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16 **UNITED STATES DISTRICT COURT**
 17 **NORTHERN DISTRICT OF CALIFORNIA**

18 NICHOLAS LUSSON, BRYANT
 19 KUSHMICK, ALEXANDER SAENZ,
 20 JOHN DENOMA, NORA PENNER,
 21 JEANMARIE ANAYA, and KENDALL
 LANGE, individually, and on behalf of all
 others similarly situated,

22 Plaintiffs,

23 v.

24 APPLE INC.,

25 Defendant.

Case No. 3:16-CV-00705-VC

**STIPULATED REQUEST FOR APPROVAL
 OF PRE-CERTIFICATION INDIVIDUAL
 SETTLEMENT AND DISMISSAL OF
 PLAINTIFFS' INDIVIDUAL CLAIMS
 WITH PREJUDICE AND PUTATIVE
 CLASS CLAIMS WITHOUT PREJUDICE;
~~PROPOSED~~ ORDER**

Complaint Filed: February 11, 2016

1 Pursuant to Paragraph 33 of the Court’s Standing Order for Civil Cases, Plaintiffs and
2 Defendant Apple Inc. (“Apple,” and with Plaintiffs, the “Parties”) hereby submit this stipulated
3 request for approval of the Parties’ pre-certification settlement—on an individual, not classwide
4 basis—and for an order dismissing Plaintiffs’ individual claims with prejudice and the putative
5 class claims without prejudice. The Parties further submit that, because unnamed class members
6 who are not signatories to the settlement will not be prejudiced (or even bound) by the settlement,
7 and identifying such class members at this stage would be burdensome and unnecessary, the
8 dismissal should be without notice.

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

10 Plaintiffs filed this putative class action lawsuit on February 11, 2016, alleging that Apple
11 misrepresented and/or failed to disclose information about an “Error 53” code that could impact
12 certain Apple devices after a consumer damaged and subsequently attempted to install an iOS
13 software update on that device. Dkt. 1. Plaintiffs filed a first amended complaint (“FAC”) on
14 February 19, 2016, and a second amended complaint (“SAC”) on April 13, 2016. Dkts. 11, 24.
15 Apple moved to dismiss the SAC on May 2, 2016, which the Court granted with leave to amend
16 on June 20, 2016. Dkts. 27, 43. Plaintiffs filed a third amended complaint (“TAC”) on July 13,
17 2016. Dkt. 48. Apple moved to dismiss the TAC on August 3, 2016, which the Court granted in
18 large part on October 19, 2016. Dkts. 55, 62. The only claims remaining in the case after the
19 Court’s October 19 dismissal order were for negligence and negligent misrepresentation, and for
20 fraudulent omission under the Florida and Washington consumer protection statutes. Plaintiffs’
21 motion for class certification was to be filed by August 28, 2017. Dkts. 68, 71.

22 On or around February 18, 2016, Apple publicly announced the release of a software
23 update to its iOS operating system that eliminated the Error 53 issue that was the subject of this
24 lawsuit.¹ At that same time, Apple also announced that it was implementing a reimbursement
25 program for consumers who paid out-of-pocket to repair or replace a device affected by Error 53
26 (the “Error 53 Reimbursement Program”). The specific terms of the Error 53 Reimbursement
27

28 ¹ See <https://support.apple.com/en-us/HT205628> (Apple support webpage explaining the Error 53 issue and noting availability of software fix and reimbursement, last published Jan. 20, 2017).

1 Program were set forth in detail in the declaration submitted in support of Apple’s motion to
2 dismiss the SAC by James Johnson, an Apple manager responsible for implementing and
3 overseeing the program. *See* Dkt. 27-1.

