

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

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MICHAEL LEESE, on behalf of himself  
and all others similarly-situated,

Plaintiffs,

v.

JOS. A. BANK CLOTHIERS, INC.,

Defendant.

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Civil Action No. \_\_\_\_\_

Judge \_\_\_\_\_

**NOTICE OF REMOVAL**

Defendant Jos. A. Bank Clothiers, Inc. ("JAB") hereby removes the above-captioned action, Case No. BUR-L-437-17, which was pending in the New Jersey Superior Court, Law Division, Burlington County, to the United States District Court for the District of New Jersey. Removal is based upon 28 U.S.C. §§ 1332(d), 1441, 1446, and 1453, as amended in relevant part by the Class Action Fairness Act of 2005 ("CAFA"). As grounds for removal, Defendant states as follows:

1. On February 14, 2017, Plaintiff Michael Leese, on behalf of himself and a putative class of allegedly similarly-situated persons, filed a Class Action Complaint ("Complaint") in the New Jersey Superior Court, Law Division, Burlington County, styled *Michael Leese v. Jos. A. Bank Clothiers, Inc.*, Case No. BUR-L-437-17 (the "State Court Action").

2. On March 10, 2017, Plaintiff Michael Leese had the Complaint and written discovery requests served on JAB's New Jersey registered agent. Pursuant to 28 U.S.C. §

1446(a), attached as Exhibit A are true and correct copies of all “process, pleadings, and orders” that were served upon JAB.

3. In the Complaint, Plaintiff asserted five causes of action allegedly based on Defendant’s retail sales and advertising practices. The first cause of action is for alleged violations of the Truth in Consumer Contract, Warranty and Notice Act (“TCCWNA”). The second cause of action is a request for declaratory and other equitable relief. The third cause of action is for alleged violations of the New Jersey Consumer Fraud Act. The fourth cause of action is for alleged breach of contract under the implied covenant of good faith and fair dealing. The fifth cause of action is for unjust enrichment and disgorgement of profits, benefits, and compensation. *See* Exhibit A, Complaint, Counts I-V.

4. This Court has original jurisdiction under 28 U.S.C. § 1332(d), as amended by CAFA, because this is a putative class action in which (a) at least one member of the putative class is a citizen of a State different than that of Defendant JAB; (b) the number of putative class members is not less than one hundred; and, (c) the matter in controversy exceeds the sum or value of five million dollars (\$5,000,000.00) when the claims of the individual putative class members are aggregated, exclusive of interest and costs.

5. JAB’s Notice of Removal is timely under 28 U.S.C. § 1446(b), as it was filed within thirty (30) days of the date that Plaintiff served JAB with the Complaint.

**DIVERSITY EXISTS UNDER 28 U.S.C. § 1332(d)(2)(A)**

6. A corporation is a citizen of the state where it is incorporated and the state where it has its principal place of business. 28 U.S.C. § 1332(c)(1). JAB is incorporated in Delaware and is a citizen of that state for purposes of diversity jurisdiction.

7. The “principal place of business” refers to the corporation’s “nerve center” or “the place where the corporation’s high level officers direct, control, and coordinate the corporation’s activities[.]” *Hertz Corp. v. Friend*, 559 U.S. 77, 92-93 (2010). JAB’s principal place of business is in California. The vast majority of JAB’s executive officers, senior vice presidents, and its board of directors direct, control, and coordinate JAB’s business activities from its executive office in Fremont, California. *See Exhibit B*, Declaration of Yolanda M. Diaz (hereinafter “Diaz Dec.”) ¶¶ 4-6. Thus, for purposes of diversity jurisdiction, JAB is also deemed a citizen of California.

8. Plaintiff’s Complaint alleges that he is a resident and citizen of New Jersey. *See* Complaint, ¶ 24. Further, the putative class and subclass that Plaintiff seeks to represent allegedly consists only of New Jersey citizens. *See* Complaint, ¶¶ 86-87 (defining the members of the class and subclass as “[a]ll New Jersey citizens[.]”). As such, the members of Plaintiff’s putative class are citizens of New Jersey.

9. There is diversity of citizenship as required for removal under CAFA because JAB is not a citizen of New Jersey. *See* 28 U.S.C. § 1332(d)(2)(A).

