UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

IN RE CONAGRA FOODS, INC.

CASE NO. CV 11-05379 MMM (AGRx)

ORDER GRANTING PLAINTIFFS' MOTION FOR WITHDRAWAL AND VOLUNTARY DISMISSAL OF INDIVIDUAL CLAIMS

Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the court finds the matter appropriate for decision without oral argument and vacates the hearing scheduled for May 5, 2014.

I. BACKGROUND

Plaintiffs are consumers residing in California and fourteen other states.[1] They allege that from at least June 27, 2007 to the present, defendant ConAgra Foods, Inc. ("ConAgra")

[1]The other states in which plaintiffs reside are Colorado, Florida, Illinois, Indiana, Massachusetts, Nebraska, New Jersey, New York, Ohio, Oregon, South Dakota, Texas, Washington, and Wyoming. (Second Consolidated Amended Class Action Complaint ("SAC"), Docket No. 143 (Dec. 19, 2012), ¶ 5.)

deceptively and misleadingly marketed its Wesson brand cooking oils, made from genetically-modified organisms ("GMO"), as "100% Natural."[2]

On June 28, 2011, Robert Briseno filed a complaint against ConAgra.[3] Between October and December 2011, the court consolidated several cases filed against ConAgra, under the caption indicated above.[4] On January 12, 2012, plaintiffs filed a First Consolidated Amended Complaint.[5] On February 24, 2012, ConAgra filed a motion to dismiss,[6] which the court granted in part and denied in part on November 15, 2012.[7] On December 19, 2012, plaintiffs filed a Second Consolidated Amended Complaint, which alleged claims for (1) violation of state consumer protection laws, (2) breach of express warranty, (3) breach of the implied warranty of merchantability, and (4) unjust enrichment.[8]

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[2]*Id.*, ¶ 1.

[3]Complaint, Docket No. 1 (June 28, 2011).

[4]Minutes (In Chambers): Order Taking Off Calendar and Denying as Moot Motion of Plaintiffs Briseno and Toomer to Consolidate Related Actions and Designate Interim Class Counsel, Docket No. 33 (Oct. 6, 2011); Order Consolidating Cases, Docket No. 56 (Nov. 28, 2011); Order Re Stipulation to Consolidate Related Actions, Docket No. 59 (Dec. 9, 2011); Amended Order Granting Stipulation Re Amended Consolidated Complaint, Response to Amended Consolidated Complaint, and Consolidation of Additional Action, Docket No. 61 (Dec. 9, 2011). The consolidated cases are *Robert Briseno v. Conagra Foods, Inc.*, CV 11-05379 MMM(AGRx); *Christi Toomer v. Conagra Foods, Inc.*, CV 11-06127 MMM(AGRx); *Kelly McFadden v. Conagra Foods, Inc.*, CV 11-06402 MMM(AGRx); *Janeth Ruiz v. Conagra Foods, Inc.*, CV 11-06480 MMM(AGRx); *Brenda Krein v. Conagra Foods, Inc.*, CV 11-07097 MMM(AGRx); *Phyllis Scarpelli, et al. v. Conagra Foods, Inc.*, Case No. CV 11-05813 MMM (AGRx); *Michele Andrade v. ConAgra Foods Inc.*, CV 11-09208 MMM (AGRx); and *Lil Marie Virr v. Conagra Foods, Inc.*, CV 11-08421 MMM (AGRx).

[5]Consolidated Amended Class Action Complaint, Docket No. 80 (Jan. 12, 2012).

[6]Motion to Dismiss, Docket No. 84 (Feb. 24, 2012).

[7]Order Granting in Part and Denying in Part Defendant's Motion to Dismiss, Docket No. 138 (Nov. 15, 2012).

