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11 WISE COMPANY, INC.

12
13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**

15 NICHOLAS MILLER and JEFFREY
16 BORNEMAN, individually and on
17 behalf of all others similarly situated,

18 Plaintiff,

19 v.

20 WISE COMPANY, INC., and DOES 1
21 through 10, inclusive,

22 Defendant.

CASE NO. 5:17-cv-00616

23 **NOTICE OF REMOVAL OF ACTION**
24 **FROM STATE COURT**

25 **[28 U.S.C. §§ 1332, 1441, 1446]**

26 Action Filed: February 15, 2017

27 Action Removed: March 30, 2017

28
NOTICE OF REMOVAL FROM STATE COURT

1 PLEASE TAKE NOTICE that Defendant Wise Company, Inc. (“Defendant”)
2 hereby removes the above-captioned action, *Miller & Borneman, et al. v. Wise Company*
3 *Inc.*, Case No. RIC 1702659 (the “Action”) from the California Superior Court for the
4 County of Riverside to the United States District Court for the Central District of
5 California, Eastern Division, pursuant to 28 U.S.C. §§ 1332(d), 1441(a), and 1446(b) on
6 the grounds articulated below. Defendant provides this “short and plain statement of the
7 grounds for removal” pursuant to 28 U.S.C. § 1446(a). In the event that the Court
8 requires that Defendant prove the facts alleged in this pleading, or to otherwise establish
9 jurisdiction, Defendant is prepared to do so.¹

10 **STATEMENT OF JURISDICTION**

11 This Court has original jurisdiction over this action under the Class Action
12 Fairness Act of 2005 (“CAFA”), 28 U.S.C. § 1332(d). In relevant part, CAFA grants
13 District Courts original jurisdiction over civil class actions filed under federal or state law
14 in which any member of a class of plaintiffs is a citizen of a state different from any
15 defendant and where the amount in controversy for the putative class members in the
16 aggregate exceeds the sum or value of \$5,000,000, exclusive of interest and costs. As set
17 forth below, this case meets all of CAFA’s requirements for removal and is timely and
18 properly removed by the filing of this Notice. The sole named defendant, Wise Company,
19 Inc., initiates, and consents to, removal.

20 _____
21 ¹ A removing defendant is only required to provide a “short and plain statement” of the
22 basis for removal and need not present or plead evidentiary detail. *Dart Cherokee Basin*
23 *Operating Co., LLC v. Owens*, 135 S. Ct. 547, 551 (2014). *See also Janis v. Health Net,*
24 *Inc.*, 472 F. App’x 533, 534 (9th Cir. 2012) (“Nothing in 28 U.S.C. § 1446 requires a
25 removing defendant to attach evidence of the federal court’s jurisdiction to its notice of
26 removal. Section 1446(a) requires merely a ‘short and plain statement of the grounds for
27 removal.’ Moreover, we have observed that ‘it is clearly appropriate for the district
28 courts, in their discretion, to accept certain post-removal [evidence] as determinative of
the [jurisdictional requirements].”); *Hertz Corp. v. Friend*, 559 U.S. 77, 96-91 (2010)
 (“When challenged on allegations of jurisdictional facts, the parties [who assert
jurisdiction] must support their allegations by competent proof.”).

1 **VENUE**

2 The Action was filed in the Superior Court of the State of California for the
3 County of Riverside. Therefore, venue properly lies in the United States District Court
4 for the Central District of California, Eastern Division, pursuant to 28 U.S.C. §§ 84(a),
5 1391(a) and 1441(a).

6 **PLEADINGS, PROCESS, AND ORDERS**

7 On or about February 15, 2017, Plaintiffs Nicholas Miller and Jeffrey Borneman
8 (“Plaintiffs”), on behalf of themselves and others similarly situated, initiated the Action
9 by filing a complaint in the Superior Court for the State of California, Riverside County.

10 Plaintiff served Defendant with the Summons and Complaint on March 2, 2017,
11 and this Notice of Removal is filed within 30 days from the date of service.

12 In accordance with 28 U.S.C. §1446(a), a true and correct copy of the Summons
13 and Complaint (together with a copy of all process, pleadings, and orders served upon
14 Defendant) filed in the Riverside County Superior Court and served on Defendant is
15 attached hereto as Exhibit A.

16 The Complaint alleges five causes of action for: (1) violation of California’s
17 Consumer’s Legal Remedies Act, Civil Code §§ 1750, et seq.; (2) false advertising in
18 violation of California’s Business and Professions Code §§ 17500 et seq.; (3) unlawful
19 business practices in violation of California’s Business and Professions Code §§ 17200,
20 et seq.; (4) fraudulent business practices in violation of California’s Business and
21 Professions Code §§ 17200, et seq.; and (5) unfair business practices in violation of
22 California’s Business and Professions Code §§ 17200, et seq.

