IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

HEATHER ERWIN and ASHLEY PRICE, individually and on behalf Of all other similarly-situated Current Illinois citizens,	)	
Plaintiffs,	)	Case No: 3:20-cv-1268
v.	)	
JIMMY JOHNS LLC and JIMMY JOHN'S FRANCHISE, LLC	)	
Defendants.	)	

NOTICE OF REMOVAL

Pursuant to 28 U.S.C. §§ 1332(d), 1441, 1446, 1453, Defendants Jimmy John's LLC ("JJ LLC") and Jimmy John's Franchise, LLC ("JJF") (collectively, "Defendants") hereby remove this action from the Circuit Court of St. Clair County, Illinois ("State Court") to the United States District Court for the Southern District of Illinois. As grounds for removal, Defendants state as follows:

FACTUAL BACKGROUND

1. On October 1, 2020, Plaintiffs Heather Erwin and Ashley Price filed a putative class-action complaint (hereinafter "Complaint") in State Court, Case No. 20-L0759, against Defendants. The Complaint alleges three counts against Defendants: (1) violations of the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), 815 ILCS 505/1 *et seq.,* (Count I), (2) breach of express warranty (Count II), and (3) unjust enrichment (Count III).

2. A Notice of Removal must be filed "within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim

for relief." 28 U.S.C. § 1446(b)(1). Here, Plaintiffs served Defendants' registered agent with a copy of the Summons, the Complaint, Plaintiffs' Preliminary Motion for Class Certification, Affidavit of Damages Pursuant to Supreme Court Rule 222(b), and Entries of Appearance for Counsel on October 28, 2020. A true and accurate copy of all pleadings, process, and orders served are attached hereto as **Exhibit 1**. This Notice is filed within 30 days of receipt by Defendants of the Summons and the Complaint, so this Notice of Removal is timely.

VENUE

3. Venue is proper in this Court because the Southern District of Illinois is "the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a).

JURISDICTION

4. The Class Action Fairness Act ("CAFA") gives federal courts jurisdiction over "class actions"[1] where (1) "any member of a class of plaintiffs is a citizen of a State different from any defendant"; (2) "the number of members of all proposed plaintiff classes in the aggregate is [more] than 100"; and (3) "the matter in controversy exceeds the sum or value of $5 [million], exclusive of interest and costs." 28 U.S.C. § 1332(d)(1), (2)(A), (5)(B); *see also Hart v. FedEx Ground Package Sys. Inc.*, 457 F.3d 675, 679 (7th Cir. 2006). All of these requirements are satisfied in the present case, and it is, therefore, removable under 28 U.S.C. § 1453(b).

[1] This action falls within CAFA's definition of "class action." 28 U.S.C. § 1332(d)(1)(B) (defining "class action" as "any civil action filed under Rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action"). In their Complaint, Plaintiffs allege that they filed this action under 735 ILCS 5/2-801, *et seq.*, *see* **Exh. 1**, Compl. ¶ 28, which is the state analog to Federal Rule of Civil Procedure 23. *See Avery v. St. Farm Mutual Auto. Ins. Co.*, 835 N.E. 2d 801, 819 (Ill. 2005) (stating that section 2-801 of the Code of Civil Procedure "is patterned after Rule 23 of the Federal Rules of Civil Procedure").

MINIMAL DIVERSITY

5. Under CAFA, this Court has original subject-matter jurisdiction "if 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). That requirement is met here.

6. Plaintiffs allege in the Complaint that Plaintiff Erwin and Plaintiff Price are Illinois citizens. **Exh. 1**, Compl. ¶¶ 8–9; *see also Meyerson v. Harrah's E. Chi. Casino*, 299 F.3d 616, 617 (7th Cir. 2002) (stating that "residence and citizenship are not synonyms and it is the latter that matters for purposes of the diversity jurisdiction"); *Dakuras v. Edwards*, 312 F.3d 256, 258 (7th Cir. 2002) (stating that an individual is a "citizen" of the state in which she is "domiciled," which means where she has her home and to which she intends to return when absent from it). Plaintiffs also allege that they seek to represent a class of "current citizens of Illinois who purchased" Jimmy John's Triple Chocolate Chunk Cookies ("Chocolate Chunk") and/or Jimmy John's Raisin Oatmeal Cookies ("Raisin Oatmeal") from Defendants. *See* **Exh. 1**, Compl. ¶ 28.

