FILED
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
JAN 07 2004
KENNETH S. GARDNER, CLERK
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UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

IN RE: CONSECO, INC. et al.,	)	CHAPTER 11
	)	
Debtors,	)	CASE NO. 02B49675
	)	(JOINTLY ADMINISTERED)
	)	
	)	Hon. Carol A. Doyle
	)	
	)	Date: January 14, 2004
	)	Time: 11:00 a.m.
	)	Courtroom: The Hon. Carol A. Doyle
	)	

FLOYD HALL AND NANCY HALL'S NOTICE OF OPPOSITION AND OPPOSITION TO PROPOSED ESTIMATION PROCEDURES OF DEBTOR CFC

Come now FLOYD HALL and NANCY HALL (hereinafter collectively referred to as "HALL"), a creditor of the above-named Debtor, and oppose the Finance Company Debtor's proposed estimation procedures as follows:

I. THE MOTION SHOULD BE DENIED OR CONTINUED AS IT IS UNTIMELY.

Pursuant to the Court's Order re Case Management and Administrative Procedures, any Request for Relief shall be served no less than ten (10) business days prior to the date set for hearing, but if served by mail, no less than thirteen (13) business days prior to hearing. The motion in this case was served by mail on December 30, 2003. Aside from the obviously convenient holiday timing, no doubt calculated to minimize objections, the motion is untimely by any calculation. January 1, 2004 was a holiday. Presumably, January 2, 2004 was a court holiday as well, and was a holiday for virtually every business and law office. Thus, the motion was served by mail, ten business days prior to the hearing. Even if January 2 is not considered a holiday, the motion remains untimely.

This creditor is doubly prejudiced by the timing. HALL's counsel is in San Diego, California, and did not receive the motion until January 5, 2004, a day which was already booked. The HALL's, to the extent they could have offered appropriate affidavits are out of the country. Prior to departing, they confirmed with counsel that nothing was happening and it was safe to leave. They are in the Philipines and cannot be reached. Even if they were home, they reside in Northern California, and it would be difficult to coordinate their statements with literally two days' notice.

Accordingly, the motion should not be considered, pursuant to the Court's Order of January 14, 2003. The matter should be reset accordingly.

II. THE HALL CLAIM SHOULD BE SUBJECT TO THE COURT'S ABSTENTION.

Whether or not the estimation procedures are appropriate as to this creditor will be addressed below. However, the HALLS will separate file a motion requesting abstention or, in the alternative, compelling arbitration. As to this creditor, the argument should be considered at this stage.

A) STATEMENT OF THE CASE & STATEMENT OF FACTS

The HALLS filed a lawsuit against CONSECO in the Superior Court of San Mateo County, California, on July 17, 2001. (Exhibit 1; See also Amended Complaint - Exhibit 2) The complaint alleged the following causes of action: Fraud, Breach of Fiduciary Duties, Negligent Misrepresentation, Negligence, Negligent Supervision, Violation of the Unruh Civil Rights Act and Violation of the California Unfair Business Practices Act. No Federal claims are alleged.

The salient facts giving rise to those claims are as follows:

Plaintiff FLOYD HALL is presently 56 years old and thus in the protected age group. Plaintiff NANCY HALL is currently 67 years old (but will be 68 within days of the instant hearing) and thus in a protected age group. In addition, Plaintiff NANCY HALL is Filipino and thus protected under the Unruh Act by virtue of her race and national origin, as will be further

alleged below. Plaintiff FLOYD HALL is a Black African American, and thus also protected by virtue of his race and national origin, as further alleged below.

The HALLS entered into relationship with MICHELLE REYES, while she was employed with another Lender, Associates Home Equity Services. ASSOCIATES was also a named Defendant in the State Court action, but all claims against them have been resolved.

Prior to meeting REYES, the HALLS had a mortgage on their home obtained through Bank of America, secured by a First Deed of Trust, together with another loan, secured by a Second Deed of Trust, in the aggregate amount of $197,500. The total amount of their monthly payments from these two loans as at the time they met Defendant REYES was $2,029.00. The note secured by the Second Trust Deed would have been paid off by the year 2012 and the note secured by the First Trust Deed would have been paid off by the year 2026.

In 1998, when they were 51 and 61, respectively, Mr. and Mrs. Hall were looking to obtain better terms and to consolidate these two loans. This is when they met REYES.

REYES was aware that, because of her age and difficulty with English, Plaintiff NANCY HALL was particularly vulnerable to repose trust in Reyes, and to fall prey to her influence and ultimate deception. REYES became aware that Plaintiff completely entrusted REYES to take care of her home financing needs. Senior citizens and minorities are typical targets of unfair lending practices.

On or about August 31, 1998, REYES, through ASSOCIATES, refinanced the HALLS' home. The net effect of the refinance was to reduce the total monthly payment to $1,949.26. On its face, this appeared to be a good deal. However, REYES misrepresented appropriate charges and available finance rates. Despite the small decrease in HALLS' monthly payments, the loan principal increased to more than $222,000. Furthermore, REYES and ASSOCIATES helped themselves to loan fees in the amount of $12,168 and additionally sold unnecessary and overpriced credit life insurance to the HALLS in the amount of $6,250. Despite the almost $30,000 increase in the principal balance of the loan, Plaintiffs received no cash from this transaction. Expert testimony would question the propriety of this first loan, given the absence of cash to the borrowers, but, because of the arguable benefit of a slight decrease in payment, it

was of arguable benefit. There is no question that the fees were excessive. This is relevant background because REYES is the real culprit here. Nonetheless, as indicated above, claims against ASSOCIATES have been resolved.

Within one year, REYES, still working for ASSOCIATES, convinced the Plaintiffs that they needed to again refinance their home. As a result, on October 13, 1999, ASSOCIATES wrote a new loan, whereby it paid off its old principal and put Plaintiffs in a new 30 year fixed loan at an interest rate 2% higher than the prior loan. ASSOCIATES was paid the balance of $223,000 on the previous loan. The HALLS were again sold credit life insurance (since the prior note had been paid off, the prior credit life policy no longer applied) in the total amount of $6,250 and charged loan fees approaching $10,000. The Halls received cash from this transaction in the approximate amount of $11,000. As a result of this loan, Plaintiffs' monthly payment increased to $2,478.04 and the loan balance increased to $253,350.57. Expert testimony would establish that the loan fees were excessive and that this loan, in light of the terms, conditions, increased principal and increased monthly payment, was of no benefit to the HALLS, breached fiduciary obligations, should not have been written, and was in fact, seriously detrimental to the HALLS.

Shortly thereafter, Defendant REYES obtained employment with Defendant CONSECO. By February 24, 2000, approximately four months after the prior transaction, REYES convinced the Plaintiffs that they needed to refinance their home again. A new loan was written at a still higher interest rate (12.24%) with a monthly payment of $3,062.84 and a 20 year balloon payment. Despite the nearly $40,000 increase in the loan principal, Plaintiffs received no money from this transaction. Instead, the increase was made up for by loan fees, points, alleged costs and a prepayment penalty of more than $11,000. Expert testimony would establish that this loan was fraudulent, that all standards of real estate lending were violated, that it did not benefit the HALLS, violated fiduciary duties, should never have been written and the charged fees were excessive.

Because of the new monthly obligation, which had now risen by more than $1,000, the HALLS fell into desperate financial straits and again turned for help to REYES. On September

26, 2000, REYES convinced the HALLS that, in order to extricate themselves from these problems, they needed another new loan. Predictably, the HALLS followed this scurrilous and fraudulent advice. This time the principal rose to $346,750. While the interest rate went down to 10.89%, the loan was still subject to a 20 year balloon and Plaintiffs were subjected to a monthly payment of $3,273.39. CONSECO paid itself nearly $299,000, a portion of which included prepayment penalties, additional unreasonable costs it claimed to have incurred, and took fees in excess of $26,000. From this loan, the HALLS were paid additional cash of $17,862.49. Again, expert testimony would establish that even writing this loan violated all underwriting principles and CONSECO's fiduciary duties, and that the loan was excessive.

The practice of continually "flipping" or "churning" of home mortgages is commonly referred to as "predatory lending." Expert testimony would establish that, the above constitutes predatory lending. Indeed, the testimony would be that the above facts constitute some of the most heinous churning practices imaginable. Further, the elderly and minorities are frequently the target of such practices, particularly foreign born minorities, such as Mrs. Hall, who handled all aspects of these transactions.

In short, Ms. Reyes knew she had a mark, and abused the HALLS to the point where they are barely staving off resort to the Bankruptcy Courts.

