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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAUL GRANILLO and JENNIFER FITE, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

CONDE NAST ENTERTAINMENT LLC, a Delaware limited liability company; and DOES 1-50, inclusive,

Defendant.

Case No. **'19CV2104 BEN JLB**

San Diego County Superior Court Case No. 37-2019-00051411-CU-BT-CTL

DEFENDANT'S NOTICE OF REMOVAL OF ACTION UNDER 28 U.S.C. §§ 1332(d)(2), 1441(a), 1446

TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA:

PLEASE TAKE NOTICE that Defendant Condé Nast Entertainment LLC[1] ("Condé Nast" or "Defendant") removes this action from the Superior Court of the State of California, County of San Diego, to the United States District Court for the Southern District of California pursuant to 28 U.S.C. §§ 1332(d)(2), 1441(a), and 1446.

LIMITED PURPOSE

1. The filing of this Notice does not, in any way, waive any right, privilege, immunity, or defense Condé Nast may have under any applicable law relating to the claims asserted in this matter. By filing this Notice, Condé Nast does not concede that Plaintiffs Saul Granillo ("Granillo") or Jennifer Fite's ("Fite") (collectively, "Plaintiffs") or the putative class' claims have merit. Specifically, by filing this Notice, Condé Nast does not concede that any "automatic subscription" programs referred to herein constitute an "automatic renewal" or "continuous service" offer pursuant to Business and Professions Code § 17600, *et seq*.

BACKGROUND

2. Granillo alleges that on or about July 2017 he responded to an online offer from Condé Nast to receive six issues of *Vogue* magazine for $6.00. Declaration of Peter Z. Stockburger ("Stockburger Dec.") at ¶ 2, Exhibit ("Ex.") A, Complaint ("Compl.") at ¶ 15. Granillo alleges he agreed to the offer and submitted his debit card information online to complete the purchase. *Id*. Granillo alleges Condé Nast subsequently charged his debit card $6.00 for the six issues. *Id*. Granillo alleges that upon submission of the order for six issues of *Vogue*, Condé Nast enrolled him into an automatic subscription program without his knowledge or consent. *Id*. at ¶ 17. Pursuant to that program, Granillo

[1] Condé Nast Entertainment LLC, the named defendant in this matter, is a wholly-owned subsidiary of Advance Magazine Publishers Inc. d/b/a Condé Nast ("AMPI"). AMPI is the publisher of the magazines at issue in this lawsuit. Declaration of Matthew Hoffmeyer ("Hoffmeyer Dec.") at ¶ 2. For the purposes of this Notice only, the two entities are collectively referred to as Condé Nast.

alleges that in or about November 2017 Condé Nast posted an additional charge to Granillo's debit card in the amount of $21.99 without Granillo's authorization. *Id*. at ¶ 16.

3. Fite alleges that in or about August 2017 she provided Condé Nast with her credit card details to pay for a one-year subscription to *Vanity Fair* magazine at a cost of $5.00. *Id*. at ¶ 19. Fite alleges that upon submission of the order for a one-year subscription of *Vanity Fair*, she also was enrolled into an automatic subscription renewal program without her knowledge or consent. *Id*. at ¶ 21. Fite alleges that in or about September 2018 she was charged an additional $12.00 as part of the alleged automatic subscription program. *Id*. at ¶ 20.

4. Plaintiffs filed a class action Complaint against Condé Nast on September 27, 2019 in the Superior Court of the State of California, County of San Diego ("Complaint"), entitled *Granillo v. Conde Nast Entertainment LLC*, Case Number 37-2019-00051411-CU-BT-CTL ("State Court Action"). Stockburger Dec. at ¶ 2, Ex. A, Compl. Plaintiffs provided a copy of the Complaint to Condé Nast on or about October 2, 2019. *Id*. at ¶ 5, Ex. D.

