

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

Republic Mortgage Insurance Co., et al,

Plaintiffs,

- against -

Countrywide Financial Corp., et al.,

Defendants.

Index No.: 09603915/2009

**COUNTRYWIDE DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF  
MOTION TO DISMISS AND COMPEL ARBITRATION, OR TO STAY COURT  
PROCEEDINGS PENDING COMPLETION OF ARBITRATION**

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Defendants Countrywide Financial Corporation (“CFC”), Countrywide Home Loans, Inc. (“CHL”), BAC Home Loans Servicing LP (formerly Countrywide Home Loan Servicing, LP) (“Servicing LP”) and Bank of America, N.A., as successor in interest to Countrywide Bank, N.A. (“BANA”) (collectively “Countrywide” or, the “Countrywide Defendants”), by and through their attorneys, Reed Smith LLP, on their own behalf and, pursuant to agreement, on behalf of Defendant The Bank of New York Mellon Trust Company, N.A., as trustee (“BNYM”) hereby move this Court (i) pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. (“FAA”) and CPLR § 7503(a) for an Order compelling arbitration of all matters alleged in the Amended Complaint; and (ii) pursuant to New York Civil Practice Law and Rules (“CPLR”) §§ 3211(a)(1) and (7), for an Order dismissing the Amended Complaint on the grounds that (i) documentary evidence shows that all claims alleged in the Amended Complaint are subject to arbitration, and thus (ii) the Amended Complaint fails to state a claim. In the alternative, if the Court declines to dismiss the Amended Complaint, the Countrywide Defendants request an Order staying further proceedings in this Court pending arbitration. In support of this Motion, Countrywide hereby submit this Memorandum of Law, along with the accompanying Affirmation of Jean M. Farrell, dated February 11, 2010 (the “Farrell Aff.”).

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

For reasons unrelated to the coverage provided by mortgage insurance policies plaintiffs sold to Countrywide, Plaintiffs Republic Mortgage Insurance Company and Republic Insurance Company of North Carolina (collectively “RMIC”) have denied millions of dollars in valid mortgage insurance claims that Countrywide submitted. In

more prosperous times, RMIC reaped hundreds of millions of dollars through its participation in the home mortgage market, selling mortgage insurance policies to insure that if borrowers of certain residential mortgage loans defaulted on their obligations to pay principal and interest, the insurer would pay the amounts of such default to make whole on defaulted loans. RMIC now, however, faces the reality of steep losses because of a significant economic downturn and has failed to pay claims in accordance with its duties under the policies that it sold and for which it received millions of dollars in premiums.

Countrywide and RMIC actively engaged in discussions in an attempt to resolve their dispute over unpaid claims under five mortgage insurance policies (the “Policies”). Farrell Aff., ¶ 3. Countrywide had requested that RMIC enter into a tolling agreement to facilitate continued discussions. Id. In the midst of these discussions, without prior notice, and without regard to broad arbitration provisions (the “Arbitration Provisions”) in each of the Policies, RMIC initiated litigation in this Court seeking to immunize its refusal to honor its contractual obligations. See Farrell Aff. at ¶ 3. RMIC seeks declaratory judgments that: (1) an agreement with Countrywide regarding the circumstances under which claims for coverage would become incontestable applies to a single Policy, and not to all policies that include that provision encompassed under the agreement, and (2) certain claims-handling and review appraisal processes do not violate the terms of the Policies. See Amended Complaint, Farrell Aff., Ex. A.

The Arbitration Provisions in each of the Policies provide that the Insured may elect to arbitrate any disputes “arising out of or relating to” the applicable Policy:

Unless prohibited by applicable law, the Insured, at its option, may elect to settle by arbitration a controversy, dispute, or other assertion of liability or

rights which it initiates arising out of or relating to this Policy, including the breach, interpretation, or construction thereof.

Policies, § 7.6, Farrell Aff., Exs. C–G.

Accordingly, shortly after Countrywide was served with RMIC's surprise complaint, Countrywide filed a comprehensive Demand for Arbitration in Los Angeles, California (the "Arbitration Demand"), encompassing the specific disputes raised by RMIC here, along with additional issues and causes of action not raised by RMIC. Farrell Aff., Ex. B. The Arbitration Demand evidences Countrywide's intent to exercise the contractual option under the Policies to comprehensively resolve disputes regarding the Policies through arbitration.

