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15 (additional parties continued on next page)
 16

17 UNITED STATES DISTRICT COURT
 18 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

20 JOHN LUNA, as an individual and on behalf
 of all others similarly situated,
 21
 Plaintiff,

22 vs.

23 RENEWAL BY ANDERSEN LLC;
 24 ANDERSEN CORPORATION; JEMICO
 LLC d/b/a RENEWAL BY ANDERSEN OF
 25 SAN FRANCISCO, LONG ISLAND
 CUSTOM WINDOWS LLC d/b/a RENEWAL
 26 BY ANDERSEN OF LONG ISLAND, and
 MOORE HOLDINGS LLC,
 27
 Defendant.

Case No. 3:18-cv-07304-vc

**STIPULATED REQUEST FOR
 DISMISSAL AND ~~PROPOSED~~ ORDER**

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1 Pursuant to F.R.C.P. 41(a)(1)(A)(ii) and Paragraph 48 of the Court’s Standing Order for
2 Civil Cases,¹ Plaintiff and Defendants Renewal by Andersen, LLC (“Andersen”), Jemico, LLC
3 d/b/a Renewal by Andersen of San Francisco (“Jemico”), Long Island Custom Windows, LLC
4 d/b/a/ Renewal by Andersen of Long Island (“Long Island”) and Moore Holdings, LLC (“Moore”)
5 hereby jointly and respectfully submit this request for approval of the dismissal of Plaintiff’s
6 individual claims with prejudice and the putative class claims without prejudice. The Parties
7 further jointly and respectfully submit that, because there has been no publicity surrounding this
8 case and no unnamed class members will be prejudiced (or even bound) by the dismissal, there is
9 no need for notice. A proposed order to this effect is set forth at the end of this pleading, and
10 Plaintiff and Defendant hereby jointly and respectfully request that the Court enter this proposed
11 order.

12 **I. Factual Background And Procedural History**

13 On November 1, 2018, Plaintiff filed the instant putative class action in the Superior Court
14 of the State of California for the County of Santa Clara, entitled John Luna, et al. v. Renewal by
15 Andersen, LLC, et al., Case No. CIV537393. The complaint alleged that Defendants violated
16 California Penal Code section 632.7 by recording outbound calls to customers who were using
17 cellular or mobile phones.

18 On December 3, 2018, Defendants removed the action to the United States District for the
19 Northern District of California, and the action is now captioned John Luna, et al. v. Renewal by
20 Andersen, LLC, et al., No. 18-CV-07304 (“Federal Action”). On April 30, 2019, Plaintiff filed a
21 First Amended Complaint against Renewal by Andersen, LLC (“Andersen”), Andersen
22 Corporation, Jemico, LLC d/b/a Renewal by Andersen of San Francisco (“Jemico”), Long Island

23 _____
24 ¹ The Standing Order states: “In the event of a pre-certification settlement or dismissal of a proposed
25 class action, the named plaintiffs may not simply dismiss the lawsuit without court approval. Rather,
26 the parties must submit a request for dismissal explaining how a dismissal would not prejudice the
27 unnamed class members whose claims are not being resolved by the settlement. In particular, the
28 parties must consider whether the unnamed class members need to be notified of the dismissal. See,
e.g., *Dunn v. Teachers Ins. & Annuity Ass’n of Am.*, No. 13-cv-05456-HSG, 2016 WL 153266, at *3
(N.D. Cal. Jan. 13, 2016); *Tomblin v. Wells Fargo Bank, N.A.*, No. 13-cv-04567-JD, 2014 WL
5140048 (N.D. Cal. Oct. 10, 2014); *Lyons v. Bank of Am., N.A.*, No. 11-cv-01232-CW, 2012 WL
5940846 (N.D. Cal. Nov. 27, 2012); see also *Diaz v. Trust Territory of Pac. Islands*, 876 F.2d 1401,
1408 (9th Cir. 1989).”

1 and Moore Holdings, LLC (“Moore”) (collectively, “Defendants”). On June 11, 2019 the Parties
2 filed a stipulation and proposed order dismissing Andersen Corporation without prejudice from
3 the Federal Action, which the Court entered on June 14, 2019.

4 Once again, the sole claim in this action is that Defendants allegedly recorded outbound
5 telephone calls to the cellular telephones of Plaintiff and putative class members without
6 disclosing such calls were being recorded in violation of California Penal Code Section 632.7.
7 Defendants have denied and continue to deny all allegations of wrongdoing made in the Action by
8 Plaintiff and the putative class members.