[8]*Id.*, ¶¶ 64-103. Specifically, plaintiffs plead the following state law claims: California (consumer protection, express warranty, and implied warranty); Colorado (consumer protection, express warranty, implied warranty, and unjust enrichment); Florida (consumer protection and

On February 20, 2014, plaintiffs filed a motion representing that Patty Boyer, Anne Cowan, Brenda Krein, Janeth Ruiz, and Christi Toomer (collectively "withdrawing plaintiffs") wished to withdraw as named plaintiffs.[9] The withdrawing plaintiffs represent that they are no longer able to expend the time and effort, or incur the responsibilities, entailed in serving as class representatives.[10] Boyer is from Wyoming; Cowan is from Washington; Krein is from New Jersey; Ruiz is from Florida; and Toomer is from California.[11] While other named plaintiffs from California, Florida and New Jersey remain, and are prepared to represent their putative state class, no other named plaintiffs resides in Washington or Wyoming.[12] Thus, while Krein, Ruiz, and Toomer can remain class members if they withdraw,[13] Boyer's and Cowan's withdrawal will require dismissal of claims asserted by the putative Washington and Wyoming classes.[14]

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unjust enrichment); Illinois (consumer protection and unjust enrichment); Indiana (express warranty, implied warranty, and unjust enrichment); Massachusetts (consumer protection, express warranty, implied warranty, and unjust enrichment); Nebraska (consumer protection, express warranty, implied warranty, and unjust enrichment); New Jersey (consumer protection, express warranty, and implied warranty); New York (consumer protection, express warranty, and unjust enrichment); Ohio (consumer protection and unjust enrichment); Oregon (consumer protection and unjust enrichment); South Dakota (consumer protection, express warranty, implied warranty, and unjust enrichment); Texas (consumer protection and unjust enrichment); Washington (consumer protection, express warranty, and unjust enrichment); and Wyoming (express warranty, implied warranty, and unjust enrichment).

[9]Motion for Order for Allowing Withdrawal and Voluntary Dismissal, Docket No. 190 (Feb. 20, 2014). See also Corrected Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Order Allowing Withdrawal and Voluntary Dismissal ("Motion"), Docket No. 191 (Feb. 20, 2014) at 4, 5, 6.

[10]Motion at 1.

[11]SAC, ¶¶ 12, 17, 22, 30, 31.

[12]See *id.*, ¶¶ 11-13, 16, 23; Motion at 4-5.

[13]*Id.* at 5.

[14]On March 16, 2014, plaintiffs filed an *ex parte* application to continue the deadlines to add new parties and to file a class certification motion. (*Ex Parte* Application to Modify

On March 7, 2014, ConAgra filed a motion to compel the production of documents.[15] Magistrate Judge Alicia G. Rosenberg heard the motion on an expedited basis on March 10, 2014, to the extent the requested documents were relevant to plaintiffs' motion for class certification.[16] Judge Rosenberg ordered plaintiffs to produce certain documents, and denied the motion without prejudice in all other respects.[17]

Although ConAgra has filed a notice of non-opposition to plaintiffs' motion, it conditions its non-opposition on the withdrawing plaintiffs' production of all documents responsive to its first set of Requests for Production – including documents covered by Judge Rosenberg's March 31, 2014 order – and their submission of sworn declarations setting forth in detail the reasons they seek to dismiss their respective claims.[18]

II. DISCUSSION

A. Legal Standard Governing Voluntary Dismissal

Rule 41 of the Federal Rules of Civil Procedure governs the voluntary dismissal of claims. FED.R.CIV.PROC. 41. It provides, in pertinent part: "Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court

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Scheduling Order or, in the Alternative, for Expedited Scheduling Conference, Docket No. 220 (Mar. 16, 2014).) On March 28, 2014, the court continued the deadline for the filing of a class certification motion, but declined to continue the deadline for the amendment of pleadings. (Order Granting Plaintiffs' *Ex Parte* Application to Modify Scheduling Order ("March 28 Order"), Docket No. 230 (Mar. 28, 2014).) Thus, plaintiffs cannot, at this stage, amend their pleadings to add new named plaintiffs who could represent a Washington and a Wyoming class.

