

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JENNIFER HARBERS, for Herself, as a
Private Attorney General, and/or On Behalf
Of All Others Similarly Situated,

Plaintiff,

v.

EDDIE BAUER LLC, and DOES 1-20,
inclusive,

Defendants.

Civil Action No.: 19-1012

NOTICE OF REMOVAL

[Originally King County Superior Court
Case No. 19-2-14167-1 SEA]

PLEASE TAKE NOTICE that Defendant Eddie Bauer LLC (“Eddie Bauer”), pursuant to 28 U.S.C. §§ 1332, 1441, 1446, and 1453, hereby removes the above-captioned action from the King County Superior Court to the United States District Court for the Western District of Washington.

I. INTRODUCTION

1. This Action is properly removed to this Court pursuant to 28 U.S.C. § 1441 because this Court has jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d) (“CAFA”), in that this Action is a civil action in which the alleged amount in controversy

1 exceeds the sum of \$5,000,000 exclusive of costs and interest, has more than 100 members in
2 the proposed putative class, and involves citizens of different states.

3 **II. BACKGROUND**

4 2. On May 28, 2019, Plaintiff Jennifer Harbers, purportedly on behalf of herself
5 and “all others similarly situated,” filed a civil action in the King County Superior Court
6 entitled *Jennifer Harbers v. Eddie Bauer LLC*, King County Superior Court, Case No. 19-2-
7 14167-1 SEA. Plaintiff served the Summons and Complaint on Eddie Bauer on May 29, 2019.
8 (See Exhibit A, which includes the Summons, Complaint and additional documents served on
9 Eddie Bauer.) No other activity has occurred in the case.

10 3. The Complaint, which is styled as a class action, purports to bring claims for
11 damages, disgorgement, and injunctive relief under Washington’s Consumer Protection Act
12 (“CPA”), RCW Chapter 19.86, and for permanent injunctive relief under RCW 19.86.093.
13 Plaintiff’s Complaint alleges that Eddie Bauer has deceived customers by perpetually offering
14 items at a discount.

15 4. The proposed putative nationwide class consists of “[a]ll persons in the United
16 States of America who, within the applicable limitations period, purchased from an Eddie
17 Bauer brick-and-mortar store or from the Eddie Bauer website (excluding any purchase from an
18 Eddie Bauer Outlet brick-and-mortar store) one or more products which was advertised or
19 promoted by displaying or disseminating a reference price.” (Complaint ¶ 66.)

20 5. Nothing in this Notice of Removal should be interpreted as a concession of
21 liability, the appropriateness of venue, the appropriateness of class treatment, Plaintiff’s class
22 definition, or the validity of Plaintiff’s claim for relief. Eddie Bauer reserves the right to
23 supplement and amend this Notice of Removal.

24 **III. REQUIREMENTS FOR REMOVAL UNDER CAFA**

25 6. This Court has original jurisdiction over this action under the Class Action
26 Fairness Act of 2005 (“CAFA”), codified in part at 28 U.S.C. §§ 1332(d) and 1453. Under
27 CAFA, a district court shall have original jurisdiction over any putative civil class action in

1 which: (1) there are at least 100 members in all proposed plaintiff classes; (2) “the matter in
 2 controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs”; and (3)
 3 “any member of a class of plaintiffs is a citizen of a state different from any defendant.” 28
 4 U.S.C. § 1332(d)(2, 5). Because this action meets each of CAFA’s requirements, it may be
 5 removed to federal court. 28 U.S.C. § 1441(a) (“[A]ny civil action brought in a State Court of
 6 which the district courts of the United States have original jurisdiction, may be removed by the
 7 defendant.”).

8 **IV. THE REQUIREMENTS FOR REMOVAL UNDER CAFA ARE SATISFIED**

9 **A. The Number of Proposed Class Members Exceeds 100**

10 7. The Complaint alleges that members of the putative class are “so numerous that
 11 joinder of all members is impracticable,” but does not identify the number of class members.
 12 (Complaint ¶ 68.)

13 8. According to Plaintiff’s Complaint, the putative nationwide class includes all
 14 Eddie Bauer customers who have bought anything on sale, anywhere in the country, in-store or
 15 online, during the class period. (Complaint ¶ 66.) The size of the putative class thus well
 16 exceeds 100 members. Indeed, Plaintiff estimates that the available damages are “at least tens
 17 of millions of dollars.” (Prayer for Relief ¶ b.)

18 **B. The Amount in Controversy Exceeds \$5 Million**

19 9. Defendant denies Plaintiff’s substantive allegations, the appropriateness of class
 20 treatment, and that Plaintiff is entitled to any of the relief sought in her Complaint, and does not
 21 waive any defense with respect to any of Plaintiff’s claims. Nonetheless, the amount in
 22 controversy is determined by accepting Plaintiff’s allegations as true. See *Cain v. Hartford Life*
 23 *& Accident Ins. Co.*, 890 F. Supp. 2d 1246, 1249 (C.D. Cal. 2012) (“In measuring the amount
 24 in controversy, a court must assume that the allegations of the complaint are true and assume
 25 that a jury will return a verdict for the plaintiff on all claims made in the complaint.”).

