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RMG SUNSET, INC., PB CANTINA,

9 LLC, CABO CANTINA L.A., LLC,

CABO CANTINA, LLC, and

10 BOARDWALK F&B, LLC

11 UNITED STATES DISTRICT COURT

12 SOUTHERN DISTRICT OF CALIFORNIA

13
14 SCOTT STERN, an individual; on
15 behalf of himself and all others
16 similarly situated,

17 Plaintiffs,

18 v.

19 RMG SUNSET, INC., a California
corporation; PB CANTINA, LLC, a
California limited liability company;
20 CABO CANTINA L.A., LLC, a
California limited liability company;
21 CABO CANTINA, LLC, a California
limited liability company; and DOES 1
22 through 100, inclusive,

23 Defendants.

Case No. **'17CV1646 JLS NLS**

(Removed from San Diego Superior
Court, Case No.: 37-2016-00019511-
CU-BT-CTL)

CLASS ACTION

**DEFENDANTS RMG SUNSET,
INC., PB CANTINA, LLC, CABO
CANTINA L.A., LLC, CABO
CANTINA, LLC, AND
BOARDWALK F&B, LLC'S
NOTICE OF REMOVAL OF CASE
TO FEDERAL COURT**

[28 U.S.C. § 1332(d)(2)]

1 TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR
 2 THE SOUTHERN DISTRICT OF CALIFORNIA, AND TO PLAINTIFF AND HIS
 3 ATTORNEYS OF RECORD:

4
 5 PLEASE TAKE NOTICE that RMG Sunset, Inc., PB Cantina, LLC, Cabo
 6 Cantina L.A., LLC, Cabo Cantina, LLC, and Boardwalk F&B, LLC (“Defendants”),
 7 the defendants in the above-referenced action, which was originally commenced in
 8 San Diego Superior Court, entitled *Scott Stern v. RMG Sunset, Inc., et al.*, Case No.
 9 37-2016-00019511-CU-BT-CTL, hereby invoke the removal jurisdiction of the
 10 United States District Court for the Southern District of California, pursuant to 28
 11 U.S.C. §§ 1332, 1441, 1446, 1453 and Federal Rules of Civil Procedure, Rule 81(c),
 12 asserting original federal jurisdiction under 28 U.S.C. §§ 1332(d)(2) and 1453(b).
 13 This Court has original jurisdiction over the action pursuant to the Class Action
 14 Fairness Act of 2005 (“CAFA”) for the following reasons:

15 **I.**

16 **JURISDICTION**

17 1. This Court has jurisdiction over this action pursuant to 28 U.S.C.
 18 §§ 1332, 1441, 1446, and 1453. In particular, this Court has jurisdiction under
 19 CAFA, codified in part at 28 U.S.C. §§ 1332(d)(2) and 1453(b), because it is styled
 20 as a class action in which: (1) the number of members of the proposed plaintiff
 21 class is not less than one hundred, in the aggregate; (2) the amount in controversy
 22 exceeds the sum or value of \$5,000,000, exclusive of interest and costs; and
 23 (3) minimal diversity exists between plaintiff and Defendants, i.e., any member of
 24 the plaintiff class is a citizen of a state different from Defendants. 28 U.S.C.
 25 §§ 1332(d)(2) and (d)(4). Paragraphs 3 through 37 below provide a detailed basis
 26 for this removal. Defendants have satisfied all procedural requirements of 28 U.S.C.
 27 § 1446, and remove this action to the United States District Court for the Southern
 28 District of California, pursuant to 28 U.S.C. §§ 1332, 1441, 1446, and 1453.

1 disgorgement of Defendants' ill-gotten gains to Plaintiff and the proposed Class
2 Members where and when appropriate..." *Id.*, Prayer for Relief, pp. 12-13.

3 6. Plaintiff served a copy of the FAC upon Defendants on July 19, 2016.

4 7. On August 4, 2017, Plaintiff filed his Motion for Class Certification
5 (the "Motion"). In the Motion, Plaintiff, for the first time, expanded the definition
6 of his putative class to include individuals who are not California citizens:

7 All persons who between January 1, 2016, and May 1,
8 2017, paid a surcharge at one of Defendants' restaurants.

9 See Motion, p. 2:5-6, attached as Ex. 2. Plaintiff served the Motion on August 4,
10 2017, and Defendants received it on August 7, 2017.

11 IV.

12 **THE REQUIREMENTS FOR REMOVAL UNDER CAFA ARE SATISFIED**

13 8. CAFA was enacted "to facilitate adjudication of certain class actions in
14 federal court." *Dart Cherokee Basin Operating co. v. Owens*, 135 S.Ct. 547, 554
15 (2014). The Supreme Court recently held that there is no presumption against
16 removal of CAFA actions, and the statute's provisions "should be read broadly, with
17 a strong preference that interstate class actions should be heard in a federal court if
18 properly removed by any defendant." *Id.*

19 9. To invoke removal jurisdiction, a defendant's notice of removal need
20 only include "a short and plain statement of the grounds for removal." *Dart*, 135
21 S.Ct. at 553. "Congress . . . intended to simplify the pleading requirements for
22 removal and to clarify that courts should apply the same liberal rules [to removal
23 allegations] that are applied to other matters of pleading." *Id.* (internal quotations
24 omitted). In determining whether the requirements of removal have been satisfied,
25 this Court may also rely upon the allegations of Plaintiff's FAC, taken as true for
26 purposes of removal. *Levine v. BIC USA, Inc.*, 2007 U.S. Dist. LEXIS 60952, at
27 *16-17 (S.D. Cal. Aug. 19, 2007) (applying allegations in complaint that amount in
28 controversy did not exceed \$74,999.99 as to each putative class member to

determine that the \$5,000,000 jurisdictional threshold under CAFA was satisfied); *Korn v. Ralph Lauren Corp.*, 536 F.Supp.2d 1199, 1203 (E.D. Cal. 2008) (“plaintiff is bound by the allegations in the complaint that assert defendant’s citizenship” for diversity purposes). A defendant need *not* submit evidentiary support with its notice of removal. *Dart*, 135 S.Ct. at 551 (“A statement ‘short and plain’ need not contain evidentiary submissions.”).