**THE STATE COURT ACTION IS A “CLASS ACTION” WITHIN THE MEANING OF CAFA**

10. Under CAFA, “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 1 or more representative persons as a class action[.]” *See* 28 U.S.C. § 1332(d)(1)(B).

11. Plaintiff purports to define and represent his putative class pursuant to New Jersey Court Rule 4:32. *See* Complaint, ¶ 86. Rule 4:32 of the New Jersey Court Rules governs class actions in New Jersey state courts and is patterned after Federal Rule of Civil Procedure 23.

*Folbaum v. Rexall Sundown, Inc.*, No. A-244-02T1, 2004 WL 3574116, at \*2 (N.J. Super. Ct. App. Div. May 4, 2004). Plaintiff's putative class action therefore satisfies the definition in 28 U.S.C. § 1332(d)(1)(B).

**PLAINTIFF'S PUTATIVE CLASS CONTAINS AT LEAST ONE HUNDRED MEMBERS**

12. Plaintiff seeks to certify one putative class and one putative subclass. Plaintiff defines the putative class as “[a]ll New Jersey citizens who received a mail or email advertisement from Defendant Jos. A. Bank advertising a discount between February 8, 2011 and the present.” *See* Complaint, ¶ 86. Plaintiff defines the putative subclass as “[a]ll New Jersey citizens who purchased any discounted item from Defendant Jos. A. Bank website or any retail stores in New Jersey between February 8, 2011 and the present. *See* Complaint, ¶ 87.<sup>1</sup>

13. There are currently 23 JAB stores in New Jersey. Diaz Dec. ¶ 7.

14. JAB offers frequent sales promotions and events to its customers, typically several each month. *Id.* at ¶ 8; *see also* Complaint, ¶ 35.

15. JAB's advertisements reach consumers in New Jersey and throughout the country via television, radio, in-store displays, print advertisements, direct mails, and electronic mail messages. Diaz Dec. ¶ 9.

16. JAB maintains a nationwide electronic mailing list that, as of April 3, 2017, contains 1,178,154 email addresses. JAB sends advertisements to this email list approximately eight to ten times per week. Diaz Dec. ¶ 10. JAB's electronic mailing list contains 26,016 consumer email addresses that are linked to New Jersey addresses through JAB's Bank Account Rewards membership program. Diaz Dec. ¶ 11.

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<sup>1</sup> While the Complaint does not make it clear, given that this is a putative subclass, JAB presumes that it is constrained by the same limitation as the class, that being that they must have also received a “mail or email advertisement from Defendant Jos. A. Bank advertising a discount between February 8, 2011 and the present.”



17. JAB also maintains a physical mailing list that, as of April 3, 2017, contains 444,798 consumer addresses within New Jersey, and sends print advertisements approximately four times per month to these mailing addresses. Diaz Dec. ¶ 12.

18. More than half of all items JAB sells in New Jersey (and nationwide) are purchased at a discounted rate. *Id.* at ¶ 13.

19. In fiscal year 2016, JAB estimates that 71,263 customers made purchases in JAB's New Jersey stores. *Id.* at ¶ 14.

20. In fiscal year 2016, JAB's New Jersey stores generated net sales proceeds of \$31,797,095, after adjusting for returns. *Id.* at ¶ 15.

21. In fiscal year 2016, JAB generated net online sales of approximately \$4,412,123 from purchases made through JAB's website by 19,165 customers with New Jersey shipping addresses. *Id.* at ¶ 16.

22. In fiscal year 2016, JAB generated net sale proceeds of approximately \$138,575 from purchases made through JAB's call centers by 979 customers with New Jersey shipping addresses. *Id.* at ¶ 17.

23. Given the number of JAB stores in New Jersey and JAB's advertising and sales data for just fiscal year 2016, it is a logical certainty that Plaintiff's putative class consists of far in excess of 100 members. Plaintiff's Complaint alleges that the putative class and subclass "are each composed of at least 10,000 persons." *See* Complaint, ¶ 90.

24. Because there are at least 100 putative class members, the exclusion for removal under CAFA for class actions with fewer than 100 class members does not apply. 28 U.S.C. § 1332(d)(5).

