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7 and the Plaintiff Classes

8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**

11 EDWARD MUSGRAVE, individually,
and on behalf of all others similarly
12 situated,

13 Plaintiff,

14 vs.

15 ICC/MARIE CALLENDER'S
GOURMET PRODUCTS DIVISION,
16

17 Defendant.

Case No. 3:14-cv-02006-HSG

CLASS ACTION

**JOINT REQUEST FOR DISMISSAL OF
INDIVIDUAL CLAIMS WITH PREJUDICE
AND DISMISSAL OF CLASS CLAIMS
WITHOUT PREJUDICE AND ~~PROPOSED~~
ORDER**

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1 **I. INTRODUCTION**

2 The parties, plaintiff Edward Musgrave (“Plaintiff”) and defendant ICC/Marie Callender’s
 3 Gourmet Products Division (“Defendant”), hereby jointly request dismissal of Plaintiff’s individual
 4 claims with prejudice and dismissal of the putative class claims without prejudice. Plaintiff has
 5 settled and released his individual claims against Defendant and no longer has standing to pursue the
 6 class claims herein. Because the proposed classes have not been certified and because no class
 7 members’ rights are affected in that no class members will be bound by or prejudiced by the
 8 dismissal of the class claims, the Court should dismiss this case without notice.

9
 10 **II. RELEVANT PROCEDURAL HISTORY**

11 Plaintiff filed this action on May 1, 2014. The parties conducted significant discovery and
 12 agreed to attend a mediation session before the Honorable Jack Komar (Ret.) on April 28, 2015. The
 13 case did not settle at that mediation, but the parties continued to exchange information and hold
 14 settlement negotiations over the following months. Eventually, the parties agreed to return to
 15 mediation before Judge Komar on November 5, 2015. At that second mediation session, the parties
 16 reached an agreement in principle to settle the case on an individual basis, and the parties have now
 17 executed a settlement agreement releasing all of Plaintiff’s individual claims against Defendant.

18
 19 **III. ARGUMENT**

20 The parties request that the Court dismiss Plaintiff’s individual claims with prejudice
 21 pursuant to the settlement agreement and dismiss the class claims without prejudice. The settlement
 22 encompasses all of Plaintiff’s claims against Defendant and does not resolve or bar any claims by
 23 any absent class member. Pursuant to Federal Rule of Civil Procedure 23(e), “[t]he claims, issues, or
 24 defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the
 25 court’s approval.” Although Rule 23(e) expressly refers to certified classes, the Ninth Circuit has
 26 previously held—that is, before Rule 23(e) was amended in 2003—that the rule applies to pre-
 27 certification dismissals and compromises. *Diaz v. Trust Territory of the Pac. Islands*, 876 F.2d 1401,
 28 1408 (9th Cir. 1989); *see also See Lyons v. Bank of America*, No. C 11-1232 CW, 2012 WL

1 5940846, at *1 (N.D. Cal. Nov. 27, 2012). However, the rule changed in 2003, as explicitly noted by
 2 the Advisory Committee:

3 Rule 23(e)(1)(A) resolves the ambiguity in former Rule 23(e)'s reference to
 4 dismissal or compromise of "a class action." That language could be -- and at times
 5 was -- read to require court approval of settlements with putative class
 6 representatives that resolved only individual claims. *See* Manual for Complex
 Litigation Third, § 30.41. The new rule requires approval only if the claims, issues,
or defenses of a certified class are resolved by a settlement, voluntary dismissal, or
 compromise.

7 Fed. R. Civ. P., Rule 23 (Notes from 2003 Advisory Committee) (emphasis added).

8 If this Court decides to review the settlement despite the Advisory Committee's statement,
 9 the Court should approve it because all of the *Diaz* factors are satisfied. In *Diaz*, the Ninth Circuit
 10 stated that pre-certification approval was required "to ensure that [a settlement] is not collusive or
 11 prejudicial." *Id.* In making that determination, the Ninth Circuit stated that "the district court should
 12 inquire into possible prejudice from (1) class members' possible reliance on the filing of the action if
 13 they are likely to know of it either because of publicity or other circumstances, (2) lack of adequate
 14 time for class members to file other actions, because of a rapidly approaching statute of limitations,
 15 and (3) any settlement or concession for class interests made by the class representative or counsel in
 16 order to further his own interests." *Id.*

17
 18 **A. ABSENT CLASS MEMBERS HAVE NOT RELIED ON THESE CLASS CLAIMS**

19 After a diligent search of internet sites, newspapers, and other news sources published in the
 20 United States, Plaintiff's counsel asserts it is unlikely there are putative class members that are aware
 21 of and have relied on Plaintiff's action in this Court. Applying the *Diaz* factors to a non-class
 22 settlement in a case that initially began as a putative class action, the Court in *Houston v. Cintas*
 23 *Corp.*, 2009 U.S. Dist. LEXIS 33704 (N.D. Cal. April 3, 2009) approved the settlement and
 24 dismissal without notice. In the *Houston* case, the Court noted that "although there has been some
 25 publicity regarding this case and articles in which some of the Plaintiffs were mentioned by name, it
 26 has been minimal." *Id.* at *5. While this case has been the subject of some publicity, media attention
 27 has been minimal and mostly limited to professional legal news sources that are not likely read by
 28

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1 lay consumers. Accordingly, it is highly unlikely that any absent class member has relied on this
 2 case rather than pursuing an action of his or her own.

