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

11
12 RYAN RICHARDS, individually, and) **Case No. 13-CV-04317-JD**
on behalf of all others similarly)
13 situated,) **CLASS ACTION**
14)
Plaintiff,) **JOINT STATEMENT REGARDING THE**
15) **PROPRIETY OF APPROVING THE**
vs.) **INDIVIDUAL SETTLEMENT AND**
16) **DISMISSAL WITHOUT CLASS NOTICE**
SAFEWAY, INC.,)
17)
Defendant.)

18
19 **I. INTRODUCTION**

20 In response to the Court’s December 16, 2014 Order deferring ruling on the Parties’
21 stipulation for dismissal, the Parties hereby submit this Joint Statement Regarding The Propriety
22 Of Approving The Individual Settlement And Dismissal Without Class Notice. Plaintiff Ryan
23 Richards (“Plaintiff”) seeks an Order approving the dismissal of his putative class claims against
24 Safeway, Inc. (“Safeway”) without prejudice, and a determination that notice to putative class
25 members is not required.

26 The Parties request that, pursuant to the settlement agreement, the Court dismiss the
27
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1 individual claims of Ryan Richards with prejudice and dismiss the class claims without
 2 prejudice. Because the proposed classes have not been certified and because no class members
 3 rights' are affected in that no class members will be bound by or prejudiced by the dismissal of
 4 the class claims, the Court should dismiss this case without notice.

5 II. PROCEDURAL HISTORY

6 Plaintiff filed his complaint for false advertising and related claims in the Northern
 7 District of California on September 18, 2013. The parties attended mediation on June 12, 2014
 8 before the Honorable Jay Folberg, Esq. (retired) but did not settle. Thereafter, on October 8,
 9 2014, the Parties mediated with Martin Quinn, Esq. and reached a preliminary agreement.
 10 However, the Parties continued to negotiate for months before agreeing to all terms.

11 III. ARGUMENT

12 The parties request that the Court dismiss the claims of named Plaintiff with prejudice
 13 pursuant to the settlement agreement and dismiss the class claims without prejudice. The
 14 settlement reached encompasses all of named Plaintiff's claims against Safeway and does not bar
 15 claims by any absent class member.

16 Pursuant to Federal Rule of Civil Procedure 23(e), "[t]he claims, issues, or defenses of a
 17 certified class may be settled, voluntarily dismiss, or compromised only with the court's
 18 approval." Although Rule 23(e) expressly refers to certified classes, the Ninth Circuit
 19 previously—that is, before Rule 23(e) was amended in 2003—held that the rule applied to pre-
 20 certification dismissals and compromises. *Diaz v. Trust Territory of the Pac. Islands*, 876 F.2d
 21 1401, 1408 (9th Cir. 1989); *see also See Lyons v. Bank of America*, No. C 11-1232 CW, 2012
 22 WL 5940846, at *1 (N.D. Cal. Nov. 27, 2012). However, the rule changed in 2003, as explicitly
 23 noted by the Advisory Committee: "Rule 23(e)(1)(A) resolves the ambiguity in former Rule
 24 23(e)'s reference to dismissal or compromise of 'a class action.' That language could be -- and at
 25 times was -- read to require court approval of settlements with putative class representatives that
 26 resolved only individual claims. See Manual for Complex Litigation Third, § 30.41. The new
 27 rule requires approval only if the claims, issues, or defenses *of a certified class* are resolved by a
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1 settlement, voluntary dismissal, or compromise.” *See* Fed. R. Civ. P., Rule 23 (Notes from 2003
2 Advisory Committee) (emphasis added).

3 Additionally, the Court should approve this settlement because all *Diaz* factors are
4 satisfied. In *Diaz*, the Ninth Circuit stated that pre-certification approval was required “to ensure
5 that [a settlement] is not collusive or prejudicial.” *Id.* In making that determination, the Ninth
6 Circuit stated that “the district court should inquire into possible prejudice from (1) class
7 Members’ possible reliance on the filing of the action if they are likely to know of it either
8 because of publicity or other circumstances, (2) lack of adequate time for class members to file
9 other actions, because of a rapidly approaching statute of limitations, and (3) any settlement or
10 concession for class interests made by the class representative or counsel in order to further
11 his own interests.” *Id.*

12 **1. Absent Class Members Have Not Relied On These Class Claims**

13 After a diligent search of internet sites, newspapers, and other news sources published in
14 the United States, Plaintiff’s counsel asserts it is unlikely there are putative class members that
15 are aware of and have relied on Plaintiff’s action in this Court. Applying the *Diaz* factors to a
16 non-class settlement in a case that initially began as a putative class action, the Court in *Houston*
17 *v. Cintas Corp.*, 2009 U.S. Dist. LEXIS 33704 (N.D. Cal. April 3, 2009) approved the settlement
18 and dismissal without notice. In the *Houston* case, the Court noted that “although there has been
19 some publicity regarding this case and articles in which some of the Plaintiff were mentioned by
20 name, it has been minimal.” *Id.* at *5. While this case has been the subject of some publicity,
21 media attention has been minimal and mostly limited to professional legal news sources that are
22 not likely read by lay consumers. Accordingly, it is highly unlikely that any absent class member
23 has opted to rely on this case rather than pursue an action of his or her own. After the filing of
24 the suit, Plaintiff’s counsel was not contacted by any potential class members seeking to be part
25 of the suit or otherwise to inquire as to its status.

