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16 Attorneys for Defendant  
17 NESTLE USA, INC.

18 **UNITED STATES DISTRICT COURT**  
19 **NORTHERN DISTRICT OF CALIFORNIA**

20 MARK BEASLEY, on behalf of himself and  
21 all others similarly situated,

22 Plaintiff,

23 v.

24 LUCKY STORES, INC., NESTLE USA,  
25 INC., SAVE MART SUPER MARKETS,  
26 THE KROGER COMPANY, and THE SAVE  
27 MART COMPANIES, INC.,

28 Defendants.

Case No. 18-07144

**(San Francisco Superior Court Case No.  
CGC-18-570953)**

**NOTICE OF PETITION FOR REMOVAL  
BY DEFENDANT NESTLÉ USA, INC.  
PURSUANT TO 28 U.S.C. §§ 1332, 1441  
1446, AND 1453**

1 PLEASE TAKE NOTICE that Defendant Nestlé USA, Inc. (“Nestlé”), through its  
2 undersigned counsel, hereby removes the case identified in paragraph 1 below to this Court.  
3 This removal is made pursuant to 28 U.S.C. §§ 1332, 1441, 1446, and 1453.

4 **I. PAPERS FROM THE REMOVED ACTION**

5 1. On October 29, 2018, Plaintiff Mark Beasley filed the removed case, *Beasley v.*  
6 *Lucky Stores, Inc., Nestlé USA, Inc., Save Mart Super Markets, The Kroger Company, and The*  
7 *Save Mart Companies, Inc.*, No. CGC-18-570953, in the Superior Court of California, County of  
8 San Francisco. Plaintiff served the Complaint on Nestlé on October 31, 2018.

9 2. In accordance with 28 U.S.C. § 1446(a), true and correct copies of the following  
10 papers served upon Nestlé are attached to the Declaration of Dale J. Giali (“Giali Decl.”):

- 11 • The Summons, attached to the Giali Decl. as Exhibit A;
- 12 • Plaintiff’s Class Action Complaint, attached to the Giali Decl. as Exhibit B;
- 13 • The Civil Cover Sheet, attached to the Giali Decl. as Exhibit C;
- 14 • The Notice to Plaintiff of Case Management Conference, attached to the Giali  
15 Decl. as Exhibit D;
- 16 • Plaintiff’s Application to Designate His Action as Complex, attached to the Giali  
17 Decl. as Exhibit E; and
- 18 • Discovery requests propounded on defendants, attached to the Giali Declaration  
19 as Exhibit F.

20 3. None of the defendants in this action answered plaintiff’s Complaint in San  
21 Francisco County Superior Court prior to removal and Nestlé is not aware of any further  
22 proceedings or filings regarding this action in that court. Giali Decl. at ¶ 4.

23 **II. NATURE OF REMOVED ACTION**

24 4. Plaintiff alleges that he purchased Coffee-mate coffee creamer products  
25 manufactured, distributed, and labeled by Nestlé. Compl. at ¶¶ 13-14. Plaintiff contends that the  
26 Coffee-mate brand creamer products were unlawfully made with the allegedly unsafe food  
27  
28

1 additive known as partially hydrogenated oil (“PHO”), and further, that the products were falsely  
2 labeled as containing “0g Trans Fat” when in fact PHO contains trans fat. *Id.* at 3, 8.

3 5. Plaintiff seeks to represent the following putative class:

4 All citizens of California who purchased in California, on or after January 1, 2010,  
5 Coffee-mate products containing partially hydrogenated oil.

6 Plaintiff further seeks to represent the following subclass:

7 All citizens of California who purchased in California, on or after January 1,  
8 2010, Coffee-mate containing the nutrient content claim “0g Trans Fat” and  
9 containing partially hydrogenated oil.

10 Compl. at ¶ 147.

11 6. Plaintiff asserts five causes of action: (a) violation of the California Unfair  
12 Competition Law, Bus. & Prof. Code §§ 17200 *et seq.*, alleging unfair and unlawful conduct; (b)  
13 breach of implied warranty of merchantability; (c) on behalf of the “0g Trans Fat” subclass,  
14 violation of the California Unfair Competition Law, Bus. & Prof. Code §§ 17200 *et seq.*, alleging  
15 unlawful, fraudulent, and unfair conduct; (d) on behalf of the “0g Trans Fat” subclass, violation  
16 of California’s False Advertising Law, Bus. & Prof. Code §§ 17500 *et seq.*; and (e) on behalf of  
17 the “0g Trans Fat” subclass, and against Nestlé only, breach of express warranty. *Id.* at ¶¶ 155-  
18 201.

