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9 *Counsel for Ghirardelli Chocolate Company*

10 **IN THE UNITED STATES DISTRICT COURT**

11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

12 LINDA CHESLOW and STEVEN  
13 PRESCOTT, individually and on behalf of all  
others similarly situated,

14 Plaintiffs,

15 v.

16 GHIRARDELLI CHOCOLATE COMPANY  
and DOES 1 THROUGH 10, inclusive.

17 Defendants.  
18

Case No. 3:19-cv-7467

**NOTICE OF REMOVAL BY  
DEFENDANT GHIRARDELLI  
CHOCOLATE COMPANY**

19 **NOTICE OF REMOVAL**

20 Defendant Ghirardelli Chocolate Company, through undersigned counsel, removes the  
21 above-captioned action from the Superior Court for Sonoma County to the United States District  
22 Court for the Northern District of California in accord with 28 U.S.C. §§ 1332(d), 1441, and 1446.

23 1. On September 19, 2019, plaintiffs Linda Cheslow and Steven Prescott sued  
24 Ghirardelli and “DOES 1 through 10” in the Superior Court for Sonoma County.

25 2. In accord with 28 U.S.C. § 1446(a), attached as Exhibit 1 is a copy of “all process,  
26 pleadings, and orders” served on Ghirardelli in this action.

27 3. In accord with 28 U.S.C. §1446(d), Ghirardelli will promptly serve this notice on  
28 plaintiffs’ counsel and file a copy with the clerk of the Superior Court for Sonoma County.

1 4. On October 15, 2019, Ghirardelli executed a written acceptance of service by mail.  
2 *See* Cal. Code. Civ. P. § 415.30 (“Service of a summons [by mail] is deemed complete on the date  
3 a written acknowledgment of receipt of summons is executed.”).

4 5. Under 28 U.S.C. § 1446(b) and Rule 6, Federal Rules of Civil Procedure, this  
5 removal is timely because Ghirardelli removed within 30 days of executing the written acceptance.  
6 *See, e.g., Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 348 (1999) (clock for  
7 removal not triggered by “mere receipt of the complaint unattended by any formal service”);  
8 *Harper v. Little Caesar Enter., Inc.*, 2018 WL 5984841 (C.D. Cal. Nov. 14, 2018) (Staton, J.)  
9 (collecting authority and explaining that the clock begins when the defendant executes acceptance  
10 of service by mail).

11 6. The time for Ghirardelli to respond to the complaint has not yet expired.

12 7. Ghirardelli need not secure consent to removal from the “Doe” defendants. *See,*  
13 *e.g., United Comp. Sys., Inc. v. AT&T Corp.*, 298 F.3d 756, 762 (9th Cir. 2002) (explaining that  
14 the consent requirement “does not apply to” “unknown” or “fictitious” parties).

15 8. As the Supreme Court has explained, Congress enacted CAFA to ensure that federal  
16 courts hear large class actions with interstate consequences. *See, e.g., Standard Fire Ins. Co. v.*  
17 *Knowles*, 568 U.S. 588, 595 (2013). Where, as here, the amount in controversy exceeds \$5 million,  
18 a defendant and at least one putative class member are diverse, and the proposed class exceeds 100  
19 members, CAFA confers subject-matter jurisdiction. 28 U.S.C. § 1332(d).

20 9. The removing party need only provide a “short and plain statement of the grounds  
21 for removal” and need not submit evidence unless and until the opposing party challenges the  
22 factual allegations in the notice of removal. *See generally Dart Cherokee Basin Operating Co. v.*  
23 *Owens*, 135 S. Ct. 547 (2014); *Arias v. Residence Inn by Marriott*, 936 F.3d 920, 922 (9th Cir.  
24 2019).

25 **VENUE**

26 10. Under 28 U.S.C. §§ 84(a) and 1441(a), venue is proper in the United States  
27 District Court for the Northern District of California because this Court embraces the Superior  
28 Court for Sonoma County, where this action was pending.

**BRIEF OVERVIEW OF THE PLAINTIFFS’ ALLEGATIONS**

1  
2 11. In this putative class action under the UCL, CLRA, and FAL, the plaintiffs claim  
3 that Ghirardelli “affirmatively misrepresented” the “nature and characteristics” of Ghirardelli’s  
4 Classic White baking chips. *E.g.*, Compl. ¶ 33.

5 12. The plaintiffs claim that Ghirardelli deceptively advertised that the Classic White  
6 chips contain “white chocolate” when in fact the Classic White chips allegedly “do[] not contain  
7 *any* white chocolate. It is fake white chocolate.” Compl. ¶ 4.