10. For cases involving class allegations, CAFA confers original jurisdiction on a district court where (1) the number of members of the proposed plaintiff class is not less than one hundred, in the aggregate; (2) the amount in controversy exceeds \$5,000,000 (exclusive of interest and costs), and (3) any member of the class is a citizen of a state different from any defendant. 28 U.S.C. § 1332(d)(2).

A. Timeliness

11. This Notice of Removal is timely, because Defendants are filing it within thirty (30) days of receiving a pleading or motion from which they could ascertain that the case has become removable.

12. Pursuant to 28 U.S.C. Section 1446(b)(3):

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.

13. Plaintiff served his Motion for Class Certification on August 4, 2017, and Defendants received it on August 7, 2017. In the Motion, Plaintiff seeks to certify a class of **all** persons who allegedly paid the Surcharge at Defendants’ restaurants, regardless of citizenship. Motion, p. 2:5-6, attached as Ex. 2.

14. Defendants did not remove this case prior to receiving Plaintiff’s Motion for Class Certification, because Plaintiff had explicitly limited the class to include **only** California citizens. In his Motion for Class Certification, Plaintiff, for

1 the first time, expanded the class definition to include *all* of Defendants’ customers.
 2 As described below, Plaintiff’s new class definition includes a substantial number of
 3 non-California citizens.

4 15. Defendants served this Notice of Removal on August 16, 2017, which
 5 is less than thirty days after Plaintiff served his Motion for Class Certification.
 6 Accordingly, this notice is timely filed. *See* U.S.C. § 1446(b)(3); *Kuxhausen v.*
 7 *BMW Fin. Servs. NA LLC*, 707 F.3d 1136, 1139 (9th Cir. 2013) (a “second thirty-
 8 day removal period is triggered if the initial pleading does not indicate that the case
 9 is removable, and the defendant receives ‘a copy of an amended pleading, motion,
 10 order or other paper’ from which removability may first be ascertained.”).

11 **B. Venue**

12 16. This action was originally brought in the Superior Court of California
 13 for the County of San Diego. Pursuant to 28 U.S.C. § 1441(a), removal to this
 14 District Court is proper because the Superior Court of California for the County of
 15 San Diego is geographically located within this Court’s district.

16 **C. Plaintiff’s Case Is Styled as a Class Action**

17 17. The term “class action” is defined under the statute as “any civil action
 18 filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or
 19 rule of judicial procedure authorizing an action to be brought by 1 or more
 20 representative persons as a class action.” 28 U.S.C. § 1332(d)(1)(B). Plaintiff styles
 21 his FAC as a class action. Plaintiff purports to bring it “on behalf of himself and all
 22 others similarly situated,” asserts a putative class and class allegations, and seeks an
 23 order certifying the proposed class. FAC, ¶¶ 22-35, and Prayer for Relief, p. 13.
 24 Although Defendants dispute that Plaintiff can meet the requirements for certifying
 25 a class under Federal Rule of Civil Procedure 23, and dispute any amount owing to
 26 Plaintiff or the alleged class, this lawsuit qualifies as a “class action” under CAFA.

1 **D. Minimal Diversity Exists**

2 18. Removal is proper where at least one class member is diverse from at
3 least one defendant. 28 U.S.C. § 1332(d). As alleged in the FAC, Plaintiff resides
4 in San Diego County, California. FAC, ¶ 8.

5 19. For diversity purposes, a corporation is deemed to be a citizen of the
6 state in which it has been incorporated and the state where it has its principal place
7 of business. 28 U.S.C. § 1332(c)(1). The FAC alleges that defendant RMG Sunset,
8 Inc. is a California corporation with its principal place of business in Hollywood,
9 California. FAC, ¶ 9.

10 20. For purposes of determining citizenship under CAFA, an
11 unincorporated association such as a limited liability company is deemed to be a
12 citizen of the state where it has its principal place of business and the state where it
13 was organized. 28 U.S.C. § 1332(d)(10); *Ferrell v. Express Check Advance of SC*
14 *LLC*, 591 F3d 698, 705 (4th Cir. 2010). The FAC alleges that defendants PB
15 Cantina, LLC, Cabo Cantina L.A., LLC, and Cabo Cantina, LLC are all limited
16 liability companies organized and existing under the laws of California with their
17 principal places of business in California. FAC, ¶¶ 10-12. Defendant Boardwalk
18 F&B, LLC is also a limited liability company organized and existing under the laws
19 of California with its principal place of business in California.

20 21. Some courts determining the citizenship of a limited liability company
21 under CAFA have also relied upon the citizenship of company's members. *See*
22 *Lafountain v. Meridian Senior Living, LLC*, 2015 U.S. Dist. LEXIS 84134, *5, n. 2
23 (C.D. Cal. June 29, 2015). The members of PB Cantina, LLC, Cabo Cantina L.A.,
24 LLC, Cabo Cantina, LLC, and Boardwalk F&B, LLC all reside in California.

25 22. Pursuant to Plaintiff's Motion for Class Certification, Plaintiff's
26 purported class now includes "[a]ll persons who between January 1, 2016, and
27 May 1, 2017, paid a surcharge at one of Defendants' restaurants." Motion, p. 2:5-6.
28 Plaintiff's newly-proposed class definition is no longer limited to California

1 citizens. As a result, the purported class now includes all individuals domiciled
 2 outside of California who traveled to California during the Class Period, patronized
 3 one of Defendants' restaurants, and paid the Surcharge. Defendants' restaurants are
 4 located in heavily trafficked tourist areas, and commonly attract a substantial
 5 number of customers who are citizens of other states or countries.

