

SETTLEMENT AGREEMENT AND MUTUAL GENERAL RELEASE

1. **PARTIES:** The parties to this Settlement Agreement ("Agreement") are Plaintiff FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver for Downey Savings & Loan Association, F.A. ("FDIC-R"), and Defendant appraiser SPENCER WADE SMITH ("Smith"), an individual. The FDIC-R and Smith are sometimes herein collectively referred to as the "Parties."

2. **RECITALS:** This Agreement is made with reference to the following facts:

2.1 Certain claims arose between the Parties concerning a residential refinance loan that was made by Downey to borrower [REDACTED] ("Loan").

2.2 The Loan was secured by a first trust deed on the real property owned by [REDACTED] and commonly known as [REDACTED] Gilroy, California. The Loan application was submitted to Downey by Absolute Investment Group, Inc. dba Palacio Mortgage ("Palacio")

2.3 In support the [REDACTED] Loan application Palacio obtained an appraisal report that was purportedly prepared by [REDACTED] Downey thereafter engaged Smith to conduct a review appraisal of the [REDACTED] report. Smith concluded that [REDACTED] report complied with the Uniform Standards of Professional Practice ("USPAP") and he agreed with the final opinion of value; although, Smith made notations of some irregularities with the [REDACTED] report concerning their mis-analysis of several of the comparables. Downey relied on Smith's review appraisal and approved and funded the [REDACTED] loan on September 14, 2005.

2.4 Subsequently, the [REDACTED] Loan defaulted and at the trustee's foreclosure sale the property reverted to Downey on its credit bid. Based on that bid, Downey sustained a base loss of over \$290,000. Thereafter, Downey had to maintain and market the property for sale as REO.

2.5 On November 18, 2008, the FDIC-R was appointed the Receiver over all of Downey's assets and liabilities. Among the assets the FDIC-R is charged with trying to recover upon is the loss Downey sustained on the [REDACTED] Loan ("Claim").

2.6 The Claim subsequently became the subject of a Complaint ("Complaint") entitled *FDIC-R v. Absolute Investment Group, Inc., et al.*, Case No. CV10-04927 IFW (RCx)

("Action") that was filed by the FDIC-R in the United States District Court for the Central District of California, Western Division.

2.7 Smith Answered the FDIC-R's Complaint in the Action and is represented by legal counsel.

2.8 At a Court ordered mediation of the Action, the Parties conditionally agreed to a settlement of the FDIC-R's Claim against Smith on the terms that are hereafter set forth. The only condition to the Parties' settlement was the FDIC-R obtaining formal approval to enter into this settlement, which approval has now been obtained by the FDIC-R.

2.9 By this Agreement the Parties hereto intend to settle and dispose of, fully and completely, any and all claims, demands, causes of action, obligations, damages, and liabilities that arise out of or relate to the Action and the Claim alleged therein by the FDIC-R against Smith.

2.10 The FDIC-R expressly reserves and retains its right to proceed against other defendants named in the Action, including requesting entry of a default judgment against any and all named defendants whom it served with process, but who failed to timely appear in response thereto. Further, the FDIC-R expressly reserves and retains its right to enter into a separate settlement with other appearing defendants, including Paul aka Pablo Curiel, Christy Bosteder and Raya Ghajar.

2.11 The Federal Deposit Insurance Corporation in its separate corporate capacity as the insurer of deposits and as a bank regulator, and all other federal agencies of the United States of America, are not parties to this Agreement and are not bound in any manner to its terms and conditions. The FDIC-R enters into this Agreement solely in its limited capacity as the appointed Receiver of Downey Savings & Loan Association, F.A., and for no other receivership now existing, previously existing or hereafter appointed.

3. **NO ADMISSION RE MERITS OF CLAIMS:** The Parties agree that nothing in this Agreement, and no performance under this Agreement, shall be construed as an admission by any Party of the validity or invalidity of the Claim alleged in the Action against Smith; and, the Parties agree that this Agreement is entered into solely for the purpose of convenience and to compromise the disputed Claim the FDIC-R has alleged in the Action against Smith.

4. **SETTLEMENT TERMS:** The Parties agree to the following settlement terms:

4.1 Smith shall pay, by draft payable on first presentation, the sum of Seventy-Five Thousand No/100 Dollars (\$75,000.00) to the FDIC-R within thirty (30) days of the full execution of this Agreement. After said payment has been made and the draft has cleared Smith shall be dismissed from the Action with prejudice.

4.2 **No Administrative Grievances.** In executing this Agreement, each of the Parties warrants that he or it will not initiate nor cause to be initiated any action or proceeding

pertaining to or concerning the appraisal license of Smith and/or any of his agents or employees, which arises out of or relates, in whole or in part, to the claims, demands, causes of action, choses in action or matters relating to or arising out of the Action and/or the Loan.