23 **SERVICE ON THE STATE COURT**

24 Pursuant to 28 U.S.C. §1446(d), contemporaneously with the filing of this Notice
25 of Removal in the United States District Court for the Central District of California,
26 Eastern Division, written notice of such filing will be given by the undersigned to
27 Plaintiffs’ counsel of record, and a copy of the Notice of Removal will be filed with the
28 Clerk of the Riverside County Superior Court.

1 **TIMELINESS OF THE REMOVAL**

2 This removal is timely because this Notice is being filed within 30 days after the
3 receipt by Defendant, through service of process, of a copy of the Summons and
4 Complaint. *See* 28 U.S.C. § 1446(b)(1); *Roth v. CHA Hollywood Med. Center, L.P.*, 720
5 F.3d 1121, 1125 (9th Cir. 2013).

6 **ORIGINAL JURISDICTION PURSUANT TO CAFA**

7 This Court has jurisdiction over this case under CAFA, 28 U.S.C. § 1332(d), and
8 this case may be removed pursuant to the provisions of 28 U.S.C. § 1441(a), in that it is a
9 civil putative class action and: (1) the proposed class contains at least 100 members; (2)
10 no defendant is a state, state official, or other governmental entity; (3) the total amount in
11 controversy for all class members exceeds \$5 million; and, (4) there is diversity between
12 at least one class member—*e.g.*, the named plaintiffs, who are citizens of the state of
13 California—and the sole defendant, which is a citizen of the State of Utah. CAFA
14 authorizes removal of such actions in accordance with 28 U.S.C. § 1446. As discussed
15 below, this case meets each CAFA requirement for removal.

16 ***The Proposed Class Contains At Least 100 Members***

17 Plaintiffs’ class consists of all persons who purchased a Wise Company Long-
18 Term Food Kit or Emergency Food Kit in California during the last four years. (Ex. A,
19 Complaint ¶ 20.) In the past four years, more than 100 individuals have purchased on-line
20 or at retail Wise Company Long-Term Food Kits or Emergency Food Kits. Therefore, it
21 appears that there are well over 100 retail purchasers who would comprise the putative
22 class. *See Mullins v. Harry’s Mobile Homes, Inc.*, 861 F. Supp. 22, 24 (S.D.W.V. 1994)
23 (stating that when analyzing the propriety of removal: “The court . . . is not required to
24 leave its common sense behind.”); *see also Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d
25 744, 770 (11th Cir. 2010) (“[V]iewing facts through the lens of common sense is not star
26 gazing.”).

27 ***Defendant Is Not A Governmental Entity***

28 Defendant is not a state, state official, or other governmental entity.

1 *A Putative Class Member’s State Of Citizenship Is Diverse From Defendant’s*
2 *Citizenship*

3 CAFA’s diversity requirement is satisfied when at least one plaintiff is a citizen of
4 a state in which the defendant is not a citizen. 28 U.S.C. §§ 1332(d)(2)(A), 1453. Here,
5 Plaintiffs allege that they reside in California, and, from the face of the Complaint,
6 Plaintiffs offer no evidence or allegations to suggest they are citizens of Utah, or of any
7 state other than California. (Ex. A, Complaint ¶ 7.).

8 For diversity purposes, a corporation “shall be deemed to be a citizen of every
9 State and foreign state by which it has been incorporated and of the State or foreign state
10 where it has its principal place of business . . .” 28 U.S.C. § 1332(c)(1); *see Hertz Corp.*
11 *v. Friend*, 559 U.S. 77, 80-81, (2010). Here, Defendant was, at the time of the filing of
12 this action, and remains, a Utah corporation with its corporate headquarters in Salt Lake
13 City, Utah. All of its administrative and executive functions are performed at those
14 headquarters. And all of Defendants production facilities are located in Utah. Utah is
15 therefore Defendant’s principal place of business. Thus, Defendant is a citizen of Utah
16 and is not a citizen of the State of California.

17 The “DOE” defendants named in Plaintiffs’ Complaint are fictitious. (Ex. A,
18 Complaint ¶ 6.). The Complaint does not set forth the identity or status of these fictitious
19 defendants, nor does it set forth any charging allegation against any fictitious defendants.
20 The citizenship of such fictitious defendants sued under fictitious names must be
21 disregarded for the purposes of determining diversity jurisdiction and cannot destroy the
22 diversity of citizenship between the parties in this action. *See* 28 U.S.C. § 1441(b)(1);
23 *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 690-91 (9th Cir. 1998).

