clocking out each day.

15 58. Defendants' failure to pay Plaintiffs and the putative members of the  
16 Class minimum wage for all hours worked violates the California Labor Code and  
17 the IWC Wage Order 4-2001, and Plaintiffs, on behalf of themselves and all  
18 putative members of the Class, seek compensation for all unpaid straight time at  
19 the minimum wage for the Relevant Time Period herein as well as attorneys' fees  
20 and costs.  
21  
22  
23

24 ///

25 ///

1 **FIFTH CAUSE OF ACTION**  
2 **(Failure to Pay Minimum and Overtime Wages in Violation of The**  
3 **Fair Labor Standards Act, 29 U.S.C. 206(a))**  
4 **(By Plaintiffs and the Collective Class against Defendants)**

5 59. Plaintiffs hereby incorporate each and every allegation contained  
6 above, and reallege said allegations as if fully set forth herein.

7 60. Defendants are engaged in communication, business, and  
8 transmission throughout the United States and is, therefore, engaged in commerce  
9 within the meaning of 29 U.S.C. § 203(b).

10 61. 29 U.S.C. § 255 provides that a three-year statute of limitations  
11 applies to willful violations of the FLSA.

12 62. 29 U.S.C. § 207(a) (l) provides in pertinent part: “Except as otherwise  
13 provided in this section, no employer shall employ any of his employees who in  
14 any workweek is engaged in commerce or in the production of goods for  
15 commerce, or is employed in an enterprise engaged in commerce or in the  
16 production of goods for commerce, for a workweek longer than forty hours unless  
17 such employee receives compensation for his employment in excess of the hours  
18 above specified at a rate not less than one and one-half times the regular rate at  
19 which he is employed.”  
20  
21  
22

23 63. The Fair Labor Standards Act, at 29 USC § 206(a) also states that an  
24 employee must be paid the minimum wage for all hours worked.  
25  
26

1           64. There is no exception from the provisions of 29 U.S.C. §§ 206(a) and  
2 207(a) (1) applicable to the Plaintiffs and the other hourly paid employees that  
3 constitute the Collective Class herein.  
4

5           65. Plaintiffs are informed and believe and thereon allege that Defendants  
6 have willfully engaged in a widespread pattern and practice of violating the  
7 provisions of the FLSA, as detailed above, in an illegal attempt to avoid payment  
8 of minimum and overtime wages and other benefits in violation of the Fair Labor  
9 Standards Act and Code of Federal Regulations requirements. In particular,  
10 Defendants' compensation scheme fails to properly pay Plaintiffs and the  
11 members of the Collective Class for many work-related activities, including  
12 requiring Plaintiffs and putative members of the Class to boot up their computer  
13 systems and connect to Defendants' telephone system prior to clocking in each  
14 day and shutting down their computer systems and disconnecting from  
15 Defendants' telephone system after clocking out each day.  
16  
17

18           66. Pursuant to the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*,  
19 Plaintiff and the members of the Collective Class are entitled to compensation at  
20 their regular rate for all hours actually worked, and are also entitled to wages at a  
21 rate not less than one and one-half times their regular rate of pay for all hours  
22 worked in excess of forty (40) hours in any workweek.  
23  
24  
25  
26

1           67. At all relevant times, Defendants failed to pay Plaintiff and the other  
2 members of the Collective Class minimum wages and, when applicable, overtime  
3 compensation for the hours they have worked in excess of the maximum hours  
4 permissible by law as required by section 207 of FLSA, even though members of  
5 the Collective Class regularly worked, and did in fact work overtime hours.  
6

7           68. For purposes of FLSA, the employment practices of Defendants were  
8 and are uniform throughout the United States in all respects material to the claims  
9 asserted in this Complaint.  
10

11           69. Plaintiffs propose to undertake the appropriate proceedings to have  
12 the Collective Class members, aggrieved by Defendants' unlawful conduct,  
13 notified of the pendency of this action and join this action as Plaintiffs, pursuant to  
14 29 U.S.C. § 216(b).  
15

16           70. Therefore, Plaintiffs demand that they and the members of the  
17 Collective Class be paid wages at their regular rate for all hours worked at each of  
18 Defendants' facilities, and when applicable, overtime compensation as required by  
19 the FLSA for every hour of overtime worked in any work week for which they  
20 were not compensated, plus interest and attorneys' fees as provided by law.  
21

22           71. Because the actions of Defendants were without substantial  
23 justification as required by 29 USCS § 260, Plaintiffs request the amount of  
24  
25  
26

1 damages be doubled, not as a penalty, but in lieu of interest and as liquidated  
2 damages as provided in 29 U.S.C. 216(b).

3  
4 **SIXTH CAUSE OF ACTION**  
5 **(Unfair Competition- Business & Professions Code, Section 17200,**  
6 **et seq.)**  
7 **(By Plaintiffs and the California Class against Defendants)**

8 72. Plaintiffs hereby incorporate each and every allegation contained  
9 above, and reallege said allegations as if fully set forth herein well as the  
10 allegations set forth in the causes of action below.

11 73. California Business & Professions Code, Section 17200, entitled  
12 definition, provides:

13 “As used in this Chapter, unfair competition shall mean and include  
14 any unlawful unfair or fraudulent business act or practice and unfair,  
15 deceptive, untrue or misleading advertising and any act prohibited by Chapter  
16 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business  
and Professions Code.”

17 74. Defendant’s conduct described herein above, specifically taking  
18 overtime labor without payment at the minimum wage for all hours worked and  
19 taking labor without paying proper overtime wages, constitutes an unfair and  
20 unlawful business practice in violation of provisions of California Business and  
21 Professions Code, Section 17200.

22  
23 75. Defendants violated provisions of the Labor Code by doing the  
24 following:  
25  
26

- 1 a. failing to pay to Plaintiffs and putative class members of the Class  
2 overtime pay as required by Labor Code, Section 510, 1194 and 29  
3 U.S.C. § 206 et seq.;
- 4
- 5 b. failing to pay Plaintiffs and putative members of the Class  
6 minimum wage for all hours worked as required by Labor Code  
7 Section 1194 and 29 U.S.C. § 206 et seq.;
- 8
- 9 c. failing to pay Plaintiffs and putative members of the Class all  
10 premium wages due and owing for Defendants' failure to provide  
11 meal and rest breaks in conformity with California law; and,
- 12
- 13 d. failing to pay all wages due upon termination of employment,  
14 including, but not limited to minimum wages overtime wages,  
15 accrued vacation pay, and the like.

