ARBITRATION PROCEEDINGS BEFORE
HON. JOHN M. TRUE, III (RET.)

SCOTT GALEN, individually and behalf of others similarly situated, Claimant, and REDFIN CORPORATION, Respondent.	ND Cal. No. 14-cv-05229-TEH ADRS No. 17-0015 JMT CLAUSE CONSTRUCTION AWARD AND STAY ORDER Case Manager: Kathleen Emma

I. INTRODUCTION

Respondent's Motion For Clause Construction filed pursuant to the American Arbitration Association's Employment Arbitration Rules and its Supplementary Rules for Class Arbitrations was heard on December 12, 2016 in Oakland, California. Ronald D. Arena Esq. of Arena Hoffman LLP appeared for the moving party, Redfin Corporation. Anthony Kappus, Esq., Redfin's General Counsel, was also present. Appearing for the opposing party, Scott Galen, was James Kan, Esq. of Goldstein Borgen Dardarian & Ho.

In its motion, Respondent Redfin contends that the "Field Agent Independent Contractor Agreement" ("Agreement")[1] signed by Claimant Scott Galen requires that he prosecute the claims he has made against Redfin in arbitration on an individual basis only, not on a class basis. Galen contends to the contrary that he may pursue his claims on behalf of himself and similarly situated others by way of a class action should one be certifiable.

The parties have submitted extensive briefing along with declarations of counsel and

[1] The Agreement is appended to the Declaration of Ronald D. Arena In Support of Defendant's Motion For Clause Construction filed herein ("Arena Decl.") as Exhibit B.

Requests For Judicial Notice. The Requests For Judicial Notice are granted without objection, and the evidence and authority set forth therein are received and given the weight appropriate in the circumstances. Having fully considered these written submissions as well as the oral arguments of counsel, and pursuant to AAA Supplementary Rule 3, I make the following Clause Construction Award and Stay Order.

II. FACTS

Claimant was hired by Respondent as a Contract Field Agent ("CFA") on August 26, 2009. Upon hire, he signed the Agreement referenced above. On June 13, 2011, after working for approximately 22 months, Claimant was told "it wasn't working out" and was fired.[2]

On January 16, 2013 Claimant timely filed a class-action lawsuit in Alameda County Superior Court alleging seven causes of action, six of them based on the California Labor Code and the seventh derivative thereof.[3] The gist of the complaint is that, despite language in the Agreement to the effect that Claimant is an independent contractor, he and those similarly situated are entitled be treated as employees under California wage and hour statutes and regulations and to obtain appropriate relief for any proven violations thereof.

Respondent moved to compel arbitration pursuant to the Agreement. The Superior Court denied the motion, finding that the complaint raised issues of California state law not covered by the Agreement and that, in any event, the Agreement was substantively and procedurally unconscionable.[4]

Respondent appealed and, on July 21, 2014, the First District Court of Appeal reversed the trial court, holding that the arbitration term in the Agreement is enforceable. *Galen v. Redfin*

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[2] *See,* Request For Judicial Notice No. 2 In Support Of Claimant's Surreply To Redfin's Motion For Clause Construction (Decision of A.S. Grunberg, Administrative Law Judge, California Unemployment Insurance Appeals Board, Oakland Office of Appeals, dated October 31, 2011).

[3] Arena Decl., Exhibit A (Complaint in *Galen v. Redfin Corporation*, Alameda County Superior Court No. RG13 663672).

[4] *See,* Appendix Of Court Filings In Support Of Claimant's Motion For Remand To Court ("Appendix"), filed herein, Exhibit 5, (May 8, 2013 Order Denying Petition To Compel Arbitration in *Galen v. Redfin Corporation*, Alameda County Superior Court No. RG13 663672).

Corporation, 227 Cal.App.4th 1525 (2014). Claimant petitioned the California Supreme Court for review, and the Court "granted and held" the case pending the outcome of *Sanchez v. Valencia Holding Co, LLC*, 61 Cal. 4th 899 (2015).[5]

On November 25, 2014, while the case was awaiting the Supreme Court's action, Respondent removed it to the U.S. District Court for the Northern District of California pursuant to the Class Action Fairness Act, ("CAFA"), 28 U S.C. §§ 1332 (d), 1435 and 1171-1715. The next day, Respondent removed another case to federal court, also originally filed in Alameda County.[6] The Court related the two cases on March 3, 2015, but did not consolidate them. At the oral argument on this motion on December 12, 2016, the parties informed the Arbitrator that *Cruz* is now going forward in a separate proceeding before Arbitrator Joel M. Grossman in Southern California. State court litigation is stayed pending the outcome of these proceedings.[7]

In federal court, Claimant renewed his challenge to the Agreement, arguing that the "law of the case" doctrine required adherence to the state trial court's ruling. Claimant also contended that current California law prohibits enforcement of any arbitration agreement which would extinguish claims under the California's Private Attorney General Act ("PAGA") Cal. Lab. Code §§ 2699 *et seq*.[8]

In his order dated December 1, 2015, U.S. District Court Judge Thelton E. Henderson rejected Claimant's "law of the case" contention and granted Respondent' s motion to compel arbitration, holding that the Agreement's incorporation of AAA Employment Dispute Resolution

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[5] Appendix, Exhibit 8 (*En banc* Order of the California Supreme Court dated November 12, 2014).

[6] *See, Cruz v. Redfin Corporation,* originally Alameda Superior Court No. RG13 707955 filed December 24, 2013, since docketed in the US District Court for Northern California as 14-cv-05234-TEH.

[7] The parties do not agree on the posture of the state court litigation or on which of the state court substantive decisions – the trial court's or the appellate court's – may be cited. Resolution of this disagreement is not necessary to this decision.

[8] *See, Iskanian v. CLS Transportation Los Angeles, LLC,* 59 Cal.4th 348 (2014); *Sakkab v. Luxottica Retail of North America, Inc.* 803 F3d 425 (9th Cir. 2015). No such claim is made in *Galen*, although a PAGA claim is made in *Cruz,* the companion case.

Rules "clearly and unmistakably delegated the question of arbitrability to the arbitrator."[9]

In reaching the conclusion that the Agreement may be enforced, the District Court severed certain of its provisions, including:

- Paragraph 23 (Costs and Attorneys Fees);
- that part of Paragraph 26 (c) pertaining to the choice of forum, and
- Paragraph 29 (Law).[10]

Finally, the District Court ordered that (1) "the question of arbitrability is delegated to an arbitrator in the San Francisco Bay Area applying the 2009 era AAA Labor and Employment Law Rules," and (2) "the arbitrator will determine what the parties voluntarily agreed to, but may not do so in a way that would result in waiver of the PAGA claim."[11] Thereafter, the parties met and conferred for the purpose of agreeing upon an arbitrator pursuant to the Court's order. They were unable to do so and submitted a list of names to the Court. The undersigned was selected by the Court from the parties' list. Claimant promptly filed a Motion for Remand to Court with the undersigned. The motion was heard on July 15, 2016 and denied in an order filed August 5, 2016.[12] This clause construction phase of the litigation followed.