5. Plaintiffs claim Condé Nast violated California law by enrolling them and putative class members in an automatic subscription program without adequate notice and consent. Plaintiffs assert four causes of action against Condé Nast on a putative class basis: (1) violation of the California Automatic Renewal Law, Cal. Bus. & Prof. Code §§ 17600, *et seq*. ("ARL") (Stockburger Dec. at ¶ 2, Ex. A, ¶¶ 1, 33-37); (2) violation of the California Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750, *et seq*. ("CLRA") (Stockburger Dec. at ¶ 2, Ex. A, ¶¶ 1, 38-43); (3) violation of the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq*. ("UCL") (Stockburger Dec. at ¶ 2, Ex. A, ¶¶ 1, 44-52); and (4) for unjust enrichment (*id*. at ¶¶ 53-55).

6. Plaintiffs define the putative class as "[a]ll individuals in California who, within the applicable limitations period, were enrolled by [Condé Nast] in an automatic renewal or continuous service program[.]" (*Id*. at ¶ 25.) For the purposes of this Notice,

the applicable statute of limitations is four years from the date of the filing the Complaint - i.e., September 27, 2015 to the present. Stockburger Dec. at ¶ 2, Ex. A, Compl. at ¶ 36 (alleging a four year statute of limitations); Cal. Code Civ. Proc. § 338(a) (action upon a liability created by statute is three years); Cal. Bus. & Prof. Code § 17208 (statute of limitations for claims brought under the UCL is four years). Plaintiffs seek the return of all initial and automatic subscription fees and charges, and an award of attorneys' fees. Stockburger Dec. at ¶ 2, Ex. A, Compl. at ¶¶ 36, 51, 54, Prayer.

TIMELINESS OF REMOVAL

7. 28 U.S.C. § 1446(b)(1) generally requires that a notice of removal be filed within 30 days after the receipt by the defendant of a copy of the original pleading setting forth the claim for relief upon which such action is based. Plaintiffs provided Condé Nast with a copy of the Complaint on or about October 2, 2019. Stockburger Dec. at ¶ 5, Ex. D. The deadline to file a notice of removal is therefore November 1, 2019, and this Notice is timely.

VENUE

8. Venue is proper in this Court because Plaintiffs filed this matter in the Superior Court of the State of California, County of San Diego, which lies within the Southern District of California. See 28 U.S.C. § 84(d), 1441(a). Venue is also appropriate because Plaintiffs allege they reside in San Diego County and that the "complained of conduct" occurred in San Diego County. 28 U.S.C. § 1391(b)(2); Stockburger Dec. at ¶ 2, Ex. A, Compl. at ¶¶ 2-3, 6.

JURISDICTION

9. The State Court Action is a civil action over which this Court has original jurisdiction pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d)(2) ("CAFA"). CAFA provides "original jurisdiction" to this Court to hear a putative class action if the class has more than 100 members, the parties are minimally diverse, and the matter in controversy "exceeds the sum value of $5,000,000." 28 U.S.C. § 1332(d)(2), (d)(5). A class action that meets CAFA standards may be removed to federal court.

28 U.S.C. § 1441(a).

10. Congress intended CAFA jurisdiction to be "interpreted expansively." *Ibarra v. Manheim Investments, Inc.*, 775 F.3d 1193, 1197 (9th Cir. 2015). Thus, unlike other removal cases, "no antiremoval presumption attends cases involving CAFA." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 89 (2014). The burden of establishing removal jurisdiction is on the removing party. *Washington v. Chimel Innolux Corp.*, 659 F.3d 842, 847 (9th Cir. 2011).

11. As set forth below, the State Court Action is a civil action that may be removed pursuant to CAFA because (1) the putative class has more than 100 putative class members; (2) minimal diversity exists between Plaintiffs and Condé Nast; and (3) the amount in controversy exceeds $5,000,000 exclusive of interest and cost. 28 U.S.C. §§ 1332(d)(2), (d)(5); *Bryant v. NCR Corp.*, 284 F. Supp. 3d 1147, 1149 (S.D. Cal. 2018).