16 76. Plaintiffs demand that Defendants make full restitution for all such  
17 compensation owed to Plaintiffs and putative members of the Class for the  
18 Relevant Time Period.  
19

20 77. Plaintiffs also seek costs and such other relief as is appropriate  
21 including, but not limited to declaratory relief, injunctive relief, and installation  
22 of a receiver.  
23

24 ///

25 ///





1           2. For an order of restitution that Defendants pay to  
2           Plaintiffs and members of the California Class and Collective Class  
3           all sums due and owing for failure to pay minimum wages, and  
4           premium overtime for all hours worked pursuant to state and federal  
5           law;  
6

7           3. For liquidated damages under both state (Lab. Code §  
8           1194.2) and federal law (29 U.S.C. § 216) for unpaid minimum  
9           wages as alleged herein;  
10

11           4. For liquidated damages under federal law (29 U.S.C. §  
12           216) for unpaid overtime wages as alleged herein;  
13

14           5. For waiting penalties for Plaintiffs and the putative  
15           members of the Class who are former employees of the Defendants,  
16           specifically “employee’s daily wages for each day he or she  
17           remained unpaid up to a total of 30 days” and for reasonable  
18           attorney’s fees;  
19

20           6. For violations of Labor Code § 226(a), \$50 for each  
21           initial violation and \$100 for each subsequent violation for Plaintiffs  
22           and each member of the Class per pay period, up to a total of \$4,000,  
23           pursuant to California Labor Code § 226(e), plus costs and attorneys’  
24           fees;  
25  
26

1           7. For an injunction against Defendants enjoining it from  
2 all future violations of the California Labor Code;

3           8. The full amount of penalties provided for in Labor  
4 Code Section 2699 on account of Defendants' violations of the  
5 provisions of California Labor Code § 226.  
6

7           9. Damages (in terms of premium pay) pursuant to  
8 Section 11(D) and/or 12(B) of the IWC Wage Order(s) and Labor  
9 Code § 226.7(b), in the amount of one (1) additional hour of pay at  
10 the employee's regular rate of compensation for each work day that  
11 the meal and/or rest period is/was not provided to any member of  
12 the Class, the cumulative sum of which is to be proved at time of  
13 trial.  
14

15           10. Damages and/or penalties pursuant to Labor Code  
16 §558(a).  
17

18           11. For all interest on any sums awarded as allowed by  
19 law, including but not limited to Labor Code §§ 218.6, 1194(a) and  
20 Civil Code §§ 3287(b) and 3289;  
21

22           12. For all reasonable attorneys fees provided for by any  
23 applicable statute, including, but not limited to Lab. Code §§ 218.5,  
24 226, and 1194 and 29 U.S.C. § 216.  
25  
26

1                   13. For all costs of this suit allowed by law;

2                   14. For any other and further relief that the Court deems

3  
4                   just and proper.

5 Dated this 23<sup>rd</sup> day of June 2010

6                   THE CULLEN LAW FIRM, APC  
7                   THE THIERMAN LAW FIRM  
8                   LAW OFFICES OF SHAUN SETAREH

9                   By:           /s/ Paul T. Cullen            
10                   Paul T. Cullen  
11                   Attorneys for Plaintiff

**EXHIBIT E**

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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Case No. CV 09-5898 CAS (PJWx) Date September 19, 2011  
Title DOMINIQUE WHITAKER; ET AL. v. COUNTRYWIDE FINANCIAL CORPORATION; ET AL.

Present: The Honorable CHRISTINA A. SNYDER

RITA SANCHEZ

N/A

N/A

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

N/A

N/A

Proceedings: **(In Chambers:) DEFENDANTS' MOTION TO COMPEL ARBITRATION AND STAY LITIGATION** (filed 8/22/2011)

**I. INTRODUCTION**

This putative class action is brought on behalf of current and former employees of Countrywide Financial Corporation and Countrywide Home Loans, Inc. ("Countrywide") against Countrywide and Bank of America, the alleged successor-employer and/or successor-in-liability to Countrywide. On August 12, 2009, this case was removed from the Superior Court for the County of Ventura. On June 30, 2010, pursuant to stipulation of the parties, this case was consolidated with another class action case alleging similar wage and hour claims (Foley v. Countrywide Home Loans, Inc., et al., Los Angeles Superior Court Case #BC 414463).

On November 1, 2010, the Court issued an order staying the case pending the resolution of a motion made to the Judicial Panel on Multidistrict Litigation ("MDL") to approve the action as a tag-along case. On April 11, 2011, the Court issued an order returning the case to its active calendar.

On May 5, 2011, plaintiffs filed a Second Amended Complaint ("SAC"). The SAC alleges claims for: (1) failure to pay overtime wages in violation of Cal. Labor Code § 510 and § 1194 and IWC Wage Order 4-2001; (2) waiting time penalties pursuant to Cal. Labor Code § 203; (3) failure to provide an accurate itemized wage statement pursuant to Cal. Labor Code § 226; (4) failure to pay minimum wage in violation of Cal. Labor Code § 1194; (5) failure to pay minimum and overtime wages in violation of the

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Fair Labor Standards Act, 29 U.S.C. § 206(a); (6) unfair competition pursuant to Cal. Business & Professions Code, § 17200 et seq.; and (7) failure to provide meal and rest periods. On June 27, 2011, the Court granted the parties' stipulation to dismiss plaintiff Foley and substitute in her place John White. That same day, plaintiffs filed a Third Amended Complaint ("TAC") alleging the same seven claims as set forth in the SAC.

On August 22, 2011, defendants filed the present motion to compel individual arbitration and stay litigation. On August 29, 2011, plaintiffs filed their opposition, and defendants replied on September 5, 2011. After carefully considering the arguments set forth by both parties, the Court finds and concludes as follows.