7. Plaintiffs allege in the Complaint that Defendants are Delaware limited liability companies with their principal places of business in Illinois. *Id.* ¶¶ 10–11.

8. Both Defendants are limited liability companies. As a general rule, a limited liability company's citizenship depends on the citizenship of its members. *See Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998); *see also Carden v. Arkoma Associates*, 494 U.S. 185, 195–96 (1990). The Seventh Circuit has made clear that parties must allege the citizenship of "all the members of a limited liability company through all the layers of ownership until the Court reaches only individual human beings and corporations to adequately allege citizenship of such entities." *Vocational Consultants, Ltd. v. H & R Block Tax Servs., Inc.*, No. 13-1138, 2013 WL 6008694, at *1 (S.D. Ill. Nov. 13, 2013).

9. As set forth in the Affidavit of Jeffrey Vaughan ("Vaughan Affidavit"), JJF is a direct, wholly owned subsidiary of JJBC, LLC. **Exh. 2**, ¶ 2(a). JJBC, LLC, in turn, is a direct, wholly owned subsidiary of JJ LLC. *Id.* at ¶ 2(b). Next, JJ LLC is a direct, wholly owned subsidiary of Jimmy John's Holding Company, LLC. *Id.* at ¶ 2(c). And finally, Jimmy John's Holding Company, LLC is a direct, wholly owned subsidiary of IRB Holding Corporation. *Id.* at ¶ 2(d). A true and accurate copy of the Vaughan Affidavit is attached hereto as **Exhibit 2**.

10. JJF is a Delaware limited liability company with its principal place of business in Illinois. *Id.* at ¶ 2(a). JJBC, LLC is a Delaware limited liability company with its principal place of business in Illinois. *Id.* at ¶ 2(b). JJ LLC is a Delaware limited liability company with its principal place of business in Illinois. *Id.* at ¶ 2(c). Jimmy John's Holding Company, LLC is a Delaware limited liability company with its principal place of business in Georgia. *Id.* at ¶ 2(d). IRB Holding Corporation is a Delaware corporation with its principal place of business in Georgia. *Id.* at ¶ 2(e); *see also* 28 U.S.C. § 1332(c)(1) (stating a corporation is citizen of "every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business").

11. Because IRB Holding Corp. is, for diversity purposes, a citizen of Delaware and Georgia (*see* **Exh. 2**, ¶ 2(e)), JJF and JJ LLC are also citizens of Delaware and Georgia. *See Cosgrove*, 150 F.3d at 731 (concluding that "the citizenship of an LLC for purposes of diversity jurisdiction is the citizenship of its members."). As a result, there is minimal diversity between either JJF or JJ LLC, both citizens of Delaware and Georgia, on the one hand, and Plaintiffs,

both citizens of Illinois, on the other. *See* 28 U.S.C. § 1332(d)(2)(A); *see also Dancel v. Groupon, Inc.*, 940 F.3d 381, 385 (7th Cir. 2019) (noting that "the hurdle of minimal diversity for the CAFA is lower than the complete diversity required in most cases").[2]

NUMBER OF MEMBERS OF PROPOSED CLASS

12. Under CAFA, this Court has original subject-matter jurisdiction if "the number of members of all proposed plaintiff classes in the aggregate is [more] than 100." 28 U.S.C. § 1332(d)(5).

13. This requirement is met on the face of the pleadings. Here, Plaintiffs seek to represent "[a]ll current citizens of Illinois who purchased Jimmy's All Natural Triple Chocolate Chunk Cookies and/or Jimmy's All Natural Raisin Oatmeal Cookies in the five years preceding the filing of the Complaint." **Exh.1**, Compl. ¶ 28. Plaintiffs further assert that "[u]pon information and belief, the Class consists of hundreds or thousands of purchasers." *Id.* at ¶ 30. This allegation is sufficient to satisfy this CAFA requirement.

