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8 JAMS

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10 ) JAMS No. 1425001975

11 Claimant,

12 vs.

12) CORRECTED ARBITRATION AWARD

13 COUNTRYWIDE SECURITIES
14 CORPORATION,

15 Respondent.

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18 I, THE UNDERSIGNED ARBITRATOR --- in accordance with the parties'
19 agreement to arbitrate --- after having carefully considered the allegations, contentions
20 and proofs of the parties ---- after careful deliberation, and based upon the evidence
21 adduced at evidentiary hearing and thereafter, applicable law and the papers submitted
22 by the parties, and good cause appearing --- make the following findings, conclusions,
23 determinations ("determinations") and this Corrected Arbitration Award* as follows:
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25 _____
26 * No objection was made to either side's or the Arbitrator's timely proposed JAMS
27 Employment Arbitration Rule 24(j) corrections to the May 12, 2009 Award, except as follows.
28 Upon careful consideration, including during and after telephonic hearing held on May 21,
2009, the Arbitrator has sustained Claimant's timely objection to Respondent's "change in
control" re-argument as (A) not within the proper scope of Rule 24(j) and (B) a position which
has been previously considered and not accepted by the Arbitrator. Unobjected-to proposed
corrections have been incorporated in this Corrected Award, objected-to corrections have not.

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DETERMINATIONS

1. The Arbitrator has jurisdiction over the subject matter and the parties in this arbitration.¹

The Award corrected and superseded by this Corrected Award was timely rendered on May 12, 2009, pursuant to the parties' April 8, 2009 telephonic stipulation, which is set forth in the Arbitrator's May 11, 2009 Order. This Corrected Award is timely rendered under JAMS Employment Arbitration Rule 24(j).

2. Five in-person evidentiary sessions of the Arbitration Hearing were held. All pre-marked and other exhibits offered by both sides were received in evidence. All witnesses testified under oath and were subject to cross-examination. By stipulation, the court reporters' transcripts of the evidentiary sessions of the Arbitration Hearing are the official record of those sessions. The Arbitration Hearing is hereby re-declared closed, nunc pro tunc, as of April 13, 2009, the date of last post-hearing (reply) papers.

3. The following determinations include factual determinations by the Arbitrator, which the Arbitrator has determined to be true and necessary to this Corrected Award. To the extent that the Arbitrator's determinations differ from any party's positions, that is the result of determinations as to credibility, relevance, burden of proof considerations, and the weighing of the evidence, both oral and written.

The parties, by parallel assertion, agreed on only one important matter concerning resolution of this dispute: the chronology or timeline of what occurred on February 7, 2008 is key, as is credibility.

4. Because the preponderant amount of time and energy in the arbitration, pre-hearing (via motions to dismiss and for summary adjudication), centered on Claimant's claim for attempted extortion, that will be dealt with first. Claimant failed

¹ At the commencement of the Arbitration Hearing, Claimant dismissed all claims against Respondent Lori Shead (formerly Lori Lilly), with prejudice, pursuant to settlement. Ms. Shead's dismissal, which was placed on the record, prior to opening statement and the taking of evidence, was subsequently confirmed in writing. The caption of this arbitration reflects that Ms. Shead no longer is a party herein.

1 to sustain his burden of proof as to that claim.² Based on the evidence, there was no
2 damage caused by the challenged conduct. Whatever damage Claimant sustained,
3 which he attributes to Respondent's threat to prepare and file a "dirty" U-5, unless
4 Claimant agreed to accept a settlement amount less than he was contractually entitled
5 to and to execute a general release in favor of Respondent, was not the result of
6 Respondent's threat but the result of Respondent's termination of his employment
7 and/or the actual filing of the U-5. Accordingly, it is not necessary to determine any
8 other issues --- such as whether Respondent's conduct was outrageous per se.