## II. BACKGROUND

On August 30, 2007, plaintiff Whitaker signed a Mutual Agreement to Arbitrate Claims ("Arbitration Agreement") in connection with her employment with Countrywide. Declaration of Michael D. Mandel ("Mandel Decl.") Exh. C. Plaintiff White signed the same agreement on September 26, 2008. *Id.* The Arbitration Agreement provides, in pertinent part, for:

the resolution by arbitration of all claims or controversies arising out of, relating to or associated with the Employee's employment with the Company that the Employee may have against the Company or that the Company may have against the Employee, including any claims or controversies relating to the Employee's application for employment with the Company, the Company's actual or potential hiring of the Employee, the employment relationship itself, or its termination (hereinafter the "Covered Claims"). The Covered Claims subject to this Agreement include, but are not limited to, claims for wages or other compensation due; claims for breach of any contract or covenant, express or implied; . . . and claims for violation of any federal, state or other governmental constitution, statute, ordinance, regulation, or public policy. The purpose and effect of this Agreement is to substitute arbitration, instead of a federal or state court, as the exclusive forum for the resolution of Covered Claims.

Declaration of Gershom Runyan ("Runyan Decl.") Exh. A ¶ 1.

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The Arbitration Agreement makes clear that “[a]rbitration is the parties’ exclusive remedy for Covered Claims.” Id. ¶ 10. Furthermore, it expressly covers claims against Countrywide “and all of its subsidiary and affiliated entities . . . and all successors and assigns of any of them.” Id. ¶ 1. It states that “the Federal Arbitration Act shall govern the interpretation, enforcement and all proceedings pursuant to this Agreement.” Id. ¶ 2.

The Agreement further provides that:

EACH PARTY TO THIS AGREEMENT ACKNOWLEDGES CAREFULLY READING THIS AGREEMENT, UNDERSTANDING ITS TERMS, AND ENTERING INTO THIS AGREEMENT VOLUNTARILY AND NOT IN RELIANCE ON ANY PROMISES OF REPRESENTATIONS OTHER THAN THOSE CONTAINED IN THIS AGREEMENT ITSELF.

EACH PARTY FURTHER ACKNOWLEDGES HAVING THE OPPORTUNITY TO DISCUSS THIS AGREEMENT WITH PERSONAL LEGAL COUNSEL AND HAS USED THAT OPPORTUNITY TO THE EXTENT DESIRED.

Id. (immediately following ¶ 16).

In accepting the Agreement, an employee must acknowledge the following:

By selecting “I agree” below, I acknowledge that I have read, fully understand the terms of this agreement and voluntarily, and not in reliance on any promises or representations other than those contained in the Arbitration Agreement itself, agree to be bound by all of the terms and conditions of the Arbitration Agreement. I further acknowledge that I agree to the use of an electronic method of signature to demonstrate my acceptance of the terms and conditions of the Arbitration Agreement.

Id.

### III. LEGAL STANDARD

The Federal Arbitration Act (“FAA”) provides that “a contract evidencing a

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transaction involving commerce to settle by arbitration a controversy thereafter arising . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. The FAA reflects a “liberal federal policy favoring arbitration agreements.” Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991) (quoting Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

The “first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate the dispute.” Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985). The court must determine (1) whether there exists a valid agreement to arbitrate; and (2) if there is a valid agreement, whether the dispute falls within its terms. Chiron Corp. v. Ortho Diagnostic Sys., 207 F.3d 1126, 1130 (9th Cir. 2000). When determining whether a valid and enforceable contract to arbitrate has been established for the purposes of the FAA, federal courts should apply “ordinary state-law principles that govern the formation of contracts to decide whether the parties agreed to arbitrate a certain matter.” First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995); Circuit City Stores v. Adams, 279 F.3d 889, 892 (2002). “[A]greements to arbitrate [may] be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” AT&T Mobility LLC v. Concepcion, 563 U.S. ----, 131 S. Ct. 1740, 1746 (2011).

#### IV. DISCUSSION

Countrywide argues that plaintiffs agreed to arbitrate their disputes on an individual basis pursuant to the Arbitration Agreement. Plaintiffs respond that Countrywide waived its right to compel arbitration, that the Court lacks jurisdiction to compel arbitration, and that the Arbitration Agreement in any event contains unconscionable provisions.

##### A. Whether Countrywide Waived the Right to Compel Arbitration

Plaintiffs argue that two years into this litigation, “after removal, stipulations to consolidate this and another state law case, two successive motions to dismiss, a stay of

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proceedings and a stipulations [sic] to pare down claims in this case,” only now does Countrywide move to compel arbitration. Opp’n at 7. Plaintiffs contend that Countrywide intentionally sat on its hands, “waiting for the law to become apparently more favorable to it,” which amounts to a waiver of its right to compel arbitration. Id.

Countrywide asserts that prior to Concepcion, they did not have an existing—and therefore waivable—right to compel individual arbitration, that their litigation conduct has not been inconsistent with their intent to arbitrate, and that plaintiffs have not established that they have suffered any prejudice. Reply at 3, 5, 9.

To prove waiver under the FAA, the party resisting arbitration must establish that (1) the waiving party had knowledge of an existing right to compel arbitration; (2) the waiving party acted inconsistently with asserting such a right; and (3) the resisting party must demonstrate prejudice resulting from the waiving party’s inconsistent acts.<sup>1</sup> United Computer Sys., Inc. v. AT&T Corp., 298 F.3d 756, 765 (9th Cir. 2002). The Ninth Circuit has held that a party does not act inconsistently with the right to arbitrate by failing to seek enforcement of an arbitration agreement that would be “futile” under existing law. Fisher v. A.G. Becker Paribas Incorporation, 791 F.2d 691, 697 (9th Cir. 1986). Because “waiver of the right to arbitration is disfavored because it is a contractual right . . . any party arguing waiver of arbitration bears a heavy burden of proof.” Van Ness Townhouses v. Mar Indus. Corp., 862 F.2d 754, 758 (9th Cir. 1988).

The Court finds that despite the fact that Countrywide actively litigated in federal court for more than two years without seeking to compel arbitration, the circumstances of this case do not warrant a finding that Countrywide waived its right to compel individual

---

<sup>1</sup>Although plaintiffs contend the correct waiver standard is set forth in California law, the Arbitration Agreement explicitly states that “the Federal Arbitration Act shall govern the interpretation, enforcement and all proceedings pursuant to this Agreement.” Runyan Decl. Exh. A, ¶ 2. Accordingly, the applicable standard for analyzing waiver is governed by federal law.