14. Extrinsic evidence—which would be admissible for this purpose even if Plaintiffs had not admitted the 100-person threshold is met—also confirms that Plaintiff's proposed class would contain more than 100 members. As set forth in the Vaughan Affidavit, there were

[2] CAFA contains a statutory citizenship rule for "unincorporated associations" when assessing diversity. *See* 28 U.S.C. § 1332(d)(10) (explaining that for purposes of § 1332(d) and § 1453, an "unincorporated association" is 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."). The Seventh Circuit has not addressed whether limited liability companies, like Defendants, are "unincorporated associations" for purposes of 28 U.S.C. § 1332(d)(10). Nevertheless, authority from this District suggests that § 1332(d)(10) does not apply to limited liability companies. *See, e.g.*, *Kremmel v. Fairlife, LLC*, No. 16-583, 2017 WL 4535695, at *1 (S.D. Ill. June 19, 2017) (stating that the defendant limited liability company failed to allege its citizenship for purposes of CAFA when the notice of removal "improperly" relied on § 1332(d)(10) and the notice was otherwise "devoid of any information regarding the citizenship of its members"); *see also Halperin v. Int'l Web Servs., LLC*, 70 F. Supp. 3d 893, 904 (N.D. Ill. 2014) (applying the rule that a limited liability company is a citizen of every state for which any of the limited liability company members is a citizen in CAFA context).

7,056,253 transactions at Jimmy John's restaurants in Illinois that included the sale of one or more Chocolate Chunk Cookies and/or Raisin Oatmeal Cookies between November 1, 2016 and October 1, 2020. **Exh. 2**, ¶ 6. Without question, those 7,056,253 transactions between November 1, 2016 and October 1, 2020 were made by more than 100 putative class members.[3]

AMOUNT IN CONTROVERSY

15. To establish subject-matter jurisdiction under CAFA, the amount in controversy must exceed $5 million, less costs and interest, and that threshold is also readily met here. *See* 28 U.S.C. § 1332(d)(2).

16. The removing party bears the burden of establishing the amount-in-controversy requirement. *See Spivey v. Vertrue, Inc.*, 528 F.3d 982, 986 (7th Cir. 2008). Under this standard, the removing party's notice of removal must contain only "a plausible allegation" that the amount in controversy exceeds the jurisdictional amount. *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 89 (2014). Thus, the jurisdictional question is "what the plaintiff is claiming (and thus the amount in controversy between the parties)" and is not what "plaintiff is likely to win or be awarded." *Spivey*, 528 F.3d at 986 (quoting *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 449 (7th Cir. 2005)); s*ee also Blomberg v. Serv. Corp. Int'l*, 639 F.3d 761, 763 (7th Cir. 2011) (stating that the removing party does not need to "establish what damages the plaintiff will recover, but only how much is in controversy between the parties."). That is, when the removing party plausibly alleges that the class might recover actual damages, punitive damages, and attorneys' fees aggregating more than $5 million, the case belongs in

[3] The "All-Natural" claims at issue in the case appeared on the packaging for the Chocolate Chunk and Raisin Oatmeal Cookies beginning in the middle of the class period alleged in the Complaint, on approximately November 1, 2016. **Exh. 2**, ¶ 4. As such, this Notice calculates the sales and number of transactions of Chocolate Chunk and Raisin Oatmeal Cookies between November 1, 2016 and October 1, 2020 (i.e., the date the Complaint was filed).

federal court unless "it is *legally impossible* for the plaintiff[s] to recover that much." *ABM Sec. Servs., Inc. v. Davis*, 646 F.3d 475, 478 (7th Cir. 2011) (quoting *Blomberg*, 639 F.3d at 764).

17. The removing party's burden is "a pleading requirement, not a demand for proof." *Spivey*, 528 F.3d at 986 (quoting *Brill*, 427 F.3d at 449). As such, in support of that burden, the removing party may introduce its own affidavits, declarations, or other documentation to satisfy the standard. *See, e.g.*, *Blomberg*, 639 F.3d at 763 (establishing the amount in controversy through pleadings in other related lawsuits, counsel's affidavit, and other documentary evidence).

18. Additionally, the removing party does not need to "confess liability in order to show that the controversy exceeds the threshold." *Spivey*, 528 F.3d at 986 (quoting *Brill*, 427 F.3d at 449). To be clear, Defendants dispute that Plaintiffs (or any putative class member) are entitled to any recovery. But for purposes of the removal analysis, Defendants need only show "*plausibly* how the stakes exceed $5 [million]." *ABM Sec. Servs., Inc.*, 646 F.3d at 478 (quoting *Blomberg,* 639 F.3d at 764).