Under both the FAA and CPLR § 7503(a), the Court must grant a motion to compel arbitration if a dispute falls within the scope of valid arbitration clauses. Here, as discussed more fully below, the Arbitration Provisions at issue are part of valid and enforceable insurance contracts and the issues raised in RMIC's Amended Complaint fall within the broad scope of those Arbitration Provisions. Countrywide is entitled, on its own behalf, and pursuant to a ratification agreement with BNYM, on behalf of BNYM, to an Order compelling arbitration of the claims alleged in the Amended Complaint. Moreover, as the Policies and Arbitration Demand unequivocally evidence, the parties contractually agreed that the claims raised by RMIC should be arbitrated and not litigated. The Court should accordingly dismiss the entire Amended Complaint pursuant to CPLR § 3211(a)(1), which mandates dismissal of claims for which a defense unequivocally is established by documentary evidence. Because all the claims in the Amended Complaint are subject to arbitration, it should also be dismissed pursuant to CPLR § 3211(a)(7) for failure to state a viable claim. In the alternative, if the Court

declines to dismiss the Amended Complaint, the Countrywide Defendants request an Order staying further proceedings in this Court pending arbitration.

**I. FACTS PERTINENT TO THIS MOTION**

Over the last decade, Countrywide was a leading first lien mortgage lender in the United States. As part of that business, Countrywide established strategic business relationships with mortgage insurance companies, including RMIC, purchasing mortgage insurance to provide coverage in the event a borrower defaults on a loan. During this period, there was great competition in the mortgage insurance market and RMIC, along with other mortgage insurers, engaged in a marketing campaign to convince lenders such as Countrywide to purchase its mortgage insurance products and services.

During the development of Countrywide's lending business, it and RMIC regularly and routinely interacted at all levels of their business, and RMIC had access to detailed and comprehensive loan information from Countrywide. In addition to having a sound understanding of how Countrywide operated its mortgage lending business based on the parties' regular interactions, RMIC understood first hand the risks associated with the mortgage lending business.

**A. The Mortgage Insurance Policies RMIC Sold to Countrywide**

**1. Flow Policy 06854**

"Flow" mortgage insurance policies are intended to cover individual loans generated and/or acquired by the lender in the ordinary course of its business. Parties seeking to insure a loan apply for Flow policy coverage on an individual loan basis and mortgage insurers underwrite such policies on that basis. RMIC issued Flow Policy 06854 to Countrywide Funding Corporation on February 28, 1986, to insure certain first-lien mortgage loans it originated or acquired to protect against loss caused by the failure

of borrowers to repay home mortgage loans covered thereunder. See Flow Policy, Farrell Aff., Ex. C. On March 11, 1996, the “Insured” under Flow Policy 6854 was changed to CHL, and on September 2, 2005, the “Insured” under Flow Policy 6854 was changed to Countrywide Financial and any of its subsidiaries. Amended Complaint, ¶ 16, Farrell Aff., Ex. A.

## **2. Bulk Policies**

RMIC also sued on four “bulk policies,” Bulk Policy 06L75-00, Farrell Aff., Ex. D, Bulk Policy 067L5-01, Farrell Aff., Ex. E, Bulk Policy 067L5-02, Farrell Aff., Ex. F, and Bulk Policy 6854-42, Farrell Aff., Ex. G (collectively, the “Bulk Policies”). Bulk Policies 06L75-00, 067L5-01, and 067L5-02 insure against default of mortgage loans held in a securitized trust, insuring the particular single family residential mortgage loans within each trust that RMIC had agreed to insure.

