UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JESSICA MEDINA, CARLA KLEINUBING, DAVID TALMASON and LAURA BARBER, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

HOMEOLAB U.S.A., INC., a foreign corporation,

Defendant.
_____/

CASE NO.:

**DEFENDANT'S NOTICE OF REMOVAL**

Defendant HOMEOLAB U.S.A., INC. ("HomeoLab"), pursuant to 28 U.S.C. §§ 1441, 1446, and the Class Action Fairness Act of 2005 ("CAFA"), as codified in 28 U.S.C. §§ 1332(d) and 1453, and with full reservation of all defenses, hereby removes this action from the Circuit Court for the Seventeenth Judicial Circuit in and for Broward County, Florida to the United States District Court for the Southern District of Florida. In support of this Notice of Removal, HomeoLab states the following:

## I. BACKGROUND.

1. On or around November 6, 2013, Plaintiffs Jessica Medina, Carla Kleinbubing, David Talmason, and Laura Barber ("Plaintiffs") filed this lawsuit in the Seventeenth Judicial Circuit in and for Broward County, Florida against HomeoLab, under case number CACE-13-024681 (the "Complaint").

2. Plaintiffs bring their claims individually and as a putative class action on behalf of a nationwide class of "[a]ll persons 18 years of age or older who, while residing in the United

States, purchased in the United States: (a) "Kids Relief Flu," "Kids Relief Cough & Cold," and/or "Kids Relief Pain & Fever," for their child(ren) 2 years of age or over; and/or (b) "Kids Relief Earache," for child(ren) between 0-9 years of age, and/or (c) the same under "0-9" labels, during the 4 years preceding the filing of this action." (Complaint ¶ 64).

3. The complaint asserts class claims for unjust enrichment (Count I), violation of the Florida Deceptive and Unfair Trade Practices Act (Count II), and negligent misrepresentation (Count III) arising from Plaintiffs' alleged purchases of the foregoing Kids Relief products.

4. Plaintiffs allege that HomeoLab misrepresents the products as "relieving children's medical symptoms and falsely advertises the products as "safe and effective" when the products are purportedly "worthless." Complaint ¶ 1. Plaintiffs further allege that the key ingredients in the products "have no medicinal value" and therefore constitute "worthless doses." *See generally id.* ¶¶ 8-35. Plaintiffs contend that "[b]ased on the false beliefs induced by HomeoLab's false and misleading representations, named Plaintiffs and Class members purchased HomeoLab products for their children." *Id.* ¶ 37. They further assert that "[b]ut for HomeoLab's misrepresentations, Plaintiffs and Class members would not have purchased HomeoLab's "Kids Relief" products for their children." *Id.* ¶ 38.

5. This is not Plaintiffs' first attempt to file a lawsuit against HomeoLab. These same plaintiffs filed a lawsuit in the Southern District of Florida on October 23, 2013, under Case No. 0:13-cv-62312-WJZ. The Court sua sponte dismissed that complaint on October 24, 2013 on the ground that the complaint did not facially plead CAFA jurisdiction because it alleged the Plaintiffs' residency rather than citizenship. The Plaintiffs filed an amended complaint that cured this defect and properly alleged the Plaintiffs' citizenship, but on November 5, 2013, the Court struck the amended complaint from the record because Plaintiffs did not file a

new action or seek to reopen the prior action before filing their amended complaint. Thereafter, rather than file a new action in federal court, Plaintiffs filed the operative complaint in state court.

## II. BASIS FOR JURISDICTION.

6. This Court has jurisdiction over this removed action pursuant to 28 U.S.C. §§ 1332(d), 1441 and 1453. This action for monetary, declaratory, and injunctive relief could have been filed originally in this Court pursuant to 28 U.S.C. § 1332(d)(2), because it is a putative class action wherein at least one plaintiff is a citizen of a State different from at least one defendant, and the value of the matter in controversy exceeds $5,000,000 in the aggregate.