19. Here, Plaintiffs' Complaint does not demand a certain dollar amount. Nevertheless, Plaintiffs, according to their Complaint, seek the following relief: (1) compensatory damages or alternatively, disgorgement or restitution; (2) treble damages under the ICFA;[4] (3) pre and post-judgment interest; (4) attorneys' fees and costs; (5) punitive damages; and (6) "other and further relief, as may be just and proper." *See* **Exh. 1**, Compl., Prayer for

[4] Although Plaintiffs seek treble damages pursuant to the ICFA, *see* Exh. 2, Prayer for Relief (d), such damages are not available under the ICFA. *See In re Bayer Phillips Colon Health Probiotics Sales Pracs. Litig.*, No. 11-3017, 2014 WL 576153, at *4 n.3 (D.N.J. Nov. 6, 2014) ("Under Illinois law, there is no provision for treble damages; the ICFA is aimed primarily at compensation for actual damages."). As such, Defendants do not include these requested damages in the amount in controversy.

Relief (c) – (g). Thus, it is clear that the relief sought exceeds the jurisdictional threshold of $5 million for the amount in controversy.

COMPENSATORY DAMAGES OR ALTERNATIVELY, RESTITUTION.

a. **ICFA (Count I).** The first count of the Complaint alleges a violation of the ICFA. *See* **Exh. 1**, Compl. ¶¶ 37–50. Compensatory damages on an ICFA claim brought by an individual consumer are measured by the benefit-of-the-bargain rule. *See Kim v. Carter's Inc.*, 598 F.3d 362, 365 (7th Cir. 2010) (stating that actual loss may occur if "the seller's deception deprives the plaintiff of 'the benefit of her bargain' by causing her to pay 'more than the actual value of the property.'" (quoting *Mulligan v. QVC, Inc.*, 888 N.E.2d 1190, 1197 (Ill. Ct. App. 2008))). Here, Plaintiffs plead that the "damages" associated with the violations are "the difference between the actual value of the Cookies and the value of the products if they had been as represented." **Exh. 1**, Compl. ¶ 50. Plaintiffs contend that "the Cookies as sold" (which allegedly were "highly processed") were "worth less than the Cookies as represented" (which allegedly were represented as "minimally processed"). *Id.* at ¶ 49. Indeed, Plaintiffs allege that *but for* the "All-Natural" Labels, Plaintiff, and those similarly situated, "would not have purchased the Cookies," *id.* at ¶ 49, meaning that the Cookies had no value to the purchasers without the challenged labels. *See also id.* at ¶ 22 ("Plaintiffs and Class Members paid a price premium for the Cookies that they would not and should not have paid absent Defendants' misrepresentations."). As stated in the Vaughan Affidavit, the total amount of sales of Chocolate Chunk and Raisin Oatmeal Cookies with "All-Natural" Labels during the relevant period is

$17,379,865, which becomes the total amount of damages pleaded in the Complaint for the ICFA claim. *See* **Exh. 2**, ¶ 7.

b. **Breach of Express Warranty (Count II).** The second count of the Complaint alleges a breach of express warranty. **Exh. 1**, Compl. ¶¶ 51–57. Like the damages alleged in the ICFA claim, Plaintiffs allege Defendants deprived them of the benefit of the bargain, which equates to "less value than was reflected in the premium purchase price [the customers] paid for the Cookies." *Id.* at ¶ 56. Presumably, Plaintiffs potentially could argue that the total value of the loss is the full value of the purchase price paid for the Cookies. Thus, like the ICFA claim, this claim seeks up to **$17,379,865** in total damages. **Exh. 2**, ¶ 7.

c. **Unjust Enrichment (Count III).** The third count of the Complaint alleges unjust enrichment. **Exh. 1**, Compl. ¶¶ 58–62. Plaintiffs allege that they, and those similarly situated, "conferred a benefit" on Defendants. *Id.* at ¶ 59. They further allege that Defendants "appreciated the benefit" because without Plaintiffs, and those similarly situated, Defendants would have no sales. *Id.* at ¶ 60. Thus, they suggest that "restitution and/or disgorgement" of such enrichment is proper. *Id.* at ¶ 62. That is, this claim also seeks **$17,379,865** in total damages—the total amount of sales of Chocolate Chunk and Raisin Oatmeal Cookies with "All-Natural" Labels between November 1, 2016 and October 1, 2020. **Exh. 2**, ¶ 7.