Bulk Policy 6854-42 insures a portfolio of loans. CHL is the Insured under Bulk Policy 6854-42. Amended Complaint, ¶ 57, Farrell Aff., Ex. A. BNYM, the trustee of the securitized trusts, is the Insured on Bulk Policies 06L75-00, 067L5-01, and 067L5-02 (the “Remaining Bulk Policies”). Farrell Aff., Exs. D-F. The agreements that formed the securitizations also allocate to Countrywide, as the Master Servicer on the Remaining Bulk Policies, the right and the obligation to take, administer, and enforce the Remaining Bulk Policies for all purposes, including resolution of disputes with RMIC. See Pooling and Servicing Agreement, dated as of Nov. 1, 2006, Asset-Backed Certificates, Series, 2006-23, § 3.01, Pooling and Servicing Agreement, dated as of Dec. 1, 2006, Asset-Backed Certificates, Series, 2006-24, § 3.01, Pooling and Servicing Agreement, dated as of Dec. 1, 2006, Asset-Backed Certificates, Series, 2006-25, § 3.01, Farrell Aff., Ex. H. BNYM, has agreed to be bound by the results of Countrywide’s efforts. See Letter, dated

February 16, 2010, from Leo T. Crowley, counsel for BNYM, to Michael R. Hassan, counsel for RMIC, Farrell Aff., Ex. I.<sup>1</sup> The Countrywide Defendants also are third-party beneficiaries of the Remaining Bulk Policies, and thus have the authority, in their own right, to enforce the provisions of the Remaining Bulk Policies, including the Arbitration Provisions.

**3. The Arbitration Provisions.**

The Policies each provide under Section 7.6 that the Insured may elect to arbitrate any disputes “arising out of or relating to” the applicable Policy:

Unless prohibited by applicable law, the Insured, at its option, may elect to settle by arbitration a controversy, dispute, or other assertion of liability or rights which it initiates arising out of or relating to this Policy, including the breach, interpretation, or construction thereof.

Policies, § 7.6, Farrell Aff., Exs. C–G.

**4. The June 7, 2006 Incontestability Agreement**

RMIC’s standard form policy, including the form used for Flow Policy 06854, and flow policies issued to other lenders, provided at Section 2.4 that a claim would be incontestable only after the borrower made “twelve (12) consecutive full installment payments of principal, interest and impound or escrow amounts in the amounts as called for by the Loan, and all of those payments must have been made from the [b]orrower’s own funds.” Flow Policy, Farrell Aff., Ex. C. To induce Countrywide to continue doing business with it, RMIC agreed by letter dated June 7, 2006, that incontestability for certain misrepresentations in the application would be “effective as of the certificate date,” rather than after the borrower has made 12 consecutive payments. See “June 7, 2006 Incontestability Agreement,” Farrell Aff., Ex. J.

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<sup>1</sup> BNYM also has confirmed that Countrywide’s filing of the Arbitration Demand is within the rights and obligations allocated to Countrywide under the transaction documents. Id.

**B. RMIC's Amended Complaint<sup>2</sup>**

RMIC has alleged in its Amended Complaint that the June 7, 2006 Incontestability Agreement applies only to the Flow Policy and seeks a declaration to that effect. See Amended Complaint, Farrell Aff., Ex. A, at §§ 61, 62. As set forth in the Arbitration Demand, Countrywide disputes this position, and asserts that the June 7, 2006 Incontestability Agreement applies to all mortgage insurance policies that RMIC issued containing Section 2.4(a), or other mortgage insurance policies that RMIC issued to lenders who sold loans, and/or transferred the servicing rights of loans to Countrywide. See, e.g., Arbitration Demand at ¶ 42, Farrell Aff., Ex. B.

RMIC's Amended Complaint also seeks a declaration that certain claims-handling procedures and review appraisal processes that RMIC has relied upon to rescind insurance for certain loans do not violate the Policies at issue. See Amended Complaint at 23, ¶ (f), Farrell Aff., Ex. A. As set forth in Countrywide's Arbitration Demand, discussed below, Countrywide disputes RMIC's position, and the subjects of both of RMIC's claims are encompassed in Countrywide's Demand for Arbitration.