9 On December 20, 2019, the Fourth District, Division Two of the California Court of
10 Appeal held in *Smith v. LoanMe, Inc.*, 43 Cal. App. 5th 844 (Ct. App. 2019), that Section 632.7
11 applies only to third party eavesdroppers, not alleged parties to a call such as the Defendants here.
12 As this Court has noted, federal courts have a “duty” to follow California Court of Appeal
13 precedent unless “it is in tension with the law as stated by the California Supreme Court.” *Am.*
14 *Guarantee and Liability Ins. Co. v. Technichem, Inc.*, 2016 WL 3844329, at n.1 (N.D. Cal. July
15 15, 2016); see also *Ryman v. Sears, Roebuck & Co.*, 505 F.3d 993, 995 (9th Cir. 2007) (“[W]here
16 there is no convincing evidence that the state supreme court would decide differently, a federal
17 court is obligated to follow the decisions of the state's intermediate appellate courts.”) It is
18 Defendants’ position that this precedent precludes the claim asserted in this action as a matter of
19 law. After further investigation (including extensive discovery) into the facts underlying
20 Plaintiff’s claims and into the likelihood of obtaining any recovery for either himself or the
21 putative class even if the litigation proceeds, including assessment of LoanMe, Plaintiff and his
22 counsel believe that the dismissal requested here is the best course for an efficient resolution of
23 Plaintiff’s individual claims without prejudice to absent class members. The Court Should
24 Dismiss Plaintiff’s Individual Claims With Prejudice and the Putative Class Claims Without
25 Prejudice and Without Requiring Notice to the Putative Class.

26 Under the Court’s Standing Order, the parties to a putative class action seeking a pre-
27 certification dismissal of the action must “submit a request for dismissal explaining how a
28 dismissal would not prejudice the unnamed class members whose claims are not being resolved by

1 the settlement,” and must consider in particular “whether the unnamed class members need to be
2 notified of the dismissal.” The Standing Order cites several cases—all of which rely on *Diaz v.*
3 *Trust Territory of Pac. Islands*, 876 F.2d 1401, 1408 (9th Cir. 1986)—discussing the factors for
4 evaluating a pre-certification settlement and dismissal. See, e.g., *Dunn v. Teachers Ins. & Annuity*
5 *Ass’n of Am.*, 2016 WL 153266, at *3 (N.D. Cal. Jan. 13, 2016); *Tomblin v. Wells Fargo Bank,*
6 *N.A.*, 2014 WL 5140048 (N.D. Cal. Oct. 10, 2014); *Lyons v. Bank of Am., N.A.*, 2012 WL
7 5940846 (N.D. Cal. Nov. 27, 2012). These cases hold that under (at least the prior version of)
8 Rule 23(e), a court must review and approve both pre- and post-certification dismissals, but a pre-
9 certification dismissal review takes “a much lighter form that does not entail the kind of
10 substantive oversight required when reviewing a settlement binding upon the class.” See, e.g.,
11 *Tomblin*, 2014 WL 5140048, at *2 (citing *Diaz*, 876 F.2d at 1408).

12 To determine whether pre-certification dismissal is appropriate, “the Court must inquire
13 into possible prejudice from (1) class members’ possible reliance on the filing of the action if they
14 are likely to know of it either because of publicity or other circumstances; (2) lack of adequate
15 time for class members to file other actions, because of a rapidly approaching statute of
16 limitations; (3) any settlement or concession of class interests made by the class representative or
17 counsel in order to further their own interests.” *Lyons*, 2012 WL 5940846, at *1 (citing *Diaz*, 876
18 F.2d at 1408); see also *Tomblin*, 2014 WL 5140048, at *2. The purpose of this review is to
19 assess whether there are unusual circumstances that would necessitate notice to absent class
20 members prior to the dismissal. *Diaz*, 876 F.2d at 1408 (“In no pre-certification dismissal would
21 the court reject the dismissal and require anything more than notice to the class and an opportunity
22 to intervene.”) The Ninth Circuit “emphasized” in *Diaz* that notice “to the class of pre-
23 certification dismissal is not ... required in all circumstances.” *Tomblin*, 2014 WL 5140048, at
24 *2 (citing *Diaz*, 876 F.2d at 1408-09). Instead, notice may be appropriate only if the “putative
25 class members might be subject to prejudicial or unfair impacts” from the dismissal. *Id.*

26 Here, the *Diaz* factors for approving a pre-certification dismissal are clearly satisfied.
27
28

1 **A. Class Members Have Not Relied To Their Detriment On This Lawsuit**

2 First, there is no evidence that unnamed class members relied on this lawsuit at all, much
3 less to their detriment, such that they will be prejudiced by the dismissal. The Parties are unaware
4 of any media coverage regarding the lawsuit, and Plaintiff’s counsel have not received any
5 communications from any putative class members about the case.