4 **II. The Pre-Certification Individual Settlement**

5 On May 30, 2017, after ongoing negotiations, the Parties reached an agreement on the key
6 terms of a settlement to resolve the named Plaintiffs’ individual claims. The settlement also
7 establishes a process to compensate 162 additional individuals—who are not named Plaintiffs in
8 this action but who, according to Plaintiffs’ counsel, experienced the Error 53 issue and retained
9 Plaintiffs’ counsel (the “162 Individual PCVA Clients”). The key terms of the Parties’ settlement
10 are as follows:

- 11 • Apple will pay Plaintiffs’ counsel an agreed amount in exchange for a release of any
12 claim by Plaintiffs or Plaintiffs’ counsel for expenses, costs, and attorneys’ fees,
including any catalyst fees, in connection with the litigation;
- 13 • Apple will pay each named Plaintiff an agreed amount to release any and all claims or
14 potential claims related to the litigation or the Error 53 issue;
- 15 • Apple will pay each of the 162 Individual PCVA Clients who “opt in” and elect to
16 receive compensation in exchange for releasing any actual or potential claims related
17 to the Error 53 issue. The settlement provides a process through which Plaintiffs’
counsel will notify each of the 162 Individual PCVA Clients of their entitlement to
18 payment under the agreement, and the 162 Individual PCVA Clients will have the
19 opportunity to “opt in” and receive that payment or choose not to receive the payment
and thus preserve their rights to pursue further relief;
- 20 • If more than one-third of the Individual PCVA Clients (*i.e.*, 54 out of 162) expressly
21 elect not to receive compensation under the settlement, then Apple has the option (but
not the obligation) to terminate the settlement agreement;
- 22 • The settlement is made on behalf of the named Plaintiffs and any of the 162 Individual
23 PCVA Clients who elect to “opt in”; the settlement does not bind or otherwise affect
unnamed absent class members;
- 24 • The specific terms of the settlement agreement shall remain confidential, except that
25 Plaintiffs’ counsel may state on their website that the litigation has been resolved on
26 an individual, not class, basis;
- 27 • The settlement is not an admission of liability of any kind by Apple, and is instead
28 entered into to avoid the risk, inconvenience, and expense of litigation. Nor is any
payment under the settlement agreement a measure of any alleged injuries or damages
suffered by any individual; it is solely a compromise amount that is unique to the
circumstances of this litigation and its venue in the United States.

27 In addition, as part of the settlement of Plaintiffs’ claims and the potential claims of the
28 162 Individual PCVA Clients, Apple will also provide all the benefits to Plaintiffs and the 162

1 Individual PCVA Clients to which they are or were entitled under the Error 53 Reimbursement
2 Program. Thus, neither this settlement, nor any payments provided thereunder, alters in any way
3 the ability of Plaintiffs and the 162 Individual PCVA Clients to take advantage of the software fix
4 for Error 53 or the Error 53 Reimbursement Program. Plaintiffs and the 162 Individual PCVA
5 Clients—like all affected consumers—may install the software fix (if they have not already done
6 so) and seek reimbursement for out-of-pocket costs to repair or replace an affected device.

7 **III. The Court Should Approve the Settlement and Dismiss Plaintiffs’ Individual Claims**
8 **With Prejudice and the Putative Class Claims Without Prejudice**

9 Under the Court’s Standing Order, parties to a pre-certification settlement must “submit a
10 request for dismissal explaining how a dismissal would not prejudice the unnamed class members
11 whose claims are not being resolved by the settlement,” and must consider in particular “whether
12 the unnamed class members need to be notified of the dismissal.” The Standing Order cites
13 several cases—all of which rely on *Diaz v. Trust Territory of Pac. Islands*, 876 F.2d 1401, 1408
14 (9th Cir. 1986)—discussing the factors for evaluating a pre-certification settlement and dismissal.
15 *Dunn v. Teachers Ins. & Annuity Ass’n of Am.*, 2016 WL 153266, at *3 (N.D. Cal. Jan. 13, 2016);
16 *Tomblin v. Wells Fargo Bank, N.A.*, 2014 WL 5140048 (N.D. Cal. Oct. 10, 2014); *Lyons v. Bank*
17 *of Am., N.A.*, 2012 WL 5940846 (N.D. Cal. Nov. 27, 2012). These cases held that under Rule
18 23(e), a court must review and approve both pre- and post-certification settlements—but that
19 unlike for class settlements, the review of a pre-certification settlement takes “a much lighter
20 form that does not entail the kind of substantive oversight required when reviewing a settlement
21 binding upon the class.” *E.g.*, *Tomblin*, 2014 WL 5140048, at *2 (citing *Diaz*, 876 F.2d at
22 1408); *Lyons*, 2012 WL 5940846, at *1 (“the risk of prejudice to absent class members is
23 significantly lower” for pre-certification settlements).