24 In sum, because Plaintiffs are citizens of California, and Defendant is a citizen of
25 Utah, at least one putative class member is diverse from the Defendant, and thus CAFA’s
26 minimal diversity requirement is met.

1 ***The Amount In Controversy On Class Claims Exceeds \$5,000,000***

2 Though Defendant concedes no liability on Plaintiffs' claims, assuming Plaintiffs'
3 allegations to be true, Plaintiffs' class claims place in controversy a sum greater than
4 \$5,000,000. Specifically, Plaintiffs allege that they and the putative class members,
5 among other things, are entitled to recover from Defendant "[r]estitution of the amounts
6 that Plaintiffs and all members of the class paid to purchase Wise Company's Long-Term
7 and Emergency Food Kits and restitutionary disgorgement of the profits Wise Company
8 obtained from those transactions." (Ex. A, Complaint, Prayer ¶ 2). Plaintiffs further
9 allege the relevant statutory time period is four years. (Ex. A, Complaint ¶ 20.).
10 Accordingly, because the total retail sales in California for Wise Company's Long-Term
11 and Emergency Food Kits exceeds \$5,000,000 , the amount-in-controversy requirement
12 is satisfied here. *See Watkins v. Vital Pharm., Inc.*, 720 F.3d 1179, 1181 (9th Cir. 2013).

13 On top of this, Plaintiffs and their putative class also seek to recover attorneys'
14 fees, costs, and interests. (Ex. A, Complaint, Prayer ¶ 6). None of these additional
15 recoveries are included in the foregoing calculation.

16 At issue "is what amount is put 'in controversy' by the plaintiff's complaint, not
17 what a defendant will *actually* owe." *See Korn*, 536 F. Supp. 2d 1199, 1205 (E.D. Cal.
18 2008) (quoting *Rippee v. Boston Market Corp.*, 408 F. Supp. 2d 982, 986 (S.D. Cal.
19 2005)). "In measuring the amount in controversy, a court must assume that the
20 allegations of the complaint are true and that a jury will return a verdict for the plaintiff
21 on all claims made in the complaint." *Id.* at 1205 (citing *Kenneth Rothschild Trust v.*
22 *Morgan Stanley Dean Witter*, 199 F. Supp. 2d 993, 1001 (C.D. Cal. 2002). Further,
23 defenses that a defendant may assert are not considered in assessing the amount placed in
24 controversy. *See Riggins v. Riggins*, 415 F.2d 1259, 1262 (9th Cir. 1969) ("None of these
25 facts are disclosed by the complaint; the court must resolve them in determining the
26 validity of the defense of the statute of limitations; and the possibility of the defense
27 being valid does not affect the jurisdiction of the district court to hear and determine the
28 controversy."); *Hernandez v. Towne Park, Ltd.*, No. CV 12-02972 MMM (JCGx), 2012

1 WL 2373372, * 10 (C.D. Cal. June 22, 2012) (“[T]he fact that [defendant] may assert a
2 limitations defense does not limit the relief sought in the complaint.”); *Lara v. Trimac*
3 *Transp. Svcs. (W.) Inc.*, No. CV 10-4280-GHK (JCx), 2010 WL 3119366, *3 (C.D. Cal.
4 Aug. 6, 2010) (“affirmative defenses . . . may not be invoked to demonstrate that the
5 amount in controversy is actually less than the jurisdictional minimums.”).

6 Defendant denies that it has any liability to Plaintiffs or to the putative class that
7 they seek to represent, and denies that Plaintiffs or the putative class members are
8 entitled to recover any damages, injunctive relief, attorney fees, or the other relief
9 requested in the Complaint. Defendant also submits that this action does not satisfy the
10 requirements for class certification under Fed. R. Civ. P. 23. Nevertheless, amount in
11 controversy is not a merits issue, but, instead is measured simply by the nominal value of
12 the claims asserted in the Complaint. Here, the amount in controversy exceeds \$5
13 million, based upon sales of Wise Company’s Long-Term and Emergency Food Kits in
14 California over the past four years.

15 Removing Defendant hereby reserves the right to amend this notice of removal.

16 WHEREFORE, Defendant removes the Action from the Superior Court of the
17 State of California, County of Riverside, to this Court.

18 Respectfully submitted,

19 Dated: March 30, 2017

GREENBERG TRAURIG, LLP

21 By: /s/ Rick L. Shackelford

Rick L. Shackelford

22 Attorneys for Defendant

23 WISE COMPANY, INC.