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arbitration.<sup>2</sup> The Arbitration Agreement is silent as to class actions. See Runyan Decl. Exh. A. Prior to the 2011 Supreme Court decision in Concepcion, any motion to compel individual arbitration would have been subject to the Discover Bank rule, and therefore futile. See Discover Bank v. Super. Ct., 36 Cal. 4th 148, 162 (2005) (holding class action waivers in arbitration agreements unconscionable where found in contracts of adhesion). In Concepcion, however, the Supreme Court found that the FAA preempts the Discover Bank rule, and held that class action waivers in arbitration agreements are enforceable.<sup>3</sup> Concepcion, 131 S.Ct. at 1753. Prior to the Supreme Court's decision in Concepcion, Countrywide had a "good faith belief" that any attempt to compel individual arbitration would be futile. Quevedo, --- F. Supp. 2d ---, 2011 WL 3135052 at \*5. Because it would have been futile for Countrywide to file a motion to compel individual arbitration earlier, Countrywide did not act inconsistently with a known existing right to compel arbitration. Fisher, 791 F.2d at 697.<sup>4</sup>

<sup>2</sup>Countrywide has unequivocally expressed its intent to compel individual, and not class, arbitration in this case. Mot. at 5; Reply at 4. Courts have held that a "good faith basis" to believe it would have been futile to bring a motion to compel *individual* arbitration does not constitute a waiver, even if the defendant could have potentially brought *class* arbitration. See Quevedo v. Macy's, Inc., --- F. Supp. 2d ---, 2011 WL 3135052, \*5 (C.D. Cal. June 16, 2011). In Quevedo, the court noted the "meaningful[] diff[erences]" between class and individual arbitration, and held that "[i]f Macy's waived any right, it was the right to defend against Quevedo's class and collective claims in arbitration. Because Macy's did not believe that it had the option to defend against Quevedo's *individual* claims in arbitration, its failure to seek to enforce the arbitration agreement did not reflect any intent to forego that option." Id. (citing Concepcion, 131 S.Ct. at 1751) (emphasis in original).

<sup>3</sup>Although the Arbitration Agreement is silent as to class action waiver, any attempt to compel individual arbitration pre-Concepcion in a class action lawsuit would have effectively amounted to an implicit class action waiver.

<sup>4</sup>Furthermore, on April 11, 2011, plaintiffs filed a motion for leave to file a Second Amended Complaint, arguing, inter alia, that no prejudice would result to defendants by granting the motion due to the limited substantive movement in this litigation: "no trial date [is] set in this action, the action has been stayed over the last 6 to 7 months, and the

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Accordingly, the Court finds that Countrywide has not waived its right to compel individual arbitration.

**B. Whether the Court Maintains Jurisdiction Over This Action**

Plaintiffs argue that this Court does not have jurisdiction to enforce the Arbitration Agreement because it is preempted by §§ 102 and 103 of the Norris-LaGuardia Act (“NLGA”) and § 7 of the National Labor Relations Act (“NLRA”). Plaintiffs contend that, although there is “almost no reported case law directly construing” these provisions, the applicable statutory sections’ “plain meaning” preclude the Court from enforcing a class action waiver. Opp’n at 20–22. Section 2 of the NLGA provides:

In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is

---

class certification deadline has been vacated . . . defendant has yet to take a single deposition and has only served one set of production requests and special interrogatories.” Dkts. 42 and 47. On May 5, 2011, the Court granted plaintiffs’ motion and ruled that “defendants will not suffer prejudice as a result of this order, given that the case has been stayed, minimal discovery has been taken, and the significant dates in the litigation have not yet been set.” Dkt. 50. Since May 5, 2011, the only filings have been a Third Amended Complaint and the instant motion to compel arbitration—in other words, the Court is not convinced that either plaintiffs or defendants have suffered any prejudice since the Court’s May 5, 2011 ruling, as required to show waiver. AT&T Corp., 298 F.3d at 765.

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necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

29 U.S.C. § 102 (emphasis added).

Section 3 of the NLGA states:

Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 102 of this title, is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court. . . .

Id. § 103 (emphasis added).

Finally, § 7 of the NLRA provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157 (emphasis added).

Plaintiffs argue that because engaging in “concerted activities for the purposes of . . . other mutual aid or protection” is protected under these statutes, this Court does not

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have jurisdiction to enforce an arbitration agreement that provides for an explicit or implicit class action waiver. Opp'n at 23–25. Plaintiffs cite no case law or other legal authority for this proposition other than the “plain language” of the provisions.

The Court finds plaintiffs’ arguments unpersuasive. The NLGA was passed to take “the federal court out of the labor injunction business,” and the statute works to deprive federal courts of jurisdiction to issue restraining orders and other forms of injunctive relief in cases that grow out of a labor dispute. See, e.g., Marine Cooks & Stewards v. Panama S.S. Co., 362 U.S. 365, 369 (1960); Burlington N. R.R. Co. v. Bhd. of Maint. of Way Emps., 481 U.S. 429 (1987). The NLGA is simply not intended to divest federal courts of their jurisdiction for any other reason, and the present case neither seeks injunctive relief nor arises out of a labor dispute.

Furthermore, a recent decision rejected a similar argument that § 7 of the NLRA renders an arbitration agreement unenforceable. In Valle v. Lowe’s HIW, Inc., the court called the plaintiffs’ argument “nonsensical” and noted that plaintiffs “cite no law for their proposition that [§ 7] preemptively renders the arbitration agreement unenforceable.” 2011 WL 3667441, \*5 (N.D. Cal. Aug. 22, 2011).

Here, plaintiffs cite no relevant case law holding to the contrary. Taking plaintiffs’ contention to its logical conclusion, the Court would lack jurisdiction to ever deny class or conditional certification under the federal rules because doing so would impair the putative class members’ ability to “engage in other concerted activities for the purposes of . . . other mutual aid or protection.” Accordingly, the Court rejects plaintiffs’ jurisdictional arguments.

**C. Whether the Arbitration Agreement Covers Plaintiffs’ Claims**

Pursuant to the FAA, the Supreme Court has held that courts may decide only two “gateway” issues when a party seeks to compel arbitration: (1) “whether the parties are bound by a given arbitration clause”; and (2) “whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.” Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002). “If the response is affirmative on both counts, then the [FAA] requires the court to enforce the arbitration agreement in accordance with its terms.” Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126,

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1130 (9th Cir. 2000).