III. CONTRACT LANGUAGE

The language in the Agreement upon which this clause construction motion is primarily based can be found at Paragraph 26:

> 26. Mediation/Binding Arbitration. In the event that any disputes arise regarding the interpretation or enforcement of this Agreement, such disputes shall be resolved as follows:
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> a. the parties shall first attempt to resolve them by good-faith negotiations. If any disputes cannot be resolved by direct

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9 Arena Decl., Exhibit D.

10 Arena Decl., Exhibit D, pp. 16-18.

11 Arena Decl., Exhibit D, p 19.

12 Arena Decl., Exhibit F.

negotiations within fifteen (15) days or such longer time as mutually agreed by the parties, then the parties shall submit such disputes to mediation, which shall focus on the needs of all concerned parties and seek to solve problems cooperatively, with an emphasis on dialogue and accommodation. The goal of the mediation shall be to fairly resolve each dispute in a manner which preserves and enhances the parties relationships. Any party desiring mediation may begin with the process by giving the other party a written request to mediate which describes the issues involved and invites the other party to join in naming a mutually agreeable mediator and setting a time frame for the mediation meeting. The parties and the mediator may adopt any procedural format that seems appropriate for the particular dispute. The contents of all discussions during the mediation shall be confidential and non-discoverable in subsequent arbitration or litigation, if any. If the parties can agree upon a mutually acceptable resolution to the disagreement, it shall be reduced to writing, signed by the parties and the dispute shall be deemed resolved. The costs of the mediation shall be divided equally among the parties to the dispute.

b. if any dispute cannot be resolved through mediation, or if any party refuses to mediate or to name a mutually acceptable mediator or establish a time frame for mediation within a period of time that is reasonable considering the urgency of the disputed matter, or fails to agree to procedures for the mediation, then any party who desires dispute resolution shall seek binding arbitration as hereinafter provided.

c. All disputes among the parties arising out of or related to this agreement which have not been settled by mediation shall be resolved by binding arbitration within the state of Washington. Within twenty (20) days of receiving written demand for arbitration, the parties involved in the dispute shall attempt to reach agreement upon the selection of a qualified impartial arbitrator. If the parties cannot agree upon an arbitrator within twenty days from the date written demand for arbitration is served, the party demanding arbitration may commence an action for the limited purpose of obtaining appointment of an arbitrator by the Presiding Judge of the Superior Court of the State of Washington for King County. Any arbitration shall be conducted in accordance with the rules of the American Arbitration Association then in effect, although the arbitration need not be conducted under the auspices of the Association. Any arbitration award may be enforced by

judgment entered in the Superior Court of the state of Washington for King County.[13]

IV. CONTENTIONS

The parties present a number of contrasting contentions on the issue of clause construction. Their salient arguments are summarized here:

1. THE MOVING PARTY

Redfin's argument begins with the principle that arbitration is "a matter of consent, not coercion." *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l. Corp.,* 559 U.S. 662, 681 (2010) ("*Stolt-Nielsen*"). In the deal struck on August 26, 2009, Respondent argues, Claimant agreed to arbitrate his disputes with Redfin on a one-on-one basis only, not by means of the class-action device. This is clear, it is urged, from the text of the entire agreement, which, taken as a whole, must be construed as a bilateral contract between Redfin and one of its Contractor Field Agents and nothing more. Consent to class arbitration "must be discernible in the contract itself." *Nelsen v. Legacy Partners Residential Inc.,* 207 Cal.App.4th 1115, 1128 (2012), and "[i]n the absence of language permitting class arbitration, and the presence of language indicating that the parties intended bilateral arbitration," the Arbitrator "cannot infer that the parties intended to arbitrate class claims." *Martinez v. Leslie's Poolmart Inc.*, 2014 WL 5604974 at *4 (C.D. Cal. 2014).

Redfin also contends that Claimant himself has taken the position that he may not arbitrate his claims on behalf of others. During the above-referenced legal proceedings in the state trial and appellate courts and in federal court, Claimant is said to have contended that forcing him to arbitration would be tantamount to depriving him of the right to proceed on a class basis. Permitting Claimant to argue now that he *should* be permitted to proceed in this fashion in arbitration would be unfair and would violate settled principles of judicial estoppel. *Milton H. Greene Archives, Inc. v. Marilyn Monroe, LLC,* 629 F.3d 983, 992-94. (9th Cir. 2012). In any event, Redfin argues, Claimant's previously articulated position may be received as evidence here of his intent at the time he signed the Agreement. *Alameda County Flood Control v. Department of Water Resources,* 213 Cal.App.4th 1163, 1188-89 (2013).

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[13] Arena Decl. Exhibit B.

2. CLAIMANT'S RESPONSE

Claimant's initial response is that controlling Ninth Circuit law "mandates" arbitration of his complaint against Redfin as a class action. *Morris v. Ernst & Young, LLP,* 834 F.3d 975 (9th Cir. 2016) ("*Morris*"). Claimant has a substantive right under the National Labor Relations Act,[14] to pursue his claims collectively, so the assertion goes, and any employer attempt to prevent him from doing so is not only unenforceable but substantively illegal. In addition, Claimant argues that judicial estoppel is not appropriate here where his prior arguments with respect to class treatment are not "clearly inconsistent" with those he makes now.

Finally, Claimant argues that even if *Morris* does not compel the Arbitrator to hear this case on a class basis, the Agreement, correctly construed under California contract interpretation principles, requires the same result.

V. DISCUSSION

A. PRELIMINARY CONSIDERATIONS

My primary task here is to construe the contract between the parties so as to ascertain as closely as possible their intent on the issue of class litigation. Before getting to that, however, three preliminary questions must be answered:

1. IS CLAIMANT ESTOPPED FROM ASSERTING CLASS CLAIMS?

This case was originally filed as a class action by Scott Galen on his own behalf and on behalf of others similarly situated. Throughout, Claimant has prosecuted the case as a class action. For over three years in three different courts – and now before me – the parties have been litigating the meaning and application of the arbitration language in the Agreement. Up until this juncture, Claimant has contended that he should not be compelled to arbitrate at all, basing his objections on (1) the claim that his state Labor Code rights arise separately from and are not covered by the Agreement, and (2) that the Agreement is unenforceable due to its unconscionability. In support of the latter claim, Claimant pointed to various clauses in the Agreement, some of which have now been severed. He also contended in a brief to the California Court of Appeal that "the parties did not agree to arbitrate . . . the class's independent contractor

[14] 29 U.S.C. §§ 151, *et seq.* ("NLRA")

misclassification claims."[15] Now he argues that the language of the agreement and other circumstances compel the conclusion that the parties *did* agree to class arbitration, a not insubstantial change of position. Notably, in the interval the District Court has rejected the coverage argument, severed the three provisions from the Agreement referred to above and, upon doing so, held that the agreement is *not* unconscionable.

I do not find that Claimant took contrary positions in different judicial or quasi-judicial forums when he first argued against enforcement of the arbitration clause that *might* be interpreted to force him to proceed on an individual basis only, then later argued in opposition to a construction of the Agreement that would have the same effect. Now that the decision has been made that the matter is indeed arbitrable, it should not be foreclosed to Claimant to advance the alternative argument that, if he must arbitrate, he should be permitted to do so on a class basis.

