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13
14 UNITED STATES DISTRICT COURT
15 SOUTHERN DISTRICT OF CALIFORNIA

16
17 HARLAN ZABACK, individually and on
18 behalf of all others similarly situated,

19 Plaintiff,

20 v.

21 KELLOGG SALES COMPANY and
22 DOES 1 through 10, inclusive,

23 Defendants.

Case No. '20CV0268 BEN MSB

**DEFENDANT KELLOGG SALES
COMPANY'S NOTICE OF REMOVAL**

1 Defendant Kellogg Sales Company (“Kellogg”) hereby effects the removal of this
2 action from the Superior Court of California, County of San Diego to the United States
3 District Court for the Southern District of California. Removal is proper under the Class
4 Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. § 1332(d), because this case is a class
5 action in which the putative class exceeds 100 members, at least one plaintiff is diverse
6 from at least one defendant, and the amount in controversy exceeds \$5 million. Venue is
7 proper in this Court because it is the “district and division embracing the place where [the]
8 action is pending.” 28 U.S.C. § 1441(a); *see also* 28 U.S.C. § 84(d) (providing that San
9 Diego County is part of the Southern District of California).

10 **FACTUAL BACKGROUND AND STATE COURT PROCEEDINGS**

11 1. Plaintiff filed this lawsuit in San Diego County Superior Court on December
12 20, 2019. Kellogg was served with the Summons and Complaint on January 17, 2020. *See*
13 Ex. 1 (“Compl.”).

14 2. Pursuant to 28 U.S.C. § 1446(a), a true and correct copy of the state court case
15 file is attached to this Notice of Removal and is incorporated by reference herein. The file
16 includes all process, pleadings, motions, and orders filed in this case, including the
17 Summons and Complaint (Exhibit 1) and all other documents in the state court case file
18 (Exhibit 2).

19 3. Plaintiff alleges that Bear Naked Granola Fit V’Nilla Almond, which is
20 manufactured and sold by Kellogg, is mislabeled because it purports to be “made with
21 vanilla flavoring derived exclusively from vanilla beans when the ingredient list reveals
22 otherwise.” Compl. ¶¶ 1-2. Plaintiff alleges that the labeling of this product is misleading
23 and that it violates various FDA regulations governing the labeling of vanilla and other
24 flavoring agents. *See id.* ¶¶ 15-47.

25 4. Based on those allegations, Plaintiff asserts claims for violations of the
26 Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750 *et seq.*, the Unfair Competition
27 Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.*, and the False Advertising Law, Cal. Bus. &
28 Prof. Code §§ 17500 *et seq.* *See* Compl. ¶¶ 60-93. Plaintiff also asserts a claim for “Quasi-

1 Contract/Unjust Enrichment/Restitution.” *See id.* ¶¶ 94-101. Plaintiff purports to assert
2 these claims on behalf of a class consisting of all California consumers who purchased Bear
3 Naked Granola Fit V’rilla Almond within the relevant statute of limitations periods. *See*
4 *id.* ¶ 49.

5 5. Plaintiff seeks a variety of remedies on behalf of the class, including
6 restitution, disgorgement, actual damages, punitive damages, injunctive relief, and
7 attorneys’ fees. *See* Compl. at 21-22 (Prayer).

8 **REMOVAL IS PROPER UNDER CAFA (28 U.S.C. § 1332(D))**

9 6. CAFA provides that federal courts have original jurisdiction over class actions
10 in which (a) any plaintiff is diverse from any defendant, (b) there are at least 100 members
11 in the putative class, and (c) the amount in controversy exceeds \$5 million, exclusive of
12 interest and costs. 28 U.S.C. § 1332(d). Under 28 U.S.C. § 1441(a), any such action may
13 be removed to the district court for the district and division embracing the place where the
14 action is pending.

15 **THE PARTIES ARE SUFFICIENTLY NUMEROUS TO SATISFY CAFA**

16 7. Plaintiff purports to bring this action on behalf of “[a]ll persons, who are
17 California residents who purchased ‘Bear Naked Granola Fit V’Nilla Almond,’ or who
18 purchased ‘Bear Naked Granola Fit V’Nilla Almond’ within the State of California, for
19 personal, family, or household purposes during the relevant statute of limitations periods.”
20 Compl. ¶ 49. Plaintiff alleges that “members of the Class number in at least the thousands.”
21 *Id.* ¶ 53. This is sufficiently numerous to satisfy CAFA.