3
 4 **B. ABSENT CLASS MEMBERS WILL NOT BE PREJUDICED BY ANY**
RAPIDLY APPROACHING STATUTE OF LIMITATIONS

5 There is no danger that absent class members will be prejudiced by a rapidly approaching
 6 statute of limitations here. The filing of a class action on both federal and state law claims tolls the
 7 applicable statute of limitations for members of the putative class. *See Am. Pipe & Constr. Co. v.*
 8 *Utah*, 414 U.S. 538, 553-554 (1974); *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1122 (1988). The
 9 statutes of limitations will resume when Plaintiff's class claims are dismissed. *See Chardon v.*
 10 *Fumero Soto*, 462 U.S. 650, 661-662 (1983) (whether tolling resulting from the filing of a class
 11 complaint has the effect of suspending or renewing the limitations period depends on the underlying
 12 statute of limitations); *Tosti v. City of Los Angeles*, 754 F.2d 1485, 1488 (9th Cir. 1985) (statute of
 13 limitations resumed on plaintiff's Section 1983 claims after class certification denied).

14 Given the impossibility of calculating the actual remaining statute of limitations for each
 15 putative class member's claims, courts in this Circuit have measured this factor by assessing the time
 16 remaining on the statute of limitations of the original named Plaintiff's claims after tolling. In
 17 *Singer*, the court determined that notice was not necessary due in part to the fact that absent class
 18 members had anywhere from a one-year to a four-year tolled statute of limitations once the
 19 individual claims were dismissed. *Singer v. Am. Airlines Fed. Credit Union*, 2006 U.S. Dist. LEXIS
 20 82147 (N.D. Cal. Oct. 30, 2006). "Based on the tolling of the statute of limitations as to the class
 21 which occurred by virtue of the filing of plaintiff's complaint, there is ample time for absent class
 22 members to commence a new action should they determine that such a case had merit." *Id.* at *10.
 23 Plaintiff's claims, which incorporate a claim under California's Business and Professions Code,
 24 generally implicate a four-year statute of limitations. Plaintiff filed his case less than two years ago
 25 in May 2014. Thus, Plaintiff would not face any impending deadlines. As in *Singer*, there is ample
 26 time for class members to commence an action.

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C. PLAINTIFF HAS NOT MADE ANY CONCESSION OF CLASS INTERESTS TO FURTHER HIS OWN INTERESTS

1
2 Finally, the dismissal of the putative class claims without prejudice will not affect the rights
3 of putative class members such that notice is necessary. Applying the *Diaz* factors to a non-class
4 settlement in a case that initially began as a putative class action, the Court in *Houston v. Cintas*
5 *Corp.*, 2009 U.S. Dist. LEXIS 33704 (N.D. Cal. April 3, 2009) approved the settlement and
6 dismissal without notice, stating, “the parties do not seek to dismiss the class claims with prejudice
7 and, therefore, they are not impacting the rights of potential class members.” *Id.* at *6. Similarly, the
8 class claims in this case are not being dismissed with prejudice. Indeed there has been absolutely no
9 “settlement or concession” of class interests in resolving this action on an individual basis. As in
10 *Houston*, no notice should be required here because no concessions of the class’ interests have been
11 made.

12
13 **IV. CONCLUSION**

14 The parties request that the Court dismiss this case with prejudice as to the named plaintiff
15 and without prejudice as to all absent members of the putative class.
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1 Dated: December 23, 2015

2 **SCOTT COLE & ASSOCIATES, APC**

3
4
5 By: /s/ Molly A. DeSario
6 Molly A. DeSario, Esq.
Attorneys for the Representative Plaintiff
and the Plaintiff Classes

7 Dated: December 23, 2015

8 **GRAY DUFFY LLP**


9
10
11 By: /s/ Richard Williams
12 Richard M. Williams, Esq.
13 Nathan B. Lee, Esq.
Attorneys for Defendant
14 ICC/Marie Callender's Gourmet Products Division

15
16 **PROPOSED ORDER**

17 Pursuant to the foregoing Joint Request for Dismissal, Plaintiff's individual claims are
18 dismissed with prejudice and the class claims herein are dismissed without prejudice.

19
20 **IT IS SO ORDERED.**

21
22 Dated: 12/28/2015

23 
24 Honorable Haywood S. Gilliam, Jr.
25 United States District Judge
26
27
28

ATTESTATION

In accordance with Civil Local Rule 5-1(i)(3), I attest that concurrence in the filing of this document has been obtained from each of the other Signatories, which shall serve in lieu of his/her/their signatures on the document.

Dated: December 23, 2015

SCOTT COLE & ASSOCIATES, APC

By: /s/ Molly A. DeSario
Molly A. DeSario, Esq.
Attorneys for Representative Plaintiff
and the Plaintiff Classes

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