[15]Motion to Compel, Docket No. 196 (Mar. 7, 2014).

[16]Minutes of Granting in Part and Denying in Part Motion to Compel ("Mar. 10 Order"), Docket No. 209 (Mar. 10, 2014).

[17]*Id.*

[18]Notice of Non-Opposition ("Opposition"), Docket No. 234 (Apr. 14, 2014) at 7.

considers proper." FED.R.CIV.PROC. 41(a)(2).[19] A Rule 41(a)(2) motion is addressed to the sound discretion of the district court. *Sams v. Beech Aircraft Corp.*, 625 F.2d 273, 277 (9th Cir. 1980); accord *Hamilton v. Firestone Tire & Rubber Co., Inc.*, 679 F.2d 143, 145 (9th Cir. 1982). "The purpose of the rule is to permit a plaintiff to dismiss an action without prejudice so long as the defendant will not be prejudiced or unfairly affected by dismissal." *Stevedoring Servs. of Am. v. Armilla Int'l B.V.*, 889 F.2d 919, 921 (9th Cir. 1989) (citation omitted); *Hamilton*, 679 F.2d at 145 ("In ruling on a motion for voluntary dismissal, the District Court must consider whether the defendant will suffer some plain legal prejudice as a result of the dismissal. Plain legal prejudice, however, does not result simply when defendant faces the prospect of a second lawsuit or when plaintiff merely gains some tactical advantage" (citations omitted)).

B. Whether the Court Should Grant Plaintiffs' Motion

"When confronted with a motion for voluntary dismissal pursuant to Rule 41(a)(2), the Court must determine: (1) whether to allow dismissal; (2) whether the dismissal should be with or without prejudice; and (3) what terms and conditions, if any, should be imposed." *Fraley v. Facebook, Inc.*, No. 11–CV–01726–LHK, 2012 WL 893152, *2 (N.D. Cal. Mar. 13, 2012) (citing *Williams v. Peralta Community College Dist.*, 227 F.R.D. 538, 539 (N.D. Cal. 2005)); W. Schwarzer, A. Tashima, & J. Wagstaffe, 16-G RUTTER GROUP PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL (Calif. & 9th Cir. eds.) § 16:343. The court considers these factors in turn.

1. Whether the Court Should Allow Dismissal

A Rule 41(a)(2) motion for voluntary dismissal should be granted "unless a defendant can show that it will suffer some plain legal prejudice as a result." *Smith v. Lenches*, 263 F.3d 972, 975 (9th Cir. 2001). "[L]egal prejudice means prejudice to some legal interest, some legal claim,

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[19]Rule 41(a)(1) permits dismissal without a court order where a notice of dismissal is filed "before the opposing party serves either an answer or a motion for summary judgment; or [ ] a stipulation of dismissal signed by all parties who have appeared." FED.R.CIV.PROC. 41(a)(1). Because ConAgra has filed an answer (Answer to Amended Complaint, Docket No. 145 (Jan. 16, 2013)), and the parties have not stipulated to the withdrawing plaintiffs' dismissal, Rule 41(a)(1) does not apply.

some legal argument." *Id.* at 976. Courts consider the following factors: (1) whether the defendant has expended efforts or made preparations that would be undermined by granting withdrawal, (2) the plaintiff's delay in prosecuting the action, (3) the adequacy of the plaintiff's explanation as to why withdrawal is necessary, and (4) the stage of the litigation at the time the request is made. *Roberts v. Electrolux Home Products, Inc.*, No. SACV 12–1644 CAS (VBKx), 2013 WL 4239050, *2 (C.D. Cal. Aug. 14, 2013). ConAgra does not oppose plaintiffs' motion, nor does it contend it will suffer any prejudice as a result of the withdrawal of these named plaintiffs. Consequently, the court concludes that allowing the plaintiffs to withdraw as named class representatives, and to dismiss their individual claims will not prejudice ConAgra.