Nor are there grounds to conclude that Claimant is judicially estopped. "Judicial estoppel, 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" *Milton H. Greene Archives, Inc., supra,* 629 F.3d at 993-4, citing *New Hampshire v. Maine,* 532 U.S. 742, (2001). It is an equitable doctrine invoked "not only to prevent a party from gaining an advantage by taking inconsistent positions, but also because of 'general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings,' and to 'protect against a litigant playing fast and loose with the courts.' " *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) In this case there simply has been no "advantage" gained by Claimant. None of the three courts – the Superior Court, the Court of Appeal or the U.S. District Court – which considered the parties' arguments made any actual determination that the Agreement is unconscionable because of its purported silence on the class issue. I went to some lengths to make clear that I was not deciding the issue of class treatment in my order on Claimant's Motion to Remand to Court.[16] There is nothing in the record that suggests that Redfin would have been willing to proceed on a class basis had Claimant only agreed to arbitrate; indeed

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[15] Arena Decl. ¶ 9, Exhibit G.

[16] Arena Decl., Exhibit F., fn. 6, noting that "[b]y agreement between the parties, that issue is reserved for another day."

Redfin has been quite careful to maintain its position that this dispute is between it and one CFA only. Claimant, for his part, has been equally consistent in pursuing the rights of the purported class. I can find no basis for concluding that Redfin has been in any way prejudiced by Claimant's arguments in the alternative on this issue. *Milton H. Greene Archives, Inc., supra,* 629 F.3d at 993-4.

2. DOES EXTERNAL LAW EITHER MANDATE THAT THIS MATTER PROCEED ON A CLASS BASIS OR REQUIRE THAT IT PROCEED INDIVIDUALLY?

Claimant places great emphasis on *Morris,* a Ninth Circuit case which assertedly decides the issue before me in his favor as a matter of law. Respondent, on the other hand, points to a provision of the California Business & Professions Code, Section 10032(b), as its own source of law irrefutably in *its* favor.

a. *Morris v. Ernst & Young*

In *Morris, supra,* the Ninth Circuit Court of Appeals held that an employer which requires its employees as a condition of employment to enter into waivers of their rights to pursue class-based remedies violates Sections 7 and 8(a)(1) of the NLRA by interfering with employee rights to engage in "concerted" activity. *Morris,* 834 F.3d at 983-4. Concerted activity has been held to include the filing of a lawsuit by a group of employees, and "courts regularly protect employees' right to pursue concerted work-related legal claims under section 7." *Id.* at 982, citing *Mohave Electric Co-Op v. NLRB,* 206 F.3d 1183, 1189 (D.C. Cir. 2000). Section 7 rights are substantive rights. *Id.,* citing *NLRB v. Bighorn Beverage,* 614 F.2d 1238 (9th Cir. 1980). Accordingly, Redfin may not require Claimant to waive them as a condition of employment, as to do so would violate federal labor law prohibiting interference with the exercise of these legal rights. *Morris* at 984.

Here, however, there is no specific class action waiver language in the Agreement, so section 8(a)(1) of the NLRA cannot be said to apply *directly;* that is, Redfin has not required Claimant as a condition of employment, specifically to surrender his right to engage in concerted conduct. Therefore, an award in favor of Claimant is not "mandated" by the Ninth Circuit law. I must ultimately decide, however, whether a construction of the Agreement prohibiting class treatment would run afoul of *Morris* by restricting NLRA Section 7 rights.

b. *Cal. Bus. & Prof. Code § 10032(b)*

The purported trump card Redfin lays on the table reads as follows:

> A real estate broker and a real estate salesperson licensed under that broker may contract between themselves as independent contractors or as employer and employee, for purposes of their legal relationship with and obligations to each other. Characterization of a relationship as either "employer and employee" or "independent contractor" for statutory purposes, including, but not limited to, withholding taxes on wages and for purposes of unemployment compensation, shall be governed by Section 650 and Sections 13000 to 13054, inclusive, of the Unemployment Insurance Code. For purposes of workers compensation, the characterization of the relationship shall be governed by Section 3200, and following, of the Labor Code.

Cal. Bus. & Prof. Code § 10032(b). Respondent argues that, as Galen's rights are circumscribed by this statute, and as he is assertedly required to be treated as an independent contractor thereby, it cannot be that *Morris* applies because the NLRA does not cover independent contractors. *See,* 29 U.S.C. § 151; Cal Unempl. Ins. Code §§ 650, 13004.1.[17]

This argument indeed puts the cart before the horse. At this juncture of the arbitration proceedings, I do not find it necessary or even appropriate to rule out class treatment based on the application of Section 10032(b). Claimant is entitled to attempt to make a showing that he has been misclassified, whatever the merits of that claim might be. I will leave Respondent's argument that the statute represents a legislative determination that Claimant has *not* been misclassified – that he is an independent contractor – for another day.[18]

3. DOES THE PAGA REQUIRE CLASS TREATMENT OF THE CASE?

California's Labor Code provides an avenue for employees to sue on behalf of the State as private attorneys general. Cal. Lab. Code §§ 2699 *et seq.* An individual employee may not be

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[17] Redfin points out that the Administrative Law Judge who ruled on Claimant's unemployment insurance benefits claim applied this statutory scheme even though he found Claimant to be a "common-law employee" because the services Claimant rendered to Redfin were "as a licensed real estate salesperson pursuant to a written contract." RJN No. 2 In Support Of Claimant's Sur-reply (Decision of A.S. Grunberg, Administrative Law Judge, CUIAB, Oakland Office of Appeals, dated October 31, 2011).

[18] To the extent that this Award construes the Agreement in light of *Morris,* Redfin is certainly not precluded from arguing the applicability of Business & Professions Code Section 10032(b) at a later stage of the proceedings.

compelled to arbitrate his or her PAGA claim. *Iskanian v. CLS Transportation Los Angeles, LLC, supra,* 59 Cal.4th 348; *Sakkab v. Luxottica Retail of North America, Inc., supra*, 803 F3d 425. Although Scott Galen has not included a PAGA cause of action in his complaint against Redfin, Ivonneth Cruz *did* do so,[19] and the District Court has instructed the Arbitrator to "determine what the parties voluntarily agreed to, but . . . [not] . . . in a way that would result in waiver of the PAGA claim." As the *Cruz* litigation and its PAGA claim are pending elsewhere in the state before another arbitrator, however, the task of applying that part of Judge Henderson's order is before that arbitrator. Because Claimant has not included such a claim in his lawsuit, it is my view that I need not reach the waiver issue, and I decline the invitation to construe the contract *as if* a PAGA claim had been made originally.

B. CLAUSE CONSTRUCTION

The Agreement does not specify that Claimant may proceed on a class basis with claims against Redfin, nor does it prohibit him from doing so. It is "silent" and to that extent ambiguous on the issue. In *Stolt-Nielsen,* the Supreme Court analyzed a somewhat different situation, one in which "the parties *agreed* that their agreement was 'silent' in the sense that they had not reached any agreement on the issue of class arbitration . . . ." *Stolt-Nielsen, supra*, 599 U.S. 622, 672. Indeed, the parties had entered into a stipulation to that effect. In a subsequent case on the arbitration issue, the Court emphasized this distinction:

> We overturned the arbitral decision [*Stolt-Nielsen*] because it lacked any contractual basis for ordering class procedures, not because it lacked . . . a 'sufficient' one. The parties in *Stolt-Nielsen* had entered into an unusual stipulation that they had never reached an agreement on class arbitration. *See,* 559 U.S. at p. 668-669, 130 S.Ct.1758. In that circumstance, we noted, the panel's decision was not – indeed, could not have been – 'based on the determination regarding the parties' intent' *id* at 673, n. 4, *see id* at 676, 130 S.Ct. 1758 ('Th[e] stipulation left no room for an inquiry regarding the parties intent.').

