

1 Joseph G. Sauder (*pro hac vice*)
2 SAUDER SCHELKOPF LLC
3 1109 Lancaster Avenue
4 Tel: 610-200-0580
5 Fax: 610-421-1326
6 jgs@sstriallawyers.com

7 *Attorney for Plaintiff*

8 UNITED STATES DISTRICT COURT
9
10 NORTHERN DISTRICT OF CALIFORNIA

11 JAQUELYN KLEINER, on behalf of herself)
12 and all others similarly situated,)

13 Plaintiff,

14 v.)

15 DIGITAL MEDIA ACADEMY, INC. d/b/a)
16 MEDIA ACADEMY LIMITED)
17 PARTNERSHIP,)

18 Defendant.)
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Case No.: 3:20-cv-04591-EMC

**BRIEF IN SUPPORT OF STIPULATION
OF VOLUNTARY DISMISSAL WITH
PREJUDICE**

Plaintiff Jaquelyn Kleiner files this brief in response to the Court’s April 13, 2021 Clerk’s Notice (ECF No. 34). For the foregoing reasons, Plaintiff requests the Court approve the voluntary dismissal of this action.

I. Introduction

In *Diaz v. Trust Territory of the Pacific Islands*, the Ninth Circuit held that while Rule 23(e) applies to a pre-certification stipulation of dismissal, it does so in in a milder form which does not require “the kind of substantive oversight required when reviewing a settlement binding on the class.” 876 F.2d 1401, 1408 (9th Cir.1989). Under *Diaz*, there are three factors used to evaluate a voluntary dismissal pre-certification: “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

1 other actions, because of a rapidly approaching statute of limitations, (3) any settlement or
2 concession of class interests made by the class representative or counsel in order to further
3 their own interests.” *Id* at 1407.

4 Here, the individual settlement agreement¹ reached does not prejudice the interests of
5 the putative class pled in Plaintiff’s complaint, nor does it impede their ability to bring a claim
6 against Defendant. As explained in the following paragraphs, dismissal is appropriate based on
7 analysis of the *Diaz* factors.

8 **II. There has been little publicity of this action.**

9 In evaluating the first *Diaz* factor, a finding of reliance is “generally limited to actions
10 that would be considered of sufficient public interest to warrant news coverage of either the
11 public or trade-oriented variety, and such reliance can occur only on the part of those persons
12 learning of the action who are sophisticated enough in the ways of the law to understand the
13 significance of the class action allegation.” *Mahan v. Trex Co.*, No. 5:09-CV-00670 JF PVT,
14 2010 WL 4916417, at *3. This factor does not require that there have been no news coverage
15 relating to the action, or no interest expressed in the action by putative class members. *See*
16 *Ramirez v. Cintas Corp.*, No. C 04-00281JSW, 2009 WL 921629, at *2 (N.D. Cal. Apr. 3,
17 2009) (affirming dismissal where the case had been covered by news media and plaintiff’s
18 counsel had been approached by putative class members). Rather, the evidence must be
19 “sufficient to show that the proposed dismissal will not prejudice absent putative members
20 ‘with a reasonable reliance expectation of the maintenance of the action for the protection of
21 their interests.’” *Del Rio v. CreditAnswers, LLC*, No. 10CV346-WQH-BLM, 2011 WL
22 1869881, at *3 (S.D. Cal. May 16, 2011) (*quoting Diaz, supra*, at 1407).

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¹ Upon request, the parties can provide a copy of the confidential settlement agreement for the Court to review *in camera*.

1 In this case, news coverage about the proposed class action is limited to a posting on
 2 Plaintiff's counsel's website,² a single news article from *NBC Bay Area*,³ and a blog post from
 3 a docket aggregation website.⁴ Further, Plaintiff's counsel has received little communication
 4 from potential class members. Over the entire course of this litigation, only nineteen
 5 individuals contacted Plaintiff's counsel, which is approximately 3.45% of the putative class.
 6 These putative class members will not be prejudiced by the dismissal as it only constitutes a
 7 dismissal with prejudice for the named plaintiff. Other class members are still free to pursue
 8 independent actions, and have well over three years to do so, as explained, *infra*. As there are
 9 very few putative class members with a reasonable reliance interest in this litigation, and
 10 because the interests of those individuals will not be prejudiced by dismissal, the first *Diaz*
 11 factor is satisfied.

