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7

8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10
11 MIGUEL OLMEDO, and SIOBHAN
MORROW on behalf of themselves and
12 all others similarly situated,

13 Plaintiffs,

14 v.

15 PVH RETAIL STORES LLC, a Delaware
Limited Liability Company, and DOES 1-
16 20,

17 Defendants.

Case No. 3:18-cv-01373-BEN-JLB

**DEFENDANT PVH RETAIL
STORES LLC'S NOTICE OF
REMOVAL OF ACTION (28 U.S.C.
§§ 1332 (d), 1441, 1446 AND 1453(b));
DEMAND FOR JURY TRIAL**

(Removed from San Diego Superior
Court Case No. 37-2018-00019565-CU-
MC-CTL)

18
19 TO PLAINTIFFS MIGUEL OLMEDO, SIOBHAN MORROW AND THEIR
20 ATTORNEYS OF RECORD, AND TO THE CLERK OF THE ABOVE-ENTITLED
21 COURT:

22 PLEASE TAKE NOTICE that Defendant PVH Retail Stores LLC (“PVH
23 Retail”), the defendant in this action which was originally commenced in the Superior
24 Court of the State of California in and for the County of San Diego (San Diego
25 Superior Court as Case No. 37-2018-00019565-CU-MC-CTL, hereby invokes the
26 removal jurisdiction of the United States District Court for the Southern District of
27 California pursuant to 28 U.S.C. §§ 1332, 1441, 1446, and 1453, asserting original
28 federal jurisdiction under 28 U.S.C. § 1332(d)(2) and 1453(b). This Court has

1 original jurisdiction over this action pursuant to the Class Action Fairness Act of 2005
2 (“CAFA”) for the following reasons:

3 **STATEMENT OF THE CASE**

4 1. This action is related to a prior lawsuit filed on February 10, 2016 by one
5 of the plaintiffs in this action, Plaintiff Siobhan Morrow (“Morrow”), entitled *Morrow*
6 *v. PVH Corp., PVH Retail Stores LLC, Calvin Klein, Inc., and Tommy Hilfiger*
7 *Wholesale, Inc.*, United States District Court for the Southern District of California
8 Case No. 3:16-cv-00348-L-RBB (the “Prior Related Action). The Prior Related
9 Action was assigned to The Hon. M. James Lorenz, United States District Judge.

10 2. The complaint in the Prior Related Action alleged, *inter alia*, that: (i) on
11 November 13, 2015, Morrow purchased a black tee shirt and a black polo shirt from a
12 Tommy Hilfiger factory outlet store located in San Ysidro, California; (ii) the items
13 were advertised as having originally been priced at, respectively, \$33.99 and \$59.40;
14 (iii) PVH Retail’s advertising represented that these purported original prices were
15 being discounted by approximately “50% off”; (iv) Morrow purchased the items in
16 reliance on the representations by PVH Retail; and (v) the representations were false
17 and deceptive as the items had never actually been offered for sale at the \$33.99 and
18 \$59.40 advertised “original” prices. Based upon these allegations, Morrow,
19 individually and on behalf of a class of similarly situated customers who made
20 purchases at Tommy Hilfiger factory outlet stores in California, sued PVH Retail for
21 alleged violation of California’s False Advertising Law (the “FAL”), Unfair
22 Competition Law (the “UCL”) and Consumer Legal Remedies Act (the “CLRA”).
23 Morrow’s complaint in the Prior Related Action also made similar allegations against
24 Calvin Klein, Inc, in connection with one item Morrow alleged she had purchased at a
25 Calvin Klein factory outlet store in San Ysidro, California on the same day.

26 3. In paragraph 7 of the complaint in the Prior Related Action, Morrow
27 alleged that:
28

1 7. This Court has original jurisdiction of this Action pursuant
2 to the Class Action Fairness Act, 28 U.S.C §1332 (d) (2). The matter in
3 controversy, exclusive of interest and costs, exceeds the sum or value of
4 \$5,000,000 and at least some members of the proposed Class have a
5 different citizenship from Defendants.

6 4. In paragraph 30 of the complaint in the Prior Related Action, Morrow
7 alleged that:

8 30. *Numerosity:* The class members are so numerous that
9 joinder of all members is impractical. Plaintiff is informed and believes
10 that the proposed Class contains hundreds of thousands of individuals
11 who have been damaged by Defendants’ conduct as alleged herein. The
12 precise number of Class members is unknown to Plaintiff.