**C. The Arbitration Demand**

On January 29, 2010, Countrywide filed an Arbitration Demand against RMIC, selecting Los Angeles, California as the situs where the arbitration proceeding will take place. See Arbitration Demand, dated January 29, 2010, Farrell Aff., Ex. B. The Arbitration Demand asserts causes of action arising under the same Policies that are at issue here, addressing more comprehensively the parties' dispute, including the same

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<sup>2</sup> RMIC filed its initial complaint on December 31, 2009, and its amended complaint on January 5, 2010, and served the two complaints simultaneously. The Amended Complaint and the Complaint are the same in all material respects.

issues that RMIC addresses in its Amended Complaint. Specifically, the Arbitration Demand seeks the following declarations:

- a) The June 7, 2006 incontestability agreement applies to all mortgage insurance issued by RMIC on loans originated or acquired by Countrywide that are insured under RMIC policies containing Section 2.4, including but not limited to Flow Policy 6854;
- b) RMIC must pay claims within the time specified in the Policies or set forth with specificity the reasons as to why RMIC believes the claim is not covered, including the citation of specific policy provisions, and if RMIC does not respond to a claim or set forth with specificity its reasons for denying or otherwise avoiding coverage for a claim within the appropriate time periods, RMIC is precluded from later asserting grounds for denying or otherwise avoiding coverage for a claim;
- c) To the extent that RMIC is permitted to deny or otherwise avoid coverage based on alleged misrepresentations, it may not rely on information outside the application;
- d) RMIC can only deny or otherwise avoid coverage based on a material misrepresentation upon which it actually relied;
- e) RMIC can only deny or otherwise avoid coverage based on fraud, if the Insured committed the fraud, and not if the borrower or any third party committed the fraud;
- f) A misrepresentation regarding an appraiser's opinion of the value of property can occur only if the opinion stated was not the appraiser's actual opinion or, at least, that the appraiser's opinion was made in bad faith;

- g) RMIC cannot deny or otherwise avoid coverage for a claim based on alleged variance among origination and review appraisals, so long as an origination appraisal is defensible;
- h) RMIC cannot deny or otherwise avoid coverage for a claim based on alleged late filings unless RMIC can show that it suffered real and substantial prejudice as a result;
- i) Countrywide has substantially complied with the requirements of the Policies and such substantial compliance satisfies the Policies' requirements for filing a claim;
- j) RMIC cannot deny or otherwise avoid coverage for a claim based on alleged documents missing from the loan file unless RMIC can show that such alleged missing documents are material to RMIC's claim evaluation and that absence of those documents has caused real and substantial prejudice;
- k) RMIC cannot deny or otherwise avoid coverage for a claim based on Countrywide marking IRS Form 4506-T in order to protect the privacy interests of its borrowers;
- l) RMIC cannot deny or otherwise avoid coverage for a loan based on alleged ineligible loan characteristics where such information was provided, or was otherwise available to RMIC prior to the time RMIC agreed to insure the loan;
- m) The appropriate remedy for RMIC when determining whether a claim or proof of loss has been timely filed is to request supplemental information, not to forfeit coverage;
- n) Countrywide's compliance with any time limitation provision imposed in the Policies or by law is tolled for both existing claims

and future claims as a result of the filing of this Arbitration Demand; and

- o) Any attempt by RMIC to rescind coverage on improper grounds by returning premiums is invalid and any monies received by Countrywide should be credited against amounts that RMIC owes.

Arbitration Demand, Farrell Aff., Ex. B, at 27. In addition, the Arbitration Demand alleges causes of action for Breach of Contract, Promissory Estoppel (Id. at ¶¶ 107-113) and breach of the implied duty of good faith and fair dealing (Id. at ¶¶ 114-120), seeking damages of approximately \$38 million. Id. at 28. The Arbitration Demand thus will comprehensively resolve all issues arising under the Policies, including those raised by RMIC in its Amended Complaint.

## **ARGUMENT**

### **I. RMIC MUST ARBITRATE THIS DISPUTE IN THE PENDING CALIFORNIA ARBITRATION**

#### **A. Governing Principles**

##### **1. The Federal Arbitration Act**

RMIC entered into contractual agreements permitting the Countrywide Defendants to elect to arbitrate all disputes “arising from” or “related to” the Policies. The Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1-16, requires that the Court enforce those agreements. Section 2 of the FAA provides that arbitration clauses shall be “valid, irrevocable, and enforceable”:

A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable and enforceable.

9 U.S.C. § 2. Section 3 of the FAA further provides that any actions brought on issues referable to arbitration shall be stayed pending the arbitration:

[i]f any suit or proceeding be brought...upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had.” 9 U.S.C. § 3. A motion to compel arbitration is governed by Section 4 of the FAA, which provides that “[a] party aggrieved by the alleged failure, neglect or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court...for an order directing that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 4.

