

II. BASIS FOR REMOVAL: CLASS ACTION FAIRNESS ACT

A class action may be removed under the Class Action Fairness Act (“CAFA”) when: (1) there is minimal diversity (*i.e.*, the citizenship of at least one plaintiff is diverse from the citizenship of at least one defendant), 28 U.S.C. § 1332(d)(2); (2) there are at least 100 putative class members, 28 U.S.C. § 1332(d)(5)(B); (3) the amount in controversy based upon the class members’ aggregated claims exceeds \$5 million exclusive of interest and costs, 28 U.S.C. § 1332(d)(2); (4) the primary defendants are not states, state officials, or other governmental entities against whom the district court may be prevented from ordering relief, 28 U.S.C. § 1332(d)(5)(A); and (5) the 30-day deadline for removal is met, 28 U.S.C. § 1446(b).

A. “Minimal” Diversity Exists.

“Minimal diversity” means that “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). Plaintiff Brian H. Burden is a citizen of Tarrant County, Texas because he is domiciled there.² *See Preston v. Tenet Healthsystem Mem’l Med. Ctr.*, 485 F.3d 793, 797-98 (5th Cir. 2007). Costa is a Florida Corporation with its principal place of business in Daytona Beach, Florida. Thus, “minimal” diversity exists between the parties.

B. The Putative Class Consists of More Than 100 Members.

Plaintiff asserts that the “Class is composed of thousands of persons geographically dispersed throughout the State of Texas.” Complaint ¶ 45.

C. The Aggregate Amount in Controversy Exceeds \$5,000,000.

CAFA provides that the claims of the individual members in a class action are aggregated to determine if the amount in controversy exceeds the sum or value of \$5,000,000. *See* 28 U.S.C. § 1332(d)(6). Federal jurisdiction is appropriate under CAFA if, in the aggregate, “the

² *See* Exhibit 1 ¶ 7.

value of the matter in litigation exceeds \$5,000,000 either from the viewpoint of the plaintiff or the viewpoint of the defendant, and regardless of the type of relief sought (e.g., damages, injunctive relief, or declaratory relief).” Senate Judiciary Report, S. Rep. No. 109-14, at 42 (2005).

It is well settled that in determining the amount in controversy for removal purposes, the Court may consider compensatory damages, attorney’s fees, treble damages, and injunctive relief. *See, e.g., Foret v. Southern Farm Bureau Life Ins. Co.*, 918 F.2d 534, 537 (5th Cir. 1990) (“[A]ttorney’s fees may be included in determining the jurisdictional amount.”); *Wilson v. Hibu Inc.*, No. 3:13–CV–2012–L, 2013 WL 5803816, at *3 (N.D. Tex. Oct. 28, 2013) (considering “various categories of compensatory damages” including punitive damages); *Gene And Gene LLC v. BioPay LLC*, 541 F.3d 318, 324 (5th Cir. 2008) (taking into consideration the possibility of treble damages to determine the amount in controversy under CAFA); *Leininger v. Leininger*, 705 F.2d 727, 729 (5th Cir.1983) (considering injunctive relief for amount in controversy purposes as “the value of the right to be protected or the extent of the injury to be prevented.”).

In this matter, Plaintiff has requested compensatory and treble damages, along with injunctive relief and attorney’s fees. As discussed below, these categories of relief place more than \$5 million in controversy. Although discussed for purposes of this removal, as to each of the below damages and relief claimed by Plaintiff, Costa does not concede and expressly reserves the right to challenge Plaintiff’s theory of liability and damages. *See Robertson v. Exxon Mobil Corp.*, 814 F.3d 236, 240 (5th Cir. 2015) (internal citations omitted) (the required demonstration of the amount in controversy concerns “everything [the plaintiff] seeks,” not only what “the plaintiff is likely to win”); *see also see also Carter v. Westlex Corp.*, 643 F. App’x 371,

376 (5th Cir. 2016) (the “maximum amount” of possible damages may be included in amount in controversy calculations.).

1. Actual damages

Plaintiff asserts that the putative class contains “thousands of persons.” Compl. ¶ 45. If Plaintiff’s claim is at all typical of the claims of the absent class members, as Plaintiff alleges, Compl. ¶ 45, the amount in controversy is clearly met. Plaintiff’s argument centers on the assertion that he and the purported class members were deprived of the “benefit of their bargain” when they bought Costa’s sunglasses by paying “more for a product that was falsely warranted and represented than they would have paid had the product not been falsely warranted and represented.” Compl. ¶¶ 36, 60. Plaintiff further asserts that the purported class members “paid more than nominal fees for replacement and/or repair, contrary to the warranty.” Compl. ¶ 60. In essence, Plaintiff argues that he, along with similarly situated class members, (i) paid more for Costa sunglasses than they would have otherwise paid because the Costa sunglasses had less value as a result of the falsely represented warranty, and (ii) paid more for repairs than they otherwise should have paid.