13 5. Morrow stipulated to file an amended complaint in the Prior Related
14 Action, but failed to do so. The Prior Related Action was dormant until June 28,
15 2017, when the District Court issued an Order to Show Cause regarding dismissal for
16 lack of prosecution, and set a hearing date for July 31, 2017. On July 28, 2017,
17 Morrow voluntary dismissed the Prior Related Action without prejudice.

18 6. On April 18, 2018, Morrow and Plaintiff Miguel Olmedo (“Olmedo”)
19 (collectively “Plaintiffs”) filed their initial class action Complaint in this action. With
20 four exceptions, Morrow’s charging allegations in the Complaint in this action were
21 essentially similar to her allegations in her complaint in the Prior Related Action.

22 7. As in the Prior Related Action, the initial Complaint in this action alleged
23 that, on November 13, 2015, Morrow purchased a black tee shirt and a black polo shirt
24 from a Tommy Hilfiger factory outlet store located in San Ysidro, California.
25 Morrow alleged again that the items she purchased had not been sold at the ticketed
26 “reference” prices within the immediately preceding 90 days in violation of the FAL,
27 the UCL and the CLRA. However, unlike the complaint in the Prior Related Action,
28 the Complaint in this action: (i) named Tommy Hilfiger Wholesale, Inc., rather than

1 PVH Retail, as the defendant; (ii) alleged that the two shirts Morrow purchased were
2 advertised as having originally been priced at “approximately \$27.00 to \$29.00” and
3 “approximately \$49.50” rather than \$33.99 and \$59.40; (iii) alleged that the
4 discounted price paid by Morrow was a 40% discount off the reference price, rather
5 than a 50% discount; and (iv) because the Complaint was filed in Superior Court,
6 rather than in United States District Court, omitted the jurisdictional allegations in the
7 Prior Related Action that the matter in controversy, exclusive of interest and costs,
8 exceeds the sum or value of \$5,000,000 and there are “hundreds of thousands” of
9 unnamed class members. Complaint at ¶¶ 12, 13.

10 8. The initial Complaint in this action also joined a second named plaintiff,
11 Olmedo, who made similar allegations and claims with respect to a polo shirt he
12 purportedly purchased on an unspecified date at a Tommy Hilfiger factory outlet store
13 in Commerce, California. Complaint at ¶ 14.

14 9. The initial Complaint in this Action was not removable inasmuch as it
15 alleged that Plaintiffs and the defendant named in that pleading, Tommy Hilfiger
16 Wholesale, Inc., were all California residents. Complaint at ¶¶ 12, 14, 15.

17 10. Plaintiffs’ counsel agreed to voluntarily dismiss Tommy Hilfiger
18 Wholesale, Inc.

19 11. On May 21, 2018, Plaintiffs filed a First Amended Class Action
20 Complaint (the “FAC”) naming PVH Retail as defendant in place and instead of
21 Tommy Hilfiger Wholesale, Inc. The FAC alleges that Plaintiffs are California
22 resident, and PVH Retail is “a Delaware limited liability company with its principal
23 place of business in New York, New York.” FAC at ¶¶ 12, 14, 15. Accordingly,
24 based on the face of the FAC, there is complete diversity between Plaintiffs and PVH
25 Retail. Apart from naming PVH Retail as defendant, the balance of the FAC’s
26 allegations are essentially similar to the allegations in the Complaint.

27 12. Plaintiffs seek to certify a class of “[a]ll California residents who, within
28 the applicable statute of limitations and going forward from the date of filing this

1 complaint (“Class Period”), purchased any product bearing a false Reference Price at
2 one of Tommy Hilfiger’s outlet or factory stores located in the State of California.”
3 FAC at ¶ 31.

4 13. Plaintiffs, on behalf of themselves and the alleged class, seek “restitution
5 and disgorgement of all profits and unjust enrichment that Defendants obtained from
6 Plaintiffs and the Class members as a result of its unlawful, unfair and fraudulent
7 business practices[,]” declaratory relief, injunctive relief (including a “corrective
8 advertising campaign”), and statutory attorneys’ fees and costs. FAC ¶¶ 8, 58 &
9 Prayer for Relief. The complaint also alleges that Plaintiffs may seek actual, punitive
10 and statutory damages. FAC ¶¶ 8, 69.

