

1 Paul R. Hejmanowski, Esq. (SBN 0094)
2 Leslie Bryan Hart, Esq. (SBN 4932)
3 John D. Tennert, Esq. (SBN 11728)
4 LIONEL SAWYER & COLLINS
5 1100 Bank of America Plaza
6 50 W. Liberty St.
7 Reno, NV 89501
8 (Tel) 775-788-8650 (Fax) 775-788-8682
9 phejmanowski@lionelsawyer.com
10 lhart@lionelsawyer.com
11 jtennert@lionelsawyer.com

7 Matthew W. Close, Esq. (*Admitted Pro Hac Vice*)
8 Sandra Sepulveda, Esq. (*Admitted Pro Hac Vice*)
9 O'MELVENY & MYERS LLP
10 400 S. Hope Street
11 Los Angeles, CA 90071
12 (Tel) 213-430-7213 (Fax) 213-430-6407
13 mclose@omm.com
14 ssepulveda@omm.com

11 Attorneys for Defendants

12 UNITED STATES DISTRICT COURT
13 DISTRICT OF NEVADA

14 STATE OF NEVADA,

CASE NO: 3:11-cv-00135-RCJ-WGC

15 Plaintiff,

16 vs.

**DEFENDANTS' RESPONSE TO
17 PLAINTIFF'S MOTION FOR LEAVE
18 TO FILE SECOND AMENDED
19 COMPLAINT**

17 BANK OF AMERICA CORPORATION;
18 BANK OF AMERICA, N.A.; BAC HOME
19 LOANS SERVICING, LP; RECONTRUST
20 COMPANY, N.A.; COUNTRYWIDE
21 FINANCIAL CORPORATION;
22 COUNTRYWIDE HOME LOANS, INC.;
23 and FULL SPECTRUM LENDING, INC.,

24 Defendants.

25
26 With its proposed Second Amended Complaint ("SAC"), Plaintiff seeks to transform an
27 already unwieldy lawsuit into one of epic scope and complexity. As Plaintiff itself notes in a
28 recent press release, the proposed SAC will grow this lawsuit into one that "cuts across virtually
every aspect of [Defendants'] operations." Press Release, Office of the Attorney General,

1 “Attorney General Seeks to Terminate Countrywide Settlement” (Aug. 30, 2011), *available at*
2 <http://ag.state.nv.us/newsroom/press/2011/BofAComplaint.pdf>.

3 Had Plaintiff met and conferred with Defendants prior to seeking leave to amend,
4 Defendants would have readily acknowledged the breadth of Plaintiff’s liberty to amend its
5 pleadings at this early stage.¹ Defendants thus have no objection to Plaintiff’s request for leave
6 to amend. However, Defendants would have called attention to the serious case management
7 implications of the proposed amendments, and would have offered their consent to an
8 amendment on the condition that the parties join in requesting a case management conference to
9 discuss the sequencing of proceedings in what appears to be a case of unprecedented breadth and
10 complexity. Defendants respectfully urge the Court to put such a case management conference
11 on the calendar at the earliest opportunity.

12
13
14 Plaintiff’s proposed SAC is discussed in further detail below, but a critical amendment
15 for purposes of this motion is that Plaintiff now seeks to assert claims that it expressly released
16 over two years ago in the Consent Judgment. Plaintiff argues it is entitled to pursue these claims
17 because Defendants allegedly have materially breached their own obligations under the Consent
18 Judgment, freeing Plaintiff from its release. The scope of the released claims is undeniably vast,
19 covering entire sectors of the mortgage industry—such as mortgage origination, including
20 marketing, underwriting and securitization practices—that are not addressed by the First
21 Amended Complaint (“FAC”). Unless the litigation is properly sequenced, the proposed
22 amendments will push the limits of manageable and timely litigation. Defendants will also
23 suffer substantial prejudice if subjected to trial and discovery on such wide-ranging claims that
24 are the subject of an express release before the Court determines whether the release is still

25
26 ¹ Before embarking on this course, Plaintiff did not try to meet and confer with
27 Defendants to see if the parties could agree to a stipulated amendment, opting instead for motion
28 practice from the outset. This desire for a contested proceeding perhaps stems from Plaintiff’s
apparent plan to create a high-profile media event around its filing. *See* Press Release, Office of
the Attorney General, “Attorney General Seeks to Terminate Countrywide Settlement” (Aug. 30,
2011), *available at* <http://ag.state.nv.us/newsroom/press/2011/BofAComplaint.pdf>.