The FAA embodies a strong public policy in favor of arbitration, and resolves all doubts with respect to arbitrability in favor of arbitration:

a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary . . . the Arbitration Act establishes that, as a matter of federal law, ***any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration***, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitrability.

Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)

(emphasis added; internal citations omitted); accord, Southland Corp. v. Keating, 465

U.S. 1, 16 (1984).

As the Second Circuit has stated, the FAA reflects “Congress’ recognition that arbitration is to be encouraged as a means of reducing the costs and delays associated with litigation.” Vera v. Saks & Co., 335 F.3d 109, 116 (2d Cir. 2003) (per curiam) (quoting Deloitte Noraudit A/S v. Deloitte Haskins & Sells, 9 F.3d 1060, 1063 (2d Cir. 1993)).

As a result, the FAA requires a court to “enforce arbitration agreements and to stay litigation that contravenes them. The FAA affords no latitude for discretion.” Burns v. New York Life Ins. Co., 202 F.3d 616, 620 (2d Cir. 2000) (internal citations omitted); see also Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985) (holding that the FAA “leaves no place for the exercise of discretion . . . , but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed”) (emphasis added); Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974) (“An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.”)

The FAA “supplies not simply a procedural framework applicable in federal courts; it also calls for the application, in state as well as federal courts, of federal substantive law regarding arbitration.” Preston v. Ferrer, 552 U.S. 346, 128 S.Ct. 978, 981, 169 L.Ed. 917, 923 (2008). Congress’s intent was “to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.” Moses H. Cone, 460 U.S. at 22. The FAA governs any contract that facilitates interstate commercial transactions or directly or indirectly affects commerce between states—such as the substantial commercial contracts at issue here. 9 U.S.C. § 2; Allied-Bruce Terminix Cos. Inc. v. Dobson, 513 U.S. 265, 277 (1995) (FAA governs any contract affecting commerce and was based on an intent to exercise Congress’s commerce power “to the full.”). Further, it has been held that the term ‘involving interstate commerce’ should be broadly read as “the functional equivalent of ‘affecting’ ” interstate commerce. Diamond Waterproofing Co., Inc. v. 55 Liberty Owners Corp., 6 A.D.3d 101, 104, 774

N.Y.S.2d 32, 34 (1<sup>st</sup> Dep't 2004). Accordingly, state courts, such as this court, have jurisdiction, concurrent with federal courts, to enforce the FAA. Moses H. Cone, 460 U.S. at 25.

Because of the broad sweep of the FAA, in ruling on a party's motion to compel arbitration, this Court is only faced with the narrow issue of arbitrability, and need not address any of the merits of the case. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985); Moses H. Cone, 460 U.S. at 24-25. To establish arbitrability, the moving party need only demonstrate: "(1) [that] the parties agreed to arbitrate; and (2) [that] the particular dispute falls within the scope of that agreement." See Hartford Accident & Indem. Co. v. Swiss Reinsurance Am. Corp., 246 F.3d 219, 226 (2d Cir. 2001); see also Egol v. Egol, 68 N.Y.2d 893, 895-96, 501 N.E.2d 584, 585, 508 N.Y.S.2d 935, 936 (1986). Once this two-part test is satisfied, the mandatory stay provisions of FAA section 3 apply. See Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985).

And as noted, any doubts concerning the scope of arbitrable issues must be resolved in favor of arbitration. Moses H. Cone, 460 U.S. at 24-25; accord, Hartford Accident & Indem. Co. v. Swiss Reinsurance Am. Corp., 246 F.3d 219, 226 (2d Cir. 2001) ("[T]here is a strong federal policy favoring arbitration as an alternative means of dispute resolution...in accordance with that policy, where, as here, the existence of an arbitration agreement is undisputed, doubts as to whether a claim falls within the scope of that agreement should be resolved in favor of arbitrability").