6 23. By way of example only, the Baja Beach Café in Pacific Beach,
 7 California where Plaintiff allegedly dined (*see* FAC, ¶ 2) is located next to Pacific
 8 Beach, near the Pacific Beach Pier. Defendants' restaurant at this location is very
 9 popular with out-of-state and foreign tourists visiting San Diego, California. The
 10 other defendant restaurants are likewise popular with tourists. A substantial number
 11 of Defendants' customers who paid the Surcharge are out-of-state or out-of-country
 12 residents.

13 24. Although Plaintiff purports to assert his claims against numerous
 14 "Doe" defendants, the citizenship of fictitious and unknown defendants should be
 15 disregarded for purposes of establishing removal jurisdiction under 28 U.S.C. §
 16 1332. *See Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1213 (9th Cir. 1980)
 17 ("unknown defendants sued as 'Does' need not be joined in a removal petition.").
 18 Thus, the existence of Doe defendants 1 through 100, named in Plaintiff's FAC,
 19 does not deprive this Court of jurisdiction.

20 25. Accordingly, because the proposed class in Plaintiff's Motion includes
 21 non-California citizens, minimal diversity exists.

22 **E. The Amount in Controversy Exceeds \$5,000,000**

23 26. The claims of the individual members in a class action are aggregated
 24 to determine if the amount in controversy exceeds the sum or value of \$5,000,000.
 25 28 U.S.C. § 1332(d)(6). The Supreme Court recently held that where, as here, a
 26 plaintiff's complaint does not explicitly specify the amount in controversy (*see*
 27 FAC, ¶ 12), a defendant's notice of removal need include only a plausible allegation
 28 that the amount in controversy exceeds the jurisdictional threshold under CAFA.

1 *Dart*, 135 S.Ct. at 554. The amount in controversy allegation in a defendant’s notice
 2 of removal should be accepted as true when not contested by a plaintiff or
 3 questioned by the court. *Id.* at 553. If the court is uncertain about whether all
 4 matters in controversy meet the \$5,000,000 jurisdictional threshold under CAFA,
 5 “the court should err in favor of exercising jurisdiction over the case.” *Kearns v.*
 6 *Ford Motor Co.*, 2005 U.S. Dist. LEXIS 41614, at *19 (C.D. Cal. Nov. 18, 2005)
 7 (citing Senate Judiciary Committee Report, S. REP. No. 109-14).

8 27. Defendants deny that Plaintiff and the putative class have been harmed
 9 in any way, or that they are entitled to any damages, disgorgement, or restitution.
 10 Defendants further dispute Plaintiff’s apparent method for calculating purported
 11 damages, disgorgement, or restitution, as well as Plaintiff’s claim that he and the
 12 purported class are entitled to “disgorgement of Defendants’ ill-gotten gains,” and
 13 deny any liability to Plaintiff or any member of the class he purports to represent.
 14 FAC, Prayer for Relief, p. 13. However, for the purposes of determining the amount
 15 in controversy under CAFA, Plaintiff’s allegations place at issue an amount greater
 16 than CAFA’s \$5,000,000 jurisdictional threshold.

17 28. Plaintiff seeks restitution, damages, punitive damages, disgorgement
 18 and injunctive and declaratory relief for himself and each putative class member
 19 who paid the Surcharge. FAC, ¶¶ 2, 19-20, Ex. 1, p. 2.

20 29. Plaintiff alleges that, had “Plaintiff and Class members known that
 21 Defendants were charging the additional fee, they would not have gone to
 22 Defendants restaurant, would have reduced their orders to stay with budget, or
 23 would have asked for a discount or waiver of the fee.” *Id.*, ¶¶ 2, 21, 62.

24 30. Although Defendants dispute these allegations and Plaintiff’s alleged
 25 damages, Plaintiff’s own calculations put at issue an amount in controversy well in
 26 excess of \$5,000,000. In support of his Motion for Class Certification, Plaintiff
 27 argues that Defendants received approximately \$2,000,000 in revenue from the
 28 allegedly improper Surcharge. Memo. of Ps & As ISO Motion, p. 11:16-18.

1 Plaintiff's FAC goes even further, and seeks compensatory and punitive damages in
2 addition to the Surcharge that he and each class member paid.

3 31. Plaintiff seeks restitution and damages for more than just repayment of
4 the approximately \$2 million in Surcharge that he and the putative class allegedly
5 paid. Plaintiff's FAC expressly alleges that Plaintiff seeks both restitution *and*
6 damages. Moreover, Plaintiff alleges that he and many of the class members would
7 have never eaten at Defendants' restaurants in the first place if they had known
8 about the Surcharge. FAC, ¶¶ 2, 21, 62. Plaintiff thus claims that he and the
9 putative class are entitled to damages, presumably in the form of a refund of the full
10 purchase price of their meal. *Id.*, Prayer for Relief, p. 13. This is confirmed by
11 additional allegations in the FAC and Exhibits thereto. For example, in his CLRA
12 letter, which is attached as Exhibit 1 to the FAC, Plaintiff wrote that he seeks from
13 Defendants "restitution of the purchase price." FAC, Ex. 1. Moreover, after
14 receiving Plaintiff's CLRA letter, Defendants offered to reimburse him for the
15 Surcharge and the entire cost of his meal. Plaintiff rejected this offer and, in the
16 FAC, alleges that this offer only "partially reimburse[s] Plaintiff for his individual
17 damages." FAC, ¶ 43. Plaintiff's request for restitution and damages, in the form of
18 a full refund of every purchase, easily puts at issue more than \$5 million, because
19 Defendants' total sales during the Class Period exceed \$40 million.