Oxford Health Plans v. Sutter ___ U.S. ___ 133 S.Ct. 2064, 2069-70 (2013) (*Sutter*). The reach of *Stolt-Nielsen* is limited by that circumstance.

In this case as well, of course, there is no such agreement but "the Supreme Court has never held that a class arbitration clause must explicitly mention that the parties agreed to class

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[19] *See,* fn. 6, *supra.*

arbitration in order for a decision-maker to conclude that the parties consented to class arbitration . . . . [T]he failure to mention class arbitration in the arbitration clause itself does not necessarily equate with the 'silence' discussed in *Stolt-Nielsen*." *Vasquez v. ServiceMaster Global Holding, Inc.,* 2011 WL 2565574 at *3 n. 1 (N.D. Cal 2011), quoted in *Yahoo! Inc. v. Iverson,* 836 F.Supp.2d 1007, 1011 (N.D. Cal. 2011). The task of construing the Agreement begins, rather than ends, with the acknowledgment that it does not mention class arbitration.

Discerning the intent of the parties to an ambiguous contract requires an understanding of: (1) the formation of the contract, (2) the principles of law applicable to its interpretation and (3) the relevant language used – or not used – in it. Each will be discussed below.

1. CONTRACT FORMATION

The Agreement was drafted by Redfin and given to Claimant as a preprinted form to sign more or less on the spot. The circumstances make clear, and I have already found, that the Agreement is adhesive.[20] Redfin argues somewhat cursorily and with no evidentiary basis that Claimant is a "sophisticated real estate salesperson," but that possibility alone does not transform the circumstances under which Claimant signed the Agreement into an arms-length transaction. Redfin, clearly the dominant party, required him to sign the Agreement without alteration. Claimant was given no opportunity to bargain over it, nor to opt out of any of its provisions, nor to propose to Redfin some other form of service arrangement. Indeed, Claimant has testified without contradiction that he was rushed into executing it.[21]

a. Claimant's Intent

Little evidence exists of what Claimant was thinking at the time, and I would hesitate to reach a conclusion either way if that were all I had to rely on. By far the strongest probability,

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[20] Arena Decl., Exhibit F at p. 4. Each of the three courts which has previously analyzed the Agreement has concluded that the Agreement is adhesive. *See, e.g.* Appendix, Exhibit 5 at p. 7: "there is undisputed evidence that the contract was adhesive . . . ." (Superior Court); Appendix, Exhibit 7 at p. 14: " . . . as the agreement here is adhesive in character . . ." (Court of Appeal); Appendix, Exhibit 12 at p. 15: " the Court finds that Redfin had greater bargaining strength than the plaintiffs, and that the Agreement, including the arbitration provision and the delegation clause of the AAA rules, were presented on a take it or leave it basis." (US District Court).

[21] Appendix, Exhibit 4 at ¶ 4.

however, is that he simply thought he was giving up a judicial forum for an arbitral forum.[22]

The contention advanced by Redfin that Claimant *himself* intended to waive his rights to proceed on a class basis when he signed the Agreement is speculative and counterintuitive. It certainly cannot be the case, for instance, that, by affixing his signature to the Agreement, Claimant intended to or did bind himself never to proceed legally against Redfin in conjunction with other individuals. First, he could hardly have signed such a contract – which would potentially waive the rights of others – without the capacity and the authority to do so. "Requesting an employee, at the inception of his relationship with his employer, to enter into an agreement on behalf of himself 'and other employees' would most certainly be unusual, confusing and legally problematic." *Martinez v. Utilimap Corp., AAA No. 01-15-0004-6935* (Taren, Arbitrator, 2016).[23]

> When two parties enter into a contract, or employment agreement, they are the sole parties to that agreement. Whether that agreement allows them to 'invite' other parties to join a collective action or whether it allows the employee to bring a representative action on behalf of others, cannot be derived solely from a grammatical construct.

Id., p. 19 of 24.

Moreover, by signing the Agreement, taking on its obligations, and particularly by agreeing to arbitration, Claimant most likely intended a dispute resolution mechanism that would provide for him the same rights and remedies he might have in a court of law. That belief, under the circumstances, was a reasonable one. Certainly, Redfin gave him no reason to think otherwise. He has testified without contradiction that "at no point did Defendant tell me about

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[22] Redfin's attempt to bind Claimant with the arguments made after the fact in his legal submissions is difficult to credit insofar as it fails to account for the actual realities of Claimant's situation. Positions his lawyers now take in this litigation tell me little, if anything, about their client's intentions at the time he entered into the Agreement. *See, e.g., Sacramento-Yolo Port District v. Cargill of California, Inc.*, 4 Cal.App.3d 1004, 1011 (1970).

[23] The *Martinez* Award and others are found in the Appendix submitted by Claimant in his Opposition To Respondent's Motion For Clause Construction. *Martinez* is at Exhibit 4. The cited language is at pp. 17 and 18 of 24.

the arbitration clause in the agreement or explain it to me."[24]

He can thus be deemed to have contemplated a straightforward swap of the courtroom for an "alternative forum," which is how arbitration has been consistently defined and recognized in the employment field ever since *Gilmer v. Interstate Johnson/Lane Corporation.*[25] Any other supposition about what Claimant might have been thinking when he signed would be entirely notional. It would be rank speculation, for instance, to assume that he somehow intended that he would retain all the rights he would have had in court *except* for the right to bring claims on a class basis.

b. Redfin's Intent

As to Redfin's intent at the formation of the Agreement, I am mindful of the significant differences between a legal proceeding involving a single employee and a class action, and I must assume that Redfin had them in mind at the time it entered into the Agreement. *Stolt-Nielsen* at 685. It is true that

> [c]lasswide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties.

AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 347-48 (2011). Redfin did not, however, choose to draft language which would address any of these realities.

Even so, there is significant evidence of Redfin's intentions. They can be divined not only in the language of the contract, discussed below, but also by reference to then-existing legal doctrines which constituted the environment in which the Agreement was formed. No one

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[24] Appendix, Exhibit 4, ¶ 4.