24 To “determine whether pre-certification settlement or dismissal is appropriate, the Court
25 must inquire into possible prejudice from (1) class members’ possible reliance on the filing of the
26 action if they are likely to know of it either because of publicity or other circumstances; (2) lack
27 of adequate time for class members to file other actions, because of a rapidly approaching statute
28 of limitations; (3) any settlement or concession of class interests made by the class representative

1 or counsel in order to further their own interests.” *Lyons*, 2012 WL 5940846, at *1 (citing *Diaz*,
2 876 F.2d at 1408); *see also Tomblin*, 2014 WL 5140048, at *2. The “central purpose of this
3 inquiry is to determine whether the proposed settlement and dismissal are tainted by collusion or
4 will prejudice absent putative members.” *Id.* The Ninth Circuit “emphasized” in *Diaz* that notice
5 “to the class of pre-certification dismissal is not ... required in all circumstances” and “should not
6 trump the general judicial policy of favoring settlements.” *Tomblin*, 2014 WL 5140048, at *2
7 (citing *Diaz*, 876 F.2d at 1408-09). Instead, notice may be appropriate only if the “putative class
8 members might be subject to prejudicial or unfair impacts” from the dismissal. *Id.*; *Diaz*, 876
9 F.2d at 1408 (“In no pre-certification dismissal would the court reject the dismissal and require
10 anything more than notice to the class and an opportunity to intervene.”)

11 Here, even before reaching the *Diaz* factors, it is clear absent class members will suffer no
12 harm from a dismissal without prejudice of the putative class claims because, regardless of the
13 settlement or the outcome of this litigation, **all** consumers affected by Error 53—including absent
14 class members—can already install the software fix and seek reimbursement for out-of-pocket
15 costs to repair or replace an affected device. *See* Dkt. 27-1 (Johnson Declaration defining terms
16 of reimbursement program). Since the Parties’ settlement agreement has literally no impact on
17 the availability of the highly publicized² software fix and reimbursement program, unnamed
18 putative class members can obtain relief from Apple directly—without regard to the settlement or
19 any future judicial proceeding.

20 The *Diaz* factors for approving a pre-certification settlement and dismissal are satisfied
21 here in any event. The Court should therefore approve the settlement and dismiss Plaintiffs’
22 individual claims with prejudice and the putative class claims without prejudice.

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

24 **First**, there is no evidence that unnamed class members relied on this lawsuit at all, much

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26 ² *E.g.*, <https://support.apple.com/en-us/HT205628>; [https://techcrunch.com/2016/02/18/apple-](https://techcrunch.com/2016/02/18/apple-apologizes-and-updates-ios-to-restore-iphones-disabled-by-error-53/)
27 [apologizes-and-updates-ios-to-restore-iphones-disabled-by-error-53/](https://www.forbes.com/sites/amitchowdhry/2016/02/18/apple-error-53-fix/#6c5bdeb06585);
28 <https://www.forbes.com/sites/amitchowdhry/2016/02/18/apple-error-53-fix/#6c5bdeb06585>;
<http://www.bbc.com/news/technology-35611756>; [http://www.dailymail.co.uk/sciencetech/article-](http://www.dailymail.co.uk/sciencetech/article-3453566/Apple-issues-fix-Error-53-apologises-customers-faces-legal-action-following-warnings-update-renders-iPhones-unusable-breaks-laws.html)
[3453566/Apple-issues-fix-Error-53-apologises-customers-faces-legal-action-following-warnings-](http://www.dailymail.co.uk/sciencetech/article-3453566/Apple-issues-fix-Error-53-apologises-customers-faces-legal-action-following-warnings-update-renders-iPhones-unusable-breaks-laws.html)
[update-renders-iPhones-unusable-breaks-laws.html](http://www.dailymail.co.uk/sciencetech/article-3453566/Apple-issues-fix-Error-53-apologises-customers-faces-legal-action-following-warnings-update-renders-iPhones-unusable-breaks-laws.html).