1 10. Here, taking Plaintiff’s allegations as true, the amount in controversy in this
2 action (including attorney’s fees) exceeds \$5,000,000. The Prayer for Relief requests, inter
3 alia, the following relief:

4 B. For damages, including actual damages to Plaintiff and the Class in an
5 amount to be determined at trial but which is more than \$ 100,000 and **which is**
6 **estimated to be at least tens of millions of dollars**, pursuant to, without
7 limitation, RCW 19.86.090;

8 C. For **additional damages up to an amount not to exceed three times the**
9 **actual damages** sustained by the Plaintiff and the members of the Class up to
10 any applicable statutory maximum pursuant to, without limitation, RCW
11 19.86.090;

12 D. For disgorgement or restitution, including, without limitation, **disgorgement**
13 **of all revenues**, profits and/or unjust enrichment that each defendant obtained,
14 directly or indirectly, from Plaintiff and the members of the Class or otherwise
15 as a result of the unlawful conduct alleged herein;

16 (Prayer for Relief ¶ b-d (emphasis added).)

17 11. Case law is clear that “the amount-in-controversy allegation of a defendant
18 seeking federal-court adjudication should be accepted when not contested by the plaintiff or
19 questioned by the court.” *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547,
20 549-50, (2014) (citations omitted); *see also* Schwarzer, Tashima, et al., California Practice
21 Guide: Federal Civil Procedure Before Trial (2016) § 2:2395, at 2D-30 (“[D]efendant may
22 simply allege in its notice of removal that the jurisdictional threshold has been met and
23 discovery may be taken with regard to that question.”); *id.* § 2:3435, at 2D-172 – 173
24 (“Defendant’s notice of removal ‘need include only a plausible allegation that the amount in
25 controversy exceeds the jurisdictional threshold.’). Further, CAFA’s legislative history
26 indicates that even if the Court “is uncertain about whether all matters in controversy in a
27 purported class action do not in the aggregate exceed the sum or value of \$5,000,000, the court
should err in favor of exercising jurisdiction over the case.” Senate Report on the Class Action
Fairness Act of 2005 Dates of Consideration and Passage, S. Rep. 109-14.

1 12. Plaintiff seeks a disgorgement of Eddie Bauer’s profits, in addition to treble
2 damages. (Prayer for Relief ¶ c, d.) Given the number of potential class members, and the
3 number of commercial email messages, the amount in controversy easily exceeds \$5,000,000.
4 Plaintiff estimates that actual damages are in the tens of millions of dollars. (Prayer for Relief
5 ¶ b.) Accounting for the treble damages, however, Plaintiff need only allege \$1,666,666.67 in
6 actual damages in order to satisfy the \$5 million threshold.

7 13. Plaintiff also seeks an award of attorney’s fees and injunctive relief. (Prayer for
8 Relief ¶¶ f, h, j). While Eddie Bauer denies that Plaintiff is entitled to either, each pushes the
9 amount in controversy even further above the \$5,000,000 million minimum. *See Guglielmino*
10 *v. McKee Foods Corp.*, 506 F.3d 696, 700 (9th Cir. 2007); *In re Quintus Sec. Litig.*, 148 F.
11 Supp. 2d 967, 973 (N.D. Cal. 2001) (benchmark for attorneys’ fees is 25% of 10 the common
12 fund); *Tompkins v. Basic Research LLC*, No. 5-08-244, 2008 WL 71808316, at *4 & n9 (E.D.
13 Cal. Apr. 22, 2008) (noting that under CAFA, the amount in controversy includes defendants’
14 potential cost of compliance with a request for injunctive relief).

15 **C. Minimum Diversity Exists**

16 14. Diversity exists for purposes of removal under CAFA where “any member of a
17 class of plaintiffs is a citizen of a State different from any defendant.” 28 U.S.C. § 1332(d)(2).
18 “[T]he term ‘class members’ means the persons (named or unnamed) who fall within the
19 definition of the proposed or certified class in a class action.” 28 U.S.C. § 1332(d)(1)(D).

20 15. Plaintiff is a resident of Washington. (Complaint ¶ 8.) However, the putative
21 nationwide class includes customers from across the country. (*Id.* ¶ 66.)

22 16. The Complaint alleges that Eddie Bauer is “is a limited liability corporation
23 chartered under the laws of the State of Delaware and which currently has and at all relevant
24 times in the past has had its headquarters, executive office, principal place of business or nerve
25 center in Bellevue, Washington.” (Complaint ¶ 9.) Therefore, under 28 U.S.C. § 1332(d)(10),
26 Eddie Bauer is a citizen of Delaware and Washington.