PUTATIVE CLASS SIZE

12. Plaintiffs define the putative class as "[a]ll individuals in California who, within the applicable limitations period, were enrolled by [Condé Nast] in an automatic renewal or continuous service program." Stockburger Dec. at ¶ 2, Ex. A, Compl. at ¶ 25. The applicable statute of limitations for the purpose of this Notice is September 27, 2015 to the present. Stockburger Dec. at ¶ 2, Ex. A, Compl. at ¶ 36 (alleging a four year statute of limitations); Cal. Code Civ. Proc. § 338(a) (action upon a liability created by statute is three years); Cal. Bus. & Prof. Code § 17208 (statute of limitations for claims brought under the UCL is four years).

13. Based on a review of Condé Nast's records, the total number of putative class members in California who were enrolled by Condé Nast in an alleged "automatic renewal or continuous service program" for a Condé Nast publication during the relevant time period is over 150,000, well beyond the 100 class member threshold. Hoffmeyer Dec. at ¶ 8.

DIVERSITY OF CITIZENSHIP

14. Minimal diversity under CAFA 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 party's allegation of minimal diversity may be based on 'information and belief.'" and "[t]he pleading 'need not contain evidentiary submissions.'" *Ehrman v. Cox Comms.*, 932 F.3d 1223, 1227 (9th Cir. 2019). *Ehrman v. Cox Commc'ns, Inc.*, 932 F.3d 1223, 1227 (9th Cir. 2019) (quoting *Carolina Cas. Ins. Co. v. Team Equip., Inc.*, 741 F.3d 1082, 1087 (9th Cir. 2014)). Moreover, and "[t]he pleading 'need not contain evidentiary submissions.'" *Id*. (quoting *Dart Cherokee*, 574 U.S. at 84).

Plaintiffs' Citizenship

15. Plaintiffs are the only named plaintiffs in the Complaint. Both allege they are individuals residing in San Diego County[.]" Stockburger Dec. at ¶ 2, Ex. A, Compl. at ¶¶ 2-3. Upon information and belief, they are both also domiciled in California. Hoffmeyer Dec. at ¶ 6.

16. A natural person's state of citizenship is determined by his or her state of domicile. *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001). A person's domicile is his or her permanent home, "where [he or] she resides with the intention to remain or to which [he or] she intends to return." *Id*. Although the Ninth Circuit has yet to formally adopt the so-called "residence presumption" (see *Mondragon v. Capital One Auto Fin.*, 736 F.3d 880, 887 (9th Cir. 2013); see also *Jes Solar Co. Ltd. v. Ton Soo Chung*, 725 F. App'x 467, 469 (9th Cir. Feb. 12, 2018)), numerous courts treat a party's residence as *prima facie* evidence of his or her domicile. *See, e.g.*, *Anderson v. Watts*, 138 U.S. 694, 705-06 (1891); *State Farm Mut. Auto Ins. Co. v. Dyer*, 19 F.3d 514, 520 (10th Cir. 1994); *Hollinger v. Home State Mut. Ins. Co.*, 654 F.3d 564, 571 (5th Cir. 2011); *Zoroastrian Ctr. & Darb-E-Mehr of Metro. Wash., D.C. v. Rustam Guiv Co.*, 822 F.3d 739, 750 n.6 (4th Cir. 2016).

17. Plaintiffs allege they are residents of California (Stockburger Dec. at ¶ 2, Ex. A, Compl. at ¶¶ 2-3), and Condé Nast alleges upon information and belief they are domiciled in California (Hoffmeyer Dec. at ¶ 6). Based on the residence presumption, Plaintiffs are citizens of California for the purposes of this Notice.

Condé Nast's Citizenship

18. Condé Nast Entertainment LLC is the named defendant in this suit. Condé Nast Entertainment LLC is a limited liability company. Condé Nast Entertainment LLC is a wholly-owned subsidiary of AMPI, the publisher of the magazines at issue in this case. Hoffmeyer Dec. at ¶ 2. Thus, for the purposes of this Notice, the citizenship of Condé Nast will be analyzed from both an LLC and corporate perspective.