As a result, the HALLS have suffered significant economic damage. However, they have both suffered severe emotional distress, particularly Mrs. Hall, who has had gastro-intestinal problems, suffered fainting spells and sought medical treatment for her emotional injuries.

The claims made in this case all sound in tort and seek special and general damages for emotional distress. Furthermore, as noted above, the HALLS sued under the Unruh Civil Rights Act, a California statute which provides:

> (a) This section shall be known, and may be cited, as the Unruh Civil Rights Act.
> (b) All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of

every kind whatsoever. (California Civil Code Section 51)

The statue further provides:

> Whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51, 51.5, or 51.6, is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars ($4,000), and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51, 51.5, or 51.6. (California Civil Code Section 52)

The complaint also alleges the following fraudulent representations: (1) that the finance rates she was obtaining were fair and reasonable; (2) that the points being charged by her were fair and reasonable; (3) that the insurances that were being sold were advisable and reasonable and that they were conditions of the loan; (4) that the penalties being paid were simply a cost of doing business and that they needed to be incurred; (5) that the arrangements being entered into would be financially beneficial to the Plaintiffs; and (6) that the refinancing arrangements were necessary, reasonable and appropriate for someone in Plaintiffs' circumstances, and that the arrangements would solve their economic worries. The complaint adds that CONSECO fraudulently breached fiduciary duties of disclosure with respect to various loan terms, fees, risks and drawbacks.

Upon being served with this complaint, CONSECO filed a motion to compel arbitration (Exhibit 3), based on the operative mortgage agreement, the applicable portion of which is cited in CONSECO's motion (Exhibit 3, p. 2). The HALLS opposed the motion, contending that the arbitration agreement was an unconscionable and unilateral, and argued further, pursuant to California law that the agreement was unenforceable insofar as it might require equal payment by the HALLS for the cost of arbitration. (Exhibit 4) It was the opinion

of counsel for the HALLS that the Plaintiff had a greater likelihood of prevailing, or of at least reforming the agreement.

Accordingly, the parties, through their counsel, entered into a new arbitration agreement, articulating all issues with specificity, down to forum selection, selection of the arbitrator, the conduct of discovery and making CONSECO responsible for arbitration costs. (Exhibit 5) The HALLS seek to have that agreement enforced.

In reliance on this agreement, the HALLS attempted to conduct discovery, although discovery was delayed by CONSECO. At the time this action was filed, the HALLS had set depositions for the Person(s) Most Knowledgeable at CONSECO regarding the HALL transactions, as well as MICHELLE REYES. (Exhibits 6 and 7, respectively)

Of course, because of these proceedings, those depositions were never held. Those depositions were agreed to by the arbitration agreement, and remain necessary. If experts are to be designated by CONSECO, then their depositions would be necessary as well. With or without these depositions, there is no reason this matter could not be arbitrated within sixty (60) to ninety (90) days.

The HALLS' case will require testimony from the HALLS relative to liability and damages. It is critical that testimony regarding emotional distress be through live testimony. Since a significant part of the claim will be for emotional distress, brief supporting witnesses would be anticipated. The case will also require expert testimony on liability and damages. At least one, if not two, experts will be required. There are also medical records which may require testimony from a physician.

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B. THIS COURT LACKS JURISDICTION TO HEAR THE HALL CLAIMS.

Pursuant to 28 U.S.C. Section 157, this matter is not a "core proceeding." It involves a personal injury claim. Liquidation or estimation of personal injury claims are specifically delineated as "non-core." (28 U.S.C. Section 157(b)(2)(B))

In Leatham v. Von Volmar, 317 B.R. 561 (N.D. IL 1998) motion to amend denied 218 B.R. 890, this Court ruled that personal injury claims should not be narrowly construed as involving only bodily injury, and practice abstention where significant emotional injury was alleged. (Id. at 566) The same is present here. While there are significant economic damages in this action, it is not exclusively, nor perhaps even predominantly, about economic damages.

Similarly, civil rights claims are considered claims for personal injuries over which this court lacks jurisdiction. (In re Boyer, 90 B.R. 313, 317-318 (Bkrtcy N.D.N.Y. 1988; See also In Re Gary Brew Enterprises, 198 B.R. 616 (Bkrtcy. S.D.CA 1996) The gravamen of all the causes of action alleged in the complaint related to the age, ethnicity and age of the Plaintiffs. In facts alleged as pertinent to all claims, it is alleged that the illegal lending practices in question are targeted toward the elderly and minorities. The HALLS specifically alleged a violation of their civil rights under California law (the Unruh Civil Rights Act). This claim, which allows for all possible damages, including emotional distress, penalties and attorney's fees, are not taken lightly.

C. THE COURT SHOULD ABSTAIN FROM HEARING THE HALL CLAIMS.

Under 28 U.S.C. Section 1334, this Court may consider whether to abstain from hearing this claim. This claim requires abstention per 28 U.S.C. Section 1334(c)(2) as this action was already commenced and long since pending in the state court, and could not have

otherwise been commenced in the federal courts. The claims in question arise exclusively under state law, and can be promptly adjudicated, particularly in light of the arbitration agreement.

Whether or not the Court finds all factors present for mandatory abstention, it should still consider permissive abstention. (Citicorp Savings of Illinois v. Chapman, 132 BR 153 (Bankr. N.D. IL 1991). Permissive factors also weigh in favor of abstention. The following factors are relevant:

1. Abstention, particularly by way of enforcing the operative arbitration agreement, will be an efficient way to resolve this claim and will not negatively impact the administration of the estate;

2. The claim arises exclusively under California law;

3. The state court action is long since filed;

4. There is no federal jurisdictional basis outside of 28 U.S.C. Section 1334;

5. There is no inextricable relationship between this claim and the main bankruptcy case;

6. The prompt arbitration of the case, with enforcement in this Court can be accomplished very easily;

7. Arbitration will relieve this Court's docket;

8. There is no forum shopping at work here;

9. There is a non-debtor party, MICHELLE REYES, in the underlying proceeding;

10. The state court case carries with it the right to a jury trial, although that has been waived, but only in reliance upon the specifically negotiated arbitration agreement.

But for that agreement, and concessions thereunder, Plaintiffs would have insisted that their right to a jury trial be preserved.

In Brown v. Hoffman, 56 B.R. 487 (Bankr. D. Md. 1985), the Court found abstention appropriate where counterclaims were asserted against the lender in a mortgage foreclosure, where both federal and state claims were alleged. Initially, the court determined that abstention was proper because of the right of jury trial, then determined that the state court was better suited than the District Court to hear the case.

D. THE COURT SHOULD ABSTAIN IN FAVOR OF ARBITRATION.

Bankruptcy Courts should honor arbitration agreement, as arbitration is favored in law. (Dean Witter Reynolds v. Byrd, 470 U.S. 213 (1985); Shearson/American Express v. McMahon, 482 U.S. 220 (1987) When it was convenient, CONSECO sought enforcement of the arbitration provision and claimed the matter arose under the Federal Arbitration Act. That agreement, i.e. the loan agreement, remains in force, is being serviced and CONSECO is receiving the benefit of it every month.

The question is whether arbitration and the policies behind it would, in any given instance, conflict with the principles behind the bankruptcy laws. It is clear that, in non-core proceedings, the court may lack discretion to deny enforcement of an arbitration agreement. (Hays & Co. v. Merrill, Lynch, et al., 885 F. 2d 1149, 1156-1157 (3rd Cir. 1989) Even in core proceedings, the F.A.A. does not necessarily conflict with the purposes of the Bankruptcy Code. (Matter of National Gypsum Co., 118 F. 3d 1056, 1067 (5th Cir. 1997); In re U.S. Lines, 199 B.R. 465, 473-475 (S.D.N.Y. 1996) The burden is on the party opposing arbitration to demonstrate conflict with the Code. (National Gypsum, supra at 1156-1157).

Under the unique circumstances of this case, and the objections to the proposed estimation procedures, issues regarding jurisdiction, classification as a non-core proceeding and abstention, arbitration, as agreed, provides the perfect alternative to estimating or otherwise trying the claims, and can be effectuated with minimal investment of time and money.

III. THE ESTIMATION PROCEDURES DO NOT AFFORD DUE PROCESS.

The proposed procedures allows the Debtor to select a date at its convenience, and imposes no deadline for scheduling of any hearing. It can set a date as much as thirty (30) days prior to sending notice. The notice then issued gives the creditor thirty (30) days notice of the hearing, but requires submission of all opposition, including evidence and affidavits within seven (7) days.

