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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

GAYLIA PICKLES & DONNA VANDIVER
 individually and on behalf of all others
 similarly situated,

Plaintiffs,

v.

KATE SPADE AND COMPANY, a Delaware
 corporation; and DOES 1-50, inclusive,

Defendants.

Case No. 3:15-CV-05329-VC

Hon. Judge Vince Chhabria

CLASS ACTION

JOINT REQUEST FOR DISMISSAL OF
 INDIVIDUAL CLAIMS WITH PREJUDICE
 AND DISMISSAL OF CLASS CLAIMS
 WITHOUT PREJUDICE; AND [PROPOSED]
 ORDER

Complaint Filed: November 20, 2015

Trial Date: None Set

1 **I. INTRODUCTION**

2 Named Plaintiffs Laura Marks, Gaylia Pickles, and Donna Vandiver (collectively,
3 “Plaintiffs”) and defendant Kate Spade & Company (“Kate Spade”, and with Plaintiffs, the
4 “Parties”), by and through their respective counsel of record in this case, hereby jointly request
5 dismissal, with prejudice, of the individual claims of Plaintiffs. The Parties also request dismissal,
6 without prejudice, of the putative class claims of the unnamed class members. This Request is
7 made because Plaintiffs no longer wish to pursue their individual claims. No consideration is
8 being given to Plaintiffs or their counsel in exchange for the dismissal, and all Parties have agreed
9 to bear their own costs. The proposed classes have not been certified and the putative class
10 members will not be prejudiced by the dismissal because their respective rights are not affected
11 thereby. As such, the Parties respectfully request that the Court dismiss this action as jointly
12 requested herein without notice.

13 **II. PROCEDURAL HISTORY**

14 This case is a proposed consumer class action against Kate Spade by California Plaintiffs,
15 Gaylia Pickles and Laura Marks, and Texas Plaintiff, Donna Vandiver. Kate Spade previously
16 filed motions to dismiss Plaintiffs’ First Amended Complaint and Second Amended Complaint, as
17 well as a motion for reconsideration of the Court’s order on Kate Spade’s motion to dismiss the
18 Second Amended Complaint. The motions have been ruled upon or otherwise resolved, and Kate
19 Spade has answered the operative Third Amended Complaint denying all material allegations.
20 The Parties have each propounded written discovery, and have taken several party, third party and
21 expert depositions. On July 6, 2017, Plaintiffs’ filed a Motion for Class Certification (*see* ECF
22 Dkt. No. 89).

23 The matter has recently been resolved as to the named Plaintiffs only. The Parties propose
24 dismissal with prejudice of their individual claims against Kate Spade with a mutual release and
25 waiver of costs and fees. The Parties further propose to dismiss the class claims without
26 prejudice. No additional consideration, monetary or otherwise, will be exchanged. In sum,
27 Plaintiffs have agreed to dismiss this case for a waiver of fees and costs only. The Parties so
28 advised the Court at a telephonic Case Management Conference on November 7, 2017. The Court

requested that the Parties file a Request for Dismissal in compliance with Paragraph 33 of Judge Chhabria's Civil Standing Order no later than November 28, 2017. This Request is being submitted in compliance with that order.

III. THE REQUEST FOR DISMISSAL SHOULD BE GRANTED WITHOUT NOTICE

Federal Rule of Civil Procedure 23(e) provides, in pertinent part: "Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a *certified* class may be settled, voluntarily dismissed, or compromised only with the court's approval..." (Emph. added.) Although the rule does not expressly require court approval for the voluntary dismissal of pre-certified claims, "the Ninth Circuit has held that Rule 23(e) also applies to settlements before certification, but in a much lighter form that does not entail 'the kind of substantive oversight required when reviewing a settlement binding upon the class.'" *Dunn v. Teachers Ins. & Annuity Ass'n of America*, No. 13-cv-05456-HSG at *9 (N.D. Cal. Jan. 13, 2016), *citing*, *Diaz v. Trust Territory of Pac. Islands*, 876 F.2d 1401, 1408 (9th Cir. 1989). "[C]ourts in [the Ninth] circuit continue to follow *Diaz* to evaluate the proposed settlement and dismissal of putative class claims." *Dunn* at *10, *citing*, *e.g.*, *Tomblin v. Wells Fargo, N.A.* No. 13-cv-04567, 2014 U.S. Dist. LEXIS 145556, 2014 WL 5140048 at *2 (N.D. Cal. Oct. 10, 2014); *Luo v. Zynga, Inc.*, No. 13-cv-00186, 2014 U.S. Dist. LEXIS 13225, 2014 WL 457742, at **3-4 (N.D. Cal. Jan. 31, 2014).

Pursuant to *Diaz*, in deciding whether to grant a request for dismissal of pre-certification claims, the Court must consider whether putative class members will be prejudiced as a result of: (1) "possible reliance on the filing of the action if they are likely to know if it either because of publicity or other circumstances"; (2) "lack of adequate time for class members to file other actions, because of a rapidly approaching statute of limitations"; and (3) "any settlement or concession of class interests made by the class representative or counsel in order to further their own interests." *Dunn* at **10-11, *citing*, *Diaz* at 1408. This analysis must be made "to determine whether the proposed settlement and dismissal are tainted by collusion or will prejudice putative members." *Dunn* at *11, *citing*, *Tomblin*, *supra*, 2014 U.S. Dist LEXIS 145556, 2014 WL 5140048, at *2 (internal citations and quotations omitted). If the court concludes that the

1 settlement creates the possibility of prejudice or other unfair results to the putative class, “district
2 courts may require notice to putative class members.” *Dunn* at *11, *citing*, *Diaz* at 1408-11.