**1. Whether the Parties Agreed to the Arbitration Agreement**

Plaintiffs do not contest that they and Countrywide agreed to arbitrate. Both parties' assent is demonstrated by their respective signatures found in each employee's "Mutual Agreement to Arbitrate Claims" contract. See Mandel Decl. Exh. C, at 5 (indicating signature of plaintiff Whitaker and Countrywide HR officer Leora Goren) and at 7 (indicating signature of plaintiff White and Countrywide HR officer Leora Goren). Accordingly, the Court finds that both parties assented to the Arbitration Agreement.

**2. Whether the Arbitration Agreement Governs Plaintiffs' Claims**

Plaintiffs also do not contest that the Arbitration Agreement governs their claims.<sup>5</sup> The Arbitration Agreement expressly includes agreeing to arbitrate "all claims or controversies arising out of, relating to or associated with the Employee's employment with the Company," which includes any "claims for wages or other compensation due" and "claims for violation of any federal, state or other governmental constitution, statute, ordinance, regulation, or public policy." Runyan Decl. Exh. A, ¶ 1. Plaintiffs' TAC alleges claims for: (1) failure to pay overtime wages in violation of Cal. Labor Code § 510 and § 1194 and IWC Wage Order 4-2001; (2) waiting time penalties pursuant to Cal. Labor Code § 203; (3) failure to provide an accurate itemized wage statement pursuant to Cal. Labor Code § 226; (4) failure to pay minimum wage in violation of Cal. Labor Code § 1194; (5) failure to pay minimum and overtime wages in violation of the Fair Labor Standards Act, 29 U.S.C. § 206(a); (6) unfair competition pursuant to Cal. Business & Professions Code, § 17200 et seq.; and (7) failure to provide meal and rest periods. TAC

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<sup>5</sup>At oral argument, plaintiffs argued that the FLSA claim should remain in this Court even if the rest of the case is sent to arbitration. However, the Ninth Circuit has squarely held that FLSA claims may be arbitrated. See, e.g., Kuehner v. Dickinson & Co., 84 F.3d 316, 320 (9th Cir. 1996); Horenstein v. Mortgage Market, Inc., 9 Fed. Appx. 618, \*\*2 (9th Cir. 2001) (citing Kuehner and holding that "[t]he appellants' FLSA claims are subject to arbitration."); Davis v. O'Melveny & Myers, 485 F.3d 1066, 1083 (9th Cir. 2007). Accordingly, the plaintiffs' FLSA claim is subject to arbitration.

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at 1. The Court finds that each claim falls within, and is therefore governed by, the plain terms of the Arbitration Agreement.

**3. Whether the Arbitration Agreement Demands Individual Arbitration**

Because the Court has answered both “gateway” questions affirmatively, the FAA requires the Court “to enforce the arbitration agreement in accordance with its terms.” Howsam, 537 U.S. at 84; Chiron Corp., 207 F.3d at 1130. Defendants maintain that the Court should compel individual arbitration; plaintiffs note their intent to pursue class or collective arbitration. Mot. at 13–17 (“plaintiff must be compelled to arbitrate on an individual basis”); Opp’n at 13 (“plaintiffs intend to proceed on a class basis in arbitration”). The Arbitration Agreement is silent as to class arbitration. See Runyan Decl. Exh. A.

Plaintiffs rely on Gentry v. Sup. Ct. In arguing that they should not be subject to individual arbitration. Opp’n at 13; 42 Cal. 4th 443, 463 (2007). In Gentry, the California Supreme Court held that courts must evaluate the factual showing made by the party resisting the class action waiver with regard to: “the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill informed about their rights, and other real world obstacles to the vindication of class members’ rights to overtime pay through individual arbitration.” Id. The court noted that “[w]e cannot say categorically that all class arbitration waivers in overtime cases are unenforceable,” and that there “may be circumstances under which individual arbitrations may satisfactorily address the overtime claims of a class of similarly aggrieved employees.” Id. at 463, 465.

Plaintiffs argue that because Concepcion “did not squarely or expressly hold that Gentry is preempted, Gentry remains the law of the State of California.” Opp’n at 26. Plaintiffs cite two recent cases purportedly declining to enforce arbitration provisions that would “preclude adequate vindication of statutory rights.” Id. at 29–30 (citing Sutherland v. Ernst & Young LLP, 2011 WL 838900, \*2 (S.D.N.Y. Mar. 3, 2011); De Souza Silva v. Pioneer Janitorial Serv., Inc., 2011 WL 832503 (D. Mass. Mar. 3, 2011)). Plaintiffs argue that because Concepcion did not address the impact of an implicit class action waiver in the context of statutory employment rights, “a determination that a class

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action is needed to vindicate statutory rights is perfectly consistent with federal common law.” Opp’n at 30.

Defendants respond that although Gentry was not squarely overruled, several post-Concepcion decisions indicate that the reasoning behind it should be rejected and that plaintiffs must therefore be subject to individual arbitration. Reply at 17–18. Moreover, according to defendants, even if Gentry remains viable post-Concepcion, plaintiffs have failed to present facts showing why the Court should not enforce individual arbitration. Id. at 19. Defendants further argue that individual arbitration is the Court’s only option because Stolt-Nielsen and its progeny forbid class arbitration in the absence of explicit class arbitration language. Id. at 13–14. Finally, defendants contend that § 5 of the FAA preempts any effort to pursue class arbitration in this case. Id. at 22.

The Court agrees that Gentry is no longer good law, but nevertheless finds that the question of whether plaintiffs are subject to individual or class arbitration depends on the parties’ intent and is a question for the arbitrator to decide.<sup>6</sup> In Stolt-Nielsen, the

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<sup>6</sup> Although Concepcion did not explicitly overrule Gentry, it did explicitly overrule Discover Bank, on which Gentry’s logic was based. Concepcion, 131 S.Ct. at 1751; Gentry, 42 Cal. 4th at 453–54. Moreover, several courts since Concepcion have held that Concepcion overruled Gentry. See, e.g., Murphy v. DIRECTV, 2011 WL 3319574, \*4 (C.D. Cal. Aug. 2, 2011) (holding that “it is clear to the Court that Concepcion overrules Gentry”); Valle, 2011 WL 3667441 at \*6 (“[I]n light of Concepcion, Gentry is no longer good law.”); Morse v. ServiceMaster Global Holdings Inc., 2011 WL 3203191, \*3 n.1 (N.D. Cal. July 27, 2011) (explaining that “Concepcion rejected the reasoning and precedent behind Gentry”). The two cases that plaintiffs cite in support of their position, Sutherland and De Souza, were both decided before Concepcion and therefore of questionable precedential value.