9 Claimant also failed to sustain his burden of proof as to his claim for intentional
10 emotional distress --- the gravamen of which the August 12, 2008 Order required to be
11 the same as Claimant's attempted extortion claim.³ Because Claimant failed to prove
12 that he sustained damage as the proximate result of Respondent's allegedly extortionate
13 conduct, his emotional distress claim has failed for the same reason.

14 Likewise --- because there has been no actual damage --- there is no basis for
15 punitive damages.

16 Claimant is not entitled to statutory attorneys' fees and costs. They would be
17 recoverable in this arbitration only under California Labor Code 218.5, if Respondent
18 did not prove in connection with Claimant's Labor Code 206.5 claim that Respondent
19 had a good faith belief that there was a genuine dispute over whether Respondent was

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23 ² Because Claimant failed to prove his attempted extortion claim, it is not necessary to further
24 dwell on whether the Arbitrator has been correct in holding that Claimant's attempted extortion
25 claim states a claim for which relief may be granted under California law --- including for the
26 reasons stated in the Arbitrator's August 12, 2008 Order, which is repeated, adopted and
27 incorporated by reference herein, as though fully set forth at this point.

28 ³ As stated in the August 12, 2009 Order, the gravamen of Claimant's intentional emotional
distress claim had to involve the gravamen of the attempted extortion claim --- i.e., a malicious,
oppressive and/or otherwise outrageous threat by Respondent Countrywide to prepare and/or
transmit to FINRA an allegedly "dirty" U-5 as to Claimant. Claimant's claims for negligent
infliction of emotional distress and prima facie tort were dismissed by Order dated August 12,
2008 ("the August 8, 2008 Order").

1 obligated to pay Claimant at termination all compensation he claimed he was entitled to
2 under his written contract.⁴

3 Respondent at all relevant times had such a good faith belief. The Arbitrator has
4 made the determinations in this award with the benefit of five days of conflicting
5 testimony, numerous exhibits presented and reviewed (often on cross-examination) and
6 extensive pre-hearing and post-hearing briefing (including reply briefing by both sides).
7 Only during the Arbitration Hearing was each side (and the Arbitrator) presented with
8 the other side's detailed chronology and February 7, 2008 "timeline" integrating
9 (including adjusting) and summarizing disparate electronic and other data concerning
10 who did or did not do what, when.

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18 ⁴ Labor Code section 206.5 in pertinent part provides, as follows:

19 "No employer shall require the execution of any release of any claim or right
20 on account of wages due, or to become due...unless payment of such wages
21 has been made. Any release required or executed in violation of the
22 provisions of this section shall be null and void as between the employer
23 and employee and the violation of provisions of this section shall be a misdemeanor."

24 Prior to hearing, the Arbitrator declined to dismiss Claimant's Labor Code claims.

25 "That is because under On-Line Power, Inc. v. Mazur, 149 Cal.App.4th 1079,
26 1086 (2007), executives, as well as other employees in various fields, may sue
27 both for breach of contract and under the Labor Code for employers' claimed
28 failures or refusals to pay wages allegedly due upon termination or resignation.
Claimant's Labor Code claims include a claim under section 206.5, concerning
a terminated employee's giving of a release to his terminating employer. It
remains to be determined at a later point --- and not now, because of the
difference of applicable rules governing motions to dismiss and summary judgment,
for example --- whether there is, as asserted, a genuine dispute whether there is a
genuine good faith dispute by Respondent Countrywide of Claimant's
compensation entitlement claims. Barnhill v. Robert Saunders & Co., 125 Cal.App.3d 1, 8
(1981) (issue of whether nonpayment of wages was the result of a good faith belief
generally presents a question of fact)." August 12, 2008 Order.