3 In addition, Paragraph 33 of the Standing Order For Civil Cases Before Judge Vince
4 Chhabria provides:

5 In the event of a pre-certification settlement of a proposed class action involving
6 the individual named plaintiffs only, the named plaintiffs may not simply dismiss
7 the lawsuit without court approval. Rather, the parties must submit a request for
8 dismissal explaining how a dismissal would not prejudice the unnamed class
9 members whose claims are not being resolved by the settlement. In particular, the
10 parties must consider whether the unnamed class members need to be notified of
11 the dismissal. *See, e.g., Dunn v. Teachers Ins. & Annuity Ass'n of Am.*, No. 13-cv-
12 05456-HSG, 2016 WL 153266, at *3 (N.D. Cal. Jan. 13, 2016); *Tomblin v. Wells*
13 *Fargo Bank, N.A.*, No. 13-cv-04567-JD, 2014 WL 5140048 (N.D. Cal. Oct. 10,
14 2014); *Lyons v. Bank of Am., N.A.*, No. 11-cv-01232-CW, 2012 WL 5940846
15 (N.D. Cal. Nov. 27, 2012); *see also Diaz v. Trust Territory of Pac. Islands*, 876
16 F.2d 1401, 1408 (9th Cir. 1989).

17 Here, dismissal of the claims of the unnamed class members would cause them no
18 prejudice. First, it is highly unlikely that putative class members have relied on the filing of the
19 action as there has been minimal publicity regarding the case and even then, that occurred in legal
20 forums unlikely to have been read by any consumer. “[L]ack of media coverage makes it unlikely
21 that similarly situated [putative class members] knew of Plaintiffs’ lawsuit and relied on it for
22 vindication of their own rights.” *Lyons, supra*, at **5-6, *citing*, *Mahan v. Trex Company, Inc.*,
23 2010 U.S. Dist. LEXIS 130160, 2010 WL 4916417 (N.D. Cal. Nov. 22, 2010) at *3. However,
24 even if some putative class members may have seen the publicity relating to, or otherwise relied
25 on, Plaintiffs’ lawsuit, application of the other two *Diaz* factors militates against a finding of
26 prejudice. *Lyons* at *6.

27 As to the second *Diaz* factor, there is adequate time for class members to file other actions
28 because their potential claims have been subject to equitable tolling since the date this case was
filed. *See, American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 559 (1974).¹ Because they have

¹ Claims for violation of California’s False Advertising Law and Consumer Legal Remedies Act are subject to three year statute of limitations periods (*see* Cal. Code Civ. Proc. § 338; Cal. Civ. Code § 1783), while claims under California’s Unfair Competition Law are subject to a four year

1 been tolled, “there is a substantially diminished risk of prejudice to those putative class claims:
 2 putative class members could have years to file a new complaint. Accordingly, ...this factor
 3 weighs against the need to provide notice...” *Dunn* at *23.

4 Finally, there has been no settlement or concession of class interests as the class claims are
 5 being dismissed without prejudice. As such, putative class members are free to bring their own
 6 claims if they so wish. In addition, the class representatives and counsel have not furthered their
 7 own interests because neither has received any consideration, monetary or otherwise, for the
 8 dismissal of the claims other than a mutual waiver of fees and costs associated with the case.

9 For the foregoing reasons, the dismissal of this action requested herein presents little, if
 10 any, possibility of prejudice or other unfair results to the putative class such that notice to the class
 11 should be required. Further, “courts have moved away from the idea that notice is required for all
 12 pre-certification dismissals.” *Diaz* at 1407.

13 **IV. CONCLUSION**

14 For all the foregoing reasons, the Parties respectfully request that the Court dismiss the
 15 claims of the individual Plaintiffs with prejudice, and dismiss the claims of the absent putative
 16 class members without prejudice, and without notice.

17
 18 DATED: November 22, 2017

**MARKUN ZUSMAN FRENIERE & COMPTON,
 LLP**

19
 20 By:



21 David S. Markun
 Mark A. Ozello


22 *Attorneys for Plaintiffs Laura Marks,*
 23 *Gaylia Pickles, and Donna Vandiver,*
 24 *individually and on behalf of all*
 25 *others similarly situated*

26
 27 statute of limitations period (*see* Cal. Bus. & Prof. Code § 17208) . Claims under the Texas
 28 Deceptive Trade Practices Act are subject to a two year statute of limitations period (*see* Tex. Bus.
 & Com. Code § 17.565). These multi-year limitations periods were all tolled upon the filing of
 this action in November 2015.

1 DATED: November 22, 2017

SHEPPARD MULLIN RICHTER & HAMPTON

2 By:

3 
4 P. Craig Cardon
5 Dylan Price
6 Jay Ramsey

Attorneys for Defendant Kate Spade & Company

[PROPOSED] ORDER

Pursuant to the parties' Stipulation, the Court enters the following Orders:

1. The individual claims of Plaintiffs Gaylia Pickles, Donna Vandiver, and Laura Marks are hereby dismissed with prejudice, with each side to bear their own costs and fees;

2. The claims of putative class members of the proposed California and Texas classes are hereby dismissed without prejudice; and

3. Notice to putative class members is not required.

IT IS SO ORDERED.

DATED: November __, 2017

The Honorable Vince Chhabria
United States District Court Judge

ATTESTATION PURSUANT TO LOCAL RULE 5-1(i)(3)

I, David S. Markun, am the ECF User whose identification and password are being used to file this document. In compliance with Civil Local Rule 5-1(i)(3), I hereby attest that all signatories have concurred in this filing.

A handwritten signature in blue ink, appearing to read "David S. Markun", written over a horizontal line.

David S. Markun