Furthermore, although Concepcion involved a consumer contract and not employee grievances, the Supreme Court has indicated that arbitration might be “of particular importance in employment litigation.” Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001) (“Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often

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Supreme Court analyzed an arbitration agreement that was “silent” as to class arbitration, and held that an arbitration panel exceeded its authority in compelling class arbitration when there was no contractual basis for concluding that the parties agreed to do so. 130 S.Ct. at 1764, 1775. Importantly, however, the Supreme Court declined to hold that an arbitration agreement must *expressly* state that the parties agree to class arbitration in order to enforce class arbitration; rather, the “silence” found in Stolt-Nielsen flowed from a mutual stipulation by the parties that they had reached “no agreement” on the issue. Id. at 1776 n.10 (“We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class arbitration.”). The Supreme Court opined that an arbitration agreement may contain an “implicit” agreement to authorize class arbitration, but that an implicit agreement may not be “infer[red] solely from the fact of the parties’ agreement to arbitrate.” Id. at 1775. The question, therefore, is “whether the parties *agreed to authorize* class arbitration,” and because the parties in Stolt-Nielsen had stipulated to the contrary, “it follows that the parties cannot be compelled to submit their dispute to class arbitration.” Id. (emphasis in original). Here, the Arbitration Agreement is silent as to class action waiver and, unlike Stolt-Nielsen, there has been no stipulation between the parties as to their intent; accordingly, it is impossible to know whether the parties “agreed to authorize class arbitration.” Id.; compare Mot. at 9 (“plaintiffs must be compelled to arbitrate on an individual basis”) with Opp’n at 13 (disputing whether plaintiffs agreed to waive class arbitration). The Second Circuit recently adopted this exact reading of Stolt-Nielsen. See Jock v. Sterling Jewelers Inc., 646 F.3d 113, 119–121 (2d Cir. 2011).

Whether the parties implicitly agreed to accept or waive class arbitration is a question for the arbitrator to decide. In Green Tree Financial Corp. v. Bazzle, the Supreme Court was “faced at the outset with a problem concerning the . . . silence [of a contract between a commercial lender and its customers]. Are the contracts in fact silent, or do they forbid class arbitration as petitioner . . . contends?” 539 U.S. 444, 447 (2003) (plurality op.). The court held that although it is “important” to resolve that question,

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involves smaller sums of money than disputes concerning commercial contracts.”). Indeed, the Supreme Court has been “clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context.” Id.

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“we cannot do so, not simply because it is a matter of state law, but also because it is a matter for the arbitrator to decide.” *Id.* In Green Tree, the parties agreed to arbitrate “all claims or controversies” arising out of their respective contracts. *Id.* at 451. “Hence, the parties seem to have agreed that an arbitrator, not a judge, would answer the relevant [contract interpretation] question.” Green Tree, 539 U.S. at 451–42 (citing First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995) (holding that arbitration is a “matter of contract”)). Furthermore, “if there is doubt about . . . the scope of arbitrable issues . . . we should resolve that doubt in favor of arbitration.” Green Tree, 539 U.S. at 452 (internal quotation marks and citation omitted).<sup>7</sup>

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<sup>7</sup>Defendants cite two cases in support of their position that the Court—and not the arbitrator—should compel plaintiffs to individual arbitration. First, in Bear Stearns & Co. v. N.H. Karol & Assoc. Ltd., the court rejected defendants’ contention that “the issue of whether they have chosen a proper forum for arbitration is an issue properly decided by the arbitrator rather than the court.” 728 F. Supp. 499, 501 (N.D. Ill. 1989). The court noted that the question “is appropriate for judicial consideration” because “an arbitrator who is improperly elected has no power to resolve a dispute between the parties” and “an arbitrator can not be the judge of his own authority.” *Id.* However, the court also noted that the arbitrator *is* charged with interpreting “the agreement of the parties.” *See id.* Here, unlike Bear Stearns, defendants are challenging the interpretation of the Arbitration Agreement, which is better suited for the arbitrator to decide. *See Green Tree*, 539 U.S. at 451–52 (holding that an arbitrator should interpret the applicable contract provisions).

Second, in In re California Title Ins. Antitrust Lit., the court discussed the arbitration agreement’s silence as to class actions in the context of whether defendants had waived their right to compel arbitration. 2011 WL 2566449, \*3 (N.D. Cal. June 27, 2011). The court read Stolt-Nielsen as precluding courts from compelling class arbitration absent an express agreement to do so. *Id.* However, the Second Circuit recently clarified Stolt-Nielsen and held that an arbitration agreement *may* contain an implicit agreement for class-wide arbitration, which is a matter for the arbitrator to decide. Jock v. Sterling Jewelers Inc., 646 F.3d 113, 119–121 (2d Cir. 2011); Green Tree, 539 U.S. at 451–52; *see also Stolt-Nielsen*, 130 S.Ct. at 1775–76. The Court finds the reasoning set forth in Sterling Jewelers to be persuasive.

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Here, like the agreement in Green Tree, the parties agreed to arbitrate “all claims or controversies” arising out of their contract. Runyan Decl. Exh. A, ¶ 1. In other words, “the parties seem to have agreed that an arbitrator” would resolve any contract interpretation questions. Green Tree, 539 U.S. at 451–52. Accordingly, the Court finds that the arbitrator must determine whether the parties implicitly agreed to permit or waive class arbitration.<sup>8</sup>

**4. Unconscionable Provisions of the Contract**

Plaintiffs contend that ¶ 10 of the Arbitration Agreement contains “special judicial review provisions in contravention of the FAA,” and that “they should be stricken and severed from the agreement.” Opp’n at 27. In pertinent part, ¶ 10 of the Arbitration Agreement provides:

The arbitrator’s decision shall be final and binding upon the parties except that both parties shall have the right to appeal to an appropriate court with jurisdiction errors of law in the decision rendered by the arbitrator.

Runyan Decl. Exh. A, ¶ 10.