2. Whether the Dismissal Should be With or Without Prejudice

In determining whether a dismissal should be with or without prejudice, courts consider (1) the defendant's effort and expense involved in preparing for trial; (2) excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action; and (3) insufficient explanation of the need to dismiss. *Fraley*, 2012 WL 893152 at *3; *Burnette v. Godshall*, 828 F.Supp.1439, 1443-44 (N.D. Cal. 1993). The court "may order the dismissal to be with prejudice where it would be inequitable or prejudicial to defendant to allow plaintiff to refile the action." *Burnette*, 828 F.Supp. at 1443.

Krein, Ruiz, and Toomer seek to withdraw as named plaintiffs and become members of any California, Florida, and New Jersey class that is certified. Because other named class members from each of these states remain, plaintiffs' California, Florida, and New Jersey claims and their ability to attempt certification of classes for these states will be unaffected. Consequently, ConAgra's trial preparation efforts with respect to plaintiffs' California, Florida and New Jersey claims will not have been for naught. Thus, this factor weighs in favor of permitting these named plaintiffs to withdraw and dismiss their individual claims without prejudice. See *Fraley*, 2012 WL 893152 at *4 ("[T]hree putative class representatives remain in this action, and this case will continue to move forward as planned. Thus, Defendant's investment of resources in this litigation thus far will not [ ] be rendered futile by dismissal of

Fraley's and Wang's claims without prejudice, nor will the dismissal without prejudice subject Defendant to the risk of additional litigation").

The same cannot be said for Boyer and Cowan, however. Because there are no other named plaintiffs from Washington and Wyoming, and the deadline for the amendment of pleadings has passed, plaintiffs' Washington and Wyoming claims will have to be dismissed if plaintiffs' motion is granted. Thus, any resources ConAgra invested preparing to defend the claims will have been expended for no purpose. Dismissal without prejudice, moreover, would subject ConAgra to the risk of additional litigation on such claims. Had ConAgra raised these arguments, the court would have been inclined to dismiss Boyer's and Cowan's claims with prejudice. Compare *id*. As ConAgra does not argue that it has been prejudiced by defending their claims for three years, however, and does not seek dismissal with prejudice, however, the court will not weigh this factor in that manner.

As respects the second factor, as noted in the court's prior order, this action has been pending for nearly three years. While early on, litigation activity focused on consolidating all relevant actions before this court and settling the pleadings, those activities ended in early 2013. Since that time, plaintiffs have done little to prepare for class certification or move the case forward.[20] At the same time, the case remains at an early stage, as no motion for class certification or summary judgment has been filed. See *id.* (finding that the relatively early stage of the proceedings and lack of legal prejudice to defendant weighed in favor of dismissing the named plaintiffs' claims without prejudice); see also *Roberts*, 2013 WL 4239050 at *2 (finding that the timing of named plaintiffs' request to withdraw, prior to the filing of a motion for class certification or summary judgment, weighed against a finding that dismissal would prejudice defendant). The court therefore finds the second factor neutral with regard to all of the plaintiffs who seek to withdraw.

The third factor examines the adequacy of plaintiffs' explanation of their desire to dismiss their claims. The withdrawing plaintiffs represent that they are unable to continue to serve as

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[20]March 28 Order at 6.

named plaintiffs because they are no longer able to expend the time and effort required or to assume the responsibilities entailed in serving as class representatives. As ConAgra notes, the explanation is vague and general, and is not supported by evidence.[21] Nonetheless, because it appears the withdrawing plaintiffs are unable to "prosecute the action vigorously on behalf of the class," *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998), requiring their continued participation would be contrary to the interests of the class. The court therefore finds that this factor weighs slightly in favor of dismissing all withdrawing plaintiffs' claims with prejudice.