11 14. On or about May 24, 2018, the designated agent for service of process for
12 PVH Retail received by certified mail a 30-day CLRA notice and demand letter dated
13 May 21, 2018 from counsel for Plaintiffs accompanied by a copy of the FAC.

14 15. On or about June 6, 2018, Plaintiffs served a copy of the Summons and
15 FAC on PVH Retail.

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

17 16. CAFA was enacted “to facilitate adjudication of certain class actions in
18 federal court.” *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 537, 554
19 (2014). As the Supreme Court recently has held, there is no presumption against
20 removal and the statute’s provisions “should be read broadly, with a strong preference
21 that interstate class actions should be heard in a federal court if properly removed by
22 any defendant.” *Id.* (internal quotation and citation omitted).

23 17. With respect to a defendant’s burden in seeking to remove a case to
24 federal court, defendant’s notice of removal need only include “a short and plain
25 statement of the grounds for removal.” *Dart*, 135 S. Ct. at 553. “Congress . . .
26 intended to simplify the pleading’ requirements for removal and to clarify that courts
27 should apply the same liberal rules to removal allegations that are applied to other
28 matters of pleading.” *Id.* (internal quotation omitted). In determining whether the

1 requirements of removal have been satisfied, this Court may also rely upon the
 2 allegations of Plaintiff's complaint, taken as true for purposes of removal. *See, e.g.,*
 3 *Muniz v. Pilot Travel Ctrs. LLC*, No. Civ. S-07-0325, 2007 WL 1302504, at *10 (E.D.
 4 Cal. Apr. 30, 2007) (court must accept as true plaintiff's allegations as pled in
 5 complaint and assume plaintiff will prove liability and recover damages alleged);
 6 *Levine v. BIC USA, Inc.*, No. 07cv1096, 2007 WL 2406897 at *16-17 (E.D. Cal. Aug.
 7 20, 2007)(applying allegation in complaint that amount in controversy does not
 8 exceed \$74,999.99 as to each putative class member in determining that \$5 million
 9 jurisdictional threshold under CAFA was satisfied); *Korn v. Ralph Lauren Corp.*, 536
 10 F.Supp.2d 1199, 1203 (E.D. Cal. 2008)(plaintiff is bound by allegation in complaint
 11 concerning defendant's citizenship for diversity purposes); *see also Lewis v. Verizon*
 12 *Communs., Inc.*, 627 F.3d 395, 399 ("In determining the amount [in controversy], we
 13 first look to the complaint.").¹

14 **A. Timeliness**

15 18. The FAC was filed on May 21, 2018 and served on PVH Retail on June
 16 6, 2018. However, prior to service, a copy of the FAC was received by PVH Retail's
 17 agent for service of process on May 24, 2018 as an enclosure to a May 21, 2018 letter
 18 from Plaintiffs' counsel. PVH Retail is filing this Notice of Removal within thirty
 19 days of the May 24, 2018 receipt of a copy of the FAC, and this Notice of Removal
 20 therefore is being filed timely pursuant to 28 U.S.C. § 1446(b).

21 **B. Venue**

22 19. This action was originally brought in the Superior Court of California for
 23 the County of San Diego, a place which is "embraced by" the United States District
 24 Court for the Southern District of California. 28 U.S.C. § 84(d). Accordingly, federal
 25

26 ¹ The courts in these cases, in determining whether CAFA's requirements for removal
 27 were satisfied, also relied upon affidavits or declarations submitted by defendants in
 28 support of their notice of removal. Subsequent to these decisions, however, the
 Supreme Court made clear that a defendant need *not* submit evidentiary support for
 removal with its notice. *Dart Cherokee*, 135 S. Ct. at 554.

1 statute requires that this action be removed to this district for venue purposes. 28
2 U.S.C. §§ 1441, 1446(a).