This notice procedure, which are a theoretical substitute for a jury trial provide insufficient notice and allow the debtor to exercise surprise in the preparation. Should the motion be granted, the Debtor could send notice of a hearing immediately upon signing of a motion, then require creditors, most of whom are out of state, including this objecting creditor, to marshal affidavits in lieu of testimony, and file originals of the same with the court, together with any and all evidence. In short, the procedure gives the Debtor a significant notice advantage, and does not provide adequate response time with respect to any claim, much less this Creditor's. As is apparent from the timing and notice of this hearing, Debtors are not reluctant to exercise every possible notice advantage.

Notably, the motion does not even attempt to describe or categorize the various claims, which presumably run the gamut in amounts, facts and legal theories. Clearly, these procedures, if acceptable for any claim, are not acceptable for all. It is absolutely unacceptable in the instant matter.

Following notice, all matters are submitted to the court, within this very narrow window of time. It is proposed that briefs not exceed fifteen (15) pages, but the proposal chips away at the possible content of this limitation, requiring that damages be articulated in the brief, together with a witness list (duplicative in light of the fact that all witness statements must be submitted). It is not unusual to propose a page limit, and put the burden on the briefing party to request relief from the limitation, but the fifteen page limitation, in this case, would be insufficient in light of the history, facts, amount of documentary evidence and multiple causes of action which are based on the law of another state. These creditors suspect the same is true for many creditors.

The Debtor then is given an opportunity to reply, and provides for no surreply, thus allowing the party without the burden to have the first and last word, effectively reversing all rules of civil procedure. Reply by the Debtor should either be disallowed, or the Creditor given an opportunity to respond to the Debtor's reply.

The proposed procedures allow a total of 1.5 hours for argument and presentation of evidence. It is unclear if this includes the proposed thirty (30) minutes for cross-examination, but presumably it does not. In the instant case, that amount of time is clearly insufficient and does a disservice to the significance of the claim of the HALLS.

It is proposed that there be only one witness, and that on the issue of damages. The Debtor has objected to the claim, claiming there is no liability. Liability is apparently a contested issue. It is the understanding of HALL'S counsel that CONSECO will claim that REYES made full disclosures and did not attempt to persuade the HALLS to enter into these loan agreements, but that NANCY HALL insisted. The credibility of these witnesses is essential to the appropriate disposition of this claim. Testimony, even streamlined, from these

two witnesses, would easily exceed 1.5 hours, exclusive of cross-examination. In addition, it is the HALLS position that, irrespective of the conclusion as to what transpired between them and REYES, these loans should not have been underwritten. They are entitled to call underwriting witnesses in establishing this claim.

Furthermore, as already indicated above, the issue of damages will require live testimony from the creditors, as well as from at least one expert. The procedures are insufficient, deprive the HALLS of a fair hearing, deprive them of the opportunity to properly establish liability, document damages, call hostile witnesses, present expert testimony, and have the benefit of live testimony.

Furthermore, the proposed procedures, as proffered, are confusing and ambiguous. It is apparent that the time limits are as described above, but the proposal and the proposed order then reference more than one hearing date, proposes exchanges, dates for deposition, all within a very limited period of time.

By way of further example, the motion does not describe discovery opportunities, but the proposed order reference a time limit to make "damage witnesses available," presumably so that depositions can be taken. It is unclear whether this refers to the proposed live witnesses, or all damage witnesses, including those who submit an affidavit. No other discovery is referenced, though this particular case requires further discovery. CONSECO has had the benefit of taking the deposition of NANCY HALL in the state court matter, but avoided giving the HALLS the corresponding benefit.

The purpose of this proposal is evident. The procedures are so onerous that the intent is to make it impossible to present, or at least to adequately present claims, so that lowball settlements can be negotiated, or claims can evaporate.

IV. ALTERNATIVE ESTIMATION PROCEDURES ARE SUPERIOR.

The Halls, of course, propose that the best manner of resolving their dispute is the contractual arbitration negotiated by respective counsel. With or without such an order, the HALLS oppose being subject to estimation proceedings, but more vigorously oppose the specific procedures proposed. They are deficient in all respects, but particularly so as to them. Should the Court be inclined to impose estimation procedures, then the HALLS propose the following, at least as to them:

1. That dates be set within the next sixty (60) days for all claims, subject to permitting the affected creditors to object to any date set, and to provide cut-off dates for bringing motions to continue. No estimation hearing shall be heard less than 120 days from the date of this hearing.

2. That the date for any estimation hearing be set with at least sixty (60) days notice.

3. That the parties be allowed to conduct discovery up to 21 days prior to the hearing.

4. That within 15 days from the date of notice, the parties file their respective proposals relative to what evidence will be submitted by affidavit, and what evidence is anticipated to be live, and provide an estimate of the time they will require for their presentation.

5. That, within seven (7) days thereafter, the parties respond to the proposed presentation of evidence by the other side, including proposed stipulations to streamline the presentation, and modifications based upon the proposal from the other party.

6. That no less than thirty (30) days prior to the estimation hearing, the Court hold a hearing to establish the order of presentation of the evidence, and address the requests and responses of the respective sides.

7. Within ten days after that hearing, the Creditor shall submit its brief, limited to twenty (20) pages, affidavits and documentary evidence.

8. That debtor thereafter have ten (10) days to file an opposition to Creditor's evidence and brief.

9. Within five days thereafter, Creditor shall file any reply papers.

This foregoing is but an initial effort by this Creditor, who is not the moving party, but is intended to provide the Court food for thought.

In this opposition, the HALLS have proposed an order compelling arbitration and/or abstaining from hearing this case. They propose this in response to the procedures proposed because the proposal in question makes these issues ripe for consideration. While it is arguably within the Court's power to issue the appropriate relief, the HALLS will shortly file a motion to abstain and/or compel arbitration. The motion cannot be filed in time for this hearing. Then again, this motion, given insufficient notice, should not be heard on the date set.

If the Debtor's motion is granted, in whole or in part, the HALLS request that it be granted without prejudice to their future motion(s).

Dated January 7, 2004

George L. De La Flor
Counsel for FLOYD and NANCY HALL

GEORGE L. DE LA FLOR
8355 LaMesa Boulevard
LaMesa, California 91941
619.698.7540

BENJAMIN, BERNEMAN & BROM, LLC, Local Counsel
Robert Benjamin (ARDC No. 10070529)
Beverly A. Berneman (ARDC No. 0618418)
John M. Brom (ARDC No. 6206657)
205 W. Randolph St., Ste. 2110
Chicago, IL 60606
(312) 444-1996

UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

IN RE: CONSECO, INC. et al.,	)	**CHAPTER 11**
	)	
Debtors,	)	**CASE NO. 02B49672**
	)	**(JOINTLY ADMINISTERED)**
	)	
	)	**Hon. Carol A. Doyle**
	)	
	)	**Date:** **January 14, 2004**
	)	**Time:** **11:00 a.m.**
	)	**Courtroom:** **The Hon. Carol A. Doyle**
	)	

AFFIDAVIT OF GEORGE L. DE LA FLOR IN SUPPORT FLOYD HALL AND NANCY HALL'S OPPOSITION TO PROPOSED ESTIMATION PROCEDURES OF DEBTOR CFC

I, GEORGE L. DE LA FLOR, DECLARE:

1. I am an attorney at law licensed to practice in the State of California, and am counsel for Creditors FLOYD and NANCY HALL. I am competent to testify to the following facts and, if called as a witness will testify in accordance therewith;

2. The Debtor's motion was served late. It was served on me by mail on December 30, 2003. Federal Courts in California were closed on January 1 and 2, 2004. My office was closed as were most local offices. I did not receive the motion until Monday, January 5, 2004, a day that I already had fully booked. This was inadequate notice of this motion and has not allowed me to fully brief or prepare the issues. I had precious little time to prepare these documents, particularly in light of my West Coast location, and the time difference. I have had literally two days notice to prepare these papers, and have them filed and served across the country. I request that the motion not be considered, or that it be continued.

3. Furthermore, my clients are out of the country, visiting family in the Philippines for a month. Prior to departing, they confirmed with me that it was safe to leave, i.e. that nothing was happening in their case that would require their presence. I assured them it was safe to leave. I have no way of contacting them, and thus the facts declared cannot be supported by their affidavits (although, even if they were in the country, they live in Northern California, in no way near my office). Facts related to their case are presented here through my declaration, as they are unavailable. These facts are true to the best of my knowledge, based on my conversation with my clients, review of underlying documents, discovery in this case (including the deposition of NANCY HALL, and interrogatory responses submitted by both Mr. and Mrs. Hall).