**THE AMOUNT IN CONTROVERSY EXCEEDS FIVE MILLION DOLLARS (\$5,000,000)**

25. Original jurisdiction in federal court exists to remove a class action under CAFA when, *inter alia*, “the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs[.]” *See* 28 U.S.C. § 1332(d)(2).

26. Under 28 U.S.C. § 1332(d)(6), “[i]n any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs.”

27. Despite claiming that his putative class contains at least 10,000 persons, Plaintiff’s Complaint alleges that “the total amount in controversy in this matter, including attorney’s fees, is less than \$5 million.” Complaint ¶ 31. Plaintiff’s allegation does not bind anyone but himself, and thus, does not reduce the value of the putative class members’ claims, for purposes of the CAFA analysis. *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1349-1350 (U.S. 2013) (district court should ignore allegation and comply with statutory directive to aggregate the claims of the class members).

28. It is well-settled that conclusory statements are inadequate to determine whether federal subject matter jurisdiction exists. *See, e.g., Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (instructing that “conclusions” and “formulaic recitation ... will not do”); *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir. 2009) (“The District Court must accept all of the complaint’s well-pleaded facts as true, but may disregard any legal conclusions.”).

29. To establish the amount in controversy in a notice of removal, “a defendant’s notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold.” *Dart Cherokee Basin Operating Co., LLC v. Owens*, \_\_ U.S. \_\_, 135 S. Ct. 547, 554 (2014) (emphasis added). A “short and plain statement,” just as

required of pleadings under Fed. R. Civ. P. 8(a), is sufficient. *Id.* at 553. No evidentiary support is required, and a defendant's amount in controversy allegation "should be accepted" for purposes of conferring jurisdiction on the federal court unless it is "contested by the plaintiff or questioned by the court." *Id.*; *see also id.* at 554 ("Defendants do not need to prove to a legal certainty that the amount in controversy requirement has been met. Rather, defendants may simply allege or assert that the jurisdictional threshold has been met."). It is only upon challenge by the plaintiff that the removing defendant must prove by a "preponderance of the evidence that the amount in controversy exceeds" \$5 million. *Id.* at 553-544.

30. JAB denies that Plaintiff or any putative class member is entitled to recover any amount or is entitled to recover any of the relief demanded in the Complaint. However, based on the Complaint's allegations of a statewide class over a six-year period and the various forms of relief sought, it is plausible that the aggregate amount in controversy exceeds \$5 million, exclusive of interests and costs, for purposes of removal.

31. Plaintiff alleges violations of the TCCWNA and seeks, on behalf of Plaintiff and each of the members of the putative class, unspecified actual damages in addition to statutory damages of \$100 per violation, pursuant to N.J.S.A. 56:12-17. *See* Complaint at Count I. Plaintiff's Complaint alleges that his putative class includes all New Jersey citizens who received a mail or email advertisement that advertised a discount within the last six years. *Id.* at ¶ 86. Plaintiff alleges that at least 10,000 New Jersey citizens received advertisements that allegedly violated the TCCWNA; assuming that each of these consumers received just five advertisements, the alleged damages would be \$5 million. *See* Complaint ¶ 90 ("The proposed class and subclass are each composed of at least 10,000 persons.").

32. Plaintiff alleges that he and the purported class received “repeated and frequent unlawful advertising emails” on a near-daily basis and that he personally received “at least 787 advertising emails” from JAB. *See* Complaint ¶¶ 80, 123. Based on this frequency of email advertisements over the course of the six year statute of limitations period, multiplied by a putative class of at least 10,000 persons, it is readily apparent that the plausible aggregate amount in controversy far exceeds \$5,000,000. This is all the more apparent when the Court considers that JAB send messages to 26,016 email addresses eight to ten times per week.

33. In addition to statutory damages, Plaintiff seeks actual damages incurred by the class and subclass as well as disgorgement of all JAB’s profits received from its advertisements or full refunds of all purchases made by the purchasing subclass members. *See* Complaint ¶ 124, Prayer for Relief at ¶¶ C, E.

34. According to JAB’s sales records, New Jersey consumers generated over \$35 million in net sales for just fiscal year 2016. Diaz Dec. ¶¶ 15-17. Assuming similar sales figures in each of the last five years, a judgment of \$5 million in actual damages would represent less than three percent of JAB’s net sales over the course of the six year putative class period. Thus, for purposes of removal, the \$5 million threshold is plausible, given that JAB’s advertisements reach hundreds of thousands of consumers in New Jersey every year and more than half of all JAB’s items are purchased at a discount.

