

1                                    IN THE UNITED STATES DISTRICT COURT  
2                                    FOR THE NORTHERN DISTRICT OF CALIFORNIA

3  
4 GINA LYONS and JERRY LYONS, on  
5 behalf of themselves and all  
6 others similarly situated,

7                                    Plaintiffs,

8                                    v.

9 BANK OF AMERICA, NA, and BAC HOME  
10 LOANS SERVICING, LP,

11                                    Defendants.

No. C 11-1232 CW

ORDER GRANTING  
MOTION FOR  
SETTLEMENT  
APPROVAL (Docket  
No. 70)

12                                    Plaintiffs, Gina and Jerry Lyons, brought this putative class  
13 action in March 2011 for breach of contract and various other  
14 claims against Defendants, Bank of America, NA and BAC Home Loans  
15 Servicing, LP. The parties reached a settlement agreement in  
16 September 2012 and now move for preliminary approval. The Court  
17 took the matter under submission on the papers and now grants the  
18 motion.

19                                    BACKGROUND

20                                    On September 18, 2012, the parties met with mediator Gilda R.  
21 Turitz and reached an initial settlement agreement. They informed  
22 the Court two days later but declined to provide any details about  
23 the proposed agreement. Docket No. 65. The parties also failed  
24 to notify the Court whether they would be seeking preliminary  
25 approval of the settlement under Rule 23. Accordingly, on  
26 September 26, 2012, the Court ordered the parties to submit a  
27 joint status report addressing that question. Docket No. 66.  
28

1 One week later, the parties submitted a status report stating  
2 that they did "not believe Court approval is required in order to  
3 dismiss these post-2003, uncertified, putative class member claims  
4 without prejudice." Docket No. 67, at 2. They noted, however,  
5 that they were "prepared to file a motion for approval . . . if  
6 this Court requires it." Id. On October 9, 2012, after reviewing  
7 the joint status report, the Court ordered the parties to file a  
8 motion for preliminary approval. Docket No. 68. The parties  
9 filed the motion on November 16, 2012.

10 LEGAL STANDARD

11 Federal Rule of Civil Procedure 23(e) states that the  
12 "claims, issues, or defenses of a certified class may be settled,  
13 voluntarily dismissed, or compromised only with the court's  
14 approval." The Ninth Circuit has extended this court approval  
15 requirement to settlements made before a class has been certified.  
16 Diaz v. Trust Territory of Pac. Islands, 876 F.2d 1401, 1408 (9th  
17 Cir. 1989).<sup>1</sup> It has stressed, however, that a "court's duty to  
18 inquire into a settlement or dismissal differs before and after  
19

---

20 <sup>1</sup> Courts in this district have expressed some uncertainty  
21 about whether Rule 23(e) still applies to pre-certification  
22 settlement proposals in the wake of the 2003 amendments to the  
23 rule but have generally assumed that it does. See, e.g., Mahan v.  
24 Trex Co., Inc., 2010 WL 4916417, at \*3 (N.D. Cal.) (noting that  
25 "even where the procedures of Rule 23(e) do not apply  
26 automatically," court approval of class settlements and dismissals  
27 is still required (citations omitted)); Houston v. Cintas Corp.,  
28 2009 WL 921627, at \*1-\*2 (N.D. Cal.) (discussing the 2003  
amendments to Rule 23(e) and "[a]ssuming without deciding that  
Rule 23 [still] applies" to pre-certification settlements); Castro  
v. Zenith Acquisition Corp., 2007 WL 81905, at \*1 (N.D. Cal.)  
(assuming that Rule 23(e) applies to pre-certification dismissals  
without discussing the 2003 amendments).

1 certification" because, before certification, the risk of  
2 prejudice to absent class members is significantly lower. Id.  
3 (noting that pre-certification dismissals do not require "the kind  
4 of substantive oversight required when reviewing a settlement  
5 binding upon the class").

6 To determine whether pre-certification settlement or  
7 dismissal is appropriate, the court must

8 inquire into possible prejudice from (1) class members'  
9 possible reliance on the filing of the action if they  
10 are likely to know of it either because of publicity or  
11 other circumstances, (2) lack of adequate time for class  
12 members to file other actions, because of a rapidly  
13 approaching statute of limitations, (3) any settlement  
14 or concession of class interests made by the class  
15 representative or counsel in order to further their own  
16 interests.

17 Diaz, 876 F.2d at 1408; see also Houston, 2010 WL 4916417, at \*1  
18 (applying the Diaz factors). The central purpose of this inquiry  
19 is to "determine whether the proposed settlement and dismissal are  
20 tainted by collusion or will prejudice absent putative members."  
21 Mahan, 2010 WL 4916417, at \*3.

#### 22 DISCUSSION

23 The parties have not provided the Court with a copy of their  
24 proposed settlement agreement. Instead, they describe their  
25 proposed agreement in broad terms and argue that it satisfies the  
26 three Diaz factors. Under the parties' description of their  
27 agreement, Plaintiffs would voluntarily dismiss all claims against  
28 Defendants with prejudice. Class claims would also be dismissed,  
but without prejudice to allow putative class members to bring  
these claims against Defendants in the future. The parties have  
not disclosed any of their other obligations under the settlement;

1 nonetheless, they have demonstrated that approval is appropriate  
2 here.

3 Under the first Diaz factor, the Court must assess whether  
4 dismissal will prejudice absent class members who knew of and  
5 relied on Plaintiffs' lawsuit. The parties argue that putative  
6 class members are not aware of this lawsuit and have not relied on  
7 it because the suit has garnered little media attention. The  
8 Court agrees that this apparent lack of media coverage makes it  
9 unlikely that similarly situated homeowners knew of Plaintiffs'  
10 lawsuit and relied on it for vindication of their own rights. See  
11 Mahan, 2010 WL 4916417, at \*3 (finding that detrimental reliance  
12 by absent class members was unlikely because there was "no  
13 evidence that the instant case has garnered significant news  
14 coverage").

15 Furthermore, even if some putative class members had relied  
16 on Plaintiffs' lawsuit, application of the second and third Diaz  
17 factors makes clear that they would not be prejudiced by dismissal  
18 here. Under those factors, the Court must determine whether the  
19 parties' settlement jeopardizes absent class members' opportunity  
20 to bring suit against Defendants or otherwise undermines their  
21 ability to prosecute class claims. In this case, because the  
22 parties intend to dismiss the class claims without prejudice,  
23 absent class members would still be able to bring suit against  
24 Defendants. What's more, these claims would not be time-barred  
25 because of the class action tolling doctrine. Tosti v. City of  
26 Los Angeles, 754 F.2d 1485, 1488 (9th Cir. 1985); Hanni v. Am.  
27 Airlines, Inc., 2010 WL 1576435, at \*3 (N.D. Cal.).

28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Accordingly, the basic terms of the parties' pre-certification settlement agreement satisfy the Diaz factors and merit approval under Rule 23(e).

CONCLUSION

For the reasons set forth above, the Court GRANTS the parties' motion for settlement approval and voluntary dismissal (Docket No. 70). Plaintiffs' individual claims against Defendants are dismissed with prejudice. All class claims are dismissed without prejudice. The parties are not required to provide notice of the settlement to absent class members.

IT IS SO ORDERED.

Dated: 11/27/2012

  
\_\_\_\_\_  
CLAUDIA WILKEN  
United States District Judge