

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

JOSEPH BASSOLINO, individually and on behalf of all others similarly situated, Plaintiff, v. WHOLE FOODS MARKET GROUP, INC., Defendant.

No. 15-6046

NOTICE OF REMOVAL

PLEASE TAKE NOTICE that Defendant Whole Foods Market Group, Inc. (“Whole Foods”), pursuant to 28 U.S.C. §§ 1332, 1367, 1441, 1446, and 1453, and with full reservation of all defenses, by its undersigned attorneys, submits this Notice of Removal to this Court from the New York Supreme Court for the County of Bronx, in which the state action described below is now pending, but which is within the original jurisdiction of this Court and properly removed based upon the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332, 1446, and 1453 (“CAFA”).

Pursuant to 28 U.S.C. § 1446(d), copies of this Notice of Removal will be served upon counsel for Plaintiff Joseph Bassolino and filed with the Clerk of the New York Supreme Court for the County of Bronx, as an exhibit to a Notice of Filing of Notice of Removal.

In support of removal to this Court, Whole Foods alleges as follows.

PROCEDURAL HISTORY AND TIMELINESS OF REMOVAL

1. On June 25, 2015, Plaintiff filed a putative Class Action Complaint captioned *Joseph Bassolino v. Whole Foods Market Group Inc.*, No. 23469/2015E (N.Y. Sup. Ct., Bronx County), against Whole Foods in the New York Supreme Court for the County of Bronx (the “State Court Action”). Pursuant to 28 U.S.C. § 1446(a), true and correct copies of

the Summons and Complaint in the State Court Action are attached to this Notice as **Exhibit A**.

2. On July 31, 2015, at 1:11 PM, in response to Whole Foods' request, counsel for Plaintiff provided an Affidavit of Service purporting to show service of the Summons and Complaint upon the New York Secretary of State in Albany, New York, on July 3, 2015.

3. Thirty days have not yet elapsed from July 3, 2015. This notice is therefore timely pursuant to 28 U.S.C. § 1446(b).

4. The New York Supreme Court for the County of Bronx is located within this judicial district. 28 U.S.C. § 112(c). This Notice of Removal is therefore properly filed in this Court pursuant to 28 U.S.C. § 1441(a).

ALLEGATIONS OF THE COMPLAINT

5. This action is a putative class action brought on behalf of all persons “who purchased merchandise from Whole Foods stores located in the State of New York within the previous three (3) years,” since June of 2012. *See* Complaint, ¶ 6. The Complaint alleges that Whole Foods “systematically overcharged its customers for pre-packaged food by mislabeling the weight of the product,” “inaccurately labeled its products by listing a weight that was heavier than the actual weight of the product sold and purchased by Plaintiff and the proposed Class,” and “added tax to non-taxable items.” Complaint ¶¶ 16-19. The Complaint alleges that the “pre-packaged products” for which customers were allegedly overcharged included “meats, dairy and Baked goods.” *See* Complaint, ¶ 8(c).

6. On behalf of Plaintiff and the putative class, the Complaint purports to state claims for: (a) fraudulent and deceptive trade practices in violation of N.Y.G.B.L. § 349; (b) false advertising in violation of N.Y.G.B.L. § 350; (c) violation of New York Executive Law § 63(12); (d) unjust enrichment, and (e) breach of contract. Complaint ¶¶ 21-43.

7. With respect to the claims set forth in the Complaint, Plaintiff is seeking, *inter alia*, compensatory damages in an unspecified amount, injunctive and declaratory relief, and attorneys' fees and costs. Complaint p. 8.

8. Plaintiff seeks to represent a putative class consisting of: "himself and all others similarly situated who purchased merchandise from Whole Foods's stores located in the State of New York within the previous three (3) years." Complaint ¶ 6.

9. Whole Foods disputes the Complaint's factual and class-related allegations and legal conclusions, and denies that Plaintiff or the putative class have been harmed in any way.

