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 8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA – OAKLAND DIVISION
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11 FEDERAL DEPOSIT INSURANCE
 12 CORPORATION as Receiver for INDYMAC
 13 BANK, F.S.B.,

Case No.: C11-03295
 STIPULATION TO AMEND ANSWER

14 Plaintiff,

15 v.

16 RICHARD STRAUB, an individual and dba
 17 STRAUB APPRAISAL,

18 Defendants.

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 20 Plaintiff, FEDERAL DEPOSIT INSURANCE CORPORATION, AS
 21 RECEIVER FOR INDYMAC BANK, F.S.B. (“Plaintiff”), by and through its
 22 attorneys of record, Vanessa Widener and Jennifer Muse of Anderson, McPharlin
 23 & Connors LLP and defendant RICHARD STRAUB, individually and dba
 24 STRAUB APPRAISAL ("Defendant") by and through their attorneys of record
 25 Julia M. Wei and Henry Chuang of The Law Offices of Peter N. Brewer, hereby
 26 stipulate and agree as follows:
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1 1. Plaintiff filed its Complaint for breach of contract and negligent
2 misrepresentations on July 6, 2011.

3 2. Defendant filed his Answer to the Complaint on September 30,
4 2011. In the Answer, Defendant's Eleventh Affirmative Defense alleged a
5 complaint of comparative negligence. The Eleventh Affirmative Defense reads as
6 follows:

7 The damages sustained by plaintiff were either wholly or in part
8 negligently caused by and/or the fault of persons, firms, corporations, or
9 entities other than this answering defendant, and said negligence and/or
10 fault, comparatively reduces the percentage of negligence and/or fault, if
11 any, by this answering defendant. More specifically, Plaintiff's
12 contributory or comparative negligence in the underwriting of the subject
13 loan caused or contributed to Plaintiff's claimed damages relating to the
14 approval of the subject loan. Additionally, Plaintiff relied on the acts and
15 representations of the mortgage broker to underwrite the loan and its
16 damages are either in whole or in part negligently caused by the mortgage
17 broker.

18 3. The FDIC contends that Defendant's Eleventh Affirmative Defense
19 for comparative fault/negligence does not apply to the claims asserted in the
20 Complaint -- i.e., breach of contract or negligent misrepresentation. The FDIC
21 has filed a Motion to Strike the Eleventh Affirmative Defense which is set for
22 hearing on March 6, 2012.

23 4. Prior to filing the Motion to Strike, the Parties met and conferred
24 regarding the sufficiency of the defense. Defendants' agreed the Eleventh
25 Affirmative Defense does not apply to breach of contract action. However,
26 Defendants argue that the Eleventh Affirmative Defense for comparative
27 fault/negligence can be asserted in response to a claim for negligent
28 misrepresentations.

 5. Therefore, in the interest of judicial economy, the Parties hereby
stipulate and agree that the Eleventh Affirmative Defense shall not apply to the

1 breach of contract claim and shall be amended to state:

2 The damages sustained by plaintiff as to the negligent misrepresentation
3 claim for relief were either wholly or in part negligently caused by and/or
4 the fault of persons, firms, corporations, or entities other than this
5 answering defendant, and said negligence and/or fault, comparatively
6 reduces the percentage of negligence and/or fault, if any, by this answering
7 defendant. More specifically, Plaintiff’s contributory or comparative
8 negligence in the underwriting of the subject loan caused or contributed to
9 Plaintiff’s claimed damages from the negligent misrepresentation claims
10 for relief relating to the approval of the subject loan. Additionally, Plaintiff
11 relied on the acts and representations of the mortgage broker to underwrite
12 the loan and its damages are either in whole or in part negligently caused
13 by the mortgage broker.

14 6. The Parties continue to disagree about whether the defense can be
15 applied to a claim for negligent misrepresentation. As such, the Parties stipulate
16 and agree that the FDIC’s Motion to Strike the Eleventh Affirmative Defense as it
17 relates to the FDIC’s claim for negligent misrepresentation shall remain on
18 calendar and the issue should be decided by this Court on March 6, 2012 as
19 noticed.

20 IT IS SO STIPULATED

21 DATED: October 25, 2011

22 ANDERSON, McPHARLIN & CONNERS
23 LLP

24 Bv: /s/ Jennifer S. Muse
25 Vanessa H. Widener
26 Jennifer S. Muse
27 Attorneys for Plaintiff FEDERAL DEPOSIT
28 INSURANCE CORPORATION as Receiver
for INDYMAC BANK, F.S.B.

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1 DATED: October 26, 2011

LAW OFFICE OF PETER N. BREWER

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4 Bv: /s/ Henry Chuang
5 Julia M. Wei
6 Henry Chuang
7 Attorneys for Defendant RICHARD STRAUB

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PURSUANT TO STIPULATION, IT IS SO ORDERED.

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12 DATED: 10/28/11

Sandra B. Armstrong
13 SANDRA BROWN ARMSTRONG
14 UNITED STATES DISTRICT JUDGE

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