Plaintiffs argue that permitting a court to rule on an arbitrator’s interpretation of

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<sup>8</sup>Defendants separately contend that permitting class arbitration would violate § 5 of the FAA. Mot. at 13–17. Section 5 provides that if parties agree to “a method of naming or appointing an arbitrator . . . such method shall be followed.” 9 U.S.C. § 5. Defendants contend that the present Arbitration Agreement permits both sides to participate in the arbitrator’s selection, and “[f]oisting a single arbitrator on Defendants for the collective claims of every putative class member . . . would deprive Defendants . . . of their right to select an individual arbitrator for each individual’s set of claims.” Mot. at 16; Reply at 23. Defendants miss a critical issue, however, which is that if the arbitrator determines that the Agreement permits class arbitration, then defendants would *not* be permitted to “select an individual arbitrator for each individual’s set of claims” pursuant to the Arbitration Agreement’s meaning. Accordingly, the Court rejects defendants’ § 5 preemption argument.

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the law exceeds the scope of 9 U.S.C. § 10(a). Section 10(a) provides narrow grounds for a court to vacate an arbitration award:

- (a) [A court may vacate an arbitration award]—
- (1) where the award was procured by corruption, fraud, or undue means;
  - (2) where there was evident partiality or corruption in the arbitrators, or either of them;
  - (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
  - (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

The Ninth Circuit has held that a court may only vacate an arbitrator's award if the arbitrator "manifest[ly] disregard[s] the law," which means "something more than just error in law or failure on part of arbitrators to understand or apply law; it must be clear from the record that arbitrators recognized applicable law and then ignored it." Michigan Mut. Ins. Co. v. Unigard Sec. Ins. Co., 44 F.3d 826, 832 (9th Cir. 1995). Furthermore, the Ninth Circuit has explicitly held that "private parties have no power to determine the rules by which federal courts proceed" under the FAA. Kyocera Corp. v. Prudential-Bache Trade Serv., Inc., 341 F.3d 987, 1000 (9th Cir. 2003). "[A] federal court may only review an arbitral decision on the grounds set forth in the Federal Arbitration Act. Private parties have no power to alter or expand those grounds, and any contractual provision purporting to do so is, accordingly, legally unenforceable." Id.

Accordingly, to the extent ¶ 10 of the Arbitration Agreement purports to expand judicial review of the arbitrator's agreement, it is unenforceable. Id. However, its plain language does not necessarily expand beyond the "manifest disregard" standard set forth in Unigard. See Runyan Decl. Exh. A, ¶ 10 (parties may appeal "errors of law" to a court). The Court therefore reads ¶ 10 to mean the parties may appeal errors of law only

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if it rises to the level of “manifest disregard of the law,” meaning “it must be clear from the record that arbitrators recognized applicable law and then ignored it.” Unigard, 44 F.3d at 832.

**D. Whether Plaintiffs Have Waived Their Right to Select an Arbitrator or Arbitration Forum**

Defendants contend that in the event the Court compels arbitration, plaintiffs have “waived the right to select the [arbitration forum] and participate in selecting the arbitrator.” Mot. at 17. According to defendants, plaintiffs failed to respond to a July 6, 2011 formal demand that plaintiffs immediately proceed to arbitration and begin selecting an arbitrator. Id. Defendants assert that plaintiffs’ “inaction” has caused them to waive their rights under the Agreement. Id.

The Court finds that plaintiffs have not waived their rights to participate in choosing the arbitrator. Plainly, plaintiffs did not respond to defendants’ letter because they awaited this Court’s ruling on whether defendants waived their right to compel arbitration. Pursuant to the FAA, this Court must “require the court to enforce the arbitration agreement in accordance with its terms.” Chiron, 207 F.3d at 1130. Here, the Arbitration Agreement states that “the aggrieved party must file a written demand” with one of the prescribed dispute resolution providers in the event they seek to arbitrate claims. Runyan Decl. Exh. A, ¶ 4.

Accordingly, plaintiffs have not waived their rights under the Agreement to choose which provider in which to file its grievance.

**V. CONCLUSION**

For the foregoing reasons, the Court GRANTS Countrywide’s motion to compel arbitration. It is up to the arbitrator to determine whether class or individual arbitration is appropriate. The proceedings are STAYED and the Clerk is directed to remove this action from the Court’s civil active list pending completion of arbitration. The Court ORDERS the parties to file a joint status report regarding the posture of the arbitration every one hundred and eighty (180) days and within twenty (20) days of the arbitrator’s

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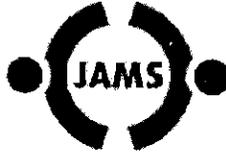
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final decision. If the matter is resolved by settlement, or in the event plaintiffs elects not to pursue arbitration, they shall promptly cause this action to be dismissed.

IT IS SO ORDERED.

Initials of Preparer RS 00 : 00

**EXHIBIT F**



THE RESOLUTION EXPERTS®

## Demand for Arbitration Before JAMS

TO RESPONDENT: COUNTRYWIDE FINANCIAL CORPORATION, BANK OF AMERICA CORPORATION,  
COUNTRYWIDE HOME LOANS, INC. and DOES 1-10, inclusive  
(Name of the Party on whom Demand for Arbitration is made)

(Address) MCGUIREWOODS LLP, 1800 Century Park East, 8th Floor

(City) Los Angeles

(State) CA

(Zip) 90067

(Telephone) (310) 315-8200

(Fax) (310) 315-8210

(E-Mail) mkane@mcguirewoods.com

Representative/Attorney (if known): Matthew C. Kane, Esq.

(Name of the Representative/Attorney of the Party on whom Demand for Arbitration is made)

(Address) MCGUIREWOODS LLP, 1800 Century Park East, 8th Floor

(City) Los Angeles

(State) CA

(Zip) 90067

(Telephone) (310) 315-8200

(Fax) (310) 315-8210

(E-Mail) mkane@mcguirewoods.com

FROM CLAIMANT (Name): DOMINIQUE WHITAKER and JOHN WHITE

(Address) LAW OFFICE OF SHAUN SETAREH, 9454 Wilshire Boulevard, Penthouse Suite

(City) Beverly Hills

(State) CA

(Zip) 90212

(Telephone) (310) 888-7771

(Fax) (310) 888-0109

(E-Mail) shaun@setarehlaw.com

Representative/Attorney of Claimant (if known): Shaun Setareh, Esq.