35. Alternatively, JAB tracks the average amount spent on each transaction in its stores. The average amount spent at JAB’s New Jersey stores during fiscal year 2016 was \$505 per customer transaction. Diaz Dec. ¶ 18. Using this average sales amount figure and assuming there are at least 10,000 class members as alleged by Plaintiff, if the Court awarded relief in the



form of a refund to each putative class member, the purported actual damages would exceed \$5 million.

36. Plaintiff also seeks attorney's fees and costs as well as interest. *See* Complaint at Prayer for Relief, ¶¶ H, I. Awards of attorney's fees and costs in class actions can amount to as much as thirty percent of a class's recovery, which would substantially increase the amount in controversy. *See, e.g., Frederico v. Home Depot, Inc.*, 507 F.3d 188, 199 (3d Cir. 2007) (citing *In re Rite Aid Corp. Secs. Litig.*, 396 F.3d 294, 303 (3d Cir. 2005)); *Suber v. Chrysler Corp.*, 104 F.3d 578, 585 (3d Cir. 1997)).

37. Plaintiff further seeks punitive or exemplary damages. Punitive damages, where recoverable, may be considered by a court in determining whether the amount in controversy requirement has been satisfied. *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1046 (3d Cir. 1993). Plaintiff claims that JAB acted "purposefully" and "acted with knowledge that its conduct was deceptive and with intent that such conduct deceive[d] purchasers." *See* Complaint ¶ 151-152. The New Jersey Consumer Fraud Act permits the award of treble damages and attorney's fees should such a violation be found. N.J. Stat. Ann. § 56:8-19.

38. Thus, assuming that Plaintiff prevails on its allegations, if the fact-finder holds JAB responsible for \$1.67 million in actual damages under the Consumer Fraud Act, it could arguably be trebled to reach a total judgment of \$5 million. If each putative sub-class member spent what Plaintiff spent (\$169), a putative subclass of 10,000 members would exceed the \$5 million amount in controversy.

39. Accordingly, JAB has alleged more than sufficient information and facts to support a finding that it is plausible that the amount in controversy exceeds \$5 million. JAB has identified numerous allegations in Plaintiff's Complaint that support its good faith estimate and

conclusion that it is plausible that the amount in controversy exceeds \$5 million, and JAB has also supplied evidence and data that corroborate the plausibility of this estimate and conclusion.

40. It is important to note that in advancing these arguments for the limited purpose of establishing subject matter jurisdiction before this Court, JAB does not waive any defenses, does not concede any of Plaintiff's allegations or claims, and vigorously denies that it has engaged in any act that violates New Jersey law.

#### **COMPLIANCE WITH REMOVAL STATUTES AND PROCEDURE**

41. JAB's Notice of Removal is timely. Plaintiff served the Complaint on JAB on March 10, 2017. JAB is filing its Notice of Removal with this Court on April 7, 2017, less than 30 days after receipt of the Complaint. *See* 28 U.S.C. § 1446(b).

42. This Court is the proper court in which to file this Notice of Removal. This Court is part of the "district and division within which [the State Court Action] is pending[.]" i.e., the New Jersey Superior Court, Law Division, Burlington County. *See* 28 U.S.C. § 1446(a).

43. The Notice of Removal is signed pursuant to Rule 11, and Exhibit A hereto contains "a copy of all process, pleadings, and orders served upon" JAB. *Id.*

44. JAB attaches as Exhibit C a copy of the "Notice of Filing of Notice of Removal," which JAB will promptly serve upon Plaintiff's counsel and will file with the Clerk of the New Jersey Superior Court, Law Division, Burlington County, as required by 28 U.S.C. § 1446(d).

#### **CONCLUSION**

WHEREFORE, Defendant Jos. A. Bank Clothiers, Inc. hereby removes this state court action from the New Jersey Superior Court, Law Division, Burlington County, to this Court, which has original diversity jurisdiction pursuant to CAFA. *See* 28 U.S.C. § 1332(d). This

action should proceed in the United States District Court for the District of New Jersey as an action properly removed thereto.

Dated: April 7, 2017

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