PUNITIVE DAMAGES.

20. Plaintiffs seek punitive damages. **Exh. 1**, Compl., Prayer for Relief (g). Punitive damages "factor into the amount-in-controversy calculation." *Roppo v. Travelers Comm. Ins. Co.*, 869 F.3d 568, 578 (7th Cir. 2017) (citing *Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 831 (7th Cir. 2011)); *see also LM Ins. Corp. v. Spaulding Enterprises Inc.*, 533

F.3d 542 (7th Cir. 2008) ("If punitive damages are available, subject matter jurisdiction exists unless it is legally certain that the plaintiff will be unable to recover the requisite jurisdictional amount."). Although Defendants dispute that Plaintiffs are entitled to punitive damages, the ICFA does allow for their recovery. *See* 815 ILCS 505/10a; *Dubey v. Pub. Storage, Inc.*, 918 N.E.2d 265, 279 (Ill. Ct. App. 2009). Under that provision, Illinois courts have imposed punitive damage multipliers of 3:1. *Roppo*, 859 F.3d at 582–83; *see also Robinson v. Avanquest N. Am. Inc.*, No. 14-8015, 2015 WL 196343, at *5 (N.D. Ill. Jan. 13, 2015) (suggesting for calculating amount in controversy for CAFA, the punitive damage multiplier of 6:1 is not "legally impossible"). Together with compensatory damages, that theoretically increases the amount in controversy in this case to well in excess of $5 million.

ATTORNEYS' FEES.

21. Plaintiffs also seek recovery of their attorneys' fees. **Exh. 1**, Compl., Prayer for Relief (f). Attorneys' fees are included in the amount in controversy when sought as part of an underlying claim. *See El v. AmeriCredit Fin. Servs., Inc.*, 710 F.3d 748, 753 (7th Cir. 2013) (including attorneys' fee in amount in controversy where "such expenses are sought as part of an underlying claim" as opposed to "a separate post-judgment right to 'costs' or 'fees' incurred in the litigation"). Although Defendants dispute that Plaintiffs are entitled to recover attorneys' fees, Plaintiffs asserted at least one cause of action under which attorneys' fees may be awarded. *See* 815 ILCS 505/10a(c) (providing for the recovery of "reasonable attorneys' fees and costs to the prevailing party" under the ICFA). When determining how fees should be accounted for in evaluating CAFA jurisdiction on an ICFA claim, this Court has suggested a 30% fee is appropriate for purposes of the calculation. *See Back Doctors Ltd. v. Metlife Auto & Home*, No. 10-444, 2011 WL 13359263, at *2 n.1 (S.D. Ill. Jan. 25, 2011), *vacated,* 637 F.3d 827 (7th

Cir. 2011). Utilizing the damage figure above, a fee award in that amount would yield a total award well in excess of the $5 million threshold.

22. Based on Plaintiffs' allegations in the Complaint and information set forth in the Vaughan Affidavit, Plaintiffs' proposed class claims place in controversy an amount far exceeding the $5 million jurisdictional threshold. Moreover, because there are more than 100 members of the putative class, minimal diversity, and an amount in controversy greater than $5 million, the Court has subject matter jurisdiction. *See* 28 U.S.C. § 1332(b).

COMPLIANCE WITH 28 U.S.C. § 1446

23. Pursuant to 28 U.S.C. § 1446(a), Defendants have attached all process, pleadings, and orders served in State Court. *See* **Exhibit 1**, attached hereto.

24. Pursuant to 28 U.S.C. § 1446(b)(1), this Notice of Removal is filed within 30 days of service on Defendants of the pleadings setting forth the claims for relief upon which the State Court action is based.

25. Pursuant to 28 U.S.C. § 1446(b)(3), Defendants will promptly provide written notice of the removal of the state court action to Plaintiffs, through their attorneys of record, and to the Circuit Court of St. Clair County, Illinois. *See* **Exhibit 3**, attached hereto.

WHEREFORE, Defendants respectfully give notice that the action referred to above is removed from the State Court to this Court.

Dated: November 25, 2020.

Respectfully submitted,

/s/ *Kyle P. Seelbach*
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing instrument was forwarded this 25th day of November, 2020, by operation of the Court's electronic filing system to all parties.

/s/ *Kyle P. Seelbach*
Attorney for Defendants