3 **C. Putative Class Action**

4 20. The term “class action” is defined under the statute as “any civil action
5 filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or
6 rule of judicial procedure authorizing an action to be brought by 1 or more
7 representative persons as a class action.” 28 U.S.C. § 1332(d)(1)(B). Plaintiffs style
8 their FAC as a class action. They purport to bring it “on behalf of themselves and all
9 others similarly situated,” alleging a statewide class, and they seek an order certifying
10 the purported class. FAC, Prayer for Relief. Although PVH Retail disputes that
11 Plaintiffs can meet the requirements under Federal Rule of Civil Procedure 23 for
12 certifying the alleged class of unnamed plaintiffs, and disputes any amount owing to
13 Plaintiffs or the alleged class, this lawsuit qualifies as a “class action” under CAFA.

14 **D. Minimal Diversity Exists**

15 21. Removal is proper where at least one class member is diverse from at
16 least one defendant. 28 U.S.C. § 1332(d). As alleged in the FAC, Plaintiffs are
17 citizens of the State of California. FAC at ¶¶ 12, 14.

18 22. Pursuant to 28 U.S.C. § 1332(c), “a corporation shall be deemed to be a
19 citizen of any State by which it has been incorporated and of the State where it has its
20 principal place of business.” The FAC alleges that PVH Retail is “a Delaware limited
21 liability company with its principal place of business in New York, New York.” FAC
22 at ¶ 15.

23 23. Although Plaintiffs purport to assert their claims against numerous “Doe”
24 defendants, the residence of fictitious and unknown defendants should be disregarded
25 for purposes of establishing removal jurisdiction under 28 U.S.C. § 1332. *Fristos v.*
26 *Reynolds Metals Co.*, 615 F.2d 1209, 1213 (9th Cir. 1980) (unnamed defendants are
27 not required to join removal petition). Thus, the existence of Doe defendants one
28

1 through 20, inclusive, named in Plaintiffs' amended complaint does not deprive this
2 Court of jurisdiction.

3 **E. Amount in Controversy**

4 24. The claims of the individual members in a class action are aggregated to
5 determine if the amount in controversy exceeds the sum or value of \$5,000,000. 28
6 U.S.C. § 1332(d)(6). The Supreme Court recently held that where, as here, a
7 plaintiffs' complaint does not explicitly specify the amount in controversy, a
8 defendant's notice of removal need include only a plausible allegation that the amount
9 in controversy exceeds the jurisdictional threshold under CAFA. *Dart Cherokee*, 135
10 S. Ct. at 554. Congress intended for federal jurisdiction to be appropriate under
11 CAFA "if the value of the matter in litigation exceeds \$5,000,000 either from the
12 viewpoint of the plaintiff or the viewpoint of the defendant, and regardless of the type
13 of relief sought (e.g., damages, injunctive relief, or declaratory relief)." Senate
14 Judiciary Committee Report, S. REP. 109-14, at 49 (2005). The amount-in-
15 controversy allegation in a defendant's notice of removal should be accepted as true
16 when not contested by a plaintiff or questioned by the court. *Dart Cherokee*, 135 S.
17 Ct. at 553. If a court is uncertain about whether all matters in controversy meet the \$5
18 million jurisdictional threshold under CAFA, "the court should err in favor of
19 exercising jurisdiction over the case." *Kearns v. Ford Motor Co.*, No. CV 05-5644,
20 2005 WL 3967998, at *6 (C.D. Cal. Nov. 21, 2005) (citing S. REP. 109-14, at 49).

21 25. As discussed above in paragraph 3, in paragraph 7 of her complaint in the
22 Prior Related Action based on essentially similar claims and factual assertions,
23 Morrow alleged that "This Court has original jurisdiction of this Action pursuant to
24 the Class Action Fairness Act, 28 U.S.C §1332 (d) (2). The matter in controversy,
25 exclusive of interest and costs, exceeds the sum or value of \$5,000,000 and at least
26 some members of the proposed Class have a different citizenship from Defendants."
27 Although PVH Retail denies any liability to Plaintiffs and the FAC's claims and
28 allegations, including the allegation that Plaintiffs are entitled to recover any damages

1 at all, and disputes Plaintiffs' apparent method for calculating purported damages,
2 Morrow's allegations in the complaint in the Prior Related Action and Plaintiffs'
3 allegations in the FAC place at issue in this action an amount that meets CAFA's
4 \$5,000,000 jurisdictional threshold.