[25] "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Gilmer v Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) citing *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth* 473 U.S. 614, 628 (1985). *See, also, Cole v. Burns International Security Services,* 105 F.3d 1465 (D.C. Cir. 1997) (same); *Armendariz v. Foundation Health/Psychcare Serv, Inc*., 24 Cal. 4th 83 (2000) (same).

disputes, for instance, that the Labor Code provisions upon which Claimant's complaint is based may be pursued by groups or classes of employees. Both the California Labor Code and the Code of Civil Procedure so provide,[26] and Redfin is presumed to have been aware of this fundamental principle of California employment law.[27] Moreover, when the Agreement was entered into in 2009, the law in California prohibited class-action waivers. *See, Discover Bank v. Superior Court,* 36 Cal 4th 148 (2005). Although *Discover Bank* has since been expressly overruled,[28] it was a controlling rule of contract law in the state at the time.[29]

Also revealing of Redfin's intentions is its incorporation in the Agreement of the AAA dispute resolution procedures which themselves include specific rules for class-action arbitrations. The Employment Arbitration Rules and the Supplementary Rules For Class Arbitrations, discussed in greater detail *infra,* are relevant here as a signifier, among others, of Redfin's intent in drafting the Agreement. It is fair to deduce from their inclusion that Redfin was aware that arbitration may be conducted on a class basis because the ADR rules it incorporated into the Agreement so provided.[30]

Still, there is the omission to mention class actions. Why? One could conclude that Redfin purposely "went silent" on the issue so as to *deprive* CFA's of the ability to proceed against it as a class should the occasion arise. But I do not impute to Redfin a motive secretly to

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[26] *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094, 1105–1106 (2007); *Brinker Restaurant Corporation v. Superior Court,* 53 Cal.4th 1004 (2012); Cal. Code Civ. Proc. § 382.

[27] *Edwards v. Arthur Andersen LLP*, 44 Cal.4th 937, 954-55 (2008) ("*Edwards').*

[28] *AT&T Mobility v. Concepcion, LLC,* supra, 563 U.S. 333; *see also, DIRECTV v. Imburgia,* ___ U.S. ___, 136 S.Ct. 463 (2015).

[29] The state of Washington, whose law was originally designated in the choice of law language in the Agreement, also prohibited class-action waivers at the time. *Scott v. Cingular Wireless* 160 Wash.2d 843 (2007). *See,* Arena Decl. Exhibit D, Paragraph 29, now severed.

[30] Interestingly, Redfin does *not* make the excessively strained argument put forward in some of the cases it cites – that the failure specifically to mention the Supplementary Rules while referring in general to the AAA rules, reflects an implicit agreement between parties that arbitration is for individual matters only, not class-actions. *See Lopez v. Ace Cash Express, Inc*., 2012 WL1655720 (C.D. Cal 2012); *Cobarruviaz v. Maplebear, Inc.,* 143 F.Supp.3d 930 (N.D. Cal. 2015). Indeed, Redfin omits entirely any discussion of the AAA Rules or their applicability in this matter.

withdraw from those working for it an important means of redressing potential wrongs without at least clearly stating that those individuals were giving up such a device, and I am reluctant to construe the Agreement in that fashion. "Under these circumstances, construing the Agreement to contain a waiver of a significant procedural right would impermissibly insert a term for the benefit of one of the parties that it had chosen to omit from its own contract." *Jock v. Sterling Jewelers, Inc.,* AAA No. 11 160 00655 08 (Roberts, Arbitrator, 2009), *confirmed, Jock v. Sterling Jewelers,* 646 F.3d. 113 (2d. Cir. 2011).

2. RULES OF CONTRACT CONSTRUCTION

California principles of contract interpretation apply to the construction of the Agreement. *Stolt-Nielsen* at 684.[31] An arbitrator is not to indulge in a presumption either in favor of or against arbitration where the agreement is silent on the issue. Put another way, although parties may implicitly agree to the device of class-action litigation, an arbitrator may not assume from contractual silence that this is the case:

> An implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.

Id. at 685.

Under California law, a contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties. Cal. Civ. Code § 1643. "It is one of the cardinal rules of interpreting an instrument to give it such construction as will make it effective rather than void." *Edwards, supra,* 44 Cal.4th at 954, citing *Toland v. Toland,* 123 Cal. 140, 143 (1898). The Restatement of Contracts § 203(a) states that "[a]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful or of no effect."

Other provisions of the California Civil Code provide further guidance: where an

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[31] As noted, the Agreement's original choice of law provision (Paragraph 29) has been severed by the District Court.

agreement between parties has been reduced to writing, their agreed language "is to govern . . . if the language is clear and explicit and does not involve an absurdity." Cal. Civ. Code § 1638. The arbitrator is to look to the writing alone, if possible, subject to other rules of interpretation. Cal. Civ. Code § 1639.

Of importance in this case, as well, is the principle that a contract of adhesion is construed against the drafter. "In cases of uncertainty . . . the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." Cal. Civ. Code § 1654. It is now well settled that

> [t]he rule requiring resolution of ambiguities against the drafting party . . . applies with peculiar force in the case of the contract of adhesion. Here the party of superior bargaining power not only prescribes the words of the instrument but the party who subscribes to it lacks the economic strength to change such language. Hence, any ambiguity in the contract should be resolved against the draftsman, and questions of doubtful interpretation should be construed in favor of the subscribing party.

Sandquist v. Lebo Automotive, supra, 1 Cal.5th 233, 248, citing *Graham v. Scissor-Tail*, 28 Cal.3d 807, 819, fn. 16.[32]

Also, in California, the parties to an agreement are presumed to know, indeed to incorporate into their agreement, existing law. *Swenson v. File,* 3 Cal.3d 389, 394-95 (1970). "[A]ll applicable laws in existence when an agreement is made, which laws the parties are presumed to know and to have in mind, necessarily enter into the contract and form a part of it, without any stipulation to that effect, as if they were express expressly referred to and incorporated." *Edwards, supra,* at 954-55. Put another way, the contract is presumed to conform to existing law and does not need amendment as external law may change.

Redfin seeks to avoid this unambiguous principle of contract interpretation through the escape hatch it inserted in Paragraph 22 of the Agreement entitled Interpretation and Fair Construction of Contract:

> This Agreement has been reviewed and approved by each of the parties. In the

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[32] *See, also, Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 63 (1995) ("The reason for this rule is to protect the party who did not choose the language from an unintended or unfair result.")

> event it should be determined that any provision of this Agreement is uncertain or ambiguous the language in all parts of this Agreement shall be in all cases construed as a whole according to its fair meaning and not directly construed for nor against either party.[33]

This attempt to contract around the rules of construction applicable to a boilerplate, adhesive contract by the insertion of more boilerplate, adhesive language is ineffective.

3. THE AGREEMENT

a. Signatories/Use of The Singular

There is no dispute that there are only two signatures on the Agreement, Claimant's and Redfin's. Neither Redfin nor Claimant committed anyone but themselves to comply with the respective obligations of the Agreement. Also, the Agreement refers throughout to Claimant in the singular. To this extent, the Agreement is properly seen as a bilateral contract, although this is far from the end of the inquiry. That a contract is "bilateral" reveals nothing more than that it involves two parties.

Redfin places great emphasis on this feature of the agreement, however, counting in excess of 120 references to Claimant in the singular, with no mention of any other party, and citing to decisions by courts in California and elsewhere which have found this circumstance decisive. This authority, discussed *infra*, lends some support to Redfin's position, but falls far short of being wholly conclusive.

Underlying this emphasis on the type of pronouns in the Agreement, Redfin's proposition seems to be that there was never any need for language on class actions because a bilateral Agreement, by operation of law, precludes them. The authority on which this sleight-of-hand rests is discussed below, but its logic in this context is unpersuasive. Bilateral language "is not by itself a conclusive tool for determining whether parties intended to bar class or collective arbitration. In particular phrases such as 'you' and 'your employment' do not expressly disclaim collective arbitration proceedings and do not necessarily signal an intent to preclude collective or class arbitration." *Ray v. Dish Network, LLC*, AAA No. 01-15-0003-4651 (Brewer, Arbitrator, 2015). Similarly,

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[33] Arena Decl. Exhibit B, p. 3.