1 enforceable.

2 Accordingly, if the Court grants Plaintiff's motion for leave to amend its complaint,
3 Defendants intend promptly to seek bifurcation of discovery and trial of the released claims until
4 after the Court determines whether Plaintiff is indeed entitled to revoke the release. These and
5 other concerns about the scope of Plaintiff's pleadings can be addressed at the requested case
6 management conference.

7
8 **I. THE PROPOSED SECOND AMENDED COMPLAINT SIGNIFICANTLY ENLARGES AN ALREADY EXPANSIVE PROCEEDING**

9 The pending FAC broadly alleges consumer fraud violations with respect to Defendants'
10 implementation and handling of loan modification and loss mitigation programs for existing
11 residential mortgage loans. FAC ¶¶ 26–69. The FAC also alleges violations of the Consent
12 Judgment that Plaintiff entered in February 2009 with Defendant Countrywide Financial
13 Corporation (“CFC”). FAC ¶¶ 70–74. Plaintiff alleges that all Defendants (even the six
14 Defendants that were not parties to the Consent Judgment) violated their obligations under the
15 Consent Judgment by failing to provide loan modifications to eligible borrowers, failing to make
16 timely decisions on loan modification requests, and initiating foreclosure processes while such
17 requests were pending. *Id.*

18 The Parties are engaged in wide-ranging discovery in connection with these allegations.
19 Plaintiff has served 73 expansive requests for production, including for documents relating to
20 Defendant's many internal loan servicing processes, and voluminous loan servicing documents
21 for potentially tens of thousands of Defendants' customers. To date, discovery among the parties
22 has been limited to a period beginning January 1, 2009 and ending on June 30, 2011. Plaintiff
23 has also engaged in extensive and early third-party discovery, issuing broad subpoenas to 26
24 financial institutions, ratings agencies, and insurance companies, among others. Defendants are
25 currently conducting regular meet and confer sessions with Plaintiff and are focusing their
26 diligent efforts on investigating and responding to the current discovery requests in order to meet
27 the discovery cutoff date of September 17, 2012. The parties are also scheduled to disclose
28 experts on May 1, 2012. Defendants will need to continue their focused attention on the claims

1 currently at issue in the FAC in order to adhere to these deadlines.

2 Now, in the SAC, Plaintiff alleges not only that all Defendants violated the Consent
3 Judgment on certain occasions, but that they materially failed to meet their obligations such that
4 Plaintiff is entitled to terminate the Consent Judgment. SAC ¶ 74. The allegation that
5 Defendants' non-compliance was of such magnitude as to permit termination of the Consent
6 Judgment fits reasonably within the scope of issues alleged in the FAC, since the current
7 complaint alleges that Defendants breached the Consent Judgment. Plaintiff principally seeks a
8 new remedy—termination of the Consent Judgment—rather than a finding of Defendants'
9 violations and imposition of monetary relief like restitution and civil penalties.

10 As part of the Consent Judgment, Plaintiff released CFC and its affiliates from liability
11 “arising out of the residential mortgage origination or servicing activities of CFC and its
12 subsidiaries occurring before entry of this Judgment.” Consent Judgment § 9.2. Plaintiff now
13 asks to be freed from the release and to sue Defendants for any and all alleged misconduct it
14 covered, whenever it occurred. *Id.* Plaintiff is seeking not only a finding that the Consent
15 Judgment may be terminated, but also—apparently simultaneously—to commence litigation that
16 can proceed only if Plaintiff first succeeds in securing that ruling.