22 **THE PARTIES ARE MINIMALLY DIVERSE**

23 8. Plaintiff resides in San Diego County and is a citizen of California. *Id.* ¶ 11.

24 9. Kellogg is a Delaware corporation with its principal place of business in Battle
25 Creek, Michigan. *Id.* ¶ 13. Thus, Kellogg is a citizen of Delaware and Michigan. *See* 28
26 U.S.C. § 1332(c)(1) (providing that a corporation is a “citizen of every State . . . by which
27 it has been incorporated and of the State . . . where it has its principal place of business”);
28 *see also Hertz Corp. v. Friend*, 559 U.S. 77, 92-93 (2010) (noting that a corporation’s

1 principal place of business is the place where “a corporation’s officers direct, control, and
2 coordinate the corporation’s activities,” which is typically “the place where the corporation
3 maintains its headquarters”).

4 10. Accordingly, the minimal diversity requirement is satisfied because at least
5 one plaintiff is diverse from at least one defendant. *See* 28 U.S.C. § 1332(d)(2)(A);
6 *Bridgewell-Sledge v. Blue Cross of Cal.*, 798 F.3d 923, 928 (9th Cir. 2015) (“[U]nder
7 CAFA, complete diversity is not required; ‘minimal diversity’ suffices.”) (citation omitted).

8 11. Because Kellogg is not a citizen of California, neither the “local controversy”
9 nor the “home state” exception to CAFA applies. *See* 28 U.S.C. § 1332(d)(3)-(4).

10 **THERE IS AT LEAST \$5,000,000 IN CONTROVERSY**

11 12. “In measuring the amount in controversy, a court must assume that the
12 allegations of the complaint are true and that a jury will return a verdict for the plaintiff on
13 all claims made in the complaint.” *Korn v. Polo Ralph Lauren Corp.*, 536 F. Supp. 2d 1199,
14 1205 (E.D. Cal. 2008). It must then “add[] up the value of the claim of each person who
15 falls within the definition of [the] proposed class.” *Std. Fire Ins. Co. v. Knowles*, 568 U.S.
16 588, 592 (2013). In other words, “[t]he ultimate inquiry is what amount is put ‘in
17 controversy’ by the plaintiff’s complaint, not what a defendant will actually owe.” *Korn*,
18 536 F. Supp. 2d at 1205; *see also Rippee v. Boston Mkt. Corp.*, 408 F. Supp. 2d 982, 986
19 (S.D. Cal. 2005) (“It’s not a question as to what you would owe. It’s a question as to what
20 is in controversy.”) (citation omitted). And under CAFA, there is no presumption against
21 removal to federal court. *See Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81,
22 89 (2014).

23 13. “A defendant seeking removal of a putative class action must demonstrate, by
24 a preponderance of the evidence, that the aggregate amount in controversy exceeds the
25 jurisdictional minimum.” *Rodriguez v. AT & T Mobility Servs. LLC*, 728 F.3d 975, 981
26 (9th Cir. 2013). The preponderance of the evidence standard is satisfied where “the
27 potential damages could exceed the jurisdictional amount.” *Rea v. Michaels Stores Inc.*,
28

1 742 F.3d 1234, 1239 (9th Cir. 2014) (quoting *Lewis v. Verizon Commc'ns, Inc.*, 627 F.3d
2 395, 397 (9th Cir. 2010)).

3 14. Plaintiff's complaint seeks, among other things, damages consisting of the
4 alleged "[m]oney spent" on Bear Naked Granola Fit V'Nilla Almond, restitution of the
5 "unlawfully, unfairly, and fraudulently obtained money" Kellogg allegedly obtained from
6 Plaintiff and other class members, and "restitution, disgorgement, and/or the imposition of
7 a constructive trust upon all profits, benefits, and other compensation obtained by
8 Defendant" due to its alleged deceptive conduct. Compl. ¶¶ 74(b), 86, 101. Because
9 Plaintiff's claims are subject to either a three-year or four-year statute of limitations, his
10 demand places into controversy all sales of the product in California since December 20,
11 2015.¹

12 15. Kellogg has access to retail sales data for Bear Naked Granola Fit V'Nilla
13 Almond through Nielsen, including data reflecting sales of this product in California. The
14