12 III. Putative class members have ample time to file individual actions.

13 The primary claim at issue in this litigation is a breach of contract, and the applicable
 14 statute of limitations for this claim is four years in California and six years in Washington. Cal.
 15 Civ. Proc. Code § 337 (West); Wash. Rev. Code Ann. § 4.16.040. This case also includes
 16 claims for conversion and unjust enrichment, which share a three-year statute of limitations in
 17 both California, Cal. Civ. Proc. Code § 338,⁵ and Washington. Wash. Rev. Code Ann. §
 18 4.16.080.⁶ Further, this action has tolled the statute of limitations for putative class members
 19 since it was filed. *Gutierrez v. J.M. Distrib., Inc.*, No. SACV2000617DOCJEM, 2020 WL
 20 _____

21 ² See www.sauderschelkopf.com/investigations/digital-media-academy-camps-2020-refund-class-action-lawsuit-investigation (last visited Apr. 14, 2021).

22 ³ See <https://www.nbcbayarea.com/investigations/consumer/after-refusing-refunds-palo-alto-summer-camp-faces-lawsuit/2325388> (last visited Apr. 14, 2021).

23 ⁴ See <https://www.classaction.org/news/class-action-seeks-refunds-from-digital-media-academy-for-canceled-2020-summer-camps> (last visited Apr. 14, 2021).

24 ⁵ See *Fed. Deposit Ins. Corp. v. Dintino*, 167 Cal. App. 4th 333, 348, 84 Cal. Rptr. 3d 38, 50
 25 (2008) (stating “[a]n unjust enrichment or quasi-contract action in the form of a common count
 26 to recover money or other benefit obtained by mistake is governed by the three-year statute of
 27 limitations for actions based on fraud or mistake”).

28 ⁶ See *Seattle Pro. Eng'g Emps. Ass'n v. Boeing Co.*, 139 Wash. 2d 824, 838 (Wash. 2000) (But
 we note that Washington case law has applied a three-year statute of limitations to claims
 involving unjust enrichment).

1 4355513, at *1 (C.D. Cal. June 3, 2020) (citing *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538,
2 554 (1974)). So, post-dismissal, putative class members will be “in the same position as they
3 were when the suit was initially filed.” *Poyet v. Consumer Affs. Legal Ctr., Inc.*, No.
4 CV111269FMORNBX, 2013 WL 12403555, at *2 (C.D. Cal. Aug. 15, 2013). Because there is
5 adequate time for putative class members to retain counsel and file suit, the second *Diaz* factor
6 is satisfied.

7 **IV. The dismissal does not prejudice the interests of other putative class members.**

8 Courts generally recognize that the risks inherent in class action litigation can be
9 sufficient to compel settlement and voluntary dismissal of a putative class action prior to class
10 certification. *Castro v. Zenith Acquisition Corp.*, No. C 06-04163 SI, 2007 WL 81905, at *2
11 (N.D. Cal. Jan. 9, 2007). Such a settlement agreement comports with the third *Diaz* factor
12 where “representative plaintiffs do not receive disproportionate recoveries” and the dismissal
13 “will not affect any other pending cases or any right to bring an action by any putative class
14 member.” *Id.*

15 Here, Plaintiff’s counsel engaged in arms-length negotiations with the Defendant and
16 participated in mediation with a court-appointed mediator. Through these negotiations,
17 Plaintiff’s counsel identified numerous risks in pursuing with class litigation, including the
18 existence of an allegedly enforceable arbitration agreement. Additionally, Defendant’s
19 customers have the option to use credits for future sessions. According to Defendant, a
20 significant majority of them have exercised that option. Nevertheless, the dismissal of this
21 action does not affect the ability of Defendant’s customers to bring an action, as the class
22 claims brought by Plaintiff’s counsel will not be dismissed with prejudice. Because this
23 dismissal and settlement agreement will not prejudice the interests of other putative class
24 members, it satisfies the third *Diaz* factor.

25 **V. Conclusion**

26 For the foregoing reasons, Plaintiff requests the Court approve the voluntary dismissal
27 of this action.

1 Dated: April 20, 2021

Signed: /s/ Joseph G. Sauder
Joseph G. Sauder (*phv*)
Sauder Schelkopf LLC
1109 Lancaster Avenue
Berwyn, PA 19312
Telephone: 610-200-0583
jgs@sstriallawyers.com
Attorney for Plaintiff

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true and correct copy of the foregoing **BRIEF IN SUPPORT OF STIPULATION OF VOLUNTARY DISMISSAL WITH PREJUDICE** was served this 20th day of April 2021 via the Court's CM/ECF system, thereby electronically serving it upon all counsel of record.

/s/ Joseph G. Sauder
Joseph G. Sauder