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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

KARA HARDMAN, on behalf of herself and  
all others similarly situated,

Plaintiff,

vs.

TRI-FINANCIAL, LLC,

Defendant.

CASE NO. 09-CV-0081 - IEG (AJB)

ORDER GRANTING PLAINTIFF'S  
UNILATERAL MOTION FOR  
DISMISSAL OF CLASS CLAIMS  
WITHOUT PREJUDICE

[Doc. No. 8]

Currently before the Court is Plaintiff's Unilateral Motion for Dismissal of Class Claims Without Prejudice. [Doc. No. 8]. For the reasons set forth below, the Court GRANTS the motion and DISMISSES WITHOUT PREJUDICE the class claims in this action.

**BACKGROUND**

Plaintiff brought this case as a class action, alleging violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. §§ 227 et seq. [Doc. No. 1]. Summons were issued on January 15, 2009, and were returned executed on February 9, 2009. [Doc. Nos. 2, 3]. The Proof of Service indicates that Defendant was served on January 27, 2009, with the answer due on February 17, 2009. [Doc. No. 3]. On November 25, 2009, Plaintiff filed a Request for Entry of Clerk Default against Defendant, seeking an entry of default on behalf of herself and all others similarly situated due to the fact that Defendant has failed to respond to the complaint within 20 days. [Doc. No. 5]. On November 30, 2009, the Clerk of Court entered a default as to Defendant. [Doc. No. 6].

1 Currently before the Court is Plaintiff's Unilateral Motion for Dismissal of Class Claims  
2 Without Prejudice. [Doc. No. 8]. In her motion, Plaintiff moves to dismiss the class claims against  
3 Defendant because: (1) "class certification in this action is nearly impossible due to Defendant's  
4 unresponsiveness," and (2) Plaintiff "no longer desires to be the class representative in the instant  
5 action." (Pl. Motion, at 2.) Having initially reviewed Plaintiff's motion, the Court requested Plaintiff  
6 to provide a proposed notice to the class or to make a showing why such notice was not necessary.  
7 [Doc. No. 9]. Plaintiff filed a response to the Court's Order as requested, arguing that class notice is  
8 not necessary because there is no prejudice to the putative class members. [Doc. No. 10].

### 9 DISCUSSION

10 Pursuant to Federal Rule of Civil Procedure 23(e), "[t]he claims, issues, or defenses of a  
11 certified class may be settled, voluntarily dismissed, or compromised only with the court's approval."  
12 Although Rule 23(e) expressly refers only to a "certified class," before Rule 23(e) was amended in  
13 2003, the Ninth Circuit has held that the Rule also applied to pre-certification dismissals and  
14 compromises. See Diaz v. Trust Territory of the Pac. Islands, 876 F.2d 1401, 1408 (9th Cir. 1989).  
15 In Diaz, the court indicated that pre-certification approval was required to ensure that any dismissal  
16 or compromise "is not collusive or prejudicial." Id. Thus, according to the Ninth Circuit:

17 the district court should inquire into possible prejudice from (1) class members'  
18 possible reliance on the filing of the action if they are likely to know of it either  
19 because of publicity or other circumstances, (2) lack of adequate time for class  
20 members to file other actions, because of a rapidly approaching statute of limitations,  
21 (3) any settlement or concession of class interests made by the class representative or  
22 counsel in order to further their own interests.

23 Id. The Ninth Circuit concluded that, at least in some circumstances, class notice of a pre-certification  
24 voluntary dismissal might be appropriate.<sup>1</sup> Id. "Notice to the class of pre-certification dismissal is not,  
25 however, required in all circumstances." Id.

#### 26 **I. Prejudice due to possible reliance by putative class members**

27 In the present case, the putative class members are unlikely to suffer any prejudice due to

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28 <sup>1</sup> A number of district courts have applied the holding of Diaz to post-2003 pre-certification  
voluntary dismissals of class action claims. See, e.g., Ramirez v. Cintas Corp., No. C 04-00281 JSW,  
2007 WL 4410414, at \*\*1-2 (N.D. Cal. Dec. 14, 2007); Mansourian v. Bd. of Regents, No. CIV. S-  
03-2591 FCD EFB, 2007 WL 1722975, at \*1 (E.D. Cal. June 12, 2007); Castro v. Zenith Acquisition  
Corp., No. C 06-04163 SI, 2007 WL 81905, at \*\*1-2 (N.D. Cal. Jan. 09, 2007).

1 reliance on this class action. As Plaintiff's counsel indicates, it is not likely that this case has received  
2 any press coverage or notoriety since it was filed. (See Swigart Decl. ¶ 4.) There is also little reason  
3 to believe that other individuals who received autodialed or prerecorded calls by Defendant are even  
4 aware of this litigation. (See *id.*) Accordingly, it is very unlikely that any of the putative class  
5 members have refrained from filing their own suits because of reliance on the present action.

6 **II. Prejudice due to lack of adequate time to file other actions**

7 Likewise, the putative class members are unlikely to suffer any prejudice due to lack of  
8 adequate time to file their own actions once the class claims in this case are dismissed. First, there will  
9 be no procedural bar to filing separate claims because the dismissal of class claims in the present  
10 action will be without prejudice. (See Pl. Motion, at 2.) Second, any putative class member wishing  
11 to file his or her own action will have the benefit of a four-year statute of limitations. See 28 U.S.C.  
12 § 1658. Moreover, because a filing of an alleged class action tolls the statute of limitations for all  
13 individual claims covered by the class action during the pendency of the suit, see *Am. Pipe & Constr.*  
14 *Co. v. Utah*, 414 U.S. 538 (1975), the putative class members will be in the exact same position upon  
15 dismissal of the class claims as when the suit was initially filed.

16 **III. Prejudice due to any settlement or concession made by the class representative**


17 Finally, the Court finds no prejudice to putative class members from the conduct of the class  
18 representative. As already noted, the dismissal of class claims in the present action will be without  
19 prejudice. Moreover, because Defendant never responded, there has been no settlement of the class  
20 claims by the class representative and, accordingly, no concessions made. (See Swigart Decl. ¶ 6.)

21 **CONCLUSION**

22 For the foregoing reasons, voluntary dismissal of class claims at this early stage of the  
23 proceedings will not result in any prejudice to the putative class members. Accordingly, the Court  
24 **GRANTS** the motion and **DISMISSES WITHOUT PREJUDICE** the class claims in this action.

25 **IT IS SO ORDERED.**

26 **DATED: February 3, 2010**

27   
28 **IRMA E. GONZALEZ, Chief Judge**  
**United States District Court**