1 17. Diversity exists because Eddie Bauer is a citizen of the States of Washington
 2 and Delaware, as the citizenship of an unincorporated association is defined at 28 U.S.C.
 3 §1332(d)(10). Ordinarily, for purposes of diversity jurisdiction, an unincorporated association
 4 has the citizenships of all of its members. *See Johnson v. Columbia Props. Anchorage, LP.*, 437
 5 F.3d 894, 899 (9th Cir. 2006). However, the “exception to this rule is for class actions brought
 6 pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d)(10).” *Moss v. Infinity Ins. Co.*,
 7 2015 WL 7351395, at *2 (N.D. Cal. Nov. 20, 2015). CAFA abrogates the traditional rule that
 8 an unincorporated association shares the citizenship of each of its members for diversity
 9 purposes. *See Davis v. HSBC Bank Nevada, N.A.*, 557 F.3d 1026, 1032 n.13 (9th Cir. 2009) (A.
 10 Kleinfeld, concurring) (“For qualifying class actions such as this one, CAFA abrogates the
 11 traditional rule that an unincorporated association shares the citizenship of each of its members
 12 for diversity purposes”).

13 18. For purposes of diversity jurisdiction under CAFA, “an unincorporated
 14 association shall be deemed to be a citizen of the State where it has its principal place of
 15 business and the State under whose laws it is organized.” 28 U.S.C. § 1332(d)(10). *See also*
 16 *Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 684 (9th Cir. 2006) (“Certain aspects of CAFA,
 17 it is true, evidence Congress’s intent that the district courts’ jurisdiction vis-a-vis certain kinds
 18 of actions be broadened rather than restricted. For example ... under § 1332(d)(10), ‘an
 19 unincorporated association [is] ... deemed to be a citizen of the State where it has its principal
 20 place of business and the State under whose laws it is organized,’ which departs from the rule
 21 that frequently destroys diversity jurisdiction, that ‘a limited partnership’s [or unincorporated
 22 association’s] citizenship for diversity purposes can be determined only by reference to all of
 23 the entity’s members”); *Kim v. Shellpoint Partners, LLC*, 2016 WL 1241541, at *5 (S.D. Cal.
 24 Mar. 30, 2016) (“For CAFA’s purposes, [defendant] is a citizen both of the state where it has
 25 its principal place of business and the state under whose laws it is organized. *See* 28 U.S.C. §
 26 1332(d)(10).”). To determine the principal place of business for diversity purposes, the
 27 appropriate test is the “nerve center” test. *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1192 (2010).

1 19. The diversity requirement is clearly satisfied because the putative class includes
2 members from across the country, and Eddie Bauer is not a citizen of all fifty states. 28 U.S.C.
3 § 1332(d)(2).

4 **D. No CAFA Exceptions Apply**

5 20. The Action does not fall within any of exclusion to removal jurisdiction
6 recognized by 28 U.S.C. § 1332(d), and Plaintiff has the burden of proving otherwise. *See*
7 *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1021 (9th Cir. 2007) (“[T]he party seeking
8 remand bears the burden to prove an exception to CAFA’s jurisdiction”).

9 **V. THE OTHER PROCEDURAL REQUISITES FOR REMOVAL ARE SATISFIED**

10 21. Removal to this judicial district and division is proper under 28 U.S.C. §§
11 1441(a), 1446(a), because the King County Superior Court is located within the Western
12 District of Washington.

13 22. This Notice of Removal is timely because it was filed within thirty days of May
14 29, 2019, the date on which Eddie Bauer was served with the Summons and Complaint. 28
15 U.S.C. § 1446(b).

16 23. Pursuant to 28 U.S.C. § 1446(a), a copy of the Summons, Complaint, and all
17 other documents served on Eddie Bauer are attached as Exhibit A.

18 24. Pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of Removal and all
19 documents in support thereof and concurrently therewith are being filed with the Clerk of the
20 King County Superior Court. Written notice of the filing of this Notice of Removal is being
21 served upon counsel for Plaintiff.

22 25. Pursuant to LCR 101(b)(1) and (3), Plaintiff’s Complaint filed May 28, 2019
23 and Jury Demand filed May 28, 2019 are filed herewith. A certificate of service is included
24 below pursuant to LCR 101(b)(2).

25 **VI. CONCLUSION**

26 Eddie Bauer respectfully submits that this action is removed properly pursuant to the
27 Class Action Fairness Act.

1 Respectfully submitted this 28th day of June, 2019,

2 SEED IP Law Group LLP

3 /s/ Marc C. Levy
4 Marc C. Levy, WSBA No. 19203

5 /s/ Thomas A. Shewmake
6 Thomas A. Shewmake, WSBA No. 50765
7 701 Fifth Ave., Suite 5400
8 Seattle, WA 98104
9 Telephone: 206-622-4900
Facsimile: 206-682-6031
marcl@seedip.com
tomshewmake@seedip.com

10 STEPTOE & JOHNSON LLP
11 Stephanie A. Sheridan (*pro hac vice forthcoming*)
12 Anthony J. Anscombe (*pro hac vice forthcoming*)
13 Meegan B. Brooks (*pro hac vice forthcoming*)
14 One Market Street
15 Steuart Tower, Suite 1800
16 San Francisco, CA 94105
17 Telephone: 415-365-6700
18 Facsimile: 415-365-6699
19 ssheridan@steptoe.com
20 aanscombe@steptoe.com
21 mbrooks@steptoe.com

22 Attorneys for Defendant
23 Eddie Bauer LLC
24
25
26
27