20 32. Plaintiff also seeks punitive damages. FAC, Ex. 1, p. 2 (expressly
21 identifying punitive damages as an item of damages Plaintiff seeks); FAC, ¶ 44
22 (alleging that "Defendants' conduct is malicious, fraudulent and wanton . . ."); *see*
23 *Back Doctors Ltd. v. Metropolitan Prop. & Cas. Ins. Co.*, 637 F.3d 827, 831 (7th
24 Cir. 2011) (permitting inclusion of punitive damages in CAFA removal calculation,
25 where they were available to plaintiff and plaintiff did not disclaim entitlement to
26 them in its complaint). In determining whether the "amount in controversy"
27 requirement of 28 U.S.C. §1332(a) is met, a court "must" consider punitive damages
28 in the calculation where recoverable under state law. *Gibson v. Chrysler Corp.*, 261

1 F.3d 927, 945-46 (9th Cir. 2001). The amount of punitive damages is based, in part,
 2 on a ratio to compensatory damages. A conservative punitive damages award
 3 bearing only a 1:1 ratio to a compensatory damages award to Plaintiff would even
 4 further enlarge the amount in controversy. *See Guglielmino v. McKee Foods Corp.*,
 5 506 F.3d 696, 698 (9th Cir. 2007) (approving District Court's consideration of a
 6 "conservative" 1:1 punitive to compensatory damages ratio on removal).

7 33. Plaintiff also requests attorney's fees. FAC, Prayer for Relief, p. 13.
 8 Although Defendants deny that Plaintiff is entitled to such fees, the Court should
 9 take attorney's fees into account in ascertaining the amount in controversy, even
 10 where an award is discretionary. *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150,
 11 1155-56 (9th Cir. 1998). Plaintiff's request puts approximately another 25% of
 12 Plaintiff's alleged damages at controversy. *See Molnar v. 1-800-Flowers.com, Inc.*,
 13 2009 U.S. Dist. LEXIS 131768, at *5 (C.D. Cal. Feb. 23, 2009) (approving estimate
 14 of attorney's fees of 25% of alleged damages when determining amount in
 15 controversy).

16 34. Finally, Plaintiff also seeks declaratory and injunctive relief, including
 17 an order requiring Defendants to make certain price disclosures and conduct a
 18 corrective marketing campaign. FAC, ¶¶ 39-42, 53, 65, and Prayer for Relief, p. 13.
 19 While Defendants no longer include the Surcharge on their bills, the corrective
 20 campaign Plaintiff seeks will nonetheless be costly. *See Anderson v. Seaworld*
 21 *Parks and Entertainment, Inc.*, 132 F.Supp. 3d 1156 (N.D. Cal. 2015) (holding
 22 CAFA amount in controversy requirement was met, where the potential harm to
 23 defendant's business reputation and loss of sales caused by complying with
 24 plaintiff's proposed corrective marketing campaign could lead to over \$5,000,000 in
 25 losses). The costs of complying with Plaintiff's proposed injunction by buying an
 26 advertising campaign may also be considered in determining the amount in
 27 controversy. *See BEM I, LLC v. Anthropologie, Inc.*, 301 F.3d 548, 553 (7th Cir.

2002) (costs of complying with injunction may be considered to determine amount in controversy under CAFA).

35. Although Defendants deny that Plaintiff or the purported class members are entitled to any relief, in determining the amount in controversy, the Court must assume that allegations of the FAC are true, and that Plaintiff will ultimately prevail on all claims made in the FAC. *Kenneth Rothschild Trust v. Morgan Stanley Dean Witter*, 199 F.Supp.2d 993, 1001 (C.D. Cal. 2002); *see also Korn v. Polo Ralph Lauren Corp.*, 536 F.Supp.3d 1199, 1204-05 (E.D. Cal. 2008) (“the ultimate inquiry is what amount is put ‘in controversy’ by the plaintiff’s complaint, not what a defendant will *actually* owe.”). Therefore, based on Plaintiff’s request for restitution, damages, punitive damages, attorney’s fees and injunctive relief, the FAC places more than \$5,000,000 at issue in this action.

F. The Putative Class Far Exceeds 100 Members

36. CAFA requires that the proposed class includes at least 100 members. 28 U.S.C. § 1332(d)(5)(B). Although Defendants dispute Plaintiff’s class allegations, and deny that the class is ascertainable as alleged, the class and subclass pled by Plaintiff exceeds 100 members. Plaintiff claims that the class is “so large that the joinder of each individual claim ... would be impracticable.” Memo. of Ps & As ISO Motion, p. 11:19-21. He further claims that over “eight hundred thousand receipts with the Surcharge” were generated in the first fourteen months it was assessed. *Id.*, p. 11:18-19. Now, Plaintiff seeks to represent a class of any and all persons who dined at Defendants’ restaurants and paid the Surcharge from January 1, 2016 to May 1, 2017. *Id.*, ¶ 10:23-11:1. While Defendants dispute many of Plaintiff’s allegations, they agree that the number of individuals who dined at Defendants’ restaurants and paid the Surcharge during the class period far exceeds 100. Therefore, CAFA’s class size requirement is satisfied.

G. Notice to the Clerk of the State Court and to Adverse Parties, Submission of Process, Pleadings and Orders on File in State Court

37. Copies of this Notice of Removal promptly will be served on counsel of record for Plaintiff and filed with the Clerk of the San Diego County Superior Court as required under 28 U.S.C. § 1446(d). In compliance with 28 U.S.C. § 1446(a), a true and correct copy of the First Amended Complaint is attached hereto as **Exhibit 1**, true and correct copies of Plaintiff's Motion for Class Certification and all pleadings filed in support thereof are attached hereto as **Exhibit 2**, and true and correct copies of the remaining pleadings, process, and orders served or filed in the state court action are attached as **Exhibit 3**.

V.

CONCLUSION

By this notice and attachments, Defendants do not waive any objections they may have as to improper service, jurisdiction, or venue, or any other defenses or objections to this action. Defendants pray that this action be removed to this Court; that all further proceedings in the state court be stayed; and that Defendants obtain all additional relief to which they are entitled.

