

1 LOEB & LOEB LLP
PATRICK N. DOWNES (SBN 186461)
2 pdownes@loeb.com
MEREDITH J. SILLER (SBN 278293)
3 msiller@loeb.com
10100 Santa Monica Blvd., Suite 2200
4 Los Angeles, CA 90067
Telephone: 310.282.2000
5 Facsimile: 310.282.2200

6 PILLSBURY WINTHROP SHAW PITTMAN LLP
ROBERT L. WALLAN (SBN 126480)
7 robert.wallan@pillsburylaw.com
725 South Figueroa Street, Suite 2800
8 Los Angeles, CA 90017
Telephone: 213.488.7100
9 Facsimile: 213.629.1033

10 ATTORNEYS FOR DEFENDANT
11 LENNY & LARRY'S INC.

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA

14 ODESSA WILEY and RENE HORSCH,
individually and on behalf of all others similarly
15 situated,

16 Plaintiffs,

17 v.

18 LENNY & LARRY'S INC., a California
corporation; and DOES 1-50,

19 Defendants.
20

Case No.: 3:16-cv-2727

**NOTICE OF REMOVAL OF CIVIL
ACTION TO FEDERAL COURT BY
DEFENDANT LENNY & LARRY'S
INC.**

Complaint Filed: May 18, 2015
Amended Complaint Filed: May 17, 2016

21
22
23
24
25
26
27
28

1 TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR
2 THE NORTHERN DISTRICT OF CALIFORNIA, PLAINTIFFS ODESSA WILEY AND RENÉ
3 HORSCH, AND TO THEIR ATTORNEYS OF RECORD, TINA WOLFSON, ESQ., ROBERT
4 AHDOOT, ESQ., KEITH CUSTIS, ESQ., THEODORE W. MAYA, ESQ., AND AHDOOT &
5 WOLFSON, P.C.:

6 PLEASE TAKE NOTICE that Defendant LENNY & LARRY’S INC. (“Defendant” or
7 “Lenny & Larry’s”) hereby removes this action from the Superior Court of the State of California,
8 County of San Francisco, to the United States District Court for the Northern District of California.
9 Defendant removes this action pursuant to 28 U.S.C. §§ 1332 (as amended by the Class Action
10 Fairness Act of 2005), 1441, 1446, and 1453, based on the following:

11 DEFENDANT’S NOTICE OF REMOVAL IS TIMELY, AND
12 VENUE IS PROPER IN THIS DISTRICT COURT

13 1. On May 18, 2015, Plaintiff Odessa Wiley (“Wiley”) filed a Complaint in the
14 Superior Court of the State of California for the County of San Francisco (“Superior Court”),
15 entitled “ODESSA WILEY, individually and on behalf of all others similarly situated, Plaintiff, v.
16 LENNY & LARRY’S INC., a California corporation; and DOES 1-50, Defendants. [,]” designated
17 as Case No. CGC15-545875 (the “Complaint” or “Compl.”). The Complaint alleged that Wiley
18 purchased four varieties of products from Defendant, and on that basis asserted the following
19 causes of action on behalf of a nationwide putative class of consumers: (1) “Breach of Express
20 Warranty”; (2) “Violation of California Consumers Legal Remedies Act, California Civil Code §
21 1750, *et seq.*”; and (3) “Violation of California Unfair Competition Law, California Business &
22 Professions Code § 17200, *et seq.*”

23 2. A copy of the Summons and Complaint was filed and thereafter served on Lenny &
24 Larry’s on May 21, 2015. *See* Declaration of Marcie Crouch (“Crouch Decl.”) ¶ 2. On July 15,
25 2015, Lenny & Larry’s filed its Answer to Class Action Complaint (“Answer”). The Summons
26 and Complaint and Lenny & Larry’s Answer are attached to the Crouch Decl. as **Exhibit A**.

