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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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10 GARY DAVIS, Individually and On Behalf of)
All Others Similarly Situated,)

Case No. C-04-1016-JW

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Plaintiff,)

**STIPULATION AND ~~[PROPOSED]~~
ORDER OF DISMISSAL**

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vs.)

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14 FREMONT INVESTMENT ADVISORS,)
INC., *et al.*)

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STIPULATION

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2 WHEREAS on June 23, 2004 the Court entered an Order appointing Beverly E. Laymon as
3 Lead Plaintiff, Schiffrin & Barroway, LLP and Wechsler Harwood, LLP as Co-Lead Counsel for
4 Plaintiffs, and Kaplan Fox & Kilsheimer, LLP as Liaison Counsel for Plaintiffs; and

5 WHEREAS the issue of class certification has not been raised before this Court; and

6 WHEREAS by this Stipulation and [Proposed] Order of Dismissal (the “Stipulation”), Lead
7 Plaintiff has agreed to resolve all of its claims against the defendants in this action by voluntarily
8 dismissing with prejudice her individual claims alleged in this action; and

9 WHEREAS by this Stipulation, Lead Plaintiff and defendants have agreed to jointly request
10 a voluntary dismissal without prejudice of the individual claims of absent class members of the
11 putative class in this action; and

12 WHEREAS Lead Plaintiff, defendants, and their respective counsel have conducted
13 sufficient investigation to enable each party to determine that it is in the best interests of each party
14 to enter into this Stipulation; and

15 WHEREAS Lead Plaintiff and defendants jointly request that the Court not require notice of
16 the dismissal of this action to be provided to the absent members of the putative class; and

17 WHEREAS the parties make this request to approve the voluntary dismissal of this action
18 with prejudice to Lead Plaintiff but without prejudice and without notice to absent members of the
19 putative class in reliance upon *Diaz v. Trust Territory of Pacific Islands*, 876 F.2d 1401, 1409 (9th
20 Cir. 1989), and decisions of district courts within the Ninth Circuit that have applied *Diaz* to permit
21 the dismissal of pre-certification putative class actions without notice. *See, e.g., Diaz*, 876 F.2d at
22 1408 (“The court’s duty to inquire into a settlement or dismissal differs before and after
23 certification. Before certification, the dismissal is not *res judicata* against the absent class members
24 and the court does not need to perform the kind of substantive oversight required when reviewing a
25 settlement binding upon the class.”); *Singh v. Pizza Hut of America, Inc.*, 2002 U.S. Dist. LEXIS
26 26350 (W.D. Wash. July 22, 2002) (approving voluntary dismissal with prejudice of named
27 plaintiff’s claims without notice to absent class members and without prejudice to their claims);
28 *Robbins v. Hometown Buffet, Inc.*, 1995 U.S. Dist. LEXIS 17870 (S.D. Cal. March 15, 1995)

1 (approving voluntary dismissal without notice to absent members of putative class); *Tepper v.*
2 *Western Inv. Real Estate Trust*, 1993 U.S. Dist. LEXIS 2148, *1 (N.D. Cal. Feb. 23, 1993) (same);
3 *Kas v. Chevron Corp.*, 1992 U.S. Dist. LEXIS 13635, *1 (N.D. Cal. Aug. 20, 1992) (same); and

4 WHEREAS “Rule 23(e) does not require notice of pre-certification dismissal except where
5 the Court concludes that such notice is necessary for one or more of the following reasons: (1) to
6 protect defendants by preventing plaintiffs from appending class allegations merely to obtain a more
7 favorable settlement; (2) to protect the class from objectionable structural relief or depletion of
8 funds available to pay class claims, *e.g.*, through a collusive settlement; (3) to protect the class from
9 prejudice based on their reliance on the filing or pendency of the action.” *Hockert Pressman &*
10 *Flohr Money Purchase Plan v. American President Cos.*, 1995 U.S. Dist. LEXIS 17608, **1-2
11 (N.D. Cal. Nov. 20, 1995); and

12 WHEREAS none of the concerns described in *Hockert Pressman & Flohr* is applicable in
13 this action; and

14 WHEREAS defendants would not be prejudiced by a dismissal of this action without notice
15 to absent members of the putative class; and

16 WHEREAS the effectiveness of this Stipulation is dependent upon Court approval of the
17 voluntary dismissal of this action with prejudice as to Lead Plaintiff, without prejudice to absent
18 members of the putative class, and without notice to absent members of the putative class; and

19 WHEREAS Lead Plaintiff and defendants agree that each party and each attorney has
20 complied with each requirement of Rule 11 as to any pleadings filed in this action; and