On balance, the court finds dismissal of all plaintiffs' claims without prejudice is appropriate. Although Krein's, Ruiz's, and Toomer's explanation for seeking to withdraw is not compelling, ConAgra will not be prejudiced by the dismissal or exposed to additional litigation. By contrast, ConAgra could suffer some prejudice if Boyer's and Cowan's claims were dismissed without prejudice. ConAgra, however, did not request dismissal with prejudice of their Washington and Wyoming claims. Because ConAgra did not make such a request, and because the court found the vague explanations of Krein, Ruiz, and Toomer an insufficient justification for dismissing their claims with prejudice, it reaches the same conclusion with respect to Boyer and Cowan, and finds that their claims too should be dismissed without prejudice.

3. Whether the Court Should Impose Terms and Conditions on the Dismissal

As noted, ConAgra conditions its non-opposition on a request that the court order the withdrawing plaintiffs to produce all documents responsive to its first set of Requests for Production, including those that were the subject of Judge Rosenberg's March 10, 2014 order, and to submit a sworn declaration setting forth in detail their reasons for seeking to dismiss their claims.[22]

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[21]Opposition at 5. ConAgra also objects to plaintiffs' earlier representation that they sought to have Boyer withdraw as a named plaintiff because she had died. Plaintiffs later confirmed that this was an error and that Boyer is alive. (*Id.* at 3-4, 5; Motion at 2 n. 1.)

[22]Opposition at 7.

a. Production of Materials Covered by Judge Rosenberg's March 10 Order

The withdrawing plaintiffs are presently under a court order to produce documents responsive to certain of ConAgra's document requests. Because they have an independent duty to comply with Judge Rosenberg's March 10 order, the court need not condition their withdrawal and dismissal of claims on compliance with her order. See *Fraley*, 2012 WL 893152 at *4 ("Although Defendant filed a Statement of Non–Opposition, Defendant conditions its non-opposition on 'Plaintiffs' compliance with Magistrate Judge Grewal's February 21, 2012 Order denying Plaintiffs' Motion for a Protective Order, in which Plaintiffs sought to bar Facebook from taking the deposition of Ms. Fraley.' Plaintiffs have an independent duty to comply with Magistrate Judge Grewal's Order, and therefore the Court sees no need to condition this dismissal on Plaintiffs' compliance therewith"); cf. *Teck Gen. P'ship Crown Cent. Petroleum Corp.*, 28 F.Supp.2d 989, 992 (E.D. Va. 1998) ("[I]t is settled that a plaintiff may not obtain a non-prejudicial voluntary dismissal simply to circumvent adverse rulings"). Judge Rosenberg ordered, in fact, that the documents were to be produced no later than March 31, 2014. To the extent the withdrawing plaintiffs have not complied, they have violated her order, subjecting them to sanctions.

b. Production of Materials Not Covered by Judge Rosenberg's March 10 Order and Declarations Describing Plaintiffs' Reasons for Dismissing Their Claims

"At the pre-class certification stage, discovery in a putative class action is generally [focused on] certification issues: e.g., the number of class members, the existence of common questions, the typicality of claims, and the representative's ability to represent the class." *Dysthe v. Basic Research, L.L.C.*, 273 F.R.D. 625, 628 (C.D. Cal. 2011) (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 359 (1978)). Judge Rosenberg's order addressed those requests for production relevant to class certification issues.[23] ConAgra does not explain why the

[23]Mar. 10 Order at 1 ("This court considers Defendant's motion to compel on an expedited basis to the extent the requested documents are necessary for the motion for class certification").

withdrawing plaintiffs should be compelled to respond to document requests that were not the subject of the March 10 order, nor is there any indication that it objected to Judge Rosenberg's limited consideration of its motion to compel.