4. I filed a lawsuit on behalf of the HALLS against CONSECO, and others in the Superior Court of San Mateo County, California, on July 17, 2001. A true and correct copy of the front page of the complaint is submitted herewith as Exhibit 1. A true and correct copy of the Amended Complaint is submitted herewith as Exhibit 2.

5. The complaint alleged the following causes of action: Fraud, Breach of Fiduciary Duties, Negligent Misrepresentation, Negligence, Negligent Supervision, Violation of the Unruh Civil Rights Act and Violation of the California Unfair Business Practices Act. No Federal claims are alleged.

6. To my knowledge, belief and, per my representations above, based on my review of the records and files, this case arises from the following facts, as alleged in the complaint:

A. Plaintiff FLOYD HALL is presently 56 years old and thus in the protected age group. Plaintiff NANCY HALL is currently 67 years old (but will be 68 within days of the instant hearing) and thus in a protected age group. In addition, Plaintiff NANCY HALL is Filipino and thus protected under the Unruh Act by virtue of her race and national origin, as will be further alleged below. Plaintiff FLOYD HALL is a Black African American, and thus also protected by virtue of his race and national origin, as further alleged below. The

Unruh Act is a California civil rights law which protects against discrimination in the provision of business services.

B. In 1998, the HALLS, who were then 51 and 61, respectively, entered into relationship with MICHELLE REYES, while she was employed with another Lender, Associates Home Equity Services. ASSOCIATES was also a named Defendant in the State Court action, but all claims against them have been resolved. The halls were interested in bettering their economic position and consolidating loans.

C. Prior to meeting REYES, the HALLS had a mortgage on their home obtained through Bank of America, secured by a First Deed of Trust, together with another loan, secured by a Second Deed of Trust, in the aggregate amount of $197,500. The total amount of their monthly payments from these two loans as at the time they met Defendant REYES was $2,029.00. The note secured by the Second Trust Deed would have been paid off by the year 2012 and the note secured by the First Trust Deed would have been paid off by the year 2026.

D. REYES was aware that, because of her age and difficulty with English, NANCY HALL was particularly vulnerable to repose trust in Reyes, and to fall prey to her influence and ultimate deception. REYES became aware that HALL completely trusted REYES to take care of her home financing needs. Senior citizens and minorities are typical targets of unfair lending practices.

E. On or about August 31, 1998, REYES, through ASSOCIATES, refinanced the HALLS' home. The net effect of the refinance was to reduce the total monthly payment to $1,949.26. On its face, this appeared to be a good deal. However, REYES misrepresented appropriate charges and available finance rates. Despite the small decrease in HALLS' monthly payments, the loan principal increased to more than $222,000. Furthermore, REYES and ASSOCIATES helped themselves to loan fees in the amount of $12,168 and additionally sold unnecessary and overpriced credit life insurance to the HALLS in the amount of $6,250. Despite the almost $30,000 increase in the principal balance of the loan, Plaintiffs received no cash from this transaction. I have engaged an expert to review these transactions. Expert testimony would question the propriety of this first loan, given the absence of cash to the

borrowers, but, because of the arguable benefit of a slight decrease in payment, it was of arguable benefit. There is no question that the fees were excessive. This is relevant background because REYES is the real culprit here. Nonetheless, as indicated above, claims against ASSOCIATES have been resolved.

F. Within one year, REYES, still working for ASSOCIATES, convinced the Plaintiffs that they needed to again refinance their home. As a result, on October 13, 1999, ASSOCIATES wrote a new loan, whereby it paid off its old principal and put Plaintiffs in a new 30 year fixed loan at an interest rate 2% higher than the prior loan. ASSOCIATES was paid the balance of $223,000 on the previous loan. The HALLS were again sold credit life insurance (since the prior note had been paid off, the prior credit life policy no longer applied) in the total amount of $6,250 and charged loan fees approaching $10,000. The Halls received cash from this transaction in the approximate amount of $11,000. As a result of this loan, Plaintiffs' monthly payment increased to $2,478.04 and the loan balance increased to $253,350.57. Expert testimony would establish that the loan fees were excessive and that this loan, in light of the terms, conditions, increased principal and increased monthly payment, was of no benefit to the HALLS, breached fiduciary obligations, should not have been written, and was in fact, seriously detrimental to the HALLS.

G. Shortly thereafter, Defendant REYES obtained employment with CONSECO. By February 24, 2000, approximately four months after the prior transaction, REYES convinced the HALLS that they needed to refinance their home again. A new loan was written at a still higher interest rate (12.24%) with a monthly payment of $3,062.84 and a 20 year balloon payment. Despite the nearly $40,000 increase in the loan principal, the HALLS received no money from this transaction. Instead, the increase was made up for by loan fees, points, alleged costs and a prepayment penalty of more than $11,000. Expert testimony would establish that this loan was fraudulent, that all standards of real estate lending were violated, that it did not benefit the HALLS, violated fiduciary duties, should never have been written and the charged fees were excessive.

H. Because of the new monthly obligation, which had now risen by more than $1,000, the HALLS fell into desperate financial straits and again turned for help to REYES. On September 26, 2000, REYES convinced the HALLS that, in order to extricate themselves from these problems, they needed another new loan. Predictably, the HALLS followed advice that REYES rendered. This time the principal rose to $346,750. While the interest rate went down to 10.89%, the loan was still subject to a 20 year balloon and Plaintiffs were subjected to a monthly payment of $3,273.39. CONSECO paid itself nearly $299,000, a portion of which included prepayment penalties, additional unreasonable costs it claimed to have incurred, and took fees in excess of $26,000. From this loan, the HALLS were paid additional cash of $17,862.49. Again, expert testimony would establish that even writing this loan violated all underwriting principles and CONSECO's fiduciary duties, and that the loan was excessive.

I. I am familiar with legal theories and industry standards relative to "predatory lending practices." The practice of continually "flipping" or "churning" of home mortgages is a practice commonly referred to as "predatory lending." Expert testimony would establish that, the above constitutes predatory lending. Indeed, the testimony would be that the above facts constitute some of the most heinous churning practices imaginable. Further, the elderly and minorities are frequently the target of such practices, particularly foreign born minorities, such as Mrs. Hall, who handled all aspects of these transactions.

J. As a result, the HALLS have suffered significant economic damage. However, they have both suffered severe emotional distress, particularly Mrs. Hall, who has had gastro-intestinal problems, suffered fainting spells and sought medical treatment for her emotional injuries. Mrs. Hall even suffered a fainting spell at work and was taken to a local emergency room.

K. The claims in the complaint are all based on tort, and all seek remuneration for emotional distress.

7. Upon being served with this complaint, CONSECO filed a motion to compel arbitration based on the operative mortgage agreement, the applicable portion of which is cited

in CONSECO's motion. A true and correct copy of that brief is submitted herewith as Exhibit 3.

8. I filed an opposition to that motion, a true and correct copy of which is submitted as Exhibit 4. I am familiar with California law relative to motions to compel arbitration, particularly as it relates to consumer claims. The agreement in question was on a contract of adhesion, and was unilateral in its remedy. For example, CONSECO was free to enforce foreclosure, through judicial and non-judicial means. While there was a risk involved, I felt confident in our likelihood of prevailing.

9. Nonetheless, there are no guarantees, and I engaged in discussions with CONSECO's counsel to resolve the dispute regarding arbitration. The result was that I agreed, on behalf of the Halls to submit the matter to arbitration, subject to negotiated conditions regarding discovery, and selection of venue and the arbitrator. Specifically, we agreed that CONSECO would pay the costs of the arbitration, that discovery would be conducted within defined limits, and that the case would be conducted in San Diego before the Honorable Raymond F. Zvetina, a highly respected retired Superior Court judge (who coincidentally began his legal career in Chicago). A true and correct copy of that agreement is submitted as Exhibit 5.

10. In reliance on this agreement, we attempted to conduct discovery, although discovery was delayed by CONSECO. I granted a number of extensions, had difficult obtaining documents, and entered into a protective order relative to documents produced. At the time this proceeding was filed, we had set depositions for the Person(s) Most Knowledgeable at CONSECO regarding the HALL transactions, as well as MICHELLE REYES. True and correct copies of the notices of those depositions (which were set for January of 2003) are

submitted herewith as Exhibits 6 and 7, respectively. Of course, because of these proceedings, those depositions were never held. Those depositions were agreed to by the arbitration agreement, and remain necessary. If experts are to be designated by CONSECO, then their depositions would be necessary as well. The last discovery accomplished was the deposition by CONSECO of NANCY HALL.