1 less to their detriment, such that they will be prejudiced by the dismissal. Although Error 53 (as
2 well as Apple’s response to it) garnered some media attention, under the circumstances class
3 members will not suffer any prejudice by a dismissal without notice. *Houston v. Cintas Corp.*,
4 2009 WL 921627, at *2 (N.D. Cal. Apr. 3, 2009) (approving settlement and dismissal under *Diaz*
5 and noting “although there has been some publicity regarding this case ... , it has been minimal”).
6 That is because neither this lawsuit nor the settlement has any impact on the ability of consumers
7 to obtain relief—*i.e.*, to install a software fix for Error 53 and seek reimbursement for costs
8 related to Error 53 directly from Apple. There is also no reason to believe that consumers waited
9 passively for this lawsuit to run its course to obtain a remedy. Indeed, the evidence suggests to
10 the contrary—162 putative class members actively sought out Plaintiffs’ counsel after becoming
11 aware of the lawsuit (through the media or otherwise). Those individuals will be directly
12 informed of the settlement, and can choose to either accept compensation under the settlement or
13 refuse it and preserve their rights. Plaintiff’s counsel will also state on their website that this
14 lawsuit has been resolved on an individual, not class, basis—to the extent any putative class
15 member has been monitoring the case, they will know that the matter has been settled. In short,
16 there is nothing to suggest that unnamed class members will suffer prejudice by the requested
17 dismissal.

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

19 *Second*, even had some putative class members relied on this lawsuit, there is no “rapidly
20 approaching statute of limitations” that would render them without sufficient time to pursue relief
21 (beyond that which is already provided under the reimbursement program). *E.g.*, *Tomblin*, 2014
22 WL 5140048, at *3 (“The parties also represent that no putative class member will face a short
23 fuse on pursuing the claims to be dismissed.”). The only claims left in this case after the Court’s
24 October 19 dismissal order were for negligence and negligent misrepresentation (on behalf of
25 Plaintiffs from Arizona, Florida, and Washington), and fraudulent omission under the Florida and
26 Washington consumer protection statutes. Dkt. 62. The negligence-based claims under Arizona,
27 Washington, and Florida law have limitations periods between two to four years, and the Florida
28

1 and Washington consumer protection claims each have a limitations period of four years.³ More
 2 fundamentally, as many courts in this circuit have recognized in approving pre-certification
 3 settlements, the “filing of the class action complaint toll[s] the statute of limitations, which will
 4 not resume running until [Plaintiffs’] class claims are dismissed.” *See, e.g., Tomblin*, 2014 WL
 5 5140048, at *3 (internal citations omitted); *Lyons*, 2012 WL 5940846, at *2 (“What’s more, these
 6 claims would not be time-barred because of the class action tolling doctrine.”); *Houston*, 2009
 7 WL 921627, at *2 (“[T]he statute of limitations has been tolled since the lawsuit was filed.”);
 8 *Diaz*, 876 F.2d at 1407 (citing *American Pipe Construction Co. v. Utah*, 414 U.S. 538 (1974)
 9 (filing of class action tolls statute of limitations on individual claims covered by class action)).
 10 Thus, because absent class members will not “face a short fuse on pursuing the claims to be
 11 dismissed,” this *Diaz* factor favors approval of the settlement and dismissal without notice.

12 C. There Was No Collusion Or Concession Of Class Interest

13 **Third**, and finally, there is nothing to suggest the Parties’ settlement agreement was made
 14 “by the class representatives or their counsel in order to further their own interests.” *Lyons*, 2012
 15 WL 5940846, at *1 (citing *Diaz*, 876 F.2d at 1408). To the contrary, the settlement was the result
 16 of neutral, arms-length negotiations in which the only claims to be dismissed with prejudice are
 17 those of the named Plaintiffs and the 162 Individual PCVA Clients who elect to “opt in” and
 18 receive payment under the terms of the settlement—absent class members are not bound by the
 19 settlement, and the putative class claims will be dismissed **without** prejudice. *Id.* (“[B]ecause the
 20 parties intend to dismiss the class claims without prejudice, absent class members would still be
 21 able to bring suit against Defendants.”); *see also Tomblin*, 2014 WL 5140048, at *3 (“Because

