	Case 5:19-cv-07471-SVK Document 1 F	iled 11/13/19 Page 1 of 7			
1 2 3 4 5	MAYER BROWN LLP Dale J. Giali (SBN 150382) <i>dgiali@mayerbrown.com</i> Keri E. Borders (SBN 194015) <i>kborders@mayerbrown.com</i> 350 South Grand Avenue, 25 th Floor Los Angeles, California 90071-1503 Telephone: (213) 229-9509 Facsimile: (213) 625-0248				
6	Counsel for Nestlé USA, Inc.				
7	IN THE UNITED STATES DISTRICT COURT				
8	FOR THE NORTHERN DISTRICT OF CALIFORNIA				
9	LINDA CHESLOW and STEVEN	Case No. 5:19-cv-07471			
10	PRESCOTT, individually and on behalf of all others similarly situated,	NOTICE OF REMOVAL BY			
11	Plaintiffs,	DEFENDANT NESTLÉ USA, INC.			
12	V.				
13	NESTLÉ USA, INC., and DOES 1 THROUGH				
14	10, inclusive.				
15 16	Defendants.				
17	NOTICE OF REMOVAL				
18	Defendant Nestlé USA, Inc. ("Nestlé"),	through undersigned counsel, removes the			
19	above-captioned action from the Superior Court for	Santa Cruz County to the United States District			
20	Court for the Northern District of California in acc				
21		Linda Cheslow and Steven Prescott sued Nestlé			
22	and "DOES 1 through 10" in the Superior Court for Santa Cruz County.				
23	2. In accord with 28 U.S.C. § 1446(a), attached as Exhibit 1 is a copy of "all process,				
24	pleadings, and orders" served on Nestlé in this action.				
25	3. In accord with 28 U.S.C. §1446(d), Nestlé will promptly serve this notice on plaintiffs' counsel and file a copy with the clerk of the Superior Court for Santa Cruz County.				
26					
27					
28					

Case 5:19-cv-07471-SVK Document 1 Filed 11/13/19 Page 2 of 7

4. On October 15, 2019, Nestlé executed a written acceptance of service by mail. See 1 Cal. Code. Civ. P. § 415.30 ("Service of a summons [by mail] is deemed complete on the date a 2 written acknowledgment of receipt of summons is executed."). 3 5. Under 28 U.S.C. § 1446(b) and Rule 6, Federal Rules of Civil Procedure, this 4 removal is timely because Nestlé removed within 30 days of executing the written acceptance. 5 See, e.g., Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 348 (1999) (clock for 6 removal not triggered by "mere receipt of the complaint unattended by any formal service"); 7 Harper v. Little Caesar Enter., Inc., 2018 WL 5984841 (C.D. Cal. Nov. 14, 2018) (Staton, J.) 8 (collecting authority and explaining that the clock begins when the defendant executes acceptance 9 of service by mail). 10 6. The time for Nestlé to respond to the complaint has not yet expired. 11 7. Nestlé need not secure consent to removal from the "Doe" defendants. See, e.g., 12 United Comp. Sys., Inc. v. AT&T Corp., 298 F.3d 756, 762 (9th Cir. 2002) (explaining that the 13 consent requirement "does not apply to" "unknown" or "fictitious" parties). 14 8. As the Supreme Court has explained, Congress enacted CAFA to ensure that federal 15 courts hear large class actions with interstate consequences. See, e.g., Standard Fire Ins. Co. v. 16 Knowles, 568 U.S. 588, 595 (2013). Where, as here, the amount in controversy exceeds \$5 million, 17 the parties are at least minimally diverse, and the proposed class exceeds 100 members, CAFA 18 confers subject-matter jurisdiction. 28 U.S.C. § 1332(d). 19 9. The removing party need only provide a "short and plain statement of the grounds 20 for removal" and need not submit evidence unless and until the opposing party challenges the 21 factual allegations in the notice of removal. See generally Dart Cherokee Basin Operating Co. v. 22 Owens, 135 S. Ct. 547 (2014); Arias v. Residence Inn by Marriott, 936 F.3d 920, 922 (9th Cir. 23 2019). 24 <u>VENUE</u> 25 10. Under 28 U.S.C. §§ 84(a) and 1441(a), venue is proper in the United States 26 District Court for the Northern District of California because this Court embraces the Superior 27 Court for Santa Cruz County, where this action was pending. 28

1

BRIEF OVERVIEW OF THE PLAINTIFFS' ALLEGATIONS

2 11. In this putative class action under the UCL, CLRA, and FAL, the plaintiffs claim
3 that Nestlé "affirmatively misrepresented" the "nature and characteristics" of Nestlé's Premier
4 White Morsels. *E.g.*, Compl. ¶ 31.

5 12. The plaintiffs claim that Nestlé deceptively advertised that Nestlé's Premier White
6 Morsels contain "white chocolate" when in fact the White Morsels allegedly "do[] not contain *any*7 white chocolate. It is fake white chocolate." Compl. ¶ 3.