26 **2. Absent Class Members Will Not Be Prejudiced By Any Rapidly** 27 **Approaching Statute Of Limitations**

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

11 Given the impossibility of calculating the actual remaining statute of limitations for each
 12 putative class member's claim, courts in this Circuit have measured this factor by assessing the
 13 time remaining on the statute of limitations of the original named Plaintiff's claims after tolling.
 14 In *Singer*, the court determined that notice was not necessary due in part to the fact that absent
 15 class members had anywhere from a one year to a four year tolled statute of limitation once the
 16 individual claims were dismissed. *Singer v. Am. Airlines Fed. Credit Union*, 2006 U.S. Dist.
 17 LEXIS 82147 (N.D. Cal. Oct. 30, 2006). "Based on the tolling of the statute of limitations as to
 18 the class which occurred by virtue of the filing of plaintiff's complaint, there is ample time for
 19 absent class members to commence a new action should they determine that such a case had
 20 merit." *Id.* at *10. Plaintiffs' claims, which incorporate a claim under California's Business and
 21 Professions Code, generally implicate a four year statute of limitations. Plaintiff only filed
 22 approximately one year ago in September 2013. Thus, Plaintiff would not face any impending
 23 deadlines. As in *Singer*, there is ample time for class members to commence an action.

24 **3. Plaintiff Has Not Made Any Concession Of Class Interests To Further**
 25 **His Own Interests**

26 Finally, the dismissal of the putative class claims without prejudice will not affect the
 27 rights of putative class members such that notice is necessary. Applying the *Diaz* factors to a
 28 non-class settlement in a case that initially began as a putative class action, the Court in *Houston*

1 v. *Cintas Corp.*, 2009 U.S. Dist. LEXIS 33704 (N.D. Cal. April 3, 2009) approved the settlement
2 and dismissal without notice, stating, “the parties do not seek to dismiss the class claims with
3 prejudice and, therefore, they are not impacting the rights of potential class members.” *Id.* at *6.
4 Similarly, the class claims in this case are not being dismissed with prejudice. Indeed there has
5 been absolutely no “settlement or concession” of class interests in resolving this action on an
6 individual basis. As in *Houston*, no notice should be required here because no concessions of the
7 class’ interests have been made.

8 **IV. CONCLUSION**

9 The parties request that the Court approve the individual settlement reached in this
10 action and dismiss the case with prejudice as to named Plaintiff Ryan Richards and without
11 prejudice as to all absent members of the putative class.

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13 DATED: January 7, 2015

SCOTT COLE & ASSOCIATES, APC

15 By: /s/ Stephen Noel Ilg
16 Stephen Noel Ilg, Esq.
17 Attorneys for Representative Plaintiff
and the Plaintiff Class

18 DATED: January 7, 2015

ARNOLD & PORTER LLP

21 By: /s/ Monty Agarwal
22 Monty Agarwal
23 Attorneys for Defendant
24 SAFEWAY, INC.

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: January 7, 2015

SCOTT COLE & ASSOCIATES, APC

By: /s/ Stephen Noel Ilg
Stephen Noel Ilg, Esq.
Attorneys for Representative Plaintiff
and the Plaintiff Class

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

RYAN RICHARDS, individually and)
on behalf of all others similarly)
situated,)
)
Plaintiff)
)
vs.)
)
SAFEWAY, INC.,)
)
Defendant.)

Case No. 13-cv-04317-JD
CLASS ACTION
**[PROPOSED] ORDER GRANTING
APPROVAL OF INDIVIDUAL SETTLEMENT
AND DISMISSAL WITHOUT NOTICE**

Judge: Honorable James Donato

1 This matter having come on for hearing, and this Court, having considered the papers and
2 pleadings on file, and good cause appearing, HEREBY GRANTS the motion for approval of
3 individual settlement; and for an Order approving dismissal of the claims of named Plaintiff
4 Ryan Richards with prejudice and the claims of the putative class without prejudice and without
5 notice.

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7 **IT IS SO ORDERED.**

8
9 Dated: _____

10 By: _____
11 Honorable James Donato
12 United States District Court Judge

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