11. Even if these depositions are still taken, assuming availability of respective counsel, there is no reason this matter could not be arbitrated within sixty (60) to ninety (90) days.

12. This case cannot possibly be fairly tried within the proposed estimation procedures. The HALLS' case will require testimony from the HALLS relative to liability and damages. It is critical that testimony regarding emotional distress be through live testimony. Since a significant part of the claim will be for emotional distress, brief supporting witnesses would be anticipated. The case will also require expert testimony on liability and damages. At least one, if not two, experts will be required. There are also medical records which may require testimony from a physician, absent an affidavit, a stipulation and cooperation.

13. I intend to file and am now working on a motion to abstain and/or to order this matter to arbitration in accordance with the provisions of the above referenced agreement. Those will be filed so that they may be heard by the next omnibus hearing. It is requested, however, that the Court consider the brief filed here in response to the proposed estimation, and/or deny or continue this motion, but if the motion is granted, in whole or in part, that it be granted without prejudice to the Creditors' proposed motion.

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 6th day of January, 2004 at La Mesa, California.

_____

George L. de la Flor
Counsel for FLOYD and NANCY HALL

BENJAMIN, BERNEMAN & BROM, LLC, Local Counsel
Robert Benjamin (ARDC No. 10070529)
Beverly A. Berneman (ARDC No. 0618418)
John M. Brom (ARDC No. 6206657)
205 W. Randolph St., Ste. 2110
Chicago, IL 60606
(312) 444-1996; Fax: (312) 444-9086

George L. de la Flor
State Bar No. 112488
8355 La Mesa Blvd.
La Mesa, California 91941
(619) 698-2926

Attorneys for Plaintiffs

ENDORSED FILED
SAN MATEO COUNTY
JUL 17 2001
Clerk of the Superior Court
By MICHAEL BOLANDER
DEPUTY CLERK

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN MATEO, SOUTHERN BRANCH, UNLIMITED JURISDICTION

FLOYD HALL and NANCY HALL, Plaintiff, vs. MICHELLE REYES, ASSOCIATES HOME EQUITY SERVICES, INC., An Arizona Corporation, CONSECO FINANCIAL SERVICES, INC., a Corporation, and DOES 1-20, Inclusive, Defendants.	CASE NUMBER 417598 COMPLAINT FOR BREACH OF FIDUCIARY DUTY, FRAUD, NEGLIGENT MISREPRESENTATION, VIOLATIONS OF THE UNRUH ACT, AND VIOLATIONS OF BUSINESS AND PROFESSIONS CODE SECTION 17200, NEGLIGENCE, NEGLIGENT TRAINING AND SUPERVISION *UNLIMITED JURISDICTION*

FIRST CAUSE OF ACTION
AGAINST ALL DEFENDANTS
FOR BREACH OF FIDUCIARY DUTY

1. Plaintiffs are, and at all times herein mentioned were, residents of San Mateo County, California.

2. Defendant, ASSOCIATES HOME EQUITY SERVICES, INC. (hereinafter ASSOCIATES) is, and at all times herein mentioned was, a corporation operating in the State of Arizona, but doing

EXHIBIT 1

EXHIBIT 2

George L. de la Flor
State Bar No. 112488
8355 La Mesa Blvd.
La Mesa, California 91941
(619) 698-2926

Attorneys for Plaintiffs

ENDORSED FILED
SAN MATEO COUNTY
AUG 2 1 2001
Clerk of the Superior Court
By A. KACZMAREK
DEPUTY CLERK

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN MATEO, SOUTHERN BRANCH, UNLIMITED JURISDICTION

FLOYD HALL and NANCY HALL, Plaintiff, vs. MICHELLE REYES, ASSOCIATES HOME EQUITY SERVICES, INC., A Business Entity, form unknown, ASSOCIATES FINANCIAL SERVICES COMPANY, INC., A Delaware Corporation, ASSOCIATES FINANCIAL SERVICES COMPANY OF CALIFORNIA, INC., A California Corporation, CONSECO FINANCIAL SERVICES, INC., a Corporation, and DOES 1-20, Inclusive, Defendants.	CASE NUMBER 417593 1st AMENDED COMPLAINT FOR BREACH OF FIDUCIARY DUTY, FRAUD, NEGLIGENT MISREPRESENTATION, VIOLATIONS OF THE UNRUH ACT, AND VIOLATIONS OF BUSINESS AND PROFESSIONS CODE SECTION 17200, NEGLIGENCE, NEGLIGENT TRAINING AND SUPERVISION *UNLIMITED JURISDICTION*

FIRST CAUSE OF ACTION
AGAINST ALL DEFENDANTS
FOR BREACH OF FIDUCIARY DUTY

1. Plaintiffs are, and at all times herein mentioned were, residents of San Mateo County, California.

2. Defendant ASSOCIATES HOME EQUITY SERVICES, INC. (hereinafter AHES) is, and at all times herein mentioned was, a business entity, form unknown, with a place of business in Phoenix, Arizona, but doing business in California. Plaintiff is informed and believes and thereon alleges that said defendant was either a wholly owned subsidiary, a predecessor in interest or a fictitious business name of Defendant ASSOCIATES FINANCIAL SERVICES COMPANY, INC. and/or ASSOCIATES FINANCIAL SERVICES COMPANY OF CALIFORNIA, INC. Said Defendant is in the home loan brokerage business.

3. Defendant ASSOCIATES FINANCIAL SERVICES COMPANY OF CALIFORNIA, INC. (hereafter AFS-CA) is a California Corporation, doing business in California. Plaintiff is informed and believes that the business dealings she had with Defendants REYES and AHES were, in fact, transacted through this corporation and/or that said corporation is a parent and/or alter ego of AHES.

4. Defendant ASSOCIATES FINANCIAL SERVICES COMPANY, INC. hereafter AFS) is a Delaware corporation, doing business in California. Said Defendant is the successor in interest, through merger of ASSOCIATES FINANCIAL SERVICES COMPANY OF ARIZONA, INC. At all times relevant hereto, Plaintiffs transacted with the entity calling itself AHES, through Defendant REYES in Arizona, for a loan on her property in California. Plaintiffs are informed and believe that AHES was either a wholly owned subsidiary or a fictitious business name of AFS OF ARIZONA, and that Defendant AFS is the successor in interest and/or alter ego of AHES. ***Hereafter, all of the***

foregoing corporate defendants shall be collectively referred to as "ASSOCIATES."

5. Defendant CONSECO FINANCIAL SERVICES, INC. is a corporation also doing business in California and is also in the home loan brokerage business.

6. At all times relevant hereto, Defendant MICHELLE REYES was an employee of each respective corporation. For the time period from 1997 until sometime in 1999, Defendant REYES was employed by Defendant ASSOCIATES and was the agent, servant and employee of said Defendant. From and after that time, Defendant REYES became employed by Defendant CONSECO and, at all times relevant hereto, was the agent, servant and employee of Defendant CONSECO.

7. Plaintiff is unaware of the true names and capacities of Defendants sued herein as DOES 1-20, Inclusive, and therefore sues said Defendants by those fictitious names. Plaintiff is informed and believes, and thereon alleges, that each of said fictitiously named Defendants was responsible in some manner for the acts and damages complained of herein. Plaintiff is furthermore informed and believes that each of said fictitiously named Defendant was the agent, servant and employee of each and every other Defendant, acting within the course and scope of his or her agency and employment, and with the knowledge, consent and approval of each respective principal. Plaintiff will seek leave to amend this complaint when the true names and capacities of said DOE Defendants have been ascertained.

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8. At all times relevant hereto, Plaintiffs owned a home located at 864 Donahoe Street, Palo Alto, California 94303. Plaintiff FLOYD HALL is presently 54 years old and thus in the protected age group. Plaintiff NANCY HALL is currently 65 years old and thus in a protected age group. In addition, Plaintiff NANCY HALL is Filipino and thus protected under the Unruh Act by virtue of her race and national origin, as will be further alleged below. Plaintiff FLOYD HALL is a Black African American, and thus also protected by virtue of his race and national origin, as further alleged below.

9. Prior to meeting Defendant REYES and doing business with the corporate defendants, Plaintiffs had a mortgage on their home obtained through Bank of America, secured by a First Deed of Trust, together with another loan, secured by a Second Deed of Trust, in the aggregate amount of $197,500. The total amount of their monthly payments from these two loans as at the time they met Defendant REYES was $2,029.00. The note secured by the Second Trust Deed would have been paid off by the year 2012 and the note secured by the First Trust Deed would have been paid off by the year 2026.