## **2. CPLR § 7503**

Although the FAA governs, New York law and public policy with respect to the enforceability of arbitration provisions mirrors the FAA. New York public policy

“favors and encourages arbitration as a means of conserving the time and resources of the courts and the contracting parties . . . [and] New York courts interfere as little as possible with the freedom of consenting parties to submit disputes to arbitration.” Matter of Smith Barney Shearson v. Sacharow, 91 N.Y.2d 39, 49-50, 689 N.E.2d 884, 890, 666 N.Y.S.2d 990, 996 (1997) (internal citation and quotation marks omitted) As under the FAA, any doubts as to whether an issue is arbitrable will be resolved in favor of arbitration. Id.

CPLR § 7503 governs motions to compel arbitration, providing that a court “shall” compel arbitration when there is a “valid agreement” to arbitrate:

A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. ***Where there is no substantial question whether a valid agreement was made or complied with***, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502 [*i.e.*, the statute of limitations], ***the court shall direct the parties to arbitrate***. Where any such question is raised, it shall be tried forthwith in said court. If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. ***If the application is granted, the order shall operate to stay a pending or subsequent action***, or so much of it as is referable to arbitration.

CPLR § 7503(a) (emphases added).

Accordingly, as under the FAA, “the court ***shall direct*** the parties to arbitrate,” where there is a valid agreement to arbitrate; and (2) the dispute comes within the scope of the arbitration agreement. CPLR § 7503(a) (emph. added); County of Rockland v. Primiano Constr. Co., Inc., 51 N.Y.2d 1, 6-7, 409 N.E.2d 951, 952, 431 N.Y.S.2d 478, 480 (1980) (internal citations omitted).<sup>3</sup>

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<sup>3</sup> A third criteria that may apply under the CPLR is whether the claim sought to be arbitrated would be barred by the statute of limitations had it been brought in a state court. The timeliness of the claim is not an issue here.

**B. Since This Dispute Comes Within The Scope Of A Valid Agreement To Arbitrate, the FAA and the CPLR Mandate Arbitration**

**1. The Arbitration Provisions Are Valid**

The Policies' plain language contains binding agreements to arbitrate. Moreover, RMIC brings this action under those Policies. To make its claims, RMIC relies upon, and thus cannot dispute the validity of the Policies and, by extension, the Arbitration Provisions contained therein. Under the plain language of those Provisions, the Insured may elect to arbitrate any dispute arising out of or relating to the Policies, and the Countrywide Defendants have so elected through their Demand for Arbitration.<sup>4</sup>

**2. RMIC's Claims Fall Within The Broad Scope of the Policies' Arbitration Provisions**

It is well-settled that “while the question [of arbitrability] is governed by the intent of the parties, that intent will be broadly construed, and arbitration should be ordered ‘unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.’ ” New York Cross Harbor R.R. Terminal Corp. v. Consolidated Rail Corp., 72 F. Supp. 2d 70, 77 -78 (E.D.N.Y. 1998) (citing Leadertex, Inc. v. Morganton Dyeing & Finishing Corp., 67 F.3d 20, 27 (2d Cir. 1995)). Where the arbitration clause is a broad one, “there arises a presumption of arbitrability” and arbitration of even a collateral matter will be ordered if the claim alleged “implicates issues of contract construction or the parties' rights and obligations under it.” Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc., 252 F.3d 218, 224 (2<sup>nd</sup> Cir. 2001) (citation omitted).

The Arbitration Provisions at issue here provide that arbitration is available, at the Insured's option, for any claims “arising out of or relating to [the Policies].” Farrell Aff., Ex. C-G, § 7.6. Courts consider “arising out of or relating to” to be broad in scope, thus

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<sup>4</sup> The Countrywide entities that initiated arbitration are either the Insured under the Policy in question, or in the case of certain insured trusts, the party authorized to assert the Insured's rights under the Policies. Because the Policies' Arbitration Provisions provide for binding arbitration at the exclusive election of the Insured, the Countrywide Defendants are entitled to compel arbitration of this dispute.

warranting application of a presumption in favor of arbitrability. See, e.g., State v. Philip Morris Inc., 30 A.D.3d 26, 31, 813 N.Y.S.2d 71, 75 (1st Dept. 2006) (holding that “the terms ‘arising out of’ and most particularly ‘relating to,’ certainly evince a broad arbitration clause”).