19 7. Plaintiff seeks class certification, restitution, pre- and post-judgment interest, and  
20 attorneys’ fees and costs. *Id.* at 34. Plaintiff asserts that the amount of restitution sought exceeds  
21 \$20 million. *See* Giali Decl. at Ex. E.

### 22 **III. VENUE**

23 8. Venue is proper under 28 U.S.C. § 1441(a) because this Court is the United States  
24 District Court for the district and division embracing the place where the state court case was  
25 pending.

### 26 **IV. THE REMOVAL IS TIMELY**

27 9. The removal is timely under 28 U.S.C. § 1446(b).

28 10. Plaintiff filed his Complaint on October 29, 2018. *See* Compl. Plaintiff served  
Nestlé on October 31, 2018. *See* Giali Decl. at ¶ 3.

1 11. Nestlé filed this Notice of Removal within thirty (30) days of service, as required  
2 by law. *See, e.g., Murphy Bros, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347-48, 354-  
3 56 (1999).

4 **V. NOTICE TO ADVERSE PARTY AND STATE COURT**

5 12. Pursuant to 28 U.S.C. § 1446(d), Nestlé is serving written notice of the removal of  
6 this case on plaintiff’s counsel:

7 Gregory S. Weston  
8 Andrew C. Hamilton  
9 1405 Morena Blvd., Suite 201  
10 San Diego, CA 92110

11 13. Pursuant to 28 U.S.C. § 1446(d), Nestlé will promptly file a Notice of Removal  
12 Filing with the Clerk of the Superior Court of California, County of San Francisco.

13 **VI. BASES FOR REMOVAL JURISDICTION**

14 **A. This Court Has Jurisdiction Under CAFA**

15 14. CAFA confers federal jurisdiction over class actions involving: (a) minimal  
16 diversity (*i.e.*, diversity between any defendant and any putative class member); (b) at least 100  
17 putative class members; and (c) at least \$5 million in controversy, exclusive of interests and  
18 costs. *See* 28 U.S.C. § 1332(d). Although the burden rests on the removing party to demonstrate  
19 that CAFA’s jurisdictional requirements are met, the party opposing jurisdiction under CAFA  
20 bears the burden of demonstrating that any exception to CAFA jurisdiction applies. *Serrano v.*  
21 *180 Connect, Inc.*, 478 F.3d 1018, 1021-22 (9th Cir. 2007). This case satisfies CAFA’s  
22 requirements.

23 **1. The Parties Are Minimally Diverse**

24 15. Plaintiff “is a citizen of California” and he seeks to represent a class and subclass  
25 composed of other “citizens of California.” Compl. at ¶¶ 18, 147.

26 16. A corporation is deemed to be a citizen of the state in which it has been  
27 incorporated and where it has its principal place of business. 28 U.S.C. § 1332(c)(1). The phrase  
28 “principal place of business” “refers to the place where the corporation’s high level officers

1 direct, control, and coordinate the corporation's activities." *Hertz Corp. v. Friend*, 559 U.S. 77,  
2 80 (2010). This is the corporation's "nerve center." *Id.* at 81 (internal quotation marks omitted).  
3 This "should normally be the place where the corporation maintains its headquarters." *Id.* at 93.

4 17. At the time of the filing of the Complaint and this notice of removal, Nestlé was a  
5 Delaware corporation with its principal place of business in Virginia. *See* Compl. ¶ 12.  
6 Accordingly, Nestlé is not a citizen of California.

7 18. At the time of the filing of the Complaint and this notice of removal, Kroger is a  
8 Delaware corporation with its principal place of business in Ohio. *See id.* at ¶ 17. Accordingly,  
9 Kroger is not a citizen of California.

10 19. Because plaintiff is a citizen of California, Nestlé is a citizen of Delaware and  
11 Virginia, and Kroger is a citizen of Delaware and Ohio, the parties are minimally diverse.

## 12 **2. The Proposed Class Exceeds 100**

13 20. For purposes of removal, the Court looks to a plaintiff's allegations respecting  
14 class size. *See Kuxhausen v. BMW Fin. Servs. NA LLC*, 707 F.3d 1136, 1140 (9th Cir. 2013).