10. In 1998, Plaintiffs were looking to obtain better terms and to consolidate these two loans. At that point, they met Defendant REYES who was employed by Defendant ASSOCIATES.

11. At all times relevant hereto, Plaintiff NANCY HALL did all of the negotiations on behalf of both Plaintiffs to handle this personal family business.

12. Plaintiff REYES was aware that, because of her age and difficulty with English, Plaintiff NANCY HALL was particularly vulnerable to repose trust in Reyes, and to fall prey to her influence and ultimate deception. REYES became aware that Plaintiff completely entrusted REYES to take care of her home financing needs.

13. On or about August 31, 1998, Defendant ASSOCIATES, acting through REYES, refinanced the Plaintiffs' home. The net effect of the refinance was to reduce the total monthly payment to $1,949.26. On its face, this appeared to be a good deal. However, Defendant misrepresented appropriate charges and available finance rates. Despite the small decrease in Plaintiffs' monthly payments, the loan principal increased to more than $222,000. Furthermore, Defendants helped themselves to loan fees in the amount of $12,168 and additionally sold unnecessary and overpriced credit life insurance to the Plaintiffs in the amount of $6,250. Despite the almost $30,000 increase in the principal balance of the loan, Plaintiffs received no cash from this transaction.

14. While Defendants had a duty to make certain Disclosures as to the nature and meaning of "points," availability of better loan rates, availability of superior credit life insurance, Plaintiffs would not complain if this had been the only transaction. They could complain only as to their own naivete.

15. However, sensing a vulnerable client, Defendant REYES thereafter engaged in a despicable practice known as "churning" or "flipping" of loans. Within one year, REYES, still working

for ASSOCIATES, convinced the Plaintiffs that they needed to again refinance their home. As a result, on October 13, 1999, ASSOCIATES wrote a new loan, whereby it paid off its old principal and put Plaintiffs in a new 30 year fixed loan at an interest rate 2% higher than the prior loan. ASSOCIATES was paid the balance of $223,000 on the previous loan. Plaintiffs were again sold credit life insurance (since the prior note had been paid off, the prior credit life policy no longer applied) in the total amount of $6,250 and charged loan fees approaching $10,000. Plaintiffs received cash from this transaction in the approximate amount of $11,000.

16. As a result of this loan, Plaintiffs' monthly payment increased to $2,478.04 and the loan balance increased to $253,350.57.

17. Shortly thereafter, Defendant REYES obtained employment with Defendant CONSECO. By February 24, 2000, approximately four months after the prior transaction, REYES convinced the Plaintiffs that they needed to refinance their home again. A new loan was written at a still higher interest rate (12.24%) with a monthly payment of $3,062.84 and a 20 year balloon payment. Despite the nearly $40,000 increase in the loan principal, Plaintiffs received no money from this transaction. Instead, the increase was made up for by loan fees, points, alleged costs and a prepayment penalty of more than $11,000.

18. Because of the new monthly obligation, which had now risen by more than $1,000, Plaintiffs fell into desperate financial straits and again turned for help to Defendant REYES.

19. On September 26, 2000, REYES convinced the Plaintiffs that, in order to extricate themselves from these problems, they needed another new loan. Predictably, the Plaintiffs followed this advice. This time the principal rose to $346,750. While the interest rate went down to 10.89%, the loan was still subject to a 20 year balloon and Plaintiffs were subjected to a monthly payment of $3,273.39. CONSECO paid itself nearly $299,000, a portion of which included prepayment penalties, additional unreasonable costs it claimed to have incurred, and took fees in excess of $26,000. From this loan, Plaintiffs were paid additional cash of $17,862.49.

20. At all times relevant hereto, Defendant REYES was a fiduciary and owed a fiduciary obligation to Plaintiffs. At all times relevant hereto, Plaintiffs reposed trust and confidence in Defendant REYES and turned to her because they believed that she could assist them in their difficult financial situations. Furthermore, at all times relevant hereto, Defendants CONSECO and ASSOCIATES were fiduciaries of the Plaintiff and had a duty to review, inspect and monitor the conduct of Defendant REYES.

21. Defendants violated this fiduciary duty by engaging in the practice known as "churning" or "flipping," by taking advantage of Plaintiffs due to their naivete, their age, as well as their respective race and/or national origin. Furthermore, Defendants had the financial records of the Plaintiffs and knew what they could pay and what would be advisable for persons of their age under the circumstances. Instead of assisting them in any manner, over the course of approximately two years, Defendant REYES unnecessarily refinanced the home four times

over. Instead of obtaining a benefit for their client, the Defendants acted solely in pursuit of their own economic gain. Through the history of these transactions, the loan balance increased by nearly $150,000. Plaintiffs' monthly payments increased by more than $1,000. Furthermore, because of the way these loans were structured, by the year 2020, Plaintiffs, who will then be in their late 70's and 80's, respectively, will owe more than $240,000 on their home. They owed a total of $197,000 on the home when they met Defendant REYES and would have had all loans paid off by the year 2026, as alleged above.

22. Despite the $150,000 increase in the balance of the loans, Plaintiffs received less than $50,000 in total cash from these transactions. They did not enter into these transactions because they needed cash but, given their financial situation, when they had the opportunity and when REYES did not otherwise take any excess money, Plaintiffs took advantage of cash distributions. However, the balance of approximately $100,000 went to commissions, costs, prepayment penalties and unnecessary and/or duplicative insurances.

23. As a result of the foregoing conduct, Plaintiffs are now on the edge of bankruptcy. They cannot make the monthly payments on their home and are threatened with foreclosure. They have suffered significant financial damage, all in a sum to be determined according to proof.

24. Furthermore, as a result of this conduct, Plaintiffs have suffered emotional injuries, entitling them to special damages for the care and treatment thereof, together with

general damages for their mental pain and suffering, all in an amount to be determined according to proof.

25. The action of Defendants was malicious, oppressive, discriminatory, fraudulent and in reckless disregard of the rights and safety of the Plaintiffs, entitling Plaintiffs to punitive damages in a sum to be determined according to proof thereof.

26. Furthermore, as a result of this conduct, Plaintiffs entered into agreements with Defendants ASSOCIATES and CONSECO, which agreements have attorneys fees provision. Thus, Plaintiffs, who have incurred, and will continue to incur, attorney's fees for the prosecution of this action, are entitled to attorney's fees in an amount to be determined according to proof thereof.

SECOND CAUSE OF ACTION
AGAINST ALL DEFENDANTS
FOR FRAUD

27. Plaintiffs hereby replead and reallege each and every allegation contained in paragraphs 1-26 of this Complaint and incorporates the same herein as if fully set forth.

28. As set forth above, Plaintiffs initially came to the Defendant seeking to put themselves in a more advantageous financial position. Thereafter, Plaintiffs continued to repose trust and confidence in Defendants, particularly as they became further immersed in financial troubles as a result of the refinancing arrangements in question.

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29. Throughout the time that Defendant REYES, acting on behalf of the two corporate Defendants, represented the Plaintiffs, she made numerous misrepresentations including, but not limited to, the following: (1) that the finance rates she was obtaining were fair and reasonable; (2) that the points being charged by her were fair and reasonable; (3) that the insurances that were being sold were advisable and reasonable and that they were conditions of the loan; (4) that the penalties being paid were simply a cost of doing business and that they needed to be incurred; (5) that the arrangements being entered into would be financially beneficial to the Plaintiffs; and (6) that the refinancing arrangements were necessary, reasonable and appropriate for someone in Plaintiffs' circumstances, and that the arrangements would solve their economic worries.

30. Furthermore, at all times relevant hereto, Defendants had a duty, as fiduciaries, to disclose risks of these types of transactions, to make full disclosure with an adequate explanation of the terms and conditions of the loans, and to advise of all possible economic drawbacks.

31. Defendants failed to make the appropriate disclosures, and failed to advise the Plaintiffs that, by entering into these transactions, their monthly payments would continue to rise and that they would have little or no chance of substantially paying down the balance owed on their home before their deaths. Defendants were and are well aware that this practice is known as "churning" and know that it is inappropriate and illegal, and

nonetheless targeted the Plaintiffs who are stereotypical victims of this type of abuse.