5. **MUTUAL GENERAL RELEASES:**

5.1 In consideration of the Settlement terms as set forth in Paragraph 4 above, and all other promises, covenants and consideration provided for herein, the Parties agree that, except as to such rights or claims as may be created by this Agreement, they hereby covenant not to sue each other ever again on the Claims and the Parties acknowledge full and complete satisfaction of, and hereby release, remise, and forever discharge each other, including their respective insurers, officers, directors, affiliated companies, agents, servants, representatives, spouse, heirs, successors or predecessors in interest, assignees, attorneys, employees and contractors from any and all the Claims, demands, counts, obligations, agreements, damages, liabilities, losses, costs and expenses of any kind, in law or in equity, whether known or unknown, that either Party now holds, or has ever held against the other, or may hold in the future, that arise out of or are in any way connected with, the Claims alleged in the Action.

5.2 The parties expressly waive all rights under section 1542 of the *California Civil Code* or analogous provisions of other state and/or federal laws. *California Civil Code* section 1542 provides:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

5.3 The Parties agree that the possibility that such unknown claims exist was taken into account in determining the consideration to be paid for the giving of this Agreement. Accordingly, the FDIC-R expressly waives any and all possible future claims, either known or unknown, that would arise out of Smith's work as a panel appraiser for loans originated by or handled through Downey.

5.4 This Agreement shall be binding on the Parties and on their respective officers, directors, affiliated companies, agents, servants, representatives, spouses, heirs, successors, predecessors in interest, assignees, insurers, attorneys, employees and contractors and shall inure to the benefit of the Parties, and each of them.

6. **ATTORNEYS' FEES:** In the event any action is brought to enforce or interpret this Agreement, the prevailing party shall be entitled to an award of reasonable attorneys' fees in addition to any other relief to which the prevailing party may be entitled.

7. **REPRESENTATIONS AND WARRANTIES:** The Parties represent, warrant, and agree as follows:

7.1 The FDIC-R is the lawfully appointed Receiver for Downey and has succeeded to and now holds each of the Claims that are the subject of the Action and this Agreement. The FDIC-R has the authority to enter into this compromise and settlement of the Claim against Smith as the Receiver of Downey.

7.2 Each of the Parties has received or had the opportunity to seek their own independent legal advice with respect to the advisability of executing this Agreement.

7.3 The Parties acknowledge that they have executed this Agreement without fraud, duress, or undue influence. The Parties affirm that they have read this Agreement and understand the contents hereof.

7.4 No Party, nor any agent or attorney of any Party, has made any statement, representation, or promise to any other Party regarding any facts which the Party has then relied upon in entering into this Agreement, and the Parties here each affirm that they have not relied upon any statement, representation or promise by any other Party, or of any agent or attorney for another Party, in executing this Agreement, or in making the settlement provided for herein, except as is expressly represented or promised in this Agreement.

7.5 None of the Parties have heretofore assigned, transferred, or granted, or purported to assign, transfer, or grant, any Claim alleged in the Action.

7.6 Each Party agrees to execute any additional documents as reasonably convenient, necessary or desirable to carry out the provisions of this Agreement including without limitation a Stipulation for Dismissal of Smith from the Action, with prejudice.

8. **MISCELLANEOUS:**

8.1 This Agreement shall be deemed to have been executed and delivered within the State of California, and the rights and obligations of the Parties hereto shall be construed and enforced in accordance with, and governed by, the laws of the State of California.

8.2 This Agreement constitutes a single, integrated written contract expressing the entire agreement of the Parties. This Agreement may only be modified in a writing signed by all the Parties. This Agreement shall be interpreted in accordance with the plain meaning of its terms and not strictly for or against any of the Parties to this Agreement.

8.3 The provisions of this Agreement are contractual and not mere recitals. The Agreement shall be considered severable, such that if any provision or part of the Agreement is ever held invalid under any law or ruling all other provisions or parts shall remain in full force and effect.

8.4 This Agreement may be executed in counterparts and shall be effective on the date first executed by any one of the Parties hereto if so executed in counterparts (the

"effective date"). Any signature obtained by facsimile or e-mail shall be as valid as an original signature. An authenticated copy of this Agreement can be used for any purpose for which the original may be used.

(b)(6)

DATED:

9/2/11

[Redacted Signature]

SPENCER WADE SMITH, an individual

DATED:

8/31/11

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Downey Savings & Loan Assoc., F.A.

By:

Name: David Bartels

Title: Senior Attorney

(b)(6)

APPROVED AS TO FORM:

HERSHORIN & HENRY LLP

(b)(6)

By:

[Redacted Signature]

JEAN C. WILCOX
CLAUDIA MOURAD
Attorneys for Federal Deposit Insurance Corporation as Receiver for Downey Savings & Loan Association, F.A.

ERICKSEN ARBUTHNOT

(b)(6)

By:

[Redacted Signature]

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