(Name of the Representative/Attorney for the Party Demanding Arbitration)

(Address) LAW OFFICE OF SHAUN SETAREH, 9454 Wilshire Boulevard, Penthouse Suite

(City) Beverly Hills

(State) CA

(Zip) 90212

(Telephone) (310) 888-8200

(Fax) (310) 888-0109

(E-Mail) shaun@setarehlaw.com

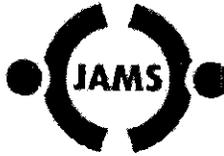
### NATURE OF DISPUTE

Claimant hereby demands that you submit the following dispute to final and binding arbitration (a more detailed statement of the claim(s) may be attached):

PLEASE SEE PLAINTIFFS' COMPLAINT ATTACHED AS "EXHIBIT A"

### ARBITRATION AGREEMENT

This demand is made pursuant to the arbitration agreement which the parties made as follows (cite location of arbitration provision & attach two (2) copies of entire agreement).



THE RESOLUTION EXPERTS®

## Demand for Arbitration Before JAMS

### CLAIM & RELIEF SOUGHT BY CLAIMANT

Claimant asserts the following claim and seeks the following relief (include amount in controversy, if applicable): PLEASE SEE PLAINTIFFS' COMPLAINT ATTACHED AS "EXHIBIT A"

### RESPONSE

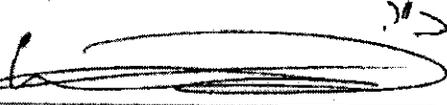
Respondent may file a response and counter-claim to the above-stated claim according to the applicable arbitration rules. Send the original response and counter-claim to the claimant at the address stated above with two (2) copies to JAMS.

### REQUEST FOR HEARING

JAMS is requested to set this matter for hearing at: LOS ANGELES  
(Preferred Hearing Location)

### ELECTION FOR EXPEDITED PROCEDURES (COMPREHENSIVE RULE 16.1)

By checking this box  Claimant requests that the Expedited Procedures described in JAMS Comprehensive Rules 16.1 and 16.2 be applied in this matter. Respondent shall indicate not later than 7 days from the date this Demand is served whether it agrees to the Expedited Procedure.

Signed (Claimant): 

Date: 9-30-12

(may be signed by an attorney)

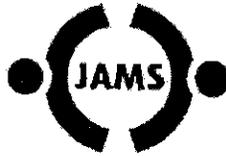
Print Name: Shan Setareh

Please include a check payable to JAMS for the required initial, non-refundable \$125 per party deposit to be applied toward your Case Management Fee and submit to your local JAMS Resolution Center.

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Effective 10/20/2011

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THE RESOLUTION EXPERTS®

## Demand for Arbitration Before JAMS

COMPLETION OF THIS SECTION IS REQUIRED FOR CLAIMS INITIATED IN CALIFORNIA

A. Please check here if this  IS or  IS NOT a CONSUMER ARBITRATION as defined by California Rules of Court Ethics Standards for Neutral Arbitrators, Standard 2(d) and (e):

"Consumer arbitration" means an arbitration conducted under a pre-dispute arbitration provision contained in a contract that meets the criteria listed in paragraphs (1) through (3) below. "Consumer arbitration" excludes arbitration proceedings conducted under or arising out of public or private sector labor-relations laws, regulations, charter provisions, ordinances, statutes, or agreements.

- 1) The contract is with a consumer party, as defined in these standards;
- 2) The contract was drafted by or on behalf of the non-consumer party; and
- 3) The consumer party was required to accept the arbitration provision in the contract.

"Consumer party" is a party to an arbitration agreement who, in the context of that arbitration agreement, is any of the following:

- 1) An individual who seeks or acquires, including by lease, any goods or services primarily for personal, family, or household purposes including, but not limited to, financial services, insurance, and other goods and services as defined in section 1761 of the Civil Code;
- 2) An individual who is an enrollee, a subscriber, or insured in a health-care service plan within the meaning of section 1345 of the Health and Safety Code or health-care insurance plan within the meaning of section 106 of the Insurance Code;
- 3) An individual with a medical malpractice claim that is subject to the arbitration agreement; or
- 4) An employee or an applicant for employment in a dispute arising out of or relating to the employee's employment or the applicant's prospective employment that is subject to the arbitration agreement.

If Respondent disagrees with the assertion of Claimant regarding whether this IS or IS NOT a CONSUMER ARBITRATION, Respondent should communicate this objection in writing to the JAMS Case Manager and Claimant within seven (7) calendar days of service of the Demand for Arbitration.

B. If this is an EMPLOYMENT matter, Claimant must complete the following information:

Effective January 1, 2003, private arbitration companies are required to collect and publish certain information at least quarterly, and make it available to the public in a computer-searchable format. In employment cases, this includes the amount of the employee's annual wage. The employee's name will not appear in the database, but the employer's name will be published. Please check the applicable box below:

Annual Salary:

- |   |   |
|---|---|
| <input type="checkbox"/> Less than \$100,000    | <input checked="" type="checkbox"/> More than \$250,000 |
| <input type="checkbox"/> \$100,000 to \$250,000 | <input type="checkbox"/> Decline to State               |

C. In California, consumers (as defined above) with a gross monthly income of less than 300% of the federal poverty guidelines are entitled to a waiver of the arbitration fees. In those cases, the respondent must pay 100% of the fees. Consumers must submit a declaration under oath stating the consumer's monthly income and the number of persons living in his or her household. Please contact JAMS at 1-800-352-5267 for further information.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 1901 Avenue of the Stars, Suite 1600, Los Angeles, CA 90067-6055.

On November 12, 2012, I served true copies of the following document(s) described as **DECLARATION OF GREGG A. FISCH IN SUPPORT OF RESPONDENTS' MOTION FOR SUMMARY JUDGMENT** on the interested parties in this action as follows:

Joshua D. Buck, Esq.  
josh@thiermanlaw.com  
Thierman Law Firm P.C.  
7287 Lakeside Drive  
Reno, NV 89511  
Tele: 775-284-1500  
Fax: 775-284-1606

Paul Cullen, Esq.  
paul@cullenlegal.com  
The Cullen Law Firm  
29229 Canwood Street  
Suite 208  
Agoura Hills, CA 91301-1515  
Tele: 626-744-9125  
Fax: 626-744-9436

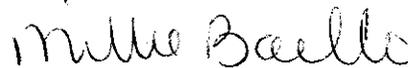
**BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

**BY FEDEX:** I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

**BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s) to be sent from e-mail address mbaello@shepparmullin.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 12, 2012, at Los Angeles, California.



\_\_\_\_\_  
Millie Baello