## III. THIS CASE IS A "CLASS ACTION" UNDER CAFA.

7. This case is a putative "class action" as defined by 28 U.S.C. § 1332(d)(1)(B). According to 28 U.S.C. § 1332(d)(1)(B), the term "class action" means any civil action filed under Rule 23 of the Federal Rules of Civil Procedure or similar state statute or rule of judicial procedure authorizing an action to be brought by one (1) or more representative persons as a class action.

8. According to the allegations in the Complaint, Plaintiffs assert that class certification is appropriate pursuant to Fla. R. Civ. P. 1.220. Complaint ¶¶ 64-77. Fla. R. Civ. P. 1.220 is a state rule of civil procedure modeled after and similar to Fed. R. Civ. P. 23. *Lance v. Wade*, 457 So. 2d 1008, 1009 n.2 (Fla. 1984). Accordingly, this action qualifies as a class action under 28 U.S.C. § 1332(d)(1)(B).

## IV. THE CAFA REQUIREMENTS ARE MET HERE.

9. Congress enacted CAFA to enlarge federal jurisdiction over proposed class actions. CAFA provides that a class action against a non-governmental entity may be removed

to federal court if: (a) the number of proposed class members is not less than 100; (b) any member of the proposed class is a citizen of a state different from any defendant; and (c) the aggregate amount in controversy exceeds $5 million, exclusive of interest and costs. *See* 28 U.S.C. §§ 1332(d)(2), 1332(d)(5) & 1453(b); *Cappuccitti v. DirecTV, Inc.*, 623 F.3d 1118 (11th Cir. 2010). Each of these requirements is satisfied in this case.

## V. THE SIZE REQUIREMENT.

10. Plaintiffs allege that "the number of Class members is at least in the hundreds of thousands and geographically dispersed." Complaint ¶ 67. This allegation satisfies the size requirement of CAFA.

## VI. DIVERSITY REQUIREMENT.

11. The diversity requirement is met in this case.

a. **Citizenship of Plaintiffs**. Plaintiffs do not specify their state of citizenship in the Complaint. They instead allege that they are residents of Broward and Palm Beach Counties, Florida. Complaint ¶¶ 2-5. However, the prior amended federal court complaint explicitly alleged that these same Plaintiffs are all citizens (not just residents) of Florida. *See* Exhibit A ¶¶ 2-5 – First Amended Complaint (S.D. Fla., filed 10/28/13). The prior federal court complaints are sufficient to satisfy the requirement of 28 U.S.C. § 1446(b)(3) that "if the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order *or other paper* from which it may first be ascertained that the case is one which is or has become removable." (emphasis added). The federal court complaints constitute the "other paper" described in 28 U.S.C. § 1446. Thus, upon information and belief, Plaintiffs are citizens of Florida.

b. **Citizenship of Defendant**. Plaintiffs allege that HomeoLab is a "Delaware Corporation." Complaint ¶ 6. In their federal court amended complaint, Plaintiffs recognize that Homeolab's principal place of business is in Delaware. *See* Exhibit A ¶ 6. Consequently, at least one member of the purported class of Plaintiffs is a citizen of a state different from at least one Defendant. Because HomeoLab is a citizen of Delaware and Plaintiffs and certain other putative class members are citizens of Florida, the minimal diversity of citizenship required under CAFA exists. *See* 28 U.S.C. § 1332(d)(2).

12. Significantly, in its order of dismissal of the prior federal complaint, the Court distinguished the situation before it then from the case of a defendant "who removes an action from state court on the basis of diversity jurisdiction, and the notice of removal fails to set forth the Court's jurisdiction properly." Case 0:13-cv-62312-WJZ Doc. 4 at 4. The Court noted that "[i]n those instances, the Eleventh Circuit has held that such pleading requirements are procedural and not jurisdictionally significant and that the removing party must have an opportunity to cure the defect." *Id.* (citing *Corp. Management Advisors, Inc. v. Artjen Complexus*, 561 F.3d 1294, 1296-97 (11th Cir. 2009)).

## VII. VALUE OF THE MATTER IN CONTROVERSY.

13. The putative class members' claims, aggregately considered, exceed the sum or value of $5,000,000.00, exclusive of interest and costs.

14. Plaintiffs allege in the Complaint that this is an action seeking, among other things, damages that "exceed the sum of $15,000.00," exclusive of interest, costs, and attorneys' fees. Complaint ¶ 7. Apart from that statement, Plaintiff does not specifically allege the amount in controversy or the total amount of damages she demands.

15. That said, the dismissed original federal court complaint and stricken amended

federal court complaint both alleged that the "aggregate damages of members of the Plaintiff Class in the matter in controversy, exclusive of interest and costs, exceed $5,000,000." *See* Exhibit A ¶ 7; Exhibit B – Complaint ¶ 7 (S.D. Fla., filed on 10/23/13). As noted above, these filings are sufficient to satisfy the requirement of 28 U.S.C. § 1446(b)(3).

16. As the foregoing shows, the value of the matter in controversy exceeds the $5,000,000 requirement under CAFA. Thus, jurisdiction in this Court is clearly proper.

## VIII. NO EXCEPTIONS TO CAFA JURISDICTION APPLY.

17. Furthermore, diversity jurisdiction exists and removal is proper because the exceptions set forth in 28 U.S.C. § 1332(d)(4)(A) & (B) do not apply.

## IX. PLEADINGS AND PROCESS.

18. As required by 28 U.S.C. § 1446(a), HomeoLab has attached copies of all state court process and pleadings to this Notice of Removal.[1]

## X. NOTICE GIVEN.

19. Written notice of the filing of the Notice of Removal will be promptly served on Plaintiff's counsel, and a copy will be promptly filed with the Clerk of the Seventeenth Judicial Circuit in and for Broward County, Florida, pursuant to 28 U.S.C. § 1446(d).[2]

## XI. REMOVAL IS TIMELY FILED.

20. Removal is timely under 28 U.S.C. § 1441(a). The first pleading, motion, order or other paper from which it first could be ascertained that this case is removable is the Complaint, which was filed November 6, 2013, and served on November 7, 2013. This notice of removal is being filed within 30 days of the service date.

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[1] A true and correct copy of all state court process and pleadings is attached hereto as Composite Exhibit C.

[2] A copy of the Notice of Filing of Notice of Removal to Federal Court is attached as Exhibit D.

## XII. VENUE.

21. Venue is proper in the Southern District of Florida, Fort Lauderdale Division under 28 U.S.C. § 1441(a) because the Circuit Court of Broward County, Florida is within the Fort Lauderdale Division.

## XIII. NON-WAIVER OF DEFENSES.

22. Nothing in this Notice shall be interpreted as a waiver or relinquishment of HomeoLab's right to assert any defense or affirmative matter, including without limitation, a motion to dismiss pursuant to Federal Rule of Civil Procedure 12, or any other challenge that may be appropriate as this case progresses.

**WHEREFORE**, HomeoLab respectfully removes this action from the Circuit Court in and for Broward County, Florida to this Court pursuant to 28 U.S.C. §§ 1332, 1441, and 1446.

Dated: December 5, 2013

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***Attorneys for Defendant***

**CERTIFICATE OF SERVICE**

**WE HEREBY CERTIFY** that a true and correct copy of the foregoing was served via Email this 5th day of December, 2013 to: **Thomas P. O'Connell, Esq.** (TrialTom2@aol.com), Thomas P O'Connell, P.A., 750 S.E. 3rd Avenue, Suite 204, Ft. Lauderdale, FL 33316 and **Sheila Zolnoor, Esq.** (Sheila@ZolnoorLaw.com), 746 N.E. 3rd Avenue, Fort Lauderdale, FL 33304, *Attorneys for Plaintiffs*.

By: _____
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