27 3. On May 17, 2016, Wiley filed a First Amended Complaint (“FAC”) in the Superior
28 Court, significantly broadening the allegations by adding named Plaintiff René Horsch (“Horsch”)

1 who alleges that she purchased the large majority of Defendant’s product line. (Hereinafter Wiley
2 and Horsch are collectively referred to as “Plaintiffs”). A true and correct copy of the FAC is
3 attached to the Declaration of Robert L. Wallan (“Wallan Decl.”), ¶ 2, as **Exhibit A**. The FAC
4 states that Horsch “has purchased all varieties of Defendant’s All Natural Complete Cookies and
5 certain varieties of Defendant’s ‘All Natural’ Muscle Brownies, most varieties of Defendant’s All
6 Natural Muscle Muffins” at numerous retailers in California, New York, and Illinois. FAC at ¶ 79.
7 In contrast to Wiley’s purchase of four products in San Francisco County (¶ 74), Horsch alleges to
8 have purchased more than a dozen types of products on multiple occasions across the country.
9 This dramatically expands and increases the proposed Nationwide Class as defined in Paragraph 85
10 of the FAC.

11 4. Doe Defendants 1 through 50 are unnamed and unknown, and therefore have not
12 been served with either the initial Complaint or the FAC. *See* Compl. ¶ 18; FAC ¶ 19.

13 5. Lenny & Larry’s has not yet filed an answer or other pleading in response to the
14 FAC. *See* Wallan Decl. ¶ 3.

15 6. The Summons, Complaint, and FAC constitute “all process [and] pleadings...
16 served upon [Lenny & Larry’s]” to date. 28 U.S.C. § 1446(a). There have been no orders entered
17 with respect to the state court case. *See* Wallan Decl. ¶ 4.

18 7. Lenny & Larry’s removal of this nationwide class action, as pled in the FAC, is
19 timely. *See* 28 U.S.C. § 1446(b) (notice of removal is timely if filed “within 30 days after receipt
20 by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or
21 other paper from which it may first be ascertained that the case is one which is or has become
22 removable”).

23 8. Venue is proper in this District pursuant to 28 U.S.C. § 1441(a) because the
24 Superior Court where this action was pending is located within this District.

25 9. This action is one over which this Court has original jurisdiction under the
26 provisions of 28 U.S.C. § 1332, and is properly removed to this Court pursuant to 28 U.S.C. §§
27 1441, 1446, and 1453, on the grounds set forth below.

28

1 THIS CASE IS PROPERLY REMOVED TO FEDERAL COURT UNDER
2 THE CLASS ACTION FAIRNESS ACT OF 2005

3 10. This action is properly removed to this Court under the rules for diversity of
4 citizenship jurisdiction under the Class Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. §§
5 1332(d) and 1453, for the following reasons.

6 11. CAFA Requirements. Under the CAFA statute, a district court has original
7 jurisdiction of a putative class action if: (a) there are at least 100 individuals who fall within the
8 proposed class; (b) there is “minimal diversity” between the parties (*i.e.*, any putative class member
9 is a citizen of a state that is different from that of any defendant); and (c) the amount in controversy
10 exceeds \$5,000,000, exclusive of interest and costs. *See* 28 U.S.C. §§ 1332(d)(2), (d)(5)(B).

11 12. The Number Of Putative Class Members Exceeds 100. Plaintiffs seek to represent
12 California and nationwide putative classes consisting, respectively, of “[a]ll persons residing in
13 California who, from the date that is four years prior to the filing of this Complaint until the date
14 notice is disseminated to the Class, purchased any of the Products (the “California Class”)” and
15 “[a]ll persons residing in the United States who, from the date that is four years prior to the filing
16 of this Complaint until the date notice is disseminated to the Class, purchased any of the Products
17 (the “Nationwide Class”).” FAC ¶¶ 85-86. The two named Plaintiffs alone claim to have
18 purchased over a dozen types of products across the country. Plaintiffs allege that “many
19 thousands or millions of consumers have purchased the Products” at issue. *Id.* ¶ 89. This
20 allegation alone is sufficient to establish that the class is sufficiently numerous, for purposes of
21 CAFA jurisdiction. *See, e.g., Kuxhausen v. BMW Financial Services NA LLC*, 707 F.3d 1136,
22 1140 (9th Cir. 2013) (allegation in complaint that plaintiff was seeking to “provide remedies for
23 hundreds of affected consumers” was sufficient to establish that CAFA’s numerosity requirement
24 was met; “No investigation . . . or ‘further inquiry’ was necessary for [defendant] to understand
25 that ‘hundreds,’ by definition, means at least 200”); *Tompkins v. Basic Research LL*, 2008 WL
26 1808316, at *3 (E.D. Cal. Apr. 22, 2008) (CAFA numerosity satisfied because allegation
27 referencing “a class of ‘thousands of persons’” implies “a logical minimum of 2,000 class
28 members”).