8 13. The plaintiffs incorporate into the complaint (¶ 4) the front of the Classic White  
9 chips package and suggest that the package falsely advertises that the “Classic White” chips  
10 contain white chocolate. (In fact, the word “chocolate” appears nowhere on the photo incorporated  
11 into the plaintiffs’ complaint.)

12 14. In addition to claiming that Ghirardelli falsely advertised that the Classic White  
13 chips contain white chocolate, the plaintiffs protest the product’s use of the word “premium.”  
14 According to the plaintiffs, the word “premium” misleads consumers “into thinking that the  
15 [p]roduct contains premium ingredients, not fake white chocolate.” Compl. ¶ 6. The plaintiffs  
16 claim that “[r]easonable consumers do not expect the [p]roduct to include fake white chocolate  
17 made of inferior—not premium—ingredients like hydrogenated and palm oils.” Compl. ¶ 7.

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

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

24 **THE PROPOSED CLASS EXCEEDS 100 MEMBERS**

25 17. The plaintiffs sue on behalf of a nationwide class of consumers who bought the  
26 Classic White chips between September 19, 2015 and the present. Nationwide retailers, such as  
27 Whole Foods, Albertson’s, and Safeway, sell the Classic White chips in at least hundreds of  
28

1 stores across the United States. Without more, these facts compel concluding that more than 100  
2 putative class members bought the Classic White chips.

3 18. Also, the plaintiffs allege that “the [c]lass is comprised of millions of consumers  
4 throughout the United States...” Compl. ¶ 46; *see also, e.g., Roppo v. Travelers Comm. Ins. Co.*,  
5 869 F.3d 568, 581 (7th Cir. 2017) (“[A defendant] may rely on the estimate of the class number  
6 set forth in the complaint.”). Common sense and the plaintiffs’ allegations independently satisfy  
7 the requirement to show that the putative class likely exceeds 100 members.

8 **GHIRARDELLI IS DIVERSE FROM AT LEAST ONE PUTATIVE CLASS MEMBER**

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. Ghirardelli Chocolate Company is a California corporation with its principal  
14 place of business in California. *See Hertz Corp. v. Friend*, 559 U.S. 77, 80-81 (2010)  
15 (explaining what constitutes a corporation’s principal place of business). Under 28 U.S.C.  
16 § 1332(c)(1), Ghirardelli Chocolate Company is a citizen of California.

17 21. The plaintiffs sue on behalf of a nationwide putative class that comprises  
18 “millions of consumers throughout the United States.” Compl. ¶ 46; *accord* Compl. ¶ 45  
19 (defining the class to include “[a]ll persons who purchased the [p]roduct in the United States or,  
20 alternatively, in California” from September 19, 2015 to the present).

21 22. Common sense readily confirms that a putative class of consumers who bought  
22 the Classic White chips throughout the United States between September 19, 2015 and the  
23 present necessarily includes at least one citizen of a state other than California (and likely  
24 hundreds of thousands of citizens from states other than California). *See Roe v. Michelin N. Am.*,  
25 *Inc.*, 613 F.3d 1058, 1062 (11th Cir. 2010) (“[C]ourts may use...common sense in determining  
26 whether the case stated in the complaint meets federal jurisdiction requirements.”); *Rosas v.*  
27 *Carnegie Mortg., LLC*, 2012 WL 1865480 at \*5 (C.D. Cal. May 21, 2012) (“Because the  
28 complaint alleges a nationwide class, minimal diversity necessarily exists.”) (internal quotation

1 omitted); *Arias*, 936 F.3d at 922 (explaining that the invocation of CAFA jurisdiction may rely  
2 on “reasonable assumptions”).

3 23. Because Ghirardelli is a citizen of California and because at least one putative  
4 member of the putative nationwide class is a citizen of a state other than California, the parties  
5 are at least minimally diverse.

6 **THE AGGREGATE AMOUNT IN CONTROVERSY EXCEEDS \$5 MILLION**

7 24. The amount in controversy “is simply an estimate of the total amount in dispute,  
8 not a prospective assessment of the defendant’s liability.” *Lewis v. Verizon Comms., Inc.*,  
9 627 F.3d 395, 400 (9th Cir. 2010).

10 25. Under CAFA, determining if the amount in controversy exceeds \$5 million  
11 requires aggregating the claims of the putative class members. 28 U.S.C. § 1332(d)(6).

12 26. In this action, the aggregate amount in controversy from the plaintiffs’ putative  
13 nationwide class allegations far exceeds \$5 million, excluding costs and interest.