15 21. Plaintiff purports to bring a claim on behalf of "[a]ll citizens of California who  
16 purchased in California, on or after January 1, 2010, Coffee-mate products containing partially  
17 hydrogenated oil." Compl. ¶ 147. Plaintiff further purports to bring a claim on behalf of a  
18 subclass of "[a]ll citizens of California who purchased in California, on or after January 1, 2010,  
19 Coffee-mate containing the nutrient content claim '0g Trans Fat' and containing partially  
20 hydrogenated oil." *Id.* Plaintiff asserts that "[t]he Class is sufficiently numerous, as it includes  
21 thousands of individuals who purchased Coffee-mate throughout California during the Class  
22 Period." *Id.* at ¶ 151. Thus, the proposed class exceeds 100 members.

## 23 **3. The Aggregate Amount In Controversy Exceeds Five Million Dollars**

24 22. Under CAFA, "the claims of the individual class members shall be aggregated to  
25 determine whether the matter in controversy exceeds the sum or value of \$5,000,000, exclusive  
26 of interest and costs." 28 U.S.C. § 1332(d)(6). "[T]he statute tells the District Court to determine  
27 whether it has jurisdiction by adding up the value of the claim of each person who falls within  
28

1 the definition of [the] proposed class and determine whether the resulting sum exceeds \$5  
2 million.” *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 592 (2013).

3 23. To determine the amount in controversy, the Court must assume that the  
4 allegations in the operative pleading are true and that a jury will return a verdict for the plaintiff  
5 on all such claims. *See Cain v. Hartford Life & Accident Ins. Co.*, 890 F. Supp. 2d 1246, 1249  
6 (C.D. Cal. 2012) (“The ultimate inquiry is what amount is put ‘in controversy’ by the plaintiff’s  
7 complaint, not what a defendant will actually owe.”) (emphasis and internal quotation marks  
8 omitted). The Court also may consider summary-judgment-type evidence relevant to the amount  
9 in controversy. *See Kenneth Rothschild Trust v. Morgan Stanley Dean Witter*, 199 F. Supp. 2d  
10 993, 1001 (C.D. Cal. 2002).

11 24. Further, “when a defendant seeks federal-court adjudication, the defendant’s  
12 amount-in-controversy allegation should be accepted when not contested by the plaintiff or  
13 questioned by the court.” *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547,  
14 553, 190 L. Ed. 2d 495 (2014). “Once the proponent of federal jurisdiction has explained  
15 plausibly how the stakes exceed \$5 million . . . then the case belongs in federal court unless it is  
16 legally impossible for the plaintiff to recover that much.” *Rhoades v. Progressive Cas. Ins. Co.*,  
17 410 F. App’x 10, 11 (9th Cir. 2010).

18 25. Here, it is clear that the amount in controversy exceeds \$5 million.

19 26. Plaintiff does not allege a particular amount in controversy in his complaint.  
20 However, in a filing in state court to designate the action as complex, plaintiff states that “[t]he  
21 amount of restitution demanded for the proposed class exceeds \$20 million.” *See Giali Decl.* at  
22 Ex. E.

23 27. This is reflected in the complaint’s allegations and prayer for relief, where  
24 plaintiff demands “disgorgement” and “restitution,” which plaintiff alleges is equal to “all  
25 revenue received by Defendants from the sale of Coffee-mate.” Compl. at ¶¶ 159, 167, 173, 183,  
26 287, 192, 195, Prayer § B. The putative class consists of “[a]ll citizens of California who  
27 purchased in California, on or after January 1, 2010, Coffee-mate products containing partially  
28

1 hydrogenated oil.” *Id.* at ¶ 147. Thus, pursuant to plaintiff’s allegations, the estimated amount  
2 in controversy with respect to plaintiff’s restitution claims can be determined by aggregating the  
3 total revenue derived from the sale of Coffee-mate products. During the calendar year 2010, and  
4 separately in each year thereafter to the present, Nestlé’s gross revenue from the sale of Coffee-  
5 mate products in the State of California has been more than \$5,000,000.

6 28. This number does not even take into account the additional mark-up added by  
7 retailers of the products, as is necessary to calculate plaintiff’s requested restitution of the  
8 revenue from the sale of Coffee-mate products from retailers, as well. *See* Compl. at ¶¶ 159,  
9 167, 173, 183, 287, 192, 195. Thus, the aggregate “amount in controversy,” consistent with  
10 plaintiff’s allegations, well exceeds the threshold established by 28 U.S.C. § 1332(d).

#### 11 4. No Exception Applies to Defeat CAFA Jurisdiction

12 29. Neither CAFA’s “local controversy” nor its “home state” exceptions apply to this  
13 case.