1 That is not to say that the Grant Couch's decision to terminate Claimant's employment
2 by Respondent was hasty or careless in the circumstances.⁵

3 On February 7, 2008, following the Treasury auction, Mr. Couch personally went
4 to the trading floor and asked Claimant's immediate co-supervisors Mark Schultz and
5 Joseph Cesare and chief risk officer David Fox about the auction and post-auction
6 events and later, with Mr. Schultz, met with Claimant and asked him about what
7 happened. Prior to making his decision terminating Claimant's employment, Mr.
8 Couch consulted with Respondent's CEO Ron Kripalani, Charles Quon of Human
9 Resources (who interviewed witnesses on February 7 and 8, 2008) and Messrs. Fox and
10 Cesare.

11 When final (reply) papers were submitted on April 13, 2009, Respondent
12 continued to have a good faith belief that there was a genuine dispute with Claimant
13 concerning whether Claimant was insubordinate, as stated in the U-5. That
14 determination is not affected by the Arbitrator's ultimately not accepting Respondent's
15 position, based on careful review and consideration of all of the evidence, applicable
16 law and the parties' papers.

17 That determination is also not affected by Respondent's disturbing willingness to
18 prepare and file a "clean" U-5 --- which Respondent believed would not be accurate or

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20 ⁵ See Cotran v. Rollins Hudig Hall International, Inc., 17 Cal.4th 93, 105-106 (1998) ("Cotran"), in
21 which the California Supreme Court stated in a related connection that facts bearing on an
employment termination decision are

22 "typically gathered under the exigencies of the workaday world
23 and without benefit of the slow-moving machinery of a contested
24 trial" [and] "implicates organizational judgment and may turn on
25 intractable factual uncertainties....If an employer is required to have
in hand a signed confession or eyewitness account of the alleged
misconduct before it can act, the workplace will be transformed into
an adjudicatory arena and effective decision-making will be thwarted."

26 Cotran teaches that a judge or arbitrator should give the employer "sensible latitude for
managerial decision making" in the circumstances and should avoid too critically

27 "reexamine[ing] in all of its factual detail the triggering cause of the
28 decision to dismiss...months or even years later, in a context distant from
the imperatives of the workplace." Id.

1 true and which Respondent knew would be relied on by FINRA, a semi-public
2 enforcement agency, and all prospective employers of Claimant --- if Claimant agreed
3 to take what Respondent insisted upon as settled severance pay, coupled with giving
4 Respondent a general release. The equitable doctrine of "unclean hands" comes to
5 mind. However, the Arbitrator does not believe that Labor Code section 206.5 "good
6 faith belief" can be set aside or disregarded under that doctrine. It more properly
7 appears to be a matter for FINRA to decide --- as a matter of industry and public policy
8 --- whether either side may raise, negotiate and select alternative U-5's as part of
9 employment separation arrangements.

10 5. For purposes of this arbitration --- based on the parallel agreement of the
11 parties --- contractual "'just cause' means that an employer has not acted 'arbitrarily,
12 capriciously, discriminatorily or made a decision not based on fact.'" Respondent's
13 Post-Hearing Brief, at p. 16.

14 6. Respondent's shifting defense of what constituted Claimant's
15 insubordination supports the Arbitrator's determinations that (A) Respondent's
16 termination of Claimant's employment was not for insubordination (as stated in the
17 U-5) or for contractual "cause"⁶ and, accordingly, that (B) the "U-5" which Respondent
18 prepared and caused to be filed with FINRA (formerly NASD) in connection with
19 Claimant's termination, was not complete, accurate or correct.

20 This arbitration award will provide a remedy intended to correct and
21 rectify the damage caused by Claimant's U-5.

22 7. Insubordination means and requires a subordinate's intentional
23 disobedience or reckless disregard a superior's lawful, clear, direct command,
24 instruction or directive ("order"). While compliance with an order implies immediate

25 ⁶ Claimant's two-year employment contract with Respondent --- dated June 14, 2006 and which
26 expired on June 30, 2008 --- provided for compensation of \$2.25 million per year, some of which
27 was deferred in cash. The contract (A) provided that if Claimant was terminated without cause,
28 all unpaid amounts under the contract would accelerate (including those due after 2008 and
into 2011) and would become immediately due and payable and (B) defined "cause," to include
"...insubordination...or a violation of Countrywide policies pertaining to conduct."

1 compliance --- insubordination requires deliberate or reckless and undue delay, where
2 time-sensitivity is material, if not crucial. Negligence or even gross negligence is not
3 sufficient to establish employment insubordination.

4 No insubordination was proved.

5 8. No policy or operating practice, procedure or rule promulgated by
6 Respondent concerning any trade or set of trades or transactions caused or ordered by
7 Claimant --- directly or through any intermediary --- was violated. Respondent's
8 internal investigation effectively so determined, Mr. Fox, who testified as Respondent's
9 representative at hearing, so testified, and no mention of any such violation is
10 referenced or fairly implied from the U-5.

11 General verbal statements of senior management made at meetings not
12 shown to have been attended by Claimant and not reduced to writing --- including
13 those made by senior management officials about how Countrywide's business would
14 or should be conducted or guided in light of Bank of America's having agreed to
15 acquire Countrywide (including its securities business) --- does not qualify as anything
16 which could be intentionally disobeyed or recklessly disregarded and constitute
17 insubordination for purposes of this arbitration. Moreover, the evidence is that it was
18 expressly "business as usual" for Countrywide's Treasury trading desk, including for
19 Countrywide in its capacity as a Federal-Reserve-designated "primary dealer," which
20 included a "market-making" function during auctions of US Treasury securities.

21 9. Claimant had the authority to get into and out of the trading positions in
22 issue in this arbitration --- i.e., in connection with the February 7, 2008 "Dutch auction"
23 \$1 billion "market supporting" bid, which he made on behalf of Respondent as a
24 primary dealer designated by the Federal Reserve to bid at US Treasury auctions

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1 conducted by the Federal Reserve⁷ --- without having to first get authority from or
2 consulting with either of his immediate superiors on the trading desk or anyone else in
3 Respondent's employ. Mr. Fox's testimony and Respondent's internal Audit Report
4 support that determination and are not to the contrary.⁸

5 Moreover, Claimant's trading on February 7, 2008, was within usual and regular
6 bidding practice and, according to Mr. Fox, within corporately acceptable risk, within
7 which Claimant and other Countrywide traders engaged from late summer 2007 to and
8 including February 7, 2008.

9 As suggested earlier in connection with the Bank of America transaction, risk
10 reduction elsewhere within Countrywide companies or entities or other trading desks
11 was not made applicable to Countrywide's Treasury auction bidding practices, at least
12 not until after Respondent's termination of Claimant's employment. The Federal
13 Reserve did not relax Respondent's primary dealer bidding obligations until Spring
14 2008 --- which also was after Respondent's termination of Claimant's employment.

15 10. Based on the record adduced at hearing --- including Mr. Fox's testimony
16 and the U-5 itself --- Claimant could only have been insubordinate if he intentionally
17 disobeyed or recklessly disregarded a time-sensitive verbal command, order,
18 instruction or directive from one of his immediate co-supervisors on Respondent's
19 Treasury trading desk, Mark Schultz and/or Joseph Cesare, to "get it down" or

21 ⁷ Respondent has conceded that primary dealer "traders are required to bid many billions of
22 dollars of securities and loans, only a small fraction of which they intend to buy." In
23 consideration of their market supporting activities, primary dealers were entitled to loans
24 directly from the Federal Reserve, which was very important to Respondent at the time of
25 February 7, 2008 auction.

26 ⁸ Respondent's Internal Audit --- which performed an independent investigation for
27 Respondent's senior management (including its president and CEO) --- in pertinent part
28 stated that

██████████ was terminated for not hedging his exposure as rapidly as instructed...
not for submitting a bid at auction with no prior approval...[which] was allowed
under CSC trading practices and policies existing at the time." [Ex. 136]
The Internal Audit Report also concluded that he was not terminated for having caused
Respondent to sustain an unacceptably large monetary loss or for allegedly having failed to
report his position.