6 **B. Class Members Do Not Face A Rapidly Approaching Statute Of Limitations**

7 Second, even if some putative class members have relied on this lawsuit, there is no
8 “rapidly approaching statute of limitations” that would render them without sufficient time to
9 pursue relief. The complaint was filed in November 2018 and addressed conduct allegedly taking
10 place up to that point. As many courts in this circuit have recognized in approving pre-
11 certification dismissals, the “filing of the class action complaint toll[s] the statute of limitations,
12 which will not resume running until [Plaintiffs’] class claims are dismissed.” See, e.g., Tomblin,
13 2014 WL 5140048, at *3 (internal citations omitted); Lyons, 2012 WL 5940846, at *2 (“What’s
14 more, these claims would not be time-barred because of the class action tolling doctrine.”);
15 Houston, 2009 WL 921627, at *2 (“[T]he statute of limitations has been tolled since the lawsuit
16 was filed.”); Diaz, 876 F.2d at 1407 (citing American Pipe Construction Co. v. Utah, 414 U.S. 538
17 (1974) (filing of class action tolls statute of limitations on individual claims covered by class
18 action)).

19 Here, of course, only Plaintiff’s individual claims are being dismissed with prejudice, and
20 so absent class members can make use of American Pipe tolling should one of them wish to assert
21 his or her own individual claim. See American Pipe & Construction Co. v. Utah, 414 U.S. 538
22 (1974), and Crown, Cork & Seal Co., Inc. v. Parker, 462 U.S. 345, 353-54 (1983) (“the
23 commencement of a class action suspends the applicable statute of limitations as to all asserted
24 members of the class who would have been parties had the suit been permitted to continue as a
25 class action.”). Under this rule, if the case is dismissed before certification as requested here, and
26 an absent class member then brings his or her own individual claim for the same wrong, then the
27 statute of limitations will be deemed tolled during the pendency of the prior putative class action
28 until the date of dismissal. See American Pipe, 414 U.S. at 561; see also China Agritech, Inc. v.

1 Resh, — U.S. —, 138 S. Ct. 1800, 201 L.Ed.2d 123 (2018); Robbin v. Fluor Corp., 835 F.2d
2 213, 214 (9th Cir. 1987).

3 Thus, because absent class members will not “face a short fuse on pursuing the claims to
4 be dismissed,” this Diaz factor favors dismissal without notice.

5 **C. There Was No Collusion Or Concession Of Class Interests**

6 Third, and finally, there has been no concession of class interests – the claims of the absent
7 class members are being dismissed without prejudice. See, e.g., Lyons, 2012 WL 5940846, at *1
8 (citing Diaz, 876 F.2d at 1408) (“because the parties intend to dismiss the class claims without
9 prejudice, absent class members would still be able to bring suit against Defendants.”); see also
10 Tomblin, 2014 WL 5140048, at *3 (“Because the settlement does not prevent putative class
11 members from pursuing claims, they are not likely, as a general matter, to be prejudiced.”);
12 Houston, 2009 WL 921627, at *2 (“[T]he parties do not seek to dismiss the class claims with
13 prejudice and, therefore, they are not impacting the rights of potential class members.”). To the
14 extent class members still have viable claims in the wake of LoanMe, such claims will not be
15 compromised by the dismissal of this matter.

16 In sum, the Diaz factors—individually, and together—favor approving the dismissal
17 requested without notice.

18 **II. CONCLUSION**

19 For the foregoing reasons, the Parties respectfully request that the Court enter the proposed
20 order and dismiss Plaintiff’s individual claims with prejudice and the putative class claims without
21 prejudice.
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DATED: March 3, 2020

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DATED: March 3, 2020

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~~PROPOSED~~ ORDER

This action is hereby dismissed with prejudice to as to Plaintiff's claims and without prejudice as to any claims of any absent or unnamed members of the putative class. **PURSUANT TO STIPULATION, IT IS SO ORDERED**

Dated: March 3, 2020



Hon. Vince Chhabria
United States District Court