Based upon these allegations and the pertinent repair data discussed in the declaration of Felicia Morrisey filed in connection with this Notice, the \$5 million jurisdictional minimum is met, without considering any of the other damages or relief sought by Plaintiff. *See* F. Morrisey Decl. ¶ 7; *see e.g., Carter*, 643 F. App’x at 376 (accepting defendants’ calculation of damages to satisfy CAFA’s amount in controversy where plaintiffs alleged general damages without specifying a certain computation of individualized damages). As indicated above, it is important to note that the numbers reflected in Ms. Morrisey’s declaration represent an estimate of the possible relief Plaintiff requests, not an affirmation by Costa as to Plaintiff’s theory of liability or that the Court should award any damages. Therefore, as pled, Plaintiff’s Complaint seeks

compensatory damages in excess of \$5 million thereby satisfying CAFA's jurisdictional minimum.

2. Plaintiff's request for treble damages.

Plaintiff also requests treble damages under the DTPA. It is well settled that treble damages are appropriate for consideration by the Court to determine the CAFA jurisdictional amount in controversy. *See e.g., BioPay*, 541 F.3d at 324 (treble damages used as a basis for CAFA amount in controversy calculation). As reflected in Ms. Morrissey's Declaration, this request for treble damages further reduces the per class member amount needed to satisfy the amount in controversy. Accordingly, while Costa denies Plaintiff or the purported class are entitled to treble damages, Plaintiff's request for treble damages further substantiates jurisdiction in this Court as the claims exceed the \$5 million CAFA threshold. *See F. Morrissey Decl.* ¶ 7.

3. Plaintiff's request for injunctive relief.

"In actions seeking declaratory or injunctive relief the amount in controversy is measured by the value of the object of the litigation." *Leininger v. Leininger*, 705 F.2d 727, 729 (5th Cir. 1983). In other words, "[t]he amount in controversy, in an action for declaratory or injunctive relief, is the value of the right to be protected or the extent of the injury to be prevented." *St. Paul Reinsurance Co., Ltd. v. Greenberg*, 134 F.3d 1250, 1252-53 (5th Cir. 1998). Here, Plaintiff requests injunctive relief to bar "Costa from continuing to falsely and deceptively advertise and label its sunglasses to the public." Compl. ¶ 62.

Although Costa strongly opposes any insinuation that it falsely and deceptively labeled its sunglasses, if the Court were to award Plaintiff's injunctive relief, it would present Costa with an enormous financial and logistical burden. *See F. Morrissey Decl.* ¶¶ 8-9. Costa would not only be required to recall its innumerable packaging materials already in circulation, it would be required to develop new packaging and replace packaging already in inventory at thousands of

retailers. *See id.* Aggregating this amount with Plaintiff's requested compensatory and treble damages results in a sum well over the \$5 million jurisdictional minimum.

4. Plaintiff's request for attorney fees.

Plaintiff's Complaint also contains a claim for attorney fees, which can be considered in the amount in controversy. *See, e.g., Grant v. Chevron Phillips Chem. Co.*, 309 F.3d 864, 873-74 (5th Cir. 2002) (holding attorney fees are included in the amount-in-controversy calculation); *Foret v. S. Farm Bureau Life Ins. Co.*, 918 F.2d 534, 537 (5th Cir. 1990) (attorney fees may also be added to meet jurisdictional amount if applicable state law permits recovery of such fees). In determining the amount of attorneys' fees in controversy for purposes of CAFA, courts within the Fifth Circuit have applied an attorneys' fees estimate of 20% of total damages. *See Laffin v. Nat'l Football League*, Nos. 3:11-CV-0345-M; 3:11-CV-248, 2011 WL 1396887, at *2 (N.D. Tex. Apr. 12, 2011); *see also Greco v. Jones*, 992 F. Supp. 2d 693, 699 (S.D. Tex. 2014) (using attorneys' fees of 20% of potential damages award to satisfy amount in controversy under "mass action" provision of CAFA).

Without conceding Plaintiff is entitled to attorney's fees, the amount that Plaintiff has placed in controversy increases significantly more than the CAFA jurisdictional minimum. Even if a pure lodestar approach is used, it is reasonable to assume that Plaintiff's counsel will incur significant attorneys' fees through the life of this case, thereby further increasing the amount in controversy above the \$5,000,000 minimum under CAFA.

D. The Defendant Is Not a State or State Official.

Costa, the only defendant named in this action, is not a state or state official.

E. Removal Is Timely.

Costa removed this action within 30 days of being served with the summons and complaint.

III. THE PROCEDURAL REQUIREMENTS HAVE BEEN SATISFIED

Removal of this action is timely under 28 U.S.C. § 1446(b) because counsel for Costa agreed to accept service on October 16, 2017, and as a result, thirty (30) days have not expired since service has taken place. Notice has been sent to the state court regarding the removal of this action. Pursuant to 28 U.S.C. § 1446(a), copies of all process, pleadings, and orders served in the State Court Action, including the Complaint, are attached hereto within the contents of Exhibit 1-2.

WHEREFORE, Costa respectfully requests that the above-captioned action now pending in State Court be removed to this United States District Court.

Dated: November 15, 2017

Respectfully submitted,

/s/ Justin Opitz

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2017, a copy of the foregoing was served via certified mail, return receipt requested, as follows:

CERTIFIED MAIL/RRR

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