22 ³ *See, e.g.,* Wash. Rev. Code § 4.16.080(2) (3-year limitations period for negligence and negligent
 23 misrepresentation); *Sabey v. Howard Johnson & Co.*, 101 Wash. App. 575, 593 (2000) (“Sabey’s
 24 claim for negligence and negligent misrepresentation are subject to three-year statutes of
 25 limitations.”); *Silaev v. Swiss-Am. Trading Corp.*, 2016 WL 4720482, at *4 (D. Ariz. Sept. 9,
 26 2016) (“[T]he claim of negligence/negligent misrepresentation is subject to a two-year statute of
 27 limitations.”) (citing A.R.S. § 12-542(3)); *Aprajita Nakra, DPM, PC. v. Porter Bros., Inc.*, 2015
 28 WL 1729134, at *3 (Ariz. Ct. App. 2015); Fla. Stat. § 95.11(3)(a), (j) (four-year limitations
 periods for actions in negligence and for fraud, including for negligent misrepresentation);
Lehman Bros. Holdings Inc. v. Phillips, 569 Fed. App’x 814, 816 (11th Cir. 2014) (citing Fla.
 Stat. § 95.11(3)); *Resnick v. Hyundai Motor Am., Inc.*, 2017 WL 1531192, at *21 (C.D. Cal. Apr.
 13, 2017) (“The FDUTPA has a statute of limitations of four years.”); Fla. Stat. § 95.11(3)(f)
 (four-year limitations for “[a]n action founded on a statutory liability”); Wash. Rev. Code §
 19.86.120 (Washington Consumer Protection Act has four year limitations period).

1 the settlement does not prevent putative class members from pursuing claims, they are not likely,
 2 as a general matter, to be prejudiced.”); *Houston*, 2009 WL 921627, at *2 (“[T]he parties do not
 3 seek to dismiss the class claims with prejudice and, therefore, they are not impacting the rights of
 4 potential class members.”).

5 In sum, the *Diaz* factors—individually, and together—favor approving the Parties’ pre-
 6 certification settlement and dismissing Plaintiffs’ individual claims with prejudice and putative
 7 class claims without prejudice (and without notice). Here, notice is not required because there is
 8 no reason to believe that absent class members would be at all prejudiced by the dismissal, and
 9 there is no clear method at this stage to identify all putative class members. Indeed, unlike the
 10 facts of *Tomblin*, in which the Court ordered Wells Fargo to provide notice of the dismissal to
 11 eleven readily-identifiable class members who were “just waiting to be [paid]” out of already
 12 earmarked funds, the pool of unnamed class members who may have experienced Error 53 is far
 13 more difficult to discern—*e.g.*, Apple has no way of knowing or identifying which consumers, if
 14 any, experienced Error 53 but never contacted Apple. Since the individual settlement does not
 15 affect the rights of anyone other than the signatories to the agreement, notice is not necessary.

16 **IV. Conclusion**

17 For the foregoing reasons, the Parties respectfully request that the Court approve their pre-
 18 certification individual settlement, and dismiss Plaintiffs’ individual claims with prejudice and the
 19 putative class claims without prejudice.

20
 21 Dated: September 1, 2017

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22
 23
 24 By: s/ Darrell L. Cochran

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Dated: September 1, 2017

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ATTESTATION OF FILING

Pursuant to Local Rule 5.1(i)(3) regarding signatures, I, Darrell L. Cochran, hereby attest that concurrence in the filing of this STIPULATED REQUEST FOR APPROVAL OF PRE-CERTIFICATION SETTLEMENT AND DISMISSAL OF PLAINTIFFS' INDIVIDUAL CLAIMS WITH PREJUDICE AND PUTATIVE CLASS CLAIMS WITHOUT PREJUDICE has been obtained from Matthew D. Powers with conformed signatures above.

Dated: September 1, 2017

By: s/ Darrell L. Cochran
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~~PROPOSED~~ ORDER

The Court, having considered the Parties’ Stipulated Request for Approval of Pre-Certification Individual Settlement and Dismissal of Plaintiffs’ Individual Claims With Prejudice and Putative Class Claims Without Prejudice, all pleadings and papers on file, and the applicable law, and finding good cause therefor, hereby **GRANTS** the Request.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

- (1) The Parties’ Settlement Agreement is approved;
- (2) The Plaintiffs’ individual claims are dismissed **WITH PREJUDICE**;
- (3) The putative class claims are dismissed **WITHOUT PREJUDICE**; and
- (4) Notice is not required.

IT IS SO ORDERED.

Date: September 6, 2017



Hon. Vince Chhabria
United States District Judge