17 The SAC incorporates allegations from the FAC, but also pleads a host of new claims
18 covered by the release. In addition to the allegations related to Defendants' loan modification
19 and loss mitigation programs featured in the FAC, the SAC also alleges that CFC engaged in
20 deceptive practices related to mortgage origination beginning in 2004. SAC ¶¶ 25–70.
21 Specifically, Plaintiff alleges that CFC deceptively structured, underwrote, marketed, and
22 securitized loan products prior to the entry of the Consent Judgment. *Id.* These released claims
23 all pre-date Bank of America's acquisition of CFC. The SAC further alleges that Defendants
24 engaged in foreclosure and collection activities without proper legal authority. SAC ¶¶ 137–151.
25 The SAC's new allegations—which Plaintiff argues it can pursue if the Court will allow it to
26 terminate the Consent Judgment—do not merely “round out” the allegations in the existing
27 complaint; they relate to different lines of business, different loans, different conduct, different
28 divisions within Defendants' organizations, different witnesses, and different periods in the

1 mortgage cycle. On top of that, Plaintiff's proposed amendments nearly triple the time period
 2 during which allegedly improper conduct took place. Conducting discovery and other litigation
 3 of the released claims at the same time as the parties are litigating the FAC claims and Plaintiff's
 4 asserted ability to terminate the Consent Judgment would be prejudicial and unworkable.

5
 6 **II. SENSIBLE CASE MANAGEMENT AND SEQUENCING ARE ESSENTIAL TO**
 7 **LIMIT THE POTENTIAL PREJUDICE CREATED BY THE PROPOSED**
 8 **AMENDMENTS**

9 Defendants agree that it may be efficient to keep all of Plaintiff's claims in one case
 10 before one court, but the proposed expanded lawsuit has prejudicial implications for the current
 11 discovery plan, case scheduling, and trial preparation absent sensible case management. For this
 12 reason, Defendants request a case management conference if Plaintiff's motion for leave to
 13 amend is granted. The FAC already presents tremendous complexity, implicating hundreds of
 14 thousands of borrower interactions. Plaintiff has not attempted to articulate a trial plan even for
 15 the current pleading,² but any hope for completing discovery and preparing the current case for
 16 trial will be lost if the parties must simultaneously conduct discovery on the merits of the
 17 separate and distinct claims released by the Consent Judgment. Discovery related to these
 18 additional claims will have almost no factual or temporal overlap with the allegations in the
 19 FAC.

20 As the Court and parties begin weighing the options for keeping this expanded case
 21 manageable and on a reasonable schedule, the logical option is bifurcating trial and discovery by
 22 focusing first on the claims alleged in the FAC, including compliance with the Consent
 23 Judgment, as well as Plaintiff's alleged entitlement to terminate the Consent Judgment and
 24 revoke its release. The focus of discovery and trial should remain Defendants' post-Consent
 25 Judgment loan modification and foreclosure practices and compliance with the Consent
 26 Judgment's requirements. Litigating the merits of the released claims through motion practice,
 27 discovery, and trial should wait until there has been an adjudication of Plaintiff's supposed right

28 ² Indeed, at the most recent hearing, the Court observed that Plaintiff's counsel
 "duck[ed]" the Court's question about how it intended to try its case and measure damages
 where so many borrowers are at issue. Tr. of Mot. Hr'g, 27:20-21, June 6, 2011.

1 to revoke its release.³ Given the size of the current case and the scope of the new issues Plaintiff
 2 seeks to add in the SAC, it is important that predicate issues be litigated and resolved before
 3 discovery begins on contingent claims. *See Jinro Am., Inc. v. Secure Invs., Inc.*, 266 F.3d 993,
 4 998 (9th Cir. 2001) (“Under Rule 42(b), the district court has broad discretion to bifurcate a trial
 5 to permit deferral of costly and possibly unnecessary proceedings pending resolution of
 6 potentially dispositive preliminary issues.”); *see also De Anda v. City of Long Beach*, 7 F.3d
 7 1418, 1421 (9th Cir. 1993) (bifurcation appropriate “to avoid prejudice, or when separate trials
 8 will be conducive to expedition and economy”).⁴