15 ¹ Kellogg believes that California law precludes Plaintiff from seeking disgorgement and
16 restitution of all profits received by Kellogg from the sale of Bear Naked Granola Fit
17 V'Nilla Almond because Plaintiff derived significant value from that product, and full
18 restitution would therefore amount to an unjustified windfall. *See Brazil v. Dole Packaged*
19 *Foods, LLC*, 660 F. App'x 531, 534 (9th Cir. 2016) (explaining that damages in false
20 advertising case were limited to "the difference between the prices customers paid and the
21 value of the [product] they bought—in other words, the 'price premium' attributable to [the
22 challenged] labels"). For the purposes of removal, however, the "inquiry is what amount is
23 put 'in controversy' by the plaintiff's complaint, not what a defendant will actually owe."
24 *Korn*, 536 F. Supp. 2d at 1205; *see also Deutsche Bank Nat'l Trust v. Heredia*, No. 12-
25 04405, 2012 WL 4714539, at *2 (N.D. Cal. Sept. 14, 2012), *report & recommendation*
26 *adopted*, No. 12-4405, 2012 WL 4747157 (N.D. Cal. Oct. 3, 2012) (citation omitted) ("[I]n
27 determining whether a challenged jurisdictional amount has been met, district courts are
28 permitted only to assess the allegations in a complaint and not the validity of any asserted
defenses . . ."). Accordingly, the full amount of Kellogg's sales during Plaintiff's
proposed class period is properly included in the amount-in-controversy calculation. *See*
Waller v. Hewlett-Packard Co., No. 11-454, 2011 WL 8601207, at *2 n.3 (S.D. Cal. May
10, 2011) (calculating amount in controversy based on the full purchase price even though
plaintiff argued it would be "unrealistic" to expect the putative class members to receive a
"100% reimbursement," since the inquiry is based on "the relief a plaintiff *seeks*, not what
the plaintiff may reasonably or ultimately *obtain*").

1 Nielsen retail sales data reflect that, since January 1, 2016, total sales of Bear Naked
2 Granola Fit V’Nilla Almond exceed \$5 million.² See Ex. 3 (“Eastwood Decl.”) ¶¶ 3-4.

3 16. Plaintiff also seeks punitive damages, which are included in calculating the
4 amount in controversy. See Compl. ¶ 73; Prayer ¶ 6; *Fritsch v. Swift Transp. Co.*, 899 F.3d
5 785, 793 (9th Cir. 2018) (noting that punitive damages are included in the amount in
6 controversy).³ Punitive damages awards “can be substantial.” *Hurd*, 2013 WL 5575073,
7 at *6-7. Even “applying the ‘conservative’ estimate of a 1:1 ratio between compensatory
8 damages and punitive damages,” Plaintiff’s request for punitive damages adds more than
9 \$5 million to the amount in controversy. *Tompkins v. Basic Research LLC*, No. 08-244,
10 2008 WL 1808316, at *4 (E.D. Cal. Apr. 22, 2008) (including potential punitive damages
11 in analyzing amount in controversy).

12 17. Plaintiff also seeks attorneys’ fees. See Compl. ¶ 72; Prayer ¶ 7. For purposes
13 of assessing the amount in controversy, the Court is not limited to considering fees incurred
14 at the time of removal; rather, “a court must include future attorneys’ fees recoverable by
15 statute or contract when assessing whether the amount-in-controversy requirement is met.”
16 *Fritsch*, 899 F.3d at 794 (holding that the amount in controversy includes fees likely to be
17 incurred after removal); see also *Bayol v. Zipcar, Inc.*, No. 14-2483, 2015 WL 4931756, at
18 *7 (N.D. Cal. Aug. 18, 2015) (“The amount in controversy can include . . . attorneys’
19 fees[.]” Fee requests in consumer class actions, such as this case, are typically significant.
20 See, e.g., *Wilson v. Airborne, Inc.*, No. 07-770, 2008 WL 3854963, at *12 (C.D. Cal. Aug.
21 13, 2008) (awarding \$3,459,946 in attorneys’ fees in deceptive advertising class action);
22

23 ² The precise sales figures are set forth in the unredacted Declaration of Winnie Eastwood,
24 which Kellogg will submit under seal concurrently with the filing of this Notice of Removal.