21 WHEREAS each party agrees to bear its own attorneys’ fees and costs and waives any claim
22 against any other party, including their counsel, for malicious prosecution, abuse of process,
23 violations of Rule 11, or any other claim arising out of, or in any way relating to or in connection
24 with, the initiation, prosecution, assertion, settlement, or resolution of this action;

25 NOW THEREFORE it is hereby stipulated and agreed by and among Lead Plaintiff and
26 defendants, by and through their undersigned counsel, as follows:

27 1. This action shall be, and hereby is, dismissed WITH PREJUDICE as to Lead
28 Plaintiff and WITHOUT PREJUDICE as to absent members of the putative class;

1 I attest that concurrence in the filing of this document has been obtained from Seth Aronson
2 and Aaron Rofkahr and that I will have on file all holograph signatures for any signatures indicated
3 by a “conformed” signature (/s/) within this e-filed document.

4 DATED: March 10, 2005

5 /s/ _____
6 By: Laurence D. King
7 KAPLAN FOX & KILSHEIMER, LLP
8 Liaison Counsel for Plaintiffs
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ORDER

Pursuant to the above stipulation, and good cause appearing therefore, IT IS SO ORDERED.

DATED: 3/15/05

/s/ James Ware

JAMES WARE, U.S.D.J

PROOF OF SERVICE

I, Arthur Bailey, declare that I am over the age of eighteen (18) and not a party to the within action. I am employed in the law firm of Kaplan Fox & Kilsheimer LLP, 555 Montgomery Street, San Francisco, California 94111.

On, March 11, 2005, the Northern District of California’s Electronic Case Filing System with the ECF registered to Laurence D. King was used to file following document(s):

STIPULATION AND [PROPOSED] ORDER OF DISMISSAL

The ECF system is designed to send an e-mail message to all parties in the case, which constitutes service. According to the ECF/PACER system, for this case, the parties served are as follows:

Stuart L. Berman – sberman@sbclasslaw.com
 Darren J. Check – dcheck@sbclasslaw.com

On this date, I served the below parties:

Seth Aronson Aaron Rofkahr 400 South Hope Street Los Angeles, CA 90071 Telephone: 213-430-6000 Facsimile: 213-430-6407	Robert I. Harwood Samuel Rosen WECHSLER HARWOOD, LLP 488 Madison Avenue New York, NY 10022 Telephone: 212-935-7400 Fax: 212-753-3630
Eric L. Zagar Richard A. Maniskas Andrew L. Barroway SCHIFFRIN & BARROWAY 280 King of Prussian Road Radnor, PA 19087 Bala Cynwyd, PA 19004 Telephone: 610-667-7706	

____ (BY FACSIMILE) I sent such document from facsimile machine on the above date. I certify that said transmission was completed and that all pages were received and that a report was generated by the facsimile machine which confirms said transmission and receipt.

XXX (U.S. MAIL) I placed the sealed envelope(s) for collection and mailing by following ordinary business practices of Kaplan Fox Kilsheimer LLP. I am readily familiar with Kaplan Fox Kilsheimer LLP’s practice for collecting and processing of correspondence for mailing with the United States Postal Service, said practice being that, in the ordinary course of business, correspondence with postage fully prepaid is deposited with the United States Postal Service the same day as it is placed for collection.

1 _____ (PERSONAL SERVICE) I caused personal delivery of the document(s) listed above the
2 person(s) at the address(es) set forth below.

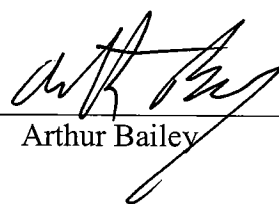
3 _____ (BY OVERNIGHT DELIVERY) I placed the sealed envelope(s) or package(s) designated
4 by the express service carrier for collection and overnight delivery by following the ordinary
5 business practices of Kaplan Fox Kilsheimer LLP. I am readily familiar with Kaplan Fox
6 Kilsheimer LLP's practice for collecting and processing of correspondence for overnight delivery,
said practice being that, in the ordinary course of business, correspondence for overnight delivery is
deposited with delivery fees paid or provided for at the carrier's express service offices for next-day
delivery the same day as the correspondence is placed for collection.

7 On this date, pursuant to Civil L.R. 23-2, I served the above-listed document on the
8 Securities Class Action Clearinghouse via electronic mail at the following address:

9 Juan Carlos Sanchez
10 Securities Class Action Clearinghouse
11 Stanford University School of Law
12 Crown Quadrangle
Stanford, CA 94305-8612
jcarlos@law.stanford.edu

13 I declare under penalty of perjury under the laws of the United States of America and the
14 State of California that the foregoing is true and correct.

15 Executed March 11, 2005 at San Francisco, California.

16 
17 _____
18 Arthur Bailey