5 26. Moreover, Plaintiffs seek attorneys' fees which must be taken into
6 account in ascertaining the amount in controversy, though PVH Retail denies that
7 Plaintiffs are entitled to such fees or costs. *Galt G/S v. JSs Scandinavia*, 142 F.3d
8 1150, 1156 (9th Cir. 1998) (claims for statutory attorney's fees to be included in
9 amount in controversy regardless of whether award is discretionary or mandatory).
10 Plaintiffs also seek injunctive relief, including a "corrective advertising campaign,"
11 which may involve significant costs of compliance. *See BEM.I, L.L.C. v.*
12 *Anthropologie, Inc.*, 301 F.3d 548, 553 (7th Cir. 2002) (cost to defendant of
13 complying with injunctive relief may be considered in determining amount-in-
14 controversy). Finally, although PVH Retail denies that it owes Plaintiffs, or any
15 member of the alleged class, any relief, let alone punitive damages, in determining the
16 amount in controversy, the Court must assume that the allegations of the FAC are true
17 and that Plaintiffs will ultimately prevail on all claims made in the complaint.
18 *Kenneth Rothschild Trust v. Morgan Stanley Dean Witter*, 199 F.Supp.2d 993, 1001
19 (C.D. Cal. 2002); *see also Scherer v. Equitable Life Assurance Society of the United*
20 *States*, 347 F.3d 394, 399 (2d Cir. 2003) (when determining the amount in
21 controversy, it is the amount put in controversy by the plaintiff's complaint, not what
22 ultimately may be provable). Accordingly, while overbroad, and unwarranted, the
23 FAC's claims for monetary, injunctive, and exemplary relief unquestionably place
24 more than \$5,000,000 at issue in this action.

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1 **F. Number of Members of Putative Class & Subclass**

2 27. As discussed above in paragraph 4, Morrow alleged in paragraph 30 of
3 her complaint in the Prior Related Action that “The class members are so numerous
4 that joinder of all members is impractical” and she “is informed and believes that the
5 proposed Class contains hundreds of thousands of individuals who have been
6 damaged by Defendants’ conduct.” Although PVH Retail contends that Plaintiffs’
7 class allegations lack merit, the class pled by Plaintiffs exceeds 100 members. The
8 FAC alleges that the members of the class “are so numerous that joinder of all
9 members is impracticable.” FAC at ¶ 33. Further, Plaintiff seeks to represent a class
10 of persons in California who, over the statute of limitations period, purchased any
11 product bearing an allegedly false reference price at one of Defendant’s outlet or
12 factory stores in the state of California. FAC at ¶ 30. The number of persons in
13 California who made a purchase in a Tommy Hilfiger factory outlet store over the
14 statute of limitations period far exceeds 100. Accordingly, CAFA’s requirement
15 under 28 U.S.C. § 1332(d)(5)(B) that the proposed class include at least 100 persons is
16 satisfied in this action.

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

19 28. Copies of this Notice of Removal promptly will be served on counsel of
20 record for Plaintiffs and filed in the Clerk of the Superior Court of the State of
21 California in and for the County of San Diego as required under 28 U.S.C. § 1446(d).
22 In compliance with 28 U.S.C. § 1446(a), true and correct copies of pleadings, process,
23 and orders served or filed in this action are attached as Exhibit 1.

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1 WHEREFORE, without waiving any objections to improper service,
2 jurisdiction, or venue, or any defenses or objections to this action, PVH Retail
3 requests that the above action pending before the Superior Court of the State of
4 California for the County of San Diego be removed to the United States District Court
5 for the Southern District of California.

6
7 Dated: June 21, 2018

LARY ALAN RAPPAPORT
COURTNEY M. BOWMAN
PROSKAUER ROSE LLP

8
9
10 By: /s/ Lary Alan Rappaport
 Lary Alan Rappaport

11 Attorneys for Defendant PVH RETAIL STORES LLC

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13
14
15 **DEMAND FOR JURY TRIAL**

16 Defendant PVH Retail Stores LLC hereby demands a trial by jury on all issues
17 so triable.

18
19 Dated: June 21, 2018

LARY ALAN RAPPAPORT
COURTNEY M. BOWMAN
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20
21
22 By: /s/ Lary Alan Rappaport
 Lary Alan Rappaport

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