BASES FOR REMOVAL

10. This action is within the original jurisdiction of this Court, and removal is proper under CAFA. CAFA grants district courts original jurisdiction over putative class actions in which the amount in controversy exceeds \$5 million and any member of the putative class of Plaintiffs is a citizen of a State different from that of Defendant. As set forth below, this action satisfies each of the requirements of 28 U.S.C. § 1332(d)(2) for original jurisdiction under CAFA.

11. Covered Class Action. Without conceding that there is any merit to the Complaint's allegations or claims, this action meets the CAFA definition of a class action, which is "any civil action filed under [R]ule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. §§ 1332(d)(1)(B), 1453(a). *See* Complaint ¶¶ 6-13.

12. Class Action Consisting of More than 100 Members. More than 100 persons have purchased “pre-packaged food” (*see* Complaint ¶ 16) from Whole Foods’s stores located in the State of New York within the previous three (3) years.

13. Diversity. The required diversity of citizenship under CAF A is satisfied because “any member of a class of Plaintiffs is a citizen of a State different from any Defendant.” 28 U.S.C. § 1332(d)(2)(A). Whole Foods is a Delaware corporation with its principal place of business in Austin, Texas. Plaintiff Joseph Bassolino is a citizen of the State of New York. *See* Complaint ¶¶ 4-5. Accordingly, at least one proposed class member is a citizen of a state different from Whole Foods, thus satisfying the diversity requirements of 28 U.S.C. § 1332(d)(2)(A).

14. Amount in Controversy. Under CAFA, the claims of the individual class members are aggregated to determine if the amount in controversy exceeds the required “sum or value of \$5,000,000, exclusive of interest and costs.” 28 U.S.C. §§ 1332(d)(2), (d)(6). On information and belief, without conceding any merit to the Complaint’s allegations or claims, the amount in controversy here exceeds \$5 million, exclusive of interest and costs, based on the sheer volume of Whole Foods’ sales of pre-packaged products, and thereby satisfies this jurisdictional threshold. The Complaint alleges that Whole Foods “overcharged its customers for pre-packaged food,” mislabeled product weights, “inaccurately labeled its products by listing a weight that was heavier than the actual weight of the product sold and purchased by Plaintiff and the proposed Class,” and “added tax to non-taxable items.” Complaint ¶¶ 16-19. These broad allegations potentially place in controversy all of Whole

Foods' sales of "pre-packaged" foods throughout the State of New York for a three-year period. Such sales are, on information and belief, far in excess of \$5 million.¹

15. For purposes of removal "the question is not what damages the Plaintiff will recover, but what amount is 'in controversy' between the parties." *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005) ("That the Plaintiff may fail in its proof, and the judgment be less than the threshold (indeed, a good chance that the Plaintiff will fail and the judgment will be zero) does not prevent removal."). While Whole Foods disputes that it is liable to Plaintiff or the putative class, or that Plaintiff or the putative class suffered any injury or incurred damages in any amount whatsoever, for purposes of satisfying the jurisdictional prerequisites of CAFA, the matter in controversy exceeds \$5 million.

RESERVATION OF DEFENSES AND RIGHTS

16. Whole Foods reserves all defenses.

17. Whole Foods reserves the right to amend or supplement this Notice of Removal as necessary.

WHEREFORE, Whole Foods gives notice that the above-described action pending against it in the New York Supreme Court for the County of Bronx is properly removed to this Court.

¹ Whole Foods notes that a purported class action Complaint in another action filed in this Court, *Sean John v. Whole Foods Market, Inc.*, No. 1:15-cv-5838 (S.D.N.Y.), alleging similar claims against Whole Foods for overstating the weights of products on behalf of a purported class of purchasers including all persons who purchased pre-packaged goods from a New York City Whole Foods location between June 25, 2010 and the present, alleges that the aggregate claims of the class in that matter exceed \$5 million. *Id.* 9. Whole Foods disputes the factual and class-related allegations and legal conclusions in that matter as well, and denies that Plaintiff or the putative class in that case have been harmed in any way.

Dated: July 31, 2015

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