Here, there is no question that this dispute “arises out of or relates to” the Policies. RMIC seeks a declaration regarding the scope and applicability of certain limited provisions in the Policies, as well as a declaration that its claims-handling practices under the Policies were proper. RMIC’s claims thus fall squarely within the broad scope of the Arbitration Provisions. Consequently, under both the FAA and the CPLR, the Court must compel RMIC to pursue its claims in the pending arbitration in accordance with the parties’ agreement.

**3. The Weight of Authority Supports Outright Dismissal of This Action.**

The FAA directs that, “on application of one of the parties,” the court shall enter a stay in a case where the asserted claims are “referable to arbitration.” FAA, 9 U.S.C. § 3. CPLR 7503 similarly directs that an order compelling arbitration “shall operate as a stay” of the issues subject to arbitration. At a minimum, therefore, this action should be stayed pending conclusion of the pending arbitration.

In the alternative, this action should be dismissed outright under the FAA, as *all* of RMIC’s claims are covered by the Arbitration Provisions and there will be nothing left for this Court to adjudicate after the arbitration is completed. Courts have recognized that outright dismissal is appropriate under such circumstances: “where all of the issues raised in the Complaint must be submitted to arbitration, the Court may dismiss an action rather than stay proceedings.” Spencer-Franklin v. Citigroup/Citibank N.A., No. 06 Civ. 3475, 2007 WL 521295, at \*4 (S.D.N.Y. Feb. 21, 2007); see also Kowalewski v. Samandarov, 590 F. Supp. 2d 477, 491 (S.D.N.Y. 2008); Drakeford v. Washington Mut., No. 07 Civ. 03489, 2008 WL 2755838, at \*4 (S.D.N.Y. July 11, 2008). Indeed, “[t]he

weight of authority clearly supports dismissal of the case when all of the issues raised . . . must be submitted to arbitration.” Alford v. Dean Witter Reynolds Inc., 975 F.2d 1161, 1164 (5th Cir. 1992) (citing Sparling v. Hoffman Constr. Co., 864 F.2d 635, 638 (9th Cir. 1988)). See also Dancu v. Coopers & Lybrand, 778 F. Supp. 832, 835 (E.D. Pa. 1991), aff’d, 972 F.2d 1330 (3d Cir. 1992). Accordingly, upon referring RMIC’s case to arbitration, the Court should dismiss this action in its entirety.

**II. THIS ACTION ALSO SHOULD BE DISMISSED PURSUANT TO CPLR §§ 3211(A)(1) AND (7) BECAUSE THE DOCUMENTS UNEQUIVOCALLY ESTABLISH THAT RMIC AND COUNTRYWIDE CONTRACTED TO RESOLVE DISPUTES UNDER THE POLICIES PURSUANT TO ARBITRATION**

The Amended Complaint also should be dismissed under the CPLR because the causes of action asserted therein cannot be maintained against Countrywide as a matter of New York law. CPLR § 3211(a)(1) provides that “a party may move for judgment dismissing one or more causes of action asserted against him on the ground that a defense is founded on documentary evidence.” A motion seeking dismissal pursuant to 3211(a)(1) should be granted where the documentary evidence providing the defense resolves all factual issues as a matter of law and conclusively disposes of the claims asserted. See, e.g., N.Y. Cmty. Bank v. Snug Harbor Square Venture, 299 A.D.2d 329, 329-330, 749 N.Y.S.2d 170, 171 (2d Dep’t 2002); Teitler v. Max J. Pollack & Sons, 288 A.D.2d 302, 302, 733 N.Y.S.2d 122, 122 (2d Dep’t 2001).

The term “documentary” describes “a paper whose content is essentially undeniable and which, assuming the verity of its contents and the validity of its execution, will itself support the ground on which the motion is based.” David D. Siegel, Practice Commentaries, N.Y. CPLR R. 3211, at 20 (McKinney 2004). Insurance policies are precisely the type of “document” that is anticipated under this provision. Sirius Am.

Ins. Co. v. Bethel Gen. Contraction, Inc., No. 07 Civ. 0103111, 2008 WL 2481876 (Sup. Ct. N.Y. County June 11, 2008) (holding that “[a]contract, like the insurance agreement submitted by Tudor, is the very type of document that may support dismissal under CPLR for a 3211(a)(1)”). See also Goldman v. Metro. Life Ins. Co., 5 N.Y.3d 561, 841 N.E.2d 742, N.Y.S.2d 583(2005); Bronxville Knolls, Inc. v. Webster Town Ctr. P’ship, 221 A.D.2d 248, 634 N.Y.S.2d 62 (1st Dept 1995).