8 13. The plaintiffs incorporate into the complaint (¶ 3) the front of the White Morsels
9 package and suggest that the package falsely advertises that the "White Morsels" contain white
10 chocolate. (In fact, the word "chocolate" appears nowhere on the package.)

11 14. In addition to claiming that Nestlé falsely advertised that the White Morsels contain 12 white chocolate, the plaintiffs protest the product's use of the word "premier." According to the 13 plaintiffs, the word "premier" misleads consumers "into thinking that the [p]roduct contains 14 premier ingredients, not fake white chocolate." Compl. ¶ 4. The plaintiffs claim that "[r]easonable 15 consumers do not expect that the [p]roduct does not contain white chocolate, or inferior ingredients 16 such as hydrogenated oils." *Id*.

17 15. On behalf of themselves and a putative nationwide class comprising "[a]ll persons
18 who purchased the [p]roduct in the United States or, alternatively, in California for personal
19 consumption and not for resale" from September 19, 2015 "through the present," Cheslow and
20 Prescott sue under the UCL, FAL, and CLRA.

21 16. The plaintiffs request for themselves and the putative class restitution, an
22 attorney's fee and costs, and an injunction. Prayer for Relief §§ A-C.

23

THE PROPOSED CLASS EXCEEDS 100 MEMBERS

17. The plaintiffs sue on behalf of a nationwide class of consumers who bought the
White Morsels between September 19, 2015 and the present. Nationwide retailers, such as
Walmart and Kroger, sell the White Morsels in at least hundreds of stores across the United
States. Without more, these facts compel concluding that more than 100 putative class members
bought the White Morsels. *See Roe v. Michelin N. Am., Inc.*, 613 F.3d 1058, 1062 (11th Cir.

Case 5:19-cv-07471-SVK Document 1 Filed 11/13/19 Page 4 of 7

		ł		
1	2010) ("[C]ourts may use their judicial experience and common sense in determining whether			
2	the case stated in the complaint meets federal jurisdiction requirements.").			
3	18. Also, the plaintiffs allege that "the [c]lass consists of millions of persons."			
4	Compl. ¶ 83; see also, e.g., Roppo v. Travelers Comm. Ins. Co., 869 F.3d 568, 581 (7th Cir.			
5	2017) ("[The defendant] may rely on the estimate of the class number set forth in the			
6	complaint."). Common sense and the plaintiffs' allegations independently satisfy the			
7	requirement to show that the putative class likely exceeds 100 members.			
8	THE PARTIES ARE AT LEAST MINIMALLY DIVERSE			
9	19. Relaxing the complete-diversity requirement, CAFA permits removal if the			
10	parties are minimally diverse, that is, if the citizenship of at least one putative class member			
11	differs from the citizenship of at least one defendant. 28 U.S.C. §1332(d)(2)(A); Dart, 135 S. Ct.			
12	at 552.			
13	20. Cheslow resides in California (\P 25), and on information and belief, Cheslow is a			
14	citizen of California. See also Cheslow v. Monsanto Co., case no. 3:19-cv-3566 at Doc. 3 ¶ 57			
15	(N.D. Cal. June 3, 2019) (Cheslow's complaint, which alleges that Cheslow "is a citizen of			
16	California'').			
17	21. Prescott resides in California (¶ 24), and on information and belief, Prescott is a			
18	citizen of California.			
19	22. Nestlé USA, Inc., is a Delaware corporation with its principal place of business in			
20	Virginia. See Hertz Corp. v. Friend, 559 U.S. 77, 80-81 (2010) (explaining what constitutes a			
21	corporation's principal place of business). Under 28 U.S.C. § 1332(c)(1), Nestlé USA, Inc., is a			
22	citizen of Delaware and Virginia.			
23	23. Because the plaintiffs are citizens of California and because defendant Nestlé			
24	USA, Inc., is a citizen of Delaware and Virginia, the parties are at least minimally diverse.			
25	THE AGGREGATE AMOUNT IN CONTROVERSY EXCEEDS \$5 MILLION			
26	24. The amount in controversy "is simply an estimate of the total amount in dispute,			
27	not a prospective assessment of the defendant's liability." Lewis v. Verizon Comms., Inc., 627 F.3d			
28	395, 400 (9th Cir. 2010).			
		l		