> [p]hrases such as 'between client and LHDR' and 'this agreement' are routine contract terms that do not expressly disclaim class litigation. All contracts are necessarily written between the parties to a transaction; if the identification of the parties or reference to 'this agreement' precluded class litigation, class claims could never stem from contracts. This is obviously not the case . . . .

Harrison v. Legal Helpers Debt Resolution LLC, 2014 WL 4185814 (D. Minn. 2014). The holding in these cases is that an agreement executed by and referring to only two parties can nonetheless give rise to class arbitration.

Redfin nonetheless urges that the Agreement must be construed to prohibit class actions, citing numerous cases almost all of which analyze arbitration agreements which, like this one, are "silent" on the issue of class treatment and each of which refers to signatory parties in the singular as this one does. In *Nelsen v. Legacy Partners Residential Inc., supra*, for instance, California's First District Court of Appeal noted that

> [w]hile the arbitration agreement in issue broadly encompasses any employment related 'claim, dispute, or controversy ... which would otherwise require or [allow] resort to any court,' it contains one very significant limitation. The agreement only covers claims, disputes, and controversies 'between myself and Legacy Partners,' that is, between Nelsen and LPI.

Id. at 1129-30. The court went on to note, "A class action by its very nature is not a dispute or controversy 'between [Nelsen] and Legacy Partners.'" *Nelsen* held that the agreement in question "does *not* permit class arbitrations." *Id.* (emphasis in the original). The Second District Court of Appeal's decision in *Kinecta Alternative Financial Solutions, Inc. v. Superior Court,* 205 Cal.App.4th 506 (2012) engages in very similar reasoning and reaches the same conclusion. *Id.* at 520.

Neither case compels the conclusion Redfin urges on me, however. Both courts confronted broad claims by plaintiffs that the arbitration agreements in question were either unconscionable (*Nelsen*), against public policy (*Nelsen*) or in violation of then-existing case law on class-action arbitrations (*Kinecta*). In both of these cases, and most of the others cited by Redfin, the plaintiffs simply argued that an arbitration agreement that did not *prohibit* class actions must therefore *permit* them. Neither court was called upon, as I am here, to construe the entire agreement before it to determine the intention of the parties in that context, and neither did

so.[34] Redfin cites to numerous other cases in various jurisdictions with the same or similar outcomes which I decline to follow:

*Paravataneni v. E*Trade Financial Corporation,* 967 F.Supp.2d 1298 (N.D. Cal. 2013) is distinguishable from this matter on the ground that the parties in that case did not provide, as they have in this case, that any arbitration would be handled pursuant to the rules of the AAA. *Id.* at 1303.[35] *Compare, Yahoo! Inc. v. Iverson, supra,* 836 F.Supp.2d at 1011. In another Northern District of California case, *Cobarruviaz v. Maplebear, Inc.,*143 F.Supp.3d 930 (N.D. Cal. 2015) the court concluded that it, rather than an arbitrator, had the power to decide how the arbitration clause in an agreement should be interpreted and concluded, erroneously in my view, but consistently with Redfin's position, that contractual silence indicated a lack of consent by the purported employer to proceed on a class basis. My analysis of *this* Agreement leads me to a different conclusion.

In the same fashion, I respectfully disagree with the opinions in other cases cited to me by Redfin: *Chico v. Hilton Worldwide, Inc.*, 2014 WL 5088240, at *12 (C.D. Cal 2014); *Reyes v. Liberman Broad, Inc*., 208 Cal.App.4th 1537 (2012) *review granted and opinion superseded by Reyes v. Liberman Broad, Inc*.,___ Cal.App.4th ___, 149 Cal.Rptr.3d 675 (2012); *review dismissed and remanded in light of Eskanian v. CLS Transportation of Los Angeles*, 59 Cal.4th 348 (2014); *Arroyo v. Riverside Auto Holdings, Inc*., 2013 WL 4997488 at * 5-6 (2013); *Whalley v. Wet Seal Inc.*, 2013 WL 6057679 at * 5-6 (2013); *J.P. Morgan Chase Bank, NA v. Jones*, 2016 WL 1182153 (W.D. Wash. 2016).[36]

In fact, there is significant instructive authority to the contrary. *See, Yahoo! Inc. v. Iverson, supra,* 836 F.Supp.2d 1007, 1011. *See also, Southern Communications Services v.*

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[34] *Kinecta* was, in any event, disapproved of by the California Supreme Court in *Sandquist v. Lebo Automotive Inc., supra,* 1 Cal.5th 233, 260, fn. 9. Nonetheless, I look to *Kinecta* and all of the other authority cited by the parties for its persuasive, rather than precedential, value.

[35] In any event, the plaintiff's motion for reconsideration was granted in *Paravataneni* and the matter was remanded for want of jurisdiction. *Paravataneni v. E*Trade Financial Corporation*, 2014 WL 12611301 (N.D. Cal. 2014). Its holding is accordingly without force.

[36] The rest of the authorities cited by Redfin have been carefully reviewed and found unpersuasive for the reasons discussed in the text.

Thomas, 730 F.3d 1352 (11th Cir. 2013); *cert. den.* ___ US ___, 134 S.Ct. 1001 (2014). In that case, an arbitrator was called upon to construe a consumer arbitration clause remarkably like that found in the Redfin Agreement, one with no mention of class treatment. The arbitrator examined the contract language, including its use of the term "any dispute." He also looked at the relevant state law on the substantive rights of the consumers and their rights to pursue them through class actions. He examined the AAA Rules. Ultimately, he interpreted the meaning of "silence" as to class arbitration in light of *Stolt-Nielsen* and *Sutter* and determined that "it is fair to conclude that the intent [of the clause] was not to bar class arbitration." *Id.* at 1360. The Eleventh Circuit found that this was exactly what the arbitrator was supposed to do. "Engaging as he did with the contract's language and the parties' intent, the arbitrator did not 'stray [ ] from his delegated task of interpreting a contract,' *Sutter*, 133 S.Ct. at 2070, for he was 'arguably construing' the contract." *Id. Smith & Wollensky Restaurant Group, Inc. v. Passow*, 831 F.Supp.2d 390, 392 (D.Mass. 2011) and *Amerix Corp. v. Jones,* 2012 WL 141150 at * 5-7 (D. Md. 2012) are to the same effect.