14 27. The plaintiffs allege that Ghirardelli “has sold millions of units or more of the  
15 [p]roduct.” Compl. ¶ 44.

16 28. Between September 19, 2015 and the present, Ghirardelli earned more than \$5  
17 million in gross revenue nationwide from the sale of the Classic White chips.

18 29. The amount paid by Cheslow and Prescott (and the putative class) likely exceeds  
19 Ghirardelli’s gross receipts from wholesale distribution because the plaintiffs bought the Classic  
20 White chips at retailers, which sell the product for more than the wholesale cost. *See, e.g.*,  
21 Compl. ¶¶ 26-27 (alleging that the plaintiffs each bought the Classic White chips at Target).

22 30. The plaintiffs request restitution and claim that they “would not have purchased the  
23 Product but for the representations by Defendant about the product.” *E.g.*, Compl. ¶ 51.

24 31. In addition to claiming that they would not have purchased the Classic White  
25 chips but for the alleged misrepresentations, the plaintiffs imply that consumers who bought the  
26 Classic White chips for baking received no benefit from the product because it “does not melt  
27 like chocolate.” *E.g.* Compl. ¶¶ 11-16.

28

1           32. Under either theory (that the plaintiffs would not have bought the Classic White  
2 chips but for the alleged misrepresentations or that consumers received no benefit from the  
3 Classic White chips because they failed to “melt like chocolate”), the plaintiffs may claim that  
4 damages include the purchase price. *See, e.g., Spann v. J.C. Penney Corp.*, 2015 WL 1526559 at  
5 \*6 (C.D. Cal. Mar. 23, 2015) (finding “complete restitution” of the purchase price a viable  
6 measure of damages where the plaintiff showed that “every dollar she spent was as a result of  
7 [the defendant’s] alleged false advertising”); *Allen v. Hyland’s Inc.*, 300 F.R.D. 643, 671 (C.D.  
8 Cal. Aug. 1, 2014) (plaintiffs might recover “full restitution” because the products were allegedly  
9 “ineffective”).

10           33. As a result, the amount in controversy just from the plaintiffs’ request for  
11 restitution on behalf of themselves and the proposed nationwide class exceeds \$5 million.

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

15           35. In accord with the CLRA and the FAL, the plaintiffs request an attorney’s fee.  
16 Prayer for Relief § C.

17           36. By itself, the attorney’s fee the plaintiffs might incur litigating this action in the  
18 future exceeds \$5 million. Ghirardelli denies that the label and advertising of its Classic White  
19 chips, which truthfully disclose the content of the product in accord with federal food-labeling  
20 law, could have misled the plaintiffs. The complaint warrants dismissal for failure to state a  
21 claim, but if an order finds that the complaint states a claim, Ghirardelli intends to move for  
22 summary judgment at the appropriate time and, if necessary, to try the action. The plaintiffs will  
23 incur a significant attorney’s fee litigating this action, attempting to defeat summary judgment,  
24 and trying this action (in the unlikely event an order denies summary judgment).

25           37. The judiciary can rely on its experience in evaluating the amount in controversy,  
26 and judicial experience readily confirms that plaintiffs’ counsels often incur or request an  
27 attorney’s fee in the millions of dollars for litigating similar class actions. *See, e.g., Fritsch*, 899  
28 F.3d at 795 (citing *Ingram v. Oroudjian*, 647 F.3d 925, 928 (9th Cir. 2011) (explaining that the

1 amount in controversy includes the prospective attorney’s fee); *Roe*, 613 F.3d at 1062 (“[C]ourts  
2 may use their judicial experience and common sense in determining whether the case stated in  
3 the complaint meets federal jurisdiction requirements.”).

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

6 **CONCLUSION**

7 39. Because the amount in controversy exceeds \$5 million, because Ghirardelli’s  
8 citizenship differs from at least one member of the putative nationwide class, and because the  
9 proposed class exceeds 100 members, CAFA confers subject-matter jurisdiction.

10 40. If any question arises about the propriety of removal, Ghirardelli requests an  
11 opportunity to submit briefing and present oral argument in support of removal before an order  
12 resolves the question.

13 41. Nothing about this removal waives (or should be construed to waive) any available  
14 right, argument, or objection.

15 42. Ghirardelli respectfully reserves the right to amend or supplement this notice.

16  
17 DATED: November 13, 2019

MAYER BROWN LLP  
DALE J. GIALI

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20 By:           /s/ Dale J. Giali            
          Dale J. Giali

21 *Counsel for Ghirardelli Chocolate Company*  
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