19. Regarding unincorporated associations, such as an LLC, CAFA provides that such associations "shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized." 28 U.S.C. § 1332(d)(10); *Davis v. HSBC Bank Nev., N.A.,* 557 F.3d 1026, 1032 n.13 (9th Cir. 2009) (citing § 1332(d)(10) and noting that "[f]or qualifying class actions . . . , CAFA abrogates the traditional rule that an unincorporated association shares the citizenship of each of its members for diversity purposes.").[2]

20. Applying the 28 U.S.C. § 1332(d)(10) citizenship test to Condé Nast Entertainment LLC, the named defendant, Condé Nast Entertainment LLC is organized under the laws of Delaware and maintains its principal place of business in New York. Hoffmeyer Dec. at ¶ 5. Thus, for the purposes of 28 U.S.C. § 1332(d)(10), Condé Nast Entertainment LLC is a citizen of both Delaware and New York.

21. For AMPI, the parent company of Condé Nast Entertainment LLC and the

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[2] In the Ninth Circuit, whether an LLC is an "unincorporated association" for CAFA purposes under 28 U.S.C. § 1332(d)(10) remains an open question. The Fourth Circuit, the only federal circuit to resolve the issue, offers persuasive guidance. In *Ferrell v. Express Check Advance of SC LLC*, 591 F.3d 698 (4th Cir. 2010), the Fourth Circuit expressly held that an LLC is properly considered an "unincorporated association" within the meaning of 28 U.S.C. § 1332(d)(10) "and therefore is a citizen of the State under whose laws it is organized and the State where it has its principal place of business." Id. at 700. Most courts to consider the issue have reached the same conclusion, including the Southern District of California. See, e.g., *Marroquin v. Wells Fargo, LLC*, 2011 WL 476540 , at *2 (S.D. Cal. Feb. 3, 2011) (treating an LLC as an unincorporated association under CAFA); *Ramirez v. Carefusion Resources, LLC,* 2019 WL 2897902, at *2 (S.D. Cal. July 5, 2019).

publisher of the magazines at issue in this case, the analysis turns on the "principal place of business" test for corporations. For a corporation, the phrase "principal place of business" refers to the place where its "officers direct, control, and coordinate" the entity's activities. *Hertz Corp. v. Friend*, 559 U.S. 77, 92 (2010). In practice, this is "normally. . . the place where the [entity] maintains its headquarters – provided that the headquarters is the actual center of direction, control, and coordination, i.e., the 'nerve center,' and not simply an office where the [entity] holds its board meetings. . . ." *Id.* at 79. AMPI is incorporated in New York and headquartered in New York City, where AMPI's officers direct, control, and coordinate the company's activities. Hoffmeyer Dec. at ¶ 4.

22. Based on the foregoing, regardless of whether the Court considers Condé Nast Entertainment LLC or AMPI as the appropriate entity for the purposes of this Notice, the result is the same. Condé Nast Entertainment LLC is a citizen of both Delaware and New York. AMPI is a citizen of New York. Both entities are minimally diverse from Plaintiffs, who are citizens of California.

23. Accordingly, there is minimal diversity between Plaintiffs and Condé Nast.

AMOUNT IN CONTROVERSY

24. A "removing defendant need only include a plausible allegation that the amount in controversy exceeds the jurisdictional threshold [under CAFA], and the defendant's amount in controversy should be accepted if not contested by the plaintiff or questioned by the court." *Bryant*, 284 F. Supp. 3d at 1149. Under this standard, Condé Nast need only establish that the "potential damages could exceed the jurisdictional amount." *Rea v. Michaels Stores Inc.*, 742 F.3d 1234, 1239 (9th Cir. 2014) (internal quotations and citations omitted). This "burden is not daunting and only requires that the defendant provide evidence establishing that it is *more likely than not* that the amount in controversy exceeds [$5 million]." *Varsam v. Lab. Corp. of Am.*, 2015 WL 4199287, at *2 (S.D. Cal. July 13, 2015) (internal quotations and citations omitted, emphasis in original). Claims regarding the amount in controversy under a preponderance of the

evidence standard should be "tested by consideration of real evidence and the reality of what is at stake in the litigation, using reasonable assumptions underlying the defendant's theory of damages exposure." *Ibarra*, 775 F.3d at 1198.