Dated: August 16, 2017 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By /s/ Moe Keshavarzi
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EXHIBIT 1

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Superior Court of California,
County of San Diego

07/13/2016 at 04:40:00 PM

Clerk of the Superior Court
By Christina Villegas, Deputy Clerk

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Attorneys for Plaintiff
Scott Stern

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

SCOTT STERN, an individual; on behalf of
himself and all others similarly situated,

Plaintiffs,

vs.

RMG SUNSET, INC., a California corporation;
PB CANTINA, LLC, a California limited
liability company; CABO CANTINA L.A., LLC,
a California limited liability company; CABO
CANTINA, LLC, a California limited liability
company; and DOES 1 through 100, inclusive,

Defendants.

CASE NO.: 37-2016-00019511-CU-BT-CTL

**FIRST AMENDED CLASS ACTION
COMPLAINT FOR:**

- 1. VIOLATION OF THE CONSUMERS
LEGAL REMEDIES ACT, CIVIL
CODE § 1750, *ET SEQ.*;**
- 2. VIOLATION OF CALIFORNIA'S
FALSE ADVERTISING ACT,
BUSINESS & PROFESSIONS
CODE §17500 *ET SEQ.*;**
- 3. VIOLATION OF THE UNFAIR
COMPETITION LAW, BUSINESS
& PROFESSIONS CODE §17200,
ET SEQ.;**
- 4. UNJUST ENRICHMENT**

Plaintiff Scott Stern (“Plaintiff”), by and through his attorneys, brings this action on behalf of himself and all others similarly situated against defendants RMG SUNSET, INC., a California corporation; PB CANTINA, LLC, a California limited liability company; CABO CANTINA L.A., LLC, a California limited liability company; CABO CANTINA, LLC, a California limited liability company; and DOES 1 through 100, inclusive (collectively, “Defendants”). Plaintiff alleges, on information and belief, except for information based on personal knowledge, as follows:

NATURE OF THE ACTION

1. This is a consumer class action for Defendants’ imposition of improper, hidden and unauthorized fees in relation to the purchase of meals and drinks at its restaurants.

2. Defendants operate fourteen restaurants throughout Southern California, including the Baja Beach Café in Pacific Beach, California. Defendants charge their customers an undisclosed service charge of 4.9%. Plaintiff went to Defendants’ Baja Beach Café in Pacific Beach on February 24, 2016 and purchased several meals. Defendants charged an undisclosed service fee (approximately 4.9%) to customers for any meal and/or drink purchased. The additional fee was not posted in the lobby nor on the menu. Only later, when Plaintiff inspected his receipt, did he notice the additional charge. Had Plaintiff known about the undisclosed fee, Plaintiff would not have eaten at Defendants’ restaurant.

3. In charging Plaintiff and other customers the additional service fee, Defendants have been unjustly enriched and have wrongfully withheld monies from Plaintiff and other customers who have purchased meals and/or drinks and were charged the undisclosed fee. Plaintiff alleges violations of California’s False Advertising Act, California’s Unfair Competition Law (“UCL”), and violations California’s Consumer Legal Remedies Act (“CLRA”), in addition to Unjust Enrichment.

JURISDICTION AND VENUE

4. This action is within the Court’s jurisdiction under California’s UCL, Business and Professions Code section 17200 *et seq.* The amount in controversy arising from the actions and

statutory violations as further described below is sufficient to implicate the general jurisdiction of the Superior Court in and for San Diego County.

5. Based upon information, investigation and analysis as of the filing date of this complaint, Plaintiff alleges that the amount in controversy for each class representative, including claims for monetary damages, restitution, and a pro rata share of attorneys' fees, is less than seventy-five thousand dollars and that the aggregate amount in controversy for the proposed class action, including monetary damages, restitution, injunctive relief, and attorneys' fees, is less than five million dollars, exclusive of interests and costs.

6. Venue is proper in this judicial district, pursuant to California Code of Civil Procedure sections 395 and 395.5, Business & Professions Code sections 17203, 17204 and 17535, and Civil Code section 1780(c), as Defendants conduct substantial business within San Diego County and many of the acts complained of occurred in the County of San Diego, and Plaintiff specifically paid Defendants' undisclosed fee in this County.

7. If new facts are obtained with respect to the amount at issue, Plaintiff will seek leave to amend this Complaint.

PARTIES

8. At all times relevant to this matter, Plaintiff Scott Stern resided and continues to reside in San Diego County, California. During the Class period, Plaintiff paid Defendants' undisclosed fee, and suffered injury in fact and lost money as a result of the misrepresentation and unfair competition described here.

9. Defendant RMG Sunset, Inc. dba Sunset Restaurant Management Group is and at all times mentioned was, a corporation organized and existing under the laws of California with its principal place of business in Hollywood, California. Defendant jointly owns and/or operates fifteen restaurants and bars in Southern California.

10. Defendant PB Cantina, LLC is and at all times mentioned was, a limited liability company organized and existing under the laws of California with its principal place of business in Hollywood, California. Defendant jointly owns and/or operates fifteen restaurants and bars in Southern California.

11. Defendant Cabo Cantina L.A., LLC is and at all times mentioned was, a limited liability company organized and existing under the laws of California with its principal place of business in Hollywood, California. Defendant jointly owns and/or operates fifteen restaurants and bars in Southern California.

12. Defendant Cabo Cantina, LLC is and at all times mentioned was, a limited liability company organized and existing under the laws of California with its principal place of business in Hollywood, California. Defendant jointly owns and/or operates fifteen restaurants and bars in Southern California.

13. Defendants RMG Sunset, Inc., PB Cantina, LLC, and Cabo Cantina L.A., LLC, and Cabo Cantina, LLC, are collectively referred to as “Defendants” unless separate treatment is intended. Upon information and belief, RMG Sunset, Inc. is the acquirer, parent company, and/or alter ego of PB Cantina, LLC, Cabo Cantina L.A., LLC, and Cabo Cantina, LLC, which controls the restaurants day-to-day operations.