1 13. There Is Minimal Diversity Between The Parties. Under CAFA, Lenny & Larry’s
2 need only show that “*any* member” of the putative class “is a citizen of a State different from any
3 defendant.” 28 U.S.C. § 1332(d)(2)(A) (emphasis added).

4 (a) Lenny & Larry’s is now, and was at the time this action was commenced, a
5 citizen of the state of California, within the meaning of 28 U.S.C. § 1332(c)(1). *See, e.g., Johnson*
6 *v. Columbia Props. Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006) (“[A] corporation is a
7 citizen only of (1) the state where its principal place of business is located, and (2) the state in
8 which it is incorporated.”); *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1192 (2010) (“[I]n practice [a
9 company’s ‘principal place of business’] should normally be the place where the corporation
10 maintains its headquarters . . . ”); Croutch Decl., ¶ 3 (Lenny & Larry’s is incorporated and exists
11 under the laws of the State of California; the Company’s headquarters are located in California);
12 *see also* FAC ¶ 18 (“Defendant Lenny & Larry’s, Inc. is a California Corporation with its principal
13 place of business located in Northridge, California.”).

14 (b) Based on Plaintiffs’ own allegations, the putative class consists of “[a]ll
15 *persons residing in the United States* who . . . purchased any of the Products” which includes
16 individuals who are citizens of states other than California. *Id.* ¶ 86 (emphasis added).

17 (c) The citizenship of defendants sued as “Does” is disregarded for purposes of
18 removal under 28 U.S.C. § 1441. Thus, because at least one of the putative class members “is a
19 citizen of a State different from [that of the] defendant,” CAFA’s minimum diversity requirement
20 is met. 28 U.S.C. § 1332(d)(2)(A).

21 14. The Amount In Controversy Exceeds \$5,000,000. Without admitting any liability to
22 Plaintiffs or the putative class members, or otherwise conceding the merit of any of the claims set
23 forth in Plaintiffs’ FAC, the amount in controversy exceeds CAFA’s jurisdictional threshold of
24 \$5,000,000, as set forth below.

25 (a) Under CAFA, the putative class members’ claims are aggregated to
26 determine whether the amount in controversy exceeds the threshold “sum or value of \$5,000,000,
27 exclusive of interest and costs.” 28 U.S.C. §§ 1332(d)(2), (d)(6).

28

1 (b) For purposes of removal, the amount in controversy is simply “an *estimate*
2 of the total amount in dispute, not a prospective assessment of defendant's liability.” *Lewis v.*
3 *Verizon Communications, Inc.*, 627 F.3d 395, 400 (9th Cir. 2010) (emphasis added). The removing
4 defendant’s burden “is not ‘daunting,’” and “a removing defendant is not obligated to ‘research,
5 state, and prove the plaintiff's claims for damages.’” *Coleman v. Estes Express Lines, Inc.*, 730 F.
6 Supp. 2d 1141, 1148 (C.D. Cal. 2010) (quoting *Muniz v. Pilot Travel Centers LLC*, 2007 WL
7 1302504, at *2 (E.D. Cal. May 1, 2007)) (emphasis in original). Moreover, under 28 U.S.C. §
8 1446(a), a notice of removal need only contain a “short and plain statement of the grounds for
9 removal.” 28 U.S.C. § 1446(a). Based on this language, the United States Supreme Court has held
10 that a notice of removal need only include a “*plausible allegation* that the amount in controversy
11 exceeds the jurisdictional threshold” – the notice “need not contain evidentiary submissions.” *Dart*
12 *Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 551, 554 (Dec. 15, 2014) (emphasis
13 added).

