

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ALEXANDER HUN and DANA PAUL,
on behalf of themselves and all others similarly
situated,

Plaintiffs,

v.

KASHI COMPANY, a California Corporation,

Defendant.

Case No. 1:15-cv-01391-ILG-JO

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
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STIPULATION OF DISMISSAL WITHOUT PREJUDICE

Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii), Plaintiffs Alexander Hun and Dana Paul (“Plaintiffs”) and Defendant Kashi Company (“Kashi”), by their undersigned counsel, stipulate to dismiss Plaintiffs’ action without prejudice,¹ subject to the parties’ tolling agreement below.

1. On March 17, 2015, Plaintiffs initiated this action by filing a Class Action Complaint alleging that Kashi had mislabeled certain products as “All Natural” or “Nothing Artificial” despite containing one or more allegedly synthetic and/or artificial ingredients. ECF No. 1, ¶¶ 1–2.

2. On June 29, 2015, Kashi filed a Motion to Dismiss or Stay Action Pending Ruling on Motion to Approve Class Settlement in *Garcia v. Kashi* (“Motion”). ECF No. 6.

¹ A stipulated dismissal pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii) is without prejudice unless “the notice or stipulation states otherwise” or “the plaintiff previously dismissed any federal- or state-court action based on or including the same claim.” Fed. R. Civ. P. 41(a)(1)(B); *see also Youssef v. Tishman Const. Corp.*, 744 F.3d 821, 825 (2d Cir. 2014) (“In the absence of any indication by the plaintiff, Rule 41(a)(1) presumes that a voluntary dismissal under these circumstances is without prejudice.”). Neither circumstance specified in Fed. R. Civ. P. 41(a)(1)(B) applies here, and thus, this stipulated dismissal is without prejudice.

3. Kashi's Motion seeks to dismiss Plaintiffs' claims without prejudice, or to stay the action, pending approval of a 49-state class-action settlement in *Garcia et al. v. Kashi Co.*, No. 1:12-cv-21678, ECF No. 178 (S.D. Fla.) (preliminary approval filed June 5, 2015) ("Stipulation of Settlement"). See Kashi Company's Memorandum of Law in Support of Motion to Dismiss or Stay Action Pending Ruling on Motion to Approve Class Settlement in *Garcia v. Kashi* at 1, ECF No. 6-1.

4. On August 13, 2015, Plaintiffs filed a response to Kashi's Motion, requesting that the Court deny Kashi's request to dismiss the action because the Stipulation of Settlement had not even been preliminarily approved, and the obvious prejudice to Plaintiffs and putative class members if Plaintiffs' claims were dismissed now, and the Stipulation of Settlement was not ultimately approved. ECF No. 7.

5. On August 25, 2015, Kashi filed a reply in support of its Motion, arguing that Plaintiffs and putative class members would not be prejudiced by dismissal of this action because, as members of the putative class in *Garcia*, any statutes of limitations in Plaintiffs' independent lawsuit are tolled by virtue of the *Garcia* case, citing *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974), *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350-51 (1983), and their progeny. ECF No. 8.

6. The Stipulation of Settlement in *Garcia* includes a broad release of claims, providing that "Released Claims" "shall be construed as broadly as possible to effect complete finality over this Litigation" and, except personal-injury claims, shall include:

any and all actions, claims, demands, rights, suits, and causes of action of whatever kind or nature that arose during the Settlement Class Period against the Released Persons, including damages, costs, expenses, penalties, and attorneys' fees, known or unknown, suspected or unsuspected, in law or equity arising out of or relating to the packaging, marketing, distribution or sale by Kashi of food products labeled as "All Natural," "100% Natural," "Nothing Artificial," or the

like, which have been or could have been asserted by the Class Representatives in Plaintiffs' Second Amended Consolidated Class Action Complaint or in any of the previous Complaints.

Stipulation of Settlement at § II.A.23, *Garcia*, ECF No. 179-1.

7. Given the breadth of the release in the *Garcia* Stipulation of Settlement, and Kashi Company's agreement that *American Pipe* tolling applies to toll Plaintiffs' claims herein, the Parties hereby stipulate that:

- a) Plaintiffs' action be dismissed, without prejudice; and
- b) Defendant agrees for Plaintiffs' and putative class members' claims arising from their purchases of the Kashi products alleged in the Complaint filed in the herein action (ECF No. 1) all applicable statutes of limitations shall be tolled as of the date of the commencement of this action until sixty (60) days after either: i) the denial of the Motion for Preliminary Approval of the Stipulation of Settlement in *Garcia* (ECF Nos. 178 and 179-1); ii) the denial of any motion to finally approve the Stipulation of Settlement in *Garcia* (ECF Nos. 178 and 179-1); or iii) the granting of any motion to finally approve the Stipulation of Settlement in *Garcia* (ECF Nos. 178 and 179-1) (including the final disposition of all appeals). Such tolling shall apply to any an individual or subsequent class action Plaintiffs or putative class members file.

DATED: September 1, 2015

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So Ordered
J. W. G. Jensen
USDJ
9/1/15