Finally, I find the awards of other arbitrators construing purportedly bilateral agreements to be instructive. *See,, e.g., Smith, et al. v. Brand Energy & Infrastructure,* AAA No. 70-160-000270-13 (Zimmerman, Arbitrator, 2013: "class and collective proceedings are available in arbitration as they would be in court proceedings."); *Jock v. Sterling Jewelers, supra,* (Roberts, Arbitrator: "waiver of a significant procedural right would impermissibly insert a term for the benefit of one of the parties that it has chosen to omit from its own contract."); *Martinez v. Utilimap, supra,* (Taren, Arbitrator: agreement "intended to and did encompass an agreement to submit to binding arbitration, 'any claims, demands or actions based upon any claim for wages,' including any class-action wage claims and any collective action wage claims."); *Ray v. Dish Network, supra,* (Brewer, Arbitrator: "arbitration agreement does permit class arbitration of the claimant's state law statutory and breach of contract claims."); *Stone v. Universal Protection Service, LP* AAA Case No. 01-15-0002-7497; ADRS Case No. 15-5886-KJM (Murphy, Arbitrator: "[W]hen the language of the agreement is viewed in its entirety it leads to the

conclusion that the contracting parties intended to include class and representative actions.").[37]

In sum, it does not appear that the use of the singular throughout the Agreement necessarily results in the conclusion that Claimant may not utilize class procedures.

b. The Arbitration Clause's Coverage

As noted, Paragraph 26 of the Agreement, entitled "Mediation/Binding Arbitration," recites that "[i]n the event that *any disputes* arise regarding the interpretation or enforcement of this agreement," such disputes shall be resolved by arbitration. Subparagraph (c), which provides for arbitration, states (in pertinent part) that "*[a]ll disputes among the parties* arising out of or related to this agreement which have not been settled by mediation shall be resolved by binding arbitration . . . ."[38]

No intent to exclude class-action claims can be discerned in the descriptors "any" and/or "all." These are broad, all-inclusive and general terms which certainly do not suggest two-party disputes only. "Read naturally, the word 'any' has an expansive meaning." *U.S. v. Gonzalez* 520 U.S. 1, 5 (1997). Indeed the phrase "all disputes *among* the parties" brings with it, if anything, the possibility of litigation involving more than just two parties – a concept which could encompass a class-action.

Obviously, Redfin could have inserted class-action waiver language at this point (or anywhere else) in its Agreement. Why didn't it? The California Supreme Court, in its recent articulation of rules of construction applicable to adhesive arbitration agreements, suggests a possible reason:

> Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning. Indeed he may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert.

Sandquist v. Lebo Automotive, supra, 1 Cal.5th 233, 247, citing Rest. 2d, *Contracts*, § 206, comment a., p. 105.

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[37] As noted, all of the cited arbitration cases appear at Appendix submitted by Claimant in his Opposition To Respondent's Motion For Clause Construction. *See* fn. 23, *supra.*

[38] Arena Decl., Exhibit B (emphasis supplied).

d. References to "This Agreement"

Redfin points out that the arbitration language to which the parties committed themselves refers only to disputes arising out of "this Agreement," and not, *e.g.,* disputes arising out of "my *employment*."[39] According to Redfin, this usage suggests that neither it nor Claimant could have had in mind class-action litigation over-wage-and hour rights. Presumably the arbitration clause was meant to cover only issues arising from the various provisions of the Agreement (commission rate, etc.), and those terms affected Claimant and Redfin only, no others.

I am not convinced. First, the assertion completely contradicts Redfin's persuasive – and successful – argument in opposition to Claimant's earlier Motion to Remand to Court. In that context, Redfin contended that the Agreement should be construed broadly, to cover the entire employment relationship, sweeping into arbitration Claimant's California Labor Code rights as well as the derivative California Business & Professions Code claim. I agreed with Redfin and, consistent with controlling law, construed the Agreement in that broad fashion. It is too late now for me to turn around and hold that the term "this Agreement" actually was never intended to encompass the entirety of the service relationship between Redfin and Claimant.

In any event, "this Agreement" carries no inherent limiting meaning; the use of the term does not, by itself, indicate any restriction on the pursuit of a dispute regarding the interpretation or enforcement of "this Agreement" on a class basis. Put another way, I can see no logical reason why, if otherwise permitted, CFAs could not pursue claims concerning, *e.g.,* commissions, on a class basis.

d. Designation of AAA Rules

Paragraph 26 (c) of the Agreement provides that "[a]ny arbitration shall be conducted in accordance with the rules of the American Arbitration Association then in effect, although the arbitration need not be conducted under the auspices of the Association."[40] This arbitration proceeding commenced with the December 1, 2015 order of U.S. District Court Judge

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[39] *Compare, Sandquist v. Lebo Automotive, supra,* 5 Cal.5th 233, 246 (" arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the company . . . .")

[40] Arena Decl. Exhibit B, Paragraph 26.

Henderson, not with an arbitration demand or other indication of intent to arbitrate filed by either party with the AAA. There is no evidence of an AAA file or docket. The arbitration is nonetheless conducted "in accordance" with AAA Rules, including Rule 39(d) which states, "The arbitrator may grant any remedy or relief that would have been available to the parties had the matter been heard in court . . . ."

Effective October 8, 2003, the AAA promulgated its Supplementary Rules for Class Arbitrations. ("Supplementary Rules"). Section 1 thereof provides as follows:

> (a) These Supplementary Rules for Class Arbitrations ("Supplementary Rules") shall apply to any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the American Arbitration Association ("AAA") where a party submits a dispute to arbitration on behalf of or against a class or purported class, and shall supplement any other applicable AAA rules. *These Supplementary Rules shall also apply whenever a court refers a matter pleaded as a class action to the AAA for administration*, or when a party to a pending AAA arbitration asserts new claims on behalf of or against a class or purported class.
>
> (b) Where inconsistencies exist between these Supplementary Rules and other AAA rules that apply to the dispute, these Supplementary Rules will govern. The arbitrator shall have the authority to resolve any inconsistency between any agreement of the parties and these Supplementary Rules, and in doing so shall endeavor to avoid any prejudice to the interests of absent class members of a class or purported class.

Supplementary Rule 1, Applicability (emphasis supplied). These rules also provide that "[i]n construing the applicable arbitration clause, the arbitrator shall not consider the existence of these supplementary rules, nor any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis." Supplementary Rule 3, Construction of the Arbitration Clause.

As I have indicated above, the inclusion of these rules in the Agreement provides a telling indicator of Redfin's intent. They are also binding on the Arbitrator.

f. Limiting Language

Other keys to Redfin's intent are found in those clauses in the Agreement in which Redfin chose to protect its interests by imposing significant limitations upon Claimant. Each one of them

separately – and all of them taken together – contrast strikingly with the Agreement's silence on class action treatment. Many clauses circumscribe Claimant's specific substantive and procedural rights. Salient limiting contract provisions include:

- Paragraph 4, which binds the CFA to abide by company "rules, regulations and policies" as well as "any applicable local, state and federal laws" including those concerning discrimination;

- Paragraph 5, which limits the CFA as to representations to clients and "warrants"that the CFA will not engage in fraudulent activity;

- Paragraph 7, which requires the CFA to indemnify and hold the company harmless with regard to violations by the CFA as to Multiple Listing Service membership;

- Paragraph 10, requiring the CFA to provide auto insurance at his or her sole cost and expense;

- Paragraph 11, which provides for termination by Redfin in the event of misconduct, dishonesty or material breach by the CFA;

- Paragraph 12, which prohibits disclosure of trade secrets and confidential and proprietary information during and after the CFA's performance under the Agreement;

- Paragraph 13, which prohibits disclosure of third-party proprietary information and requires the CFA to hold the company harmless in the event of breach;

- Paragraph 15, which requires indemnification of the company by the CFA in the event that the IRS or any other taxing authority declares the CFA to be an employee rather than an independent contractor;[41]

- Paragraph 16, which requires return of information by the CFA to the company at the time of termination of the Agreement;

- Paragraph 18, which states that the CFA will not compete by representing any non-company clients in real estate transactions;

- Paragraph 19 , which prohibits solicitation of clients by the CFA during the term

[41] The paragraph goes on to say, "Furthermore, CFA agrees to indemnify, defend and hold Company, its principals, officers, employees and agents harmless from any liabilities, losses, claims, costs and/or damages arising from CFA's activities under this Agreement."

of the agreement and for a period of six months thereafter;

- Paragraph 21, which allows Redfin, but not the CFA, unilaterally to modify the Agreement in certain respects;

- Paragraph 22, which, as noted above, declares that the Agreement will not be construed in favor of or against either party;

- Paragraph 23 , which allocates attorneys fees and costs to the "prevailing party" in any action "whether or not a lawsuit shall be involved."[42]

- Paragraph 26, which designates the state of Washington as the forum in the event a legal proceeding is necessary for the purpose of appointing an arbitrator;[43]

- Paragraph 27, which provides for injunctive relief in the event of default under the agreement;[44] and

- Paragraph 29, which provides that the Agreement "shall be governed by construed and enforced in accordance with the internal laws of the state of Washington . . "[45]

The Agreement carefully allocates substantive rights and responsibilities between the parties, just as any such contract would. But it also contains a number of significant limitations on Claimant which clearly protect Redfin's vital interests. Claimant is required to hold Redfin harmless in various circumstances, for instance. (Paragraphs 7 and 15.) Confidential information and trade secrets are protected. (Paragraphs 12, 13 and 16.) Claimant is prohibited from competing with or soliciting clients from Redfin during or after his employment. (Paragraphs 18 and 19.) Paragraph 21 allows Redfin but not Claimant to modify the agreement unilaterally in

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[42] This clause was one of those severed by the U.S. District Court. Arena Decl., Exhibit D.

[43] This clause was also severed by the U.S. District Court. Arena Decl., Exhibit D.

[44] In its entirety, Paragraph 27 reads as follows: "If any party shall default in its obligations under this Agreement, the parties each acknowledge that it would be extremely difficult to measure the resulting damages. Accordingly, any non-defaulting party, in addition to any other rights or remedies, shall be entitled to restraint by injunction of a violation, or by compelling performance of any such condition or provision. In such event all parties hereto each expressly waive their defense that a remedy in damages or at law would be adequate, and hereby waive the mediation and arbitration provisions hereof only to the extent of such specific performance action."

[45] This provision was also struck by Judge Henderson.

regard to compensation.

Several of these clauses were severed from the contract by the District Court when it found that the Agreement was not unconscionable and delegated the question of arbitrability to me. Thus, the "loser pays" provision in Paragraph 23, the choice of forum clause found in Paragraph 26 and Paragraph 29's choice of law provision were all stricken.[46] Many of these are standard provisions in employment and independent contractor agreements of this kind. One stands out as an example for the purposes of this analysis, however.

Paragraph 27 permits either party to go to court for injunctive relief in the event that the other party "shall default in its obligations under this agreement." In that event, "all parties" waive certain legal defenses *and* "the mediation and arbitration provisions" of the Agreement. Although the language appears to apply to both parties, it is a fact of employment life that there is almost never the need for an employee to obtain injunctive relief against his or her employer; and if there ever should be such a need, there is seldom the means. Practically, therefore, the clause invests in Redfin the right to unilaterally suspend the arbitration clause and sue a CFA in court should it reach the conclusion that he or she is in default in some fashion and that damages are not a sufficient remedy. This is careful drafting by which Redfin shows its awareness of the dangers of a loosely drafted arbitration clause. It is fair to assume that equal thought went into its decision to forgo prohibition of class arbitration.

There is no indication among all of these provisions of whether individual CFAs may – or may not – join together to bring claims. The conclusion is plausible, indeed reasonable, that Redfin wished to provide for a detailed set of legal strictures with which to regulate its relationship with Claimant, including a sophisticated dispute resolution procedure, but did *not* elect to exclude the possibility that disputes could be resolved on a class basis.

Arbitrator Meyerson found guidance on this point in "the general rule of contract interpretation, *expressio unius est exclusio alterius*, the listing of particular items . . . without a more general or inclusive term, excludes all other provisions of the agreement, not specifically

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[46] I refer to these provisions not to revisit the issue of unconscionability; that has been resolved. They still may be considered, however, in evaluating Redfin's intent as a matter of clause construction.

mentioned." *McCulley v. Central States Logistics, Inc.* AAA Case No. 01-15-0004-6822 (Meyerson, Arbitrator, 2016).[47] This principle is common in California cases involving statutory construction, but it is useful by analogy in this instance, even though it is an agreement, not a statute, which is being construed. *See, e.g., In Re Carlos H.,* 5 Cal.App.5th 861, 210 Cal.Rptr.3d 207, 214 (2016).

It is difficult to conclude under these circumstances, therefore, that Redfin really meant to prevent Claimant, or any CFA, from proceeding against it on a class-wide basis by simply *omitting* a class-action prohibition when it was so careful to *include* other clauses which protect not only its financial interests, its intellectual property, its relationships with clientele and, most of all, its freedom of access to the judicial system.

4. CONCLUSION

The most plausible – not the only, but the most plausible – understanding of the parties' intentions, both in the formation of the contract and while it has been operative, is that they contemplated the possibility of class actions, or at least that neither had in mind that the Agreement extinguished that possibility.

An unusual feature of this case is that if I were to construe the Agreement as Redfin contends I should and thereby prevent Claimant from proceeding further on a class basis, a reviewing court would be confronted with a non-frivolous claim that upholding this Award would violate the rights of Claimant and others under Sections 7 and 8(a)(1) of the NLRA. *Morris v. Ernst & Young, supra,* 834 F.3d 975. I have concluded that *Morris* does not directly apply here because the Agreement can be construed to authorize the submission of the claims Claimant makes pursuant to the California Labor Code on a class-wide as well as on an individual basis to arbitration. Were the Agreement to be construed as containing a class action waiver, then pursuant to the authority granted me in the AAA's Supplementary Rules for Class Actions,[48] I would modify the Agreement to authorize class proceedings so as to prevent it from being in violation of Sections 7 and 8 of the NLRA.

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[47] Claimant's Appendix, Exhibit 5.

[48] Supplementary Rule 1(a) and (b).

V. CLAUSE CONSTRUCTION AWARD

The Agreement between Claimant Scott Galen and Respondent Redfin Corporation was not intended to and does not exclude claims made in Claimant's complaint on behalf of himself and similarly situated others.

December 31, 2016 _____

HON. JOHN M. TRUE, III (RET.)

VI. STAY

Pursuant to the American Arbitration Association Supplementary Rules for Class Arbitration, the Arbitrator retains jurisdiction of this arbitration. These proceedings shall be stayed for thirty (30) days to permit any party the opportunity to move The Honorable Thelton E. Henderson, United States District Judge, Northern District of California, a court of competent jurisdiction, to confirm or vacate this Clause Construction Award. If all parties inform the Arbitrator in writing during the period of stay that they do not intend to seek judicial review of this Clause Construction Award, or once the requisite time expires without any party having informed the Arbitrator that it has sought judicial review, ADR Services, Inc. shall promptly arrange a telephonic case management conference.

IT IS SO ORDERED this December 31, 2016 _____

HON. JOHN M. TRUE, III (RET.)