9 Rule 60 of the Federal Rules of Civil Procedure—which permits a court to hear a motion
 10 to “relieve a party or its legal representative from a final judgment, order, or proceeding”—
 11 further confirms that the threshold question of whether Plaintiff can be relieved from the release
 12 it signed should be the subject of discovery and trial before commencing discovery and motion
 13 practice on the released claims. Fed. R. Civ. P. 60(b). The Rule specifies that such a motion
 14 “does not affect the judgment’s finality or suspend its operation,” Fed. R. Civ. P. 60(c)(2), thus
 15 confirming that Plaintiff’s effort here to set aside the Consent Judgment and its release does *not*
 16

17 ³ In considering bifurcation to first resolve the predicate question of material breach, the
 18 Court should consider that several of the “new” allegations supporting the alleged material
 19 breach are frivolous and indeed self-contradictory. For example, Plaintiff incredibly alleges that
 20 Countrywide violated the Consent Judgment by requiring borrowers to submit proof of income
 21 before they could obtain a loan modification, SAC ¶ 83, just a few pages after lambasting
 22 Defendants for underwriting mortgages in a manner “which did not require Countrywide to
 23 confirm the borrower’s income,” SAC ¶ 46. Plaintiff apparently thinks it can escape the effect
 24 of a stipulated court judgment because Defendants both required and did not require borrowers to
 25 verify their financial status. Moreover, many of Plaintiff’s new claims are plainly barred by the
 26 Nevada Deceptive Trade Practices Act’s four-year statute of limitations. Nev. Rev. Stat. Ann. §
 27 11.190 (2)(d). Plaintiff seeks to avoid this problem by claiming, in conclusory fashion, that
 28 those “claims are timely as they were tolled by entry of the Consent Judgment and Defendants
 are equitably stopped [sic] from raising statute of limitations defenses.” SAC ¶ 75. This
 argument is meritless; Plaintiff negotiated for many favorable provisions in the Consent
 Judgment, but there is no provision for the tolling of applicable statutes of limitations.

⁴ The Court also has discretion to impose reasonable conditions on a grant of leave to
 amend a complaint in order to prevent prejudice. *See Int’l Ass’n of Machinists v. Republic
 Airlines*, 761 F.2d 1386, 1391 (9th Cir. 1985); *cf. Eminence Capital, LLC v. Aspeon, Inc.*, 316
 F.3d 1048, 1052 (9th Cir. 2003) (consideration of prejudice to the opposing party “carries the
 greatest weight” in ruling on motions for leave to amend). These conditions can include both
 costs and case management orders. *See General Signal Corp. v. MCI Telecomms. Corp.*, 66 F.3d
 1500, 1514 (9th Cir. 1995) (upholding the imposition of costs as a condition of granting leave to
 amend); *Aida Eng’g Inc. v. Red Stag, Inc.*, 629 F. Supp. 1121, 1128 (E.D. Wis. 1986) (cancelling

1 suspend the release, and therefore discovery related to the released claims should not begin
2 unless and until the Court finds a material breach of the Consent Judgment permitting Plaintiff to
3 terminate.

4 **III. CONCLUSION**

5 Plaintiff can and will assert whatever claims it deems appropriate, but Defendants
6 respectfully submit that the price of pursuing a complaint that by Plaintiff's own admission
7 covers virtually every corner of the American mortgage industry is acceptance of a case
8 management regime that accounts for its scope. Defendants request and look forward to a case
9 management conference to begin that discussion.

10 DATED this 16th day of September, 2011.

11
12 LIONEL SAWYER & COLLINS

13 By: /s/ Leslie Bryan Hart
14 Paul R. Hejmanowski, Esq. (SBN 0094)
15 Leslie Bryan Hart, Esq. (SBN 4932)
16 John D. Tennert, Esq. (SBN 11728)
17 1100 Bank of America Plaza
18 50 W. Liberty St.
19 Reno, NV 89501
20 (Tel) 775-788-8650 (Fax) 775-788-8682
21 phejmanowski@lionelsawyer.com
22 lhart@lionelsawyer.com
23 jtennert@lionelsawyer.com

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26 O'MELVENY & MYERS LLP
27 400 S. Hope St.
28 Los Angeles, CA 90071
(Tel) 213-430-7213 (Fax) 213-430-6407
mclose@omm.com
ssepulveda@omm.com

Attorneys for Defendants

trial date and extending the period for discovery given expanded nature of amended complaint).