14. Plaintiff does not know the true names and capacities of defendants sued as DOES 1 through 100, inclusive, and therefore sues them by fictitious names. Plaintiff is informed and believes DOES 1 through 100, inclusive, are in some way responsible for the events and the damages described in this Complaint. Plaintiff will seek leave to amend this Complaint when the true names and capacities of these defendants have been ascertained.

15. At all relevant times, Defendant and DOES 1-100, jointly, managed, directed, and controlled the operations, and dictated the common service fee policies applicable to Baja Beach Café and the other thirteen restaurants in question.

16. Plaintiff is informed, believes and alleges that each defendant acted in all respects pertinent to this action as the agent of the other defendants, carried out a joint scheme, business plan or policy in all respects pertinent here, and the acts of each defendant are legally attributable to the other defendants.

17. Upon information and belief, at all times relevant, each of the defendants was the agent, employee, alter ego, and/or joint venture of, or working in concert with each of the other co-defendants and was acting within the course and scope of such agency, employment, joint

venture, or concerted activity. To the extent said acts, conduct, and omissions were perpetrated by certain defendants, each of the remaining defendants confirmed and ratified those acts, conduct, and omissions of the acting defendant.

ADDITIONAL FACTUAL ALLEGATIONS

18. According to Defendants' LinkedIn profile, they "currently ha[ve] [] locations throughout Southern California and a corporate office located on the world famous Sunset Strip in West Hollywood . . . [t]here are six different restaurant concepts under [their] corporate umbrella: Cabo Cantina, Fiesta Cantina, The Sunset Trocadero Lounge, PB Cantina, Jameson's Irish Pub & Baja Beach Cafe."¹

19. Upon information and belief, Defendants actively and affirmatively charge an undisclosed service fee at each of their restaurant locations. This fee is not posted in the restaurants or on the menus, nor announced by the staff. Customers dining at the restaurants would expect to pay the menu price for their meals and sales tax. Instead, their meals cost an additional 4.9% more due to the hidden and unauthorized fee that Defendants failed to disclose. Customers would only become aware of this additional fee upon reviewing their receipts, where the fee is unintelligibly labeled "statelivwage/s/e4.9%". Plaintiff believes that most, if not all customers will assume this is just another form of mandatory sales tax, when in reality it is not.

20. Defendants inaccurately, deceptively, and unfairly charged the additional service fee without any disclosure to all customers who dined at their restaurants.

21. As a result of Defendants' misrepresentations and omissions of fact, Plaintiff has been harmed when he paid the undisclosed service fee, which was never refunded. Plaintiff was misled and lost money as a result, and would not have patronized Defendants' restaurant had he not been misled, or if Defendants had appropriately disclosed the additional service fee. Accordingly Plaintiff seeks actual and/or compensatory damages, restitutionary and equitable relief, costs and expenses of litigation, attorneys' fees and all other available relief for Plaintiff and Class Members.

¹ See <https://www.linkedin.com/company/sunset-restaurant-management-group>, last accessed May 19, 2016.

CLASS ACTION ALLEGATIONS

22. Plaintiff brings this action individually, and as a class action, under California Code of Civil Procedure section 382 and California Civil Code sections 1752, 1780 and 1781. The proposed Class consists of:

All California citizens who paid an undisclosed “state liv wage/s/e 4.9%” fee to Defendants since June 1, 2012.

23. Subject to additional information obtained through further investigation and discovery, the foregoing definition of the Class may be expanded or narrowed by amendment or amended complaint. Specifically excluded from the proposed Class are Defendants, their officers, directors, agents, trustees, parents, children, corporations, trusts, representatives, employees, principals, servants, partners, joint venturers, or entities controlled by the Defendants, and their heirs, successors, assigns, or other persons or entities related to or affiliated with defendants and/or their officers and/or directors, or any of them; the Judge assigned to this action, and any member of the Judge’s immediate family.

24. ***Numerosity.*** The members of the Class are so numerous that their individual joinder is impracticable. Plaintiff is informed and believes, and on that basis alleges, that the proposed Class contains many thousands of members. The precise number of Class members is unknown to Plaintiff. The true number of Class members is known by the Defendants, however, and thus, may be notified of the pendency of this action by first class mail, electronic mail, and by published notice.

25. ***Existence and Predominance of Common Questions of Law and Fact.*** There exists a well-defined community of interest in the questions of law and fact presented by this controversy. Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting only individual Class members. These common legal and factual questions include, but are not limited to, the following:

- (a) whether Defendants charged Plaintiff and Class an undisclosed service fee;
- (b) whether Defendants engaged in unfair business practices in violation of UCL;

- (c) whether Defendants engaged in false or misleading advertising;
- (d) whether Defendants should be permanently enjoined from continuing to charge undisclosed fees;
- (e) whether Plaintiff and Class members have sustained monetary loss and the proper measure of that loss;
- (f) whether Plaintiff and Class members are entitled to an award of restitution; and
- (g) whether Plaintiff and Class members are entitled to declaratory and injunctive relief.

26. **Typicality.** Plaintiff's claims are typical of the claims of the members of the Class in that the Defendants were unjustly enriched as a result of Plaintiff's and the Class' respective payment to Defendants for the undisclosed fee.

27. **Adequacy of Representation.** Plaintiff will fairly and adequately protect the interests of the members of the Class. Plaintiff has retained counsel highly experienced in complex consumer class action litigation, and Plaintiff intends to prosecute this action vigorously. Plaintiff has no adverse or antagonistic interests to those of the Class.