It is true that courts have conditioned a named plaintiff's dismissal on complying with discovery requests, where the dismissal would otherwise prejudice the defendant's ability to defend itself. See *In re Vitamins Antitrust Litig.*, 198 F.R.D. 296, 305 (D.D.C. 2000) ("Defendants argue that dismissal would prejudice their rights as to the production of certain documents and the taking of discovery from these plaintiffs. Clearly, legal prejudice would result if dismissal of certain plaintiffs would render the defendants unable to conduct sufficient discovery to adequately defend themselves against the charges in this case. The Court therefore finds it proper for protection of defendants that the production of all documents and the answering of all interrogatories already noticed by defendants be a prerequisite to a voluntary dismissal without prejudice and without costs; under such circumstances defendant can lose no substantial right by the dismissal" (citation omitted)). ConAgra does not contend that its inability to obtain discovery from the withdrawing plaintiffs will prejudice its defense, nor can the court envision such a possibility, given that fifteen named plaintiffs remain in the case.

The cases ConAgra cites, *Dysthe v. Basic Research, LLC* and *Fraley v. Facebook, Inc.*, are not to the contrary.[24] Neither involved the imposition of conditions on a plaintiff's dismissal. Rather, both addressed discovery regarding named plaintiffs whose motions to withdraw had not yet been decided, and who thus remained parties in their respective cases. In *Fraley*, plaintiffs moved for a protective order to prevent the deposition of Fraley, who had moved to withdraw as a named plaintiff. No. C 11–1726 LHK (PSG), 2012 WL 555071, *1 (N.D. Cal. Feb. 21, 2012). The magistrate judge rejected plaintiffs' argument that "that the court should treat Fraley as an absent class member based on the motion for her withdrawal and fact that she will not be proffered as a class representative." *Id.* at *2. Here, in like fashion, the motion to withdraw had not been filed at the time Judge Rosenberg ordered plaintiffs to produce documents. Similarly, in *Dysthe*,

[24]Opposition at 6.

the court granted defendants' motion to compel the deposition of a plaintiff who had moved for dismissal, but whose motion had not yet been granted. 273 F.R.D. at 630. While the *Dysthe* court noted that plaintiff's testimony as a percipient witness would remain relevant even after his dismissal because "[i]nformation regarding [his] personal experiences . . . is unlikely to be available from other representative parties," ConAgra has not made a similar showing with regard to the documents it seeks to have the withdrawing plaintiffs produce. Thus, neither case supports the proposition that the court should condition plaintiffs' withdrawal on the production of documents not ordered by Judge Rosenberg. See *Roberts*, 2013 WL 4239050 at *3 ("[A]t best, these decisions stand for the proposition that a named plaintiff cannot avoid the obligation to sit for a deposition merely by filing a request to withdraw. They do not stand for the proposition that a named plaintiff's withdrawal can be conditioned upon the plaintiff's willingness to sit for a deposition").

Similarly, these cases do not support ConAgra's request that dismissal be conditioned on the withdrawing class members' provision of sworn declarations detailing their reasons for seeking to dismiss their individual claims. Neither this court nor Judge Rosenberg previously ordered plaintiffs to provide such declarations; nor, insofar as the court is aware, did ConAgra seek to have declarations provided prior to the filing of plaintiffs' motion. Although ConAgra may argue that the declarations are akin to the depositions that were at issue in *Fraley* and *Dysthe*, it is at best unclear that information concerning plaintiffs' reasons for wishing to withdraw would be relevant to the issues in this action. Moreover, while it is true that plaintiffs' reasons for seeking to withdraw are relevant to the Rule 41(a) analysis, see *supra*, the court has already considered the adequacy of the explanations offered in determining whether to dismiss the withdrawing plaintiffs' claims with or without prejudice.

Accordingly, the court declines to condition plaintiffs' withdrawal on their production of documents that are not the subject of Judge Rosenberg's order, or on the filing of a declaration that details their reasons for seeking dismissal.