14 30. For the home state exception to apply, all primary defendants must be citizens of  
15 the state in which the case is filed. 28 U.S.C. § 1332(d)(B); *see also Corsino v. Perkins*, 2010  
16 WL 317418, at \*5 (C.D. Cal. Jan. 19, 2010). As discussed *supra*, Nestlé, the primary defendant,  
17 is not a citizen of California, and therefore, this exception does not apply.

18 31. For the local controversy exception to apply, at least one defendant must be a  
19 citizen of California, and that defendant’s conduct must form a significant basis for the claims  
20 asserted by the proposed plaintiff class. 28 U.S.C. § 1332(d)(4)(i)(II). Here, the California  
21 defendants are retailers who merely sold products that Nestlé owns, manufactures, distributes,  
22 formulates, labels, and markets. *See* Compl. at ¶¶ 4, 11-16; *see also* ¶¶ 76, 78, 80 (outlining that  
23 it is Nestlé’s conduct that forms the basis of plaintiff’s claims). The California defendants are  
24 not responsible for the labeling or the ingredient formulation of the Coffee-mate products.  
25 Accordingly, the retailers’ conduct does not form a significant basis for the claims asserted by  
26 the proposed class. *See Clay v. Chobani LLC*, 2015 WL 4743891, at \*6 (S.D. Cal. Aug. 10,  
27 2015).

28

1           32.       Moreover, the local controversy exception does not apply when the principal  
2 injury alleged is one that occurred throughout the country, not just in the state where the case  
3 was filed, as is the case here. 28 U.S.C. § 1332(d)(A)(4)(i)(III); *see also Waller v. Hewlett-*  
4 *Packard Co.*, 2011 WL 8601207, at \*4 (S.D. Cal. May 10, 2011); *Clay*, 2015 WL 4743891, at  
5 \*6. Coffee-mate is sold nationwide and the labels and ingredient formulation for the Coffee-  
6 mate products are the same throughout the United States. Indeed, in 2015, plaintiff’s counsel  
7 filed a putative class action alleging the same misbranding theory against the very same product,  
8 and brought that case as to a nationwide class. *See Giali Decl.* ¶ 5. This demonstrates that this  
9 controversy is not truly local in nature, and that the principal injury is nationwide.

10           33.       Finally, the local controversy exception does not apply when, in the three years  
11 preceding the filing of a case, any other class action has been filed “asserting the same or similar  
12 factual allegations against any of the defendants on behalf of the same or other persons.” 28  
13 U.S.C. § 1332(d)(4)(A)(ii). *Backus v. Nestlé USA, Inc.*, No. 3:15-cv-01963 (N.D. Cal.) was first  
14 filed on April 30, 2015, just outside of the three-year requirement, demonstrating that removal of  
15 this case is consistent with the policy behind CAFA and is an example of a type of controversy  
16 that is not truly local in nature, and should instead be heard in federal court.

## 17 **VII. CONSENT OF DEFENDANTS**

18           34.       With respect to CAFA jurisdiction, a case can be removed by any defendant  
19 without the consent of any other defendant, as provided by 28 U.S.C. § 1453(b).

## 20 **VIII. RESERVATION OF RIGHTS AND REQUEST FOR ADDITIONAL BRIEFING** 21 **IF NECESSARY**

22           35.       By removing this matter, Nestlé does not waive and, to the contrary, reserves any  
23 rights it may have, including, without limitation, all available arguments and affirmative  
24 defenses. Nestlé does not concede that class certification is appropriate or that plaintiff is  
25 entitled to any recovery whatsoever. However, the question is not whether class certification is  
26 appropriate or whether plaintiff will recover any amount for any particular time period. “The  
27 amount in controversy is simply an estimate of the total amount in dispute, not a prospective  
28



1 assessment of defendant's liability." *Lewis v. Verizon Commc 'ns, Inc.*, 627 F.3d 395, 400 (9th  
2 Cir. 2010).

3 36. In the event that plaintiff files a request to remand, or the Court considers remand  
4 *sua sponte*, Nestlé respectfully requests the opportunity to submit additional argument and/or  
5 evidence in support of removal.

6 **IX. CONCLUSION**

7 37. Nestlé hereby removes the above-captioned action from the Superior Court of  
8 California, County of San Francisco, to the United States District Court for the Northern District  
9 of California.

10 Dated: November 26, 2018

MAYER BROWN LLP  
Carmine R. Zarlenga  
Dale J. Giali  
Keri E. Borders

13 by: /s/ Dale J. Giali  
14 Dale J. Giali  
15 Attorneys for Defendant  
16 NESTLE USA, INC.