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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

TANYA CANTU, individually and on
behalf of all other similarly situated,

Plaintiff,

v.

LUX GLOBAL INC., a California
corporation d/b/a TOPLUX NUTRITION,
inclusive,

Defendants.

Case No. 2:23-cv-07192-MCS-MAA
Assigned to Judge Mark C. Scarsi

**PLAINTIFF'S NOTICE OF
VOLUNTARY DISMISSAL
PURSUANT TO FEDERAL RULE OF
CIVIL PROCEDURE 41(a)(1)(A)(i)**

Complaint Filed: April 28, 2023
Action Removed: August 30, 2023

1 TO THE COURT, CLERK AND ALL PARTIES OF RECORD, please take notice
2 that Plaintiff Tanya Cantu (“Plaintiff”) respectfully requests dismissal of the instant
3 action pursuant to Rule 41(a)(1)(A)(i) of the Federal Rules of Civil Procedure *with*
4 *prejudice* as to the Plaintiff’s individual claims, and *without prejudice* as to the putative
5 class. There has been no responsive pleading or motion filed, no class has been certified,
6 and there is no settlement or concession of class interests in order to resolve Plaintiff’s
7 individual claims.

8 Pursuant to Rule 23(e), “the district court should inquire into possible prejudice
9 from (1) class members’ possible reliance on the filing of the action if they are likely to
10 know of it either because of publicity or other circumstances, (2) lack of adequate time
11 for class members to file other actions, because of a rapidly approaching statute of
12 limitations, (3) any settlement or concession of class interests made by the class
13 representative or counsel in order to further their own interests.” *Diaz v. Trust Territory*
14 *of the Pacific Islands*, 876 F.2d 1401, 1408 (9th Cir. 1989).

15 Plaintiff contends the *Diaz* factors do not apply to the facts of this case, but even
16 if they did, dismissal is nonetheless proper. In 1989, the Ninth Circuit held in *Diaz* that
17 Rule 23(e) applies prior to class certification. 876 F.2d at 1408. At that time, Rule 23
18 provided that “[a] class action shall not be dismissed or compromised without the
19 approval of the court” Fed. R. Civ. P. 23(e) (as amended Mar. 2, 1987, eff. Aug. 1,
20 1987). Under *Diaz*, the district court evaluating dismissal is to “inquire into possible
21 prejudice from (1) class members’ possible reliance on the filing of the action if they are
22 likely to know of it either because of publicity or other circumstances, (2) lack of
23 adequate time for class members to file other actions, because of a rapidly approaching
24 statute of limitations, (3) any settlement or concession of class interests made by the class
25 representative or counsel in order to further their own interests.” 876 F.2d at 1408
26 (citations omitted).

27 Notably, *Diaz* was decided prior to amendments to Rule 23(e), which clarified that
28 Rule 23(e) applies to certified classes or settlement classes. Specifically, Rule 23(e) now

1 provides that “[t]he claims, issues, or defenses of a *certified class*—or a *class proposed*
2 *to be certified for purposes of settlement*” may be settled or voluntarily dismissed “only
3 with the court’s approval.” Fed. R. Civ. P. 23(e) (emphasis added); *see also Lee v. CVS*
4 *Pharmacy, Inc.*, No. 3:20-cv-01923-BEN-DEB, 2021 WL 308283, at *2 (S.D. Cal. Jan.
5 28, 2021) (acknowledging that “in 2003, the Congress revised Rule 23 to make clear that
6 court approval is only required in a putative class action where the plaintiff seeks to
7 approve a settlement of both individual and class claims”); 7B Charles Alan Wright &
8 Arthur R. Miller, Fed. Prac. & Proc., *Settlement, Voluntary Dismissal, or Compromise of*
9 *Class Actions* § 1797 (3d ed. 2021) (“settlements or voluntary dismissals that occur
10 before class certification are outside the scope of subdivision (e)”). Accordingly, because
11 no class has been certified and there is no settlement of any kind in this action, Rule 23(e)
12 does not apply. *See* Fed. R. Civ. P. 23(e).

13 Nevertheless, even if the Court were to apply the *Diaz* factors to these
14 circumstances, dismissal would be proper. *First*, it is unlikely that any putative class
15 members have relied on the action to protect their interests given that the case is in its
16 infancy and there are no circumstances suggesting reliance on Plaintiff’s claims. This
17 action has not been publicized in any way and as such, the putative class members are
18 highly unlikely to have knowledge of it, or to have relied upon it in any way. Similarly,
19 Plaintiff’s counsel is unaware of any other circumstances that may have led to the
20 putative class’s knowledge of, or reliance upon, this action. *Second*, just five months
21 have passed since the filing of the Complaint. Plaintiff’s purchase at issue was in summer
22 of 2022 and as such, based on the three-year statute of limitations, the statute of
23 limitations shall not run until mid-2025. As such, the rights of the putative class are
24 preserved by the solely individual dismissal of Plaintiff’s claims with prejudice. *Third*,
25 as discussed above, there is no settlement or concession of putative class interests given
26 that there has been no settlement or compromise of any kind related to any potential class
27 claims asserted in the Complaint. Indeed, the resolution reached between the Parties does
28

1 not address, affect, or change the putative class’s rights or claims in any manner. Even
2 under *Diaz*, dismissal is clearly proper here.

3 Plaintiff has diligently followed the rules to obtain a voluntary dismissal prior to
4 any substantive response to the Complaint. *Diaz* should not stand as a barrier to
5 dismissal, given the subsequent amendments to Rule 23(e) and the facts of this case in
6 which there is no settlement or compromise of any class claims, no collusion, and no
7 potential prejudice to any putative class member. Moreover, the dismissal as to any
8 putative class members would be *without prejudice*.

9 For all the foregoing reasons, the Plaintiff respectfully requests that the Court enter
10 a dismissal of this action *with prejudice* as to the named Plaintiff and *without prejudice*
11 as to the putative class.

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14 Dated: September 22, 2023

Respectfully submitted,
PACIFIC TRIAL ATTORNEYS
By: /s/ Scott J. Ferrell
Scott J. Ferrell
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2023, I electronically filed the foregoing **PLAINTIFF’S NOTICE OF VOLUNTARY DISMISSAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 41(a)(1)(A)(i)** with the Clerk of the Court using the CM/ECF system which will send notification of such filing via electronic mail to all counsel of record.

/s/ Scott J. Ferrell Esq.
Scott J. Ferrell, Esq.

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