C. Whether Plaintiffs' Motion for Dismissal Must Comply with the Procedures Set Forth in Rule 23(e)

As noted, Boyer's and Cowan's withdrawal will necessitate the dismissal of the putative Washington and Wyoming class claims. As pertinent here, Rule 23(e) states that "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." FED.R.CIV.PROC. 23(e). In *Diaz v. Trust Territory of Pacific Islands*, 876 F.2d 1401, 1408 (9th Cir. 1989), a case in which the district court had entered an order on a stipulation to dismiss the claims of one of the putative classes alleged in the complaint, the Ninth Circuit held that "Rule 23(e) applies before certification" to putative class action lawsuits. Rule 41(a)(1)(A) is expressly made "[s]ubject to Rule[ ] 23(e)." FED.R.CIV.PROC. 41(a)(1)(A). Although *Diaz* was decided prior to the 2003 amendments to Rule 23(e) – which now explicitly states that it applies only to certified classes – courts in this circuit have generally concluded that *Diaz* remains binding precedent subsequent to those amendments. See, e.g., *Lyons v. Bank of America, NA*, No. C 11–1232 CW, May 1, 2014, *1 n. 1 (N.D. Cal. Nov. 27, 2012) (noting that "[c]ourts in this district have expressed some uncertainty about whether Rule 23(e) still applies [after *Diaz*] to pre-certification settlement proposals in the wake of the 2003 amendments to the rule but have generally assumed that it does," and applying the *Diaz* factors to a pre-certification motion for settlement approval and voluntary dismissal); *Houston v. Cintas Corp.*, No. C 05–3145 JSW, 2009 WL 921627, *1-2 (N.D. Cal. Apr. 3, 2009) (applying the *Diaz* factors to evaluate a request for dismissal, and "[a]ssuming without deciding that Rule 23 applie[d]" to pre-certification settlement and dismissal); *Castro v. Zenith Acquisition Corp.*, No. C 06-04163 SI, 2007 WL 81905, *1-2 (N.D. Cal. Jan. 9, 2007) (applying the *Diaz* factors in deciding a motion for dismissal of a pre-certification class action).

Approval of a voluntary dismissal or settlement under Rule 23(e) generally involves a two-step process "in which the [c]ourt first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is warranted." *Nat'l Rural Telecommunications Cooperative v. DIRECTV, Inc.* ("*NRTC*"), 221 F.R.D. 523, 525 (C.D. Cal. 2004) (citing MANUAL FOR COMPLEX LITIGATION,

THIRD, § 30.14, at 236-37 (1995)). The *Diaz* court noted that the reason a court must approve the dismissal or compromise of a class action under Rule 23(e) is to "ensure that the representative plaintiff fulfills his fiduciary duty toward the absent class members" and does not collude with the defendant or otherwise engage in conduct that is prejudicial to absent class members. 876 F.2d at 1408. It stated that to determine whether settlement or dismissal is appropriate, the district court must typically hold a hearing and

> "inquire into possible prejudice from (1) class members' possible reliance on the filing of the action if they are likely to know of 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, (3) any settlement or concession of class interests made by the class representative or counsel in order to further their own interests." *Id.*

The court noted, however, that "[t]he [district] court's duty to inquire into a settlement differs before and after certification. Before certification, the dismissal is not *res judicata* against the absent class members and the court does not need to perform the kind of substantive oversight required when reviewing a settlement binding upon the class." *Id.* Thus, it held, in the case of some pre-certification dismissals, a court need only consider these matters and need not require notice to the putative class members.

In determining whether notice to putative class members was required, the *Diaz* court looked to the three purposes for requiring notice of the settlement or dismissal of a class action – (1) protecting a defendant "by preventing a plaintiff from appending class allegations to her complaint in order to extract a more favorable settlement," (2) "protect[ing] the class from objectionable structural relief, trade-offs between compensatory and structural relief, or depletion of limited funds available to pay the class claims," and (3) "protect[ing] the class from prejudice it would otherwise suffer if class members have refrained from filing suit because of knowledge of the pending class action." It held that so long as the purposes underlying the notice requirement were not implicated, a plaintiff need not provide notice of a pending voluntary dismissal in a pre-certification action. *Id.* at 1408-09.

