Jack R. Nelson (SBN 111863)
Email: jnelson@reedsmith.com
Heather B. Hoesterey (SBN 201254)
Email: hhoesterey@reedsmith.com
REED SMITH LLP
101 Second Street, Suite 1800
San Francisco, CA 94105

Telephone: +1 415 543 8700
Facsimile: +1 415 391 8269

Attorneys for Defendant Wachovia Mortgage
FSB, f/k/a World Savings Bank, FSB

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO/OAKLAND DIVISION

LETICIA ZAMORA and DANIEL PEREZ and ELIZABETH PEREZ,

Plaintiffs,

vs.

WACHOVIA CORPORATION and WORLD SAVINGS BANK,

Defendants.

No.: C 07 4603 JSW

STIPULATION AND REQUEST FOR ORDER APPROVING SETTLEMENT AND DISMISSING ACTION

Hon. Jeffrey S. White

Defendant Wachovia Mortgage FSB, formerly known as "World Savings Bank FSB" ("Defendant") and Plaintiffs Leticia Zamora and Daniel and Elizabeth Perez ("Plaintiffs") (collectively, the "Parties"), by and through their respective undersigned counsel of record, submit the following joint request for approval of the terms of proposed settlements as between Defendant and Plaintiffs individually (collectively, the "Settlements"), and further request that, in accordance with the terms of the Settlement, the Court dismiss Plaintiffs' individual claims with prejudice. Defendant and counsel for Plaintiffs further request that the Court dismiss, without prejudice, all putative class claims alleged in the First Amended Class Action Complaint (the "Complaint") on file in this matter.

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The Parties and their counsel stipulate as follows:

BACKGROUND

1. This action was initiated on September 5, 2007, and alleged claims for relief for alleged violations of the Equal Credit Opportunity Act, the Fair Housing Act and sections 1981 and 1982 of the Civil Rights Act on behalf of Plaintiffs individually as well a putative class consisting of certain customers of Defendant. No class has been certified in this action.

2. In lieu of formal discovery, and with the consent of the Court, the Parties engaged in informal exchanges of information in anticipation of a private mediation before The Hon. Edward Infante (ret.). Mediation sessions were held on May 13 and September 15, 2008 and February 25, 2009, following which consideration for tentative settlements of Plaintiffs' individual claims was proposed and ultimately agreed to by the Parties, subject to, *inter alia*, approval by this Court.

SETTLEMENT

3. The specific financial terms of the Settlements are described for the Court in the concurrently filed Declaration of Jack R. Nelson in Support of Stipulation and Request for Order Approving Settlement and Dismissing Action ("Nelson Dec."), and the forms of agreement attached as Exhibits A and B thereto, and the concurrently filed Declaration of Wendy J. Harrison in Support of Stipulation and Request for Order Approving Settlement and Dismissing Action ("Harrison Dec.") and the summary of fees and costs attached as Exhibit A thereto.

4. Plaintiffs and Plaintiffs' counsel have agreed that the terms of the Settlements are satisfactory to Plaintiffs and represent a fair compromise of all of Plaintiffs' claims against Defendant. Plaintiffs thus wish to accept such terms, cease all direct or indirect participation in this or any other action against Defendant and release Defendant from any claim Plaintiffs may have, believes that they may have or discovers that they may have, whether brought by them directly or by anyone on their behalf.

REQUESTED DISPOSITION OF ACTION

4. In addition to seeking approval of the Settlement and dismissal of Plaintiffs' individual claims with prejudice, the Parties and Plaintiffs' counsel jointly request that the Court at this time also dismiss, without prejudice, the putative class allegations set forth in the Complaint, as Plaintiffs' counsel are not at this time pursuing such allegations further.

STANDARD FOR APPROVAL OF PLAINTIFFS' SETTLEMENTS AND DISMISSALS

5. The Parties agree that the Court may, but is not necessarily required to, utilize the tests for collusion and prejudice set forth in *Diaz v. Trust Territory of the Pacific Islands*, 876 F. 2d 1401, 1408-1410 (9th Cir. 1989), in determining whether to approve the Settlements and voluntary dismissal of the class action allegations in the Complaint.

6. Rule 23(e) of the Federal Rules of Civil Procedure does not mandate that the Court approve either the individual settlement between Defendants and Plaintiff or the separate dismissal (without prejudice) of the alleged class claims in the Complaint.[1] After amendment in 2003, Rule 23(e)(1)(A) provided that "[t]he court must approve any settlement, voluntary dismissal, or compromise of the claims, issues or defenses of a certified class" and, since a further amendment in 2007, the Rule has provided that "[t]he claims, issues or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. Rule Civ. Proc. 23(e). Thus, by its current plain language, and in light of the fact that the Rule's original wording was amended in 2003 specifically to add a qualifier that it applied to only "certified" classes, Rule 23(e), standing alone, does not obligate a district court to approve the resolution of a putative class action in which no class has been certified. As the Advisory Committee Notes to the 2003 Amendments point out, even though Rule 23(e) was amended in 2003 "to strengthen the process of reviewing proposed class-action settlements," then-Rule 23(e)(1)(A) was amended concurrently in order to

[1] Because the proposed dismissal of Plaintiff's individual claims and the separate proposed dismissal of the putative class claims are by stipulation of all parties, neither does Rule 41(a) require court approval to effectuate dismissal.

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"resolve[] the ambiguity" caused by its former statement that the court had to approve resolutions of "a class action." Fed. Rule Civ. Proc. 23, Advisory Comm. Notes, 2003 Amendments, Subdivision (e). The Notes state further that the problematic ambiguity was that this "language could be – and at times was – read to require court approval of settlements with putative class representatives that resolved only individual claims." *Id.* Thus, to clarify the more limited scope of a district court's *mandatory* obligations under Rule 23(e), the wording of the Rule was changed to" require[] approval only if the claims, issues or defenses of a certified class are resolved ...." *Id.*

7. The fact that Rule 23(e) no longer requires court approval of a pre-certification dismissal of putative class claims without prejudice (which is all that is at issue here relative to the putative class) does not mean that a district court must refrain from reviewing a proposed individual settlement or a proposed dismissal of class allegations, or that a district court may not exercise its discretion to invoke Rule 23(e), or the *Diaz* opinion, as a guide for requiring a showing that the settlement is non-collusive and non-prejudicial to the putative class. [2] Several district courts in this Circuit, including this Court, have thus elected to reference the approval provisions of Rule 23(e), and the *Diaz* decision, when faced with pre-certification requests to approve, without notice to the putative class, settlements by individual putative class representatives and accompanying voluntary dismissal of pending putative class allegations. See *Houston v. Cintas Corp.*, 2009 WL 921627 (N.D. Cal. Apr. 3, 2009); see also, *Singer v. American Airlines Federal Credit Union*, 2006 WL 3093759 at *2 (N.D. Cal.); *see also Mansourian v. Board of Regents of the University of California at Davis,* 2007 WL 1722975 at *1 (E.D. Cal.).

8. The authority of a district court under Rule 23(d) to provide for "the fair conduct" of

[2] *Diaz was* a pre-2003 case in which the Ninth Circuit held that Rule 23(e), as it was then worded, obligated a district court to approve even pre-certification settlements and dismissals in any class action. 876 F. 2d at 1408. Based on its determination, the *Diaz* court then held that, under Rule 23(e), a district court *must* "inquire into the terms and circumstances of any dismissal or compromise to ensure that it is not collusive or prejudicial." *Id.* The court then posited a series of circumstances in which there might be possible prejudice to putative class members. *Id.* Because the holding and resulting analysis laid out in *Diaz* were premised on a conclusion that is no longer valid (*i.e.*, that Rule 23(e) mandates court approval of pre-certification settlements and dismissals), however, its directive that *all* settlements with individual plaintiffs, and *all* pre-certification requests for voluntary dismissal of class allegations, must be tested under Rule 23(e) is also no longer valid.

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any action governed by Rule 23 (which includes every case brought but not yet certified as a class action) permits a district court to test any request to "settle, compromise or voluntarily dismiss" any class allegations. *See, e.g., Shelton v. Pargo, Inc.,* 582 F. 2d 1298, 1306 (4th Cir. 1978). In *Shelton*, the Fourth Circuit referenced Rule 23(d)'s case management provisions as "authority for judicial control over settlements and compromises, by representative parties or not," calling Rule 23(d) part of the district court's "ample arsenal to checkmate any abuse of the class action procedure, if unreasonable prejudice to absentee class members would result." 582 F. 2d at 1306. Accordingly, this Court has the inherent authority to test the Settlements, and Plaintiffs' counsel's separate request for dismissal of the class allegations in the Complaint, for collusiveness or undue prejudice to the putative class. The factors laid out in the *Diaz* opinion constitute a proper standard for such a test.

THE SETTLEMENTS AND REQUESTED DISMISSAL MEET THE *DIAZ* STANDARDS

9. In *Diaz*, the Ninth Circuit made clear that a "representative plaintiff fulfills his fiduciary duty toward the absent class members [if any pre-certification] dismissal or compromise ... is not collusive or prejudicial" to the putative class. 876 F. 2d at 1408 (citations omitted). Both the Settlement and plaintiff's counsel's simultaneous but independent request to voluntarily dismiss the class allegations of the Complaint, without prejudice, easily meet both parts of this test.

The Resolution of this Action Is Not the Product of Collusion

10. The first test that *Diaz* sets forth for examining the dismissal or compromise of a class action is whether the resolution is collusive. 876 F. 2d at 1408. Here, neither the Settlement nor the separate request for dismissal of the class allegations of the Complaint can be so characterized.

Plaintiffs' Settlements Were Bargained At Arms' Length

11. The Settlements were reached after extensive negotiations that commenced at a private, confidential mediation supervised by an experienced and respected neutral, the Hon. Edward Infante of JAMS, and in further sessions supervised by Judge Infante, in which the parties were represented by experienced counsel. Nelson Dec. at ¶¶ 2 and 5; Harrison Dec. at ¶ 5. During the

mediation, Defendant made a presentation which explained its defenses. Nelson Dec. at ¶ 5.

12. Defendant never made a formal offer to settle the class allegations in the Complaint. *Id.* Instead, Defendant eventually extended offers to settle each of the Plaintiffs' individual claims only. *Id.* at ¶ 4. After substantial further negotiations, which were monitored by the mediator, the Settlements were reached. Nelson Dec. at ¶¶ 2 and 3. Defendant's decision to settle with Plaintiffs individually, and to reach a compromise with their legal counsel regarding their fees and costs, related strictly to Defendants' (privileged and private) judgments about the size and nature of Plaintiffs' loan transactions, the costs of defending the action both to date and moving forward and other internal and confidential business considerations. *See* Nelson Dec. at ¶ 4. The Settlements were not the product of any collusion or intent to cause prejudice to the putative class. *Id.* at ¶ 7; Harrison Dec. at ¶ 5.

13. There is an initial presumption that a proposed settlement is fair and reasonable when it is the result of arm's-length negotiations. See *In re Excess Value Ins. Coverage Litig.*, No. M-21-84 (RMB), 2004 U.S. Dist. LEXIS 14822, at *34 (S.D.N.Y. July 30, 2004) ("[w]here 'the Court finds that the Settlement is the product of arm's length negotiations conducted by experienced counsel knowledgeable in complex [] litigation, the Settlement will enjoy a presumption of fairness'"); *In re Inter-Op Hip Prosthesis, Liab. Litig.*, 204 F.R.D. 359, 380 (N.D. Ohio 2001) ("when a settlement is the result of extensive negotiations by experienced counsel, the court should presume it is fair"). Further, the opinion of experienced counsel, as here, is entitled to considerable weight. *Williams v. Vukovich*, 720 F.2d 909, 922-23 (6th Cir. Ohio 1983) ("The court should defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs"); *Kirkorian v. Borelli*, 695 F. Supp. 446, 451 (N.D. Cal. 1988) (opinion of experienced counsel is entitled to considerable weight); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979) (recommendations of plaintiffs' counsel should be given a presumption of reasonableness).

The Decision to Dismiss All Class Allegations is Entirely Voluntary

14. Plaintiffs' counsel's request for voluntary dismissal of the class allegations in the

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Complaint is entirely independent of the Settlement and cannot be labeled collusive either. At no time did Defendant demand or request, as part of the Settlements or otherwise, that the class allegations of the Complaint be dismissed. Nelson Dec. at ¶¶ 5 and 7; Harrison Dec. at ¶ 4. Defendant has paid no consideration in exchange for the proposed dismissal without prejudice of such claims, and no release(s) of such claims has been requested, promised or made part of the proposed Settlement Agreements. Nelson Dec. at ¶ 5; Harrison Dec. at ¶ 4.

There Is No Possibility of Prejudice to the Alleged Putative Class

15. The second test that *Diaz* prescribes for examining the appropriateness of pre-certification dismissal or compromise of class allegations is whether there is any possible prejudice to the absent putative class members. 876 F. 2d at 1408. Here, the Settlements cannot present any such prejudice because they in no way affect or bind the putative class. *See* Nelson Dec. at ¶ 5; Harrison Dec. at ¶ 4. As for the separate request for dismissal of the class allegations, it is clear that it too presents no possibility for prejudice.