25 ³ See also, e.g., *Bell-Sparrow v. Wiltz*, No. 12-2782, 2014 WL 2927354, at *4-5 (N.D. Cal.
26 June 27, 2014) (including punitive damages award with 5.5 multiplier in amount-in-
27 controversy in light of plaintiff’s request for punitive damages in connection with claim for
28 intentional misrepresentation); *Lee v. Equifax Info. Servs., LLC*, No. 13-4302, 2013 WL
6627755, at *4 (N.D. Cal. Dec. 16, 2013) (similar); *Hurd v. Am. Income Life Ins.*, No. 13-
5205, 2013 WL 5575073, at *6-7 (C.D. Cal. Oct. 10, 2013) (similar); *Simmons v. PCR
Tech.*, 209 F. Supp. 2d 1029, 1033 (N.D. Cal. 2002) (similar).

1 *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 46 (2008) (awarding attorneys’ fees of \$2.04
2 million as part of the settlement of consumer class action); *In re Sony SXRDRear Projection*
3 *Television Class Action Litig.*, No. 06-5173, 2008 WL 1956267, at *16 (S.D.N.Y. May 1,
4 2008) (awarding class counsel \$1.6 million in attorneys’ fees and expenses in breach-of-
5 warranty class action).

6 18. Furthermore, Plaintiff seeks injunctive relief. *See* Compl. at 21-22 (seeking to
7 enjoin Kellogg from “engaging in the unlawful act” alleged in the Complaint). “In actions
8 seeking declaratory or injunctive relief, it is well established that the amount in controversy
9 is measured by the value of the object of the litigation.” *Cohn v. Petsmart, Inc.*, 281 F.3d
10 837, 840 (9th Cir. 2002) (quoting *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S.
11 333, 347 (1977)); *see also* *Rose v. J.P. Morgan Chase, N.A.*, No. 12-225, 2012 WL 892282,
12 at *2-3 (E.D. Cal. Mar. 14, 2012) (denying motion to remand where value of injunctive
13 relief sought exceeded the amount in controversy). The amount in controversy therefore
14 includes “the cost [to Kellogg] of complying with [Plaintiff’s] requested injunctive relief.”
15 *Gen. Dentistry for Kids, LLC v. Kool Smiles, P.C.*, 379 F. App’x 634, 635 (9th Cir. 2010).

16 19. Here, the injunctive relief Plaintiff seeks would likely require Kellogg to
17 immediately cease selling Bear Naked Granola Fit V’nilla Almond in its current packaging
18 in California. The costs of compliance would be significant, as they would include the cost
19 of removing Bear Naked Granola Fit V’Nilla Almond from all stores in California and re-
20 designing the product packaging, as well as the loss of sales Kellogg would likely incur
21 between the time it removed current products from store shelves and when it distributed
22 updated products with re-designed packaging. *See* Eastwood Decl. ¶ 5.

23 20. When aggregated, the actual damages, restitution and disgorgement, punitive
24 damages demanded by Plaintiff, the amount of attorneys’ fees that class counsel may
25 recover, and the cost of complying with Plaintiff’s requested injunctive relief easily exceed
26 CAFA’s \$5 million threshold.

1 **VENUE IS PROPER**

2 21. Venue is proper in this Court because Plaintiff filed his complaint in San Diego
3 County Superior Court, which is located in this District. *See* 28 U.S.C. § 1441(a) (“Except
4 as otherwise expressly provided by Act of Congress, any civil action brought in a State
5 court of which the district courts of the United States have original jurisdiction, may be
6 removed by the defendant or the defendants, to the district court of the United States for the
7 district and division embracing the place where such action is pending.”); 28 U.S.C. § 84(d)
8 (providing that San Diego County is part of the Southern District of California).

9 **REMOVAL IS TIMELY**

10 22. Under 28 U.S.C. § 1446(b), a notice of removal of a civil action must be filed
11 within thirty days of the defendant’s receipt of service of the Summons and the Complaint.
12 Kellogg was served on January 17, 2020. *See* Ex. 1. This Notice of Removal is accordingly
13 timely.

14 **OTHER REQUIREMENTS FOR REMOVAL ARE MET**

15 23. Kellogg has not had any attorneys enter an appearance, file any responsive
16 pleadings, or file any papers responding to the Complaint in the Superior Court.

17 24. Pursuant to 28 U.S.C. § 1446(d), Kellogg will promptly give written notice of
18 the filing of this Notice of Removal to all parties and will promptly file a written notice,
19 along with a copy of this Notice of Removal, with the Clerk of the San Diego County
20 Superior Court. *See* Ex. 4 (Notice to State Court of Removal to Federal Court).

21
22 DATED: February 13, 2020

JENNER & BLOCK LLP

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