Countrywide will assert as a defense to this action that RMIC is contractually required to arbitrate the claims stated in the Amended Complaint. As demonstrated above, (1) the Arbitration Provisions indisputably show that RMIC agreed that the Insured under the Policies had the option to elect to resolve any disputes arising under the Policies by arbitration; (2) the Arbitration Demand definitively establishes the Insureds’ election to arbitrate; and (3) the claims asserted in the Amended Complaint are within the scope of the Arbitration Provisions. Accordingly, the documentary evidence, coupled with both federal and New York law and public policy favoring arbitration, “conclusively disposes of the claims asserted” in the Amended Complaint, thus warranting dismissal.

New York courts have dismissed claims under § 3211(a)(1) on analogous defenses, based on similar “documentary evidence.” New York courts have, for example, dismissed claims brought in New York under agreements containing forum selection clauses that chose a different forum. See, e.g., W.J. Deutsch & Sons, Ltd. v. Charbaut Am., Inc., 57 A.D.3d 529, 530, 868 N.Y.S.2d 293, 294–295 (2d Dep’t 2008) (dismissing a complaint on § 3211(a)(1) grounds, holding that “the defendants met their burden of showing that the documentary evidence submitted conclusively demonstrates that the parties intended to submit disputes such as the instant one, arising from their [agreement]

to resolution [in Reims, France]”). See also, e.g., Stravalle v. Land Cargo, Inc., 39 A.D.3d 735, 835 N.Y.S.2d 606 (2d Dep’t 2007) (affirming dismissal of complaint based on forum-selection clause contained in bill of lading); LSPA Enter., Inc. v. Jani King of New York, Inc., 31 A.D.3d 394, 817 N.Y.S.2d 657 (2d Dep’t 2006) (affirming dismissal of complaint where parties had agreed to litigate any disputes in Dallas, Texas). In accord with this precedent, the Court should dismiss RMIC’s claims under CPLR 3211(a)(1).

This evidence also provides grounds for dismissal under § 3211(a)(7), which calls for dismissal where a complaint fails to state a cause of action. As demonstrated above, the evidence establishes that all claims asserted by RMIC are subject to arbitration. New York courts have granted motions to dismiss pursuant to CPLR § 3211(a)(7) on similar facts. See, e.g., Nardi v. Povich, No. 06 Civ. 105554, 2006 WL 2127714, \*1 (Sup. Ct. N.Y. County, July 31, 2006)(granting motion for dismissal for failure to state a cause of action, and compelling arbitration where the claims “are subject to arbitration under a valid arbitration clause in an employment agreement signed by Plaintiff”).

**CONCLUSION**

For the foregoing reasons, the Countrywide Defendants respectfully request that this Court grant their Motion and enter an Order: (i) compelling arbitration of all matters alleged in the Amended Complaint; and (ii) dismissing the Amended Complaint. In the alternative, if the Court declines to dismiss the Amended Complaint, the Countrywide Defendants request an Order staying further proceedings in this Court pending the California arbitration.

Dated: February 16, 2010

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

Republic Mortgage Insurance Co., et al,

Plaintiffs,

- against -

Countrywide Financial Corp., et al.,

Defendants.

**COUNTRYWIDE DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO  
DISMISS AND COMPEL ARBITRATION, OR TO STAY COURT PROCEEDINGS PENDING  
COMPLETION OF ARBITRATION**

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*Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contentions contained in the annexed document are not frivolous.*

Dated: 2/11/2010.....

Signature.....

Print Signer's Name Jean M. Farrell

Service of a copy of the within is

is herby admitted.

Dated:

.....  
Attorney(s) for

**PLEASE TAKE NOTICE**

NOTICE OF ENTRY that within is a (certified) true copy of a entered in the office of the clerk within named Court on 20

NOTICE OF SETTLEMENT at Hon. one of the judges of the within named Court, on 20, at M.

Dated:

Check Applicable Box