16. *Diaz* posed three scenarios in which a potential for prejudice might exist in a pre-certification resolution of class claims: "(1) class members' possible reliance on the filing of the action if they are likely to know of it either because of publicity or other circumstances, (2) lack of adequate time for class members to file other actions, because of a rapidly approaching statute of limitations, [or] (3) any settlement or concession of class interests made by the class representative or counsel in order to further their own interests." 876 F. 2d at 1408 (citations omitted). None of these exist in the present action. Neither the filing of the Complaint in this action nor the pendency of the action has been the subject of any publicity or news or media reports. Nelson Dec. at ¶ 6. No borrowers of Defendant have contacted Defendant about this action, and there has been no indication that other borrowers are awaiting the results of this action in lieu of acting on their own behalf. *Id.* This is enough to presume that no putative class member is aware of, much less relying on, the pendency of this action to protect their interests. See *Singer*, 2006 WL 3093759 at *3.

17. The putative class will not be put into new and imminent danger of the running of a

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statute of limitations by virtue of dismissal of the class allegations. The statutes at issue were all tolled as to the class with the filing of the complaint. See *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). This alone means that there is "ample time for absent [putative] class members to commence a new action should they determine that such a case had merit." *Singer*, 2006 WL 3093759 at *4. In any event, this action was filed in September of 2007, and Plaintiffs obtained their loans in July of 2005 (more than two years before the class allegations were first made) and March of 2007 (less than 6 months before the class allegations were first made). Accordingly, dismissal of those class claims now will not trigger an "imminent" running of any statute of limitations.

18. The third scenario for prejudice posed in *Diaz* – concession of class interests – is wholly absent here. No such concession has been demanded or made. Nelson Dec. at ¶ 5; Harrison Dec. at ¶ 4_. The Settlements do not bind the putative class [*id.*], and the requested dismissal of class allegations is without prejudice. "There is no prejudice to defendants or to the putative class [when] plaintiff and [his] counsel have determined, based on their evaluation of this matter, not to further prosecute the class claims in this case." *Mansourian v. Board of Regents*, 2007 WL 1722975 at *1.

19. For all of the foregoing reasons, the proposed resolution of this action meets all of the standards set forth in *Diaz*, and thus the Parties jointly request that the Court issue the accompanying [Proposed] Order Approving Settlement and Dismissing Action.

Dated: October 14, 2009.

REED SMITH LLP

By /s/

Jack R. Nelson (SBN 111863)
Heather B. Hoesterey (SBN 201254)
101 Second Street, Suite 1800
San Francisco, CA 94105
Telephone: +1 415 543 8700
Facsimile: +1 415 391 8269

Attorneys for Defendant Wachovia Mortgage FSB, f/k/a World Savings Bank, FSB

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Dated: October 14, 2009.

BONNETT, FAIRBOURN, FRIEDMAN & BALINT, P.C.

By /s/

Andrew S. Friedman (*pro hac vice*)
Wendy J. Harrison (SBN 151090)
2901 North Central Avenue, Ste. 1000
Phoenix, Arizona 85012-3311
Telephone: 602-274-1100
Facsimile: 602-274-1199

RODDY KLEIN & RYAN
Gary Klein (*pro hac vice*)
Shennan Kavanagh
727 Atlantic Avenue
Boston, MA 02111-02810
(617) 357-5500 ext. 15

CHAVEZ & GERTLER, L.L.P.
Mark A. Chavez (SBN 90858)
Jonathan Gertler (SBN 111531)
Nance F. Becker (SBN 99292)
42 Miller Avenue
Mill Valley, California 94941
(415) 381-5599

COUGHLIN STOIA GELLER RUDMAN & ROBBINS LLP
John J. Stoia, Jr. (CA SBN 141757)
Theodore J. Pintar (CA SBN 31372)
Leslie E. Hurst (CA SBN 178432)
655 West Broadway, Suite 1900
San Diego, CA 92101
(619) 231-1058

HOUSING AND ECONOMIC RIGHTS ADVOCATES
Maeve Elise Brown (CA SBN 137512)
1305 Franklin Street, Suite 305
Oakland, CA 94612
(510) 271-8843

BARROWAY TOPAZ KESSLER MELTZER & CHECK, LLP
Joseph H. Meltzer
Edward W. Ciolko
Joseph A. Weeden
Peter Muhic
Donna Siegel Moffa
280 King of Prussia Road
Radnor, PA 19087
(610) 667-7706

Attorneys for Plaintiffs

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