1. Protecting Defendant

There is no indication that Boyer or Cowan asserted Washington and Wyoming claims on behalf of a class to extort a favorable settlement from ConAgra. In *Diaz*, the court held that "[a]bsent any indication that *these* plaintiffs actually appended class allegations in an attempt to get favorable individual settlements, there is no reason to require notice . . . as a deterrent to hypothetical abusive plaintiffs." *Id.* at 1409. Nor does ConAgra suggest that Boyer or Cowan had such a motive in its statement of non-opposition. Accordingly, the court finds that the need to protect ConAgra does not require notice to the class.

2. Protecting the Class from Objectionable Relief

In *Diaz,* the court noted that the district court's approval of a stipulated dismissal without notice to the class did not harm absent class members because the "class claims were dismissed; they were not compromised." *Id.* There was, therefore, no relief obtained that could have prejudiced the class. See *Castro*, 2007 WL 81905 at *2 ("Neither concession nor settlement of class claims is being made and this settlement will not affect any other pending cases or any right to bring an action by any putative class member. The class claims against the Defendants are being dropped because of the risk and uncertainty of litigation. The proposed settlement is only with regard to Mr. Castro's claim against the Defendants. No rights or claims of the potential class members are surrendered or otherwise compromised. Thus, the proposed settlement between Mr. Castro and the Defendants will not prejudice the potential class members").

Here, as in *Diaz* and *Castro*, the dismissal of Boyer and Cowan will not affect any pending case or any putative class member's right to file an action. Boyer and Cowan have not entered into a settlement with ConAgra; rather, they seek to dismiss their claims because they are no longer able to serve as class representatives. Accordingly, the court need not require notice to protect the class from objectionable relief.

3. Protecting Class Members' Reliance on the Action

In *Diaz*, the court held that "the likelihood that members of the class had knowledge of the litigation, and the short time before expiration of the statute of limitations made prejudice likely." 876 F.2d at 1411. For that reason, the court held, "the district court erred in not requiring notice

to the class." *Id.* Here, the parties have provided no information as to whether any putative class members have relied on the filing of this action to protect their claims. The court's own research, however, reveals virtually no media coverage discussing the inclusion of Washington or Wyoming claims in this action, and the court thus takes judicial notice that media coverage of Boyer's and Cowan's claims has been sparse. See *Castro*, 2007 WL 81905 at *2 ("It is doubtful that any purported class member has relied on [the] filing of this action to protect his or her claims. It is highly unlikely that the class members were aware of the present action. There has been no publicity regarding this matter or plaintiff's claims against Defendants. Thus, potential class members did not rely on the filing of the present action to assert or protect their claims").

The statute of limitations, moreover, has been tolled since suit was filed. See *American Pipe and Construction v. Utah*, 414 U.S. 538, 552-53 (1974). This reduces the likelihood that the statute of limitations on absent class members' claims will soon expire. *Castro*, 2007 WL 81905 at *2 (citing *American Pipe*, and noting that due to tolling, "the Statute of Limitations is not 'rapidly approaching' and the potential class members are not prejudiced thereby," and granting dismissal of pre-certification class action claims without requiring notice); see also *Houston*, 2009 WL 921627 at *2 (stating that with one exception, "the statute of limitations has been tolled since the suit was filed [under *American Pipe*]. Potential class members who may have relied on the Plaintiffs' claims still have time to file suit if they so choose," and granting dismissal without notice to the class).

4. Conclusion

Each *Diaz* factor weighs in favor of dismissing Boyer's and Cowan's claims without notice to the class. Accordingly, the court will not require that putative class members be notified of the dismissal of the Washington and Wyoming putative class claims.

III. CONCLUSION

For the reasons stated, the court grants plaintiffs' motion. The claims of plaintiffs Krein, Ruiz, Toomer, Boyer and Cowan are dismissed without prejudice.

DATED: May 2, 2014

MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE