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13 **UNITED STATES DISTRICT COURT**
 14 **CENTRAL DISTRICT OF CALIFORNIA**

15 THERESA REISFELT on behalf of
16 herself and all others similarly situated,

17 Plaintiffs,

18 v.

19 TOPCO ASSOCIATES, LLC, a
20 Delaware Limited Liability Company,
21 and DOES 1 through 25, inclusive,

22 Defendants.

Case No.

(Orange Superior Court Case No.
30-2020-01141971-CU-BT-CXC)

**NOTICE OF REMOVAL OF
 STATE COURT ACTION UNDER
 28 U.S.C. §§ 1331, 1332, 1441 AND
 1446**

**(FEDERAL QUESTION
 JURISDICTION AND DIVERSITY
 OF CITIZENSHIP)**

Complaint Filed: June 8, 2020
Complaint Served: June 19, 2020

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Topco Associates, LLC (“Topco”) removes the state court action described below from the Superior Court of the State of California, for the County of Orange, Case No. 30-2020-01141971-CU-BT-CXC, to the United States District Court for the Central District of California. Federal jurisdiction of this action is proper on the basis of federal question under 28 U.S.C. sections 1331 and 1441(c) and diversity jurisdiction under 28 U.S.C. sections 1332 and 1441(b). Topco removes this action on the following grounds:

I. BACKGROUND

1. On June 8, 2020, Plaintiff Theresa Reisfelt filed a putative class action in the Superior Court of the State of California, for the County of Orange, entitled *Theresa Reisfelt on behalf of herself and all others similarly situated v. Topco Associates, LLC, and Does 1-25*, Case No. 2020-01141971-CU-BT-CXC (“State Court Action”). A true and correct copy of the Complaint filed in the Orange County Superior Court is attached to this Notice as Exhibit A.

2. Plaintiff served the Complaint and Summons on Topco on June 19, 2020. Topco has not filed an Answer in the State Court Action. Nor has Topco taken part in any proceedings or filed any other pleadings.

3. The Complaint is brought pursuant to California Business and Professions Code § 17200 *et seq.* and California Civil Code Section 1750 *et seq.* and seeks equitable relief. (Exh. A, Compl., ¶ 6.) The gravamen of Plaintiff’s claims – indeed, the sole predicate for such claims – is that Topco unlawfully misbranded its products in violation of federal law by using packaging that contained approximately 25% non-functional slack-fill. (Exh. A, Compl., ¶¶ 1-2, 11-21, 27, 37, 38, 41.)

4. Plaintiff seeks to represent a class of “[a]ll persons who made retail purchases in the State of California of Full Circle Market™ Microwavable Popcorn

1 from June 9, 2016, through the date a class is certified.” (Exh. A, Compl., ¶ 23.)

2 **II. PROCEDURAL COMPLIANCE**

3 5. This Notice of Removal is timely filed within 30 days of June 19,
4 2020, the day on which Topco was served with the Action. 28 U.S.C. § 1446(b).

5 6. The State Court Action is pending before the Superior Court for the
6 County of Orange. Because this Court is the United States District Court for the
7 district and division embracing the place where the original action was filed, it is
8 the appropriate Court for removal under 28 U.S.C. Section 1441(a).

9 7. Pursuant to 28 U.S.C. Section 1446(a), included in Exhibit A are
10 copies of “all process, pleadings, and orders served upon” Topco.

11 8. The Complaint also names as defendants “DOES 1-25.” Topco is
12 informed and believes and on that basis alleges none of the fictitiously-named
13 defendants have been served with a copy of the Summons and Complaint.
14 Therefore, the fictitiously-named defendants are not parties to the above-captioned
15 action and need not consent to removal. *See* 28 U.S.C. § 1441(b)(1); *Fristoe v.*
16 *Reynolds Metals Co.*, 615 F.2d 1209, 1213 (9th Cir. 1980) (“Does” defendants need
17 not be joined in a removal petition).

18 9. A copy of this Notice has been served on all parties of record and will
19 be filed with the Clerk of the Superior Court for the County of Orange.

20 **III. FEDERAL QUESTION JURISDICTION LIES OVER THIS ACTION.**

21 10. The above-described State Court Action is a civil action of which this
22 Court has original jurisdiction under 28 U.S.C. § 1331, and is one that may be
23 removed to this Court pursuant to 28 U.S.C. Section 1441(a).

24 11. A state-created cause of action arises under federal law “(1) where
25 federal law completely preempts state laws; (2) where the claim is necessarily
26 federal in character; or (3) where the right to relief depends on the resolution of a
27 substantial, disputed federal question.” *ARCO Env'tl. Remediation, L.L.C. v. Dept.*
28 *of Health & Env'tl. Quality*, 213 F.3d 1108, 1114 (9th Cir. 2000) (citations omitted);

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1 *see also Franchise Tax Bd. v. Const. Laborers Vacation Trust*, 463 U.S. 1, 13
2 (1983) (federal question jurisdiction exists if federal law is necessary element of
3 state claim).

4 12. Plaintiff’s first cause of action for unlawful business practices under
5 California Business and Professions Code Section 17200 (“Section 17200”) arises
6 under federal law because Plaintiff’s right to relief under Section 17200 is
7 necessarily federal in character and relies on the resolution of a disputed federal
8 question. (*See* Exh. A, Compl., ¶¶ 1-2, 11-21, 27, 37, 38, 41.)

9 13. To be an “unlawful” business practice under Section 17200, a predicate
10 violation of an applicable statute or regulation must be shown. *Lazar v. Hertz*
11 *Corp.*, 69 Cal. App. 4th 1494, 1505 (1999). “In effect, the UCL borrows violations
12 of other laws . . . and makes those unlawful practices actionable under the UCL.”
13 *Id.* (citations omitted).

14 14. Plaintiff’s Section 17200 claim is based on three predicate laws:
15 a. The Federal Food, Drug, and Cosmetic Act (“FDCA”), 21
16 U.S.C. § 301 *et seq.*, specifically including 21 U.S.C. § 331;
17 b. Title 21 of the Code of Federal Regulations § 100.100; and
18 c. California Fair Packaging and Labeling Act (“FPLA”), Cal.
19 Bus. & Prof. Code § 12601 *et seq.*
20 (*See* Exh. A, Compl., ¶¶ 1-2, 11-21, 27, 37, 38, 41.)

21 15. While the first two predicate laws (the FDCA and 21 C.F.R. §100.100)
22 are federal by nature, the third law (the FPLA) is by necessity federal in character.

23 16. A violation of the FPLA is dependent upon a violation of the FDCA.
24 Cal. Bus. & Prof. Code § 12606.2(e) (“This section shall be interpreted consistent
25 with the comments by the United States Food and Drug Administration on the
26 regulations contained in Section 100.100 of Title 21 of the Code of Federal
27 Regulations, interpreting Section 403(d) of the Federal Food, Drug, and Cosmetic
28

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1 Act (21 U.S.C. Sec. 343(d)). . . .”); Cal. Bus. & Prof. Code § 12606.2(f) (“If the
2 requirements of this section do not impose the same requirements as are imposed by
3 . . . the [FDCA], or any regulation promulgated pursuant thereto, then this section is
4 not operative to the extent that it is not identical to the federal requirements. . . .”).

5 17. Plaintiff’s unlawful claim under Section 17200 arises under federal law
6 because Plaintiff must establish that Topco violated a federal law – the FDCA – in
7 order to prevail. In fact, Plaintiff concedes this much in the Complaint. (See Exh.
8 A, Compl., ¶ 14 & fn. 1.)

9 18. Under the second prong of Section 17200, a business practice is
10 “unfair” if it violates a public policy that is “tethered” to specific constitutional,
11 statutory or regulatory provisions. *Scripps Clinic v. Superior Court*, 108 Cal. App.
12 4th 917, 940 (2003).

13 19. To support her “unfair” claim Plaintiff relies on the same statutory and
14 regulatory provisions referenced above that are federal in nature or necessarily so in
15 character. (See Exh. A, Compl., ¶ 38.)

16 20. As such, Plaintiff’s unfair claim under Section 17200, likewise, arises
17 under federal law.

18 21. Plaintiff does not bring a “fraudulent” claim under the third and final
19 prong of Section 17200. (See Exh. A, Compl., *generally*)

20 22. Plaintiff’s second cause of action for unfair and unlawful business
21 practices under the California Consumers Legal Remedies Act is also necessarily
22 federal in character because it relies on violations of the federal slack-fill laws
23 mentioned above for survival. (See Exh. A, Compl., ¶ 41.)

24 23. Because each of Plaintiff’s claims depends on the existence of a
25 violation of federal law this Court has original subject matter jurisdiction. See
26 *Franchise Tax Bd.*, 463 U.S. at 13.