32. The failures to make the necessary disclosures outlined above constitute actionable fraud.

33. Furthermore, the above representations were false. The truth was that Plaintiffs did not need credit life insurance, that the points being paid were outrageous, that the penalties incurred were unnecessarily incurred, that the finance rates available were far from the best available, and that, not only would the continued refinancing not lead to an economic benefit, but that, in fact, it would, and now has put Plaintiffs at the brink of economic disaster.

34. To the extent that any such misrepresentation constitutes a statement of opinion, Plaintiffs came to the Defendants specifically for that opinion, as the Defendants are professionals in the loan brokerage business. Plaintiffs are consumers and have no knowledge or understanding of said business and turned to the Defendants for their superior knowledge.

35. Defendants made these false representations with the intent to induce Plaintiffs to enter into consecutive refinance contracts so that Defendants could continue to inflate the principal due on Plaintiffs' home and collect commissions, as well as ultimately foreclose on the property.

36. Plaintiffs reasonably relied upon these representations by entering into each of said agreements. The reliance was reasonable because Plaintiffs were consumers,

ignorant of home finance and had complete trust and confidence in Defendant REYES.

37. The representations were made with full knowledge of their falsity and/or with a reckless disregard of their truth or falsity, constituting fraud and deceit.

38. As a result of the foregoing conduct, Plaintiffs have suffered financial damage, all in a sum to be determined according to proof.

39. Furthermore, as a result of this conduct, Plaintiffs have suffered emotional injuries, entitling them to special damages for the care and treatment thereof, together with general damages for their mental pain and suffering, all in an amount to be determined according to proof.

40. The actions of Defendants were malicious, oppressive, discriminatory, fraudulent and in reckless disregard of the rights and safety of the Plaintiffs, entitling Plaintiffs to punitive damages in a sum to be determined according to proof thereof.

41. Furthermore, as a result of this conduct, Plaintiffs entered into agreements with Defendants ASSOCIATES and CONSECO, which agreements have attorneys fees provision. Thus, Plaintiffs, who have incurred, and will continue to incur, attorney's fees for the prosecution of this action, are entitled to attorney's fees in an amount to be determined according to proof thereof.

THIRD CAUSE OF ACTION
AGAINST ALL DEFENDANTS
FOR NEGLIGENT MISREPRESENTATION

42. Plaintiffs hereby replead and reallege each and every allegation contained in paragraphs 1-41 of this Complaint and incorporate the same herein as if fully set forth.

43. Alternatively, the representations alleged in the preceding cause of action were made without reasonable ground for believing those representations to be true. In addition, the omissions set forth in the preceding causes of action were the result of negligence.

44. As a result of the foregoing conduct, Plaintiffs have suffered financial damage, all in a sum to be determined according to proof.

45. Furthermore, as a result of this conduct, Plaintiffs have suffered emotional injuries, entitling them to special damages for the care and treatment thereof, together with general damages for their mental pain and suffering, all in an amount to be determined according to proof.

46. Furthermore, as a result of this conduct, Plaintiffs entered into agreements with Defendants ASSOCIATES and CONSECO, which agreements have attorney's fees provision. Thus, Plaintiffs, who have incurred, and will continue to incur, attorney's fees for the prosecution of this action, are entitled to attorney's fees in an amount to be determined according to proof thereof.

FOURTH CAUSE OF ACTION
AGAINST ALL DEFENDANTS
FOR NEGLIGENCE

47. Plaintiffs hereby replead and reallege each and every allegation contained in paragraphs 1-46 of this Complaint and incorporates the same herein as if fully set forth.

48. At all times relevant hereto, Defendant REYES was a home loan professional acting under the auspices of the respective corporate Defendants.

49. Said Defendants had a duty to use due care in the handling of Plaintiffs' financial matters, to make appropriate disclosures, and to comport with the standard of care of home loan professionals.

50. By the conduct set forth above, Defendants breached their duty to Plaintiffs to act in a reasonable and prudent manner.

51. As a consequence of this conduct, Plaintiffs have suffered financial injury in an amount to be determined according to proof thereof.

52. Furthermore, as a result of this conduct, Plaintiffs have suffered emotional injuries, entitling them to special damages for the care and treatment thereof, together with general damages for their mental pain and suffering, all in an amount to be determined according to proof.

FIFTH CAUSE OF ACTION
AGAINST DEFENDANTS ASSOCIATES AND CONSECO
FOR NEGLIGENT TRAINING AND SUPERVISION

53. Plaintiffs hereby replead and reallege each and every allegation contained in paragraphs 1-51 of this Complaint and incorporates the same herein as if fully set forth.

54. At all times relevant hereto, as financial lending institutions, Defendants CONSECO and ASSOCIATES had a duty to ensure that its agents and employees were familiar with the law and standards of conduct with respect to residential lending, as well as to oversee and supervise each and every transaction entered into by its agents and employees so as to avoid illegal, unfair, discriminatory and/or deceptive practices.

55. Defendants CONSECO and ASSOCIATES breached this duty by failing to adequately train Defendant REYES and/or by failing to adequately supervise the transactions entered into by Defendant REYES with the Plaintiffs herein.

56. As a result of this breach, Plaintiffs have been caused economic injury in an amount to be determined according to proof thereof.

57. Furthermore, as a result of this conduct, Plaintiffs have suffered emotional injuries, entitling them to special damages for the care and treatment thereof, together with general damages for their mental pain and suffering, all in an amount to be determined according to proof.

SIXTH CAUSE OF ACTION
AGAINST ALL DEFENDANTS
FOR VIOLATION OF THE UNRUH ACT

58. Plaintiffs hereby replead and reallege each and every allegation contained in paragraphs 1-57 of this Complaint and incorporate the same herein as if fully set forth.

59. As alleged above, both Plaintiffs are in a protected age group. Plaintiff FLOYD HALL is a black African American, and also thus protected by virtue of his race and national origin. In addition, all of these transactions occurred through Plaintiff NANCY HALL, who is 65 years old, of Filipino origin, and for whom English is a second language. Accordingly, the Plaintiffs are also protected by the Unruh Act by virtue of her race and national origin.

60. The quintessential and stereotypical victims of "churning" in the loan industry are minorities and elderly people. It is understood in the industry that these groups are particularly vulnerable to this type of abuse. Plaintiffs fit both of those categories and thus were targeted by Defendants as receptive victims for successive refinancing.

61. Plaintiffs are informed and believe that persons similarly situated, who are not in a protected age, ethnic or racial class, were not similarly targeted by the Defendants.

62. This conduct constitutes discrimination in violation of the Unruh Act (Civil Code Section 51 et seq.).

63. As a result of the foregoing conduct, Plaintiffs have suffered financial damage, all in a sum to be determined according to proof.

64. Furthermore, as a result of this conduct, Plaintiffs have suffered emotional injuries, entitling them to special damages for the care and treatment thereof, together with general damages for their mental pain and suffering, all in an amount to be determined according to proof.

65. The action of Defendants was malicious, oppressive, discriminatory, fraudulent and in reckless disregard of the rights and safety of the Plaintiffs, entitling Plaintiffs to punitive damages in a sum to be determined according to proof thereof.

66. As alleged above, Plaintiffs have incurred attorney's fees and expenses in the prosecution of this action and is entitled to reimbursement of the same pursuant to Civil Code Section 52, as well as Code of Civil Procedure Section 1021.5.

67. Furthermore, Plaintiffs are entitled to treble damages as a penalty for this discriminatory conduct, pursuant to Civil Code Section 52.

SEVENTH CAUSE OF ACTION
AGAINST ALL DEFENDANTS
FOR VIOLATIONS OF BUSINESS
AND PROFESSIONS CODE SECTION 17200

68. Plaintiffs hereby replead and reallege each and every allegation contained in paragraphs 1-67 of this Complaint and incorporates same as if fully set forth.

69. The conduct set forth above constitutes unfair business practices within the meaning of Business and Professions Code Section 17200.

70. Plaintiffs are entitled to injunctive relief for violations of the statute which would include nullification of the contracts obtained by illegal means, injunction from enforcement of those contracts, declaration that those contracts are null and void, and restitution of any sums paid under those contracts.

71. Furthermore, Plaintiffs are informed and believe that these practices constitute a course of conduct and that there are other persons similarly aggrieved. Plaintiffs will request a court order joining Plaintiffs from engaging in such practices, nullifying any contracts obtained through the process of churning, and granting restitution to all victims of these illegal practices.

72. Plaintiffs have incurred attorney's fees in the prosecution of this action, entitling them to attorney's fees pursuant to Code of Civil Procedure Section 1021.5.