		1		
1	25. Under CAFA, determining if the amount in controversy exceeds \$5 million			
2	requires aggregating the claims of the putative class members. 28 U.S.C. § 1332(d)(6).			
3	26. In this action, the aggregate amount in controversy from the plaintiffs' putative			
4	nationwide class allegations far exceeds \$5 million, excluding costs and interest.			
5	27. The plaintiffs allege that Nestlé "has sold millions of units or more of the product."			
6	Compl. ¶ 43.			
7	28. Between September 19, 2015 and the present, Nestlé's gross revenue from the			
8	sale of the White Morsels exceeded \$5 million.			
9	29. The amount paid by Cheslow and Prescott (and the putative class) exceeds			
10	Nestlé's gross receipts from wholesale distribution because the plaintiffs bought the White			
11	Morsels at retailers, which sell the product for more than the wholesale cost. See, e.g., Compl.			
12	\P 24-25 (alleging that the plaintiffs each bought the White Morsels at Target).			
13	30. The plaintiffs request restitution and claim that they "would not have purchased the			
14	Product but for the representations by Defendant about the product." <i>E.g.</i> , Compl. ¶ 50.			
15	31. In addition to claiming that they would not have purchased the White Morsels but			
16	for the alleged misrepresentations, the plaintiffs imply that consumers who bought the White			
17	Morsels for baking received no benefit from the product because it "does not melt like real			
18	chocolate." E.g. Compl. ¶¶ 11-16. For example, the plaintiffs allege that a consumer "ended up			
19	throwing the whole product away." Compl. ¶ 14.			
20	32. Under either theory (that the plaintiffs would not have bought the White Morsels			
21	but for the alleged misrepresentations or that consumers received no benefit from the White			
22	Morsels because they failed to "melt like real chocolate"), the plaintiffs may claim that damages			
23	include the purchase price. See, e.g., Spann v. J.C. Penney Corp., 2015 WL 1526559 at *6 (C.D.			
24	Cal. Mar. 23, 2015) (finding "complete restitution" of the purchase price a viable measure of			
25	damages where the plaintiff showed that "every dollar she spent was as a result of [the			
26	defendant's] alleged false advertising"); Allen v. Hyland's Inc., 300 F.R.D. 643, 671 (C.D. Cal.			
27	Aug. 1, 2014) (holding that plaintiffs might recover "full restitution" because the products were			
28	allegedly "ineffective").			

33. As a result, the amount in controversy from the plaintiffs' request for restitution
 alone exceeds \$5 million.

3 34. Also, the attorney's fee contributes to the amount in controversy. The amount in
controversy at the time of removal includes not just the attorney's fee incurred before removal
but also the attorney's fee the plaintiffs might incur in the future. *Fritsch*, 899 F.3d at 792-96.

6 35. In accord with the CLRA and the FAL, the plaintiffs request an attorney's fee.
7 Prayer for Relief § C.

36. By itself, the attorney's fee the plaintiffs might incur litigating this action in the 8 future exceeds \$5 million. Nestlé denies that the label and advertising of its White Morsels, 9 which never use the word "chocolate" and which truthfully disclose the content of the product, 10 could have misled the plaintiffs. The complaint warrants dismissal for failure to state a claim, 11 but if an order finds that the complaint states a claim, Nestlé intends to move for summary 12 judgment at the appropriate time and, if necessary, to try the action. The plaintiffs will incur a 13 significant attorney's fee litigating this action, attempting to defeat summary judgment, and 14 trying this action (in the unlikely event an order denies summary judgment). 15

37. The judiciary can rely on its experience in evaluating the amount in controversy,
and judicial experience readily confirms that plaintiffs' counsels often incur or request an
attorney's fee in the millions of dollars for litigating similar class actions. *See, e.g., Fritsch*,
899 F.3d at 795 (citing *Ingram v. Oroudijian*, 647 F.3d 925, 928 (9th Cir. 2011) (explaining that
the amount in controversy includes the prospective attorney's fee); *Roe*, 613 F.3d at 1062
("[C]ourts may use their judicial experience and common sense in determining whether the case
stated in the complaint meets federal jurisdiction requirements.").

23 24 38. Together, the amount at stake in this putative nationwide class action for restitution, damages, an injunction, and an attorney's fee far exceeds \$5 million.

25

CONCLUSION

39. Because the amount in controversy exceeds \$5 million, because the parties enjoy
at least minimal diversity, and because the proposed class exceeds 100 members, CAFA confers
subject-matter jurisdiction.

6

Case 5:19-cv-07471-SVK Document 1 Filed 11/13/19 Page 7 of 7

1	40. If any question arises about the propriety of removal, Nestlé requests an opportunity			
2	to submit briefing and present oral argument in support of removal before an order resolves the			
3	question.	question.		
4	41.	41. Nothing about this removal waives (or should be construed to waive) any available		
5	right, argument, or objection, including an objection to the lack of personal jurisdiction.			
6	42. Nestlé respectfully reserves the right to amend or supplement this notice.			
7				
8	DATED: No	ovember 13, 2019	MAYER BROWN LLP DALE J. GIALI	
9				
10				
11 12			By: /s/ Dale J. Giali Dale J. Giali	
12	Counsel for Nestlé USA, Inc.		Counsel for Nestlé USA, Inc.	
13				
15				
16				
17				
18				
19				
20				
21				
22				
23				
24				
25				
26				
27				
28				
			7	