28. **Superiority** (to the extent required). A class action is superior to all other available means for the fair and efficient adjudication of this controversy. The damages or other financial detriment suffered by individual Class members is relatively small compared to the burden and expense that would be entailed by individual litigation of their claims against the Defendants. It would thus be virtually impossible for the Class, on an individual basis, to obtain effective redress for the wrongs done to them. Furthermore, even if Class members could afford such individualized litigation, the court system could not. Individualized litigation would create the danger of inconsistent or contradictory judgments arising from the same set of facts. Individualized litigation would also increase the delay and expense to all parties and the court system from the issues raised by this action. By contrast, the class action device provides the benefits of adjudication of these issues in a single proceeding, economies of scale, and

comprehensive supervision by a single court, and presents no unusual management difficulties under the circumstances here.

29. In the alternative, the Class may also be certified because:

(a) the prosecution of separate actions by individual Class members would create a risk of inconsistent or varying adjudication with respect to individual Class members that would establish incompatible standards of conduct for the Defendant;

(b) the prosecution of separate actions by individual Class members would create a risk of adjudications with respect to them that would, as a practical matter, be dispositive of the interests of other Class members not parties to the adjudications, or substantially impair or impede their ability to protect their interests; and/or

(c) Defendants have acted or refused to act on grounds generally applicable to the Class thereby making appropriate final declaratory and/or injunctive relief with respect to the members of the Class as a whole.

30. Unless stated otherwise, the claims asserted herein are applicable to all persons who paid the undisclosed fee to Defendants.

31. Adequate notice can be given to Class members directly using information maintained in Defendants' records or through notice by publication.

32. Damages may be calculated, in part, from the sales information maintained in Defendants' records, so that the cost of administering a recovery for the Class can be minimized. However, the precise amount of damages available to Plaintiff and the other members of the Class is not a barrier to class certification.

33. Plaintiff seeks a preliminary and permanent injunction and equitable relief on behalf of the entire Class, on grounds generally applicable to the entire Class, to enjoin and prevent Defendant from engaging in the acts described, and requiring Defendant to provide full restitution to Plaintiff and Class members.

34. Unless a class is certified, Defendant will retain monies received as a result of its conduct that was taken from Plaintiff and proposed Class members. Unless a class-wide

injunction is issued, Defendants will continue to commit the violations alleged, and the members of the Class and the general public will continue to be misled.

35. Defendants have acted and refused to act on grounds generally applicable to the Class, making appropriate final injunctive relief with respect to the Class as a whole.

FIRST CAUSE OF ACTION
Violation of Consumers Legal Remedies Act,
California Civil Code section 1750, *et seq.*
(On Behalf of Plaintiff and the Class against Defendants and Does 1 through 100)

36. Plaintiff incorporates by reference each and every allegation contained in the paragraphs above as if fully set forth here.

37. Plaintiff brings this claim individually and on behalf of the Class.

38. This cause of action is brought pursuant to the Consumers Legal Remedies Act, Civil Code, Section 1750, *et seq.* (the “Act”). Plaintiff is a consumer as defined by Civil Code, Section 1761(d). The additional service fee charged by Defendants are services within the meaning of the Act.

39. Defendants violated and continues to violate the Act by engaging in the following practices proscribed by Section 1770(a):

- (a) Failing to disclose the hidden and unauthorized fee for all purchases at their restaurants;
- (b) Failing to disclose the true price of their meals and/or drinks, as required by law; and
- (c) Advertising Defendants’ food and/or drink products with the intent not to sell them as advertised;

40. Defendants violated the Act by making the representations and claims for its products as described above when it knew, or should have known, that the representations and advertisements were unsubstantiated, false, and misleading.

41. Pursuant to Section 1782 of the Act, Plaintiff notified Defendants in writing by certified mail of the particular violations of Section 1770 of the Act and demanded that

1 Defendants rectify the problems associated with the actions detailed above and to give notice to
 2 all affected consumers of its intent to so act. A copy of the letter is attached as **Exhibit 1**.

3 42. Pursuant to Section 1782(d) of the Act, Plaintiff and the Class seek a Court order
 4 enjoining the above-described wrongful acts and practices.

5 43. Plaintiff has standing to bring an action pursuant to the CLRA on behalf of himself
 6 and the Class because Plaintiff and the members of the Class have sustained damages as a result
 7 of Defendants' wrongful conduct. Plaintiff is seeking the recovery of monetary damages. Pursuant
 8 to Section 1782 of the CLRA, Plaintiff notified Defendants in writing via certified mail (return
 9 receipt requested) of the particular violations of the CLRA described more fully above. In that
 10 writing, Plaintiff demanded that Defendants rectify the actions described above by, among other
 11 things, proving complete monetary relief and agreeing to cease the unlawful business practices
 12 alleged in this pleading. Although Defendants offered to partially reimburse Plaintiff for his
 13 individual damages, Defendants did not agree to rectify their actions pursuant to the written
 14 demand.

15 44. Defendants' conduct is malicious, fraudulent and wanton, and provides misleading
 16 information that deceives Class members into paying an undisclosed fee.

17 45. Plaintiff has incurred attorneys' fees and costs in connection with the investigation
 18 and filing of this Complaint and anticipates incurring additional attorneys' fees and costs in
 19 connection with the prosecution of this action. An award of attorneys' fees is, therefore,
 20 appropriate pursuant to, among other grounds, Civil Code, Section 1780(d).

21 46. Pursuant to Section 1780(d) of the Act, attached hereto as **Exhibit 2** is the affidavit
 22 showing that this action has been commenced in the proper forum.

23 **SECOND CAUSE OF ACTION**

24 **Violation of California's False Advertising Act Business & Professions Code §17500, *et seq.***

25 **(On Behalf of Plaintiff and the Class against Defendants and Does 1 through 100)**

26 47. Plaintiff repeats and re-alleges the allegations contained in the paragraphs above,
 27 as if fully set forth here.

48. Defendants failed to disclose to consumers the additional service fee for all purchases at their restaurants. Defendants misled consumers in that they failed to disclose the true price of their meals and/or drinks, as required by law.