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1 **IV. DIVERSITY JURISDICTION LIES OVER THIS ACTION.**

2 24. This Court has original jurisdiction over the State Court Action under
3 28 U.S.C. § 1332 because this is a civil action between citizens of different states
4 and the amount in controversy exceeds the sum of \$75,000, exclusive of interest and
5 costs. The action may be removed to this Court pursuant to 28 U.S.C. § 1441(b).

6 The Parties Are Diverse

7 25. Complete diversity of citizenship exists between the parties in
8 accordance with 28 U.S.C. § 1332(a)(1).

9 26. Plaintiff is, and was at the time of filing the State Court Action, a
10 citizen of California. (Exh. A, Compl., ¶ 3.) Residence is prima facie evidence of
11 domicile. *See State Farm Mut. Auto Ins. Co. v. Dyer*, 19 F.3d 514, 520 (10th Cir.
12 1994).

13 27. Topco is a Delaware limited liability company with its headquarters in
14 Elk Grove Village, Illinois. (Exh. B, Declaration of Greg Lenski (“Lenski Decl.”), ¶
15 2.)

16 28. Pursuant to 28 U.S.C. § 1441(b)(1), the citizenship of defendants sued
17 under fictitious names shall be disregarded for purposes of establishing removal
18 jurisdiction under 28 U.S.C. § 1332. *See* 28 U.S.C. § 1441(b)(1); *see also*
19 *Newcombe v. Adolf Coors Co.*, 157 F. 3d 686, 690-91 (9th Cir. 1998) (in
20 determining whether diversity of citizenship exists, only the named defendants are
21 considered). The existence of Doe Defendants 1 through 25 does not deprive this
22 Court of jurisdiction.

23 29. Accordingly, complete diversity of citizenship exists between Plaintiff
24 and Topco.

25 The Amount in Controversy Exceeds \$75,000

26 30. The amount in controversy is satisfied by Plaintiff’s request for
27 injunctive relief. “In actions seeking declaratory or injunctive relief, it is well
28 established that the amount in controversy is measured by the value of the object of

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1 the litigation.” *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 (9th Cir. 2002); *see also*
 2 *Rose v. J.P. Morgan Chase, N.A.*, No. CIV. 2:12-225 WBS, 2012 WL 892282, at *2
 3 (E.D. Cal. Mar. 14, 2012) (denying motion to remand where value of injunctive
 4 relief sought exceeded \$75,000); *Doe v. Aetna, Inc.*, No. 17-CV-07167-EMC, 2018
 5 WL 1614392, at *4 (N.D. Cal. Apr. 4, 2018) (costs for compliance with injunction,
 6 if named plaintiff prevailed in class action, considered in analysis of whether
 7 amount in controversy is satisfied).

8 31. Here, Plaintiff seeks injunctive relief “permanently” prohibiting Topco
 9 from selling Full Circle Market™ Organic Light Butter, Organic Butter, and Organic
 10 Salted microwave popcorn product in California. (*See* Ex. A, Compl. ¶¶ 39, 46; *see*
 11 *also* Ex. B, Lenski Decl., ¶ 5.) Plaintiff seeks such injunctive relief whether or not a
 12 class is certified. The amount in controversy includes “the cost of complying with
 13 [Plaintiff’s] requested injunctive relief.” *See Gen. Dentistry for Kids, LLC v. Kool*
 14 *Smiles, P.C.*, 379 Fed. Appx. 634, 635 (9th Cir. 2010).

15 32. The expense of complying with the requested injunctive relief would
 16 exceed \$75,000. Topco’s revenues over the last 12 months from selling the Full
 17 Circle Market™ popcorn products in California totaled over \$210,000. (*See* Lenski
 18 Decl., ¶ 4.) If permanently enjoined from selling the products, Topco would lose
 19 those revenues every year for as long as the injunction is in place. In addition, it
 20 would cost Topco at least an estimated \$40,000 to remove and destroy the existing
 21 product from the shelves of California stores currently selling it. (*Id.* at ¶ 7.)

22 33. Because there is complete diversity of citizenship between Plaintiff and
 23 Topco and the amount in controversy exceeds \$75,000, this Court has original
 24 diversity jurisdiction. *See* 28 U.S.C. § 1332.

25 **IV. CONCLUSION**

26 34. Topco respectfully requests this Court to take jurisdiction over this
 27 action by removing it from the Orange Superior Court to the United States District
 28

1 Court for the Central District of California, pursuant to 28 U.S.C. §§ 1331, 1332,
2 1441, and 1446.

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4 Dated: July 17, 2020

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