25. Although Plaintiffs do not specify how much they seek in restitution (see Stockburger Dec. at ¶ 2, Ex. A, Compl. at ¶¶ 51, 54, Prayer), the evidence demonstrates that it is more likely than not that the amount in controversy relating to restitution will exceed the $5,000,000 jurisdictional threshold.

26. Plaintiffs allege a putative class of all individuals in California who, between September 27, 2015 and the present, were enrolled in a Condé Nast "automatic renewal or continuous service program" for one of Condé Nast's publications. Stockburger Dec. at ¶ 2, Ex. A, Compl. at ¶ 25. Based on a review of subscriber records, the total number of putative class members under this definition is over 150,000. Hoffmeyer Dec. at ¶¶ 7-8. Of those individuals, the total amount paid during the relevant time period for an initial subscription fee was over $2,000,000. *Id*. The total amount paid for subsequent renewal subscriptions was over $17,000,000, well exceeding the jurisdictional threshold. *Id*.

27. Plaintiffs seek an order returning all moneys paid to Condé Nast by putative class members during the relevant time period, including the original subscription fee and any automatic renewal charges. See Stockburger Dec. at ¶ 2, Ex. A, Compl. at ¶ 18 ("If Granillo had known that Defendants were going to enroll him in an automatic renewal or continuous service program, he would not have responded to the offer for *Vogue* and would not have paid any money to Defendants"), Compl. at ¶ 22 ("If Fite had known that Defendants were going to enroll her in an automatic renewal or continuous service program, she would not have submitted the order for *Vanity Fair* and would not have paid any money to Defendants"), Compl. at ¶ 35 ("Plaintiffs have suffered injury in fact and lost money as a result of Defendants' violations of the ARL), Compl. at ¶ 36 ("Plaintiffs and Class members are entitled to restitution of all amounts that Defendants charged to Plaintiffs' and Class members' credit cards, debit cards, or third-party

payment accounts during the four years preceding the filing of this Complaint and continuing until Defendants' statutory violations cease"), Compl. at ¶ 50 ("Plaintiffs have suffered injury in fact and lost money as a result of Defendants' acts of unfair competition), Compl. at ¶ 51 ("Plaintiffs and the Class members are entitled to an order: (1) requiring Defendants to make restitution to Plaintiffs and Class members"), Compl. at ¶ 54 ("Defendants should be ordered to restore said funds to Plaintiffs and Class members"), Prayer (seeking restitution). Plaintiffs therefore are seeking an order demanding restitution of at least approximately $20,000,000.

28. Although the amounts the named Plaintiffs themselves will seek in restitution will be much smaller, the approximate $20,000,000+ figure is not surprising considering the size of the putative class. Indeed, at least one verdict in a case that similarly alleged violations of the ARL, CLRA and UCL yielded a jury verdict of $20,629,000 in restitution. See, e.g., *Habelito v. Guthy-Renker L.L.C.*, 2017 WL 9939712 (Sup. Ct. Los Angeles June 23, 2017).

29. Based on the foregoing, the amount in controversy will more likely than not exceed the $5,000,000 jurisdictional threshold based on Plaintiffs' request for restitution alone.

COMPLIANCE WITH 28 U.S.C. § 1446

30. No previous application has been made for the relief requested herein.

31. Pursuant to 28 U.S.C. § 1446(a), copies of all process, pleadings, and orders served on Condé Nast are attached with this Notice. Stockburger Dec. at ¶¶ 2-6, Exs. A-E.

32. Pursuant to 28 U.S.C. § 1446(d), Defendants will serve on Plaintiffs and will file with the Clerk of the Superior Court for the County of San Diego a written "Notice to the Clerk of the San Diego Superior Court and Plaintiffs of Filing of Notice of Removal of Civil Action to Federal Court," attaching a copy of this Notice of Removal and all supporting papers.

DATED: November 1, 2019

DENTONS US LLP

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