WHEREFORE, Plaintiffs pray for judgment against Defendants, and each of them, as follows:

1. For economic damages in a sum to be determined according to proof;

2. For special damages for the care and treatment of emotional injuries in a sum to be determined according to proof;

3. For general damages for emotional pain and suffering in an amount to be determined according to proof;

4. For punitive damages in a sum to be determined according to proof;

5. For attorney's fees under applicable causes of action,

pursuant to applicable contracts, Civil Code Section 52 and Civil Procedure Section 1021.5;

6. For injunctive and declaratory relief as prayed herein;

7. For costs of suit incurred herein; and

8. For such other and further relief as this court may deem just and proper.

DATED: 8-10-01

GEORGE L. de la FLOR
Attorney for Plaintiffs

EXHIBIT 3

JOHN B. SULLIVAN (State Bar No. 96742)
PETER J. VAN ZANDT (State Bar No. 153321)
SEVERSON & WERSON
A Professional Corporation
One Embarcadero Center, Suite 2600
San Francisco, CA 94111
Telephone: (415) 398-3344
Facsimile: (415) 956-0439

Attorneys for Defendant
CONSECO FINANCE SERVICING CORP.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

FLOYD HALL and NANCY HALL, Plaintiffs, vs. MICHELLE REYES, ASSOCIATES HOME EQUITY SERVICES, INC., A Business Entity, form unknown, ASSOCIATES FINANCIAL SERVICES COMPANY, a Delaware Corporation, ASSOCIATES FINANCIAL SERVICES COMPANY OF CALIFORNIA, INC., A California Corporation, CONSECO FINANCIAL SERVICES, INC., a Corporation, and DOES 1-20, Inclusive Defendants.	Case No. 417593 **DEFENDANT CONSECO FINANCE SERVICING CORP.'S (Sued erroneously herein as "Conseco Financial Services, Inc.") MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO COMPEL ARBITRATION** Date: November 2, 2001 Time: 9:00 a.m. Dept.: 13 (Room 2C) Judge: Hon. Phrasel L. Shelton

I. INTRODUCTION

Plaintiffs Floyd and Nancy Hall are Conseco customers. On or about September 26, 2000 they executed a loan agreement with Conseco Finance Servicing Corp. ("Conseco"). This loan in the amount of $346,750.00 was secured by a deed of trust on a property located at 864 Donohoe Street, East Palo Alto, California. Prior to that, they executed a loan agreement with Conseco on February 24, 2000 in the amount of $292,500.00, also secured by a deed of trust on the 864 Donohoe Street property. The earlier (2/24/00) loan was paid off in full by the later (9/26/00) loan. The Halls have now filed the instant action naming Conseco. Plaintiffs' lawsuit states causes of action for Breach of Fiduciary Duty, Fraud, Negligent Misrepresentation, Negligent

Training and Supervision, Unruh Act violations and a Business and Professions Code §17200 claim. What plaintiffs have overlooked is that they agreed to arbitrate "all disputes, claims, or controversies arising form or relating to this note or the relationships which result from this note, or the validity of this arbitration clause or the entire note, shall be resolved by binding arbitration by one arbitrator selected by you with my consent." The identical Arbitration Agreement, contained in both the February 24, 2000 note and the September 26, 2000 note is extremely broad, encompassing all the claims asserted here. Accordingly, Conseco now moves to enforce the parties' agreement and compel arbitration of plaintiff's claims and dismissal of their action.

II. STATEMENT OF FACTS

Plaintiffs' Complaint

Plaintiffs complain that they are the victims of some sort of undefined lending abuse which they call "churning" or "flipping," despite having signed contracts which appear to set forth all necessary terms and conditions and are not in any way unlawful.

The problem with proceeding in this forum is that plaintiff agreed to arbitrate all of the claims as they relate to Conseco.[1]

The Arbitration Clause. The identical arbitration clause found in both of the plaintiff's promissory notes provides that all disputes arising from or relating to the note "shall" be arbitrated:

> "**ARBITRATION** - All disputes, claims, or controversies arising from or relating to this note or the relationships which result from this note, or the validity of this arbitration clause or the entire note, shall be resolved by binding arbitration by one arbitrator selected by Lender with Borrowers consent. This arbitration agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act, Title 9 of the United States Code. Judgment upon the award rendered may be entered in any court having jurisdiction. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties understand that they have a right or opportunity to litigate disputes in court, but that they prefer to resolve their disputes through arbitration, except as provided herein. **THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO**

[1] Conseco does not know if the Associates note has a similar arbitration agreement. In any event, plaintiffs may not avoid their duty to arbitrate by naming parties with whom they do not have such a duty. (*Bose Material Handling, Inc. v. Crown Controls Corporation.* (1982) 137 Cal.App.3rd 99, 112.)

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> **ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY LENDER (AS PROVIDED HEREIN).** The parties agree and understand that all disputes arising under case law, statutory law, and all other laws including, but not limited to, all contract, tort, and property disputes, will be subject to binding arbitration in accord with this agreement. Borrower agrees that Borrower shall not have the right to participate as a representative or member of any class of claimants pertaining to any claim arising from or relating to this agreement. The parties agree and understand that the arbitrator shall have all powers provided by the law and the Agreement. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief. . . ."

(Declaration of Peter J. Van Zandt, Promissory Notes attached as Exh. "A" and "B" respectively [emphasis in original].)

Demand for Arbitration. On September 23, 2001, Conseco sought in writing, via facsimile, arbitration of this dispute and dismissal of the action from plaintiff and offered to pay all costs of arbitration. (Decl. of Van Zandt, Exh. "C".) Plaintiffs have not responded to that letter.

Therefore, defendants now request that this Court compel arbitration and dismiss this case with prejudice.

III. ARGUMENT

A. The Federal Arbitration Act Applies, And Therefore, Plaintiff Is Required To Arbitrate His Claims Against Conseco.

The Federal Arbitration Act, 9 U.S.C. §1 *et seq.* ("FAA"), governs this motion. Under the FAA, plaintiffs are required to arbitrate their claims.

First, the Arbitration Agreement explicitly invokes the federal act, stating that all claims and disputes shall be arbitrated in accordance with the Federal Arbitration Act. (Decl. of Van Zandt, Exh. "A" and "B")

Second, even if the parties had not expressly agreed to have the FAA apply, it still would. The FAA applies to any "written arbitration provision" which is part of a "contract evidencing a transaction involving commerce" (9 U.S.C. §2) and "commerce" means any transaction "among the several states." (9 U.S.C. §1.) "The sine qua non of the FAA's applicability to particular dispute is an agreement to arbitrate the dispute in a contract which evidences a transaction in

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interstate commerce." (*IP Timberlands Operating Company, Ltd. v. Denmiss Corporation* (Miss. 1998) 726 So.2d 96, 107 (internal quotations omitted).)

The Arbitration Agreement itself acknowledges that the loan transactions involve interstate commerce as defined in the FAA. (Decl. of Van Zandt, Exh. A and B) Under these facts, the FAA plainly applies. (*Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265, 276 (1995) ("[T]he word 'involving' . . . signals an intent to exercise Congress' commerce power to the full.").)

B. Plaintiff's Claims Fall Within The Scope Of The Arbitration Agreement.

All of plaintiffs' claims fall within the scope of the Arbitration Agreement to which they agreed. This includes negligence, contract and statutory claims arising out of loan agreements, or negotiations. Where all of the claims asserted by a party are covered by a written agreement, the FAA dictates that arbitration must be compelled. "'The preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered,' a concern which 'requires that we rigorously enforce agreements to arbitrate.'" (*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc* 473 U.S. 614, 625-626 (1985) quoting *Dean Witter Reynolds v. Byrd* 470 U.S. 213, 221 (1985); see also *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).)

As the Ninth Circuit has repeatedly stated, courts must "resolv[e] ambiguities as to the scope of arbitration in favor of arbitration." (*Wagner v. Stratton Oakmont, Inc.*, 83 F.3d 1046, 1048 (9th Cir. 1996).) California law, too, has a strong public policy favoring arbitration agreements. (*Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 322.) "Doubts concerning the scope of arbitrable issues are to be resolved in favor of arbitration." (*Id.*, at 323.) This presumption applies equally to consumer suits. (*Allied-Bruce Terminix Cos. v. Dobson, supra*, 513 U.S. at 280; *Harris v. Green Tree Financial Corp.*, 183 F.3d 173, 176 (3d Cir. 1999).)

The Court, therefore, should hold plaintiff to his contractual promise, as stated in the Arbitration Agreement, and should compel plaintiff to arbitrate his claim.

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