49. Defendants engaged in unfair, deceptive, untrue or misleading advertising by omitting and failing to state that they charged an additional service fee on all purchases of meals and/or drinks in their restaurants.

50. Defendants disseminated or caused to be disseminated misleading advertising statements with the intent to either directly or indirectly induce members of the public, including Plaintiff and Class Members, to dine or to purchase food and/or drinks at their restaurants.

51. The facts Defendants misrepresented, concealed and failed to disclose to Plaintiff and the Class are material facts that a reasonable person would have considered important in deciding whether or not to purchase the product.

52. Defendants' advertisements and marketing statements regarding the price and true costs of the food and/or drinks at their restaurants were false, untrue, misleading, and deceptive as set forth above. Defendants knew or should have known that their failure to disclose the additional fee was misleading to customers who dined at their restaurants.

53. Plaintiff, individually and on behalf of all others similarly situated, demand judgment against Defendants for restitution, disgorgement, injunctive relief, and all other relief afforded under Business & Professions Code section 17500, plus interest, attorneys' fees and costs.

THIRD CAUSE OF ACTION
Violation of the Unfair Competition Law
Business & Professions Code §17200, *et seq.*
(On Behalf of Plaintiff and the Class against Defendants and Does 1 through 100)

54. Plaintiff repeats and re-alleges the allegations contained in the paragraphs above, as if fully set forth here.

55. Business & Professions Code Section 17200 prohibits any “unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.”

56. Defendants have violated Section 17200's prohibition against engaging in unlawful business acts and practices by actively and affirmatively misrepresenting material facts, as set forth more fully here, and violating, among other statutes, Civil Code Sections 1572, 1573, 1709, 1710, and 1711; and Business & Professions Code, Sections 17200 and 17500 *et seq.*

57. Plaintiff and the Class reserve the right to allege other violations of law which constitute other unlawful business acts or practices. Such conduct is ongoing and continues to this date.

58. Defendant's acts, omissions, misrepresentations, practices and non-disclosures as alleged here also constitute "unfair" business acts and practices within the meaning of Business & Professions Code Section 17200 *et seq.* in that its conduct is substantially injurious to consumers, offends public policy, and is immoral, unethical, oppressive, and unscrupulous as the gravity of the conduct outweighs any alleged benefits attributable to such conduct.

59. As stated in this Complaint, Plaintiff alleges violations of consumer protection, unfair competition and truth in advertising laws resulting in harm to consumers. Plaintiff asserts violations of the public policy of engaging in false and misleading advertising, unfair competition and deceptive conduct towards consumers.

60. There were reasonably available alternatives to further Defendants' legitimate business interests, other than the conduct described here. Defendants could have, and should have, disclosed up front their intent to raise the price of the food and beverage sold to account for increased labor costs. Defendants elected instead to recoup the costs of increased labor expenses while hiding that fact from their customers.

61. Defendants' nondisclosure and/or omission as more fully set forth above, were also misleading and/or likely to deceive the consuming public within the meaning of Business & Professions Code, Section 17200, and actually *did* deceive Plaintiff.

62. As a result of Defendants' misrepresentations and nondisclosure, Plaintiff and the Class members lost money or property because they were charged the additional undisclosed fees that were automatically added. Had Plaintiff and Class members known that Defendants were

charging the additional fee, they would not have gone to Defendants restaurant, would have reduced their orders to stay with budget, or would have asked for a discount or waiver of the fee.

63. Defendants' conduct cause and continues to cause substantial injury to Plaintiff and the other Class Members. Plaintiff and Class Members have suffered injury in fact and have lost money as a result of Defendants' wrongful conduct.

64. Defendants have thus engaged in unlawful, unfair, and fraudulent business acts and practices and false advertising, entitling Plaintiff to judgment, restitution, and other equitable relief against Defendants, as set forth in the Prayer for Relief.

65. Additionally, pursuant to Business & Professions Code, Section 17203, Plaintiff seeks an order requiring Defendants to immediately cease such acts of unlawful, unfair and fraudulent business practices and requiring Defendants to engage in a corrective advertising campaign. Plaintiff also seeks, on behalf of himself and the class, all allowable interest, costs, and attorneys' fees.

FOURTH CAUSE OF ACTION

Unjust Enrichment

(On Behalf of Plaintiff and the Class against Defendants and Does 1 through 100)

66. Plaintiff repeats and re-alleges the allegations contained in the paragraphs above, as if fully set forth here.

67. Defendants have been unjustly enriched because they knowingly gained and retained money in an inequitable manner at the expense of their customers and are thus accountable to the Plaintiff and Class Members to restore such money, and are holding in constructive trust such monies for the benefit of Plaintiff and the Class.

68. Defendant may not in good conscience and equity retain the benefits from their wrongful conduct and those monies belong instead to Plaintiff and members of the Class.

69. Plaintiff requests individually, and on behalf of the Class Members, that Defendants be required to disgorge all amounts wrongfully and unjustly obtained and be enjoined from continuing their deceptive acts and practices.

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PRAYER FOR RELIEF

Plaintiff, on behalf of himself and the Class, prays for judgment against Defendants, as follows:

1. Certifying the Class as requested here;
2. Awarding Plaintiff and the proposed Class Members damages, where and when appropriate;
3. Awarding restitution and disgorgement of Defendants' ill-gotten gains to Plaintiff and the proposed Class Members where and when appropriate;
4. Awarding declaratory and injunctive relief as permitted by law or equity, including: enjoining Defendants from continuing the unlawful, unfair, and deceptive practices as set forth here;
5. Awarding attorneys' fees, interest, and costs; and
6. Providing such further relief as may be just and proper.

JURY DEMAND


Plaintiff hereby demands a trial by jury.

Respectfully submitted,

NICHOLAS & TOMASEVIC, LLP

Dated: July 13, 2016

By:



Craig M. Nicholas
Lacy Wells
Attorneys for Plaintiff