14 (c) In the FAC, Plaintiffs allege that certain products made by Lenny & Larry’s
15 contained “false” and “misleading” labeling in violation of California law. FAC ¶¶ 65-73.
16 Plaintiffs maintain, among other things, that they and the putative class members “would not have
17 purchased the Products, would not have paid as much for the Products, or would have purchased
18 alternative products in the absence of the representations” being challenged in this lawsuit. *Id.* ¶¶
19 76, 81. Plaintiffs seek, among other things, “full restitution of all monies paid by Plaintiffs and all
20 Class members...including, but not limited to, disgorgement of all profits derived from the sale of
21 the Products” *Id.* ¶ 120 (emphasis added).

22 (d) During the relevant time period of May 18, 2011 through May 18, 2015, net
23 sales of the subject products throughout the United States (*i.e.*, the geographical area covered by
24 Plaintiffs’ proposed class definition) have exceeded \$5,000,000. *See* Crutch Decl., ¶ 6. Thus,
25 Plaintiff’s claims for damages and restitution (FAC ¶ 120) establish that for purposes of CAFA, in
26 excess of \$5,000,000 is in controversy. *See Watkins v. Vital Pharmaceuticals, Inc.*, 720 F.3d 1179,
27 1181-82 (9th Cir. 2013) (declaration stating that the removing defendant’s “total sales exceeded \$5
28

1 million” was “sufficient to establish that CAFA’s \$5 million amount in controversy requirement is
2 met.”).

3 (e) In addition to the claims for damages and restitution referenced in paragraph
4 120 above, Plaintiff also seeks to recover an award of attorneys’ fees and punitive damages. FAC
5 at Prayer for Relief ¶¶ B, C, F, G. These amounts are also properly included in the amount in
6 controversy. *See, e.g., Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1155-56 (9th Cir. 1998)
7 (“[W]here an underlying statute authorizes an award of attorneys’ fees, either with mandatory or
8 discretionary language, such fees may be included in the amount in controversy.”); *Goldberg v.*
9 *CPC Int’l, Inc.*, 678 F.2d 1365, 1367 (9th Cir. 1982) (attorneys’ fees may be taken into account in
10 determining jurisdictional amount); *Bell v. Preferred Life Assur. Soc’y*, 320 U.S. 238, 240 (1943)
11 (“Where both actual and punitive damages are recoverable under a complaint, each must be
12 considered to the extent claimed in determining jurisdictional amount.”).

13 Thus, Lenny & Larry’s has established that the amount in controversy exceeds CAFA’s
14 jurisdictional threshold of \$5,000,000.

15 15. Pursuant to 28 U.S.C. § 1446(a), copies of all state court pleadings and process
16 served on Lenny & Larry’s to date are attached as **Exhibit A** to the Croutch Decl. and **Exhibit A** to
17 the Wallan Decl. There have been no orders entered with respect to the state court case. See
18 Wallan Decl. ¶ 4.

19 16. Pursuant to 28 U.S.C. § 1446(d), the undersigned counsel certifies that a copy of
20 this Notice of Removal and all supporting papers will be promptly served on Plaintiffs’ counsel
21 and filed with the Clerk of the Superior Court. True and correct copies of the Notice to Adverse
22 Party of Removal of Civil Action and the Notice to Superior Court of Removal of Civil Action are
23 attached to the Wallan Decl. as **Exhibits B** and **C**, respectively.

24 Accordingly, Lenny & Larry’s respectfully submits that this action is properly removed to
25 this Court, pursuant to the CAFA statute and other authorities outlined above.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: May 19, 2016

LOEB & LOEB LLP
PATRICK N. DOWNES
MEREDITH J. SILLER

PILLSBURY WINTHROP SHAW PITTMAN LLP
ROBERT L. WALLAN

By: /s/ Robert L. Wallan
Robert L. Wallan
Attorneys for Defendant
LENNY & LARRY'S INC.